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Litigating Terror in The Sinai After The Egyptian Spring Revolution: Should States Be Liable to Foreign Investors for Failure to Prevent Terrorist Attacks?

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LITIGATING TERROR IN THE SINAI AFTER THE EGYPTIAN SPRING REVOLUTION: SHOULD STATES BE LIABLE TO FOREIGN INVESTORS FOR FAILURE TO PREVENT TERRORIST ATTACKS?

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ABSTRACT

The ambiguity of the due diligence standard of the Full Protection and Security obligation in investment treaties persists to this day. A recent ICSID tribunal found a developing state liable for breaching the Full Protection and Security obligation due to its inability to protect a foreign investment against terrorist attacks in a remote deserted area. In this article, we analytically criticize the Ampal v. Egypt arbitral award against the comprehensive factual matrix behind the case. Based on our criticism of Ampal, we argue that developing states should not be liable for failing to prevent or stop terrorist attacks under the Full Protection and Security obligation when they exert efforts relevant to their limited capacity to offer such protection. Further, we argue that investors should also optimize political risk insurance offered by the Multilateral Investment Guarantee Agency when they choose to invest in a host state that might be vulnerable to terrorist attacks, might face potential insurgencies, or suffer from political turmoil. Finally, we highlight the importance of integrating other subfields of international law – such as international human rights law – to the international investment arbitration system, especially in defining what acts or omissions are required of a host state to fulfill the due diligence standard of the Full Protection and Security Obligation.

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INTRODUCTION

Investor-state arbitration has become one of the most controversial forms of international litigation.[1] Arbitration under the International Centre for the Settlement of Investment Disputes ("ICSID") or the United Nations Commission on International Trade Law ("UNCITRAL") allows an investor to sue a host state before an *ad hoc* arbitral tribunal for violations of bilateral investment treaties ("BITs") or trade and investment agreements (for example, the North American Free Trade Agreement ("NAFTA")). If successful, the investor can enforce a monetary award against the host state in domestic courts around the world pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[2] The use of international investment agreements to create host state liability to investors for regulatory change has sparked considerable policy debate.[3] Arbitrators have often imposed such liability through a broad reading of typical provisions in investment treaties that interpret fair and equitable treatment requirements as protecting an investor's expectations of regulatory stability.[4]

In many international investment agreements ("IIAs"), the obligation of fair and equitable treatment is accompanied by a related clause granting the investor "full protection and security" ("FPS").[5] Until recently, arbitrators

1. *See* U. N. CONFERENCE ON TRADE AND DEVELOPMENT ["UNCTAD"], REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP, IIA ISSUES NOTE (Jun. 26, 2013), http://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf; Stephan W. Schill, *Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework*, 20 J. INT'L ECON. L. 649, 649–52 (2017).

2. Articles I, III, IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter NYC]; Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, *in* INTERNATIONAL LAW AND LITIGATION (Helene Ruiz-Fabri ed., 2017).

3. *See* Schill *supra* note 1, at 199–210.

4. The Abs-Shawcross convention defined the Fair and Equitable Treatment Standard ("FET") in terms of the obligations of the host state. It stipulated: "[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or *discriminatory* measures." Herman Abs & Harley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 1 EMORY L. J. 115, art. 1 (1960) [hereinafter Abs-Shawcross Convention]; *see* Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM U. INT'L L. REV. 451, 522 (2008).

5. The Full Protection and Security Obligation is defined as requiring each member state "to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments." ASEAN (Association of South-East Asian Nations) Comprehensive Investment Agreement, art 11(2)(b), Feb. 24, 2012.

have generally rejected expansive readings of FPS clauses.[6] States had been held liable only for abject failure to provide normal police protection to the physical persons and property of investors.[7] Recently, however, there have been disturbing signs that FPS clauses are being converted into a political risk insurance policy for investors. For example, tribunals have used FPS clauses to impose liability on host states not only for government actions that have a negative economic impact on the investment, but also for the behavior of non-governmental actors over whom governments have limited control, especially in situations of civil conflict or unrest.[8]

One of the latest decisions of this type held Egypt liable to an investor operating a pipeline through one of the most dangerous conflict zones in the Middle East, the North Sinai of Egypt.[9] According to the 2017 ICSID decision *Ampal v. Egypt*, the failure of Egypt to stop terrorist attacks on a pipeline running through the North Sinai was a violation of the investment treaty's obligation to provide "full protection and security."[10] The investor claimed $635 million U.S. dollars in damages for disruption of the pipeline.[11] Before the *Ampal* tribunal ("the Tribunal") could address the request for damages, the conflicting interests of the Egyptian and Israeli governments complicated the case, and ultimately resulted in the discontinuation of the claim in 2020 upon a settlement reached by both parties.[12]

The *Ampal* award on the merits is a warning call about the dangers of investor-state arbitrators inexperienced in matters of national and international security. [13] Tribunals—such as *Ampal*—subjectively measure terror and counterterror attacks to impose legal liability on states. In reaching their conclusion, the arbitrators judge whether a host state has done enough to protect investors against insurgent violence, or whether specific terrorist incidents could have been avoided if specific governmental interventions had

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6. MAHNAZ MALIK, THE FULL PROTECTION AND SECURITY STANDARD COMES OF AGE: YET ANOTHER CHALLENGE FOR STATES IN INVESTMENT TREATY ARBITRATION? 8 (Int'l Inst. Sustainable Dev., Nov. 2011).

7. *Id.* at 12.

8. *See, e.g.*, Asian Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB /87/3, ¶ 4 (June 15, 1990) (Dissenting Opinion of Assante) 4 ICSID Rep. 296.

9. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 289–90 (Feb. 21, 2017), http://www.italaw.com /sites/default/files/case-documents/italaw8487.pdf.

10. *Id.*

11. *Id.* ¶ 148.

12. *See Ampal-American and Others v. Egypt*, INV. POL'Y HUB: UNCTAD, http://investmentpolicy.unctad.org/investment-dispute-settlement/cases/469/ampal-american-and-others-v-egypt (last visited Mar. 10, 2022).

13. *See* L. Yves Fortier, TWENTY ESSEX, http://twentyessex.com/people/yves-fortier; Campbell McLachlan, VICT. U. WELLINGTON, http://people.wgtn.ac.nz/Campbell.McLachlan; Francisco Orrego Vicuña, WORLD BANK ADMIN. TRIB., http://web.worldbank.org/archive /website01534/WEB/0__CO-21.HTM.

been taken.[14] The *Ampal* award on the merits has been the subject of sparse academic or practice commentary.[15] Yet, this decision raises crucial issues about the role of arbitrators and investment arbitration in situations of armed conflict or civil disorder.

Beginning with a critical analysis of the *Ampal* merits award, this article seeks to address the broad policy questions raised by converting a vague and general treaty provision into strict liability for events such as terrorist attacks. As we demonstrate, the inherent open-endedness of the phrase "full protection and security," when bootstrapped from basic police protection into compensation based on arbitrators' opinions about the adequacy of state actions against terror (such as whether states have done enough for foreign investors to stop acts like sabotage by insurgents), leads to arbitrariness and inadequate *ex post* reallocation of risks for known hazards. It is true that, in the case of some attacks on the pipeline, the security services failed to protect the pipeline.[16] However, the notion that a sovereign state with limited resources and extreme security challenges must prioritize the protection of a foreign investor is troubling.[17] In an act of severe historical and political blindness, the Tribunal largely ignored the context of the Arab Spring and the complex political transition in Egypt throughout the period in question.[18]

There may be a need to operate critical infrastructure and provide essential services in conflict zones where foreign investors would not invest without obtaining political insurance coverage for extreme risks such as terrorism and insurrection. This challenge has been considered by the World Bank's political risk insurer, the Multilateral Investment Guarantee Agency ("MIGA"), which provides some forms of risk insurance in such situations due to their unpredictable nature.[19]

Further, developing states can hardly afford to indemnify investors. Indemnification often requires hundreds of millions of dollars for risks that failed or fragile states can hardly contain.[20] In effect, the consequence of indemnification is that investment Tribunals will likely prioritize foreign investors above other victims of terrorism and related political violence in

14. *Ampal* ¶¶ 769–801.

15. *See* David Collins, *Review of 2017 ICSID Decisions*, 14 MANCHESTER J. INT'L ECON. L. 371, 375 (2017); Ira Ryk-Lakhman, *Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security, in* INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 259, 263 (Katia Fach Gómez et al. eds., 2019). These commentaries were produced by international legal scholars that were not involved in the *Ampal* case as arbitrators or counsels.

16. *Ampal*, ¶¶ 773, 792.

17. *Ampal*, ¶ 284.

18. *Id.* ¶¶ 283–90.

19. *Political Risk Insurance*, MULTILATERAL INV. GUARANTEE AGENCY, http://www.miga.org/political-risk-insurance, (last visited July 22, 2021).

20. Leigh P. Hollywood, *MIGA: Long Term Political Risk Insurance for Investments in Developing Countries*, 17(63) GENEVA PAPERS RISK & INS. 257, 257–58 (1992).

conflict areas, a shocking result from an international justice perspective. Had the Tribunal analyzed the origins of the general obligation of FPS, it could not have logically arrived at the conclusion that indemnification would be required for terrorism on a strict liability standard. Although ICSID awards are not binding, they largely influence the evolution of the field of international investment arbitration.[21] Schill argues that: "[e]ven though arbitral tribunals do not become tired of emphasizing that arbitral precedent is not binding, they nevertheless attach importance to it up to a point where a *jurisprudence constante* becomes more authoritative as an argument than reference to a formal source of international law."[22]The Tribunal's reasoning sets an alarming precedent. The *risk* that a tribunal *may* follow the expansive approach in *Ampal* may lead risk-adverse governments that want to avoid the possibility of extensive liability in damages to distort their approach to police protection in a conflict situation in favor of the investors interests. This is so even if there is not binding effect of an award such as *Ampal*. In this article, we begin by examining the factual and legal matrix behind the *Ampal v. Egypt* dispute in Part I. We present a detailed account of the security situation in the Sinai Peninsula during the relevant period, and of the policies and practices of Egypt's government and security services from 2011 to the present. This account draws on international and Egyptian documents, media reports, and expert intelligence. Subsequently, we analyze the origins of the FPS norm in international law in Part II. We then demonstrate the Tribunal's failure to articulate the substantive content of the FPS norm, and its selective application of the facts. We demonstrate that by reviewing a more nuanced factual background and international law sources, as is required by the U.S.-Egypt Bilateral Investment Treaty ("BIT") in Part III. In Part IV, we indicate the kinds of international law sources that the Tribunal ought to have reverted to for an objective conception of the substance of "full protection and security."

Our analysis suggests that investor-state arbitrators may not be well-suited in training or mindset for making sensitive judgments on state behavior in situations of conflict, especially in terror and counter-terror contexts.[23] This deficiency is compounded in a case like *Ampal* by the failure of the Tribunal to articulate a determinate, objective substantive norm of protection and security. Arbitrators thus become even more dependent on their

21. Stephan W. Schill, *Sources of International Investment Law: Multilaterization, Arbitral Precedent, Comparativism, Soft Law, in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1095, 1105 (Jean d'Aspermont & Samantha Besson eds., 2017) (arguing that both litigators and Tribunals treat ICSID case law as *jurisprudence constante* of international investment law).

22. *Id.*

23. See, for example, the biographies of the Ampal Tribunal arbitrators, *supra* note 13.

own intuitions in an area far removed from the commercial questions that have preoccupied most arbitrators throughout their legal careers.[24]

Finally, in our conclusion, we suggest alternative approaches to the protection of foreign investment in conflict zones, such as political risk insurance. Political risk insurance is a viable option to foreign investors seeking to invest in countries facing security risks and would mean that arbitral tribunals would no longer need to hold developing states liable for failing to defend these investments in conflicts zones with unpredictable terrorist attacks.

I. THE FACTS BEHIND THE *AMPAL V. EGYPT* AWARD:

A. *Brief Factual and Legal Overview of EMG v. EGAS, the Contracts Case Upon Which the Ampal Tribunal Relied*

The East Mediterranean Gas Company S.A.E. ("EMG") was incorporated as a tax-free-zone company in Egypt to purchase natural gas at the source from Egyptian Natural Gas Holding Company ("EGAS") (a state-owned company) and export it to Israel.[25] In 2000, EMG signed a preliminary agreement with EGAS for the sale of seven billion cubic meters of natural gas per year.[26] After four years of negotiations, the Egyptian Minister of Petroleum confirmed the agreement and instructed EGAS and the Egyptian General Petroleum Company ("EGPC") to conclude a gas supply agreement with EMG.[27] In 2005, EMG and EGPC/EGAS signed the Source Gas Sales and Purchase Agreement ("GSPA") and the Tripartite Agreement.[28] The GSPA stipulated what it meant by "force majeure" and "rea-

24. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 51–52 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167. Anthea Roberts argues that: "[a]rbitrators who specialize in international commercial and investment arbitration often treat commercial arbitration as a "default template" for investment treaty arbitration, readily transporting principles from one area to the other. Similar points could be made about arbitrators with backgrounds in other areas. For instance, the President in Corn Products was a prominent professor of public international law (and is now a Judge on the International Court of Justice) and the award drew extensively on international law jurisprudence… the President in Continental Casualty was a member of the WTO Appellate Body and the award drew extensively on trade law jurisprudence." *Id.* (emphasis added).

25. *Ampal*, ¶¶ 27, 30.

26. *Id.* ¶ 35.

27. *Id.* ¶ 38; The petroleum industry in Egypt is managed by the Ministry of Petroleum and Mineral Resources, under which state owned companies operate including The Egyptian General Petroleum Corporation (EGPC) and The Egyptian Natural Gas Holding Company (EGAS). International Trade Administration, *Egypt - Oil & Gas*, , http://www.trade.gov/energy-resource-guide-egypt-oil-and-gas.

28. *Ampal*, ¶ 40.

sonable and prudent person."[29] It also included a choice of law clause selecting English Law as the applicable law.[30]

In an arbitration before the International Chamber of Commerce ("ICC"), EMG made several allegations of EGAS's unlawful termination of the GSPA and EGAS's failure to perform its contractual obligation.[31] First, EGAS withheld gas supplies from EMG in order to force the renegotiation of the GSPA so that EMG would sign a less favorable amendment in the GSPA.[32] Second, throughout the spring of 2008, EGPC/EGAS did not provide the required supplies to EMG because of alleged gas shortages in Egypt.[33] Third, EGAS continued to withhold gas during the negotiations in order to force higher prices for lower quantities of gas.[34] Fourth, even after the first amendment to the GSPA was signed, EGAS continued to fall short of its supply obligations.[35] Fifth, EMG alleged that EGAS/EGPC only supplied two months of contracted quantities in the fourteen months between the first attack on the pipeline and the termination of the GSPA.[36]

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29. Art. 16.3 Annex 1 to the Source Gas Sale and Purchase Agreement ("GSPA") defines "force majeure" as follows: "[It] means an event or circumstance which is beyond the control of the Party concerned (acting and having acted as a Reasonable and Prudent Person), resulting in or causing the delay or the failure by such Party to perform all or any of its obligations under this Agreement (including, in the case of Buyer, the inability to take delivery of any Properly Nominated Quantity of Gas and in the case of Seller, the inability to deliver the Properly Nominated Quantities of Gas), which delay or failure could not have been prevented or overcome by the standard of a Reasonable and Prudent Person." *Id.* ¶ 301. The GSPA also elaborated on the diligence standard required under force majeure in Art. 16.2 of Annex 1 as follows: "A Party claiming force majeure must act as a Reasonable and Prudent Person in preventing the effects of any force majeure events (and as soon as reasonably practicable after the commencement of an event of force majeure, a Party claiming force majeure must act as a Reasonable and Prudent Person to overcome and mitigate the effects of such event of force majeure), and shall continue to perform its obligations pursuant to this Agreement to the extent such obligations are not impacted by such force majeure events. To the extent a Party claiming force majeure fails to act as a Reasonable and Prudent Person in preventing or mitigating the effects of any force majeure events, such Party shall not be excused for any delay or failure to perform that would have been avoided if such Party had acted as a Reasonable and Prudent Person." *Id.* ¶ 303. A definition of a "reasonable and prudent person" is also included in Annex 6 to the GSPA as follows: "A Person seeking in good faith to perform its contractual obligations and in so doing and in the general conduct of its undertaking exercising that degree of skill, prudence, diligence and foresight that would reasonably and ordinarily be expected from a skilled and experienced Person complying with Law engaged in the same type of undertaking under the same or similar circumstances and conditions." *Id.* ¶ 302.

30. *Id.* at 80 n.285.

31. Cherine Foty, *The Evolution of Arbitration in the Arab World*, KLUWER ARB. BLOG (July 1, 2015), http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/?print=print.

32. *Ampal*, ¶ 45.

33. *Id.* ¶ 47.

34. *Id.* ¶ 51.

35. *Id.* ¶ 53.

36. *Id.* ¶ 57.

Furthermore, in July 2011, EGAS/EGPC threatened to terminate the GSPA following an attack on the pipeline, as EMG had failed to pay invoices for gas supply in early 2011.[37] EMG later paid the disputed invoices to the Nation Bank of Egypt ("NBE").[38] The NBE informed EMG that it would not transfer $14 million USD to EGAS unless EGPC/EGAS revealed a confirmed intention to resume gas supplies and perform their obligations under the GSPA.[39] However, EGPC/EGAS refused to recommence gas supplies and the funds remained frozen in EMG's account.[40] Moreover, EMG pointed out that while it did not receive gas due to an alleged state of *force majeure*, "EGPC/EGAS continued to supply gas to Jordan."[41]

When terrorists attacked the pipeline again on September 27, 2011, this time halting gas flow to Jordan and other Arab customers, "EGPC/EGAS reacted and repaired in less than one month damage far more serious than the damage caused by the July 12, 2011 attack that left EMG's Pipeline without gas for ninety-nine days."[42] Lastly, on April 19, 2012, EGPC/EGAS sent a termination notice of the GSPA to EMG for alleged non-performance by EMG, to which EMG responded with a letter indicating that this termination attempt was "invalid and in bad faith, and that EGAS should withdraw the notice."[43] However, on May 9, 2012, EMG, having no other choice, accepted EGPC/EGAS's repudiation and termination of the GSPA, and sought damages from EGPC and EGAS.[44]

EGAS, on the other hand, claimed that the attacks on the pipeline amounted to *force majeure* events, and that it had met all the requirements provided under the GSPA to invoke the *force majeure* defense,[45] thus its failure to perform its contractual obligations under the GSPA was justified.[46]

After a consideration of the factual background concerning the pipeline attacks,[47] the ICC tribunal determined that the attacks on the pipeline did not constitute a *force majeure* event under the GSPA.[48] Thus, the ICC tribunal found for EMG by rejecting the *force majeure* defense of EGAS on the grounds that EGAS had failed to act as a "Reasonable and Prudent Pipeline

37. *Id.* ¶ 60.
38. *Id.*
39. *Id.* ¶ 61.
40. *Id.*
41. *Id.* ¶ 62.
42. *Id.*
43. *Id.* ¶ 66.
44. *Id.*
45. *Id.* ¶ 330.
46. *Id.*
47. *Id.* ¶¶ 271–82.
48. *Id.* ¶ 272.

Operator."[49] The ICC tribunal also rejected EGAS's second claim that EMG owed EGAS an amount that was due in February 2011[50], and ultimately reached the conclusion that EGAS' termination of the GSPA was unlawful.[51]

The result of this ICC proceeding was that the Egyptian state company EGAS was found to have not taken various precautions and security measures that at least some of the experts on the Tribunal argued ought to have been taken by a Reasonable and Prudent Pipeline Operator.[52] Given the views of these experts, there was clearly some onus on EGAS, the defendant, to show why the hypothetical measures indicated were not reasonably available and/or would not have been effective to prevent or reduce the risks in question. Clearly, a *force majeure* clause would raise a moral hazard if it simply excused performance of the contract in the case of a certain event or series of events regardless of the conduct of the party required to perform. That party, knowing that it would be excused in these circumstances, would have no incentive to refrain from behavior that might increase the likelihood of the event occurring or to take obvious precautions to prevent the event from occurring. The fundamental question before the Tribunal in *Ampal* was different. It was not the contractual obligation of an Egyptian state company, rather, it was the general duty of the Egyptian state itself to provide (outside the framework of a contractually bargained allocation of risk) protection and security based on norms of public international law.

B. *Understanding the Broader Political and Security Context in the North Sinai—A Reality Check on the Ampal Tribunal's Selective and Arbitrary Facts:*

The Tribunal considered the FPS obligation of Egypt to the investor by assessing the protection of the pipeline between February 2011 and May

49. *Id.*; The ICC tribunal reached the conclusion that: "EGAS has failed to prove that it acted as a RPPO [reasonable and prudent pipeline operator] in preventing and mitigating the effects of the attacks; in particular, it has failed to prove that it implemented security plans, provided physical security to the pipeline, deployed technological detection devices, and retained proper security forces; and [t]hat the evidence in the file indicates that the attacks initially against the facilities and afterwards against the pipeline could have been avoided (or, at least, significantly mitigated) had EGAS acted as a RPPO and adopted the minimal standard security measures suggested by the counter-experts. Consequently, the Tribunal dismissed the force majeure defence: EGAS' failure to perform and to deliver the contractually agreed quantities of gas cannot be excused. The Tribunal also dismissed all additional arguments and defences raised by EGAS relating to this issue." *Id.* ¶ 330 (citing E. Mediterranean Gas ["EMG"] v. Egyptian Gen. Petrol. Corp. ["EGPC"], , Case No. 18215/GZ/MHM, Decision, ¶¶ 1792–93 (ICC Int'l Act. Arb.), http://pacer-documents.s3.amazonaws.com/36/202064/04516889014.pdf.).

50. *Ampal*, ¶ 329.

51. *Id.*

52. *Id.*

2012.[53] Yet, a thorough account of the evolution of events in the Sinai further illustrates that the Tribunal overly simplified the security situation and emergency circumstances both in the North Sinai and all over Egypt. In doing so, the Tribunal inadequately relied on isolated incidents taken out of context within this timeframe.

In February 2011, after the ousting of Hosni Mubarak and the suspension of the Egyptian constitution of 1971,[54] the Supreme Council of the Armed Forces had assumed the roles of both the legislative and executive authorities in the country until the presidential and parliamentary elections could be had in accordance with the Constitutional declaration.[55] The military's new role placed additional burdens on it beyond its main role of defending the country.[56]

On June 30th, 2012, Mohamed Morsi became the President-elect of Egypt.[57] As a member of the Muslim Brotherhood, he was an advocate and a supporter of establishing an Islamic state in accordance with Islamic law.[58]

Concurrently, taking advantage of the security vacuum, a Salafi jihadist group called *Ansar Bait al-Maqdis* (Supporters of Jerusalem) formed in the North Sinai Province of Egypt.[59] They allied with the militant group *Al-*

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53. *See Ampal*, ¶ 70(6).

54. *Hosni Mubarak Resigns as President*, AL-JAZEERA (Feb. 11, 2011), http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html; Tesch Noah, *Egypt Uprising of 2011*, ENCYCLOPÆDIA BRITANNICA http://www.britannica.com/event/Egypt-Uprising-of-2011(last visited on Feb. 9, 2022).

55. EGYPTIAN CONSTITUTIONAL DECLARATION OF 2011 arts. 56, 57, 61; Kareem Fahim, *Egypt's Military and President Escalate Their Power Struggle,* N.Y. TIMES (Jul. 9, 2012), http://www.nytimes.com/2012/07/10/world/middleeast/egypt-tension-after-order-to-reconvene-parliament.html; *Egypt Government Powers: Breakdown Of Responsibilities After Country's First Democratic Elections*, HUFFINGTON POST (June 28, 2012, 10:09 AM EDT), http://www.huffingtonpost.com/2012/06/28/egypt-government-power_n_1628634.html; Erin Cunningham, *Muslim Brotherhood vs. Supreme Council of the Armed Forces in Egypt*, THE WORLD (Aug. 13, 2012, 6:20 AM EDT) http://www.pri.org/stories/2012-08-13/muslim-brotherhood-vs-supreme-council-armed-forces-egypt.

56. EGYPTIAN CONSTITUTIONAL DECLARATION OF 2011 art. 53.

57. Abdel-Rahman Hussein & Julian Borger, *Muslim Brotherhood's Mohamed Morsi Declared President of Egypt*, THE GUARDIAN (June 24, 2012, 1:55 PM EDT) http://www.theguardian.com/world/2012/jun/24/muslim-brotherhood-egypt-president-mohamed-morsi.

58. The Muslim Brotherhood (in Arabic al-Ikhw n al-Muslimkn) is a "religiopolitical organization founded in 1928 at Ismailia, Egypt, by Hassan al-Banna. Islamist in orientation, it advocated a return to the Qur¾n and the Hadith as guidelines for a healthy modern Islamic society. The Brotherhood spread rapidly throughout Egypt, Sudan, Syria, Palestine, Lebanon, and North Africa." *Muslim Brotherhood*, ENCYCLOPÆDIA BRITANNICA (Sept. 11, 2020), http://www.britannica.com/topic/Muslim-Brotherhood; Timothy Stanley, *An Islamic State in Egypt Can Still Mean Democracy,* CNN (June 27, 2012), http://www.cnn.com/2012/06/27/opinion/stanley-morsi-islam/index.html.

59. Salafi-jihadists believe that the only identity that truly matters is "that of membership in the 'umma, the global Islamic community that bestows comfort, dignity, security and

Tawhid wa' al-Jihad and they later became known as "IS-SP" ("Islamic State—Sinai Province") after affiliating themselves with the Islamic State ("IS"). [60] At first, their main ambition was to attack Israeli targets.[61] However, the ousting of Mohamed Morsi on July 3rd, 2013,[62] triggered IS-SP to direct attacks at the Egyptian police, army, officials, and institutions.[63] Their attacks were so sophisticated that they were called "Egypt's most dangerous militant group" by the *New York Times*.[64] Since their emergence in 2011, the North Sinai Peninsula has become one of the deadliest places for terrorist attacks in the world.[65]

Since IS-SP pledged allegiance to IS in 2014,[66] it became clear to Egyptian intelligence that IS-SP would receive resources and weapon supplies to execute more attacks in the Sinai.[67] IS-SP is estimated to number between hundreds to thousands of members.[68] Despite the fact that IS-SP is no match for the Egyptian army with regards to manpower and the degree of sophistication of weapons, their unbelievable success in executing their attacks triggered fears by some Egyptian officials that they might have informants in the Egyptian military.[69]

In *Ampal v. Egypt,* the claimants argued that the systematic pipeline terrorist attacks took place from February 2011 until April 2012 – totaling thir-

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honor upon the downtrodden Muslims. . . . Salafi-jihadists present a program of action, namely jihad, which is understood in military terms. They assert that jihad will reverse the tide of history and redeem adherents and potential adherents of Salafi-jihadist ideology from their misery. Martyrdom is extolled as the ultimate way in which jihad can be waged—hence the proliferation of suicide attacks among Salafi-jihadist groups." THE ISLAMIC STATE - SINAI PROVINCE, STAN. UNIV. CTR. FOR INT'L SEC. & COOP. 1, http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/557#note5 (last visited Mar. 10, 2022); Assaf Moghadam, *The Salafi-Jihad as a Religious Ideology*, 1 COMBATTING TERRORISM CTR. SENTINEL 14, 15 (2008), http://ctc.usma.edu/volume-1-issue-3.

60. THE ISLAMIC STATE - SINAI PROVINCE, *supra* note 59, at 1–3.

61. *Id.* at 5.

62. *Egypt's Mohammed Morsi: A Turbulent Presidency Cut Short,* BBC NEWS (June 17, 2019), http://www.bbc.com/news/world-middle-east-18371427.

63. THE ISLAMIC STATE - SINAI PROVINCE, *supra* note 59, at 2.

64. *Id.*

65. Adam Taylor, *How Parts of Egypt's Rugged Sinai Peninsula Have Become a Terrorist Hot Spot*, WASH. POST (Nov. 24, 2017), http://www.washingtonpost.com/news/worldviews/wp/2017/11/24/how-parts-of-egypts-rugged-sinai-peninsula-have-become-a-terrorist-hot-spot (last visited Nov. 2018).

66. David Kirkpatrick, *Militant Group in Egypt Vows Loyalty to ISIS*, N.Y. TIMES (Nov. 11, 2014), http://www.nytimes.com/2014/11/11/world/middleeast/egyptian-militant-group-pledges-loyalty-to-isis.html (last visited Nov. 2018).

67. *See* THE ISLAMIC STATE - SINAI PROVINCE, *supra* note 59, at 2.

68. Kirkpatrick, *supra* note, 66.

69. THE ISLAMIC STATE - SINAI PROVINCE, *supra* note 59, at 6.

teen attacks during this timeframe.[70] Egypt failed to supply the promised gas throughout this period. By reviewing the political timeline, it is evident that this was an interim period in which Egypt was governed by the Supreme Council of the Armed Forces.[71] Additionally, Mohamed Morsi only became President-elect by the end of June 2012.[72]

Thus, arguments raised by the claimants with regards to the possibility of anti-Israeli political bias based on Morsi's affiliation with Muslim Brotherhood are factually flawed since neither Morsi nor Muslim Brotherhood members were in office during the timeframe assessed by the Tribunal. [73] Even after Mohamed Morsi became the President-elect of Egypt, he did not repudiate the Camp David peace accords with Israel.[74] Moreover, he maintained a friendly relationship with the Israeli President.[75] He went further by discussing with Israel its security concerns, promising to promote the peace process in the region and provide stability to the Israeli people.[76]

While the Tribunal purported to not find evidence of Egyptian attempts to protect the pipeline, easily accessible sources establish that Egypt not only deployed military personnel to guard the pipeline, it also added hundreds of additional soldiers to fight terrorism in the North Sinai area and protect the pipeline after the February 5th attack.[77] Additionally, an attempt to bomb the pipeline failed in March 2011 after soldiers successfully defused a bomb.[78] Moreover, the Supreme Military Council delivered a warning to

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70. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 70(6) (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

71. Khaled Elgindy, *Army May Be Real Winner in Egypt*, BROOKINGS (Dec. 13, 2011), http://www.brookings.edu/opinions/army-may-be-real-winner-in-egypt/amp/; *see* MOHAMED EL-BENDARY, , THE EGYPTIAN REVOLUTION: BETWEEN HOPE AND DESPAIR 15 (2013).

72. Richard Spencer, *Muslim Brotherhood Makes Overture to Israel*, THE TELEGRAPH (July 31, 2012), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/9442362/Muslim-Brotherhood-makes-overture-to-Israel.html.

73. *See Ampal*, ¶ 56. Morsi was sworn in as president on June 30th, 2012, *Mohamed Morsi: President of Egypt*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/biography/Mohamed-Morsi; Human Rights First, *Egypt Timeline 2009-2015*, http://www.humanrightsfirst.org/sites/default/files/HRF-Egypt-timeline-hires.pdf; MICHELE DUNNE & AMR HAMZAWY, EGYPT'S SECULAR POLITICAL PARTIES: A STRUGGLE FOR IDENTITY AND INDEPENDENCE 12 (Carnegie Endowment for Int'l Peace2017).

74. Spencer, *supra* note 72, at 2.

75. *Id.* at 1.

76. *Id.*

77. Yaakov Katz, *Israel Agrees to More Troops in Demilitarized Sinai*, JERUSALEM POST, Feb. 16, 2011, http://www.jpost.com/defense/israel-agrees-to-more-troops-in-demilitarized-sinai; *Israel Allows Egypt Troops in Sinai for First Time Since 1979 Peace Treaty*, HAARETZ, Jan. 31, 2011), http://www.haaretz.com/1.5115726.

78. *Bombing Attempt On Egypt-Israel Gas Pipeline Fails*, JERUSALEM POST (Mar. 27, 2011), http://www.jpost.com/Middle-East/Bombing-attempt-on-Egypt-Israel-gas-pipeline-fails (last visited Mar. 10, 2022); *Bombing Attempt on Egypt-Israel Gas Pipeline Fails*, EGYPT

EGAS that the resumption of the gas transmission would be contingent upon additional security on the pipeline like raising fence heights, installing barbed wires on top of fences, increasing lighting, levelling sand dunes around each site, and installing monitoring system with TV cameras.[79]

The Tribunal did not bother to mention much less analyze these measures when considering whether Egypt had met its due diligence standard to provide FPS.[80] *This evidence alone would have been arguably sufficient for Egypt to meet its due diligence in many understandings of what is required under international law in the way of "protection"* (albeit the primary obligation, as noted, was never defined by the Tribunal in a meaningful manner). FPS due diligence is usually met when a host state adopts reasonable steps – relative to its capacity at the time – towards protecting the foreign investment.[81] Yet, when a Tribunal – like *Ampal* – raises the due diligence bar too high for a developing state facing instability and security breaches, it transforms a due diligence standard to a strict liability one – which is rejected by the ISDS case law.[82]

IS-SP did not stop bombing the pipelines situated in North Sinai even after the termination of the GSPA.[83] IS-SP recruited operatives to bomb the pipeline between Egypt and Jordan even though they are two Arab countries with a peaceful relationship.[84] The extraordinary circumstances that Egypt was going through at the time prevented Egypt from protecting Jordan's pipeline as well as the Israeli one – rebutting arguments that their failure to act was due to Egypt's prejudice against Israel.[85] At the time, Egypt could not protect its own police stations, high-ranked officials, police officers, and

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INDEP. (Mar. 27, 2011), http://www.egyptindependent.com/bombing-attempt-egypt-israel-gas-pipeline-fails.

79. Ampal v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 776 (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

80. *Id.* ¶¶ 283–91.

81. "A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice." Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/2, Award, ¶ 77 (July 30, 2009).

82. *See* Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 26(a).

83. Mohamed Metwali, *Bombing Gas Pipelines: 30 Successful Attempts*, EL-WATAN NEWS (May 31, 2015),#http://www.elwatannews.com/news/details/741059.

84. *Id*.

85. *See Ampal*, ¶ 56.

citizens.[86] Thus, it could not be expected – under a due diligence standard – to protect the Israeli gas pipeline.

Furthermore, even now after Egypt had restored stability and security, the Egyptian military forces are still combating IS-SP in in El-Arish to put an end to their attacks against other pipelines and institutions.[87] The bombings against the pipelines continued to take place—as shown in the chart below—under both Morsi's and Abdel Fatah el-Sisi's regimes in a time when the military has no longer been burdened with other additional political roles besides defending the country.[88] And if it is still a burdensome objective to achieve under ordinary circumstances, *a fortiori*, it must have been extremely challenging under extraordinary circumstances when the military was overburdened with wider political and security duties during governmental collapse and the police withdrawal.[89]

During the timeframe of the alleged FPS breach, Egypt indeed deployed thousands of troops to the North Sinai, despite it being a demilitarized area pursuant to the Camp David Peace Accords.[90] Notwithstanding the fact that deploying such troops were beyond the restrictions placed by the Camp David Accords, their presence was encouraged by Israel as a measure that had the potential to curb the activities of the IS-SP group in North Sinai.[91]

What made it even more onerous for Egypt to protect the pipeline was the advanced capabilities of IS-SP as a terrorist group.[92] The organization is highly capable, holding extensive tactical experience and knowledge of

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86. *See infra* note 105and accompanying text.

87. *Id.*

88. *See infra* note 105 and accompanying text; "Abdul Fattah al-Sisi has been Egypt's president since 2014, a year after he led the military's overthrow of Islamist President Mohammed Morsi amid mass protests against his rule." *Egypt President Abdul Fattah al-Sisi: Ruler with an Iron Grip*, BBC NEWS (Dec. 2020).

89. *Egyptian Gas Pipeline to Israel Hit by 6th Attack*, CBC NEWS (Sep. 27, 2011), http://www.cbc.ca/news/world/egyptian-gas-pipeline-to-israel-hit-by-6th-attack-1.1025769.

90. David Kirkpatrick & Heba Afify, *Egypt Deploys Soldiers to North Sinai*, N.Y. TIMES (Aug. 16, 2011), http://www.nytimes.com/2011/08/16/world/middleeast/16sinai.html; Anshel Pfeffer, *Egypt Deploys Thousands of Troops and Tanks in Sinai, in Coordination With Israel*, HAARETZ (Aug. 14, 2011), http://www.haaretz.com/1.5046028 (last visited Feb. 2011); Orin Kessler, *Egyptian Army Deploys Additional Soldiers in Sinai*, THE JERUSALEM POST (Feb. 18, 2011), http://www.jpost.com/middle-east/egyptian-army-deploys-additional-soldiers-in-sinai; "A "demilitarized zone" is an area, agreed upon between the parties to an armed conflict, which cannot be occupied or used for military purposes by any party to the conflict. Demilitarized zones can be established by a verbal or written agreement in times of peace or during an armed conflict." *Demilitarized Zones* INT'L COMM. RED CROSS, https://casebook.icrc.org/glossary/demilitarized-zones.

91. Zvi Bar'el, *Camp David: The Agreement That Ripped Up the Rule Book*, HAARETZ (Sep. 22, 2014), http://www.haaretz.com/.premium-the-agreement-that-broke-all-the-rules-1.5304283 (last visited Nov. 2018).

92. *See generally* WILAYAT SINAI, TAHRIR INST. FOR MIDDLE E. POL'Y (2014), http://timep.org/esw/terror-groups/wilayat-sinai (describing their capabilities, weapons, and successful attack history).

weapons.[93] They not only succeeded in launching multiple attacks on pipelines, but also on the highest ranks of Egyptian officials amid the Egyptian regime's most prudent and skillful guards.[94] Their victims even included the head of the Interior Minister's technical office.[95] Further, IS-SP terrorists attacked a Coptic church in Alexandria killing at least twenty-one and injuring seventy.[96] IS-SP had also murdered sixteen Egyptian soldiers in North Sinai,[97] fired a rocket on the southern Israeli city of Eilat, and attacked an Israeli border patrol, killing one soldier and injuring another.[98]

In sum, Egypt, especially the North Sinai, became highly vulnerable to non-state actor violence, including acts of terror, after the Arab Spring.[99] Even with the presence of the Egyptian army troops to protect El-Arish and the pipeline, the army guards were often overpowered by IS-SP due to its mastery of the element of surprise.[100]

Reviewing the nuanced facts regarding Egypt's security breaches and Egypt's war on terrorism is necessary to prove that the *Ampal* Tribunal decided the FPS breach upon a one-sided consideration of selective facts. The

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93. *Id.*

94. *Egypt's Minister Mohammed Ibrahim Survives Bomb Attack*, BBC NEWS (Sept. 5, 2013), https://www.bbc.com/news/world-middle-east-23971239; *Egypt Prosecutor Hisham Barakat Killed in Cairo Attack*, BBC NEWS (June 29, 2015), http://www.bbc.com/news/world-middle-east-33308518; *Senior Egyptian Prosecutor Survives Car Bomb Assassination Attempt*, REUTERS (Sept. 29, 2016); TAHRIR INST. FOR MIDDLE E. POL'Y, EGYPT SECURITY WATCH: FIVE YEARS OF EGYPT'S WAR ON TERROR 19–20, http://timep.org/wp-content/uploads/2018/07/TIMEP-ESW-5yrReport-7.27.18.pdf.

95. *Id.*

96. *Egypt Bomb Kills 21 at Alexandria Coptic Church*, BBC NEWS (Jan. 1, 2011), http://www.bbc.com/news/world-middle-east-12101748.

97. Dan Murphy, *With 16 Egyptian Soldiers Murdered, Sinai is Front and Center for President Morsi*, CHRISTIAN SCI. MONITOR (Aug. 7, 2012), http://www.csmonitor.com/World/Security-Watch/Backchannels/2012/0807/With-16-Egyptian-soldiers-murdered-Sinai-is-front-and-center-for-President-Morsi; *A Timeline of Terror in Egypt*, NAT'L (Nov. 25, 2017), http://www.thenational.ae/world/mena/a-timeline-of-terror-in-egypt-1.678626.

98. *A Raging Hotbed of Terror on the Sinai Border, ISIS*, ISR. DEFENSE FORCES (Sep, 2015), http://www.idf.il/en/minisites/isis/a-raging-hotbed-of-terror-on-the-sinai-border

99. Shadi Hamid, *Sisi's Regime is a Gift to the Islamic State*, BROOKINGS (Aug. 7, 2015), http://www.brookings.edu/blog/markaz/2015/08/07/sisis-regime-is-a-gift-to-the-islamic-state.

100. Daniel R. Morris, *Surprise and Terrorism: A Conceptual Framework*, 32 J. STRATEGIC STUD., 1, 12 (February 2009); *see Islamic State Militants Claim 20 Egyptian Soldiers Killed, Wounded in Sinai,* HINDUSTAN TIMES (Jan. 31, 2017), http://www.hindustantimes.com/world-news/islamic-state-militants-claim-20-egyptian-soldiers-killed-wounded-in-sinai/story-d7PrPVhYJZIxsNKqZVE1HP.html; *19 Terrorists Killed in Sinai Raids, 5 Military Personnel Killed or Injured*, EGYPT TODAY (May 31, 2020_, http://www.egypttoday.com/Article/1/88147/19-terrorists-killed-in-Sinai-raids-5-military-personnel-killed; *Bombing Attempt On Egypt-Israel Gas Pipeline Fails*, JERUSALEM POST (Mar. 27, 2011), http://www.jpost.com/Middle-East/Bombing-attempt-on-Egypt-Israel-gas-pipeline-fails; *6 Egyptian Soldiers Killed in Sinai Attack*, NEWS 24 (Oct. 13, 2017), http://www.news24.com/news24/africa/news/6-egyptian-soldiers-killed-in-sinai-attack-20171013.

Ampal Tribunal did not consider the general political and security background of Egypt at the time of the breach.[101] Rather, it only counted the attacks on the investor's pipeline after a passing mention of Egypt's January 25th, 2011 revolution.[102]

Key IS-SP attacks and counter-military operations can be summarized in bullet points by government administration, timeframe, and events as follows: [103]

1. Supreme Council of Armed Forces ("SCAF") Rule (February 2011-June 2012) – High Political Instability Level:

On January 29, 2011, four days after the revolution, around eight hundred Hamas and Hezbollah militants infiltrated North Sinai through Gaza tunnels. On their way to Cairo, they burnt several police stations and broke into Wadi al-Natron prison to release prisoners affiliated with Hezbollah, Hamas, and the Muslim Brotherhood.[104]

On February 5th, 2011, Islamist militants began targeting the Israeli gas pipeline in North Sinai. The pipeline was subject to at least 18 terrorist attacks since that date.[105] A few months later, on August 18, 2011, Islamist militants launched a cross-border terrorist attack against Israel targeting Eilat, which resulted in the death of eight Israelis.[106] In the same month, due to the heightened security risks in North Sinai, the Egyptian military launched "Operation Eagle" – a widescale military campaign to crack down

101. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–91 (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

102. *Id.*

103. Holly Cramer, Tim Harper, Samantha Moog & Eric Spioch, *Special Feature: Terrorism in Sinai*, MIDDLE EAST INSTITUTE, http://www.mei.edu/sinai-terrorism; DPA & Haaretz, *Mubarak Testifies as Morsi Tried Over Prison Escape That Included Hamas Members*, HA'ARETZ (Dec. 26, 2018), http://www.haaretz.com/middle-east-news/egypt/mubarak-testifies-as-morsi-tried-over-prison-escape-that-included-hamas-members-1.6785249; Yasmine Fathi & Ekram Ibrahim, *Who Let the Thugs Out? An Ahram Online Investigation*, AL-AHRAM ONLINE (Mar. 11, 2011), http://english.ahram.org.eg/NewsContentm/1/64/7148.aspx; EMILY DYER & OREN KESSLER, TERROR IN THE SINAI (Henry Jackson Soc'y ed., 2014), http://henryjacksonsociety.org/wp-content/uploads/2014/05/HJS-Terror-in-the-Sinai-Report-Colour-Web.pdf; Nawal Sayed, *Timeline of Terrorist Attacks on Egyptian Worshippers 2016-2017*, EGYPT TODAY (Nov. 25, 2017); AGENCE FRANCE PRESSE, *Egypt: 7 Sinai Jihadists Killed, 15 Soldiers Dead or Wounded in Attack*, TIMES ISR. (Feb. 16, 2019), http://www.timesofisrael.com/egypt-7-sinai-jihadists-killed-15-soldiers-dead-or-wounded-in-attack; *Egypt Attack: Soldiers Killed in Raid on Sinai Checkpoint*, AL JAZEERA (June 5, 2019), http://www.aljazeera.com/news/2019/06/egypt-attack-soldiers-killed-raid-sinai-checkpoint-190605074358827.html.

104. Hamza Hednawi, *Hamas Blamed for Egyptian Jail Breaks in 2011*, TIMES OF ISRAEL (May 2013), http://www.timesofisrael.com/hamas-blamed-for-egyptian-jail-breaks-in-2011.

105. DYER & KESSLER, *supra* note 103, at 9.

106. *Id.*

Islamist militants' activities in North Sinai and regain control of the region.[107]

2. Morsi Government (June 2012 – July 2013) – Medium Political Instability Level:

Approximately a month after Morsi assumed office as the president-elect of Egypt, the Islamist militants ambushed the Egyptian army troops situated in North Sinai killing sixteen Egyptian soldiers on August 5th, 2012.[108] As a response to the Islamist militants' ambush, the Egyptian military launched "Operation Sinai" against Islamist militants in North Sinai to further crack down on terrorism in North Sinai.[109] On July 3rd, 2013, the minister of defense and military chief officer – Abdel Fatah El-Sisi – removed Morsi from office after a large-scale revolution against Morsi erupted on June 30, 2013, calling for Morsi's removal from the presidential office and ending the Muslim brotherhood reign over the country.[110]

3. El-Sisi's Government (July 2013 – Present) – Low Political Instability Level:

A month and half after President El-Sisi assumed office, Islamist militants ambushed the Egyptian police in Rafah, North Sinai, killing 24 police officers.[111] Further, on November 20th, 2013, Islamist militants detonated a Vehicle-Borne Improvised Explosive Devices near Egyptian soldiers cite in North Sinai, killing eleven soldiers.[112] A month later, on December 24th, 2013, Islamist militants' attacks infiltrated other northern governorates after they detonated a bomb at Daqahliya Security Directorate, killing twelve Egyptian civilians and officials – including the head of the security Directorate – and injuring 130 others.[113] On January 24th, 2014, another terrorist attack carried by Islamist militants (Ansar Bayt El-Maqdis) reached the heart of Cairo – bombing the Cairo security Directorate killing six people and injuring a hundred Egyptian civilians and officials.[114] As a reply, the Egyptian army conducted multiple air raids on Islamist militants in North Sinai on January 31st, February 3rd, and February 7th of 2014 – airstrikes

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id; Key events of 30 June revolution,* Egypt Today (30 Jun 2018), http://www.egypttoday.com/Article/1/53082/Key-events-of-30-June-revolution

111. DYER & KESSLER, *supra* note 103.

112. *Id.*

113. Salma Abdelaziz and Steve Almasy*, Report: At least 12 killed in explosions at Egyptian government building,* CNN (Dec 23, 2013), http://www.cnn.com/2013/12/23/world/africa/egypt-explosion/index.html.

114. DYER & KESSLER, *supra* note 103.

killed more than 50 Islamist militants.[115] In 2015, Islamists Militants assassinated the Prosecutor General Hisham Barakat after detonating a parked vehicle during the passage of his convoy in Cairo, also killing three other civilians.[116] Although terrorist attacks inside Cairo relatively diminished in the last few years, the war against terrorism in North Sinai continues to this day.[117]

Thus, even after Egypt had passed its most tumultuous political period between February 2011 to June 2012, it never succeeded in eradicating the IS-SP from North Sinai. Mcmanus observes that: "while the military has been relatively successful in achieving this more realistic containment strategy, the continued presence of the threat remains a concern. Sustaining a military presence is costly: the military continues to sustain nearly daily casualties, the local population suffers and is susceptible to militant recruitment, and militants have sporadically penetrated and attacked the mainland."[118] And since it is an extremely onerous objective to regain control over North Sinai at times of relative political stability and police presence throughout the country, it raises the question of what Egypt could have done during times of police withdrawal, military governance, and extreme political instability to succeed against *Ampal* under an FPS claim.

II. THE TREATY PROVISION APPLIED BY THE *AMPAL* TRIBUNAL AND ITS ORIGINS AND DEVELOPMENT IN INTERNATIONAL LAW

In determining Egypt's liability for terrorist attacks on the pipeline, the Tribunal applied Article II (4) of the U.S.-Egypt BIT, which provides that "treatment, protection and security of investments shall never be less than that required by international law and national legislation."[119]

At the same time, Article IV of the U.S.-Egypt BIT limits state responsibility for compensation in cases of "civil disturbance or insurrection," to "treatment no less favourable" than that accorded to its own nationals or nationals and companies "of any third country."[120] In other words, through

115. *Id.*

116. Egypt prosecutor Hisham Barakat killed in Cairo attack, BBC News (June 29, 2015), http://www.bbc.com/news/world-middle-east-33308518.

117. *Id*; see further terrorist attacks on Egyptian Military, Officials, Churches, and Civilians in the appendix attached to this Article.

118. ALLISON MCMANUS, THE EGYPTIAN MILITARY'S TERRORISM CONTAINMENT CAMPAIGN IN NORTH SINAI (Carnegie Endowment Int'l Peace, June 30, 2020), http://carnegieendowment.org/sada/82218. Allison McManus is a senior fellow at the Center for Global Policy.

119. Treaty Concerning the Reciprocal Encouragement and Protection of Investments art. II, ¶ 4, U.S.-Egypt, Sept. 29, 1982, 21 I.L.M. 927 [hereinafter US-Egypt BIT].

120. Article IV provides for compensation for damages due to war and similar events. It stipulates: "Nationals or companies of either Party whose investments or returns in the territory of either Party suffer (a) damages due to war or other armed conflict between such other Party and a third country or (b) damages due to any kind of civil disturbance or insurrection in

Article IV, the state's responsibility is limited to non-discriminatory treatment of the investor in cases such as those of civil disturbance or insurrection. However, the *Ampal* tribunal manifestly failed to abide by such limitations. It applied Article II (4) of the U.S.-Egypt BIT without considering how Article IV might delimit state responsibility under Article II (4). Our critique of the *Ampal* decision does not focus on Article IV because the proceedings were bifurcated between the merits and damages. It is possible that, had the claim not been discontinued before the damages phase, the tribunal might have applied Article IV at that point. This said, the Ampal tribunal did not in any way in its decision on the merits indicate the issue of non-discrimination would come into play at the damages phase.

A. The Origins of the Full Protection and Security Obligation

Since the Tribunal failed to define the primary obligation of FPS yet found Egypt liable for not being able to protect the pipeline despite extreme political instability and high-level security breaches, it is important to discuss the origins of the FPS standard to understand its contours.

The FPS obligation on host states traces its origins to customary international law emerging in the eighteenth century.[121] In 1749, Christian Wolff, a German professor and jurist, provided a thorough overview of what is now known as the FPS obligation.[122] Wolff's writings is considered among the earliest on the duty of a state to protect aliens and their properties in the state's territory.[123] Wolff defined the host state's duty under customary international law to protect aliens and their property within its territory.[124] He also emphasized that the FPS obligation does not only apply to the acts of the host states, but also to its failures to protect aliens from the harmful acts of its subjects.[125] Some scholars contend that the terms Wolff used, such as "injury," "loss," and "wrong," were vague enough to entail a protec-

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the territory of such other Party, shall be accorded treatment no less favorable than that which such other Party accords to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, when making restitution, indemnification, compensation or other appropriate settlement with respect to such damages." *Id*. art. IV.

121. George K. Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current* Significance, 45 VAND. J. TRANSNAT'L L. 1116 (2012).

122. *Id.* at 1117 (citing CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (1749), reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW 9 (James Brown Scott ed., Joseph H. Drake trans., 1934)).

123. *Id.* at 1116.

124. *Id*. at 1117 (citing CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTUM (1749), reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW 536 (James Brown Scott ed., Joseph H. Drake trans., 1934)).

125. *Id.* (citing CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTUM (1749), reprinted in 2 THE CLASSICS OF INTERNATIONAL LAW 536 (James Brown Scott ed., Joseph H. Drake trans., 1934)).

tion against non-physical harms.[126] A noteworthy aspect of Wolff's thought is that he based the FPS obligation on a tacit agreement between the ruler of the state and the alien. Under this tacit agreement, the state promises protection in exchange for the alien's "temporary obedience."[127]

Emmerich de Vattel, another prominent jurist, followed in Wolff's footsteps. Vattel argued for the same basis of the FPS obligation as Wolff.[128] He stipulated that:

> A sovereign may not allow the right of entrance into his territory granted to foreigners to prove detrimental to them; in receiving them he agrees to protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security. Thus, we see that every sovereign who has granted asylum to a foreigner considers himself no less offended by injuries which may be done to the foreigner than if they were done to his own subjects.[129]

As indicated in this passage, Vattel regarded the FPS obligation as fundamentally one of non-discrimination against aliens; aliens must be afforded the same standard of protection as nationals. Here, the FPS obligation is determinate as it offers a clear benchmark by which to assess the treatment of the alien—equal treatment to that of similarly situated domestic actors.

Vattel also agreed with Wolff's views that the FPS obligation to non-discrimination should not be limited to physical security but should extend to cover "any unjust act."[130] He added that the host state's protection and security obligations include the protection of the alien's property.[131] It is worth noting that Vattel's treatise on the law of nations, in which he elaborated on the FPS obligation, has been regarded by some international law scholars as "the single most useful and authoritative expression of international law."[132]

The attempted codification of the FPS obligation by the International Law Commission ("ILC") several centuries later did not clarify the contours of FPS obligation. The ILC started producing reports on state responsibility

126. *Id.*

127. *Id.*

128. *Id.* at 1117–18 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758)).

129. *Id.* (emphasis added) (citing EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758)).

130. *Id*. at 1118 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 136 (1758)).

131. *Id.* (citing EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 146 (1758)).

132. *Id.* (citing Albert de Lapradelle, *Introduction,* 3 THE CLASSICS OF INTERNATIONAL LAW xxxiv–xxxv (James Brown Scott ed., Charles G. Fenwick trans., 1916)).

in the late twentieth century.[133] Generally speaking, despite the efforts of Special Rapporteur Roberto Ago to understand the content of the primary obligation,[134] the ILC articulated state responsibility in terms of due diligence, while suggesting that "due diligence" is treated relative to the nature of the primary obligation in the treaty containing the FPS obligation.[135] James Crawford, who became the Special Rapporteur after Ago, found it tedious to define the primary obligations of host states under the FPS.[136] His approach left an enormous amount of discretion to arbitrators to determine what due diligence, or absolute liability with a due diligence defense, might mean in any given situation.[137]

In early cases, tribunals applied FPS in tandem with the FET standard.[138] These cases provided the first guidelines around the FPS obligation.[139] They determined that this obligation is both negative and positive. On the one hand, it is a negative obligation upon states and their organs to abstain from engaging in any act that might infringe on the security of aliens and their property.[140] On the other hand, it is a positive obligation whereby the state and its organs have a duty to protect aliens and their property against acts of third partiesnon-state actors in its territory.[141] However, these cases mostly only applied the due diligence standard to the positive obligation, not the negative obligation.[142] The positive obligation encompasses three sub-obligations:[143]

1) the obligation of states to prevent acts of individuals that may harm the security of aliens and their property, by making use of their administrative and judicial apparatus to that effect;

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133. *See* James Crawford, Int'l Law Comm'n, Rep. on the Work of its Fiftieth Session, *First Rep. on State Responsibility*, U.N. Doc. A/CN/4/190 (Aug. 12, 1998).

134. *See* Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'I L. & COM. 319, 323 (2015).

135. *Id.*

136. *See id.*

137. *See id.*

138. *See* Occidental Expl. & Prod. Co. v Republic of Ecuador, London Ct Int'l Arb. [LCIA"] Case No. UN 3467, Award, ¶ 187 (July 1, 2004), http://www.italaw.com/sites /default/files/case-documents/ita0571.pdf; Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Arg. Republic, ICSID Case No. ARB/97/3, Award, 1 (Aug. 20, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0206.pdf; Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 84–95 (Dec. 8, 2000) 6 ICSID Rep. 89; De Brabandere, *supra* note 142, at 334.

139. De Brabandere, *supra* note 142, at 341, 347.

140. *Id.* at 333–34.

141. *See* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States,* 35 GER. Y.B. INT'L. L. 9, 22 (1992).

142. *See id.*; *see also supra* note 146.

143. Pisillo-Mazzeschi, *supra* note 149, at 22, 29.

2) the obligation of states to apprehend and bring to justice those responsible for injuries caused to aliens by making use of their administrative and judicial apparatus to that effect, and;
3) the obligation for states to possess and make available to aliens a judicial and administrative system capable of preventing acts, and of punishing and apprehending those responsible for the acts.

State responsibility for in respect of the first two primary obligations are assessed through a due diligence standard.[144] These two obligations also apply during public disorders, revolts, violence, civil wars, or international armed conflict.[145] It will be noted that in this classic statement of the content of FPS as primary obligation, there is not requirement that the host state make available special law enforcement facilities or resources to deal with particular threats to the alien; the obligation is simply to make use of such law enforcement apparatus as already exists in the host state.

Venable v. Mexico, an early case that elaborated on the FPS obligation, the tribunal found that failing to prosecute the theft of a locomotive' parts was a breach of the host state's obligations of protection and security.[146] In reaching this decision, the tribunal determined that the state had failed to apprehend and punish the perpetrators.[147] The tribunal also articulated the due diligence standard, describing the failure of FPS as: "an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[148] Instead of referring to the "international standard," the tribunal referred to extreme anomalies such that the acts were clearly beyond the responsibility of the state.[149] Further, the tribunal's finding a breach of the FPS standard was not triggered by the state's failure to prevent the thefts, but in its failure to exert efforts to apprehend and punish the perpetrators. [150]

B. *Attempts to Define the Content of Full Protection and Security*

Some BITs, such as the U.S. Model BIT and Canadian Model Foreign Investment Promotion and Protection Agreement, attempt to limit the FPS obligation, preventing it from being read as a form of strict liability, or open-ended *ex post* reallocation of risk between the investor and the host

144. *See* F. V. Garcia Amador, Int'l Law Comm'n, *Second Rep. on the Resp. of the State for Injuries Caused in its Territory to the Person or Property of Aliens: Part I: Acts and Omissions*, U.N. Doc. A/CN.4/106, at 110–11, 121 (Feb. 15, 1957).

145. *See* Pisillo-Mazzeschi, *supra* note 149, at 27–32.

146. H.G. Venable (U.S.) v. United Mex. States, Decision, 22 AM. J. INT'L L. 432, 443–44 (1927) *see* De Brabandere, *supra* note 142, at 325–26.

147. De Brabandere, *supra* note 142, at 326.

148. *See* H. G. Venable (U.S.), 22 AM. J. INT'L L., at 443–44.

149. *See id.*

150. *See id.*

state.[151] The U.S. Model BIT goes even further by clarifying such a standard and restricting it only to police protection. Article 5 of the U.S. Model BIT provides that:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>   (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>   (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[152]

Some BITs include two arguably correlated clauses on FPS, such as the U.S.-Zaire BIT.[153] Article II (4) of the U.S.-Zaire BIT provides that:

> Investment . . . shall at all times be accorded fair and equitable treatment. . . . shall enjoy . . . protection and security. . . . [T]he treatment . . . may not be less than that recognized by international law.[154]

Article IV (1) of the BIT stipulates that a national or company of either party whose investments are losses in the territory of the other party "*owing to war or armed conflict, revolution, state or national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or company of any third country, whichev-*

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151. U.S. TRADE REP., U.S. MODEL BILATERAL INVESTMENT TREATY (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

152. *Id.* art. 5.

153. *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Dem. Rep. Congo, Aug. 3, 1984, http://jusmundi.com/en/document/treaty/en-treaty-between-the-united-states-of-america-and-the-republic-of-zaire-concerning-the-reciprocal-encouragement-and-protection-of-investment-democratic-republic-of-the-congo-usa-bit-1984-friday-3rd-august-1984.

154. *Id.* art. II(4).

er is the most favorable treatment," as regards any measures it adopts in relation to such losses.[155] Accordingly, the FPS due diligence standard referred to in these examples is equal to the early proper relative treatment standard of treating a foreign investor no less favorably than a national of the host state.

However, ISDS arbitrators, at least in the absence of restrictive wording, are more inclined to expand the reading of the FPS obligation, which goes beyond the classic understandings of FPS in customary international law. A key example is the *AAPL v. Sri Lanka* award, in which the Tribunal rejected the state's contention that the FPS obligation should be restricted to the minimum standard under customary international law and applied what it considered the treaty standard of the United Kingdom–Sri Lanka BIT.[156] This broadening of FPS may be connected to the specific facts of the case, where the non-state actors who injured the investment may well have had links to the state that, if proven would have been a basis for finding a violation of Fair and Equitable Treatment. In the presence of ambiguity about state complicity or involvement, is understandable that the tribunal might have sought to take an expansive view of FPS. However distinguishable on the facts, *AAPL* was quickly taken by other tribunals as an invitation to unmoor the content of FPS as a treaty obligation from the limits of the customary international law minimum standard of treatment of aliens (as exemplified in e.g. *Venables* and the writings of Wolff and Vattel discussed above). In *AMT v. Zaire*, the Tribunal also found Zaire in breach of FPS due diligence standards for not taking any action to protect the claimant's property during riots in Kinshasa.[157] The Tribunal gave no weight or relevance to whether the acts of the host state were committed by a member of the Zairian armed forces or a common burglar.[158] The Tribunal also based its finding on a treaty standard of FPS that was higher than the customary international law standard, and found that Zaire owed an "obligation of vigilance" to the foreign investor regardless of who committed the riots.[159] Thus, it became a common practice and *jurisprudence constante* among investment Tribunals to extend the FPS protection beyond its contours under customary international law.

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155. *Id.* arts. III(3), IV(1) (emphasis added).

156. *See* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 50 (June 27, 1990), 30 I.L.M. 577 (1991); MAHNAZ MALIK, INT'L INST. FOR SUSTAINABLE DEV., THE FULL PROTECTION AND SECURITY STANDARD COMES OF AGE: YET ANOTHER CHALLENGE FOR STATES IN INVESTMENT TREATY ARBITRATION? 5 (2011), http://www.iisd.org/system/files/publications/full_protection.pdf.

157. American Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, ¶ 6.05 (Feb. 21, 1997), http://www.italaw.com/sites/default/files/case-documents/ita0028.pdf.

158. *Id.*

159. *Id.*

III. THE APPROACH OF THE *AMPAL* TRIBUNAL TO FULL PROTECTION AND SECURITY: FAILURE TO INTERPRET THE PRIMARY OBLIGATION

According to Article II (4) of the U.S.-Egypt BIT, "treatment, protection and security of investments shall never be less than that required by international law and national legislation."[160] Rather than addressing the meaning of the FPS standard under international law and the Egypt-U.S. BIT to identify primary obligations behind the "protection and security of investments," the Tribunal initially discussed the issue of secondary obligations.[161] The Tribunal did not attempt to articulate the nature and extent of state responsibility for the primary obligation. Moreover, the Tribunal did not define the scope of the due diligence portion of the FPS clause under the U.S.-Egypt BIT's requirement that "treatment, protection and security of investments shall never be less than that required by international law and national legislation."[162] Thus, the primary obligation under the FPS is largely vague. At the same time, the reference to "international law" in general gave the tribunal the mandate to consider international law beyond the four corners of the customary international law of protection of aliens. What it did not do was authorize the Tribunal to create as it did a highly subjective test, using due diligence to bypass the requirement to articulate the substantive content of the primary obligation through international law sources, albeit these sources not being restricted to the customary law minimum standard.

The language of Article II (4) of the U.S.-Egypt BIT requires that the content of the primary obligation is to be ascertained in significant part through a consideration of international law sources. The Tribunal largely ignored this critical language. Indeed, it failed to identify what bodies of international law might contain primary obligations of "protection and security," such as customary international law of diplomatic protection of aliens, international humanitarian law, international human rights law, or all of the above. This is a fundamental initial flaw in the Tribunal's reasoning. One scholar correctly notes, "[t]he due diligence obligation depends on a particular primary rule of international law that determines the standard of state behavior . . . the obligation arising from the primary norm and the due dili-

160. US-Egypt BIT, *supra* note 127, art. II ¶ 4..

161. *See* Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–91 (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf. Primary and secondary obligations are categories of legal obligations/rules first developed by. H.L.A Hart in his famous Book: "The Concept of Law." Primary rules or obligations refer to acts or omissions needed to satisfy a legal obligation. Secondary rules refer to legal rules used to interpret, modify, and apply the primary rules or provide for the responsibility/liability arising out of breaching primary rules and the extent of such liability. H.L.A HART, THE CONCEPT OF LAW 81 (Oxford University Press, 1961).

162. US-Egypt BIT, *supra* note 127, art. II ¶ 4 (emphasis added).

gence obligation do not constitute one and the same obligation . . . ."[163] Accordingly, the primary obligations of host states under FPS remain vague to this day and the *Ampal* Tribunal – following other ISDS Tribunals – did not bother to define such FPS primary obligations.

A. *International Law and the Content of the "Full Protection and Security" Obligation*

Critically, the *Ampal* Tribunal has not even asked the question of how to define the primary obligation of "protection and security" under international law as it applies to investors and investments. In addressing this question, arbitrator Paulsson in the *Pantechniki* case suggested that the first consideration is that the primary obligation may be one that is special to the context of civil unrest or armed conflict and articulates the duties of the state to certain actors in those situations.[164]

When we shift to the context of investment, the primary focus is the protection of the company's property (though the physical security of managers and employees has also been prominent in some instances).[165] Typically, the investment context is one where political risk insurance is available for events such as insurrection, civil strife, and armed conflict (either provided by private insurers or entities such as MIGA).[166] It would be difficult to define what is expected from the state in terms of due diligence without also considering the due diligence of the investor in protecting its own investment. That is because a diligent investor who decides to invest in a remote location subject to terrorist attacks or insurgencies (such as North Sinai) is expected to purchase a political risk insurance to cover any breaches to their investment resulting from those insurgencies. If a Tribunal adopted a one-sided analysis of the host state's due diligence required to fulfill its FPS obligation leaving the investor's due diligence aside, the failure of such investor to diligently obtain political risk insurance to cover expected dam-

163. Elif Askin, *Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers*, EJILTALK (Mar. 1, 2017), http://www.ejiltalk.org/due-diligence-obligation-in-times-of-crisis-a-reflection-by-the-example-of-international-arms-transfers.

164. Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 77–81 (July 30, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0618.pdf. For instance, under human rights law, the focus is primarily on human life and the security of the person. This focus also arguably extends to the international law of diplomatic protection of aliens. In the latter case, one of the crucial issues is that of discrimination: the notion that, in situations of emergency, aliens of the protecting state should be treated no worse than nationals – referring to the national treatment standard. *Id.*

165. *See* Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From?,* 7 AM. U. BUS. L. REV. 1 (2018).

166. *See* Nasser Alreshaid, *Revisiting the Notion of Full Protection and Security of Foreign Direct Investments in Post-Gadhafi Libya: Two Governments, Tribal Violence, Militias, and Plenty More*, 28 FLA. J. INT'L L. 63, 82–85 (2016).

ages to their investment would never be considered. That would result in an inadequate due diligence standard.

Thus, the notion of "*due* diligence" suggests that the entire responsibility for the failure of protection and security of the investor should not fall *exclusively* on the host state. However, it requires us to consider what factors might come into play in determining how much risk is acceptable and the related duties of risk management assumed by each of the actors—the investor and the host state. In some situations, it might be reasonably evident to an investor *ex ante* that they are entering a situation of conflict and unrest, for example, if they are entering an area of a country where it is well-known that the state and its security forces lack effective control over the territory or population, or into a setting where non-state actors such as insurgents have the upper hand (at least to the extent of frustrating or making unacceptably hazardous the operations of the state's military or other security services). In *LESI v. Algeria*, a highly relevant award that the Tribunal did not discuss, the arbitrators noted that, at the time of the investment, Algeria was experiencing significant security issues with insurgents throughout the country, particularly in the area where the investment was located—a remote area with many obstacles for security forces attempting to establish order.[167] The Tribunal found Algeria not liable under the FPS claim after finding that Algeria did not treat the foreign investor less favorably than its own nationals.[168] Had the *Ampal* Tribunal truly considered *LESI*, it would have found substantial analogies with the facts in dispute, which would have that called for a similar approach to be adopted by *LESI* – dismissing the FPS claim in the merit stage.[169]

In sum, an analysis of "due diligence" should not just focus on the responsibility of the host state but should also consider the degree of the investor's assumption of risk based upon what the investor knew (or what a reasonable investor should have known) at the time of the investment about the security situation in the host state. The scope of a due diligence analysis should include what methods of risk management might have been reasonably available to the investor to protect its property in the case of civil strife or armed conflict.

Another set of issues raised by *Pantechniki* and cited by the Tribunal is identifying the host state's available means to protect the investment in the specific circumstances relevant to their capacities.[170] The *Pantechniki* tribunal took into account two factors to measure the due diligence standard: the limited resources of the state and the remoteness of the place where the civil

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167. L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award, ¶ 10.

168. *Id*. at ¶¶ 180–82.

169. *Id.*

170. Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶ 76 (July 30, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0618.pdf.

disturbance took place.[171] Taking into account Albania's level of development and overall political instability, the *Pantechniki* Tribunal did not find Albania liable under the FPS obligation.[172] This is a complex judgment, especially when the threat is that of terrorism, because (as has been explored extensively the security literature in recent decades) conventional military and police forces, even the most advanced and well-trained in the world, armed with sophisticated weaponry and information technology, have often failed to suppress or prevent terrorist incidents, especially in failed states or conflict zones where there are general obstacles to the state maintaining order.[173] Indeed, the difficulty with using conventional military strategies against insurgencies was understood by strategists as early as David Galula,[174] who based his work on the French experience in Algeria and Indochina.[175] From the word "due," due diligence implies that the actions required of the state be reasonably likely to be effective.[176] For example, if stationing ordinary soldiers around the investor's facility is not likely to prevent terrorist incidents, then it would be very difficult to argue that such a measure is "due," such that the inability to provide these guards would engage state responsibility.

Further, if one considers the duty of "protection and security" in a broader context, which includes the human rights and humanitarian law obligations of a state to its own people, the question in a period of strife or armed conflict is not simply whether the state could make available a given means to protect the investor, but rather, the reasonableness of its allocation of these means to fulfill all of its obligations under the circumstances. The U.S.-Egypt BIT required the Tribunal to apply "international law" in general (including international human rights and international humanitarian law); it is international law that determines what the investor was owed under the treaty in the matter of FPS, and the host state is not required to provide, by virtue of the treaty provision, a level of protection, or any kind of protection that would be above what is required by international law, much less one that would compromise any norms of international law.[177]

Through contract or political risk insurance, an investor may contract for specified entitlements when certain events occur, such as an insurrection

171. *Id*, ¶¶ 76–82.

172. *Id,* ¶ 84.

173. *See Countering Terrorism,* N. ATL. TREATY ORG. ("NATO"), http://www.nato.int/cps/en/natohq/topics_77646.htm.

174. Galula based his work on the French experience in Algeria and Indochina.

175. *See* DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE (2006).

176. The definition of "due diligence" in Black's Law Dictionary is: "[T]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."

177. US-Egypt BIT, *supra* note 127.

or armed conflict.[178] If the standard is "due diligence," what is required by international law cannot, however, be converted into the equivalent of such a specified entitlement through a flawed application of FPS by an investment Tribunal. The host state's conduct must be assessed by its reasonableness in providing what is "due" not only on the basis of its obligation to the investor but to other classes of individuals protected by international law (e.g., International Human Rights law) whose protection also relies on the developing state's limited resources.[179] Such duties to the investor, as may be implied through extension of the customary law of diplomatic protection of aliens, would hardly trump duties under human rights treaties, customary international law of human rights, or international humanitarian law whether based on customary international law or treaties.

A developing state with limited resources that aims to satisfy a heightened FPS due diligence standard would, by the same token, be forced to sacrifice fulfilling other international obligations such as its obligations under international human rights law. It is not only a matter of prioritizing security resources to fulfill a state's duties under human rights law, even if fewer resources are dedicated to the security of the investor; it is also a matter of refraining from measures to protect the investor that could themselves cause human rights violations. This was acknowledged, perhaps cryptically, by the tribunal in the *Tecmed* case, which suggested that the state is expected to take such measures that are within the normal parameters for a "democratic" state.[180] In the case of North Sinai, there has been a long record of Egyptian army campaigns against IS-SP to regain control over the region and provide safety to individuals living there. Such campaigns rely on available security resources. The more security resources placed to protect the pipeline, the less security resources would have been directed towards protecting citizens and individuals living in cities, governorates, and North Sinai. In addition to resource issues, international human rights obligations, including the obligation to protect the security of the person might justifiably restrain a state from taking measures to protect an investors property that put at risk the lives or safety of bystanders or employees, such as the use of force against terrorists or insurgents. None of these complexities were discussed by the Tribunal, which failed to provide any clear legal analysis of the content of the primary obligation, based upon applicable international law.

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178. Multilateral Investment Guarantee Agency (World Bank Group), 1 (2015) http://www.miga.org/sites/default/files/2018-06/MIGA%20products.pdf

179. *See* Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶ 76 (July 30, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0618.pdf.

180. Técnicas Medioambientales Tecmed, S.A. v. The United Mex. States, ICSID Case No. ARB (AF)/00/2, ¶ 177 (May 29, 2003), http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

Without articulating the content of the primary norm on the basis of international law sources, the Tribunal reached a conclusion of what kind of liability ought to be imposed on a host state for breach of the primary norm.[181] The Tribunal cites a number of previous awards and decisions as support for the "due diligence" standard, but the Tribunal does so without building upon their relative wisdom to define the primary obligation of FPS.[182] These citations nevertheless seem to establish for the Tribunal that the nature of state responsibility is not one of strict liability for the physical harm that non-state actors inflict on investors and investments.[183] Yet the term "due diligence" remains vague unless the substantive standard of conduct to which this level of effort or vigilance is directed is defined or articulated, an undertaking the Tribunal simply failed to do. This failure may be understood as a form of judicial coup, in which, with the substantive content of the norm of FPS completely undetermined, the arbitrators decide as a matter of their discretion if the host state has exercised "due diligence." The closest the Tribunal comes to articulating the primary obligation in Article II (4) is a brief quotation from the award of the sole arbitrator, Jan Paulsson, in *Pantechniki v. Albania*. The passage cited by the Tribunal reads as follows:

> [A] failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.[184]

Even this statement does not clearly articulate a primary obligation (i.e., the content of the "international standard"). However, the *Pantechniki* tribunal does seem to allude to a primary obligation. First, the international standard appears to activate state responsibility where a state fails to adopt reasonable measures to control civil disorders or insurgencies despite its

181. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–91 (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

182. *See Ampal,* ¶¶ 241–47.

183. *Id.* ¶ 241.

184. *Id.* ¶ 244.

clear capacity to do so.[185] Second, state responsibility— according to Paulsson —appears to be engaged in situations where a state does not plan to avoid failure of protection and security, but where civil disorder is predictable.[186] Third, in determining state responsibility, one must consider some kind of proportionality between the capabilities of a state and what is required of it by way of due diligence.[187]

It is notable that there is a significant literature attempting to articulate the meaning of due diligence in the law of state responsibility, upon which the *Ampal* Tribunal might have drawn.[188] The Tribunal's inadequate manner of operating is illustrated by the practice of substituting a rigorous consideration of the meaning and contours of due diligence with minimal quotations from previous awards or decisions without indicating even the facts at issue in those cases or even what primary obligations were being applied (whether treaty, custom, or general principles of international law).[189]

Pierre Dupuy, who undertakes a thorough analysis of the sources of the concept of due diligence in international law, opined that due diligence under international law is explained in terms of what a reasonable state should do – in light of its circumstances and available means – to fulfil its primary international obligation.[190] Thus, the due diligence of the host state to satisfy its FPS obligation towards the foreign investor should be measured in a comprehensive manner. Its measurement should take into account, among other things, the relevant capacity of the host state, the political instability of the state, the remoteness of the location where the insurrection took place, and the obligations of the host state towards its own citizens whether provided by international or national laws. These factors should be comprehensively considered to assess whether a host state has met its due diligence to fulfill the FPS obligation.

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185. Pantechniki S.A. Contractors & Eng'rs (Greece) v. Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶ 77 (July 30, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0618.pdf.

186. *Id.*

187. *Id.*

188. MALIK, *supra* note 6; George K. Foster*, Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT'L L., 1099 (2012).; Dr. Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'I L. & COM., 322 (2015); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 164 (Oxford Univ. Press 2012); STEPHAN W. SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 193 (Oxford Univ. Press 2010).

189. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 283 (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

190. Pierre Dupuy, *Due Diligence in the International Law of Liability*, *in* LEGAL ASPECTS OF TRANSFRONTIER POLLUTION, 369–79 (OECD 1977).

B. How did the Tribunal Apply Its Own Notion of Due Diligence?

Given this abject failure to determine the content of the primary obligation, it is understandable that the Tribunal's articulation of Egypt's liability involved an arbitrary and context-less selection of particular facts, most of which were considered as *res judicata* from a prior commercial arbitral award by the International Chamber of Commerce ("ICC"), which concerned purely contractual obligations for gas delivery of EGAS, an Egyptian-government owned company.[191]

The Tribunal, citing the findings of this prior commercial arbitration tribunal, asserted that the Egyptian military remained extremely powerful despite the revolution that deposed Hosni Mubarak. The finding of that previous tribunal was that: "The Egyptian armed forces, well-resourced and the largest in the Middle East, remained powerful after the January uprising. At that time the Egyptian military had 11 battalions in the Sinai Peninsula."[192]

The Tribunal's selective use of facts from a similar contractual dispute should be understood in context. Interpreting contractual provisions that allocate the risk of events such as acts of terrorism between the parties is clearly a different matter than assessing liability based upon a general treaty norm such as FPS.[193] As we have argued above, the latter is only properly understandable and applicable within a broader universe of international law norms and concepts.[194] The focus of contract law, however, is a bargain between two parties.[195] In the contractual dispute between EGAS and EMG, the question before the commercial arbitrators was whether the *force majeure* clause in the contract could excuse performance, in this instance by a state entity where performance was disrupted by terrorism.[196] Normally, the party relying on *force majeure* would be expected to establish the appropriate legal standard and facts required to justify its invocation.[197] In *Ampal*, however, at issue was whether Egypt had committed a wrongful act

191. EMG v. EGPC, Case No. 18215/GZ/MHM, Decision, (ICC Int'l Ct. Arb.), http://pacer-documents.s3.amazonaws.com/36/202064/04516889014.pdf.

192. *Id.* ¶ 791.

193. The Tribunal's lack of sensitivity to the difference between a commercial contractual dispute and a public international law dispute under a treaty reflects a more general problem with the lack of clarity of many arbitrators on the distinct features of contract and treaty, and how they interact or overlap (or not, as the case may be). For a superb exploration of this general problem, see Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV., 351 (2016).

194. See our discussion regarding the multiple components of international law and how they influence the due diligence standard of FPS in Part III of this research.

195. Legal Info. Inst., *Bargain*, CORNELL L. SCHOOL, https://www.law.cornell.edu/wex/bargain#.Yoe4MMhKcdI.

196. EMG v. EGPC, ¶ 160.

197. *Id.* ¶¶ 186–88.

under public international law, violating a treaty provision.[198] Clearly, it was up to the claimant, under international law principles of burden of proof,[199] to establish international wrongfulness on the part of Egypt, proving the facts that would make out such a violation. The assumption of good faith is important in international law and for amicable relations between states. The international wrongfulness of a state must not be presumed or suspected, but carefully established. [200] Thus, the *Ampal* Tribunal's assumption that Egypt had breached the FPS obligation without requiring sufficient evidence from the claimant regarding Egypt's capacity to protect the pipeline despite emergency circumstances is flawed.

It was an incident that occurred in July 2011 that led the Tribunal to believe it was on firm ground in finding liability from a lack of due diligence. This event is described in paragraph 288 of the award:

> The failure by State security forces in the Northern Sinai to take any steps to stop saboteurs from damaging the lifeline of the Claimants' investment, whether preventive or reactive, is revealed by EGPS/EGAS's technical report on the 12 July 2011 attack (attack no. 5): the report describes how, as the attack was unfolding, EGAS personnel made contact with an Egyptian army patrol and asked them to stop saboteurs from laying explosives on the pipeline at a facility just 1.5 kilometers away from where the patrol was stationed. The Egyptian security forces refused to mobilize. Some 40 minutes later, the explosives were detonated.[201]

The presentation of this incident by the tribunal as a "smoking gun" that shows Egypt's lack of "due diligence" is deeply problematic. Perhaps influenced by Hollywood thrillers about terrorism, the Tribunal imagined a small heroic band of Egyptian soldiers rushing to the pipeline and deftly foiling a terrorist attack already well under way. The Tribunal makes no inquiry into whether this patrol was at all equipped to respond rapidly to the evolving situation—for instance, considering whether the patrol possessed the required protective vehicles and anti-explosive gear required to rapidly diffuse explosives that had already been laid without undue loss of life. In conclu-

198. *See* Ampal v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 68(b) (Feb. 21, 2017), http://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

(reciting the treaty violations that the claimant was inviting the tribunal to find*)*.

199. *See generally* KABIR DUGGAL & WENDY CAI, PRINCIPLES OF EVIDENCE IN PUBLIC INTERNATIONAL LAW AS APPLIED BY INVESTOR-STATE TRIBUNALS: BURDEN AND STANDARDS OF PROOF (2019).

200. As the Appellate Body of the World Trade Organization put it, "We must assume that [states parties] will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the Vienna Convention." Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 278, WTO Doc. WT/DS231/AB/R (2002).

201. *Ampal*, ¶ 288.

sion, the *Ampal* Tribunal neglected Egypt's comprehensive circumstances at the time and rushed to find Egypt liable for not meeting its due diligence standard in performing an undefined primary obligation – the "full protection and security."

CONCLUSION

Our analysis of the legal and factual complexities presented in the *Ampal* Tribunal's attempt to apply the standard of FPS raises a range of questions of law and policy. Clearly, there is much work to be done by scholars, practitioners, and international institutions concerned with both economic development and political conflict in attempting to articulate the substantive content of FPS, beyond the vague concept of due diligence deployed by the *Ampal* Tribunal. The liabilities in damages faced by a host state can be immense, and as illustrated by the intuitive and arguably subjective approaches of the Tribunal to the complex facts of conflict in the Sinai, the question of predictability and certainty of the liability of the host state to the investor is inevitably raised. States need to have some degree of certainty as to the kind of measures that they must take to avoid significant financial liability. Further, what constraints, practical as well as normative (for example, the need to respect human rights, not to endanger innocent civilians, etc.) are legitimate to take into account in determining the extent of the host state's liability in a conflict situation that may be largely beyond its control? Up to now, the standard of FPS has simply not developed sufficient determinacy to answer these concerns, and while we are critical of the Tribunal for its failure to develop the law in the direction of greater certainty (instead applying a vague ill-defined standard), clearly individual *ad hoc* arbitral tribunals cannot bear the full responsibility for working out an appropriate code of behavior for host states toward foreign investors in conflict zones. In our view, the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism is ideally situated to take up the challenge of addressing the extent to which states are responsible for counterterror measures, given that some of these measures may threaten human rights (including, for instance, detention without trial, or raids that compromise the right to life of innocent bystanders).

Defining appropriate norms for the protection and security of economic actors in conflict areas in a manner consistent with human rights is a challenge that has been addressed in the Voluntary Principles on Security and Human Rights, an initiative of the United Kingdom and U.S. governments with the participation of other actors, including nongovernmental organizations and MIGA.[202] The Voluntary Principles, however, do not expressly address the risk that, faced with the threat of liability in damages for failing

202. *What are the Voluntary Principles*, VOLUNTARY PRINCIPLES ON SECURITY & HUM. RTS., http://www.voluntaryprinciples.org/what-are-the-voluntary-principles.

to prevent a terror attack under FPS, host state governments will be under pressure to protect foreign investors at the expense of human rights, and to prioritize the security needs of foreign corporations over those of vulnerable populations caught up in the conflict. The indirect impact of arbitral awards such as *Ampal* on developing nations – holding them liable to a heightened due diligence standard relative to their capacity – is likely to induce them to devote more of their resources towards foreign investments' protection rather than fulfilling their vital human rights obligations.

In this light, we suggest considering the challenge of investor protection in conflict situations in two alternative ways that depart from depending on case-by-case application of a general and up-to-now jurisprudentially indeterminate FPS standard.

The first alternative involves application of the non-discrimination standard that is part of the notion of fair and equitable treatment and/or national treatment in most BITs or other investment agreements protecting investors through ISDS. In the case of non-discrimination, the benchmark employed to determine whether the host state has met its obligations of protection is determined by the measures it takes to protect *similar domestic economic interests or those of third country investors*. In other words, the host state is obligated to give as much protection to a given foreign investor under a BIT as it does to domestic actors or economic actors from third countries. This approach has the advantage that the benchmark for the treatment of foreign investors is not that created from a general or vague international standard, viewed strictly or loosely depending on the tribunal, but is established from the general practices and policies of the host state to protect its own people and firms from the risks in question. Foreign investors do not have to be treated better, or enjoy special protections, relative to nationals of the host state–but they cannot be treated worse, either.

The second alternative to case-by-case application of an FPS standard that is worth considering is that of Political Risk Insurance (PRI). This moves more radically beyond treaty protection and case-by-case application of general norms by ad hoc arbitral tribunals.

There may be important policy reasons for encouraging foreign investment in conflict zones, such as maintaining essential infrastructure and access to services that are necessary for the civilian population, such as energy.[203] These policy considerations, as well as the heightened risk investors face in conflict-affected and fragile states, may justify the subsidization or reallocation of part of that risk through PRI.[204]

Notably, MIGA, along with certain other political risk insurance entities, can provide insurance against conflict-related risks to foreign inves-

203. WORLD BANK GRP., WORLD BANK GROUP STRATEGY FOR FRAGILITY, CONFLICT AND VIOLENCE 2020–2025, ¶ 69 (2020), http://documents1.worldbank.org/curated/en/844591582815510521/pdf/World-Bank-Group-Strategy-for-Fragility-Conflict-and-Violence-2020-2025.pdf.

204. *Id.* at ¶ 232.

tors.[205] MIGA has gone the furthest, arguably, in identifying the specific needs associated with conflict zones. The Conflict Affected and Fragile Economies Facility ("CAFEF") was founded in 2013 with the stated goal to support "projects in labor-intensive industries, such as agribusiness and light manufacturing . . . . Its support to infrastructure projects will underpin further private sector investment and lead to direct and indirect employment generation."[206] A recent MIGA report notes: "The Conflict Affected and Fragile Economies Facility started operations in 2013 and has supported 11 projects so far in the most challenging environments. Since inception it has mobilized $589 million [U.S. dollars] of private capital in support of projects totaling $1.3 billion [U.S. dollars]; some $33.1 million [U.S. dollars] of capacity remains."[207] Additionally, in the Middle East and Africa, regional political insurance facilities, the African Trade Insurance Agency ("ATIA") and The Islamic Corporation for the Insurance of Investment and Export Credit ("ICIEC") have been active in providing insurance in conflict-affected areas such as Sudan, Yemen, and the Democratic Republic of the Congo; this coverage typically extends to war and civil disturbance.[208]

The existence of political risk insurance, and an increasing effort to ensure that it is available for investments in conflict zones, reinforces the viability of alternatives to using FPS under investment treaties on a case-by-case basis. The *Ampal* dispute suggests that the latter approach depends on the subjective and potentially arbitrary and non-expert judgments of investment arbitrators, with case law not having defined with any clarity the relevant norms to be considered in determining the primary obligation of protection required by FPS. At the same time, a requirement of non-discrimination against foreign investors in these contexts seems warranted, unless differential treatment of foreign investors can be justified on grounds such as public order or national security. While political risk insurance may be more appropriate for general guarantees to foreign investors in conflict zones, we do not see any reason that non-discrimination provisions in investment treaties should not, in general, apply in these situations.

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205. ROBERT HOWSE & PETRUS VAN BORK, POLITICAL RISK INSURANCE AS A TOOL FOR SUSTAINABLE INVESTMENT POLICY IN THE LEAST-DEVELOPED COUNTRIES-MIGA AND BEYOND 11–12 (2019) (on file with author).

206. World Bank, *MIGA Approves New Facility for Conflict-Affected and Fragile Economies (*Apr. 10, 2013), http://www.worldbank.org/en/news/press-release/2013/04/10/miga-approves-new-facility-for-conflict-affected-and-fragile-economies .

207. MULTILATERAL INVESTMENT GUARANTEE AGENCY, STRATEGY AND BUSINESS OUTLOOK FY21-23 ¶ 4.2.1.2 (2021), http://www.miga.org/sites/default/files/2020-07/MIGA%20FY21-23%20Strategy%20%26%20Business%20Outlook.pdf.

208. HOWSE & VAN BORK, *supra* note 213, at 11–13.