JIMMA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE
SCHOOL OF LAW
LL.M. PROGRAM ON COMMERCIAL AND INVESTMENT LAW

A Thesis Submitted to Jimma University School of Law for the Partial Fulfillment of the Requirements for Obtaining Master of Law (LL.M.) in Commercial and Investment Law

FULL PROTECTION AND SECURITY STANDARD UNDER THE INTERNATIONAL INVESTMENT LAW: CHALLENGES AND PROSPECTES TO ETHIOPIA

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June, 2017

Jimma, Ethiopia

Acknowledgments

First and foremost, I would like to praise the omnipotent, omnipresent and omniscient God for helping me go through the hardships of life and complete this work.

My warmest gratitude goes to my advisor Mr. Legesse Tigabu (LL.M., Assistant Professor), who has supported me starting from the development of proposal to the completion of this work.

Furthermore I would like to extend my gratefulness to my husband Aynalem Bezabih who provided me with reading materials and reviewed initial drafts of this work.

At the end but not the least, I am also thankful to all my family members and friends who unremittingly assisted me in one way or another.

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Abstract

International investment law is dynamic. As treaty practice and jurisprudence in the area constantly develop, global standards are always in the making. Reviewing Ethiopia's Bilateral Investment Treaties (BITs) is important to evaluate the standard of FPS obligations under the regime of global investment standards. This research paper briefly evaluates the concept of Full Protection and Security(FPS) standard, under the customary International law and International Investment Agreement in relation to the nature or scope of FPS clause and its interaction with FET provisions contained in BITs. In doing so, this paper evaluates the different rulings of investment tribunals with regard to the scope of application FPS standard. A review of Ethiopian BITs indicate that in almost all of the BITs, the FPS clause is phrased in general terms and leaves leverage to raise competing interpretations and creating a matrix of obligations thereby stretching the country's obligations under the respective agreements. This calls for revising the application of FPS and incoherent application of the FPS standard contained in various BITs signed by Ethiopia with the aim to laying down a coherent investment treaty framework.

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ACRONYMS AND ABVRIVIATIONS

FPS..Full Protection and Security

BITs …………………………. ....Bilateral Investment Treaties

CIL …………………………….............Customary International Law

ECT …………………………….............Energy Charter Treaty

FCN... Friendship, Commerce and Navigation Treaty

FET ……………………………............Fair and Equitable Treatment

IIAs ……………………………............International Investment Agreements

NAFTA ………………………….............North American Free Trade Agreement

UK ……………………………….............United Kingdom

US………………………………..............United States

CHAPTER ONE

Introduction

1.1. Background of the Study

During the nineteenth century and the first part of the twentieth, the customary notion of protection and security underwent further refinement, and U.S. FCN treaties evolved in commensurate fashion. The evidence is unequivocal; however, the standard was understood throughout this period as requiring more than mere police protection.[1] Indeed, to the extent the standard evolved, it was in the direction of requiring more extensive protections under the law for aliens' property rights.[2]

Accordingly, several commentators asserted that the customary duty of protection requires not only physical protection but also ready access to courts, equal protection before the law, and just treatment by governmental authorities. Scholars and diplomats from capital-exporting countries also began emphasizing during this era that the protection offered to foreigners must be consistent with international standards, not only national ones.[3] They did so in response to a position first articulated by the Argentine diplomat Carlos Salvo—and later taken up many Latin American countries—that a home state has no basis to complain under international law unless the treatment accorded to its nationals is worse than that experienced by host-state nationals..[4] An example of the developed country view that host states must meet an international minimum in the protection accorded to foreigners can be seen in the following comments by former U.S. Secretary of State Elihu Root in 1910:

> *Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.*

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[1]George K Foster Recovering *"protection and security": The treaty standard's obscure origins, forgotten meaning and key current significance (2012),*45 Vanderbilt Journal of transnational Law, 1095, 1120-1121.

[2] Ibid

[3] ibid

[4]Don Wallace Jr. Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico. International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron (2005), 677.

In time, this notion that the host state must meet "the established standard of civilization" in relation to foreigners would come to be known as the "international minimum standard of treatment.

FDI involves the physical movement of investor and his property so that the home country needs protection of its citizens and their property that gave rise to the modern rules of foreign investment law. The host state which admitted the investor into the country was required to extend the international minimum standard of protection to both aliens and their property under international law has been the bedrock of traditional foreign investment law.[5] Thus, full protection and security standard was developed from the traditional notion of diplomatic protection and the treatment of aliens which became part of Customary International Law. Customary international law prescribes certain minimum standards of treatment of foreign investment.

Hence, Customary International Law (CIL) was developed with intention, to protect investment of investors from mistreatment at the hands of governments and thus to accelerate investment among states, presumably for the benefit of all treatment."[6]

The most common expression of this standard is in the form of "full protection and security." However, different variants are also found, such as "constant protection and security," "protection and security" or "physical protection and security." The standard can be found in the blueprint for the typical European bilateral investment treaty (BIT) template, the Abs-Shaw cross Convention (1960), as follows:

Article I

Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most 'constant protection and security' within the territories shall not in any way be impaired by unreasonable or discriminatory measures.

This is echoed nearly 40 years later in Article 10 of the Energy Charter Treaty (1994), whose membership is largely European, in the following terms:

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[5]LyubaZarsky, International Investment for Sustainable Development, Balancing Rights and Rewards (Earth scan, 2005) at 152-170

[6] Foster (n 1)1121-1122

10(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law.[7]

Although the "most constant protection and security" provision is found in a number of treaties, the typical language used is "full protection and security." Article 2(2) of the United Kingdom–Vietnam BIT (UNCTAD, 2002) reflects the most common formulation of the standard: "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[8]

The importance of adjectives such as "constant" or "full" in defining the scope of this standard will be seen from the discussion below of arbitral rulings. However, whether couched as "most constant" or "full protection and security," the obligation appears in the vast majority of BITs, without any reference to the standard to be applied in interpreting it.[9] However, lack of reference to a standard has led to a debate on whether the obligation should be interpreted as reflecting the minimum standard of treatment for aliens in customary international law, or whether it is in fact a higher, independent treaty standard.[10]

The investor-state arbitrations under Chapter 11 of the North American Free Trade Agreement (NAFTA, 1992 Article 1105(1) contained broad language providing that the parties "shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." In 2001 the NAFTA Free Trade Commission issued an interpretive statement confirming that the concepts of fair and equitable treatment and full protection and security "do not require treatment in addition to or beyond that

[7]TW Walde, *'Energy Charter Treaty-based Investment Arbitration'* (2004) 5 J World Invest Trade 390–1.
[8]Article 2(2) of the United Kingdom–Vietnam BIT (UNCTAD, 2002)
[9] Ibid
[10] ibid

which is required by the customary international law minimum standard of aliens" (NAFTA Free Trade Commission, 2001).[11]

The NAFTA interpretive statement of 2001 (NAFTA Free Trade Commission, 2001) sought to clarify this issue by clarifying that the full protection and security standard did not provide protection beyond what was stated in customary international law.[12] The Canadian and U.S. texts contain this clarification in their treaties. While NAFTA tribunals have followed the interpretive statement by applying the customary international law standard, non-NAFTA tribunals have found that the broad full protection and security standard is not limited to the customary international law test but creates an independent treaty standard.[13]

For example, the first tribunal to rule on the provision in *AAPL v. Sri Lanka* (1990) rejected the state's argument that this obligation should be limited to such a standard put under CIL.(par. 9). Even earlier, in the case of ELSI (*United States v. Italy*, 1989), a Chamber of the International Court of Justice found that the standard of constant protection and security in a friendship, commerce and navigation treaty went further than the customary international law position (par. 109).[14]

On the other hand, the tribunal in *Noble v. Romania* (2005) was inclined to find that the full protection and security standard should be limited to the security for aliens under customary international law. It said: With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the "Investment shall ... enjoy full protection and security," the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. (par. 164)[15]

The bulk of authority suggests that, arbitral tribunals will not necessarily apply a customary international law standard unless states express this standard in their treaties. The argument for

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[11]Article 1105(1) of NAFTA (1992)
[12] ibid
[13] ibid
[14]See Murphy. The ELSI Case: An Investment Dispute at the International Court of Justice" (1991) 16 Yale Journal of International Law, 16 (1991), 391-452.
[15]Christophe Schreuer, *'Full Protection and Security' (2010)Journal of International Dispute Settlement'*, 1–17, 4.

not doing so is strengthened in relation to recent treaties: tribunals are likely to assume an intention to provide a broad degree of protection because the options to define this obligation narrowly are now well-known, and so they may assume that a state made a deliberate choice by using a broader formulation. The U.S. and Canadian model BITs now expressly define the limits of the full protection and security standard.

Article 5 of the U.S. Model BIT (U.S. State Department, 2004) states:

> *Article 5: Minimum Standard of Treatment*
>
> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*

The US Model BIT (2004) is explicit in two ways. First, it pegs the full protection and security standard to the minimum standard of customary international law for the treatment of aliens, and second, it refers only to the level of police protection. The latter also helps clarify the debate in recent cases on the application of this standard beyond police protection.

Article 5 of the Canadian Model Foreign Investment Promotion and Protection Agreement (Foreign Affairs and International Trade Canada, 2004) is broader, as it does not limit full protection and security to only police protection, as does the U.S. Model BIT. However, it does peg the standard to customary international law:

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[16]

The vast stock of investment treaties use the term "full protection and security" without any reference to the standard to be applied. This provides arbitral tribunals with broad discretion to impose a high duty on states to prevent harm to investments.

Recent cases have tested the perception that full protection and security is restricted to situations of physical security. This issue has divided arbitral tribunals. While one set of decisions is clear that this standard applies only to physical security and thus limits the state's duty to protect the investor from violence caused by state actors or private parties, the other set of awards is firm in finding that this standard applies to physical, legal and commercial security.[17] The vast majority of decisions in the last couple of years have opted for the latter school of thought, and it appears that the trend is toward an expansive interpretation rather than a narrow one restricted to physical security only.

For instance, The tribunal in *Campania de Agues and Vivendi v. Argentina* (2007) was also clear in its rejection of the argument that the protection and security standard was limited to physical interference (Dolzer& Stevens, 1995, p. 61).It stated as follows:

If the parties to the BIT had intended to limit the obligation to "physical interferences," they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full

[16]Canada Model BIT, art 5

[17]Christopher Scherer (n 15) 6.

protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized. (par. 7.4.12)

The statement of the Vivendi tribunal contains an importance message for states. If states choose to draft their obligations toward investors using broad language such as "full protection and security" without expressly limiting its scope, then a tribunal can give these words their ordinary (and expansive) meaning.

The Biwater v. Tanzania (2008) tribunal follows the approach in Vivendi v. Argentina (2007) and Azurix v. Argentina (2006). The tribunal stated:

The Arbitral Tribunal adheres to the Azurix holding that when the terms "protection" and "security" are qualified by "full," the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments. (Biwater Gauff v. Tanzania, 2008, par. 729)

This was followed also by *National Grid v. Argentina* (2008, par. 189), in which the tribunal concluded that the phrase "protection and constant security" as related to the subject matter of the Treaty did not carry with it the implication that this protection is inherently limited to protection and security of physical assets.

The seemingly innocuous and obvious treaty promise to accord full protection and security to investments can impose an onerous level of liability on states with scarce resources. Investment treaties formulate the standard of full protection and security in a broad manner, and tribunals have taken this at face value, thus interpreting the obligation as imposing a duty upon states to prevent harm to the investment from the acts of government and non-government actors.[18]

Moreover, recent tribunals have extended this standard to accord all types of protection, including legal and physical security. Like, the tribunal in *Biwater v. Tanzania* (2008) BITs between United Kingdome and Tanzania stated that full protection and security "implies a State's guarantee of stability in a secure environment, physical, commercial and legal" (par.

[18] ibid

729). This raises concerns for states that have limited resources to spend to ensure that investments receive international standards of protection and security.[19] The relevance of a state's development level in interpreting this standard has also been raised in recent cases. Tribunals have ruled upon these very issues in widely conflicting ways, making it difficult to understand precisely what this promise to provide protection can mean for developing states. It is also likely to cause concern for developed states, as they face the risks of terrorism and natural calamite.

So far, tribunals have shied away from imposing a strict or absolute liability standard. However, tribunals have not typically restricted themselves to the standard of customary international law unless the treaty constrains or caps the obligation using the reference to customary international law. The vast majority of treaties do not refer to customary international law. Tribunals have therefore assumed an independent treaty standard that imposes a high degree of diligence in what is expected from a well-administered government.

The tribunal in *AAPL v. Sri Lanka* (1990) rejected the argument that the full protection and security standard creates absolute liability.7 On the other hand, it also rejected the state's proposition that the standard was limited to customary international law. Instead, it proceeded to interpret the standard as an independent treaty standard. This independent treaty standard has been described as that of due diligence, that is, a reasonable degree of vigilance. Dolzer and Stevens (1995) have stated:

> *The standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability' which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State.*

In the ELSI case (*United States v. Italy*, 1989), a chamber of the International Court of Justice said, "The reference. . . to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed" (par. 108).[20]

[19] BiwaterGauff v Tanzania, Award, 24 July 2008, para 730.
[20] ElectronicaSiculaSpA (ELSI) (United States of America v Italy) [1989] ICJ Rep 15.

However, tribunals often speak of a state's duty to take all measures to prevent damage (*AAPL v. Sri Lanka*, 1990) and have emphasized that there is no need to prove negligence or bad faith for a state to be liable (*AAPL v. Sri Lanka*, 1990, par. 77). Tribunals have typically not taken account of a state's level of development or stability in determining the level of due diligence to be expected.

As we can see from the above ruling awards, and the recent arbitral awards show that the standard can be onerous for states to meet, particularly states with limited resources. As a result, for developing states found liable for breach of this obligations are particularly high. Developing states, like Ethiopia with a limited resource is very difficult for a country to attained the resource to spend to ensure that investments receive international standards of protection and security. Thus, BITs to which the country has a party, Leaving the FPS standard undefined and unclear .will allow arbitral tribunals to include legal, commercial and regulatory security, as they have indeed done in recent awards. A typical example for this is Biwatter vs Argentina cases. This is more difficult for state like Ethiopia to which the county has party to BITs with the other contracting states because, still the FPS standard is undefined and remained unsettled.

1.2. Statement of the Problem

Even if, the introduction of BITs created a favorable environment for the protection of foreign investors, the nature and extent of the full protection and security standard is very controversial and Arbitral Investment Tribunal decisions with regard to the standard lack consistency. For example , we can take the above stated case *CME v Czech Republic, Biwater Gauff v Tanzania* and *Azurix v Argentina* awards the tribunal extends FPS clauses beyond physical security, so as to include legal security and encompass a restriction of host states regulatory power. On the other hand, the ruling award of Nobel *v Romania* the tribunal extends the application of the standard be limited to the customary international law.

When we look at the Ethiopian BITs, we can get the standard granting protection and security in almost all investment treaties which the country has signed with the other contracting states. The standard of full protection and security clause is most of the time incorporated under the same paragraph of the Standard of Fair and Equitable Treatment. And we can also find the independent existence of the standard of FPS obligation in some of the BITs which Ethiopia has signed. But, regarding its content, nature and extent of application of the standard of FPS which

Ethiopia has signed is still undefined. For example if we take the Ethiopian Denmark BITs under Art.2.2 it says:

"Investments of investors of each Contracting Party shall at all times enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

The same holds to Ethiopian Finland BITs which says

"Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security under this Agreement"

From this one can understand that the aforementioned BITs which Ethiopia is party don't clearly define the standard of FPS regarding its meaning, nature and scope of application. Due to this, the decision of Arbitral Tribunal may be vary and the extents of the application of the standard may also be broader. As a result, this clause highly exposes host states to unforeseen and onerous liability before the international investment tribunals. Currently, there were demonstrations and protests in Ethiopia which resulted in the destruction of foreign investments. Hence, unless the nature and scope of the clause is clearly defined, it will undoubtedly expose the government to enormous liability before the International investment tribunal.

If states choose to retain the classically formulated full protection and security provision in their investment treaties, then they could be undertaking a duty to act in a manner that will protect the investment in accordance with international standards, and not just in line with national treatment standards, irrespective of the resources available to them. On the other hand, if states decide to include a protection and security obligation, then it is important to define the standard with care, in particular stating clearly whether it applies only to physical protection (for example, as the U.S. Model BIT (U.S. State Department, 2004) does in relation to police protection). Leaving it undefined and broad will allow arbitral tribunals to include legal, commercial and regulatory security, as they have indeed done in recent awards

Accordingly, the recent arbitral awards show that the standard can be onerous for states to meet, particularly states with limited resources. However, the controls to a large extent are in the hands

of the states, which can take steps to minimize their exposure under this treaty obligation. If states do not take control, then tribunals will decide what this standard means for them. This may lead to unpleasant and costly surprises in investment treaty awards, in the form of hefty damages.

Therefore, it is better to adopt a proper mechanism to employ toward the application of full protection and security clause like, the US, Canada and Norway have developed new model IIAs that clarify the meaning and scope of investment obligations in much greater detail.[21]

On the other hand, full protection and security standard is largely undefined and its relationship with FET has also been the subject of ongoing debate both in treaty practice and arbitral tribunals.[22] Some tribunals have distinguished them, some have conflated them and some have interpreted the two principles in tandem without clarifying their evident affiliation.[23]

Thus, the rationale for proposing this title is to enable the Ethiopian government to realize and understand the challenges it could face with regard to violation of the full protection and security obligation and thereby suggesting the government to take appropriate precautionary measures in order to minimize the risks related with the full protection and security clause by clearly defining the scope of Full Protection and Security Clause.

1.3. Objectives of the Study

1.3.1. General Objectives

The general objective of this research paper is to analyze the standard of full protection and security clause under the international investment law and examining the scope of application of FPS clause under international investment tribunal.

1.3.2. Specific Objectives

The specific objectives are:

- To analyze the scope of full protection and security clause under the Ethiopian BITs with regard to its challenges and prospects.

[21] Ibid

[22] Kendra Leite, *'The Fair and Equitable Treatment Standard: A search for a better balance in International Investment Agreements'* (2016), AM.U.INT'L L.REV.32:1,p. 376

[23] Ibid

- To explore the mechanisms employed to limit the scope of full protection and security clause to enable host states to exercise regulatory autonomy.

1.4. Research Questions

This research paper is designed in such a way to address the following research questions. These are:

1. What is the relationship between the standard of FPS and FET with regard to the scope of application?
2. Is there uniformity towards the application of the standard of FPS in investor state arbitration ?
3. What are the challenges and prospects imposed on the Ethiopian government in relation to the obligation of Full Protection and Security standard?

1.5. Significance of the Study

- To enable the Ethiopian government to realize and understand the challenges it could face with regard to violation of the full protection and security clause and thereby suggesting the government to take appropriate precautionary measures in order to minimize the risks related with violation of the full protection and security clause.
- The concept of full protection and security clause is not also well researched by scholars. As a result, this research paper could significantly contribute to the development of literature on the area so that other scholars can use it as a bench mark for further research.

1.6. Research Methodology

The research will use qualitative method to undertake the study at hand. In doing so, the scope of full protection and security clause will be analyzed under both Customary International Law and modern International Investment Treaties. Furthermore the decisions of Arbitral Investment Tribunal will be analyzed whether or not there is uniform interpretation of the clause. In line with that both primary and secondary sources of data will be used for the furtherance of the purpose the research intends to accomplish. The primary data includes modern International Investment Treaties and cases decided by Investment Tribunals. Secondary sources include books, journals and related literatures on the Full Protection and Security Clause which are relevant in order to accomplish the research. Hence, this research is a doctrinal descriptive

research type that solely relies on written literature and cases decided by the arbitral tribunal to conduct the research.

1.7. Literature Review

Most writers have been conducted study on the Scope of Full Protection and Security standard under modern IIAs as well as in light of investment arbitral decisions on the standard. Among them, Kendra Leite, in his comment on the book '*The Fair and Equitable Treatment Standard Search For A Better Balance In International Investment Agreements',* explained that the standard of FPS like FET clause is largely undefined and still its relationship with FET has been ongoing debate both in treaty practice and in international investment arbitral decision. But he failed to express the impact on the host state if the standard of Full Protection and Security is not clearly defined.

George K. Foster Camera on his book Recovery *Protection and security* stated that under international investments agreements FPS clause is controversial, as a result Investment Tribunal lacks consistency regarding the application of the standard. some Tribunal extend the standard to the extent of physical security, still some other Tribunal take in to consideration the clause to the extent of legal security in addition to physical security. He also emphasizes that absences of uniformity toward the application of the standard under international investment tribunal undermine legitimacy of investment treaty arbitration. As a result he seeks to resolve the controversy by employing the full range of interpretative tools offered by the vena convention on the law of treaty LVC. But he failed to express the impacts on the host state if the standard is not clearly defined and the obligation is violated by the contracting state.

Both of them conducted their study on the issue by analyzing the relationship of the scope of Full Protection and Security Clause with that of Fair and Equitable Treatment (FET) Clause. In doing so they come up with some finding which are lack of transparency, accountability, and legitimacy in the investor–state dispute settlement process; the broad definition of Full Protection and Security Standard and the overly broad interpretations of host state obligations with regard to the Full Protection and Security Standard.[24]

[24] S. Friedman, Expropriation in International Law (London: Stevens & Sons Limited, 1953) at 89

Christopher Scherer has also discussed about the scope of full protection and security standard in line with the ruling of arbitral tribunal without showing the impact of the standard to the host state regulatory autonomy.

M. Sornarajah on his book *on 'the international law on foreign investment'* also express that the standard of FPS as it has a firmer basis in the customary international law as developed by the United States and it has been recognized, in a long series of awards, that the failure to provide protection to an alien who is threatened with violence creates responsibility in the host state. He also explained the standard of Full Protection and Security in line with that of FET and he showed the award given by tribunal which they extend the application of the standard to the broader meaning of FET Clause. But he failed to express the impacts on the host state if the standard is not clearly defined and the obligation is violated by the contracting state.

However, some of those researches were only focused on the definition and historical development of the standard, but they fail to mention its impact on the police power of host state. Moreover, some other researchers were focused and analyzed the scope of NAFTA interpretation which only targets the affair and jurisprudence of United States, Canada and Mexico.

1.8. Scope of Coverage

This paper is limited to the issue of the scope of full protection and security clause under both CIL and modern Investment Treaties. It analyses whether or not the scope of the clause is only limited to protection against physical violence or it also includes legal protection. It also evaluates the scope of the clause under Ethiopian BITs in light of other modern Investment Treaties. Additionally, decisions granted by the Investment Tribunals will be analyzed.

1.9. Limitation of the Study

Time and financial constraints as well as lack of adequate research on the field and getting adequate data on the practical implication of the standard of full protection and security are the possible limitations or constraints of doing this research.

1.10. Organization of the Study

This research will be organized in to four chapters. The first chapter deals with the introductory part. It contains, background of the study, some literature review, problem in study, objectives of the study, research question, methodology used, scope of the study and constraints.

Chapter two will focus on the application of the FPS standard both under Customary International Law and modern treaty practices. Accordingly, the term full protection and security will be defined; its purpose and significance will be consulted. Additionally, specific cases which have relevancy for the subject matter will be examined.

The third chapter examines the concept of full protection and security standard under the Ethiopian BITs. In doing so, the challenge and prospects to Ethiopian BITs will be identified. Finally, under chapter four the paper ends up with conclusion and possible recommendation.

CHAPTER TWO

2. Application of the FPS standard under International Investment Law

2.1. The Concept of FPS standard under Customary International Law

Full protection and security is an established standard of customary international law that requires the host state to exercise due diligence or reasonable care to prevent injury to the property (and person) of foreign investor. This standard was seen as early as the 1833 Friendship, Commerce and Navigation treaty between the United States and Chile and the first BIT which was concluded between Germany and Pakistan in 1959 contains FPS clause.[25] The FPS standard appeared in these early treaties in response to various waves of outright and creeping expropriations of the assets of Western companies in the Developing world, eventually becoming a norm in most BITs.[26]

Traditionally, the primary purpose of full protection and security clause was to protect investor against physical violence, including invasion of premise of the investment.[27]Accordingly, the provision of protection to investor against physical harm has been viewed as an embodiment of customary international law standards relating to the protection of diplomatic aliens. This is particularly seen in customary international law which was developed by the United States. The FPS standard was simply taken as another way of referring to the traditional international minimum standard of protection set out in customary international law.[28] Different writers claim that FPS corresponded to indirect responsibility of states, meaning failures to maintain public order and to operate the system of criminal law that were seen as core responsibilities of states during the 19th Century.[29]

Direct responsibility, which was regarded as the duty to proactively act to protect foreign investors, was therefore a feature of the more general FET standard. In contrast, Subedi wrote that FPS, like FET is meant to imply that foreign investors are entitled to protection over and above their entitlement to nondiscriminatory treatment under international law.[30]

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[25]Collins, D. A. (2011) *'Applying the Full Protection and Security Standard of International Investment Law to Digital Assets' (2011) 12(2)* Journal of World Investment and Trade, 7.

[26] ibid

[27]Andrew Newcombe& Luis Paradell, Law and Practice of Investment Treaties, Standards of Treatment, 310(2009).

[28] ibid

[29] ibid

[30] Supra at note 1, p.8

On the other hand, the controversy regarding whether the FPS standard is autonomous or merely incorporates customary international law has led to some investment treaties addressing the issue directly. For example, NAFTA states that FPS does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. The NAFTA Free Trade Commission indicates that the FPS clause in NAFTA denotes the current manifestation of the customary international law minimum standard. Canada's Model Treaty Art 5.2 and US Model Treaty Art 2.b states that the FPS standard is only that provided by customary international law.[31]

Similarly the Central American Free Trade Agreement asserts that FPS requires each Party to provide the level of police protection required under customary international law.[32] This would imply and suggest that there is some minimum level of protection against civil unrest which a state must offer foreigners who cross its borders. Some commentators have claimed that FPS protection in BITs expanded upon the existing international minimum standard, requiring host states to proactively defend investors against others.[33] This is in keeping with the theory that BITs are themselves a *lexspecial is* which are separate from general international law.

2.2. The Content of the FPS Standard under the customary international law

As it is already discussed above, the FPS standard traditionally referred to the need to protect the investor against various forms of physical violence resulting from war or civil disturbances, including the invasion of the premises of the investment.[34] This can be seen as a dual standard in as much as harm is caused to an investment either through direct action of the state, or by its failure to protect when harm has come from somewhere else.[35] Accordingly, Scherer and Dozer suggests that FPS clauses establish the host state's obligation to take active measures to protect the investment from adverse effects, which may have been caused either by the actions of the host state or by third parties. In the Iran-US Claims tribunal established that the failure to provide protection to an alien who is threatened by violence, imposes liability in the host state, whether the duty is not fulfilled either negligently or willfully.

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[31]U.S. State Department.(2004). 2004 U.S. model bilateral investment treaty. Retrieved from http://www.state.gov/ documents/organization/117601.pdf

[32]Andrew Newcomb&LuisPara dell, *Law and Practice of Investment Treaties, Standards of Treatment* (2009).

[33] ibid

[34]ChristopheScherer, '*Full Protection and Security'*Journal of International Dispute Settlement, (2010), pp. 1–17

[35] ibid

The same holds to the first known investment treaty arbitration which is the *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka 1990.*On the basis of the full protection and security clause in the United Kingdom–Sri Lanka BIT, the tribunal held that Sri Lanka had violated its obligation by not taking 'all' possible measures to prevent the killings and destruction of investment.[36] The investor argued that the treaty wording created a strict liability standard. Sri Lanka counter-argued that the obligation was limited to invoking the standard of due diligence which is set out in customary international law.[37] The tribunal held that an independent treaty standard was applicable and found Sri Lanka liable for its failure to take precautionary measures to prevent harm to the investment.

In addition, the tribunal found there was no need to establish malice or even negligence, but that "the mere lack or want of diligence" would be sufficient.[38] The tribunal argued that due diligence 'is nothing neither more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar conditions.'

The irrelevance of direct causality in the breach of the standard must be emphasized. It does not matter that the host state itself did not cause the damage, as long as the damage had occurred within its territory. This dual nature of the standard can be found in its historic origins in the political volatility of Latin America during the 20th Century.[39] Accordingly, First, the investor's property must not be harmed by action of the host state's military which is the duty not to harm, and second, the investor's property must be protected against the actions of a riotous mob which is referred to as an affirmative duty to protect.[40] The responsibility to ensure that foreign investors' property is not damaged exists irrespective of the lack of connection between the state and the party which caused the injury.

Here, we can also consider this standard in AMT *v.* Zaire (1997) case, which involved a similar conflicting issue. The tribunal had established that Zaire had taken no action whatsoever to protect the claimant's property during riots in Kinshasa.[41] It held that it was of little or no consequence whether the acts complained of were committed by a member of the Zairian armed

[36]Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, 4 ICSID Rep. 246 (June 21, 1990).
[37] ibid
[38] ibid
[39]Mahnaz Malik (2011) *'The Full Protection Standard Comes of Age: Yet another challenge for states in investment treaty arbitration', the international institute for sustainable development'* available at www.iisd.org.
[40] ibid
[41]AMT v. Zaire, 5 ICSID Rep. 11 (February 21, 1997).

forces or a common burglar, because Zaire had an 'obligation of vigilance,' and accordingly its responsibility was invoked for failure to provide full protection and security and for losses owing to riots or acts of violence.[42]

However, this view should be contrasted with the principle drawn from International Law Commission's Draft Articles on State Responsibility stating that actions of private parties do not normally engage the international responsibility of the state.[43]Still, under international law if an attack by a third party was foreseeable, then a duty of protection is owed to an alien. On the other hand, the FPS standard consider a state's responsibility for the consequences of actions of private parties because of a failure of its police or other such agencies charged with maintaining peace.[44] The state will have a duty to prevent the harm-causing action by the private entity.

The FPS standard of protection against physical damage is rooted in the state's failure to exercise a proper level of care, or 'due diligence.' Although FPS has referred to as an absolute standard of treatment, the 'due diligence' approach suggests that the host state must only make its best efforts to protect foreign investors from physical harm that may result from civil unrest or other such disturbances.[45] Accordingly, a violation of FPS is dependent on whether the state exercised a reasonable level of effort in affording protection to foreign investors. Liability will therefore exist in the state if a capacity to exercise control exists and there was a failure to exercise that control. Different scholars have noted a reluctance on the part of investment tribunals to extend the FPS standard beyond the requirement of due diligence.[46] In this sense, under an FPS obligation, the host state must prove that it has taken all measures of precaution to protect the investment of the investor and its territory; there is no strict liability imposed upon the state.

Even though, arbitral tribunals have not imposed a strict liability standard, the degree of diligence expected of states is high, and it is not necessarily proportionate to the resources available.[47] Further, the expansion of this standard to commercial and legal security raises a whole host of new issues for governments.

As indicated by a tribunal of the Permanent Court of Arbitration: 'the FPS standard obliges the host state to adopt all reasonable measures to protect assets and property from threats or attacks

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[42] ibid
[43] Rudolf Dozer&ChristopheScherer, *'Principles of International Investment Law'* (2008).
[44] ibid
[45]Joana Tudor, 'The *Fair and Equitable Treatment Standard in the International Law of Foreign Investment'* (2008).
[46] ibid
[47] ibid

which may target particularly foreigners or certain groups of foreigners.' The ICJ later stated that a reference to 'full protection and security' could not be considered as a guarantee that property should never be disturbed under any circumstances, with emergencies or wars being the most obvious defenses.[48] Cordero Moss suggests that this limitation should characterize a state's FPS duty as an 'obligation of means' the extent to which a host state must provide security will be linked to its resources.[49]As such, in his words: 'the state enjoys a rather wide discretion to discharge this obligation in accordance with its own sovereign appreciation.'

Thus, although the standard of 'full protection and security' clause does not provide guarantee or assurance against damage, at a minimum, it seeks to provide protection against physical harm caused by armed forces, police, insurgent movements, and civil disturbance.[50] The minimum standard of treatment requires 'due diligence' on behalf of States to exercise reasonable care within its means to protect investments.[51]

2.3. The Formulation of the FPS Standard In Treaty Practice

The rise of the modern investment treaty has created a vibrant new area of international law and practice, and has endowed many foreign investors a package of benefits that was previously unimaginable. Not only do these treaties clarify and strengthen investors' rights under international law vis-à-vis host states, but they also offer, for the first time, an effective avenue for enforcing those rights.[52]Nevertheless, the law in this area remains unsettled in many respects, and a persistent point of controversy is the meaning of the phrase 'protection and security' as used in most investment treaties when detailing obligations of each party toward investments emanating from the other.[53]

Even if the entitlement of foreign investors to 'full protection and security' is found in many investment treaties there is no generally agreed definition of this term and different parties have claimed different levels of protection under this principle.[54]

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[48]George K. Foster (n 1) 8.

[49] ibid

[50]Kendra Leite, *'The Fair and Equitable Treatment Standard: A search for a better balance in International Investment Agreements'* (2016), 32(1) AM.U.INT'L L.REV. 376.

[51] ibid

[52] George K Foster (2012) Recovering *"protection and security": The treaty standard's obscure origins, forgotten meaning and key current significance,*Vanderbilt Journal of transnational Law, vol.45:1095, 1097.

[53] ibid

[54] Surya P Supped (2008) International Investment Law: Reconciling Policy and Principle, (Hart Publishing, North America)

Most investment treaties like BITs, as well as NAFTA, and ECT contain provisions granting protection and security for investments. The FPS standard are now common to many of more than three thousand Bilateral Investment Treaties (BITs) concluded between states to attract foreign direct investment (FDI) and protect multinational investors.[55]

Many of these treaties, including the North American Free Trade Agreement (NAFTA), refer to the standard of obligation as 'full protection and security'. Others, including the Energy Charter Treaty (ECT), refer to 'most constant protection and security'. Some put 'security' before 'protection.'[56]Although the 'most constant protection and security' standard is found in a number of treaties, and the wording of such provision varies, the typical language used is 'full protection and security.' but, a formulation found in many U.S. bilateral investment treaties (BITs) is as follows: 'Investment shall at all times be accorded fair and equitable treatment, shall enjoy *full protection and security* and shall in no case be accorded treatment less than that required by international law.'[57]

Other treaties refer the obligation instead to 'constant protection and security,' 'constant security and protection,' or rarely 'protection and legal security. For instance, if we see BITs between the Federal Republic of Germany and Argentine Republic on the promotion and Reciprocal Protection of Investment, specifically refer to *protection and legal security* under Art 4 of their BITs. And a few seem to subsume the protection and security standard within the concept of fair and equitable treatment.[58]

On the other hand, the importance of adjectives such as 'constant' or 'full' in defining the scope of this standard can be seen from the discussion below of arbitral rulings. However, whether the investment treaty of the contracting state formulated the provision as 'most constant' or 'full protection and security,' the obligation appears in the vast majority of BITs, without any reference to the standard to be applied in interpreting it.[59] The lack of reference to a standard has led to a debate on whether the obligation should be interpreted as reflecting the minimum standard of treatment for aliens in customary international law, or whether it is in fact a higher,

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[55]George K. Foster (n 1) 2.

[56]ChristopheScherer, '*Full Protection and Security*,'(2010) Journal of International Dispute Settlement, 1–17.

[57]Supra at note 20, p.2.

[58] George K Foster, '*Recovering "protection and security: The treaty standard's obscure origins, forgotten meaning and key current significance'*, 45 Vanderbilt Journal of transnational Law, 1095.

[59] ibid

independent treaty standard.[60] The vast majority of investment treaties use the term 'full protection and security' without any precise definition to the standard to be applied. As a result, this makes arbitral tribunals to have broad discretion to impose a high duty on states to prevent harm to investments.

2.4. The Rulings of International Investment Tribunals regarding the Scope of FPS standard

When we come to the decision of arbitral tribunal with respect to its application of the standard the tribunal in *Campania de Agues and Vivendi v. Argentina* (2007) was clear in its rejection of the argument that the protection and security standard was limited to physical interference. It stated as follows:

> *If the parties to the BIT had intended to limit the obligation to 'physical interferences,' they could have done so by including words to that effect in the section.*[61]

In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus the full protection and security standard can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.

The statement of the Vivendi tribunal contains an important message for states. Because, if states choose to draft their obligations toward investors using broad language such as 'full protection and security' without expressly limiting its scope, then a tribunal can give these words their ordinary and expansive meaning. The same holds to the *Biwater v. Tanzania* (2008) tribunal follows the approach in *Vivendi v. Argentina* (2007) and *Azurix v. Argentina* (2006). The tribunal stated:

> *The Arbitral Tribunal adheres to the Azurix holding that when the terms 'protection' and "security" are qualified by 'full,' the content of the standard may extend to matters other than physical security. It*

[60] ibid

[61] Dozer, R., and Stevens, M. (2005). *Bilateral investment treaties,* The Hague: Nijhoff.

implies a State's guarantee of stability in a secure environment, which is physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of 'full security' only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.[62]

This was followed also by *National Grid v. Argentina* (2008, par. 189), in which the tribunal asserted that the phrase 'protection and constant security' as related to the subject matter of the Treaty did not carry with it the implication that this protection is inherently limited to protection and security of physical assets.[63]

On the other hand, in the majority of investment treaties, the principle of fair and equitable treatment is often connected to that of full protection and security. For example, the wording in the BIT between the Netherlands and Honduras ties the FET and FPS standard together as follows:

"Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party...Each Contracting Party shall accord to such investments full security and protection."

On the other hand, a recurrent theme is the relationship of the standard of full protection and security to the standard of fair and equitable treatment and to the international minimum standard in customary international law. Tribunals have disagreed on whether full protection and security merely reflects the broader fair and equitable treatment (FET) standard and customary international law or offers an independent and additional standard.[64] The relationship between 'full protection and security' and FET has been the subject of ongoing debate both in treaty practice and arbitral tribunals. Some tribunals have distinguished between the two obligations, some have conflated them, and some have interpreted the two principles in tandem without clarifying their evident affiliation. Expression of these two standards in treaty practice has also varied.[65]

In U.S. IIA practice, NAFTA explicitly tied both standards to international law. U.S. BITs concluded prior to 2004 express the standards, then assert that the treatment and protection

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[62] *Biwater Gauff v. Tanzania*, 2008, par. 729.

[63] *National Grid v. Argentina,* 2008, par. 189.

[64] Kendra Leite, *'The Fair and Equitable Treatment Standard: A search for a better balance in International Investment Agreements'* (2016), 32(1) AM.U.INT'L L.REV. 376.

[65] ibid

accorded must be at least that required by international law. Modern-day U.S. IIAs build upon this method by specifying an obligation to provide a level of police protection required under customary international law.[66]

Some tribunals have equated the standards of full protection and security with Fair and Equitable Treatment. For instance, In *Wane Hotels v Egypt* the Tribunal dealt with the two standards jointly without drawing any distinction between them.[67] In *Occidental vs. Ecuador* the Tribunal seemed to regard the two standards as largely equivalent. After finding that, the Respondent had violated the standard of FET, it said:

> *In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.*

Similarly, in *PSEG vs. Turkey* the Tribunal found that the standard of full protection and security exceptionally go beyond physical safety, in such a case the connection with FET would become very close. The situation did not qualify under full protection and security as a separate heading of liability since the anomalies were all included under the standard of FET.

By contrast, in Azurix vs. Argentina case the tribunal found that the two standards were separate. In the view that the two standards are to be seen as different obligations and treated independently. As a matter of interpretation, it appears unconvincing to assume that two standards listed separately in the same document have the same meaning.

The Tribunal in Jan de Null vs. Egypt also separate the standard of full protection and security with fair and equitable treatment. It said: The notion of continuous protection and security is to be distinguished from the fair and equitable standard since they are placed in two different provisions of the BIT. As a matter of substance, the content of the two standards is distinguishable. The FET standard consists mainly of an obligation on the host State's part to desist from behavior that is unfair and inequitable.[68]

Thus by assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as

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[66] Id, pp.376-377

[67] Wane Hotels v. Egypt, 41 ILM 896 (December 8, 2000).

[68] Supra at note 37.

State organs.[69] In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective exercises of right from an investor point of view.

The recent Association of South East Asian Nations (ASEAN) Investment Agreement (2009) does not expressly refer the standard to the customary international law, as in the North American approach, but it does note that full protection and security require member states to take such measures as may be reasonably necessary to ensure the protection and security of covered investments. Thus, it clarifies in the treaty itself that the standard does not impose strict liability, but a duty to take reasonable measures. It provides as follows:

Article 11 Treatment of Investment

1. Each Member State shall accord to covered investment of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty:

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and

(b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.[70]

There are some investment treaties simply omit the full protection and security standard. The omission of this standard in the two key African regional investment treaties, Annex 1 (Investment) of the Southern African Development Community Finance and Investment Protocol (2006)and the Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA, 2007), reflects the growing concern among developing countries about this standard.[71] It remains to be seen, however, if countries will follow this

[69] Ibid, pp. 13-14.

[70]Association of South East Asian Nations (ASEAN) Investment Agreement.(2009). Retrieved from http://www. aseansec.org/documents/FINAL-SIGNED-ACIA.pdf

[71] Common Market for Eastern and Southern Africa (COMESA) (2007). Investment Agreement for the COMESA Common Investment Area. Retrieved from http://programmes.comesa.int/attachments/104_Investment%20 agreement%20for%20the%20CCIA%20FINAL%20_English_.pdf

regional approach in their bilateral investment treaties, particularly when negotiating with a partner that insists otherwise.

Generally, to conclude the full protection and security treatment provision may be a stand-alone provision or it may be incorporated into the fair and equitable treatment or the treatment provision of BITs. The formulation used in the current BITs confirms the autonomous character of the standard. The Dutch Model Text of March 2004 qualifies the protection clause with the phrase 'physical'. This clearly implies that the standard is not meant to cover just any kind of impairment of an investor's investment, but rather to protect the investor and his property from physical threats and injuries, particularly from actions or armed insurgents, or disgruntled workers. This would preclude the legal security of the investor from the standard. So, the BITs that incorporate this standard thus make explicit that the standard applies to covered investment, or reference to customary international law.

CHAPTER THREE

3. The Concept of FPS standard under the Ethiopian BITs: Challenges and Prospects

3.1. Formulation of the FPS standard under the Ethiopian BITs

Many developing countries signed BITS with developed as well as with developing countries with a view to attract FDI owing to the advantages that it offers for growth and development. Similarly, in an effort to attract foreign investment, the government of Ethiopia has signed BITs with developed, as well as developing countries. Accordingly, Ethiopia has signed more than 30 bilateral investments treaties up to now.

Out of the top ten countries which were the main sources of FDI to Ethiopia are BITs with eight countries, namely Turkey, India, the Netherlands, United Kingdom, Sudan, China, Germany and Italy. The structure of all BITs exhibits a striking similarity. They all contain a preambles statement which reiterates the aim of the treaty as the reciprocal encouragement and protection of investment. A definitional section which identifies the types of property protected is also included. The standard of treatment of the investor or the investment or both, standard of compensation as well as procedure for settlement of disputes also comprises part of the BITs. On the other hand, the content of standard of Full Protection and Security clause found in all the BITs are not similar and the wordings in which the statements are crafted have variation. It is this variation in the statements contained in the different BITs signed by a single country which at times leads to controversies. The focus of this thesis is on one aspect of these BITS: standard of treatment, particularly the standard of full protection and security.

When we look at the Ethiopian BITs, the majority of them around 17 in number, combine the standard of fair and equitable treatment with the obligation of full protection and security. For example, BITs Ethiopia signed with the Republic of Austria, China, the Arab Republic of Egypt, Finland, Germany, Islamic Republic of Iran, the state of Israel, Libya, Malaysia, the Netherland, South Africa, Kingdom of Spain, Switzerland, Republic of Tunisia , Turkey, the UK and Equatorial Guinea are some of the BITs which shows the combination of the standard

of FPS and FET. Even the combination of the two standards is there in the above stated BITs, the wording of the standard of full Protection and security in such a BITs shows variation in language and it does not define the scope of the standard of full protection and security clearly. For instance, if we take Article 2.3 of Ethiopia / Republic of Equatorial Guinea[72] BITs, it omits the adjective full, and puts the standard by saying protection and security. The article reads as follows:

Investments made in accordance with the laws and regulations of each Contracting Party by investors of the other Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Contracting Party.

The formulation of the standard of Full Protection and security under Article 2.2 of Ethiopia Malaysia[73]BITs put the obligation by adding the adjective adequate before the wording of protection and security. It says as follows:

Once an investment is admitted investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy 'full and adequate protection and security' in the territory of the other Contracting Party.

BITs which is signed between Ethiopia and the Arab Republic of Egypt[74] includes the wording of the standard of full protection and security by saying 'adequate protection and security but it omits the adjective full unlike that of Ethiopia Malaysia BITs. It reads as follows

Investment of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy 'adequate protection and security' in the territory of the other Contracting party.

Ethiopia and Republic of Austria[75] BITs stated the standard of the obligation by adding the adjective constant**,** which read as follows:

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[72]Agreement between the Republic of Equatorial Guinea and the Government of the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investment signed on 11 June 2009.

[73] Agreement between the Federal Democratic Republic of Ethiopia and the State of Malaysia for the encouragement and reciprocal protection of investment, signed on 22 October 1998, entered in to force on 12 November 1998.

[74] Agreement between the Federal Democratic Republic of Ethiopia and the State Egypt for the encouragement and reciprocal protection of investment, signed on 27 July 2006, entered in to force on 12 July 2006.

[75] Agreement between the Federal Democratic Republic of Ethiopia and the Republic of Austria on the Promotion and Protection of Investment signed on 12 November 2004 entered into force 1 November 2005.

Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and 'full and constant protection and security.'

We can also see variation in the wording of the standard of full protection and security in Ethiopia China[76] BITs which omits the adjective full and security, and it simply puts the standard by saying protection as follows:

Investments and activities associated with, investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy 'protection' in the territory of the other Contracting Party.

Ethiopia Germany[77] BITs puts the wording of the standard simply by saying full protection. It says:

Each contracting party shall in its territory in any case accord investment by investor of the other contracting party fair and equitable treatment as well as 'full protection' under the treaty.

On the other hand, BITs which Ethiopia signed with UK[78] , Swiss confederation, the government of Republic of Tunisia, Kingdom of Spain, Islamic Republic of Iran , the Kingdom of Sweden contains the wording of standard of 'Full Protection and security' in the same ways by stating the word full protection and security. For example, Ethiopia UK BITs says

Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy 'full protection and security' in the territory of the other Contracting Party.

The same holds to the BITs Ethiopia signed with Switzerland, it puts the standard in the same ways like the above Ethio-UK BITs. It says

Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy 'full protection and security' in the territory of the other Contracting Party.

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[76] Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investment, signed on 11 May 1998 entered in to force on 1 May 2000.

[77]Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia Concerning the Encouragement and Reciprocal Protection of Investments, signed on 19 January 2004 entered into force on 4 May 2006.

[78] Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and protection of investment, signed on 19 November 2009.

The BITs Ethiopia signed with Tunisia[79]reads as follows:

Investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy 'full protection and security' in the territory of the other Contracting party.

The BITs signed between Ethiopia and Spain[80]also put the wording of Full Protection and Security in the same ways like the above BITs, which reads as follows:

Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment and shall enjoy 'full protection and security'.

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BITs which Ethiopia has signed with the Republic of Finland[81] and Republic of Austria[82] contain similarly worded provision of the formulation of the standard of Full protection and security by adding the adjective constant before the wording of protection and security. Article 2.2 of Ethiopia and the Republic of Finland BITs reads as follows:

Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and 'full and constant protection and security' under this Agreement.

The same hold to BITs which is signed between Ethiopia and the Republic of Austria in its Article 3.1 says:

Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and 'full and constant protection and security.'

On the other hand, some of the BITs to which Ethiopia signed with Belgian Luxembourg Economic Union and the Kingdom of Denmark, put the standard of Full protection and security without combining with the standard of Fair and Equitable Treatments. Here also the wording of the standard is not similar even if, the obligation of full protection and security clause put in to these BITs is independently existed. This can be inferred from BITs which Ethiopia has signed

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[79] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Tunisia for the Promotion and Protection of Investment signed on 14 December 2000, entered into force 2 October 2004.

[80] Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, Signed on 17 March 2009.

[81]Agreement between the Federal Democratic Republic of Ethiopia and the State of Finland for the encouragement and reciprocal protection of investment, signed on 23 February 2006, entered in to force on 12 November 2006.

[82] Agreement between the Federal Democratic Republic of Ethiopia and the Republic of Austria on the Promotion and Protection of Investment signed on 12 November 2004 entered into force 1 November 2005.

with Belgian Luxembourg Economic Union[83] the provision uses the adjective continuous. Article 3.2 read as follows:

1. All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.

2. Except for measures required to maintain public order, such investments shall enjoy 'continuous protection and security,' i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation.

The same holds to the BITs Ethiopia signed with Denmark[84] in its formulation of FPS standard, the standard has been put in to the BITs independently, but its wording is different from the Ethiopia and Belgian Luxembourg BITs. It says:

Investments of investors of each Contracting Party shall at all times enjoy 'full protection and security' in the territory of the other contracting party.

Some of the BITs which the country has signed with the People Democratic Republic of Algeria[85], Republic of the Sudan[86], Republic of Yemeni[87]have also put the standard of Full Protection and Security in their agreement with the independent existence of the obligation. The wording of the clause is similar and the BITs simply state the standard by saying full protection. For example, Article 5.1 of the Ethiopian and the People Democratic Republic of Algeria BITs reads as follows:

Investment of investors of one Contracting Party shall enjoy 'full protection' in the territory of the other Contracting Party.

[83] Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investment signed on 26 October 2006.

[84]Agreement between the Federal Democratic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed on 24 April 2001 entered into force 21 August 2005.

[85]Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, Signed on 4 June 2002, entered into force 1 November 2005.

[86]Agreement between the Federal Democratic Republic of Ethiopia and the State of Republic of Sudan for the encouragement and reciprocal protection of investment, signed on 7 March 2000, entered in to force on 12 April 2000.

[87]Agreement between the Federal Democratic Republic of Ethiopia and the State of Republic of Yemeni for the encouragement and reciprocal protection of investment, signed on 15 April 1999, entered in to force on 12 June 1999.

The same holds to Ethiopia and Republic of the Sudan BITs in its Article 3.1 puts the standard in the same way of wording like in the Ethiopian and the Peoples Democratic Republic of Algeria BITs by saying the provision only full protection. The clause says as follows:

> *Investments made in accordance with the laws and regulations of each Contracting Party by Investors of the other Contracting Party shall enjoy 'full protection' in the territory of the other Contracting Party.*

On the other hand, BITs between Ethiopia and Kingdom of Denmark[88] and with the state of Kuwait[89] puts the standard of the obligation of Full protection and security in their agreement by using its typical language of the standard full protection and security. Article 2.2 of Ethiopia and Kingdom of Denmark BITs, states the wording of the standard as follows:

> *Investments of investors of each Contracting Party shall at all times enjoy 'full protection and security' in the territory of the other Contracting Party.*

There are around 3 BITs which doesn't include the standard of Full protection and security totally. These are, Ethiopia BITs with Republic of France[90], the government of the Russian Federation[91], the Republic of India[92] BITs are some of the BITs.

Generally, it is possible to say that almost all Ethiopian BITs don’t have any clear definition that explained the obligation of full protection and security. Such clauses are general in that they do not define the precise meaning of the word full protection and security nor do they specify the scope of FPS obligation. Majority of the BITs combine the standard with that of Fair and Equitable Treatments but the wording of the standard put in such agreement is inconsistent. On the other

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[88]Agreement between the Federal Democratic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed on 24 April 2001 entered into force 21 August 2005.

[89] Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investment, signed on 14 September 1996, entered in to force on 12 November 1998.

[90]Agreement between the Federal Democratic Republic of Ethiopia and the government of Republic of France for the encouragement and reciprocal protection of investment, signed on 25th June 2003, entered in to force on 12 July 2003.

[91]Agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, signed on 10 February 2000, entered into force 6 June 2000.

[92]Agreement between the Federal Democratic Republic of Ethiopia and the State of Republic of India for the encouragement and reciprocal protection of investment, signed on 5th July 2007, entered in to force on 12 August 2007.

hand, some of the BITs put the autonomous character of the obligation, but still there is variation in the wording of the standard of full protection and security.

On top of this, no definition is provided toward the meaning of the obligation of full protection and security rather than simply inserting the standard under the BITS. Usually, the provision is qualified with adjectives such as ‘full protection and security’ ‘full and constant protection’, ‘continues protection’, 'adequate protection', and 'full protection.' However, it should be stressed that not all Ethiopian BITs follow the obligation of protection and security with qualifying adjectives. For instance, the United States-Congo BIT reads as follows:

> *‘investments of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party’.*

On the other hand, the scope of the application of this obligation in the majority of Ethiopian BITs is inconsistent and lacks coherence. No definition for the standard is provided. Accordingly, the obligation of the standard is not defined to what extent it will apply, whether to physical security or legal security. Cases reaffirm the view that when qualifiers such as 'full', 'constant' 'continuous' and the like are added, the scope of obligation extends beyond physical security.

For example the tribunal in *Azurix v Argentina* was of the view that “when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation is provided, they extend, in their ordinary meaning the content of this standard beyond physical security”. Conversely, if the adjective ‘full’ is not added, the protection is restricted to physical security and protection. This position is also supported in the *Biwater case* where the tribunal viewed full protection and security as extending to actions by organs and representatives of the State and not limited to a State’s failure to prevent actions by the state.

Therefore, the above few cases clearly show that unless the scope of the FPS standard is not clearly defined, this will entail differing interpretation by the investment tribunals regarding the scope of application of the standard. The same holds true to Ethiopia. As we have already discussed above the different BITs concluded by Ethiopia do not clearly define the scope of the FPS standard. Hence, in the near future if disputes arise under those BITs undoubtedly this scenario will expose the country to numerous liabilities. Thus there is a need to define the scope of the FPS standard in signing future BITs.

3.2. Practical Implication of the Standard of Full Protection and Security

As we remember previously in different part of Ethiopia, there were demonstration and protests. As a result, foreign investments had been damaged. Accordingly, I went to the Ethiopian investment Commission (EIC) to get data which describes damage which the foreign investors had sustained. I have conducted an interview with Ato Yisfalign Welde Amanuel who is an Agricultural Investment Projects Facilitation and after a case team leader and I have raised issues like for example, the extent of the damage which foreign investors have suffered, which type of foreign investment more sustained damage, if there are foreign investors who bring their claim before international investment tribunal and what is intended by the government for the investment who sustained damage.

I am not successful toward getting accurate data explaining the damage which the foreign direct investment has lost. But, Ato yisfalign told me that, foreign investors who came from Israel, India, Holland, Yemen, Italy, who invest on the area of especially in horticulture and flower which exists in Oromiya and Amhara regions more sustained damage than other investment areas. But, I cannot get data regarding the exact loss which these foreign investors has sustained.

Generally around 52 investors has engaged in the investment area of Horticulture, of which 11 are foreign investors who sustained damage. And Ato yisfalign said that the government of Ethiopia has paid damage to those investments which sustained damage. According to him, nine of them are supported by finance but not in the form of compensation from the government. As Ato yisfalign told me that no foreign investors brought the case before international investment tribunal.

Currently, even if different investments sustained damage due to the political turmoil happened in Ethiopia, the government of Ethiopia able to settle the case peacefully without the need for the investments to bring their case before the ICSID tribunal. In fact this does not mean that in the near future there will be no case brought before the Investment tribunal in relation with the FPS clause. Therefore, to avoid un necessary liabilities arising in relation with the FPS clause, Ethiopia needs to reframe the scope of the clause in signing future BITs. Accordingly, like that of the US-Model BITs Ethiopia should limit the scope of the FPS clause to the minimum standard of customary international law and should refer only to the level of police protection.

Up to now, Ethiopia signed twenty nine (29) BITs with both developed and developing countries. When we see the number of BITs the country has signed with different countries, still this figure is insignificant compared to the number of countries around the world. Hence, this scenario can be taken as a good prospect for the country to reshape the scope of the clause in signing future BITs.

CHAPTER FOUR

4. Conclusion and Recommendations

4.1. Conclusion

Among the most persistent controversies in international investment law is the scope of the 'protection and security' standard found in most investment treaties. Some tribunals contend that the standard requires nothing more than physical protection of covered investments, while others maintain that it requires legal security as well.

As I have tried to show in the preceding Chapters, International Investment Tribunal regarding the application of full protection and security clause shows tendency towards interpreting the obligation with its broader meaning, not only restricted to physical security but also extending the clause to legal security. This is because the vast investment treaties use the term “full protection and security” without any reference to the standard to be applied. This provides arbitral tribunals with broad discretion to impose a high duty on states to prevent harm to investments. The same is true when we come to Ethiopia, the standard of Full Protection and Security in majority of the BITs framed in the general words and no definition is provided as to the application of the obligation. The content of the standard incorporated in the BITs lacks coherent and consistency. Some of the BITs put Full Protection and Security clause with the independent existence of the standard and still Some other BITs combine the standard of Full Protection and Security with Fair and Equitable Treatment with no reference to the scope of application of the standard. Usually the provision is qualified with adjective such as, full, constant, continuous, adequate, without any reference to the standard of Full Protection and Security to be applied.

So far, tribunals have shied away from imposing a strict or absolute liability standard. However, tribunals have not typically restricted themselves to the standard of customary international law unless the treaty constrains or caps the obligation using the reference to customary international law. The vast majority of treaties do not refer to customary international law. Tribunals have therefore assumed an independent treaty standard that imposes a high degree of diligence in what is expected from a well-administered government.

If states choose to retain the classically formulated full protection and security provision in their investment treaties, then they could be undertaking a duty to act in a manner that will protect the investment in accordance with international standards, and not just in line with national treatment standards, irrespective of the resources available to them. Many of the BITs signed by Ethiopia entered into force in the early 2000. The initial minimum period of many of these BITs has lapsed or is about to lapse. This gives the government of Ethiopia a good opportunity to learn from the experience of other countries and revisit its BITs with the aim of having a Coherent investment treaty framework.

In view of the recent rulings on the full protection and security standard, states may wish to consider the following options as a recommendation.

4.2. Recommendation

- When Ethiopia enters into BITs, it should give consideration to the following issues. Firstly, the exact meaning of the standard of full protection and security in most Ethiopian BITs is not defined and it is not clear to what extent the clause has to be applied. So the country should have to define the scope of the standard with care, in particular stating clearly whether it applies only to physical protection (for example, as the U.S. Model BIT (U.S. State Department, 2004) does in relation to police protection).Leaving it undefined and broad will allow arbitral tribunals to include legal, commercial and regulatory security, as they have indeed done in recent awards.
- Secondly, if states wish to provide protection and security pursuant to an international standard, incorporating a reference to the standard of customary international law for the treatment of foreign investor give some clarity toward its scope of application of the obligation. Therefore an arbitral tribunal may well find that the "modern" interpretation of this obligation is higher than states may have thought was in the case in its more classical form.
- Thirdly, with respect to existing Bilateral Investment Treaties, states retain the option to delete this standard or to define it narrowly through an amendment of the treaty. The amendment would require the consent of both parties to the treaty. If an amendment is not possible, states can also issue an interpretive statement, as the NAFTA parties did in 2001 (if this can be accomplished with the consent of the other party). In the event that the other treaty party is not willing to make a joint statement, states may wish to issue a

unilateral interpretive statement, which could have some influence over tribunals interpreting future disputes.

- Finally, still with the existing BITs, state have an options to renegotiate with the contracting states before the termination of their agreement.
- Thus, It is advisable for Ethiopia, when it conclude future BITs, with the other state, the country should have take in to consideration the precautionary measure before signing of BITs. Hence, Ethiopia should expressly limit and define the scope of the FPS standard under its BIT like that the US and Canada model BITs.

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