Standard of Compensation for Expropriation of Foreign Investment in Ethiopia: the Tension between BITs and Municipal Law

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1. Introduction

Investment relationships involve international law and municipal law. While through international investment law protection is extended to foreign investors, the regulation of the investment, including its admission, is governed by the municipal laws of the host state. At times, the rights and protections guaranteed by international investment law need the municipal law of the host state for its implementation. One such scenario is the payment of compensation for expropriated or nationalized investments. While the international law focuses on guaranteeing against expropriation and sets the norm for compensation, the municipal law of the host state chips in providing the details for assessment of compensation and manner of payment; hence requiring coherence between the two planes of laws.

Like many other countries, Ethiopia has signed bilateral investment treaties (BITs) and other international investment agreements that give protection to foreign investment and issued investment legislations. There are also other domestic legislations relevant for the regulation of foreign investment. The article looks in to the interaction between the BITs the country signed and the relevant domestic legislations with the aim of assessing the policy coherence between the two planes of laws and assessing if sufficient protection has been extended to foreign investment. To this end, the next part gives a general note on investment protection. The third part looks into the concept and types of taking in international investment law and municipal law of Ethiopia. The fourth section assesses the two competing norms of compensation that have gained prominence in international investment jurisprudence and traces their development. It is followed by assessment of compensation standard as reflected in the BITs signed by Ethiopia and its municipal legislations. The

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norm of compensation for unlawful expropriation is also briefly dealt with. Concluding remarks are made at the end.

2. Protection of Investment: General Remark

By investing in a foreign country, foreign investors subject their investment to less known environment of the host country and hence need protection. One mechanism resorted to by many states for protecting and promoting foreign investment is through the signing of BITs. BITs aim at protecting and promoting foreign investment between the contracting States Parties by granting a number of rights to foreign investors.[1]

The development of BITs began in the 18th century with the signing of treaties of friendship, navigation and commerce (FNC). The primary concern of FNCs was trade relations as they were designed at a time when commerce was largely restricted to trading in goods by merchants and did not contemplate direct investment by corporations.[2] The treaties also extend to military matters. The investment protection provisions of these treaties mainly focused on the protection of property in the country of another party.[3] Alien treatment, including freedom of worship and travel within the host state, was also included in the FCN.[4] The treaties of FCN were used by countries until the beginning of the 1960s in which period modern bilateral investment treaties surfaced.

Following the signing of the first modern BIT between West Germany and Pakistan in 1959, their conclusion has been one of the most active areas of public international law making in the last decades.[5] By the end of 2012, the

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[1] Stephan W. Schill, Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses, Berkley Journal of International Law, Vol. 27 No. 2, (2009), p. 498

[2] M Sornarajah, The International Law on Foreign Investment, (3rd ed., Cambridge University Press, 2010), p 210

3. Alireza Falsafi, Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate, Syracuse Journal of International Law and Commerce, Vol. 36, (2008-2009), p 46

[4] Sornarajah, supra note 2, p. 210

[5] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, International Lawyer, Vol. 24, (1990),p 655

total number of BITs concluded reached 2,857.[6] Though the number of BITs signed in recent years has decreased, they still play an important role in international investment rule making.[7]. The fact that these bilateral investment treaties can be negotiated in such a manner to suit the mutual interests of the parties[8] and the absence of a comprehensive multilateral agreement on the area contributed to the popularity of the BITs.

While BITs extend protection, the regulation of the foreign investment is left for the municipal law of the host state. Municipal law of the host state also play an important role in the settlement of investor-state disputes. In the process of settling investment disputes, tribunals will be faced with the inevitable task of choosing the applicable substantive law the decision of which will be based on either of the four possible sources of choice of law rules.[9] The tribunal, however, has three set of substantive law irrespective of which choice of law rule it applies.[10] These are: the municipal law of the host state, the investment treaty itself and general principles of international law.[11]

The application of municipal law in international disputes has been one of the points being debated for some time. In mid 1920s, the Permanent Court of International Justice (PCIJ) ruled in *Certain German Interests in Polish Upper Silesia* that 'municipal laws are merely facts which express the will and constitute the activities of States…The court is not called upon to interpret the

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[6] UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development, , (United Nations Publication, Switzerland, 2013), p 101

[7] The number of BITs signed in 2009 was 82 as opposed to meager 33 in 2011 and 20 in 2012- the lowest annual number in a quarter century. For number of BITs signed in 2009, see UNCTAD, World Investment Report 2010: Investing in a Low-Carbon Economy, (United Nations Publication, Switzerland, 2010), p. 81

[8] Sornarajah supra note 2, p 183

[9] The four sources are: first, where there is a contractual relation between the investor and the host state or entity of the host state, this contract may contain a choice of law provision. Second, the arbitral rules governing the reference to arbitration may also contain a default choice of law. Article 42(1) of the ICSID Convention and Article 35(1) of the UNCITRAL Rules as revised in 2010 are good examples in this regard. Third, the *lex loci arbitri* might supply the choice of law rule if the arbitral rules are silent on this point. Fourth, the choice of law rule might be derived from the legal system which gives effect to the international treaty-public international law. Zachary Douglas, The Hybrid Foundations of Investment Treaty Arbitration, British Yearbook of International Law, Vol. 74, (2003), p 194

[10] Ibid

[11] Ibid

[municipal] law as such…'.[12] According to the Court, municipal law will be assessed to determine whether the state was in conformity with its obligations towards other states while applying it.[13] The International Court of Justice (ICJ) in Barcelona Traction reflected a different view in that while it applied international law, it emphasized the need, in certain circumstances, to refer to municipal law.[14] Municipal law was relevant to the extent that international law needed to refer to it to determine the existence of rights relevant on the international plane.[15]

On the specific issue of foreign investment, the major sources of international law on foreign investment are bilateral investment treaties, supplemented by custom, general principles of law and judicial decisions.[16] As mentioned earlier, investment treaties are international instruments that are entered into by States that lay down international standards of protection. The beneficiaries of these protections are the investors-entities or individuals- that are in turn subject to municipal law, which also governs the underlying investment that the treaty addresses.[17] It is in view of this interplay between international and municipal law that Douglas referred the investment treaty regime as having 'hybrid or *sui generis'* character.[18] This interplay between the two laws is more emphasized in cases of disputes. 'Investment disputes are about investment, investments are about property and property is about specific rights over things cognizable by the municipal law of the host state.'[19] Thus, ascertaining the property right requires reference to the municipal law of the host state. The municipal law of the host state determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests while the investment treaty supplies the classification of an investment and thus prescribes whether the right *in rem* recognized by the municipal law is subject to the protection

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[12] Certain German Interests in Polish Upper Silesia (Merits), Judgment, (25 May 1926), PCIJ Series A. No. 7, p 19
[13] Ibid
[14] Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports (1970), p.3, Paragraph 38.
[15] Monique Sasson, Substantive Law in Investment Treaty Arbitration: the Unsettled Relationship between International Law and Municipal Law, (Kluwer Law International, 2010), p. xxiii
[16] Sornarajah *supra* note 2, pp 79ff
[17] Sasson *supra* note 15, p. xxv
[18] see Douglas *supra* note 9, p. 153 and Sasson *supra* note 15, p. xxv
[19] Douglas *supra* note 9, p. 197

afforded by the investment treaty.[20] Though the investment treaties provide protection for the investment, which is property, they do not contain substantive rules of property law, requiring *a renvoi* to a municipal law.[21] The application of municipal law to international investment disputes is not limited to determining existence of a particular right. Holdings of investment tribunals indicate that municipal law is relevant in determining whether the investment is held in the territory of the host state, its validity, the nature and scope of the rights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of the investment, as well as the nature and scope of the government measures allegedly in breach of the international investment agreement.[22]

3. Taking of Property

One protection extended to foreign investors through the BITs is the guarantee against taking of their investment/property/. Taking of property through nationalization and expropriation is an old phenomenon in the regulation of foreign direct investment. There are different ways in which the property of a person might be taken. One such way is confiscation, which refers to the taking or appropriation of the private property for a public use without payment of compensation.[23] Countries declare the estate, goods or belongings of a person who has been found guilty of some crime, to be forfeited for the benefit of the public treasury as a punishment.[24] The other two ways of taking are nationalization and expropriation. Both nationalization and expropriation involve the taking of property on a permanent basis. However, 'nationalization is often associated with the "indigenization" programs of countries (particularly Latin American countries) which entailed the conversion of substantial foreign private property to local state ownership.'[25] Nationalization

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[20] Id., p. 198

[21] Ibid and Sasson supra note 15, p. xxx

[22] Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law international, 2009), pp 93-94

[23] Richard J. Hunter Jr., Property Risks in Business, Currents: International Trade Law Journal, Vol. 15, (2006), p 28

[24] Ethiopia is one such country that sets the confiscation of property as punishment for crimes. See article 98 and 260 of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004.

[25] Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr., International Business Transactions, (2nd ed., West Group, St Paul Minn, 2001), §32.5

is often thought to define a taking of property by government with the intention to have the government itself become owner and operator,[26] whereas in expropriation it is not necessary that the state becomes owner or beneficiary of the property taken. While expropriation is an individual or personal act, nationalization measures, on the other hand, reflect changes brought about in the State's socio economic structure (land reforms, socialization of industry or of some of its sectors, exclusion of private capital from certain branches of the national economy).[27] And again only privately owned property will be affected by nationalization while national governments can expropriate property held by government body as well as privately owned property.[28]

The government of Ethiopia has issued a new investment proclamation and regulation in 2012.[29] The proclamation under Article 25 gives protection to foreign investors by guaranteeing their investment against expropriation except for public interest and only in conformity with the requirements of the law. Even then, adequate compensation, corresponding to the prevailing market value will be paid.[30] This compensation is to be paid in advance.

From the reading of Article 25, one can gather that the law has already assumed two classes of takings: expropriation and nationalization. This assumption, however, becomes meaningless when one looks at sub Article 3 of article 25 which assimilates the two classes of taking when it requires that 'nationalization' is to be used interchangeably with 'expropriation'. As indicated above, there is a difference between the terms 'expropriation' and 'nationalization' as the former applies to individual measures taken for public purpose while the latter involves large scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests

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[26] Ibid

[27] F.V.Garcia Amador, Louis B. Sohn and Richard R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens, (Oceana Publications, 1974), p 48

[28] Muradu Abdo, Ethiopian Property Law: A Text Book, (Addis Ababa, September 2012), p 353

[29] Investment Proclamation No 769/2012 and Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012. A new drat investment regulation has been proposed and is under consideration. The draft makes few changes like renaming the Ethiopian Investment Agency as Ethiopian Investment Commission and it will also mae the Commission accountable to the Prime Minister.

[30] Article 25/2 of the Investment Proclamation No 769/2012

into the public domain.[31] This approach, actually, is not typical of the Ethiopian Investment law. Most bilateral investment treaties also do not differentiate between expropriation and nationalization although it is generally recognized in legal doctrine that there are substantial differences between these concepts.[32] The Ethiopian investment law also uses the terms interchangeably irrespective of the difference in meaning conveyed by each.

The taking of property through expropriation can be conducted either directly or indirectly. Direct taking refers to a situation in which the state, through a decree or other means, expressly acknowledges that it takes or will take the property. In such circumstances, there is no doubt that the property has been taken as the state itself acknowledges it. The importance of this manner of taking property, however, has declined in the past years as states no longer want to be perceived as posing a threat of expropriation. Instead, states have resorted to an indirect way of taking.

The term indirect expropriation encompasses a range of acts and omissions of the state which deprives the person the benefit of his/her property/investment. Different BITs and other International investment agreements use different terminologies, like measures equivalent to expropriation, measures tantamount to expropriation, creeping expropriation, etc., to refer to indirect expropriation. Though there could be slight difference in the meaning attributed to the terms, all of them refer to indirect expropriation.[33] The study of indirect expropriation

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[31] Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties, (Martinus Nijhoff Publishers, the Netherlands, 1995), p. 98 foot note 263

[32] Id., p. 99

[33] De facto expropriation, constructive expropriation, disguised expropriation, consequential expropriation are some of the terms used to signify indirect expropriation. A Creeping expropriation denotes an expropriation accomplished by a cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment W. Michael Reisman and Robert D. Sloane, Indirect Expropriation and Its Valuation in the BIT Generation, British Yearbook of International Law, Vol. 74, (2003), p 128 Consequential expropriation, on the other hand, involve the deprivations of economic value of a foreign investment, which, within the legal regime established by a BIT, must be deemed expropriatory because of their causal links to failures of the host state to fulfill its paramount obligations to establish and maintain an appropriate legal, administrative, and regulatory normative framework for foreign investment. Ibid.

takes us back to two early international decisions on expropriation.[34] The tribunals in these cases recognized indirect expropriation by establishing two important things: i) that a state may expropriate property, where it interferes with it, even though the state expressly disclaims any such intention and ii) that even though a state may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.[35] Unlike direct expropriation, the express acceptance of the state of its action is irrelevant to conclude that it has expropriated the property. And again, the mere rendering of the right useless suffices to consider interference on property right an expropriation. In recent years also several tribunals have acknowledged that states may accomplish expropriation in ways other than by formal decree and often in ways that may conceal expropriatory conduct with coating of legitimacy.[36] A prominent example would be the Iran-US Claims Tribunal established in the aftermath of the 1979 Iran revolution which resulted in the expropriation of several US investments. The tribunal in Starrett Housing Corporation Vs Iran held that:

> …[it] is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[37]

As we can see from the holding of the tribunal, the central point in investigating existence of expropriation is the extent of interference that the investor suffers and not as such on the form or content of the state measure or intention of the state. Accordingly, different types of government measures, like deprivation of profits, exorbitant taxation, measures substantially interfering with the management or control of a business enterprise, harassment

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[34] The two cases are *Certain German Interests in Polish Upper Silesia* (Germany Vs Poland), (1926), PCIJ Report Series A.No. 7 and *Norwegian Ship owners Claims* (Norway Vs U.S), (1922). See Christie, infra note 35.

[35] G.C Christie, What Constitutes a Taking of Property Under International Law, British Yearbook of International Law, Vol. 38, (1962), p 311. See also Reisman and Sloane, supra note 33

[36] Reisman and Sloane, Supra note 33, p. 121

[37] Starrett Housing Corporation Vs Islamic Republic of Iran, 4 Iran-US CTR, (1983), 154 as cited by Newcombe and Paradell, supra note 22, p 326

of employees, annulment and cancellation of property rights and licenses etc, may be considered as expropriation.[38]Many of the measures which are found to be indirect expropriation may also fall under the police power of the state and the question remains as to how one can distinguish between indirect expropriation and non compensable regulatory taking. In this regard, three criteria have been identified by international tribunals in distinguishing between the two: the degree of interference with the property right, the character of governmental measure i.e, the purpose and context of the governmental measure and the interference of the measure with reasonable and investment backed expectations.[39] For the state's interference to constitute indirect expropriation, the interference needs to be substantial and severely affect the property right of the person. But again a question would arise whether one should consider only the effect of the government's measure on the individual or the purpose and context of the government's measure must be included in the consideration. Using either of the two criteria to the exclusion of the other would lead to different results even in cases with similar facts. If one considers only the effect of the measure, also known as 'sole effects test', an expropriation will be found to have occurred where a regulatory measure, or series of measures, is sufficiently restrictive; whereas through the employment of 'purpose' test a legitimate public purpose may, in certain circumstances, in and of itself suffice to cast a measure as being in the nature of the normal exercise of police power, and hence non compensable, regardless of the magnitude of its effect on investment.[40] A balanced approach, which consists of weighing the purpose of the measure with its effect on the investment, is the predominant approach used by tribunals.[41] That is, there needs to be proportionality between the purpose sought to be achieved through the measure

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[38] Blocking of access to a plant and government takeover of a key supplier, prohibition on re export of equipment, creation of state monopolies and other forms of arbitrary conduct depriving the investor of the benefit of its property, forced sale and requisition of land are some examples in which international tribunals have found indirect expropriation to exist. See Newcombe and Paradell, supra note 22, pp. 327-328

[39] OECD, Indirect Expropriation and the Right to Regulate in International Investment Law, Working Paper on International Investment, No. 2004/4, (September 2004), p. 10

[40] L. Yves Fortier and Stephen L. Drymer, Indirect Expropriation in the Law of International Investment: I know it when I See it, or *Caveat Investor*, ICSID Review: Foreign Investment Law Journal, Vol. 19 No 2, (2004), p. 300

[41] OECD supra note 39, p. 15

and the effect of the measure on the investment for the measure to be a regulatory measure.

3.1 Expropriation under Ethiopian law

Expropriation in Ethiopia is governed by laws issued by the Federal government as well as the regional governments. On the federal level, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005 and Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Council of Minister Regulation no 135/2007 are the major laws governing expropriation. The matter of expropriation is also governed by the Re-Enactment of Urban Land Lease Holding Proclamation 272/2002 with regard to land held under the urban land lease holding system. In addition to these proclamations, the 1960 Civil Code provisions which are consistent with the other laws play a gap filling role. And it is in this Code that we can find definition of the term expropriation proceeding. Accordingly, Article 1460 of the Civil Code defines expropriation proceedings as 'proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes.'

Though the concept of compensation is not included in the definition, the subsequent provisions of the code deal with it and hence one can include compensation as element of the expropriation law. Following the 1974 revolution and subsequent change in political ideology, land became property of the State. Under the current Constitution also land is jointly owned by the government and nations, nationalities and people wherein the government is given the power to administer it on behalf of the latter.[42] Accordingly, Article 1460 of the Civil Code needs to be read harmoniously with the Constitution and hence the word 'owner' in the civil code must be read to mean "landholder who owns property situated upon the land".[43] The terminology 'indirect expropriation' is employed in the Civil Code which allows the competent authorities to take the property of individuals for the purpose of setting up installations or construct works without undergoing through expropriation

[42] Article 40 of the Constitution of the FDRE
[43] Muradu Abdo *supra* note 28, p. 359

proceeding.[44] One limitation is that the construction works or installations should not seriously impair the rights of the property owner or notably reduce the value of the immovable, in which case resort to the normal expropriation proceeding is required. And again, it is in cases where the work needs to be executed within less than a month's time and where the work can be carried out without impairing the normal exploitation of immovable that the authorities may resort to indirect expropriation (Article 1486). One restriction on this right of the authorities is that actions which would impair the right of a person on dwelling houses are not allowed (Article 1487). Compensation will be paid for the owner of the property for the damage caused by the works and installations done by the authorities.

The purpose of the provisions on indirect expropriation under the civil code seem to emanate from the fact that sometimes the state must urgently undertake a public work on private property for such a short period of time that compliance with normal expropriation procedures might not make sense.[45] Whatever the purpose of the provisions might be, one thing we can clearly see is that the meaning attributed to the concept of 'indirect expropriation' in the Civil Code is quite different from the meaning of indirect expropriation in international investment jurisprudence that we have seen above. One can even say that indirect expropriation as is incorporated in the bilateral investment treaties, including the ones signed by Ethiopia, is unknown under the Ethiopian domestic law of expropriation.

4. Norms of Compensation

States have the sovereign right under international law to take property held by nationals or aliens for economic, political, social or other reasons.[46] Expropriation and nationalization of the alien's property is considered as inalienable right of the host state. However, such taking must be accompanied by the payment of compensation. Unlike the right of the state to expropriate, there is no single universally accepted norm of compensation for expropriation. In this regard, we have two distinct groups whose difference is particularly

[44] Article 1485 of the Civil Code
[45] Muradu Abdo supra note 28, p. 362
[46] UNCTAD, Expropriation: UNCTAD Series in Issues in International Investment Agreements II, (United Nations Publications, Switzerland, 2012), p. 1

observed in cases of large scale takings. The first group, composed of the developed, capital exporting countries, push for the payment of full and prompt compensation according to international law while capital importing countries argue full and prompt compensation is not the norm under international law and call for appropriate compensation.

At any given period in history, the legal norms governing taking of foreign property have been determined by the economic, political and social processes of the time.[47] From about the mid 19th century to the First World War, during which time the legal policies relating to compensation were formulated, the international scene was dominated by European cultures wherein the state played a comparatively negative role, protecting a regime of laissez-faire, and assuring the sanctity of private wealth.[48] Accordingly, States' intervention was limited to the regulation of private property and the government's power to take private property was exercised rarely and for a limited purpose.[49] And again, as expropriation of foreign property was an isolated and uncommon phenomenon then, it was never a matter of national policy.[50] It was at this time in history that the payment of full compensation[51] as a standard of compensation for expropriation has been introduced. In the absence of contrary treaty provision, payment of full compensation was even made a condition for the legality of the taking.[52]

The full compensation norm, which was introduced at a time where there was minimum intervention in private property, was latter on challenged while things have taken a different route during the twentieth century with changes in economic, political and social conditions of states. One significant change of the twentieth century is the direct interference and participation of the state in the national and international economic order.[53] With this change in political circumstances, foreign wealth deprivations have become subjects of national

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[47] Frank G Dawson and Burns H Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, Fordham Law Review, Vol. 30(4), (1962), p. 728
[48] Id., pp. 728-729
[49] Id., p. 729
[50] Seymour J. Rubin, Nationalization and Compensation-A Comparative Approach, The University of Chicago Law Review, Vol. 17, (1950), p 459
[51] Please see the discussion infra for definition of 'full compensation'
[52] Dawson and Weston, supra note 47, p. 729
[53] Id., p. 730

policy.[54] As such, the 'full compensation' norm was put to the litmus where mass nationalizations have been undertaken by different countries due to reforms in their domestic policies. Countries started to question the application of 'full compensation' norm for large scale expropriations and hence the divide between the capital importing and capital exporting countries. Resisting the 'full compensation' norm, the capital importing countries pushed for 'appropriate compensation' norm as is implanted in the Calvo Doctrine.

Authors like Montt argue that the introduction of the Calvo Doctrine, and hence the divide between the two worlds, precedes the reform programs undertaken in many of the Latin American and Eastern European countries.[55] Rather, it was the resistance by the capital importing countries of the concept of 'diplomatic protection' as it existed in the late 19th century that contributed to the formation of a group advocating for 'appropriate compensation'. Tracing back the investor protection regime in earlier times in history, one can find the reliance of foreign investors on diplomatic protection they get from their home states. Diplomatic protection through the espousal of claims of investors developed in an era of colonialism and imperialism wherein States exercise all possible means-political, economic and military-to protect their nationals' interests abroad.[56] During the nineteenth and early twentieth centuries, the exercise of diplomatic protection by powerful states was often accompanied by 'gun boat diplomacy'- the threat or the use of force to back up diplomatic protection claims.[57] The Great Powers' use of forcible self-help to advance the claims of their citizens living or investing abroad transformed diplomatic protection into an institution well-suited to major abuses.[58] To make things worse, the Great Powers were extending this 'gun-boat diplomacy' on, sometimes, exaggerated and erroneous facts. The real and perceived abuses of diplomatic protection led Latin American states to resist its use, particularly in

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[54] Id., p. 731

[55] Santiago Montt, State Liability in Investment Treaty Arbitration: Global, Constitutional and Administrative Law in the BIT Generation, (Hart Publishing, 2009), pp. 32 ff

[56] Newcombe and Paradell supra note 22, p. 8. At the time, the use of force in the exercise of diplomatic protection was not inconsistent with international law. Id., p. 9. The use of force as a means of settling dispute was prohibited following the adoption of the UN Charter. See article 2/3 and 2/4 of the UN Charter.

[57] Id., p. 9

[58] Montt supra note 55, p. 36

its more interventionist form, [59]and it was as a response to this abuse of diplomatic protection that the Calvo Doctrine and Clause were designed.[60]

What we find at the core of the Calvo Doctrine is equality between foreigners and nationals. This equality signifies that foreigners are to receive similar treatment and enjoy similar rights and protection as is given to nationals.[61] Nonetheless, equality can also be understood to mean 'equality is the maximum' and that the responsibility of governments toward foreigners cannot be greater than the responsibility of governments towards their own citizens.[6263] However, this notion of equality as originally incorporated in the Calvo Doctrine changed its feature in subsequent years. The expectation of developing countries concerning standard of protection to property of aliens was changed which significantly altered the substantive law of expropriation in which the standard became compensation that the state deems appropriate.[64]

This position of the capital importing countries was the cause for the heated debate following the mass expropriations undertaken by the Governments of Mexico and Russia in the 1930s.[65] In each case the expropriating state

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[59] Newcomb supra note 22, p. 9

[60] Montt supra note 55, p. 36. As Mexico once argued, equality of treatment was established to defend 'weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position'. Ibid. Montt also asserts that, contrary to what is usually assumed, the Argentinean jurist and diplomat Carlos Calvo did not create the Doctrine; rather, he attributes real authorship of the Doctrine to the Venezuelan jurist Andrés Bello.

[61] Id., p. 39

[62] Id., pp. 39-40

[63] Shan, on the other hand, argued that what the Calvo Doctrine does is emphasize on the rejection of superiority or imperial prerogative of powerful states and their national, which in other words makes the Calvo doctrine a doctrine of 'anti super state'. Consequently, unlike national treatment, 'anti super state' does not deny or reject the special privileges that host countries often grant or reserve to their own nationals. See Wenhua Shan, Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law, in Wenhua Shan, Penelope Simons and Dalvinder Singh, (eds.) Redefining Sovereignty in International Economic Law, (Hart Publishing, 2008), p 249

[64] Montt supra note 55, p. 56. In the second half of the twentieth century, all discussions of minimum standards and the national standard turned out, in reality, to be about expropriation and compensation, and nothing more. Thus, the *classic* claim—the nineteenth century Calvo Doctrine, whose aim had not been to erode the rule of law but to terminate forcible self-help through national treatment—was transmuted into a new and *opportunistic* one: expropriation without compensation. Id., p. 57.

[65] Mexico, undergoing a revolution that had begun with the fall of Porfiorio Diaz in 1910-had enacted an agrarian reform program that would dispossess large number of foreign land

disclaimed any obligation to pay full compensation to the foreign nationals affected by the measure; it rather offered the expropriated landowners only the partial deferred compensation available to its own citizens under applicable domestic law.[66] This view was in stark contrast to what was being pushed for by the developed countries and the prevailing norm in the 19th century for limited (small scale) takings: adequate, prompt and effective compensation, also known as the 'Hull rule'.[67]

Adequate compensation is agreed to mean full compensation. Though 'full compensation' has not been defined, many commentators agree that it includes the full market value of the expropriated investment as well as the anticipated earnings or future profits.[68] In the valuation of expropriated investment, those advocating for the hull rule of compensation favor the market value as it takes

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owners, who had bought property in the country under the investment-friendly Diaz regime. Russia has also undertaken a comprehensive program of nationalization by the Bolsheviks after the October 1917 revolution. Agrarian reform in Eastern European countries following the first world war triggered dispute between Romania and Hungary as residents of Transylvania who had opted to retain their Hungarian nationality when the region was transferred to Romania found themselves dispossessed when the Romania government decided to extend to Transylvania a land reform program already in effect in other regions of Romania. See O. Thomas Johnson Jr., and Jonathan Gimblett, From Gunboats to BITs: The Evolution of Modern International Investment Law, in Karl P. Sauvant (ed.), Yearbook on International Investment Law and Policy 2010-2011, (Oxford University Press, 2012), pp. 661-662

[66] Id., p. 662

[67] This difference of position was reflected in a correspondence between the Mexican Minister of Foreign Affairs and US Secretary of State Cordell Hull. The Mexican position emphasized the non discriminatory nature of the country's agrarian reforms and asserted that:

> [T]here does not exist in international law any principle universally accepted by countries, nor by the writers of treaties on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains of the subject [...] is that the time and manner of such payment must be determined by her own laws.

For which Secretary Hull responded:

> The government of the United States merely adverts to a self evident fact when it noted that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose without provision for prompt, adequate and effective payment therefore.

For more on the correspondence, see Andreas F. Lowenfeld, International Economic Law, (Oxford University Press, 2008), pp 475-481 and Johnson and Gimblett, supra note 65, p 664.

[68] Sornarajah *supra* note 2, pp. 413-414

future profitability into account.[69] The meaning of 'appropriate compensation', however, was far from being agreed upon. Different legal publicists attempted at defining 'appropriate compensation'. Newcombe, for example, defines 'appropriate' compensation as signifying something less than full fair market value, providing more flexibility in the amount, manner and timing of payment.[70] Sornarajah also concurs with this view as he defines appropriate compensation standard as 'a reference to a flexible standard which could range from the payment of full compensation, the amount of future profits lost, to the payment of no compensation at all in circumstances where the foreign investor had visibly earned inordinate profits from his investment and the host state had no benefits at all from it.'[71]

The United Nations General Assembly Resolution 1803 under paragraph 4 recognizes the right of States to expropriate private property provided the owner is paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. The US argued that appropriate compensation under the Resolution is to mean adequate compensation[72] and concluded that the resolution represents a consensus of the economically developed and less developed countries.[73] To the dismay of the US the meaning of 'appropriate' was contested by other countries as some were suggesting that it allowed for less than full compensation. The adoption of the Charter of Economic Rights and Duties of States by the General Assembly in 1974 gave the matter a rest. The charter under article 2.2/c affirmed the right of each state:

> [t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. (emphasis added)

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[69] Id., p 451
[70] Newcombe and Paradell supra note 22, p. 377
[71] Sornarajah supra note 2, p. 446
[72] Ibid
[73] Johnson and Gimblett supra note 65, p. 680

Hence, under the charter, the obligation of a state that expropriates the property of an alien is, in the end, defined solely by the law of that state.[74] And the Declaration on the Establishment of a New International Economic Order, Resolution 3201, prohibits the home states from exerting any economic, political or other pressure on the taking state to get redress for their nationals.[75] Leaving aside the debate as to whether resolutions of the General Assembly have a law creating effect, these resolutions, at the least, indicate a desire on the part of the states to reject full compensation as the sole standard of compensation.[76]

We have seen earlier that BITs are currently important sources of international investment law which extend various forms of protection to foreign investors, one example being the guarantee against expropriation without compensation. They also cover standards of compensation. Contrary to the past experience where there is difference of position with regard to the standard of compensation for nationalization, BITs almost across the board, adopt similar standard of compensation for both large scale and small scale takings. And the standard adopted is 'prompt, adequate and effective' compensation or the Hull rule.[77] It is to be noted that not all BITs use similar language in their choice of a particular standard of compensation as many set a standard of full compensation based on 'market value', actual market value' or 'fair market value'.[78] Despite the difference in terminology used by the BITs, they all refer to the standard of 'full compensation'. This was asserted by international investment tribunals where the phrases 'prompt, adequate and effective compensation', 'fair market value' and 'actual value' were all interpreted as requiring full compensation.[79] One question that can be raised in this regard is whether the consistent acceptance of a particular norm in the bilateral investment treaties will convert the norm into a principle of international law.

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[74] Id., p. 681

[75] Resolution 3201, after recognizing the permanent sovereignty of States over their natural resources and the right to nationalization or transfer of ownership to its nationals, states in paragraph 4/e that 'no state may be subjected to economic, political, or any other type of coercion to prevent the free and full exercise of this inalienable right.'

[76] Sornarajah supra note 2, p. 446

[77] Id., p. 416

[78] Newcombe and Paradell, Supra note 22, p. 383

[79] Id., p. 384 referring to article 4(c) of Egypt Greece Treaty in Middle East Case, Article 1110 NAFTA in Metalclad, Vivendi and Siemens cases

It is unlikely that such a view can be taken of BITs in general as, despite the fact that BITs reflect considerable consensus with respect to their structure and main content, they show diversity in the actual wording of provisions and in the level of protection and treatment stemming from those provisions.[80] And again, the fact that many of them provide for valuation of compensation to be made by national authorities make the possibility of such treaties creating a norm as to the standard of compensation remote.[81]

4.1 Compensation Standard under BITs Signed by Ethiopia

From the perspective of developing countries, BITs are viewed as a tool for attracting foreign direct investment. As opposed to capital exporting countries whose goal of signing BITs is protection of present and future investment by their nationals, the basic goal of the capital importing developing countries is encouragement of future investment.[82] As such, even if their goal is different, developing countries subscribe to the idea of signing BITs with as many developed capital exporting countries as possible. Proliferation of south-south BITs has also been witnessed in the past years.

In an effort to attract foreign investment to the territory, the government of Ethiopia has been signing BITs with developed as well as developing countries. As of end of June 2012, the country has signed 29 BITs.[83] A cursory look at these BITs shows that the Hull rule of 'Adequate, Prompt and Effective' compensation is adopted in the BITs signed with developed as well as developing countries, albeit the wordings used are different. Many of the BITs qualify the term 'adequate' to refer to the 'market value' of the investment on the day the expropriation measure was taken or publicly known. While the BITs between Kuwait and Ethiopia and France and Ethiopia use the term 'actual value', the BITs between Sweden and Ethiopia, Netherlands and Ethiopia and Austria and Ethiopia use the term 'fair market value' in describing the word 'adequate'. Article 6/1/b of the BIT with Kuwait reads: 'Such compensation shall amount to the actual value of the expropriated

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[80] Anna Joubin-Bret, BITS of the Last Decade: A Ticking Bomb for States? In Catherine A. Rogers and Roger P. Alfors, (eds.), The Future of Investment Arbitration, (Oxford University Press, 2009), p. 150

[81] Sornarajah *supra* note 2, p. 416

[82] Salacuse *supra* note 5, p. 661

[83] UNCTAD *supra* note 6, p. 231

investment….' While the BIT between Netherlands and Ethiopia under article 6/c states: 'the measures are taken against prompt, adequate and effective compensation. such compensation shall represent the fair market value of the investment immediately before the moment the measure or impending measures become public knowledge….'

The BIT between India and Ethiopia uses a different terminology where it refers to 'fair and equitable compensation' but again qualifies it to mean the market value of the investment at time of expropriation. Article 5 in relevant part states:

> Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation …except… against fair and equitable compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge…(emphasis added)

With regard to the other two elements of the Hull Rule, the BITs specifically mention that the compensation must be effectively realizable (paid in a convertible currency) and payment must be made promptly (without undue delay). All in all, one can conclude that the BITs which are signed by the government of Ethiopia contain the Hull rule of compensation for both direct and indirect expropriations and nationalization.

4.2 Compensation Standard under Domestic Legislations

i. Investment Law

Regarding the standard of compensation, Article 25/2 of the investment proclamation seems to embrace the 'adequate' compensation standard in a similar manner as the BITs wherein it states 'adequate' compensation corresponding to the prevailing market value, shall be paid in cases of both expropriation or nationalization of an investment for public interest. But it becomes a bit complicated when we see the standard applicable for cases of nationalization under Article 25/3 of the same. The provision stipulates that 'nationalization' results in the payment of appropriate or adequate compensation. The question, then, will be what is the standard of compensation

in cases of nationalization; adequate or appropriate? Daniel argued that different adjectives added to the word compensation are there to give more emphasis rather than having separate legal significance.[84] The author of this article humbly disagrees with this assertion at least as far as compensation for nationalized foreign investments are concerned. As discussed in previous sections above, the terms 'adequate' and 'appropriate' compensation have significant difference in the jurisprudence of international investment protection and it has been a bone of contention for some years. In the face of all debate that took place between the capital importing and exporting countries and the stand taken by the General Assembly, it cannot be concluded that the prefixes do not have separate legal significance.

ii. Other Laws on Expropriation

In Ethiopia, like in many other countries, though the government has the power to expropriate the property of the landholder, such power is limited as such action can be taken only against the payment of compensation. In this regard, Article 40(8) of the FDRE Constitution puts an obligation on the government to pay in advance compensation commensurate to the value of the property expropriated. The standard that is employed in the Constitution is 'commensurate compensation', which unfortunately is not defined either in the Constitution or Proclamation 455/2005. The Merriam Webster Dictionary defines the term as 'equal in measure or extent or corresponding in size, extent, amount, or degree'[85] while the Amharic version of the Constitution refers to 'ተመጣጣኝ' compensation. Hence, we can understand the term 'commensurate compensation' to mean an amount which is equivalent to the value of the property expropriated, without expecting mathematical equality between the compensation and the value of the expropriated property.[86] This deviation from equivalence in payment of compensation is also comprised in the Civil Code provisions for compensation.

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[84] Daniel W/Gebriel, Compensation During Expropriation, in Muradu Abdo (Ed.), Land Law and Policy in Ethiopia Since 1991: Continuities and Changes, Ethiopian Business Law Series, Vol. 3, (November 2009), p. 206

[85] See <http://www.merriam-webster.com/dictionary/commensurate> [accessed on February 25, 2013]

[86] Muradu supra note 28, p. 381

The underlying goal of compensation, as envisaged in the Civil Code, is to put the affected person to the position s/he would have been had the harm complained of did not materialize. Article 2090 of the civil code stipulates 'unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages' and the damages due shall be equal to the damage caused to the victim by the act giving rise to the liability.[87] Here, the whole idea of compensation is to put back the victim to the position he/she would have been had the harm complained of did not materialize. When this principle is applied to expropriation cases, 'the purpose of determining the amount of compensation would be to arrive at an amount which would neither permit the public to enrich at the cost of the affected person nor the latter to enrich at the detriment of the public…rather [I]t would be to put the affected person into the position that would have existed had the expropriation not taken place.'[88]

Article 2090 leaves a room for deviation from the rule of equivalent compensation when it provides the phrase 'unless otherwise' at the beginning. This indicates that the equivalence principle has an exception which may entail the award of compensation which is more or less than the harm incurred.[89] One such exception is expropriation. The Amharic version of Article 1474/1 of the Civil Code, in relevant part, states that '…መሬቱን ከማስለቀቅ የተነሳ በደረሰውና በተረጋገጠው ጉዳት ልክ ይሆናል።' This is translated to mean '…equal to the amount of *present* and *certain* damage caused by the expropriation'[90] (emphasis added). This provision limits compensation to present and certain damage. This limitation implies that future loss is not compensable although certain to occur[91] and as such consequential damage like loss of profit and transportation cost are disregarded.[92] This is in stark contrast to the concept of adequate compensation which is endorsed in the BITs signed by the country and the investment proclamation.

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[87] Article 2091 of the Civil Code
[88] Muradu supra note 28, p. 379
[89] George Krzeczunowicz, The Ethiopian Law of Compensation for Damages, (Addis Ababa University, Faculty of Law, 1977), p 79
[90] The English version of the code is different as it speaks of compensation equal to 'actual damage' caused by expropriation.
[91] Krzeczunowicz supra note 89, p. 173
[92] Muradu supra note 28, p. 380

This deviation from the principle of equivalence can also be traced in Proclamation 455/2005. The cumulative reading of articles 7 and 8 of the proclamation shows that the compensation will be paid for expropriated property situated on the land, permanent improvement to the land and permanent or temporary loss of the land. In the first category of compensable property falls buildings, fences, utilities, trees, crops, perennial crops, protected grass, etc. The basis for determining the amount of compensation for such property, which is located in rural areas, as provided under article 7/2 is the replacement cost of the property. In cases where the property expropriated is situated on urban land, the law provides for the lowest possible threshold for determining the amount of compensation when it stipulates under article 7/3 that the amount may not be less than the current cost of constructing a single room low cost house in accordance with the standard set by the concerned region. Here, the Regulation for payment of compensation[93] chips in by providing that the amount of compensation for a building will be determined on the basis of the current cost per square meter or unit for constructing a comparable building. Such amount will include the current cost for constructing floor tiles of the compound, septic tank and other structures attached to the building as well as the estimated cost for demolishing, lifting, reconstructing, installing and connecting utility lines of the building.[94] This applies for buildings located both in urban and rural areas. One should note that consequential damages like cost of removal, transportation, and erection of the building will only be paid as compensation for property that could be relocated and continue its service as before.[95]

The second category of compensable interest under the expropriation proclamation is permanent improvement made on land. Article 7/4 stipulates that the compensation for permanent improvement to land shall be equal to the value of capital and labor expended on the land. As such, this amount will be determined by computing the machinery, material and labor costs incurred for clearing, leveling and terracing the land, including the costs of water reservoir

[93] Council of Ministers Regulation on the Payment of Compensation for Property Situated on Landholdings Expropriated for Public Purposes, Regulation No 135/2007
[94] Article 3/2 of Regulation 135/2007
[95] Article 7/5 of Proclamation 455/2005

and other agricultural infrastructural works in cases of permanent improvements to rural land.[96]

The permanent or temporary loss of land holding is also compensable. Proclamation 455/2005 provides for two possible ways of compensating the person whose land holding has been expropriated: land to land compensation and monetary compensation. While the proclamation under article 8/3 indicates that a substitute land will be given for a rural land holder whose holding has been expropriated, article 15 of the regulation specifically mentions that the possessor of rural land used for growing crops or a protected grass, whose holding has been expropriated for public purpose will, as much as possible, be provided with a plot of land capable of serving a similar purpose. This will be effected when the *wereda* administration confirms that a substitute land is available within its locality (Article 8/3). Land to land compensation is also available for expropriated urban land holding. According to article 8/4 of the Proclamation, an urban land holder whose land holding has been expropriated will be provided with a plot of urban land the size of which will be determined by the urban administration. The main source of controversy regarding land to land compensation in urban areas is the size and location of the substitute land.[97] There is no requirement that the substitute land should be of equal size as the expropriated land, which can lead to grudge of the expropriated land holder. And again, the expropriated land might be located in the centre of town where there is relatively developed infrastructure while the substitute land could be located in undeveloped area, adding to the dissatisfaction.

In addition to or in lieu of land to land compensation, as the case may be, the land holders of both rural and urban land are entitled to payment of displacement compensation. Displacement compensation for rural land holders represents the compensation given for the loss of land itself[98] and the amount of the compensation is equivalent to ten times the average annual income the holder secured during the five years preceding the expropriation. This amount will be limited to the average annual income secured during the five years in cases where the *wereda* administration confirms the availability of a substitute

[96] Article 9 of Regulation 135/2007
[97] Daniel supra note 84, p. 228
[98] Id., p 215

land.[99] Where the expropriated property and land holding is located in urban areas, the holder will be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house, or be allowed to reside free of charge for one year in a comparable dwelling house owned by the urban administration.[100] This applies mutatis mutandis to demolished business house. When an urban land lease holding is expropriated prior to the expiry of the lease year, the holder will be provided with a similar plot of land and will be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house. Alternatively, he/she may be allowed to reside free of charge for one year in a comparable dwelling house owned by the urban administration.[101] The displacement costs paid to the urban land holder are to be paid in addition to the compensation paid for the property situated on the land.

4.3 Standard of Compensation for Unlawful Expropriation

International law recognizes the sovereignty of a State over resources found within its territory. And the taking of foreign property by the state is *prima facie* lawful; subject to conditions like public purpose, non discrimination, due process and payment of compensation.[102] Two questions can be raised in relation to the last element. First, would the failure of the state to pay compensation for the expropriated property, while all the other three conditions are fulfilled, make the expropriation illegal? Some commentators observe that numerous awards of the Iran-United States Claims Tribunal "*recognize the payment of prompt compensation to be a consideration relevant to the lawfulness of a taking under customary international law*".[103] On the other hand, authors like Sornarajah argue that the non-payment of compensation will not make the expropriation illegal provided the other conditions are fulfilled; rather, unlawful expropriation creates an obligation to pay restitutionary

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[99] Article 8/1 and 8/3 of Proclamation 455/2005. The justification for fixing this amount is unknown. See Daniel for further discussion on the argument whether such amount is commensurate to the property right lost, Id., p 216.

[100] Article 8/4/b of proclamation 455/2005. Where the house demolished is a business house, this provision applies mutatis mutandis.

[101] Article 8/4

[102] Sornarajah supra note 2, p. 406

[103] Brower CN and Brueschke JD, The Iran-United States Claims Tribunal, (Kluwer Law International, The Hague, 1998), p. 499 as cited by UNCTAD supra note 46, p. 43

damages. [104] The practice of the European Court of Human Rights also aligns to this approach. Accordingly, the court distinguishes between inherent illegality of a taking, for example a taking which is not in the public interest, and illegality due to the non-payment of compensation wherein the first category triggers automatic application of a higher compensation standard. [105]

The second question with regard to this element relates to the rule that will be followed for compensation in cases of illegal/unlawful takings. The PCIJ in Chorzow Factory Case laid down an important principle of compensation for illegal taking. It stated

> …reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed…. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. [106]

This principle has been an important principle in the determination of compensation to be paid for illegal taking as it has been employed by many international tribunals, including the Iran-US Claims Tribunal. Implementing this principle in expropriation cases requires the consideration of *damnum emergens*, the value of the expropriated enterprise, including tangible property, contract rights, and intangible valuables such as business good will; and *lucrum cessans*, lost profits. [107] Accordingly, the foreign investor whose enterprise has been illegally expropriated is entitled to the payment of the value of the expropriated enterprise as well as a reasonable profit that has been lost. This is reflected in different international decisions which declare that it is '… universally accepted rule of law that an investor cannot be fully compensated for the going concern value of his expropriated interests unless he is awarded

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[104] Sornarajah supra note 2. P. 364
[105] UNCTAD supra note 46, p. 44
[106] Case Concerning the Factory at Chorzow (Germany v Poland), PCIJ Report Series A, No 13, (September 13, 1928), p 47
[107] Reisman and Sloane supra note 33, p. 136

both the damage that has been sustained as a result of the taking and the reasonably ascertainable 'profit that has been missed'.'[108]

BITs adopt the Hull Rule of compensation for direct and indirect expropriations. In some forms of indirect expropriation, like in the case of creeping expropriation, one can identify illegal taking as it involves an accumulation of acts and omissions over time which depreciates the value of the property, with the state denying existence of expropriation and hence subsequent failure to pay compensation. And again, it is difficult to see how an expropriation accomplished by a series of ostensibly valid measures that collectively deprive an investor of its property right, could be considered to have fulfilled the due process requirement for a lawful expropriation.[109] This leads us to the conclusion that in cases of creeping expropriation, the Hull rule of compensation must be seen in light of the principle devised in the Chorzow Factory case.

What we have under the Hull rule is the requirement that compensation must be 'adequate, prompt and effective'. In many of the BITs 'adequate' is qualified to mean the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known.[110] The market value of an enterprise in modern economic terms is not the enterprise itself but rather the stream of profits it can be expected to produce over its lifetime.[111] At this point one may raise a question as to the applicability of the Chorzow Factory principle as it will entitle the investor to be over compensated as he/she is entitled to the value of the expropriated property (which includes the stream of profit) and lost profit. Some argue that despite the double count, the distinction serves a useful policy purpose in so far as it permits international tribunals to penalize egregious expropriations and, hopefully, to deter them in the future.[112]

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[108] Brice M Clagett, Just Compensation in International Law: The Issue before the Iran-US Claims Tribunal, in Richard B. Lillich, (ed.), IV The Valuation of Nationalized Property in International Law, (1987), p 42 as cited by Riseman and Sloane supra note 33, Footnote no 98

[109] Id., 137

[110] The BITs Ethiopia signed with Germany, Belgian-Luxembourg Economic Union and Equatorial Guinea are just few of the examples.

[111] Reismand and Sloane supra note 33, p 137

[112] Ibid.

Coming to the issue of indirect expropriation under Ethiopian law, as indicated in section above, the domestic legislations on expropriation do not recognize the concept in a similar manner as it is reflected in the BITs the country signed.

5. Conclusion

Foreign investment is a vital tool for economic growth and prosperity of states. All countries, whether rich or poor, seek foreign capital as an important element for the development of their economy. The flow of foreign investment is influenced by, among other things, the legal framework the host state provides. The legal framework on the promotion and regulation of investment is derived from the national law of the host state, the contract the host state concludes with the individual investor and international law, particularly bilateral investment treaties. Achieving the goal of investment promotion and protection requires coherence among the different sources of law for investment. Integrating the investment policy framework into an overall development strategy and ensuring coherence among the three sets of rules is challenging. In this respect, UNCTAD proposes that there should be coherence and synergy at both the national and international level. If what is committed internationally by the host state is different from what is provided in the host state's municipal law, which is equally applicable, then the protection accorded on the international level loses its meaning.

In this short article, an attempt is made to show that this synergy and coherence is lacking in the international and national investment policy of Ethiopia. This is particularly so in areas of expropriation and standard of compensation. While on the international level the BITs recognize the concept of indirect expropriation, this concept is understood somehow differently in the national legislation. And again, while the BITs adhere to the 'adequate, prompt and effective' standard of compensation, otherwise known as 'Hull Rule', the national legislation seems to use both the Hull Rule and 'adequate standard'; concepts which entail different obligation. This is despite the fact that all policies that impact on investment need to be coherent.