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A Critical look at the Ethiopian Investment Law and BIT's

1. Introduction

Ethiopian economy remained closed to foreign investment after the 1974 revolution. The revolution, among others, resulted in the nationalization of private property both domestic and foreign. The military that took over the power declared that, the country thereafter will be guided by a socialist command economy with stringent limitation on private investment. The previous private investments were replaced by public enterprises which are fully controlled by the government. The legacy of the nationalization is haunting the country at present undermining its bid to attract FDI.

Like least developed countries Ethiopia suffers from a shortage of foreign exchange and general underdevelopment. One of the things the present administration is trying

to do is to progressively liberalize the economy and attract foreign direct investment, albeit with various degrees of success. Since, the demise of the military government in 1990 after seventeen years, different laws have been put in place in order to attract the much needed local and foreign investment.[1] These laws beyond facilitating the process also have introduced packages of incentives. Moreover, Ethiopia has entered into about eight Bilateral Investment Treaties (BIT's) with different countries. The purpose of this essay, therefore, is to critically examine the most recent investment law and BITs in light of international law and practice.

2. The 2002 Investment Proclamation

The Ethiopian Investment Law had to pass through different phases. This progressive development symbolizes the gradual liberalization of the economy. Before the 2002 law there were many laws that had to be changed to align it with changed situations and the obligation Ethiopia had assumed in its dealings with the Britton Woods Institutions. Though, it still needs to be perfected, important notable changes have been introduced over the years. The present law has as its objectives the encouragement and promotion of investment as a necessary condition for the acceleration of the economic development of the country and the improvement of the living standard of the people; the necessity of widening the scope of participation of

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[1].The following reforms are made in the past years: deregulation of domestic prices; liberalization of foreign trade; privatization of public enterprises; abolition of all export taxes and subsidies; devaluation of the exchange rate followed by the introduction of inter-bank foreign currency market and the determination of exchange rates based on market forces; enhancing private sector development and private-public partnership through providing effective industry association; and creating a forum for consultation between the private sector and the government; promulgation of a liberal investment law for the promotion and encouragement of private investment, both foreign and domestic; issuance of a new labour law; strengthening and enhancing institutional support for the export sector through strengthening/revitalizing existing institutions and establishing such new institutions as :the Ethiopian Livestock Marketing Authority; the Ethiopian Leather and Leather Products Technology Institute, the Ethiopian Export Promotion Agency;

foreign and domestic investors and facilitate conditions with a view to enhancing the country's investment activities; to encourage balanced development and integrated economic activity among the various regions of the country and to strengthen the inter-sectoral linkages of the economy and to ensure the transparency and efficiency of the system of administration of investment.[2] The Ethiopian investment law is not solely guided by the export push policy. Given the lack of developed technology in the country, the need for import substitution by producing locally is of a paramount importance.[3] By doing so, the country will be able to save its meagre foreign exchange reserve. Furthermore, the country seeks to create wide employment opportunities for Ethiopians and to foster the transfer of technical know-how, of management skills and the technology required for the progress of the country.

Like other similar laws, some key terms are defined at the beginning of the legislations which, among others, includes: capital, investment, investor, foreign investor, domestic investor etc…

3. Investment Areas

Despite its progressive liberalization scheme there are still certain areas of investment solely reserved for the government and those which are off limit to the foreign investor. Through another regulation, the Ethiopian government has also reserved certain areas of investment only for domestic investors.[4] Those that are presently exclusively reserved for government are transmission and supply and of electrical energy through integrated national grid system; and postal services with the

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[2] .Proclamation No. 280/2002, "The re-enactment of the investment proclamation", *Federal Negarit Gazetta,* 8th year, number 27, Addis Ababa, 2nd July 2002.

[3] .This is vividly observed in the preambles and objectives section of the proclamation.

[4] . Council of Ministers Regulation No.84/2003

exception of the courier services.[5] The latter appears to be in line most countries' policy. For manufacturing of weapons and ammunition and telecommunication services investors shall be allowed to invest only in joint venture with the government.[6] Thus, if an investor is not willing to work in joint venture with the government then these areas of investments remain within the exclusive area of government's investment. Concerning the telecommunications sector at present there is a strong push on the government to privatize and open the sector for the private investment by doing away with the joint venture requirement. The present government monopoly in the sector is perceived to be inefficient and costly at the expense of the consumers. One of the major arguments which the government raises against privatization is that the private sector is guided by a profit motive and is not willing to extend its services to rural and the peripheral areas of the country. This argument is valid only to a certain extent. Even if the private sector is driven by the profit motive, there is no reason why it should not extend its services to the rural and peripheries so long as there are customers willing to pay. That still raises a question as to how far the government will go in investing in areas which give no return. It should rather be argued that the government must carry out its responsibility in bringing about development in those outlying regions so that they will be able to attract investment on their own right. It remains to be seen as to when the government will change its position and yield in to the demands.

The regulation of the Council of Ministers, which is passed based on the investment proclamation lists areas that are specifically left to Ethiopian nationals. These are

[5] . Article 5-1 of the Investment Proclamation, note 2 above.
[6] . Ibid, Article 5-2.

banking, insurance and micro credit and saving services; forwarding and shipping agency services; broadcasting services; and air transport services using aircraft with a seating capacity of up to 20 passengers.[7] It is expected that in light of Ethiopia's bid to join the WTO, there could come a strong demand by members of the WTO to require the country to open up these sectors to foreigners especially the Banking and Insurance sector. Ethiopia is yet to submit its memorandum for the negotiation for its ultimate accession to the WTO. Ethiopia at present has an observer status with the WTO.

The form of investment could be effected in the form of sole proprietorship, business organizations incorporated in Ethiopia or abroad; public enterprises and cooperative societies formed according to the relevant law.[8] Any business organization incorporated either in Ethiopia or abroad needs to be registered according to the business licensing and registration law. There is no restriction on foreign equity requirement and control of the company. However, there is a minimum capital requirement applied only to foreign investors.[9] Accordingly, 100,000 USD is required

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[7] . In addition the following areas are reserved for Domestic Investors: 1. retail trade and brokerage;2. wholesale trade (excluding supply of petroleum and its by-products as well as wholesale by foreign investors of their products locally produced);3. import trade (excluding LPG, bitumen and upon approval from the Council of Ministers, material inputs for export products); 4. export trade of raw coffee, chat, oil seeds, pulses, hides and skins bought from the market and live sheep, goats and cattle not raised or fattened by the investor; 5. construction companies excluding those designated as grade 1; 6. tanning of hides and skins up to crust level; 7. hotels (excluding star-designated hotels), motels, pensions, tea rooms, coffee shops, bars, night clubs and restaurants excluding international and specialized restaurants; 8. travel agency, trade auxiliary and ticket selling services; 9. car-hire and taxi-cabs transport services; 10. commercial road transport and inland water transport services; 11. bakery products and pastries for the domestic market; 12. grinding mills; 13. barber shops, beauty saloons, and provision of smith workshops and tailoring services except by garment factories; 14. building maintenance and repair and maintenance of vehicles; 15. saw milling and timber making; 16. customs clearance services;17. museums, theaters and cinema hall operations;18. printing industries.

[8] . Article 10 of the Investment Proclamation, note 2 above.

[9] . Ibid, Article 11.

by way of minimum capital in general. As a matter of fact it is not a big requirement for the kind of investment a country seeks to attract. It does not appear to be an obstacle. However, this goes against the principle of national treatment at pre-entry stage. The requirement of minimum requirement is lowered to 60,000 USD when investment is made jointly with a domestic investor. The reduction of minimum capital requirement does not make sense since the law does not indicate the percentage of ownership on the part of the foreigner. Hence it is easy for the foreigner to evade this minimum capital requirement by allotting a little slice of the capital to the domestic investor and be able to control the company. Thus, it is not very clear about what is intended to be achieved by this requirement. The minimum capital requirement of a foreign investor investing in areas of engineering; architectural; accounting and audit services; project studies and business and management consultancy services or publishing shall be 50,000USD if the investment is wholly on his own and 25,000USD if the investment is made jointly with domestic investors.

In all cases, the foreign investor shall not be required to allocate minimum capital if it reinvests its profit or dividend or exports at least 75% of its product. To begin with regarding the requirement of re-investment, it appears that the company needs to reinvest all its income. And it does not also answer for how long the company needs to reinvest. Capital is a requirement at the beginning and performance has to be seen and based on figures to determine that 75% of the product is destined for export. This also rules out the service sector whose service is likely to be consumed locally. The emphasis is not also not exactly in line with one of the objectives of the law, which is to substitute imports by producing locally. This problem is acute when it comes to

incentives, which we will discuss in the later part of this essay. One important legal issue to be raised though is the legitimacy of providing incentives and suspending the minimum capital requirements based on export performance. Under the Ethiopian case clearly export performance is not being set as an admission requirement but it is set as a condition for enjoying the incentives.

Another questionable aspect of this law is the distinction it draws between foreign nationals proper, foreign nationals with a permanent residence status in Ethiopia and foreign nationals of Ethiopian origin (those Ethiopians who are originally from Ethiopia but have changed their citizenship).[10] To these distinctions, there attaches a preferential treatment in favor of foreign nationals with permanent residence status and those of Ethiopian origin. For example, a foreign national permanently residing in Ethiopia and a foreign national who is an Ethiopian by birth is treated as a domestic investor with the benefits attached to the term. Since Ethiopia does not allow for double nationality, technically speaking these categories of domestic investors remains to be foreigners which in turn raise a question of discrimination. But this scenario does not seem to trigger the Most Favoured Nations requirement as the pool of foreign nationals benefiting from this is diverse and does not aim to benefit nationals of a specific country.

4. Investment Permit

One other important aspect of the Ethiopian investment law is the requirement it imposes for obtaining investment permit. Accordingly, foreign investors; foreign

[10] . see article 11 of the Investment Proclamation, note 2 above.

nationals; domestic investors investing in areas eligible for incentives; domestic and foreign investors making investments in partnerships are required to obtain investment permit.[11] As seen from this, there is no requirement for a domestic investor to obtain an investment permit unless the investment is in areas that are eligible for incentives. This requirement clearly discriminates against foreign investors. Even if the law tries to promote an efficient system (one stop shop), the practice shows that the bureaucracy is yet to be reformed to make it is easy for foreigners to get an investment permit. Nonetheless, the question that remains why many countries including Ethiopia resort to the permit requirement. Partly, it could be said that it has a purpose of screening projects as it apparently is the discretion of the investment authority to either issue or deny the permit. In reality, however, there does not appear to be an investment which is ultimately rejected. Nonetheless, there are instances where investors get frustrated by the unnecessarily prolonged procedures and give up making the investment. Likewise, a foreign investor intending to buy an existing enterprise in order to operate as it stands or to buy shares in an existing enterprise have to obtain prior approval from the investment authority. But this requirement does not apply if the investment is an area not eligible for investment incentive or if the investor is willing to waive its right to the incentives.

In any event when an investor makes an application for the permit his application needs to contain the following information: the project profile; a list of the type and quantity of machinery and equipment intended to be exempted from import duties and taxes; in case of business organizations the memorandum and articles of associations; in case of expansion or upgrading , a brief description of same and the implementation

[11]. In general see article 11 and the following of the Investment Proclamation, note 2 above.

programme; in the case of planned employment of expatriate staff, with the exception of top management positions, a statement on the time schedule for their replacement by Ethiopians and the training program designed for such replacement; power of attorney in the case of an application made through an agent and other relevant information relating to the particulars of the project.[12] A holder of an investment permit is not required to obtain a business license until completion of project implementation and the commencement of production or rendering service.(14-3). But the permit needs to be renewed annually until the investor commences the marketing of his output or services. Still the investor is required to submit progress report on the implementation of the project to the appropriate investment organ at the end of every six month. This requirement may appear to be burdensome on the investors. From our earlier discussion we have noted that this requirement applies to those investors who seek to avail themselves of the incentive provided. Hence, these requirements of obtaining a permit and submitting a progress report has to be weighed against the incentive provided. On the government side, one could imagine that, these procedural requirements are put in place to see to it that the income foregone as a result of the incentives is being utilized properly.

Another point worthy of note in connection to investment permit is that an investment permit may not be transferred to another person without the prior authorization of the appropriate investment organ.[13] Thus, if an investor transfers the permit without authorization he could risk revocation and is subsequently required to return the benefits acquired before the revocation. The requirement of authorization for transfer

[12] . Article 13 of the Investment Proclamation, note 2 above.
[13]. Article 14-4 of the Investment Proclamation, note 2 above.

of ones property interest is questionable especially in light of the fact that the law does not provide for the principles based on which the authorization is to be made. It is left to the discretion of the investment authority to approve or reject the transfer the investment permit. This requirement is more than keeping track of investors who are getting the incentives. Otherwise, it would have been sufficient to impose a condition of either informing or registering the transfer agreement with the investment authority without imposing a severe penalty of revoking the permit.

The law does not put a restriction on the repatriation of the profit of the company and the income of the expatriate employees. However, the law appears to limit the right to remittance only to those regarded as foreign investors. This excludes foreigners with a permanent residence status and foreigners of Ethiopian origin. This may cause a problem to these categories as they might need to repatriate a portion of their income to their foreign connection. At the moment this writer is not aware of how this issue is handled in practice. Hence, at least from a legal point of view, these category of investors need to weigh the costs and benefits of opting for a domestic status in light of this problem.

5. Investment Guarantees and Protections

Ethiopia was once a notorious place for a private property. The 1974 revolution swept away almost all factories, plantations and any conceivable major establishment owned by Ethiopians and foreigners alike. Land was also nationalized which still remains in the hands of the "government and the public". The present administration is responding to demand of returning properties taken illegally. But those that were

taken in accordance with the nationalization law still remain in the hands of the government. The file is not yet closed. As of very recently some multinationals whose property were taken during the nationalization are demanding compensation. For example, Nestle (the world's largest coffee company) requested for a compensation of 6million USD for property it lost. The Ethiopian government did offer a settlement of 1.5 Million USD which is rejected. The fate of this case is not yet known. However, Nestle is being pressured not push its case further as the country is suffering from famine and other problems. Whatever the outcome of this case might be, there is a determination on the part of the Ethiopian government to clean the goodwill tarnished by the events that followed the 1974 revolution. The present investment law provides for some measures of protection for investors.

Accordingly, article 21 of the law provides that no investment may be expropriated or nationalized except when required by the public interest and then only in compliance with the requirements of the law. 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. Any foreign investor may remit compensation paid to him out of Ethiopia in convertible foreign currency. As it stands the protection afforded by this law is sufficient and inline with international standards. For the sake of comparison we will later look at the level of protection given by the BIT's which Ethiopia has signed with different countries.

6. Incentives

As noted earlier a separate piece of legislation is in force regarding incentives to be given foreign investors. It is also to be recalled that acceptance of these incentives carries with it certain duties like obtaining investment permit.

To encourage private investment and promote the inflow of foreign capital and technology into Ethiopia, the following incentives are provided to investors /domestic and foreign/ engaged in new enterprises and expansion projects in areas qualified for investment incentives.

6.1. Customs Import Duty

- One hundred percent exemption from the payment of import customs duties and other taxes levied on imports is granted to all investment capital goods, such as plant and machinery, equipment etc. Spare parts worth up to 15% of the value of the imported investment capital goods, provided that the goods are not produced and not available locally in comparable quantity, quality and price are also treated in the same manner.
- Investment capital goods imported without the payment of import customs duties and other taxes levied on import may be transferred to another investor enjoying similar privileges.

- Exemptions from customs duties or other taxes levied on imports are granted for raw materials necessary for the production of export goods.

6.2. Exemptions from payment of Export Customs Duties

Ethiopian products and services destined for export are exempted from the payment of any export tax and other taxes levied on exports.

6.3. Income Tax Holiday

Any income derived from an approved new manufacturing and agro-industry investment or investment made in agriculture shall be exempted from the payment of

income tax for different periods depending upon the area of investment selected, the volume of export to be made, and the location in which the investment is undertaken. Profit tax holiday is granted subject to council of Ministers Regulation on the basis of the investment proclamation No.280/2002. Accordingly, an investor engaged in a new manufacturing or agro industry activity is exempted from payment of profit tax for a number of years if at least 50% of its production is to be exported(five years); or if at least 75% of its production will be an input for the production of export items(five years); if the project is evaluated under a special circumstance by the Board of Investment (not longer than seven years); if less than 50% of the production is to be exported(two years or seven years if the production is considered to be special by the Board of Investment); if the production is for the local market (two years). When the investment is for the expansion of the above projects, and if the expansion or upgrading increases the existing production by 25%, in value and 50% of the production is to be exported the investment is entitled to two years of profit tax exemption. In all of the above cases, if the investment is made in relatively under-developed regions the investment receives one more additional year of exemption from profit tax. Moreover, the council of ministers may also award profit tax holiday for more than seven years.

6.4. Exemption From Payment of Taxes On Remittance of Capital

Any remittance made by a foreign investor from the proceeds of the sale or transfer of shares of assets upon liquidation or winding up of an enterprise is exempted from the

payment of any tax.

6.5. Loss Carry Forward

Business enterprises that suffer losses during the tax holiday period can carry forward such losses following the expiry of the exemption period for half of the income tax exemption period.

7. Ethiopian BIT's in comparative perspective

7.1. Introduction

In addition to the investment law we have explored above, Ethiopia has so far signed about thirteen bilateral investment treaties. These countries are Germany as early as 1964 and more recent ones with, China, Tunisia, Russia, Italy, Israel, Kuwait, the Netherlands, Sudan, Denmark, Turkey, Yemen and Malaysia. These treaties do not follow the same model. There are some notable differences on the obligations which the state parties assumed and regarding issues that are given more emphasis in the treaties. Some of these will be captured in our discussion in the following paragraphs. Comparison will also be made with the Ethiopian domestic investment law and other relevant international principles and practices.

At the beginning one of the notable differences to be observed is the difference on the definition of investment in these treaties. Some of these treaties go to the least possible minute detail and some others prefer to define it in a general fashion. As crucial it is to define what investment means in reality there is less disagreement on

what may be regarded as a foreign investment. Concerning admission for investment since there is no binding international principle and practice, these treaties also leave to the host state to address issues of admission based on its domestic laws and regulations. In other words it is up to the host state either to admit or not to admit foreign investment. This in effect means, the screening procedure which is used in the process of giving an investment permit is not in violation of either these BIT's or international practice.

The other crucial issue covered by the BIT's is the manner of treatment. In this regard most of the treaties Ethiopia signed refer to the standard of "fair and equitable treatment". For example this is explicitly stated in the BIT with China, Israel, Malaysia, Sudan, Yemen etc… And some of these go to the extent of demanding that this fair and equitable treatment should not be less favourable than those given to their nationals or a national of third state and even either of these depending on the best interest of the investor. The implication is that, the standard of "fair and equitable" treatment goes beyond National Treatment or the Most Favoured Nation Treatment. The "fair and equitable" treatment is an abstract standard which might be superior to a standard with which the host state treats its own nationals and nationals of a third state. Regarding the Ethiopian BIT's in certain cases, for example, with China the treatment given is that of the MFN, in most others the combination of MFN and NT. However, those that are given the MFN treatment could still make use of the better treatment afforded to other states. In other words, there still remains a free rider problem. The only exception in most MFN clauses under the Ethiopian BIT's only relate to membership of future or existing regional economic integration

agreement or customs union to which the states could be parties and an international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation. However, this treatment does not appear to extend to the BIT's based on which a country extends a preferential treatment to investors from a particular country. Furthermore, it looks strange that a preferential treatment resulting from domestic tax law does not trigger either the MFN or NT as this measure falls within the exceptions.

In some of the BIT's there exists a clause which requires host states to provide the investment full and adequate protection and security within its territory.(Malaysia, Denmark).The issue of security is featuring in these agreements in light of contemporary developments in the world affairs. However, the BIT with Germany that was signed in 1964 also refers to the duty of the host state to provide adequate protection and security. Some of these agreements are short of mentioning an obligation to give security by only mentioning the duty of protection. From a legal point of view it is not clear what this obligation entails and whether the state is obligated to pay compensation in case of security breach and subsequent damage to the investor. In addition the BIT signed with Israel goes further and states that "either contracting parties may take measures strictly necessary for the maintenance or protection of its essential security interests. Such measures shall be taken and implemented in good faith, in a non-discriminatory fashion so as to minimize the deviation from the provision of this agreement".[14]This of course, states the obvious that states could take measures they deem necessary to safeguard their security

[14] Article 7-1 of the Ethiopia-Israel BIT

interest. But it is easy to imagine that this clause is added at the insistence of the State of Israel.

7.2. Investment Protection

It is the classic purpose of the BIT's to ensure that investments are protected. In contrast to most provisions on standards of treatment, most investment-protection provisions are "absolute" and not relative in character, i.e., they do not refer to another body of rules (e.g., rules of domestic law, in the case of the national treatment standard) but expressly state the conduct that is expected. In particular, they spell out the conditions under which an expropriation is lawful and the manner in which compensation is to be assessed and paid. The approach they follow reflects concerns of investors, not only that they may be treated in a discriminatory manner, but that the national law rules on such issues applicable to local nationals and firms may not be adequate, may be very hard to determine and apply or may be too easily and too frequently changed.[15]

Investment-protection provisions may then be understood as provisions concerning the specific, detailed and non-contingent treatment of investors. On the other hand, the possible effects of the behaviour of investors on the protection afforded to them by international rules may have to be taken into consideration. In fact, in some instances, the availability of some elements of investment protection are made conditional on investors having met certain criteria: the Overseas Private Investment Corporation (OPIC) of the United States, for example, requires that a FDI project meet some criteria as far as impact on host and home countries is concerned (e.g., positive

[15] . UNCTAD, World Investment Report, 2003, FDI Policies for Development: National and International Perspectives, p. 90&ff. See also UNCTAD World Investment Report 1996.

developmental effects and absence of negative environmental effects on the host country; and absence of detrimental effect on the economy of the home country). Depending on the form of bilateral agreement under which its programmes operate in a given country, OPIC also requires either specific approval of the project by the host government, or assurance that the project has received such host government approval as is required in the ordinary course. Similarly, before MIGA insures a project, it must undergo a review during which an assessment is made of, among other things, the contribution of the project to the host country's development (including job creation, technology transfer and export generation); in addition, MIGA must obtain the host government's approval to offer insurance to an investor.

Investment protection (and pertinent provisions) involves issues, not necessarily closely related one to another, at least in legal terms. There are two broad categories.[16] Government measures, such as expropriations, nationalizations or abrogations of contracts with foreign investors, which generally cause major disruptions to an investor's operations or even put an end to an investor's presence in a host country. Other measures, such as excessive and discriminatory taxation, refusal to allow repatriation of funds and unfair treatment by administrative and judicial authorities, which, although by definition detrimental to an investor's interests, do not normally, endanger the continuation of operations in the host country. While such measures are smaller in scale and do not amount to a total disruption of an investment, they may cause major damage to the investor and, whether because of the scale of injury or the intent of the measures, may amount to "indirect" expropriation. The principal

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[16] . UNCTAD World Investment Report, 1996

elements of investment-protection provisions fall under the following headings: expropriations and property takings in general; abrogation (or unilateral amendment) of state contracts with investors; transfer of funds; other specific treatment issues; settlement of dispute.

7.3. Expropriation

The problems arising from takings of foreign property by the state have been on the international agenda since the nineteenth century. They acquired increasing saliency this century, in the period between the two world wars and especially in the decades after the Second World War. The political focus shifted over the years, from the ideological conflict of the first post-war decades to decolonization and developing countries' efforts to assert control over natural resources in subsequent decades.[17] The government actions involved were in most cases large-scale measures, in the context of general socio-political change and decolonization. The historical and ideological context has today changed and, while the possibility of individual measures of property deprivation cannot be excluded, the actual risk of large-scale action of this sort is considerably diminished.

Relevant international law norms have been the object of considerable debate both in diplomatic correspondence and in scholarly writings. Developed countries have insisted that takings of foreign property are unlawful in international law unless they meet certain requirements, most important of which is the payment of full compensation. Developing countries have asserted that property takings are subject to the exclusive jurisdiction of the host country, which also determines how

[17] . The discussions during the formulations the NIEO and the Charter on the Rights and Duties of States is worthy of note.

compensation is to be assessed and paid. In practice, it was the requirement of compensation and the modalities for its assessment and payment that have been at the centre of the debate. Debate ranged over a wide field, from the assertion of a need for "full, adequate and effective" compensation to numerous qualifications of varying effect, such as "fair" or "appropriate" compensation. Despite the doctrinal debate, the practice of arbitral tribunals and diplomatic settlements has tended to take into account to varying extent numerous pertinent factors arising in each particular case.

Nowadays, host countries are increasingly willing to provide to investors assurances of fair treatment, generally including undertakings against expropriation, promises of full compensation in case of property taking and acceptance of dispute-settlement procedures. Bilateral investment treaties, as well as some recent regional instruments (e.g., NAFTA, Energy Charter Treaty), include elaborate provisions setting strict conditions for the legality of expropriations and specifying standards for the compensation to be paid. Future problems are likely to relate to compensation for new forms of property interests of investors, such as administrative licenses and permits, under which a foreign affiliate operates in a host country. Bilateral treaties and some other instruments also deal with a related topic, that of losses due to war, civil strife or other such catastrophe. Related provisions, however, establish a relative standard, essentially that of national (and MFN) treatment and accord to foreign investors in such cases the same treatment that host nationals (or nationals from other countries) receive.

The BIT's signed by Ethiopia contain different wording and standards in that respect. It is to be recalled that the Ethiopian domestic law has its own standards. To refresh our memory it provides that no investment may be expropriated or nationalized except when required by the public interest and then only in compliance with the requirements of the law. 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. In majority of the BIT's expropriation or nationalization is to be undertaken for a public interest and/or for the internal needs of the host country. In some cases, for example in BIT with China, a specific reference has been made to domestic legal procedures. In most of the cases, however, no mention is made of the domestic law. The measures should be non-discriminatory and against payment of prompt, adequate and effective compensation. All except the BIT with China and Germany contain the latter standard which is popularly known as the Hull Doctrine. The BIT with China simply refers to non-discriminatory payment of compensation without delay. The one with Germany contains an older standard regarding the compensation (signed 1964). Accordingly, the compensation is required to be equivalent to the investment expropriated. In some of these BIT's market value is stressed as to the amount of compensation. The value of the compensation is the one immediately before the expropriation is made or the impending expropriation was publicly known. This formulation may guard against a loss to the market value of the investment because of sudden changes as a result of things like instability that comes along with the decision of expropriation. The payment has to be made without undue delay. The failure to do so in some cases carries with it the duty of payment of interest from the time the decision of expropriation or after undue delay. The BIT with Israel

gives a little relief of six month period on the ground of balance of payment difficulties according to GATT rules. And the whole step is required to follow due process of law. In light of the Ethiopian investment law there does not appear to be a problem on the time of payment as it is stipulated that it has to be made in advance i.e before the expropriation.

As we have seen above, the act of taking expropriation is not limited to the actual takeover. Some BIT's refer to instances that are tantamount to expropriation either in general terms or by illustrative list of instances that amount to expropriation. For example the BIT with Kuwait further defines expropriation as also applying to "interventions or regulatory measures by a contracting state such as the freezing or blocking of the investment, levying of arbitrary or excessive tax on the investment, compulsory sale of all or parts of the investment, or other comparable acts or measures, that have a de facto confiscatory or expropriatory effect in that their results in depriving the investor in fact from his ownership, control or substantial benefit over his investment or which may result in loss damage to the economic value of the investment". This is quite an expanded definition of expropriation which, is not featured in the domestic investment law. The issue of repatriation of the compensation amount is guaranteed in the entire BIT's which in turn is also acknowledged by the domestic investment law.

7.4. Dispute Settlement

Concerning dispute settlement the BIT's, in addition to demanding effective legal system that plays a crucial role, providing for various steps to be taken in case of controversy. The process begins by negotiation; it involves possible court cases,

conciliation and arbitration before international tribunals regarding both inter-state and a dispute between an investor and a state.

8. Conclusion

Ethiopia is the second most populous country in Sub-Saharan Africa with 70 million population. This caters for the cheap labour needs of foreign investors. It has also put the necessary laws and institutions to attract and protect investment. While this presence is vital for increased FDI, figures on the ground indicate that it is further away from achieving its ambitions. Where does the problem lie? Various reasons could be cited. First, attracting FDI is a matter of competition among all developing countries. Multinationals corporations from the developed world enjoy a wide variety of choice in choosing where they want to invest. Clearly, Ethiopia does not appear to be high in their list, apparently because other developing countries are simply more attractive. There are more concrete reasons as well. Ethiopia is one of the poorest countries in the world, which means it could not serve as a market base for foreign investors in the short run. The majority of the labour force is unskilled and the country will not be able to attract hi-tech industries. Presently, Ethiopia is a land-locked country. This location minimizes the strategic importance of Ethiopia as a production base of export products. Furthermore, even if there is a political commitment on the part of the present government, the fact that the country fought the most conventional bloodiest war with its neighbour Eritrea in 1998 continues to project an image of instability in the region in general. The fact that the border dispute is not solved yet is destined to result in further dire consequences. Internally,

democratic political structures are not fully put in place. The judicial system suffers from a chronic shortage of trained manpower with cases taking an unwarranted long time to be solved. There is an utter disregard of the problem which the judiciary is facing. This writer is aware of the Civil Service Reform Programs which the government has embarked upon. Issues taken up regarding judicial reform are misguided and are also a threat to Judicial Independence. It appears that there is a less recognition on the part of the government of the fact that vibrant judicial system ought to be at the centre of a market system that gives adequate protection of private property. In sum, reform measures need to take a holistic approach to changing the overall framework within which investment is nurtured and protected. Certainly investors are not only interested in shiny investment laws and incentives.