



Preventing Investment Treaty Violations during Political Crises: Lessons from *De Sutter v. Madagascar* (II) Case

*Ramalina Ranaivo Mikea Manitra*¹, *Rakotoarisoa Maminirina Fenitra*², *Randrianasolo Tsanganasy Brico*³

¹ASTA Research Center, Antananarivo, Madagascar & Faculty of Law, Universitas Indonesia, Depok, Indonesia.

²ASTA Research Center, Antananarivo, Madagascar & Faculty of Management, Universiti Teknologi Malaysia, Malaysia & Faculty of Economics and Business, Universitas Indonesia, Depok, Indonesia.

³ASTA Research Center, Antananarivo, Madagascar & Faculty of Social and Political Sciences, Universitas Indonesia, Depok, Indonesia.

*Corresponding author : ramalina.ranaivo@ui.ac.id

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Abstract

Background: Political crises often expose structural weaknesses in State governance, raising critical questions about the extent of State responsibility under international investment treaty law, particularly in ensuring Full Protection and Security (FPS) for foreign investors. The *De Sutter v. Madagascar* (II) case provides a relevant context to reassess how domestic political instability interacts with legal obligations of Host State. **Methodology:** This study employs a doctrinal legal research method using a case study approach centred on the *De Sutter v. Madagascar* (II) award and a conceptual approach based on the doctrines of due diligence, FPS, and State responsibility. **Objectives:** The paper aims to explain how State responsibility operates during political crises and to develop practical pathways for future prevention of investment treaty violations through strengthened legal and institutional frameworks. **Findings:** The analysis shows that political instability does not reduce international obligations but increases the expectation of vigilance, preparedness, and coordinated State action. Liability arises primarily from the failure to anticipate and respond to foreseeable risks. At the same time, the study identifies preventive measures, including early warning mechanisms, institutional coordination, and post-crisis judicial integrity, as essential tools to minimise future violations. **Originality/Novelty:** This research proposes a clear preventive action of State responsibility by integrating a context-sensitive due diligence standard with concrete institutional reforms, offering a focused framework for managing recurring political instability.

Keywords: due diligence; international investment law; political crisis; state responsibility; investor-state dispute settlement



Abstrak

Latar Belakang: Krisis politik sering kali memperlihatkan kelemahan struktural dalam tata kelola negara, sehingga menimbulkan pertanyaan penting mengenai sejauh mana tanggung jawab negara dalam hukum perjanjian investasi internasional, khususnya dalam menjamin perlindungan dan keamanan penuh (Full Protection and Security/FPS) bagi investor asing. Kasus *De Sutter v. Madagascar (II)* memberikan konteks yang relevan untuk menilai kembali bagaimana ketidakstabilan politik domestik berinteraksi dengan kewajiban hukum negara tuan rumah.

Metodologi: Penelitian ini menggunakan metode penelitian hukum doktrinal dengan pendekatan studi kasus yang berpusat pada putusan *De Sutter v. Madagascar (II)* serta pendekatan konseptual yang didasarkan pada doktrin due diligence, FPS dan tanggung jawab negara.

Tujuan: Penelitian ini bertujuan untuk menjelaskan bagaimana tanggung jawab negara beroperasi dalam situasi krisis politik serta merumuskan langkah-langkah preventif guna mencegah pelanggaran perjanjian investasi di masa depan melalui penguatan kerangka hukum dan kelembagaan. **Temuan:** Hasil penelitian menunjukkan bahwa ketidakstabilan politik tidak mengurangi kewajiban internasional negara, melainkan meningkatkan tuntutan akan kewaspadaan, kesiapsiagaan, dan koordinasi tindakan negara. Tanggung jawab hukum timbul terutama dari kegagalan dalam mengantisipasi dan merespons risiko yang dapat diperkirakan. Selain itu, penelitian ini mengidentifikasi langkah-langkah pencegahan seperti mekanisme peringatan dini, koordinasi kelembagaan, dan integritas peradilan pascakrisis sebagai instrumen penting untuk meminimalkan pelanggaran di masa depan. **Keunikan/Kebaruan:** Penelitian ini menawarkan model preventif tanggung jawab negara yang mengintegrasikan standar due diligence yang kontekstual dengan reformasi kelembagaan yang konkret sebagai kerangka yang terarah dalam menghadapi krisis politik yang berulang.

Kata Kunci: due diligence; hukum investasi internasional; krisis politik; tanggung jawab negara; penyelesaian sengketa investor-negara

A. Introduction

Foreign Direct Investment protection during political instability sits among the most contested areas of international investment treaty law, particularly around the obligation of Full Protection and Security (FPS) found in bilateral investment treaties.¹ In developing countries such as Madagascar, recurring political crises expose institutional weaknesses that affect the State's capacity to secure foreign investments and maintain public order.² The 2009 Malagasy political crisis made this especially visible, generating widespread unrest, destruction of property, and serious economic disruption for domestic and foreign economic actors alike. Political instability causing economic losses to foreign investors is one problem; a State incurring international responsibility for failing to take reasonable measures against foreseeable harm during that instability is

¹ Ondřej Svoboda, "Investors' Responsibilities beyond Investment Treaties: A Workaround to Balance the Investment Protection Regime," *European Foreign Affairs Review* 25, no. 2 (2020): 462–74.

² See, e.g., Abraham Mensah Acquah and Muazu Ibrahim, "Foreign Direct Investment, Economic Growth and Financial Sector Development in Africa," *Journal of Sustainable Finance & Investment* 10, no. 4 (2020): 315–34, <https://doi.org/10.1080/20430795.2019.1683504>; Obed Kwame Essandoh, Moinul Islam, and Makoto Kakinaka, "Linking International Trade and Foreign Direct Investment to CO2 Emissions: Any Differences between Developed and Developing Countries?," *Science of The Total Environment* 712 (2020): 136437, <https://doi.org/10.1016/j.scitotenv.2019.136437>.

another, and a distinct one. Political unrest does not erase a State's treaty obligations, and FPS does not guarantee against every loss an investor suffers the standard sits between these two poles. What matters, in the circumstances of a political crisis, is whether the measures available to State authorities were reasonably sufficient to protect the investment.

De Sutter v. Madagascar (II),³ arbitrated before the International Centre for Settlement of Investment Disputes (ICSID), offers a clear illustration of how political instability can give rise to international responsibility under investment treaty law.⁴ The dispute arose from the destruction of a textile factory during the January 2009 unrest, and the investors' subsequent failure to obtain effective remedies through domestic mechanisms. The facts leave little room for ambiguity: the factory was attacked, looted, and burned amid the unrest, and the investors argued that Malagasy security authorities had received warnings of the danger yet failed to act on measures that could have protected the property. The tribunal found that Madagascar had breached the FPS obligation, since the authorities had failed to take reasonable and available steps to protect the investment. The case narrows the broader question of political instability and investment protection into something more specific: how far State authorities must go in anticipating and responding to foreseeable threats to foreign investments during a political crisis.

Other ICSID disputes involving political instability show the same problem in different factual settings. In *Ampal-American Israel Corp. and others v. Egypt*,⁵ the investors' interests in a gas pipeline suffered from attacks and disruptions during the instability surrounding and following Egypt's 2011 uprising, and the tribunal examined, among other issues, Egypt's obligations regarding the security of the investment and its response to repeated attacks on the pipeline. Political upheaval, in this case, turned a security problem into a question of international investment protection once the threats to the investment became recurrent and foreseeable. *Strabag SE v. Libya*⁶ followed a related

³ See DSJ2, S.A., Peter de Sutter and Kristof De Sutter v Republic of Madagascar (II), ICSID Case No ARB/17/18, Award (17 April 2020) ("*De Sutter v. Madagascar (II)*"), available on <https://jsumundi.com/en/document/decision/fr-kristof-de-sutter-peter-de-sutter-and-ds-2-s-a-v-republic-of-madagascar-ii-pas-encore-disponible-wednesday-14th-june-2017>.

⁴ For clarity, two separate treaty-based arbitrations arose from the De Sutter investors' textile investment in Madagascar under the 2005 Belgium–Luxembourg Economic Union–Madagascar BIT. The first arbitration, *De Sutter v. Madagascar (I)*, was initiated in 2013 under the ICC Rules and concerned Madagascar's alleged interference with domestic proceedings relating to the enforcement of an insurance claim following the destruction of the Polo Garments Majunga textile factory; an ICC award was rendered in favour of the investors in August 2014 but was subsequently annulled by the Paris Court of Appeal in 2016. The present article focuses on the subsequent ICSID arbitration, *De Sutter v. Madagascar (II)*, registered in June 2017, which revisited the dispute under the same BIT and resulted in the 17 April 2020 ICSID award finding that Madagascar had breached its obligation to provide FPS in relation to the destruction of the investors' factory during the January 2009 political unrest.

⁵ *Ampal-American Israel Corp. and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Award (21 February 2017) ("*Ampal v. Egypt*") available on <https://jsumundi.com/fr/document/decision/en-ampal-american-israel-corp-egi-fund-08-10-investors-llc-egi-series-investments-llc-bss-emg-investors-llc-and-david-fischer-v-arab-republic-of-egypt-decision-on-jurisdiction-monday-1st-february-2016>.

⁶ *Strabag SE v Libya*, ICSID Case No ARB(AF)/15/1, Award (29 June 2020) ("*Strabag v. Libya*") available on <https://jsumundi.com/en/document/decision/en-strabag-se-v-libya-award-monday-29th-june-2020>.

path: an Austrian investor's infrastructure projects were caught up in the conflict after Libya's 2011 revolution, and Strabag claimed losses from damage to its investment and the interruption of its operations. The tribunal found Libya liable under the applicable treaty and awarded roughly €74.9 million. The legal findings differed from those in *De Sutter (II)*, but the dispute points to the same difficulty: political violence exposes foreign investments to foreseeable physical and operational risks and, with that, raises questions about how far the host State's international responsibility extends. These cases sharpen the specific issue in *De Sutter (II)* not whether political instability itself breaches an investment treaty, but whether the State exercised the degree of preventive due diligence reasonably expected once threats to an investment were sufficiently foreseeable. The *De Sutter v. Madagascar (II)* case was examined under the bilateral investment treaty concluded between the Belgium–Luxembourg Economic Union and Madagascar, particularly the provisions relating to Fair and Equitable Treatment (FET) and Full Protection and Security (FPS). The applicable treaty expressly provides that:

“Article 3

1. All investments made by investors of one Contracting Party shall enjoy, in the territory of the other Contracting Party, fair and equitable treatment.

2. Subject to measures necessary for public order, morality, public health and environmental protection, such investments shall enjoy constant [full] protection and security, excluding any unjustified or discriminatory measure which could hinder, in law or in fact, the management, maintenance, use, enjoyment or liquidation of such investments.”⁷

In its award, the tribunal concluded that Madagascar had breached its obligation to provide FPS by failing to take reasonable and foreseeable preventive measures despite prior indications of risk. The tribunal further clarified that the existence of political turmoil does not suspend treaty obligations, although the assessment of due diligence may take contextual circumstances into account. Consequently, the legal issue addressed in this article is how political crises give rise to investment treaty violations and how States can prevent such violations through improved legal and institutional responses.

Previous studies have looked at the economic consequences of political instability in Madagascar. In 2023, Idriss Fontaine and Justinien Razafindravaosolonirina studied the economic effects of the 2009 Malagasy political crisis, treating it as a significant case because of its sudden onset and prolonged duration. Using the synthetic control method, they built a counterfactual for the Malagasy economy from a weighted combination of countries that had not gone through a comparable crisis. The results pointed to a substantial and persistent effect: per capita income fell by an estimated 25 percent eight years after the crisis began. Looking at the mechanisms behind this loss, the authors

⁷ Agreement between the Belgium–Luxembourg Economic Union and the Republic of Madagascar concerning the Reciprocal Promotion and Protection of Investments, September 29, 2005 (hereinafter BLEU–Madagascar BIT), Article 3, available on <https://www.ceja.ch/images/CEJA/DOCS/Bib/Pays/Madagascar/AC1.pdf>.

found that a contraction in investment was among the principal factors driving the decline in economic performance, and on this basis they treated political instability as a major constraint on Madagascar's long-term economic development.⁸

In 2024, Rindra Tsiferana Rajaonson examined the relationship between exchange rate volatility and FDI in Madagascar over 1987–2021, using an Autoregressive Distributed Lag (ARDL) model. The study found a long-term relationship between the variables: economic growth had a positive effect on FDI, while external economic openness worked differently in the short and long term. In the short term, greater exchange rate volatility came with a temporary rise in FDI, whereas sustained volatility reduced investment inflows over time. A one percent increase in national output was linked to a substantial rise in FDI in the long run, and a one percent increase in external openness initially reduced FDI before turning positive over a longer period. These findings led the author to stress macroeconomic stability, predictable exchange rate conditions, and a gradual approach to economic openness as key to Madagascar's ability to attract and retain foreign investment.⁹

In the same year, Njakanasandratra Rajaonarison and Lazanoe Rajamarison investigated the determinants of FDI in Madagascar, aiming to build an econometric model that could estimate and forecast investment flows and inform investment policy. Their analysis used an ARDL framework, drawing on data from Madagascar and a panel of developing countries — Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Kenya, Malawi, Mali, Mozambique, Niger, Senegal, and Tanzania. Economic growth, external openness, investment conditions, and access to credit all emerged as factors associated with greater investment inflows, with economic growth showing the strongest long-term effect among the variables examined; external openness, meanwhile, helped export-oriented firms attract investment. They also looked at the relationship between public and private investment and found evidence of a crowding-out effect of public investment on private investment in the earlier dataset. From these results, they proposed policy measures on public investment, domestic savings, access to credit, taxation, and external trade to improve Madagascar's investment environment.¹⁰

These three studies establish the economic weight of political instability, macroeconomic volatility, and institutional and economic conditions for foreign investment in Madagascar. Their focus, though, stays economic and policy-oriented: none of them addresses how political instability might engage the host State's international legal responsibility, particularly under the Full Protection and Security obligation in an

⁸ Idriss Fontaine and Justinien Razafindravaosolonirina, "The Income Loss of a Political Crisis: Evidence from Madagascar," *Economics of Transition and Institutional Change* 31, no. 3 (2023): 657–81, <https://doi.org/10.1111/ecot.12354>.

⁹ Rindra Tsiferana Rajaonson, "Volatilité Du Taux De Change Et Investissement Direct Etranger A Madagascar," *International Journal of Progressive Sciences and Technologies* 45, no. 1 (2024): 353–58, <https://hal.science/hal-05553174v1/document>.

¹⁰ Njakanasandratra Rajaonarison and Lazanoe Rajamarison, "Déterminants et Modèles d'Estimation Des Investissements Directs Étrangers à Madagascar," *SSRN Electronic Journal*, 2025, 1–35, <https://hal.science/hal-04726119v1/document>.

investment treaty. The novelty of the present study addresses the legal dimension through a focused analysis of *De Sutter v. Madagascar (II)* and the tribunal's treatment of State due diligence during political unrest.

This paper aims to examine how treaty violations arise in situations of political crisis and to identify concrete pathways through which such violations can be avoided in the future. To achieve this, first, we examine political crisis and investment vulnerability, focusing on the 2009 events in Madagascar, the structural exposure of foreign investments during periods of unrest, and the legal implications of treating crisis as a foreseeable risk rather than an excuse for non-compliance. Second, we analyse what can be learned from *De Sutter v. Madagascar (II)*, with particular attention to the tribunal's reasoning and its interpretation of the obligation of constant protection and security. Third, we reconstruct State responsibility in times of political crisis, by reassessing due diligence as a context-sensitive standard, evaluating the limits of crisis-based defences, and extracting normative lessons oriented towards prevention. Through this structure, the article contributes to the development of a more proactive understanding of State responsibility, offering a practical framework for strengthening institutional capacity and reducing the risk of future investment treaty violations in politically unstable contexts.

This study adopts a doctrinal legal research method to examine the legal issues arising from the protection of foreign investment during periods of political crisis. It employs a case study approach and a conceptual approach, with the case study centred on *De Sutter v. Madagascar (II)*, ICSID Case No. ARB/17/18, Award of 17 April 2020, as the principal source for examining how political instability affects the application of the Full Protection and Security (FPS) obligation and the scope of State due diligence. The empirical material on political instability and foreign investment in Madagascar is used to establish the factual and economic context in which the tribunal's legal reasoning must be understood, particularly whether political risks were foreseeable and whether reasonable preventive measures could have been expected from State authorities. The empirical analysis focuses primarily on the 2009 Malagasy political crisis, which is the relevant period for the events giving rise to the dispute, while also drawing on recent literatures concerning the economic effects of the crisis, exchange rate volatility, and the determinants of FDI in Madagascar. These materials are used to identify the nature, persistence, and investment-related consequences of political instability and to assess whether the risks faced by the investment in *De Sutter (II)* can be understood as isolated events or as part of a wider pattern of political and economic instability. The conceptual approach is used to examine the meaning and development of due diligence, Full Protection and Security, State responsibility, foreseeability, and the distinction between obligations of means and obligations of result within international investment law. The research relies on primary legal materials, including the 2005 Belgium–Luxembourg Economic Union–Madagascar BIT, particularly Article 3 concerning Fair and Equitable Treatment and Full Protection and Security, the *De Sutter v. Madagascar (II)* award and decision on annulment, and selected subsequent arbitral awards and decisions that address the protection of investments during political unrest or refer to the principles applied in *De Sutter (II)*. The

analysis of the *De Sutter (II)* award focuses specifically on the tribunal's findings concerning the existence of a foreseeable risk, the information available to Malagasy authorities before the destruction of the investment, the preventive measures that were reasonably available to the State, the adequacy of the authorities' response to the unrest, and the tribunal's treatment of political instability in determining the scope of the FPS obligation. Subsequent arbitral jurisprudence is examined to determine whether and how these principles have been applied or developed by other adjudicative bodies. Secondary legal materials consist of scholarly articles and books addressing international investment law, investor-State dispute settlement, Full Protection and Security, due diligence, political risk, and State responsibility, together with empirical studies concerning political instability and FDI in Madagascar. Tertiary legal materials, such as legal dictionaries and encyclopaedias, are used to clarify key legal concepts and terminology. The materials are analysed through normative qualitative analysis and a deductive approach, moving from the treaty standard and general principles of international investment law to the factual circumstances of the 2009 crisis and the specific reasoning of the *De Sutter (II)* tribunal. The empirical findings are then brought into direct dialogue with the legal analysis by asking whether the documented characteristics of political instability help explain the foreseeability of the risk, the State's capacity to take preventive measures, and the reasonableness of the measures expected under the FPS obligation. This approach allows the study to distinguish between the existence of political instability as a factual circumstance and its legal significance for State responsibility.

B. Discussion

1. Political Crisis and Investment Vulnerability

1.1. The 2009 Political Crisis in Madagascar

The events giving rise to *De Sutter v. Madagascar (II)* must be situated within the broader and deeply destabilising political crisis that unfolded in Madagascar between late 2008 and March 2009. This period was marked by escalating tensions between President Marc Ravalomanana and opposition leader Andry Rajoelina. What began as political disagreement soon transformed into sustained confrontation, fuelled by public dissatisfaction with governance, economic conditions, and perceived inequalities in development policies.¹¹ The crisis reflected deeper structural weaknesses in political dialogue and institutional conflict management.

By early 2009, these tensions had escalated into widespread protests, particularly in the capital, Antananarivo. Demonstrations rapidly intensified and turned violent, leading to riots, looting, and confrontations with security forces. More than 135 people were killed in the weeks leading up to the collapse of the government, illustrating the severity of the

¹¹ For further understanding, see generally Adrien M. Ratsimbaharison, *The Political Crisis of March 2009 in Madagascar: A Case Study of Conflict and Conflict Mediation* (Columbia, United States: Bloomsbury Publishing Plc., 2017).

unrest.¹² Public buildings, commercial centres, and private enterprises were targeted, signalling a breakdown of general security conditions across key urban areas.

The situation reached its peak in March 2009 when President Ravalomanana, under pressure from both protesting crowds and mutinous elements within the military, transferred power to the armed forces. The military subsequently handed authority to Andry Rajoelina, who declared himself head of a transitional government. This transfer of power was widely characterised as unconstitutional and was condemned by regional and international actors.¹³ The involvement of the military revealed significant institutional fragility and an inability to resolve political disputes through constitutional means. Beyond the immediate political confrontation, the crisis was rooted in broader governance and development challenges. Discontent had been growing over economic policies, including efforts to attract foreign investment and implement land reforms, which were perceived by some segments of the population as exclusionary or insufficiently responsive to local needs.¹⁴ These tensions were compounded by weak mechanisms for political participation and conflict resolution, which limited the ability of institutions to absorb and manage dissent effectively.¹⁵ As a result, political rivalry escalated into systemic instability.¹⁶

The crisis also had profound economic and social consequences. Madagascar experienced a sharp decline in foreign investment and international financial support, as donors and organisations suspended aid in response to the unconstitutional change of power. Idriss Fontaine and Justinien Razafindravaosolonirina estimate that the crisis contributed to a significant reduction in per capita income over subsequent years.¹⁷ At the same time, the suspension of external funding for key sectors such as health and education exacerbated poverty and social vulnerability.¹⁸ These developments further weakened the State's capacity to respond to ongoing instability.

¹² Lauren Ploch, "Madagascar's 2009 Political Crisis," in *Politics and Economics of Africa*, vol. 7 (Nova Science Publishers, Inc., 2011), 129–40.

¹³ Katiana Sandra Ramsamy, "French Involvement in the Malagasy Crisis and during SADC's Mediation," *African Security Review* 30, no. 2 (2021): 223–46, <https://doi.org/10.1080/10246029.2021.1887905>.

¹⁴ Martin Weber, "A Puzzle: The Environment/Development Constellation in Madagascar," *Globalizations* 18, no. 6 (2021): 947–65, <https://doi.org/10.1080/14747731.2020.1859762>.

¹⁵ Wenche Hauge, "When Peace Prevails: The Management of Political Crisis in Ecuador, Madagascar, Tunisia, and Venezuela," *Alternatives: Global, Local, Political* 35, no. 4 (2010): 469–93, <https://doi.org/10.1177/030437541003500407>.

¹⁶ Ramalina Ranaivo Mikea Manitra and Adya Paramita Prabandari, "Judicial Independence Under Political Pressure: The High Constitutional Court and Electoral Justice in Madagascar (2009–2023)," *Constitutional Review* 11, no. 2 (2025): 393–421.

¹⁷ Fontaine and Razafindravaosolonirina, "The Income Loss of a Political Crisis: Evidence from Madagascar."

¹⁸ Daniel Kasproicz, "Medics to Africa the Level of Achievement of the Millennium Development Goals on the Example of Madagascar," *Annales Academiae Medicae Gedanensis* 44 (2014): 143 – 155, <https://annales.gumed.edu.pl/articles/169.pdf>. See also Ramalina Ranaivo Mikea Manitra and Rakotoarisoa Maminirina Fenitra, "Democracy Is Not for the Hungry? Rethinking the Right to Vote in Fragile States Like Madagascar," *Human Rights in the Global South (HRGS)* 4, no. 2 (2025): 139–64.

International and regional actors played an important role in shaping the trajectory of the crisis. Organisations such as the African Union and the Southern African Development Community condemned the change of government and suspended Madagascar from their frameworks. Mediation efforts were initiated, particularly by SADC, but progress was uneven and influenced by competing external interests.¹⁹ While these interventions eventually contributed to a return to constitutional order in 2013, they did little to address the immediate breakdown of security that characterised the events of early 2009.

Therefore, the 2009 crisis represents more than a background to the *De Sutter (II)* dispute. It illustrates how political instability, when combined with weak institutional capacity, can expose foreign investments to significant risks. However, as the subsequent arbitration demonstrates, the existence of such a crisis does not in itself absolve the State of responsibility. The central issue lies in whether the authorities took reasonable and timely measures to prevent foreseeable harm. The failure to do so during a period of heightened risk transformed a context of instability into one of international legal liability.

1.2. Structural Vulnerabilities of Foreign Investment During Crisis

Political crises expose foreign investments to risks that differ significantly from ordinary commercial uncertainty. In the African context, these vulnerabilities are often shaped by the sector in which the investment operates. Investments in non-resource tradable sectors are particularly sensitive to instability, as they depend on predictable market conditions and secure infrastructure.²⁰ By contrast, resource-based investments tend to remain more resilient, which creates an uneven distribution of risk across sectors.²¹ This structural imbalance explains why industrial facilities, such as the Polo Garments factory, become especially exposed during episodes of unrest. The erosion of public order during political crises intensifies these risks and places physical assets at direct threat. Civil unrest, including riots and one-sided violence, has been shown to significantly deter foreign investment and disrupt ongoing operations.²² These dynamics are particularly visible in low-income settings where security infrastructures are limited. At the same time, political instability often interacts with existing institutional weaknesses, which further reduces the capacity of authorities to protect private property.²³ The result is a situation in which foreign investments are physically unprotected.

¹⁹ Ramsamy, "French Involvement in the Malagasy Crisis and during SADC's Mediation."

²⁰ Martijn Burger, Elena Ianchovichina, and Bob Rijkers, "Risky Business: Political Instability and Sectoral Greenfield Foreign Direct Investment in the Arab World," *The World Bank Economic Review* 30, no. 2 (2016): 306–31, <https://doi.org/10.1093/wber/lhv030>.

²¹ Olumide Onitekun and Oluremi Ogun, "Investment Uncertainties and Economic Growth in Sub-Saharan Africa," *Global Studies Quarterly* 4, no. 1 (2024): 1–15, <https://doi.org/10.1093/isagsq/ksae005>.

²² Hao Xiao, Bin Tang, and Li Dai, "The Effects of African Civil Conflicts on FDI: The Moderating Role of Bilateral Political Relations," *China Economic Review* 89 (2025): 102326, <https://doi.org/10.1016/j.chieco.2024.102326>.

²³ Elizabeth Asiedu, "Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability," *The World Economy* 29, no. 1 (2006): 63–77, <https://doi.org/10.1111/j.1467-9701.2006.00758.x>.

Institutional fragility plays a central role in amplifying these vulnerabilities. Weak governance structures, including corruption and administrative inefficiencies, undermine the credibility of State institutions and reduce investor confidence.²⁴ During crises, these weaknesses become more pronounced, as decision-making processes slow down and coordination between public authorities deteriorates. Empirical studies suggest that countries with stronger institutional frameworks are better able to sustain investment inflows even under conditions of instability.²⁵ In contrast, fragmented governance systems tend to produce delayed or ineffective responses to emerging threats.

Economic structure also contributes to the exposure of foreign investments during periods of instability. Many African economies rely heavily on resource-based sectors, which limits diversification and reduces resilience to shocks.²⁶ This dependence is often accompanied by structural constraints, such as high import reliance and limited industrial capacity. In times of crisis, these conditions can exacerbate disruptions to supply chains and production processes. At the same time, broader macroeconomic instability, including inflation and currency volatility, further undermines the operational environment for investors.²⁷ These structural vulnerabilities reinforce one another in times of political crisis. Weak institutions, sectoral exposure, and macroeconomic instability combine to create an environment in which foreign investments face heightened and multidimensional risks. Political instability also affects labour markets, increasing unemployment and social tensions, which can indirectly contribute to further unrest.²⁸ In this context, the experience of Madagascar illustrates how these factors converge to transform political instability into a direct threat to foreign investment, shaping the legal disputes that may subsequently arise.

1.3. Legal Implications: Crisis as Risk, Not Excuse

The interaction between political crisis and investment protection raises a fundamental legal question: to what extent can instability mitigate or excuse a State's failure to protect foreign investments? As noted by Patrick Dumberry, international investment law maintains that obligations such as FPS remain applicable even in situations of civil unrest,

²⁴ Emmanuel Cleeve, "Political and Institutional Impediments to Foreign Direct Investment Inflows to Sub-Saharan Africa," *Thunderbird International Business Review* 54, no. 4 (2012): 469–77, <https://doi.org/10.1002/tie.21477>.

²⁵ Ochuko B Emudainohwo et al., "Analysis of Government Policies, Institutions, and Inward Foreign Direct Investment: Evidence from Sub-Saharan Africa," *Thunderbird International Business Review* 60, no. 4 (2018): 523–34, <https://doi.org/10.1002/tie.21942>.

²⁶ Joe U Umo, "Fundamental Structural Reforms of African Economies for Sustainable Resilience: A Human Capital Perspective," *Nigerian Journal of Economic and Social Studies* 65, no. 2 (2023): 259–86, <https://www.njess.org/journal/njess/articles?id=99>.

²⁷ Augustin Kwasi Fosu, "Instabilities and Development in Africa," in *Towards Africa's Renewal* (Michigan, United States: Routledge, 2017), 209–24, <https://doi.org/10.4324/9781351144445-9>.

²⁸ Benjamin Fomba Kamga, Dieu Ne Dort Talla Fokam, and Paul Ningaye, "Political Instability and Youths Unemployment in Sub-Saharan Africa," *Review of Development Economics* 26, no. 3 (2022): 1850–79, <https://doi.org/10.1111/rode.12870>.

although their content is assessed in light of prevailing conditions.²⁹ While the standard of due diligence is context-dependent, it does not disappear during crises but adapts to the State's capacity and circumstances.³⁰ The existence of a crisis may influence what qualifies as reasonable measures, yet it does not extinguish the obligation itself.

Arbitral jurisprudence has consistently affirmed that States are not guarantors of absolute security, but they are required to act with vigilance and take preventive steps where risks are foreseeable. In recent practice, tribunals have also examined how both States and investors assess risks, particularly in situations involving third-party violence.³¹ This includes scenarios where threats arise from demonstrators or rioters, requiring authorities to anticipate and mitigate foreseeable harm. The legal threshold is therefore framed around reasonableness and foreseeability rather than absolute control over events, and tribunals frequently rely on these criteria when evaluating claims arising from civil unrest.³² In this sense, political crises are treated as risk factors that must be managed rather than as legal justifications for inaction.

Moreover, general defences under international law such as force majeure or necessity are interpreted restrictively. According to Lu Wang and Wenhua Shan, force majeure requires the existence of an irresistible event that renders performance materially impossible, not merely more difficult.³³ Similarly, necessity is subject to strict conditions, including the requirement that the impugned act be the only means available to safeguard an essential interest, a threshold that is rarely satisfied in practice.³⁴ As a result, States cannot simply invoke political instability to justify a failure to act, particularly where there is evidence that preventive measures could have been taken.

This issue is especially relevant in the case of Madagascar, a country characterised by recurring political crises, most notably the events of 2009, which led to widespread unrest, institutional disruption, and significant economic consequences. This broader context of fragility is reflected in empirical governance indicators. Data from the Worldwide Governance Indicators show uneven but generally weakened institutional performance across key dimensions between 1996 and 2024 (see Figure 1). Political

²⁹ Patrick Dumberry, "Host States' Due Diligence Obligation Towards Foreign Investors in the Context of Rebellions and Civil Wars," *The Journal of World Investment & Trade* 22, no. 5-6 (2021): 705-31, <https://doi.org/10.1163/22119000-12340226>.

³⁰ Ira Ryk-Lakhman, "Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security," in *European Yearbook of International Economic Law* (London, United Kingdom: Springer Science and Business Media Deutschland GmbH, 2019), 259-82, https://doi.org/10.1007/978-3-030-10746-8_13.

³¹ Mateo Tomas L Escueta, "Paradigm Shift: Investor Due Diligence and Third-Party Illegality," *ICSID Review - Foreign Investment Law Journal*, 2025, <https://doi.org/10.1093/icsidreview/siaf014>.

³² Nartnirun Junngam, "Thailand's Debut in Investment Treaty Arbitration: The Curious Case of Walter Bau and Its Lessons for Participants in International Investment Law," *Arbitration International* 38, no. 3 (2022): 213-29, <https://doi.org/10.1093/arbint/aiac011>.

³³ Lu Wang and Wenhua Shan, "Force Majeure and Investment Arbitration," *ICSID Review - Foreign Investment Law Journal* 37, no. 1-2 (2022): 138-59, <https://doi.org/10.1093/icsidreview/siac014>.

³⁴ Helene Sabalbal, "States' Defenses against Foreign Investors in Times of Political and Economic Crisis," *Journal of Siberian Federal University - Humanities and Social Sciences* 17, no. 12 (2024): 2337-46, <https://cyberleninka.ru/article/n/states-defenses-against-foreign-investors-in-times-of-political-and-economic-crisis/viewer>.

stability, for instance, declined from a relatively high level of around 70 in 1996 to approximately the mid-50 range in 2014, and remained largely stagnant through 2019 and 2024. Government effectiveness followed a lower trajectory, hovering around 30–35 in 1996 and declining slightly to the mid-20 range in subsequent years. A similar pattern is observed in the rule of law, which dropped from above 50 in 1996 to roughly 35–40 in recent periods. Control of corruption also deteriorated significantly, decreasing from nearly 60 in 1996 to below 40 by 2014 and remaining at that level thereafter. While regulatory quality and voice and accountability display relatively more stability, they too remain within modest ranges, generally between 40 and 55. These trends point to a structural weakening of institutional capacity, which directly affects the State's ability to anticipate, prevent, and respond to risks affecting foreign investments.

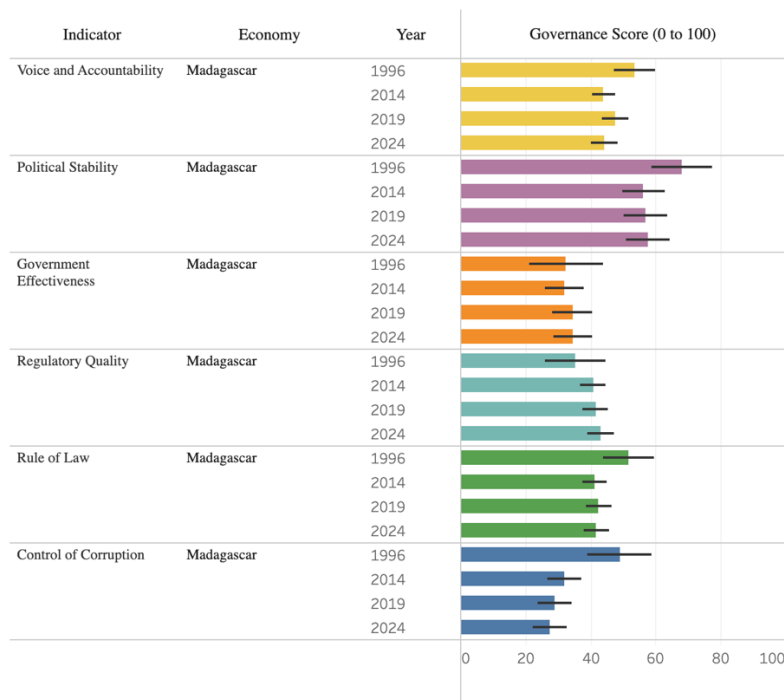


Figure 1. Governance Score of Madagascar (1996-2024)

Source: World Governance Indicator³⁵

In light of these considerations, the 2009 crisis in Madagascar should be understood as a critical test of the State's capacity to fulfil its international obligations under conditions of stress. Shaqir Rexhepi and Sanije Doda emphasise that political instability amplifies investment risks and requires effective risk management strategies, which are often lacking in fragile contexts.³⁶ The vulnerabilities identified above, including security breakdown, administrative fragmentation, and judicial disruption, take on particular

³⁵World Bank, *Worldwide Governance Indicators*, <https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access> (accessed April 16, 2026).

³⁶ Shaqir Rexhepi and Sanije Doda, "How Does Risk Management Affect Foreign Investment Returns in Albania," *Interdisciplinary Journal of Research and Development* 12, no. 3 S1 (2025): 311–17, <https://doi.org/10.56345/ijrdv12n3s142>.

significance where crises are recurrent and institutional resilience is limited.³⁷ This makes the analysis of *De Sutter v. Madagascar (II)* especially relevant, as it provides a concrete example of how such vulnerabilities may translate into international responsibility. Against this backdrop, the following section turns to the arbitration itself, examining how these contextual factors were framed as legal claims and how the tribunal assessed the conduct of the State under the applicable investment treaty.

2. Lesson Learnt from *De Sutter v. Madagascar (II)* Case

2.1. Facts of *De Sutter v. Madagascar (II)*

International investment disputes often emerge from complex interactions between private investment, domestic instability, and state conduct. Periods of political crisis are particularly sensitive moments for host States. During such periods, the ability of public authorities to protect foreign investment may be tested by social unrest, institutional disruption, and competing priorities of public order. The dispute between the investors of the Polo Group and the Republic of Madagascar illustrates how such circumstances can evolve into international arbitration (as summarised in Figure 1). The case concerns the destruction of a textile factory during political unrest in 2009 and the subsequent legal disputes that followed. The arbitration was ultimately brought before the International Centre for Settlement of Investment Disputes under the bilateral investment treaty concluded between the Belgium–Luxembourg Economic Union and Madagascar.

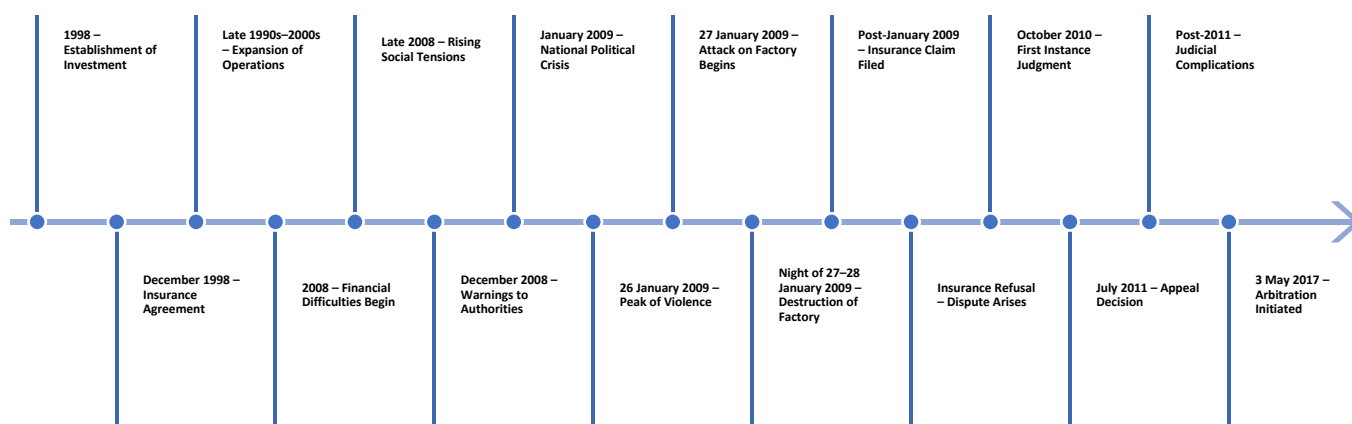


Figure 1. Summary of Facts in *De Sutter v. Madagascar (II)*

Source: Illustration by the authors

The claim was initiated by three investors. The first claimant was (DS)² S.A., a company incorporated in Luxembourg. The other two claimants were Peter de Sutter and Kristof de Sutter, Belgian nationals and brothers who were involved in the management of the Polo Group. The Polo Group is an international clothing manufacturer founded in 1963

³⁷ Sead Mehović, “Applicable Law in International Investment Disputes,” *Corporate Law and Governance Review* 7, no. 3 (2025): 113–19, <https://doi.org/10.22495/clgrv7i3p11>.

by Renaat de Sutter. Over the years, the group developed a network of production and distribution entities across several countries, including Belgium, France, Tunisia, China, and Madagascar.³⁸ The investment at the centre of the dispute concerned a textile manufacturing company known as Polo Garments Majunga, which operated a factory in the city of Mahajanga in the north-west of Madagascar.

The factory was established in the late 1990s as part of the expansion strategy of the Polo Group. In 1998, the investors created the company Polo Garments Majunga with the objective of producing finished textile products for international markets. The enterprise was later registered in the Malagasy commercial registry and benefited from the legal regime applicable to export processing zones. The investment included a large industrial complex comprising production facilities, storage warehouses, and technical installations. At the time relevant to the dispute, the factory covered more than 21,000 square metres and employed close to one thousand workers.³⁹

To protect its assets, the company also entered into an insurance agreement with the Malagasy insurance company Ny Havana in December 1998. The insurance policy covered several risks, including fire, theft, and loss of business operations. Importantly, the policy also contained extensions related to risks associated with strikes, riots, and popular disturbances. These contractual arrangements later became central to the legal disputes that followed the destruction of the factory.⁴⁰ Despite the scale of the investment, the company began to experience financial and social difficulties during 2008. The collapse of an important client created liquidity problems that affected the company's ability to pay wages. As a consequence, the company temporarily suspended certain operations and placed a number of employees on technical leave. These financial difficulties contributed to growing tensions between management and employees during the second half of 2008.⁴¹

The tensions escalated in December 2008. The management of the factory warned local authorities that unrest might occur among employees and within the surrounding community. Reports were sent to the regional authorities in Mahajanga describing the risk of disturbances and the circulation of rumours regarding the payment of salaries. According to the investors, these warnings were intended to alert the authorities to the possibility of violence and to request preventive intervention. These communications later became an important element in the arbitration proceedings because they were used to demonstrate that the authorities had been informed of the risk of disorder before the events occurred.⁴² The situation unfolded against the backdrop of a broader national crisis. In January 2009, Madagascar entered a period of intense political confrontation between supporters of the mayor of Antananarivo, Andry Rajoelina, and the government of President Marc Ravalomanana. The political confrontation generated widespread

³⁸ *De Sutter v. Madagascar (II)*, para 1-4.

³⁹ *De Sutter v. Madagascar (II)*, para. 56-61.

⁴⁰ *De Sutter v. Madagascar (II)*, para. 62-66.

⁴¹ *De Sutter v. Madagascar (II)*, para. 74.

⁴² *De Sutter v. Madagascar (II)*, para. 75-77.

demonstrations, riots, and social instability throughout the country. The unrest reached a peak on 26 January 2009 when violent clashes in Antananarivo resulted in more than eighty deaths.⁴³ The events of that period are widely recognised as a major turning point in the political history of Madagascar.

The following day, the industrial site where the Polo Garments factory was located became the target of violent attacks. On 27 January 2009, large groups of individuals gathered near the industrial compound and began to force entry into the premises. According to reports presented by the investors, the security personnel stationed at the site alerted the local gendarmerie and requested reinforcements as rumours of an impending attack began to circulate during the afternoon. Despite the arrival of several units of gendarmes, the situation rapidly deteriorated as hundreds and later thousands of individuals entered the industrial area and began to loot and vandalise the facilities.⁴⁴ During the night of 27 to 28 January 2009, the attackers penetrated several buildings of the factory complex, including warehouses and production halls. The facilities were extensively looted and ultimately set on fire. The violence caused the complete destruction of the factory and brought the activities of Polo Garments Majunga to an abrupt end. According to the investors, the destruction of the plant resulted in the immediate collapse of the enterprise and the termination of its industrial operations.⁴⁵

Following the destruction of the factory, the investors sought compensation through their insurance contract. A claim was submitted to the insurance company Ny Havana shortly after the events. However, the insurer refused to indemnify the losses, arguing that the destruction resulted from political events that were excluded from the insurance coverage. This refusal triggered a series of legal proceedings before Malagasy courts concerning the nature of the events and the scope of the insurance contract.⁴⁶ The dispute initially appeared to be resolved in favour of the investors. In October 2010, the Tribunal of First Instance of Mahajanga ruled that the destruction of the factory resulted from social unrest rather than political events. The court therefore ordered the insurer to compensate the company for the damages suffered. The decision was later confirmed by the Court of Appeal of Mahajanga in July 2011, which held that the destruction was linked to labour tensions that had existed within the factory during the preceding year.⁴⁷

However, the dispute did not end with these decisions. The insurance company challenged the judgment before the Court of Cassation. At the same time, a series of procedural interventions by public authorities complicated the enforcement of the judicial decisions. Among these developments was the introduction of a special appeal in the interest of the law and the suspension of enforcement measures that had been initiated against the insurer. The investors argued that these interventions effectively

⁴³ *De Sutter v. Madagascar (II)*, para. 79.

⁴⁴ *De Sutter v. Madagascar (II)*, para. 81.

⁴⁵ *De Sutter v. Madagascar (II)*, para. 80-84.

⁴⁶ *De Sutter v. Madagascar (II)*, para. 86-87.

⁴⁷ *De Sutter v. Madagascar (II)*, para. 88-89.

prevented them from obtaining the compensation that had been recognised by the domestic courts.⁴⁸

Frustrated by the outcome of the domestic proceedings, the investors turned to international arbitration. On 3 May 2017, they submitted a request for arbitration against Madagascar under the bilateral investment treaty concluded between the Belgium–Luxembourg Economic Union and Madagascar. The claim alleged several violations of the treaty, including the failure to provide constant protection and security, the denial of fair and equitable treatment, discriminatory conduct, and the unlawful deprivation of the investment.⁴⁹ The arbitral tribunal was subsequently constituted under the rules of the International Centre for Settlement of Investment Disputes. The dispute therefore raised fundamental questions regarding the responsibility of host States during periods of political turmoil. In particular, the case required the tribunal to determine whether the conduct of the Malagasy authorities during the 2009 unrest and the subsequent judicial developments could engage the international responsibility of the State under the applicable investment treaty.

2.2. Legal Analysis of *De Sutter v. Madagascar* (II)

2.2.1. The Scope of Full Protection and Security

The obligation of FPS plays a central role in investment treaty law. It is designed to protect foreign investments from physical harm, especially where such harm may result from the conduct of third parties. In this sense, the obligation is closely linked to the idea that the host State must maintain a basic level of public order and security for investors operating within its territory. The *De Sutter (II)* arbitration provides a clear context in which this obligation was tested under conditions of instability. In this regard, Sebastián Mantilla Blanco stated that the FPS standard is closely connected to the rule of law because it requires States to maintain an institutional environment capable of protecting investors against foreseeable harm, including harm caused by non-State actors during periods of unrest.⁵⁰

At the centre of the dispute was the interpretation of Article 3(2) of the bilateral investment treaty. The tribunal clarified that this provision establishes a binding legal obligation rather than a discretionary power. The wording of the treaty indicates that investments “shall enjoy” constant protection and security, which reflects a duty that is continuous and not dependent on the State’s preference or convenience.⁵¹ The tribunal also addressed an important argument raised by Madagascar, which attempted to limit the scope of the obligation by linking it to unjustified or discriminatory measures. This interpretation was rejected. The tribunal explained that the reference to such measures does not restrict the obligation but rather complements it. As a result, the obligation

⁴⁸ *De Sutter v. Madagascar (II)*, para. 90-99.

⁴⁹ *De Sutter v. Madagascar (II)*, para. 50.

⁵⁰ Sebastián Mantilla Blanco, “Full Protection and Security and the Rule of Law,” in *Investment Protection Standards and the Rule of Law* (Oxford University Press/Oxford, 2023), 81–104, <https://doi.org/10.1093/oso/9780192864581.003.0005>.

⁵¹ *De Sutter v. Madagascar (II)*, para. 306.

extends beyond direct State conduct and includes failures to act in the face of foreseeable risks.⁵²

The legal nature of the obligation was further clarified as one of due diligence rather than strict liability. This means that the State is not required to guarantee absolute protection. Instead, it must take reasonable measures to prevent harm. This standard recognises that risks cannot always be eliminated, but it requires a level of vigilance that reflects the circumstances and the resources available to the State.⁵³ Christina Elena Popa similarly observed that investment protection during periods of crisis is based on cooperation and reasonable preventive action rather than absolute guarantees of security, particularly where States face political and social instability.⁵⁴

At the same time, the tribunal confirmed that the obligation applies to both acts and omissions. It is not limited to situations where State agents directly cause harm. It also includes situations where the State fails to act when it should have done so. This interpretation is important because it places responsibility on the State even when the damage is caused by private actors, such as demonstrators or rioters.⁵⁵ The tribunal emphasised that the key element triggering the obligation is knowledge of risk. Once the State is aware, or should reasonably be aware, of a potential threat to an investment, it must take preventive action. This duty arises even without a formal request from the investor, which highlights the proactive nature of the obligation under international investment law.⁵⁶ Ira Ryk-Lakhman further explained that the FPS standard imposes a relative due diligence obligation requiring States to actively anticipate and mitigate foreseeable risks during periods of hostilities or civil unrest, even where the harm originates from third parties rather than the State itself.⁵⁷

2.2.2. *Due Diligence and State Inaction*

The events of January 2009 raise the question of whether Madagascar fulfilled its duty of due diligence. The case shows that the risk to the investment was not sudden or unexpected. There were prior warnings about tensions between the company and its employees, and these warnings were communicated to public authorities. This context is important because it establishes that the risk was foreseeable.

The tribunal acknowledged that the State had been informed of potential unrest. Letters sent in December 2008 highlighted the possibility of disturbances, and these communications were addressed to key authorities responsible for public security. This indicates that the State had at least some level of awareness of the situation before the

⁵² *De Sutter v. Madagascar (II)*, para. 307.

⁵³ *De Sutter v. Madagascar (II)*, para. 301.

⁵⁴ Cristina Elena Popa, "Defense or Cooperation between States and International Investors in Times of Crisis?," *Juridical Tribune* 11, no. special (2021): 380–94, <https://doi.org/10.24818/TBJ/2021/11/SP/07>.

⁵⁵ *De Sutter v. Madagascar (II)*, para. 303.

⁵⁶ *De Sutter v. Madagascar (II)*, para. 304.

⁵⁷ Ryk-Lakhman, "Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security," 260–69.

events escalated.⁵⁸ In this regard, Patrick Dumberry stated that host States may incur responsibility under the FPS standard when authorities fail to respond adequately to foreseeable risks arising from rebellions, civil wars, or disturbances caused by non-State actors.⁵⁹ This perspective reinforces the tribunal's view that prior knowledge of potential violence creates a legal expectation for preventive action.

Despite this awareness, the tribunal found that preventive measures were limited. While it did not consider the absence of earlier surveillance as a decisive failure, it examined more closely the events of 27 January 2009. On that day, the authorities were informed of an imminent threat and were requested to intervene. This moment marked the point at which the obligation of due diligence became particularly important. Similarly, Sebastián Mantilla Blanco explained that due diligence under the FPS obligation is assessed through objective criteria, particularly whether the State had a realistic opportunity to take preventive or mitigating measures once the risk became foreseeable.⁶⁰

The tribunal noted that the response of the authorities was delayed. The first group of security forces arrived only after a significant period of time, despite the relatively short distance to the site. This delay raised questions about the efficiency and preparedness of the State's response.⁶¹ More importantly, the tribunal focused on the behaviour of the security forces once they were present. It found that their actions were largely ineffective. The forces did not take control of the situation and did not attempt to secure key entry points. Instead, they retreated and remained passive while the situation escalated. This interpretation is consistent with the observation of Mantilla Blanco, who argued that the FPS standard is closely connected to the rule of law and requires States to demonstrate active institutional engagement rather than passive observation when investments are threatened by third-party violence.⁶² This finding is strongly reflected in the tribunal's description of the events: "*More striking than the late arrival is the manifest inaction of the forces once on site... the second contingent merely joined the first in retreat... to wait passively for approximately five hours*"⁶³

The issue of passivity was further aggravated by the premature departure of the security forces. A portion of the forces left the site while the situation was still ongoing, and the remaining forces withdrew completely before the damage had ended. This conduct was seen as a serious failure to maintain protection. The tribunal described this situation in clear terms:

⁵⁸ *De Sutter v. Madagascar (II)*, para. 332.

⁵⁹ Dumberry, "Host States' Due Diligence Obligation Towards Foreign Investors in the Context of Rebellions and Civil Wars," 710–20.

⁶⁰ Sebastián Mantilla Blanco, "Due Diligence in the Context of 'Full Protection and Security' Claims," in *European Yearbook of International Economic Law*, vol. 8 (Springer Science and Business Media Deutschland GmbH, 2019), 421–91, https://doi.org/10.1007/978-3-030-24838-3_13.

⁶¹ *De Sutter v. Madagascar (II)*, para. 337.

⁶² Mantilla Blanco, "Full Protection and Security and the Rule of Law," 82–90.

⁶³ *De Sutter v. Madagascar (II)*, para. 339.

*"The second [departure] amounts to a pure and simple abandonment, without offering the slightest resistance to the ongoing looting and destruction"*⁶⁴

2.2.3. Crisis Context and the Limits of Public Order Justifications

Madagascar argued that the political crisis of January 2009 justified its conduct. According to the State, the situation amounted to a revolution or major unrest, which limited its ability to act. This argument raises a broader legal issue about the role of crisis in assessing State responsibility. In this context, Helene Sabalbal explained that States frequently invoke public order and necessity defences during periods of political or economic crisis, yet such justifications remain subject to strict legal scrutiny under international investment law.⁶⁵ This observation is relevant in understanding why the tribunal did not automatically accept the crisis situation as a complete defence for Madagascar's conduct.

The tribunal recognised that the country was experiencing serious disturbances. It accepted that the events formed part of a wider context of unrest affecting different regions. However, it did not accept that this context could fully excuse the conduct of the authorities on the ground.⁶⁶ The reasoning of the tribunal shows that the existence of a crisis does not remove the obligation of protection. Instead, it affects how the obligation is applied. The State must still act, but the assessment of what is reasonable may take into account the difficulties created by the situation. Similarly, Patrick Dumberry stated that the due diligence obligation under the FPS standard remains applicable even during rebellions and civil wars, although the assessment of compliance must consider the practical limitations faced by the host State.⁶⁷

In this case, the tribunal found that the authorities had options available to them. It noted that simple measures could have been taken to control access to the site and to discourage the crowd. These measures did not require excessive force or sophisticated resources. This reasoning is reflected in the tribunal's observation: *"The available forces could have taken several simple measures capable of protecting the site... blocking access points... ensuring a visible presence"*⁶⁸ Madagascar also relied on the argument that stronger action could have resulted in loss of life. The tribunal acknowledged the importance of protecting human life, but it did not consider that this justified complete inaction. It suggested that there were intermediate measures that could have been used without escalating violence. The tribunal therefore rejected the idea that public order concerns could justify the absence of any meaningful intervention. The obligation of protection required at least some effort to manage the situation, even under difficult conditions.

⁶⁴ *De Sutter v. Madagascar (II)*, para. 340.

⁶⁵ Sabalbal, "States' Defenses against Foreign Investors in Times of Political and Economic Crisis," 2337-40.

⁶⁶ *De Sutter v. Madagascar (II)*, para. 344.

⁶⁷ Dumberry, "Host States' Due Diligence Obligation Towards Foreign Investors in the Context of Rebellions and Civil Wars," 709-15.

⁶⁸ *De Sutter v. Madagascar (II)*, para. 341.

2.2.4. *The Rejection of International Law Defences*

In addition to treaty-based arguments, Madagascar invoked general defences under international law. These included force majeure, necessity, and distress. Each of these defences has strict conditions, and their application is limited. The tribunal began by examining the argument of force majeure. It recalled that this defence requires an irresistible event that makes it materially impossible to comply with the obligation. In this case, the tribunal found no evidence that such impossibility existed.⁶⁹ Similarly, Wang and Shan explained that force majeure under international investment law requires not only the existence of an unforeseeable and uncontrollable event, but also proof that compliance with the obligation became materially impossible rather than merely difficult or burdensome.⁷⁰ This interpretation aligns closely with the tribunal's restrictive approach in *De Sutter v. Madagascar (II)*. The defence of necessity was also rejected. This defence applies only when a State has no other means to protect an essential interest. The tribunal found that inaction could not be considered the only available option. The existence of alternative measures weakened this argument.⁷¹

The argument based on distress was similarly unconvincing. This defence requires that the act in question be the only way to save lives. The tribunal did not find any indication that the failure to act was necessary for this purpose.⁷² This reasoning corresponds with the analysis of Federica Paddeu and Michael Waibel, who argued that the "only way" requirement under the necessity defence constitutes one of the strictest thresholds in international law and often prevents States from successfully relying on necessity where alternative measures remain available.⁷³ The tribunal also dismissed the reference to jus cogens norms made by Madagascar. The protection of life is indeed a fundamental principle, but the tribunal did not see how this principle justified the conduct of the authorities in this case.⁷⁴ In the final analysis, the tribunal concluded that the obligation of constant protection and security requires States to take reasonable measures to prevent harm to foreign investments when the risk is known or foreseeable:

(c) Declares that the Respondent has breached its obligation to provide constant protection and security under Article 3(2) of the BLEU–Madagascar Bilateral Investment Treaty;

(d) Orders the Respondent, in respect of the principal amount, to pay the Claimants EUR 6,451,113.24, together with interest compounded annually at the rate of 12-month Euribor plus 2%, accruing from 28 January 2009 until full payment of the amount due;

⁶⁹ *De Sutter v. Madagascar (II)*, para. 347.

⁷⁰ Wang and Shan, "Force Majeure and Investment Arbitration," 139–45.

⁷¹ *De Sutter v. Madagascar (II)*, para. 348.

⁷² *De Sutter v. Madagascar (II)*, para. 349.

⁷³ Federica Paddeu and Michael Waibel, "Necessity 20 Years On: The Limits of Article 25," *ICSID Review – Foreign Investment Law Journal* 37, no. 1–2 (2022): 160–91, <https://doi.org/10.1093/icsidreview/siab047>.

⁷⁴ *De Sutter v. Madagascar (II)*, para. 350.

*(e) Orders the Respondent, in respect of conservation costs, to pay the Claimants EUR 474,488, together with interest compounded annually at the rate of 12-month Euribor plus 2%, accruing from 1 January 2010 until full payment of the amount due;*⁷⁵

These findings show that international law does not easily allow States to avoid responsibility. Defences are interpreted narrowly, and they require strong evidence. In the absence of such evidence, the State remains bound by its obligations. In the end, the tribunal concluded that Madagascar had failed to meet the standard of due diligence required under the treaty. The combination of delayed response, ineffective action, and premature withdrawal showed a lack of reasonable measures in the face of a foreseeable risk. Even in times of political crisis, this outcome makes clear, the obligation to protect foreign investments continues to apply and calls for active and consistent engagement by the State. That finding stands out more clearly against other ICSID decisions involving investments exposed to political instability. In *Ampal-American v. Egypt*, the tribunal also treated Full Protection and Security as an obligation of due diligence rather than strict liability, judging the State's responsibility against the circumstances in which the damage occurred. The tribunal accepted that Egypt could not reasonably have prevented the first attack on the Trans-Sinai pipeline in February 2011, given that it happened in the immediate context of the Arab Spring and deteriorating security conditions. But four further attacks between February and July 2011 changed the picture: the repeated attacks amounted to a warning that further harm was foreseeable, and Egypt's failure to take concrete protective measures after that point breached its due diligence obligation. *Ampal-American* backs up the reasoning in *De Sutter (II)* that foreseeability is not fixed but can build up over time, through information and events that progressively establish a credible risk calling for preventive action.

The comparison with *Strabag v. Libya* shows that foreseeability alone does not establish responsibility, and that the surrounding security conditions still carry legal weight. In *Strabag*, the tribunal drew on *Ampal-American* in recognising that FPS imposes a duty of due diligence, but stressed that this duty has to be judged against the conditions prevailing at the relevant place and time. Libya was going through prolonged armed conflict, weak and uncertain State authority, recurring violence, and a widespread breakdown of law and order. On that basis, the tribunal found it was not reasonably possible for the Libyan authorities to take consistent and effective measures to protect the investment, and rejected the FPS claim. *De Sutter (II)* went the other way: the tribunal there considered that Madagascar retained practical opportunities to intervene and pointed to relatively simple measures that could have protected the factory once the authorities were alerted to the imminent threat. The two cases show that the FPS standard is neither an absolute guarantee of physical security nor a general exemption for States going through political instability. The decisive question is whether, given the information available, the nature of the threat, the State's actual capacity, and the

⁷⁵ *De Sutter v. Madagascar (II)*, para. 482.

measures reasonably available at the time, the State failed to exercise the degree of due diligence international law requires.

De Sutter (II), *Ampal-American*, and *Strabag*, read together, point to a more nuanced view of State responsibility during political instability. *De Sutter (II)* shows that prior warnings and an inadequate response can establish a breach where the State retains a realistic capacity to act. *Ampal* shows that repeated attacks can turn an initially unforeseeable event into a foreseeable security risk that calls for additional preventive measures. *Strabag* adds the limiting principle: the FPS obligation has to stay sensitive to situations where State authority has substantially collapsed and effective protection is no longer realistically possible. This comparison strengthens the finding that the legal test is whether the host State, given the circumstances actually prevailing, took the reasonable preventive and responsive measures that could realistically be expected of it. It also explains why the tribunal's finding of responsibility in *De Sutter v. Madagascar (II)* rested the combination of prior knowledge, the foreseeability of the threat, the availability of practical protective measures, and the authorities' failure to respond effectively during 2009 crisis.

3. Reconstructing State Responsibility in Times of Political Crisis

3.1. Due Diligence Revisited: A Context-Sensitive Standard

The *De Sutter v. Madagascar (II)* award provides an opportunity to refine the understanding of due diligence within the framework of international investment law. Rather than imposing a rigid or absolute obligation, the tribunal adopted a context-sensitive approach, assessing the conduct of Madagascar in light of the specific risks and institutional constraints prevailing at the time. As noted by Aniruddha Rajput, due diligence obligations in international investment law are inherently shaped by contextual factors and evolving standards of responsible governance.⁷⁶ This approach is consistent with broader principles of State responsibility, where obligations of conduct require States to act reasonably, taking into account their capacities and the circumstances they face, particularly in crisis situations where anticipatory governance mechanisms become essential.⁷⁷

However, contextualisation does not equate to leniency. The tribunal made it clear that the existence of political instability does not lower the standard of protection owed to foreign investors; instead, it redefines what constitutes reasonable action in a given situation. In the middle of this reasoning, Mir-Hossein Abedian and Reza Eftekhari emphasise that reasonableness operates as a guiding standard requiring proportional

⁷⁶ Aniruddha Rajput, "Due Diligence in International Investment Law," in *Due Diligence in the International Legal Order* (London, United Kingdom: Oxford University Press, 2020), 273–87, <https://doi.org/10.1093/oso/9780198869900.003.0016>.

⁷⁷ Madhavi Malalgoda Ariyabandu et al., "Strengthening Anticipatory Action with the Early Warning, Early Action and Early Finance (AWARE) Platform: A Gender Equality and Social Inclusion (GESI) Lens for Inclusive Resilience," *IWMI Working Papers*, vol. 214 (Colombo, Sri Lanka: International Water Management Institute, 2025), <https://doi.org/10.5337/2025.228>.

and non-arbitrary State conduct even under strained conditions.⁷⁸ Where risks are heightened, as is typically the case during political crises, the expectation of vigilance correspondingly increases, and States must balance regulatory authority with investor expectations in a manner that avoids discriminatory or unpredictable measures.⁷⁹ This reasoning aligns with a growing body of arbitral jurisprudence that emphasises foreseeability, preparedness, and responsiveness as core elements of due diligence. Dimitrios Katsikis highlights that even in crisis situations, reliance on exceptional doctrines does not displace the obligation to act proactively within the bounds of international law.⁸⁰ It also reflects a shift away from formalistic interpretations of treaty standards towards a more functional assessment of State conduct, where practical risk mitigation strategies such as de-risking instruments play an increasingly important role in managing investment exposure in unstable environments.⁸¹

3.2. Crisis as a Legal Stress Test: Limits of Defences

One of the most significant implications of the case lies in its treatment of political crisis as a stress test for State responsibility. Rather than accepting instability as a mitigating factor per se, the tribunal effectively examined whether the State's legal and institutional framework was capable of withstanding the pressures generated by the crisis. At the beginning of this perspective, Helene Sabalbal underlines that crisis situations do not suspend legal obligations but instead test the adequacy of State responses under established international standards.⁸² This shifts the analytical focus from the crisis itself to the State's preparedness and resilience in managing that event, reinforcing the need for pre-established legal flexibility mechanisms such as non-precluded measures clauses.

In this regard, potential defences under international law such as force majeure, distress, or necessity play a limited role. These doctrines are narrowly construed and require stringent conditions, including the absence of alternative courses of action, a threshold that is rarely satisfied in practice.⁸³ In the context of *De Sutter (II)*, the tribunal did not find that the situation met these thresholds, and early warning systems and coordinated crisis alert mechanisms are increasingly recognised as tools that enable States to act

⁷⁸ Mir-Hossein Abedian and Reza Eftekhari, "Reasonableness: A Guiding Light—A Probe into the World Court's Landmark Judgment on Substantive Standards of Investment Protection and Its Takeaways for Investment Treaty Tribunals," *Arbitration International* 40, no. 3 (2024): 307–36, <https://doi.org/10.1093/arbint/aiae012>.

⁷⁹ Solveiga Palevičienė and Simona Drukeitinienė, "Limits of State Regulatory Power in Investment Law and under National Legislation: Search for Common Denominator," *Entrepreneurship and Sustainability Issues* 8, no. 2 (2020): 1197–1210, [https://doi.org/10.9770/jesi.2020.8.2\(71\)](https://doi.org/10.9770/jesi.2020.8.2(71)).

⁸⁰ Dimitrios Katsikis, "'Necessity' Due to COVID-19 as a Defence to International Investment Claims," *ICSID Review - Foreign Investment Law Journal* 36, no. 1 (2021): 46–69, <https://doi.org/10.1093/icsidreview/siab009>.

⁸¹ Clémence Lévêque, Behrang Shirizadeh, and Johannes Trüby, "De-Risking Renewable Investments: Internalizing the Risks and Quantifying the Impact of de-Risking Instruments," *Renewable and Sustainable Energy Reviews* 227 (2026): 116570, <https://doi.org/10.1016/j.rser.2025.116570>.

⁸² Sabalbal, "States' Defenses against Foreign Investors in Times of Political and Economic Crisis."

⁸³ Andrea K Bjorklund, "Emergency Exceptions: State of Necessity and Force Majeure," in *The Oxford Handbook of International Investment Law* (United States: Oxford University Press, 2012), 459–523, <https://doi.org/10.1093/oxfordhb/9780199231386.013.0012>.

before such extreme defences become necessary.⁸⁴ This has important implications for States like Madagascar, where political crises may recur with some frequency. The repetition of instability cannot justify a pattern of non-compliance with international obligations, and instead reinforces the expectation of institutional learning and adaptation. In this respect, strengthening institutional quality and regulatory predictability is essential to maintaining investor confidence during periods of instability.⁸⁵ A State that has previously experienced similar crises is therefore under a stronger obligation to anticipate risks and develop mechanisms capable of mitigating them, including crisis-responsive regulatory frameworks designed to manage economic and legal disruptions.⁸⁶

The case therefore underscores a crucial point: legal responsibility in times of crisis is not suspended, but intensified. As argued by Jeremy K. Sharpe, the legitimacy of State conduct in investment arbitration increasingly depends on its demonstrated capacity to manage risks and respond effectively to disputes.⁸⁷ The inability to prevent harm may be excusable in exceptional circumstances, but the failure to prepare for foreseeable risks is not, particularly where coordinated institutional responses could have mitigated the impact of instability.⁸⁸

3.3. *From Responsibility to Prevention: Normative Lessons for Madagascar*

The central contribution of *De Sutter v. Madagascar (II)* lies in its potential to inform preventive legal strategies. If the case is read prospectively rather than retrospectively, it offers a framework through which Madagascar can rethink the relationship between political governance and investment protection (see Figure 3). Obiajunwa Ama argues that reforming dispute settlement mechanisms, including the development of regional or hybrid systems, can play a significant role in reducing the likelihood of future disputes.⁸⁹ In this sense, the case provides a foundation for shifting from reactive dispute resolution towards preventive institutional design.

⁸⁴ Sanna Zandén Kjellén and Stefan Olsson, "Rapid Alerts for Crises at the EU Level," in *Crisis Management in the European Union* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2009), 61–82, https://doi.org/10.1007/978-3-642-00697-5_4.

⁸⁵ J W Fedderke and J M Luiz, "The Political Economy of Institutions, Stability and Investment: A Simultaneous Equation Approach in an Emerging Economy. The Case of South Africa," *The Journal of Development Studies* 44, no. 7 (2008): 1056–79, <https://doi.org/10.1080/00220380802150854>.

⁸⁶ Liudmila Baranova et al., "Impact of Economic Crises on Obligations in Civil Law: Analysis of Current European Social and Legal Context," *Social and Legal Studies* 8, no. 1 (2025): 278–89, <https://doi.org/10.32518/sals1.2025.278>.

⁸⁷ Jeremy K Sharpe, "Control, Capacity, and Legitimacy in Investment Treaty Arbitration," *AJIL Unbound* 112 (2018): 261–65, <https://doi.org/10.1017/aju.2018.69>.

⁸⁸ Popa, "Defense or Cooperation between States and International Investors in Times of Crisis?"

⁸⁹ Obiajunwa Ama, "Progressive Reform of African States' Investor-State Dispute Settlement Policy," in *International Investment Law Reform* (London: Routledge, 2025), 199–241, <https://doi.org/10.4324/9781003502760-11>.

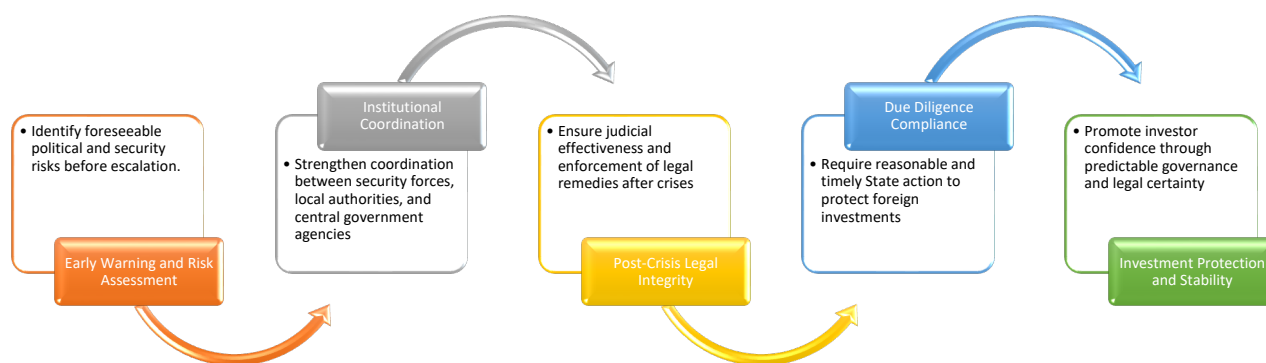


Figure 3. Preventive Model of State Responsibility for Investment Protection during Political Crises

Source: Authors' analysis

First, the case highlights the importance of early warning and risk assessment mechanisms. The tribunal's emphasis on prior knowledge suggests that liability may arise not merely from inaction, but from the failure to act upon available information. Fahira Brodlija notes that dispute prevention tools such as early mediation and monitoring mechanisms can significantly reduce escalation during politically sensitive periods.⁹⁰ Establishing formal channels for monitoring political tensions and assessing their potential impact on economic assets could therefore play a crucial role in preventing future violations.

Secondly, the findings point to the need for institutional coordination, particularly between security forces, local authorities, and central government agencies. The fragmentation observed during the 2009 crisis illustrates how the absence of clear lines of authority can undermine effective response. In the middle of this discussion, Floor Doppen *et al.* emphasise that coordinated investment screening and regulatory alignment are essential for balancing security concerns with economic openness.⁹¹ A more integrated approach to crisis management would enhance the State's capacity to meet its due diligence obligations while maintaining investor confidence.⁹²

Thirdly, the case underscores the significance of post-crisis legal integrity. The difficulties encountered by the investors in enforcing judicial decisions reveal that State responsibility may extend beyond the immediate event to encompass subsequent institutional conduct. Markus Krajewski highlights that integrating human rights due diligence into investment governance strengthens accountability and reinforces the

⁹⁰ Fahira Brodlija, "Expanding the Dispute Resolution Toolbox for Investment Disputes: Opportunities for Dispute Prevention and Mediation in the Western Balkans," in *European Union and Its Neighbours in a Globalized World*, vol. 20 (Sarajevo, Bosnia and Herzegovina: Springer Nature, 2025), 173–92, https://doi.org/10.1007/978-3-031-76345-8_11.

⁹¹ Floor Doppen, Antonio Calcara, and Dirk De Bièvre, "Balancing Security and Economics: Domestic State-Firm Relations and Investment Screening Mechanisms in Europe," *Review of International Political Economy* 31, no. 6 (2024): 1637–61, <https://doi.org/10.1080/09692290.2024.2368601>.

⁹² See generally Adaeze Agatha Aniodoh, *Foreign Direct Investment and International Law: Liberalization and Economic Sovereignty* (London: Routledge, 2025), <https://doi.org/10.4324/9781003611714>.

legitimacy of State action.⁹³ Ensuring the independence and effectiveness of the judiciary, particularly in politically sensitive cases, remains an essential component of investment protection, supported by evolving regional practices in responsible investment governance.⁹⁴

Consequently, these lessons converge towards a broader normative shift from a reactive model of responsibility to a proactive model of prevention, where legal and institutional frameworks are designed to minimise the likelihood of harm in the first place. Gbemisola C. Osadua demonstrates that regional cooperation frameworks such as the AfCFTA can provide structured approaches to dispute prevention and regulatory harmonisation.⁹⁵ For Madagascar, this shift is necessary given the structural conditions that make political instability a recurring feature of its governance landscape, particularly when balanced investment regimes are designed to accommodate both public interest and investor protection.⁹⁶ In this light, *De Sutter (II)* should be viewed as a blueprint for future compliance. It demonstrates that the key to avoiding investment treaty violations lies in strengthening the State's capacity to manage their legal consequences. As noted at the end of this analysis, improved governance and the integration of political stability with investment policy remain central to sustainable development strategies in African contexts.⁹⁷

C. Conclusion

De Sutter v. Madagascar (II) case shows that the legal consequences of political instability depend on the State's conduct before and during the threat to an investment, not simply on the fact that unrest occurred. The tribunal's ruling treats FPS not as an absolute guarantee that an investment will remain undamaged during a political crisis, but as an obligation requiring the State to exercise reasonable due diligence in light of risks it knew or should have known about. In Madagascar's case, the tribunal's reasoning turns on how the authorities behaved before the destruction of the textile factory:

⁹³ Markus Krajewski, "Overcoming Conflicts between Investment Protection and Human Rights through Corporate Sustainability Due Diligence?," in *Global Corporations and Sustainability* (Public Law and Public International Law, Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), Germany: Edward Elgar Publishing, 2025), 107–26, <https://doi.org/10.4337/9781035353835.00011>.

⁹⁴ Long Tran, "Responsibility for Human Rights Due Diligence in International Investment Law: Experiences from ASEAN and Implications for Vietnam," *International Journal of Law and Management* 1 (2026): 1–24, <https://doi.org/10.1108/IJLMA-09-2025-0423>.

⁹⁵ Gbemisola C Osadua, "5 Investment Dispute Settlement in the African Continental Free Trade Area: Finding a Fit for Purpose Mechanism for the Continent," *African Yearbook of International Law Online / Annuaire Africain de Droit International Online* 25, no. 1 (2025): 108–42, https://doi.org/10.1163/22116176_02501006. See also Hendronoto Soesabdo et al., "Global Competition Law Beyond Treaties: The Rise and Limits of Networks," *Juridical Tribune-Review of Comparative & International Law* 16, no. 2 (2026): 204–23, <https://doi.org/10.62768/TBJ/2026/16/2/03>.

⁹⁶ Olufunmilola Olabode, "A TWAIL Approach to Reforming the International Investment Regime," in *European Yearbook of International Economic Law*, vol. Part F1949 (Nigeria: Springer Science and Business Media Deutschland GmbH, 2023), 93–116, https://doi.org/10.1007/978-3-031-41996-6_4.

⁹⁷ See, e.g., Christian-Junior N. Kabange, "Balancing the Interaction between Political Stability, Human Rights and Private Investments in the Sustainable Development Process: An Ongoing Challenge for African Governments and Their Peoples," *Environment, Development and Sustainability* 15, no. 3 (2013): 743–64, <https://doi.org/10.1007/s10668-012-9404-2>.

whether there were indications of danger, what preventive measures were available, and why the security response fell short. The lesson here is that political instability cannot, on its own, justify inaction once a threat to an investment becomes sufficiently foreseeable; State responsibility can arise from failing to turn information about an emerging security risk into timely preventive action. This supports a preventive reading of FPS, one where compliance is judged by the quality of a State's anticipation, preparation, coordination, and response. For Madagascar, that means public authorities need to treat the protection of foreign investments as part of crisis-management planning: setting up mechanisms to identify threats to investment assets, passing risk information between the relevant authorities, deploying security resources according to identified risks, and keeping institutional records of the measures taken. The State does not have to prevent every loss caused by political violence, but it does need to be able to show that reasonable measures were considered and put in place once a foreseeable threat emerged. These findings also carry practical implications for institutional responsibility, though they need to be read within the limits of a study built mainly around a single arbitral award, *De Sutter v. Madagascar (II)*, with its own particular facts and treaty context. The case gives a detailed basis for understanding preventive due diligence, but its reasoning cannot simply be extended to every form of political crisis or every investment treaty. Future research should look at a wider body of ICSID and other investment arbitration awards to see how later tribunals have interpreted foreseeability, reasonable preventive measures, and the FPS obligation across different forms of political unrest and armed conflict. At the policy level, the Ministry responsible for investment and the relevant investment promotion authorities should develop procedures for identifying and communicating political and security risks to investors; security and interior authorities should build coordinated mechanisms for responding to credible threats against investment facilities; and judicial and administrative authorities should keep effective remedies available after periods of unrest. These measures should follow the sequence the case points to: early identification of foreseeable risks, coordinated preventive action, adequate protection during the crisis, and an effective institutional response once damage occurs. None of this would eliminate the possibility of investment losses during political instability, or guarantee immunity from future claims, but it could reduce the chances that preventable failures of State protection turn into violations of international investment obligations.

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