Investment Law for Fourth Year Students

Prepared by:- Mulugeta Akalu

Chapter One: Overview of Investment Law
1.1 Definition and Nature of Investment

- There is no clear cut definition for investment.
- Different legal systems and disciplines define the term investment differently;
- The definition adopted in bilateral treaties is also usually different from the definition found in domestic investment proclamations
- it can generally be defined as ‘the expenditure of assets (capital) for the purpose of generating profits’
- The expenditure of either tangible or intangible assets or both can be investment.
- However, any kind of expenditure of capital may not necessarily be investment.
- The aim of the expenditure of capital should be to generate additional wealth or profits

Contd…..

- Defining the term investment is necessary because only the interests of investors falling within the scope of an “investment” defined in the particular applicable law can form the basis of a claim. Investment law can give protection only for those who fall in the definition of investment.
- Countries should take the necessary precaution in deciding what should constitute ‘investment’ since it entails liability on the part of host states.
- Almost all Bilateral Investment treaties use a wide, open ended phrase, stating that investment means “*every kind of asset*” or “*any kind of asset*”, and is followed by an illustrative list of categories of assets, interest and rights.

Contd…..

- This created a huge burden on host states of protecting each and every activities of foreigners.

1.1.2 Meaning of Investment under Ethiopia's Investment Proclamation

- The provision of Art 2(1) of Proclamation No. 1180/2020 defined investment as
- "expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise;
- **Capital :-** means: local or foreign currency, negotiable instruments, machinery or equipment, buildings, initial working capital, property rights, patent rights, or other business assets."

Contd

- Here the law recognizes both tangible and intangible assets as capital.
- Investor" is defined by article 2(4) of the same proclamation as a Domestic or Foreign investor who has invested capital in Ethiopia; However, the definition is not definition proper since it classifies investment as domestic and foreign rather than defining it in appropriate words.
- The proclamation defined "Domestic Investor" as one of the following
- a) An Ethiopian National;b) An Enterprise incorporated in Ethiopia and wholly owned by Ethiopian National;c) The Government; d) a Public Enterprise; e) A cooperative society established as per the relevant law;f) A Foreign National or Foreign Enterprise treated as domestic investor as per the relevant law or international treaty ratified by Ethiopia;

Cont'd

- g) An Enterprise incorporated in Ethiopia jointly between any of the investors specified under Sub-article (5) paragraphs (a) to (f) of this Article; h) A Foreign National or Foreign Enterprise accorded a domestic investor investment permit as per laws which were in effect when the permit was issued but which have since been repealed and continues to operate in Ethiopia, provided that this applies only in
- respect of investments that are operational at the time of enactment of this Proclamation; i) Descendant of a foreign national specified under Sub-article (5) paragraph (h) of this Article, provided that this applies only in respect of investments specified in the same Sub-article;
- The definition provided by proclamation 1180/2020 is more detailed and clearer than the repealed proclamation.
- Compare and contrast the definition provided by the new proclamation with the old one.

Cont'd

- The Proclamation defined foreign investor
- A) Foreign National;
- b) An Enterprise in which a Foreign National has an ownership stake;
- c) An Enterprise incorporated outside of Ethiopia by any investor;
- d) An Enterprise established jointly by any of the investors specified under Sub-article
- (6) paragraphs (a), (b) or (c) of this Article; or
- e) An Ethiopian permanently residing abroad and preferring treatment as a Foreign investor;

Cont'd

- **The term Enterprise is defined under Art. 2(2)**. An enterprise is defined as "an undertaking established for purpose of profit.
- Entities which are established for the purpose of promoting other societal values such religion, culture or interests are not considered as investors.
- "Expansion" or "Upgrading" is defined as increasing in volume, by at least 50 percent of the attainable production or service rendering capacity of an existing enterprise, or increasing in variety by at least 100 percent by introducing new production or service rendering line of an existing enterprise, or increment by both. The percentage is increased from the previous proclamation

1.2 Types of Investment

- Investment can be categorized into domestic and foreign investment.
- **foreign investment** involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country
- Whereas **Domestic investment** is expenditure of assets whose source of capital is the host state.
- Foreign investment can further be divided into foreign direct investment (FDI) and portfolio investment. Portfolio investment is about the movement of money whereas FDI involves transfer of equipment and physical property.
- To be regarded a FDI at least ten per cent management control is needed.
-

Chapter 2 Conflicting Economic Theories on Foreign Investment

- ***2.1.The Classical Theory***
- The classical economic theory on foreign investment takes the position that foreign investment is wholly beneficial to the host economy. Justifications are:
- Avoids scarcity of capital in the host state
- Transfer of technology
- Creating new Job opportunity
- Transfer of Managerial Skill:
- Expansion of Basic Infrastructures

Criticisms against classical theory

- Discourage local entrepreneurs
- Repatriation of capital
- Obsolete Technology
- Focus on lower management level:
- Human rights violations and environmental problems:
- ***2.2The Dependency Theory***
- Diametrically opposed to the classical theory
- foreign investment keeps developing countries in a state of permanent dependence on the central economies of developed states
- takes the view that foreign investment will ***not*** bring about meaningful economic development.
- Believes that MNCs comes to serve the interests of the developed states in which they have their headquarters

- The home states become the central economies of the world and
- The states of the developing world become subservient or peripheral economies serving the interests of the central economies of the home states of the MNCs.
- The resources which flow into the state as a result of foreign investment are seen as benefiting only the elite classes in the developing state, who readily form alliances with foreign capital.

- This theory sees economic development not in terms of flow of resources to the host state but as a meaningful distribution of wealth to the people of the state.
- **2.3 The Middle Path Theory**
- Communism proved unsuccessful and the superiority of a free market economy to marshal the means of production gained acceptance, theories which are hostile to private initiative as the means of generating growth became unlikely to make headway

- The view which was once held that multinational corporations were a threat to the sovereignty of developing states may not arouse the same degree of concern any more.
- MNCs abandoned the role of being instruments of the foreign policy of their home states.
- A study made by United Nations Commission on Transnational Corporations reduced the tension between the two theories

- These studies helped to identify the beneficial as well as the harmful effects of foreign investment.
- The beneficial effects identified were very similar to those which were identified by the supporters of the classical theory of foreign investment.
- UNCTC was able to list out the harmful effects of foreign investment
- This enabled the host countries to take regulatory measures to counter harmful practices.

- The effect of the acceptance of the new theory is that foreign investment is entitled to protection only on a selective basis, dependent on the extent of the benefit it brings the host state and the extent to which it had behaved as a good corporate citizen in promoting the economic objectives of the host state
- Developing countries generally view the success of the newly industrialized states of Hong Kong, Singapore, Taiwan and South Korea as the models to follow

- According to middle path theory, If the emulation of these states is possible, then, a mix of regulation and openness to foreign investment rather than an attitude of hostility is necessary.

Chapter Three :Risks in Foreign Investment

- Risk to an investment refers to the probability of damage to the property or at least the probability of loss of expected rate of return.
- Risk analysis is important for different reasons
- First MNC can use it to avoid investing in countries with excessive risk
- It can be used to monitor states where MNC is engaged in international business.
- It also helps to assess a particular for a proposed project in a foreign country. Below are the major risks to foreign investment

- Colonial Period, There was absolute protection
- Where no, colony It was based on pressure such as sanctions. Gun boot diplomacy declined gradually due to UN policy.
- The more risks increase the more investors search for legal methods of protection from risks.
- Risks to investment arise from one of the following factors.

Cont'd…

- **Ideological Hostility risk**
- Communism is against private capital and private means of production. But this ideology has failed.
- socialism is also averse to property rights and remains a potent force in the politics of most nations.
- In states which are opening their doors to foreign investment, there are still socialist political forces which remain antagonistic to foreign investment.
- The newly elected party might dismantle and harm foreign investment activities.
- Regime changes, particularly those ideologically inspired, pose problems for foreign investment.

Contd'….

B) Nationalism

- Nationalistic sentiments pose a threat to foreign investments.
- Xenophobic sentiments and religious fundamentalism are example. EG. Iranian revolution, which was both nationalist and fundamentalist, destroyed American properties in Iran. The other example is the destruction of Japanese investors property in China.
- C) Ethnicity as a factor
- Market liberalization promoting foreign investment may accentuate problems arising from ethnic nationalism as foreign investors make alliances with the economic elite of states, who usually belong to minority groups.

- The members of the majority who are disadvantaged because of the alliance between foreign investors and the elite minority become the targets of the majority. Hence, when the minority upraise and over throw the minority from power, they will nationalize foreign property.
- D. **Change in industry Patterns**
- The oil crisis in the 1970s was provoked by the concerted effort on the part of the oil-producing nations to take control of the oil industries in their states and to fix the price of oil.

- The changes that take place globally within the oil industry have affected oil investors who invested abroad. Such changes were done to the disadvantage of foreign investors, as they were forced to renegotiate the bargain originally made in light of the changes.
- Dramatic changes consequently took place in the oil industry. With the more representative
- governments replacing authoritarian regimes that relied on the imperial powers for
- their continuance, political demands for the cancellation of the concession agreements
- became inevitable

- E. Contracts made by previous regimes
- Investment contracts signed by a dictatorial regime with a foreign investor might be discarded by a new democratic government on the ground of corruption illegitimacy and other factors.
- **F. Regulation of the economy**
- Host states growing interest to regulate their economy based on the teachings of middle path theory is growing. The scope for interference with foreign investment, which does not adhere to the policy objectives behind the regulations, therefore increases. Regulation in the field of the environment and human rights is the most common cause of disputes.
- .

- Restriction on entry, denial of license and expropriation without adequate compensation are disputed regulatory systems
- G. Onerous Contracts
- Foreign investment contracts, which become too onerous to perform, are also subject to the risk of government intervention. In these circumstances, states will reduce the loss that could be suffered by the state or the state agency by interfering legislatively with the contracts.

- **H. Human rights and environmental concerns**
- Competing concerns of environmental protection and the protection of human rights could trump the interests of investment protection in certain circumstances. This introduces a new element of instability into the international law on foreign investment.

I. Absence of Law and Order

- Instability in the law-and-order situation in a state poses a threat to foreign investment. Where the political situation foments animosity against foreigners and targets their property, difficulties will arise. These usually arise when the government is unable to contain marauding mobs and gangs of criminals or when the government itself foments uprisings against foreigners,

Chapter Four:- International Law on Foreign Investment

- Countries had diverging views on laws governing foreign investment due to the sensitive nature of the issues involved. As a result, there has not been a well-developed international law on foreign investment.
- The different efforts to come up with multilateral instrument on foreign investment had brought only a very limited success.
- ***Sources of International Law on Foreign Investment***
- Do you remember ICJ statute article 38(1), of the different sources of public international law from your international law course?

- **Treaties**
- Treaties are the main sources of public international law including international law on foreign investment.
- Multilateral treaties are those international instruments signed by large number of countries across the world.
- Regional and plurilateral treaties, on the other hand, are made on the basis of same geographical area or similar level of economic development

- There are no multilateral treaties/ instruments on foreign investment.
- A number of efforts to formulate multilateral instrument on foreign investment proved to be a failure.
- The first attempt was in formulating the ITO.
- subsequent attempts made by organizations like Organization for Economic Co-operation and Development (OECD), by the World Bank Group, and the World Trade Organization all proved to have little success.

- However, there are several regional treaties on foreign investment. Eg. the European Union agreements.
- Bilateral investment treaties are treaties concluded between two countries. Countries have been concluding a large number of bilateral investment treaties since the 1990s
- They are one of the most important international instruments on foreign investment

Custom

- consistent state practice and *opinion juris* (sense of legal obligation on the part of the states that practice) should be fulfilled for development of customary international law on a given issue.
- Concerning issues on foreign investment there are only few customs on foreign investment.
- The reason is lack of uniform practice and diverging views on issues of foreign investment among countries.
- **. General Principles of Law**
- The limited scope of the role of general principles of law as a source of international law is generally accepted by authorities

- **D. Judicial Decisions**
- Judicial decisions are a subsidiary source of international law. Though stated to be a subsidiary source, the decisions of the ICJ and its predecessor (Permanent Court of International Justice) have had an immense influence in shaping the principles of international law.
- **E. Writings of Scholars**
- The teachings of the most highly qualified publicists of the various nations" are a subsidiary means for the determination of rules of international law. The writings of scholars and commentators do not, of course, provide authoritative rules; but they help to construct the conceptual framework and to crystallize approaches and expectations that may eventually find expression in formal binding texts.

Chapter 5: Bilateral Investment Treaties

- The importance of bilateral investment treaties (BITs) has grown through course of time.
- They are currently one of the most important instruments that govern foreign investment issues.
- Many countries of the world have concluded such treaties for reciprocal promotion and protection of investment.
- Issues of foreign investment between countries is mainly governed by BITs.
- BITs are invoked in an increasing number of international arbitrations.

Reasons for Proliferation of BITs

- The growth of the number of BITs was not rapid during the 1960s, 1970s and 1980s as compared with the period in the 1990s and onwards.
- There were less than 700 BITs between the period 1959 until 1980s
- There has been a rapid growth in the number of BITs as of the 1990s.
- Currently there are more than 3200 Bits signed between different countries.
- The reasons for increase in BITs are:-
- Failure to create multilateral instrument on foreign investment.
- Lack of a well developed customary international law on foreign investment

- Change of ideology by former communist countries.
- The lack of loans for many developing countries following their failure to repay their loans caused capital available to dry up.
- To boost confidence of investors to invest in their territory.

Features of Bilateral Investment Treaties

- Most BITs have similar features as far s structure is concerned though content wise there might be differences. The following are the basic structures in which BITs reveal similar features
- A. Preamble
- Every BITs provide introduction or preamble.

- The preamble stated the purpose as the investment treaty is directed at a reciprocal encouragement and protection of investment.
- Preamble of BITs also stipulate that countries conclude such treaties with a belief that foreign investment brings about economic and other benefits to both the host and home state.
- **B**. **Definitions**
- Almost all BITs have a definition section in which they broadly define the term investment.
- **C. Standards of Treatment**
- BITs provide for various standards of treatment. These are:-

- **National Treatment**
- This treatment obliges a host country to extend to foreign investors treatment that is as favorable as the treatment that it accords to national investors in like circumstances.
- National treatment is a contingent standard based on the treatment given to other investors.
- Terms used to express national treatment principles usually are “same treatment” or “as favourable as that treatment accorded to domestic investors” or “no less favourable treatment accorded to domestic investor.
- the investors or investments in a host country should be found in like circumstances.

- Exceptions to national treatment might be provided under the agreements such as morality, public health exceptions.
- National treatment is an important principle for foreign investors, but it may raise difficulties for host countries, since it may make it difficult to foster the growth of domestic enterprises.
- **Most-favoured-nation treatment**
- The MFN standard obliges a host country to extend to investors from one foreign country treatment no less favourable than it accords to investors from any other foreign country in like cases.
- the MFN standard seeks to prevent discrimination against investors from foreign countries

- The MFN standard sets certain limits upon host countries with regard to their investment policies by prohibiting them from favouring investors of one particular foreign nation over those of another foreign country.
- MFN treatment however, is claimed only in like circumstances.
- Most BITs allow contracting parties to derogate from MFN standard, for the maintenance of public order, public health or public morality.

- **Fair and Equitable Treatment**
- As fair and equitable treatment represents a general clause, i.e. an open-textured clause phrased in especially broad terms, search for an intrinsic literal meaning of its terms is naturally foredoomed. Consequently, attempts describing the literal meaning of fair and equitable treatment often yield circular shorthand definitions, for instance: ‘fair and equitable treatment should beunderstood to be treatment in an even-handed and just manner’.
- Such a definition merely replaces the terms ‘fair’ and ‘equitable’with equally vague synonyms and contributes nothing to the specification of the terms.

- **The international minimum standard**
- It is built on the assumption that there is a standing body of customary rules protecting a foreign individual in another country.
- The minimum standard is thus asserting a level of protection for the foreigner, below which the treatment provided for by the host state must not fall.
- However, the contents of the international minimum standard remain debatable throughout history

D. Repatriation of Capital

- Repatriation refers to remittance of capital by a foreign investor from the host state to home state or any other third country.
- The ultimate purpose of investors is to gain as much profit as possible.
- To avoid or minimize problems related to remittance of funds, BITs do have provisions on repatriation of capital giving investors the right to repatriate their capital under different circumstances.
- **E. Taking of Property and Compensation**
- taking of foreign property by a host state has been one of the most important risks to foreign investment.
- To reduce this risk almost all BITs contain guarantee against expropriation clauses.

- According to BITs, taking of a foreign owned property can only be made when it is done for public purpose, up on payment of adequate advance compensation, following due process of law and without discrimination.
- **F. Dispute Settlement Mechanisms**
- The dispute settlement mechanisms in BITs can either be provisions dealing with state-to- state dispute or investor-to-state dispute.
- Within the context of the regulation and protection of the investment activities of transnational corporations, disputes might arise between States or between States and investors.
- That is why BITs contain dispute settlement clauses in case a dispute arise.

Chapter Six:- Regulation of Investment

- Regulation of investment refers to different controls made by either host or home state.

6.1 General Overview on Regulation of Investment

- Regulation of foreign investment can be made at three stages
- During entry,
- During establishment and operation, and
- at the time of withdrawal.

- At the time of entry, a country can regulate investment by restricting some sectors for foreign investors and reserving them for only domestic investors or the government.
- Sector which are harmful might be prohibited for any investors also.
- A host state might also allow entry of foreign investors in some of the areas but impose some conditions to start operation.
- The right to restrict foreign investment is unlimited right which emanates from sovereignty.
- At the second stage the host state can regulate foreign investment through various mechanisms. These include:-

- requirement of getting different permits like investment and business license, minimum capital requirements, requirements related to joint venture, requirements related to export, local equity requirement, local content requirement, employment requirements and any other requirements imposed during establishment and operation.
- At the third stage, Host states regulate foreign investment by imposing different procedures that should be followed by investors when they withdraw their capital out of the country.
- there are rules that govern the process of winding up and dissolution of business organization.

- Despite the host states power to regulate, there are controversial international laws rules which seek to limit the states' power to regulate. These are:-
- The first relates to the rules of state responsibility for injuries to aliens. There are strong claims that certain minimum safeguards are provided to an alien and that these minimum standards of treatment cannot be violated by the host state.
- The second limitation comes from international trade law (Eg. TRIMS) which prevents local content and performance requirements as against the principle of freer trade.

- A third area relates to the bilateral and regional investment treaties which have increased in number in recent times. Treaty clauses limit the power to regulate of host states in numerous cases.
- **Rationales for Regulation of Investment**
- One of the regulations during establishment and operation imposed on foreign investors is minimum capital requirement. This helps increase local financing and attract more foreign capital for the host state.
- Another regulation relates to export requirements; This helps to increase foreign currency earnings which in turn boost host state’s economy conditions

- joint ventures is another regulatory mechanism whose purpose is effective transfer of management and technology to the local joint venture partner. This is a logical consequence of the measures relating to the indigenization of the economy. It helps maximising local control of investment.
- Requirements relating to the level of employment of local staff, have the purpose of of the transfer of skills to the local labour and management.

Regulation of Investment in Ethiopia

- Ethiopia has reformed its investment regulation system again and again for the past three decades with a view to minimize the negative effects and to maximize the positive impacts of foreign investment. The following shows the actions taken.
- In May 1992, the Transitional Government of Ethiopia (TGE) issued Investment Proclamation No. 15/1992 with a view to encourage, expand and coordinate investment in the country.
- Investment Proclamation No. 37/1996 was issued in June 1996 with a view to avoid the shortcomings of proclamation 15/1992. Changes include;-

- Education, health, tourism, engineering and technical consultancy as well as construction contracting below grade 1, were included in the incentive scheme;
- Many small-scale agricultural and manufacturing activities each with an investment capital of less than Birr 250,000 previously excluded from incentives were exempted from the payment of import customs duty on capital goods;
- Some areas of investment that were reserved for government were allowed for the participation of private investors .

- The minimum capital required of a foreign investor investing jointly with domestic investor(s) was reduced from US$500,000 to US$300,000, and the minimum investment capital required of a foreign investor investing in engineering or other technical consultancy services was lowered to US$100,000;
- The requirement for foreign investors to deposit in a blocked account US$ 125,000 was removed.
- Proclamation No. 37/1996 was amended by Proclamation No. 116/1998 to redefine domestic investors so as to include foreign nationals who were Ethiopian by birth, to allow private investors to invest jointly with the Government in defense industries and telecommunication service & to enable the Federal Investment Board grant additional incentives other than what is provided under the Investment Incentive Regulation

- to enable the Federal Investment Board grant additional incentives other than what is provided under the Investment Incentive Regulation
- amendments and revisions of investment laws mentioned above were repealed and replaced by Proc. No. 280/2002
- Then proclamatio 280/2002 was amended repeatedly to incorporate provisions favourable to investors. Proclamation 280/2002 was also amended by proclamation 1180/200 last year to address several issues including easing the restriction on foreign investors.

- Hence, the laws that are currently applicable on investment are
- Investment proclamation 1180/220 and
- Investment regulation 474/2020
- **Regulations During Entry/ Admission of Foreign Investment**
- Ethiopia’s regulation of investment during entry is mainly effected by way of not opening some investment areas to foreign investors. Some investment areas are closed to foreign investors.
- See the new investment regulation to know what areas are restricted for foreign investors, which areas are reserved for the government and which areas are reserved for joint ventures bn domestic & foreigners.

- Please compare and contrast the new regulation with the old one and explain what changes have been done.
- **Regulation During Establishment and Operation**
- capitalization requirement
- Art. 9 requires foreign investors to allocate minimum capital. A foreign investor intending to invest on his own is required to allocate a minimum capital of US$200,000 for a single investment project.
- For joint investorship a foreign investor should bring at least 150,000 USD.
- In areas of engineering, architectural, accounting and audit services, project studies and management consultancy services or publishing, the minimum capital required for a foreign investor who intends to undertake investment activity on his own is 100,000 by his own and 50,000 jointly.

- **Requirements for permit**
- All foreign national with the exception of Ethiopians by birth are required to obtain investment permits.
- What is more, domestic investors may also be required to obtain investment permits if they invest in investment areas eligible for incentives and invest in joint venture with foreign investors as per Art 10.
- the types of investors that are not required to obtain investment permit are Ethiopian national and Ethiopians by birth provided, however, that they do not invest in areas eligible for incentives and in joint venture with foreign investors

- Environmental Requirements
- The Environmental Impact Assessment Proclamation No. 299/2002 and the environmental regulations, as well as directives, govern the investment and environment nexus.
- **Local Content and Export requirements**
- Local content requirement refers to a measure by host state that obliges investors to purchase locally produced goods.
- Export requirement, on the other hand, refers to a measure of the government that requires investors to export their products rather than supplying them to the local market

- There are no local and export requirements under Ethiopian investment laws even though the law has incorporated different provisions that encourage investors to use locally produced products and to export their products.
- Dear learners, please search the legal provisions which purports to encourage LCR and Export performance.
- **Employment Requirement**
- There is no complete ban on employment of foreign experts. They are allowed to employ expats as long as they can’t get workers from the domestic market. See Proclamation 1180/2020 Art. 22 for details.

- Requirements Related to Exchanging and Remitting of Funds.
- a foreign investor has the right to make the following remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange:
- Profits ,and dividends accruing from investment;
- Principal and interest payments on external loans;
- Payments related to a technology transfer agreement registered in accordance with this Proclamation;
- proceeds from the, sale or liquidation of an Enterprise;
- Proceeds from the transfer of shares or of partial ownership of an enterprise to a domestic investor.

- **Other Regulations**
- There are also a number of other regulations imposed on investors other than those mentioned above. Such regulations are stipulated not only under investment legislations but also in other laws of the country. There are requirements related to submitting an application to obtain business license or to get work permits for expatriate experts, there are also requirements related to labour standards.
- Regulation During Exit or Withdrawal
- Ethiopia does not have a specific exit law for foreign investment. This does not mean, however, that there is no law for regulation of investment at the time of exit

- The Commercial Code of Ethiopia’s provisions for dissolution and winding up of legally established business organizations govern regulation of foreign investment during exit or withdrawal
- the provisions of the Commercial Code of Ethiopia on dissolution and winding up of business organizations are applicable to businesses of foreign investors during exit.

Incentives, Guarantees, Favourable Conditions and Challenges to Investment in Ethiopia

- Incentives
- Incentive refers to the grant of a specific advantage to investors arising in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment in the territory of a state with a view to attract foreign investment or meet other objectives.
- There are three main categories of investment incentives . These are
- financial incentives, such as outright grants and loans at concessionary rates; this type of incentive government might provide money to investors either in the form of aid/grant or could provide loans at no or much lower interest than normal

- fiscal incentives such as tax holidays and reduced tax rates; In this type incentives government does not make direct contribution of money to investors but relieves investors form payment of taxes at all or permits them to pay taxes at much reduced rates usually for a limited period of time.
- other incentives:
  - including subsidized infrastructure or services, market preferences (closing the market to further entry or granting of monopoly rights to protect from import competition, or
  - providing preferential government contracts without having to compete with others) and regulatory incentives(including exemptions from labour or environmental standards).

- Governments may also provide incentives by arranging subsidized infrastructure (electricity, water, and telecommunication) at less than commercial price.
- Regulatory incentives could either be lowering of environmental and labour standards to attract foreign investors or to provide stabilization clause which guarantees that existing laws or regulations will not be amended or repealed in the future to the detriment of investors.
- Among the broad range of possible incentives, financial and fiscal incentives are the ones most frequently employed.

Incentives Under Ethiopian Investment Law

- The Ethiopian investment law provides different types of incentives under the Council of Ministers Regulations No. 270/2012 and under various other laws.
- Exemption from Income Tax
- Provisions concerning exemption from income tax are provided from Arts. 5 to 7 of Regulation No. 270/2012. Art. 5 of the regulation specifies those investment areas that are eligible for income tax exemption. Therefore, not all investment areas are eligible for income tax exemption

- The law sets different time period of income tax exemption depending on the type of activity an investor is engaged, the place of establishment and the export performance.
- According to article 7 of the regulation, an investor who exports at least 60% of his products or services inputs, shall be eligible for income tax exemption for two additional years.
- Persuant to Art. 5(2) of the Regulation an investor who undertakes investment activity in relatively under developed regions in terms of economic advancement such as Gambella, Benishangul and Gumuz, Afar, South Omo and Somalia shall be eligible for income tax exemption for 30% income tax deduction for three consecutive years.

Exemption from Payment of Customs Duty

- The Ethiopian law allows investors to import capital goods and construction materials duty free. Capital goods are distinguished from consumer goods in that they are used for further production or used as input of production while consumer goods are not used for further production but rather used by consumers.
- However, not all investment areas will be eligible for importing capital goods and construction materials duty free.
- the privilege of importing duty free capital goods and construction materials might not be extended with respect to an investor who imports capital goods and construction materials to Ethiopia while such goods are locally produced

- An investor can transfer the capital goods he imported to a third party – a third party who is eligible for exemption from customs duty without conditions. However, capital goods imported duty free can be transferred to a third party who is not eligible for customs duty exemption only upon prior payment of the customs duty.
- Incentives Related to Provision of Land
- To encourage investment in some areas, regional states in Ethiopia have arranged different mechanisms whereby investors can get land for free or at a reduced rate.

Guarantees

- the Ethiopian law has provisions that guarantee investment against different risks
- As per Art. 19 of Proc. No. 1180/2020 no investment may be expropriated unless the following conditions are met:
- the public interest;
- In compliance with the requirements of the law;
- Payment of adequate compensation should be effected (adequate compensation has been defined as amount that corresponds to the market value); and
- The compensation should be paid in advance.

Repatriation

- As per Art. 20 of the Proc. investors can 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 investment;
- Principal and interest payments on external loans;
- Payments related to a technology transfer agreement registered in accordance with the Proclamation;
- Proceeds from the sale or liquidation of an enterprise;
- Proceeds from the transfer of or of partial ownership of an enterprise to a domestic investor.
- etc.

Favourable Conditions to invest in Ethiopia

- Favorable Economic Policy
- Political stability?
- Raw Materials
- Huge Market?
- Legal Protections
- Cheap Labour
- One-stop-shop Service?

Challenges to investment in Ethiopia

- Corruption
- Bureaucracy
- Poor infrastructure
- Unskilled manpower
- Power cuts
- Inefficient Judiciary
- Inefficient Investment Organs
- Problems attributable to Investors

Investment Opportunities

- Agriculture
- Forestry
- Fishery
- Manufacturing
- Mining
- Tourism
- Infrastructure

New Concerns in Foreign Investment: Human Rights and Environmental Issues

- Foreign Investment may create employment opportunities, transfer technology and know-how, stimulate local research and innovation, and improve opportunities for income distribution while at the same time promote trade and prospects of growth and further global integration
- However, BITs showed little concern for the environmental and human rights interests involved in foreign investment.
- Investment agreements focused entirely on the protection of the interests of the foreign investor and did not concern the interests of the host state

These challenges are:

- The areas of environmental protection,
- Human rights and economic development

Human Rights and Investment

- Investment can play a big role for human rights promotion by creating employment opportunity and by giving lively hood and by creating more equal society.
- On the other hand Human rights protection might have a positive role for the attraction of investment
- However, the effects of investment on the enjoyment of human rights are not always positive and it might bring negative results for HR

- Unless properly handled. depending on the type of investment, the host country, the sector targeted by investment, the motivations of the investor as well as the policies of both host and home country.
- There has been concern that Governments have lowered environmental and human rights standards - including labour standards, freedom of expression and freedom of association - to attract investment.
- The relationship between human rights and investment is therefore subject to many variables and much depends on the type of investment, the motivations of the investor, the actions of Governments, and the country and sector in question

- In practice there are a lot of human right violations through foreign direct investment
- Human rights are seldom, if at all, referred to in bilateral investment treaties.

- Including the promotion and protection of human rights among the objectives of investment agreements.
- Ensuring States' right and duty to regulate
- Promoting investors' obligations alongside investors' right.
- **:**Promoting international cooperation as part of investment liberalization
- Promoting human rights in the context of privatization
- Increasing dialogue on human rights and trade
- Undertaking human rights assessments of investment liberalization

Foreign Investment and the Environment: Climate of Controversy

- The association between foreign investment and the environment is multi-layered/complex
- The allegations include:
- foreign investment privileges in exchange for raised environmental standards
- as pointed out in recent arbitral awards, there have been allegations that environmental regulation has operated as a form of indirect expropriation of foreign-owned investments.
- There have been assertions that foreign investment creates pollution havens and that its protection laws allow Multinational Corporations to influence the domestic environmental, worker protection, and health and safety regulation of the states in which they invest

- Attention has also been turned to those who provide the finance for environmentally-harmful projects resulting in pressure to reform lending practices in both the public and private sectors.
- There is, of course, the converse position:
  - advocating the need for safeguards against domestic protectionism disguised as environmental regulation and
  - supporting the viewpoint that Multinational Corporations encourage the introduction of higher environmental standards through technology transfer.

key sources of hostility in the foreign investment and environment relationship.

- **Micro-Level Corporate Damage**
- The interaction between foreign investment and the environment is particularly volatile at the micro-level where the focus is on individual examples of environmental degradation resulting from the activities of foreign-owned companies.
- Notable conflicts include the controversy surrounding the operations of the Shell Oil Company in Nigeria, ChevronTexaco Corporation in Ecuador, Broken Hill Proprietary Co

Pollution Havens, Capital Flight and Regulatory Chill

- states may lower their domestic environmental and health standards, engaging in what is called a regulatory 'race-to-the-bottom'
- This raises the spectrum of 'pollution havens' and 'regulatory chill'.
- in order to remain competitive in the market for foreign investment, states will set unacceptably low environmental standards, or set adequate standards but not enforce them,
- Multilateral Agreement on Investment
- Protesters of Multilateral Investment Agreements (MIA) often expressed the view that these provisions in the MAI would elevate the rights of investors far above those of governments, local communities, citizens, workers and the environment

- Some Compromising Initiatives for Environmental Problems
- **Creation of Voluntary Codes of Conduct**
- The development of a series of guiding principles to which companies commit and then implement throughout their operations on a continuing basis; and the promotion of environmentally, socially and financially responsible investment policies.
- **Ethical Investment Funds**
- The emergence of ‘ethical’ investment funds is another indicator of the current socio-political climate, which looks to the promotion of responsible environmental corporate governance through the financier

- **Settlement of Investment Disputes**
- The vast majority of bilateral investment treaties (BITs) – as well as some regional agreements and other instruments – contain provisions for the settlement of disputes between private parties and the host State, and of disputes between States arising from investment.
- ***State-to-State Investment Dispute Settlement***
- Inherent in the concept of State sovereignty lies the notion that a State has the power – which can be qualified in an IIA – to admit foreigners within its territory and to regulate their activities, as well as to protect its nationals abroad from acts contrary to international law

- IIAs put into place frameworks consisting of general and specific undertakings and obligations by the States party to such agreements that determine the scope, extent and manner of their involvement with the cross-border investment activities of their nationals
- **Dispute Settlement Mechanisms and Their Procedures**
- The types of bilateral and third-party mechanisms typically provided for in inter-State DSAs include:
- • Negotiations and consultations;
- • Ad hoc inter-State arbitration, which is most prominently featured in IIAs;
- • Permanent arbitral or judicial arrangements for dispute settlement;
- • Political or administrative institutions whose decisions are binding.

- **Negotiations and consultations**
- settlement of disputes through diplomatic negotiations and/or consultations have historically been the most common means of dispute settlement between States.
- they all establish an obligation that the parties involved in a dispute must first engage in negotiations, before resorting to third-party means
- *Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through through diplomatic channel."*

- **Ad hoc arbitration**
- Party autonomy is the basic rule in the establishment of an arbitral tribunal
- the procedures for the establishment of the arbitral tribunal are effected either by the agreement of the disputing parties when a dispute arises (compromise), or by the operation of provisions negotiated previously and incorporated into DSAs
- Selection of arbitrators, the place, venue and the official language for the proceedings;
- -Determination of the terms of reference for the arbitral panel; and
- - Institution of time limits for the conduct of the arbitration proceedings and the promulgation of working rules for the panel and the parties,

- *Any dispute between the Contracting Parties as to the interpretation or application of the present Agreement not satisfactorily adjusted by diplomacy shall be referred for decision to an arbitration board*
- IIAs almost universally provide that each party selects, within a prescribed time period, one arbitrator. In most instances, parties select an arbitrator who is their own national
- **Permanent arbitral and judicial institutions**
- The only arbitral institution that provides for the settlement of State-to-State disputes under its auspices is the Permanent Court of Arbitration (PCA) at the Hague.

- ICSID and the International Chamber of Commerce (ICC), are geared to the settlement of investor-State disputes.
- where State that are parties to a dispute have accepted the jurisdiction of the ICJ, and their acceptance provides, on a reciprocal basis, subject-matter jurisdiction to the ICJ, then the matter could be adjudicated by the World Court
- **Permanent political institution for dispute settlement**
- An example would be the Senior Economic Officials Meeting of the Association of South-East Asian Nations (ASEAN) Investment Agreement.
- their decisions may be political and incapable of achieving binding effects on the parties

- **Investor-to-State Investment Dispute Settlement**
- following methods are all possible means of investor-state dispute settlement mechanisms.
- Diplomatic protection under international law.
- Resolving disputes by Domestic courts
- or using alternative dispute resolution methods;
- a) Bilateral means of dispute settlement through negotiation and consultation
- b) Mediation
- c) Arbitration: either using ad hoc arbitration or Institutionalized Arbitration tribunals (like ICSID)

- A dispute between a host State and a foreign investor will normally be settled by the domestic courts of the host State. From the investor’s perspective, this type of dispute settlement carries important disadvantages since domestic courts may not be impartial.

Pollution Havens, Capital Flight and Regulatory Chill

Pollution Havens, Capital Flight and Regulatory Chill

Pollution Havens, Capital Flight and Regulatory Chill