

# RETHINKING LEGAL PROTECTIONS FOR INVESTMENTS AGAINST POLITICAL VIOLENCE IN ETHIOPIA

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## Abstract

*Amid Ethiopia's unfolding political volatility, investors face significant risks of investment losses due to political violence, including riots, violent protests, and similar incidents. This paper, through a doctrinal analysis of relevant domestic legislation, treaty provisions, arbitral decisions, and scholarly literature, evaluates the adequacy of legal protections for investments under domestic laws and Bilateral Investment Treaties (BITs). The study reveals a sharp disparity in legal protections afforded to foreign and domestic investors against the risks of political violence. Notably, foreign investors benefit from compensation mechanisms under BITs, including Full Protection and Security (FPS) clauses and War Clauses, whereas domestic investors lack comparable remedies, leading to discriminatory treatment despite facing identical risks. Of course, investors might seek remedies via tort claims against individual wrongdoers and, theoretically, through constitutional tort actions, although the latter have yet to receive practical recognition. However, these mechanisms are inadequate to address the multifaceted challenges of investment losses caused by political violence. Furthermore, some BITs provide extensive protections for foreign investments against such risks without exceptions, broadening Ethiopia's obligations during times of political uncertainty. To address this imbalance, the study recommends legal reforms, including enacting domestic investment laws with comprehensive compensation mechanisms and renegotiating BITs to*

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*incorporate emergency clauses. The article further highlights the importance of institutional reforms, including implementing preventive strategies, strengthening law enforcement capabilities, promoting political dialogue, and expanding investment insurance coverage to include political violence, all of which are essential for reducing investment risks and enhancing investor confidence.*

**Key-terms:** Investment protection, Ethiopia, BITs, Political Violence, War Clause, Full Protection and Security.

## Introduction

Investments inherently demand stability and falter in the face of violence and political turmoil. Developing countries, including Ethiopia, are susceptible to various forms of political risks, where economic and political instability often prevails. Political risks, i.e., political unrest, civil strife, and armed conflict are the main factors that affect investment in developing countries.<sup>1</sup> In Ethiopia, civil unrest and political volatility have been prominent since 2016, leading to loss of lives, property, and displacement. Further, between mid-2019 and 2020, 113 major incidents were recorded across different parts of the country.<sup>2</sup> To make matters worse, the war in the northern part of the country, along with other ethnically motivated incidents elsewhere, caused profound humanitarian suffering and extensive property destruction.<sup>3</sup> As a result of those incidents, many investments were wholly or

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<sup>1</sup> Alex Braithwaite & Jeffrey Kucik, *The Costs of Domestic Political Unrest*, 58 *Int'l Stud. Q.* (2014) 489, p. 490.

<sup>2</sup> Hilary Matfess, *Change and Continuity in Protests and Political Violence in PM Abiy's Ethiopia*, ACLED, (Oct. 13, 2018).

<sup>3</sup> Alonso Soto, & Selcuk Gokoluk, *Once-Thriving Economy in Trouble as Ethiopia's Abiy Cracks Down*, Bloomberg (June 18, 2021).

partially damaged.<sup>4</sup> This, in turn, prompts investors to pressure the government to compensate for such losses.<sup>5</sup>

Ethiopia, host to numerous foreign and domestic investments, has signed Bilateral Investment Treaties (BITs) with 35 countries<sup>6</sup> and is a signatory to the Multilateral Investment Guarantee Agency (MIGA).<sup>7</sup> These legal frameworks, supplementing or standing alone from domestic laws, aim to safeguard foreign investments against political risks. Political risk encompasses the potential for government actions, instability, and changes in policies which in turn adversely affect profitability of investments. Specifically, political violence risk, as a major component of political risk, involves the possibility of civil unrest, terrorism, or other forms of violence disrupting business operations.

To this end, BITs typically incorporate investment protection clauses designed to address violent situations, such as civil unrest, insurrection, armed conflict and war, by incorporating key standards including the

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<sup>4</sup> Fasika Tadesse, *Committee Arises to Assess Damaged Investments*, Addis Fortune, (Dec. 26, 2020), <https://addisfortune.news/committee-arises-to-assess-damaged-investments/>.

<sup>5</sup> Daniel Behailu Gebreamanuel, *Economic Commentary: FDI and Democracy in Ethiopia: Can FDI Push for a Well-Administered Government?*, Addis Standard (Oct. 15, 2021), <https://addisstandard.com/economic-commentary-fdi-and-democracy-in-ethiopia-can-fdi-push-for-a-well-administered-government/>. Ethiopia has paid over half a billion birr to support investors whose investment has been damaged wholly or partially in riots in the last 3 years. In the time of the affected 300 investments, only 200 of them were supported.

<sup>6</sup> UNCTAD, *International Investment Agreements Navigator*, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>

<sup>7</sup> Ethiopia is one of the original members of the Multilateral Investment Guarantee Agency (MIGA), which, under Article 11(a)(iv) of the MIGA Convention, provides coverage for investment losses arising from war, civil disturbance, and similar political risks. See *Convention Establishing the Multilateral Investment Guarantee Agency* (MIGA) art. 11(a)(iv), Oct. 11, 1985, 1508 U.N.T.S. 99.

“Full Protection and Security” (FPS) Clause and “Compensation for Loss or War Clause”. The first standard of treatment, the FSP clause, primarily imposes a due diligence obligation on the host State to safeguard investments against risks of political violence. In contrast, a war clause extends specific protection to investments against losses arising from wars and other armed conflicts.<sup>8</sup>

The relevance of these provisions is evident in the recent surge of investor arbitral claims seeking redress for investment damages resulting from the ongoing conflict and instability since 2017.<sup>9</sup> An illustrative case is the case of two Egyptian investors, who have served notice to Ethiopia, signaling their intention to pursue a treaty-based claim against the country for investment losses attributed to conflicts in the Tigray region.<sup>10</sup> This pending claim of \$40 million, stemming from losses incurred during the civil war, acts as a significant precursor to future challenges, particularly the potential for an escalation of investor claims due to political instability.<sup>11</sup>

In this context, given Ethiopia's proactive efforts to attract foreign direct investment (FDI) by offering robust protections against conflict-related risks through BITs, it is both timely and relevant to examine the

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<sup>8</sup> Noradele Radjai, Laura Halonen & Panagiotis A. Kyriakou, *An Analysis of the Compensation Regime Applicable to Claims Arising from Armed Conflicts Affecting Investments in MENA*, 3 *BCDR Int'l Arb. Rev.* 219, pp. 219–242 (2016).

<sup>9</sup> R.H. Khafaga & S.H. Albagoury, *Political Instability and Economic Growth in Ethiopia: An Empirical Analysis*, 5 *J. Soc. & Pol. Sci.* 20 (2022).

<sup>10</sup> Damien Charlotin, *Egyptian Investors Put Ethiopia on Notice of A Treaty-Based Dispute Following Civil War in Tigray*, *Investment Arbitration Reporter*, (Sept. 1, 2021), <https://www.iareporter.com/articles/egyptian-investors-put-ethiopia-on-notice-of-a-treaty-based-dispute-following-civil-war-in-tigray/>

<sup>11</sup> Toby Fisher, *Egyptian Investors Threaten Ethiopia over Civil War Disruption*, *Global Arb. Rev.* (2021), <https://globalarbitrationreview.com/article/egyptian-investors-threaten-ethiopia-over-civil-war-disruption>.

protection standards provided by Ethiopian BITs, focusing on key provisions such as FSP and war clauses, as well as potential defences Ethiopia might raise against related claims. Additionally, as domestic investments face similar risks, it is also essential to appraise the legal recourse available to domestic investors.

The primary objective of this article is to examine the legal protections available for foreign and domestic investments against political unrest. To achieve this, the article analyzes relevant provisions of BITs, other legal and policy documents, and pertinent literature on the subject. However, given the complexity and breadth of investment protection during political uncertainty, this paper does not aim to provide an exhaustive analysis from the perspective of international investment law. Instead, it seeks to highlight the issue and offer a glimpse on the challenges Ethiopia might face from foreign investors due to conflict-related investment losses, while also assessing the adequacy of national laws in compensating domestic investments for similar risk.

To do so, investment-specific laws such as the Investment Proclamation No. 1180/2020,<sup>12</sup> Investment Regulation No. 474/2020,<sup>13</sup> Industrial Parks Proclamation No. 886/2015,<sup>14</sup> Petroleum Operation Proclamation No. 678/2010<sup>15</sup> and Mining Operation Proclamation No.

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<sup>12</sup> Investment Proclamation No. 1180/2020, *Federal Negarit Gazeta*, (2020). [Hereinafter, Proclamation No. 1180/2020].

<sup>13</sup> Investment Regulation No. 474/2020, *Federal Negarit Gazeta*, (2020). [Hereinafter, Regulation No. 474/2020].

<sup>14</sup> Industrial Parks Proclamation No. 886/2015, *Federal Negarit Gazeta*, (2015). [Hereinafter, Proclamation No. 886/2015].

<sup>15</sup> Mining Operations Proclamation No. 678/2010, *Federal Negarit Gazeta*, (2010). [Hereinafter, Proclamation No. 678/2010].

295/1986<sup>16</sup> are scrutinized. Furthermore, other laws which have relevance in addressing risks of political violence including the FDRE Constitution,<sup>17</sup> Directive No. 253/2021 issued to Provide Government Support for Investors Whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters,<sup>18</sup> the Civil Code,<sup>19</sup> the Criminal Code,<sup>20</sup> and the Criminal Procedure Code<sup>21</sup> are also examined.

The article is structured into four parts. In the first part, the impacts of political instability on Ethiopia's investment environment are covered. The second part provides a comprehensive overview of political risk and political violence within the investment context. Subsequently, the third part scrutinizes the protection afforded by the Ethiopian legal framework including BITs and domestic legislation, for investments against political violence risk. The fourth part thoroughly evaluates the effectiveness of domestic laws in comparison to BITs in protecting investments from risks related to conflicts. Lastly, the final part summarizes the article's key findings and provides the way forward.

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<sup>16</sup> Petroleum Operation Proclamation of the Ethiopian provisional Military Government Proclamation No. 295/1986, *Negarit Gazeta*, (1986). [Hereinafter, Proclamation No. 295/1986].

<sup>17</sup> The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, *Federal Negarit Gazeta*, (1994). [Hereinafter, FDRE Constitution].

<sup>18</sup> Directive to Provide Government Support for Investors Whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters No. 253/2021 (Hereinafter, Directive No. 253/2021).

<sup>19</sup> Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960). [Hereinafter, the Civil Code].

<sup>20</sup> Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, *Federal Negarit Gazeta*, (2004). [Hereinafter, the Criminal Code].

<sup>21</sup> Criminal Procedure Code of Ethiopia, Proclamation No. 185/961, *Negarit Gazeta* (1960), Art. 154 (1). [Hereinafter, the Criminal Procedure Code].

## **1. Ethiopia's Political Uncertainty and Its Impact on Investment**

Once considered an island of stability in a tumultuous region, Ethiopia has faced a persistent trend of political uncertainty since November 2015.<sup>22</sup> This period of instability has resulted in recurrent bloodshed and the vandalizing and looting of both local and foreign investments. In specific instances, covering 2015 and 2017, a considerable number of investments were either partially or wholly disrupted, with 301 investments impacted in the Amhara and Oromia regions alone.<sup>23</sup> According to a study conducted by the Ethiopian Investment Commission (EIC), between 2014 and 2017, over 700 investments were damaged due to the recurrent violence that has engulfed the country.<sup>24</sup> Besides, despite the lack of accurate data on investment losses, the war in the northern part of the country has caused uncountable damage in the country. The political risk index also underscores the ongoing high risks of political violence in the country.<sup>25</sup>

Political instability poses a significant threat to the economic development of any country.<sup>26</sup> For instance, Yi Feng's analysis on the impact of politics on private investment in developing nations demonstrates the negative impact of political instability on private

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<sup>22</sup> Hilary, *supra* note 2.

<sup>23</sup> Maya Misikir, *Loan Directive Emerges for Damaged Investments*, Addis Fortune (Dec. 12, 2020), <https://addisfortune.news/loan-directive-emerges-for-damaged-investments/>.

<sup>24</sup> Fasika Tadesse, *supra* note 4. Between 2014 and 2017, the government spent a total of over 800 million Birr to support for damaged investments through Development Bank of Ethiopia and Commercial Bank of Ethiopia.

<sup>25</sup> Willis Towers Watson, *Political Risk Index*, (spring 2022), <https://www.wtwco.com/en-US/Insights/2022/06/political-risk-index-spring-2022>.

<sup>26</sup> Jahangir Chawdhury, *Political Instability: A Major Obstacle to Economic Growth in Bangladesh* (2016) (thesis, Central University of Applied Science, Business Management)

investment.<sup>27</sup> Political instability also negatively affects investors' decisions to invest, leading to reduced investment in fixed capital assets, such as factories or land, as investors prefer to maintain their assets and portfolios in liquid and transferable forms.<sup>28</sup> This implies that the level of political uncertainty associated with an unstable political environment deters investment.<sup>29</sup> Moreover, the perception of political violence risk influences investors to favor labor-intensive, low-productivity industries over capital-intensive enterprises,<sup>30</sup> which in turn contributes for diminishing job opportunities and the share of investment in GDP.<sup>31</sup>

Despite the government's efforts in legislative revisions such as revising the six-decade old Commercial Code, enactment of new Investment Law and industry liberalization i.e., such as liberalization of the telecom industry by the issuance of a telecom license, localized unrest in several parts of the country, political tensions, and a devastating war in the northern part of the country and some part of Oromia region could negatively impact the investment climate and lower future FDI inflow.<sup>32</sup> Although the data is scant on the flow of domestic investment, FDI was adversely affected by instability in certain parts of the country, including regions with industrial parks.<sup>33</sup> Evidently, notwithstanding Ethiopia's peak FDI inflows, recorded at \$4.14 billion in 2016, the

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<sup>27</sup> Yi Feng, *Political Freedom, Political Instability, and Policy Uncertainty: A Study of Political Institutions and Private Investment in Developing Countries*, 45 *Int'l Stud. Q* (2001), p. 271.

<sup>28</sup> *Id.*, at 273.

<sup>29</sup> Alex Braithwaite & Jeffrey Kucik, *supra* note 1.

<sup>30</sup> See Feng, Yi, *supra* note 27, p. 274.

<sup>31</sup> *Id.*, p. 274.

<sup>32</sup> US Department of State, *Ethiopia: Investment Climate Statements*, (2021), <https://www.state.gov/reports/2021-investment-climate-statements/ethiopia/>.

<sup>33</sup> UNCTAD, *World Investment Report: International Production Beyond the Pandemic* 34 (2020).



country has experienced a decline in FDI since 2017, mainly due to domestic political unrest and a global economic slowdown.<sup>34</sup>

Political instability has also ramifications on the distribution of investments, leading to a concentration of financial resources in areas or regions deemed relatively safe.<sup>35</sup> This phenomenon was evident in Ethiopia. For instance, in the fiscal year 2017/18, out of 1,550 operational investments, approximately 87.9% (1,362 projects) were located in Addis Ababa, 4.3% (66 projects) in Tigray, 3% (46 projects) in Afar, 1% (15 projects) in Amhara, 0.1% (1 project) in Benshangul-Gumuz, and 1 project in SNNPR. In contrast, the National Bank Report for 2018 highlighted the absence of operational investment projects in Oromia, the epicenter of the instability.<sup>36</sup>

## **2. Political Risks and Risk of Political Violence in General**

Within the realm of investment, risks can be broadly classified into two categories: commercial risks and political risks. Commercial risks pertain to inherent uncertainties associated with changes in the investment market, including factors such as new competitors, price fluctuations, or alterations affecting the financial context of the investment. On the other hand, non-commercial or political risks involve potential interventions by the host state in the investment landscape. Political risks impacting investments cover a wide range of

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<sup>34</sup> National Graduate Institute for Policy Studies, *Ethiopia FDI Policy Report 2022*, p. 32 (2022). See also *Id.*, p. 72. Ethiopia's FDI inflows have fluctuated since 2014. Initially, inflows were USD 1.8 billion in 2014, increasing to USD 2.627 billion in 2015, and reaching a peak of USD 4.143 billion in 2016. Subsequently, there was a slight decrease to USD 4.017 billion in 2017, followed by further reductions to USD 3.310 billion in 2018 and USD 2.516 billion in 2019.

<sup>35</sup> Gary Krueger, *Violent Conflict and Foreign Direct Investment in Developing Economies: A Panel Data Analysis*, (2005), p. 3.

<sup>36</sup> National Bank of Ethiopia, *Annual Report 2017/18*, (2018), p. 102.

factors, including expropriation, government corruption, taxation, regulation, currency devaluation, trade tariffs, labor laws, or environmental regulations.<sup>37</sup> Furthermore, political risks also encompass political violence which contributes to physical harm to investments due to events such as civil unrest or riot, war, terrorism, or insurgency in the host state.<sup>38</sup>

Political violence, as one component of non-commercial risk, refers to acts of violence committed by both state and non-state actors for political purposes.<sup>39</sup> Usually, political violence, arises from a complex interplay of social, economic, and political factors, involves the use of force, coercion, or intimidation to achieve political objectives.<sup>40</sup> This type of violence often occurs within the context of political struggles, competing ideologies, or power struggles.<sup>41</sup> Physical violence, terrorism, civil unrest, riots, coups, and armed conflicts, manifests political violence.<sup>42</sup>

Here, it is crucial to differentiate political violence from social violence or ordinary crime.<sup>43</sup> Political violence contains organized group actions that explicitly or implicitly aim to defy or challenge governmental

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<sup>37</sup> Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford Univ. Press 2008), p. 196.

<sup>38</sup> Jason Webb Yackee, *Political Risk and International Investment Law*, 24 Duke J. Comp. & Int'l L. (2014), p. 494.

<sup>39</sup> Tim Sweijjs, Nicholas Farnham & Hannes Rööß, *The Many Faces of Political Violence: Volatility and Friction in the Age of Disintermediation*, HCSS StratMon Annual Report 2016/2017, (The Hague Ctr. for Strategic Studies 2017), p. 6.

<sup>40</sup> Zahid Latif et al., *FDI and 'Political' Violence in Pakistan's Telecommunications*, 36 Hum. Sys. Mgmt. (2017), p. 341.

<sup>41</sup> Belay, T. et al., *Peace & Security Report: Ethiopia Conflict Insight*, Institute for Peace and Security Studies, Addis Ababa University (2022), p. 1.

<sup>42</sup> Ekkart Zimmermann, *Theories of Political Violence: Definition, Conception, and Development*, in *The Wiley Handbook of Violent Extremism* (2017).

<sup>43</sup> See Perry Mars, *The Nature of Political Violence*, 24 Soc. & Econ. Stud. at 2 (1975). <http://www.jstor.org/stable/27861557>.

authority. In contrast, as Sean F. and Kristián H. contend, unlike political violence, social violence pertains to acts committed by individuals or groups with common occurrences being murder, homicide, and assaults, devoid of political motivation, or not intending to challenge governmental authority.<sup>44</sup>

In the current global business landscape, marked by intricate political environments including political violence and uncertainty, the concept of political violence emerges as a prominent topic.<sup>45</sup> In the context of investment, Hatice Erkekoglu and Zerrin Kilicarslan have identified political violence risks as a major critical factor that investors carefully evaluate when considering to invest in any country.<sup>46</sup> Similarly, Alex Braithwaite and Jeffrey Kucik have noted that political violence and instability significantly undermine investor confidence and choices.<sup>47</sup> This is why both investors and their home countries prioritize investment guarantee arrangements through investment treaties to mitigate such risks.<sup>48</sup>

This article specifically focuses on politically motivated acts of civil unrest in Ethiopia and the legal protection afforded to investment against such risks.<sup>49</sup>

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<sup>44</sup> Sean Fox & Kristián Hoelscher, *Political Order, Development and Social Violence*, 49 J. Peace Res. (2012), p. 433.

<sup>45</sup> Jason Webb Yackee, *supra* note 38, p. 479.

<sup>46</sup> Hatice Erkekoglu & Zerrin Kilicarslan, *Do Political Risks Affect the Foreign Direct Investment Inflows to Host Countries?*, 5 J. Bus. Econ. & Fin., (2016), p. 2.

<sup>47</sup> Alex Braithwaite & Jeffrey Kucik, *supra* note 1, p. 491.

<sup>48</sup> See Eamon Macdonald, *Bilateral Investment Treaties*, 1 St Andrews L.J. (2020), p. 32.

<sup>49</sup> To describe this context, terms such as unrest, instability, and conflict are used interchangeably throughout this article.

### **3. Ethiopian Legal Framework on Investment Protection against Political Violence Risks**

A robust legal framework providing adequate protection for investments is crucial for a country's economic growth.<sup>50</sup> Recognizing the pivotal role of investments, countries extend guarantees and legal protection through investment treaties and domestic laws to both foreign and domestic investors. International Investment Agreements (IIAs), such as BITs, offer substantive standards of protection, including National Treatment (NT), Fair and Equitable Treatment (FET), Most-Favored-Nation Treatment (MFN), Full Protection and Security (FPS), Expropriation, and War Clause, to name a few, for foreign investments.<sup>51</sup> Furthermore, as part of the procedural framework, BITs usually include a dispute resolution mechanism that enables investors to bring claims against the host state in international arbitration.<sup>52</sup>

#### **3.1. Ethiopia's BITs in Protecting Investments Against Political Violence Risks**

As a prominent recipient of FDI in Africa, Ethiopia has strategically pursued investment treaties, such as BITs and multilateral agreements such as MIGA, to enhance its attractiveness to FDI. These treaties establish reciprocal agreements aimed at promoting and safeguarding foreign investments from political risks in the host State.<sup>53</sup> Ethiopian BITs incorporate several protective standards relevant to foreign

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<sup>50</sup> C.M. Lakpini, *Political Risks and the Protection of Investors Under Nigerian Law*, p. 1, [https://www.researchgate.net/publication/327339442\\_Political\\_Risks\\_and\\_Protection\\_of\\_Investors\\_under\\_Nigerian\\_Law](https://www.researchgate.net/publication/327339442_Political_Risks_and_Protection_of_Investors_under_Nigerian_Law).

<sup>51</sup> M. Sornarajah, *The International Law on Foreign Investment* 202 (3d ed. Cambridge Univ. Press 2010).

<sup>52</sup> *Id.*

<sup>53</sup> Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 Trade L. & Dev. (2010), p. 19.

investments, with specific clauses addressing instances of violence, including armed conflict. For example, the FPS clause, which provides general protection during violent events, and the Compensation for Losses or War Clause, which applies to wars and similar conflicts, are two common investment protection standards designed to safeguard investments against risks associated with political violence.

The above noted two common BITs clauses have been frequently invoked by investors against the host state to claim compensation for investment losses caused by conflict or armed conflict. In this regard, C. Schreuer notes that since the 1990s, a growing number of investors have invoked the standard of protection to file arbitration claims, alleging that host states failed to uphold their obligations to protect foreign investments.<sup>54</sup> Although FPS clauses do not directly address situations of armed conflict, investors have frequently invoked the clause to show host state's failure to diligently protect foreign investments from third-party violence within its territory.<sup>55</sup> Another frequently invoked provision is the War Clause, which addresses restitution for investment losses resulting from armed conflict. However, there is no consensus on their application and interpretation by scholars and arbitral tribunals.<sup>56</sup>

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<sup>54</sup> *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3 (final Award) 30 I.L.M. 580 1991, cited in C. Schreuer, *Full Protection and Security*, 1 J. Int'l Disp. Settlement, (2010), p. 2. See also, *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 483.

<sup>55</sup> C. Schreuer, *Full Protection and Security*, 1 J. Int'l Disp. Settlement, (2010) p. 2. [Hereinafter, C. Schreuer, *Full Protection and Security*].

<sup>56</sup> *Id.*

### 3.1.1. Full Protection and Security (FPS) Clause

Although BITs lack a precise definition on the term "Full Protection and Security", the standard generally requires the host State to enforce its laws and provide police protection for foreign investments within its territories.<sup>57</sup> While providing the protection, various BITs used fickle terminologies, with some employing phrases such as 'full protection and security';<sup>58</sup> 'most constant protection and security';<sup>59</sup> 'full and adequate protection and security',<sup>60</sup> and the commonly used term, 'full protection and security'. However, these variations in terminology do not substantially alter the level of police protection a host State is required to provide.<sup>61</sup>

As provided above, the FPS clauses have been broadly utilized by investors pertaining to physical harm caused by state organs or by third parties owing to war, insurrection, and revolution. The ICSID case between *Asian Agricultural Products Ltd. (AAPL) V. Republic of Sri Lanka (AAPL v. Sri Lanka)* cases is notable for its early application of the FPS standard.<sup>62</sup> The case was initiated by the investor, who argued that Sri Lanka had breached its obligation to provide 'full protection and security' under article 2 of the UK-Sri Lanka BIT, thereby bearing international responsibility for the complete destruction of the farm

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<sup>57</sup> Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford Univ. Press 2008), p. 67.

<sup>58</sup> See Ethiopia–Denmark BIT (2001), art. 2(2); Ethiopia–Israel BIT (2003), art. 2(2); & Ethiopia–Russia BIT (1999), art. 2(2) each contain a similar clause.

<sup>59</sup> Belgium–Luxemburg–Ethiopia BIT (2006), art. 3 contains similar clause. However, it also contains a saving clause for the host state to take measures required to maintain public order.

<sup>60</sup> Ethiopia - Malaysia BIT (1998) also incorporates similar clause.

<sup>61</sup> C. Schreuer, *The Protection of Investments in Armed Conflicts*, in *Investment Law Within International Law* (Freya Baetens ed., Cambridge Univ. Press, 2013) p. 3. [Hereinafter, C. Schreuer, *The Protection of Investments in Armed Conflict*].

<sup>62</sup> C. Schreuer, *Full Protection and Security*, *supra* note 55.

due to its counter-insurgency operations against the Tamil rebels. In interpreting FPS clause, the tribunal clarified that:

...the FPS standard does not establish *strict liability* and did not render Sri Lanka liable for any destruction of investments. It rather emphasized that Sri Lanka could only be held liable if the damage suffered were *attributable to the State or its agents* and *if the State failed to act with due diligence*.<sup>63</sup> (Emphasis added)

The tribunal's qualification of the FPS standard as not imposing strict liability was reiterated in the *Tecmed v Mexico* case. In the case, the Tribunal, citing the case law quoted above, emphasized that “...*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it*”.<sup>64</sup> Similarly, in other ICSID case between *AMT v. Zaire*, the tribunal ruled in favor of the claimant due to Zaire's failure to protect the property during riots, emphasizing the State's obligation of *vigilance*.<sup>65</sup> The Tribunal also disregarded the perpetrator's status, stating that “it made no difference whether the alleged acts were committed by a member of the Zairian armed forces or a member of the public because Zaire had the *obligation of vigilance*”.<sup>66</sup>

Thus, from the arbitral tribunals' decisions, it is sound to contend that, the host State obligation under the FPS clause is not absolute,<sup>67</sup> but

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<sup>63</sup> *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) (paras.45-53).

<sup>64</sup> *Tecnicas Medioambientales Tecmed S. A. v The United Mexican States*, Award, 29 May 2003, paras 175-181.

<sup>65</sup> *American Manufacturing & Trading, Inc. (ATM) v. Democratic Republic of the Congo* (ICSID Case No. ARB/93/1).

<sup>66</sup> *Id.*, para 6.05.

<sup>67</sup> C. Schreuer, *Full Protection and Security*, *supra* note 55, p. 19. For further discussion on its content and scope and its relation with armed conflicts and international

rather a reasonable *duty of vigilance* or *due care* to prevent harm to persons or property related to an investment. As reflected in the case laws, in examining the proper content of the FPS standard, arbitral tribunal often used both objective and subjective standards of *due diligence*.<sup>68</sup> While the objective standard demands that all states adhere to the same international minimum standard of due diligence, irrespective of their individual circumstances and capabilities, the subjective standard, conversely requires the tribunal to take into account a state's resources, capabilities, and specific circumstances when determining the required level of due diligence.<sup>69</sup>

Nevertheless, arbitral tribunals often consider the host State's capacity and available resources in assessing the requirement of *due diligence*, especially in situations involving civil strife or unexpected breakdowns in public order.<sup>70</sup> This means, when subjective test is employed by tribunal, a State is less likely to be held accountable for its failure to

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humanitarian law, see, Ira Ryk-Lakhman, *Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security*, in European Yearbook of International Economic Law, pp. 260-279 (Springer, Katia Fanch Gomez et'al., ed., 2019). <https://doi.org/10.1007/978-3-030-10746-8>

<sup>68</sup> Markus Burgstaller & Giorgio Rizzo, *Due Diligence in International Investment Law*, 38 J. Int'l Arb., (2021), p. 697.

<sup>69</sup> Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 Syracuse J. Int'l L. & Com. (2015), p. 319.

<sup>70</sup> Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?* (Int'l Inst. for Sustainable Dev. 2011), pp. 1–13. FPS standard is applied to the exercise of the host state's police powers. See *Pantechniki S.A. Contractors & Engineers V. Republic of Albania*, ICSID Case No. Arb/07/21 (Greece/Albania BIT), Award (2009, pars. 71–84). In this case the tribunal emphasized that host state's level of development required consideration in determining FPS clause under BIT. Thus, given the “environment of desolation and lawlessness” in Albania at the time that the Claimant established its investment, it is unreasonable to expect a high standard of police protection”.



provide protection and security during unexpected breakdowns in public order or disturbances of unprecedented scale and location.<sup>71</sup>

In general, the due diligence standard is an obligation of conduct rather than an obligation of result, as state might not be automatically responsible for all investment damage caused by its organ or third party within its territories.<sup>72</sup> This is because demonstrating the state's exercise of due diligence under the prevailing circumstances would shield it from liability for breaching the FPS standard. On the investors' side, successfully invoking FPS protection requires them to demonstrate specific failures by the host state to exercise *due diligence* in protecting investments or taking precautionary measures to prevent harm.

### **3.1.2. Compensation for Loss or War Clause**

The War Clause is the other key provision often included in BITs designed to protect investments from losses caused by conflict-related events. Unlike the FPS clause, the War Clause introduces a result-oriented obligation specifically tailored to compensate for investment losses triggered by war, armed conflict, riots, or similar events in the host country.<sup>73</sup> The primary objective of the clause is to provide an additional guarantee for foreign investment in times of war and armed

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<sup>71</sup> C. Schreuer, *Full Protection and Security*, *supra* note 55, p. 16.

<sup>72</sup> Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From?*, 7 Am. U. Bus. L. Rev. (2018), p. 95.

<sup>73</sup> Sébastien Manciaux, *The Full Protection and Security Standard in Investment Law: A Specific Obligation?*, in European Yearbook of International Economic Law, (Katia Fach Gómez et al. eds., 2019), p. 226. For further discussion on the interpretation of war clauses in investment treaties by investment tribunals, see Michail Risvas, *Non-Discrimination and the Protection of Foreign Investments in the Context of an Armed Conflict*, in European Yearbook of International Economic Law, (Katia Fach Gómez et al. eds., Springer 2019), p. 200. <https://doi.org/10.1007/978-3-030-10746-8>.

conflict.<sup>74</sup> However, it must be noted that the exact nature and scope of the protection afforded by War Clause depends on the type of war clause set out in the specific BIT.<sup>75</sup>

War clauses within BITs are generally classified into three types: *non-discrimination*, *extended* and *strict liability war clauses*, each type imposing distinct obligations on the host State.<sup>76</sup> The non-discrimination war clause, for instance, mandates equal treatment of investors regarding compensation or merely pledge non-discriminatory treatment for investments in post-conflict situations.<sup>77</sup> Therefore, it is the State's differential treatment of investors in compensating the losses that trigger the application of the war clause.<sup>78</sup>

Many BITs to which Ethiopia is a signatory include a non-discrimination war clause. An example is article 4(3) of the Ethiopia-Turkey BIT, which reads:

Investors of either Party whose investments suffer losses in the territory of the other Party *owing to war, insurrection, civil disturbance or other similar events* shall be accorded by such other

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<sup>74</sup> Facundo Pérez-Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, 32 ICSID Rev. – Foreign Investment L.J. (2017), p. 696. <https://doi.org/10.1093/icsidreview/six010>.

<sup>75</sup> S. Spears & M. F. Agius, *Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties*, in European Yearbook of International Economic Law, at 283 (Katia Fach Gómez et al. eds., Springer 2019) <https://doi.org/10.1007/978-3-030-10746-8>.

<sup>76</sup> N. Radjai, *et al*, *supra* note 8, pp. 219–242.

<sup>77</sup> C. Schreuer, *War and Peace in International Investment Law*, in European Yearbook of International Economic Law: Special Issue – International Investment Law and the Law of Armed Conflict, (K.F. Gómez, A. Gourgourinis & C. Titi eds., 2021), p. 6.

<sup>78</sup> *EDF International SA et al v Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012), paras 1158–1159; *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 559, cited in *Id.*, p. 290.

Party treatment *no less favorable than that accorded to its own investors or to investors of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses.*<sup>79</sup> (Emphasis added)

This provision, while ensuring non-discriminatory treatment for compensation extended to nationals or third-country investors, does not establish an unequivocal obligation for the host state to indemnify investors against conflict-related losses.<sup>80</sup> Accordingly, from the perspective of investors, the non-discriminatory war clause offered little protection against investment losses caused by conflict. This is because, as Spears and Agius stated, the clause allows the State to avoid payment of compensation for investment losses by choosing not to compensate any investor.<sup>81</sup>

Extended War Clause is the other form of war clause incorporated in Ethiopian BITs. This type of war clause includes non-discriminatory clause but goes beyond and includes the obligation to compensate investors for losses resulting from the host State's military actions.<sup>82</sup> For instance, article 5 (2) of the Ethio-Kuwait BIT provides:

*.... investment losses resulting from:*

*a) requisitioning of their property by the forces or authorities of the latter Contracting Party, or b) destruction of their property by the forces or authorities of the latter Contracting Party which was not*

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<sup>79</sup> Ethiopia's BIT with Algeria, Spain, Turkey, Netherlands, Denmark, China, Germany, Belgium, Egypt, India, Malaysia, Russia, Sudan, France, Libya, Tunisia, Yemen, Sweden, UAE, and Switzerland contains a similar clause.

<sup>80</sup> Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer L. Int'l, 2014).

<sup>81</sup> S. Spears & M. F. Agius, *supra* note 75, p. 293.

<sup>82</sup> N. Radjai, *et al*, *supra* note 8, p. 233.

*caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or just and adequate compensation for the losses sustained during the period of the requisitioning or as a result of the destruction of the property.<sup>83</sup>*  
(*Emphasis added*)

The provision delineates the conditions for restitution or compensation, requiring the investor to establish state attribution, that the harm did not occur during combat, and the absence of justification under military necessity for the claimed losses.<sup>84</sup> In contrast, the host state must demonstrate that the damage resulted from combat and was justified by military necessity to defend against liability for destruction that would otherwise require compensation.

Finally, the Strict Liability War Clause, although uncommon and not found in BITs to which Ethiopia is a party, constitutes a third category of war clauses incorporated into BITs. As its name suggests, this form of war clause imposes an unconditional and absolute obligation on the host State regardless of fault.<sup>85</sup> In terms of protection, arguably, it is a relatively strong standard with little vulnerability to state defense.

In a nutshell, these substantive rights, complemented by investors' procedural right to international arbitration for treaty violations,<sup>86</sup> afford foreign investors robust protection against political violence risks. Thus, considering the current conflicts within Ethiopia, a

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<sup>83</sup> Ethiopia's BIT with Kuwait, Israel, UK, Austria, Finland, Qatar, South Africa, Brazil, Iran & Spain contains similar clause.

<sup>84</sup> Jorge E. Viñuales, *Defence Arguments in Investment Arbitration*, ICSID Rep. 9, p. 18 (2020). <https://doi.org/10.1017/9781107447455.002>.

<sup>85</sup> S. Spears & M. F. Agius, *supra* note 75, p. 296.

<sup>86</sup> Jason Webb Yackee, *supra* note 38, p. 491.

comprehensive understanding of available legal defenses is crucial for informing discussions on this subject.

### **3.1.3. Security Emergency Measure under Ethiopian BITs**

States commonly incorporate emergency or exception clauses in investment treaties to exempt themselves from actions taken for public order or national security reasons. The security exception clause, often invoked to safeguard public order and national security, enable host states to implement security measures during extraordinary events that might otherwise violate treaty obligations.<sup>87</sup> In this regard, save BITs signed between 1994 and 2004, BITs signed afterward with Brazil,<sup>88</sup> Qatar,<sup>89</sup> United Arab Emirates,<sup>90</sup> United Kingdom,<sup>91</sup> and South Africa,<sup>92</sup> contain public policy exceptions. The incorporation of additional principles with an emphasis on public policy in recently signed BITs reflects an evolving approach.

For instance, article 13 of the Ethiopia-Brazil BITs states that:

Nothing in this Agreement shall be construed: . . . to prevent a Party from adopting or maintaining *measures* aimed at *preserving its national security or public order* or . . . *maintenance of international peace and security* per the provisions of the United Nations Charter.<sup>93</sup> (Emphasis added)

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<sup>87</sup> Caroline Henckels, *Investment Treaty Security Exceptions, Necessity and Self-Defense in the Context of Armed Conflict*, in European Yearbook of International Economic Law, (K.F. Gómez et al. eds., Springer 2019), p. 321.

<sup>88</sup> Ethiopia- Brazil BIT (2018).

<sup>89</sup> Ethiopia- Qatar BIT (2017).

<sup>90</sup> Ethiopia- United Arab Emirates BIT (2016).

<sup>91</sup> Ethiopia- United Kingdom BIT (2009).

<sup>92</sup> Ethiopia- South Africa BIT (2008).

<sup>93</sup> Ethiopia- Brazil BIT, art. 13.

Likewise, the Ethiopia-Qatar BIT,<sup>94</sup> Ethiopia-UAE BIT,<sup>95</sup> and Ethiopia-Finland BIT<sup>96</sup> provide a general exception clause, thus allowing exceptions related to public health, labor rights, environmental protection, and national security, aiming to strike a balance between investor protection and the host state's right to regulate.

The security exception clause incorporated in Ethiopian BITs are formulated in varied ways. The first category of security exception clause is called *self-judging* clause,<sup>97</sup> which grants the country considerable autonomy in identifying measures that qualify as a security measure. For instance, article 13 of Ethio-Qatar BIT incorporated a *self-judging* clause as it uses the term “...may take actions that it *deems necessary* for the protection of its national security”. The phrase ‘*as it deems necessary*’ grants the host State certain margin of discretion to decide when there is a threat to national security and how to react to it. This in turn limits arbitral tribunals from reviewing the measure taken by the host state to avert the threat.<sup>98</sup> Of course, the clause does not have the effect of divesting a tribunal of jurisdiction, as the tribunal still required to review whether the state invoked the clause in good faith, to prevent states from abusing such provision.

Non-self-judging security exception clause is the other category incorporated in Ethiopian BITs. These clauses are ‘*non-self-judging*’ because the determination of what constitutes a threat to national

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<sup>94</sup> Ethiopia - Qatar BIT, art. 13.

<sup>95</sup> Ethiopia - UAE BIT, art. 19 (4).

<sup>96</sup> Ethiopia - Finland BIT, art. 14.

<sup>97</sup> C. Schreuer, *War and Peace in International Investment Law*, *supra* note 77, p. 11.

<sup>98</sup> UNCTAD, *The Protection of National Security in IIAs*, (2009), p. 39. Nonetheless, it must be noted that the clause does not provide a complete shield from judicial scrutiny, and States remain subject to the general obligation of to carry out its commitments in good faith as per Art. 26 of the Vienna Convention on the Law of Treaties.

security is not left solely to the state's discretion but is subject to objective review by arbitral tribunal. This type of clause is reflected in Ethio-Finland and Ethio-Brazil BITs, as both BITs omitted the term “*it considers necessary*”, rather used the term “...*adopting or maintaining measures aimed*”,<sup>99</sup> “...*taking any action necessary*...” aimed at preserving its national security or public order....<sup>100</sup> Accordingly, unlike *self-judging* clauses, *non-self-judging* security clause offers discretion to the arbitral tribunal to determine the necessity or otherwise of the State's measures,<sup>101</sup> thus, makes measures taken by the host-State under the scrutiny of the arbitral tribunal.<sup>102</sup>

Generally, successfully invoking security emergency measures clauses may exempt Ethiopia from complying with substantive BIT standards, such as Full Protection and Security (FPS) and War Clauses, during violent emergency situations.<sup>103</sup> Nonetheless, it is important to note that a substantial portion of Ethiopian BITs lack security emergency measures clause that could potentially exempt the country from BITs-based claims in violent situations. This necessitates us to prompt the question of whether Ethiopia, in the absence of a security clause in a

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<sup>99</sup> Ethiopia-Finland BIT, art. 14.

<sup>100</sup> Ethiopia-Brazil BIT, art. 13. Sub art. 2 of the same provision also makes measures taken for national security or international obligations non-arbitrable, barring investors from using the treaty to claim compensation. This clause would normally oust the tribunal jurisdiction over any claims resulting from the adoption of such security measures.

<sup>101</sup> Catherine H. Gibson, *Beyond Self-Judgment: Exceptions Clauses in U.S. BITs*, 38 Fordham Int'l L.J. (2015), p. 27.

<sup>102</sup> C. Schreuer, *supra* note 77, *War and Peace in International Investment Law*, p. 17.

<sup>103</sup> Ofilio Mayorga, *Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations*, HPCR Pol'y Brief, (Aug. 15, 2013), p. 8. He further alluded that the determination of what is necessary for the maintenance of public order or the protection of security interests in case of war clause needs reference to the law of armed conflict.

BIT, could still have other avenues that exempt the country from treaty claims owing to conflict-related investment damage.

Addressing this issue necessitate examining the general jurisprudence of international law. In this context, Ethiopia could invoke the general defence of '*necessity and force majeure*' under customary international law, which precludes state responsibility for wrongful acts, to defend against treaty claims arising from conflict-related investment losses.<sup>104</sup> However, invoking necessity and *force majeure* as a defence against investment losses caused by violence under the law of state responsibility is subject to significant limitations, as the host state facing a treaty claim must meet a stringent requirements.<sup>105</sup>

Notably, *necessity* and *force majeure* may only be invoked during periods when a state of necessity exists, and the intervening event is unforeseeable. This requirement sets a high threshold, even during periods of relative peace and stability, further limiting the applicability of these defences.<sup>106</sup> Consequently, Ethiopia's attempts to invoke such defenses, arguably, may not consistently provide a reliable safeguard against potential liabilities stemming from BIT claims.<sup>107</sup>

### **3.2. Investment Protection under MIGA**

As has been discussed, BITs offer various standards of protection for foreign investors. However, these measures fall short of fully

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<sup>104</sup> C. Schreuer, *supra* note 77, *War and Peace in International Investment Law*, p. 18.

<sup>105</sup> Jure Zrilič, *Armed Conflict as Force Majeure in International Investment Law*, 16 Manchester J. Int'l Econ. L. (2019), p. 28.

<sup>106</sup> A. M. Daza-Clark & D. Behn, *Between War and Peace: Intermittent Armed Conflict and Investment Arbitration*, in European Yearbook of International Economic Law 44, (K.F. Gómez et al. eds., Springer 2019), p. 62.

<sup>107</sup> *Id.*



safeguarding investor interests, as host states may still take adversarial actions against foreign investors.<sup>108</sup> MIGA, as supplementary guarantee scheme, has become a *de facto* requirement for investors to consider investing, irrespective of the presence of other investment treaty.<sup>109</sup> In fact, BITs protection and MIGA standards are mutually inclusive. This is because the substantive protections offered through BITs supplements MIGA by defining the incidence of risks, or injuries, while the insurance scheme under MIGA provides a mechanism for indemnifying those injured, in accordance with the substantive law.<sup>110</sup>

In lieu of BITs, Ethiopia also offered investment protection through the MIGA since 1991. MIGA is established with the aim of providing foreign investors with financial guarantees, and risk mitigation solutions for non-commercial risks in developing countries.<sup>111</sup> MIGA, operating as a multilateral treaty, provides coverage for four principal categories of non-commercial or political risks: the risk of currency inconvertibility, expropriation, breach of contract, and the impact of war or civil disturbance.<sup>112</sup> Specifically, article 11(a)(iv) of the Convention is relevant for this discussion, as it is designed to cover events arising from political violence, such as revolutions, insurrections, *coups d'état*, and similar political upheavals, which are

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<sup>108</sup> T. Modibo Ocran, *Book Review — Multilateral Investment Guarantee Agency and Foreign Investment by Ibrahim F.I. Shihata*, 13 N.C. J. Int'l L. (1988), p. 547.

<sup>109</sup> *Id.*

<sup>110</sup> Leigh P. Hollywood, *MIGA: Long Term Political Risk Insurance for Investments in Developing Countries*, Geneva Papers on Risk & Ins. Issues & Prac., (1992), p. 257.

<sup>111</sup> Comeaux, Paul E., and N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance*, 15 N.Y.L. Sch. J. Int'l & Comp. L. (1994), p. 40.

<sup>112</sup> Convention Establishing the Multilateral Investment Guarantee Agency, art. 11, Oct. 11, 1985, 1508 U.N.T.S. 99. [hereinafter MIGA Convention].

typically beyond the host government's control.<sup>113</sup> However, while this provision excludes acts of terrorism and similar events, the MIGA Board could extend the provision to include it as per Article 11 (d) of the Convention.<sup>114</sup>

Moreover, MIGA coverage is not available to all investors and investments. Instead, only investors and investments that meet the eligibility requirements under Articles 11 and 12 of the Convention are covered by the MIGA scheme. Thus, to qualify for the insurance scheme, for a natural person, he/she must be a national of member states other than the host state,<sup>115</sup> while a juridical person, must be incorporated and have its principal place of business in a member state other than the host state, or the majority of the capital must be owned by a member state or its national, excluding the host state or its nationals.<sup>116</sup> Furthermore, state-owned corporations (by member state or host state) engaged in commercial activities are also eligible for the coverage.<sup>117</sup>

Besides, despite MIGA's primary focus on safeguarding FDI, arguably, there are avenues in which domestic private investments and nationals of host state could be covered by the MIGA. The first scenario arises when, as per article 2(5) of the Investment Proclamation, foreign nationals or enterprises incorporated abroad are classified as 'domestic investors,' thereby granting them the same legal treatment as local

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<sup>113</sup> Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency 9 (1985) [hereinafter MIGA Commentary].

<sup>114</sup> *Id.* Save the risk of devaluation or depreciation of currency, by special majority, the Board may extend its coverage to specific non-commercial risks, such as terrorisms and other risks than those mentioned above.

<sup>115</sup> MIGA Convention, *supra* note 112, art 12.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

investors under applicable laws or treaties.<sup>118</sup> In this regard, even if they are considered as domestic investor, if their home country is a member, they would be covered by the MIGA insurance scheme.

Of course, Ethiopian nationals investing in Ethiopia are *prima facie* excluded from MIGA's insurance scheme. Nevertheless, this exclusion is not absolute. This is because, article 13(c) of the Convention provides an exception that allows MIGA to extend eligibility to Ethiopian nationals or enterprises incorporated in Ethiopia, or those with the majority of capital owned by Ethiopian nationals, provided they involve the repatriation of assets from abroad, receive Board of Directors approval by a special majority vote, and the funds originate from outside Ethiopia with government approval.<sup>119</sup>

This exception is a tool that can be particularly valuable for Ethiopia in its efforts to mobilize additional investment resources and promote and safeguard the repatriation of capital held by its nationals living abroad. Besides, MIGA also encourages and supports domestic investment by extending its eligibility and indemnifying foreign nationals from MIGA member states who are granted domestic investor status, even if their investment does not strictly qualify as cross-border or foreign direct investment.<sup>120</sup>

### **3.3. Investment Protection against Political Violence Risk under Domestic Laws**

The protection and promotion of investment in Ethiopia are significantly influenced by both investment-specific and general

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<sup>118</sup> Proclamation No. 1180/2020, *supra* note 12, art 2 (5).

<sup>119</sup> MIGA Convention, *supra* note 112, art 13.

<sup>120</sup> *Id.*

domestic laws. These laws can be categorized into two groups: those specifically tailored for investment purposes and those broader regulations applicable across various sectors. This section, therefore, focuses on different domestic legislation in the protection of investment against political violence risks.

### **3.3.1. Ethiopian Investment Laws**

The Investment Proclamation No. 1180/2020 and Regulations No. 474/2020, serve as the primary legislation governing investments, with the exception of those in the mining, exploration, and development of minerals and petroleum sectors.<sup>121</sup> Other industry-specific laws, such as the Industrial Parks Proclamation No. 886/2015, Mining Operation Proclamation No. 816/2013, and Petroleum Operation Proclamation No. 295/1986, regulate investments in specific sectors. These laws aim to promote, facilitate, and safeguard investments in the country, addressing aspects of incentives, support mechanisms, and investor rights. Given the complexity of these issues, this section does not comprehensively address investment incentives, promotion, or the full spectrum of investor rights. Instead, it focuses on providing an objective analysis of the compensability of investment losses resulting from political instability under domestic investment laws.

The Investment Proclamation No. 1180/2020 explicitly guarantees and protects investments against politically motivated risks such as expropriation, and expatriation of funds. The standards of protection offered under these provisions are limited to market value compensation in case of expropriation for both domestic and foreign investor.<sup>122</sup> Even the right to repatriate funds in convertible foreign

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<sup>121</sup> See Proclamation No. 1180/2020, *supra* note 12, art. 3.

<sup>122</sup> *Id.*, art. 19.

currency at the prevailing exchange rate applies exclusively to foreign investors.<sup>123</sup> Aside from this, the Investment Proclamation No. 1180/2020 is silent on safeguarding investments from risks associated with political unrest such as war, riots, insurrection or similar crises.<sup>124</sup>

Comparatively, the Industrial Parks Proclamation No. 886/2015 includes more comprehensive investor rights including national treatment (NT),<sup>125</sup> market value compensation for expropriation,<sup>126</sup> and remittance of funds.<sup>127</sup> Yet, this Proclamation, like others, does not extend protection to investments against political violence risks such as war, civil disturbance and other political upheaval.

The petroleum exploration and mining sectors are the major areas of investment in which domestic and foreign investors are reportedly engaging. The Mining Operation Proclamation and Petroleum Operation Proclamation govern investments made in Petroleum and Mining sectors, respectively. Again, the Mining Operation Proclamation No. 816/2013 and Petroleum Operation Proclamation No. 295/1986, focusing on their respective sectors, also lack provisions addressing protection of investment against political violence risks or similar risks.

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<sup>123</sup> *Id.*, art. 20. It must be noted that the remittance of fund in convertible currency is granted only for foreign investors.

<sup>124</sup> Desalegn Beyene, *The Need of Rule for Domestic Investors Compensation/Guarantee against Political Risks: The Case of Political Violence*, (LLM thesis, A.A. University) (2020).

<sup>125</sup> Proclamation, No. 886/2015, *supra* notes 14, under art. 19, provides about foreign investors 'national treatment'. This clause makes the Proclamation unique, unlike the other laws.

<sup>126</sup> *Id.*, art. 20.

<sup>127</sup> *Id.*, art. 21.

In a nutshell, domestic investment laws in Ethiopia do not explicitly offer legal protection to investors against political violence risks, i.e., riots, wars, insurrection, or similar events. This gap in legal protection, arguably, could deter domestic investment, as investors may perceive a higher risk associated with political instability.

### 3.3.2. General Laws

Beyond investment-specific laws, general legislation, depending on their relevance, also plays a key role in regulating, promoting, and protecting investments in Ethiopia. More specifically, Directive No. 253/2021 issued to Provide Government Support for Investors whose Properties Have Been Destroyed Due to Natural and Man-Made Disasters<sup>128</sup> is particularly relevant.

The purpose of the Directive is to support investors impacted by natural and man-made disasters.<sup>129</sup> To this end, article 3(1) of the Directive defines natural disaster as a ‘disaster that has occurred on the property of investors and businesses due to *unprecedented flood* that have not been experienced by the appropriate government body for many years’.<sup>130</sup> However, while listing what constitutes natural disaster, the Directive limited it to unprecedented flood, omitting other types of disasters, like earthquakes or fires.

The Directive also covered investment losses owing to man-made disasters. The Directive defined a ‘man-made disaster’ as follows:

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<sup>128</sup> Directive No. 253/2021, *supra* note 18.

<sup>129</sup> Directive No. 253/2021, *supra* note 18, art. 4.

<sup>130</sup> *Id.*, art. 3 (1). (Author’s translation).

ሰው ሠራሽ አደጋ ማለት በአገራችን የተለያዩ ክፍሎች በሚፈጠር ያለመረጋጋት ምክንያት በንግድ እና ኢንቨስትመንት ሥራ ላይ በተሠማሩ ባለሀብቶች ንብረት ላይ የደረሰ አደጋ ነው።<sup>131</sup>

Roughly translated, this reads:

*Man-made disaster refers to damage caused to the property of investors engaged in trade and investment activities due to instability in various parts of the country.* (Author's translation)

This provision plays a key role in supporting investors engaged in trade and investment activities, whose investment or property was damaged or destroyed due to political uncertainties in various parts of the country. Of course, the Directive did not mention political violence or of political uncertainty in its definition. However, given the political context prevailing when the Directive was issued, it is reasonable to conclude that man-made disasters stemming from political instability include riots, civil unrest, mob violence, arson, or armed conflicts in various parts of the country. Thus, article 3 (2) of the Directive, at least by definition, resembles a war clause in which it attempted to cover investment damage caused by political uncertainty such as war, armed conflict, instruction, riot, etc.

Coming to the support mechanism, the Directive provides non-cash support, including tax relief, duty-free imports, exemptions from Value Added Tax (VAT) or Turnover Tax arrears, and access to domestic loan facilitation, for those investors eligible to the support.<sup>132</sup> For example, income tax relief was provided by allowing the carry-forward of income tax losses incurred during the event for three consecutive years.<sup>133</sup> It is

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<sup>131</sup> *Id.*, art. 3(2).

<sup>132</sup> *Id.*, art. 6.

<sup>133</sup> *Id.*, art. 9.

important to note that the carry-forward of loss under the Directive was granted in addition to what is provided in the tax law.<sup>134</sup> The type of loss allowed to be carried-forward and deducted under the Directive was a loss to investment generally, called a business asset, as a result of natural or man-made disasters.

In other jurisdiction, this type of loss carry-forward is called causality loss.<sup>135</sup> Causality losses are special provisions that allow businesses and individuals to claim deductions specifically for losses that arise from extraordinary and unexpected events. Yet, causality loss rule is not recognized under the Ethiopian tax law, as the basic principle of deductibility under the income tax laws only allows deductions for only business losses incurred to derive, maintain, and secure the business income.<sup>136</sup> However, at least in terms of support, the Directive had offered an additional opportunity for the investor to carry-forward the loss incurred as a result of instability or conflict.

In addition to the income tax measures, the Directive also exempts the affected investor from any taxes and duties levied on imported goods, vehicles, and goods to replace the damaged property.<sup>137</sup> Exemption from VAT and TOT arrears, which was required for tax purposes before the damage and had not been paid to the tax authority, was also

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<sup>134</sup> Federal Income Tax Proclamation No. 979/2016, *Federal Negarit Gazzeta*, (2016), art. 26 (4). See also Federal Income Tax Regulation No.410 /2017, *Federal Negarit Gazzeta*, (2017), art. 42. The loss carry-forward rule under tax law is a scheme whereby a taxpayer is allowed to deduct the loss of one tax year from the income of subsequent years.

<sup>135</sup> Mike Enright, *Casualty Loss Rules Differ for Personal and Business Property*, Wolters Kluwer (2021). <https://www.wolterskluwer.com/en/expert-insights/casualty-loss-rules-differ-for-personal-and-business-property>.

<sup>136</sup> See Proclamation No. 979/2016, *supra* note 134, art. 22. Contrary to this, some countries such as US, Kenya, South Africa to mention a few, designed casualty loss provisions to provide additional tax relief for significant, unexpected losses, beyond the regular deductions available for ordinary business expenses.

<sup>137</sup> See Directive No. 253/2021, *supra* note 18, art. 7.



included.<sup>138</sup> Aside from support in the form of taxation, the Directive authorized the National Bank of Ethiopia (NBE) to arrange loans for investors to replace their assets or to defer servicing of loans acquired for the investment.<sup>139</sup>

However, although the Directive broadly resembles a war clause under BITs in addressing investment losses caused by political violence, the absence of provisions for monetary compensation, arguably, represents a significant drawback.<sup>140</sup> This omission arguably diminishes its efficacy as a protective measure, as it fails to provide investors with a clear and immediate avenue for financial redress.

Besides the Directive, various legislative stipulations exist to protect private property and, by extension, investments.<sup>141</sup> For instance, the FDRE Constitution, under articles 40(1) and 40(2), establishes a general framework for protecting property rights by limiting government interference to cases of public interest as prescribed by law, and mandates compensation solely for the expropriation of private property.<sup>142</sup> In doing so, the Constitution imposes a dual obligation on the government to protect individuals' property rights from both state interference and violations by private entities. The Constitution also explicitly allows property owners to seek compensation through the

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<sup>138</sup> *Id.*, art. 8.

<sup>139</sup> *Id.*, art. 9.

<sup>140</sup> *Id.*

<sup>141</sup> See also Muradu Abdo, *Legislative Protection of Property Rights in Ethiopia: An Overview*, 7 *Mizan L. Rev.* (2013), p. 168.

<sup>142</sup> FDRE Constitution, *supra* note 17, art. 40 (1) & (2).

constitutional property clause for any expropriation of private property.<sup>143</sup>

Nevertheless, although the Constitution establishes fundamental property rights, it lacks explicit provisions requiring compensation for damages resulting from political violence. Due to the broad and general nature of constitutional provisions, the Constitution is unlikely to offer granular redress for particular property rights violation owing to political violence. This gap necessitates recourse to supplementary legislation, including the Criminal Code, the Civil Code, and the Civil Procedure Code. These laws collectively provide mechanisms for redress through civil and criminal liability for property rights violations by third parties or state actors.<sup>144</sup>

This legal framework establishes a dual remedies scheme, encompassing both private and public mechanisms for compensation. Under the private scheme, victims of the crime may seek restitution directly from individuals or groups who were involved in the criminal acts.<sup>145</sup> In contrast, the public scheme ensures state accountability by holding the government responsible for damage caused by its direct actions or

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<sup>143</sup> Bram Akkermans, *A Comparative Overview of European, US and South African Constitutional Property Law*, 7 EUR. PROP. L.J. (2018), p. 108. <https://doi.org/10.1515/eplj-2018-0002>.

<sup>144</sup> In contexts where strong legal protections are lacking, political risk insurance commonly serves to mitigate such risks. In Ethiopia, where political instability has significantly disrupted businesses and investments, especially affecting those without insurance, obtaining political risk coverage that includes political violence can help restore investor and business confidence. In response to these challenges, Nyala and United insurance companies pioneered the introduction of political violence and terrorism insurance policies in 2017. See Samson Brehane, *Insurance Firms Warned of Bites from Political Violence*, Addis Fortune, (2021), vol. 22, no. 1100. Insurance Firms Warned of Bites from Political Violence ([addisfortune.news](http://addisfortune.news))

<sup>145</sup> Silesh Abye, *Compensation of Crime Victims in Ethiopia: Lessons Drawn from the Experience of Selected Countries*, (LL.M. thesis, Bahir Dar Univ. 2021) (unpublished). P. 24-30.

failure to implement adequate protective measures to safeguard property during unrest, thereby contributing to losses. The following discussion explores the mechanisms through which investors can seek restitution for their losses.

### ***A. Vandalizing Property/ Investment as a Crime***

The deliberate destruction of individual's property or investment constitutes a criminal offense under the Ethiopian Criminal Code, and is punishable by simple imprisonment upon the victim's complaint.<sup>146</sup> The punishment is subject to aggravation when it involves significant damage; holds substantial value to the public; is committed with the intent to coerce government action or inaction; or poses a threat to public safety; particularly if it involves explosions, fire, or similar hazards.<sup>147</sup> These provisions ensure that individuals or groups causing damage to property, including investments, are subject to penalties as defined by the Criminal Code.

It is important to note that investors and property owners seek not only to hold perpetrators accountable but also to secure financial compensation for the recovery or replacement of their damaged assets. To this end, the Criminal Code allows a victim of such acts to institute a civil claim for compensation for the damaged property/investment or destruction thereof caused by the criminal offense.<sup>148</sup> This offers the

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<sup>146</sup> Criminal Code, *supra* note 20, art. 689-691.

<sup>147</sup> *Id.*, art. 689-691.

<sup>148</sup> *Id.* Art. 101 "Where a crime has caused *considerable damage* to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be ordered *to make good the damage or to make restitution or to pay damages by way of compensation.*" (Emphasis added).

victim the right to institute a separate compensation claim for the damage caused to investment/property by the offenders.

Furthermore, article 154 of the Criminal Procedure Code also imposes an obligation on offenders to make restitution, such as the return of the property or payment for the harm or loss suffered, and reimbursement of expenses incurred as a result of the victimization.<sup>149</sup> Thus, while the victim may need to seek public enforcement through criminal law, the provision bestows property owners the right to pursue tort claims, as the Civil Code makes individuals held civilly liable for the harm caused by their own criminal acts.<sup>150</sup>

This remedy is a private law remedy. The victim may seek compensation through civil proceedings which operates independently of criminal proceedings or claim damages in connection with criminal proceedings from individuals who directly took part in the violence,<sup>151</sup> those who planned or incited the mob,<sup>152</sup> or, in certain cases, groups or associations with proven direct involvement in the violent act.<sup>153</sup> This tortious civil liability, whether pursued independently or alongside criminal proceedings, serves not only to punish wrongdoing but also to restore the injured party to their original position through appropriate compensation. However, identifying perpetrators in cases of mob violence, perpetrators disappearance, or lack of financial capacity might affect the effectiveness of such remedies.

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<sup>149</sup> See Criminal Procedure Code, *supra* note 21, art. 154.

<sup>150</sup> See the Civil Code, *supra* note 19, art. 2027 cum art. 2054.

<sup>151</sup> See Criminal Code, *supra* note 20, art. 32.

<sup>152</sup> *Id.* art. 36

<sup>153</sup> *Id.* art. 34.

Thus, a framework that mandates the State to intervene and directly compensate victims, who often receive little to no compensation through private schemes, is essential.

### ***B. Investment Damage as Constitutional Tort***

Taking investment damage as a constitutional tort is the other domestic legal avenue for investors. A constitutional tort can be defined as a civil wrong committed by governmental bodies or officials that violate constitutionally protected rights, for which monetary compensation may be claimed.<sup>154</sup> It also serves as a legal mechanism in which it allows individuals to invoke the Constitutional provisions directly as the basis for remedying harm caused by state action.<sup>155</sup> In doing so, it provides a pathway for holding public officials accountable for injuries resulting from breaches of constitutional protections.<sup>156</sup>

Although the concept of constitutional tort is not recognized in Ethiopia, this legal avenue, operating under the public scheme, could enable investors to seek compensation from the government for its failure to protect investments during conflicts or civil unrest, potentially qualifying as a constitutional tort.<sup>157</sup> Using constitutional tort as a basis for seeking compensation for investment losses due to conflicts, requires investors to prove government's affirmative duty to protect investments, beyond its mere negative duty to refrain from interference. This affirmative duty entails exercising due diligence in anticipating,

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<sup>154</sup> Noah Smith-Drelich, *The Constitutional Tort System*, 96 Ind. L.J. (2021), p. 579. <https://www.repository.law.indiana.edu/ilj/vol96/iss2/6>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Michael Wells & Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J. L. REFORM (1982), p. 1. <https://repository.law.umich.edu/mjlr/vol16/iss1/2>.

preventing, and responding to foreseeable harm, notably harm arising from violence or instability that threatens private property.

Constitutional tort claims often hinge on the individual's or investor's ability to establish government's affirmative duty to act to prevent or mitigate the harm suffered by the investor. In Ethiopian context, this affirmative duty to protect could stem from three interrelated legal frameworks. Firstly, the constitutional guarantee of the right to private property under article 40 (1) implies not only a duty to abstain but also a positive obligation on the State to protect such rights from unlawful interference, including harm caused by non-state actors. Thus, failure to take preventive or protective measures in the face of known threats may amount to a constitutional violation.

Secondly, through Ethiopia's ratification of international and regional human rights instruments that protect private property from arbitrary interference, there is a compelling basis for establishing affirmative duties on the government to exercise due diligence in safeguarding individuals' investments from physical harm. Article 17 of the UDHR and article 14 of the ACHPR are often interpreted widely, which in turn impose due diligence obligations and require States to take proactive measures to prevent foreseeable harm by third parties.<sup>158</sup>

Thirdly, the granting of an investment permit by the government also establishes a reciprocal legal relationship between the government and the investor, whereby the State assumes responsibility to provide a secure and enabling environment for the investment, and the investor undertakes to contribute to the national economy through taxes,

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<sup>158</sup> Björnstjern Baade, *Due Diligence and the Duty to Protect Human Rights*, in *Due Diligence in the International Legal Order* 36 (Heike Krieger, Anne Peters & Leonhard Kreuzer eds., 2020), <https://doi.org/10.1093/oso/9780198869900.003.0006>.

compliance with domestic laws, and corporate social responsibility. Thus, where the government possesses actual or constructive knowledge of foreseeable risks, such as conflict-related violence, and fails to take reasonable action, it may incur indirect liability for the damaged investment.<sup>159</sup>

Overall, these legal frameworks establish a due diligence obligation on the part of the State. Thus, considering government's responsibility to protect investments from conflict-related harm coupled with its awareness of the associated risks, arguably establishes a special relationship between the government and third-party wrongdoers. Once this special relationship is established, arguably, it would be easy to prove government's affirmative duty to take reasonable steps to prevent harm to investments, and its failure to do so may give rise to constitutional tort liability for breaching constitutional protections.

Before concluding this discussion, it is worth highlighting the experiences of other countries in mitigating conflict-related investment losses. Several countries have implemented "riot compensation schemes" to address property losses resulting from riots. For instance, in the United Kingdom, the Riot Act of 1886 establishes a statutory fund administered by local authorities through whom victims can recover damages for property destroyed or damaged during riots.<sup>160</sup> The Act imposes a strict liability obligation on police forces to compensate property owners for losses resulting from communal violence or

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<sup>159</sup> Office of the High Comm'r for Hum. Rts., *Protection and Redress for Victims of Crime and Human Rights Violations*, in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (2003), p. 751. <https://www.un.org/ruleoflaw/files/training9chapter15en.pdf>.

<sup>160</sup> Jonathan Morgan, *Strict Liability for Police Nonfeasance? The Kingan Report on the Riot (Damages) Act 1886*, 77 Mod. L. Rev. (2014), p. 377. <https://doi.org/10.1111/1468-2230.12073>.

rioting, regardless of fault.<sup>161</sup> However, if the county or municipal corporation can prove that it used reasonable diligence to prevent or suppress the riot, the municipality would be immune from the obligation.

While Ethiopia does not have such sort of separate laws that directly impose obligation to compensate for property damage owing to civil disturbances, article 2130 of the Civil Code can be used to bear vicarious liability on the State for the wrongful acts of the public servant,<sup>162</sup> provided that the public servant acted “within the scope of such service or supervision.”<sup>163</sup> Consequently, property damage or investment losses stemming from the actions or inaction of a public official falls under the purview of vicarious liability, thus enabling victims to seek compensation directly from the State.<sup>164</sup>

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<sup>161</sup> Michael Melusky, *Maryland's Riot Act: Subrogation Potential for Property Damages Occurring During Riots*, Subrogation & Recovery L. Blog (Aug. 24, 2015).

<sup>162</sup> A public servant refers to any individual who, whether on a temporary or permanent basis, performs functions through employment, appointment, assignment, or election to a public office or a public enterprise. This encompasses members of the police, defense forces, municipal authorities, and similar institutions. These entities carry a positive obligation to protect individuals and prevent foreseeable harm, particularly where such risks arise from violence, negligence, or unlawful acts. Their roles are integral to the State's duty to uphold public order and ensure the security and rights of citizens.

<sup>163</sup> See Civil Code, *supra* note 19, art. 2035.

<sup>164</sup> Stewart E. Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. Pa. L. Rev. (2012), p. 2130. See also Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss*, 23 San Diego L. Rev. (1986), p. 79. <https://digital.sandiego.edu/sdlr/vol23/iss1/5>.



#### **4. Adequacy of Domestic Legal Framework in Protecting Investment against Political Violence Risk *vis-à-vis* Ethiopian BITs**

Domestic laws are the primary legal instruments for promoting and protecting domestic investments. In this context, it would be fair to assess the adequacy of national investment laws in protecting investors against political violence in comparison with BITs. Such an assessment is made based on the implicit premise that one of the functions of investment law is investment protection, and investment treaties serve the same purpose.<sup>165</sup> As discussed above, Ethiopian BITs provide foreign investors with protection against political violence risks through FPS and War Clauses, while domestic investment laws fall short in offering comparable protection. Notably, unlike the robust protection offered by BITs, domestic investment laws only provide a restricted set of rights, leaving investors without a legal avenue for seeking compensation for investment damage because of political violence.

Besides, while Directive No. 253/2021 represent a notable step in supporting investors to restore their damaged investments through a non-cash-based mechanism, its utility for the investors is impeded by the absence of a cash-based compensation scheme. The absence of cash-based restitution arguably undermined the Directive's ability to enable investors to resume their ventures, as recovering the full extent of investment damage through non-cash means alone is challenging, if not unattainable.

Furthermore, the Directive neither grants investors a right to compensation nor imposes an obligation on the government to cover investment losses; instead, it merely offers non-cash support as a discretionary privilege

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<sup>165</sup> Jan Knörich, *Friends or Foes? Interactions Between Indonesia's International Investment Agreements and National Investment Law* (Deutsches Institut für Entwicklungspolitik, 2014).

determined by the committee. Moreover, the Directive was not intended to grant the affected investors a right to seek compensation for investment losses resulting from a sovereign state's adverse acts or omissions during political violence.

Utilizing the Civil Code, Criminal Code, and Civil Procedure Code to sue a person or group charged with vandalism under the Civil Code for tort liability to replace the damaged property, has been also discussed as another recourse for investor. However, considering the financial magnitude of the compensation claim relative to the financial capabilities of individuals or groups engaged in vandalizing the investment, coupled with the considerable time required for enforcing any judgment, it would be painstaking and inefficient for the investor. This makes claiming compensation using a private scheme inadequate and would not enable investors to resume business shortly.

Besides, although it requires testing in a court of law, utilizing the public scheme of compensation seems difficult, if not impossible. This is because proving the circumstances under which the government is liable for wrongdoing, particularly through omission, is challenging. Furthermore, despite utilizing constitutional tort claims based on articles 37 and 40 of the Constitution is theoretically available recourse for investors, their practical application in providing effective remedies within the existing legal system seems doubtful.

Therefore, based on the foregoing discussion, it is reasonable to conclude that, compared to BITs, domestic legal frameworks are, arguably, inadequate in protecting and compensating investors for investment losses resulting from political violence. This, in turn, results in discriminatory treatment between foreign and domestic investors for identical risk. Thus, given the importance of domestic investment in the country's economic growth, the

disparity in treatment of domestic and foreign investment for the same risks poses potential risks to the growth of domestic investments and contradicts the government's objective of fostering a conducive investment environment and increasing domestic investment.

## **Concluding Remarks**

The persistent political instability in Ethiopia, combined with the substantial investment and property damage owing to the violence, serves as the impetus for the analysis conducted in this study. Focusing on Ethiopian BITs and domestic legal frameworks, this article critically assessed the protection afforded for foreign and domestic investment against political violence risks. Ethiopian BITs incorporate FPS and War Clauses that obligate the State to protect foreign investments during both peace and armed conflict. Notably, while FPS clause imposes a due diligence obligation in protecting investment, War Clauses, particularly extended types, require Ethiopia to compensate foreign investors for investment losses because of political violence.

While addressing the available defences for such claims, the article argued that treaty-based defences available to Ethiopia are limited, as, except for BITs with Qatar, UAE, Finland, and Brazil, most Ethiopian BITs lack general exception or security clauses. In such cases, Ethiopia must rely on customary international law defences, such as *necessity* or *force majeure*, to justify governmental actions or omissions in safeguarding investments during periods of significant upheaval, such as widespread civil unrest or political instability. However, it has been argued that while these defenses may offer a partial shield for Ethiopia against claims of treaty breaches (BIT), they do not exempt the country from compensating investors for the loss. This underscores the need to revise existing BITs to incorporate tailored security exception clauses, as doing so could provide avenue for

exempting the country from liability during emergency, thereby reducing the risk of costly arbitration claims.

This article also discussed the domestic legal framework for investment protection against the risk of political violence. While the FDRE Constitution, the Civil Code, and other relevant legislation provide a foundational framework for addressing such damages, the paper argued that these legal instruments are insufficient to fully address investment losses caused by political violence. As a result, domestic investors are particularly disadvantaged by the absence of a specialized compensation mechanism, unlike foreign investors protected under BITs.

Thus, to address this disparity, the paper recommends both legal and institutional reform regarding investment protection. This article recommends the inclusion of a separate provision within the Investment Proclamation to extend protection against investment losses arising from political violence. This law should articulate clear compensation mechanisms for losses incurred due to political violence, of course by incorporating a *carve-out clause* for uncontrollable events which are consistent with national security priorities.

In addition to legal reform, the article has highlighted the importance of institutional reforms, including implementing preventive strategies, strengthening law enforcement capabilities, and expanding investment insurance coverage to include political violence, all of which are essential for reducing investment risks and enhancing investor confidence.<sup>166</sup>

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<sup>166</sup> Bantayehu Demlie, *Insuring Against Unrest: Can Ethiopia's Membership with the African Trade Insurance Agency Mitigate Political Risks, Boost Investment?* Ethiopian Bus. Rev., No. 39 (2016).