INTRODUCTORY REMARKS

Many developing countries, like Ethiopia, are now actively seeking for promoting investment by trying to create a favorable environment for it. Once an investor is admitted, both he and his property are subject to the laws of the host state as he has voluntarily subjected himself to the regime of the host state by making entry to it.[1] Hence, the legal guarantees that provide security and protection for investor's property are the major determinants in the decision of investors to invest in a given country.[2]

This research will try to answer questions: (1) how investment guarantees are addressed under the international experience of different legal systems? (2)What guarantees are available under Ethiopian investment laws against risks of investment? (3)What are the gaps existed in the current investment laws of Ethiopia related to investment guarantees? What are the possible solutions to rectify the same? The study generally aims to evaluate the legal framework that regulates investment guarantees in Ethiopia. Specifically, the research intend to explain the extent that investors are guaranteed under Ethiopian investment laws, to identify the gaps in the existing laws of the country and to suggest some legislative reconsiderations to rectify the same.

The research method in this study involves a review of the existing legal documents such as the FDRE constitution, the investment proclamation, BITs to which Ethiopia is signatory and an analysis of relevant literatures such as text books, periodicals, journal articles and other materials will be investigated. The research may help the government and other policymakers to take some corrective legislative and policy measures in managing investment for better implementation. It can also give potential investors a general overview of investment guarantees available in Ethiopia.

[1] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart publishing, oxford and Portland, 2008, p.56

[2] Getinet Haile & Hirut Assefa, determinants of foreign direct investment in Ethiopia: a time-series analysis, west minister research online digital archive http://www.wmin.ac.uk/westministerresearch.

This thesis is organized in four chapters. After this introduction and the research proposal, chapter two introduces a general overview of investment such as definition, types and risks of investment. Chapter three gives a general highlight about investment guarantees and the standard of guarantees. Chapter four is devoted to the legal regime governing investment guarantees in Ethiopia. Finally, the research will present conclusion and provides recommendations.

CHAPTER ONE

PROPOSAL OF THE RESEARCH

1.1. Background of the Study

The term investment refers to "expenditure to acquire property or assets to produce revenue". [3] The elements that investment constitutes are not the same in all states as investment is something established in accordance with the laws of host countries.[4] Accordingly, the Investment Proclamation of Ethiopia defines investment as:

> *expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists.*[5]

Investment plays an important role as an engine of economic development of a state. At the same time, investment generates a huge benefit for investors. However, a closer look at the risks that investors face when they operate an investment activity reveals that they are susceptible to different kinds of risks. Hence, investors may not decide to invest at all, or may not able to generate the expected profit, or lost their capital due to risks such as geological, commercial and regulatory ones among other things.[6]

---

[3] Bryan A. Garner,(Editor-in-Chief), **Black's Law Dictionary**, Eight Edition, Thomson, West, United States of America, 2004, P.844

[4] UNCTAD **International Investment Agreements,** Volume I, (2004), P 122

[5] Investment Proclamation, 20122, Federal Negarit Gazzeta, Proc. No.769,18th year, No.63, Art.2 (1) (here in after, Investment Proc.No769/2012).

[6] Tilahun Weldie, An Overview of the Legal Regime Governing Minerals in Ethiopia, *Bahir Dar University Journal Of Law*, 2013,Vol.3, No.1, PP.24-66,at P. 24.**[**here in after Tilahun Woldie, 'The Legal Regime Governing Minerals In Ethiopia']

Even if it cannot remove all risks of investment, legislative specification of investment rights is very important to avoid significant gaps, ambiguities, vagueness and contradictions and create certainty in the mind of potential investors.[7] Moreover, it can ensure long-term investments in a fixed asset as opposed to short-termism in investment through mobile assets. To this effect, among other things a clear and well established legal specification of investment rights should determine the holder of an investment property, manner of transfer of the investment property and restrictions thereof, institutions which are mandated to enforce the right upon infringement and specific remedies attendant to investor`s property right violations.[8]

Hence, apart from geological, commercial, political and other considerations, investors would decide to invest only when there is a legal framework that provides sufficient guarantees and protection to their investment during entry, establishment and operation, and at the time of withdrawal.[9] And many developing countries have attempted to improve their domestic legal framework by passing specialized legislations which are designed to create clarity and favorable conditions for investment.[10] Thus, the research will throw light on certain loopholes existing in investment guarantees accorded to investors in Ethiopia and making suggestions to rectify the same.

1.2. **Statement Of Problem**

It is clear that the current globalized world recognized private capital as a determinant for development, and investment in general and foreign direct investment in particular is one of the most striking features of

[7] Muradu abdu, Legislative Protection of Property Rights in Ethiopia: An Overview, *Mizan Law Review,* 2013,Vol.7,No.2,PP.165-206,at P166-167.
[8] Ibid.
[9] Tilahun Woldie The Legal Regime Governing Minerals In Ethiopia, p.25.
[10]United Nation Economic Commission for Africa, *Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration,* February 2016, Economic Commission For Africa, p.1, {www.uneca.org}.

today's globalized economy.[11] Taking this fact, the government of Federal Democratic Republic of Ethiopia has made commendable efforts through legislative and procedural reforms in order to improve the investment climate of the country. Among other things, major positive changes have been introduced through Investment Proclamation No.769/2012 and Regulations No.270/2012. Moreover, currently the country is undertaking the Second Growth and Transformation Plan which is a robust plan requiring significant capital investment and technology transfer. In brief the fiscal policy implemented during GTP I have been directed both to increasing domestic revenue and mobilizing external resources and channeling them to poverty reduction endeavors, infrastructure development and provision of basic services.[12] Despite significant improvements in domestic saving mobilization in GTP I, the gap between the investment requirements and the level of domestic saving has widened.[13] Moreover, GTP II is expected to feature an 11 percent yearly economic growth accompanied by stable macroeconomic environment.[14] This undeniably requires the involvement of private sector investments both domestic and foreign which in return needs an adequate legal protection for their investment from the side of the government.

However, there exists a persisting poverty, unemployment and low saving in the country and Ethiopia's private sector investment in general and foreign direct investment in particular is not growing as fast as it should, even by the standards of Sub -Saharan Africa.[15] This may be attributable among other things to the failure of investment laws of the country to provide adequate guarantees for investors. The guarantees offered to foreign investors may be found in constitutions and codes as

---

[11] Zewdneh Beyene Haile, *International Business Transactions*, Bahir Dar University School of law(unpublished),2014 p.398.
[12]An Overview of The Second Growth and Transformation Plan(GTP II 2015/16-2019/20), National Planning Commission, September 2015, Addis Abeba, p.6.
[13] Ibid.
[14] Id. P.16-17
[15] UNCTAD, Investment and Innovation Policy Review Ethiopia,2004 available at http://stats.unctad.org/fdi/treaties/dtts/Ethiopia.htm last accessed October 10, 2016.

well as in special laws. And different laws of host states do have regulatory effect on investment activities undertaken in a host country.

In Ethiopia the FDRE Constitution did not expressly contain guarantees to investors and it arguably address investor's property right under the framework of general property right of Ethiopian nationals while investors needs a separate protection for their invaluable investment.[16] For instance, Art 40 of the FDRE Constitution uses the term 'every Ethiopian citizen' in identifying the person whose properties are protected. Such terminology creates uncertainty especially on foreign investors as to whether their investment properties accords protection under the FDRE Constitution or not. This also creates uncertainty in the mind of investors and minimizes the confidence of investors to believe in the genuineness of the guarantees provided by other subordinate laws as they lack a base in the constitution.[17]

The guarantees accorded to foreign investors in Ethiopia are expressly provided under Art 25 and 26 of the Investment Proclamation No. 769/2012.[18] However, these guarantees are provided in a general language and lacks detail and clarity which create uncertainty in the mind of potential investors. The Proclamation contains provisions that are vague and open to interpretations which would raise the likelihood for disagreements between the host country and investors. Furthermore, unlike investment incentives there is no Regulation issued to regulate the details of investment guarantees provided by Investment Proclamation No.769/2012. These problems were also aggravated by the absence of an enforceable international investment code. Even if BITs to which Ethiopia is a signatory has a role in filling the gaps of the legal regime related to investment guarantee, it will not sufficient enough to address investment guarantees in the country as much as it required.

---

[16] Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, federal negarit gazzeta, proc. No. 1, 1st year, No. 1, art 40.

[17] Subordinate investment laws may be easily altered by the government since they are unilateral in nature and the reverse is true in case of a constitution. Hence, having a constitutional base creates certainty for the guarantees provided under other subordinate laws.

[18] Investment Proc.No769/2012), Art 25 & 26.

1.3. Objective Of The Study

1.3.1. General Objective

The main target of this study is to evaluate the legal framework that regulates investment guarantees in Ethiopia.

1.3.2. Specific Objectives

Hence, the research is specifically aimed:

- To explore the international experience related to investment guarantee in different legal systems.
- To explain the extent that investors are guaranteed under the BITs to which Ethiopia is signatory, the FDRE Constitution, the Investment Proclamation No 769/2012.
- To identify the gaps in the existing investment laws of Ethiopia and to suggest some policy and legislative reconsiderations.

1.4. Research Question

1.4.1. Central Research Question:

To what extent investors are guaranteed under Ethiopian investment laws?

1.4.2. Specific Research Questions:

(1) How investment guarantees are addressed under the international experience of different legal system?
(2) What guarantees are available for investors under BITs to which Ethiopia is signatory, the FDRE Constitution and Investment Proclamation No.769/2012?
(3) What are the gaps existed in the current investment laws of Ethiopia related to investment guarantees? What are the possible policy and legislative solutions to rectify those gaps?

1.5. Significance of the Study

Investment is used as a bridge in the transformation of developing countries like Ethiopia towards a better standard of life.[19] And investment in general and foreign direct investment in particular has been highly recognized by the government of Ethiopia for its contribution to employment opportunity and in the achievement of poverty reduction.[20] Hence, as the researcher tries to investigate the legal framework that governs investment guarantees in Ethiopia, it can help the government to take some corrective legislative measures in managing investment for better implementation.

It can also give potential investors a general overview of investment guarantees available in Ethiopia.

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

1.6. Review of Literature

So far, various researches were conducted in the area of investment in general and foreign direct investment in particular. However, almost all the researches focused on the impact of investment on the economic development of Ethiopia and the available investment opportunities and incentives in the country. But, as to my knowledge, they provided little attention for the legal guarantees accorded to investment activities in the country. To see some examples:

(1) An article written by Tilahun Weldie Hindeya, under the title '**An Overview of the Legal Regime Governing Minerals in Ethiopia'**, address the issue of investment guarantees in Ethiopia and try to appreciate the

[19]Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration by the Economic Commission for Africa, p.10,[available at www.uneca.org.] [last accessed October 20, 2016.]
[20]Investment Proc.No769/2012), Art 5.

existing controversies under the FDRE constitution relating to investment guarantees.[21] Specifically, he try to identify the possible arguments relating to the terminology 'every Ethiopian citizen' under article 40 of the FDRE constitution and the scope of the term 'expropriation' under article 40(8) of the constitution.[22] However, the issues of investment guarantees are not addressed in a detail and a comprehensive manner and the writer did not provide any possible solutions on the existing controversies.

(2) A paper prepared by Getinet Astatike and Hirut Assefa for the 4th International Conference on the Ethiopian Economy (June 2005) under the title '**Determinants of Foreign Direct Investment in Ethiopia: A Time-Series Analysis'** attempt to address the determinants of foreign direct investment in Ethiopia over the period 1974-2001. Among other things, the paper reviews the policy regimes, the FDI regulatory framework and institutional set up in the country over the study period.[23] However, in the paper at hand investment guarantees as a determinate of FDI were given little attention as nothing is said more than listing the available investment guarantees in the country. Moreover, the paper was limited by time so that it has nothing to do with investment guarantees in the country after the lapse of 2001 since the legal framework of the country is in continuous reform.

(3) Moreover, a work by Tsegaye Teklu titled with **'Investment Promotion and Incentives in Ethiopia'**, deals about set of investment guarantees and provided that "in addition to the constitutional provisions of protection of private investment, Ethiopia has acceded to the Multilateral Investment Guarantee Agency."[24] Hence, the writer failed to

[21] Tilahun Woldie, The Legal Regime Governing Minerals In Ethiopia, p.53-54
[22] Ibid.
[23] Getinet Haile & Hirut Assefa, determinants of foreign direct investment in Ethiopia a time series analysis, west minister research online digital archive p.8-13[http://www.wmin.ac.uk/westministerresearch]
[24] Tsegaye Teklu, *Investment Promotion And Incentives In Ethiopia*, p.368

address investment guarantees in the country as much detail as it required.

Generally, even if my work is not a novel one in the study area, the researcher believes that, this study will try to fill some gaps in the existing knowledge and it at least address the study area in a broader and more specific understanding to alert the legislators intention and to make our legal system commendable to investors.

1.7. Methodology

As the research questions that the research will going to answer involves an analysis of the legal regime governing investment guarantees in Ethiopia, it falls under the category of a purely doctrinal legal research. Accordingly, I try to consult a legal encyclopedia to establish an overview of the law and gather an initial list of authorities. Moreover, analysis of relevant documents such as text books, periodicals, journal articles and other materials will be made.

1.8. Scope of the Study

Different laws of host states do have regulatory effect on investment activities undertaken in a host country. And even the present regulatory regime governing investment in Ethiopia is based on a series of investment proclamations issued between 1996 and 1998; principally Proclamations 71/1996, 37/1996, 351/1998, 361/1998 and 116/1998. However, the analysis, judgment and proposition of this research is exclusively based on the FDRE Constitution and Investment Proclamation No.769/2012, which are the governing laws during the time when this study is conducted. In addition, BITs which Ethiopia concludes with different countries will be considered.

1.9. Limitations to the Study

Writing a senior thesis is not an easy task due to various factual situations. In conducting this research the researcher will face with difficulties such as unavailability of a well-documented literatures in the

study area as researches conducted so far on investment in Ethiopia is limited, and shortage of time as the research was conducted while the researcher attending class and preparing for the national exit examination for student of Ethiopian law schools. Even though these limitations are inevitable the researcher will endeavor to handle the difficulties by different mechanisms such as applying efficient use of time and other resources and attempting to triangulate sources to avoid their inconsistency and exploring different literatures.

1.10. Organization of the Study

This thesis is organized in four chapters. After the above introduction, chapter two introduces a general overview of investment and investor. Chapter three gives a general highlight about investment guarantees and the standard of treatment of investors. Chapter four is devoted to the legal regime governing investment guarantees in Ethiopia. Finally, the research will present conclusion and provides recommendations.

CHAPTER TWO

A GENERAL OVERVIEW ON INVESTMENT IN GENERAL

2.1. Introduction

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

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

2.2. Definition of Investment and Investor

Having a clear and well-organized definition of the term “investment” and “investor” is very crucial as they are the key elements determining the scope of application of rights and obligations of investors and the minimum threshold to entertain the issue of investment guarantees under dispute.[25] It is only the interest of investors failing within the scope of an “investment” and “investor” defined in a particular applicable law that can form the basis of a claim in general and investment guarantees in particular. Specifically, from the perspective of a capital exporting state, the definition identifies the group of investors whose foreign investment the country is seeking to protect through the agreement, including, in particular, its system for neutral and depoliticized dispute settlement. From the capital importing country perspective, it identifies the investors and the investment the country wishes to attract and protect though the devise of investment guarantees; from the investor`s perspective, it identifies the way in which the investment might be structured in order to benefit from the agreements` protection, specifically from investment guarantees available in a host state.[26]

---

[25] M.Sornarajuhp, *The International Law on Foreign Investment*, Second edition, Cambridge University Press, Cambridge, 2004, pp58-60. [here in after ‘M.Somarajuhp ‘*International Law on Foreign Investment*’]

[26] B. Legum “*Defining Investment and Investor: Who is Entitled to Claim*?” presentation at the Symposium “Making the Most of International Investment Agreements: A

Despite these importance's, there is no common definition for the term "investment" and "investor". The definition of these terms varies from legal system to legal system. The definition adopted in bilateral investment treaties is also usually different from the definitions found in domestic investment laws. To see some definitions;

The US Model BIT of 2004 defines the term investor as:

> *'investors of a party' means a party or state enterprise thereof, or a national or an enterprise of a party,*
>
> *that attempt to make, is making, or has made an investment in the territory of the other party; provided,*
>
> *however, that a natural person who is a dual national shall be deemed to be exclusively a national of the*
>
> *state of his or her dominant and effective nationality.*[27]

This definition includes investors that are attempting to make an investment and protect pre-establishment rights of potential investors in the host country concerned.

The US Model BIT of 2004 also defines investment as: "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".[28] Then it provides a non-exhaustive list of investments. Generally, the trend in BITs, FTAs and IIAs is to define the terms 'investment' and 'investor' as broadly as possible with open-ended definitions and indicative rather than definitive lists of investors and investments.[29] They often refer to 'every kind of asset' followed by a list of examples that includes movable and immovable property, shares and other participations in companies, claims to money or to any

---

Common Agenda" co-organized by ICSID, OECD and UNCTAD, 12 December 2005, Paris.

[27] US Model BIT of 2004, Art 1

[28] Id .

[29] S UNCTAD, International Investment Agreements Negotiators Handbook: UNCTAD Modules (IIA Handbook), 2012, Asia-Pacific Economic Cooperation, p.13-25. [available at www.unctad.org last accessed on November,12, 2016]

performance having a financial value, intellectual property rights, know-how and business concessions.[30]

BITs to which Ethiopia is a party adopts the same formula in defining investment as almost all stating that investment means “every kinds of asset” or “any kind of asset”, and is followed by illustrative list of categories of assets, interests and rights. The same formula is adopted in the definition of investor. For example, articles 1(1) of Ethiopia-Germany BIT define investment as every kind of assets and provide an illustrative list of assets that are considered as investment.[31]

Unlike BITs, Ethiopia`s Investment Proclamation No. 769/2012 defines the term ‘investment’ as:

> *“expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists”.*[32]

---

[30] Scope And Definition, UNCTAD/DIAE/IA/2010/2, 163 pages, Sales No: E.11.II.D.9 [available at http://unctad.org last accessed on November,14, 2016]

[31] Treaty Between The Federal Democratic Republic Of Ethiopia and The Federal Republic Of Germany Concerning The Encouragement And Reciprocal Protection Of Investment, Art.1 define investment and investor as 1.The term “Investments” comprises every kind of asset, in particular:
a) Movable and immovable property as well as any other rights in rem, such a mortgages, liens and pledges;
b) Shares of companies and other kinds of interest in companies;
c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;
d) Intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;
e) Business concessions under public law, including concessions to search for, extract and exploit natural resources.
Any alteration of the form in which assets are invested shall not affect their classifications as investment.

2. The term “Returns” means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;
3. The term ‘Investors” with regard to either Contracting Party refers to:
a)Natural persons who
• In respect of the Federal Republic of Germany are Germans within the meaning of the Basic Law of the Federal Republic of Germany, and
• In respect of the Federal Democratic Republic of Ethiopia are persons who are nationals of Ethiopia according to its applicable laws.
b) Legal entities, including companies, corporations, business associations and other organizations, with or without legal personality, which have their seat in the territory of that Contracting Party, irrespective of whether or not their activities are directed at profit

[32]Investment Pro. No.769/2012, Art 2(1).

The definition deviates from the common formula (every kinds of asset" or "any kind of asset", and followed by illustrative list of categories of assets, interests and rights). The provision itself does not provide a clear meaning of investment; rather it needs a reference of other definitional provisions of the proclamation such as article 2(2), article 2(3) and article 2(4) so as to understand the meaning of terms like 'enterprise', 'capital' and 'investor'.

Apart from its importance as a basis of a claim, the definition of the terms 'investment' and 'investor' have various implications.[33] For instance, a broad definition of the terms which includes even a simple contractual claims arising from the delivery of goods and services is considered as investment. This may result in subjecting countries to many and undesirable disputes with investors under international investment arbitration.[34] Moreover, multiple cases could be filed by several investors in the same business entity for the same set of facts. Different investors having shares in the same company may initiate multiple arbitrations under different corporate or shareholder capacities.[35] Hence, countries including Ethiopia should take the necessary precaution in deciding what should constitute 'investment'.

2.3. Types of Investment

Depending on the nationality of an investor and the source of capital, investment may be divided into domestic and foreign investment. Though foreign direct investment is now the most important external source of long-term funds in the developing world, financing development remains primarily an issue of domestic investment.[36] In brief, domestic investment

[33] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart publishing, oxford and Portland, 2008, p.61(here in after Surya p Subedi, *International Investment Law*.)
[34] Ibid.
[35] UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series On International Investment Policies For Development, New York, United Nations, 2005, pp.15.
[36] Ndikumana, L. and Verick, S.). "The Linkages between FDI and Domestic Investment: Unravelling the Developmental Impact of Foreign Investment in Sub-Saharan Africa." Bonn, Germany: IZA Discussion Papers, No. 3296, 2008.

involves an expenditure of capital by a national of the host state whose source of capital is also the host state, while foreign investment involves the transfer of tangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.[37] Foreign investment is also further divided into foreign direct investment (FDI) and portfolio investment.[38]

International Monitory Fund (IMF) defines foreign direct investment as an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management (IMF, 1977). In a similar token, UNCTAD (1999), define FDI as an investment involving a long term relationship and reflecting a lasting interest and control of a resident entity in one economy other than that of a foreign direct investor.[39] The lasting interest implies the existence of a long-term relationship between the direct investor and a significant degree of influence on the management of the enterprise.[40] Accordingly, the transfer of physical property such as equipment or the physical property that is brought or constructed such as plantations or manufacturing plants constitute foreign direct investment. And as per IMF Balance of Payment Manual, an investment by a foreign investor is regarded as FDI if the direct investor holds at least 10 percent of the ordinary share or voting power of a firm.[41]

In contrast, portfolio investment involves a movement of money for the purpose of buying shares in a company formed or functioning in another country.[42] Hence, the distinguishing element is that, in portfolio

---

[37] *Encyclopedia of Public International Law*, Vol.8 P.246.
[38] Ndikumana, L. and Verick, S.). "The Linkages between FDI and Domestic Investment: Unravelling the Developmental Impact of Foreign Investment in Sub-Saharan Africa." Bonn, Germany: IZA Discussion Papers, No. 3296, 2008.
[39] UNCTAD (1996). Foreign Direct Investment, Trade, Aid and Migration: United Nations Publication, Geneva.
[40] Ibid.
[41] International Monetary Fund (IMF), Balance of Payments and International Investment Position
Manual, 99.
[42] M.Somarajuhp International Law on Foreign Investment, p.7.

investment, there is a separation between management and control of the company and the investor himself takes the risks involved in the making of such investment.

The Investment Proclamation of Ethiopia did not classify investment rather it categorized investors into domestic and foreign investors.[43] This deviation of the Proclamation may be justified only by the identification of domestic investors for the purpose of providing them areas reserved for domestic investors provided under Art 3 of Regulation No.270/2012.[44] Unless an investor is considered as domestic investor he/she cannot be benefited from areas reserved to domestic investor. Hence, the classification may be considered as justifiable on this perspective. Apart from this reason the classification of investors as domestic and foreign investors under the Proclamation may not have an implication on the type and magnitude of investment guarantees. This is because it leads us to unjustifiable result and will not be the real intention of the legislature. For instance, assume that an investors who is considered as a domestic investor under the Investment Proclamation can also be a foreigner and as such want to repatriate funds to the home state, can we prevent the repatriation as the investor is a domestic investor under the Investment Proclamation?

2.4. Risks in investment

Assumption of risk is inevitable in the operation of investment activities.[45] A closer look to the risks that investors face when they operate an investment activity reveals that investors are susceptible to different types of risks. Specially, the risk to foreign investment is increased after the end of colonialism because during the colonial period, an investor from an imperial state taking assets into the colonies had almost absolute

[43]Investment Proc. No,679/2012, Art. 2(5) & (6).
[44]Investment Incentives And Investment Areas Reserved To Domestic Investors Council Of Ministers Regulations, 2012, Federal Negarit Gazeta, Regulations No. 270, 19th year, No. 4, Art. 3.
[45] Angelos Dimopoulos, Foreign Investment Insurance and EU Law, TILEC Discussion Paper DP-2012-028, July 18,2012, Tilburg Universty, p.2[available at http://ssrn.com/abstract=2112053] last accessed November 5, 2016

protection.[46] Even though investors are faced various kinds of risks, the following are the biggest risks that pose a great treat for investors.[47] These are: geological risks, commercial risks, regulatory risks.

2.4.1. Geological risks:

It is the biggest risk for investors as it is related to factors which are out of the control and wish of both the host state and the investor himself.[48] For instance, an investor may found natural resources in the host country in amount less than he/she is anticipated during his/her decision to invest in that country or a natural event such as earth quick, flood, and others may destroy the property of an investor.

2.4.2. Commercial risks

As an effect of the broad right of states to regulate their economy, commercial risks are inherent in investment both domestic and foreign. Among other things, a change in the cost of production and other transaction costs, unavailability of foreign currency, fluctuations in exchange rates, inflation and limited availability of financing constitute commercial risks which are important concerns for investors.[49] Hence, investors must consider both the international and domestic economic condition before making the decision to establish or expand an investment.

2.4.3. Regulatory risks

Some called these risks as political risks of investment and some other called non-commercial risks of investment. Whatever the nomenclature be, these risks refers to risks of losses of capital and income of investment as a result of the act of the host state through legislative surprises and policy choices that would affect the anticipated right of

[46]M.Somarajuhp *International Law on Foreign Investment* , p.75.
[47] Tilahun Woldie, *The Legal Regime Governing Minerals In Ethiopia*, p.26
[48].ibid.
[49] Gerald M. Meier, Legal-Economic Problems of Private Foreign Investment in Developing Countries, 1966, University of Chicago Law Review: V ol. 33: Iss. 3, Article 3, [available at: http://chicagounbound.uchicago.edu/uclrev/vol33/iss3/3]

investors.[50] In other word, these are risks which result from adverse sovereign actions and inactions in the host state. The government of the host country may take various regulatory changes that would pose a series danger or possibility that the investor will have to bear the costs and expenses of the damage or otherwise of the investment property. As summarized by Zewidneh B. among other things regulatory change as risks of investment includes:

- *The approval and monitoring process relating to the necessary licenses is not transparent and reasonable fast;*
- *The investment climate is unstable; incentives, tax rates, conditions of export producing zones, import duties, and disguised administrative costs change rapidly and are unpredictable;*
- *The banking system is not well developed. The procedures for wiring and exchanging money are too burdensome. The imposition of exchange and repatriation restrictions is unforeseeable;*
- *The existing judicial system is not effective, independent and reliable when it comes to the enforcement of contractual and property rights;*
- *A new administration may not honor the investment contract which was concluded with the old administration, and deprive an investor of the existing contractual rights;*
- *A radical political change may occur leading to nationalization, outright and creeping expropriation and civil unrest;*
- *Reality may not conform to the written laws and regulations; corruption may take place in various forms at the different agencies which are in charge of granting approvals, licenses, and incentives to investors.*[51]

Hence, a risk on stable regulatory framework in general and the political condition of the host state in particular has been one of the most important considerations for investment.[52]

To sum up, in order to secure themselves from such risks, as these can significantly influence the existence and operation of an investment, investors resort to political risk insurance sponsored by government and investment guarantees directly accorded by the government.[53] In this way, investors avail themselves with a significant risk management and risk mitigation tool, which provides a more stable environment for investments abroad, and unlocks better access to finance.

---

[50]Tilahun Woldie, *The Legal Regime Governing Minerals In Ethiopia*, p.27.
[51]Zewdneh Beyene Haile, *International Business Transactions*, Bahir Dar University School of Law (Unpubliced), 2014, p.401.
[52]Tilahun Woldie, The Legal Regime Governing Minerals *In Ethiopia*, P.27
[53]K. Gordon, 'Investment Guarantees and Political risk Insurance: Institutions, Incentives and Development' in OECD (ed) OECD Investment Policy Perspectives 2008 (OECD, 2008), p. 97. [available at http://www.oecd.org/daf/investment/%0bguidelines] last accessed November 10, 2016.

CHAPTER THREE

INVESTMENT GURANTEES AND THE STANDARD OF INVESTMENT GUARANTEES

3.1. Introduction

Besides other factors that determine the flow of investment in a given country, investment guarantees available in a country play an important role to attract investors as they usually want to see sufficient protections to their investment.[54] In brief, investment guarantees requires a host state to exercise due diligence in protecting investments from adverse act of private parties and of state organs, including law enforcement agencies and the armed forces in equal manner. In traditional understanding, investment guarantees requires the host state only to provide certain level of police protection and physical security.[55] But recently broad interpretations of investment guarantees were adopted by arbitral tribunals which added guarantees such as legal, economic and regulatory protection and security.[56] Case law also supports the view that

[54]Tilahun Woldie The Legal Regime Governing Minerals In Ethiopia , p.53
[55] M.Somarajuhp *International Law On Foreign Investment*, p.142
[56] International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (IIA Handbook)
APEC Committee on Trade and Investment, Investment Experts Group December 2012

the formula ‘full protection and security’ covers not only protection against violence but also provides protection and security against infringements of the investor`s rights.[57] Here one thing that must be remind is, investment guarantees should not affect the right of host countries to take regulatory measures so as to protect the public at large and apply an economic reform that fits for the countries situation.

The standard of treatment is the major concern for investors and a center of investor-state dispute.[58]

Thus, as discussed in previous chapter investors faced various types of risks such as geological, commercial and regulatory risks among other things. The guarantees designed to protect investors are different depending on the type of risk that investors will face. Accordingly, this chapter will give a general hint about investment guarantees that are designed to protect investors from regulatory risks of investment. Particularly the first section deals about the definition and concept of investment guarantee in relation to regulatory risks of investment. The second section will address the types of investment guarantees that investors would claim from a host state for the protection their investment activity from the regulatory action of the host government. The third section assesses the standard of investment guarantees of investors in general and the case of the calvo doctrine and hull formula in particular.

3.2. Definition and Concept of Investment Guarantee

There is no generally agreed definition for the term investment guarantee so that different parties have claimed different level of protection under the umbrella of investment guarantee.[59] A guarantee may be defined as the agreement of a guarantor to assume the responsibility for the performance of an action or obligation of another person or entity. The guarantor agrees to compensate the beneficiary in

[57] Azurix v Argentina, award of 14 July 2006.para 406-408.
[58]UNCTAD, (2008), Latest Developments in Investor-State Dispute Settlement, International Investment Agreements MONITOR, No. 1.
[59] Surya P Subedi, *International Investment Law*,P.67

the event of non-performance. The trend in most investment treaties reveals that investment guarantees are nowhere defined rather the treaties try to list the guarantees accorded to investors in that particular treaty. As it is hard to give a comprehensive definition for the term investment guarantee, the best approach in investment treaties is listing the available investment guarantees in a certain investment treaty. The same is true under Ethiopian legal system. Neither the investment proclamation nor the BITs that Ethiopia concludes with provides the definition of investment guarantees rather they provide lists of guarantees that investors are accorded in the country.[60]

The concept of the term 'investment guarantees' is not clearly established and it varies from time to time, legal system to legal system and even it differs among investment treaties that a country concludes with different countries. Investment guarantees are usually expressed by various clauses such as 'full protection and security', 'constant protection and security', or 'security and protection'. All of these clauses suggest that the host state is under an obligation to take active measures to protect the investment from adverse effects.[61] However, the extent of protection advocated usually by the phrase full protection and security is a point of disagreement between the host state and the investors.[62] The decision of various tribunals adopts a restrictive interpretation of the phrase 'full protection and security'. For instance, in *Noble Ventures v Romania,* it is argued that Romanian was required to provide Noble Ventures with 'full protection and security', which required Romania to enforce its own laws and to provide police protection to protect the investment of foreign investors located in Romania.[63] Accordingly, the phrase 'full protection and security' should be depend on whether the state in question exercised due diligence in affording protection to investors. Hence, investment guarantees are not absolute and does not

[60] Investment Proc.No769/2012, article.25 & 26. See also Treaty Between The Federal Democratic Republic Of Ethiopia and The Federal Republic Of Germany Concerning The Encouragement And Reciprocal Protection Of Investment, Art.4.
[61] Christoph schreuer*, Investments, International Protection,* p.52-57
[62] Plama Consortium Limited v. Bulgaria, ICSID Case No.ARB/03/24, 2005, para 198
[63] Noble Ventures v Romania, ICSID Case No ARB/01/11 of October 2005, para.111.

impose strict liability upon the state that grants it and states must not be liable if it has taken all measures of precaution to protect the investment of the investor in its territory.

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

- Losses caused by the inability to convert foreign currency representing earnings or liquidations of capitals into dollars;
- Expropriation or confiscation, including abrogation repudiation or impairment by the host country`s government of its contract with the investor which has the effect of depriving the investor of his ownership, control or substantial benefit from his investment;[64]
- Losses resulting from damage to physical assets by reason of war, revolution or insurrection.[65]

3.3. Types of Investment Guarantees

Investment guarantees can be classified depending on the nature of investment risks they are designed to protect.[66] Host states may provide different types of investment guarantees so as to attract investors in general and foreign investors in particular to their country. For instance the Russian federation federal law on foreign investment in the Russian federation provides to investors guarantees such as guarantee of compensation in case of nationalization and requisition of the property of a foreign investor or commercial organization with foreign investment; guarantee against a change in the legislation of the Russian Federation that is unfavorable for a foreign investor and commercial organization with foreign investment; and the guarantee of the use in the territory of

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

[65] T.M. Ocran, International Investment Guarantee Agreements and Related Administrative Schemes, *Journal of InternationalLaw*,1988,Vol.10,Iss.3pp.341-370,p.344-345.[availableat http://scholarship.law.upenn.edu/jil/vol10/iss3/2] last accessed December 1, 2016.

[66] Id p.353-354.

the Russian Federation and transfer out of the territory of the Russian Federation of earnings, profit and other lawfully gained funds.[67]

Protection treaties also typically give reciprocal assurances to contracting states as to the treatment of investments within their borders. They provide many protections such as national treatment and most-favored-nation treatment; expropriation only in accordance with law, accompanied by prompt, adequate, and effective compensation, or some liberal variation of this formula; free transfer of dividends and proceeds from disinvestment; subrogation of the home country's investment guarantee agency to the rights and claims of an investor against the expropriating state; and international arbitration for any disputes arising under the treaty, subject to the prior exhaustion of reasonable local remedies.[68]

As a direct reflection of the right of sovereign states to regulate their economy, various types of investment guarantees are provided under the domestic laws of states. However, the major and mostly accepted guarantees to investors are guarantee against expropriation and guarantee for repatriation of capitals.

3.3.1. Guarantee against expropriation

Any attempt to deal with guarantees against expropriation needs a clear understanding of what constitute expropriation. Although various IIAs, FTAs, BITs and literatures seek to define the term taking of property commonly known as expropriation or nationalization, the meaning of the term expropriation remains controversial. The meaning of the term has also been the preoccupation of international courts and tribunals in a

[67] Federal Law on Foreign Investments in the Russian Federation, Moscow, the kremlin No. 160-FZ, July 9, 1999, articles 5-15.
[68] Ocran, Bilateral Investment Protection Treaties: A Comparative Approach, 8 N.Y.L. SCH. J. INT'L & COMP. L. (1988) (forthcoming).[http://scholarship.law.upenn.edu/jil/vol10/iss3/2] last accessed November 12, 2016.

number of cases referred to them.[69] The 1961 Draft Conventions on State Responsibility define expropriation as:

> *(a) A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference;*
>
> *(b) A 'taking of investment property' includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of property for a limited period of time.*[70]

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

- Direct expropriation: it is the actual taking of property of investors by the host government by direct means, including the loss of all, or almost all, useful control of property.[71] It is a traditional form of expropriation and becoming rare recently because of globalization, economic interdependence and the increasing existence of comprehensive body of law on investment.
- Indirect expropriation is a governmental, whether administrative or legislative, measures which has an effect equivalent to direct expropriation without transfer of title or outright seizure.[72] This is one of the more controversial forms of expropriation.
- Creeping expropriation form of indirect expropriation and involves the use of a series of governmental measures to reduce the economic value of the investment.[73] Here the cumulative impact of

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

[70] Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974)50.

[71] Dolzer and Schreuer, Principles of International Investment Law, p.89.

[72] Weston, 'Constructive Takings' Under International Law: A Modest Foray Into the Problem of 'Creeping Expropriation', 16 VA. J. INT'L LAW 103, (1975), p.111-13

[73]Ibid.

the measures rather than individual measures which on their own may not amount to expropriation.

- Regulatory expropriation a form of indirect expropriation in which a measure taken by the host government for regulatory purposes has an impact on the economic value of the asset owned by an investor.[74] The major challenge here is to distinguish between a legitimate exercise of governmental discretion that interferes with the enjoyment of investment property and a regulatory taking that amounts to expropriation requiring compensation. In order for such a measure to constitute regulatory expropriation the measure should be discriminatory one.[75] A non-discriminatory regulatory measure designed to protect legitimate public welfare objectives does not necessarily constitute regulatory expropriation.[76]

It is true that investors needs sufficient protections for their investment activities that ensure they are protected from unlawful expropriations and guaranteed for compensation in the event of lawful expropriations. Hence, guarantees against expropriation in investment are intends to protect investors from expropriation of their investment in either form of expropriation discussed above.

3.3.2. Guarantee of repatriation of capital

Most investors would expect to be able to transfer any profits made from their investment back to their home state. Taking this fact, most IIAs, FTAs and BITs states that the investor has the right to carry out the transfer in a freely convertible currency, that the transfer takes place at the official rate of exchange of the host state on the date of the transfer and the transfer will be authorized 'without delay', 'without undue delay', or that the procedures are carried out 'expeditiously'.[77] Free transfer of funds is a guarantee important only for foreign investors as domestic

[74] Id p.115-116.
[75] Saluka Investments BV (The Netherlands) v Czech Republic UNCITRAL Partial Award, 2006, para. 263.
[76] Ibid. see also Methanex v. USA, NAFTA 2005, IV D para.7.
[77] The East African Model Investment Code, 2006, East African Community Secretariat Arusha, Tanzania, Art 13.

investors invest in their country there is nothing to be repatriated. The UK Model BIT prescribes that the contracting parties shall guarantee the unrestricted transfer of an investment which falls within the treaty regime and any returns on such investments.[78] The model BIT of UK define returns as "the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees."[79] There are various transfers covered by the provision of the laws of states. Among other things, transfer includes:

a) *Profits, dividends, interests, capital gains, royalty payments, management fees, technical assistance and other fees and amounts derived from the investment;*
b) *Proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment;*
c) *Payments arising from the compensation from expropriation;*
d) *Payments pursuant to the application of provisions relating to the settlement of disputes.*[80]

Transfers must be made without delay even though there is a difference between states in specifying the maximum time limit within which a transfer must be made. The guarantee for repatriation of capital is not always available as it can be subjected to restriction due to some exceptional financial or economic circumstances.[81] Although it is determined by the domestic law of a country, transfer may be restricted in whole or in part if there is balance of payment difficulties or a threat

[78]Model Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of X for the Promotion and Protection of Investments UK Model BIT <http://www.unctad.org/sections/dite/iia/docs/Compendium//en/69%20volume%203.pdf>)
(accessed November 6, 2016.
[79]Ibid.
[80]United Nations Conference on Trade and Development (UNCTAD), Transfer of Funds, UNCTAD
Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/20 (New York: United
Nations, 2000).
[81] R.Dolzer and C. Schreuer, Principles of International Investment Law, Oxford University Press, Oxford, 2008, p.80-82.

thereof, or if it is necessary to safeguard the integrity and independence of its currency.[82]

3.4. The Standard of Investment Guarantees

The very notion of sovereignty refers that foreigners residing within the national borders of the country were subject to the law of the land.[83] Relaying on the doctrine of sovereignty and sovereign equality, when colonial territories began to gain independence they asserted that foreign investors were not entitled to any greater protection than those accorded to the nationals of the county under the law of the land.[84] In supporting this idea of national treatment, the Convention on the Rights and Duties of States, signed at the Seventh Pan-African Conference, provided that "the jurisdiction of states within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals".[85]

However it was submitted that if the local law were considered inferior, not well established or failed to meet the standards of justice and equity, the international minimum standard rather than national law would apply to foreign investors.[86] In supporting this argument G. Schwarzenberger added his voice in the following words:

> *[T]he national standard cannot be used as a means of evading international obligations under the minimum standard of international law. Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as,*

[82]Abba Kolo and Thomas W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties," in Standards of Investment Protection (Oxford, U.K, New York, USA: Oxford University Press, 2008), p.213-214.
[83]Permanent Sovereignty Over Natural Resources, General Assembly Resolution, 1803 (XVII) of 14 December 1962, par.3-4.
[84]Surya p Subedi, *International Investment Law*, p.14.
[85] The Convention on the Rights and Duties of States (Montevideo Convention, 1933), 1976, Art 9.
[86] EM Borchard, *The Minimum International Standard in the Protection of Aliens',* 1939, p.33.

> *in any case, they would be entitled to enjoy under international customary law or the general principles of law recognized by civilized nations.*[87]

Hence, all states had to accept the international minimum standard by bringing their national laws up to this standard. To ascertain the international minimum standard, one had to look mainly on customary international law as there is no internationally negotiated treaty outlining the terms and conditions of protection of foreign investment.

In the previous time, once it was established that foreign investors enjoyed the international minimum standard of protection under customary international law, the home states invoked the law to provide protection to their citizens doing business abroad and sought remedy for them under the notion known as 'diplomatic protection'. Concerning diplomatic protection Borchard stated that "diplomatic protection is in its nature an international proceeding, constituting an appeal by nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties".[88]

In acknowledging the states right to resort to diplomatic protection the Permanent Court of International Justice in *Mayrommatis Palestine Concessions* case stated that:

> *It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from when they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights-the right to ensure, in the person of its subjects, respect for the rules of international law*.[89]

However, this traditional form of diplomatic protection is no longer necessary in today`s world where aggrieved foreign investors can resort

[87] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1939, p.248.
[88] EM Borchard, *The Diplomatic Protection Of Citizens Abroad Or The Law Of International Claims,* 1915, p. 354.
[89] Permanent Court Of International Justice, *Report Series*, 1924, A No.2.

to various international tribunals and a different view which opposed the separate treatment of foreign investors in the name of international minimum standard was proposed by Latin American jurist Carlos Calvo of Argentina.

3.4.1. The Calvo Doctrine

In response to abuses of diplomatic protection of citizens abroad by western powers in the 19th century Latin American countries put forward the claim that investment regulation in general and the taking of foreign property in particular are matters of 'domestic jurisdiction' as opposed to the 'international minimum standard'.[90] Carlos Calvo was the first to formulate this claim; hence it comes to be known as the 'calvo doctrine'. It is also referred to as the 'national standard'. According to this doctrine, no state should be required to offer more protection to foreign investors than that accorded to its own nationals and if a state in question was not discriminating against foreign investors, it was not violating any rules of customary international law. The argument was important for newly independent and developing countries as it would difficult to accord a higher standard of treatment to foreign investors despite their need to have foreign investors in their territory.[91]

By the word of Calvo of the doctrine of economic sovereignty of states is articulated in the following terms:

> *It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong to any pecuniary indemnity……. The rule that in more than one case it has been attempted to*

[90] Surya p Subedi, *International Investment Law*,p.14.
[91]Ibid..

impose on American states is that foreigners merits more regard and privileges more marked and extended than those accorded to the nationals of the country where they reside.[92]

As Verwey and Schrijver rightly stated, the calvo doctrine basically stipulates:

a) *The principle of absolute equality before the law between nationals and foreigners;*
b) *The exclusive subjection of foreigners and their property to the laws and juridical regimes of the state in which they reside or invest, and*
c) *Strict abstention from interference by other governments, notably the governments of the states of which the foreigners are nationals, in disputes arising over the treatments of foreigners or their property (i.e. abstention from diplomatic protection.)*[93]

That means invoking the principle of the sovereign equality of States and the principle of equality of nationals and aliens, the Calvo doctrine required that foreigners not be afforded greater rights than locals and those domestic laws apply to, and local courts adjudicate investment disputes.

In addition, according to the Calvo doctrine, land and other natural resources belong to the state by virtue of the doctrine of sovereignty and no foreign entity can permanently own land in the host state.[94]

3.4.2. The Hull Formula

During the agrarian revolution in Mexico, the government of Mexico proclaimed state ownership of land; and the assets of foreign companies including land owned by US nationals were expropriated and nationalized without proper compensation, through invoking the sovereignty of states.[95] But later by renouncing this extreme notion of

[92]DR Shea, *The Calvo Clause* [translated and quoted from Calvo`s work in Spanish], 1995, p.17.
[93]W.D. Verwey and N.J.Schrijver, The Taking Of Foreign Property Under International Law: A New Legal Perspective?,in 15 Netherlands Yearbook Of International Law, 1984, 1-96, p,22-27.
[94]Id p.32.
[95]Surya p Subedi, *International Investment Law*, P.15.

national treatment, the Mexican constitution promulgated in 1917 admits the duty to compensate foreigners against expropriation of the assets that they owned in Mexico, but the nature of compensation was not necessarily prompt, adequate and effective and depends on the ability of the state to pay compensation.[96] However, US government claims adequate compensation based on the international law standard despite the absence in international law any principle universally accepted by countries that would render obligatory the giving of adequate compensation for expropriation.[97] In its dealing with the US, the Mexican government maintained that as a sovereign state it had the power to expropriate the assets of foreign investors in pursuance of a social policy and foreign investors had no special rights and privileges when it comes to awarding compensation and any compensation had to be determined by applying the national laws of Mexico and the principle of justice and equity rather than those international law standard as Hull claimed.[98] Concerning the issue of the nature of compensation, the US Secretary of State, Cordell Hull, began a series of diplomatic exchanges with the Mexican Government and the content of these diplomatic exchanges in which Hull articulated the US view on compensation came to be known in international foreign investment law as the Hull formal. The US and Mexico settled their claims without reaching an agreement on the applicable law.

The central idea of the Hull Formula as put by Hull in outlaying the US position on the issue of expropriation was:

> *The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that government , its economic circumstances and local legislation may perhaps permit, the*

[96] The 1917 Constitution of Mexico , Oceana publications, Art 27
[97] Letter of the US Secretary of states to Mexican Ambassador to the United States, 21 July 1938 as cited in Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart publishing, oxford and Portland, 2008, p.16.
[98] Mexican Minister of Foreign Affairs to US Ambassador, 3 august 1938, p.399.

> *safeguards which the constitution of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard for the rules of compensation under international law. Nor can we admit that any government unilaterally and through its domestic legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is reason, equity and justice.*[99]

After this time on ward the Hull Formula was advocated by developed countries in general and the US in particular and become a powerful norm sidelining much of the tents of the Calvo doctrine favored by developing countries.

CHAPTER FOUR

THE LEGAL REGIME GOVERNING INVESTMENT GUARANTEES IN ETHIOPIA

[99] Letter of the US Secretary of States to Mexican Ambassador to the United States, 21 July 1938, as cited in AF Lowenfled, International Economic Law, 2002, Oxford University Press, P. 398.

4.1. Introduction

It is vivid that investment guarantees available in a country play an important role in attracting investment in general and foreign investment in particular. Among other things investors went to see that there are sufficient protection to their investment activities that could ensure their properties are not damaged or in case of damage that they receive appropriate compensation, and assurance that they can easily remit their capital whenever they need. In attempting to meet this demand of investors the government of FDRE provides guarantees to investors and the investment laws of the country have provisions that guarantee investors against different risks.

Accordingly, this chapter will try to discuss the guarantees provided to investors in Ethiopian under BITs to which Ethiopia is a party; the FDRE Constitution; and Investment Proclamation No.679/2012. Specifically this chapter will evaluate the extent of protection provided by these guarantees and the possible available gaps in the investment laws in addressing investment guarantees available in Ethiopia.

4.2. BITs to which Ethiopia is Signatory

So far Ethiopia concluded a number of Bilateral Investment Treaties (BITs).[100] Even though they are helpful only for foreign investors all the BITs concluded by Ethiopia have provisions dealing with investment guarantees that are designed to protect the investment activities of investors against risks of investment in general and regulatory risks in particular.[101] Among other things, all the BITs have provisions that

[100] For example Ethiopia has concluded BITs with Algeria, Austria, China, Denmark, Djibouti, Egypt, France, Germany, India, Israel, Italy, Netherlands, Russia, Spain, Sweden, South Africa, Sudan, Turkey, United Kingdom, e.t.c.

[101] See some of the provisions contained in Art 5 & 6 of Ethiopia-Algeria BIT, Art 4, 5 & 6 of Ethiopia-Germany BIT, Art 4, 5 & 6 of Ethiopia-Israel BIT, Art 4, 5 & 6 of Ethiopia-Russia BIT, Art 4,5 & 6 of Ethiopia-Sweden BIT, Art 5,6,& 7 of Ethiopia-Spain. For instance, Art 5 of Ethiopia-Algeria BIT provides that "

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

address guarantee against expropriation and compensation as well as guarantee for repatriation of capital.[102] Compared to the provision of the FDRE Constitution and the Investment Proclamation, the provisions of BITs related to investment guarantees are more clear and detailed to some extent. Specifically, the BITs mainly use similar expressions to refer direct and indirect expropriations. While some of them expressly use the term 'direct or indirect measures' other employ phrases such as 'expropriations, nationalization or any other measure having the same nature and effect'.[103] However, neither of the BITs determines the measures that constitute expropriation nor they provide guideline that serve as a base to determine what constitute expropriation either direct or indirect.

Concerning guarantee for repatriation of capital the BITs has recognized it either in a general language that allows the unrestricted right of investors to transfer their investment and return or provide an illustrative list of capitals that would be subject to repatriation.[104] As far as repatriation of capita is concerned, the provisions of the BITs go a step forward compared to the provision of the Investment Proclamation. But not all most of the BITs incorporated the possible situations like serious Balance of Payments difficulties that justify the prohibition of transfer of capital out of Ethiopia.[105]

---

same effects against investments of investors of the other Contracting Party.

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

a) The measures shall be carried out under due process of law;
b) The measures shall not be discriminatory; and
c) The measures shall be accompanied by prompt, adequate and effective compensation.

3) The amount of such compensation shall correspond to the market value of the expropriated investment, on the day before such expropriation, nationalization or similar measure became effective or public knowledge.
4) The compensation shall be paid in freely convertible currency at the official exchange rate applied pursuant to the exchange regulation of the Contracting Party on which it is incumbent pay the said compensation. Such compensate shall be freely transferable.

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid. For instance Art 6(3)(a) of Ethiopia-Israel BIT provided that "Notwithstanding the foregoing:

4.3. The FDRE Constitution

The guarantees accorded to investors may be found under the constitution of a state. For instance, paragraph 75 of the constitution Kenya provides that property belonging to an approved enterprise cannot be compulsorily acquired without the payment of compensation.[106] It also limits the grounds on which land can be compulsorily acquired such as where it is necessary in the interest of defense, public safety or public morality and the provision further provides that "prompt payment of full compensation" must be made.[107] Regulating investment guarantees under constitution may be important for increasing the confidence of investors in the guarantees provided by states and it reveals the degree of government`s commitment to protect investment properties. It can also attract investors in extent higher than what would be accomplished by other subordinate investment laws.

The FDRE Constitution regulates the right to property in general and it does not specifically and separately address investment properties. Art. 40 of the FDRE Constitution provided that:

> *Article 40*
>
> *Right to property*
>
> 1. *Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.*

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

[106] The constitution of Kenya as cited by (Akash Devani, Partner, Investing In Kenya: An Overview Of Existing Regulatory Environment And Framework For Investors, 2009, ALN, p.15. available at www.africalegalnetwork.com last accessed on December 1, 2016.

[107] Ibid.

2. *"Private property", for the purpose of this article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.*

.

.

.

.

7 *Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.*

8 *Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property*.[108]

As can be seen from the above provision, in specifying the persons whose properties are protected the FDRE Constitution employ the term 'every Ethiopian citizen'. Such terminology may lead to at least two ways of interpretations. First, the provisions can be interpreted as they protects only Ethiopian investors excluding foreign investors as they expressly uses the terms every Ethiopian or every Ethiopian citizen.[109] Second, the provisions may be interpreted as it accords protection for properties of foreign investors. Because companies or entities established and owned by foreign investors may be considered as Ethiopians as Ethiopian nationality is conferred both to natural and legal persons. Hence, the provisions are considered as they referred to both natural and legal persons who have Ethiopian nationality.[110] Therefore, even if foreign natural persons have no Ethiopian nationality, the enterprise they

[108]Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1year, No. 1. Art.40 [here in after 'Constitution of FDRE']

[109] Article 2(5)&(6) of Investment Proc. No.679/2012 defines domestic and foreign investors as "domestic investor" means an Ethiopian national or a foreign national treated as a domestic investor as per the relevant law, and includes the government, public enterprises as well as cooperative societies established as per the relevant law; while, "foreign investor" means a foreigner or an enterprise wholly owned by foreign nationals, having invested foreign capital in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor;

[110] Tilahun Weldie, The Legal Regime Governing Minerals In Ethiopia, p.53.

established and owned may be considered as legal persons who have Ethiopian nationality.

In the one hand, the provisions of the Constitution are open to such kind of interpretations, and investors on other hand needs clear provisions of the law which apparently shows the commitment of a state towards the protection of their investment. Even if one accepts the second interpretation and conclude that foreign investments are equally protected under the FDRE Constitution, the manner of protection of investment properties in general and foreign investments in particular is under question. The Constitution regulates investment properties under the framework of general property. But, taking into account the special features of investment properties in general and foreign investments in particular a separate regulation which includes guarantee against repatriation of capital is more than important. The separate treatment of investment property under the Constitution may reflect the government's commitment in attracting investment and makes investors to feel secure and decide to participate in long term investments with fixed assets. Because, unlike other subordinate laws, the Constitution is not easily altered by the unilateral act of the government taking into account its rigid amendment procedures.[111] Hence, having a Constitutional base creates certainty for the guarantees provided under other subordinate laws.

4.4. The Investment Proclamation (Proc.No.679/2012)

Even if Investment Proclamation No.679/2012 is amended by the Amendment Proclamation No.849/2014, major substantive parts of the Proclamation including provisions related to investment guarantees remains enforceable. That is why it is used as a base for this discussion. In order to attract investment and achieve the investment objectives provided under article 5 the Investment Proclamation, among other things, incorporated guarantees to investors which are designed to give

[111] Constitution of FDRE, Art. 105&106.

protection and security for their investment activities. The Proclamation provided guarantee against expropriation and for remittance of funds.[112]

4.4.1. Guarantee against Expropriation

Expropriation is a right of a sovereign state permitted under international investment law.[113] Relaying on the doctrine of sovereignty and sovereign equality, every sovereign state had the right to expropriate or nationalize foreign assets provided that the foreign investor was provided with compensation. [114] That means after admission of investment a sovereign state is entitled to expropriate the property of an investor. But this right of states is limited by the payment of compensation in a manner provided under the appropriate provision of the law which can be found either in BITs or domestic laws of the host state.[115] Hence, one of the threats of investors is the risk of expropriation of investment by the host state and protection against expropriation is an essential guarantee for investors.

In recognizing guarantee against expropriation Proc.No.679/2012 provided that "No investment may be expropriated or nationalized except for public interest and then, only in conformity with the requirements of the law".[116] Hence, under Ethiopian legal system, as a principle no investment can be expropriated or nationalized.[117] Expropriation of investment property is possible only when it is required by the public interest and in compliance with the requirements set by the law.[118] In international jurisprudence there are lawful expropriations and unlawful expropriations. Lawful expropriations are those carried out against compensation and in accordance with conditions and requirements set by

[112] Investment Proc. No.769/2012, Art 25 and 26
[113] Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess..,Supp.No.31 (1974) 50, article 2.
[114] International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (IIA Handbook)
APEC Committee on Trade and Investment Investment Experts Group December 2012.
[115] Surya p Subedi, international investment law,p.121.
[116] Investment proc. no.769/2012, Art 25(1).
[117] Ibid.
[118] Ibid.

the provision of the appropriate law.[119] An unlawful expropriation includes those carried out without compensation or those in violation of the conditions and requirements set by the law.[120] In international law, unlawful expropriation calls for *restitution in integrum*, or if impossible, its financial equivalent including its future profit, and for a lawful expropriation there is an obligation to pay compensation.[121] Similarly, Art 25 of Investment Proc.No.678/2012, guarantees lawful compensation and expropriation which did not conform to the conditions and requirements set therein are considered as breach of contract and out of the scope of Art 25 of the Proclamation.

Even though the provision of the Proclamation incorporates guarantee against expropriation many issues related to guarantee against expropriation remains unregulated. To begin, the Proclamation did not address the issue of what constitute an 'expropriation'. While this issue is the center of disagreement between a host state and investors and a number of cases referred to international courts and tribunals involves the issue of what constitute an expropriation.[122] Like the FDRE Constitution, the Proclamation lacks a well-defined scope of expropriation, even the reading of the Amharic version of Art 25(1) revels that the law guarantees only direct expropriation.[123] Rather than direct expropriation which is uncommon currently, other forms of expropriation such as indirect expropriation, creeping expropriation and regulatory expropriations are the most common and recent threats or risks of investors.[124] However, Art 25 does not indicate whether the same protection is accorded to investors when an indirect expropriation, a creeping expropriation or regulatory expropriation takes place.

[119]Homayoun Mafi[1], Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards Of The Iran-United States Claims Tribunal, *Intl. J. Humanities*, 2011, vol.18, no.1, pp.83-102.
[120]ibid
[121]Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts (2001), 87. States for internationally wrongful acts (2001), p.87. see also Waste Management, Inc.v. United Mexican States, ARB(AF)/00/3, Award, 30 April 2004, para. 174
[122] Surya p Subedi, *International Investment Law,*p.120.
[123] The Amharic version of Art 25(1) of Investment Proclamation No.679/2012 provides that "ለኢንቨስትመንት የዋለ ሀብት ለሕዝብ ጥቅም ሲባል በሕግ በተደነገገዉ መሠረት ካልሆነ በስተቀር ሊወረስ ወይም ሊወረስ አይችልም"
[124] Article 11 of MIGA convention.

Indirect expropriation may be defined as a state measure or series of measures which causes injury to an investment and have an effect equivalent to direct expropriation without formal transfer of title or outright seizure. Creeping expropriation may be defined as a form of indirect expropriation in which a cumulative effect of measures or series of measures interferes in investment undertaking of investors. It is a situation where an investment is injured by an accumulation of state actions over time.[125] While regulatory expropriation refers other form of indirect expropriation in which a measure taken by the host government for regulatory purposes has an impact on the economic value of the assets owned by the foreign investor. The determination of whether a measure or series of measures of a government constitute an indirect expropriation creeping expropriation or regulatory expropriation requires a case-by-case, fact-based inquiry that considers among other factors:

a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a government has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
b) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations (i.e. there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part); and
c) the character of the measure or series of measures; for instance, non-discriminatory regulatory actions of a government that are designed and applied to protect legitimate public welfare

[125] Tecmed v Mexico, ICSID Add. Facility 2003, para 114. See also Rumeli Telekom A. S v Kazakhstan ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 708.

objectives, such as public health, safety, and the environment do not constitute indirect expropriations.[126]

The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[127] In addition, the purpose for which a certain measure is warranted is irrelevant in the determination of whether such measure constitute an expropriation in either form.[128] That means no matter how laudable and beneficial to the society as a whole or no obvious benefit to the state concerned, a measure or series of measures can be considered as expropriation and warranted payment of compensation provided that the above thee cumulative factors are existed and the nature each specific case in our hand demands so.[129]

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

- Disproportionate tax increase (In the Matter of Revere Copper v. OPIC, Award 1978)
- Arrest and expulsion of an investor or other persons who play key roles in the investment (Biloune and others v. Ghana, UNCITRAL ad hoc Tribunal, Award 1989)
- Replacement of the owners of management by government imposed managers (Tippetts Abbett McCarthy Stratton v TAMS-AFFA Consulting Engineers of Iran, 6 Iran-US C.T.R. 219, (1984))
- Revocation of a free zone permit (Middle East Cement Shipping v. Egypt, ICSID Award, 2002)
- Revocation of an operating license (Tecmed S.A. v. Mexico,ICSID Award,2003)

[126] August Reinisch, Expropriation in International Investment Law, University of Vienna, Austria, p.30
[127] Rumeli Telekom A.S. v.Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 707. See also PSEG v. Turkey, ICSID 2007, para. 278.
[128] Ibid.
[129] August Reinisch, Expropriation in International Investment Law, University of Vienna, Austria, p.30.

- Denial of a construction permit contrary to prior assurances (Metalclad v. Mexico, ICSID Award, 2000)
- Impending the distribution of dividends (PSEG v. Turkey, ICSID 2007, para. 278.)
- Depriving the company of its property or control in total or in part (PSEG v. Turkey, ICSID 2007, para. 27)

In attempt to rectify these problems some BITs that Ethiopia concluded try to incorporate a clear reference to an 'indirect expropriation' or employ phrases such as 'expropriations, nationalization or any other measures having the same nature or the same effect'.[130] These expressions reveal that the BITs protect and guarantee against both direct and indirect expropriations. For instance, a BIT Ethiopia concluded with the government of Sweden stated that "*Neither Contracting Party shall take any measure depriving directly or indirectly, an investor of the other Contracting Party of an investment (hereinafter referred to as "expropriation") ……"* .[131] But still the BITs does not give an overall solution to the problem identified as they are limited to investors who come from states that concluded a bilateral treaty with Ethiopia and not addressed the issue at hand as detail as it requires.

4.4.1.1. The Standard of Compensation During Expropriation

It has been established under international law that the host state is duty bound to pay compensation when it expropriate a foreign investment.[132] But the issue of the standard of compensation during expropriation remains controversial under international law both in theory and practice. The assessment of compensation by the host State (or, failing

[130] For further information on provisions of expropriation in BITs concluded by Ethiopia see Art 5(1) of Ethiopia-Austria BIT, Art7(1) of Ethiopia-Belgian Luxemburg BIT, Art 5(1) of Ethiopia-India BIT, Art 4(2) of Ethiopia-Germany BIT, Art 5(1) of Ethiopia-Finland BIT, Art 5(1) of Ethiopia- Israel BIT, Art 5(2) of Ethiopia- Italy BIT, Art 4(1) of Ethiopia-Russia BIT.
[131] Agreement Between the Government of the Federal Democratic Republic of Ethiopia And The Government of the Kingdom of Sweden on the Promotion and reciprocal Protection of Investments, Art. 4(1)
[132]SKB Asante, International Law And Foreign Investment: A Reappraisal, 1998, *ICLQ*, 588-628, p.595.

this, by an arbitral tribunal) must be according to specific rules. This is what is termed as the standards of compensation. There are two standards with respect to compensation in case of expropriation. The first standard requires the state to effect partial compensation and it is commonly known as 'appropriate' compensation standard.[133] This standard is based on economic necessity since full compensation makes the expropriating state reluctant to expropriate investor's property and if expropriated the expropriating state would bankrupt.[134]The second standard of compensation known as 'Hull formula', primarily advocated by the government of United States in its claim against the government of Mexico, requires the expropriating state to pay full compensation in 'prompt, adequate and effective' standard.[135] "Prompt, adequate and effective" compensation means that the investor should be granted, as soon as the investment is expropriated (prompt), an amount equal to the total value of its expropriated investment (adequate), in a freely transferable and exchangeable currency (effective).[136]

In determining the extent of compensation during expropriation Art 25(2) & (3) of Proclamation No.679/2012 provides that:

> *2) Adequate compensation, corresponding to the prevailing market value, shall be paid in advance in case of expropriation or nationalization of an investment for public interest.*
>
> *3) For the purpose of this Article the word "nationalization" shall be used interchangeably with the word "expropriation" and results in the payment of appropriate or adequate compensation*

The provision of the Proclamation used the term adequate or appropriate compensation. The term 'adequate' does not directly refer appropriate compensation or prompt, effective and adequate compensation. Hence, the standard of compensation adopted by the proclamation seem

[133]Henry Landau, Protection of Private Foreign Investments In Less Developed Countries - Its Reality and Effectiveness, 1968, *William And Mary Law Review*, vol.9, issu.no.3/11, [http://scholarship.law.wm.edu/wmlr] last accessed December 3, 2016.
[134] Id.
[135]US Secretary of State Cordell Hull in a diplomatic note addressed to his Mexican counterpart 1938
[136] 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment.

different from the above two standards and as it used both the word 'appropriate' and 'adequate' it leads to a paradoxical conclusion. But that is not the real aim of the provision of the proclamation as far as standard of compensation is concerned.[137] In trying to define adequate compensation the law provides that adequate compensation refers to the amount which corresponds to the market value of the expropriated investment.[138] If investors are compensated an amount which corresponding to the market value of the expropriated investment, it is possible to conclude that investors are compensated in full and the investment proclamation of Ethiopia indirectly adopted the HULL formula which requires the payment of 'prompt, effective and adequate' compensation. The compensation is effective as it is required to be repatriated out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance.[139] Related to this, the reference date in which the market value of the expropriated investment is determined should be specified. Is it the 'market value' of the property before the decision of expropriation is made known to the public or after the decision is made known to the public? Most international and bilateral investment agreements stated that the market value of property should be determined in reference to the market value of the expropriated property before the decision of expropriation is made known to the public. This is due to the fact that, in case where an announcement is made that a property is expropriated the market value of such property will be minimized.[140]

In certain situations, compensation equal to the market value of the investment may be inappropriate or unjust.[141] For instance, it is possible to envisage compensation that would not cover the entire market value of

[137]Investment Proc. No 679/2012, Art.25(2).
[138]Ibid.
[139] Investment Pro. No.679/2012, Art.26(1)(g).
[140] W.D. Verwey and N.J.Schrijver, The Taking Of Foreign Property Under International Law: A New Legal Perspective? *In 15 Netherlands yearbook of international law*, 1984, 1-96, p.34.
[141] Abba Kolo and Thomas W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties," in Standards of Investment Protection (Oxford, U.K, New York, USA: Oxford University Press, 2008), p.213-214.

the investment, especially in the case of indirect expropriation. In order to achieve a result that strikes a balance between the interests of investors and those of the host state a fair and adequate compensation should be made. And the assessment of fair and adequate compensation must be based on a fair balance between the public interest and the interests of the injured parties, taking into account all relevant circumstances, and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of past profits made by foreign investors through the investment, and duration of the investment.[142]

The other issue as far as standard of compensation during expropriation concerned is what should be taken into consideration in the assessment of the amount of compensation payable to investors.[143] The investment proclamation of Ethiopia refers only the market value of the expropriated property and it is silent on other integral part of compensation.[144] For instance, it is commonly accepted that interest is an integral part of compensation.[145] Hence, as guarantee for investors other parts of compensation which needs to be considered in the assessment of compensation should be specified in the investment laws of Ethiopia as they have high degree of possibility for being a factor in the decision of investors.

4.4.2. Guarantee for Repatriation of Capital

Transfers may occur because of income generated from invested capital, refunds, compensation, loan payments, proceeds from sales, and other sources. Guarantee for repatriation of capital usually available for foreign investors rather than domestic investors because the ultimate goal of

[142]Homayoun Mafi[1], Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards Of The Iran-United States Claims Tribunal, *Intl. J. Humanities*, 2011, vol.18, no.1, pp.83-102.
[143] Wena Hotels Ltd v Arab Republic of Egypt, Award 8 December 2000 6 ICSID Reports 68, para. 98
[144]Investment Proc. No.679/2012, Art.25(1).
[145] See section 38 of the ILC draft articles on the International Responsibility of States for Internationally Wrongful Acts

foreign investors is to make profits and repatriate such capital out of the host state.[146] Rules on the transfer of funds deals with issues such as the investor`s right to make transfers, the types of amount allowed, with convertibility and exchange rates and with limitations on the free transfer.[147]

The term 'repatriation' is not defined under the Investment Proclamation of Ethiopia. However, it can be defined as the right to transfer capital and profits from an investment operating in Ethiopia to the nation of the investor. As per article 26 of the Proclamation any foreign investors have the right to remit out of Ethiopia the following payments in convertible foreign currency at the prevailing rate of exchange on the date of remittance: profits and dividends accruing from the investment; principal and interest payments on external loans; payments related to a technology transfer agreement registered in accordance with Article 21 of the Proclamation; payments related to a technology transfer agreement registered in accordance with Article 21 of the Proclamation; proceeds from the transfer of shares or of partial ownership of the enterprise to a domestic investor; proceeds from the sale or liquidation of the enterprise; and compensation paid to an investor pursuant to Article 25(2) of the Proclamation.[148]

Individual foreign nationals who employed in an enterprise are also allowed to repatriate, in convertible foreign currency, salaries and other payments accruing from their employment in accordance with the foreign exchange laws of the country.[149]

Thus, from the above discussion it is possible to conclude that the right of investors to repatriate capital under the Investment Proclamation of Ethiopia is found broad and conclusive enough to include each kinds of fund an investor may acquire and need to repatriate. The provisions of

[146]Tilahun Woldie, The Legal Regime Governing Minerals In Ethiopia, p.51.
[147]UNCTAD 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking', February 2007, UNCTAD/ITE/IIT/2006/5,)32-33.
[148] Investment Proc. No.679/2012, Art 26(1).
[149]Id sub-article 3.

the proclamation are capable to provide sufficient guarantee to investors as far as the repatriation of their capital is concerned.

However, under Ethiopian Investment Proclamation the right to repatriate funds appears to be absolute as the law does not provide restrictions on the exercise of such rights. Even the BITs concluded by Ethiopia and usually incorporated provisions that fill the gaps in the investment laws of Ethiopia did not provide restrictions on the right of investors to repatriate capitals. It is common in IIAs, FTAs and BITs, that the right of investors to repatriate capital from the host state should be restricted in circumstances especially during economic crisis or balance of payment difficulties.[150] The absence of such restriction under the Investment Proclamation of Ethiopia would possibly lead to dispute with an investor whenever one of the situations which require restriction on repatriation existed and the government of Ethiopia demanded to restrict repatriation.

In addition, in incorporating investor`s right to repatriate capital, most treaties stated that the transfer will be authorized 'without delay', 'without undue delay', or that the procedures are carried out 'expeditiously'. Some others limit the maximum time limit within which a transfer must be made. For instance, the UK Model BIT stipulates that transfers must be made without delay.[151] The Ethiopian investment proclamation neither referring the term 'without delay', or 'without undue delay' nor it limit the maximum time limit within which investors are exercising their right to repatriate capitals from their investment.[152] This puts investors under the mercy or otherwise of the National Bank of Ethiopia. Therefore, despite sufficient legal assurances on the right to repatriate, the delays to exercise the right may be a source of difficulty for investors looking to operate investment activities in Ethiopia.

[150]Abba Kolo and Thomas W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties," in Standards of Investment Protection (Oxford, U.K, New York, USA: Oxford University Press, 2008), p.213-214.
[151] UK Model BIT, Art. 12.
[152] Investment Proc. No.679/2012, Art.26(1).

Conclusion

Even though there are many factors that determine the flow of investment in Ethiopia, the legal framework that provides security and protection for investment is at the core of such factors. Hence, the legal reform on investment guarantees in Ethiopia is a step in the right direction and is expected that it would attract investors.

After several years of experimentations, the laws on investment in general and investment guarantees in particular have undergone significant changes by creating favorable environment for investors. Among other things, the laws provide guarantees for the security and protection of investment activities operating in Ethiopia. This is a crucial step in attracting investment. However, there have been gaps in the provision of investment laws of the country that regulate investment guarantees. If such gaps persist, they can adversely affect the country's potential to become a destination for long term investments.

Investment guarantees that have a constitutional foundation would create high degree of certainty in the mind of investors. The FDRE constitution incorporated provisions that are intended to protect property right in general. However, the issue of investment in general and investment guarantees in particular seems to have been poorly addressed.

Even though there has been no well-established constitutional base investment guarantees in Ethiopia were incorporated under the Ethiopian investment proclamation. Among other things, the investment proclamation provides guarantee against expropriation and guarantee for repatriation of different kinds of capitals. However, this proclamation lacks clarity and completeness as many issues related to guarantee against expropriation and guarantee for repatriation of capital are remain unregulated. Such gaps would possibly a center of dispute between investors and Ethiopia.

Furthermore, unlike investment incentive, there is no specific regulation that governs the particulars of investment guarantees in Ethiopia. This creates uncertainty in understanding the extent of protection accorded to investment activities in Ethiopia.

Generally, the investment laws of Ethiopia lacks clarity and completeness in addressing investment guarantees accorded to investors in there operation of investment activities. If these problems are not rectified, the

effort made to attract investors through the instrumentality of investment guarantees becomes fruitless.

Recommendations

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

- In order to reveal the government`s commitment in attracting investment in general and in providing protection and security for investment property in particular, it is advisable to give a separate regulation for investment under the FDRE constitution. However, as a separate incorporation requires an amendment of the constitution which is hardly possible taking into account the amendment procedures of the constitution, the researcher alternatively recommends the broad interpretation of article 40 of the constitution so as to extend constitutional protection for investment properties, especially the property of foreign investors.
- The provisions of investment proclamation no.679/2012 that address investment guarantee should be amended in such a way that would rectify the existing gaps. Among other things, the amendment should determine measures or series of measures that would constitute expropriation of investment by the government, the extent of compensation during expropriation, the ingredients that should be included in assessing the amount of compensation, the date of reference in calculating compensation, the circumstances in which the government may restrict the repatriation of capitals and the maximum period of time at which a repatriation would be effected.
- If the amendment of the proclamation is found to be not feasible due to various policy reasons, the researcher alternatively recommends the enactment of a regulation which address the

details of investment guarantees(with especial emphasis on the above listed points) provided under the investment proclamation as what has been done for investment incentives.

BIBLIOGRAPHY

Books and Articles:

- Angelos Dimopoulos*, Foreign investment insurance and EU law: Tilic Discussion Paper, 2012, Tilburg University, [http://ssrn.com/abstract=2112053]
- A. Redferr et al, *Law and Practice of International Commercial Arbitration* 2004, London, Sweet, & Maxwell, 4th edition.
- August Reinisch, *Expropriation in International Investment Law*, University of Vienna, Austria.
- Gerald M. Meier, Legal-Economic Problems of Private Foreign Investment in Developing Countries, 1966, *University of Chicago Law Review*: V ol. 33: Iss. 3, Article 3, [available at: http://chicagounbound.uchicago.edu/uclrev/vol33/iss3/3]
- Getinet Haile & Hirut Assefa, determinants of foreign direct investment in Ethiopia a time serie analysis west minister research online digital archive http://www.wmin.ac.uk/westministerresearch .
- Henry Landau, Protection of Private Foreign Investments In Less Developed Countries - Its Reality and Effectiveness, 1968, *William And Mary Law Review*, vol.9, issu.no.3/11, [http://scholarship.law.wm.edu/wmlr]
- Homayoun Mafi[1], Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards Of The Iran-United States Claims Tribunal, *Intl. J. Humanities*, 2011, vol.18, no.1, pp.83-102.
- J. Schokkaert, 'European Conventional Practice of Protection of Investments Abroad', (2002), *Journal of World Investment & Trade,* 615, 639-640.

- Julien Chaisse*, The Shifting Tectonics Of International Investment Law—Structure And Dynamics Of Rules And Arbitration On Foreign Investment In The Asia-Pacific Region, *The George Washington International Law Review,* vol.47, 563-638.
- Kathryn Gordon, *Investment Guarantees And Political Risk Insurance: Institutions, Incentives And Developments*,2008, OCED investment policy perspectives 2008-ISBN 978-92-64-05683
- Keith Molkner, A Comparison Of The Legal Regimes For Foreign Investment In Russia, Kazakhstan, And Kyrgyzstan, *Berkeley Journal Of International Law*, 1993, vol.11, issue 1, pp71-101
- Martha Belete Hailu♣ and Tilahun Esmael Kassahun ♣♣, Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration, *Mizan Law Review*, 2014, vol.8, no.1 pp.117-144.[available at http://dx.doi.org/10.4314/mlr.v8i1.4] last accessed October 13, 2016.
- Manuel R.Garcia-Mora, The Calvo Clause in Latin American Constitutions and International Law, *Marquette Law Review*, 1950, vol.33, No.4, pp.206-219
- M.Sornarajuhp, *The International Law on Foreign Investment*, Second edition, Cambridge university press, Cambridge, 2004.
- Michael Huber-Saffer*, *Investment Guarantees Of The Federal Republic Of Germany*,
- Muradu Abdu, *Legislative Protection of Property Rights in Ethiopia: An Overview,* mizan law review, 2013, vol.7, no.2, pp.165-206.
- O. lee reed… et al, *The Legal And Regulatory Environment Of Business*,12th edition, McGraw-Hill Higher Education,
- Paul Peters and Nico Schrijver*, *Latin America and International Regulation of Foreign Investment: Changing Perceptions*, 1991, working paper series No.133.
- R.Dolzer and C.Schreuer Principles of International Investment Law, 2008,Oxford University Press, Oxford.
- Surya P Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart publishing, oxford and Portland, 2008
- Tilahun weldie, *An Overview Of The Legal Regime Governing Minerals In Ethiopia*, Bahir Dar university journal of law, 2013,vol.3, No.1, PP.24-66.

- Tsegaye Teklu, *Investment Promotion And Incentives In Ethiopia*, .
- UNCTAD, International Investment Agreements Negotiators Handbook: UNCTAD Modules (IIA Handbook), 2012, Asia-Pacific Economic Cooperation.
- W.D. Verwey and N.J.Schrijver, The Taking Of Foreign Property Under International Law: A New Legal Perspective? *In 15 Netherlands yearbook of international law*, 1984, 1-96
- Zewdneh Beyene Haile, *International Business Transactions*, Bahir Dar University School of law, 2014.

Legislations:

International

- ✓ Permanent Sovereignty Over Natural Resources, General Assembly Resolution 1803 (XVII) of 14 December 1962.
- ✓ Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974)50.

National

- ✓ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, Federal Negarit Gazzeta, Proc. No. 1, 1year, No. 1.
- ✓ Investment proclamation, 2012, Federal Negarit Gazeta, Proc. No 769, 18th year, No.63.
- ✓ Investment (amendment) proclamation, 2014, Federal Negarit Gazeta, Proc. No 849, 20th year, No.52.
- ✓ Investment Incentives And Investment Areas Reserved To Domestic Investors Council Of Ministers Regulations, 2012, Federal Negarit Gazeta, Regulations No. 270, 19th year, No. 4.

Cases

- Biloune and others v. Ghana, UNCITRAL ad hoc Tribunal, Award 1989.
- Metalclad v. Mexico, ICSID Award, 2000.
- Middle East Cement Shipping v. Egypt, ICSID Award, 2002)
- Noble Ventures v Romania, ICSID case No ARB/01/11 of October 2005, para.111.

- Plama Consortium Limited v. Bulgaria, ICSID Case No.ARB/03/24, 2005, para 198.
- PSEG v. Turkey, ICSID, 2007, para. 278.
- Rumeli Telekom A.S. v Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 707.
- Tippetts Abbett McCarthy Stratton v TAMS-AFFA Consulting Engineers of Iran, 6 Iran-US C.T.R. 219, (1984).

Others:

- www.ethiopiainvestor.com
- www.iareporter.com
- http://www.globlinnovationindex.org/content.aspx?page=gii-full-report-2013#pdfopener
- http://data.worldbank.org/indicator/NY.GNP.PCAP.CD