



**INVESTMENT GUARANTEES IN ETHIOPIA: FULL  
PROTECTION AND SECURITY OF INVESTMENTS**

**COLLEGE OF LAW,  
DEBRE BERHAN UNIVERSITY**

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**DEBRE BERHAN, ETHIOPIA**

# **INVESTMENT GUARANTEES IN ETHIOPIA: FULL PROTECTION AND SECURITY OF INVESTMENTS**

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## **Declaration**

I, Tigsti G/medhn, hereby declare that this thesis is my work and that it has not been submitted for any degree or examination in any other university. All sources used in the paper are duly acknowledged.

Tigsti G/Medhn Rezene

Signature -----

Date -----

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## **List of Abbreviations**

IP	Investment Proclamation
IR	Investment Regulation
IEC	Ethiopian Investment Commission
AAEC	Addis Ababa Investment Commission
FPS	Full Protection and Security
FPSs	Full Protection and Security Standard
BITs	Bilateral Investment Treaties
CIL	Customary International Law
MFN	Most Favored Nation
NT	National Treatment
FET	Fair and Equitable Treatment
NAFTA	North American Free Trade Agreement
MIGA	Multilateral Investment Guarantee Agency
US	United States
Art.	Article
p.	Page
PP.	Pages
Para.	Paragraphe



## **Abstract**

*In a contemporary world investment is one of the main sources of economic development. States use investment guarantees as a method to promote investment. There are many types of Investment guarantee standards and one of them is the “full protection and security” standard. The standard suggested that the host state is under the obligation to take active measures to protect the investment from adverse effects. However, the extent of protection advocated by the standard is a point of disagreement between the host state and the investors. Debates exist regarding the question of whether the standard covers not only physical but also legal security, and also whether the liability it imposes is of a due-diligence or a strict liability. The decisions of various tribunals adopt a restrictive interpretation of the phrase ‘full protection and security. This research tried to see investment guarantees in Ethiopia: the full protection and security of investments. To that effect, the researcher employed a qualitative data collection and analysis methodology. Ethiopian investment laws and several BITs have been consulted; the researcher has also interviewed experts at the EIC, AAIC, Ethiopian Insurance Corporation, and investors. The main findings of this research are the existing investment proclamation does not stipulate the FPS standard. There exists no formally decided arbitral award or judicial decisions dealing with these issues of the FPS standard. Legal experts consulted tend to have different opinions towards the issues of level of protection and/or standard of liability. Based on the findings, the research recommends measures to be adopted by the government. The researcher calls for the responsible organs (the lawmaker, arbitrators, or judicial courts) to provide uniform and formal decisions about the issues concerning the level of protection given to investors and the standard of liability of the country under full protection and security (FPS) standard.*

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background of the Study

Investment is the main source of economic development in the contemporary world.<sup>1</sup> Hence, States apply different types of instruments/schemes to promote investment and attract investors to invest in their jurisdiction. The promotion method/scheme, among others, is providing investment guarantees. The scope and depth of such guarantees can differ from state to state as the types and elements differ based on the laws and approaches of the host state.<sup>2</sup>

The term investment refers to “expenditure to acquire property or assets to produce revenue”.<sup>3</sup> Elements of investment and what they constitute are not the same in all states as an investment is something established by the laws of host countries.<sup>4</sup> Accordingly, the Investment Proclamation of Ethiopia defines investment as:

*Expenditure of capital in cash in-kind or both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise*<sup>5</sup>

Having a clear and well-organized definition of the term “investment” and “investor” is very crucial as they are the key elements determining the scope of application of rights and obligations of investors and the minimum threshold to entertain the issue of investment guarantees under dispute.<sup>6</sup> Despite this importance, there is no common definition for the term “investment” and “investor”. The definition of these terms varies from legal system to legal system. The definition adopted in bilateral investment treaties is also usually different from the definitions found in domestic investment laws.

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<sup>1</sup> Tesfaye Abate, Investment law teaching Material, (2009), p.207.

<sup>2</sup> Ibid., p.205-225

<sup>3</sup> Bryan A. Garner,(Editor-in-Chief), Black’s Law Dictionary, Eight Edition, Thomson, West, United States of America, 2004, P.844.

<sup>4</sup> UNCTAD, *International Investment Agreements*, Volume I, (2004), P. 122. (here in after UNCTAD (2004))

<sup>5</sup> Investment proclamation, *federal Negarit Gazzeta*, No. 1180/2020, 26<sup>th</sup> year, No. 28 (hereinafter referred to as “Investment Proclamation”), Art. 2(1)

<sup>6</sup> M. Sornarajuhp, *International Law on Foreign Investment*, Second edition, (Cambridge University Press, Cambridge, 2004), pp58-60. ( here in after ‘M.Somarajuhp ‘*International Law on Foreign Investment*’)

Investment generates a huge benefit for investors as investments are expenditures made with the intention/goal of making a profit. However, a closer look at the risks that investors face when they operate an investment activity reveals that they are susceptible to different kinds of risks. Hence, investors may not decide to invest at all, may not be able to generate the expected profit out of it, or lost their capital due to risks such as political, geological, commercial, and regulatory ones among other things.<sup>7</sup>

Ensuring safety and security is a natural responsibility of a given government/state. And special protection is provided to investors and investment properties through providing investment guarantees. The guarantee of safety and security, which is known as the full protection and security standard, is one way of providing special protection to investors. The guarantee of protection and security is by applying prevention measures, remedies, or both at the same time.<sup>8</sup> In brief, the guarantee of full protection and security standard requires a host state to exercise due diligence in protecting investments from the adverse actions of private parties and of state organs, including law enforcement agencies and the armed forces in an equal manner.<sup>9</sup>

Protection/safety and security of investment have been guaranteed in most international investment treaties, typically in the form of a full protection and security clause.<sup>10</sup> The wording of these clauses suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects. The adverse effects may stem from private parties or actions of the host State and its organ.<sup>11</sup> In particular, some debate still exists regarding the question of whether the standard covers not only physical but also legal security and the second whether the standard is linked to the customary international law minimum standard or whether it

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<sup>7</sup> Tilahun Weldie, An Overview of the Legal Regime Governing Minerals in Ethiopia, *Bahir Dar University Journal Of Law*, 2013, Vol.3, No.1, PP.24-66, at P. 24. (here in after Tilahun Woldie, 'The Legal Regime Governing Minerals In Ethiopia')

<sup>8</sup> 'Prevention' as in before the risk materializes (such as the presence of police force within the compound of the investment area) and 'Remedies' as in after the risk materializes (such as supplementing/replacing the investment properties destroyed or compensation in terms of cash)

<sup>9</sup> Junngam Nartnirun, "The Full Protection and Security Standard in International Investment Law: What and who is Investment Fully [?] Protected and Secured From? American University Business Law Review, Vol.7, No. 1 (2018). Available at: <https://digitalcommons.wcl.american.edu/aubl/vol7/iss1/>. Last accessed June 10, 2021. (here in after Junngam 'the FPSS in international law')

<sup>10</sup> Ibid.

<sup>11</sup> Christopher Schureuer (2010), Full Protection and Security, *Journal of International Dispute Settlement*, Vol. 1, No. 2 (2010), pp. 353–369. Doi:10.1093/jnlids/idq002. (hereinafter, Schureuer, Full protection and Security)

is an independent norm.<sup>12</sup> It is sometimes presented in connection with the question of whether full protection and security always impose a duty of due diligence, or whether it could also entail strict liability under some specific circumstances.<sup>13</sup>

Foreign investors upon entering a host state fall under the territorial jurisdiction of the state and the state must protect the persons and property of foreigners. That level of protection should at least meet those minimum international standards prescribed by international customary law and must grant foreigners protection equally with nationals as far as the safety of person and property is concerned.<sup>14</sup> The full protection and security (FPS) standard is an investment protection standard that guarantees against political storms.<sup>15</sup> The standard is interpreted as an obligation of host states to prevent harm to the investment from the acts of government and non-government actors.<sup>16</sup> In the traditional understanding, the FPS standard required the host state only to provide a certain level of police protection and physical security.<sup>17</sup> But recently broad interpretations of investment guarantees were adopted by arbitral tribunals which added guarantees such as legal, economic, and regulatory protection and security.<sup>18</sup>

Ethiopia, like many developing countries, is now actively working on the promotion of investment and trying to create a favorable environment for it. An investor, once he voluntarily enters a host state is subject to the laws of that host state.<sup>19</sup> Accordingly, the major determinants in the decision of the investor to invest in a given country are legal guarantees that provide security and protection for the investor's person and property.<sup>20</sup> The Ethiopian government is committed to giving investment guarantees to achieve the purpose of investment provided under the Ethiopian investment laws.<sup>21</sup>

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<sup>12</sup> Catharine Titi (2014), Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT, *the journal of world investment & trade* 15 (2014) PP. 534-550.

<sup>13</sup> Sebastian Mantilla Blanco (2018), Full Protection and Security in International Investment Law

<sup>14</sup> Oppenheim's International Law, 909 (Sir Robert Jennings and Sir Arthur Watts eds., 9<sup>th</sup> ed.1992) (1905) p.897-910

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> M.Somarajuhp *International Law On Foreign Investment*, p.142

<sup>18</sup> International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (IIA Handbook); APEC Committee on Trade and Investment, Investment Experts Group December 2012. (Hereinafter, UNCTAD (2012))

<sup>19</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart publishing, oxford and Portland, 2008, p.56. (Hereinafter, P Subedi, *International Investment Law*)

<sup>20</sup> Getinet Haile & Hirut Assefa, Determinants of Foreign Direct Investment in Ethiopia: a time-series analysis, west minister research online digital archive <http://www.wmin.ac.uk/westministerresearch>.

<sup>21</sup> Investment proclamation, Art.5

Thus, the research will throw light on certain problems existing in the law and on the role of the government in the implementation of the FPSs, which is one of the packages of investment protection standards, which is accorded to investors in Ethiopia and making suggestions to rectify the same.

## **1.2. Statement of the problem**

The protection of investments and investors is the natural responsibility of a host state. The full protection and security standard is one among many standards of investment protection. In a contemporary world, determining the scope/extent of the FPS standard has been a complicated issue in investment that needs a responsive law. The Ethiopian investment proclamation provides for investment guarantees<sup>22</sup> but does not stipulate the FPS standard. BITs in Ethiopia tries to stipulate the standard<sup>23</sup> but is done so under different terminologies which create uncertainty to investors as to whether they refer to the FPSS and have the same meaning or not, the extent of liability of the state, and the degree of protection (whether the standard is an independent norm from the minimum standard under CIL) is not provided under any of those BITs. Other countries try to address those issues either expressly under their laws (domestic law and BITs), or through interpretations of the standard by arbitration or judicial courts. For instance, the US 2004 Model BIT provides that the FPS does not provide protection more than what is provided under CIL.<sup>24</sup> A recently broad interpretation of the FPS standard was adopted by arbitral tribunals which added, in addition to physical security, guarantees such as legal, economic, and regulatory protection and security.<sup>25</sup> Case law also supports the view that the formula ‘full protection and security’ covers not only protection against violence but also provides protection and security against infringements of the investor`s rights.<sup>26</sup>

There are no studies that deal with the FPS standard in detail, very few merely list the FPS standard as one of the standards of protection provided under BITs in Ethiopia.

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<sup>22</sup>Investment proclamation Art 19 and 20

<sup>23</sup> E.g. see Ethiopia-Germany BIT (2004) art 2; see also Ethiopia-China BIT (1998) art.3, Ethiopia-Qatar BIT (2017) art.3

<sup>24</sup> The US Model BIT (2004), Art. 5(2) provide that “FPS” requires each party to provide a police protection required under CIL. Which means the degree of protection under the FPS standard is limited to physical security.

<sup>25</sup> UNCTAD (2012)

<sup>26</sup> *Azurix Corp v. Argentina*, Award, 14 July 2006, ICSID Case No. ARB/01/12 (US/Argentina BIT), (Hereinafter, *Azurix v Argentina*), Para 406-408

For instance; research by Wakgari on the adequacy of Ethiopia's BIT in protecting the environment reveals the FPS standard along with FET, MFN, NT, Protection against expropriation, right to repatriate, and others as the standards of investment protection under most BITs signed by Ethiopia.<sup>27</sup> The investor requires clear and transparent laws, particularly on investment law which addresses the FPS standard as one way of providing a guarantee for investments. In the last five to six years there have been several outbreaks of violence that destroyed investors' properties partially or completely. Following such a catastrophe, a lot of investors have questioned the effectiveness of governments' role in ensuring the investment guarantees provided in bilateral investment treaties, national and international laws. According to a recent report<sup>28</sup>, as a result of the civil unrest happening in different parts of the country, many investment projects were damaged.

In contemporary Ethiopia, the matter of full protection and security of investment has continued to be an issue. Due to this, the inherent side of investment has become to be the guarantee of protection and security of investment. The political instability that has been happening since a few years back has made the guarantee of full protection and security of investment to be the most determinant issue to invest in the country. In the past few years, there have been different types of ethnic-based protests around different parts of the country and this has caused protection and security problems towards the investment and investors in the country. Following the political unrest that happened at different times and places of the country, businesses especially foreign businesses, have become symbolic targets for anti-government protests. Investment properties were destroyed, and some had to close up and leave the country for good.<sup>29</sup> There has been a great decrease in the number of projects secured

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<sup>27</sup> Wakgari Kebeta Djigsa, The Adequacy Of Ethiopia's Bits In Protecting The Environment :Race To The Bottom, *Haramaya Law Review* 6 (2017):67-90

<sup>28</sup> According to recent report of the Ethiopian Investment Commission, as result of the 2016 public unrest in the Oromia region, about 24 violence-affected investors have claimed compensation for the damage caused by the unrest. In the 2019/2020 report, more than 400 investment companies in various parts of the country were completely or partially destroyed due to the political unrest.

<sup>29</sup> Political unrest hits Ethiopia FDI, Violent Protests Could spell the end of Ethiopia's impressive upward economic trend. Available at [www.Fdiintelligence.Com/article/67504](http://www.Fdiintelligence.Com/article/67504) last accessed on August 2021

compared to the years before the violence started.<sup>30</sup> This also has got on the negative side of the country in seeking the attention of investors to invest in the country.<sup>31</sup>

Failure to stipulate a full security and protection clause, the level of protection, the degree of state liability, and standard of compensation under the FPS standard could fail to attract investors to the required/expected degree. This can greatly harm the economic development of a country and its contribution to the country's GDP and result in the increase of unemployment, increases poverty, and makes the achieving of the economic development goals in general and investment goals in particular, very hard.

To sum up, there are several normative and practical issues surrounding investment guarantees in general and the FPS standard in particular, which this research is devoted to analyzing.

### **1.3. Research questions**

The research will have the following research questions to address; -

- What are the issues and challenges in the guarantee of safety and protection of investments under Ethiopian BITs?
- To what extent is Ethiopia responsible for violation of the full protection and security standard?
- What are the consequences for the violation of the guarantee of full protection and security in Ethiopia?

### **1.4. The objective of the Study**

The study has both general and specific objectives; -

#### **1.4.1. General Objective**

The main objective of this study is to assess the guarantee of the full protection and security standard under Ethiopian investment laws.

#### **1.4.2. Specific Objectives**

This study aims;

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<sup>30</sup> Ibid

<sup>31</sup> Ethiopian politics: new PM'S (Prime Minister's) reform challenged by ethnic unrest, (www.Ethiopian politics. TRT world) and reports of CGTN AFRICA on the Ethiopian ethnic violence (last accessed online on December 25/2019 )

- To address issues and challenges of guarantees of safety and protection of investments under BITs of Ethiopia.
- To determine the extent of liability of the state for violation of the full protection and security standard.
- To assess the consequences for the violation of the guarantee of full protection and security in Ethiopia.

## **1.5. Significance of the study**

The study will have both theoretical and practical significance

### **1.5.1. Theoretical Significance**

This study will mitigate the existing gap in Ethiopian literature as regards the law related to investment guarantees.

### **1.5.2. Practical Significances**

**For the investment administration authority:** -as the study mainly endeavors to pinpoint types of investment guarantees, the standard of liability, and the standard of protection. The investment administration authority will be beneficial in easily determining the extent of protection and liability.

**For investors:** - since this study tries to throw some light on the types of investment guarantees in Ethiopia and the level of protection investors will benefit from knowing the types of investment guarantees and the level of protection that will be given to their investments. It can also give potential investors a general overview of the investment guarantees in Ethiopia and their enforcement and the role of the government thereof.

**For other bodies:** - it can help the government to take some notes on the need for reformation of the Ethiopian investment policy about investment guarantees and improving measures in the standard /level of enforcement measures in managing investment for better results.

Finally, the research can be used as a background for other researchers who are interested in conducting research related to the study area.

## **1.6. Methodology**

### **a. Research Design**

To achieve the very objective of the research, a qualitative research method is employed. The research provides a systematic exposition of the legal



principles and provides advice on the areas that are challenging under the law and practice. This methodology is apt to address the research questions of the study and it has a high degree of flexibility.<sup>32</sup> In addition to this, the study incorporated the views of different stakeholders such as the officials from the Ethiopian investment commission, Addis Ababa investment commission, Ethiopian Insurance Corporation, and investors. Hence, qualitative research is more suitable to analyze data gathered through interviews and analysis of documents in those concerned bodies.<sup>33</sup>

**b. Types of Data**

The research employed both primary and secondary data. The primary data are laws, cases, and data collected through interviews. The secondary data constitutes books, articles, document analysis, and literature dealing with investment guarantees and the FPS standard there too. The secondary data has also provided information and insights as to how other countries approached the issue.

**c. Data collection method**

The researcher utilized qualitative data collection tools of interviews and analysis of documents to address the research objectives and questions until data saturation is attained. The interview is conducted by applying a semi-structured interview with purposively selected officials based on experience, expertise, education, and position to obtain general information imperative to address the research questions. Moreover, investors were also purposively selected to express their views regarding the protection and security given to their investments during and after the civil unrests. Accordingly, investors/managerial staff of the damaged/impacted investments were interviewed.

**d. Data Analysis**

The study used a qualitative data analysis method. The data collected has been analyzed interactively and analytically. They primarily have been made ready before indulging in analysis. Then the data has been familiarized based on the

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<sup>32</sup> Michael Pandelton, 'Non-Empirical Discovery In Legal Scholarship-Choosing, Researching And Writing A Traditional Scholarly Article', In Mike McConville And Wing Hong Chui's (Eds.), *Research Methods For Law* Edinburgh University Press, 2007 P.159.

<sup>33</sup> Scott W. Vanderstoep And Deirdre D. Jhnson, *Research Methods For Everyday Life Blending Qualitative And Quantitative Approaches*, In Jossey-Bass (eds.), San Francisco, 2009 P.169

similarity of opinions. Each group of responses was given its code and systematically examined to pinpoint important points and draw conclusions in line with the research questions and objectives.

### **1.7. Scope of the Study**

The study first examines the full protection and security standard as one of the packages of investment protection guarantee against political risks and the degree of protection and standard of liability under the standard are dealt with. Therefore the scope of the study is limited to the evaluation focusing on the Full Protection and Security standard. Even though some issues related to expropriation, repatriation, FET, most favored nation, and national treatment are dealt with here, the study does not focus on those packages of investment protections. In terms of territoriality, the federal laws of Ethiopia have been used since the investment proclamation, constitutionally speaking, is the law enacted by the federal government. BITs are signed by the federal governments with other countries. Therefore the laws used are federal laws only. Federal officials and investors registered by the federal government are interviewed.

### **1.8. Limitation of the Study**

Due to an absence of relevant materials or prior research on the area, this research is less extensive and full-fledged. The researcher tried to mitigate this problem by investigating foreign literature on the area and adapting to Ethiopia to the extent possible.

### **1.9. Ethical Considerations**

In undertaking the overall research, the researcher is bound by some ethical considerations. First, the researcher asked for the willingness of the participants before taking the data from them. Second, the researcher tried to keep the confidentiality of the information and when the respondents did not want the disclosure of their name, their identity is remaining anonymous. Third, the data collected are solely used for the research and are deception-free. Fourth, the researcher gave recognition to the efforts of the respondents in the research in the acknowledgment part.

## **1.10. Overview of chapters**

This thesis is organized into five chapters. Chapter one of the research is the proposal/general introduction part and hence all the components of a research proposal are provided. Chapter two deals with the introductory remarks about investment and investment guarantees. Chapter three deals with the legal regime governing investment guarantees in Ethiopia, Chapter four is all about investment guarantees: the full protection and security of investors in Ethiopia, specifically it constitutes the level of protection of investors and standard of the liability of the Ethiopian government. The final chapter encompasses the finding, conclusions, and recommendations.

## CHAPTER TWO

### INTRODUCTORY REMARKS ABOUT INVESTMENT AND INVESTMENT GUARANTEES

#### Section one: Investment in General

##### 2.1.1. Introduction

In its ordinary meaning investment may be defined as the buying and selling of goods and services to acquire a profit. The legal meaning of investment is however different from its ordinary meaning. Investment might be operated in different forms as well as it involves various kinds of investment risks.

Hence, this section will discuss a general overview of investment in general such as the meaning of investment and its effect, the types of investment, and various kinds of investment risks that investors would face in the operation of investment activities.

##### 2.1.2. Definition of Investment and Investor

Having a clear and well-organized definition of the term “investment” and “investor” is very crucial as they are the key elements determining the scope of application of rights and obligations of investors and the minimum threshold to entertain the issue of investment guarantees under dispute.<sup>34</sup> It is only the interest of investors falling within the scope of an “investment” and “investor” defined in a particularly applicable law that can form the basis of a claim in general and investment guarantees in particular.<sup>35</sup> Specifically, from the perspective of a capital-exporting state, the definition identifies the group of investors whose foreign investment the country is seeking to protect through the agreement.<sup>36</sup> From the capital importing country perspective, it identifies the investors and the investment the country wishes to attract and protect through the device of investment guarantees; from the investor’s perspective, it identifies how the investment might be structured to benefit from the agreements’ protection, specifically from investment guarantees available in a host state.<sup>37</sup>

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<sup>34</sup> M. Sornarajuhp, *International Law on Foreign Investment*, PP. 58-60.

<sup>35</sup> Ibid.

<sup>36</sup> B. Legum “*Defining Investment and Investor: Who is Entitled to Claim?*” presentation at the Symposium “Making the Most of International Investment Agreements: A Common Agenda” co-organized by ICSID, OECD and UNCTAD, 12 December 2005, Paris.

<sup>37</sup> Ibid.

### 2.1.3. Types of Investment

Depending on the nationality of an investor and the source of capital, an investment may be divided into domestic and foreign investments. Though foreign direct investment is now the most important external source of long-term funds in the developing world, financing development remains primarily an issue of domestic investment.<sup>38</sup> In brief, domestic investment involves an expenditure of capital by a national of the host state whose source of capital is also the host state, while foreign investment involves the transfer of tangible assets from one country into another for their use in that country to generate wealth under the total or partial control of the owner of the assets.<sup>39</sup> Foreign investment is also further divided into foreign direct investment (FDI) and portfolio investment.<sup>40</sup>

International Monetary Fund (IMF) defines foreign direct investment as an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose is to have an effective voice in the management (IMF, 1977). The lasting interest implies the existence of a long-term relationship between the direct investor and a significant degree of influence on the management of the enterprise.<sup>41</sup> In contrast, portfolio investment involves a movement of money to buy shares in a company formed or function in another country.<sup>42</sup> Hence, the distinguishing element is that, in portfolio investment, there is a separation between management and control of the company, and the investor himself takes the risks involved in the making of such investment.

### 2.1.4. Risks in Investment

Assumption of risk is inevitable in the operation of investment activities.<sup>43</sup> Even though investors are faced various kinds of risks, the following are the biggest risks

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<sup>38</sup> Ndikumana, L. and Verick, S.). "The Linkages between FDI and Domestic Investment: in *Unraveling the Developmental Impact of Foreign Investment in Sub-Saharan Africa.*" Bonn, Germany: IZA Discussion Papers, No. 3296, 2008. (Hereinafter Ndikumana and Verick, The Linkages between FDI and Domestic Investment)

<sup>39</sup> *Encyclopedia of Public International Law*, Vol.8 P.246

<sup>40</sup> Ndikumana and Verick, the Linkages between FDI and Domestic Investment.

<sup>41</sup> Ibid.

<sup>42</sup> M.Somarajuhp, *International Law on Foreign Investment*, p.7

<sup>43</sup> Angelos Dimopoulos, Foreign Investment Insurance and EU Law, TILEC Discussion Paper DP-2012-028, July 18, 2012, Tilburg University, p.2 [available at <http://ssrn.com/abstract=2112053>] last accessed June 5/2021.

that pose a great threat for investors.<sup>44</sup> These are geological, commercial, and regulatory risks. Geological risk is the biggest risk for investors as it is related to factors that are out of the control and wish of both the host state and the investor himself.<sup>45</sup> Commercial risks are effects of the broad right of states to regulate their economy; they are inherent in investment both domestic and foreign.<sup>46</sup> Among other things, a change in the cost of production and other transaction costs, unavailability of foreign currency, fluctuations in exchange rates, inflation, and limited availability of financing constitute commercial risks that are important concerns for investors.<sup>47</sup> Some called regulatory risk as political risks of investment and some others called non-commercial risks of investment. These are risks that result from adverse sovereign actions and inactions in the host state.<sup>48</sup> As summarized by Zewidneh B. among other things regulatory change as risks of investment includes:

- *The existing judicial system is not effective, independent, and reliable when it comes to the enforcement of contractual and property rights;*
- *A radical political change may occur leading to nationalization, outright and creeping expropriation, and civil unrest;*<sup>49</sup>

Hence, a risk on a stable regulatory framework in general and the political condition of the host state, in particular, has been one of the most important factors for investments.<sup>50</sup>

To sum up, to secure themselves from such risks, as these can significantly influence the existence and operation of an investment, investors resort to political risk insurance sponsored by the government and investment guarantees directly accorded by the government.<sup>51</sup> In this way, investors avail themselves of significant risk management and risk mitigation tool, which provides a more stable environment for investments abroad, and unlock better access to finance.

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<sup>44</sup> Tilahun Woldie, *The Legal Regime Governing Minerals in Ethiopia*, p.26. (hereinafter Tilahun Woldie)

<sup>45</sup> Ibid

<sup>46</sup> Gerald M. Meier, Legal-Economic Problems of Private Foreign Investment in Developing Countries, 1966, University of Chicago Law Review: Vol. 33: Iss. 3, Article 3, [available at: <http://chicagounbound.uchicago.edu/ucirev/vol33/iss3/3>]

<sup>47</sup> Ibid.

<sup>48</sup> Tilahun Woldie, P.27

<sup>49</sup> Zewidneh Beyene Haile, *International Business Transactions*, Bahir Dar University School of Law (Unpublished), 2014, p.401.

<sup>50</sup> Tilahun Woldie, p.27

<sup>51</sup> K. Gordon, 'Investment Guarantees and Political risk Insurance: Institutions, Incentives and Development' in OECD (Ed) OECD Investment Policy Perspectives 2008 (OECD, 2008), p. 97. [available at <http://www.oecd.org/daf/investment/0bguidelines> ] last accessed November 10, 2020.

## **Section Two: - Investment Guarantees and the Standard of Investment Guarantees**

### **2.2.1. Introduction**

Besides other factors that determine the flow of investment in a given country, investment guarantees available in a country play an important role to attract investors as they usually want to see sufficient protection to their investment.<sup>52</sup> This section discusses the definition and concept of investment guarantees as well as the types and standards of investment guarantees.

### **2.2.2 Definition and Concept of Investment Guarantee**

There is no generally agreed definition for the term investment guarantee so different parties have claimed different levels of protection under the umbrella of investment guarantee.<sup>53</sup> A guarantee may be defined as the agreement of a guarantor to assume responsibility for the performance of an action or obligation of another person or entity.<sup>54</sup> The guarantor agrees to compensate the beneficiary in the event of non-performance. The trend in most investment treaties reveals that investment guarantees are nowhere defined rather the treaties try to list the guarantees accorded to investors in that particular treaty. As it is hard to give a comprehensive definition for the term investment guarantee, the best approach in investment treaties is listing the available investment guarantees in a certain investment treaty. The same is true under the Ethiopian legal system. Neither the investment proclamation nor the BITs that Ethiopia concludes with defines investment guarantees rather they provide lists of guarantees that investors are accorded in the country.<sup>55</sup>

The concept of the term ‘investment guarantees’ is not established and it varies from time to time, legal system to legal system and even it differs among investment treaties that a country concludes with different countries.

Generally, investment guarantees are designed to protect the investor against losses including:

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<sup>52</sup>Tilahun Woldie, p.53

<sup>53</sup> P Subedi, *International Investment Law*, P.67

<sup>54</sup> Ibid.

<sup>55</sup> See art 19 of the investment proclamation: see also Ethiopia-Germany BIT, Art.4.

- Losses caused by the inability to convert foreign currency representing earnings or liquidations of capitals into dollars;
- Expropriation or confiscation, including abrogation repudiation or impairment by the host country`s government of its contract with the investor which has the effect of depriving the investor of his ownership, control, or substantial benefit from his investment;<sup>56</sup>
- Losses resulting from damage to physical assets because of war, revolution, or insurrection.<sup>57</sup>

### 2.2.3. Types of Investment Guarantees

#### Introduction

Investment guarantees can be classified depending on the nature of investment risks they are designed to protect.<sup>58</sup> Host states may provide different types of investment guarantees to attract investors in general and foreign investors in particular to their country.

Protection treaties also typically give reciprocal assurances to contracting states as to the treatment of investments within their borders. They provide many protections such as full protection and security, fair and equitable treatment, national treatment and most-favored-nation treatment; expropriation only by law, accompanied by prompt, adequate, and effective compensation, or some liberal variation of this formula; free transfer of dividends and proceeds from disinvestment; subrogation of the home country's investment guarantee agency to the rights and claims of an investor against the expropriating state; and international arbitration for any disputes arising under the treaty, subject to the prior exhaustion of reasonable local remedies.<sup>59</sup> Investment Protection provisions are commonly found in BITs.

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<sup>56</sup> The "deprivation of substantial benefit" language suggests coverage for the so-called creeping expropriation or de facto expropriation. Basically, this can be defined as any act, or series of acts, for which the state is responsible, which are illegal under domestic or international law, and which leave a substantial enough adverse effect on either the enterprise or the investor's rights under the enterprise.

<sup>57</sup> T. M. Ocran, International Investment Guarantee Agreements and Related Administrative Schemes, *Journal of International Law*, 1988, Vol.10, Iss.3pp.341-370, p.344-345 [available at <http://scholarship.law.upenn.edu/jil/vol10/iss3/2>] last accessed December 2020.

<sup>58</sup> Ibid, PP.353-354

<sup>59</sup> Ocran, *Bilateral Investment Protection Treaties: A Comparative Approach*, 8 N.Y.L. SCH. J., INT'L & COMP. L. (1988) (forthcoming). [<http://scholarship.law.upenn.edu/jil/vol10/iss3/2>] last accessed November 12, 2020.



As a direct reflection of the right of sovereign states to regulate their economy, various types of investment guarantees are provided under the investment laws of states. This section discusses the types of investment guarantees which are also known as the investment guarantees/protection packages. Those Packages include the FPS, FET, NT, MFN, guarantee against expropriation, and transfer of funds.

### **2.2.3.1 Full Protection and Security (FPS) standard**

The FPS standard owes its origin to treaties of friendship, commerce, and navigation (FCN) concluded in the 19<sup>th</sup> century.<sup>60</sup> By the end of WWII, the FPS standard found its way to too many commercial treaties and failed multilateral treaties<sup>61</sup>. It has been guaranteed in most international investment treaties, typically in the form of a full protection and security clause. The wording of these clauses suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects.<sup>62</sup> The adverse effects may stem from private parties or actions of the host State and its organ.<sup>63</sup> The FPS standard represents the obligation of the host state to actively work on the creation of an environment that guarantees the security of the investor and the investment.<sup>64</sup> The standard establishes the dual obligation for the states that is, the obligation of active action to prevent and remedy the violation or to punish wrongdoers on one hand, and the obligation of states to refrain from any activities that may hurt foreign investment.<sup>65</sup> The first BIT to incorporate the FPS standard was signed between Germany and Pakistan for the promotion and protection of investments in 1959.<sup>66</sup> Since then it has found its way into different BITs and other international investment agreements.

Most investment agreements contain provisions that guarantee the protection and security of investments. These provisions are in the literature referred to as the full protection and security standard.

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<sup>60</sup> Junggam, "The Full Protection and Security Standard in International Investment Law", Pp.204-205

<sup>61</sup> The abortive Havana charter of 1948 which intended to establish International Trade Organization contained an obligation to grant "adequate security for existing and future investment".

<sup>62</sup> Christoph Schereur, *investments in international protection*, p.52-27.

<sup>63</sup> Ibid.

<sup>64</sup> Orsat Miljenić, Full Protection and Security Standard in International Investment Law, P40 DOI: <http://doi.org/10.25234/pv/8128>. (Last accessed June 7, 2021). (Hereinafter Miljenić, FPSS in international investment law)

<sup>65</sup> Sicard-Mirabal, J.; Derains, Y., Introduction to investor-state Arbitration, Klumer Law International Alphenaan Rijn, 2018, P.147,

<sup>66</sup> Treaty for promotion and protection of investment, Art 3(1), Ger.-Pak, Nov.25, 1959,457 U.N.T.S.23

The Multilateral Investment Guarantee Agency (MIGA) is a member of the World Bank Group. Its mandate is to promote foreign direct investment (FDI) in developing countries by providing guarantees (political risk insurance and credit enhancement) to investors and lenders.<sup>67</sup> MIGA's guarantees protect investments against non-commercial risks and can help investors obtain access to funding sources with improved financial terms and conditions. The agency derives its unique strength from the World Bank Group and from its structure as an international organization whose shareholders include most countries of the world.<sup>68</sup> This enables MIGA to provide an umbrella of deterrence against government actions that could disrupt projects, and assist in the resolution of disputes between investors and governments. MIGA also adds value through its ability to offer clients extensive knowledge of emerging markets and of international best practice in environmental and social management.<sup>69</sup>

Different BITs provide different formulations and patterns of the FPSs. "full protection and security", "full security and protection", "full and complete protection and security", "most constant and protection and security", "full protection", and "protection" are illustrative of this diversity in treaty language.<sup>70</sup> The arbitration tribunal in *Parkerings vs. Lithuania* has established that linguistic variations have no major effect on the level of protection the host state must provide.<sup>71</sup> A similar opinion was expressed in *AAPL v. Sri Lanka* which concluded that the presence or absence of adjectives such as "full" or "constant" has no effect on the contents and the level of protection provided by the FPS standard.<sup>72</sup> However, there are also arbitration awards that established that the content of the FPS standard is directly connected with the wording referring to the standard. For instance, the arbitration tribunal in *Biwater vs. Tanzania* establishes that when the terms "protection" and "security" are qualified by "full", they extend, in their ordinary meaning, the contents of the standard beyond

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<sup>67</sup> MIGA: investment guarantee guide, July 2015. Available at [www.miga.org](http://www.miga.org) (last accessed February 28, 2022)

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Junngam, "The Full Protection and Security Standard in International Investment Law", p.25

<sup>71</sup> *Parkerings -Compagniet AS V Republic of Lithuania-* ICSID Case no. ARB/05/8, Para. 354. <https://www.italaw.com/sites/default/files/case-documents/ita0619>. Accessed on 28, August 2021 (hereinafter, *Parkerings vs. Lithuania*)

<sup>72</sup> *Asian Agricultural Products Ltd. v. the Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, Para 50 (hereinafter *AAPL V. Sri Lanka*). This award is the 1<sup>st</sup> investment treaty award on the FPSS...the award was passed in 1990. <https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf> . Accessed on September 28, 2021

physical security.<sup>73</sup> This implies a state's guarantee of stability in a secure environment to physical, commercial, and legal securities.<sup>74</sup>

Investment and/or investors may be objects of protection under the standard. The prevailing arbitration practice has taken the position that the protection also includes the investor, i.e. that the clause about the protection of investment implicitly protects the investor.<sup>75</sup> The arbitral tribunal in *AWG v. Argentina* provides that "the FPS standard obliges Argentina to exercise due diligence to protect investors and investments".<sup>76</sup>

### 2.2.3.1.1 Degree of Protection under the FPS Standard

In the primary times, the degree of the standard was provided as that degree of protection that is required by the minimum standard under customary international law.<sup>77</sup> The minimum standard under customary international law requires the level of protection and security to cover physical violence/security.<sup>78</sup> The OECD study defines the international minimum standard as a "norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."<sup>79</sup> The international minimum standard sets several basic rights established by international law that States must grant to aliens, independent of the treatment according to their citizens".<sup>80</sup> The minimum standard is a general duty to provide for the protection and security of foreign nationals found in the CIL of aliens.<sup>81</sup> Some authors take the position that the standard is an element or the other name for the international

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<sup>73</sup> *Biwater Gauff (Tanzania) Ltd. V United Republic of Tanzania*, ICSID Case No. ARB/05/22 Award, Para. 729.

<https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf> . Accessed on august 9, 2021

<sup>74</sup> *Ibid*

<sup>75</sup> Junngam, *the FPSS in International Law*, p. 59.

<sup>76</sup> *AWG Group Ltd. V the Argentine Republic*, UNCITRAL, Conclusion about Responsibility, Para. 179.

<https://www.italaw.com/sites/default/files/case-documents/ita0055.pdf> . Accessed on 21 June, 2021

<sup>77</sup> Treaty of Friendship, Commerce, and Consular Rights Art I, U.S.-Ger., Dec.8, 1923, 44 state.2132

<sup>78</sup> Campbell McLachlan et al., *international investment arbitration: substantive principles* 247 (2007); Jeswald W. Salacuse, *The Law of investment treaties* 229 (2010) (Hereinafter, Salacuse, *The Law of Investment Treaties*).

<sup>79</sup> OECD Working Papers on International Investment 2004/03: Fair and Equitable Treatment Standard in International Investment Law, OECD Publishing 2004, pp. 8 and 9.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

minimum standard and it provides the same level of protection.<sup>82</sup> According to Sacerdoti, the FPS standard does not provide protection that goes beyond the international minimum standard under the CIL and therefore is not an autonomous treaty norm.<sup>83</sup> The NAFTA Interpretative Declaration for Article 1105(1) provides that “the FPS standard does not require the treatment that would be added or that would exceed the requirements of the minimum standard of CIL in the treatment of aliens”.<sup>84</sup> In *Elpaso energy international Co. v. Argentina*, It was provided that the standard is not an autonomous treaty norm that imposes more requirements than does the minimum standard saying “it is no more than the traditional obligation to protect aliens under CIL”.<sup>85</sup> Similarly, the tribunal in *Saluka Investments vs. The Czech Republic* provided that:-

*The “full protection and security” standard applies essentially when foreign investment has been affected by civil strife and physical violence. The “Full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.*<sup>86</sup>

Recently, it has been viewed that the standard of protection of the FPS standard goes beyond physical protection and extends to legal protection.<sup>87</sup> Legal protection/security refers to the availability of the judicial system and the quality of the legal system which implies certainty in its norms, consequently and their foreseeable application.<sup>88</sup> According to Schereur, the standard is an independent/absolute standard and forwards a level of protection that goes beyond the international minimum standard under the

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<sup>82</sup> Miljenić, FPSS in international investment law.

<sup>83</sup> Georgio Sacerdoti, *Bilateral treaties and multilateral instruments on investment protection* (1997). (hereinafter Sacerdoti, *Bilateral treaties on investment protection*)

<sup>84</sup> North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission, July 31, 2001,

<http://www.sice.oas.org/tpd/nafta/commission/ch11understanding-e.asp>. Accessed on August 15, 2021

<sup>85</sup> *Elpaso Energy International Co. Vs. Argentina*, ICSID Case No. ARB/03/15, Award, 522 (oct.31, 2011)

<sup>86</sup> *Saluka Investments BV (Private entity - The Netherlands) v The Czech Republic*, Decision of the Swiss Federal Tribunal dated 7 September 2006 (here in after *Saluka v. Czech Republic*)

<sup>87</sup> Alejaandro M. Garro, *Trade And Investment Treaties The Rule Of Law, And Standards Of The Administration Of Justice*, 42 U, Miami Inter-Am. L. REV. P.267-269 (2011)

<sup>88</sup> *Biwater V. Tanzania*, Para.613 defines legal protection as an obligation to ensure that neither by amendment of its laws nor by actions of its administrative bodies is agreed and approved security and protection of the investor’s investment withdrawn. Protection against legal harm is keeping the judicial system available for claimants to bring their claims and for such claims to be properly examined and decided in accordance with domestic and international law.

CIL.<sup>89</sup> The standard is an absolute standard, which means that it does not depend on how the state receiving the investment treats other investments or investors. One of the arguments for such an extension of the standard is the fact that modern investment treaties, as a rule, also protect intellectual property rights<sup>90</sup> that, logically, cannot be infringed by physical injuries and thus would not enjoy protection according to the strict interpretation of the FPS standard. The arbitration tribunal in *Siemens v. Argentina* set out that, “As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved”.<sup>91</sup>

The case between *Lauder V. Czech Republic* is the first tribunal to decide that the FPS standard guaranteed the protection of legal rights through the availability of the host states’ judicial system that endured a proper trial.<sup>92</sup> Such extension of legal rights is not only limited to those consequences of physical harm and the existence of physical harms is not a prerequisite for legal protection and security.<sup>93</sup> In terms of substance, legal protection and security cover both substantive protection of investments and effective procedural protection in cases of harms against investments.<sup>94</sup> The minimum standard represents the lower limit of a state’s obligations under the FPS standard clause.<sup>95</sup> Most tribunal awards that came after also found that a change in law and administrative proceedings that gravely/adversely affects investments violated the FPS standard.<sup>96</sup> The tribunal in *Azurix v. Argentina* also found that the expression “not less than required by international law” in the investment treaty should be interpreted in the manner that the FPS is a higher standard than that of the international law since the purpose of such clause is to set the “floor”

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<sup>89</sup> Schreuer, Full Protection and Security, p. 353-358

<sup>90</sup> *ibid*

<sup>91</sup> *Ibid*

<sup>92</sup> *Lauder V. Czech Republic*, UNCITRAL, Final Award,3 (sept.3.2001)

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Junngam "The Full Protection and Security Standard in International Investment Law, Pp. 64-67. See *Siemens V. Argentina*, ICSID case no. ARB/02/8, Award,1, at 4 (Jan. 17,2007) (hereinafter *Siemens V Argentina*)

and not the “ceiling” to avoid possible interpretation of these standards under the level required by the international law”.<sup>97</sup>

The most convincing point of view about the FPS is that following which the FPS is a different and independent standard of protection the content of which cannot be identified with the content of the international minimum standard.<sup>98</sup> But the minimum standard can represent the lower limit of obligations that the state has in providing protection and security for investors, unless, of course, it has not been otherwise agreed in the relevant investment treaty.<sup>99</sup> This standpoint was also taken by Salacuse, who says that this standard imposes an objective obligation that must not be lesser than that required by the minimum standard of diligence and care under international law”.<sup>100</sup>

Even though the host state’s legislation or regulation adversely affects investment, the host state is not prevented from seeking recourse to it, given that its acts are circumstances reasonable for reaching its objectively rational public policy goals.<sup>101</sup>

#### **2.2.3.1.2 Liability Standard of the Host State**

Host states must undertake all possible measures that could be reasonably expected to protect and secure investment or take all measures necessary to ensure the full enjoyment of protection and security of investment. Such measures can be precautionary, preventive, remedial, coercive (against those disrupting investment), and/or responsive.<sup>102</sup> Compared with the fair and equitable (FET) standard, which requires host states to behave fairly and equitably, The FPS standard requires host states to provide “a legal framework that grants security and protects the investment against adverse action by private persons (3<sup>rd</sup> parties) as well as state organs.<sup>103</sup> An arbitration tribunal in *Biwater Gauff v. Tanzania* considered that the full security

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<sup>97</sup> Azurix v. Argentine, Para 361

<sup>98</sup> Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB (AF)/11/2 Awards, Para. 632, <https://www.italaw.com/sites/default/files/case-documents/italaw7194.PDF> . Accessed on August 17, 2021

<sup>99</sup> Miljenić, FPSS in international investment law, P. 40

<sup>100</sup> Salacuse, the law of international treaties, p. 240

<sup>101</sup> AES Summit Generation Ltd. vs. Hungary, ICSID Case No ARB/07/22, Award, 13.3.2 (sept.23,2010)

<sup>102</sup> Toto Costruzioni General: S.P.A V. Lebanon, ICSID case no. ARB/07/12, AWARD, 229 (JUNE 7,2012)

<sup>103</sup> Frontier Petroleum Serves. Ltd. V. Czech, UNICTRAL, Final Award, 296 (Nov.12, 2010)

standard is not limited to a state's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the state itself.<sup>104</sup>

There are two views about the liability standard of the host state. The first view is that host states are strictly liable<sup>105</sup> in cases of damages caused by state organs. <sup>106</sup> In providing this standard, the protection against the actions of state bodies is absolute and the state is always answerable/strictly liable. The arbitration Tribunal in *AMT v. Zaire* ascertained that the responsibility of the state irrefutably arises from the very fact that "Zaire omitted to undertake all necessary measures to protect and secure the safety of the investment."<sup>107</sup> About the accountability of the state for actions of third parties, the standard of the state's "due diligence" should be applied. When third persons are involved, the state answers under the principle of due diligence.<sup>108</sup>

The second view is that The FPS standard does not grant investments absolute but rather reasonable protection and security determined by "due diligence", which is to be determined depending on the circumstances.<sup>109</sup> According to Freeman, The standard provides a general obligation for the host state to exercise due diligence in the protection of foreign investment as opposed to creating strict liability which would render a host state liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the state.<sup>110</sup> Most tribunals are in support of this second view which provides that the FPS standard does not establish absolute responsibility of the state.

### 2.2.3.1.3 Due Diligence

Due diligence is defined as nothing more or less than the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.<sup>111</sup> The arbitration tribunal in *AAPL v. Sri Lanka* defines it in a similar manner providing it as "nothing less or more than reasonable measures of

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<sup>104</sup> *Biwater vs. Tanzania*, Para 730

<sup>105</sup> Strict liability does not require the finding of intent, negligence or fault. Liability arises from the fact of the act or omission itself.

<sup>106</sup> Ralph Alexander Lorz, protection and security in international investment law 764, 781 (2015)

<sup>107</sup> *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Para 6.11,

<https://www.italaw.com/sites/default/files/case-documents/ita0028PDF>. Accessed on August 10, 2021

<sup>108</sup> Miljenic, FPSS in international investment law, p.45.

<sup>109</sup> Schureuer, Full Protection and Security

<sup>110</sup> Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* 14 (A.W. Sijthoff Ed., 1957), P.15-16

<sup>111</sup> *Ibid.*

prevention that could be expected to be taken by a well-organized authority under similar circumstances.<sup>112</sup> This means that the precise degree of such vigilance is not necessarily the same for all situations.<sup>113</sup> In determining the level of due diligence a state's level of development or stability during the time of investment should be taken into account.<sup>114</sup> Due diligence/reasonable care standard is related to the variations in wealth and educational standards between the various states of the world.<sup>115</sup> The arbitration tribunal in *Pantechniki V. Albania* concluded that the question of whether the state has acted with due diligence must be considered with regards to the conditions in the recipient country and therefore due diligence may differ in different states depending on their level of development and options they have at their disposal.<sup>116</sup> In *Paushok v. Mongolia*, the Arbitration Tribunal defined that "states must act with due diligence to prevent unlawful injuries to persons or property of aliens on their territories, and that in case they fail to do so, they must act at least with due diligence in the punishment for such injuries".<sup>117</sup> The comparator is, therefore, not an abstract well-organized government, but a state with the same conditions as those in the state receiving the investment.<sup>118</sup> Nevertheless, it must be emphasized that even in such an assessment, there are certain minimum standards under which no state is allowed to go.<sup>119</sup>

Due diligence does not require states to prevent all and every risk of injury instead, it requires them to take reasonable acts within their power to prevent injury, restore the previous situation, and/or punish the author of the injury when states are or should be aware of a risk of injury, depending on the prevailing circumstances on a case-by-case basis.<sup>120</sup> In *Rumeli Telekom A.S. V. Kazakhstan* it was provided that investment is not under absolute protection and security, but rather under a "certain level of

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<sup>112</sup> AAPL v. Sri Lanka , Para 77

<sup>113</sup> *ibid*

<sup>114</sup> J.L. BRIERLY, *the Law of Nations; AN Introduction to International LAW of Peace* (Humphrey Waldock Ed., 6th Ed.1963) (1928), P.280

<sup>115</sup> *Ibid*.

<sup>116</sup> The Republic of Albania, ICSID Case No ARB/07/21 Award, Para. 79, (Herein after *Pantechniki v Albania*) <https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf> Accessed on August 3, 2021

<sup>117</sup> Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company vs. The Government of Mongolia, UNCITRAL, Award on jurisdiction and responsibility, Para 324, <https://www.italaw.com/sites/default/files/case-documents/ita0622pdf>. Accessed on august 7, 2021

<sup>118</sup> *ibid*.

<sup>119</sup> *Pantechniki V. Albania*

<sup>120</sup> Schureuer, Full Protection and Security



protection”.<sup>121</sup> The responsibility for violations of the FPS standard by the state receiving the investment should be proportional to its resources.<sup>122</sup>

In *Noble Ventures v. Romania*, the Arbitration Tribunal explicitly stated that “... the general duty to provide protection and security for foreign nationals... is not a strict standard but a standard requiring the state to act with due diligence”.<sup>123</sup> The Arbitration Tribunal in *Siag v. Egypt* also found that the liability standard under the FPS standard is not absolute and that the state receiving the investment must act with due diligence in preventing investment damage.<sup>124</sup>

#### **2.2.3.1.4. Compensation for Losses**

Compensation for losses is provided due to non-compliance with FPS Standard. It protects a combination of some or all of the following types of man-made violence: “war or other armed conflicts”, “civil strife”, “revolution”, “a state of national emergency”, “revolt”, “insurrection”, or a “riot or similar situation”. Sometimes it also includes natural disasters.<sup>125</sup> Investors may seek to recover losses suffered in the context of an armed conflict under specific war clauses, as well as under traditional standards of investment protection, including expropriation, fair and equitable treatment, and full protection and security.<sup>126</sup> Protection owed under this clause is generally formulated as a relative standard, thereby leaving the host country with the choice of whether to compensate, but requiring that any action is taken be on a non-discriminatory basis.<sup>127</sup> Although most bilateral agreements provide for compensation for losses, there is some slight degree of variation in the use and content of this clause. Some treaty contains clauses to non-discriminatory treatment concerning measures adopted relating to losses suffered owing to armed

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<sup>121</sup> Rumeli Telecom A.S. V. Kazakhstan, ICSID CASE NO.ARB/O5/16, AWARD, 668-670 (JULY 29, 2008).

<sup>122</sup> *Pantehniki v. Albania*, Para 77

<sup>123</sup> *Noble Ventures V Romania*, ICSID Case No ARB/01/11 of October 2005, para.164 (here in after *Noble Ventures V Romania*)

<sup>124</sup> *Waguih Elie George Siag and Clorinda Vecchi vs. The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, Para. 447, (Hereinafter *Siag v. Egypt*) <https://www.italaw.com/sites/default/files/case-documents/ita0786-0.pdf>. Accessed on august 7, 2018

<sup>125</sup> UNACTAD (2010) , P49

<sup>126</sup> Stephen Jagusch and Nicole Duclos, *Compensation for the Breach of Relative Standards of Treaty Protection*

<sup>127</sup> United Nations Conference on Trade and Development (UNCTD-2008), *Identifying core elements in investment agreements in the Asia–Pacific Economic Cooperation (APEC) region*

conflict or civil strife. For instance, Egypt- Turkey BIT contain such a clause;<sup>128</sup>

### Article III: - Compensation for Losses

*Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favorable than that accorded to its investors or to investors of any third country, whichever is the most favorable treatment, as regards any measures it adopts about such losses.*

Provisions of this type are common in BITs and the same holds in NAFTA. These clauses of this type indicate that the mere occurrence of investment losses does not render the government responsible to compensate for the losses.<sup>129</sup> The effect depends on measures taken by the host State concerning host State nationals or nationals of third countries investors. In other words, these clauses do not create substantive rights to restitution or compensation unless the host state violates non-discrimination clauses.

On the other hand, some treaty contains a clause that creates an absolute obligation on the host state and creates a substantive right to restitution or compensation. For instance, Article 10(1) of the Energy Charter Treaty (ECT) requires states to provide the most constant protection and security to the investments of an investor. This is known as the full protection and security standard. Further, it contained compensation for losses as follows:-

#### *Article 12: Compensation for Losses*

1. *an Investor of any Contracting Party which suffers a loss concerning any Investment in the Area of another Contracting Party owing to war or other armed conflicts, state of national emergency, civil disturbance, or another similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favorable of that which that Contracting Party accords to any other Investor, whether its Investor, the Investor of any other Contracting Party, or the Investor of any third state.*
2. *Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from*
  - (a) *requisitioning of its Investment or part thereof by the latter's forces or authorities; or*
  - (b) *Destruction of its Investment or part thereof by the latter's forces or authorities, which*

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<sup>128</sup>Egypt-Turkey BIT (1996)

<sup>129</sup> AAPL V. Sri Lanka Para 79

*were not required by the necessity of the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate, and effective.*

According to this clause, the compensation is due only if the adverse action was caused by government forces or authorities and not by rebel forces. The duty to make restitution or pay compensation in the case of requisitioning of the investment or part thereof is independent of military necessity: even if the requisitioning was mandated by military necessity restitution or compensation is still due. By contrast, restitution or compensation for destruction is due only if the forces acted more than military necessity. In other words, collateral damage arising from military action that is lawful under the *Jus-in-Bello* is not covered. This corresponds to the situation under customary international law.<sup>130</sup> This kind of compensation clause does not impose an absolute obligation to compensate; rather, national treatment and most favored nation treatment would apply. By contrast, in cases where the host Government has requisitioned the property or has caused unnecessary damage to the investment, there would be an absolute obligation to compensate.

### **2.2.3.2 Fair and Equitable Treatment (FET)**

The FET standard overlaps with the FPS standard, even though they are separate standards, in many respects. Overlapping of these two standards could be explained by the fact that they both originate from the same norm of international customary law, but over time, different practices have developed in the implementation of these two standards.<sup>131</sup> Thus the FPSS obliges the states receiving investments to act with due diligence, in the amount that can be reasonably expected, to protect foreign investments and investors, at the same time putting at their disposal the adequate legal system for their protection.<sup>132</sup> The FETS, on the other hand, is the standard the aim of which is to “fill the gaps that may have been left by other, more concrete standards (including the FPSS) to realize the protection of investors envisaged by the treaties”.<sup>133</sup> The FETS consists mainly of the obligation of the recipient country to

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<sup>130</sup>Schreuer, *The Protection of Investments in Armed Conflicts*, p.175

<sup>131</sup> Foster, K., G., *Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, *Vanderbilt Journal of Transnational Law*, Vol. 45, No. 4, 2012, p. 1137.

<sup>132</sup> *Ibid*, p.1103

<sup>133</sup> Dolzer, R.; Schreuer, C., *Principles of International Law*, 2<sup>nd</sup> ED, Oxford University Press, 2012, p.130

refrain from certain forms of actions that could prove detrimental for the investor or the investment, whereas the FPSS represents the obligation of the host state to actively work on the creation of an environment that guarantees the security of the investor and the investment.<sup>134</sup> As Scheuer says, it seems to be more justified to regard these two as different standards, since it seems rather unconvincing that these two standards, which are separately stated in the treaties, should have the same meaning.<sup>135</sup> This view was also confirmed by the Arbitration Tribunal in *Jan de Nul v. Egypt* when it concluded that “the notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the bilateral investment treaty (BIT), even if the two guarantees can overlap”.<sup>136</sup> A similar opinion was expressed by the Arbitration Tribunal in *Frontier v. The Czech Republic*: “full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the part of the host state to desist from behavior that is unfair and inequitable”.<sup>137</sup>

“Fair and equitable treatment” provides a basic standard against which the behavior of the host country about foreign investments can be assessed. The obligation to provide “fair and equitable treatment” is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries.<sup>138</sup> It is an “absolute”, “non-contingent” standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the “relative” standards embodied in “national treatment” and “most favored nation” principles which define the required treatment by reference to the treatment accorded to other investment.<sup>139</sup> There exist disparities in opinions concerning whether the FET gives treatment more than what is

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid, p.132

<sup>136</sup> Jan de Nul N.V. and Dredging International N.V. vs. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, Para 269, <https://www.italaw.com/sites/default/files/case-documents/ita0440.pdf> Accessed on august 10, 2021

<sup>137</sup> Frontier Petroleum V. The Czech Republic Para 296

<sup>138</sup> See UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, 1998. Also see A. A. Fatouros, “Government Guarantees to Foreign Investors”, Columbia University Press (1962), pp. 135-141, 214-215.

<sup>139</sup> Ibid.

provided under customary international law or not.<sup>140</sup> The first opinion is that the FET is synonymous with the minimum standard of treatment of foreign investment required under customary international law.<sup>141</sup> This means that it does not set a higher standard than that required under customary international law. Several Tribunals have also found no distinction on the facts between the standard of treatment required under customary international law and the fair and equitable treatment treaty standard.<sup>142</sup> NAFTA (1994) under article 1105 requires parties to accord investments of investors “treatment by international law, including the fair and equitable treatment”. In the NAFTA context, the parties have issued an interpretation clarifying that this does not require treatment beyond what is required under the customary international law minimum standard of treatment of aliens.<sup>143</sup> The new 2004 US Model BIT<sup>144</sup> in its article 5 goes further and attempts to define the minimum standard of treatment. They provide that: “Each Party shall accord to covered investments treatment in line with customary international law, including fair and equitable treatment and full protection and security. It prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings following the principle of due process embodied in the principal legal systems of the world.<sup>145</sup> This confirms the parties’ view that the standard is a customary international law standard, not a conventional standard. The second opinion provides that the FET standard sets a higher standard of treatment than what is required under CIL. The “fair and equitable treatment standard” is not limited to the minimum standard as contained in the international customary law but takes into account the full range of international law sources, including general principles and modern treaties, and other conventional

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<sup>140</sup> OECD (2004), “Fair and equitable treatment standard in international investment law”, OECD working papers on international investment, 2004/03, OECD publishing  
<http://dx.doi.org/10.1787/675702255435>

<sup>141</sup> UNCTAD: Identifying Core Elements in Investment Agreements in the APEC Region, Series on International Investment Policies for Development, (2008), P 30. Here in after UNACTAD (2008)

<sup>142</sup> See for example Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States/Ecuador BIT), see also Azurix Corp v. Argentina,

<sup>143</sup> NAFTA Free Trade Commission (FTC) Issued A Binding Interpretation On July 21, 2001.

<sup>144</sup> US Model BIT(2004)

<sup>145</sup> Ibid

obligations.<sup>146</sup> The case between *Saluka v. the Czech Republic* recognizes that the FET requires a treatment that goes beyond what is provided under CIL.<sup>147</sup>

### **2.2.3.3. Non-discrimination**

Non-discrimination provisions guarantee investments in national and/or MFN treatment. National treatment ensures that foreign investors are not treated less favorably than domestic investors in the host country, and MFN treatment offers protection against discrimination concerning investments from different foreign countries.<sup>148</sup> These guarantees apply to investments covered by an agreement once they have been admitted into a host country by that country's domestic laws and regulations.<sup>149</sup> Post-establishment non-discrimination does not therefore normally require parties to schedule nonconforming measures since most discrimination takes place at the border.<sup>150</sup>

#### **A. Most favored nation treatment**

The MFN Guarantees investors no less favorable treatment accorded to any third parties.<sup>151</sup> It requires a party to give a "treatment no less favorable than it accords in like circumstances to investors of a 3<sup>rd</sup> state and their investments".<sup>152</sup> The MFN standard is related to the FPS standard. If the FPS standard is narrowly worded in BIT then the MFN in that same BIT could be operated to broaden the extent of the FPS standard.<sup>153</sup> This means that investors could avail themselves of the broadly worded FPS clause contained in another BIT.

The most important development in the use of MFN treatment provisions derives from jurisprudence interpreting the effect of MFN provisions over the last few years.<sup>154</sup> The *Maffezini* award's finding that the more favorable dispute settlement provisions of another BIT could be invoked led to considerable discussion about the scope of MFN provisions and whether MFN

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<sup>146</sup> UNACTAD(2008)

<sup>147</sup> *Saluka v. the Czech Republic*

<sup>148</sup> UNCTAD Series on International investment agreements II, 2010, P.74 (hereinafter UNACTAD 2010).

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> Junngam, the FPSS in international investment law, p. 81

<sup>154</sup> see UNCTAD, 2007, P. 39

treatment must be accorded for procedural provisions as well as substantive provisions.<sup>155</sup> Several further major cases have since also dealt with the applicability of the MFN standard to dispute settlement before the International Centre for the Settlement of Investment Disputes (ICSID). While some have concurred with the Maffezini finding,<sup>156</sup> others have found that MFN treatment will only extend to dispute settlement provisions where there is an unambiguous intention.<sup>157</sup>

### ***B. National treatment***

NT Accords foreign investors and their investments no less favorable treatment than nationals.<sup>158</sup> Analysis of the standard can be divided into treatment during the pre-establishment phase and treatment once investments are established in the host country.<sup>159</sup> Most BITs under their provision for the compensation of loss for investors for the non-compliance of the FPSS applies the NT, i.e. foreign investors should be treated equally with domestic investors of that particular state about the payment of compensation for the loss.

The degree to which the national treatment standard liberalizes investment flows is affected by several factors. Scope issues (definitions and exceptions) will determine whether an investment activity is captured by the treaty and the national treatment provision.<sup>160</sup> And the extent of liberalization is also dependent on whether investors are unencumbered in their establishment of an investment.<sup>161</sup> This is not strictly a question of national treatment, since there can be no direct comparison with how domestic investors are treated at the border.<sup>162</sup> Rather, it is a question of

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<sup>155</sup> Maffezini vs. Kingdom of Spain, ICSID Case No. Apr/97/7, Decision on jurisdiction of 25 January 2000 and Award of Tribunal of 13 November 2000

<sup>156</sup> Siemens V Argentina;

<sup>157</sup> Salini Construttori S.p.A. and Italstrade S.p.A. vs. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

<sup>158</sup> UNACTAD (2010)

<sup>159</sup> Ibid, p21

<sup>160</sup> Ibid, pp. 24-29.

<sup>161</sup> Ibid

<sup>162</sup> Ibid, p.29.

treating foreign investors and their investments as if they are domestic entities.<sup>163</sup>

#### 2.2.3.4 Guarantee against Expropriation

The guarantee against expropriation is one of the investment protection standards closely related to the FPSS. The compliance with the FPS standard is an element of lawful expropriation and if the unlawfulness of expropriation is established then the FPS standard is breached.<sup>164</sup> Any attempt to deal with guarantees against expropriation needs a clear understanding of what constitutes expropriation. Although various IIAs, FTAs, BITs, and literature seek to define the term taking of property commonly known as expropriation or nationalization, the meaning of the term expropriation remains controversial. The meaning of the term has also been the preoccupation of international courts and tribunals in several cases referred to them.<sup>165</sup> The 1961 Draft Conventions on State Responsibility define expropriation as:

- (a) *A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference;*
- (b) *A 'taking of investment property' includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of the property for a limited period of time.*<sup>166</sup>

In brief, 'expropriation' means the taking of the assets of investors by a host state against the wishes and will of the investor concerned. Based on jurisprudence and the literature on the subject matter, there are four types of expropriation

- Direct expropriation: it is the actual taking of property of investors by the host government by direct means, including the loss of all, or almost all, useful control of the property.<sup>167</sup> It is a traditional form of expropriation and becoming rare recently because of globalization, economic interdependence, and the increasing existence of a comprehensive body of law on investment.

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<sup>163</sup> Ibid

<sup>164</sup> Junngam, the FPSS in international investment law, p.83

<sup>165</sup> A. Redferr et al, *Law And Practice Of International Commercial Arbitration* 2004, London, Sweet, & Maxwell, 4<sup>th</sup> edition, p. 562-563. See also Chorzow Factory Case(Indemnity) (Merits) *Germany v Poland*, PCIJ Rep.(1928), Series A, No 17, par.29. See also Case Concerning Elettronica Sicula SpA (ELSI) (United States v Italy), ICJ Reports, 1989, 15, par.19.

<sup>166</sup> Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974)50

<sup>167</sup> Dolzer and Schreuer, *Principles of International Investment Law*, p.89



- Indirect expropriation is a governmental, whether administrative or legislative, measure that has an effect equivalent to direct expropriation without transfer of title or outright seizure.<sup>168</sup> This is one of the more controversial forms of expropriation.

Investors indeed need sufficient protections for their investment activities that ensure they are protected from unlawful expropriations and guaranteed compensation in the event of lawful expropriations. Hence, guarantees against expropriation in investment are intended to protect investors from the expropriation of their investment in either form of expropriation discussed above.

### **2.2.3.5 Guarantee of Repatriation of Capital**

Most investors would expect to be able to transfer any profits made from their investment back to their home state. Taking this fact, most IIAs, FTAs, and BITs states that the investor has the right to carry out the transfer in a freely convertible currency, that the transfer takes place at the official rate of exchange of the host state on the date of the transfer and the transfer will be authorized ‘without delay’, ‘without undue delay, or that the procedures are carried out ‘expeditiously’.<sup>169</sup> Free transfer of funds is a guarantee important only for foreign investors as domestic investors invest in their country there is nothing to be repatriated. The UK Model BIT prescribes that the contracting parties shall guarantee the unrestricted transfer of an investment that falls within the treaty regime and any returns on such investments.<sup>170</sup> The model BIT of UK defines returns as “the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties, and fees.”<sup>171</sup> There are various transfers covered by the provision of the laws of states. Among other things, the transfer includes:

- a) *Profits, dividends, interests, capital gains, royalty payments, management fees, technical assistance, and other fees and amounts derived from the investment;*

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<sup>168</sup> Weston, 'Constructive Takings' Under International Law: A Modest Foray into the Problem of 'Creeping Expropriation', 16 VA. J. INT'L LAW 103, (1975), p.111-13

<sup>169</sup> The East African Model Investment Code, 2006, East African Community Secretariat Arusha, Tanzania, Art 13

<sup>170</sup> Model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments UK Model BIT <<http://www.unctad.org/sections/dite/ia/docs/Compendium/en/69%20volume%203.pdf>>

(accessed Jun 2021)

<sup>171</sup> Ibid.

- b) *Proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment;*
- c) *Payments arising from the compensation from expropriation;*
- d) *Payments are according to the application of provisions relating to the settlement of disputes.*<sup>172</sup>

Transfers must be made without delay even though there is a difference between states in specifying the maximum time limit within which a transfer must be made. The guarantee for repatriation of capital is not always available as it can be subjected to restriction due to some exceptional financial or economic circumstances.<sup>173</sup> Although it is determined by the domestic law of a country, the transfer may be restricted in whole or in part if there is a balance of payment difficulties or a threat thereof, or if it is necessary to safeguard the integrity and independence of its currency.<sup>174</sup>

### **2.2.3.6. Investor-State dispute settlement**

Investor-State dispute settlement increases the level of certainty regarding the host country's business environment and depoliticizes disputes by ensuring they are decided on legal grounds. Dispute settlement provisions found in IIAs and BITs serve as a mechanism for foreign investors to take up claims directly against the host state.<sup>175</sup> The availability of courts which is represented by legal security under the FPSS starts from the recognition of it in the law and its existence in practice.

Most BITs only mention the main features and include general guidance on procedures. They place greater reliance on existing arbitration rules, often those offered by ICSID or the United Nations Commission on International Trade Law (UNCITRAL).<sup>176</sup> More recent practice amongst several APEC members, led by the NAFTA experience of Canada and the United States, has been to reform investor-state dispute settlement procedures to provide greater transparency in arbitral

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<sup>172</sup>United Nations Conference on Trade and Development (UNCTAD), Transfer of Funds, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/20 (New York: United Nations, 2000)

<sup>173</sup> Dolzer and Schreuer, Principles of International Investment Law, p.80-82

<sup>174</sup>Abba Kolo and Thomas W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties," in Standards of Investment Protection (Oxford, U.K, New York, USA: Oxford University Press, 2008), p.213-214.

<sup>175</sup> Japan-Philippines EPA (SIGNED 2006)

<sup>176</sup> UNCTAD, identifying core elements in investment agreements in the APEC region, (2008) Series on international investment policies for development, p66

proceedings, allow more involvement of interested third parties and facilitate the consolidation of claims.<sup>177</sup>

A key feature of investor-State dispute settlement provisions is the scope of claims that can be taken to international arbitration.<sup>178</sup> This varies from any dispute between an investor and the host country to disputes involving a provision of the treaty or an obligation of contracting parties.<sup>179</sup> Another key element relates to the prerequisites for accessing arbitration.<sup>180</sup> First, consultations between parties to the dispute are almost always required. Second, consent to arbitration is often provided through the inclusion of a “compulsory jurisdiction” provision. This ensures State parties to a dispute comply with the ICSID convention’s consent requirements. Thirdly, nowadays it is common that international arbitration does not require the exhaustion of local remedies before submitting a dispute to international arbitration. This reflects the fact that arbitration is considered as an alternative means of resolving a dispute rather than a subsidiary mechanism to domestic court proceedings.<sup>181</sup> Reforms have also been introduced to promote greater procedural predictability and control of the parties over the arbitration. There have also been attempts to create greater transparency by making hearings and documents to be open to the public.<sup>182</sup>

Considered together, these key features and recent developments underscore that treaty practice on investor-State dispute settlement provisions is varied and is evolving. Reforms seek to increase predictability in the arbitration process and, more generally, strengthen the rule of law.<sup>183</sup>

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<sup>177</sup> Ibid

<sup>178</sup> Ibid, p.67

<sup>179</sup> Ibid.

<sup>180</sup> Ibid, p.70

<sup>181</sup> Ibid,

<sup>182</sup> Ibid.

<sup>183</sup> Ibid, P.71

# **CHAPTER THREE**

## **INVESTMENT GUARANTEES UNDER ETHIOPIAN LAW**

### **Introduction**

It is vivid that investment guarantees available in a country play an important role in attracting investment in general and foreign investment in particular. In attempting to meet this demand of investors the government of FDRE provides guarantees to investors and the investment laws of the country have provisions that guarantee investors against different risks. The guarantees accorded to investors may be found under the constitution of a state. Regulating investment guarantees under the constitution may be important for increasing the confidence of investors in the guarantees provided by states and it reveals the degree of the government's commitment to protecting investment properties. It can also attract investors to an extent higher than what would be accomplished by other subordinate investment laws.

The FDRE Constitution regulates the property right and imposes a duty on a government to protect private property<sup>184</sup> In general and it does not specifically and separately address investment properties. Investment Proclamation No.1180/2020 includes provisions related to investment guarantees. To attract investment and achieve the investment objectives provided under article 5 the Investment Proclamation, among other things, incorporated guarantees to investors which are designed to give protection for their investment activities. The Proclamation provides a guarantee against expropriation and for remittance of funds.<sup>185</sup> So far Ethiopia concluded several Bilateral Investment Treaties (BITs).<sup>186</sup> Even though they are helpful only for foreign investors all the BITs concluded by Ethiopia have provisions dealing with investment guarantees that are designed to protect the investment activities of investors against risks of investment.<sup>187</sup> Among other things, all the BITs

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<sup>184</sup> Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1year, No. 1. Art.40 and 13 [here in after 'Constitution of FDRE']

<sup>185</sup> Investment Proclamation, Art 19 and 20

<sup>186</sup> So far 33 BITs have been concluded. For example Ethiopia has concluded BITs with Algeria, Austria, China, Denmark, Djibouti, Egypt, France, Germany, India, Israel, Italy, Netherlands, Russia, Spain, Sweden, South Africa, Sudan, Turkey, United Kingdom, e.t.c.

<sup>187</sup> See some of the provisions contained in Art 5 & 6 of Ethiopia-Algeria BIT, Art 4, 5 & 6 of Ethiopia-Germany BIT, Art 4, 5 & 6 of Ethiopia-Israel BIT, Art 4, 5 & 6 of Ethiopia-Russia BIT, Art 4,5 & 6 of

have provisions that address guarantees such as FPS, FET, Non-discrimination, guarantee against expropriation and compensation, guarantee for repatriation of capital, and investor-state dispute settlement.<sup>188</sup>

Accordingly, this chapter will try to discuss the guarantees provided to investors in Ethiopia under BITs to which Ethiopia is a party; the FDRE Constitution; and Investment Proclamation No.1180/2020. Specifically, this chapter will evaluate the extent of protection provided by these guarantees and the possible available gaps in the investment laws in addressing investment guarantees available in Ethiopia.

### **3.2. Full Protection and Security standard under Ethiopian Law**

Ethiopia is a party to MIGA. There are different investment risks covered under the MIGA and one of them is the guarantee against loss resulting from war and civil disturbance.<sup>189</sup> The guarantee Protects against loss from, damage to, or the destruction or disappearance of, tangible assets or total business interruption (the total inability to conduct operations essential to a project’s overall financial viability) caused by politically motivated acts of war or civil disturbance in the country, including revolution, insurrection, coups d’état, sabotage, and terrorism.<sup>190</sup> The cover protects against losses directly attributable to the physical damage of assets and total business

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Ethiopia-Sweden BIT, Art 5,6,& 7 of Ethiopia-Spain. For instance, Art 5 of Ethiopia-Algeria BIT provides that “

- 1) Investment of investors of one Contracting Party shall enjoy full protection in the territory of the other Contracting Party.
- 2) Neither Contracting Party shall take any measures of expropriation or nationalization or any other similar measures having the same nature and the same effects against investments of investors of the other Contracting Party.

If requirements of public purpose or national interest justify derogation from this paragraph, the following conditions must be fulfilled:

- a) The measures shall be carried out under due process of law;
  - b) The measures shall not be discriminatory; and
  - c) The measures shall be accompanied by prompt, adequate and effective compensation.
- 3) The amount of such compensation shall correspond to the market value of the expropriated investment, on the day before such expropriation, nationalization or similar measure became effective or public knowledge.
  - 4) The compensation shall be paid in freely convertible currency at the official exchange rate applied pursuant to the exchange regulation of the Contracting Party on which it is incumbent pay the said compensation. Such compensate shall be freely transferable.

<sup>188</sup> Ibid.

<sup>189</sup> Convention establishing MIGA, art 11 (4)

<sup>190</sup> MIGA, INVESTMENT GURANTEE GUIDE, July 2015. Available at [www.miga.org](http://www.miga.org) (last accessed on Feb.28/2022).

interruption.<sup>191</sup> For total business interruption, compensation would be based on the net book value of the total insured equity investment or the insured portion of the principal and interest payment in default as a direct result of a covered war and civil disturbance event.<sup>192</sup> For tangible asset losses, MIGA will pay the investor's share of the lesser of the book value of the project assets, their replacement cost, and the cost of repair of the damaged assets.<sup>193</sup> Temporary business interruption may also be included upon a request from the investor and would cover three sources of interruption: damage of assets, forced abandonment, and loss of use.<sup>194</sup> For short-term business interruption, MIGA will pay unavoidable continuing expenses and extraordinary expenses associated with the restart of operations and lost business income or, in the case of loans, missed payments.<sup>195</sup> This coverage encompasses not only violence in the host country directed against a host country government, but also against foreign governments or foreign investments, including the investor's government or nationality.<sup>196</sup>

Concerning the protection of Investments, most BITs in Ethiopia provide for each Contracting Party to encourage investments of investors of the other Contracting Party in its territory, and to admit such investments according to its laws and regulations.<sup>197</sup> Investments of investors of either Contracting Party should be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party undertakes to ensure that the management, use, enjoyment, or disposal, in its territory, of investments of investors of the other Contracting Party shall not be impaired by unreasonable or discriminatory measures.<sup>198</sup>

The FPS standard is formed differently under different BIT. For instance, in the treaty between Ethiopia; - With china<sup>199</sup>, under art 3, it is framed as "...protection...", with Belgian-Luxembourg economic union<sup>200</sup>, under art 3, it is framed as "continuous

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<sup>191</sup> Ibid

<sup>192</sup> Ibid

<sup>193</sup> Ibid

<sup>194</sup> Ibid

<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> Look for e.g. the agreement between Ethiopia and Qatar, china, UK...etc.

<sup>198</sup> Ibid.

<sup>199</sup> BIT between Ethiopia and China, art 3. (1998).

<sup>200</sup> BIT Between Ethiopia And Belgian-Luxembourg Economic Union, (2003), Under Art 3

protection and security, with France<sup>201</sup>, art 5, it is framed as “full and complete protection and security, with Algeria<sup>202</sup>, art 5, it is framed as “...full protection”, with the UK<sup>203</sup>; South Africa<sup>204</sup>; Sweden, Germany<sup>205</sup>, Austria<sup>206</sup>, Israel<sup>207</sup>, Qatar<sup>208</sup> ... it is framed as “Full Protection and security”. The law does not make it clear whether the difference in terminology makes a difference in the treatment provided under the standard or they just refer to the same thing type of treatment.

Under those BITs, it is not defined whether the standard covers physical and/or legal security and the standard of liability of the host state. They also don't make any reference to the international minimum standard under CIL. International arbitration provides that the reference of the FPSS to the minimum standard under CIL implies the limitation of the standard only to physical security.<sup>209</sup> Although these BITs do not specify the level of protection and the degree of liability of the host state, they do provide the clauses stating the governments' liability to compensate for losses. Most BITs include a clause on protection for losses due to war, armed conflict, a state of national emergency, revolt, insurrection, civil strife, riot, or other similar events. Among the agreements signed by the Ethiopian government, there is some slight degree of differences in the conditions under which the government is required to pay compensation. For instance, The BIT between Ethiopia and Egypt (2006) stated that:-

*Article 4:- compensation for losses*

*Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection, or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to investors of any other third State<sup>36</sup>*

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<sup>201</sup> BIT between Ethiopia and France (2003), art 5

<sup>202</sup> BIT Between Ethiopia And Algeria (2002)

<sup>203</sup> BIT between Ethiopia and Germany,(2004) art 2

<sup>204</sup> BIT between Ethiopia and Great Britain (2009), art 2

<sup>205</sup> BIT between Ethiopia and Germany, (2004),art 4

<sup>206</sup> BIT between Ethiopia and Austria(2004) art 3

<sup>207</sup> BIT between Ethiopia and Israel Art 2,(2003)

<sup>208</sup> BIT between Ethiopia and Qatar, (2017) art 3

<sup>209</sup> Miljenić, FPSS in international investment law.

It comprises those agreements that grant MFN concerning any compensation given by the host country for losses caused by war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection, or riot. The government is free to decide whether it wants to compensate or not but has to do so on a non-discriminatory basis. If a government wants to compensate foreign investors of any third country, it must compensate investors covered by the treaty in a no less favorable manner than those investors of any 3<sup>rd</sup> country. In some instances, some BITs extend the government obligation to grant national treatment concerning any compensation no less favorable than that accorded to its investors [NT] or investors of any third country [MFN].<sup>210</sup> The same holds to BITs which are signed between Ethiopia and Algeria, China, Denmark, India, Malaysia, Netherlands, Sudan, Sweden, Tunisia, United Arab Emirates.

On the other hand, in some situations, different BITs impose an absolute obligation on the government regardless of any applicable relative standard of protection. In cases where the host government has requisitioned the property or has caused unnecessary damage to the investment, there would be an absolute obligation to compensate.<sup>211</sup> The same holds for BITs which are signed between Ethiopia and UK, Finland, Iran, Kuwait, South Africa, Spain.

The above-mentioned point indicates that under Ethiopian BITs relative standards of protection are applied as a principle. The government is free to decide whether it wants to compensate or not but has to do so on a non-discriminatory basis. In exceptional situations, there would be an absolute obligation to compensate where the losses were caused by government forces or authorities and not by rebel forces. In another word, the government must make restitution or pay compensation in the case of requisitioned property or has caused unnecessary damage to the investment.

When speaking of compensation it is required that a substantive standard of compensation be included in a given governing law. However, most BITs fail to do so. Most of the time they only establish both NT and MFN treatment as regards compensation. In this case, the *AAPL v Sri Lanka* provided that in the absence of such stipulation in the related laws then the standard of compensation had to be

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<sup>210</sup> E.g. Ethiopia-Turkey BIT (2000)

<sup>211</sup> E.g. Ethiopia-Qatar BIT (2017)



determined according to general rules of international law and standards previously developed concerning a states' failure to comply with its "due diligence" obligation under the minimum standard of CIL.<sup>212</sup> The standard of compensation under CIL is that the compensation should cover the loss suffered as a result of the measure at issue. In other words, the amount of compensation should adequately reflect the "full value of the lost investment as a result of said destruction and all damages incurred as a result thereof."<sup>213</sup> The value taken by the tribunal was the value that was on the date immediately preceding the day of the destruction of the investment project.<sup>214</sup> In determining the full value, there are two methods of the standard of compensation under CIL. The first one is looking for the market value of the damaged investment property on the day before the destruction happened if any, and the second method which should take place in the absence of the first method is a reasonable price. The second method is used by estimating the reasonable price a willing purchaser would offer for the investment in question. But still, what it constitutes and how a "reasonable price" is determined is left for the interpretation to be given by an arbitration award. The award held that, while determining the reasonable price among other things; debts, loans, interest, goodwill, and profitability should be taken into consideration.<sup>215</sup>

About issues related to interest and time of payment of compensation, international arbitral tribunals have long-established rules, according to which it was "just and reasonable to allow interest at a reasonable rate" and the interest should run "from the date when the states international responsibility became engaged."<sup>216</sup> According to the tribunal in AAPL v Sri Lanka, the interest should be paid from the date of the request for arbitration (not the date when the damage was inflicted) because that is the date when the state's international responsibility became engaged.<sup>217</sup>

None of the Ethiopian BITs provide for a substantive standard of compensation for the loss. They only establish the national and/or MFN treatment during compensation. The assessment method of the compensation, what should be taken

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<sup>212</sup> AAPL v Sri Lanka, Para 67

<sup>213</sup> *Ibid.*, para 88

<sup>214</sup> *Ibid.*, para 95

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*, para 113-114

<sup>217</sup> *Ibid.*, para 115

into consideration during the assessment of compensation, interest rate, and time of payment of compensation are left to the discretionary power of the interpreting/implementing body.

### **3.3. Fair and Equitable Treatment (FET) in Ethiopia**

Almost all BITs accord the FET to investment and activities associated with the investment of investors in the country.<sup>218</sup> They also require that the treatment accorded should not be less favorable than that accorded to investments and activities associated with such investments of its investors or investors of any third state.<sup>219</sup> As regards the management, maintenance, use, enjoyment, or disposal of their investment the host state is obliged to accord FET which in no case be less favorable than that accorded to its investors or investors of any third state.<sup>220</sup> BITs in Ethiopia do not clarify whether the FET is an independent norm or anonymous to the minimum standard under CIL. None of the BITs makes the reference of international law or customary law to the FET which makes it hard to determine whether the standard under those BITs is an independent norm or not. Such issues are determined through interpretation of the standard by arbitration awards or judicial courts. However, there exists no award or decision that determines the extent of the standard, yet. NAFTA (1994) under article 1105 makes a reference of the international law to the FET and through interpretation provides that the FET standard does not provide treatment beyond what is required under the customary international law minimum standard of treatment of aliens.<sup>221</sup> The new 2004 US Model BIT<sup>222</sup> also provides that the treatment accorded to investors should be in accordance with customary international law.

The dependence or independence of the standard to/from the CIL and what the FET standard constitutes should be determined expressly in the BITs, through arbitration awards or judicial decisions.

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<sup>218</sup> See for instance agreements between Ethiopia and Denmark (2001), art 3: Ethiopia- China BIT (1998), art. 3

<sup>219</sup> Ibid

<sup>220</sup> Ibid

<sup>221</sup> NAFTA Free Trade Commission (FTC) issued a binding interpretation on July 21, 2001.

<sup>222</sup> US Model BIT(2004)

### **3.4. Non-Discrimination under the Ethiopian law**

Most Favored Nation Treatment and national treatment guarantees non-discrimination in treatment. The MFN guarantees the non-discrimination in treatment of foreign investors from other foreign investors of foreign countries, while the NT guarantees the non-discrimination in treatment of foreign investors from domestic investors.<sup>223</sup> These guarantees apply to investments covered by an agreement once they have been admitted into a host country in accordance with that country's domestic laws and regulations. Post-establishment non-discrimination does not require parties to schedule nonconforming measures since most discrimination takes place at the border.<sup>224</sup>

Ethiopian bilateral treaties guarantees that investors should be treated no less favorably than that granted to domestic investors or investments of investors of 3<sup>rd</sup> parties.<sup>225</sup> It is also provided that neither contracting parties should subject investors of the other contracting party, as regards their management, maintenance, use, enjoyment, or disposal of their investments, to the treatment of less favorable than that which accords to its investors or investors of any 3<sup>rd</sup> state.<sup>226</sup> As an exception, the MFN treatment and NT is not construed to oblige one contracting party to extend to the investors of the other, the benefit of any treatment, preference, or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation, any existing or future custom union and free trade area.<sup>227</sup>

### **3.5 Guarantee against Expropriation in Ethiopian law**

Expropriation is a right of a sovereign state-permitted under international investment law.<sup>228</sup> Relying on the doctrine of sovereignty and sovereign equality, every sovereign state had the right to expropriate or nationalize foreign assets provided that the foreign investor was provided with compensation.<sup>229</sup> That means after admission of investment a sovereign state is entitled to expropriate the property of an investor. But

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<sup>223</sup> UNCTAD Series on International investment agreements II, 2010, P.74

<sup>224</sup> OECD(2004), "Fair and equitable treatment standard in international investment law", P.35

<sup>225</sup> See for instance agreements between Ethiopia and Denmark (2001), art 3: Ethiopia -china BIT art 10

<sup>226</sup> Ibid.

<sup>227</sup> See for instance Ethiopia -Israel BIT, art 7

<sup>228</sup> Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29<sup>th</sup> Sess., Supp.No.31 (1974) 50, article 2.

<sup>229</sup> UNCTAD (2012)

this right of states is limited by the payment of compensation in a manner provided under the appropriate provision of the law which can be found either in BITs or domestic laws of the host state.<sup>230</sup> Hence, one of the threats of investors is the risk of expropriation of investment by the host state, and protection against expropriation is an essential guarantee for investors.

Art. 40 of the FDRE Constitution provided that:

*Article 40*

*Right to property*

1. *Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed by law on account of public interest, this right shall include the right to acquire, to use, and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.*
2. *“Private property”, for this article, shall mean any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.*  
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- 7 *Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.*
- 8 *Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.*<sup>231</sup>

As can be seen from the above provision, in specifying the persons whose properties are protected the FDRE Constitution employs the term ‘every Ethiopian citizen’. Such terminology may lead to at least two ways of interpretation. First, the provisions can be interpreted as they protect only Ethiopian investors excluding foreign investors as

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<sup>230</sup> Surya p Subedi, *International Investment Law*, p.121

<sup>231</sup> *Ibid*, art 40

they expressly use the terms every Ethiopian or every Ethiopian citizen.<sup>232</sup> Second, the provisions may be interpreted as it accords protection for properties of foreign investors. Because companies or entities established and owned by foreign investors may be considered as Ethiopians as Ethiopian nationality is conferred both to natural and legal persons. Hence, the provisions are considered as they referred to both natural and legal persons who have Ethiopian nationality.<sup>233</sup> Therefore, even if foreign natural persons have no Ethiopian nationality, the enterprise they established and owned may be considered as legal persons who have Ethiopian nationality.

On the one hand, the provisions of the Constitution are open to such kind of interpretations, and investors on other hand need clear provisions of the law which shows the commitment of a state towards the protection of their investment. Even if one accepts the second interpretation and concludes that foreign investments are equally protected under the FDRE Constitution, the manner of protection of investment properties in general and foreign investments, in particular, is under question. The Constitution regulates investment properties under the framework of general property. But, taking into account the special features of investment properties in general and foreign investments in particular a separate regulation that includes investment guarantees is more than important. The separate treatment of investment property under the Constitution may reflect the government's commitment to attracting investment and makes investors feel secure and decide to participate in long-term investments with fixed assets. Because, unlike other subordinate laws, the Constitution is not easily altered by the unilateral act of the government taking into account its rigid amendment procedures.<sup>234</sup> Hence, having a Constitutional base creates certainty for the guarantees provided under other subordinate laws.

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<sup>232</sup> Article 2(5)&(6) of Investment Proc. No.1180/2020 defines domestic and foreign investors as “domestic investor” means an Ethiopian national or a foreign national treated as a domestic investor as per the relevant law, and includes the government, public enterprises as well as cooperative societies established as per the relevant law; while, “foreign investor” means a foreigner or an enterprise wholly owned by foreign nationals, having invested foreign capital in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor;

<sup>233</sup> Tilahun Weldie, *The Legal Regime Governing Minerals in Ethiopia*, p.53

<sup>234</sup> FDRE constitution 105&106

Investment Proclamation No.1180/2020 includes provisions related to investment guarantees. The Proclamation provides a guarantee against expropriation and for remittance of funds.<sup>235</sup>

In recognizing guarantee against expropriation Proc. No.1180/2020 provided that “the government may expropriate any investment undertaken under this proclamation for a public interest, in conformity with requirements of the law, and on a non-discriminatory basis”.<sup>236</sup> Hence, under the Ethiopian legal system, as a principle, no investment can be expropriated or nationalized.<sup>237</sup> Expropriation of investment property is possible only when it is required by the public interest and in compliance with the requirements set by the law.<sup>238</sup> In international jurisprudence, there are lawful expropriations and unlawful expropriations. Lawful expropriations are those carried out against compensation and under conditions and requirements set by the provision of the appropriate law.<sup>239</sup> An unlawful expropriation includes those carried out without compensation or those in violation of the conditions and requirements set by the law.<sup>240</sup> In international law, unlawful expropriation calls for *restitution in integrum*, or if impossible, its financial equivalent including its future profit, and for a lawful expropriation there is an obligation to pay compensation.<sup>241</sup> Similarly, Art 19 of Investment Proc. No.1180/2020, guarantees lawful compensation and expropriation which did not conform to the conditions and requirements set therein are considered as a breach of contract and out of the scope of Art 19 of the Proclamation.

Even though the provision of the Proclamation incorporates a guarantee against expropriation many issues related to guaranteeing against expropriation remain unregulated. To begin, the Proclamation did not address the issue of what constitutes an ‘expropriation’. While this issue is the center of the disagreement between a host state and investors and several cases referred to international courts and tribunals

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<sup>235</sup> Investment Proclamation, Art 19 and 20

<sup>236</sup> Investment proclamation , Art 19(1)

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Homayoun Mafi<sup>1</sup>, Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards Of The Iran-United States Claims Tribunal, *Intl. J. Humanities*, 2011, vol.18, no.1, pp.83-102.

<sup>240</sup> Ibid

<sup>241</sup> Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts (2001), 87: States for internationally wrongful acts (2001), p.87: see also Waste Management, Inc. vs. United Mexican States, ARB (AF)/00/3, Award, 30 April 2004, Para. 174

involve the issue of what constitutes an expropriation.<sup>242</sup> Like the FDRE Constitution, the Proclamation lacks a well-defined scope of expropriation, even the reading of the Amharic version of Art 19(1) reveals that the law guarantees only direct expropriation.<sup>243</sup> Rather than direct expropriation which is uncommon currently, other forms of expropriation such as indirect expropriation, creeping expropriation, and regulatory expropriations are the most common and recent threats or risks of investors.<sup>244</sup> However, Art 19 does not indicate whether the same protection is accorded to investors when an indirect expropriation, a creeping expropriation, or regulatory expropriation takes place.

Indirect expropriation may be defined as a state measure or series of measures that cause injury to investment and have an effect equivalent to direct expropriation without formal transfer of title or outright seizure. Creeping expropriation may be defined as a form of indirect expropriation in which a cumulative effect of measures or series of measures interferes in the investment undertaking of investors. It is a situation where investment is injured by an accumulation of state actions over time.<sup>245</sup> While regulatory expropriation refers to another form of indirect expropriation in which a measure taken by the host government for regulatory purposes has an impact on the economic value of the assets owned by the foreign investor. The determination of whether a measure or series of measures of a government constitute an indirect expropriation creeping expropriation or regulatory expropriation requires a case-by-case, fact-based inquiry that considers among other factors:

- a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a government hurts the economic value of an investment does not establish that an indirect expropriation has occurred;
- b) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations (i.e. there must be some form of deprivation of the investor in the control of the investment, the management of

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<sup>242</sup> Surya p Subedi, *International Investment Law*, p.120

<sup>243</sup> The Amharic version of Art 19(1) of Investment Proclamation No.1180/2020 provides that “መንግስት በዚህ አዋጅ መሠረት የሚካሄድ ማንኛውም ኢንቨስትመንት ለህዝብ ጥቅም፡ በህግ አግባብ፡ እና ያለመድልዎ ሊወስድ ይችላል።”

<sup>244</sup> Article 11 of MIGA convention

<sup>245</sup> Facility 2003, Para 114: See also *Rumeli Telekom A. S v Kazakhstan* Para. 708.

day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part); and

- c) the character of the measure or series of measures; for instance, non-discriminatory regulatory actions of a government that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment do not constitute indirect expropriations.<sup>246</sup>

The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.<sup>247</sup> In addition, the purpose for which a certain measure is warranted is irrelevant in the determination of whether such measure constitutes an expropriation in either form.<sup>248</sup> That means no matter how laudable and beneficial to the society as a whole or no obvious benefit to the state concerned, a measure or series of measures can be considered as expropriation and warranted payment of compensation provided that the above three cumulative factors exist and the nature each specific case in our hand demands so.<sup>249</sup>

Case law confirms that the following measures constitute expropriation of property in either form of indirect expropriation:

- Disproportionate tax increase (In the Matter of Revere Copper v. OPIC, Award 1978)
- Arrest and expulsion of an investor or other persons who play key roles in the investment (Biloune and others v. Ghana, UNCITRAL ad hoc Tribunal, Award 1989)
- Replacement of the owners of management by government-imposed managers (Tippetts Abbett McCarthy Stratton v TAMS-AFFA Consulting Engineers of Iran, 6 Iran-US C.T.R. 219, (1984))

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<sup>246</sup> August Reinisch, Expropriation in International Investment Law, University of Vienna, Austria, p.30

<sup>247</sup> Rumeli Telekom A.S. v. Kazakhstan, Para. 707. See also PSEG vs. Turkey, ICSID (2007) Para. 278.

<sup>248</sup> Ibid.

<sup>249</sup> August Reinisch, Expropriation in International Investment Law, University of Vienna, Austria, p.30



- Revocation of a free zone permit (Middle East Cement Shipping v. Egypt, ICSID Award, 2002)
- Revocation of an operating license (Tecmed S.A. v. Mexico, ICSID Award, 2003)
- Depriving the company of its property or control in total or in part (PSEG v. Turkey, ICSID 2007, Para 27)

In an attempt to rectify these problems some BITs that Ethiopia concluded try to incorporate a clear reference to an ‘indirect expropriation’ or employ phrases such as ‘expropriations, nationalization or any other measures having the same nature or the same effect’.<sup>250</sup> These expressions reveal that the BITs protect and guarantee against both direct and indirect expropriations. For instance, a BIT Ethiopia concluded with the government of Sweden stated that “*Neither Contracting Party shall take any measure depriving directly or indirectly, an investor of the other Contracting Party of an investment (hereinafter referred to as “expropriation”) ...*”<sup>251</sup> But still, the BITs do not give an overall solution to the problem identified as they are limited to investors who come from states that concluded a bilateral treaty with Ethiopia and have not addressed the issue at hand as detail as it requires.

Compared to the provision of the FDRE Constitution and the Investment Proclamation, the provisions of BITs related to investment guarantees are more clear and detailed to some extent. Specifically, the BITs mainly use similar expressions to refer to direct and indirect expropriations. While some of them expressly use the term ‘direct or indirect measures’ others employ phrases such as ‘expropriations, nationalization or any other measure having the same nature and effect’.<sup>252</sup> However, neither of the BITs determines the measures that constitute expropriation nor do they provide a guideline that serves as a base to determine what constitutes expropriation either direct or indirect.

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<sup>250</sup> For further information on provisions of expropriation in BITs concluded by Ethiopia see Art 5(1) of Ethiopia-Austria BIT, Art7(1) of Ethiopia-Belgian Luxemburg BIT, Art 5(1) of Ethiopia-India BIT, Art 4(2) of Ethiopia-Germany BIT, Art 5(1) of Ethiopia-Finland BIT, Art 5(1) of Ethiopia- Israel BIT, Art 5(2) of Ethiopia- Italy BIT, Art 4(1) of Ethiopia-Russia BIT.

<sup>251</sup> Agreement Between the Government of the Federal Democratic Republic of Ethiopia And The Government of the Kingdom of Sweden on the Promotion and reciprocal Protection of Investments, Art. 4(1)

<sup>252</sup> Ibid.

### 3.5.1. The Standard of Compensation during Expropriation

It has been established under international law that the host state is duty-bound to pay compensation when it expropriates a foreign investment.<sup>253</sup> But the issue of the standard of compensation during expropriation remains controversial under international law both in theory and practice. The assessment of compensation by the host State (or, failing this, by an arbitral tribunal) must be according to specific rules. This is what is termed as the standards of compensation. There are two standards concerning compensation in case of expropriation. The first standard requires the state to effect partial compensation and it is commonly known as the ‘appropriate’ compensation standard.<sup>254</sup> This standard is based on economic necessity since full compensation makes the expropriating state reluctant to expropriate investors’ property and if expropriated the expropriating state would bankrupt.<sup>255</sup> The second standard of compensation known as the ‘Hull formula’, primarily advocated by the government of the United States in its claim against the government of Mexico, requires the expropriating state to pay full compensation in ‘prompt, adequate and effective’ standard.<sup>256</sup> “Prompt, adequate and effective” compensation means that the investor should be granted, as soon as the investment is expropriated (prompt), an amount equal to the total value of its expropriated investment (adequate), in a freely transferable and exchangeable currency (effective).<sup>257</sup>

In determining the extent of compensation during expropriation Art 19(2) of Proclamation No.1180/2020 provides that:

*2) In case of expropriation of an investment affected under sub-article (1) of this article, adequate compensation corresponding to the prevailing market value shall be paid in advance.*

The provision of the Proclamation used the term adequate compensation. The term ‘adequate’ does not directly refer to appropriate compensation or prompt, effective, and adequate compensation. Hence, the standard of compensation adopted by the proclamation seems different from the above two standards and as it used the word

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<sup>253</sup>SKB Asante, International Law and Foreign Investment: A Reappraisal, 1998, *ICLQ*, 588-628, p.595.

<sup>254</sup>Henry Landau, Protection of Private Foreign Investments In Less Developed Countries - Its Reality and Effectiveness, 1968, *William And Mary Law Review*, vol.9, issu.no.3/11, [<http://scholarship.law.wm.edu/wmlr>] last accessed July, 2021.

<sup>255</sup> Ibid.

<sup>256</sup>US Secretary of State Cordell Hull in a diplomatic note addressed to his Mexican counterpart 1938

<sup>257</sup> World Bank Guidelines on the Treatment of Foreign Direct Investment(1992)

‘adequate’ it leads to a paradoxical conclusion. But that is not the real aim of the provision of the proclamation as far as the standard of compensation is concerned.<sup>258</sup> In trying to define adequate compensation the law provides that adequate compensation refers to the amount which corresponds to the market value of the expropriated investment.<sup>259</sup> If investors are compensated an amount corresponding to the market value of the expropriated investment, it is possible to conclude that investors are compensated in full and the investment proclamation of Ethiopia indirectly adopted the HULL formula which requires the payment of ‘prompt, effective and adequate’ compensation. The compensation is effective as it is required to be repatriated out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance.<sup>260</sup> Related to this, the reference date in which the market value of the expropriated investment is determined should be specified. Is it the ‘market value of the property before the decision of expropriation is made known to the public or after the decision is made known to the public? Most international and bilateral investment agreements state that the market value of the property should be determined in reference to the market value of the expropriated property before the decision of expropriation is made known to the public. This is because, in the case where an announcement is made that a property is expropriated the market value of such property will be minimized.<sup>261</sup>

In certain situations, compensation equal to the market value of the investment may be inappropriate or unjust.<sup>262</sup> For instance, it is possible to envisage compensation that would not cover the entire market value of the investment, especially in the case of indirect expropriation. To achieve a result that strikes a balance between the interests of investors and those of the host state, fair and adequate compensation should be made. And the assessment of fair and adequate compensation must be based on a fair balance between the public interest and the interests of the injured parties, taking into account all relevant circumstances, and taking into account the current and past use of

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<sup>258</sup> Investment proclamation art 19 (2)

<sup>259</sup> Ibid.

<sup>260</sup> Ibid, Art. 20(1) (g)

<sup>261</sup> W.D. Verwey and N.J.Schrijver, *The Taking of Foreign Property under International Law: A New Legal Perspective?* In *15 Netherlands yearbook of international law*, 1984, 1-96, p.34

<sup>262</sup> Abba Kolo and Thomas W. Wälde, “Capital Transfer Restrictions under Modern Investment Treaties,” in *Standards of Investment Protection* (Oxford, U.K, New York, USA: Oxford University Press, 2008), P.213-214. (Hereinafter Kolo And W. Wälde, *Capital Transfer Restrictions Under Modern Investment Treaties*)

the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of past profits made by foreign investors through the investment, and duration of the investment.<sup>263</sup>

The other issue as far as the standard of compensation during expropriation is concerned is what should be taken into consideration in the assessment of the amount of compensation payable to investors.<sup>264</sup> The investment proclamation of Ethiopia refers only to the market value of the expropriated property and it is silent on another integral part of compensation.<sup>265</sup> For instance, it is commonly accepted that interest is an integral part of compensation.<sup>266</sup> Hence, as a guarantee for investors, other parts of compensation that need to be considered in the assessment of compensation should be specified in the investment laws of Ethiopia as they have a high degree of possibility for being a factor in the decision of investors.

### **3.6. Guarantee for Repatriation of Capital under Ethiopian law**

Transfers may occur because of income generated from invested capital, refunds, compensation, loan payments, proceeds from sales, and other sources. Guarantee for repatriation of capital is usually available for foreign investors rather than domestic investors because the ultimate goal of foreign investors is to make profits and repatriate such capital out of the host state.<sup>267</sup> Rules on the transfer of funds deal with issues such as the investor's right to make transfers, the types of the amount allowed, convertibility and exchange rates, and limitations on the free transfer.<sup>268</sup>

The term 'repatriation' is not defined under the Investment Proclamation of Ethiopia. However, it can be defined as the right to transfer capital and profits from an investment operating in Ethiopia to the nation of the investor. As per article 20 of the Proclamation any foreign investors have the right to remit out of Ethiopia the following payments in convertible foreign currency at the prevailing rate of exchange on the date of remittance: profits and dividends accruing from the investment;

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<sup>263</sup>Homayoun Mafi, *Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards Of The Iran-United States Claims Tribunal*, *Intl. J. Humanities*, 2011, vol.18, no.1, pp.83-102.

<sup>264</sup> *Wena Hotels Ltd V Arab Republic of Egypt*, Award 8 December 2000 6 ICSID Reports 68, Para 98

<sup>265</sup>Investment Proclamation, Art.19(1)

<sup>266</sup> See section 38 of the ILC draft articles on the International Responsibility of States for Internationally Wrongful Acts

<sup>267</sup>Tilahun Woldie, *The Legal Regime Governing Minerals in Ethiopia*, p.51

<sup>268</sup>UNCTAD 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking', February 2007, UNCTAD/ITE/IIT/2006/5, 32-33.

principal and interest payments on external loans; payments related to a technology transfer agreement registered by Article 15 of the Proclamation; proceeds from the transfer of shares or conferral of partial or total ownership of an enterprise to another investor; proceeds from the sale, capital reduction or liquidation of an enterprise; and compensation paid to an investor under Article 19(2) of the Proclamation.<sup>269</sup>

Individual foreign nationals who are employed in an enterprise are also allowed to repatriate, in convertible foreign currency, salaries and other payments accruing from their employment under the foreign exchange laws of the country.<sup>270</sup>

Thus, from the above discussion, it is possible to conclude that the right of investors to repatriate capital under the Investment Proclamation of Ethiopia is found broad and conclusive enough to include each kind of fund an investor may acquire and need to repatriate. The provisions of the proclamation are capable to provide sufficient guarantee to investors as far as the repatriation of their capital is concerned.

However, under Ethiopian Investment Proclamation the right to repatriate funds appears to be absolute as the law does not provide restrictions on the exercise of such rights. Even the BITs concluded by Ethiopia and usually incorporated provisions that fill the gaps in the investment laws of Ethiopia did not provide restrictions on the right of investors to repatriate capitals. It is common in IIAs, FTAs, and BITs, that the right of investors to repatriate capital from the host state should be restricted in circumstances, especially during an economic crisis or balance of payment difficulties.<sup>271</sup> The absence of such restriction under the Investment Proclamation of Ethiopia would possibly lead to a dispute with an investor whenever one of the situations which require a restriction on repatriation existed and the government of Ethiopia demanded to restrict repatriation.

In addition, in incorporating the investor's right to repatriate capital, most treaties stated that the transfer will be authorized 'without delay', 'without undue delay, or that the procedures are carried out 'expeditiously'. Some others limit the maximum time limit within which a transfer must be made. For instance, the UK Model BIT

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<sup>269</sup> Investment Proclamation, Art 20(1)

<sup>270</sup> Ibid, sub-article 3.

<sup>271</sup> Kolo and W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties" p.213-214

stipulates that transfers must be made without delay.<sup>272</sup> The Ethiopian investment proclamation neither referring the term ‘without delay’, or ‘without undue delay’ nor does it limit the maximum time limit within which investors are exercising their right to repatriate capitals from their investment.<sup>273</sup> This puts investors under the mercy or otherwise of the National Bank of Ethiopia. Therefore, despite sufficient legal assurances on the right to repatriate, the delays to exercise the right may be a source of difficulty for investors looking to operate investment activities in Ethiopia.

BITs have recognized repatriation of capital either in a general language that allows the unrestricted right of investors to transfer their investment and return or provide an illustrative list of capitals that would be subject to repatriation.<sup>274</sup> As far as repatriation of capital is concerned, the provisions of the BITs go a step forward compared to the provision of the Investment Proclamation. But not all most of the BITs incorporated possible situations like serious Balance of Payments difficulties that justify the prohibition of transfer of capital out of Ethiopia.<sup>275</sup>

### **3.7. Investor-State Dispute Settlement under Ethiopian law**

The investment proclamation and BITs provide for a dispute settlement mechanism. In both laws settlement of the dispute by judicial power and ADR mechanisms such as negotiation, conciliation, and arbitration are recognized.<sup>276</sup> The legal protection under FPSS is a duty to have a well-functioning system of courts and legal remedies available to the investor. That is to say providing dispute settlement mechanisms under the law is not enough but also has to be established and be functioning in practice.

Dispute settlement provision in Ethiopia requires that a state-investor dispute should as far as possible be amicably settled between the parties to the dispute. If the dispute

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<sup>272</sup> UK Model BIT, Art. 12.

<sup>273</sup> Investment proclamation, Art 20(1)

<sup>274</sup> Ibid.

<sup>275</sup> Ibid: See For instance Art 6(3)(a) of Ethiopia-Israel BIT provided that “Notwithstanding the foregoing:

(a) When a Contracting Party is in serious balance of payments difficulties of in serious difficulties for the operation of the exchange of rate policy or monetary policy, or under threat thereof, that Contracting Party may, in conformity with the conditions laid down within the framework of the GATT and with Articles VIII and XIV of the Statues of the International Monetary Fund, adopt restrictive measures which may not go beyond what is necessary to remedy the situation, for a period not exceeding six months. The Contracting Party shall notify the other Contracting Party, as soon as possible, as to the measures taken, and the expected timetable for their removal.”

<sup>276</sup> See art 28 of the proc.: see also art.9 of the Ethiopia-China BIT, art.9 of the Ethiopia-Nigeria BIT and art 8 of the Ethiopia- Israel BIT.

is not settled amicably within the time limit provided then the investor concerned can submit their case to the competent body with judicial power in the jurisdiction of the host state or to international arbitration.<sup>277</sup> Where the dispute is referred to international arbitration, parties may agree to refer their case either to ICSID where both contracting parties are parties to the convention or to international ad hoc arbitral tribunal which, unless otherwise agreed, is established under the arbitration rules of the UNCITRAL.<sup>278</sup>

Those BITs only mention the main features and include general guidance on procedures. They place greater reliance on existing arbitration rules, often those offered by ICSID or the United Nations Commission on International Trade Law (UNCITRAL). However, despite many of these bilateral treaties point to ICSID; Ethiopia is not yet a member of the ICSID convention.<sup>279</sup> And the problem is how Ethiopia could couple up with the ICSID Community and system without the knowledge of the system itself. Under both the investment proclamation and BITs the exhaustion of local remedies is not a pre-requisite to submit to international arbitrations. Dispute settlement through arbitration is provided as an alternative means to Domestic dispute settlement mechanism rather than as a subsidiary mechanism.

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<sup>277</sup> Ibid

<sup>278</sup> Ibid

<sup>279</sup> Ethiopia has not ratified the convention yet.

# **CHAPTER FOUR**

## **INVESTMENT GUARANTEES IN ETHIOPIA: THE FULL PROTECTION AND SECURITY OF INVESTMENTS**

### **Introduction**

In Ethiopia, both foreign and domestic investors are widely engaged in manufacturing, agriculture, service, and trade.<sup>280</sup> Since 1992- 2021, there have been about 111,371 licensed domestic investment projects and about 5,879 licensed foreign direct investment projects in Ethiopia. The government among other things guarantees such investment projects the protection and safety of investors and their investment projects from political storms. The “full protection and security” standard is a guarantee given against political storms such as civil war, insurrection, riot, and other similar events. This chapter will make a legal and practical analysis about the issues of Full protection and security standard in Ethiopia, including the level of protection, degrees of state responsibility, the consequences of violation of the standard, and assessment of compensation for the loss.

### **4.1 Full Protection and Security (FPS) standard in Ethiopia**

#### **4.1.1. Formation of the standard under Ethiopian laws**

The FPSS suggests that a host state must take active measures to protect the investment from adverse effects by state organs and 3<sup>rd</sup> parties. Under the standard, a government is obliged to create an environment that guarantees the security of investment and investors.<sup>281</sup> Investment agreements contain provisions that guarantee the protection and security of investment which in the literature referred to as the full protection and security standard. Different formations are used to refer to the FPS standard. Most international arbitrations established that the difference does not have

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<sup>280</sup> Since 1992- 2021, There Have Been About 111,371 Licensed Domestic Investment Projects And 12,468 Operation. About 5,879 Licensed Foreign Direct Investment Projects Operating About 3,376 with Different Countries

<sup>281</sup> Miljenic, FPSS in International investment law, p. 40.



any major effects on the level of protection the host state is to provide.<sup>282</sup> Some international arbitration awards held that the formation of the standard has a role in determining the extent of the standard.<sup>283</sup>

The Ethiopian investment proclamation provides for guarantees against expropriation and the guarantee of repatriation but does not stipulate the FPS standard.<sup>284</sup> Article 19 of the Ethiopian proclamation is framed as “investment guarantee and protection”. But it is not clear whether this “protection” also includes/is referring to, FPS or not. In Case Laws it was affirmed that “protection” alone can even carry the same weight as “full protection and security”.<sup>285</sup> It is generally accepted that the variation of language between the formulation “protection” and “full protection and security” does not make a significant difference in the level of protection a host state is to provide. The difference in the legal formations does not result in an increase or decrease in the level of protection and security under international law.<sup>286</sup> In the past 5 years, because of civil unrest, domestic and foreign investments have been impacted and the government has compensated both types of investors. However, the legality (legal base) of the compensation provided to domestic investors is questionable because the FPS clause is only stipulated in BITs (even though under different formations and benefit only foreign investors) and not stipulated in the investment proclamation. Therefore, the only way out for the legality of the compensation seems to be to give article 19 of the proclamation a broad interpretation in a way for it to be used as a legal ground for the claim of compensation by domestic investors.

The protection and security of investment have been guaranteed in most BITs in Ethiopia. The full protection and security standard takes different forms under different BITs. For instance, in the treaty between Ethiopia; - With china<sup>287</sup> it is framed as “protection”; with Belgian-Luxembourg economic union<sup>288</sup>, it is framed as “continuous protection and security; with France<sup>289</sup>, it is framed as “complete

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<sup>282</sup> See for instance the case between AAPL V. Sri Lanka Para 50: see also Parkerings vs. Lithuania Para 354

<sup>283</sup> See for instance Biwater v Tanzania Para 729

<sup>284</sup> Investment proclamation, art 19 and 20

<sup>285</sup> Parkerings-companiet V. Lithuania Para 354

<sup>286</sup> MNSS B V vs. Montenegro, ICSID Case No ARB (AF)/12/8, Award, 351 (May 4, 2016)

<sup>287</sup> BIT between Ethiopia and China, art 3

<sup>288</sup> BIT between Ethiopia And Belgian-Luxembourg Economic Union, Under Art 3

<sup>289</sup> BIT between Ethiopia and France, art 5

protection and security; with Algeria<sup>290</sup>, it is framed as “full protection”; with the UK<sup>291</sup>; South Africa<sup>292</sup>; Sweden<sup>293</sup>; Germany<sup>294</sup>, Austria<sup>295</sup>, Israel<sup>296</sup>, and Qatar<sup>297</sup> it is framed as “Full Protection and security”. All of these clauses suggest that the host state is under an obligation to take active measures to protect the investment from adverse effects.<sup>298</sup> In practice, the difference in the formation does not have effects on the treatment of investors.<sup>299</sup> The MFN standard under those BITs can be used to solve the discrimination that might have been caused by the difference in the formation.<sup>300</sup>

#### **4.1.2. Degree of Protection of investors in Ethiopia**

The extent of protection advocated usually by the phrase full protection and security is a point of disagreement between the host state and the investors<sup>301</sup> and a center of the investor-state dispute.<sup>302</sup> The guarantee against war and civil disturbance under the MIGA Protects against loss from, damage to, or the destruction or disappearance of, tangible assets or total business interruption (the total inability to conduct operations essential to a project’s overall financial viability) caused by politically motivated acts of war or civil disturbance in the country, including revolution, insurrection, coups d’état, sabotage, and terrorism.<sup>303</sup> The cover protects against losses directly attributable to the physical damage of assets and total business interruption.<sup>304</sup> It shows that the MIGA covers only physical security and does not say anything about the legal security of investments.

In the traditional understanding, investment guarantees require the host state only to provide a certain level of police protection and physical security<sup>305</sup> and the decision of

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<sup>290</sup> BIT between Ethiopia And Algeria, art 5

<sup>291</sup> BIT between Ethiopia and Germany, art 2

<sup>292</sup> BIT between Ethiopia and Great Britain, art 2

<sup>293</sup> BIT between Ethiopia and Sweden, art 2

<sup>294</sup> BIT between Ethiopia and Germany, art 4

<sup>295</sup> BIT between Ethiopia and Austria, art 3

<sup>296</sup> BIT between Ethiopia and Israel Art 2,

<sup>297</sup> BIT between Ethiopia and Qatar, art 3

<sup>298</sup> Schreuer, *Investments, International Protection*, p.52-57

<sup>299</sup> Interview With ATO Bogale Tumdedo, Investment Agreements And Legal Expert Director, Ethiopian Investment Commission, 9 August 2021

<sup>300</sup> Ibid

<sup>301</sup> *Plama consortium limited v. Bulgaria*, ICSID Case no.ARB/03/24, 2005, Para 198

<sup>302</sup> UNCTAD, (2008), Latest Developments in Investor-State Dispute Settlement, International Investment Agreements MONITOR, No. 1.

<sup>303</sup> MIGA, INVESTMENT GURANTEE GUIDE, July 2015. Available at [www.miga.org](http://www.miga.org) (last accessed on Feb.28/2022).

<sup>304</sup> Ibid

<sup>305</sup> M.Somarajuhp *International Law On Foreign Investment*, p.142

some tribunals adopts a restrictive interpretation of the phrase ‘full protection and security. For instance, in *Noble Ventures v Romania*, it is argued that Romania was required to provide Noble Ventures with ‘full protection and security, which required Romania to enforce its laws and to provide police protection to protect the investment of foreign investors located in Romania.<sup>306</sup> But recently broad interpretations of the FPS standard were adopted by arbitral tribunals which added guarantees such as legal, economic, and regulatory protection and security in addition to physical protection.<sup>307</sup> Case law also supports the view that the formula ‘full protection and security’ covers not only protection against physical violence but also provides protection and security against infringements of the investor’s rights.<sup>308</sup> One of the reasons for the extension of the standard is the fact that modern investment treaties, as a rule, also protect intellectual property rights<sup>309</sup> that, logically, cannot be infringed by physical injuries and thus would not enjoy protection according to the strict interpretation of the FPS standard.<sup>310</sup>

The degree of protection and the standard of liability of the host state can be clearly expressed in BITs. In the absence of such expression, interpretation by the competent judicial body or international arbitration can help solve the problem. But in the Ethiopian case, none of the BITs provide the standard of protection and the standard of liability of state under the FPS, expressly. Under those BITs, it is not clearly defined whether the standard covers physical and/or legal security. There is also no formally decided Case that deals with the issues of the degree of protection under the standard, yet. In a contemporary world, it is viewed that the standard of protection of the FPS standard goes beyond physical protection and extends to legal protection.<sup>311</sup> Legal protection/security refers to the availability of the judicial system and the quality of the legal system which implies certainty in its norms, consequently and

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<sup>306</sup> *Noble Ventures v Romania*, para.111: see also *BG Group v Argentina* (2007)

<sup>307</sup> International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (IIA Handbook)

APEC Committee on Trade and Investment, Investment Experts Group December 2012

<sup>308</sup> *Azurix v Argentina*, Para 406-408: see also the case between *National Grid v Argentina*.

<sup>309</sup> *Ibid.*

<sup>310</sup> For instance;- the Arbitration tribunal in *Siemens v. Argentina* provides in this matter that, “As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved”.

<sup>311</sup> Alejandra M. Garro, Trade and Investment treaties the Rule of law, and standards of the administration of justice, 42 U, Miami Inter-Am. L. REV. P.267-269 (2011)

their foreseeable application.<sup>312</sup> BIT between Kuwait and Ethiopia, under the same provision for the protection of investments which stipulates the FPS<sup>313</sup>, provides for the host state to maintain a favorable environment for investments in its territory, it shall provide effective means of asserting claims and enforcing rights concerning investment. The host state is obliged to ensure to investors, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority.<sup>314</sup> This calls for the availability and quality of the judicial system in the host state. Which is one sign of the existence of legal security under the FPSS.

The definition of investment in the Ethiopian investment laws include intellectual property or other tangible or intangible business assets<sup>315</sup>, This is one of the main reason used by international arbitration tribunals, for the extension of the protection under the FPS standard to legal security. According to interpretations of several arbitration tribunals, the FPS also comprises the obligation of the state receiving the investment to secure legal protection of the investor by allowing him legal action in which the investor can state his claim, and by guaranteeing such claim to be analyzed under the domestic and international law by an impartial and fair tribunal.<sup>316</sup> The FPS standard also reaches beyond the limits of protection against physical violence and obligates the state to also provide legal protection for the investor.<sup>317</sup>

The practice in Ethiopia shows that Even though there have been investment projects damaged by the civil unrests, their cases have been decided by the office of Prime Minister (executive decisions), and the decision was implemented/executed by the Ethiopian investment commission<sup>318</sup>. However, such executive decisions do not clearly show what the extent of protection and standard of liability is. There is no formal decision made about the standard of protection in Ethiopia. Political unrests,

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<sup>312</sup> BIWATER V. TANZANIA, Para. 613 provides that Protection against legal harm is keeping the judicial system available for claimants to bring their claims and for such claims to be properly examined and decided in accordance with domestic and international law.

<sup>313</sup> See for example, BIT between Ethiopia and Kuwait, art 3(1) (1996).

<sup>314</sup> Ibid, art 3(4)

<sup>315</sup> Investment proclamation, art 2 (1) and (3); also see for instance Ethiopia-china BIT AND Ethiopia-Nigeria BIT

<sup>316</sup> Partaking vs. Lithuania, Para 360; provides that, (legal security means), the host state is under an obligation to make a functioning system of courts and legal remedies available to investor.

<sup>317</sup> Ibid

<sup>318</sup> Art.38 (22) of the investment proclamation

revolts, and civil wars happening at different times and in different parts of the country have caused harm to investors and their investments.<sup>319</sup> During the civil unrest, there was military protection provided to the investments.<sup>320</sup> But, there was still damages caused to the investments due to the violence.<sup>321</sup> To respond to such physical damages the Prime Minister decided to compensate the investors.<sup>322</sup> Investors, whose properties were damaged due to the protests and violence's in the country, brought their complaints to the Ethiopian investment commission (EIC) and the commission compiled the damaged companies to be compensated and was approved by the PM. Complain made by investors to the EIC shows the existence of the so-called legal security because it is the first step taken to resort to judicial courts or arbitration.<sup>323</sup> The response given for the complaints against the damages caused includes compensation for the loss in cash, loans, and importation of goods free of customs duty.<sup>324</sup> When the investors believe that their matters were not handled, (not solved amicably), well then they can pursue the matter further to courts or arbitration as is provided/established under the Ethiopian laws.<sup>325</sup> The legal security provides that the host state is under an obligation to make a functioning system of courts and legal remedies available to the investor. Ethiopian investment laws provide for dispute settlement mechanisms between investor and state.<sup>326</sup> And there is a functioning system of courts and legal remedies available in the country where investors can bring

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<sup>319</sup> Interview with Ato Bogale

<sup>320</sup> Interview with W/ro Fasika Alemayehu, Manager, SEDA Textile Company plc. 4 October, 2021. It is a company which was one of the victim companies during the 2016 public-violence. According to her there was an army unit camped out in front of the company for a week until the protests died. The company was named as SAYGIN DIMA Textile, during the civil disturbance; it was later changed in to SEDA Textile Company.

<sup>321</sup> Interview with Ato Balga Birhanu, Manager, Arbaminch Textile S.C: and with Ato Zerihun Teklu, Manager, WODA Metal Industry PLC on October 4 and 5, 2021 respectively: These companies were victims of the civil disturbance in 2016. According to them the violence was so intense that the protestors overwhelmed the army during the first day of the violence.

<sup>322</sup> Interview with Ato Ermias Jano, Legal Expert, Ethiopian Investment Commission, 9 august 2021

<sup>323</sup> Interview with Ato Bogale; According to him legal security is a security that provides that investors can solve the complains using the due process of law and accordingly in this case the first step is to let the EIC know, (which means in order to solve the matter amicably, which is provided as the first step to be taken in a dispute settlement in both the investment proclamation and the BITs in Ethiopia), about the complain to ask for remedies. And if the complains were not satisfactorily decided by the commission they can resort to the next level following the procedure. The next level can be going to judicial courts or international arbitration as their choices may be.

<sup>324</sup> Ibid

<sup>325</sup> Ibid

<sup>326</sup> See art 28 of the proc.: see also art.9 of the Ethiopia-China BIT, art.9 of the Ethiopia-Nigeria BIT and art 8 of the Ethiopia- Israel BIT. Under those laws judicial courts and ADR mechanisms are recognized.

their claims.<sup>327</sup> Extending the standard to legal securities helps boost the investors' confidence in the physical and legal protection of their investments.<sup>328</sup>

Since investors upon entering the host state are left under the laws and protection of the state, that state is responsible for the safety and protection of investors and their properties. Looking after the physical security of such is one among the many responsibilities of the host state. Upon failure of such responsibility, the state is held responsible.<sup>329</sup> The government's responsibilities of protecting the investment/or include the harms of any government organs and/or third parties.<sup>330</sup> Investors upon suffering any type of harm (physical or legal) are free to pursue compensations through legal remedies (negotiation, arbitration, or judicial courts) which are provided under the investment law and bilateral investment treaties in the country.<sup>331</sup> If according to decisions of executive/administrative organs, arbitration, or courts, it is found that harm was caused because of the failure of the government living up to its promise then the government is held responsible and compensation for loss is due.<sup>332</sup>

Based on The following facts it can be concluded that the degree of protection under FPS standard in Ethiopia includes both physical and legal securities; 1<sup>st</sup> military protection was provided to investors during the happenings of public violence in the country. 2<sup>nd</sup> some provisions show signs of the extension to legal security in the BITs, the BIT with Kuwait is the best example. 3<sup>rd</sup> intangible assets are included in the definition of investments under the investment laws, as it is illogical to apply physical security on them it is feasible to conclude that the standard extends to legal security. 4<sup>th</sup> practically, investors are protected from physical harm from a government organ or third parties and they are legally guaranteed to ask for compensation for loss by complaining to the investment Commission or proceeding further to arbitral tribunals as may deem necessary. In a contemporary world, the fact that The FPS standard applies to both physical and legal protection finds support

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<sup>327</sup> Interview with Ato Bogale Tumdedo, according to him there are investors who brought their claims to federal courts and there is a well-functioning system of courts.

<sup>328</sup> Interview with Ato Zerihun Teklu

<sup>329</sup> Interview with Ato Tlahun Gemechu, Advisor to the Commissioner, Ethiopian Investment Commission, 11 August 2021

<sup>330</sup> Ibid,

<sup>331</sup> Art. 28 of the investment proc. Interview With Ato Ermias Jano,

<sup>332</sup> However, according to interview with Ato Ermias, the military protection given shows the protection of physical security. But the submission of complain to the EIC does not suffice in showing that there is legal security under the standard in Ethiopia.

from different domestic and international judicial decisions.

#### 4.1.3 Liability Standard of Ethiopia

Liability standard refers to the grounds upon which liability of the state is to be measured.<sup>333</sup> That is, should it be based on due diligence, strict liability, or both based on circumstances at hand (based on who caused the damage). Different views are forwarded on this issue some say a state is required to exercise due diligence at all times<sup>334</sup> but some others say that a state should be strictly liable if the damage is caused by state organs<sup>335</sup> and the standard of due diligence should be applied when the harm is done by 3<sup>rd</sup> parties.<sup>336</sup> The prevailing view in recent times is that investment guarantees are not absolute and do not impose strict liability upon the state that grants it and a state should not be liable if it has taken all measures of precaution to protect the investment of the investor in its territory. FPS standard requires a host state to exercise due diligence in protecting investments from the adverse actions of private parties and of state organs, including law enforcement agencies and the armed forces in an equal manner.

Similar to the degree of protection the standard liability of the Ethiopian government is also not provided under the BITs. The degree of state responsibility, upon the failure of protecting the investments, should not be a type of responsibility that puts a developing country like Ethiopia at a great loss.<sup>337</sup> The adoption of strict liability on a country could cause a huge economic loss/crisis. So the state's responsibility is assessed taking into consideration the existing situation at hand, which implies that it is measured considering whether the state has acted with due diligence or not.<sup>338</sup> When violations of the FPS standard are assessed, considering due diligence, and the government is still found responsible then the next necessary measures are taken which is the administering of compensation for loss for the rebuilding of the damage caused.<sup>339</sup> Ato Ermias, a legal expert in EIC, argues otherwise. According to him the standard of liability should be a strict liability and not of a due-diligence especially

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<sup>333</sup> Host state is required to provide measures such as precautionary, preventive or remedial or responsive in nature in order to protect and secure investments

<sup>334</sup> See for instance; Freeman, *responsibility of states for unlawful acts of their armed forces*.

<sup>335</sup> Lorz, protection and security in international investment law, p.781: see also AMT V Zaire

<sup>336</sup> Miljenic, FPSS in international investment law, p.45.

<sup>337</sup> Interview with Ato Tlahun Gemechu,

<sup>338</sup> Interview with Ato Bogale Tumdedo,

<sup>339</sup> Ibid

when the attack causing harm is attributable to the government, this is because the government may slack off from protecting investments under the guise of due diligence.

In practice, the reports made as a response to the damages caused to investments/or during the 2016 and 2019/20 violence include the selected investment projects to be compensated. The selection was made considering different circumstances.<sup>340</sup> One of the circumstances taken into consideration was that, if the government, specifically the local government of the areas where the investment projects were damaged was aware or spouse to be aware of the possibilities of the occurrence of such violence and whether upon such awareness of the possibilities, the government had taken the necessary precautionary or preventive measures.<sup>341</sup> The arbitration tribunal in *Wena Hotels v. Egypt* provides that for a state to be liable it should have been informed about the situation or be aware of the risks.<sup>342</sup> Taking such circumstances at hand into consideration the selection was made and as such compensation was provided. This shows that liability was not assumed just because of the mere existence of harm.<sup>343</sup> It was reportedly, said that the harms caused were attributable to private parties (3<sup>rd</sup> parties). The compensation for loss was given to ensure the continuation of such investment projects, considering their contribution to the economy in general.<sup>344</sup> The damage to the investment was caused by the civil disturbances (3<sup>rd</sup> parties) and compensation was given to the investor according to the assessment of damage made by the government.<sup>345</sup>

Most international arbitration tribunals hold that The FPS standard does not grant investments absolute but rather reasonable protection and security determined by “due diligence”, which is to be determined depending on the circumstances or conditions of the state concerned.<sup>346</sup> That is to say that the FPS standard does not establish the

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<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> *Wena Hotels Ltd. V Arab Republic of Egypt*, Para 85,

<sup>343</sup> Interview with Ato Bogale, according to Ato Bogale during the selection of the companies to be compensated not every company made it to the list. Because, in the years from 2018-2020 about 700 companies were reported by investors to have been caused harm due to the violence that happened around the country and, only 419 made it to the list to be compensated. This shows that the standard of liability of the government is to act with due diligence (relative standard of liability).

<sup>344</sup> Ibid

<sup>345</sup> Interview with Abraham Tadla, Production Manager, BMET Energy Telecom Industry and Trade Plc. 4 October 2021.

<sup>346</sup> Scheuer, C., Full Protection and Security, *Journal of International Dispute Settlement*, Vol. 1, No. 2, 2010,



absolute responsibility of the state. Accordingly, the standard provides a general obligation for the host state to exercise due diligence in the protection of foreign investment as opposed to creating ‘strict liability which would render a host state liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the state.’<sup>347</sup>

Provisions of compensation for the loss under the Ethiopian BITs provide a relative standard of liability as a principle and absolute standard of liability in exceptional circumstances.<sup>348</sup> The absolute standard of liability is where the losses are caused by government forces or authorities.<sup>349</sup> The government must make restitution or pay compensation in the case of requisitioned property or has caused unnecessary damage to the investment.<sup>350</sup> Those exceptional rules (related to requisition and destruction of investment property), contains the actions done by the government or its authorities. In other words the government is strictly liable when the action is attributable to the government itself.

Based on the above facts, it is possible to conclude that the Ethiopian government is strictly liable in cases of damages caused by state organs and when third persons are involved, the state answers under the principle of due diligence. In other words, it is due diligence in principle and strict liability under exceptional circumstances.

## **4.2 Compensation for losses in Ethiopia**

The violation of the full protection and security standard entails upon the government, compensation for the loss. International law has established that compensation is to be determined according to general rules of international law rules and standards previously developed with regards to a states’ failure to comply with its “due-diligence” obligation under the minimum standard of CIL.<sup>351</sup> Which is the amount of compensation should adequately reflect “the full value of the investment lost as a result of said destruction and damages incurred as a result thereof”.<sup>352</sup> The value to be

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<sup>347</sup> Ibid

<sup>348</sup> See for e.g. The BITs which is signed between Ethiopia and UK, Finland, Iran, Kuwait, South Africa, Spain.

<sup>349</sup> Ibid

<sup>350</sup> Ibid

<sup>351</sup> AAPL v Sri Lanka, para 67

<sup>352</sup> Ibid, para 88

taken is, the value on the date immediately preceding the day of its destruction.<sup>353</sup> There are two methods to determine the value of the investment. The 1<sup>st</sup> one is a market value on the relevant date would be appropriate, in the absence of market value/ quote, then through, the 2<sup>nd</sup> method Which is, estimating the reasonable price a willing purchaser would have offered for the investment in question.<sup>354</sup> The reasonable price should reflect the global asset on that date, i.e. the aggregate amount of current debts, loans, interest, goodwill, lost profit (future profit)...etc.<sup>355</sup>

most BITs in Ethiopia provides that Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection, civil unrest, or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to investors of any third State.<sup>356</sup> This implies that Some Ethiopian BITs provide the obligation to compensate based on the MFN standard.<sup>357</sup> And some BITs extend the government obligation to grant national treatment (NT) concerning any compensation no less favorable than that accorded to its investors or investors of any third country (MFN).<sup>358</sup> In principle, Under Ethiopian BITs, relative standards of obligation to compensate are applied. This means that the Ethiopian government is free to decide whether it wants to compensate or not, but has to do so on a non-discriminatory basis.<sup>359</sup> The best practical example is that, for damaged investments that took place after 2018, the Ethiopian government decided not to compensate in cash. . In exceptional situations, there would be an absolute obligation to compensate where the losses were caused by government forces or authorities and not by rebel forces.<sup>360</sup>

Besides establishing both national and MFN treatment as regards compensation,

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<sup>353</sup> Ibid, para 95

<sup>354</sup> ibid

<sup>355</sup> ibid

<sup>356</sup> See For Instance Bilateral Investment Treaties Between Ethiopia And Denmark, china, Algeria,

<sup>357</sup> See For Instance Bits between Ethiopia and Egypt, (2006) Art 4.

<sup>358</sup> E.g. see Ethiopia-Turkey BIT (2000)

<sup>359</sup> See for e.g. the BITs between Ethiopia and Algeria, China, Denmark, India, Malaysia, Netherlands, Sudan, Sweden, Tunisia, United Arab Emirates.

<sup>360</sup> See for e.g. The BITs which is signed between Ethiopia and UK, Finland, Iran, Kuwait, South Africa, Spain.

some BITs contains specific rules tailored particularly to cover two types of “losses”, which are suffered in the situation of (a) requisitioning of their property by its forces or authorities or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation.<sup>361</sup> Whenever either case is established, the investor must be accorded prompt (as soon as the investment is damaged), adequate (an amount equal to the total value of damaged investment), and effective (in a freely transferable and exchangeable currency) compensation for damage or loss sustained during the period of requisition or destruction of their property.<sup>362</sup> In many cases, the better treatment accorded to investors of 3<sup>rd</sup> state could be extended to apply under the MFN. As may be the case, they still failed to provide for issues such as; the standard of compensation for loss (for instance methods for estimation/assessment (whether it is the market value/quoted price or reasonable price), interest rate, and time of payment of compensation) are not expressly determined. Hence, as a guarantee for investors, other parts of compensation that need to be considered in the assessment of compensation should be specified in the BITs of Ethiopia as they have a high degree of possibility for being a factor in the decision of investors.

In the Ethiopian practical case, as a result of the different political-unrests happening in different parts of the country and at different times, compensation for loss was paid to investors affected by the violence.<sup>363</sup> Compensation for loss was assessed by a group of people from the Development Bank of Ethiopia, Engineers from Ethiopian Insurance Corporation, and the Commercial bank of Ethiopia.<sup>364</sup> The committee was established by the PM office to make a damage assessment on the investments that were damaged due to violence happening in the country.<sup>365</sup> Some companies provided

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<sup>361</sup> See BIT between Ethiopia and Kuwait, art 5 (1 &2) (1996): see also art 4(1&2) of Ethiopia-the UK BIT (2009) and art 8(1&2) of Ethiopia-Qatar BIT (2017)

<sup>362</sup> *ibid*

<sup>363</sup> Interview With Ato Ermias Jano,

<sup>364</sup> Interview With W/Ro Sosina Direbsa, Ethiopian Insurance Corporation, 24 august 2021. According to her, who was to be compensated was already decided by the government. The corporations’ role was only to participate during the assessment. The assessment was done through observation and the value of compensation was determined by its market value. After the assessment was done, it was submitted to the government for approval.

<sup>365</sup> *Ibid*.

their assessment of damages but they were subjected to verification by the committee.

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Before 2018, the government had been reimbursing the loss of investments due to violence, in cash. The government was also providing the companies with additional duty-free benefits and exemption for importing any property lost. However, after 2018 the reimbursement has stopped since the government could not financially cover the high cost of damage. The kind of measures taken to redress the issue includes providing loan schemes geared toward redressing damaged investments and tax payment extensions for impacted investments. This shows that the government decided not to reimburse in cash in a non-discriminatory based on the relative standard of liability.

Estimation for loss was made for each investment project to be compensated. To show as an example the damage assessment report made on Taru Construction shows as follows; Taru general construction is an investment project engaged in mining and delivery of construction material, in Ethiopia.

Damage occurred in the machinery and equipment of the company following the peoples' attack of March 2016.<sup>367</sup>

For the damage assessment on Taru Construction, Mechanical and Civil estimation was made.<sup>368</sup> The loss amount for damaged machinery was given by estimating the percentage of damage from the whole machine. The estimation was given based on assessment observation and sound engineering judgment developed by the group of engineers through experience. And the values were taken from market assessment.<sup>369</sup> In this case, the 1<sup>st</sup> method of estimation of compensation for the loss under CIL was taken which is the 'market value'.<sup>370</sup> Salvage value for the damaged items was estimated based on the importance of the salvage in the local market and it was tried to put reasonable estimation through observation.<sup>371</sup> The 'Market value' in the report

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<sup>366</sup> Interview with Abraham Tadla

<sup>367</sup> Damage Assessment Report On Taru Construction, December 2016, P.3.

<sup>368</sup> Mechanical Estimation (Damage on Construction Machinery Such As Chain Dozer and Damage on Different Stock Such As Digger Kit and Dozer Blade) Was Made By 2 Peoples from Ethiopian Insurance Company And 1 from Development Bank Of Ethiopia. Civil Estimation (Damage on Wall and Roof Construction) Was Made By 1 Person from Ethiopian Insurance Corporation, One from Development Bank of Ethiopia And 1 from Commercial Bank Of Ethiopia.

<sup>369</sup> The Damage Assessment Report on Taru Construction Made On December 2016, P.2.

<sup>370</sup> AAPL v Sri Lanka(1990)

<sup>371</sup> The Damage Assessment Report on Taru Construction Made On December 2016, P.2.

refers to the pre-accident value considering depreciation. On the agreement about payment of the estimated compensation for loss between EIC and Taru construction, it was provided that the compensation estimated does not include/consider loss profits (profitability) and goodwill of the damaged investment property.<sup>372</sup> And did not provide a reason as to why they were not considered. Neither the assessment report nor the agreement provides for interest and time of payment of compensation for the loss. In the AAPL v Sri Lanka case, the arbitral tribunal held that the interest rate (10%) should be payable starting from the day of the request for arbitration until the date on which actual payment of compensation for loss is made.<sup>373</sup>

### **4.3 Consequences of Violation of the Full Protection and Security Standard**

FPS standard is an investment protection standard and a promise made against political storms. The violation of the standard has its consequence. Failure to protect investment projects from physical or/and legal harm results in the payment of compensation for loss to investors and a great loss to the economy and the society as well.

In Ethiopia, there have been several outbreaks of violence that destroyed investors' property in the last five to six years. One of the main causes of the investments being targeted during the civil disturbances is related to land disputes over the years, i.e. the government expropriates land from the society offering tiny compensation to attract investors which haven't been beneficial to the society in general.<sup>374</sup> Following such a catastrophe, a lot of investors demanded compensation from the government. The violence-affected investment projects reports include both domestic and foreign investment projects.<sup>375</sup> This shows that even though the full protection and security standard is not stipulated under the Ethiopian investment law, domestic investors are equally claiming compensation for the loss. The violation of the FPSS in Ethiopia has caused the following effects to the country which includes;-

According to the EIC report, As a result of the 2016 civil unrest in the Oromia and

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<sup>372</sup> Agreement between the EIC and Taru Construction on the payment of the estimated compensation, art 4.1, signed on 25/01/2010 E.C.

<sup>373</sup> AAPL v Sri Lanka, para 115.

<sup>374</sup> Political unrest hits Ethiopia FDI. [www.fdiintelligence.com](http://www.fdiintelligence.com) last accessed august 2021

<sup>375</sup> The Damage Assessment Report Summary for Construction Sector-Private (Estimated Amount of Loss in Birr), 2016: China Rail Way Seventh Group (Foreign Investment) And Abebe Alemu Building Contractor (Domestic Investment) are examples of Projects Under The Category Of Construction Sector- Private.

Amhara regional states, about 25<sup>376</sup> violence-affected investors have claimed compensation for property damage. The government also agreed to compensate the affected companies in terms of cash, additional duty-free benefits, and the exemption for importing any property lost and facilitating conditions to give loans.<sup>377</sup> A recent study conducted by the commission also shows that from 2018-2019/2020 a total of 485 investments were damaged because of the political unrest. According to the report, reimbursement has stopped since the government could not financially cover the high cost of damage.<sup>378</sup> That is, the civil unrest has caused a great economic and financial loss to the country.

Another result of not living up to the promises of the government is it discourages new investors from investing in the country (promotion of investment is greatly affected), for those existing investors they are discouraged from continuing/re-investing in the country further.<sup>379</sup> That is because investors abhor uncertainty more than anything. The inflow of FDI decreased<sup>380</sup>, over the past five to six years, due to the public unrest happening in different parts of the country.<sup>381</sup> What is more damaging is the irreparable puncture on the investors' confidence in the nation. This damaging report may set the country back many years and undo the investment it has made to alter its image globally. This is a heavy burden on the already weak Ethiopia's economy.<sup>382</sup>

It also greatly affected the contribution of investment to the GDP<sup>383</sup> in the country. Because the internal conflict has taken a heavy economic toll. No doubt, the political

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<sup>376</sup> EIC, report on the assessment of damages, 2016

<sup>377</sup> Ibid

<sup>378</sup> Interview with Ato Tlahun Gemechu

<sup>379</sup> Interview With W/Ro Addisalem Tadesse, Investment Promotion Department, Ethiopian Investment Commission, 11 August 2021; Interview With Ato Teklyio Akalu W/Slasie, Addiss Ababa Investment Commission, 16 August 2021.

<sup>380</sup> UNCTAD's world investment report (2020) and (2021). In 2017 the net FDI inflows decreased by 3.04% from 2016, decrease by 16.35% in 2018, decrease by 25.12% in 2019, by 6% in 2020.

<https://www.google.com/and/knoema.com/atlast/ethiopia/topics/economy/balanbeof-payments-capital-and-financial-account/net-FDI-inflows%3fmodermp>. (Last accessed august, 2021).

<sup>381</sup> According to Interview with Ato Balga Birhanu, the company was reluctant to make progress (reinvest) with the company for fear that it may be damaged again. The damage suffered has made the company to stand still for a long time. As for the happenings in the country creates uncertainty up on the investor.

<sup>382</sup> UNCTAD's world investment report (2020) and (2021)

<sup>383</sup> The growth rate of the real gross domestic product has not been stable during the past five-six years. According to World Bank (WB) the growth rate, has continued to decrease. The GDP growth compared to previous year shows as follows: The growth rate in 2015 is 10.4%, in 2016 its 8%, in 2017 its 10.21%, in 2018 its 7.7%, in 2019 its 9.04%, in 2020 its 6.06%, in 2021 its 1.99% which is even lower than the WB estimated that is (2%), the lowest in more than two decades.. Available at

and security developments in Ethiopia caused a fast-paced economic deterioration that not only slowed down the economic growth, but also were reflected in the domestic growth, but also were reflected in the domestic and foreign performance indices and led to a deterioration of the living standards of Ethiopians.<sup>384</sup> Due to worsening economic situation, the Ethiopian central bank suspended all lending and money transfers as well as all coverage for direct imports, which caused a crisis in the exchange market and lack of foreign reserves.<sup>385</sup> Inflation rate soared<sup>386</sup>, the technology transfer is greatly lessened, and unemployment<sup>387</sup> is also being caused to increase over the years.<sup>388</sup>

The FPS standard is implemented to include both physical and legal securities to investors and their investment projects. Upon failure to protect investments from physical or/and legal harm, investment projects are closed<sup>389</sup> or are displaced from one part of the country to another which results in unnecessary additional costs which will more discourage investors in the re-building process of the investment firms.<sup>390</sup> According to an interview with W/ro Addisalem from the investment promotion department in the Ethiopian investment commission, there were investment projects that were forced to displace from one region to another because of the protection and security problems in some parts of the country.<sup>391</sup>

Ethiopia's way out of the current economic crisis appears to be hinging on the restoration of political and security stability across the country, a prerequisite for making required measures to resolve the economic turmoil. The FPS standard requires among others for government to provide preventive measures. Through applying

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<https://www.statista.com/statistics/1111111/gross-domestic-product-gdp-growth-rate-in-Ethiopia-2021> (last accessed on January, 2022).

<sup>384</sup> Samar Bagouri: How the war in Tigray is impacting Ethiopia's economy? 2021. Available at <http://www.Futureuae-Center-How-the-war-in-Tigray-is-impacting-Ethiopia's-economy?/2021/.com> (last accesses on January 2021)

<sup>385</sup> Ibid

<sup>386</sup> Ibid

<sup>387</sup> Interview with a former employee, w/ro Alemi, in TOTO Garment PLC which is already closed down after it was impacted during the violence. According to her a lot of peoples were job less for a long time and some are still unemployed and waiting until another investment projects start in the future.

<sup>388</sup> UNCTAD world reports on investment (2020) and (2021)

<sup>389</sup> The ongoing war has scared investors away from the Ethiopian market. For E.G. Dutch Company Esmeralda Farms and A US-Owned Farm Have Already Pulled out Of Ethiopia.

<https://Addisfortune.news>. Last accessed august 2, 2021

<sup>390</sup> Ibid

<sup>391</sup> According To W/Ro Addisalem There Were Chines Investment Projects That Were Displaced From The Oromia Region To The Amhara Region Because Of The Public-Unrests Happening Last Year. The Displacement Has Caused Unnecessary Expenses For The Investors.

preventive measures those consequences discussed above can be alleviated and thereby decreasing the effects of that violence on the economy in general and investment activities in particular.



## **CHAPTER FIVE**

### **FINDING, CONCLUSION, AND RECOMMENDATION**

#### **5.1 Findings**

- The Ethiopian investment proclamation no 1180/2020 does not stipulate the full protection and security clause
- Different BITs try to include the FPS clause under different formations. But none of those BITs deals with issues of standard of liability of the state and level of protection provided to investments under the FPS standard.
- The Ethiopian BIT s provide provisions for compensation for loss which in principle requires compensation based on a non-discriminatory basis but exceptionally under few circumstances, absolute responsibility is imposed in cases of requisition of property and unnecessary damages caused to investment by the government. But still, besides establishing the NT and MFN as regards compensation, those laws do not have a substantive standard of compensation.
- There is no formally made interpretation of the standard either by (arbitral awards or judicial courts) on the issues of the scope of the standard.
- The decision to compensate for those damaged investments in the past five to six years was made by the PM office. But those executive decisions do not clearly show the level of protection and standard of liability of the government. Because of the lack of clarity in the law, legal experts tend to have different opinions.
- The failure to protect investments has greatly affected the country. Financial losses, a decrease of FDI inflow, loss of foreign currency, and an increase in the unemployment rate are among the consequences suffered by the country.

## 5.2 Conclusion

Investment is the main source of economic development in the contemporary world. Hence, States apply different types of instruments/schemes to investment and attract investors to invest in their jurisdiction. The promotion method/scheme, among others, is providing investment guarantees. The scope and depth of such guarantees can differ from state to state as the types and elements differ based on the laws and approaches of the state. Investment guarantees can be given against different types of risks which amongst is a guarantee against political risks. The full protection and security (FPS) standard is one of the investment protection standards' which provide a guarantee against political storms/risks.

The FPS standard owes its origin to treaties of friendship, commerce, and navigation (FCN) concluded in 19<sup>th</sup> C. since then it has found its way to different investment treaties. The standard has taken different formulations under different BITs, amongst which includes “protection”, “full protection and security”, “constant protection and security”...etc. the standard in its traditional meaning protected physical harms. Recently it has been viewed that the standard of protection of the FPS standard goes beyond physical protection and extends to legal protection as well. The standard does not grant investments absolute but rather reasonable protection and security determined by ‘due-diligence’, which is to be determined depending on the circumstances. It has been provided in case laws that host states are required to act with due diligence and the FPS standard does not establish absolute responsibility of the state. Compensation for losses is provided due to non-compliance with FPS standards. Under most BITs, it is provided that compensation for losses is made on a non-discriminatory basis.

The FDRE constitution regulates the right to property rights and entails a duty on the government to protect private property in general and it does not specifically and separately address investment properties. The FPS standard is not stipulated in the investment proclamation. Different BITs provide for the FPS standard. The Standard is formed in different terminologies under the different BITs. However, Non-of those BITs stipulate issues related to the level of protection and/or the standard of state

liability under the standard. There exists no formal interpretation that deals with those issues above.

Ethiopian BITs provide for clauses stating the government's liability for losses. Some treaties provide that the host state is free to pay compensation but had to do so on a non-discriminatory basis (relative standard of protection). While some of those treaties provide that in cases where the host state has requisitioned the property or has caused unnecessary damages to the investment, there would be an absolute obligation to compensate. But still, the standard of compensation is not clear in those laws.

Because of the lack of clarity of the law on such issues, there is a difference in the opinions of legal experts on how the implementation of the standard in Ethiopia should be. Regardless, the practice shows that the degree of protection is not only limited to physical security but also includes legal security. The liability of the state when third parties are involved is measured under the principle of due diligence and when the government has requisitioned a property or has caused unnecessary damages to the investment then the government is strictly liable.

Generally, the investment laws of Ethiopia lack clarity and completeness in addressing the protection and security of investors. If these problems are not rectified, the effort made to attract investors through the instrumentality of investment guarantees becomes fruitless.

### **5.3 Recommendation**

Apart from their incorporation in certain legislation, investment guarantees should add clarity and a favorable environment for investors. Hence, rectifying the existing gaps in the investment laws of Ethiopia would add clarity and achieve its objective in attracting investment in the country. To this effect, the researcher recommends that:

- ❖ To reveal the government's commitment to attracting investment in general and in providing protection and security for investment property in particular, it is advisable to give a separate regulation for investment under the FDRE constitution. However, as separate incorporation requires an amendment of the constitution which is hardly possible taking into account the amendment procedures of the constitution, the researcher alternatively recommends the

broad interpretation of article 40 of the constitution to extend constitutional protection and security for investment properties,

- ❖ The provisions of investment proclamation no.1180/2020 that address investment guarantees should be amended in such a way that would rectify the existing gaps. Among other things, the amendment should stipulate the FPS clause and determine its scope thereof. It should also have a substantive standard of compensation.
- ❖ Since there is no formal arbitral award or judicial decision on the interpretation of the FPS standard which makes it hard to decide on the issues of terminological differences of the standard, degree of protection, the standard of host state liability, and other related issues... the following recommendations are made;-

- The Drafting of the FPS clause under investment laws or BITs is highly recommended. The full protection and security standard should be stipulated in the investment law. The law should be clear and similar on the terminological references, standard/level of protection (physical or/and legal securities), and standard of liability (strict liability or due diligence). It should also be clear on the standard of compensation for the loss.

- ❖ As an alternative to stipulating it in the investment laws and/or BITs, it is recommended that the FPS clause be interpreted in the following manners;

- The difference in the terminological formulation of the FPS standard under different BITs signed by Ethiopia should be interpreted in a way that increases the protection and security provided by the FPS standard. Differences should not be made between the treatments of investors solely based on the difference of the existing terminologies used.
- The standard of protection should include both physical and legal securities. This interpretation should help achieve the objectives and purposes provided under the Ethiopian BITs which is to create and

maintain favorable conditions for investment. And also the fact that the promotion of investments in the country will achieve a higher goal if it gives similar protection given to investors in a contemporary world. This is in line with the fact that interpretation of treaties should be evolutionary. As is the fact that investments nowadays include both tangible and intangible properties.

- The FPS standard requires host states to exercise due diligence regarding their acts and acts by third parties rather than imposing strict liability upon them. Regardless of whether such acts cause physical or legal harm. It is recommended that due diligence is still the standard of liability. Although host states must abstain from conducts harmful to investments, their failure to do so should not automatically entail strict liability.
  - The standard of compensation should be interpreted in line with the rules under CIL.
- ❖ To protect investors from being the targets of violence, it is recommended that the government employs preventive measures such as choosing the investment sites in a place where it does not raise land disputes with the society and as an alternative pay adequate compensation while expropriating the land. For investors, to provide different types of advantages to the society in general and the local community in particular.

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