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# PROTECTION OF FOREIGN DIRECT INVESTMENT UNDER VIETNAMESE AND ETHIOPIAN INVESTMENT LAWS

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# TABLE OF CONTENTS

# ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| BCC | Business Cooperation Contract |
| BOT | Build-Operate-Transfer |
| BT | Build-Transfer |
| BTO | Build-Transfer-Operate |
| LDC | Least Developed Countries |
| Enterprise law | Law on Enterprises No60/2005/QHII of Vietnam |
| FDI | Foreign Direct Investment |
| Guidelines | World bank Guidelines on the Treatment of Foreign Direct Investment |
| ICSID | International Center for the Settlement of Investment Disputes |
| ILV | The Law on investment No59/2005/QHII of Vietnam |
| LDC | Least Developed Countries |
| MFN | Most Favored National Treatment |
| MIGA | Multilateral Investment Guarantee Agency |
| The Proclamation | Investment proclamation No 280/2002 of Ethiopia |

# ABSTRACT

Foreign direct investment offers various advantages to both the investor and the host country. Developing and LCD countries have been trying to reap these advantages of FDI by offering deferent opportunities that would attract investors. One such condition these countries are using is the provision of legal protection to foreign investment.

Among many aspects of protection of FDI treatment of foreign investors repatriation of funds protection against expropriation and settlement of disputes constitute the major components of that should be given an acceptable level of protection.

Regarding acceptable level of protection there is no a universally acceptable international standard applicable to FDI. To fill in this gap the World Bank has issued Guidelines to be used as standards by all concerned.

Vietnam and Ethiopia as a host states for FDI, have provided legal protection in their respective investment laws. This thesis examines the protection offered by both legislations in the areas of treatment of foreign investors, repatriation of funds expropriation and settlement of disputes. Vietnamese investment law is more comprehensive than the Ethiopian and provides a level of protection consonant with the international standard, while the Ethiopian law leaves many important issues unattended which makes it incompatible with internationally accepted norms.

# INTRODUCTION

Foreign direct investment plays a significant role in the economic development process of a developing country. Developing countries in the world have realized the considerable advantages of FDI for higher living standard and economic growth. To reap the advantage that could be gained developing countries have been taking measures to attract FDI. An essential step towards this end is a sound legal regime that gives protection to foreign investors.

There are a number of concerns which foreign investors have. Before committing himself a foreign investor will need to have assurance that he gets internationally accepted treatment. No investor is willing to invest in a country where there is a danger of losing his property through nationalization, expropriation or other forms of “taking”. An investor will not invest in a country where repatriating of profits and capital is uncertain. Investors need effective mechanisms for resolving dispute with the host government.

The measures taken by developing countries to attract FDI, as mentioned above, include the enactment of investment laws that provide for treatment of foreign investment and investor and other forms of protection of FDI .The objective of this thesis is to examine the provisions of legal instruments of two such countries and comparatively analyze the protection they give to FDI. These laws are Investment proclamation No 280/2002 of Ethiopia and the Law on investment No 59/2005/QHII of Vietnam.

Until 1991, Ethiopia was under a socialist system. During this period, from 1974 to 1991,the economy of the country was structured on the basis of centralized planning system. Nationalization of private enterprises including foreign owned enterprises were carried out .Most of the modern industrial sector in food processing, textile ,beverage, tobacco and leather were produced by public sector manufacturing enterprises. Financial institutions like banks and insurance companies were under the control of the government.

After the removal of the socialist regime the country's economic policy was geared towards open market –based economy and reforms have been implemented which include privatization of public sector enterprises and liberalization of the financial sector. In line with market-oriented economic policy the investment regime has also been liberalized through a number of legislations. Since 1992 the investment law has been revised three times. The present law is Proclamation No 280/2002 that has been in force since 2 July 2002 and governs both domestic and foreign investments.

Similarly prior to 1986 the economic policy of Vietnam was a Soviet –style central planning economy. The decision of the Sixth Communist Party Congress to replace the central planning system with a market economy that encourages private business and foreign investment has brought about sweeping political changes. Top conservative communist party leaders were replaced by new leaders who were willing to implement different kinds of economic reforms.[1] (1)



[1] W.Gary Vause ,*Doing Business With Vietnam-Prospects and Concerns for the 1990S* 4 Fla. Int'l L.J. 231(1989)

In 1986 the Vietnamese Government started the implementation of "doi moi" or all-round renovation which includes, among others, the removing of price controls, promoting the sector and encouraging foreign investment. [2] In line with this economic reform program the Vietnam National Assembly adopted a new Foreign Investment law that had been in to effect as of 1 January 1988.Until the coming in to force of the current investment law in 1st July 2006 the law on foreign investment has been revised two times.

In Vietnam foreign and domestic investments were governed by two separate laws-the Law on Foreign Investment in Vietnam and the Law on Domestic Investments. On November 29/2005 the National Assembly of Vietnam passed the law on investment No 59/2005/QHII to be applicable on both foreign and domestic investments. This law comes in to force on July 2006.

As noted, the title of the thesis is the protection of FDI under Ethiopian and Vietnam laws. But why the laws of these countries? My being an Ethiopian national by birth could answer, I believe, the question in part. I have two reasons for choosing Vietnam as a country of comparison. Having abandoned their planned economic systems, both Ethiopia and Vietnam have started moving along the path towards open –market economic policy at times not far from each other. Comparing the two legal regimes would reveal the strength and weakness of each and would provide a good lesson Ethiopia one. The second reason relates to Vietnam's accession to the WTO. After

[2] Tan Cheng &Terence T.S. Lim," Vietnam; Business and Investment Opportunities ",Cassia Business Intelegence Series ,19 (1993)

having successfully completed the accession process and having met different criteria which relate to various areas including investment laws Vietnam has recently joined WTO. The current Vietnam investment law was undoubtedly influenced by the accession process. Ethiopia also has applied to join the WTO and is in the early stage of the accession process. Although the impact of WTO membership on investment law is beyond the scope of the thesis I hope it might serve as indicative of what Ethiopia should expect from the accession process in terms of protection of FDI.

Therefore the thesis will scrutinized the provisions of Vietnamese and Ethiopian investment laws to see the level of protection they give to FDI. Accordingly it will comparatively analyze the legal protection these laws provide for FDI in light of the international standard.

The thesis has three chapters. The first chapter is an introductory one and discusses issues like the meaning of investment and FDI and forms of FDI. Chapter two examines why FDI should be protected and discusses the arguments for and against FDI. It also gives a highlight on the standard against which Vietnamese and Ethiopian investment laws are evaluated. Chapter three is the core of the thesis which will provides an in-depth analysis of the legal provisions of the two regimes in treatment of foreign investors, protection against expropriation and other forms government taking, dispute settlement mechanism and repatriation of funds. Finally a summary and recommendation will form part of the conclusion.

## Chapter I

## Definitions and Forms of Foreign Direct Investment

The purpose of this work is to analyze the investment laws of Ethiopia and Vietnam with regard to the protection they accord to foreign direct investment. Before looking into the protection it is important to see the concepts to which such protection is accorded. So under this chapter attempt will be made to show the legal meanings of investment, foreign direct investment and forms of foreign direct investment.

### *1.1 Definition of Investment*

Investment is an "expenditure to acquire property or other assets in order to produce revenue;"[3] it is the placing of capital or laying out of money in a way intended to secure income or profit from its employment; it is a process of economic activity which involves capital, technology and technological know how for purpose of enhancing future wealth or profit[4].

The Ethiopian Investment Proclamation No 280/2002 (the Proclamation) defines investment as the expenditure of capital by an investor to establish a new enterprise or to expand or upgrade the already existing enterprise – enterprise being an undertaking established for purpose of gaining profit[5]



[3] Bryan A. Garner ",Black's Law Dictionary,"(7th Ed 1999) 831
[4] John G.Maurer,Joel M.Shulman ,Marcial L. Ruwe and Richard C. Becjerer ", Encyclopedia of Busines"(1995)Vol1,845
[5] Investment Proclamation," Proclamation no 280/2002", Federal Negarit Gaazeta 8th Year,No 27 Art.2(1) and (2)

The Investment law of Vietnam law (ILV) provides for similar meaning of investment. Accordingly; investment is" the use of capital in the form of tangible or intangible assets for the purpose of forming assets by investors to carry out an investment activity …."[6]Investment activity being the activities of an investor through out the investment process involving those stages of investment preparation, implementation and management of the investment project[7]

Investment can be classified in to two broad categories .Domestic investment and foreign investment. This classification usually follows the source of capital and/or identity of the investor.

The Proclamation provides no definition for domestic investment. Rather it defines domestic investor as an Ethiopian or foreign national permanently residing in Ethiopia having made an investment.[8] Domestic investment is that made by public enterprises, government, nationals, domestic investors and by those investors who are Ethiopian by birth and who desire to be treated as domestic investors.

The VIL on the other hand defines[9] domestic investment as the use of capital in monies or other lawful assets by a domestic investor in order to carry out an investment activity. As in the definition of the Proclamation the emphasis is on the investor in a sense that it



[6] Vietnam Law on Investment No 59/2005/ QHII,Art.3(1)
[7] Id.Art3(7)
[8] Investment Proclamation supra note5, atArt2(5)
[9] Vietnam Law supra note 6, at Art3(13)

is the identity of the investor –domestic or foreign –that will decide the status of the investment.

Regarding foreign investment the Ethiopian law takes the same approach of defining the term in the context of the investor .Accordingly, it defines foreign investor as "a foreign or an enterprise owned by foreign nationals having invested foreign capital in Ethiopia[10] Cumulative reading of the this provision and article2(1) of the Proclamation would give the definition of foreign investment as the expenditure of foreign capital by a foreigner or by an enterprise owned by foreign nationals to establish a new enterprise or to expand or upgrade one that already exists .The foreign capital to amount as foreign investment must be a fund that is transferred from one country to Ethiopia without any counter movement of goods or services from the later to make it participate in the economic development or productive activities.[11]

Foreign investment under Vietnam law means "the remittance of capital in monies or other lawful assets by a foreign investor into Vietnam in order to carry out an investment activity. "[12] Here again the investor as well as the capital being foreigner is emphasized. Basically there are two kind of foreign investment[13] .They are portfolio or indirect investment and foreign direct investment. Portfolio investment is an investment which does not pursue the exchange of goods as in trade, but pursue profits on a speculative

[10] Investment Proclamation supra note5, at Art.2(6)
[11] Duri Mohammed,*Private Foreign Investment In Ethiopia (1950-1968)*Journal of Ethiopian Studies VOl.7No2(Addis Ababa HIS University Institute of Ethiopian Studies ,July1969,53
[12] Vietnam Law supra note 6, at Art.3(12)
[13] Omar E.Garcia-Bolivar,*G3 Agreement:A comparison of Its Investment Chapter With The Meaninig International Law of Foreign Investment* ECKLICN-JV No 25:69,782

basis through buy and sell operations in the stock market.[14] This type of investment is "placed through the capital markets with out entrepreneurial commitment and with the sole purpose of obtaining profit with out influencing corporate management"[15]The investor does not need or seek operational control of the business but holds stock in the hope and that the stock will rise in value.

The other type of foreign investment is foreign direct investment (FDI) which is generally defined as "the acquiring of a lasting and controlling interest in an enterprise operating abroad "[16]. A lasting interest is defined as the existence of a long term relationship between the direct investor and the enterprise.[17]Controlling interest in an enterprise on the other hand refers to a number of shares that is practically sufficient to control management of the company.[18] A 10% of share ownership has been established to have a controlling interest.[19]

Distinction between the two forms of foreign investment is important especially when a given law grants some protection to only one kind but not to the other. The crucial element to differentiate the two is the investor's role in asserting management control over assets. In FDI "the investor assumes both the risk of the operation and its control"[20]

Coming back to the laws of under consideration, the Ethiopian law does not define foreign investment in terms of portfolio and direct investment. As noted above it simply

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[14] Ibid
[15] Danil E. Fedorchuk,*Acceding to WTO:Advantages For Foreign Investors In Ukranian Market*,10-FALL L.&Bus.Rev.Am.779,10
[16] Ibid
[17] Ibid
[18] Omar E.supra note 13, at 783
[19] Daniil E supra note 15 at 12
[20] Omar E.supra note 13, at 784

provides the meaning of foreign investor. However the definition given for investment --establishing a new enterprise or expanding or upgrading an existing one-- is more of FDI than portfolio investment provided the elements of foreign investor are fulfilled.[21]

The Vietnamese law on the other hand gives the definitions of both kinds of foreign investment. The investment is considered indirect or portfolio if it is by way of purchase of shares ,share certificates ,bonds or other valuable papers or by way of a securities investment fund and the investor is not participating directly on the management of the investment.[22]

The ILV also defines separately direct investment. Accordingly direct investment means a form of investment whereby the investor invests its invested capital and participates in the management of the investment activity.[23] Combined with the meaning given for foreign investment we would have what FDI is under Vietnam law that has similar elements with those discussed above.

## *1.2 Forms of Foreign Direct Investment*

Forms FDI can be categorized in terms of economic form[24] and legal form. With respect to economic forms foreign direct investment we find the following forms.



[21] The definition of investment in Art.2(1)of the Proclamation includes both forms of investment.
[22] Vietnam Law supra note 6 at Art.3(3)
[23] Id Art.3(2)
[24] Tomislav Nagy ,Foreign Direct Investments:A Comparative Studies of Croatia ,Hungary and Ireland,(CEU unpublished ),2001, 9

The first is foundation of a new company abroad. Known as Greenfield investments these include all investments by which the investing company established a new company in the host state with the aim of producing new products or services.[25]

Merger and acquisition is the other form of FDI which involves the purchasing of a controlling ownership interest in already existing foreign company.[26] These appear to represent the other end of Greenfield investment in that they do not start afresh, but merely buy the rights of the existing holders of an existing company in the host state.

Other economic forms include concession which involves a contract by which a country gives some rights to a foreigner investor which engages in an activity dependent on the contract and approval of the state[27]; reinvestment of profits of the foreign company and raising the capital between the parent company and its foreign subsidiary[28] .

Legal Forms of FDI

With respect to legal forms of foreign direct investment, the form by which a foreign investment enters into a country depends on the legal framework of that country.

The Ethiopian law under Art.10 (1) of the Proclamation lists down forms of investment available for all investors in general .These are;

- Sole proprietorship
- .Business organization incorporated in Ethiopia or abroad



[25] National Bank of Hungary,"Direct Investment:Some Theoretical and Practical Issues" (NBH Workshop Studies)1994,8

[26] Ibid

[27] Bryan A. Garner supra note 3 at 283

[28] National Bank of Hungary supra note 25 at 8-9

- . Public enterprises established in accordance with the relevant laws
- . Corporate societies formed in accordance with the relevant laws

Public enterprise is an undertaking wholly owned by the federal or regional government.[29] Therefore this form of investment is not available for foreign investors. Investment in the form of cooperative society is also not for foreign investors simply because the relevant law dealing with formation of cooperative society provides that only Ethiopian can form cooperative societies.[30]Sole proprietorship and business organization are therefore the venues that remain to be taken by the foreign investor.

Under the Commercial Code of Ethiopia business organizations can be formed by virtue of a partnership agreement whereby two or more persons join together their contributions for the purpose of conducting activities of an economic nature.[31] There are six types of business organizations provided by the Commercial Code.[32]

The first is an ordinary partnership. This is a partnership which is a business organization; but which does not have the characteristics that make it a business organization as discussed below. Such business organization is deemed to be an ordinary partnership[33].



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[29] Investment Proclamation supra note5 at Art.2(10)
[30] Abduljebar Hussein, A Comparative Analysis of Foreign Investors Under Proc.280/2002 with some countries Investment Laws,Addis Ababa University ,faculity of Law,Unpublished,64
[31] Commercial Code of the Empire of Ethiopia ,Proc. 166/1960, Negarit Gazeta(extra ordinary),19th year,No.3,Art210
[32] Id Art.212
[33] Id Art.227

The second type of business organization is joint venture. A common form for foreigners to form with domestic investors, a joint venture shall not be known to third parties and shall not have legal personality.[34]

General partnership and limited partnership are the other two forms of business organization .All of the partners in the former are general partners while the later consists of limited and general partners. Both kinds of partnerships have a legal personality, however the general partners in both organizations are personally, and jointly liable towards third parties while the limited partners are liable to the extent of their contributions.[35]

The other forms of entry for foreign investment are companies limited by shares(share company) and private limited companies .A share company can be established by not less than five members with the capital of not less than 50000 Ethiopian Birr* and may issue transferable securities such as shares.[36] A private limited company on the other hand may be formed by two or more members but can not have more than fifty members with the capital of 15000 Ethiopian Birr. Unlike the share companies private limited companies can not issue any form of transferable securities[37].



[34] Id Art272,273
[35] See Id. Arts 280,286,296,and 300
[36] Id Arts.304,306,307
[37] Id Arts 510,512
*1 Ethiopian Birr is equivalent to 0.0846727 EUR

A foreign investor can also use the business organization formed abroad to conduct his investment operations. The Commercial code, in line with the Proclamation, allows foreign firms incorporated abroad to have branches in Ethiopia.[38]

Regarding Vietnam there are six forms of direct investment that are generally available for both foreign and domestic investors.[39]

The first form of direct investment is establishment of wholly owned economic organization. The common venue available for a foreign direct investor with a 100 percent foreign capital is to organize enterprises in accordance with Enterprise Law.[40]

Basically there are three kinds of enterprises provided by the Enterprise law*.The first one is limited liability company which is an enterprise that is not permitted to issue shares. It is a no-share limited liability company which can be a more than two but less than fifty members' enterprise [41] or a one member enterprise.[42]

Shareholding Company is the other form and this one is an enterprise whose capital is divided into shares .The minimum number of shareholders is set at three while there is no restriction on the maximum number of members.[43]

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[38] Id. Art 556(1)
[39] Vietnam Law supra note 6,at Art 21
[40] Id Art. 21(1)
*Enterprise means an economic organization having its own name ,having assets and a stable transaction office and having business registration for the purpose of conducting business operation. See Infra note 41 at Art. 4(1)
[41] The Vietnam Law on Enterprises no. 60/2005/QH II,Art. 38
[42] Id Art 63
[43] Id Art 77

Partnership is also a form of enterprise under the Enterprise Law which shall have at least two individual members who are co-owners and jointly conducting business under one common name .Their liability is not limited and they can bring in partners with limited liability.[44]

The second form of direct investment is the establishment of joint ventures economic organizations between domestic and foreign investors.[45] By this form a foreign investor can carry out investment activities with a domestic investor in the different forms of economic activities.

Investment in contractual forms is the other form of foreign direct investment.[46] These forms can take a variety of arrangements. One such arrangement could be to form a business cooperation contract (BCC).This means an investment form signed between investors in order to cooperate in business and to share profit or products. Such arrangement can be a one time or can last longer. But in any case it shall not have a legal entity status. [47]

Build-Operate-Transfer (BOT) is the other type of contractual form of arrangement which is a kind of investment form signed by a competent state body and an investor in order to construct and operate commercially an infrastructure facility for a fixed duration.



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[44] Id Art. 130
[45] Vietnam Law supra note 6,at Art.21(2)
[46] Id Art 21(3)
[47] Id Art.3(16)

Upon expiry of the duration the state is entitled to have the transfer of the facility with out paying any compensation to the investor[48].

The Third one, Build –Transfer-Operate(BTO)differs from BOT described above on the time at which the investor comes into the picture to operate the given project .Under this form the investor ,upon completion of the construction of the infrastructure facility ,is required to transfer the same to the state without operating it by himself. Then to recover the invested capital and for profit gains the government grants the investor the right to operate commercially such facility for a fixed duration[49].

The last type of investing in contractual form is Build–Transfer (BT) arrangement. Unlike BOT and BTO the investor under the scheme of Build –Transfer (BT) will have no access to operate the constructed facility. Upon completion of the construction the investor transfers the facility to the state and the government in order for the investor to recover his capital and gaining profit will create conditions for the investor to implement another project or will effect payment according to the contract.[50]

The fifth form of investment under ILV is business development. Foreign investors are permitted to invest in various forms of business development such as expanding scale, increasing output capacity and business capability and renovating technology as well as reducing environmental pollution.[51]



[48] Id Art. 3(17)
[49] Id Art.3(18)
[50] Id. Arr. 3(19)
[51] Vietnam Law supra note 6, at Art24

Purchasing shares or contributing capital to participate in the management of investments activities is the sixth form that is available for foreign direct investor who are permitted to use this method to invest through this form in companies and branches operating in Vietnam. To invest in mergers and acquisitions of enterprises is also among the sixth one of the forms of direct investments under Vietnam investment law and investors are free to invest in mergers and acquire companies and branches[52].

These are the legal forms of FDI through which foreign investors would carry out their investment in Vietnam and Ethiopia. Depending on motivations, goals and preference a foreign investor can take any one of these forms to effect its investment.



[52] Id Art.25

# Chapter II

# The Standard for the Protection of FDI

As noted already the principal aim of this short thesis is to analyze the investment laws of Ethiopia and Vietnam regarding the protection they offered to foreign direct investment But the questions in this respect would be why should FDI be protected? What aspects of such protection should be seen and what is the standard against which the legal protection should be evaluated? This chapter will attempt to address these issues.

## *2.1 Why Need FDI be Protected?*

A number of developing and LCD countries have gone through economic transformation "from inward looking economies ,based on public sector control …into outward looking market economies based on private sector development and open competition.[53]Many of these countries are short of domestic capital ,equipment and know how needed for their economic development .Even if they may possess valuable natural resources they lack the capital ,skilled man power and technology to exploit their resources and benefit their people [54]. One of the means by which these countries try to overcome these problems is by importing foreign capital through foreign direct investment. This is true for both Ethiopia and Vietnam.



[53] Harvard Law Review, *Protection of Foreign Direct Investment In a New World Order : Vietnam-a Case Study* 31 J. Marshall L. –

[54] Dareskedar Bayeh ,Legal Impediments To Foreign Investment in Ethiopia ":A preview of the Law and Practice,Addis Ababa Univesity unpublished,10

However, is FDI the answer for the problems of these countries? There are basically three theories revolving around the advantages and disadvantages of FDI. The first theory is neo –classical economic theory which takes the position that foreign direct investment contributes positively to the economic development of the developing and host countries.[55] There are many reasons forwarded in support of this assertion.

FDI is said to bring the much needed capital and contributes to the opening of new working places .It provides an opportunity for employment of the labour force of the host country.[56] It increases the domestic production and redistribution of income from the owners of capital to other non capital owning members. FDI also promotes the transfer of technology and management knowledge which is very important to the development of the economy of the host state.[57] It is moreover advanced that "FDI acts as a catalyst for both the country and the investor"[58].

Diametrically opposite to the first theory mentioned above is the dependency theory. It takes the view that FDI does not produce any meaningful economic development to the host country.[59] Accordingly it argues that FDI suppresses economic growth and increases inequality of income in the host country .FDI keeps developing countries in state of permanent dependence on the economies of the developed one and is a threat to the sovereignty of the host country.[60] It has also been argued that the alleged technological



[55] Seid ,Sherif H. Global Regulation of Foreign Direct Investment Aldershot :Ashagate,2002,10
[56] Yohannes Sebhat, *About Foreign Investment*, Economic Mirrors,(1971)1
[57] Fikeremarkos Merso,Ethiopia's WTO Accession: A Strenuous Step For A Poor Nation Seeking Economic Prosperity,Action Aid Ethiopia Publications,2005,36
[58] Dareskedar supra note 54 at 11
[59] Seid supra note 55 at 12
[60] Abduljehar supra note 30 at 17

benefit is not always true as the technology that FDI brought into the developing host country is usually outdated and requires much capital[61]. In addition FDI generates profit for the investor which may leave the country in foreign exchange. Foreign direct investment may overwhelm weak domestic investors and may bring them out of the market.[62] This amount the taking away from domestic investors opportunities that were available to them before the FDI.

Between the two extremes is the third theory which is the theory of state intervention in economic activity .Accepting the merit and advantages that could be gained from foreign direct investment this theory tries to provide a mechanism through a state intervention to alleviate the negative effects of the investment on the host state. Accordingly, in order to realize the full potential and benefits of FDI it is essential for a state to have an interventionist role and adopt a policy “that is selective with respect to projects and the volume and timing of FDI inflows”[63].

The above discussion reveals the fact that FDI has both advantages for and negative effect on the economy of the host state. It also shows that in stead of blocking the inflow of FDI host states have been trying, through government intervention, to minimize the negative effects of foreign direct investment. The fact that FDI plays a significant role in the development process of most economies and its being well come by most of today’s



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[61] Fikeremarkos supra note 57
[62] Daniil E supra note 15 at 15
[63] Seid supra note 55,at 30

host state is not over statement.[64] FDI inflows for example amounts $916 billion in 2005 and this shows increase than 2004 for both developed and developing countries.[65]

To take the advantages that could be gained from foreign direct investment, therefore, many countries have been putting their effort and time to create a favorable atmosphere that would attract FDI. One element in this favorable atmosphere is the provision of legal protection to foreign direct investment.

## *2.2 The Standard for the Protection*

As mentioned above wishing to reap the advantages and benefits of FDI developing and LCD countries have been putting in place legal instruments that afford protection for foreign direct investment. However each country may have different motivations to attract FDI and thus may provide legal protection based on its internal situations like economic, social and political reasons. Therefore there would be no uniform and similar level of protection. So the question in this regard is related to which country has better level of protection and what would be the standard against which such level of protection could be evaluated.

Despite its apparent importance from both the investors/source state and host countries perspective and despite its contact with three legal systems-- i.e. the laws of the source state and host state and that of international law--- there is no single comprehensive



[64] UNCTD World Investment Report 2006, FDI From Developing and Transition Economies :Implications for Devesopement,UN Newyork and Geneva 2006,42
[65] Id,35

international rule for the regulation of foreign direct investment .One of the reason given for this is that states have been "unable or unwilling to conclude an international agreement regulating FDI.[66]"

Foreign direct investment, despite its benefits, has costs for host countries and while enjoying the advantages, these countries have been trying to take measures to mitigate the costs associated with FDI.. The measure is primarily the intervention of the state in the form of applying different forms of restriction. Such stand to intervene or to apply restriction is not in harmony and at times in conflict with the interests of investors and home countries whose interest is a free and liberal regime of investment. This difference between developing and developed countries was too wide to allow for realistic compromise [67] and treatment of foreign investment is "…..a subject where the conflicting rather than common interests of foreign investors and host states were emphasized.[68]"

Although there was difference in interest there is a need to have a general legal principle that should govern the treatment of foreign investment.[69] To meet this need an effort has been made by the World Bank to formulate principles of foreign investment. However the work had not been focused on laying down rules and principles that could form a convention, but rather it was to structure the principles in the form of soft law which are "closer to a set of recommendation to be prepared in the form of broad guidelines."[70]On



[66] Michael A. Geist, *Toward A General Agreement On The Regulation of Foreign Direct Investment* 26 Law & Pol'y INt'l Bus.673(1995) 674
[67] Shihata ,Ibrahim F.I., Legal Treatment of Foreign Investment:"The World Bank Guidellines",Dordrecht:M. Nijhoff,1993,vii
[68] Id.29
[69] Id .vii-vii
[70] Id. 40

the basis of this, in 1992 the World Bank adopted and issued the Guidelines on the Treatment of Foreign Direct Investment

The Guidelines are prepared on the basis of a survey of all existing instruments dealing with foreign investments such as bilateral investment treaties, multilateral conventions, declarations resolutions and draft conventions, international arbitral awards, writings of scholars and national laws.[71] It was also reported that the Guidelines attempted to maintain a balanced approach in the interests of the investors and the developing host countries ;this effort and the way they have been prepared facilitated its adoption with out any reservation from all representatives of the bank membership[72] to which both Ethiopia and Vietnam belonged.

The focus of attention in the Guidelines is how the host state should treat foreign investment. The Guidelines are structured in five articles referred to individually as Guideline, covering a broad range of issues. They are:-

Guideline I……….Scope of Application

Guideline II…….. Admission

Guideline III……. Treatment

Guideline IV……. Expropriation and Unilateral Alterations or Termination of Contracts

Guideline V……..Settlement of Disputes



[71] Ibid.
[72] Id. 151

The process taken in the preparation has led me to presume that they are much closer than any instrument to universally accepted principles governing foreign direct investment. In the absence of a universal international law in the area therefore, I employed the guidelines a standard to analyze the legislations in the coming chapter.

# Chapter III

# The Protection of FDI

The principal objective of this thesis is treated under this chapter in which attempt has been made to address four issues that have primarily related with protection of foreign direct investment. The areas discussed in this chapter are treatment of foreign investors, repatriation of funds, expropriation and settlement of dispute

## *3.1 Treatment of foreign investors*

The first question that could be raised when discussing treatment of foreign investment is at what point in time the treatment of investors should start. An argument can be raised that treatment of foreign investors has to be extended to investors before admission and such treatment must be applied by the host state in its regulations dealing with the entry of foreign investment .Many countries however, addressed this issue by according any standard of treatment after admission or post entry and establishment.[73]Before this time there seems neither, in the context of the particular host state, investment nor investor.

The World Bank Guidelines takes the same stance in addressing the issue and treatment of foreign investors starts at least after the foreign investor is being admitted to the host state. Therefore this section focuses on how a foreign investor should be treated once it is established in the host country.



[73] Seid supra note 55,at 44

There are three principles of international law regarding the treatment of foreign investors.

The first one is national treatment which holds that "a foreign investor should not be treated any better or any worse by the host government than the level of treatment accorded to national firms."[74]Thus according to national treatment standard[75] the host state should not make any distinction among foreigners or domestic investors who are in similar situations.[76]Under this standard, therefore, a host country has the right to regulate the investment activity as far as it has not introduced differences on the basis of nationality.[77]

The second international standard of treatment of foreign investors is the most favored nation treatment (MFN).MFN treatment provides that foreign investors should be treated in not less favorable than that accorded to other foreigners by the host country.[78]MFN prohibits discrimination between foreigners and differs from national treatment in a difference of comparing standards as the later standard compares the foreigners with nationals of the host state.



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[74] James D. Nolan *A comparative Analysis of the Laotian Law On Foreign Investment ,the World Bank Guidelines on the Treatment of Foreign Direct Investment and Normative Rules of International Law on Foreign Direct Investment* 15 Ariz. J.Int'l &Comp.L.659(1998) 668

[75] The national treatment principle is known as Calvo doctrine in the name of Argentine jurist who had developed the principle as response to foreigners who exploited Latin America's natural resources.See Id and associated text.

[76] Jian Zhou, *National Treatment in Foreign Investment Law :a Comparative Study From Chinese Perspective* 10Touro Int'l L.Rev.39(2000),83

[77] Omar E.Garcia-Bolivar,supra note 13 at789

[78] Ibid

Fair and equitable treatment by the host country is the third international standard of treatment of foreign investors. The fair and equitable concepts have not been defined ,however, non-discrimination, the international minimum standard and the duty to protect foreign property by the host state are said to be part of the elements of fair and equitable treatment[79] Among these elements while non-discrimination prohibits the host country from discriminatory actions towards foreigners[80]international minimum standard mandates "a certain de minimus treatment of aliens irrespective of the treatment accorded to nationals.[81]

The World Bank Guidelines embodied all the above three principles of treatment of foreign investors. Guideline III of the Guidelines is concerned with treatment. It provides for the general standards of treatment and a particular aspect of treatment which is transfer of investment capital and returns. This later subject will be addressed in section two of this chapter. Moreover treatment of foreign investors is not limited to these two, but also covers areas of expropriation and ownership of property which again will be discussed in their proper places.

Section 2 of Guideline III requires the host state to extend to investments established in its territory by foreigners, fair and equitable treatment. The principal standard of the Guideline is fair and equitable treatment .However there is a requirement of national treatment with respect to the protection and security of the person, property rights and



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79 Seid supra note 55 at 45
80 Ibid.
81 James D. Nolan supra note 74 at 670

interests of foreign investors.[82] In addition national treatment must be accorded to foreign investors in relation to the granting of permits, import and export licenses and the authorization to employ and the issuance of entry and stay visas to their foreigner personnel.[83]

The national treatment required under section 3(a), however is applicable only if it is compatible with the fair and equitable standard.[84]In other words if the treatment accorded by the host state to its nationals is less than the fair and equitable standard the host state should apply on foreigners the later standard instead of the national treatment.

MFN treatment is also provided under section 3(b) which requires the host state not to discriminate foreign investors on the grounds of nationality in its treatment of foreigners under its legislation and regulations.

Treatment of foreign investors as provided in the guideline is not limited or restricted to a certain activities of the investor but covers various aspects of activities. Accordingly the fair and equitable treatment is extended to the establishment, operation management control and exercise of rights in foreign investment as well as other necessary or incidental activities associated with the investment[85]

The standard of treatment of the Guideline is also applicable on the prompt issuing of licenses and permits and granting of concessions necessary for the uninterrupted

[82] Shihata ,Ibrahim supra note 67 section 3(a) of Guideline III
[83] Ibid.
[84] Id. Section 1 of GuidelineIII
[85] Shihata ,Ibrahim supra note 67 ,at section 1of Guideline III

operation of the investment as well as an authorization to the investor to employ foreign personnel to the extent necessary for the effective operation of the investment.[86]

So much about the standards of the Guideline, as well as their meanings. Let us see now what the two legislations have in store for the subject at issue.

Treatment of foreign investment is part of the investment policy of Vietnam. .The law requires the state to provide" equal treatment before the law to all investors from all economic sectors and as between domestic investment and foreign investment."[87]This provision seems to fulfill the national treatment and most favored national treatment standards as all foreigners and nationals are treated in equal terms before the law. The question is what if the law falls below the international minimum standard; does it mean that the fair and equitable standard will become applicable on foreigners while the national law(less protective) applied on domestic investors? Since the investment law guarantees both foreigner and domestic investors equality before the law, without the fair and equitable standard being part of the investment law this does not seem to be the case.

Ownership of assets, invested capital and revenue and other lawful rights and interests of investors shall be given protection by the state which shall also recognize the long term existence and development of investment activities.[88] This is also part of the investment policy of Vietnam and the recognition and protection of these rights are crucial in the treatment of foreign investors.



[86] Id.section 5 of Guideline III
[87] Vietnam Law supra note 6 at Art.4(2)
[88] Vietnam Law supra note 6,at Art.4(3)

One of the areas from which unfair treatment of foreign investors arises is the performance requirement of the investor made by the host state. Performance requirements are considered to be a violation of national treatment and include local purchasing requirement, export performance requirements and foreign exchange balance requirements[89]

The ILV does not lay down any such requirements; instead it guarantees foreign investors not to undertake such requirements. Accordingly a foreign investor is not required to give priority to purchase or use of domestic goods or services or purchase compulsory goods from a specified domestic sources[90]. Likewise there is no requirement for the investor to export good or services at a fixed percentage, to restrict the quantity, value or type of such exports as well as to restrict goods or services which may be produced or provided domestically[91]. Nor does a foreign investor is required to import goods at the same quantity and value as he had exported or to make balance by himself so that he can satisfy his import needs by the source obtained from his export.[92]

The ILV provides for detail provisions to guarantee foreign investors against measures compelling them to fulfill some goals or result. Hence a foreign investor will not be obliged to achieve" fixed localization ratios during production of goods" or to meet a



[89] Jian Zhou supra note 76 at 84
[90] Vietnam Law supra note 6,at Art 8(2)(a)
[91] Id. Art.8(2)(b)
[92] Id . Art 8(2)(c)

stipulated level or value in its research and development activities in Vietnam or to supply goods or provide services in a particular location be it in Vietnam or abroad.[93] Guideline III of the Guidelines provides for the state to require the foreign investor to recruit domestic personnel before he resorts to the recruitment of foreign personnel; but obliges the state to recognize the freedom of the investor to employ managers regardless of their nationality. [94]In line with this ILV recognizes the rights of the investor to employ foreign employees to fulfill management tasks.[95] In addition the recruitment of domestic employees is provided as the right but not obligation of the investor and hence recruitment of foreign employees other than managers seems quite possible.

The ILV governs both domestic and foreign investments and its provisions are applicable to both types of investment without any distinction. There seems ,however to be a slight distinction regarding registration of investments .Domestic investors with invested capital of below fifteen billion Vietnamese Dong*are not required to go through the procedure of investment registration [96] where as foreign investors with invested capital of below three hundred billion Vietnamese Dong have to pass through the registration procedure.[97]This requirement follows the amount of the invested capital and it probably is felt that 15 billion Vietnamese Dong is to little an amount to be invested by foreigner investor and hence the addressee for this amount is naturally the domestic investor.



[93] Id ,Art. 8(2)(d)(e)(f)
[94] Shihata ,Ibrahim supra note 67 Section 5(b) of Guideline III
[95] Vietnam Law supra note 6,at Art14(3)
[96] Id Art. 45(1)
* 1 Vietnamese Dong is equivalent to 0.0000468460 EUR
[97] Id. Art. 46(1)

Unlike its Vietnamese counterpart, the Ethiopian Proclamation does not have polices on investment dealing with treatment of foreign investors. Indeed there is no provision in the Proclamation that explicitly deals with treatment of foreign investors .Hence how is a foreign investor treated under Ethiopian investment law? To find some indicatives for an answer a look at two of the provision of the Proclamation that deals with foreign investors might be of help.

The Ethiopian Investment Commission is a government body which is responsible for the administration of the investment law .Among the powers and duties of the Commission is the issuance of investment permits to investors who are required to obtain one.[98] Requirement of investment permit is provided under Art12 of the Proclamation according to which foreign investors are required to obtain investment permits while domestic investors shall have the same only in certain circumstances, namely if they are investing in areas eligible for incentives or if they are investing jointly with foreign investors [99].Thus to possess an investment permit is a rule for foreign investors while it is an exception for domestic investors

The other provision that gives a hint on how the Proclamation addresses the issue of treatment of foreign investor is the one that deals with employment of expatriates. As observed above, section 5(b) of Guideline III requires host states to recognize the freedom of the investor to employ expatriates for management post. Under the Proclamation this freedom of the investor is not automatically recognized where he, to

[98] Investment Proclamation supra note5, at Art 30(7)
[99] Id .Art 12(1)(a),(c), (d)

have expatriate managers, is required to have a prior approval from the Commission.[100]Moreover a foreign investor who employed duly qualified expatriate experts is obliged to replace them by Ethiopians after arranging the necessary training. [101] This does not seem to be in harmony with the provisions of Guideline III and may amount to performance requirement contrary to national treatment.

It appears that both the principle of national treatment and the fair and equitable treatment do not have a place in the Ethiopian Investment law. Foreign and national investors seem to be treated some what differently .At this juncture it is important to mention the fact that not long ago such different treatment was not limited in the above two areas and indeed some improvements had taken place. Until 2003 foreign investors were required to have a capital much greater than that of domestic investors to be entitled to incentives although they are in the same eligible investment activity.[102]

Regarding the fair and equitable treatment given the fact that it some times requires a higher standard than national treatment it is very doubtful for this principle to be part of Ethiopian Investment law.

Before taking an exit from this section the following remarks are in order. The Investment law of Vietnam, as the discussions reveal, lays down provisions that are compatible and in line with the requirements of Guideline III. The Ethiopian Investment



[100] Id. Art 36(3)
[101] Id. 36(2)
[102] Investment Incentives Council of Ministers Regulation, Regulation No 7/1996,Negarit Gazeta ,2nd year No 29,Art. 6

law on the other hand, does not have any thing to say about treatment that would enable one to analyze it in light of any standard. In some of its provisions however the Proclamation provides for different treatment of foreign and domestic investors. The country may have a sound policy reasons for choosing one principle over the other .Therefore it would be very appropriate and advantageous for all concerned to explicitly provide in the legislation the principle that Ethiopia applies regarding foreign investment and investors.

## *3.2 Repatriation of Funds*

Foreign investors invest on the host country for primary reason of making profit. They do this by bringing in to the host country their capital in terms of cash, equipment and other materials and also in the forms of technology. Therefore foreign investors need to be assured that they will be able to transfer profits made from the investment, monies they had brought to the host country as well as the proceeds of sale or transfer of any asset in the event of liquidation and any other money they legally acquired. This legal assurance is one of the major factors in foreign direct investment decision making process.[103]

Section 6 of Guideline III treats the issue of transfer of funds by the foreign investor and expatriate employees. Under section 6(1) (a), Guideline III requires the host state to allow regular periodic transfer of reasonable parts of salaries and wages while the persons are still in their employment or upon termination of the employment contract, by reason of



[103] Camellia Ngo, *Foreign Investment Promotion:Thailand As a Model for Economic Development in Vietnam* 16 Hastings Int'l &Comp. L. rev. 67,(1992) 68

liquidation of investment or by contractual termination, to transfer all their savings, salaries and wages.

The ILV allows a foreigner working in Vietnam for an investment project to transfer his lawful income after having discharged his financial obligations towards the state of Vietnam.[104]Such financial obligations mainly related to income tax.[105]

Likewise, in Ethiopia the Proclamation permits expatriate employees to remit their salaries and other payments arising out of the employment in convertible foreign currency in accordance with the foreign exchange regulations of the country.[106]The regulation by the National Bank of Ethiopia in this respect is to remit the funds at the prevailing rate of exchange.[107]

Host states are required to allow investors to transfer the income realized from the investment as well as the sum necessary for the payment of debts taken or the discharge of other contractual obligations incurred in relation with the investment.[108] Both the ILV and the Proclamation are in line with these provisions and allow the remittance of profits



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[104] Vietnam Law supra note 6,at Art9(2)
[105] Van Un Nguyen ,*Foreign Investment Through Business Cooperation Contracts* 28 Int'l Law . 133(1994)142
[106] Investment Proclamation supra note5, at Art 20(2)
[107] Abduljebar Hussein supra note 30 at 90
[108] Shihata ,Ibrahim supra note 67 Section 6(1)(b),(c) of Guideline III

and dividends[109]as well as sums needed for the payment of external debt including the interest on the principal debt.[110]

On liquidation or sale of the investment the investor needs to have the right to transfer the proceeds .Accordingly, the Guideline expects host states to allow the immediate repartition of the net proceeds of the liquidation or sale. [111] In exceptional cases where there is a shortage of foreign currency such transfer may be made on installment basis not exceeding five years and subject to the payment of interest.[112]

Again the laws are in compatible with the requirements of the Guideline .The ILV allows the investor to remit the monies and assets and proceeds from liquidation of the investment.[113] Likewise the Ethiopian Proclamation recognizes the rights of the foreign investor to transfer the proceeds from the sale or liquidation of an enterprise or proceeds from the transfer of share or partial ownership of an enterprise.[114]

The transfer of monies by the foreign investor as described above has to be made in currency brought by the investor if it is still convertible or by a currency specified by IMF as convertible or by any other currency acceptable by the investor. The rate of the conversion is to be determined on the market at the time on the transfer.[115]



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[109] Investment Proclamation supra note5, at Art 20(1)(a), Vietnam Law supra note 6,at Art 9 (1)(a)
[110] Investment Proclamation supra note5,at Art.20(1)(b), Vietnam Law supra note 6,at Art 9 (1)(c)
[111] Shihata ,Ibrahim supra note 67 Section 6(1)(d) of Guideline III
[112] Ibid.
[113] Vietnam Law supra note 6,at Art 9 (1)(d)
[114] Investment Proclamation supra note5,at Art.20(1)(d),(e)
[115] Shihata ,Ibrahim supra note 67 Section 6(2) of Guideline III

The ILV provides for the money to be remitted in a freely convertible currency and it allows the investor to take exchange rates published by commercial bank of his choice.[116]Similarly, the Proclamation gives the right to the foreign investor to remit the above mentioned monies out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance. [117] The prevailing rate is determined by the National Bank of Ethiopia.

Finally the Guideline provides for sanction for the delay in effecting the transfer through central bank or other authorized public body of the host state. The sanction is the payment of interest.[118] No provision to this effect is provided in both the ILV and the Proclamation. However the investor affected by such delay might be able to claim the interest as damage in the claim based on tort.

To sum up both the ILV and the Proclamation have almost the same provisions with those provided in the Guideline. They even provide for the transfer of payment related to a technology transfer agreement[119]–a provision apparently missing in the Guideline.



[116] Vietnam Law supra note 6,at Art 9 (3)
[117] Investment Proclamation supra note5,at Art.20(1)
[118] Shihata ,Ibrahim supra note 67 Section 6(3) of Guideline III
[119] Investment Proclamation supra note5, at Art 20(1)(c), Vietnam Law supra note 6,at Art 9 (1)(b)

### *3.3 Expropriation and Nationalization*

This section deals with the most usual and known forms of governmental taking of the property and property rights of foreign investors. Expropriation is defined "as a governmental taking or modification of an individual's property rights ".[120](1)

The term modification shows, among other things, the concept what is called "indirect" or "creeping" expropriation .Unlike direct expropriation the possession or ownership rights do not transfer to the state or to a private national .But acts and interference of the government rendered the ownership rights of the investor ineffective so that the effect becomes akin to expropriation.[121] Under this situation, although the ownership rights remain in the hands of the investor he is not in the position to exercise them as the result of the interference of the government

Nationalization, on the other hand is a "systematic expropriation of private property with one or more specific sectors of a nation's economy with in the frame work of socio-economic or political reforms"[122] The difference between expropriation and nationalization is thus the degree of the scale and extent rather than their legal nature.[123]Through out this thesis therefore, I used the term expropriation to describe both forms of taking.



[120] Bryan A. Garner supra note 3 at 602
[121] Seid supra note 55 at 46
[122] Kaj Hober *Investment Arbitration In Eastern Europe: Recent Cases on Expropriation* 14 AM. Rev. Int'l Arb.377(2003) 381
[123] Ibid

Expropriation is the most serious threat for a foreign investor and the legal provisions to accord protection against this event represent an essential aspect of protection of foreign direct investment. In offering such protection there are three elements which a legal instrument must address; these are 1) Purpose of expropriation 2) Non-discrimination and 3) Compensation. Below we will discuss these three issues as they are enshrined in the Guidelines as well as in the two legislations.

A) Purpose of Expropriation

Guideline IV of the Guidelines governs expropriation .Under section 1 of this Guideline, expropriation or other measure is prohibited unless it is done "in pursuance in good faith of a public purpose"[124] The requirement that expropriation is illegal unless it is done for pursuance of public purpose had been challenged by capital importing developing and LCD countries on the ground that a state has an internationally recognized sovereign right to expropriate foreign property.[125]On the other hand such requirement is criticized on the ground of purely academic in the sense that the 'public' reason for expropriation is determined by the very state that takes the taking measure and hence the requirement has no practical legal significance.[126]

None the less most international investment treaties [127]as well as the Guideline require 'public purpose' as one of the three requirements that should be met in order for the expropriation to be legal.



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[124] Shihata ,Ibrahim supra note 67 Section 1 of Guideline IV
[125] James D. Nolan supra note 74 at 671
[126] Ibid
[127] Tamara Lothian ,*Katharina Pistor,Local Institutions, Foreign Investment and Alternative Strategies of Development :Some Views from Practice* Colombia Journal of Translational Law Associations ,Inc(2003)

Vietnamese investment law guarantees that foreign investments and capital assets shall not be expropriated by administrative actions [128] However the capital and assets may be expropriated on the ground of “real necessity for the purpose of national defense and security and in the national interest”[129]While national defense and security is to some extent have specific meanings, national interest is so broad—just like ‘public purpose’- to cover many measure of the government.

Likewise, the Ethiopian investment law in its pare dealing with for investment guarantee and protection, provides for safeguarding against expropriation and nationalization. Investment may however be *expropriated* or nationalized if a “public interest “requires these measures.[130]Public interest, as mentioned above, is not in essence different from ‘public purpose’ of the Guideline.

The question that could be raised at this point is whether or not Vietnam and Ethiopian investment laws provide guarantees against indirect expropriation .One could argue that as expropriation by definition includes indirect expropriation, giving a guarantee against expropriation in general covers both forms of expropriation and hence both laws give guarantee to both situations. On the other hand, since the Guideline mentions indirect expropriation separately as ‘measures with similar effect‘ as though the two are distinct concepts it is also arguable to hold that the laws by referring one situation cover the other one.



[128] Vietnam Law supra note 6,at Art 6 (1)
[129] Id Art 6(2)
[130] Investment Proclamation supra note5,at Art.21(1)

B) Non-discrimination

The issue of non-discrimination relates to the treatment of foreign investors discussed in the last section. The other requirement to be met by the state that wishes to take the expropriation measure is that it has to show equal treatment between investors so that the measure would not be discriminatory against foreigners. Discrimination in respect of expropriation might be directing the measure towards foreigners only or towards particular foreigners. [131]

The nondiscrimination requirement is sometimes considered as an aspect of ‘public purpose” requirement. Like the state is the one that defined or determined the ‘existence of public purpose’ a similar argument is forwarded that it is the same state that has the right to decide “whether a particular economic activity should be left in a foreign hands or be reserved for the nationals of the host state”[132]

Be the case it may, non discrimination is the second requirement set by section 1 of Guideline IV and in order for the expropriation to be legally acceptable it should be taken with out discrimination on the basis of nationality.

As has been discussed in section one of this chapter equal treatment of all investors is one of the investment policies of Vietnam.[133] This policy is reflected in the treatment of



[131] Kaj Hober supra note 122 at 386
[132] James D. Nolan supra note 74 at 672
[133] Vietnam Law supra note 6,at Art 4

investment guarantees .Non discrimination between investors is the basic principle to take the measures as well as to pay compensation and damages.[134]

Also discussed in section one was the fact that no principle of treatment of foreign investor is provided in the Ethiopian investment Proclamation. Consistence with this, nothing has been mentioned about non discrimination between investors in the chapter dealing with expropriation and nationalization measures.

C) Compensation

The payment of compensation for the expropriated foreign investor's property is the third requirement for the measure to be legally acceptable .The question in this regard is related to the elements the compensation should constitute in order to be acceptable for both the investor and the host country. There were two views.

Developed countries had contended that compensation at the event of expropriation must be prompt, adequate and effective.[135] This standard, known as Hull formula requires the compensation to be made without delay- i.e. prompt; must be full- that means adequate- and must be effective which means paid in the form which is of practical use of to the investor i.e. in convertible currency.[136]



[134] Id Art 6(2),The English language translation used words nationalization ,expropriation, acquisition requisition and confiscation alternatively. I used the term expropriation as appropriate
[135] James D. Nolan supra note 74 at 673

[136] The Hull formula is named after former US Secretary of StateCordell Hull demanding the Mexican government prompt,adequate and effective payment.Rukolf Dolzer ,*New Foundations of the Law of Expropriation of Alien Property* 45 AM .J. INT'L. (1981)558

Capital importing developing and LCD countries on the other hand had criticized the prompt adequate and effective standard[137].They argued that as most of them can not afford to pay the full compensation they will be forced to deplete their resources if they are required to full payment, and doing so is against the public interest, the very reason the expropriation measure is needed.[138]They emphasized on 'appropriate' compensation which is considered as lesser than "adequate" and to lessen the standards of promptness and effectiveness they had additional provision to the effect that the compensation should take into account the expropriating nation's "relevant law and regulations and all circumstances that the state considers fit".[139]

Although Guideline IV mentions the "appropriate "compensation formula in section 1, it considered a payment as appropriate if it is adequate, effective and prompt.[140]The general standard of compensation of the Guideline therefore is the Hull formula.

Adequate compensation, according to the Guideline, is that amount based on fair market value taken "immediately before the time at which the taking occurred or the decision to take the asset become publicly known."[141] Compensation is deemed effective if it is paid in currency originally brought by the investor or in other currency specified by IMF as convertible or in any other currency for which the investor gives his consent.[142] The



[137] Elihu Lauterpacht ,*International Law and Private Foreign Investment* Trustees of Indiana University.(1997)262
[138] Id 261
[139] Kaj Hober supra note 122 at 387
[140] Shihata ,Ibrahim supra note 67 Section 2 of Guideline IV

[141] Id Section 3
[142] Id Section 7

promptness or the without delay payment standard is lessen by the Guideline by allowing the payment, in some cases, to be made by installments of not exceeding five years.[143]

The Guideline further elaborates how to reach at market value for the purpose of compensation by using different methods of valuation for different types of assets.[144]

Back to the legislations under scrutiny in the ILV it is stated that the investor shall be 'compensated or paid damages'[145] at market price at the time of the announcement of the measure of expropriation .The law also provides that the lawful interests of the investor in the payment of damages must be respected [146]and that the payment shall be made in a freely convertible currency and shall be permitted to be remitted abroad.[147]

The Vietnam law thus explicitly lay downs the adequate and effective standards of payment of compensation. Nothing is mentioned in the English translation[148] about the standard time at which the compensation must be paid.

The Ethiopian investment law explicitly recognizes the three standards of payment of compensation .The investor is granted to the payment of adequate compensation that shall correspond to the current market value.[149] Moreover the time of the payment is provided in a more prompt manner in the sense that the state is required to pay the



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[143] Id. Section 8
[144] Id Section 6
[145] Vietnam Law supra note 6,at Art 6(2)
[146] Ibid.
[147] Id. Art. 6(3)
[148] See the comment on the English translation at supra note 134
[149] Investment Proclamation supra note5,at Art.21(2)

compensation in advance of the expropriation measure.[150]The payment however does not seem to be made directly in a convertible currency; instead the investor is allowed to remit the compensation paid to him out of Ethiopia in a convertible foreign currency. Aside the wording the effect is all the same and hence the [151]law has provided for effective payment of compensation.

To sum up except the omission about the non-discrimination requirement on the part of the Proclamation both Vietnam and Ethiopia laws are in conformity with Guideline IV in the protection of investors against expropriation. So far so good, but what guarantee do investors have whether these laws are respected? What is the assurance whether the states will not change their policies? After all change of government and policy may bring in mass nationalization as it did in nationalization of 105[152] firms in Ethiopia in the 1970s.

The above questions warrant a few words about the Multilateral Investment Guarantee Agency (MIGA). MIGA is established by the World Bank to provide insurance cover for investors against non-commercial risks. The risks covered include both direct and creeping expropriation.[153] Investors who are uncertain about the legal and political atmosphere of the host state can have insurance for their investment.



[150] Ibid.
[151] Id Art.21(3)
[152] Seid supra note 55 at 16
[153] Shihata ,Ibrahim F.I.,MIGA and Foreign Investment :Origins ,Operations, Policies and Basic Documents of the Multilateral Investment guarantee Agency, Dordrecht :M.Nighoff 1988,124

MIGA gives insurance cover for investments on the basis of eligibility. This means that apart to the requirement that risks of the investment should be eligible[154]the investor and the host state must satisfy the eligibility requirement to have the investment covered by insurance. The guarantee is given only to investments made in a developing member country[155]. Likewise the investor must be a national of a member country to be eligible for the protection[156].

Both Vietnam and Ethiopia are parties to the Convention Establishing the Multilateral Investment Guarantee Agency .Hence they are eligible host countries for the guarantee. In this respect it could be said that other than the legal protection, both countries have such additional protection in place at least with respect to eligible investor.

### 3.4 Settlement of Disputes

Disputes between foreign investors and host a state may arise for a number of reasons. There might be a disagreement over a project performed by the investor, the host state may treat the investor contrary to what its laws have promised, an investor may be prohibited from remitting his funds in accordance with the laws of the host state and most importantly the host state may take measures of expropriation affecting the property rights of the investor. All these need a dispute resolving mechanism acceptable by both parties particularly by the foreign investor .Effective and impartial dispute settlement is



[154] Convention Establishing The Multilateral Investment Guarantee Agency(1985) Art.43
[155] Id. Art. 14
[156] Id. Art. 13

therefore one of the crucial element sought by foreign investors in the legislation of the host state.[157]

Guideline V of the Guidelines addresses the issue of settlement of dispute between the foreign investor and the host state .The normal way of solving the differences between the two parties is through negotiation.[158]Failing to reach agreement the dispute will going to be settled by the national courts of the host state [159]

The parties might also agree to settle their difference through alternative mechanism which includes conciliation and independent arbitration.[160]The arbitration can be ad hoc or institutional which must be signed by the host state and the investor or could be made between the host state and the home state of the investor.[161]If the parties have agreed on independent arbitration the Guideline encourages them to use arbitration under the Convention establishing the International Center for Settlement of Investment Dispute(ICSID).[162]If the host state or the home state is not a party to ICSID the Guideline again encourages the use of the 'ICSID Additional Facility'.

Courts of the host state are not the forum preferred by foreign investors over international arbitration. Courts of the host state cause imbalance against the foreign investor .The foreigner investor is not familiar with the legal system and language of the host state



[157] James Taylor,Jr, Vietnam: *The Current Legal Environment For U.S Investors* 25 Law & Pol'y Bus.469 (1994) 478
[158] Shihata ,Ibrahim supra note 67 Section 1of Guideline V
[159] Ibid
[160] Id. Section 2 of Guideline V
[161] Ibid
[162] Id.Section 3 of Guideline V

.Access for lawyers and legal advisors is not easy for a foreigner. Above all there is always the question of bias against the foreigner.[163]Because of all these it seems unrealistic to expect a foreign investor to consent to the jurisdiction of the courts of a nation which usually caused the grievance.[164]Thus the trend is that foreign investors have a strong preference for international arbitration and indeed many bilateral investment treaties refer to arbitration under ICSID. [165]

The International Center for the Settlement of Investment Dispute was established to settle disputes between states and national of other states[166]with the aim of protection of private investors as well as to promote international investment through establishment of independent institution.[167] It is established by the Convention on the Settlement of Investment Disputes between States and National of Other States. As on December 15, 2006, 155 states signed the Convention out of which 143 have ratified and deposited the ratification.[168]Unfortunately both Vietnam and Ethiopia have not made to the list of member states.

In order for the ICSID to have jurisdiction the parties must give their consent to submit to the Center, their dispute must arise directly out of investment and one of them must be a



[163] Tibor Varady,John J. BarceloIII&Arthur T. von Mehren ,International Commercial Arbitration : A Transnational Perspective( 3rd Ed),American Casebook Series 1999,265
[164] Early Synder, *Foreign Investment Protection: The Dispute Solving Aspect* ,Columbia Journal of Transnational Law Vol. 3 No2(1965)131
[165] James D. Nolan supra note 74 at 675
[166] Moshe Hirsch ,The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes,Graham &Trotman /Martinus Nijhoff,1993,18
[167] Id. 19-20
[168] Available at: http://www.worldbank.org/icsid/constate/c-states-en.htm

member state and the other an individual national of another member state.[169] There is Additional Facility by the Center for investment disputes between parties one of whom is not a member state or a national of a member state or when their dispute does not directly arise from an investment.[170]

Among the advantages of the ICSID over other arbitration institutions is its specialization in that it only addresses disputes arising from investment. [171]The special enforcement mechanism for the awards of the Center is the other merit of the institution. An award of the Center is not subject to appeal or setting aside or any other remedy in courts where the award is sought to be enforced.[172]To get these and many of the other advantages that would be obtained from the Center, Guideline V encourages parties to employ ICSID.

Referring to the legislations, article 12 of VIL provides for dispute resolution mechanism. The provisions under this article govern disputes involving domestic investors[173], disputes involving foreign investors[174] and disputes between a foreign investor and the state or a state administrative body of Vietnam.[175]Any dispute between the foreign investor and the state must be resolved by a Vietnamese court or domestic arbitrators except where provided otherwise in a contract between the foreign investor and the Vietnamese state body or in an international treaty to which Vietnam is a party.[176]This



[169] Convention on the Settlement of Investment Disputes between States and National of Other States.(1966), Art 25
[170] Moshe Hirsch supra note 166 at 22
[171] Id xi
[172] Id. 23
[173] Vietnam Law supra note 6,at Art 12(2)
[174] Id. Art. 12(3)
[175] Id Art.12(4)
[176] Ibid

means that the contract or the treaty may provide for submitting the investment dispute before international arbitration forum which could be ad hoc or institutional.

In the absence of a contract or international treaty that opts for alternative means, disputes between the foreign investor and the state of Vietnam is to be submitted before national courts or local arbitration. As observed above foreign investors have good reasons not to rely on national courts of a state with which they have dispute. In the 1990s it was even contended that in Vietnam there were unfair legal proceedings and when ever "a non-Vietnamese company had a legal dispute with a Vietnamese enterprise the court would almost always decide in the Vietnamese entity's favor".[177]Even in the absence of such allegations and no matter how impartial a court could proved it to be, there is always doubt. Therefore the usual option of an investor is arbitration.

Regarding domestic arbitration an arbitration body –the International Arbitration Center (IAC)-was established to settle disputes arising out of, among others, international trade. The arbitrators are nominated by the Vietnam Chamber of Commerce and Industry and may include foreign arbitration experts.[178] (23)This forum, I think, represents a more preferable alternative for foreign investors.

With regard to the use of ICSID as noted above Vietnam is not a party to the ICSID Convention and can not be fully benefited from the advantages of the Center. If the



[177] Justin M. Pearson, *The U.S /Vietnam Bilateral Trade Agreement : Another Step In The Right Direction* 10 U.Miami Bus. L. Rev.431(2002) 449
[178] Van Un Nguyen, supra note 105 at140

foreign investor is a national of a member state Vietnam can of course have settle its difference with such investor in the ICSID through the Additional Facility.

We get a different situation in Ethiopia. The law preceding the present one, the Investment Proclamation No 37/1996, had provisions for investment disputes settlement. In similar fashion with Vietnamese law it had provided for the amicable settlement of disputes and upon failure to reach agreement, for the submission of the dispute before courts of law or before international arbitration in accordance with a bilateral or multilateral agreement. In the present Proclamation these provisions are completely removed and there is no provision on the settlement of investment disputes. This particular legislative measure seems to be a reverse way from protection and hence attracting of foreign direct investment.

The available path for an investor who has no agreement for international arbitration is therefore, limited to national courts or domestic arbitration .Beside the above general observations on national courts of the host state, courts in Ethiopia are weak in terms of both institution and human resources. The number of judges is incompatible with the case load and as a result the courts are highly congested. It is not unusual to see a case adjourned for a period of 18 months and above. [179]Courts are not therefore the forum that would be chosen by a foreign investor with a lot at stake.



[179] Interviews with Former judge Ato Yared Legese and former Executive Director ,Ethiopian Bar Association ,Ato Somuel Hailegiorigis,March ,2007 Budapest ,Hungary

The remaining dispute resolution mechanism for the investor could be domestic arbitration. Presently the Addis Ababa Chamber of Commerce runs an arbitration center and there is also the possibility of settling the dispute by ad hoc arbitration. Arbitration certainly could have been a good alternative for resolving investment disputes. However there are no rules of arbitral procedures that would accommodate international disputes. The rules for arbitral submission found in the Civil Code [180]and Civil Procedure Code[181] are designed for domestic purposes and hence are inadequate for this purpose. The fact that the country does not have codified private international law has been the source of problems to courts of law let alone private arbitrators. Moreover the arbitration system itself is under developed that requires a lot of work and a long way to reach at the international standard acceptable by foreign investors.[182]



[180] Civil Code of Ethiopia ,Proc. 165/1960, Negarit Gazeta(extra ordinary),19th year,No.2,Arts 3325-3346
[181] Civil Procedure Code Ethiopia ,Decree 52/1965, Negarit Gazeta(extra ordinary),24th year,No.3,Arts315-319

[182] Interviews with Ato Yared supra note 179

# CONCLUSION

Despite its associated costs FDI has various advantages needed by developing and LCD countries. To have these advantages countries attempt to create conditions that will attract foreign investors. The provision of legal protection to foreign investment and investors is one of such mechanisms. The thesis analyzed the legal protection of Vietnamese and Ethiopian investment laws in four areas against the international standard as lay down by the World Bank Guidelines.

Accordingly Vietnamese law is in compatible with the rules of the Guidelines in almost every aspect .The law addresses the subject of treatment of investors in a comprehensive manner and declares ‘equality of investors before the law’ as one element of investment policies of Vietnam. Except with some aspects of dispute settlement concerning international arbitration and ICSID the law provides for adequate protection in all of the areas examine in this thesis. Hence one could say that protection of FDI in Vietnamese law is given appropriate weight and that the law meets the international standard that will be sought by foreign investors.

Unfortunately, this not the case regarding the Ethiopian investment law. The Proclamation has no provisions concerning treatment of foreign investors which, need less to say, is one of the essential factors in foreign direct investment decision making process. Not only the treatment aspect of protection of FDI that the Proclamation fails to address ,it also leaves the issue of dispute resolution untouched .Again this aspect of FDI is equally important for the investor to make his decision .With out these major areas being addressed, therefore the Ethiopian investment law in protection of FDI is incomplete.

For a country that aims to widen the scope of participation of foreign investment, the Proclamation should have done better than its present form. If Ethiopia needs the inflow of FDI it should draw lessons from Vietnam law in the areas examined here-a lesson that will become handy in Ethiopia's accession process to WTO.

The findings of the thesis indeed are not conclusive .The thesis is not with out limitations. It did not addressed all aspects of protection of FDI, neither did it examine all the provisions of the Guidelines. To do this requires a wider scope project than a short thesis. More over shortage of research materials had its own impact on the depth of the work. Still it is my belief that this work would contribute something towards future studies and can serve as input for legislation revision in Ethiopia.

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