

# Reflections on Legitimate Expectations of Foreign Investors in Ethiopia

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## Abstract

*An investor`s legitimate expectations have emerged as essential element of the Fair and Equitable Treatment (FET) standard in international investment. Although the principle is traditionally related to transparency, it is often considered as a further development of the concepts of stability, predictability and consistency of investment environment. This article investigates the extent to which Ethiopia has protected foreign investors` legitimate expectations by focusing on the practice of Addis Ababa City vis-à-vis the legal regime. In so doing, the article brings the issue of legitimate expectations of foreign investors into the attention of policy makers so that measures that can promote legitimate expectations and thus positively impact inflow of FDI are taken. The study was conducted based on interview, observation and document analysis and employed qualitative method of study. The study shows that there is arbitrary exercise of power by public officials which is against the legitimate expectations of foreign investors.*

## Keywords:

Assurance, Contractual commitment, FET, Legitimate expectations, Ethiopia.

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## 1. Introduction

Since 1992, the Ethiopian Government has successfully implemented a series of reform programmes in order to transform the economy from command to market economy, speed up the integration of the economy into the world economy.<sup>1</sup> These series of reforms include promulgation of a liberal investment law for the promotion and encouragement of private investment, both foreign and domestic.<sup>2</sup> These measures are taken to enable foreign investment to play its role in the country's economic development.<sup>3</sup> Therefore, there is a concern among states as to the methods of stimulating these investment flows into their territories. On the other hand, there is investors' decision to invest on secure and stable business environment in the host state. So, in this regard, the fair and equitable treatment [hereinafter, FET] standard is a crucial concern in contemporary international investment agreements. The standard protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.<sup>4</sup> Protection of legitimate expectations of foreign investor as one component of the principle of fair and equitable treatment is envisaged in international investment laws to encourage foreign investors to make adequate business decisions based on the legal regime and representations made by the host state.<sup>5</sup>

The major problem at this juncture relates to implementation of the protection of legitimate expectations of foreign investors, consistency the practice with the law and behaviours of officials. Exploring and analysing of the issue is needed to identify the challenges of implementations of legitimate expectations of foreign investor in Ethiopia. Therefore, this article attempts to investigate issues of legitimate expectations of foreign investors in the laws and the practical problems that relates to implementation in the Addis Ababa city.

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<sup>1</sup> Ethiopian Investment Commission, Ethiopia: A Preferred Location for Foreign Direct Investment in Africa. An Investment Guide to Ethiopia (2015) at 6.

<sup>2</sup>*Id.*

<sup>3</sup> Investment proclamation, Proclamation No. 769/2012, FED. FEDERAL NEGARIT GAZETA, 18<sup>th</sup> Year, No. 63 Addis Ababa, 17<sup>th</sup> September, 2012 (hereafter Investment proc.) Art. 5(7).

<sup>4</sup> Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, *New York University Journal Of International Law & Politics* 43, Thomas Jefferson School of Law Research Paper NO. 2357642 ", (2010), at 52. available at: <http://nyujilp.org/print-edition/#43> [accessed on March 10, 2017]

<sup>5</sup> Felipe MutisTeñlez, *Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law*, *ICSID REVIEW FOREIGN INVESTMENT LAW JOURNAL*, *ICSID REVIEW STUDENT WRITING COMPETITION* (2012), at 1, available at ICSID Review: [www.oxfordjournals.org/page/4395/7](http://www.oxfordjournals.org/page/4395/7) (accessed on March 20 5, 2017).

## 2. Conceptual Frameworks on Legitimate Expectations of Foreign Investors

### 2.1. Determining the Concept of Legitimate Expectations

Legitimate expectations of foreign investor as an intrinsic component of FET standard, is found in different countries administrative law which in turn becomes source of international law as a general principle of law pursuant to article 38(1)(c) of the statute of International Court of Justice.<sup>6</sup> It is a principle recognized by many domestic public law systems and often used as a standard to judge governmental decision-making. Hence, its contents are determined by comparing the standards common to most national legal system and practice.<sup>7</sup>

Thus, the doctrine of legitimate expectations relates to public law that protects individuals from arbitrary exercise of the government power<sup>8</sup>; and emphasizes on stability and predictability of business environment to enable foreign investor to make rational business decision on the reliance of the host state representations.<sup>9</sup> It can be considered as a principle of natural justice which confers right to hearing to a person affected by an arbitrary exercise of government power and the government should not deprive legitimate expectations of a person without following the principles of natural justice.<sup>10</sup> This is more of the procedural aspect of legitimate expectations.

This principle originated from the English administrative law, which was first used by Lord Denning in 1969, and from that time onwards it became a significant doctrine of public law in almost all states.<sup>11</sup> From this time, there is a growing jurisprudence of legitimate expectations of foreign investors at international level by Tribunals.<sup>12</sup> For instance, in 2003 the Tribunal in *Tecmed v. Mexico* noted that FET requires treatment of international investment without

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<sup>6</sup> Trevor Zeyl, *Charging the Wrong Course: The Doctrine of Legitimate Expectation in Investment Treaty Law*, Alberta Law Review, Vol. 41, NO. 1(July 2011), at 205.

<sup>7</sup>*Id.*

<sup>8</sup>Seemeen Muzafar, *Doctrine of Legitimate Expectation in India: An Analysis*, International Journal of Advanced Research in Management and Social Sciences, Vol. 2, No. 1 (January 2013), at 116.

<sup>9</sup> Felipe MutisTe llez, *supra note 5*, at 1.

<sup>10</sup>Seemeen Muzafar, *supra note 8*.

<sup>11</sup>“*Schmidt v. Secretary of State (1969) 1 All ER 904*. In this case it was held that an alien who was granted to enter the U.K. for a limited period had legitimate expectation of being allowed to stay for the permitted period”, as cited in. Meher Nigar and Homaira Nowshin Urmi, *Doctrine of Legitimate Expectation in Administrative Law: A Bangladesh Perspective*, The Chittagong University Journal of Law, VOL. XIV, (2009), at 52.

<sup>12</sup> Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, Vol. 12, Issue 1, Santa Clara Journal of International Law 7 (2014). Available at: <<http://digitalcommons.law.scu.edu/scujil/vol12/iss1/2>>(Accessed on March 11, 2017), at 134.

affecting basic legitimate expectations of foreign investors that were considered in deciding to make the investment.<sup>13</sup>

Basically, there has been some debate as to whether legitimate expectations of foreign investor in international investment regime can cover substantive benefit or it is a mere entitlement to have a procedural aspect that concerns on administrative issues such as license, benefits and other privileges.<sup>14</sup> As elaborated above, legitimate expectation is derived from domestic legal systems and became a general principle of law. But, in most countries, legitimate expectation provides only procedural protection that relates to expectations created by administrative conduct.<sup>15</sup> Due to practical difficulties, substantive aspects of legitimate expectations were rarely protected by most domestic legal systems.<sup>16</sup>

Initially, the English law provided only procedural protection of expectations that relates to with license, benefits and other privileges.<sup>17</sup> However, this traditional approach has recently shifted to adopt the substantive legitimate expectations.<sup>18</sup> This principle is also, well-established in a number of other administrative systems such as, civil law, German and Dutch.<sup>19</sup>

Procedural legitimate expectations provide a limited form of protection that relates to hearing and participation, right to make representation during decision making process in the administrative decision.<sup>20</sup> This kind of expectations do not concern about compensation or remedies to individuals. Rather this concerns on the participation of individuals to improve standards of administration and outcomes.<sup>21</sup>

Substantive legitimate expectation, on the other hand, protect the individual by providing government body to make good its representation to the individual by altering or keeping its

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<sup>13</sup> Trevor Zeyl, *supra note 3*, at 207.

<sup>14</sup> Meher Nigar and Homaira Nowshin Urmi, *supra note 11*.

<sup>15</sup> M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press) (3<sup>rd</sup> Ed. 2010), at 334.

<sup>16</sup> *Id.*

<sup>17</sup> Meher Nigar and Homaira Nowshin Urmi, *supra note 11*.

<sup>18</sup> *Id.*

<sup>19</sup> Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 *ICSID REVIEW* (2013) 88-122, at 12 available at: <http://icsidreview.oxfordjournals.org> (Accessed on March 6, 2017)

<sup>20</sup> *Id.*, at 9.

<sup>21</sup> Abhijit P.G. Pandya, *Interpretations and Coherence of the Fair and Equitable Treatment Standard in Investment Treaty Arbitration*, (Ph.D. thesis, London School of Economics, 2011), at 49, available at: <http://etheses.lse.ac.uk/338/> (Accessed on March 1, 2017).

policy, or law, where it harms an individual's interests.<sup>22</sup> Hence, this aspect of legitimate expectations of individuals is recognized in domestic legal system of different countries as elaborated above.

The emergence of substantive legitimate expectations in domestic jurisprudence has contributed to the introduction of substantive legitimate expectations in investment treaty arbitration.<sup>23</sup> Investment tribunals develop a comprehensive concept of FET to include the jurisprudence of legitimate expectations. They considered it as an element of FET though in diverse contexts and different wordings in the great majority of BITs as well as in major multilateral investment treaties, making FET the most frequently invoked standard in investment disputes.<sup>24</sup>

Therefore, legitimate expectations of foreign investors contain a wider meaning encompassing the stability of the legal and business environment as an element of FET covered by various BITs, multilateral and regional investment and trade treaties.<sup>25</sup> This provides certainty to the foreign investors in making decision to invest, and in attracting foreign investment to the state at hand.<sup>26</sup> However, legal certainty may restrict executive action and regulatory power of the state. Therefore, caution should be taken in this regard. Details on this and other related issues are elaborated in the following sections.

## **2.2. Condition for Reliance of Investors**

Since foreign investment is a complex area that involves different activities and there are no treaty provisions specifically addressed to investors' legitimate expectations, it is difficult to single out the extent and scope of legitimate expectations of foreign investors.<sup>27</sup> That said, some yardsticks are emerging from arbitral awards.<sup>28</sup> So, it is necessary to ascertain the existence of legitimate expectations of foreign investor and conditions on which the foreign investor relied.

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<sup>22</sup>*Id.*

<sup>23</sup> Trevor Zeyl, *supra* note 6 at 219.

<sup>24</sup>*Id.*

<sup>25</sup>Shamila DLF, *Rationalize of Host State's Regulatory Measures and Protection of Legitimate Expectations of Foreign Investor: Analyzing the State of Necessity in the Investment Treaty Context*, *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 2, Issue 3 (June, 2013) ISSN 2289-1560, at35.

<sup>26</sup> Felipe MutisTeñlez, *supra* note 5 at 2.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

## A. Assurances and Representations

Legitimate expectations of foreign investor may arise from host state's assurance or representations on which the investor has relied.<sup>29</sup> Those unilateral representations of the host state could create legitimate expectations on the foreign investors that can be relied on.<sup>30</sup> Such representations of the host state may be provided in any form, including licenses, permits or some other specific oral or written representations.<sup>31</sup> The legitimacy of reliance by the foreign investor on this unilateral act of the host state comes from the principle of good faith.<sup>32</sup> This was raised by different tribunals. For instance, the tribunal in the *Waste Management v Mexico case*, noted that "in applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant"<sup>33</sup>

Legitimate expectations may also be derived indirectly from specific representations as a general act of the host state declared to attract foreign investment for certain sectors.<sup>34</sup> For instance, in *CMS v. Argentina*, due to the privatization of gas transmission in Argentina, at the time of making the investment, Argentina granted the U.S. Company the right to calculate tariffs in US dollars and then convert them to Argentina pesos at the prevailing exchange rate, and to adjust tariffs every six months to reflect changes in inflation, and the U.S. Company had invested in Argentina gas Transmission Company induced by the offer describing the tariff regime.<sup>35</sup> The regime included calculations of the tariffs in dollars and certain future adjustments in the tariff amounts. However, later Argentina amended the law and ceased to calculate the tariff rate in Dollars and to make inflation adjustments due to the economic crises that occurred in the country.<sup>36</sup> In this case, the tribunal held that Argentina violates the representation made prior to the operation of the investment; 'stability and predictability' are not separable from FET.<sup>37</sup>

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<sup>29</sup> Rudolf Dolzer, *supra note* 12 at 24.

<sup>30</sup>*Id.*

<sup>31</sup>Newcombe & Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, (2009), at 282, cited in Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, *Journal of World Investment & Trade* Vo. 12, (2011) at 798.

<sup>32</sup> Rudolf Dolzer, *supra note* 16 at 24.

<sup>33</sup>Anindita Chander, *In light of Investment Arbitral Decisions, Examine the Protection of Foreign Investors? Legitimate Expectations with in the Concept of Fair and Equitable Treatment*, *International Investment Law* at 21, available at: Academia: <http://www.academia.edu/6793628> (Accessed on March 6, 2017).

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

<sup>35</sup> Kenneth J. Vandeveld, *supra note* 4 at 75.

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

<sup>37</sup>*Id.*

Therefore, representations or assurances are capable of creating legitimate expectations to foreign investors and the host state should not arbitrarily change the assurance or representations it made to foreign investors which induced them to invest.

## **B. Contractual Commitments**

Protection of legitimate expectations of foreign investor may also be derived from contractual commitments with the foreign investor. When the host state fails to provide license grant or contractual arrangements with the investor, legitimate expectations of foreign investor under the FET is violated.<sup>38</sup>

On the one hand, it is widely recognized by tribunals that, “repudiation of a contract by the host state violates the rights of the investor even in the absence of a BIT under the minimum standard of international law”.<sup>39</sup> On the other hand, ordinary commercial disputes are not subject of BIT in the absence of Umbrella clause which incorporated in the BIT.<sup>40</sup> Therefore, when the conduct is sovereign rather than commercial conduct, it is capable of creating legitimate expectations to the foreign investor to be protected under treaty.<sup>41</sup>

## **C. Legal Framework**

Legitimate expectations of foreign investor can be created through the host state’s regulatory frameworks existed at the time of the investment<sup>42</sup>. It can also be created afterwards provided that there is a change to the legal framework on which the foreign investor relied up on and developed a legitimate expectation.<sup>43</sup> This sub-element of legitimate expectation has been often buttressed through a reference to the BIT’s preamble, that stability and predictability of legal framework to be considered as one of the aims of the treaty.<sup>44</sup>

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<sup>38</sup>*Id* at 69.

<sup>39</sup> Rudolf Dolzer, *supra* note 12 at 25.

<sup>40</sup>*Id*.

<sup>41</sup> Laura Isotalo, *Climate Compatible Investment Treaty Law: The Role of Legitimate Expectations*, *Scottish Centre For International Law Working Paper Series*, Working Paper No. 6 at 6, available at: <<http://www.scil.ed.ac.uk>> (Accessed on February 17, 2017)

<sup>42</sup> Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, *Journal of World Investment & Trade* Vo. 12, (2011) at 799.

<sup>43</sup> Christoph Schreuer and Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?* (2009) at 8, available at: [www.univie.ac.at/intlaw/pdf](http://www.univie.ac.at/intlaw/pdf) (Accessed on March 6, 2017).

<sup>44</sup> Michele Potestà, *supra* note 19 at 28.

For instance, in the *Occidental Exploration & Production Company v Ecuador case*, the tribunal used the BIT preamble as a reference and noted that stability of the legal and business framework is an essential element of FET and there is an obligation on the host state not to change the legal and business environment in which the investment has been made.<sup>45</sup> Hence, the act of tax refund by Ecuador led to a breach of the FET clause; “the tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.”<sup>46</sup>

Nevertheless, arbitral tribunals’ rulings show that regulatory change by itself is not enough to be protected under FET; i.e. the regulatory change should be supported by additional factors such as abuse of authority that amount to the breach of legitimate expectations of foreign investor.<sup>47</sup> Unless the reliance of the investor on a host state’s legal framework is not repudiated by additional factor such as abuse of authority, the mere change of the legal framework does not amount to the violation of legitimate expectations. Thus, when a host state's regulatory change is accompanied by exceptional factors [negative conduct of the host state], the combination thereof may amount to a breach of legitimate expectations protected by the FET principle.

Generally, the term legitimate expectations of foreign investors could be treated as one component of FET clause and can be derived from different patterns, such as, assurance or representation, contractual arrangement and legal framework of the host state. However, these patterns of legitimate expectations may sometimes overlap and remain interrelated. Thus, majority of tribunals affirmed that the host state is responsible for the violation of legitimate expectations of foreign investors.

### **2.3. Controversies on the Interpretation of Legitimate Expectation**

As elaborated in the above sections, protection of legitimate expectations of foreign investors is an obligation of the host state under the principle of FET. However, expectations of foreign investors and the interest of the host state to preserve its public values needs to be considered. Thus, a host state may want to put some limitations on the application of the standard due to economic, social and political development so as to “ensure a proper balance between the

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<sup>45</sup>*Id.*

<sup>46</sup> Moshe Hirsch, *supra note 42*.

<sup>47</sup> Moshe Hirsch, *supra note 42*.



protection of investors and the inherent right of a State to regulate economic conduct within its borders”.<sup>48</sup>

On this point there are broad and narrow approaches developed by Tribunals` interpretations of legitimate expectations.<sup>49</sup> The broad approach gives interpretation to the principle that host state is responsible to provide protection to the legitimate expectations of foreign investors; it is expected to act in a stable and predictable manner with the rules that the investor knows in advance.<sup>50</sup> It focused on the strict application of the principle of legitimate expectations that the host state should not change the legitimate expectations of the investor.<sup>51</sup>

In this regard, the *Tecmed v. Mexico case*, the tribunal noted that foreign investor can rely on the stability and predictability of the host state.<sup>52</sup> The host state breached legitimate expectations of the investor by changing the unlimited license of the investor to operate a landfill with a time limited license, “leading to the claim that the change in trading and legitimate space of the investment violates the fair investment treatment between Spain and Mexico.”<sup>53</sup> The tribunal held that the Mexican officials violated the legitimate expectations of the foreign investor through “unclear and ambiguous” act<sup>54</sup>.

This approach gives greater protection to and benefits the foreign investor without considering majority of citizens in the host country, the right to regulation of the host state for political and economic changes occurred over time by preferring investor’s interests to national priorities.<sup>55</sup> Hence, this is a risk to the sovereignty of the state since tribunal may potentially acquire the authority to examine all state policies which can affect interests of the investor.<sup>56</sup> Therefore, this approach is criticized for being too broad that did not consider the right to legislate of the host state and is not achievable.

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<sup>48</sup> Peter Muchlinski, *Caveat Investor? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, VO. 55, (2006) at 528, doi:10.1093/iclq/lei104

<sup>49</sup>Zeinab Asqari, *Investor’s Legitimate Expectations and the Interests of the Host State in Foreign Investment*, *Asian Economic and Financial Review*, (2014), 4(12):1906-1918, available at: Asian Economic and Financial Review: <<http://www.aessweb.com/journals/5002>> (Accessed on February 17, 2017).

<sup>50</sup>*Id.*

<sup>51</sup> Felipe MutisTeñlez, *supra note 5* at 8.

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

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup> Abhijit P.G. Pandya, *supra note 21* at 63.

The narrow approach argues for restrictive interpretation of the legitimate expectations of foreign investor; since the FET obligation and stabilization clauses are not the same and could not serve the same purpose.<sup>57</sup> Consequently, this approach seeks to introduce a balance between the need for flexible public policy and the legitimate reliance on particular investment operations.

#### **2.4. Balancing Legitimate Expectations and Regulatory Right of the Host State**

In applying the principle of legitimate expectations, it is required to consider the interest of the investor and the regulatory rights of the host state within its territory. In spite of some commitments undertaken by the host state, it might be practically impossible and unrealistic to protect “expectations of foreign investor considering different situations”.<sup>58</sup>

Tribunals have observed that the investor’s legitimate expectations required to consider host state’s specific characteristics in terms of investment environment.<sup>59</sup> In order to protect legitimate expectations, the expectations of foreign investor need to be reasonable. Reasonableness requirement of expectations need an examination of “all circumstances that the investor should consider when making the investment, including the level of development of the host country.”<sup>60</sup> Thus, the level of expectations from developing countries and developed countries is not the same, since there is a difference on socioeconomic, cultural and historical conditions.

In determining the reasonability of foreign investor’s expectations, the tribunal in the *Duke v. Ecuador case*, noted the following statement as a holistic approach:

*“The assessment of the reasonableness or legitimacy [of the investor’s expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”*<sup>61</sup>

Thus, in addition to the subjective expectations of the investor, the objective expectations based on the conditions offered by the host state are essential in determining reasonableness. States are sovereign and have undeniable right and privilege to exercise legislative power on their

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<sup>57</sup> Felipe MutisTeñlez, *supra note 5* at 8.

<sup>58</sup>*Id.*

<sup>59</sup> Michele Potestà, *supra note 19*, at 35.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

sovereign.<sup>62</sup> They have the right to enact and change laws within their jurisdiction. Thus, legitimate expectations should not interfere in the host state's sovereignty to freeze regulatory framework and should not be equated with a stabilization clause in the investment agreement.<sup>63</sup> However, this legislative power should not be unfairly, inequitably or unreasonably exercised.

To this end, it is crucial to balance these legitimate expectations of foreign investors and public interests of the host state under the principle of FET. Thus, the foreign investor will have protection of legitimate expectation if it is reasonable taking into consideration the circumstances such as, political, socioeconomic, cultural and historic conditions prevailing in the host state; and the potential change of the legal environment of the host state. However, as to the weight on the balancing of these conflicting interests, arbitral tribunals have not yet established more detailed criteria that can avoid uncertainties in the application of this important component of fair and equitable treatment.<sup>64</sup>

### **3. Evaluating Legitimate Expectations of Foreign Investors in Ethiopia**

#### **3.1. Legal Analysis on Legitimate Expectations of Foreign Investors**

##### **3.1.1. Treaties Ratified by Ethiopia**

In the international investment regime, many developing countries signed BITs with developed countries to attract FDI by creating confidence in foreign investors at the pre-investment stage<sup>65</sup> and protect their legitimate expectations. BITs are known for defending foreign investments since, currently in Ethiopia, there is no comprehensive multilateral investment instrument for the regulation of foreign investment. Thus, BITs increase the inflow of foreign investments to a host state by providing guarantees to certain rights of foreign investors.<sup>66</sup> Those treaties set forth standards for the treatment of foreign investments, among others, National treatment, most favored nation treatment, protection against expropriation and Fair and equitable treatment are guarantees for the protection the interests of foreign investors.

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<sup>62</sup> Roland Klager, *Fair and Equitable Treatment in International Investment Law*, (U.S.A.: Cambridge University Press, 2011) at 174.

<sup>63</sup> Moshe Hirsch, *supra note 42* at 802, see also Laura Isotalo, *supra note 41* at 20.

<sup>64</sup> Roland Klager, *supra note 62*.

<sup>65</sup> Martha Belete Hailu and Tilahun Esmael Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration*, *Mizan Law Review*, VOL. 8, No.1, (September 2014) at 121.

<sup>66</sup>*Id.*

In Ethiopia, due to the economic liberalization followed since 1991 there is a high inflow of FDI to the country. From that time onwards, there is also an interest on the Ethiopian government to protect foreign investors' interests so as to attract FDI. To this end, there are a lot of BITs and multilateral investment treaties signed by the Ethiopian government with different developed and developing countries.

BITs are instruments provided principally to protect FDI.<sup>67</sup> One of the protections accorded by BITs is FET. As a result, they are important tools in securing legitimate expectations of foreign investors. Thus, foreign investors rely on BITs than domestic legislations as the latter may not be stable and are subject to amendment in response to national interest of the states. To avoid such risk on foreign investors, developing countries including Ethiopia sign BITs, in order to attract FDI and as a sign of encouraging future investment.<sup>68</sup> Thus, Ethiopia has signed BITs with 33 countries; namely, Algeria, Austria, Brazil, Belgium-Luxemburg, China, Denmark, Djibouti, Egypt, Equatorial Guinea, Finland, France, Germany, India, Iran, Israel, Italy, Kuwait, Libya, Malaysia, Morocco, Netherlands, South Africa, Spain, Sudan, Russia, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, USA, United Arab Emirates, and Yemen.<sup>69</sup> Hence, these BITs ratified by the country are an integral law of the land.<sup>70</sup>

Almost all of these BITs signed by the country incorporates the standard of FET. However, the wording used in the incorporation of FET clause as one of the standard of treatments varies from one BIT to another BIT and none of these treaties provides a specific provision that deal with legitimate protections of foreign investors.

The problem is that there is no clear meaning of FET and its interpretation is controversial. In most BITs concluded by Ethiopia, the FET clause is more general in its wording and does not mention of the legitimate expectations of foreign investors.

When we see thoroughly the provisions of all these BITs with regards to the interpretation of FET and legitimate expectations of foreign investors almost all BITs signed by Ethiopia refer to

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<sup>67</sup> M. Sornarajah, *supra note* 15 at 416.

<sup>68</sup> *Id.*

<sup>69</sup> UNCTAD, *Ethiopian, Bilateral Investment Treaties*, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67> (Accessed on November 9, 2018).

<sup>70</sup> The Constitution, Proclamation No. 1/1995, FED, FEDERAL NEGARIT GAZETA, 1<sup>st</sup> Year, No.1, (Addis Ababa, 21<sup>st</sup> August, 1995), (hereafter FDRE Constitution), Art. 9(4).

the plain meaning. However among the BITs concluded by Ethiopia, the one made with the government of the Republic of France<sup>71</sup> refers to the application general rules of international law in the following manner:<sup>72</sup>

*“Either contracting party shall extend fair and equitable treatment in accordance with the principles of international law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice.”*

This provision links FET to the international minimum standard required by customary international law. The assessment of the violation of FET by one of the parties to this treaty needs to be in accordance with the recognized minimum standard of treatment set under customary international law.<sup>73</sup> However, the minimum standard of treatment is difficult to identify all its normative contents<sup>74</sup>.

Consequently, almost all other BITs signed by Ethiopia prescribe plain and ordinary meaning of FET. For instance, the treaty between the Federal Republic of Germany and the FDRE<sup>75</sup> provides:

*“Each Contracting Party shall in its territory in any case accord investments by investors of the other Contracting Party fair and equitable treatment.”*

Thus, the ordinary meaning of FET should be interpreted according to the circumstance of the case in good faith in light of the object and purpose of the BIT pursuant to the principle of article 31(1) of the Vienna Convention on the Law of Treaties.<sup>76</sup> Whether the investor has been treated

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<sup>71</sup>Signed on June 25, 2003.

<sup>72</sup> Article 3

<sup>73</sup> OECD Working Papers on International Investment, *Fair and Equitable Treatment Standard in International Investment Law*, (2004) at 8, dx.doi.org/10.1787/675702255435.

<sup>74</sup>Olatokunbo Lad-Ojomo, *what is the Distinction between the Fair and Equitable Treatment Standard and the Minimum Standard of Treatment under Customary International Law*, at 19, available at University of Dundee: <<http://www.dundee.ac.uk>> (accessed on March 23, 2017)

<sup>75</sup> Art. 2(2) of the treaty between the Federal Republic of Germany and the FDRE, (signed on January 19, 2004).

<sup>76</sup> Vienna Convention on the Law of Treaties, (1969) 1155 UNTS 331, as cited in Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, *Leiden Journal of International Law*, Vo. 25, (2012) at 77, doi:10.1017/ S0922156511000598.

fairly and his legitimate expectations has been protected should be analyzed on a case by case basis taking in to consideration the purpose of the BIT.

Primarily the purpose of BITs signed by Ethiopia is to create a favorable condition for the investments of one contracting party in the territory of the other contracting party. This statement is clearly provided in the preambles of BITs signed by Ethiopia. Thus, the provision of FET should be interpreted cumulative with the preamble so as to include legitimate expectations of foreign investors. This protects investors from arbitrary act of the government and enables them to make reasonable business decisions to invest in Ethiopia by relying on the county's representations.

Consequently, any unreasonable prejudice or discriminatory measures on the management, maintenance, use, enjoyment or disposal of investments by the government of Ethiopia is a violation of legitimate expectations of foreign investors. Putting it differently, any government measure which negatively affects the decision of the investors to invest in Ethiopia amounts a violation of legitimate expectations.

*From the cumulative reading of the preambles of BITs and the specific provision on FET it requires treatment of foreign investor without affecting basic legitimate expectation of foreign investors that were considered in deciding to make the investment (emphasis added ).*<sup>77</sup>

Some BITs signed by Ethiopia incorporate the standard of FET in different expressions in combination with other standards such as national and most favored nation treatments. They mix the standard of FET with national treatment and most favored nation treatment. For instance, Article 3(2) of the treaty between the Federal Democratic Republic of Ethiopia and the Government of the Republic of Sudan<sup>78</sup> provides:

*“Each Contracting Party shall ensure fair and equitable treatment within its territory to investments of the other Investors of the other Contracting Party and shall not be less favorable than that accorded to investments made by its own Investors or Investors of any third states.”*

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<sup>77</sup> Trevor Zeyl, *supra* note 9, at 205.

<sup>78</sup>Signed on March 7, 2005.

The BITs Ethiopia signed with China<sup>79</sup>, Denmark<sup>80</sup>, Iran<sup>81</sup>, Kuwait<sup>82</sup>, Libya<sup>83</sup>, Netherlands<sup>84</sup>, Russia<sup>85</sup> and Yemen<sup>86</sup> contains similarly worded provisions.

This kind of provision demand the treatment of foreign investors to be in accordance with the national treatment and most favored national treatment standards. This preference is different from the essence of FET, since FET is a non-contingent standard that makes it a different standard from national and most favored nation treatment. A non-contingent standard of treatment does not refer to other investment or investor to protect the legitimate expectations of the investor at hand.<sup>87</sup> Rather it should be determined independently, which ensures a minimum level of protection is accorded to the foreign investor regardless of whether nationals of the host state are treated the same way.<sup>88</sup> Thus, FET standard on the one hand and national and most favored nation treatments on the other hand, are two independent standards. It is ensuring that a minimum standard of investment protection exists even in situations not contemplated by the specific treaty provisions.

Though unlike the contingent standards, FET is a standard which does not focus on external factor/ standards which are applicable to other investor, mixing of the standard of FET with the contingent standard could create a problem on the protection of the legitimate expectations of foreign investors. i.e. if the investor from the most favored nation is not protected, the legitimate expectations of foreign investor at hand maybe not protected. FET standards tied to MFN and

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<sup>79</sup> Agreement between the government of the FDRE and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investments, (signed on May 11, 1998).

<sup>80</sup> Agreement between the FDRE and the Kingdom of Denmark concerning the promotion and reciprocal protection of investments, (signed on April 04, 2001).

<sup>81</sup> Agreement of Reciprocal Promotion and Protection of Investments Between the Government of the FDRE and the Government of the Islamic Republic of Iran, (Signed on October 21, 2003).

<sup>82</sup> Agreement between the FDRE and the State of Kuwait for the encouragement and reciprocal protection of investments, (signed on September 14, 1996).

<sup>83</sup> Agreement between the government of the FDRE and the Great Socialist People's Libyan Arab Jamahiriya concerning the encouragement and reciprocal protection of investments, (signed on January 27, 2004).

<sup>84</sup> Agreement on encouragement and reciprocal protection of investments between the FDRE and the Kingdom of the Netherlands, (signed on May 16, 2003).

<sup>85</sup> Agreement between the Government of the FDRE and the Government of the Russian Federation on the promotion and reciprocal protection of investments, (signed on February 10, 2000).

<sup>86</sup> Agreement on the Government of the FDRE and the Government of the Republic of Yemen on the reciprocal promotion and protection of investment, (signed on April 15, 1999).

<sup>87</sup> Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, (2000) at 105, available at University of van Amsterdam: <http://bybil.oxfordjournals.org> (accessed on march 26, 2017)

<sup>88</sup> Olatokunbo Lad-Ojomo, *supra note* 74 at 7

NT standards, such as the one at hand, could trigger treaty breach even where there's no investor that is treated more favorably. In other words, MFN and NT standards tied to FET could serve the same purpose that standalone MFN and NT BIT clauses serve. Because, the standard of most favored nation depends on a reference to the treatment accorded to other investment and its contents are determined by reference to the host states treaties with other countries. This makes difficult to the reasonableness of expectations of foreign investor to the regulatory measurement of the state.

### **3.1.2. Domestic laws as guarantees to foreign investors**

In order to attract and promote foreign investors many countries have adopted domestic investment laws that protect their investment from adverse measure of the government. Legislations often seek to provide incentives to promote private capital investment, especially by promoting participation of foreigners in the national economy. Legal guarantees protect the investor from adverse measure of the government and assures safe business environment which is expected by the foreign investor.

Domestic law guarantees to foreign investors are important where there are investment treaties giving protection to the investment; the violation of these guarantees may amount to a violation of treaty standards of protection.<sup>89</sup> Therefore, domestic laws guarantees are significant to implement treaty standards and protect legitimate expectations of foreign investors.

Since 1991 the national investment law of Ethiopia has been amended several times. Thus, the present regulatory regime governing FDI in Ethiopia is based on a series of Investment Proclamations issued between 1992 and 2014, principally Proclamations 15/92, 37/1996, 116/1998 (amendment), 280/2002, 375/2003(amendment), 769/2012, 849/2014 (amendment) (emphasis added).<sup>90</sup>

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<sup>89</sup> M. Sornarajah, *supra note* 15 at 101.

<sup>90</sup> UNCTAD, *Investment and Innovation Policy Review, Ethiopia*, United Nations, (New York and Geneva, 2002) at 26.



In Ethiopia, “Increasing the inflow of capital and speed up the transfer of technology into the country” is one of the purposes of Ethiopian investment law.<sup>91</sup> This indicates the intention of the country to attract foreign investors to the country’s economic development.

The repealed investment proclamation no. 37/96 protects legitimate expectations of foreign investors by recognizing the stability of the regulatory framework existing at the time of investment. Article 41(1) (b) of this proclamation provides:

*“Incentives provided for in Proclamation No.15/1992 and in directives issued thereunder shall remain applicable in respect of investments approved prior to the effective date of this Proclamation.”*

Thus, investors who relied on the incentives provided by the investment proclamation no. 15/1992 are protected by this provision. This is a treatment of foreign investment not to affect the legitimate expectations of foreign investor who made reasonable business decisions to invest in Ethiopia by relying on the county’s regulatory framework and representations.

Similarly, Article 41(1) of the investment proclamation no. 280/2002 demands for stability of the proclamation no. 37/96 with its amendment, regulation and directives for investors who relied on that prior to the issuance of this proclamation. This is clearly incorporated to protect the legitimate expectations of investors.

Nevertheless, the investment proclamation no.769/2012 does not specifically incorporate the issue of FET standard and legitimate expectations of foreign investors. These issues should have been at least briefly stated through indicative way in the preamble and the provisions of the proclamation like bilateral investment treaties signed by Ethiopia.

The special investment proclamation No. 678/2010, a proclamation to promote sustainable development of mineral resources also tried to incorporate the protection of legitimate expectations of foreign investors who concluded an agreement with the Ethiopian government prior to the coming in to force of this proclamation to invest their capital in mineral resources. Thus, Article 81(1) of this proclamation provides that:

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<sup>91</sup>Investment Proclamation, preamble.

*“Any license or mining agreement issued or concluded prior to the coming into force of this Proclamation shall, in so far as it is consistent with this Proclamation, continue in force for the remaining period of its validity; and thereafter, it may be renewed in accordance with the provisions of this Proclamation.”*

Only a license issued prior to the coming in to force of this proclamation is protected and remains in force if it is consistent with this proclamation [regulatory change]. What could happen if the license granted pursuant to the previous investment laws is inconsistent with this proclamation? Does it mean the investor could not be protected? On this regard sub-article 2 of this article provides the following statement:

*“Notwithstanding with the provisions of sub-article (1) of this article, according to the appropriate agreement where a party undertaking a mineral activity the benefit of which sustains damage due to this proclamation, upon the request of the other party under damage, both parties may agree to make the necessary correction in good faith mutual discussions.”*

Therefore, the government should undertake negotiations with investors when there is damage as a result of this regulatory change in spite of the inconsistency of a license with the new proclamation.

When we see the investment proclamation no.769/2012, though it doesn't expressly incorporate the FET standard and the protection of legitimate expectations of foreign investor, it indirectly adopted in its preamble and provisions. To begin with the preamble, it provides that “the system of administration has to be transparent and efficient”. This system applies both to the domestic and foreign investors. Transparency of the government in the decision making could create certainty on the foreign investor in making decisions to invest in Ethiopia. This transparency of government action is a related concept of legitimate expectations of foreign investors.<sup>92</sup> Foreign investors legitimately expect the Ethiopian government to act in a transparent manner. Any legal framework and decisions that can affect the interest of foreign investor should be clear.<sup>93</sup> Therefore, from this statement, it can be concluded that the Ethiopian government is expected to

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<sup>92</sup> Rudolf Dolzer and Christoph Schreuer, *Principle of International Investment Law*, (United States: Oxford University Press, 2008) at 133.

<sup>93</sup>*Id.*

notify foreign investors regarding the changes or possible changes to the investment status and the investor will perform accordingly. If the government is not transparent in dealing with a foreign investor, it is a violation of FET.

The Ethiopian government considers foreign investment as an essential factor for the economic development of the country. This is clearly provided in Article 5(7) of the investment proclamation as one of the objectives of the proclamation. This sub-article reads “to enable foreign investment play its role in the country’s economic development.” Therefore, in order to meet this objective, the government needs to protect the interests of foreign investors and comply with the international standards of treatment so as to attract them to come and invest their capital in the country.

As it has been examined in the previous section, Ethiopia tried to meet this objective by signing BITs with various countries and by adopting various standards of treatment including FET. Surely this could attract foreign investors by signaling that their legitimate expectations will be protected by these treaties. However, additionally there should be domestic guarantees to meet the objective of this proclamation. Thus, it is the belief of this researcher that the proclamation should adopt the standard of FET in its provisions to increase the confidence of foreign investors in making decisions to invest in Ethiopia.

Article 25 of the proclamation no. 769/2012 provides investment guarantees and protections. Though this article applies both to domestic and foreign investors--foreign investment guarantees and protections are broad concepts and include FET, national treatment, most favored nation treatment, protection from unlawful expropriation, protection against other government measures which are seriously detrimental to the investors’ interests such as Protection against measures that would restrict the possibility to transfer funds i.e.; currency control.<sup>94</sup> However, under this provision only the protection against unlawful expropriations or nationalizations is provided as guarantees and protections for investors.<sup>95</sup> This could be considered as one means of protecting legitimate expectations of foreign investors in Ethiopia. This article stipulates that every expropriation and nationalization involving a foreign investor should be for public purpose and be accompanied with adequate compensations corresponding to the prevailing market value paid

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<sup>94</sup> Rudolf Dolzer and Christoph Schreuer, *supra note* 92 at 119-191.

<sup>95</sup> Investment Proclamation No. 769/2012, *supra note* 3, article 25(1).

in advance.<sup>96</sup> This creates expectations on the foreign investor to have an effect on the assessment of compensation where the foreign investor suffers damage as a result of action by the government contrary to this provision. This legal framework provided by the country is an important source of legitimate expectations of foreign investors. What matters for the investor's legitimate expectations is the state of law of the country at the time of investment.<sup>97</sup> And this state of law should be transparently implemented by the government.

With regards to the standards of compensation for expropriations of foreign investor there is difference between developing and developed countries. The developed countries preferred full, prompt and effective compensation according to international law which is known as the "Hull formula" named after the United States Secretary of state Cordial Hull, who made such a claim in relation to Mexican expropriation; while developing countries preferred national treatment to have appropriate compensation which is known as Calvo doctrine named after the Argentine diplomat Carlos Calvo.<sup>98</sup> The detail issues concerning the expropriations and assessment of compensation are out of the scope of this article.

Notwithstanding these difference most bilateral investment treaties commonly refer to the Hull formula.<sup>99</sup>When we see most of the BITs signed by the Ethiopian government adopts the Hull formula of full, prompt and effective compensation.<sup>100</sup> Thus, the legitimate expectations of foreign investors concerning expropriations of property in Ethiopia is guaranteed by the BITs and domestic investment law. The other means of guarantees and protections of foreign investors such as FET, national treatment and most favored nation treatments are not directly adopted in this provision.

### **3.2. Practical Problems of Legitimate Expectations of Foreign Investors**

Legitimate expectations of foreign investors demand the host state to refrain from changing the law and business scenario as well as to properly implement its laws and policies. Therefore, foreign investors expect that their economic rights and interests will be protected in Ethiopia,

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<sup>96</sup>*Id.*, Article 25 (2).

<sup>97</sup> Rudolf Dolzer and Christoph Schreuer, *supra note* 92 at 105.

<sup>98</sup> R. Doak Bishop and James E. Etri, *International Commercial Arbitration in South America*, at 2 available at: [www.kslaw.com](http://www.kslaw.com) (accessed on February 19, 2017).

<sup>99</sup>*Id.*

<sup>100</sup> Martha Belete Hailu, *Standards of Expropriation for Compensation of Foreign Investment in Ethiopia: The Tension between BITs and Municipal law*, *Journal of Ethiopian Law*, Vol. 26, No.2, (2014) at 18.

since the country has BITs and moderate investment laws. In addition to macroeconomic stability, peace and security in the country, foreign investors are motivated to invest in the country by incentives and legal protections provided by law, representations provided in different symposiums by higher government officials.<sup>101</sup>

As has been examined in the previous section, Ethiopia has already signed BITs with 30 countries. In theory, this together with the attractive incentives and protections extended to foreign investors by law, could enhance their legitimate expectations and thus promote investment in the country. However, the practice shows that there is a clear problem in meeting the legitimate expectations of foreign investors.

There are various incentives given to foreign direct investment in Ethiopia. These include exemption from payment of export custom duties, income tax holidays from 2 to 7 years depending on the region and the sector of the investment, exemption for two years for investors exporting at least 60% of their products or supply their product as input to exporters.<sup>102</sup> For instance, Julphar Gulf Ethiopia Pharmaceutical P.L.C, a pharmaceutical industry owned by UAE, is among the beneficiaries of income tax exemption for a period of four years.

Ato Aschalew Tadesse, FDI promotion Director of the Ethiopian Investment Commission opines that:

*“These incentives and other expectations provided by the law are implemented accordingly. Pursuant to the law their legitimate expectations are protected. But in relation to land it could not be according to their expectations. There might be some unnecessary delay and bureaucracy which is not transparent at all”.*

Moreover, promises or representations provided by higher officials of the government are mostly for political purposes which may not have legal basis, and there may be discrepancies between

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<sup>101</sup>Interview with Ato Mubarek Ahmed, General Service Manager, Julphar Gulf Ethiopia Pharmaceutical industry, UAE plc. (Addis Ababa, March 31, 2017).

<sup>102</sup> Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation, Regulation No.270/2012, FED. FEDERAL NEGARIT GAZETA, 19<sup>th</sup> year No. 4, Addis Ababa, November, 2012; Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers (Amendment) Regulation, Regulation No.312/2014, FED. Federal Negarit Gazeta, 20<sup>th</sup> year No. 62, Addis Ababa, August, 2014.

the law and representations given formally or informally by the government.<sup>103</sup> In such cases, the expectations of foreign investors may not be met. The executive body is not aware of the concept. Especially in relation to land, the practice is against the legitimate expectations of foreign investor. Ato Mubarek observes that :

*“We have requested land before to expand the investment and we got the permission, even the prime minister personally came and saw our investment and promised us to support the investment. But there is a problem on the land administration officers who implement the laws and policies. From acquiring land to getting a building permit; from renewing a business license to obtaining tax clearance, the bureaucracy in Ethiopia moves lethargically. Still we have not got the land”.*

A foreign investor expanding or upgrading his existing enterprise in relation to the additional income generated by the expansion of the enterprise is also entitled to income tax exemption. But, due to the problems on implementation foreign investors could not get land for expansion of their investment and could not be the beneficiaries of income tax exemptions based on expansion of investment.<sup>104</sup>

The doctrine of legitimate expectations of foreign investors in essence imposes a duty on the authority to act fairly. Thus, any legal framework and decisions of the host state that can affect the interest of foreign investor should be clear. It is a frustration of legitimate expectations of foreign investors when there is a failure on the part of the concerned authority to act fairly in taking the decision. But the practice shows arbitrary exercise of power by the administrative authority which is not clear and fair to foreign investors. Failure to ensure transparency and give decision without ambiguity based on the legal framework is a violation of legitimate expectations of foreign investors. This happens despite the Corruption Crime Proclamation No. 881/2015, which identifies undue delay of matters by a government official to be a criminal act. Article 18 of this Corruption Crime Proclamation provides “any public servant or employee of a public organization who with intent to obtain an advantage, directly or indirectly...fails, without good cause, to decide on or delays the matter... shall be punishable.” Therefore, administrative

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<sup>103</sup> Interview with AtoYohannes Lammato, Contract Administrator Team, Ethiopian Investment Commission, (Addis Ababa, and March 24, 2017).

<sup>104</sup> Interview with Ato Mubarak Ahmed, supra note 101.

practices should be able to comply with the principle of legitimate expectations of foreign investors.

Similarly, W/ro. Muna Ahmed<sup>105</sup> says “practically there are problems on the implementations of legitimate expectations”. Moreover, the system is not clear and foreign investors are not aware of their rights what to do and not to do. Similar observations were made by representataives of other foreign investors: Ato Endale Eyayu<sup>106</sup> W/ro Helina Solomon<sup>107</sup> and Mr. Ashok Shiva.<sup>108</sup> These investors invested in Ethiopia by relying on the BITs signed and laws of the county that the laws and system of implementations are good enough in protecting their rights. But they maintained that practice is below their expectations.

This creates confusion to foreign investors who are interested in investing in the country. Foreign investors cannot be sure whether the legal guarantees will be realized to protect their interests. Consequently, the objective of investment laws and BITs to promote and protect of investment may be imperiled.

However, lacking confidence to the system, mostly they do want to bring formal complaints. Rather they informally and repeatedly ask public officials to implement their rights.<sup>109</sup> Foreign investors have doubts on the rule of law, on how the officials will act, on transparency to protect their economic rights and interests and public officials are not aware of the concept of legitimate expectations.<sup>110</sup> Ultimately, they doubt whether the legal system will ensure stability of a legal framework buttressed through a reference to the BITs preamble, which refers stability as one of the goals of treaty. For this reason, most foreign investors are not interested to bring formal complaint and confront with the government, rather as a last resort they want to take their investment to other host countries.<sup>111</sup> Therefore, my interview with foreign investors reveals that,

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<sup>105</sup>Interview with W/ro Muna Ahmed, Deputy General Manager, East African Pharmaceutical Industry, Sudanese, and Yemeni and Saudi plc. (Addis Ababa, April 4, 2017).

<sup>106</sup>Interview with Ato Endale Eyayu, General Manager, DLM Textile Industry, Indian company plc. (Addis Ababa, March 18, 2017).

<sup>107</sup>Interview with W/ro Helina Solomon, Deputy Manager, NH BAY Furniture industry, China Company, (Addis Ababa, March 17, 2017).

<sup>108</sup> Interview with Mr. Ashok Shiva, General Manager, Fonix Plastic Industry, Indian Plc. (Addis Ababa, March 17, 2017).

<sup>109</sup> Interview with Ato Mubarek Ahmed, *supra note* 101 and interview with W/ro Muna Ahmed, *supra note* 106.

<sup>110</sup>*Id.*

<sup>111</sup> Interview with Ato Abreham Minalaw, License and Registration Higher Expert, Ministry of Trade, (Addis Ababa, March 25, 2017).

though legitimate expectations did not appear anywhere in a judgment and is impossible to establish in which specific case the government violated legitimate expectations of foreign investors, legitimate expectations of foreign investors are not fully protected.

A more frustrating issue for foreign investors, according to Ato Mubarek,<sup>112</sup> is the absence of mechanisms to enforce arbitrations. Though the Ethiopian investment law provides for dispute settlement through negotiation and international arbitration, there is a doubt on foreign investors with regard to the recognition and enforcement of foreign arbitral awards in Ethiopia, since Ethiopia is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which seeks to provide common legislative standards for the recognition and enforcement of arbitration agreements as a means of settling international commercial disputes. So, investors are not confident whether their agreement or arbitration decision is enforced in Ethiopia.

Foreign investors believe that domestic administrative legal procedures are insufficient and lacked internal coherence or transparency to measure legitimate expectations of foreign investors. When the administrative legal procedure is not consistent and transparent, the state can be found to be in breach of the legitimate expectations and/or FET provisions based on the preamble in a BIT which has the objective of promoting and protecting investment. Officials of the state are expected to act in a consistent manner, ensuring clarity and transparency. Thus, the state's failure to act with transparency might result in violations of FET standard included in a treaty.

However, not all expectations of foreign investors are legitimate. As it has been examined in the previous section, foreign investor's expectations need to consider host state's specific characteristics in terms of investment environment.<sup>113</sup> Foreign investors should have to consider reasonableness requirement inherent in expectations to examine all circumstances when making the investment, including the level of development of the host country.<sup>114</sup>

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<sup>112</sup> Interview with Ato Mubarek Ahmed, *supra note* 101.

<sup>113</sup> Michele Potestà, *supra note* 19, at.1-35.

<sup>114</sup> *Id*



Practically, some foreign investors are not asking their expectations reasonably. According to Ato Frew Mamo<sup>115</sup>, some foreign investors are informal in requesting their rights, and they want to cheat the government. For instance, Ato Frew says:

*“Import-export trade is allowed to domestic investors. But we have seen and controlled investors who came from Turkey illegally involved in import and export trade. They don’t have a legitimate ground to involve on this trade”.*

Hence, foreign investors may not request incentives from the Ethiopian government without performing their obligations. For example, there are agreements with Turkey and Indian investors to export 80% of their products since the government need hard currency.<sup>116</sup> But evidence shows that 90 % of foreign investors in the textile industry provide their product to the local market.<sup>117</sup>

## **Concluding Remarks**

It has been discussed that Ethiopia has signed different BITs and multilateral agreements to protect foreign investments. These agreements are important in securing the legitimate expectations of foreign investors, viz.; to protect them from arbitrary act of the government and enable them to make reasonable business decisions to invest in Ethiopia. Thus, based on these international agreements, Ethiopia is expected to apply the fair and equitable treatment standard in general and its component—legitimate expectations of foreign investors, in particular.

In the domestic investment laws, the investment proclamations prior to the investment proclamation no. 769/2012 and the special investment proclamation No. 678/2010, a proclamation to promote sustainable development of mineral resources protects legitimate expectations of foreign investors by maintaining the stability of the regulatory framework existing at the time of investment. But the investment proclamation no.769/2012 does not specifically incorporate the issue of legitimate expectations of foreign investors. Rather the proclamation indirectly adopted it in its preamble and some of its provisions, such guarantees

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<sup>115</sup>Interview with Ato Fraw Mamo, Legal Directorate Director. Ministry of Trade, (Addis Ababa, March 25, 2016).

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

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

and protections for investors as transparency and efficiency of the administrative system, protection against unlawful expropriations or nationalizations.

The major problems relate to implementation of the protection of legitimate expectations of foreign investors, Consistency of the practice and behavior of officials with the law. For instance, the practice in Addis Ababa shows that, in some cases public officials act arbitrarily, handed down decisions that lack transparency and clarity. They act in a manner that is inconsistent with the domestic laws and the BITs thereby undermining the legitimate expectations of foreign investors. This creates confusion among foreign investors interested in investing in the country. They cannot be sure whether the legal guarantees will be realized to protect their interests.

Therefore, the researcher recommends the following points for consideration:

- The Ethiopian investment proclamation shall incorporate legitimate expectations of foreign investors
- Primarily, the Ethiopian Investment Commission is empowered by law to implement and enforce the investment laws. As a result, to avoid the inequitable treatment foreign investors, the commission should take necessary measures. Such as, share experience and coordinate with other implementing institutions to ensure the proper application of legitimate expectations of foreign investors. It should facilitate and follow up the implementation of the legitimate expectations of foreign investor specified in treaty provisions and the law.
- Most government officials dealing with foreign investment are not aware of the concept of legitimate expectations of foreign investor. Thus, awareness creation should be given through different trainings and seminars.