

THE CABO DELGADO INSURGENCY AND MOZAMBIQUE'S OBLIGATION TO PROVIDE FOREIGN INVESTORS WITH FULL PROTECTION AND SECURITY

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SUMMARY

Mozambique is currently facing a violent and rapidly escalating insurgency within its Cabo Delgado province. The province is rich in mineral resources and has attracted substantial foreign investment. In terms of most of its bilateral investment treaties, Mozambique has agreed to provide foreign investors with full protection and security (FPS) within its territory. This article explores the extent of a state's obligations to foreign investors under the FPS standard in international investment law. It finds that tribunals have adopted diverging interpretations of the standard, and critiques several of these approaches. In particular, it expresses concern over the extent to which investment law forces a state to choose between protecting its people and protecting investors' assets. It also reflects on what these diverging interpretations mean for Mozambique and the extent to which it may be liable to compensate investors for harm caused to their property by the insurgents. It is argued that investment tribunals should be alive to the various demands on state resources and not simply base liability on the foreseeability of harm. It also concludes by suggesting that Mozambique should seek an agreement with its treaty partners to restrict temporarily the extent of its liability under the FPS standard.

1 INTRODUCTION

The Cabo Delgado province is one of the poorest provinces in Mozambique.¹ A growing insurgency within the province and the subsequent withdrawal of French multinational oil company Total has recently made international headlines.² Total's gas investment in the province was the biggest foreign direct investment (FDI) project on the African continent.³ The

¹ World Bank *Strong but not Broadly Shared Growth: Mozambique Poverty Assessment* (2018) 52.

² Halasz "French Energy Giant Total Suspends Huge Mozambique Project Because of Insecurity" (26 April 2021) <https://edition.cnn.com/2021/04/26/africa/total-suspends-mozambique-project-intl/index.html> (accessed 2021-05-15).

³ African Development Bank "African Development Bank Set to Join Landmark \$20 Billion Mozambique LNG Financing" (21 July 2020) <https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-set-join-landmark-20-billion-mozambique-lng-financing-36929> (accessed 2021-05-15).

project has been controversial since local communities have expressed feelings of being sidelined in this and other mineral projects in the province.⁴ Extremist elements have capitalised on these feelings of discontent and recruited many into a violent and growing insurgency.⁵

The insurgency culminated in the siege of Palma, resulting in the deaths of dozens of people and the displacement of more than 9 000 persons.⁶ It has been reported that during the siege, there “was no security protecting the town, although 800 soldiers were inside the walls at Afungi protecting Total workers”.⁷ These reports give rise to important questions surrounding business and human rights and the extent to which the Mozambican government has prioritised foreign investors’ assets over the lives of its people. From a legal perspective, one might ponder if international investment law played a role in the Mozambican government’s decision to prioritise the protection of Total over the residents of Palma.

International investment treaties generally require states to provide investors with full protection and security (FPS).⁸ Investment tribunals have adopted diverging interpretations of the FPS standard, ranging from a standard due-diligence obligation to a stringent duty to ensure that foreign investors suffer no harm at the hands of non-state actors.⁹ This article explores these diverging interpretations of this principle and reflects on what this means for Mozambique. In particular, it reflects on whether Mozambique could potentially be exposed to substantial liability in international investment law if Total, or any other large multinational enterprise in the region, needs to withdraw permanently owing to the security situation.

2 FOREIGN INVESTORS AND THE INSURGENCY IN CABO DELGADO

The Cabo Delgado region of Mozambique is rich in mineral resources.¹⁰ This has attracted various foreign investors to the area. These foreign investors include several large multinational corporations (MNCs) such as Total, the American oil giant ExxonMobil,¹¹ and UK-based companies BP and

⁴ Faria “The Rise and Root Causes of Islamic Insurgency in Mozambique and its Security Implication to the Region” 2021 15(4) *IPPS PolicyBrief* 1 5.

⁵ *Ibid.*

⁶ Save the Children “Children as Young as 11 Brutally Murdered in Cabo Delgado, Mozambique” 2021 <https://www.savethechildren.net/news/children-young-11-brutally-murdered-cabo-delgado-mozambique> (accessed 2021-05-15).

⁷ Hanlon “Frelimo Gambled Everything on Gas – And Lost” (8 April 2021) <https://mg.co.za/africa/2021-04-08-frelimo-gambled-everything-on-gas-and-lost/> (accessed 2021-05-16).

⁸ Dolzer and Schreuer *Principles of International Investment Law* (2008) 149.

⁹ See *American Manufacturing & Trading, Inc v Republic of Zaire* International Centre for the Settlement of Investment Disputes (ICSID) Case No ARB/93/1 Award (21 February 1997) and *Pantehnik SA Contractors & Engineers v Republic of Albania* ICSID Case No ARB/07/21 Award (30 July 2009).

¹⁰ Faria 2021 *IPPS PolicyBrief* 7.

¹¹ Rawoot “Gas-Rich Mozambique May Be Headed For a Disaster” (24 February 2020) <https://www.aljazeera.com/opinions/2020/2/24/gas-rich-mozambique-may-be-headed-for-a-disaster> (accessed 2021-05-16).

Gemfields.¹² Several of these investments have given rise to substantial controversy as allegations of widespread human rights violations by MNCs have become commonplace in the region. In 2018, for example, Gemfields paid GBP 5.8 million to settle a series of claims brought by human rights defenders against it over its actions at the Montepuez mine in the Cabo Delgado province.¹³ The claimants alleged that between 2011 and 2018, more than 200 people had been subject to beatings, torture, and sexual abuse at the hands of mine security and the Mozambican police.¹⁴ The claimants also alleged that the mine had instigated repeated burnings and attacks on the Namucho-Ntoro village.¹⁵

Concerning the Afungi gas plant, the African Development Bank (ADB) had anticipated that more than 2 000 people would be physically displaced.¹⁶ The project would in fact economically displace more than 4 000 people.¹⁷ There was a complete resettlement plan in place in this instance, and many people reported obtaining better houses as a result of the resettlement. However, many still lost the means of sustaining their livelihoods as the community, predominantly fishermen and women, was relocated several kilometres inland.¹⁸

There have long been concerns that the violent militant group, known locally as al-Shabaab, would use the people's discontent as a recruitment tool.¹⁹ It has become abundantly clear that the insurgents have become substantially better organised and now possess much more advanced weaponry than in the initial stages of the insurgency.²⁰ Hanlon already warned in 2019 that foreign investors would not be able to isolate themselves from the violence in the region indefinitely as "al-Shabaab is at the gates".²¹ Mozambique started providing Total and the Afungi gas plant with increased protection with the deterioration of security conditions.²²

These events together showcase the complex legacy of foreign investment in a volatile and predominantly poor region. Several MNCs were

¹² Gemfields "Acquisition of 75% Interest in Mozambican Ruby Project" (08 June 2011) <https://www.gemfieldsgroup.com/2011/06/> (accessed 2021-05-16).

¹³ Gemfields "Gemfields Press Statement" (29 January 2019) <https://mining.com/wp-content/uploads/2019/01/gemfields-press-announcement-jan29-2019.pdf> (accessed 2021-05-19).

¹⁴ Jamasmie "Gemfields to Pay \$7.8m to Settle Human Rights Abuses Claims in Mozambique" (29 January 2019) <https://www.mining.com/gemfields-pay-7-8m-settle-claim-human-rights-abuses-mozambique/> (accessed 2021-05-19).

¹⁵ *Ibid.*

¹⁶ African Development Bank *Mozambique LNG- Resettlement Action Plan (RAP)* (2019) 3.

¹⁷ *Ibid.*

¹⁸ Ewi and Louw-Vaudran "Insurgents Change Tactics as Mozambique Seeks Help" (1 April 2020) <https://issafrica.org/iss-today/insurgents-change-tactics-as-mozambique-seeks-help> (accessed 2021-05-20).

¹⁹ Hanlon "Ruby Miner Gemfields to Pay \$8.3 Mn to Settle Montepuez Torture & Murder Claims" (29 January 2019) *Mozambique News Reports & Clippings* 4.

²⁰ Ewi and Louw-Vaudran <https://issafrica.org/iss-today/insurgents-change-tactics-as-mozambique-seeks-help>.

²¹ Hanlon (29 January 2019) *Mozambique News Reports & Clippings* 4.

²² Nhamire and Hill "Soldiers Guard Mozambican Project From Islamist Insurgents" (5 July 2020) <https://www.businesslive.co.za/bd/world/africa/2020-07-05-soldiers-guard-mozambican-project-from-islamist-insurgents/> (accessed 2021-05-20).

aware of the volatility in the region well before investing. Gemfields has, for example, noted that “instances of violence have occurred on and around the MRM licence area, both before and after Gemfields’ arrival in Montepuez”.²³ Understanding this background is vital, as it is not the function of law to provide an unqualified shield to protect investors against business risks they have voluntarily assumed.²⁴

3 MOZAMBICAN BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE ARBITRATION

Investor-state arbitration gradually developed as a mechanism for the enforcement of international investment law as the international community rejected “gunboat diplomacy”.²⁵ It has been developed principally through bilateral investment treaties (BITs), with more than 2 200 BITs now having entered into force globally.²⁶ Mozambique has concluded 28 BITs, of which 19 agreements are in force.²⁷ The Mozambican BITs most commonly consent to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID).²⁸ Several treaties also consent to arbitration

²³ Gemfields <https://mining.com/wp-content/uploads/2019/01/gemfields-press-announcement-jan29-2019.pdf> 1.

²⁴ *Waste Management Inc v United Mexican States II* ICSID Case No ARB(AF)/00/3 Award (30 April 2004) par 177 (the *Waste Management* case).

²⁵ Ashgarian “The Relationship Between International Investment Arbitration and Environmental Protection: Charting the Inherent Shortcomings” 2020 27(2) *Eastern and Central European Journal on Environmental Law* 5 18. The concept of gun-boat diplomacy refers to the use of military force by developed countries to enforce investment and commercial obligations undertaken by developing countries.

²⁶ *Ibid.*

²⁷ UNCTAD “International Investment Agreements Navigator: Mozambique” (undated) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/143/mozambique> (accessed 2021-05-16).

²⁸ Art 9(2)(l) of the Agreement Between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Mozambique on the Protection and Promotion of Investments (Vietnam-Mozambique BIT); art 10(2)(i) Agreement Between the Belgium-Luxembourg Economic Union and the Government of the Republic of Mozambique on the Reciprocal Promotion and Protection of Investments (BLEU-Mozambique BIT); art 9(2)(b) and (c) of the Agreement Between the Government of the Republic of Finland and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection Of Investments (Finland-Mozambique BIT); art 8 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (UK-Mozambique BIT); art 9(2)(a) of the Switzerland-Mozambique BIT; Art 9(2)(a) and (b) of the Agreement Between the Government of the Kingdom of Denmark and the Government of the Republic of Mozambique on the Promotion and Mutual Protection of Investments (Denmark-Mozambique BIT); art 9 of the Agreement Between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments (Mozambique-Netherlands BIT); art 9(2)(i) and (ii) of the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (Sweden-Mozambique BIT); art 7(3)(a) of the Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (China-Mozambique BIT); art VII(3)(a) of the Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (Indonesia-Mozambique BIT).

under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL).²⁹

Substantively, it matters little if a matter is heard under the ICSID Convention or the UNCITRAL rules. This applies equally to a number of other arbitral institutions that engage in investor-state dispute settlement, such as the International Chamber of Commerce (ICC) or the Permanent Court of Arbitration (PCA).³⁰ These various arbitral institutions ultimately only provide the procedural rules, while the substantive issues are decided under international law and the host state's law.³¹ This contribution is principally concerned with the substantive obligations arising from the FPS standard. Therefore, it does not offer a detailed analysis of the nuanced differences in the procedural rules applicable to different arbitral institutions.

The majority of Mozambican BITs provide for investments to be accorded "full protection and security" or "full and constant protection and security" within its territory.³² The Italy-Mozambique and the Mauritius-Mozambique BITs are the only BITs to which Mozambique is a party that do not contain any express provisions on the FPS standard.³³ The inclusion of the word "constant" in some BITs does not necessarily indicate a higher standard being owed to such investors. Investment tribunals have long held that slight differences in the wording of BITs do not generally change the nature of the obligations arising from the FPS standard.³⁴ The Mozambique-Netherlands BIT also clarifies that the FPS standard in that treaty applies to physical security.³⁵

²⁹ Art 9(2)(iii) of the Vietnam-Mozambique BIT; art 10(2)(iii) of the BLEU-Mozambique BIT; art 10(2)(d) of the Finland-Mozambique BIT; art 9(2)(c) of the Switzerland-Mozambique BIT; art 9(2)(c) of the Denmark-Mozambique BIT; art 9(2)(iii) of the Sweden-Mozambique BIT; art VII(3)(b) of the Indonesia-Mozambique BIT.

³⁰ Art 9(2)(d) of the Denmark-Mozambique BIT provides consent to ICC arbitration.

³¹ Douglas, Pauwelyn and Viñuales *The Foundations of International Investment Law: Bringing Theory Into Practice* (2014) 14.

³² Art 4(1) of the Agreement Between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment (Japan-Mozambique BIT); art 2(6) of the Vietnam-Mozambique BIT; art 2(7) of the BLEU-Mozambique BIT; art 2(2) of the Finland-Mozambique BIT; art 2(2) of the UK-Mozambique BIT; art 4(1) of the Switzerland-Mozambique BIT; art 5(1) of the Agreement Between the Government of the French Republic and the Government of the Republic of Mozambique on the Reciprocal Encouragement and Protection of Investments (France-Mozambique BIT); art 2(2) of the Denmark-Mozambique BIT; art 2(2) of the Agreement between the Federal Republic of Germany and the Republic of Mozambique on the Reciprocal Protection of Investment (Germany-Mozambique BIT); art 2(7) of the Sweden-Mozambique BIT; art 2(2) of the China-Mozambique BIT; art II(2) of the Indonesia-Mozambique BIT; art II(3) of the Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment; art 2(2) of the Portugal-Mozambique BIT.

³³ Here the author is only referring to those treaties that are in force. The author did not examine all of the treaties signed by Mozambique that have not entered into force.

³⁴ *Cengiz Insaat Sanayi ve Ticaret AS v Libya*, ICC Case No 21537/ZF/AYZ Award (7 November 2018) (the *Cengiz* case).

³⁵ Art 2(2) of the Mozambique-Netherlands BIT. This clarification was probably inserted because some tribunals, such as the tribunal in *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* ICSID Case No ARB/05/22 Award (24 July 2008) par 729, have interpreted the FPS standard as extending beyond physical security. However, this

The majority of the Mozambican BITs also contain special provisions on compensation for damages that an investor suffers as a result of war or insurrection. The BITs all provide, in virtually identical terms, that where any “restitution, indemnification, compensation or other settlement” is given concerning such damages, investors who are nationals of the treaty counterparty will be afforded national treatment and most-favoured-nation (MFN) treatment.³⁶ This obligation to pay compensation should not be conflated with the FPS standard. Unlike the FPS standard, this obligation is not an objective standard, and its scope and effect are entirely contingent upon the treatment provided to other investors.³⁷

4 DIVERGING INTERPRETATIONS OF THE FULL PROTECTION AND SECURITY STANDARD

It is generally accepted that the FPS standard is an objective standard.³⁸ The nature of the obligations imposed by the FPS standard is not contingent upon the treatment provided to other investors or investments.³⁹ This is a crucial feature distinguishing FPS from other standards in investment law, such as national treatment. A breach of FPS lies in (i) damage caused to an investor’s property by a state and its organs, or (ii) in the breach of a duty of due diligence to prevent a foreign investor’s property from being damaged by non-state actors.⁴⁰ However, as noted earlier in this contribution, some diverging interpretations of the precise nature of the obligations imposed by the FPS standard exist.

Some tribunals have, perhaps unintentionally, interpreted the FPS standard as a duty of results rather than a duty of due diligence.⁴¹ Other tribunals seem to conflate the FPS standard with other obligations in investment law, such as national treatment;⁴² in this way, the tribunal

contribution is ultimately concerned with physical security. Therefore, the extent to which the FPS standard applies beyond physical security falls outside of its scope.

³⁶ Art 5(1) of the Vietnam-Mozambique BIT; art 5(1) of the BLEU-Mozambique BIT; art 6(1) of the Finland-Mozambique BIT; art 4(1) of the UK-Mozambique BIT; art 7 of the Switzerland-Mozambique BIT; art 5(3) of the France-Mozambique BIT; art 6(1) of the Denmark-Mozambique BIT; art 4(3) of the Germany-Mozambique BIT; art 5(1) of the Sweden-Mozambique BIT; art 5(1) of the China-Mozambique BIT; art V(l) of the Indonesia-Mozambique BIT; art 4 of the Agreement Between the Government of the Italian Republic and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (Italy-Mozambique BIT); art IV of the USA-Mozambique BIT; art 5 of the Portugal-Mozambique BIT; art 5(1) of the Agreement Between the Government of the Republic of Mozambique and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments (Mozambique-Mauritius BIT).

³⁷ The differences between these two standards are expanded upon under heading 5 of this contribution.

³⁸ De Brabandere “Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity” 2017 *Journal of World Investment & Trade* 531 533.

³⁹ *Ibid.*

⁴⁰ *Cengiz case supra* par 405–406.

⁴¹ *Ampal-American Israel Corporation v Arab Republic of Egypt* ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, (21 February 2017) (the *Ampal* case).

⁴² *LESI, S.p.A. and Astaldi, S.p.A. v People’s Democratic Republic of Algeria* ICSID Case No ARB/05/3 Award (12 November 2008).

transforms an otherwise objective standard into a contingent subjective standard. Different interpretations attached to the standard could see vastly different conclusions being reached on liability on the same set of facts. In this section, the article charts varying interpretations provided by four different tribunals. It then reflects on what these diverging interpretations mean for Mozambique.

4.1 *Pantechniki v Albania*

In *Pantechniki S.A. Contractors & Engineers v Republic of Albania* (the *Pantechniki* case),⁴³ the tribunal was confronted with a claim by a contractor whose site had been destroyed by looters during a period of civil unrest in Albania.⁴⁴ The case was partially based on an alleged breach of the FPS standard in international investment law.⁴⁵ In resolving the dispute, the tribunal undertook an extensive analysis of customary international law concerning the FPS standard. The tribunal distinguished between what would be expected of a developed country and a developing country.⁴⁶ The tribunal explains that the differentiated approach does not render the FPS standard devoid of meaning as it does not mean that there is no standard. Ultimately, the differentiated approach still requires a state to provide an investor with the level of security reasonably expected from a state at its level of development.⁴⁷

The tribunal supported Newcombe and Paradell's explanation that

"[a]lthough the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as [a] relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."⁴⁸

Therefore, the FPS standard does not demand that a developing country with limited resources guarantee foreign investors that no harm will come to their investment from unexpected civil unrest.⁴⁹ Investors who invest in poorer countries are not entitled to demand a high standard of police protection.⁵⁰ In such instances, a state would only be liable for a breach of the FPS standard if it can respond to the crisis but refuses to do so.⁵¹ In the case at hand, the Albanian authorities had been completely overwhelmed,

⁴³ ICSID Case No ARB/07/21 Award (30 July 2009).

⁴⁴ *Pantechniki* case *supra* par 1.

⁴⁵ *Pantechniki* case *supra* par 71.

⁴⁶ *Pantechniki* case *supra* par 77.

⁴⁷ *Pantechniki* case *supra* par 81.

⁴⁸ *Pantechniki* case *supra* par 81 citing Newcombe and Paradell *Law and Practice of Investment Treaties* (2009) 310.

⁴⁹ *Pantechniki* case *supra* par 81.

⁵⁰ *Pantechniki* case *supra* par 82.

⁵¹ *Ibid.*

and they could not within their available resources respond to the threat to the investor's property.⁵² Consequently, Albania did not breach the FPS standard.⁵³

4 2 *Lesi v Algeria*

The case of *LESI S.p.A. and Astaldi, S.p.A. v People's Democratic Republic of Algeria*⁵⁴ concerned a contract granted for the construction of a dam that delays had beset as a result of security issues arising from the armed struggle between the government of Algeria and "Islamist extremists" at the time.⁵⁵ The claimants alleged that Algeria had failed to provide it with sufficient security to complete the project.⁵⁶ The claimants raised this complaint under fair and equitable treatment rather than the more traditional FPS standard.⁵⁷ The tribunal, however, assessed the claim under the general principles applied to FPS. In particular, it noted that the obligation to create a safe environment for investments is an obligation of means and not an obligation of results.⁵⁸

In assessing the claim, the tribunal importantly pointed out that there had been a general state of unrest in the area and that the investor was aware thereof at the time of its investment.⁵⁹ The tribunal found that the investor's knowledge of the turmoil served as a factor to be weighed against finding a breach of FPS.⁶⁰ The tribunal also found that the level of security provided to the investor by Algeria was comparable to that offered to all other investments in the region.⁶¹ It repeatedly emphasised this equality in treatment in finding that Algeria had not breached the expected standard of treatment.⁶²

4 3 *Ampal-American Israel v Egypt*

The case of *Ampal-American Israel v Egypt*⁶³ was concerned, in part, with an alleged breach of the FPS standard arising from attacks on gas pipelines during the Arab Spring in Egypt.⁶⁴ The pipelines in question were not owned by the claimant but by the Egyptian Natural Gas Holding Company (EGAS), an entity wholly owned by the Egyptian government.⁶⁵ The claimant depended on this system of pipelines to deliver gas to its facilities for export

⁵² *Pantechniki* case *supra* par 82.

⁵³ *Pantechniki* case *supra* par 84.

⁵⁴ ICSID Case No ARB/05/3 Award (12 November 2008) (the *Lesi* case) par 11.

⁵⁵ *Lesi* case *supra* par 11.

⁵⁶ *Lesi* case *supra* par 153.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Lesi* case *supra* par 154.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ ICSID Case No ARB/12/11 (21 February 2017).

⁶⁴ *Ampal* case *supra* par 67.

⁶⁵ *Ampal* case *supra* par 27.

to Israel.⁶⁶ Between February 2011 and April 2012, armed groups attacked the pipeline in question 14 times.⁶⁷ The interruptions in the gas supply caused the claimant to suffer substantial losses. The tribunal had to determine whether Egypt's failure to prevent the attacks amounted to a breach of the FPS standard.⁶⁸

The tribunal, in this case, accepted another arbitral tribunal's factual findings, concerning a contractual claim based on the same factual background, as *res judicata*.⁶⁹ However, the claims before the tribunals were legally distinguishable. Therefore, the tribunal in the *Ampal* case only considered the factual material as *res judicata*. The substantive application, which involved the alleged breach of a BIT rather than a contractual claim, was consequently not *res judicata*.⁷⁰ In assessing the alleged treaty breach of the FPS standard, the tribunal started by correctly noting that FPS is a standard of due diligence rather than strict liability.⁷¹ It referred to the *Pantechniki* case in noting that the adequacy of a state's response must be determined with reference to its available resources.⁷²

The tribunal acknowledged that "the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution".⁷³ However, it indicated that Egypt remained obligated to respond to attacks on the pipeline.⁷⁴ The tribunal found that four attacks had taken place on the pipeline between February and June 2011 and indicated that it ought to have been apparent from these attacks that future attacks may be directed at the pipeline.⁷⁵ The obligation to exercise due diligence in providing investors with FPS required Egypt to foresee this risk and implement appropriate security measures.⁷⁶ Egypt's failure to do so amounted to a breach of the FPS standard.⁷⁷

4 4 *Cengiz v Libya*

In *Cengiz v Libya*,⁷⁸ the tribunal was confronted with a claim for the breach of various provisions in the Turkey/Libya BIT, including an alleged violation of the FPS standards. Starting from 2008, Cengiz had obtained a series of infrastructure contracts, including for the "installation and construction of wastewater and rainwater networks, fresh water supply network, pump stations, water tanks, urban roads, street lighting, electric distribution networks and telecommunication networks".⁷⁹ The claim arose in light of the

⁶⁶ *Ibid.*

⁶⁷ *Ampal case supra* par 59.

⁶⁸ *Ampal case supra* par 67.

⁶⁹ *Ampal case supra* par 270.

⁷⁰ *Ampal case supra* par 281.

⁷¹ *Ampal case supra* par 244.

⁷² *Ibid.*

⁷³ *Ampal case supra* par 284.

⁷⁴ *Ampal case supra* par 289.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ampal case supra* par 290.

⁷⁸ ICC Case No 21537/ZF/AYZ Award (7 November 2018).

⁷⁹ *Cengiz case supra* par 100.

damage caused to Cengiz's property in the course of the Arab Spring.⁸⁰ Cengiz started a gradual withdrawal of its staff as the security situation rapidly deteriorated in the region.⁸¹ It completely withdrew all its staff in the wake of a direct attack upon one of its sites in August 2011.⁸² The site was subsequently destroyed entirely by armed groups.⁸³ The tribunal had to determine whether Libya's failure to protect Cengiz's property during a civil war amounted to a breach of the FPS standard.

Libya argued that compensation for any damages arising from war or insurrection would be governed strictly by article 5 of the Turkey/Libya BIT.⁸⁴ Article 5 requires Libya to accord Turkish investors no less favourable treatment than it affords its own nationals or the nationals of any other state when providing any compensation for damages arising from war or insurrection. Libya argued that this provision is *lex specialis* when addressing any damages arising as a result of the listed events and, consequently, the claimant could not rely on the FPS standard.⁸⁵

The tribunal rejected Libya's arguments in this respect.⁸⁶ The tribunal reiterated that the principle of *lex specialis* will only permit derogation from the general provision when there is a more specific obligation that deals with the same subject matter.⁸⁷ The tribunal found that article 5 of the Turkey/Libya BIT does no more than extend the ordinary most-favoured-nation (MFN) treatment to situations of war or insurrection.⁸⁸ According to the tribunal, the effect of this finding is that article 5 addresses matters of MFN treatment rather than the FPS standard.⁸⁹ Article 5 does not, therefore, derogate from the FPS standard provided for in the treaty.

Libya argued further that it would have been illogical to insert article 5 if an investor enjoyed independent protection under the FPS standard during an armed conflict.⁹⁰ The tribunal also rejected this contention.⁹¹ It explained that the FPS standard is restricted to harm caused by a state or by a failure on its part to exercise due diligence in preventing damage to a foreign investor's property.⁹² It interpreted article 5 as imposing an MFN obligation on a state if it decides to provide protection over and above that required by the FPS standard.⁹³ The tribunal concluded that article 5 provides a minimum level of compensation but does not allow departure from other obligations such as providing FPS.⁹⁴

⁸⁰ *Ibid.*

⁸¹ *Cengiz case supra* par 101.

⁸² *Ibid.*

⁸³ *Cengiz case supra* par 102.

⁸⁴ *Cengiz case supra* par 351.

⁸⁵ *Ibid.*

⁸⁶ *Cengiz case supra* par 353.

⁸⁷ *Cengiz case supra* par 356.

⁸⁸ *Cengiz case supra* par 357.

⁸⁹ *Ibid.*

⁹⁰ *Cengiz case supra* par 359.

⁹¹ *Cengiz case supra* par 360.

⁹² *Cengiz case supra* par 361.

⁹³ *Ibid.*

⁹⁴ *Cengiz case supra* par 362.

In assessing whether Libya violated the FPS standard, the tribunal started by noting that the obligation of due diligence requires a state to take reasonable measures to prevent the investor from suffering harm. It referred to the *Pantechniki* case to explain that reasonable measures are to be assessed with reference to a state's available resources.⁹⁵ It correctly noted that the "positive obligation which the FPS standard places on the State is an obligation of means – not of the result".⁹⁶ However, the tribunal found that Libya failed to provide any security to the investor by completely failing to dispatch any police or army units to protect Cengiz's property.⁹⁷ The tribunal considered that Libya failed to deploy these forces despite being aware of the heightened security risk in the region. Because of this failure, private mobs could raid Cengiz's property regularly, stealing supplies and damaging facilities.⁹⁸ Consequently, Libya violated the FPS standard.

Libya also argued that it is not reasonable to expect a government to protect "ancillary projects" amid an armed conflict when the government has limited resources at its disposal.⁹⁹ The tribunal indicated that it would find this persuasive only if Cengiz had claimed that the government was required to guarantee its "ability to perform its construction activities".¹⁰⁰ The tribunal accepted that the construction sites were scattered over a wide area, and protecting all of these sites would have been impractical.¹⁰¹ Instead, Libya was required to provide "basic static protection" to the two main camps to prevent violent mobs from stealing and plundering Cengiz's property.¹⁰² It was this failure that amounts to a breach of the FPS standard. It also found that Libya had provided 30 soldiers to protect at least one other investor's site in the region. It found that Libya's ability to provide such support to the other investor indicated that it would have been within Libya's available resources to extend static protection to Cengiz.¹⁰³

5 DISCUSSION OF THE CASES AND THEIR IMPLICATIONS FOR MOZAMBIQUE

In the author's view, the tribunals in both the *Cengiz* case and the *Ampal* case paid mere lip service to the need to consider a state's available resources. The *Ampal* tribunal, although acknowledging the challenges in the Sinai region, not once considered whether Egypt had the resources to implement security measures. It found the absence of effective security measures to amount to a breach of the FPS standard without any further consideration.¹⁰⁴ Its complete failure to take into account Egypt's limited resources at that stage is particularly problematic. By its reasoning, a state's limited resources would effectively only preclude a breach of the FPS

⁹⁵ *Cengiz* case *supra* par 406.

⁹⁶ *Cengiz* case *supra* par 437.

⁹⁷ *Cengiz* case *supra* par 438.

⁹⁸ *Cengiz* case *supra* par 442.

⁹⁹ *Cengiz* case *supra* par 443.

¹⁰⁰ *Cengiz* case *supra* par 445.

¹⁰¹ *Cengiz* case *supra* par 447.

¹⁰² *Cengiz* case *supra* par 448.

¹⁰³ *Cengiz* case *supra* par 450.

¹⁰⁴ *Ampal* case *supra* par 289–290.

standard if an attack is unexpected; if the possibility of armed attacks on an investor's property becomes reasonably foreseeable, the duty to implement adequate security measures arises automatically irrespective of a state's resources.

Applying the *Ampal* case to Mozambique makes it apparent that where Mozambique reasonably foresees harm to a foreign investor's property, it must implement adequate security measures. This may well require Mozambique to deploy its limited military resources to protect foreign investors' property and thereby neglect the interests of its own people. It is submitted that a more reasonable interpretation of a state's due diligence obligations would take into account a state's limited resources in respect of both reasonably foreseeable and unexpected attacks. The mere fact that a state foresees the possibility of harm does not automatically mean that it has unlimited resources to respond to it. Mozambique is well aware of the risk in Cabo Delgado, yet its ability to respond remains subject to resource constraints.¹⁰⁵ Considering a state's limited available resources in both instances also does not entitle a state to do nothing. It merely limits the extent of a state's obligations to what a state could reasonably achieve within its available resources. This would also be better aligned with the *Pantechniki* case, which did not limit the relevance of a state's resources to unexpected attacks.¹⁰⁶

In the *Cengiz* case, the tribunal found Libya's ability to provide protection to one other investor to be determinative of whether it had the resources to provide protection to Cengiz as well.¹⁰⁷ This fails to consider that a state may have rational reasons for providing more protection to one investment than another. The United Nations Security Council has urged states "to protect civilian infrastructure which is critical to the delivery of humanitarian aid including for the provision of essential services concerning vaccinations and related medical care and other essential services to the civilian population".¹⁰⁸ However, the approach in the *Cengiz* case does not allow a state to distinguish assets of strategic importance from others, such as differentiating between critical infrastructure and assets that may be strategically less important. In terms of the FPS standard, as interpreted in the *Cengiz* case, a state would therefore only be able to implement special measures to protect critical infrastructure – as described by the Security Council – if it offers all foreign investors the same level of protection.

The tribunal also clearly stated that the FPS standard is separate from the non-discrimination standards such as MFN and national treatment.¹⁰⁹ Yet, by relying exclusively on protection offered to one other investor to prove that Libya had the resources to respond, the tribunal effectively applied non-

¹⁰⁵ Faria 2021 *IPPS PolicyBrief* 5.

¹⁰⁶ See heading 4 1 above. The quote by Newcombe and Paradell, cited with approval by the tribunal, in particular indicates resources as a relevant consideration wherever it needs to be determined if a state acted with due diligence. The entire FPS obligation is an obligation of due diligence, and therefore a state's resources ought to be considered in the case of foreseeable risks as well. This contribution aligns itself with the *Pantechniki* case, which both the *Ampal* case and the *Cengiz* case also purported to apply.

¹⁰⁷ See heading 4 4 above; *Cengiz* case *supra* par 450.

¹⁰⁸ UN Security Council Resolution 2573 (2021) Adopted: 27 April 2021.

¹⁰⁹ See heading 4 4 above; *Cengiz* case *supra* par 357.

discrimination standards as constituent elements of the FPS standard. The provision of security to another investor should more appropriately be considered under a claim for a breach of national treatment or MFN treatment and not a breach of FPS. It is, however, acknowledged that it might be permissible to consider the protection offered to other investors as a factor when analysing a state's available resources.¹¹⁰ Nevertheless, this consideration must be only one of several factors taken into account, lest the FPS standard become MFN or national treatment cloaked in a different garb.

This contribution welcomes the attempt in the *Cengiz* case to limit the extent to which a state is required to provide an investor with security. The FPS obligation needs to be rooted in what is practically possible. Had the *Cengiz* case's approach to limiting protection to static protection been used in the *Ampal* case,¹¹¹ Egypt could not have been expected to place a pipeline running for hundreds of kilometres under permanent guard. However, future tribunals should also exercise caution not to elevate the obligation to provide static protection to a general duty arising from the FPS standard. Despite its flawed approach to the question of Libya's available resources, the *Cengiz* case still recognises that the provision of static protection remains subject to a state's ability to provide such protection within its available resources.¹¹²

Applying the *Cengiz* case's approach to Mozambique, it becomes apparent that by stationing soldiers at the Afungi gas plant, it may be presumed that Mozambique has the resources to provide countless other foreign investors in the region with the same protection. If any other investors suffered harm and Mozambique had not similarly stationed soldiers at their premises, it could breach the FPS standard. The obligation to provide FPS is, however, limited to the provision of static protection. The *Cengiz* case further limits the extent of the obligation to protection of the site and not a guarantee that works could be completed.¹¹³ In terms of this interpretation, Total would, for example, not be able to claim a breach of the FPS standard merely because it is unable to complete the construction and development of the Afungi gas plant.

Although the approach in the *Lesi* case may seem to balance the competing interests reasonably, this contribution takes issue with it for converting the FPS standard from an objective standard into a standard that is contingent upon the treatment of other investors.¹¹⁴ This contribution, therefore, also disagrees with the criticism levied at the *Ampal* tribunal for

¹¹⁰ In this statement, the author acknowledges that the question of whether a state had the resources will always be largely a subjective inquiry. One should, nevertheless, conduct a full inquiry and not simply accept the provision of security to another investor as automatic proof that a state could respond. It is submitted that the provision of security to one investor and not to another may result in an *ipso facto* breach of MFN and national treatment, but more is required when assessing a state's available resources under the FPS standard.

¹¹¹ See heading 4.4 above with respect to the *Cengiz* case limiting protection to static protection.

¹¹² See heading 4.4 above.

¹¹³ *Ibid.*

¹¹⁴ It is again worth emphasising that the FPS standard has always been regarded as an absolute or objective standard. See *inter alia* International Law Association *ILA Study Group on Due Diligence in International Law First Report* (2014) 7.

not following the *Lesi* case more closely.¹¹⁵ The approach in the *Lesi* case is problematic because it excludes the obligation to pay compensation for a breach of the FPS standard if foreign and domestic investors were treated the same.¹¹⁶ This approach could effectively reward a state for failing to take security measures provided that it failed equally to discharge its obligations to both foreign and domestic investors.

The *Lesi* case also determines that an investor's knowledge of widespread unrest in the region is a relevant factor in determining if there has been a breach of FPS.¹¹⁷ This contribution partially agrees with this finding, for, as previously indicated, it is not the function of international investment law to absolve investors from risks they have voluntarily assumed.¹¹⁸ However, the investor's knowledge of unrest is relevant to the question of damages rather than to one concerning a breach of FPS.¹¹⁹ International investment law has long recognised that investors also have a duty to take measures to reduce the risk of loss.¹²⁰ Where an investor has failed to implement reasonable measures to prevent harm, the extent to which damages arose as a result of its contributory fault needs to be determined.¹²¹ Damages awarded may then be proportionately reduced relative to the investor's contributory fault.¹²² Similarly, investors in Cabo Delgado ought to foresee the risk of harm and should take appropriate steps to mitigate such risks.¹²³

In terms of the *Lesi* case, Mozambique could not be held liable for a breach of the FPS standard if it did not provide its nationals with better treatment than foreign investors. However, as noted above, the *Lesi* case conflates the FPS and national treatment standards. The majority of investment tribunals have rejected the approach that liability for a breach of FPS is automatically excluded based on equality in treatment.¹²⁴ The author could also not find any cases on the FPS standard that have cited and

¹¹⁵ Yacoub "The Case of *Ampal v Egypt*: What Are the Parameters of the Due Diligence Standard?" (16 November 2018) <http://cilj.co.uk/2018/11/16/the-case-of-ampal-v-egypt-what-are-the-parameters-of-the-due-diligence-standard/> (accessed 2021-05-19).

¹¹⁶ See heading 4 2 above.

¹¹⁷ See heading 4 2 above; *Lesi* case *supra* par 153.

¹¹⁸ See heading 2 above; *Waste Management* case *supra* par 177.

¹¹⁹ See *Copper Mesa Mining Corporation v Republic of Ecuador* Permanent Court of Arbitration (PCA) Case No 2012-2 Award (15 March 2016) par 6.102 (*Copper Mesa Mining* case) and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7 Award (25 May 2004) par 242–243 as some examples where contributory fault is treated as a consideration in the determination of damages rather than in the question of breach.

¹²⁰ Marcoux and Bjorklund "Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration" 2020 69 *International and Comparative Law Quarterly* 877 878.

¹²¹ *Yukos Universal Limited (Isle of Man) v Russia* PCA Case No 2005-04/AA227 Final Award (18 July 2014) par 1637.

¹²² *Copper Mesa Mining* case *supra* par 6.102.

¹²³ As discussed in heading 2, many investors were aware of the volatility in the Cabo Delgado region before investing. At present, the violence has also become very widespread throughout the province. It is accordingly submitted that no prudent investor would be able to assert that the risk of harm was not reasonably foreseeable.

¹²⁴ See *inter alia* *CMS Gas Transmission Company v The Republic of Argentina* ICSID Case No ARB/01/8 Award (12 May 2005) par 375; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB/03/19 Decision on Liability, (30 July 2010) par 270–271.

followed the *Lesi* case.¹²⁵ It is accordingly submitted that Mozambique would be ill advised to consider the extent of its FPS obligations solely with reference to the interpretation in the *Lesi* case.

6 CONCLUSION

From the preceding discussion, it becomes apparent that the diverging interpretations of the FPS standard may provide vastly different outcomes for Mozambique. However, it is also clear that several tribunals have conflated non-discrimination provisions with the FPS standard.¹²⁶ Although it has been argued that these decisions were incorrect insofar as they conflated these different standards, there is no guarantee that future tribunals will not apply the standard in the same way. At the very least, this ought to serve as a cautionary note for Mozambique that in providing Total with extensive protection, it may be opening itself up to an effective obligation to provide all foreign investors in Cabo Delgado with such protection.

In conducting a cost-benefit analysis, the Mozambican government may well decide that it is worth risking liability to smaller investors for a breach of FPS rather than to large investors such as Total. If Mozambique were to be liable to Total, the extent of its liability could exceed its entire GDP.¹²⁷ An approach that involves states making a conscious decision to breach their obligations towards smaller investors is anathema to the rule of law. However, as long as investment tribunals fail to consider a state's available resources properly, such decisions will almost inevitably arise. This is so, particularly, where some tribunals effectively interpret the FPS standard as a duty of results.

Mozambique is also under an obligation in terms of international human rights law to take measures to safeguard the lives of its people.¹²⁸ In addition, Security Council Resolution 2573 obliges it to take steps to

¹²⁵ The author is, however, aware of one other case where the respondent state attempted to rely on the *Lesi* case in order to escape liability. In that case, *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic* ICSID Case No ARB/03/23 Award (11 June 2012), the tribunal rejected the respondent state's argument and did not follow the *Lesi* case. The *Cengiz* case similarly referenced the *Lesi* case at par 369 but noted that it is not in line with most arbitral tribunals and appears to suggest that the *Lesi* case had been wrongly decided.

¹²⁶ See the discussion under heading 5 of the *Lesi* case and the *Cengiz* case.

¹²⁷ Investment tribunals follow two approaches to determining the quantum of damages: *damnum emergens* and *lucrum cessans*. If the tribunal follows the *damnum emergens* approach, liability will be restricted to actual losses incurred. If, hypothetically speaking, the Afungi plant was entirely destroyed liability could run into several billions of dollars as Total has already incurred substantial costs in its construction. If the tribunal followed the *lucrum cessans* approach, Mozambique would be liable to compensate Total for gains prevented. Considering that Total values the project at more than USD 20 billion, liability could well exceed Mozambique's entire GDP. See Collins "Reliance Remedies at the International Center for the Settlement of Investment Disputes" 2009 *Northwestern Journal of International Law & Business* 195 199.

¹²⁸ Siatsitsa and Titberidze *Human Rights in Armed Conflict From the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges* (2011) 22.

safeguard infrastructure critical to the delivery of humanitarian aid.¹²⁹ Mozambique cannot simply ignore these obligations in favour of providing extensive protection to foreign investors. Investment tribunals ought to be alive to the various demands on a state's resources. Investment tribunals should also not shy away from analysing investors' contributory fault where such investors have knowingly invested in conflict zones without taking measures to restrict their risk of damages.¹³⁰ Furthermore, states prone to armed conflict may be well served by seeking to clarify the extent of their obligations arising from the FPS standard amidst an armed conflict in future treaties.¹³¹

Mozambique could also seek an agreement with its BIT partner states to restrict temporarily the extent of its FPS obligations in the Cabo Delgado region. The broad international support that Mozambique currently enjoys in its efforts to combat the insurgency may well present an opportune time to seek such accommodation. Ultimately, a BIT is a treaty, and it is undisputed that as a matter of treaty law, states are, by agreement, generally free to alter the extent of obligations arising from a bilateral treaty.¹³² Such agreement could provide for a cap on compensation that applies to all standards in the treaty during an armed conflict or parties could agree to a binding interpretation of the FPS standard.

¹²⁹ See heading 5 above.

¹³⁰ See heading 5 and the various authorities cited on contributory fault in international investment law.

¹³¹ See Ashgarian 2020 27(2) *Eastern and Central European Journal on Environmental Law* 20–22 for a more detailed discussion of the current reform efforts in international investment law.

¹³² The International Court of Justice has in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands*) ICJ Reports 1969 par 72, for example, held that "it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties".