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## Review Article

# Legal Protections of Investment from Non-Commercial Risks in Ethiopia: A Critical Appraisal of Responses to Post-2015 Civil Disturbances

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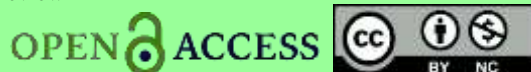
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### Abstract

The very purpose of this study is to examine the legal protections for investment in Ethiopia particularly in times of civil disturbances and proposing better protection mechanisms and remedy schemes for investments in these times. By employing a qualitative legal research approach the study has investigated the protections provided for investments in civil disturbances and their adequacy under the domestic legislations of Ethiopia and the BITs to which a country is a party. To assess their practical applications and adequacy the study has also critically examined the impacts of the civil disturbances, begun in late 2015, on the investments; and the legal remedies provided by the Government to redress the economic damage. It is found that the Ethiopian domestic investment legislations failed to integrate the issue of investment protections during civil disturbances, while the BITs to which Ethiopia is a party provides a detail of rules for the protection of investments during civil disturbances and remedies after destructions. During the civil disturbances begun on the late 2015 the government has provided a police protection through its security forces for investments and rescued many investments from destructions. However, due to its inadequacy many investments have been destructed and multi-faced crisis has occurred. After the destructions, the government has provided different kinds of remedies for investments, though the remedies lacked a legal basis. Based on the findings, the research presents important measures need to be taken for formation of a strong system of investment protections during civil disturbances.

**Keywords:** Legal Protection, Investment, Non-Commercial Risk, and Civil Disturbance.

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### Introduction

A business environment with better opportunities like natural resources, market access, cheap manpower and low production cost joined with many other reasons always

attract and motivate investors. Due to the existence of these investment opportunities to maximize profitability, developing economies have been seen as prime destinations

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for investment and mainly for FDI (Awan, 2015). Furthermore, developing countries make every effort to attract foreign investment mainly from developed economies by providing varieties of incentives. Fiscal incentives, financial incentives, and provision of land with lower rents/sometimes for free are the main tools developing countries are employing to win foreign capitals (Awan, 2015).

Ethiopia is among the developing countries with bundles of investment opportunities like abundant natural resources, cheap labor forces, and access to wider domestic and international markets (U.S. Department of State, 2015). In addition to these attractive investment opportunities, the Ethiopian investment law provides varieties of investment incentives like tax exemptions, duty free import for equipment and supplies, allocation of land at modest leasehold rates, bank loan facilities for a significant amount of the investment cost (which may reach 70% of the investment cost) and others (Nour, 2012). Job creation, foreign exchange from exports, technological spillovers, enhanced supply of goods and services, and other benefits are the assumptions underlying these incentives (Nour, 2012).

However, the existence of attractive investment opportunities and incentives does not suffice for an investor to invest in a particular country. Apart from maximum profit-making opportunities, the protection of FDI assets is understandably a prime concern of foreign investors whilst making investment in an alien economy and a vigilant investor would always take into consideration the level of protection afforded to him and his assets/investment as well as deterring factors in the host State (Nour, 2012). In order to attract investments countries should establish a strong system of investment protection as no investor is positive to take risks by investing in countries with weak investment protection. Unlike the case for ordinary commercial risks, investors are perfect risk averse for non-commercial risks and it is almost impossible for countries to obtain the advantages of investments in the existence of situations that could expose an investor for risks other than ordinary commercial risks.

Throughout history, to invest huge capital, technology and other resources, investors expect robust legal protection towards risks related with expropriation, nationalization, civil wars, regime changes, ideological hostilities, and civil disturbances (Voss, 1982). This is mainly because risks in connection with the political situations are beyond the control of investors and could not be mitigated by their private capacities like normal commercial risks. The existence of legal protection of investments against these risks, on the other hand, allow investment decision made exclusively on the basis of economic considerations -

availability of raw materials, production cost structure, proximity to sales markets etc. (Voss, 1982).

Recently, with the declining effects of nationalization, civil disturbances have become among the main sources of risks for investments that need a strong government intervention in the world. In a study conducted under the MIGA, Political violence mainly including civil disturbances has been identified as a second main concern and source of threat for investors next to breach of contracts by host states (World Bank Group, 2009). Civil disturbances arise from acts of civil disobedience and most often they arise from political grievances, urban economic conflicts and community unrest, terrorist acts, or foreign influences (Headquarters Department of the Army, 1985). Civil disturbances mostly caused by political grievances and start with simple protests. However, there are scenarios whereby simple protests could be changed in to acts of violence involving immediate danger, damage or injury to others or their property. Even though civil disturbances are not accompanied by armed means and methods of violence, their impact on the peace and security situations of a country is too high. Investments might be also targeted and destructed during civil disturbances as happened in Ethiopia. In addition to the direct damage to the economic interests of the investor, the destruction of investments erodes the good will of a country as a destination of investment and would frustrate existing and potential investors. Thus, in the age of globalization where we witness competition for capital, technology and other virtues of investment, the domestic legal system of investment seeking states should devise and assure protections for investment in civil disturbances. Similarly, in Ethiopia, as a country with a continuing plan of attracting investment, robust system of legal protection of investments in cases of civil disturbances is vital to maintain the confidence of investors and to attract the new ones.

### **Understanding Non-Commercial Risks in Investment**

Risk is typically defined as the probability that an event will happen, where the event will have adverse consequences (costs) for the relevant party (Yackee, 2014). Broadly Risks to investment could be categorized as commercial and non-commercial. Non-commercial risk to investment which is commonly referred as political risk comprises political actions which interrupt sales or cause harm to commercial property or personnel which risks include riots, operational restrictions impeding the ability to conduct business and governmental takeover of property (Chidede, 2015). Though all investors are confronted with a certain non-financial risk in their overseas investment, the magnitude, nature and direction of these non-financial risks are uniquely dependent on the nature and size of the investment



and therefore on the objective followed by a given investor (Wafo, 1998).

The well-known international investment law scholar Sornarajah has provided the following list of non-commercial risks to investment (Sornarajah, 2010): A political hostility to foreign investment, which is generated by ideological inclinations against the influx of foreign investment; a nationalistic concern over the domination of the economy by foreign elements which may result in xenophobic hysteria directed at foreign investors; a change that take place globally within an industry to the disadvantage of foreign investors, as they would be required to renegotiate the bargain originally made in light of the changes; where an incoming government seeks to rewrite contracts made by the previous regime with an investor, breach of a contract by a host state when the state finds the fulfillment of the contract onerous in light of changed circumstances; a deterioration in the general law and order situation in the country which makes the foreign investment a target for attack by groups of dissidents or marauders; where a state feels it necessary to intervene in a foreign investment in order to exercise a regulatory power such as the protection of investment or some economic interest; and where there is internal corruption or where a corrupt government has been replaced by a new government.

Instability in the law-and-order situation in a state, as a risk to investment, poses a threat to foreign investment; and where the political situation foments animosity against foreigners and targets their property, difficulties will arise (Sornarajah, 2010). These usually arise when the government is unable to contain marauding mobs and gangs of criminals or when the government itself foments uprisings against foreigners (Sornarajah, 2010). Political instability has become a serious and threatening problem especially in developing and underdeveloped countries (Memon *et al*, 2015). Foreign investors who expand into a foreign market, thus, have to worry about political risk of the host economy, since political volatility and violence may damage the investment, diminish the efficiency of overall market and, thus, hurt the profitability or survival of their investment (Qian, 2016).

### **The Legal Protections of Investment and State Responsibilities in Ethiopia**

Apart from the protections of investments like against arbitrary measures of expropriation/ nationalization and measures restricting repatriations, the Ethiopian legal system provides mechanisms whereby investments will be protected from arbitrary interference from third parties during civil disturbances though not adequate and the domestic investment legislations failed to address the issue. Therefore, in this section analysis will be made on the legal protections of investments in civil disturbances under the other laws of the country: FDRE Constitution of 1995, the

selected BITs to which Ethiopia is a party, the 2004 FDRE Criminal Code, and tax laws of the country.

The FDRE Constitution recognizes private property and its content includes the right to acquire, use and dispose by sale or bequest or transfer it otherwise subject to public interest and the rights of other persons (FDRE Constitution, 1995). It has also defined “private property” as any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common (FDRE Constitution, 1995). However, the Constitution excluded land from the ambit of private ownership right. Land as well as of all natural resources are provided as a common property of the Nations, Nationalities and Peoples of Ethiopia and are not subject to sale or to other means of exchange, (FDRE Constitution, 1995) though Ethiopian peasants and pastoralists have the right to obtain land without payment with a guarantee against illegal eviction and displacement (FDRE Constitution, 1995).

The Constitution also entrusted the government with the power to provide private investors with use right over land on the basis of payment arrangements, without prejudice to the right of Ethiopian Nations, Nationalities and Peoples to the ownership of land (FDRE Constitution, 1995). On obtaining this use right, investors will have full right to the immovable property they build and to the permanent improvements they bring about on the land by their labor or capital including the right to alienate, bequeath, and, where the right of use expires, to remove their property, transfer their title, or claim compensation for it (FDRE Constitution, 1995).

This constitutional provision grants the right to private property for Ethiopian citizens only. The drafters have intentionally opted to insert the word “*Ethiopian*” instead of “*any person*” in this provision. The issue of who can own private property (any person or only Ethiopian citizen) was a subject of debate during the process of drafting the Constitution (Minute of the FDRE Constitution, 1996). Finally, the view that the right of private property ownership should be granted only for Ethiopian citizens has prevailed. The winning argument was, “under the Investment Proclamation, there are investment areas which are prohibited for foreign investors, for instance, small hotel businesses. And it would be a paradox to have such kind of restrictions on foreigners if the term “any person” is inserted into the Constitution. Beyond this, the Constitution is expected to grant this right for citizens rather than non-citizens and it is proper for the case of foreigners to be determined by specific law” (Minute of the FDRE Constitution, 1996). If it is concluded that the Constitution grants a property right for citizens only, it would lessen



down the promotion and protection of investments for foreigners. However, Art. 40(6) of the Constitution do not specifically address investors of an Ethiopian nationality and hence it could be argued that the Constitution recognizes the possibility whereby foreign investors can obtain land use right on the basis of payment arrangements even though it is conditional and unguaranteed. In this regard, Art.24 of the Investment Proc. No. 769/2012 is a reflection of this constitutional provision. This provision of the Proclamation clearly reversed the provisions (Arts.390-393) of the Ethiopian Civil Code which denies foreigners the right to own immovable properties, and grants foreign investors a right to own immovable property including land. Once they acquire land use right, foreign investors should be provided with the rights provided under Art.40 (7) of the Constitution.

Apart from giving recognition for private property right, this particular constitutional provision provides a legal protection against an arbitrary interference in exercising this right. It provides conditions up on which a private property could be expropriated by the government. First, the expropriation should be made for the public purpose; second, there should be compensation; and third, the compensation should be paid in advance (FDRE Constitution, 1995). Unless these conditions are fulfilled, the exercise of the legally recognized and protected private property right could not be interfered through expropriation. However, this constitutional provision addressed only the issue of expropriation, which is one of the risks in the exercise of private property right including investment activities. Particularly it doesn't provide a protection for investments against the acts of third parties, including in times of civil disturbances. Thus, a reference should be made to the other constitutional provisions having a wider application than Art.40 and Art. 13(1) is a pertinent provision in this regard.

Art. 13(1) of the FDRE Constitution imposes the responsibility and duty on all federal and state legislative, executive and judicial organs at all levels to respect and enforce the provisions under chapter three of the Constitution, where Art. 40 is a part. The whole organs of government from the bottom to the top should refrain from infringing the fundamental rights and freedoms provided in this chapter. The government is also under obligation for the proper enforcement of these rights and should protect these rights from being violated by the acts of others. Since the right to property, provided under Art.40, is among the rights enshrined under chapter three of the Constitution, all federal and regional government organs have the responsibility and duty to protect this right from the acts of third parties. Accordingly, all the executive, legislative, and judicial organs of the government at all layers of the government have a constitutional responsibility and duty to provide protection for investments in civil disturbances. Naturally,

the legislative organ is required mainly to provide adequate legal frameworks for the protection of investments during civil disturbances and to follow up the proper implementation of these laws. Whereas, the executive organs have to effectively implement the legal stipulations aimed at protecting investments and their power includes the traditional role of police protection. The role of the judiciary in protecting investments in civil disturbances mainly comes in to effect in the way of providing legal remedies after the occurrence of something wrong. In general, investments in civil disturbances have a constitutional protection even though the FDRE Constitution of 1995, which is general in nature, does not clearly say so.

Ethiopia has signed BITs, which are the integral parts of the laws of the country (FDRE Constitution, 1995), with more than 30 countries of the world aimed at promoting and protecting investments to be flowed from and to the contracting states (Ethiopian investment commission, 2009). BITs provide standards of treatment for the reciprocal protection of investments within the territories of signatory states. Let us have some discussions on the standards of treatment provided under the BITs signed by Ethiopia which are more pertinent for the protection of investments during civil disturbances.

The BITs signed by Ethiopia contain provisions granting Full Protection and Security (FPS) for investments. Though its content has not been authoritatively determined and remains contested, FPS requires positive action by the host state in establishing and enforcing a legal framework for the protection of foreign investment and in protecting the physical integrity and safety of foreign investments against interference by private actors, such as demonstrating or rioting individuals (Schill, 2009). Apart from providing police protection against the acts of third parties, FPS is also violated if state conduct actually infringes upon the physical safety of foreign investments outside the scope of law enforcement which includes destruction of foreign-owned property by the host State's armed forces (Schill, 2009). Therefore, FPS standard guarantees investors from the acts of third parties as well as government agents.

FPS standard is the most related and relevant standard for the protection of investments from attacks that may stem from civil disturbances. Normally the standard of FPS relates to the physical protection of the investor and its investments and thus in a number of cases tribunals seem to have assumed that this standard applies exclusively or preponderantly to physical security and to the host state's duty to protect the investor against violence directed at persons and property stemming from state organs or private parties (Christoph, 2006). In *Rumeli v Kazakhstan* case the Tribunal stated that the FPS standard obliges the state to provide a certain level of protection to foreign investment



from physical damage (Rumeli v Kazakhstan, 2008). In the *Saluka v Czech Republic* case the Tribunal said the FPS standard applies essentially when the foreign investment has been affected by civil strife and physical violence and it has also noted that the standard does not mean to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force (Saluka Investments BV v The Czech Republic, 2006). The Tribunal for the case between *Eastern Sugar v Czech Republic* stated that the criterion of the standard concerns the obligation of the host state to protect the investor from third parties during mobs, insurgents, rented thugs and thus where a host state fails to FPS, it fails to act to prevent the actions of third parties (Eastern Sugar v Czech Rep, 2007).

Third parties usually interfere with the investments through rioting or demonstrations and the host states held liable up on the failure to adequately safeguard the investor or investment in such situations (Riggs, 2014). For instance, in the *Wena Hotels v Egypt* case, employees of a state entity (EHC) with whom the investor had contractual relations seized control of two hotels that were operated by an investor and protected by an FPS clause in its agreement for the promotion and protection of investments that stated the investments 'shall enjoy full protection and security' (Wena Hotels Ltd v Arab Rep of Egypt, 200). Government officials did not participate in the forcible seizure but the police and other authorities took no effective measures to prevent or redress the seizure though Egypt was aware of the intentions to seize the hotels. In addition to this, the police and the competent ministry took no immediate action to restore the hotels to the investor and no substantial sanctions had ever been imposed on the perpetrators. In its own words, the Tribunal stated that:

*Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment 'fair and equitable treatment' and 'full protection and security'.* Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions (Wena Hotels Ltd v Arab Rep of Egypt, 200).

In arbitration between *Pantechniki v Albania*, the claimant alleged that the respondent was under an obligation not only to actively protect the claimant's investment against riots

and looting but also to take precautionary measures to prevent these events from occurring (Pantechniki S.A. Contractors & Eng'rs v Rep. of Albania, 2009). The Tribunal held that the duty of the state under the FPS provision is relative, based upon its available resources, and it has stated that "A failure of protection and security is . . . likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile" (Pantechniki S.A. Contractors & Eng'rs v Rep. of Albania, 2009). Accordingly, the Tribunal concluded that the Albanian authorities were powerless in the face of social unrest of the magnitude in the case before it and the claimant had not shown that Albania had failed to comply with its duty to extend FPS (Pantechniki S.A. Contractors & Eng'rs v Rep. of Albania, 2009).

Generally, the above discussed cases concerned with the adverse actions not by state organs but by private persons or groups and this indicates that a forcible seizure of or interference with the investment, even by a private party, may find its sanction in the standard of protection and security against a host state (Christoph, 2006). In these situations, the Tribunals found that the host State's only duty was to exercise due diligence in protecting the investors from forcible interference (Christoph, 2006).

The standard of liability for a state failed to comply with FPS obligation is due diligence or reasonable degree of vigilance rather than an absolute liability (Christoph, 2006). The standard provides a general obligation for the host state to exercise due diligence in the protection of foreign investment as opposed to creating strict liability which would render a host state liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State (Stevens, 2008). This assertion is also supported by arbitral awards and the following are some of the instances.

In the *ELSI* case, a Chamber of the ICJ stated that the reference to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed (United States of America v Italy, 1989). In the *AAPL v Sri Lanka* case the claimant had argued that the provision granting full protection and security created a strict or absolute liability, while the Tribunal declares unfounded the claimant's main plea aiming to consider the government of Sri Lanka assuming strict liability under the BIT, without any need to prove that the damages suffered were attributable to the state or its agents, and to establish the State's responsibility for not acting with 'due diligence' (AAPL v Sri Lanka, 2018). The Tribunal for the case between *Tecmed v Mexico* also stated that "the arbitral Tribunal agrees with the respondent and with the case law quoted by it, in that the guarantee of FPS is not absolute and



does not impose strict liability upon the state that grants it” (Técnicas Medioambientales Tecmed S.A. v The United Mexican States, 2003).

Another debatable issue with regard to liability of states is whether the level of due diligence should depend on the host State’s individual circumstances. It has been argued that the availability of resources may have a decisive impact on a state’s ability to provide protection and security (Paradell, 2009). In *Pantechniki v Albania* case the Tribunal applied a modified/relative objective standard of due diligence in a situation of public violence and it found that liability in a situation involving civil strife depended on the host state’s resources and this indicated inability as a crucially different from a refusal to intervene (Yackee, 2014). Since the Tribunal takes in to account host State’s limited resources of financial or otherwise while deciding whether it has met its duty under an FPS clause; and the decision is a small triumph for developing nations that rely on foreign investment while It is disingenuous for a foreign investor to expect the level of security and protection that can be afforded by a developed state when he knows full well that the host state in which he is investing does not have the means to provide the same (Yackee, 2014).

The BITs of Ethiopia do not only provide rights of investors and obligations of the contracting states for the protection of investments in civil disturbances, rather, they also contain provisions for compensation in the event of damage to foreign investments as the result of these political situations. Almost all of the BITs make the compensations arise out of these political situations subject to National Treatment (NT) and Most Favored Nation (MFN) treatment in that the compensations to be provided for an investor should not be less favorable than what is provided for the host state’s own investors as well as other foreign investors. Even the wordings of the articles provided for compensation under the Ethiopian BITs are almost the same and this is reflected in the following stipulation.

*An investor of a Contracting Party who has suffered a loss relating to his investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favorable than that which it accords to its own investors or to investors of any third state, whichever is more favorable to the investor (Ethiopian BIT with Austria, 2005).*

As it can be understood from this stipulation the NT and MFN standards of treatment are attached to the

compensation to be provided for investments suffered losses due to civil disturbances. However, there are also BITs that provides for compensation with MFN standard but with the exclusion of NT, a state would not pay compensation for a foreign investor unless it has paid for foreign investors from third states (Ethiopian BIT with china, 200). There are also BITs that provide conditions to be satisfied by a host state while compensating investors suffered from civil disturbances. For example, the Ethiopian BIT signed with Egypt under its Art.4 provides that any payment made as a compensation for the losses due to the political situations covered by this provision shall be prompt, adequate, effective and freely transferable.

In addition to compensations, the BITs of Ethiopia contain provisions for the settlement of disputes between an investor and host state, and state to state disputes. These provisions have relevancies for investor who have suffered losses due to civil disturbances and have disagreements with the host state as to the protections during and remedies after the occurrence of events including the issues of compensation.

The dispute settlement clauses of Ethiopian BITs encourage and give priority for amicable settlement of investment disputes. Recourse to informal methods is believed to lead the investor and host state towards an amicable, negotiated settlement of their differences (UNCTAD, 2004). The Ethiopian BITs provide dispute settlement clauses having similar meanings and using almost the same wordings. Commonly the BITs provide that “Disputes which might arise between one of the Contracting Parties and an investor ..... shall whenever possible, be settled amicably between the parties concerned.”(Ethiopian BIT with the Sweden, 2004). These BITs also provide mechanisms for the settlement of disputes at the choice of the investor, if amicable disposition of the case is impossible within six months from the date either Party to the dispute requested amicable settlement: through the competent court or arbitral tribunal of the party in the territory of which the investment has been made; through ICSID; and through an ad hoc arbitral tribunal (Ethiopian BIT with Turkey, 2000). These various ways of investment dispute settlement are available for foreign investors who have a dispute with the government of Ethiopia including those who have a claim against the government due to the adverse effects of civil disturbances.

Apart from the Constitution and BITs, the Criminal Code of Ethiopia provides stipulations for the protection of investments. As discussed above private property is recognized and protected by the FDRE Constitution and the investment laws of the country. The Criminal Code reaffirms this fundamental protection by stating that State, public and private properties are protected under this Code (Criminal Code of Ethiopia, 2004). Accordingly, it provides



that any interference with property and economic rights or rights capable of being calculated in money forming a part of the property of another shall be punished in accordance with the provisions of the code (Criminal Code of Ethiopia, 2004). Art.448 of the code is among the provisions provided for the punishment of acts violating property rights and it deals about rioting. It stipulates that whoever, of free will, takes part in an unlawful assembly in the course of which violence is done collectively to person or property is punishable with simple imprisonment not exceeding one month, or fine (Criminal Code of Ethiopia, 2004). The organizers, instigators or ringleaders are punishable with fine and with simple imprisonment for not less than six months, or, in grave cases, with rigorous imprisonment not exceeding five years and fine (Criminal Code of Ethiopia, 2004). All persons who have individually committed acts of violence against persons or property are also punishable with rigorous imprisonment not exceeding three years, where their act does not constitute a crime subject to more severe punishment under any other provision of this Code (Criminal Code of Ethiopia, 2004). Thus, by criminalizing and punishing such acts, the Ethiopian law provides a criminal law protection for investments in civil disturbances whereby perpetrators will be subjected to criminal punishments. This criminal law implies an obligation on the Ethiopian government to investigate and prosecute crimes against investments during civil disturbances.

The Ethiopian tax Administration proclamations and regulations also provide for tax relief in serious hardship situations faced by tax payers. The Federal tax administration proclamation provides relief in cases of serious hardship where the payment of the full amount of tax owing by a taxpayer will cause serious hardship to the taxpayer due to natural cause, or supervening calamity or disaster, or in cases of personal hardship not attributable to the negligence or any failure on the part of the taxpayer (Tax Administration Proclamation, 2016). This provision covers the hardship situations that may happen to tax payers due to civil disturbances and therefore tax payers whose investments are destructed during civil disturbances can claim this remedy. Regional tax administration proclamations also contain similar provisions (The ANRS Tax Administration Proclamation, 2017). While the federal tax administration regulation laid down 10,000,000 (Ten Million) birr as the limit of the relief to be granted to a tax payer due to hardship situations (Federal Tax Administration Regulation, 2017), the Amhara regional tax administration regulation provides only 100,000 (One Hundred thousand) birr (The ANRS Tax Administration Regulation, 2018). However, Art 51(2) of Proc.No.983/2016 gives discretion to the Ministry of Finance and Economic Cooperation to release the taxpayer wholly or in part from payment of the tax due and any late payment interest payable in respect of the tax due. This

power is also entrusted with the ANRS Finance and Economic Cooperation Bureau under Art.51 (2) of Reg. No.162/2018. Even though it is a loss of revenue for the country, relief from income tax obligations is important for investors since they are in hardship situations due to the impacts of the events beyond their control on their incomes.

### **The Adequacy of Protections provided By the Ethiopian Government during the Civil Disturbances begun on the Late 2015**

As it is discussed above, under national and international law, the Ethiopian government has the duty to protect investments operating within the territory of the country from destructions during civil disturbances. Accordingly, the government has attempted to provide protections during the civil disturbances begun in late 2015 through different state machineries, mainly through the police and security sections.

The destructions of large number of investments at the beginning of disturbances were unexpected for the investors, the government and the entire society; and hence, it did not give a chance for the security forces to take precautionary measures (Abebe, 2019). Due to this, many investments were easily destructed by demonstrators without any interference from the security forces of the country, for instance Jovani Farms around Bahir Dar City (Asemare, 2019). Even though it was known that some investments have threats of destruction at the beginning of civil disturbances, the main focus of the government was dissolving demonstrations on the streets of biggest cities of the country; and thus, a significant number of security forces have been deployed on the streets rather than in protecting investments (Asemare, 2019). Therefore, adequate precautionary measures were not taken to protect investments at the start of civil disturbances (Abebe and Asemare, 2019). But at least those investments that were known to have threats could be rescued by taking precautionary measures.

After the start of destruction of investments, security forces of the country were providing thorough protections for investments that had a threat of attacks, without any distinction on the nationality of investors, and rescued so many investments (Abebe, 2019). It would be hard to survive for many investments in the absence of the police protections (Mulluneh, 2019). However, it was very difficult and beyond capacity for the government to deploy security forces for each and every investment in threat of destructions (Asemare and Woldeamanuel, 2019). It was not easy for investors to get immediate responses for their calls for help from security forces and sometimes it took two or three days even in the largest cities (Mulluneh, 2019). Beyond the limitations in human resources, the country failed to properly utilize the available security forces in the





protection of investments due to logistics constraints. There was lack of vehicles to transport police forces especially to the investments far from big cities (Abebe, 2019). Mainly air transportation means were highly demanded because blocking of roads was among the challenging strategies employed by demonstrators throughout the country (Abebe, 2019). Lack of air transportation means forced the security forces to waste time in cleaning roads rather than actually protecting investments (Abebe, 2019). Lack of communication mediums was also another constraint in providing efficient protections for investments (Abebe, 2019). In fact, the existence of security forces in to the investment areas was not a guarantee for investments in some instances. In many occasions investments have been fired and destructed by demonstrators in the existence and witness of security forces. It was the demonstrators' excessive emotion and number that made the event beyond the control of security forces (Asemare, 2019). In general, the adequacy of police protections provided by the Ethiopian government for investments varies depending on situations. The security forces demonstrated due diligence in many instances and rescued large number of investments, while partial and total destruction of investments have occurred for large number of investments due to the absence or weaknesses of protections from the security forces of the state. Therefore, in some circumstances the Ethiopian government failed to discharge its obligations towards providing full protection and security for investments in due diligence though the situations were not beyond control.

## **The Remedies Provided for Investments Victimized by the Civil Disturbances: Legality and Adequacy**

### ***An Overview of the Economic Damage caused by Post-2015 Civil Disturbances***

The destructions of investments have caused the investors to suffer huge amount of economic damage. In terms of extent, both partial and total destructions of investments have occurred (Asemare, 2019). Particularly, machineries, vehicles, buildings, raw materials, and products of investments were the targets of destructions (Abebe, 2019). According to an assessment jointly conducted by the Development Bank of Ethiopia (DBE), Commercial Bank of Ethiopia (CBE) and Ethiopian Insurance Corporation (EICO), from December 2008 to October 2009 E.C, 184 private domestic investments and FDIs operating in Oromia, Amhara and Gedio Zone of South Peoples Nations and Nationalities Regional States together suffered an economic damage estimated 532,764, 667.95 Birr, excluding the damage suffered by government owned enterprises (FDRE office of the Prime minister, 2017). A similar assessment was also made by the above-mentioned financial institutions on 149 investments suffered economic losses due to civil disturbances after October 2009 E.C and

it has been proven a catastrophic loss for investors even though the exact amount is not yet disclosed for the public in monetary terms (Woldeamanuel, 2019). It has been also revealed that due to the civil disturbances that begun on the late 2015, an economic damage estimated to one billion Birr has occurred to the investments operating in the Amhara Regional State only (Ethiopian press Agency, 2019).

### ***The Remedies Provided by the Government for the Economic Damage***

The Ethiopian government has provided various forms of remedies for investments that were victims of attacks during the civil disturbances begun on the late 2015 for their economic damage. The principal basis for the majority of the remedies and their implementation was a political decision of the government rather than a prescribed law. The political direction for the provision of remedies for the victim investors has emanated from three letters of the FDRE Prime Minister Office (Woldeamanuel, 2019). The underlying justification given by the government for the provision of the remedies was "for one thing, it is the expected duty of the government to support the destructed investments in the effort of restoring into their previous conditions; and second, if they continue operation, investments would play a key role in the development as well as image building of the country" (FDRE office of the Prime minister, 2017). Thus, the goal of providing remedies was maintaining investments in operation and attracting the new ones.

With the aim of keeping investments in operation and attracting potential investors, the government mainly applied the following schemes of remedies for investments affected by civil disturbances: Compensation, Fiscal Remedies (duty free importation, due date extension for tax obligations and income tax relief), Financial Remedies (loan payment rescheduling, new loan arrangements, and priority in obtaining hard currencies), and provision of land especially for floriculture investments having the plan of extension.

#### ***1. Compensation***

Compensation was the often applied but the most burdensome remedy provided by the Ethiopian government. The Federal government has already paid around 1.6 billion Birr as compensation for private domestic and foreign investments until May, 2019 (Woldeamanuel, 2019). Though the exact amount is not disclosed to the public, the economic damage suffered by other 149 private investments throughout the country has been investigated and the payment of compensation is waiting an order from the FDRE Office of the Prime Minister (Woldeamanuel, 2019). At regional level, the ANRS government expressed its plan to compensate private investments suffered an economic loss while operating in regional state, starting from July 2019 (Ethiopian press Agency, 2019). The extent of



compensation to be provided by the regional government for a victim investor is said to be 25% of the total economic damage suffered by the investor (Ethiopian press Agency, 2019). The compensation scheme established for victim investments of civil disturbances does not cover government enterprises. The political decision of the prime minister stated that the government has no the capacity to compensate them and, hence, they have to bear the damage by themselves (FDRE office of the Prime minister, 2019). In addition to the government enterprises, compensation was not provided for investments that were debtors of the DBE and controlled by the bank through foreclosure rules after suffering from attacks (Woldeamanuel, 2019). The bank took control of its debtor investments after the failure of efforts to persuade and make investors to continue their business and it is ready to deliver back investments to the owners even after the foreclosure procedures (Bekele, 2019). This denial of compensations, for government enterprises as profit making organizations and DBE as a creditor that will have the rights that could be exercised by its debtors, has no any legal ground even though the organizations are government owned. In relation to the sources of finance for compensation, it was believed to be difficult for the government to pay compensations from the country's annual budget (FDRE office of the Prime minister, 2019). Due to the absence of government funds for this purpose, compensations were covered by the DBE and CBE, though paying these liabilities of the government was not their objective of establishment (Woldeamanuel, 2019). Few investments have been also paid their compensations through the EICO (Girma, 2019).

With regard to the procedures of compensation, after receiving reports from the investors or regional governments, the EIC will cause an assessment to be made jointly by the DBE, CBE and EICO (Woldeamanuel, 2019). After completing the damage assessment, the DBE will transfer it to the FDRE Office of the Prime minister for approval and it is after this approval compensation will be paid (Woldeamanuel, 2019). Here we may pose an impartiality question on the investigating institutions. As these three institutions are the ultimate payers of the compensations to be determined by them, no one could be confident on their impartiality in assessing the extent of damage. Beyond this, the method/modes of assessment followed by the assessing institutions were not clear and transparent. Even there is no possibility for investors to institute complaints as to the amount of damage determined by the assessing institutions (Asemare, 2019). It is not also clear whether compensations provided for investors are full (equal to the damage) or partial. In this regard, as discussed above the ANRS government clearly stated 25% percent of the total damage occurred to an investor as an extent of compensation to be paid by the regional government.

The payment of compensation is, however, subject to a condition of continuing operation. Before obtaining their compensations, investors are required to enter into an agreement to continue their business, unless they will not obtain it (Woldeamanuel, 2019). Even after the agreement, they are not entitled to receive the compensation at once /in lump sum. Rather, it will be paid step by step based on the progress in continuing their businesses (Asemare, 2019). Even though it reflects the strong intention of the government in maintaining investments, it is against the interests of investors and violates the obligations of the country that mainly arise from the BITs. Under the BITs to which Ethiopia is a party, compensation due to the damage caused by civil disturbances is freely transferable (Ethiopian BIT with Turkey, 2000) and attaching a condition of continuing a business restricts the rights of investors to repatriate their compensations.

Compensations were not and are not being provided timely even after the completion of damage assessments. This creates a constraint for investments in resuming their operation early and maintaining their employees (Sibhat, 2019). Cognizant to this problem, the FDRE Prime Minister Office ordered pre-payments to the extent covering three months costs of operation, to be considered in the payment of the main compensation (FDRE office of the Prime minister, 2017). But this amount is not adequate and supportive for the investors as long as there is delay in the payment of the main compensation.

Last but not least, while providing compensations, the government does not take in to account the extent of protection provided for investments during the civil disturbances. As it has been dealt in chapter three, the obligation of the country to provide protection and security is not an absolute one and depends on its capacity. What expected from the country is due diligence in protecting investors; and where there was a due diligence, it would not violate this obligation and would not be subject to liabilities. In the previous section it has been also stated that in many situations the Ethiopian security forces demonstrated due diligence in protecting destructed investments though did not do the same in the other situations. Thus, the country has no obligation to compensate the destructed investments that had a protection from the security forces in due diligence. However, the government compensated investments equally without considering the protections they had. It has been said that the government did not decide to pay compensation only because of the existence of obligations (Asemare, 2019). It was believed by the government that maintaining the already existing investments through compensation is more viable and profitable than trying to attract new ones (Asemare, 2019).



## 2. Fiscal Remedies

In the form of fiscal remedy, the government has applied arrangements of duty-free importation, income tax relief, and due date extension for tax duties for investments affected by civil disturbances. The victim investments were permitted to import duty free raw materials, vehicles, machineries and spare parts (FDRE office of the Prime minister, 2017). Unlike compensation, the scheme covers government enterprises (FDRE office of the Prime minister, 2017). This privilege is given for a limited period of 6 months from the time of destructions (FDRE office of the Prime minister, 2017). It would be, however, very difficult for the majority of the investors to adjust themselves from the horrific destructions and start importation of equipment within this very short period. Due date extension for tax duties was another remedy provided for investments affected by civil disturbances (FDRE office of the Prime minister, 2017). Beyond due date extensions, in compliance with the above discussed Art.51 of the Federal Tax Administration Proc.No.983/2016 and the same provisions under the regional tax administration laws, income tax relief is given for victim investments of the civil disturbances for 1 tax year (FDRE office of the Prime minister, 2017). However, 1 year relief is not adequate since the impact of destructions is not limited to a single tax period.

## 3. Financial Remedies

Financial support schemes have been also implemented for investors in the forms of loan payment rescheduling, new loan arrangements, and priority in obtaining hard currencies. The office of the Prime minister directed the EIC to facilitate and write support letters for investors demanding bank debt payment rescheduling (FDRE office of the Prime minister, 2017). Provision of new loans to be executed through the DBE has been also designed especially for floriculture investments (FDRE office of the Prime minister, 2017). Victim investments have been also granted priority in obtaining hard currency for the importation of raw materials, vehicles, machineries, and spare parts (FDRE office of the Prime minister, 2017).

## 4. Provision of Land

Provision of lands was another support available for victim floriculture investments having a plan to expand their investments. The FDRE Office of the Prime Minister ordered the provision of land for floriculture investments demanding expansion, from the corresponding lands to their investments if available or from Hawassa and Bahir Dar floriculture Clusters (FDRE office of the Prime minister, 2017).

## The Way Forward: Preventing Disturbances and Rebuilding Trust as Key Priorities

There were many causes for targeting investments during civil disturbances are. And in order to create a strong system

of investment protection during civil disturbances emphasis should be given for these causes and measures need to start by targeting them. Accordingly, among others the following specific measures need to be taken in Ethiopia for improving the protection of investments in civil disturbances

First, the government should establish a strong system of follow up towards the operations of investments and encourage them to discharge their Corporate Social Responsibilities (CSR). As stated above there is a wider dissatisfaction among the society on the performance of investments especially in increasing productivity, introduction of new technologies and skills, adherence to environmental and labor standards, creating job opportunities, and generally in changing the life of the society. These dissatisfactions of the society in aggregate created a hostile attitude towards investments. Therefore, the government has to actively follow up the activities of investments, rather than waiting reports, to ensure the satisfaction of requirements under the law as well as obligations under the contract an investor would make while starting investment in Ethiopia. In addition to the legally required responsibilities, the government has to encourage and incentivize investments to discharge their CSR. The government should formulate a policy and prepare guidelines for the promotion of CSR on voluntary basis. To secure voluntary engagement by businesses, it should implement incentives like priority in obtaining loans and other services, awards/certificates of recognition, and publications of CSR experiences. These would have a great contribution in creating a strong relationship and cooperation between investments and surrounding communities, and this in turn will be helpful in avoiding threatening attitudes of the society against investments.

Second, a system should be set for the reorganization of prior holders of expropriated lands. This measure at the first place requires the payment of adequate compensation for land holders while expropriating lands, since there are problems and complains everywhere in this regard. Adequate compensation is not however an end by itself for peoples who were entirely dependent on their lands unless the government supports them in reorganizing themselves through different arrangements. The government has to implement systems aimed at helping displaced peoples to adapt living and working for gain out of their expropriated lands. In particular, trainings on saving, proper utilization of money, entrepreneurship, and vocational trainings especially for those who are going to engage in new professions should be given by the government. Displaced peoples should be also settled in safe and healthy places with a better access to essential public services. These measures should be also accompanied by transparency on the conditions of expropriation and awareness creation programs towards the underlying causes of expropriation.



By doing these it is possible to create a common understanding between the government and the society at least towards investment and reduce hostile attitudes towards investments.

Third, the issues of protection and security of investments in civil disturbances should be integrated in to the national investment legislations. Even though the BITs signed by Ethiopia have addressed the issues of investment protection and security during civil disturbances in a good manner, domestic investment legislations do not have even a single provision addressing the issue at hand. Inclusion of clear provisions for protection of investment in civil disturbances in the national investment legislations is important for investors in simplifying the procedures to claim the right at the national level. It would be also easy for national authorities to enforce and adhere to the right to protection and security of investors under the national legislations than BITs. Above all, the right to protection and security provided under the BITs has no application for domestic investments. Thus, inclusion of the protection of investments in civil disturbances into the domestic investment legislations is very essential for the domestic investments than their foreign counterparts.

Fourth, the remedies provided by the Ethiopian government for investments affected by the civil disturbances begun on the late 2015 should be legalized. Despite the existence of problems in the conditions of execution as discussed previously, the remedies are important in supporting investments suffered from destructions during civil disturbances. However, most of them lacks a legal basis and executed based on a political decision. Therefore, in order to bring certainty as to their availability in the future and for their proper implementation, they should be backed by legal provisions. Comprehensive legal provisions should be included into the national investment legislations for the remedies to be provided by the government for investors where they are affected by civil disturbances. The provisions have to contain with sufficient clarity among others, the types and conditions of remedies, extent of remedies, eligible investments for the remedies, modes and procedures of assessing the damage by an independent organ, and complaint procedures.

Fifth, the government should strengthen the police protections for investments during civil disturbances and prosecutions after destructions. As providing a strong Police protection is an important aspect of the obligation of the country towards full protection and security of investments during civil disturbances, the government has to create a strong way of protecting investments by its security forces particularly by opening a division especially responsible for the protection of investments. In addition to its responsibility in providing police protections, this division should be also responsible for the investigation and

prosecution of perpetrators participated in the destruction of investments. In addition to the problems in providing police protections during the disturbances, the weakness of investment protection in Ethiopia has been clearly reflected by the failure of the government to investigate and prosecute at least the perpetrators who had a leading role in the destruction of investments. It has been said that due to the fear of grievances from the society, the government was and is not interested to prosecute perpetrators other than taking some minor measures like “Reformation trainings”/ in Amharic “*yetehadso siltena*” (Abebe, 2019).

## Conclusion

To use the best of investment, Ethiopia has enacted and successively amended investment legislations which provided various forms of incentives to attract investments. However, these legislations do not contain adequate provisions for the protection of investments from political risks. There is no even a single provision under the domestic investment legislations for the protection of investments in civil disturbances. There are, however, few and inadequate provisions under the other domestic laws of the country that have relevancies for the protection of investments during civil disturbances. The first one is the 1995 FDRE constitution which provided a recognition and protection for private property including investments. Under its Art.40 (1) The Constitution recognizes private property. On the other hand, Art.13 (1) imposes the responsibility and duty on all Federal and State legislative, executive and judicial organs at all levels to respect and enforce the provisions under Chapter Three of the constitution which includes Art 40. Accordingly, all the executive, legislative, and judicial organs of the government at all layers of the government have a constitutional responsibility and duty to provide protection for investments in civil disturbances. The Ethiopian law also provides a criminal law protection for investments in civil disturbances. The 2004 Criminal Code of Ethiopia under Art.662 (2) reaffirms the protection of private property by stating that State, public and private properties are protected under this Code. Consequently, Art.488 provides punishments for the acts of violating property rights during riots. Beyond this, the Ethiopian tax administration laws provide reliefs from income tax duties for investments in hardship due to the causes beyond their control which includes destruction of investments during civil disturbances.

Unlike the domestic legislations of Ethiopia, the BITs to which the country is a party provide a detail of standards for the protection of investments from political risks including civil disturbances. The protections extend from police protection to remedies after the occurrence of something wrong. Among others, The BITs signed by Ethiopia provide Full Protection and Security standard that requires positive action by the host State for the protection of foreign



investments against interference by private actors, such as demonstrating or rioting individuals.

Despite the existence of legal protections in the BITs and domestic legislations of Ethiopia, investments have been targeted and destructed during the civil disturbances begun on late 2015. Though the Ethiopian government has provided police protections for many investments through its security forces and rescued investments from total and partial destructions, it was not adequate. Precautionary measures have not been taken to the required level and in many situations the security forces failed to demonstrate due diligence in protecting investments. Due to the destruction of investments caused investors and the country to suffer multi-faced crises. Investments have suffered a huge economic losses. As a result, many investments have totally stopped their operations, while others declined their extensions. The number of new Entrants to investment is declined and many have declined their projects even after taking land.

With a view to reorganize investments, the Ethiopian government has provided different remedies for investments suffered economic losses during the civil disturbances. Compensations, fiscal remedies, financial remedies, and provision of lands were the main remedies provide by the government. The measures were very important for investments though not timely and adequate enough. However, most of the remedies lack a legal basis and executed based on a political decision. There were also lack of clarity on their conditions, extents, and procedures.

It is therefore very essential to take different measures to create a strong system of protections for investments in civil disturbances. First of all, to avoid hostile attitudes and aggressions towards investments that could happen all the times, the government has to establish a system for the rehabilitation of land holders displaced due to expropriation. Beyond this, it has to establish a strong system of follow up to ensure a proper adherence from investments to their legal obligations as well as CSR. Inclusion of provisions into the domestic investment legislations for the protection of investments in civil disturbances; creating a strong system of police protections; legalizing the remedies provided by the Ethiopian government are also a required measures that should be taken place in Ethiopia to create a strong system of protection for investments in civil disturbances.

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