



**POLITICAL UPRISING AND FOREIGN DIRECT INVESTMENT IN
ETHIOPIA: LEGAL PROTECTION AND COMPENSATION**

LLM. THESIS

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Declaration

The thesis entitled, “**Political Uprising and Foreign Direct Investment in Ethiopia: Legal Protection and Compensation**” is my original work that has never been presented for a degree in any university ever before and any materials used in this thesis by way of reference are dully acknowledged.

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Advisors' Approval Sheet

This is to certify that the thesis entitled “**Political Uprising and Foreign Direct Investment in Ethiopia: Legal Protection and Compensation**” submitted in partial fulfillment of the requirements for the LLM Research Thesis in School of Law and Governance Studies specialization in Commercial Law, the graduate program of the school of Law and Governance, and has been carried out by BehailuBergena Wada under my supervision. Therefore, I recommend that the student has fulfilled the requirements and hence hereby can submit the thesis to the school.

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Examiners' Approval Sheet

As members of the Board of Examiners of the final open defense, we certify that we have read and evaluated the thesis prepared by BehailuBergena Wada under the title **“Political Uprising and Foreign Direct Investment in Ethiopia: Legal Protection and Compensation”** and recommend that it be accepted as fulfilling the thesis requirement for the degree of Master of Arts in Law with specialization in Commercial Law.

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Name of External Examiner	Signature	Date
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List of Acronyms

ATI	African Insurance Agency
ACFIs	Agreements on Cooperation and Facilitation of Investment
AIG	American International Group
BITs	Bilateral Investment Treaties
CAF	Conflict-affected and Fragile
CAMEX	Council of Ministers of Brazilian Chamber of Foreign Trade
EIC	Ethiopian Investment Commission
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Production
GTP	Growth and Transformation Plan
ICIEC	Islamic Corporation for the Insurance of Investment and Export Credit
ILO	International Labour Organization
ICSID	International Centre for Settlement of Investment Disputes
MENA	Middle-East and North Africa
MFN	Most-Favoured Nation Treatment
MIAs	Multilateral Investment Agreements
MIGA	Multinational Investment Guarantee Agency
MNCs	Multinational Corporations
NAFTA	Northern America Free Trade Agreement

NT National Treatment

OECD Organization for Economic Cooperation and Development

OLI Ownership advantage, Location-specific advantages, and Internalizations conditions

OPIC Overseas Private Investment Corporation

PRI Political Risk Insurance

SADC Southern African Development Communities

TRIMs Trade-Related Investment Measures

UN United Nations

UNCTRAL United Nations Commission on International Law

WB World Bank

WTO World Trade Organization

Abstract

In the current globalized world, where every single action of one country or any international organization directly or indirectly; positively or negatively affects another country, FDI is considered to be one of engines of boosting economic development of both developed and developing countries in which Ethiopia is not an exception. There are different theories for and against the flow of FDI into the territory of the host country. Those which analyze in favor of it try to mention the positive effects of FDI while the opposite side criticizes the same on the ground that FDI doesn't play positive role in the affairs of the host country or it takes the minimal part. Sooner or later it is positively considered by the majority of academic persons and politicians. FDI is not indifferent to the domestic situations of the host country. There are different determinants which play either positively or negatively in the inflow of FDI. One of the determinants is the political environment of the recipient country. The more stable is the political situation of the host country the more likelihood of inflow of FDI will be. The holding of massive political demonstration, political violence and armed conflicts are some of features of political instability in the host country which put the host country in disadvantageous part regarding the inflow of FDI. The study is mainly devoted to be conducted due to the current political uprising which has begun mainly three years ago. Following the political uprising, several FDIs have suffered from damage. Though the response of the government, to repair the damage, is quicker, investors have welcomed it in hesitation alleging its insufficiency. There are also investors who have refused to receive the government's 'financial support because of its disproportionality to their damage. The general objective sought to be achieved, in the study, is checking whether the country has tried its best to prevent or mitigate the occurrence of the damage and the response of investors on the 'financial support' made by the government. To do so, the qualitative and non-doctrinal research methodology has been employed. The legal documents and other literature have been reviewed. Interview has also been conducted with the Ethiopian Investment Commission and three investors which have been selected from among the injured investments following the political uprising. The study has revealed that Ethiopian government has shown reluctance in implementing the country's obligation of according full protection and security. Therefore, it has come up with the recommendation that the Ethiopian government should give equal endeavor for putting the obligation into practice as that of its diligence to attract FDI.

Key words: Ethiopia, political uprising, FDI protection,

CHAPTER ONE

1.1 Background of the Study

Many define Foreign Direct Investment differently. To mention some, FDI is defined as the process whereby residents of one country (the source country) acquire ownership of assets for the purpose of controlling the production, distribution, and other activities of a firm in other country (the host country).¹ The International Monetary Fund's Balance of Payments Manual defines FDI 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 being to have an effective voice in the management of the enterprise'.² The United Nations 1999 World Investment Report (UNCTAD, 1999) defines FDI as 'an investment involving a long term relationship and reflecting a lasting interest and control of resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor'.³ Here, we find the key features which distinguish FDI from portfolio investment. These are, having the long term relationship and controlling interest. In portfolio investment these features are missed and therefore it is characterized by being short-term in nature and non-existence of control or lasting interest by the portfolio investor.⁴ For the portfolio investor it is enough to buy securities from another investor but without having effective voice on the management of the same. The portfolio investor can transact with the security he/she/it has bought and hence the owner of the security can change so many times. Therefore, it lacks permanent existence when we compare it with that of FDI. It depends on the current profits gained from owning securities.

It is stated that "FDI has become an important factor in the economic growth and a new instrument for the integration of countries into the global economy".⁵ Therefore, attracting and

¹Imad A. Moosa, Foreign Direct Investment: Theory, Evidence and Practice(Palgrave 2002) p.1

² Ibid

³ Ibid

⁴ Ibid

⁵M. TalhaAtik,Hung Tran and CristhianVieyra, 'FDI in Developing Countries: The case of Ericsson in Mexico and Vietnam'(Msc in Business Administration, LINKOPINGS UNIVERSITET 2008) 8 cited in UNCTAD, 2005, P.1

managing FDI is stated to be an important strategy for developing countries in order to develop their economies.⁶

Ethiopia, as one of developing nations, is in massive tasksto attract FDI. It has signed Bilateral Investment Treaties with 33 countries. It has also engaged in six multilateral investment agreements.⁷ These all show the country's desire to attract FDI. In addition to these, it has legal framework, including the Constitution of Federal Democratic Republic which is the supreme law of the land, which gives legal guarantees and incentives. It has built and is still building several Industrial Parks which are among the country's Mega projects with its own administering and regulating body (at federal level). There is also one stop shop service which enables the investor to have all necessary services without laboring a lot and within possible shorter time.⁸

Ethiopia as one of the developing countries is facing many economic challenges. These challenges are ensuring sustainable economic development; creating job opportunity, exploiting its resource and maintaining balance of payment are few among many others. In order to get out of these and many other challenges of reducing poverty, Ethiopia is taking different responsibilities to attract foreign investment. As part of the attempt and of course as means of winning competition, it has been granting incentives for the investors.

Nowadays, incentive has become a policy tool in the global competition to attract FDI.⁹ These incentives include privilege of owning immovable property¹⁰, Repatriation of profits, dividends, principal and interest payments on external loans out of Ethiopia, right to employ expatriate experts and management staff; exemption from corporate income tax for exporting companies on capital goods and customs duty, construction materials¹¹ and partially on spare parts (as much as 15% of the total value of capital goods), 2-8 years, may be more for manufacturing of textile and garment inside IPs and 10-15 years for Industrial Park Developers.¹² Incentive in the form of

⁶Imad A. Moosa (n 1)

⁷Ethiopian Investment Commission, 'Investment Opportunities & Policies in Ethiopia' available at www.investethiopia.gov.et

⁸ Ibid

⁹United Nations Investment Report, cited in Tesfaye Abate, (2009),Investment Law, Justice and Legal Research Institute 212

¹⁰Article 24 of Investment Proclamation No. 769/2012

¹¹Article 13 of Council of Ministers Regulation No. 270/2012

¹²Ethiopia Investment Commission, Investment Opportunities & Policies in Ethiopia, available at:www.investethiopia.gov.et, accessed June 9/2018

income tax deduction even runs up to 30% depending on the geographic area of investment.¹³ Exporter of services or goods or supplier to exporter at least about 60% of his production are also entitled to extra two year tax exemption in addition to the above ones.¹⁴ Duty free importation of motor vehicles and duty free transferee privilege is also permitted for those eligible investors.¹⁵

Ethiopia as one of developing country is relatively disadvantaged in the game of competition. This is because investors do not need financial and material incentive alone. They seek to have favorable working environment, stable political system, predictable legal framework and law enforcement, functioning market and economic habitat. DagimBelayneh divides deriving forces of FDI as policy and non-policy factors. Policy factors include openness, product market regulation, labor market arrangements, corporate tax rates, direct FDI restrictions, trade barriers, human development and infrastructure. Non policy factors include market size of the host country (often measured by the GDP), distance/transport costs, and political and economic stability¹⁶

The first Growth and Transformation Plane (GTP I) which ran from 2010/11 to 2014/15 is ended and period of GTP II has begun to run from 2015/2016 which is expected to last five years and half of which is passed. Reducing poverty and generating employment for expanding labor force is stated to be one of the major objectives sought to be accomplished at the end of GDP II. The year 2030 is planned to be the end of poverty in Ethiopia. It is planned to reduce the proportion of the population living below national poverty line from 23.4% to 16.7% by the end of GTP II period. The development of manufacturing industries is targeted as one of the driving strategies to achieve the objectives of expanding employment and reducing poverty.¹⁷

Having such a national plan is one thing to be appreciated. However, its implementation is equally important and the one which requires the government's great commitment. Otherwise, it

¹³Article 5(2) of Council of Ministers Regulation No. 270/2012

¹⁴Ibid, art.7

¹⁵Ibid, art 14 cum 15

¹⁶DagimBelayneh, 'Ethiopia: winning Pull Factors In Drawing FDI to Ethiopia'(opinion), The Ethiopian Herald (Addis Ababa) 16 January 2018 accessed November 19, 2018, available at <https://allafrica.com/stories/201801160590.html>

¹⁷Federal Democratic Republic of Ethiopia, Growth and Transformation Plan II, National Planning Commission p124.

will remain the mere political propaganda without having practical relevance in improving the living standard of Ethiopians.

Most of the BITs signed by countries contain clauses promising protection of the foreign investment in different wording. Some use the title ‘full protection and security’ while others omit the adjective ‘full’ or replace it with the word ‘constant’.¹⁸ This clause imposes an obligation upon the host states to take active measures to protect the foreign investment from adverse effect.¹⁹ The host state cannot relieve itself from liability by raising the fact of lack of resource to take measures and if the subjects of the host states have significantly contributed for the occurrence of the adverse effect, the host state will be accountable without any question because at this time the host state is deemed to have directly breached the obligation of keeping the investment from injury.²⁰

There are several cases entertained before international investment tribunals in which the host states are held liable for the adverse actions of their authorities and citizens. In *Wena Hotels v Egypt*,²¹ the tribunal found Egypt liable under the standard of full protection and security because employees of a state entity had seized the hotel in question and because the police authorities had been aware of the seizure and had not acted to protect the investor before or after the invasive action.²² From the *accontrario* interpretation of the decisions given by the tribunals in *Teemed v Mexico*²³ and *Noble Ventures v Romania*²⁴, one can understand that if evidence as to the failure of the host state to take reasonable measure to prevent the injury upon the foreign investment following the social demonstrations, the host state will be held liable for its lack of diligence.

The standard of full protection and security is not limited only on the physical protection rather there is an authority which requires the inclusion of legal protection within the standard.²⁵ In

¹⁸ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OXFORD UNIVERSITY PRESS 2008) 149

¹⁹ *ibid*

²⁰ *Ibid* see p150

²¹ *Wena Hotels v Egypt*, Award, 8 December 2000, 41 ILM (2002) 896, para 84 cited in Rudolf Dolzer (n 18) p150

²² *Ibid*

²³ *Tecnicas Medioambientales Teemed S. A. v The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004) cited in Rudolf Dolzer (n 18) p151

²⁴ *Noble Ventures Inc. v Romania*, Award, 12 October 2005 cited in Rudolf Dolzer (n 18) p151

²⁵ *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, paras 483, 484; *Ceskoslovenska Obchodni Banka A.S. v The Slovak Republic*, Award 29 December 2004, at para 170 cited in Rudolf Dolzer (n 18) p151

CME v Czech Republic,²⁶ the tribunal said ‘The host State is obliged to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued’,²⁷ There is also tribunal award which reached at the decision that the standard of full protection and security can be breached even if there is no physical violence damage occurred.²⁸

Ethiopia has signed 33 Bilateral Investment Treaties so far. All of them contain provision regarding protection to be made by Ethiopia. Of course, it is natural to require legal guarantee from the host state before leaving one’s home state since one cannot be sure about what to take place tomorrow within the guest country. BITs usually contain both substantive and procedural rules regarding the relationship between the foreign investor and the host country. Substantive parts stipulate about the package of treatments to be provided for the foreign investor while the procedural one is about the ways of enforcing the substantive rights when they are found violated.

An investor may loss its property due to the violence taking place in and around the investment area. At this time the host country will be obliged to cover the damage sustained by the investor because the country has already taken responsibility to protect the investment from any damage via its agreement with the home country. Therefore, if it is not managed and protected well there is much possibility of FDI to be turned into curse rather than being blessing to the country.

Political instability/violence is taken as a violence that is performed by the citizens against the political system. In doing so they break the basic social norms that may lead to waves of protests, strikes, demonstrations and to regional endangerment of security and criminal violence that occurs in the form of criminal youth gangs, mafia type collaborations and drug cartels.²⁹ Politically violent actors include rebels, militias, and organized political groups who

²⁶*CME v Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121, para 613 cited in Rudolf Dolzer (n 18) p151

²⁷ Ibid

²⁸*Azurix Corp. v The Argentine Republic*, Award, 14 July 2006 cited in Rudolf Dolzer (n 18) p152

²⁹Sanchezm M., ‘Insecurity and violence as an new power in Latin America, In Annals of the American Academy of Political and social science’ (2006)606, Chronicle of a Myth Foretold: The Washington Consensus in Latin America 178,179 cited in OrtwinRenn and others, ‘Social Unrest’, OECD/IFP Project on “Future Global Shocks”(2011) p19

interact over issues of political authority (i.e. territorial control, government control, access to resources, etc.³⁰

Today, the world has come close as small as village because of fast information technology. Something happening in remote area of one country will be heard at any corner of the world whether it is good or bad. Information determines every aspect of the country. Unfortunately, a country may lose the competition of attracting FDI due to the pushing factors which discourage foreign investors from investing their capital in it.

The research is not the only and the first one to study about the area at issue. Rather, it is intended to build additional effort on what has been made before by different foreign and Ethiopian scholars. It also intends to come up with updated findings. It is important to mention the works made by Ethiopians on this area and show the gap which the study intends to fill.

Ambachew Mekonnen studied the determinants of FDI altogether and his study doesn't focus only on FDI but private investment in general. His approach also differs because his study only relied on the variables determining the private investment in Ethiopian context and the study has been made eight years ago after which so many changes have taken place.³¹ Solomon Mamo,³² and Henok Gebremedhin³³ are the other researchers who have conducted non legal (social research) and found that social and political stabilities are one of the factors which determine the inflow of FDI in Ethiopia.

This research is different from the above ones in its approach and its very nature. Because, unlike the stated studies, this thesis is conducted to check the legal obligation of the state in relation with protection to be accorded to the foreign investments and its implementation on the ground.

1.2. Statement of problem

Oppositions from different parts of Ethiopia against the then government especially since three years ago have resulted in so many injuries both personal and material. Not only citizens but also

³⁰ Available at <https://www.acleddata.com/wp-content/uploads/2015/01/definitions-of-political-violence-2015.pdf> accessed January 17/2019

³¹ Ambachew Mekonnen, 'Determinants of Private Investments In Ethiopia' (2010) XIX Ethiopian Journal of Economics 75, 116

³² Solomon Mamo, 'Determinants of Foreign Direct Investment In Ethiopia' (2008) Maastricht Graduate School of Governance Maastricht University Maastricht, The Netherlands p.41

³³ Henok Gebremedhin, 'Determinants and Impediments of FDI inflows in Ethiopia- A Firm Level Investigation' (2014) MPRA Available online at <http://mpra.ub.uni-muenchen.de/55955/>

foreign investors were targeted by the violence which exploded in the country. The report of Bloomberg, which was headed ‘Foreign Investment in Ethiopia Slumps After Business Attacks’, showed that Ethiopia has attract only the amount of \$1.2 billion in the six months of the country’s fiscal year of 2017/18 which was less in \$300 million when compared with the same fiscal period a year earlier. FitsumArega, the then Commissioner of the Ethiopian Investment Commission, said in a phone interview with the agent of Bloomberg that there may be likely for the country to miss its annual target of \$3.5 billion, with \$3.2 billion more likely to be attainable.³⁴It was also reported that businesses including those owned by Nigerian billionaire AlikoDangote and Dutch fruit processors were attacked during the unrest.³⁵

The government of Ethiopia had paid 100 million birr (\$4.4 million) damages for the foreign and domestic investors whose investment was damaged due to the political instability and there were more claims of compensation in progress as the Commissioner of Ethiopian Investment Commission said. He also added that at least two foreign businesses were successful in making claims from insurance companies while the government is also providing tax relief to operations that sustained damages during the violence. At that time, foreign investors who have already been registered opted to take “wait-and see attitude” rather than involving in the implementation of the registered projects as Fitsum said to the reporter of Bloomberg.³⁶

In the press conference held on November 11/2016, the commissioner said that tax free imports to replace damaged products and lowering to 30% the amount of capital needed for foreign investors to secure loans are additional non-financial assistance which the government intended to provide for the 47investors, whose investment has been injured by the violence occurred in Amhara and Oromia Regions.³⁷Reuters reported that dozen of the damaged investors are foreign one.³⁸

³⁴ Foreign Investment In Ethiopia Slumps After Business Attacks available at <https://www.nazret.com/2017/02/15/foreign-investment-in-ethiopia-slumps-after-business-attacks/> accessed December 3, 2018

³⁵ ibid

³⁶ ibid

³⁷ Investment Commission calls on Insurers to compensate damaged businesses, available at <capitalethiopia.com/2016/11/15>accessed December 3, 2018

³⁸ Ethiopian protesters attack factories in Africa’s rising economic star available at <<https://www.reuters.com>> accessed December 3, 2018

Most of the Bilateral Investment Treaties which Ethiopia has signed contain the provision of ‘Full Protection and Security’. When weighed with the standard of protection stipulated under the BITs signed by Ethiopia and the definition given for the standard sought from the host country in the judgment rendered by the international tribunals, this research has revealed that the Ethiopian government has failed to do its best to protect the investments of foreign investors. It has not taken precautionary and prudent measures at least in order to mitigate the extent of the damage caused against the investments.

The obligation of the host country to accord full protection and security entails the obligation of the country to compensate and repair the damage at the time when the investors sustain the damage due to different violence occurring in the country. When foreign investors encounter injuries due to political instability of the host country, the latter will be disadvantaged not only because it pays compensation for the current damage but also because the potential incoming investor will be discouraged to invest in the country because of the bad image which will be diffused all over the world.

The other problem which this thesis intended to dig out was the problem related with the payment of compensation to the damaged investments. The foreign investors have not obtained the money which is equivalent with the damage suffered by their investments. The compensation had been computed by the committee which was organized by the order of the then prime minister which consists of the members only from the government bodies. In the other word, the compensation has not been calculated in negotiation with the foreign investors which will impair or discourage the flow of FDI in the future.

1.3. Objectives of the Study

1.3.1. General Aims to Examine

The study is discussing the current Ethiopian political instability and its effects on the FDI and the role of the host country in order to accomplish its treaty obligation of ‘full protection and security’ to be accorded to foreign investments. It has also discussed the post-conflict measures taken by the Ethiopian government in order to repair the damage suffered by the FDI due to the political uprising.

1.3.2. Specific Objectives

1. To discuss treaty frameworks (bilateral and multilateral investment treaties)
2. To discuss on the Ethiopian policy, legal and institutional framework set-up for the protection of FDI.
3. To examine the response of Ethiopian government to foreign companies' demand for compensation,
4. Assessing the procedure which the government has applied to make compensation payment to the foreign investors.
5. To suggest policy recommendations.

1.4 Research Questions

The research intends to answer the following questions in order to resolve the problems mentioned above.

1. What policy, legal and institutional framework exist in Ethiopia to protect investments in general and FDI in particular?
2. What was the response of Ethiopian government to the foreign companies' demand for compensation?
3. what procedure did Ethiopian government employ to make payment?
4. What policy measures should the government of Ethiopia need to take in order to alleviate the problems related with the protection of FDI?

1.5. Significance of the Study

One of the purposes of this thesis is making additional reference on the currently scant material on the area. Commercial law students or any other person interested on the topic can make the thesis one of the references. It is mainly devoted to describe the treaty obligation of protecting and securing FDI and show the implementation gaps from the side of the Ethiopian government regarding its obligation to protect FDIs. Suggesting recommendation for policy makers is also the other purpose of the research.

1.6. Scope of the Study

The study is limited to the practical implementation of the obligation of according full protection and security to the foreign investments by the Ethiopian government. In the course of doing that

different legal documents stipulating the obligation of full security and protection and the related issues have been discussed. The research has focused on the protection standard to be accorded by the Ethiopian government, as laid down in different BITs and model BITs. It has also discussed issues of compensation in similar way. Cases entertained before international tribunals have also been referred in order to check out the sufficiency of the Ethiopia's measures in line with the stipulations of legal documents.

1.7. Limitation of the Study

Since the data which are relevant for the accomplishment of the study have relation with the political aspects of the country political persons, who the researcher has approached to collect data, have given those data which they think are not against the image of the country. To mitigate the problem, the researcher has conducted interview with some of the companies whose investment have been destroyed due to the political unrest. Managers and employees of the injured companies have been interviewed.

1.8. Methodology and Methods

1.8.1 Research Design

The research has employed descriptive research approach in which 'what' questions are answered in order to describe the existing legal framework of FDI and its implementation by the government of Ethiopia. Experience of other countries regarding the implementation of the obligation of according full protection and security as well as the post conflict measures taken by the host countries are tried to be referred in order to check whether the Ethiopian government has taken actions due to its legal obligations.

It is also non-doctrinal research type in which domestic laws and bilateral and multilateral investment treaties and their stipulations concerning the injury suffered by the foreign investors and their applicability by the Ethiopian government has been dealt with qualitatively.

1.8.2. Data Collection Technique

Interview is mainly employed in the thesis. The interview has been made with the persons from Ethiopian Investment Commission and selected investments from among the damaged one following the political uprising. Investment treaties, domestic investment laws and cases entertained before international investment tribunals are the other primary sources of data which

have been referred. Different articles, books, Thesis papers and different national and international reports are the secondary sources of data which have been utilized in order to accomplish the study. Therefore, the thesis has employed both primary and secondary sources of data.

Accordingly, the researcher has interviewed 14 respondents two of whom are from Ethiopian Investment Commission while the rest are from three injured foreign investments.

1.8.2. Sampling Technique

The three investments have been selected from among the damaged investments randomly after taking the list of the nine paid investors from the federal investment commission.

1.8.3. Ethical Considerations

Following the approval of the proposal submitted by the researcher, Hawassa University Department of Law has given the letter to the concerned body requesting any support that will going to be needed by the researcher. Then official letter duly signed and sealed encompassing the name of the researcher, purposes of data collection and title of the research was obtained from the department to collect data from interviewees.

Before embarking on data collection, the researcher had obtained permission from heads of Ethiopian Investment Commission and the selected investments to conduct interview upon showing the duly issued letter and telling the purpose of data collection. During data collection, the community culture and norms of study area were respected and respondents were informed carefully that the very purpose of the research, the fact that everything they have responded will be kept confidential unless they agreed that their name and responsibility to be disclosed. The respondents have also been informed that they will be interviewed based on their full willingness.

1.9. Organization of the Study

The study is organized into four chapters. Chapter one is all about introduction; chapter two discusses about the theoretical and legal framework of FDI. Chapter three has made discussion on the FDI and political uprising in Ethiopia. Finally, chapter four has come up with conclusion and recommendation.

Chapter Two

Political Uprising and the Obligation of Host Country to Protect Foreign Direct Investment

2.1. Introduction

In order to curb their multifaceted problems, developing countries like Ethiopia take different policy measures.³⁹ One of those measures is enabling their economy grow as rapid as possible. To this effect attracting Foreign Direct Investment is their number one choice since their domestic saving and investment alone does not enable them to have achievement on the demand of their people.

One of the problems which the developing countries are facing is meeting the rapidly growing employment demand of their people. The domestic investment alone cannot cover the gap. Foreign investors usually come with their own capital and technological know-how.

Knowing the fact that foreign investors take the determinants of FDI which exist in the host country before sinking their capital, the host states usually take as necessary measures as they think is more attractive for the foreign investors. One of the measures is engaging in several bilateral investment treaties to give better diplomatic and legal assurance for the investor.⁴⁰

There are also structural and institutional arrangements which ease the process of the government ranging from approving the investment project to provision of relevant materials for the investment like land in which the current Ethiopia's endeavor which is seen in construction of industrial parks in different parts of the country and the provisions of relevant inputs of the investment via one-stop-shop service can be taken as the country's desire to attract FDI in massive amount.⁴¹ It also has offered several incentives to attract FDI more.⁴²

³⁹ Caroline Wanjiru, 'The Determinants of Foreign Direct Investment in African Countries' (PhD Thesis, Curtin University) 2013 p. ii

⁴⁰ United Nations Conference on Trade and Development, International Investment Agreements: Key Issues (2004) Volume I p.xxi

⁴¹ Ethiopian Investment Commission, Ethiopian Opportunities and Policies in Ethiopia

⁴² Ibid

The major theme covered in this chapter is discussing the impact of political instability on FDI. Its effect will be discussed both in relation with its flow into the host country as well as its impact on the well-being of the foreign investments. In order to substantiate the issue it is tried to look into the major determinants of FDI world-wide in general and in Africa in particular in order to locate the place of political stability in determining the flow of FDI into the host country.

This chapter discusses on the topics such as determinants of FDI, the theoretical framework of political uprising and it proceeds discussing on the issues related with the treaty obligations of the host state to accord 'full protection and security' to the foreign investments.

2.2. Determinants of FDI

2.2.1. Determinants of FDI in general

Determinants refer to factors which pull FDI into the host countries. The factors which the foreign investors are attracted may vary according to the type of the FDI with its underlying intention. FDI can be categorized according to the goal which it aims to achieve. There are foreign investments which are in need of market, resource and efficiency. Though there are factors which all types of FDI are commonly affected by, there are also factors which more affect one among them. The determining factors can also vary according to the region in which the host state is found. The regions of the world are grouped into developed, emerging and developing.⁴³

For market seeking FDI, the existence of large market in the host state is very crucial since it aims to sell its products for the domestic market. FDI which come into Sub Saharan African countries are mostly non market seeking FDI.⁴⁴ They intend to sell their product out of the host country. They are resource seeking FDI's having an intention of exporting the resources out of the host state. There are also researches which show that FDI is attracted by market volume in the Southern African Development Communities (SADC).⁴⁵ It is also shown that investors from

⁴³ Caroline Wanjiru, (n 39) p.38

⁴⁴ Asiedu E. (2002) On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different? *World Development* 30: 107-119 cited in Caroline Wanjiru, (n 39) p. 38

⁴⁵ Mhlanga N, Blalock G and Christy R. (2010) Understanding foreign direct investment in the southern African development community: an analysis based on project-level data. *Agricultural Economics* 41: 337-347 cited in Caroline Wanjiru, (n 39) p.39

developing countries, whether from Africa or outside Africa, opt to invest in other African developing countries by seeking market as they are more familiar with the governance in developing nations.⁴⁶

A host country's political and policy stability are considered to be attractive investment determinants.⁴⁷ Among others, "internal and external conflict and ethnic tensions are important determinants of foreign investment flows."⁴⁸ Different literatures on the determinants of FDI suggest that political and institutional risk is one of the major concerns for foreign investors. This is true especially when the case is related with the developing countries.⁴⁹ However, this does not mean that the developed nations are free from the issue related with political risks.⁵⁰

Multi-National Corporations are discouraged to invest in a host country with political instability and violence. The risk may take place either in the domestic or international level.⁵¹ Nationalization or expropriation and breach of contract; policy instability and arbitrary regulation in FDI and war and political violence are the major types of political risks which threaten foreign investment.⁵²

Political violence such as civil wars, insurrections, organized crimes and international conflicts which leads to "political instability, the disruption of the orderly economic process in the host country, and thus smaller profit," and "such events may put host governments under political and economic pressure, which may result in nationalization and expropriation of foreign assets in order to alleviate short-term difficulties"⁵³

⁴⁶ Caroline Wanjiru, (n 39)

⁴⁷ KyeonghiBaek and XingwanQian, 'An Analysis on Political Risks and the Flow of Foreign Direct Investment in Developing and Industrialized Economies', p.3

⁴⁸ Matthias Busse and Carsten Hefeker, Political Risk, Institutions and Foreign Direct Investment, HWWA Discussion Paper 315, 2005 p.20

⁴⁹ MIGA. (2010). World Investment and Political Risk 2009 104. Retrieved from http://www.miga.org/news/index_sv.cfm?aid=2486. doi:10.1596/978-0-8213-8213-8115-1 cited in KyeonghiBaek and XingwanQian above

⁵⁰ KyeonghiBaek and XingwanQian, (n 43) p3

⁵¹ Büsse, M., & Hefeker, C. (2005). Political Risk, Institutions and Foreign Direct Investment Hamburg Institute of International Economics Discussion Paper 315. Cited in KyeonghiBaek and XingwanQian, (n 43) p6

⁵² Jensen, N. (2008). Political Risk, Democratic Institutions, and Foreign Direct Investment. *Journal of Politics*, 70(4), 13. Cited in KyeonghiBaek and XingwanQian, (n 43) p6

⁵³ Haftel, Y. Z. (2006b). Regional Integration, Signaling, and Foreign Direct Investment: The Case of ASEAN. *International Studies Association*, 35. P.6 cited in KyeonghiBaek and XingwanQian above p8

FDIs are profit making organizations and hence take care of choosing a host country, taking different determinants of FDI which exist there, before starting to establish their business and invest their capital. One of the determinants which they take into consideration is the political risk. Once foreign investors sunk their capital in the host country, it will be extremely costly for them to withdraw investments they have already made in the host market.⁵⁴ Due to this difficulty, the host country can exploit or expropriate foreign assets though initially it has promised fair and favorable terms and policies to foreign investors to attract FDI.⁵⁵ Increase in economic growth and increment in population number of the continent is said to be an incentive for the investors having market seeking intention. The large population size of the host state the more possibility of attracting market seeking FDI will be as investors seek to take advantages of the growing market. The research made by Mohamed and Sidiropoulos shows that the size of the economy influences FDI flows into the Middle East and North Africa (MENA) countries.⁵⁶ The research carried out by Leitao using data from 1998 to 2007, has showed that the market size plays an important role in influencing FDI flows into Greece.⁵⁷ In another research conducted by Zheng showed that market growth is an important determinant to pull FDI to India and China.⁵⁸

The existence of strong institutions to control corruption, enforcement of law and impartial legal system is also stated to be one of the factors which few Sub Saharan countries which lack natural resources were effective to obtain inward FDI. This finding is mentioned in the research conducted by Asiedu.⁵⁹

The existence of natural resources is concluded to be the major determinant for the inflow of FDI to Middle East and North African countries as researched by Mohamed and Sidiropoulos.

⁵⁴Tarzi, S. (2005). Foreign Direct Investment Flows into Developing Countries: Impact of Location and Government Policy. *Journal of Social, Political and Economic Studies*, 30(4), 497-515. Cited in KyeonghiBaek and XingwanQian above p8

⁵⁵Berger, A., Busse, M., Nunnenkamp, P., & Roy, M. (2010a). Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box. Staff Working Paper (ERSD-2010-13). Cited in KyeonghiBaek and XingwanQian above p8

⁵⁶Mohamed SE and Sidiropoulos MG. (2010) Another look at the determinants of foreign direct investment in MENA Countries: An empirical investigation. *Journal of Economic Development* 35: 75-95 cited in Caroline Wanjiru, (n 39) p.39

⁵⁷Leitão NC. (2010) Localization factors and inward foreign direct investment in Greece. *Theoretical and Applied Economics* XVII: 17-26 cited in Caroline Wanjiru (n 39) p.39

⁵⁸Zheng P. (2009) A comparison of FDI determinants in China and India. *Thunderbird International Business Review* 51: 263-279 cited in Caroline Wanjiru (n 39) p.39

⁵⁹Asiedu E. (2006) Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability. *World Economy* 29: 63-77 cited in Caroline Wanjiru (n 39) p.40

Infrastructure is also said to be one of determinants of FDI in SSA. If there is well developed infrastructure such as roads, railways, bridges, ports and construction, the investor's cost of production will be decreased. Africa receives low amount of FDI due to poor infrastructure when compared to other developing regions according to the finding of the research conducted by Dupasquier and Osakwe.⁶⁰ Onyeiwu and Shretha found that the mere absence of well-developed infrastructure doesn't deter inflow of FDI as natural resources, openness and other macro-economic variables may be more significant.⁶¹

Having high educated human power is another factor which positively affects flow of FDI. The country with high literacy rate will have opportunity to attract more FDI.⁶² In this regard, it must be noted that not only the quantity but also the quality of the educated matters in attracting FDI. The quality includes the health of the elite. The healthier of the elite, the more his productivity will be which the foreign investors are concerned with. Studies made by Mateev⁶³ and Leitao⁶⁴ show the cost of labour is also another significant factor which foreign investors are concerned with in deciding to invest in the host country.

Openness to trade has its part in determining the FDI flow into the country. As Asiedu found in his study, less openness of trade will attract market seeking FDI.⁶⁵ If the host country limits the amount of the product to be exported, then the multinational corporation in need of the host country's domestic market will be attracted. They will also opt to establish firm in order to escape the restrictions on the imported products such as tariffs and quotas. Restrictions on exports will discourage the multinational companies which are in need of exporting their products. This is because other countries may also take measures of retaliation following the restricting measures taken by the host country which makes exporting products to other nations difficult.

⁶⁰Dupasquier C and Osakwe PN. (2006) Foreign direct investment in Africa: Performance, challenges, and responsibilities. *Journal of Asian Economics* 17: 241-260 cited in Caroline Wanjiru (n 39) p.41

⁶¹Onyeiwu S and Shretha H. (2004) Determinants of foreign direct investment in Africa. *Journal of developing societies* 20: 89-106 cited in Caroline Wanjiru, (n 39) p.42

⁶²Twimukye E. (2006) An econometric analysis of determinants of foreign direct investment: A panel data study for Africa. *Economics. Graduate School of Clemson University*, 93. Cited in Caroline Wanjiru (n 39) p.42

⁶³Mateev M. (2009) Determinants of foreign direct investment in Central and Southeastern Europe: New empirical tests. *Oxford Journal* 6: 133-149 cited in Caroline Wanjiru, (n 39) p.43

⁶⁴Leitão NC. (2010) Localization factors and inward foreign direct investment in Greece. *Theoretical and Applied Economics* XVII: 17-26. Cited in Caroline Wanjiru, (n 39) p.43

⁶⁵Asiedu E. (2002) On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different? *World Development* 30: 107-119. Cited in Caroline Wanjiru, (n 39) p.43

Trade in services has more barriers than in goods. If services such as telecommunication, insurance, legal services, banking, transport and retail are liberalized, there will be more possibility of attracting FDI. It is stated that the findings of the research by Hailu and also shows this fact.⁶⁶

Inflation rate is another factor which determines inflow of FDI. The research conducted by Hailu shows the higher rate of inflation discourages the flow of FDI.⁶⁷ In another words, the low inflation rate has positive impact on the flow of FDI into Africa. A low level of inflation indicates the host country's macro-economic policy is sound.

There are studies which show that the political risk is one of the major components which influence FDI flow into Africa. Busse and Hafeker concluded that government stability, internal and external conflicts, law and order, ethnic tensions and bureaucratic quality are important determinants of FDI.⁶⁸ Corruption and democratic accountability also exert their share in determining FDI flow though in a lesser degree. It is also believed that political instability across the continent of Africa is accountable for the low inflow of FDI. As Daude and Stein concluded unpredictability of laws, regulations and policies, too much regulatory burden, government instability, and lack of commitment are said to be significant in determining FDI.⁶⁹

There are researchers who conclude that political instability is insignificant variable in attracting FDI. There are other variables which the foreign investors weigh more than the political condition of the host country to invest in the latter. For example, Angola is said to have attracted large amount of FDI in 1998 and 1999 which ranked it the first in SSA despite the fact that during this time the country was facing political instability.⁷⁰

⁶⁶Hailu Z. (2010) Demand side factors affecting the inflow of foreign direct investment to African countries: Does capital market matter? *International Journal of Business and Management* 5. Cited in Caroline Wanjiru, (n 39) p.44

⁶⁷ Ibid

⁶⁸Busse M and Hefeker C. (2007) Political risk, institutions and foreign direct investment. *European Journal of Political Economy* 23: 397-415. Cited in Caroline Wanjiru, (n 39) p.45

⁶⁹Daude C and Stein E. (2007) The quality of institutions and foreign direct investment. *Economics & Politics* 19: 317-344. Cited in Caroline Wanjiru, (n 39) p.45

⁷⁰Asiedu E. (2002) On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different? *World Development* 30: 107-119. Cited in Caroline Wanjiru, (n 39)

Government policies which give incentives to foreign investors are also said to play significant role in attracting FDI. Governments can offer incentives to the potential foreign investors in the form of tax holidays, tax rebates, investments in infrastructure etc.⁷¹

The existence of bilateral and regional investment treaties is also believed to play in pulling FDI. Neumayer and Spess find that a higher bilateral investment treaties increase FDI flows into a developing country.⁷² The host countries engagement in different bilateral investment treaties lifts up the foreign investors' suspicion to some degree.

Exchange rate is another factor which plays role in shaping investors' decision to invest in a host country. It is researched that real exchange rate appreciation and FDI flows have inverse relationship.⁷³ It is also found that real exchange rate volatility has negative impact on FDI inflow.⁷⁴

There are some other researchers who have come up with finding that the existence of other foreign firms in the host country lifts up the uncertainty of the potential foreign investors which is called agglomeration. Campos and Kineshita have concluded that agglomeration is an important determinant of FDI inflows for Eastern European and Baltic countries.⁷⁵

Findings by Shiimi and Kadhikwa⁷⁶, Astatike and Assefa⁷⁷ and Ndikumana and Verick⁷⁸ show natural resources, initial level of PCGDP, GDP growth, GDP per capita, economic structure (industrialization), surrounding market, expected return, human capital, domestic saving,

⁷¹Banga R. (2003) Impact of government policies and investment agreements on FDI inflows. Indian Council for Research on International Economic Relations. Cited in Caroline Wanjiru (n 39)

⁷²Neumayer E and Spess L. (2005) Do bilateral investment treaties increase foreign direct investment to developing countries? *World Development* 33: 1567- 1585. Cited in Caroline Wanjiru (n 39)

⁷³Kandiero T and Chitiga M. (2006) Trade openness and foreign direct investment in Africa. *South African Journal of Economic and Management Sciences* 9: 355- 370. Cited in Caroline Wanjiru (n 39)

⁷⁴Kyereboah-Coleman A and Agyire-Tettey K. (2008) Effect of exchange-rate volatility on foreign direct investment in Sub-Saharan Africa: The case of Ghana. *The Journal of Risk Finance* 9: 52-70. Cited in Caroline Wanjiru (n 39)

⁷⁵ Campos NF and Kinoshita Y. (2003) Why Does FDI Go Where it Goes? New Evidence from the Transition Economies: International Monetary Fund. 20 cited in Caroline Wanjiru (n 39)

⁷⁶Shiimi, I. W. and Kadhikwa, G. (1999) "Saving and Investment in Namibia". Bon Occasional Paper No. 2. Cited in Ambachew Mekonnen, 'Determinants of Private Investment in Ethiopia: A Time Series Study' (2010) *XIX Ethiopian Journal of Economics* 75, 116

⁷⁷Astatike, G. and Assefa, H. (2006) "Determinants of Foreign Direct Investment in Ethiopia: A time Series Analysis". Policy Studies Institute, London. Cited in Ambachew (n 76)

⁷⁸Ndikumana, L. and Verick, S. (2008) "The Linkages between FDI and Domestic Investment: Unravelling the Developmental Impact of Foreign Investment in Sub-Saharan Africa". Discussion Paper No. 3296, University of Massachusetts, UNECA and IZA. Cited in Ambachew (n 76)

labour inputs, access to credit, foreign exchange, openness, trade connection, export orientation, trade liberalization, degree of competition, infrastructure, investment climate, corruption and red tape, efficient institutions, legal system are the identified determinants of FDI.

2.2.2. Determinants of FDI in Ethiopia

We have looked the general overview of determinants of FDI which exist in different parts of the world. Now let's particularly examine into the factors which present in Ethiopia. Different studies, though few in number, are made regarding the determinants which exist in Ethiopia.

Investment is evidenced to be affected favorably by the growth of domestic market (growths of private consumption or per capita income), return to investment, government policies promoting openness and liberalization, infrastructure; and negatively by macro-economic instability (inflation and foreign exchange reserve), government expenditure, and political instability.⁷⁹ The government of Ethiopia has been trying to boost FDI inflows into the country by liberalizing the investment regime of the country and by providing various investment incentives. Nevertheless, the amount of foreign direct investment coming to Ethiopia is quite small and the regional distribution of FDI coming to Ethiopia is uneven.⁸⁰ Low level of effective demand due to the limited purchasing power of the people, absence of some important natural resources like petroleum, low level of infrastructure development, excessive bureaucracy, inefficient and ineffective legal system, unstable political environment, and lack of skilled force, lack of liberalization and slow process of the privatization program had been factors which deterred the flow of FDI. Therefore, the country, to draw a sizable non-resource seeking FDI or diversified FDI, is suggested to attain a certain minimum level of development.⁸¹

2.3. The Legal Framework of FDI

Since FDI crosses international boundaries of sovereign states, it is inevitable that anything related with the investment and investor will be regulated by the law having cross-border applicability. This does not mean that there are no instances in which domestic laws can also play their role in regulating the foreign investment. For example, the investor-host state prior negotiation may deal with the possibility of the applicability of the host state's domestic laws.

⁷⁹ Ibid

⁸⁰ Solomon Mamo, 'Determinants of Foreign Direct Investment In Ethiopia'(2008)Maastricht Graduate School of Governance Maastricht University Maastricht, The Netherlands p.41

⁸¹ Ibid

The very nature of foreign investment, as discussed above, makes it inevitable that the nature, structure, and purpose of foreign investment law stands out as structurally distinct in the broader realm of international law.⁸²

Legal instruments have been developed globally, bilaterally, and regionally. Though their scope varies widely among agreements, they all share elements of investment protection and promotion and are mostly and explicitly geared towards attracting FDI.⁸³

While many countries enjoy open policies on investment, some continue to protect domestic investors. Many still believe that openness to international companies will damage domestic industries, which in this scenario will not be able to compete with foreign companies. With the growing liberalization and globalization in many parts of the world including Africa, concern regarding industrial competitiveness is growing—more with developing than with developed countries.⁸⁴

2.3.1. Multilateral Investment Treaties

Most international efforts to regulate investment in the past have been led by organizations representing groups of countries and can at best be categorized as multilateral instruments—such as the Trade-Related Investment Measures (TRIMs) Agreement, part of the agreements that stem from the World Trade Organization (WTO).⁸⁵ The scope of TRIMs is limited to the investment measures affecting trade in goods, not services or internal trade. In addition, investments made in the form of “commercial presence” as well as investors in the form of “presence of natural persons” are covered by the General Agreement on Trade in Services (GATS). There are also OECD based frameworks which have instruments that constitute a body of soft and hard law pertaining to instruments for FDI. Finally there are guidelines, principles, and draft instruments that deal with the policy dimension of investment. These instruments, too, are non-binding and are mainly designed to assist countries in designing investment policies or building governance elements into their policies and regulations. Some examples that include Africa are the UN Code

⁸² Ibid p.5

⁸³ Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration,(United Nations Economic Commission for Africa 2016) p.13

⁸⁴ Ibid

⁸⁵see WTO legal texts: http://www.wto.org/English/docs_e/legal_e.htm. for the comprehensive list of WTO Agreements as stated by Investment Policies (n 33)

of Conduct on Transnational Corporations, the UN Guiding Principles on Business and Human Rights, the International Labour Organization (ILO) Tripartite Declaration on Multilateral Enterprises, the World Bank Investment Guidelines, and the UNCTAD Investment Policy Framework for Sustainable Development.⁸⁶

2.3.2. Bilateral Investment Treaties

The roots of modern treaty rules on foreign investment can be traced back to 1778 when the United States and France concluded their first commercial treaty, followed in the nineteenth century by treaties among the United States and its European allies and, subsequently, the new Latin American States.⁸⁷ Treaties signed in 18th century are generally called treaties of *friendship, navigation and commerce (FNC)* whose primary concern was governing trade relations.⁸⁸ When we look into the content of the treaties, they follow the protectionist approach which aim to the protection of property of the foreign investors situated in the country of the other party (host country).⁸⁹ Today, there are thousands of treaties signed by pairs of countries in the world.

Ethiopia has signed Bilateral Investment Treaties with 33 countries all of them containing obligation of security and protection of foreign investment.

2.4. Standards of Protection under BITs

Treaties, especially BITs, typically provide for certain standards of protection. The standards are Fair and Equitable Treatment (FET), full protection and security, protection against arbitrary and discriminatory treatment, national treatment and most favored national treatment. Though there are tribunals which consider these tribunals as strongly interconnected, majority of them choose to see the standards as analytically distinct.⁹⁰ Let's see each of them briefly.

⁸⁶ Ibid

⁸⁷ R Wilson, *United States Commercial Treaties and International Law* (1960)2 cited in Rudolf Dolzer (n 88) p.17

⁸⁸ AlirezaFalsafi (2008-2009), *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 *Syracuse Journal of International Law and Commerce*, pp. 45-46. Cited in Marta Belete and TilahunEsmael, 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration' (2014) 8 *MLR* 117,120

⁸⁹ See FlasaFi p 46 above cited in Marta, see above

⁹⁰ ChristophSchreuer, 'Investments, International Protection' working paper

2.4.1. Fair and Equitable Treatment

The FET standard is designed as a rule of international law and is not determined by the laws of the host state. It may be violated regardless of the fact that the foreign investor is treated in the same manner as the domestic one. Principles such as transparency, consistency, stability and protection of the investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith (bona fide) and freedom from coercion and harassment are evolved from the facts brought and entertained before investment tribunals.⁹¹

2.4.2. Full Protection and Security

2.4.2.1. General Consideration on the Obligation

Though the most common expression of the protection standard is "full protection and security", it has also been mentioned in different phrases such as "constant protection and security", "protection and security" and etc.

This standard imposes obligation of taking active measures to protect the investment from adverse effects upon the host state. The traditional purpose of this standard was protecting the investor against physical violence, including the invasion of the premises of the investment. There is also authority which suggests that the purpose of the standard goes beyond that to include legal protection, protection against infringements of the investor's rights as well. The standard does not provide an absolute protection against physical or legal infringement. In terms of the law of state responsibility, the host state is not placed under a strict liability to prevent such violation. Rather, it is generally accepted that the host state will have to exercise due diligence and will have to take such measures protecting the foreign investment as are reasonable under the circumstances.⁹² However, this doesn't work always. Whenever, state organs themselves act in violation of the standard, no issues of attribution or due diligence will arise because the state will then be directly responsible.⁹³

⁹¹ Ibid

⁹² *Noble Ventures Inc. v Romania* [Award of 12 October 2005] para. 164 cited in *Christoph Schreier*, (n 129)

⁹³ Ibid

The essential applicability of the standard of “full protection and security” lies when the foreign investment has been affected by civil strife and physical violence.⁹⁴ It was held in the AMT arbitration that if the host state wants to escape the liability related with the breach of this obligation “it must show that it has taken all measures of precaution to protect the investments of the investor in its territory.”⁹⁵ The host state is obliged to show whether it has played role amounting to due diligence.⁹⁶ The quote borrowed by the tribunal in *Wena from American Manufacturing and Trading*⁹⁷, has stated,

The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.⁹⁸

Therefore, it was concluded that the standard of obligation of securing and protecting the foreign investment is not the absolute obligation to be imposed upon the host state. Rather, the host state is duty bound only to adopt all possible and reasonable measures to protect assets and property of the foreign investors from threats which may target either foreigners of certain groups of foreigners.⁹⁹ However, this obligation does not shoulder the host state to protect the foreign investment from any kind of impairment, but imposes the obligation of protecting the physical integrity of an investment against interference by use of force.¹⁰⁰

BITs sometimes clearly limit the scope of the application of the obligation, sought from the host country, only to the police protection (physical protection) and other BITs keep silent on its scope while still others stipulate the same referring to the standard of the protection recognized

⁹⁴ American Manufacturing & Trading, Inc. (AMT) (USA) v. Republic of Zaire, ICSID Case No. ARB/93/1, 21 February 1997 cited in *The Matter of an Arbitration under the Uncitral Arbitration Rules 1976, Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award*, p98

⁹⁵ AMT, ICSID Case No. ARB/93/1, para. 6.05; see also *Wena Hotels Ltd. (UK) v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 8 December 2000, cited in *The Matter of an Arbitration*, above

⁹⁶ R. Dolzer & M. Stevens, *Bilateral Investment Treaties 60* (ICSID 1995), cited in *The Matter of an Arbitration* above

⁹⁷ AMT, ICSID Case No. ARB/93/1, para. 28. Cited in *The Matter of an Arbitration*, above

⁹⁸ *Wena*, ICSID Case No. ARB/98/4, para. 84, cited in *The Matter of an Arbitration*, above

⁹⁹ OECD, *Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment*, No. 2004/3 (2004) p26ff cited in *The Matter of an Arbitration*, above

¹⁰⁰ *The Matter of an Arbitration*, (n 94) p98

under the customary international law.¹⁰¹ For example, article 5 of the US Model BIT reads as follows:

*“full protection and security” requires each Party to provide the level of police protection required under customary international law.*¹⁰²

This article explicitly provides its scope of application in two ways: “First, it pegs the full protection and security standard to the minimum standard of customary international law for the treatment of aliens, and second, it refers only to the level of police protection. The latter also helps clarify the debate in recent cases on the application of this standard beyond police protection.”¹⁰³

On the other hand, article 5 of the Canadian Model Foreign Investment Promotion and Protection Agreement doesn’t limit the standard to the police protection. Rather, it simply refers to the customary international law. It reads as follows:

*The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*¹⁰⁴

The association of Southeast East Asian Nations (ASEAN) Investment Agreement kept silent as to the applicability of the customary international law. Rather, it has clearly stipulated that the standard requires the host state to take reasonable measures in order to protect the covered investments.¹⁰⁵ It reads as follows:

*Full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.*¹⁰⁶

¹⁰¹Mahnaz Malik, The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?, Best Practices Series, (International Institute for Sustainable Development 2011) p2

¹⁰² Article 5/2/b of US Model BIT 2004; See Mahnaz Malik above

¹⁰³Mahnaz (n 101)

¹⁰⁴ Article 5/2 of the Canadian Model Foreign Investment Promotion and Protection Agreement (Foreign Affairs and International Trade Canada, 2004) See Mahnaz Malik above

¹⁰⁵See Mahnaz Malik above p3

¹⁰⁶ Article 11/2/b of ASEAN Investment Agreement (2009)

According to this provision, the obligation of the host state to protect and secure the foreign investment is not the strict one. Rather, it will be seen case by case basis taking the host country's vigilance towards the protection of the foreign investments. If the host state is able to show that it has played all the necessary measures to protect the physical integrity of the investment, then it will have the chance to be freed from liability.

Surprisingly, unlike thousands of currently existing BITs, there are also two treaties which lack this standard. These are Investment of the Southern African Development Community Finance and Investment Protocol (2006) and the Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA, 2007). These treaties 'reflect the growing concern among developing countries about this standard'.¹⁰⁷

2.4.2.2. Obligation of a State at the time of Emergency, Armed Conflicts, and Force Majeure

Cases which have been decided before 1930 entertained investment issues which contain the concept of *force majeure* in relation with the consequences of unrest in Central and Latin American countries. The entertainment of the cases came up with the principle of non-responsibility of the host state for extraordinary events of social strife and disorder.¹⁰⁸ Although in principle the host state is not liable at the time of *force majeure*, this principle is qualified by a duty of the host state to exercise due diligence which includes the using of the police and the military forces to protect the interests of the foreign investors to the extent feasible and practicable under the circumstances. This is true both before the event and while it unfolds.¹⁰⁹ This presupposes a claimant's duty to establish that the host state is negligent enough to discharge its duty.¹¹⁰ This principle is developed under customary international law.

When we come to the treaties, they are not seen when deviating from the principle developed under the customary international law. Most of the treaties stipulate the obligation of the host state at the time of emergency in the following manner;

¹⁰⁷Mahnaz (n 101) p4

¹⁰⁸*Spanish Zone of Morocco Claim*(1924), RIAA, vol 2, 615,642; *Pinson v United Mexican States* (1928) in RIAA (1952) vol 5, 327,419, cited in Rudolf Dolzer and ChristopSchereuer (n18) p166

¹⁰⁹*Melilla v Ziat, Ben Kiran* (1924), RIAA (1949) vol 2, 730; *Pinson v United Mexican States* (1928), RIAA (1952) vol 5, 327, cited in Rudolf Dolzer and ChristopSchereuer (n 18).

¹¹⁰Brownlie, *Principles Public International Law* (6thed, 2003) 438 cited in Rudolf Dolzer and ChristopSchereuer (n 18)

Investors of either contracting state whose investments suffer losses in the territory of the other contracting state owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other contracting state than that which the latter contracting state accords to its own investors as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable. Investors of either contracting state shall enjoy most-favored-nation treatment in the territory of other contracting state in respect of the matters provided for in this Article.¹¹¹

Almost all of the BITs signed by Ethiopia contain the stipulations of this type.

2.4.3. National Treatment

This standard is said to be one of the difficult standards to achieve because of its sensitive nature in terms of both economically and politically. Due to this very nature of the standard, no single country, so far, has seen itself in a position to grant national treatment without qualification.¹¹²

National treatment refers to a principle whereby a host state extends to foreign investors treatment that is at least as favorable as the treatment that it accords to its national investors in like circumstances. Other investment issues and concepts which national treatment interacts with are issues of admission and establishment, the most-favored-nation (MFN) standard, host country operational measures and investor-state dispute settlement.¹¹³

2.4.4. Most-favored-nation Treatment

This standard requires parties to a treaty to treat each other in a manner at least as favorable as they treat third parties. Therefore, it depends on the particular conduct of a party. This means if a party has not done anything favorable to a third party, then this standard is not reasonable to be raised. As soon as the state does confer a relevant benefit, it is automatically extended to the state that benefits from

¹¹¹Article 4(3) and 4 of the German Model BIT. Article 5(4) of the 2004 US Model Treaty, cited in Rudolf Dolzer and Christoph Schreuer above

¹¹² United Nations Conference on Trade and Development, International Investment Agreements: Key Issues (2004)1 United Nations p161

¹¹³ Ibid

the MFN clause.¹¹⁴ It is mentioned that the acts of the political subdivision of federal government are attributable to the central government.¹¹⁵

2.5. Political instability and its impact on FDI

It is obvious that existence of peace and security in the host country is the welcoming fact for the foreign investors. However, no one, including the foreign investors, can be 100 percent sure about the fact that will take place tomorrow. Today's stable country may be turned to be the country with so many political problems.

Many developing countries in the world are not politically stable and mostly they suffer from poor quality of governance. But some of them are showing appreciated political and economic stability.¹¹⁶

It is concluded that firms locate their foreign direct investment in the host country where there is the highest potential for profit and least risk.¹¹⁷ A Country's political risks are crucial factors which are considered by foreign investors while making an investment decision. According to Schneider and Frey, high levels of political instability make a host country less attractive to foreign investors, as uncertainty about future events makes investment more risky.¹¹⁸ Civil war is one of the causes which force the flight of the productive resources such as financial, physical and human capital, to other safer nations.¹¹⁹

Strong evidence is found which shows that increased conflict intensity significantly increases the flight of capital.¹²⁰ Representing civil war with months of war in a given decade, months of potential recovery from war in a given decade, and the length in a months of any previous war, Collier finds that civil war negatively affects GDP per capita.¹²¹ There is also finding which shows political risk and sociopolitical instability (measured as the number of work-hours lost

¹¹⁴ Rudolf Dolzer and Christoph Schreuer, (n 18) p186

¹¹⁵ ADF v United States, Award, 9 January 2003, 6 ICSID Reports 470, at para 166 cited in Rudolf Dolzer, (n 18) p187

¹¹⁶ Abdul Malik Nazeer and Mansur Masih, 'Impact of political instability on foreign direct investment and Economic Growth: Evidence from Malaysia', Munich Personal RePEc Archive 2017 p4

¹¹⁷ Yarborough and Yarborough (2003) cited in Brendan Pierpont, 'Violent Conflict and Foreign Direct Investment in Developing Economies: A Panel Data Analysis' (Macalester College 2005) p.3

¹¹⁸ Schneider and Frey (1985) cited in Brendan Pierpont see above

¹¹⁹ Collier (1999) cited in Brendan Pierpont p3, see above

¹²⁰ Fielding (2004) cited in Brendan Pierpont p4, see above

¹²¹ Collier (1999) cited in Brendan Pierpont p4, see above

during periods of social upheaval) have a significant effect on foreign direct investment, controlling for market size, economic growth and time effects.¹²²

Using data from 1991-2003 from 22 countries, Brendan Pierpont has found evidence that violent conflict reduces flows of foreign direct investment per capita. Additionally, using two measures, civil conflict is shown to reduce FDI flows per person. He has also found that violent conflicts have lasting effects on a country's investment climate. Civil war can harm a country's prospects for attracting FDI for several years. However, five years after a conflict ends, some countries may experience a "peace dividend" in the form of increased foreign direct investment.¹²³

In Nigeria, furnished theft, killing and repeated attack and barring of business establishments, social foul play, and joblessness, the absence of access to occupation assets, bombings and pipelines pulverization are said to have made the security condition to be intricate. The organized assaults from the Boko Haram group in the northern part of the country has influenced vast numbers of organizations working in the district.¹²⁴ As a result of this, it is that FDI is decreased in Nigeria. Outside financial investors in the Nigerian economy are moving far from beginning new organizations or creation plants and are purchasing up offers of cited institutions. The 2010 yearly report of Central Bank of Nigeria (CBA) demonstrates a precarious 78% decrease in FDI while showing a critical 87.2% expansion in portfolio venture into the Nigerian economy to exploit the misery in the Nigeria securities exchange.¹²⁵

Nigeria is said to have faced several social security issues such as unemployment, poverty, porous borders, ethnic conflicts and terrorism. Unemployment and poverty are the major causes for an increased number of crimes and insecurity in the country.¹²⁶

2.6. Insurance for Political Risks

Usually investors who are in fear of country risks resort to political risk insurance. The phrase 'political risk insurance' refers to different programs that aim at reducing the investor's exposure

¹²² Jun and Singh (1995) cited in Brendan Pierpont p.5, see above

¹²³ Brendan Pierpont, p22 see above

¹²⁴ GylychJelilov, Kemal Ozden and SotonyeOrinaemi, 'Impact of Insecurity on Investment in Nigeria' (2018)2 JOMEINO 41,43

¹²⁵ Ibid

¹²⁶ Ibid, p.58

to country risk.¹²⁷ Insurance instruments can be classified into four principal classes.¹²⁸ The first one is when a government owns and operates insurance to its nationals that invest in eligible foreign states which is called national or bilateral guarantee programs.¹²⁹ The other category which is called multilateral guarantee programs offer investors from World Bank member states insurance to protect investments placed in developing member states. One example is MIGA.¹³⁰ The other insurance program is the one provided by regional development banks to their respective members.¹³¹ The fourth one is the one which provided by private insurance companies by selling products to anyone.¹³²

Emerging economies have more risks associated with FDI. This is characterized both in terms of the scope of the risk which range from civil unrest and war to economic crisis and geographic dispersion.¹³³ PRI started to cover risks associated with events readily identified as being political such as war and civil disturbance, currency inconvertibility, and traditional expropriation.¹³⁴

Market for investment insurance schemes was evolved following the risk for the investor inherent in major investment projects. The first phase of insurance program intended to promote outgoing investment of the nationals and was dominated by insurers run by national governments. Private insurers began the business in 1970.¹³⁵ In the United States, the Agency for International Development carried out the task until the Overseas Private Investment Corporation (OPIC) took over in 1971. In the early 1970s, private insurers entered the market, beginning with Llyd's in London and the American International Group (AIG) in New York. In 1985 the

¹²⁷KRISTA NADAKAVUKAREN SCHEFER, INTERNATIONAL INVESTMENT LAW 511–12 (2013).Cited in Marcos (n 44) p102.

¹²⁸ Ibid

¹²⁹ Ibid at 96-97

¹³⁰ Ibrahim Shihata, Toward a Greater Depolitization of Investment Disputes: The Roles of ICSID and MIGA, in INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY, cited in Marcos (n 151) p102

¹³¹ For example, political risk insurance is provided by the Islamic Corporation for Insurance of Investment and Export Credit (member of the Islamic Development Bank Group), the Asian Development Bank, the African Development Bank, and the InterAmerican Development Bank, among others. Mentioned by Marcos (n 151)

¹³² Kathryn Gordon, Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development, in OECD INVESTMENT POLICY PERSPECTIVES 2008, 103-04 (2009). Cited by Marcos (n 151)

¹³³ Theodore H. (ed), International Political Risk Management: The Brave New World (The World Bank Group and MIGA 2004) p2

¹³⁴ Ibid

¹³⁵Shihara, 'Regional Investment Insurance Project' (1972) 6 Journal of World Trade Law 185 cited in Rudolf Dolzer (n 18) p. 207

member states of the World Bank decided to establish an international organization, the Multilateral Investment Guarantee Agency (MIGA) for the same purpose. The Inter Arab Development Bank is charged primarily with the underwriting of investment insurance on the regional level.¹³⁶ Other multilateral PRIs are the African Insurance Agency (ATI), the Asian Development Bank, the Inter-American Development Bank, the Arab Investment and Export Guarantee Corporation (Dhaman), and the Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC).¹³⁷

The national program has the purpose of promoting the national economy. Usually, only national companies and their projects in countries friendly to the investor's home country are granted protection by the national program. Expropriation, non-convertibility of currency, and political violence are usually covered risks. For instance, OPIC covers issues related with expropriation, non-convertibility, and losses due to war, revolution, insurrection, and civil strife.¹³⁸

In Germany, the national programs are subsidized while in other such as OPIC in United States they undergo their activities without a burden to the taxpayer. According to the statement of preamble of MIGA, the main reason which triggered its creation was facilitating and further encouraging the flow of foreign investment to developing countries by alleviating concerns related to non-commercial risks.¹³⁹

Some government agencies, for instance OPIC, do their activities in cooperation with the private insurers. They don't seek to compete with them which bring about coinsurance and reinsurance as a result.¹⁴⁰

Domestic insurers, private and public, and MIGA differ in their willingness to accept various types of risks and offer different rates for different packages of insurance. MIGA is only prepared to insure an investment that satisfies its understanding of economic soundness and that has received host country approval.¹⁴¹ There is no requirement of specific standards of protection of foreign investment in the host country within the rules of MIGA. The reason for this is the limitation of the applicability of MIGA to its member countries. MIGA only insures risk in

¹³⁶Ibid

¹³⁷ MIGA WIPR REPORT 2010, The Political Risk Insurance Industry p.54

¹³⁸ USC Section 2194 cited in Rudolf Dolzer, (n 18)

¹³⁹ Rudolf Dolzer, (n 18)

¹⁴⁰ Ibid, p.208

¹⁴¹ See Articles 12(d) and 15 of the Convention Establishing the Multilateral Investment Guarantee Agency cite in Rudolf Dolzer, (n 18)

‘MIGA member’ countries where there is a bilateral agreement between MIGA and the host government.¹⁴²

Multilateral Political Risk Insurance (PRI) providers are more risk takers when compared to private insurers because of their mandate and ownership structures; i.e., they can be in a better position than private insurers to provide cover in investment destinations considered riskier, such as conflict-affected and fragile (CAF) countries. They are, therefore, well placed to play a catalyst role in expanding market capacity for these destinations not only by providing PRI directly, but also by mobilizing reinsurance and coinsurance for investments in destinations that may otherwise not have been considered.¹⁴³

2.7. Compensation

As we have said elsewhere in this paper, one of the factors which foreign investors worry about is the political situation of the host country. Therefore, they strictly checkout the likelihood of occurring of risk against their investment and try to find out other mitigating circumstances which will guarantee protection for their investment.

Compensation is one and the major way to make the occurred damage good. As a result, almost all of investment legal materials stipulate about compensation though in different terms. There are two types of standards which are employed while computing compensation. These are Hull standard which envisages payment of prompt, adequate, and effective compensation¹⁴⁴; and its opponent known as ‘Calvo doctrine’ which postulates national treatment of foreign investors who are subject to national laws and municipal jurisdiction.¹⁴⁵ The element of promptness requires the compensation to be contemporaneous with expropriation or the damage including interest calculated from the time of taking or damage till the time of compensation.¹⁴⁶ According to Hull doctrine, ‘adequate’ or ‘full’ compensation refers to ‘fair market value’ of the

¹⁴² Rudolf Dolzer, (n 18) p. 209

¹⁴³ MIGA WIPR REPORT 2010, supra note 123 The Political Risk Insurance Industry p.54

¹⁴⁴ Tali Levy, 'Note, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of "Prompt, Adequate and Effective" Standard', *Stanford Journal of Int'l. Law*, 31 (1995), 424. Cited in Collins Chikodili, 'Analysis of Foreign Investment Protection Regimes in the Petroleum Sector in Nigeria – 1995 - 2013: Options for Reform' (DPhil thesis, University of Manchester 2014) p46

¹⁴⁵ See Collins above, p48

¹⁴⁶ Thomas W Merrill, 'Incomplete Compensation for Takings', *New York University Environmental Law Journal*, 11 (2002-2003), 112 cited in Collins (n 144)

expropriated or damaged investment.¹⁴⁷ Effective compensation is all about conducting the payment in convertible currency that is internationally transferable.¹⁴⁸

Restitution, satisfaction and compensation are the remedies which are provided in entertaining investment disputes before international arbitral tribunals. However, compensation is the usual remedy.

The usual elements which are taken into consideration while calculating the amount of the compensation are actual loss, lost profit and consequential loss. The actual loss refers to the value of property taken or destroyed. Loss of profit is an income which the investor has lost due to the illegal act. Consequential loss, on the other hand, refers to failure of an investor to meet its obligation to third party due to the illegal act.

The purpose of compensation is restoring the investor to the position where it would have been had the illegal act not taken place.

Article 25 of Ethiopian investment proclamation gives guarantee for investments from expropriation or nationalization.¹⁴⁹ As per the provision, no investment shall be expropriated or nationalized without meeting the requirements of the law. One of the preconditions which the provision has stipulated to be fulfilled is giving of adequate or appropriate compensation. But the compensation is provided for investments which are nationalized or expropriated. It doesn't provide for the investments against which injury is occurred due to different reasons such as political violence.

2.5. Political Risk and FDI

2.5.1. Risks in General

Risks are generally considered to be the potential for experiencing harm.¹⁵⁰“Change of government; lack of continuity in government policies; political instability; war, invasions, and other types of foreign conflict; internal conflict such as civil war, social unrest and high crime rate; terrorism; nationalism; and dependence on other states or international institutions are the

¹⁴⁷Merill, 'Incomplete Compensation for Takings', 112. Cited in Collins (n 144)

¹⁴⁸Merill, 'Incomplete Compensation for Takings', 112. Cited in Collins (n 144)

¹⁴⁹ Article 25 of Ethiopian Investment Proclamation No. 769/2012

¹⁵⁰Renn, O./Zwick, M. (2008). Risikokonzepte jenseits von Eintrittswahrscheinlichkeit und Schadenserwartung, In Fegentreff, C. and Glade, T. (ed.) *Naturrisiken und Sozialkatastrophen*. Springer. 77-97 cited in Ortwin Renn and others, OECD/IFP “Future Global Shocks”: “Social Unrest” (2011) p1

components of political risk.”¹⁵¹ Risks can be either real or perceived risks which can be different in nature and origin. Social unrest can be grouped into five: political structure related whose possible consequence will be government change; demography-related which may be followed by ethnic cleansing; environment related social unrest which may come to an end by having new regulation; human health and safety related social unrest which may be followed by fatalities and injuries; and economic related social unrest whose consequences will be company bankruptcies, private persons bankruptcies and new regulations.¹⁵² Most of the countries see civil violence as illegitimate action of protest.¹⁵³

2.5.2. Political Risks in Ethiopia

The current ethnic-based federalism or politicization of tribal identity, which the country started since the taking power of Ethiopian People Revolutionary Democratic Front(EPRDF), is considered to be one of the fuels which have exacerbated the political problems which Ethiopia is facing till now.¹⁵⁴ One of the problems is ethnic based clash between different ethnic groups.¹⁵⁵ Disagreements about the possession or use of land, grazing land or water resources and about settlements, regional hegemony, access to state resources such as funds, jobs, and investments and language policy in education and administration are mentioned to be the major frequent causes of the conflict.¹⁵⁶ It is also mentioned that Ethiopia is among African countries which faces particularly high pressure due to its mixed regime type.¹⁵⁷

¹⁵¹Marcos D. García, ‘Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into Account?’ (2016) 34 Arizona Journal of International & Comparative Law 96,100

¹⁵²Ortwin Renn and others, see above

¹⁵³ Ibid

¹⁵⁴Amnesty International 2014/15. The state of the world’s human rights report. Amnesty International Report 2014/15. Available from: <http://www.amnesty.org>, [Accessed 12 June 2016], Human Rights Watch 2014a. Country reports on human rights practices for 2014. Available from: <https://www.state.gov/j/drl/rls/hrrpt/2014humanrightsreport/index.htm> [Accessed 2 January 2015] and MoreshWegenieAmhara Organization 2016. The final report on ethnic cleansing done on Amhara ethnic group from 1991 to 2016. Available from: www.moreshwegenie.org [Accessed 12 March 2015], cited in BefekaduAtnafu, ‘Ethnic Federalism and Conflict in Ethiopia’ p.8

¹⁵⁵ Ibid

¹⁵⁶Aalen, Lovise 2002. Ethnic federalism in a dominant party state: The Ethiopian experience 1991–2000. Bergen, Michelsen Institute cited in Befekadu, (n 43)

¹⁵⁷ Structural Pressures and Political Instability: Trajectories for Sub-Saharan Africa, Report from Institute for Security Studies, 2018.

Ethnic violence is one type of political instability which is caused by democratization and globalization in the presence of an ethnic minority that dominates economically the indigenous poor majority.¹⁵⁸

For the last few years, massive demonstrations have been held in different parts of Ethiopia mainly on the issues related with political administration positions, which is considered to be run by the minority, Tigreans. The highways were frequently closed by the opposing groups, different properties of government institutions were burned down, huge ethnic based displacements (putting the country on the first rank of internal displacement) were conducted, other illegal acts were done against the lives and the properties of citizens and foreigners such as damaging properties of both domestic and foreign investors. In general, the country was fell in critical political situations.¹⁵⁹

Starting from the year 2016, so many foreign and domestic investment projects have been injured following the violence occurred in different parts of the country which was driven by political intention. As the Vice Commissioner of the Ethiopian Investment Commission (EIC) said the damage has occurred in three rounds and the fourth one is also reported. In the first round, 7 projects which have been situated in Oromia National Regional State were injured out of which the 3 were foreign investors and the 4 were the domestic one. In the first round totally 27 million Birr has been granted to the injured investments as financial aid not compensation according to the respondent.¹⁶⁰

In the second round, 19 projects have been damaged in different parts of the country out of which the 7 were the foreign investors and the remaining were the domestic one. For them the 186 million financial supports was made. The three Indian investments have refused to receive the granted money alleging that it was not proportional to the damage sustained by their investment as the vice commissioner said.¹⁶¹

¹⁵⁸ Chua A. (2003). *World On Fire. How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, New York: Anchor Books. Cited in Jong A Pin, *Essays on Political Instability: Measurement, Causes and Consequences*, (PhD Thesis, University of Groningen 2008) p7

¹⁵⁹ Interview with Yisfalign W/Amanuel, Vice Commissioner, Federal Investment Commission of Ethiopia (Addis Ababa, Ethiopia, 21 February 2019)

¹⁶⁰ Ibid

¹⁶¹ Ibid

In the third round 302 projects were damaged due to the political uprising in Oromia, Amhara and Southern Nations Nationalities and Peoples Regional State. The main projects which have been damaged were coffee farms, flower industries and hotels. In this round the government has made 68 million birr financial support as the commissioner said. There are also claims which are still in progress. As the commissioner said totally 1.16 billion birr has been paid for the injured investments so far.¹⁶²

The recently reported damages indicates that 149 investments have been attacked out of which foreign investments exist. The government has not made any payment to them yet. It is investigating the extent of the damage sustained by the investors after which the financial support will be made as the respondent said.¹⁶³

¹⁶² Ibid

¹⁶³ Ibid

CHAPTER THREE

Political Uprising and Foreign Direct Investment in Ethiopia: Legal Protection and Compensation

It is stated in the investment policy of Ethiopia that the country's constitution and the investment law guarantee protection of private property and investment. It is also said that the policy had been modified four times in favor of the investors and the country is a signatory of 29 bilateral investment treaties and 6 multilateral investment agreements which stipulate among other things protection of private property rights.¹⁶⁴

As one of profit making person, foreign investors need protection for their property. It is why different bilateral and multilateral investment agreements contain stipulations for the protection of the investment of foreign investors from different acts either physical or non-physical. The act which harm the investment of foreign investor may be taken either by the government of the host country or by any other body within the territory of the host state. As stated mentioned elsewhere in this paper, the government of the host country may take part in the act injurious to the foreign investment in different ways such as by enacting regulations which are detrimental to the investment, or through its actors such as police force or public officials or by its civilian citizens.

Almost all investment agreements and treaties provide for the consequences which will follow the injury sustained by the foreign investors. They usually stipulate for compensation to be paid by the host country. Compensation is usually allowed for the investments who have suffered from direct or indirect expropriation undertaken by the host country or losses occurred due to war, insurrection, riot and the like.

3.1. Protection under the BITs Signed by Ethiopia

As it has been mentioned above, Ethiopia has signed 33 BITs with different countries and Multilateral Investment Agreements. Like any other BITs of the other parts of the world, BITs signed by Ethiopia also contain provisions regarding the protection to be accorded to the foreign investments. The protection which is required under the treaties is stipulated in different standards. The highest standard of protection accorded to the foreign investments is 'Full Protection and Security' as we have mentioned above in the theoretical part of the thesis. This

¹⁶⁴Ethiopian Investment Commission, Investment Opportunities and Policies in Ethiopia

standard requires not only the physical protection to be made by the host country but also others such as protection in terms of sustainability of the legal and business environment of the host country.¹⁶⁵

Ethio-China BIT has inserted only the word 'protection' omitting the usually co-mentioned words 'full' and 'security' under article 3(1). It doesn't put any burdensome criteria to be fulfilled by the host state. However, under sub. Article 2, it obliges the host state not to accord less favorable protection than that of the protection which it accords to the investment of any other third nation. What if the protection accorded to the third nation's investor is not favorable? Does it mean that the protection should be measured in terms of the standard of protection accorded by the host state to the other one? No. there is universally developed minimum standard which should not be violated by the host state. The traditional understanding of full protection and security, based on customary international law, is limited to protection based on physical injury and maintaining and ensuring stability in the legal and commercial environment.¹⁶⁶

Ethio-Denmark BIT stipulated word by word regarding the protection needed to be forwarded to the foreign investment as 'investments of investors of each contracting party shall at all times enjoy full protection and security in the territory of the other contracting party' under article 2(2).

This provision seems so burdensome which puts huge load of obligation upon the shoulder of the contracting parties. It is obvious that the most of developing nations including Ethiopia are recipient of FDI. Therefore, the likelihood of being influenced by the provisions of the BITs goes to the developing countries. As stated earlier, this standard goes beyond the fulfillment of physical protection. Rather, under the standard, the host state is expected to maintain sustainability of its legal and commercial environment. Ethio-Egypt BIT contain similar stipulation except for the replacement of the word 'full' by the word 'adequate' (art. 2(2)). Ethio-Finland BIT puts it as 'full and constant protection and security'(art. 2(2)). The Ethio-Brazil BIT totally omits the word 'protection' and expresses it in another way. According to art. 4(3), each party is obliged to ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with its respective laws and

¹⁶⁵Mmiselo Freedom Qumba, Balancing the Protection of Foreign Direct Investment and the Right to Regulate for Public Benefit in South Africa (LLM, University of Pretoria)55

¹⁶⁶ Ibid

regulations. Ethio-France BIT contains the phrase ‘full and complete’ under article 5(1). Ethio-Israel BIT contains the phrase ‘full protection and security’ under article 2(2). Ethio-Malaysia BIT has inserted ‘full and adequate protection’ (article 2(2)). Ethio-Netherland BIT contains the ‘full security and protection’ clause (article 3(1)) and the same to Ethio-Russia BIT. Ethio-Turkey BIT under article 2(2) and Ethio-South Africa BIT under article 3(1) contain ‘full protection’ clause.

From the above cited BITs signed by Ethiopia, it is evident that the standards of protection sought by the treaties vary. Some of them load the heavy standard ‘full protection and security’ while the other puts simply the word ‘protection’ without qualifying the same. However, since all of the treaties contain the ‘national treatment’ and ‘the most favorable nation treatment’ as one package of protection, there will be a chance of having similar standard of protection accorded towards all foreign investors regardless of their origin.

3.2. Investments Injured During Political Uprising in Ethiopia

From the figures mentioned under chapter two, we can be sure that the political violence occurred since the last three years has left the country with the great damage. As the data obtained from EIC shows there are totally 5,348 foreign projects out of which 1,263 are in pre-implementation stage, the 1,061 are in implementation stage and 3,024 are in operation. More than half of the projects are engaged in agriculture, manufacturing and real estate sectors. Within the operational foreign investment projects 615, 039 employees are hired out of which 331,082 are the permanent and 283,957 are the temporary employees.¹⁶⁷

As we have said above in the theoretical part, FDI is becoming the major source of foreign currency especially for developing countries like Ethiopia. Not only that, but also it helps the country to alleviate the problem of unemployment because it hires significant number of citizens as shown above. The three investments (TAL Flower P.L.C., ET Highland Flora P.L.C. and Solagro P.L.C.) which the researcher has interviewed hired more than 1,500 temporary and permanent employees together every of whom has family who is administered under him/her. When the company within which they are winning their daily bread is injured their survival will be at risk. The attack made against the foreign investments in the name of political game harts the country in multidirectional way. Therefore, protecting investments in general and FDI in

¹⁶⁷ Email from Azalech.Bekele@ethio-invest.com (18 February 2019)

particular is not the one which should be compromised. Protecting the investments in advance saves the country's wealth and the citizens' life in general. It also wins the competition of attracting more FDI since foreign investors choose to sink their capital in the countries where they think is more protective than others. They look not only into the paper laws but also their implementation on the ground. As we have said above Ethiopia has signed several BITs with different countries which contain clauses regarding the protection of foreign investments. It has also signed multilateral investment agreements. It has domestic investment laws which directly or indirectly are meant to regulate and protect foreign investments. It has also institutional frameworks both in the federal and regional level. The existence of all of these is welcomed by the foreign investors. Their implementation too is given equal tone as well.

As the deputy Farm Manager, TAL Flower P.L.C. said, the company has started operation in 2006 in the flower industry in Oromia Region Sebeta town. As he said, during the political uprising full pack house has been damaged together with the office. The store with so many equipment has also been fully damaged. Cars such as service house, cold truck and two tractors have been totally fired out. Flower which was prepared for export has been fired out while it was in the cold room. The damage had taken place for two consecutive days and the business has stopped for five days. There were also flowers which should have been chopped off daily from the field but forced to be spoiled due to the violence. The manager has said salary was given for the employees for those days on which the business of the company has stopped. In addition to these all essential documents of the company available both in hard copy and soft copy are totally burned-down. Totally, almost the property worthy of 10 million birr is said to have been damaged.¹⁶⁸

Similarly, farm manager of Solagro P.L.C., which has started operation in 2007 and in Oromia region wonchi town, has also explained the damage happened against the company. As per the manager, greenhouse which has covered the potato species has been totally damaged and machineries were fired out as the result of which the investment has stopped its business for about two years following the political violence. Salary was given for the employees in the days

¹⁶⁸ Interview with Tafesse Assefa, deputy Farm Manager, TAL Flower P.L.C., (Sebeta, Oromia Region, Ethiopia 1 March 2019)

when the business has stopped. He has also said that the company has lost about 20 million birr.¹⁶⁹

Vice manager of ET Highland Flora P.L.C. mentioned that about 40% of the total capital of the company has been damaged due to the violence. Stores with capital goods and 3 cars have been totally damaged. Those flowers which were still on the farm field were rendered useless due to the passage of time of chopping. The business had stopped for a week. Salary had been given for the employees in those days.¹⁷⁰

The above three respondents had been asked whether the government has played its effort to prevent or mitigate the occurred damage. Three of them said that there was gap from the part of the government in making physical protection to their investments. According to them, the government had the chance and ability to prevent the investment from being damaged. It was known that there were different protests against the government in different parts of the country as a result of which different investments had been attacked. If it had taken the case seriously, taking precautionary or damage mitigating measures would not have been so difficult. If it had taken these measures, the government would have saved its burden to pay the compensation and the lives of its citizens.

The nine employees of the three companies also said that the government has not paid attention to curb the problem. It was not vigilant so as to stop the occurrence of the damage. Either the regional or the federal government could have involved in the matter to prevent the illegal act. Due to their negligence the investors have paid sacrifice and have lost lots of their material benefits since they are profit making organizations. They have paid us salaries in the non-working days and the offices, stores, machines, vehicles and the plants which have been ready for export have been burned. They said that they do not know the specific body or individual who has caused the damage.¹⁷¹

¹⁶⁹ Interview with GirmaGadissa, farm manager, Solagro P.L.C., (Bishoftu, Oromia Region, Ethiopia, 4 March 2019)

¹⁷⁰ Interview with WondosenLegesse, Vice manager, ET Highland Flora P.L.C., (Sebeta, Oromia Region, Ethiopia, 28 February 2019)

¹⁷¹ Interview with **AD**, Farm keeper, Solagro P.L.C., (Bishoftu, Oromia Region, 4 March 2019), **KF**, Store keeper, Solagro P.L.C. (Bishoftu, Oromia Region, 4 March 2019), **CG**, product packager, Solagro P.L.C. (Bishoftu, Oromia Region, 4 March 2019), **AM**, Farm keeper, ET Highland Flora P.L.C. (Sebeta, Oromia Region, 28 February 2019), **YF**, Store keeper, ET Highland Flora P.L.C. (Sebeta, Oromia Region, 28 February 2019), **JA**, Flower packager, ET Highland Flora P.L.C. (Sebeta, Oromia Region, 28 February 2019), **GT**, Farm keeper, TAL Flower P.L.C. (Sebeta,

As we have mentioned above, there are different standards which have been developed internationally regarding the protection to be accorded to the foreign investments. While the simple one refers to the physical protection the other goes beyond to include other scenarios too such as legal and commercial protection. However, this thesis focuses on the physical protection to be made by the host country during the political uprising. When does one say that the host state has protected the foreign investment? What is really expected from it? Is that strict standard or showing the host country's diligence suffices?

South African model BIT provides for the protection and security of foreign investment. According to this provision, a host country is obliged to accord similar protection and security as the investments of its investors or investments of investors of any third state.¹⁷² This provision does not put the standard to be followed by the host country. Rather, it has provided the same without any qualification. As we have said above, most of the provisions of BITs put qualifications such as 'constant', 'full', 'adequate' etc. However, here no such prefix has been attached. What can this imply? Does this mean that the host country has the wide discretionary to apply the obligation of protecting the foreign investments in the standard it wishes is convenient? I don't think so. Because, as we have said above, there is the minimum standard of this obligation of the host state to be attained by the host country in the international customary law.

Indian model BIT, the word 'full' is added to qualify the standard of protection and security.¹⁷³ However, the same provision makes further specific stipulation as to what refers to the 'full protection and security' by saying '...for a greater certainty, "full protection and security" only refers to a party's obligations relating to physical security of investors and to investments made by the investors of the other party and not to any other obligation whatsoever.'¹⁷⁴ Unlike many other Bits, this model clearly mentions what it meant by 'full protection and security'. It has clearly limited the meaning of 'full protection and security' to the physical protection to be accorded to the foreign investment. Therefore, the host country's burden is lighter than even from the one which is imposed by the traditional understanding of the standard in the customary

Oromia Region, 1 March 2019), **HS**, Store keeper, TAL Flower P.L.C. (Sebeta, Oromia Region, 1 March 2019) and **FM**, Flower packager, TAL Flower P.L.C. (Sebeta, Oromia Region, 1 March 2019).

¹⁷² Article 9(1), South African model Bit article

¹⁷³ Indian Model BIT, Article 3.2

¹⁷⁴ Indian Model BIT, Article 3.3

international law. As we have said above, the same standard is given wider meaning to include legal and commercial protection as well.¹⁷⁵

Almost every BIT does not give a definition of its protection provision. “Only the scope of protection is more broadly or narrowly determined. Therefore, only practical applications can describe the scope of this obligation.”¹⁷⁶

“Full protection and security is not a guarantee for the investor that his property will be safe against any damages, but it gives a minimum standard to the investor’s property against physical damages caused by the armed forces, local police, or civil riots”.¹⁷⁷ In order to make the host state liable under this obligation, it has to fail to take reasonable [protective] actions to prevent physical damages of the investor’s property. In the AAPL v. Sri Lanka case the tribunal has ruled that the government of the host country violates the obligation to protect the foreign investment if it does not take any measures that fall within the normal exercise of a government to impose law and order and which could help to protect the investor’s property.¹⁷⁸ The case was brought by the Asian Agricultural Products Ltd to the arbitration in seeking compensation from the government of Sri Lanka based on United Kingdom-Sri Lanka Bilateral Investment Treaty following the distraction made against the shrimp farm of the investor by the government security forces.

Therefore, the obligation to protect the foreign investment from physical damage is not absolute obligation. Rather, there is way for the host country to escape from the liability if it shows that it has exercised a reasonable care to protect investment.¹⁷⁹

Investment Act of South Africa clearly provides for the physical security to be provided by the Republic to the foreign investors and their investments. According to the provision, the standard of the physical protection will not be more than that which is accorded to the domestic investors. It also points towards the standard developed under the customary international law. The latter,

¹⁷⁵ *Lauder v. Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para 314 cited in Rudolf Dolzer, (n 18)

¹⁷⁶ R.H. Christie, *International Arbitration- Protection of Foreign Direct Investments and Foreign Investments Dispute Settlement Under ICSID and Bilateral Investment Treaties* (LLM Thesis, 2007) p.35

¹⁷⁷ *Ibid*

¹⁷⁸ *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID case No. ARB/87/3, Award (1990), 4 ICSID Reports 245 (1997). Cited in R.H. Christie (n 145)

¹⁷⁹ *Ibid*

as we have said earlier, discusses the full protection and security as a synergy of the physical, legal and commercial securities. However, the Act encumbered the applicability of the customary law to the physical security alone. The Act also gives South Africa wider space in protecting foreign investments by allowing it to dispose its obligation as far as its available resources and capacity permits.¹⁸⁰

Like South Africa, Brazil also has enacted its own law (model investment treaty) aiming to cooperate and facilitate investments which is known as Agreements on Cooperation and Facilitation of Investments (ACFIs). Unlike traditional BITs, which are geared towards investor protection, the ACFIs focus primarily on cooperation and investment facilitation. They promote amicable ways to settle disputes and propose state-state dispute settlement as a backup. They do not contain stipulations on investor-state arbitration.¹⁸¹

In 2013, Council of Ministers of Brazilian Chamber of Foreign Trade (CAMEX) approved the draft of the ACFI to be negotiated with African countries.¹⁸² Mozambique and Angola were the first two countries to sign these agreements. As a result, CAMEX issued another decision to broaden ACFI's negotiating mandate with other countries interested in the Brazilian model agreement.¹⁸³ Brazil is also negotiating with Algeria, Chile, Colombia, Morocco, Nigeria, Peru, South Africa and Tunisia.¹⁸⁴

The ACFI framework was built on the revision of previous agreements by Brazilian policy makers- considering the limits of domestic regulation- and on the inputs from the Brazilian private sector based on their recent experience as capital exporters.¹⁸⁵ The Model agreement is structured under three main pillars: a) investment cooperation and facilitation; b) improved institutional governance; and c) risk mitigation, and dispute prevention and settlement.

¹⁸⁰South Africa Investment Act 2015, Art. 9

¹⁸¹Kalvaljit Singh and Burghard Ilge, Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices (Both Ends, Madhyam and Somo, 2016) p.141

¹⁸² Carlos Marcio Bicalho Conzendey and Pedro Mendonça Cavalcante, Novas Perspectivas para Acordos Internacionais de Investimentos – O Acordo de Cooperação e Facilitação de Investimentos (ACFI), Cadernos de Política Exterior, Ano I, N. 2 (2015), p. 106. Cited in Fabio Morosini and Michelle Ratton Sanchez, 'The New Brazilian Agreements on Cooperation and Facilitation of Investments: Navigating between resistance and conformity with the global investment regime' (University of Rio Grande do Sul, 2015) p.18

¹⁸³ Ibid

¹⁸⁴Kalvaljit Singh and Burghard Ilge, (n 181)

¹⁸⁵ Carlos Marcio Bicalho Conzendey and Pedro Mendonça Cavalcante, (n 182)

Investor and investment protection is not the major concern of ACFI. It stands for a regulatory tool that is alternative to investor and investment protection. It focuses on constant coordination between the parties' agencies and investment facilitation under thematic agendas for cooperation, and deference to domestic legislation. For example, the Brazil-Mozambique investment agreement does not contain a provision regarding the protection of investor and investment.

3.3. Can we say that Ethiopian government has fulfilled the obligation of protecting FDI?

The legal affairs team leader of the Ethiopian Investment Commission said that the government had not taken precautionary measures to prevent the damage against the foreign investments from taking place. According to him this is because of the nature of the violence which took place in different parts of the country. The damages which have taken place in several places of Ethiopia against the domestic and foreign investments had political objective and it has taken place suddenly that the government didn't have breathing time to curb all suddenly caused political violence. He said that it was beyond the government's control.¹⁸⁶ The vice commissioner of the commission also agrees with this.¹⁸⁷ According to them it was sudden action which has been prevalently happened within a short period of time.

Unlike the two persons from the commission, the v/farm manager of ET Highland Flora P.L.C. has said the government didn't take preventive actions while it could do. He reminded that the attack on their investment had taken place for two consecutive days. No government body responded to the injury. Also our investment keepers were not allowed to have ammunition. They have been forced to keep the investment without any instrument. There were indicators which show the likelihood of occurrence of damages to the investments. Different demonstrations were undertaken demanding of answers for political questions in different parts of the country. These should have awakened the government to take its precautionary actions to prevent or mitigate the damage from taking place against the domestic and foreign investments.¹⁸⁸ Therefore, according to the opinion of the respondent, government showed gap in giving due protection to foreign investments.

¹⁸⁶ Interview with BogaleTumdedo, Legal Affairs Team Leader, Ethiopian Investment Commission (Addis Ababa, Ethiopia, 25 February 2019)

¹⁸⁷ Interview with Yisfalign, (n 159)

¹⁸⁸ Interview with Wendosen, (n 170)

For the question raised to know whether there are specifically known persons or groups who involved in the destruction of the investments, all the respondents answered that there are no such specifically known groups or persons. They said that this is because it was political driven act and it took place accidentally. It was the time when almost all parts of the country involved in political demonstrations protesting the then government administrators. It is such demonstrations which turned to violence to attack foreign and domestic investments as one mechanism of the protest.

The three employees of the company also share the Wondosen's opinion. According to them, the regional as well as the federal government could have done its own effort to stop the further injury upon the investment. But it has shown reluctance in at least mitigating the extent of the damage.

Can the government of host country raise lack of resource as an excuse for the non-fulfillment obligation?

As we have said above, the obligation of full protection and security does not impose absolute obligation upon the host state rather it expects from the state to be vigilant towards protecting the investments. It needs to take as diligent measures as possible.

3.4. Post-conflict Measures

As we have said above, protection provisions enshrined under BITs are not guarantees for the non-occurrence of damages in whatever qualification they are put. Rather, they are among the obligations which the host state is expected to fulfill in order to do its best either to prevent or lower the happening of damages upon foreign investments. Almost all BITs contain provisions which stipulate for the measures to be taken by the host country following the damage against the foreign investments due to different reasons.

The most common remedy sought from the host state following the loss suffered by foreign investments is compensation. BITs usually mention those causes of losses. The type of the causes and the way they are enumerated under the BITs are almost similar. The most mentioned causes for the losses are war or other armed conflict, civil strife and state of national emergency.

India model BIT stipulated war or other armed conflict, civil strife, state of emergency or a natural disaster as causes for losses suffered by investments in territory of host country.¹⁸⁹The Brazil-Mozambique BIT similarly puts war or other armed conflict, state of emergency, revolt, upheaval and disorders as the causes of losses against the foreign investments.¹⁹⁰The South Africa model BIT provided war or other armed conflict, revolution, revolt, insurrection and riot in the territory of the host state as causes for the losses.¹⁹¹

Unlike the above countries, Ethiopia has not enacted its own model BIT yet. Having model BIT helps to have uniform and predictable stipulations regarding the country's offer for foreign investments. The effects of not having this type of model law are being reflected by the existing BITs signed by the country. Even if we look at the stipulations regarding the protection of foreign investment, as we have seen above, it has been provided in different wordings connoting different standard. However, almost all of the BITs stipulate similar provisions regarding compensation following causes which bring about the losses to foreign investments. There is Ethiopian draft model BIT which has not been approved by the legislature yet. The draft provides the same provision regarding compensation. According to the same causes of the losses which are eligible for compensation are war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the host country. The alternative remedies sought to be made are restitution, indemnification, compensation or other settlement and it is required not to be less favorable than that which the host state accords to its own investors or to investors of any third state.¹⁹²This reflects the national and most favored nation treatment to be forwarded to foreign investors. It is also provided that requisitioning of investors' property by the forces or authorities of the host country and destruction of the investors' property by the forces or authorities of the host country which was not caused in combat action or was not required by the necessity of the situation will also be a compensable action if it is followed by the losses of the investment.

The researcher believes that the way as well as the amount of the payment to be given for the injured foreign investments should be conducted in a way which will appreciate the flow of the

¹⁸⁹ Article 7, India model BIT

¹⁹⁰ Article 12, Brazil-Mozambique BIT

¹⁹¹ Article 9, South Africa Model BIT

¹⁹² Draft Model BIT of Ethiopia, Article 7

potential FDIs. Mr. Yisfalign W/Amanuel and Mr. BogaleTumdedo responded that the payment made for the injured foreign investments following the political violence was not compensation in a strictest sense. Rather it is taken as financial support which aimed only to cover some part of the damage. It has been conducted by the committee formed following the order of the then FDRE prime minister. The committee included members who came from Ethiopian Insurance Company, Ethiopian Commercial Bank, Ethiopian Development Bank, Ethiopian Investment Commission and Prime Minister Office. The committee also contained experts of different disciplines such as engineering, agriculture etc. As responded by the respondents, the committee has visited the foreign investments and evaluated the extent of the damage suffered by the investors. The evaluation of the damage has not been made in negotiation with the investors whose investment has been damaged. Rather, the committee simply observed as its understanding and evaluated the damage. Not all the damage was taken into consideration while granting the financial support.¹⁹³

According to the respondents, the reason why the government has not offered the compensation matching with the damage suffered was the extent of the damage happened at the time and shortage of the government's ability to meet all the claims.¹⁹⁴ Something which should be taken into account, here in mind, is showing how much the reason is sufficient to be excused for not fully covering the suffered damage. The above investors, who the researcher has interviewed, have also agreed that the financial support given by the government has not fully covered all the damage which their investments have suffered. They responded that they do not even know the mechanism which was followed by the committee to evaluate the damage.¹⁹⁵

According to GirmaGadissa, the non-disclosure of the method followed bythe committee to evaluate the extent of the damage, their non-participation in the evaluation process and the non-sufficiency of the financial support granted by the government discouraged them and will have negative impact on the potential inflow of FDI into the country for the future. Therefore, he said, the government needs to improve the way it treats foreign investments after losses are suffered.¹⁹⁶ This will be one way of attracting foreign investments. This is because foreign

¹⁹³ Interview with Yisfalign, (n 160) and interview with Bogale, (n 183)

¹⁹⁴ Ibid

¹⁹⁵ Interview with Interview with Wendosen, (n 170), Tafesse, (n 168) and girma, (n 169)

¹⁹⁶ Interview with Girma, (n 169)

investors are not attracted only by the host country's commitments but also by the ways it treats them at the time of post conflict. Therefore, government should be cautious enough in compensating the injured FDIs since they are profit makers. They do not bother about the host country's economic situation. We have mentioned above, as the v/commissioner of EIC stated, that there are three foreign investors who have refused to receive the government's financial support due to its insufficiency.¹⁹⁷ Unless the government continually negotiate and reach at common agreement, it will be inevitable that they will take the case to international arbitral tribunals which will incur the country high cost.

¹⁹⁷ Interview with Yisfalign, (159)

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1. Conclusion

As it has been discussed from the very beginning of the paper, developing countries in general and Ethiopia in particular are hosting a significant number of FDI which is playing crucial role in boosting the countries' rate of economic development. It has tried to show the general framework of FDI vis-à-vis the Ethiopian position on it in relation to the experience of other countries.

Almost all of legal documents, especially BITs, contain the 'protection' clause in different wordings connoting different standard of protection. The usually used term to stipulate the standard is "full protection and security". It is also stated under most of the BITs signed by Ethiopia. Some BITs expressly put the standard of the protection. For example, the US's model BIT explicitly mention that the standard of protection is limited only to the physical protection as it is laid down under customary international law. But, we do not find such expressions in the BITs signed by Ethiopia.

As stated under different investment cases entertained in international investment tribunals, the minimum standard of protection sought to be fulfilled by the host states contain not only the physical protection rather it also includes the legal protection and assuring the sustainable commercial environment. However, the express term inserted under the treaty laws will have precedence over the customary international law. Therefore, if the BIT expressly mentions the standard sought to be attained, as is in the model BIT of US and India, then it will be given precedence.

There are international arbitral tribunals which have come up with the conclusion that the protection sought to be made by the host country is not absolute. This means that if the host state is able to show that it has taken the necessary measures to avoid the occurrence of the damage against the foreign investment, then it will succeed in freeing itself from the liability which has come following the cause which brought about the damage. If it is evidenced that the host state has played its utmost effort to prevent the damage from occurring, then it will not be held liable for the damage suffered by the foreign investor. However, the decision whether the host state has played this part of its responsibility depends on case by case basis.

We have seen that Brazil and South Africa have come up with their own domestic arrangement of investment law which mainly meant to strengthen the cooperation among the host countries standing slightly in different side from the former treaty laws, which are mainly BITs and whose main concern is giving protection to the FDIs.

The political uprising which Ethiopia has experienced in the last three years has followed with so many social, political and economic crises one of which was the damages caused against the foreign investments. FDI is playing very crucial role in enhancing the country's economic development by bringing in the foreign currency. It also absorbs a significant number of employees which plays very important role in reducing the number of unemployment in the country.

Though the damage to the foreign investments has been caused following the quest for the political reform in different parts of the country, the government failed to, at least, mitigate the extent of the damage. It has not made its utmost effort to accomplish its obligation to accord 'full protection and security' which is enshrined under the BITs signed by the Ethiopian government. According to the BITs foreign investors have the right to get their dispute be settled via the methods they have chosen. This includes the settlement of their cases before international tribunals such as ISCID. Therefore, it is wise if the host state to take other alternative mechanisms before the cases are brought before the tribunals. This is because the entertainment of the cases in the international tribunals costs the country much more than the other modes. In this regard the step which the Ethiopian government has taken in order to settle the cases of the foreign investors, whose investments have been damaged following the political uprising, is the one which need to be appreciated. However, the mechanism which the government has followed to evaluate the extent of the damage was not inclusive. The committee formed by the order of the prime minister included only persons from the government body. It did not contain representatives of the investors. The amount which has been paid as a financial support also was not proportional to the damage caused against the investments. Due to this fact three foreign investors refused to receive the financial support offered by the government. This will have deterring effect in the future in attracting FDI unless it is corrected as early as possible.

4.2. Recommendation

Now the time will be for the recommendation to be forwarded to policy and law makers of Ethiopia. Since FDI is one engine for economic development for developing countries like Ethiopia, it needs to be carefully handled in order to harvest the positive fruit of the same. In addition to show commitments by enacting laws and formulating policy frameworks favorable to FDI, the same care should also be given regarding the implementation of the same. This is because unless words on the paper are respected on the ground, there will be scenario where the existing foreign investors will leave the country in search of a better host country and the potential foreign investors who are in preparation to invest in the country will be discouraged. As it is mentioned above foreign investments which are already operating in the country have hired significant number of Ethiopians which shows the sector's potential in playing the role in reducing the number of unemployment which is one of headaches challenging the developing countries in general and Ethiopia in particular.

I recommend the federal and regional governments of Ethiopia to be diligent enough in protecting and securing foreign investments before political uprising takes place. This will help the country to defend itself if cases are taken to arbitral tribunals. It is discussed above that the obligation of the host state to accord 'full protection and security' is not absolute one. Rather, the host country's diligence weighs a lot to determine its responsibility. There are cases where the international tribunals have freed host states from liability for the damage caused within their territory because of their quick and diligent action in order to prevent and mitigate the occurrence of the damage. As profit making bodies, FDI do not bother about the host country's economic ability to cover their damage caused due to the political violence. The host country's economic ability is not excuse for its inability to protect the foreign investments. Therefore, the government of Ethiopia is advised to take precautionary measures to protect FDI.

As it is mentioned above the extent and amount of the damage suffered by the foreign investments were assessed and evaluated by the committee consisting persons from the side of the government. It is also discussed that the amount which had been given to the investors was not compensation in a strictest sense rather it was mentioned as 'financial assistance'. The researcher recommends the government to assess the similar cases which will take place in the future jointly with the representatives of damaged FDIs. Otherwise, this trend of the government will have discouraging effect on the foreign investments.

Though the government's endeavor to make financial and non-financial support within a shorter time is the one which should be appreciated, negotiating with the investors on the sufficiency of the support must also be given consideration. As mentioned above, there were three foreign investors who have refused to receive the support claiming about its insufficiency.

The local governments, within whose administrative area the investments are undergoing, are advised to create awareness about the importance of the investments for the society. This will enable the society to treat the investment as if it belongs to it and protect the same from any harm. This enhances feeling of belongingness. The federal and regional governments are also advised to answer the questions which the society raise as quickly as possible. Unless otherwise, this will grow into violence and force the society to take their political measure one of which is destroying the investments.

The law maker is advised to insert provision, in its domestic investment proclamation, regarding the compensation to be given following the losses to be occurred at the time of political uprising and other reasons which have been discussed hereinabove. This is because the current investment proclamation only stipulates for the compensation at the time of nationalization or expropriation.

The law maker of the federal government is advised to enact its own model law, like South Africa and Brazil, in order to avoid the difference existing between different BITs regarding the standard of the protection sought by the country. This will enhance the certainty and uniformity of the law of the country as far as the standard of the protection sought to be accorded to the foreign investments and investors is concerned.

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INTERVIEWEES

1. Mr. Yisfalign W/Amanuel.....V/Commissioner of Federal Investment Commission of Ethiopia.
2. Mr. Bogale Tumdedo.....Legal Affairs Team Leader in the Federal Investment Commission of Ethiopia.
3. Mr. Girma Tadesse.....Farm Manager of Solagro P.L.C.
4. Mr. Wondosen Legesse.....V/Farm Manager of ET Highland Flora P.L.C.
5. Tafesse Assefa.....V/Farm Manager of TAL Flower P.L.C.
6. Mr. AD.....Farm keeper in Solagro P.L.C.
7. Mrs. KF.....Store keeper in Solagro P.L.C.
8. Mrs. CG.....Flower packager in Solagro P.L.C.
9. Mr. AM.....Farm keeper in ET Highland Flora P.L.C.
10. Mss. YF.....Store keeper in ET Highland Flora P.L.C.
11. Mss. JA.....Flower packager in ET Highland Flora P.L.C.
12. Mr. GT.....Farm keeper in TAL Flower P.L.C.
13. Mr. HS.....Store keeper in TAL Flower P.L.C.
14. Mss. FM.....Flower packager in TAL Flower P.L.C.

Appendix - A

Guideline questions for Interview

Title: “Foreign Direct Investment and Political Uprising in Ethiopia: Legal Protection and Compensation”

As one of developing countries, Ethiopia is trying to improve the living standard of its citizens by boosting its economic development. To achieve the same, the country was and is still trying to make FDI one of the sources of the capital. It has set up different institutional and legal frameworks for the investments in general and FDI in particular. However, several domestic and foreign investments have sustained injury following the conflicts which took place over the last three years. And the following questions intend to search out the main problems (in relation to the protection of FDI) behind the destruction and the subsequent measures taken by the government in order to restore the foreign investors. The questions are framed to take related informations mainly from the federal investment commission and some of the selected foreign investors whose investments have been attacked.

1. Questions for Interview with persons from Federal Investment Commission

1.1. Ethiopia has signed BITs with several countries which contain protection and security of foreign investment as one of the country’s obligations. Due to the conflict that happened over the last three years, it is reported that domestic and foreign investments were attacked and damaged. Please explain the nature and extent of the destruction caused.

1.2. Please explain the preliminary measures that the government has taken in order to prevent or mitigate the destruction from taking place.

1.3. In your opinion, what was the main reason that pushed the people to cause damage on investments?

1.4. What is the remedy sought by foreign investors?

1.5. What were the responses of the government for the claims?

1.6. Is there any unsettled claim? and why?

1.7. Are there any foreign investors who left the country because of the attacks?

- 1.9. What is the nature of the relationship between Federal Investment Commission and regional ones?
- 1.10. Is there foreign investor who opted to take the case to international tribunal by being unsatisfied with the compensation offered by the government?
- 1.11. Do you think there is gap in the legal or institutional framework in relation with the protection and security of foreign investment? Or is it only a matter of weak law enforcement? If you think there is a problem regarding these issues what do you think is the solution?
- 1.12. What other measures have been taken by the government to enable foreign investors, whose investments have been attacked, to resume their businesses within reasonable time?
- 1.13. To what extent did the conflict deter the flow of FDI into the country?
- 1.14. Were the attackers specifically known groups or persons or the mass in general?
- 1.15. Please explain the mechanism you have employed in evaluating and paying the compensations?

Appendix – B

Guideline Questions for Interview

Title: **“Foreign Direct Investment and Political Uprising in Ethiopia: Legal Protection and Compensation”**

The following questions are provided for the investors which have been injured following the political uprising occurred in Ethiopia. The aim of the questions is digging out the country’s commitment in respecting its obligation of ‘full protection and security’ which has been enshrined under almost all of the BITs which it has signed with several countries and coming up with possible recommendation regarding the problems as far as the implementation of the obligation is concerned.

Therefore, I kindly request you, as one of the investors who have suffered from the political uprising, to deliver the relevant information for the well accomplishment of the research.

2. Questions for persons from damaged investments

- 2.1. What is the type of the investment you are running?
- 2.2. When did it start?
- 2.3. What was the extent of the damage sustained by your investment due to the attack during the uprising?
- 2.4. Do you specifically know the body which caused the injury? Are they specific groups, persons or the mass in general?
- 2.5. What precautionary measures have been taken by the government to avoid the occurrence of the injury?
- 2.6. What was your claim against the government following the attack on your business?
- 2.7. Was your investment insured? Have you collected indemnification from the insurer? If not, why?
- 2.8. What was the response of the government in settling your claim? What mechanism did it follow to settle your claim?

2.9. Do you think there are gaps in the legal and institutional frameworks in protecting foreign investments? Or is it a matter of weak enforcement of the existing law ? And what are solutions to curb the occurrence of similar incidents in the future?

Appendix - C
ቃለመጠይቅ

ጥያቄዎች

1. ለኢንቨስትመንት ኮሚሽን የቀረቡ

1.1. ኢትዮጵያ ከተለያዩ ሃገራት ጋር የሁለት-ሎታል ኢንቨስትመንት ስምምነቶችን መፈራረሟ ይታወቃል። እነዚህ ስምምነቶች በውስጣቸው የውጭ ኢንቨስትመንቶችን ደህንነት የመጠበቅ ግዴታን በተቀባዩ ሀገር ላይ ይጥላሉ።

በኢትዮጵያ ከጥቂት ዓመታት ጀምሮ በተቀሰቀሰው ግጭት ምክንያት በሃገር ውስጥ ምሆነው ጭኢ ኢንቨስትመንቶች ላይ ጉዳት የደረሰ መሆኑን በተለያዩ መልኩ ዘግቧል።

እባክዎን በውጭ ኢንቨስትመንቶች ላይ የደረሰውን ጉዳት መጠንና በምን ያህል የውጭ ኢንቨስትመንቶች ላይ ጉዳት እንደደረሰ ይግለጹ።

1.2. ጉዳቱ እንዴት መጣ ወይም እንዴት ስምን ግስት አድርጓቸው የነበሩ ቅድመ ዝግጅቶችን ወይም እርምጃዎችን ይግለጹ።

1.3. በእርስዎ እይታ ጉዳት የደረሰውን አካል በውጭ ኢንቨስትመንቶች ላይ ጉዳት እንዴት ደርሶ የነሳሳው ምክንያት ምን ድነው?

1.4. ጉዳት የደረሰባቸው የውጭ ኢንቨስተሮች ጉዳቱን ተከትሎ ከመንግስት የጠየቁት መብት ምን ድነው?

1.5. የመንግስት ስምላሽ ምን ነበር?

1.6. ምላሽ ያላገኙ ጥያቄዎች አሉ? ካሉ ለምን?

1.7. በዚህ መነሻ ከሀገር የውጭ ኢንቨስተሮች አሉ?

1.8. ጉዳት የደረሰባቸው የውጭ ኢንቨስተሮች ከመድንድር ጅቶች የጉዳት ካሳ አግኝተዋል? ካላገኙ ለምን?

1.9. የፌዴራል ኢንቨስትመንት ኮሚሽን በየክልሉ ካሉት ጋር የለውግን ኑነት እንዴት ይገለጻል/ ምን ዓይነት ግንኙነት ነው ያለው/?

1.10. ጉዳዩን ለአለም አቀፍ ግልግል ፍርድ ቤት የወሰዱ ኢንቨስተሮች አሉ?

1.11. የውጭ

ኢንቨስትመንቶችን ደህንነት ከመጠበቅ አንፃር ተቋማዊ ወይም የህግ ክፍት ትክክለኛ ብለው ያስባሉ? ወይስ የአፈፃፀም ችግር ነው ያለው? ክፍተቶች ወይም የአፈፃፀም ችግሮች ከሌሎች ጌው ምን መሆን አለበት ብለው የስባሉ?

1.12.

ጉዳት የደረሰባቸው የውጭ ኢንቨስተሮች ከጉዳታቸው አገጣጠሙ ምክንያታዊ በሆነ ጊዜ ውስጥ ወደ ማምረት ተግባራቸው እንዲመለሱ በመንግስት ምን እርምጃዎች ተወሰዱ?

1.13. የተቀሰቀሰው ግጭት በውጭ ኢንቨስትመንት ፍላጎት ላይ ምን ያህል ተፅእኖ አሳድሯል?

1.14. ጉዳት አድራሻ ጭንቀት የሚታወቁ ቡድኖች ወይም ግለሰቦች ናቸው?

1.15.

ጉዳት ለደረሰባቸው የውጭ ኢንቨስተሮች ካላለመ ክፍል ምን ግስት የተከተለውን የአሰራር ና የአሰላል ሂደት ቢገልጹ፡
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Appendix - D
በተጎዱ ኢንቨስትመንቶች ሥርዓተ-ትብብር ጥያቄዎች

1. በምን ዘርፍ ነው ኢንቨስትመንቱ የተመሰረተው?
2. መቸነው የተመሰረተው?
3. በኢንቨስትመንቱ ላይ የደረሰው ጉዳት መጠን ምን ያህል ነው?
4. ጉዳቱን ያደረሱ አካላትን በግልፅ ያውቃሉ?
ጉዳቱን ያደረሱ አካላትን በግልፅ የሚታወቁ ቡድኖች ወይም ለሰበኞች ናቸው?
5. በመንግስት በኩል ጉዳቱ በኢንቨስትመንቱ ላይ እንዳይመጣ የተደረገ ቅድመ ጥንቃቄ አለ?
6. ጉዳቱን የተከትሎ ለመንግስት ያቀረባቸው ጥያቄዎች ምን ነበር?
7. ጥያቄውን የተከትሎ የመንግስት ምላሽ ምን ይመስላል?
8. ጥያቄውን ለመመለስ መንግስት የተከተለው መንገድ ምን ይመስላል እንዴት ስይገልጻሉ?
9. ኢንቨስትመንቶችን ከመጠበቅ አንጻር በኢትዮጵያ የህግና ተቋማዊ ክፍተት አለብለው ያስባሉ ወይስ በተግባር ላይ ያለ ማዋል ችግር ነው ያለው?
ተቋማዊ ወይም የአፈፃፀም ችግር አለብለው የሚያስቡ ከሆነ ወደፊት የተመሳሳይ ችግሮች እንዳይከሰቱ በመንግስት በኩል ምን ያህል ደረግ አለብባቸው ያስባሉ?
10. የህግ፣
ተቋማዊ ወይም የአፈፃፀም ችግር አለብለው የሚያስቡ ከሆነ ወደፊት የተመሳሳይ ችግሮች እንዳይከሰቱ በመንግስት በኩል ምን ያህል ደረግ አለብባቸው ያስባሉ?

