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International Trade and Investment Law in Africa Program

Title: - A Critical Examination of the Symmetry of Ethiopia's Bilateral Investment Treaties

A Mini-Dissertation Submitted to the University of Pretoria in Partial Fulfilment of the Requirements for the Master's of Law(LLM) in International Trade and Investment Law in Africa Program

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Declaration

I, Yehualashet Tamiru, hereby declare that this research entitled' Critical assessment of symmetry of Ethiopia's Bilateral Investment Treaties' is my original work and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name- Yehualashet Tamiru

Signature:-

This mini-dissertation has been submitted for examination with my approval as University advisor;

Name: - Dr. Abe Oyeniyi

Signature:-

Dedication

I dedicate this mini-dissertation for my late father, who plants a tree, under whose shade he had never planned to sit and to my mother, who shoulder unbearable obligation to see my success. All that I am and hope to be, I owe it all to you!!

Acknowledgement

፠ል፪, The Lord is my strength and shield. I trust him with all my heart. He helps me, and my heart is filled with joy. I burst out in songs of thanksgiving: Psalm 28:7. Although I am not a good Orthodox Christian first and foremost, I would like to thank to Almighty God, who create and protect me, and His Mother St. Virgin. Thank you very much!!

The second in rank is my financial supporter ABSA Bank who covers my entire tuition fee. Thank you very much!

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Acronyms

AfCFTA-African Continental Free Trade Agreement

BITs- Bilateral Investment Treaties

FDI- Foreign Direct Investment

FDRE-Federal Democratic Republic of Ethiopia

FET-Fair and Equitable Treatment

ICJ-International Court of Justice

ICSID-International Convention for Settlement of Investment Disputes

IIA-International Investment Agreement

ILO-International Labour Organization

ISDS-Investor State Dispute Settlement

MFN-Most Favoured nation

MNCs-Multinational Corporations

NAFTA-North American Free Trade Agreement

OECD-The Organization for Economic Co-operation and Development

PPP-Public Private Partnership

RTAs-Regional Trade Agreements

SADC- The South African Development Communities

UN- United Nations

UNCITRAL-United Nations Commission on International Trade Law

UNCTAD-United Nations Conference on Trade and Development

USA-United State of America

Abstract

After tearing down of colonization the new emerging countries, most of them are African countries, vow to enhance their economy. One of the mechanisms to jump- start the economy was through foreign direct investment (FDI). Foreign investors, though agree as to the high potential of least developed countries, were not comfortable with the then existing protection accorded to foreigners. Therefore, the two options left for them were either to pull back their investment or blindly invest with its all consequences. The latter option was neither feasible nor logical. As a result, developing countries and investors' state began to conclude BITs to show their commitment to protect the investor and investment at large. The modern BITs are European in origin; the first one was signed between the Federal Republic of Germany and Pakistan on November 25, 1959.[1]

Ethiopia as one of the least developed countries concluded various BITs with different countries with the view to securing FDI. The close examination of BITs Ethiopia concluded, we could find both North-South BITs type, i.e. Ethiopia and developed countries like Germany and south-south BITs type i.e. Ethiopia with developing countries like Iran.

In this study, an attempt is made to find out whether these BITs are symmetric, in terms of having balance terms and conditions of the treaty. The research found that the terms and conditions of BITs Ethiopia concluded are not favourable for the country and call for the review of those treaties. To put differently the country made a huge concession to please foreign investors, which ultimately defeat the whole essence of BITs. The broad definition, the standard of treatment, issue of expropriation and compensation, the guarantee of remittance and arbitration clause can be cited as an example.

[1] AZ Gunawardana and JE Alvarez The Inception and Growth of Bilateral Investment Promotion and Protection Treaties(1992) 86 *America Society of International Law* 544-549 at 545.

Key terms:

Home state; Host state; Capital importing; Capital exporting; Investors and investment; Symmetry/ balance of rights and obligations; Policy space; Foreign direct investment; Bilateral investment treaties; Minimum customary international law; Hull formula; Clavo doctrine; Expropriation and compensation; Standard of treatment; international arbitration; Ethiopia's BITs; Indian model BIT; USA model BIT; Canada model BIT; SADC model BIT, African continental free trade area; Pan Africa investment agreement.

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Chapter One

Background and overview of the study

1.1 Background of the study

An 18th century philosopher and former defence lawyer by the name Cicero has once said that a rational discussion of a concept should begin by defining the subject matter of the discussion.[2] Thus, before this research dive into deep, it is better to define the two key words in this research.

Organization for Economic Development (OECD) Define Foreign Direct Investment (FDI) as:[3]

> A category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise.

BITs as the very name indicate it is a bilateral agreement on the investment area between two county i.e. host and home countries. BIT somewhere is defined as 'international agreements establishing the terms and conditions for private investment by nations and companies of one state in another state.'[4]

Unlike many international areas, there is no comprehensive single legal regime governing the issue of investment.[5] Currently, almost in all countries, there is a wave of movement to attract FDI. Since the aftermath of the First World War capital exporting countries was in a precarious position to enforce their conception of appropriate foreign investors' treatment in capital importing countries.[6] In the early stage it was identified that investment will not occur unless there is a reasonable prospect of profit and an assurance of security. In many undeveloped

[2] CM Tulivison Good life 2nd ed. (1973) Unknown publisher at 23.
[3] OECD OECD benchmark definition of foreign direct investment 4th ed. (2008) at 17.
[4] Legal information institution available at https://www.law.cornell.edu/wex/bilateral_investment_treaty(accessed on 19 April 2019).
[5] At different time various efforts were made to come up with multilateral investment agreement which would have worldwide application like GATT. However, for many reasons it never come into force. For more detailed discussion concerning OECD 'initiative for such agreement please see J Canner 'The multilateral agreement on investment'(1998) 31:3 *Cornell International Law Journal* 657-682.
[6] C Lipson Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries (1985) University of California Press, Pp. 8-11.

countries, though the prospect of profit is present, the assurance of security is not.[7] After the end of First World War various efforts to come up with a comprehensive multilateral agreement on protection of foreign investors and investment did not bring any fruit.[8]

In the 1950s customary international law concerning protection of foreign investors were under attack from developing countries. The nationalization of British oil assets by Iran in 1951, the expropriation of Liamco's concession in Libya in 1955, and nationalization of Suez Canal can be cited as a good example.[9] Though states were in agreement as to obligation of compensation, there was a sizable difference on the requirements and conditions of payment.[10]

The emergence of Calvo Doctrine complicates and made thing even worse. This doctrine stipulates that, because all states are equal and independent in case any dispute arises between the host state and investor, the latter should not entitle to a higher degree of protection than domestic investors and therefore, foreign investors should submit their claim to the local court.[11]

In early 1960's Calvo doctrine begun manifested itself in the international arena. In 1962 the United Nations (UN) General Assembly passed a resolution on Permanent Sovereignty over Natural Resources, which states, among other thing, [12]

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which is recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. (My emphasis)

The resolution goes further and stated that, 'in any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.'[13]

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[7] C Wilcox A charter for world trade (1949) The Macmillan Company at 145.
[8] 'The proposed convention to protect private foreign investment: A round table' (1960) 9 *Journal of Public Law* 115-124 at 115.
[9] Elkins and others 'Competing for capital: The diffusion of bilateral investment treaties, 1960-2000' (2006) 60:4 *International Organization* 811-846 at 813.
[10] FO Vicuna 'Some international law problems posed by the nationalization of the copper Industry in Chile' (1973) 67:4 *The America Journal of International Law* 711-727 at 722.
[11] MR Garcia-Mora 'The Calvo clause in Latin American constitutions and international law' (1950) 33:4 *Marquette Law Review205-219* at 206.
[12] LA O'Connor 'The international of expropriation of foreign-owned property: The compensation requirement and the role of the taking sates' (1983) 6 *Loyola of Los Angeles International and Comparative Law Review* 355-426 at 360. The resolution is available https://www.un.org/documents/ga/res/29/ares29.htm (accessed 19 April 2019).

This is further fuelled by General Assembly resolution on new international economic resolution, which stated under Article 2(2) (c) that to 'nationalize….appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.'[14](My emphasis). As Weston said, this resolution domesticated principle of compensation.[15]

The General Assembly, which is by that time dominated by developing states,[16] underscored once and for all its loyalty for 'appropriate compensation' standard by encompassing the same term under Article 2 (2) (c) of the Charter of Economic Rights and Duties of States.[17] As a result, the appropriate compensation standard is only subject to assessment of national law to which international law is not necessarily relevant.[18] As a result of this, the only option left for the capital exporting countries was to conclude BITs with capital importing countries.

Initially, BITs were intended as an effective legal tool to protect and promote investments from coming from rich capital exporting states to the developing countries.[19] This pattern, however, drastically changed since the late 1980s and especially in the 1990s, as developing countries began to sign BITs between themselves with the view to enhance their economy.[20]

The number of BITs concluded among developing countries leaped from 47 in 1990 to 603 by the end of 2004, involving 107 developing countries.[21] The rise in south-south FDI flows have been motivated by pushing and pulling factors like increase competition or limited growth

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[13] As above.
[14] BH Weston 'The chapter of economic rights and duties of states and the deprivation of foreign-owned wealth' (1981) 75: 3 *The America Journal of International Law*437-475 P. 438. The whole content of the Resolution is available at http://www.eytv4scf.net/s6r3201.htm(accessed 19 April 2019).
[15] As above.
[16] Unlike many other institutions, as per rule 82 of the UN General Assembly each member has one vote regardless of any other factors like economy or population. The full version of the UN Genera Assembly rule is available at https://undocs.org/en/A/520/rev.18(accessed 22 June 2019).
[17] The full document is available at https://www.un.org/documents/ga/res/29/ares29.htm(accessed 19 April 2019).
[18] CN Brower and JB Tepe 'The charter on economic rights and duties of states: A reflection or rejection of international law?'(1975) *The International Lawyer* 9:2 295-318 at 305.
[19] LS Poulsen 'The Significant of south-south BITs for the international investment regime: A qualitative analysis' (2010) 30: 1 *Northwestern Journal of International Law and Business* 101-130at 101.
[20] United Nations Bilateral Investment Treaties 1959-1999 (2000) at 2.
[21] United Nations Conference on Trade and Development South-South Cooperation in International Investment Agreements (2013) UNCTAD Series on International Investment Policies for Development xiii.

opportunity in domestic markets, efficiency-seeking and procurement of raw materials.[22] This in turn exhibit that developing countries are more and more integrated than before.[23]

Unlike BITs with developed states, because developing countries have the relatively equal bargaining power there is high tendency they will agree to a different set of rules, which permit a substantial ground for developmental objectives than North-South BITs. In case of south-south type of BITs for instance, national treatment standard is either not legally binding or subject to domestic law.[24]

The very policy justifications of BITs are completely different from point view of developing countries and the developed countries' perspectives. For the former the crux of the matter in BITs is searching and securing FDI. Whereas, for developed countries, it is the best mechanism to protect investment and investors from any political risk which may potential arise in another state.[25] Some authors also consider providing assurance of national or most favoured treatment for foreign investors, compensation if there is any expropriation or nationalization, repatriation of profit to their home country and access to alternative dispute settlement as the possible policy justification behind BITs.[26] Still others consider BITs as a direct or an indirect vehicle for economic and investment liberalization of a given country.[27] Furthermore, from an investor's perspective, BITs send a signal to all investors; whether or not their own home country has signed a BITs with a particular host country and investor usually considers signing of BITs as an indication of its willingness to protect the interests of foreign investor.[28]

Although there is unequivocal evidence that there is tremendous growth of BITs between countries, to what extent it actually benefits the developing countries remain contentious. Some argue that there is strong positive cause-effect relationship between BITs and FDI. As per the principle of privity, BITs will extend protection only for those investors who belong to

[22] As above .
[23] As above .
[24] Poulsen (n 19).
[25] P Egger and Valeria 'BITs bite: An anatomy of impact of bilateral investment treaties of multilateral firms' (2012) 114:4 *Scandinavian Journal of Economics* 1240-1266 Pp. 1241-1242.
[26] VH Ruttenberg 'The United States bilateral investment treaty program: Variations on the model' (1987) 9:1 *University of Pennsylvania Journal of International Business Law* 121-144 at 122.
[27] Salacuse and Sullivan (n 134) pp. 90-93.
[28] J Tobin and SR Ackerman 'Bilateral investment treaties: Do they stimulate foreign direct investment?'(2006) unknown publisher Pp. 7-8. The Pdf is available at http://s3.amazonaws.com/zanran_storage/www.upf.edu/ContentPages/822485.pdf (accessed 23 April 2019).

contracting parties.[29] This in turn signifies that more BITs mean more protection for investors.[30] Although, signing BITs with a global superpower like the USA attract more investors than weak states like Kenya, the very conclusion of BITs put a good signal that developing countries are making serious commitment in protecting foreign investors' property and investment.[31] Furthermore, the very conclusion of BITs will lead foreign investors to believe the host country will not breach its treaty obligations and in case if it does, they will recover compensation by suing the host country in an independent international arbitration institution.[32]

On the other hand, some argue that the tremendous popularity of these BITs is puzzling since they offer foreign investors much greater protection than customary international law and Hull formula, which developing countries have long objected on sovereignty ground, ever did. And hence concluded that BITs may reduce the benefit of developing countries obtain from foreign investment.[33]

There is intense competition among and between states to attract FDI.[34] This especially works for the least developed countries.[35] This in turn makes them to enter into a race-to- the –bottom, which leads countries give huge concession to attract investors. The forefront reason is that the money foreign investors have and willing to invest in developing countries is limited. So capital importing countries compete with each other to get the highest share from this scared resource by

[29] Article 34 of VCLTstate that 'A treaty does not create either obligations or rights for a third state without its consent.'

[30] This argument is very convincing for those BITs which have umbrella clause which elevate breach of contract between investor and government to breach treaty. For more detailed discussion please see K Yannala-small 'Interpretation of the umbrella clause in investment agreements'(2006*) OECD Working Papers on International Investment*.

[31] E Neumayer and L Spess 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33:10 *World Development* 1567-1585 at 1571.

[32] A Emma; Matthias; N Peter 'Bilateral investment treaties do work: Until they don't' (2016) *Kiel Working Paper* No. 2021 1-22 Pp.3-6.

[33] AT Guzman 'The Popularity of bilateral investment treaties: Why LDCs sign treaties that hurt them' (1998) 38 *Virginia Journal of International Law* 640-688

[34] J Easson 'Tax incentives for foreign direct investment in developing countries'(1992) 9 *Austrian Tax Forum387-440* at 437.

[35] Lack of infrastructure, lack of skilled labor, weak purchasing power, transportation and other problem put developing countries in weaker bargaining position in comparison to developed countries.

lowering terms and conditions in BITs. However, as one author noted 'they would likely be better off if they could collectively commit not to undertake this race to the bottom'.[36]

All too often, least developed countries fail to understand BITs are one, but not the only means of attracting FDI.[37] Other determining factors like labour cost, skill labour, location, market size, infrastructure, political stability, comprehensive and sophisticated legal regime, reliable judicial system are also *sine-qua-non* at best.[38]

BITs not only extend much benefit to investors, but it also crippled the host state policy. Somewhere it has been noticed that:[39]

> BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development. New investment rules in BITs prevent developing country government from requiring foreign companies to transfer technology, train local workers or source inputs locally.

In recent years the world has witnessed countries massively withdrawal or letting their BITs to lapse. The cases in point are Ecuador,[40] Indonesia,[41] and South Africa.[42] At the same time there is a move to withdraw from ICSID.[43] Many researches unearth that in international investment arbitration, the arbitrators are favour the position of claimants over respondent states, especially

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[36] M Waibel and others The backlash against investment arbitration: Perceptions and reality in Michael Waibel, Asha Kausha, Kyo-Hwa Chung and Clair Balchin eds, The Backlash Against Investment (2010) Arbitration Kluwar Law International at 7.

[37] This is if we buy the arguments that BITs attract FDI.

[38] See for instance S Wei 'Attracting foreign direct investment: Has China reached its potential?' (1995) 6:2 *China Economic Law Review187-199* see also A Emma; Matthias and N peter, 'Bilateral investment treaties and foreign direct investment: Correlation and causation' (2007) *UCDARE Working Paper* 1032 1-47.

[39] Department of Trade and Industry Bilateral investment treaty policy framework Review: Government position paper (2009) 1-59 at 11.

[40] In 2008 Ecuador terminated nine BITs-with Cuba, the Dominican Republic, Guatemala, Honduran, Nicaragua, Paraguay, Romania and Uruguay. To make it worse, in 2010 the Constitutional Court of Ecuador declared that arbitration clause of six BITs i.e. China, Finland, Germany, the United Kingdom, Venezuela and United Sates unconstitutional. See United Nations UNCTAD Denunciation of the ICSID convention and BITs: Impact on investor-state Claim (2010) 2 *IIA Issues Note* (2010) 1-11at 1.

[41] As of 2015 Indonesia unilaterally withdraw from eight BITs i.e. BITs with China, Laos, Malaysia, Netherland, Italy, French, Slovakia, and Bulgaria. In addition, Indonesia delivered diplomatic notes in 2015 to India, Cambodia, Romania, Turkey, Spain, Hungary and Vietnam express its intention to terminate its BITs with those countries in 2016. Please see http://www.gbgindonesia.com/en/main/legal_updates/what_is_going_on_with_indonesia_s_bilateral_investment_treaties.php (accessed April 07, 2019).

[42] South Africa unilaterally withdraws from BITs with Germany, Switzerland, Luxemburg, Netherland, and Belgium- Luxembouge Economic Union. See Clint Peinhardt and Rachel L. Wellhausen 'Withdrawing from investment treaties but protecting investment' (2016) 7:4 *Global Policy* 571-576 at 573.

[43] Latin American countries also massively withdrawal from ICSID which is the most frequently mentioned as a favorite platform for dispute settlement in various BITs. For more discussion on this point please see A Vincentelli 'The uncertain future of ICSID in Latin America'(2010) 16:3 *Law and Business Review of the Americans 409-456.*

the position of claimants from major Western capital-exporting countries.[44] Thus, the existing platform of international arbitration, benefit investors from capital-exporting countries at the expense of capital importing countries usually developing states.[45] On top of this, panel of arbitrators with the view to promote growth of investor-state proceedings in order to get future appointment and financial reward afterward.[46]

While commenting on NAFTA defect, one author perfectly captures the loophole in general international arbitration when he said:[47]

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunal handles disputes between investors and foreign governments has led to national law being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors.

The great irony is that the group of states that has unilaterally withdrawn from investment treaties results little to no real reduction in foreign investors' access to international legal protection.[48]

On top of this, recognizing the existing imbalance of obligation between investors and host states in BITs, some regional arrangement in Africa is coming up with model BITs law with the view to bring harmonization.[49] One of the main objectives of such model law is to bring overall balance of rights and obligations between state parties and the investors.[50]

So, in this study an attempt is made to deep analysis Ethiopia's BITs terms and conditions and assesses its symmetry and the possible antidotes. To do so, first and foremost, the research leads down the historical context for the emergence of BITs and the often raised policy justification

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[44] For instance see GV Harten 'Arbitrator behavior in asymmetric adjudication: An empirical study of investment treaty arbitration' (2012) *0SGOODE Hall Law School Comparative research in law and political economy Research Paper* No.41/2012 1-67

[45]See for instance NB Osterwalder Who wins and who loses in investment arbitration? Are investors and host states on a level playing field? The launder/Czech republic legacy (2005)6:1 *Journal of world investment and trade law.*

[46] W Park 'Arbitrator Integrity: The transient an the permanent' (2009) 46 *San Diego Review* 59-78 at 658.

[47] A Depalma Nafta's Powerful little secret; obscure tribunals settle disputes, but go too far, critical say, The New York Times available at https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html(accessed 15 April 2019).

[48] Park (n 46) at 572.

[49]For instance Southern African Developmental Community (SADC Model BIT has come up with its own model law. The model law with detail explanation is available at https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

[50] As above Please see the preamble of SADC mode BIT law.

behind it. Although BITs are the main concern and focus of this mini-dissertation, the study will not give the full picture and sense without discussing the domestic arrangement. Thus, the research also discusses the legal and theoretical framework put in place for investors and investment. After laying this foundation, the research assesses the existence and non-existence of a balance of reciprocal rights and obligations of investors' and the host state by using two criteria: in reference to the obligation and rights embodied under customary international law the developed nation were advocated for and in terms of the contents of Ethiopia's BITs. Based on this finding, this research also suggests any possible way forward to rectify the problems to have just and fair system.

1.2 Theory and hypotheses

In the infamous theory of prisoner's dilemma, also known as zero-sum or game theory, individual pursuit of what seems rational decision but a collectively self-defeating result.[51] As per this theory, 'there is nothing wrong with their logic in reaching a certain conclusion, which appears to be best for individuals, but the end result makes everyone worse.'[52] In explaining why individual resort to such self-defeating decision, the greatest think-tank of his generation, Thomas Hope, believe that in the absence of sanction that is the natural way of doing things when he said:[53]

> For the law of nature, as justice, equity, modesty, mercy, and in sum, doing to others as we would be done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our nature passions that carry us to partiality, pride, revenge and the like. And covenants, without the sword are, but words and of no strength to secure a man at all.

The same logic applies to developing countries in concluding BITs to scramble the scare resource of FDI.

As pointed out earlier, BITs from the perspective of developing countries is one mechanism to secure FDI.[54] In the competition to attract FDI, the countries that managed to receive highest FDI

[51] SP Heap and Y Varoufakis Game theory: A critical introduction (1995) Routledge Taylor and Francis Group Publisher at 147.
[52] As above.
[53] T Hobbes Leviathan Renascence Editions, 1999 unknowen publisher p. 148. The full text is available at https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/748/leviathan.pdf(accessed 21 April 2019).
[54] Emma; Mattias and peter (n 32) at 31.

will benefit nothing or little from its victory[55] since what is gained in terms of FDI[56] will be traded-off in the forms of incentives.[57]

This leads to my first testable hypothesis.

H1. BITs concluded by developing countries in general and Ethiopia in particular concedes much to appease foreign investors.

BITs are part and parcel of international law governed by the Vienna Convention on the Law of Treaties (VCLT).[58] The whole reading of Article 54 to Article 57 of the Vienna Convention made it clear that termination, withdrawal or denunciation of the treaty will be conducted as per the provisions of the treaty or based on the consent of the parties. However, in case the treaty failed to specify such clause, then a state may only withdraw or denunciation or termination of that treaty only if the very nature of the treaty permits such possibility.[59] Usually BITs have sunset clauses for giving protection for investors even after termination of the treaty.[60] So, if a state feels that their BITs are not advantageous enough, there are two options: termination or renegotiation. Developing states rather than denounce BITs, which has a huge impact on reputation of compliance, should opt for letting BITs elapse and pave the way for renegotiation.[61] Renegotiation is one of the tools to challenge the cherished notion of international law as a means of regulating state behaviour because renegotiation carries within it a suggestion of wilful and opportunistic disobedience.[62] This renegotiation can be either unilateral or multilateral.

BITs are renegotiated when governments unearth new information about their commitment-the benefit of appealing to investors' measures against loss or erosion of sovereignty. Currently BITs

[55] Guzman (n 33)at 672.
[56] These among other things include: employment opportunity, technology transfer, generating hard currency.
[57] These among other things include: tax break, easy labour and environmental law, easy custom duty scheme, unlimited repatriation of profits.
[58]As indicated under Article 2 of VCLT , treaty means any international agreements between states concluded in written formality which in turn is governed by international law. Needless to mention, BITs fulfil this definitional requirement.
[59] N Shaw International Law 6th ed.(2008) Cambridge University Press at 945.
[60] Hamzah 'Bilateral investment treaties (BITs) in indonesia: A paradigm shift, issues and challenges' (2018) 21:1 *Journal of Legal Ethical and Regulatory Issue* 1-13 at 9.
[61] There are two forms of renegotiation forms. First, the state parties opt to keep the old treaty in effect but with modification. Second, the state parties may opt to sign a new treaty and terminate the previous BIT, YZ Haftel and A Thompson 'The Impact of arbitration' (2010) 17:2 *Review of International organization* at 32.
[62] T Meyer 'Power, exit costs, and renegotiation in international law' (2010) 51:2 *Harvard International Law Journal 379-426* at 397.

are renegotiated so that it provides more room for social and economic policy objectives to the host country.[63] Moreover, renegotiation implies governments are still accepting the general principle of the regime and hence, unlike denunciation, BITs renegotiation represents a change within a regime than a change of regime.[64]

This leads to my second testable hypothesis.

H2. Developing countries in general and Ethiopia in particular will be in a better position if they renegotiate the terms and conditions of BITs than abrogate altogether.

1.3 Statement of the problem

Currently, almost all counties, especially developing countries need FDI to enhance their economic development. This motive among other things, are expressed in the form of protecting and promoting investment through both national and international instruments. As part and parcel of this effort, they conclude BITs.[65]

On the face value, it seems there is a deserving cause both for the host country, usually developing counties, and sending countries, usually developed country, to conclude BITs. Since the absence of enough national capacity to finance their national economic for capital importing countries makes it necessary to attract FDI.[66] On the other side, for capital-exporting countries, BITs are a precondition for granting investment insurance to the prospective investor.[67] Ethiopia, as one of the least developed country,[68] concluded BITs with the view to attract FDI. However, the mere conclusion of BITs does not necessarily guarantee the inward movement of FDI. More importantly, the treaty as agreement presupposing the existence of reciprocity obligations and rights between the host state and investors. This opens the Pandora's Box. First and foremost, Ethiopia while concluding a BIT with any given country does not necessarily mean that the reciprocal right and the obligation of the host state and home state investor is well balanced. Second, even if in any given BIT Ethiopia concludes provide more rights and less obligations to

[63] Haftel and Thompson (n 61) PP. 29-30.
[64] As above at 44.
[65] United Nations (n 20) at iii.
[66] E Demirhan and M Masca 'Determinants of foreign direct investment flows to developing countries: A cross-sectional analysis'(2008) *Prague Economic Paper No.* 4 356-369 at 356.
[67] R Dolzer and M Stevens Bilateral investment treaties (1995) Martinus Nijhoff Publishers at 12.
[68] UN Committee for Developmental Policy(n 85).

the investor, this does not imply investors are flocking to the country. So, there is a real tension between attracting FDI without making so much concession and attracting FDI.

The existing Ethiopia's BITs are in favour of investors' rights without providing counter obligations and this is done at the expense of the host state duty to regulate. For instance, unlike the old model of all forms of investment area good for the host state, in contemporary BITs the benefit of investment is not automatic and hence, the investor and its investment should contribute among other things to human rights, labour and environmental rights and protection. Under the existing Ethiopia's BITs these issues are given either scant or no attention at all. Moreover, the right to regulate of the host state, Ethiopia, is highly crippled by broader interpretation of investors' rights such as protection from indirect expropriation and the fair and equitable standard of treatment. However, Ethiopia as a country failed to notice and provide appropriate feedback is because so far Ethiopia's BITs are quite dormant and rarely invoked by investors.

1.4 Purpose of the study

The purpose of the study is mainly to assess the balance of investors and host-states, Ethiopia, as a capital importing country, rights and obligations embodied in BITs. Treaties as an agreement presuppose the existence of fair reciprocal rights and obligations between contractual parties. This research assesses the balance of rights and obligation in 27 BITs Ethiopia concluded. The second purpose is to come up with an alternative for Ethiopia and investors. Countries alarmed by the imbalance of rights and obligations in BITs are withdrawing from various BITs. The research provides the most viable option work for Ethiopia in particular and developing countries in general.

1.5 Significance of the study

Among other things, the research will have the following major significance:

- ✓ The study will critically examine the symmetry of Ethiopia's BITs and the possible antidote. Thus, the end result will be a good input for policy maker and negotiators as a good guidance as to how to secure the interest of the host state without conceding so much and keeping the balance of rights and obligations of the host state and investors.

- ✓ Although BITs in general are fairly well researched area, there are rare research outputs which examine its symmetry. To be specific, there is barely enough literature on the imbalance Ethiopia's BITs. Thus, the research will serve as a stepping stone for further study in the area.

1.6 Research methodology

This research makes use of the doctrinal method of research. The research employs both primary and secondary sources extensively. The research also extensively consults the literature on BITs, FDI and the co-relationship between the two. To exhibit the contemporary concerns, comparative studies are made. Although the literatures on Ethiopia's BITs are next to none, highest effort is deployed to consult any available materials. Primary sources more particularly BITs to which Ethiopia is a party, Ethiopia investment laws, and other relevant bylaws are examined in more detail and critical manner. All in all, intensive library research and desktop analysis and review are employed.

1.7 Research Questions

Although BITs are concluded between two states, the host state, in our case it is Ethiopia, and home state, the most significant actors in this bilateral relationship are the investor, who is coming from the home state and the recipient of those investors, the host state. There is a general tendency to accept the investor as only rights holder, whereas the host state as a duty bearer. Within this broader framework, the research tries to address the following questions:

1.7.1 What are the historical backgrounds for the rise and development of BITs?

1.7.2 What are the legal and institutional frameworks put in place for investors and investment under the Ethiopia legal system?

1.7.3 What is the main taxonomy of Ethiopia's BITs?

1.7.4 Whether nor not the existing Ethiopia's BITs are symmetry in terms of balancing the reciprocal obligations and rights of the host state and investors?

1.7.5 If the existing BITs are asymmetry in favour of the investor, what should be done to fix the imbalance exhibited in Ethiopian's BITs? Does AfCFTA or Pan Africa Investment agreement address the problem?

1.8 Limitation of the study

Lack of adequate literature on Ethiopia's BITs and its impact is the major significantly affected this research. It will not be over-exaggerating to say there is dearth literature on Ethiopia's BITs in general. Inaccessibility of law is another problem. While commenting on another legal system somewhere it has been said that 'it is today extremely difficult for anyone without special training to discover what the law is on any given topic.'[69] To make thing worse, in Ethiopia even for a specialized and a savvy lawyer, it is quite difficult to find out proclamation and regulation just not to mention directives and policy. While even for those available treaties in some instance, there is the problem of language. For instance, the BIT Ethiopia concluded with Italy is available only in Latin which makes it almost impossible to examine its content.

1.9 Delimitation of the study

This research does not dwell on the reason behind for the conclusion of BIT with any particular country. Here the research assumes the general objectives of the host country, Ethiopia, is to attract investment and the objective of sending country is seeking more protection for their investors.[70]

Although the research examines 27 Ethiopia's BITs, it does not examine each and every provision of those treaties rather some selected provisions which are in line with the issue in consideration and the main objective of the research. Furthermore, the research included expire BITs. By now it should be a matter of common knowledge that once the treaty expires or repudiate it will not have legal effect between contractual parties.[71] Still and all, for examining the basic difference and the pattern established, the research opts to include them.

1.10 Definition of terms

With the view to clarify the mist surrounding seemingly synonymous terms, this study made a clear distinction between a portfolio investment, FDI, BITs and International Investment Agreements (IIAs)

[69] M Dyson; J Lee and SW Stark (ed.)(2016) Fifty years of the law commission: The dynamics of law reform Hart Publisher at 112.
[70] This assumption is based on the discussion on background of the study.
[71] Article 60 of VCLT.

Portfolio investment can be defined as a type of investment whereby resident entities in one country which seek capital gain without having a lasting interest in another country.[72] Thus, it is one part and parcel of international capital flows which embodied of the transfer of financial assets.[73] Such investment includes, among other things, notes, bond, market instrument and financial derivatives.[74] Whereas, FDI is a situation whereby an oversee investment in which a resident in one country obtain a lasting interest in an enterprise reside in other country.[75] Among other things FDI includes mergers and acquisitions, reinvestment from the profit earns, building facilities and intra company loan.[76] Therefore, the presence of lasting effect and the components are the main glaring difference.

The United Commission on Trade and Development (UNCTAD) defines the term BITs as 'agreements between two countries for reciprocal encouragement, promotion and protection of investments in each other's territory by companies based in either country.'[77]

IIAs refer to agreements that establish binding rules on investment protection. IIAs range from BITs to BITs-like investment arrangement which commonly found in regional, interregional, multilateral and free trade agreements.[78] Thus, IIAs are the broader legal framework that governs issues of investment and it is a proper subset of BITs.

1.11 Literature review

BITs become one of the most common means of attracting FDI. It enables developing countries to attract FDI. For capital exporting countries, BITs can be used as a mechanism to secure protection for their investors in an alien land, which they failed to secure in the international arena. Capital exporting countries insist that expropriation should be permitted if two

[72] UNCTAD Comprehensive Study of the Interrelationship between Foreign Direct Investment (FDI) and Foreign Portfolio Investment (FPI) (1999) A staff paper prepared by the UNCTAD Secretariat at 4.
[73] PC Ekeocha 'Modeling the long term determinates of foreign portfolio investment in Nigeria' '(2012) 3:8 *Journal of Economics and sustainable development* 194-205 at 194.
[74] UNCTAD (n 72).
[75] PN Joubert 'Foreign Direct Investment in Switzerland: benefit and drawback' (2012) 3:1 *The business and management review* at 213.
[76] KM Adeleke; OS Olwe FO Oluwanfolakemi 'Impact of foreign direct investment in Nigeria economy' (2014) 4:8 *International Journal of Academic research in business and social science* at 235.
[77] UNCTAD 2004b as quoted in Jennifer Rank International Investment Agreements and investments in renewable energy (2007) Yale school of forestry and environmental studies, pre-publication draft (file with the author) at 30.
[78] MA Weiss and others International Investment agreements: Frequently asked question Congressional research service (2015) at 4. See also H Mann 'International investment agreements, Business and human rights: Key issues and opportunity' (2008) *International institution for sustainable development* 1-42 at 3.

requirements are there cumulatively: public purpose and accompanied by prompt, adequate and effective compensation.[7980] At this junction one may ask, is it the mere conclusion of BITs beneficial by and own it? There is a gulf of difference between scholars in this regard.

Although in various multilateral agreement developing countries categorically reject the Hull formula by alleging that it is a matter of domestic jurisdiction, in various BITs they have agreed to implement not only prompt, adequate and fair compensation, but also go much further in providing protections for foreign investors and concluded BITs that have more of harm than benefit to developing countries.[81] Although expropriation was the base for coming into existence of BITs, BITs in general govern many other things ranges from standard of treatment to dispute settlement.[82]

While looking into the possible justification for such paradox, one author perfectly capture the ideal when he said:[83]

> From a policy viewpoint, such treaties signify that the countries concerned don't view the Hull rule as undesirable *per se*; the inference is warranted that these countries assume that Hull rule should apply only under conditions of mutual intensified cooperation and that those conditions are not secured by the general norms of present customary international law.

On the other hand, some scholar after reviewing the nature and scope of BITs provisions which exhibit that investor and investment enjoy a higher degree of protection from the political risk of government intervention concluded that BITs not only enhance foreign investment but also served as an instrument for economic liberalization of developing countries.[84]

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[79] This in effect means Hull doctrine. The American secretary of state made the following statement in response to Mexico expropriation was that the Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment there for.(My emphasis).

[80] RJ Smith 'The United Sates government perspective on expropriation and investment in developing countries' (1974) 9 *Vanderbilt Journal of Transitional Law* at 518.

[81] Guzman (n 33) at 7.

[82] Structurally almost all BITs will have preamble, definition of investment and investors, standard of treatment, compensation and expropriation, return of investment and profit, dispute settlement and entry of enforcement and other issues.

[83] R Dolze 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 *America Journal of International Law* 553-589 at 567.

[84] JW Salacude and NP Sullion 'Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard International Law Journal 67-130*

Ethiopia as one of the least,[85] but the fastest growing country,[86] aspires to attract FDI through the mechanism of BITs although what is the real impact of its subject to debate. In this regard one work is worthy of mentioning: 'The Role of Bilateral Investment Treaties in Securing Foreign Direct Investments in Ethiopia.'[87]

As one can see from the very title at least consulting to the BITs Ethiopia conclude is the least expected from the paper. To our surprise, the author did not mention any treaties in the body. To make thing worse, he tries to recommend based on BITs Ethiopia concluded.[88] This is like prescription without any description.

The conclusion, for instance, should be followed from the discussion which envisage in the body. All the same, in his conclusion rather than refereeing to analysis and discussion envisage in the body, he cited other research to support his assertion when he said: [89]

> According to a study by Neumayer and Spess, BITs fulfil their purpose, that is attracting more foreign direct investment to signatory states….BITs concluded by Ethiopia do not only benefit foreign investors, but also benefit Ethiopia by attracting more investment from developed countries. [9091]

Thus, the research cited by the author does not relate to the Ethiopian context and leads to hasty generalization. On the other occasion also the author without showing any link between FDI and BITs in Ethiopia provide his humble suggestion that Ethiopia should conclude more BITs.[92]

On some very important points the author approach is very questionable. In Chapter three, he discusses about the Ethiopian investment legal framework.[93] First and foremost, the list of

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[85] United Nations Committee for Developmental Policy Ethiopia is categorized as one of the least developing countries in the world https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf(accessed March 26, 2109).

[86] According to latest Word Bank Report Ethiopia is one of the fastest growing countries http://pubdocs.worldbank.org/en/575011512062621151/Global-Economic-Prospects-Jan-2018-Sub-Saharan-Africa-analysis.pdf(accessed March 26, 2019).

[87] A Dessay The Role of bilateral investment treaties in securing foreign investment in Ethiopia (2015) LLM Thesis, University of South Africa(file with the author).

[88] As above PP. 68-75.

[89] Robert Talisse and Scott F. Ailki Two forms of straw man, argumentation (2006) unknown publisher 20:3 at 347.

[90] Dessay (n 87) at 64.

[91] In this particular instance the author heavily reliance of literature is exhibited by the fact that he does not mention the impacts of BITs concluded between Ethiopia and developing countries.

[92] Dessay (n 87) at 68.

[93] As above PP. 55-58.

legislatives the author provided is far from complete.[94] Although on those incomplete lists, the author fails to discuss regulation No. 276/2002,[95] and regulation No. 312/2014[96] even in a single instance. More importantly, the discussion on investment Proclamation[97] is condensed. All in all, despite the fact that, this thesis is neither comprehensive nor organized, the author deserves a credit for his pioneer work. Unlike the study under critics, this mini-dissertation assess the main feature of Ethiopia's BITs, legal and institutional framework for investment in Ethiopia and consult the relevant literature in the area before providing a way forward for the identified problems.

On top of this, the joint work of Martha Belete and Tilahun Esmael, provide us glimpse review of Ethiopia's BITs in light with Most Favoured Nation (MFN) treatment standards.[98] The authors observed that most Ethiopian BITs are framed in a more highly general manner as to invite interpretation.[99] Although it is the most comprehensive and breakthrough contribution, as admitted by the authors themselves, the research does not examine the full-fledged frameworks of Ethiopian BITs rather the research limit itself in examining the issue of MFN principle, especially its relationship with dispute resolution clause embodied in Ethiopia's BITs.[100] Unlike this under review, this mini-dissertation assesses the full-fledged Ethiopia's BITs in core and essential aspect which ranged from the definition of investment and investor to dispute settlement provisions.

1.12 Synopsis of the chapters

Structurally, this paper has six chapters. The first Chapter display and layout the roadmap of the research. Chapter two discusses the historical development of BITs. In connection with this the policy justifications behind BITs is discussed. Generally there are two policy justifications: to attract foreign direct investment and as a protection mechanism for the investors and investment.

[94] For instance the author failed to mention Expropriation of Land Holding for Public Purpose and Payment of Compensation Proclamation, Proclamation No. 455/2005, Fed. Neg. Gaz. 11th Year No. 43.
[95] Investment Incentives and Investment areas Reserved for Domestic Investors, Regulation No. 270/2012 Fed. Neg. Gaz. 19th Year No. 4.
[96] Amendment regulation for Regulation No. 270/2017, Fed. Neg. Gaz. 20th Year No. 62.
[97] Investment Proclamation No. 769/2012, Fed.Neg.Gaz. 18th Year No. 63.
[98] M Belete and T Esmael 'Rethinking ethiopia's bilateral investment treaties in light of recent developments in international investment arbitration' (2014) 8:1 *Mizan Law Review 117-144*
[99] As above at 142.
[100] As above at 118.

Finally, the role of BITs in setting the general rules of customary international law will be discussed.

In Chapter three, the research discusses Ethiopia as a country that follow the government model of investment regulation.[101] The chapter will assess the normative and institutional framework for investment in Ethiopia. As part and parcel of normative framework, this Chapter examine the incentives available for investors. Not all areas are open to foreign investors and hence enough attention exerted to clarify, which areas are reserved for foreign investors exclusively, domestic investors exclusively and areas open for foreign and domestic investors.

Chapter four systematically studies the common features or provision in Ethiopia's BITs which have a drastic effect on the host state. As a result, definition of investment and investors, which usually provided interpretative definition for some important words, general standard of treatment, which usually provided what type of remedies are available to the investors, remittance, which usually provided what possible options are there to repatriate profits accrued during the investment, investment dispute, which provided which in case there is disputes which platform is available and compensation, which usually deals about what are the possible remedies in case of expropriation or nationalization of investors' property.

Chapter five unlocks one of the research problems: are the provisions of BITs symmetry to Ethiopia? Two yardsticks are employed to examine the symmetry. First, the possible rights of investors and obligations of the host states that would have exist had they accepted customary international law i.e. had they not concluded BITs. Second, the reciprocal rights and obligations of the host state under various Ethiopia's BITs by way of comparative analysis.

[101] Generally regulation in the economy can be broadly classified in to three: market- base regulation(self-regulation) industry base regulation and government regulation see A Shleifer 'Understanding regulation' (2005) 11:5 *European Financial Management* 439-451 PP. 440-441.

Chapter Two

The Conceptual framework for BITs and its impacts

Introduction

Although currently the world witness unprecedented increase of BITs concluded between states, the history can be traced back to Friendship, Commerce and Navigation agreements which main objective was to facilitate trade but incidentally also deal investment issues. After prohibition of use of force together with absence of agreement on the minimum standard of treatment of aliens, developed countries had no option but to come up with a multilateral investment agreement which never realized. Thus, the only enviable option was to conclude BITs. The main *raison d'être* therefore for developed countries to conclude BITs is to secure investments and investors, but for developing countries the aim is to secure FDI. There are disagreements as to the impact of BITs on FDI, which range from the negative effects to positive impacts on the economic development of developing countries. Although traditionally BITs were concluded between developed and developing countries (North-South), since 1964 there are ever growing BITs between developing countries (South-South). The impact of BITs on the formulation of customary International Law is also very controversial. This Chapter tries to unpack these issues.

2.1 The History and rise of BITs

The history of foreign investment is as old as human beings. Such investments were there in Asia, the Middle East, Africa and the rest of the world.[102] Prior to Second World War most international agreements were primarily concerned with the establishment of trade partnership than protection of foreign investors *per se*. In the early eighteenth century, for example the USA used to conclude Friendship commerce and Navigation (FCN) Treaty. In such agreements it is possible to find provisions concerning protection of alien.[103]

[102] M. Sornarajah The international law on foreign investment 3rd ed. (2010) Cambridge University Press at 19.
[103] JF Coyle 'The treaty of friendship, commerce and navigation in the modern era' (2013) 51 *Columbia Journal of Transitional Law* 302-359 at 327.

In the 18th and 19th centuries, however, foreign investments were taken place in the form of colonization.[104] Because there were overlapping between capitals exporting and importing country under an integrated legal system of colonization, the need to have a separate legal regime for protection of foreign investors was not pressing.[105] In those non-colonized countries, protections were extended in the form of diplomacy. Whenever this failed, covert and overt use of power or force were employed.[106] However, the aftermath of colonization this option was not visible at best and impossible at worst, especially with the coming into effect of UN Charter. Under Article 2 (4) of the UN Charter it is stated that:[107]

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Although the Charter failed to provide as to what means by threat or use of force, the scope of prohibition is very broad and wide and not limited to armed force only.[108] More importantly, it is agreed that this principle has attained the status of customary international law.[109]

Needless to mention, the history of least developed countries has been dominated by struggling to achieve their independence from colonial power.[110] However, even after independence from the colonial power they failed to achieve economic liberalization. Thus, 'expropriation therefore becomes a symbolic economic equivalent to political independence.'[111] The new populist politician in developing countries including Africa with the view to secure political support began expropriating and nationalization of foreign asset.[112]

This is evidently exhibited in a Chile case under president Feri's regime. Before this regime, the stance of Chile government was any measure involves expropriation should be designed to

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[104] J Venderelde 'A brief history of international investment agreements'(2005) 12 *University of California Davis Journal of International Law and Policy* 157-194 at 158.
[105] Sornarajah (n 102).
[106] As Above at 20.
[107] Charter of United Nations Article 2(4).
[108] AH Hsiao 'Is China's policy to use force against Taiwan a violation of the principle of non-use of force under international law' (1998) 32:3 *New England Review* at 72.
[109] L Hannikainen Peremptory norms(Jus cogens) in international law, historical development, criteria, present use(1988) University of Lapland Publications pp. 325-356.
[110] DM Ray 'The cause of expropriation of american property abroad'(1976) 11 *Stanford Journal of International Law* 122-152 at 125.
[111] As Above at 125.
[112] R Berrois, A Marak and S Morgenstern Explaining hydrocarbon nationalization in Latin America: Economics and political ideology(2010) Routlede Taylor and Francis group publisherat 674.

prevent any form of arbitrariness and the measure should be in compliance with the law.[113] All the same, for the sake of political support, Feri's regime makes it clear that expropriation of the copper industry by foreign investor is nothing but enclave of the Chilean economy.[114] Then it is followed by constitutional amendment to enable government to expropriate investors' property. And later two drastic measures were introduced: excluding court from examining copper expropriation and minimizing the amount of compensation due to foreign investors.[115]

One author captures the whole scene of the early aftermath of Second World War for foreign investors when he said: [116]

> In light of what happened in Cuba all of our investments are in jeopardy.... Confiscation feeds the political excitement new governments need and satisfied latent nationalism and the desire to be a complete master in their own house ... It is easy and all it requires is a decree.... As long as it seems easy and free to transfer foreign owned property to the local government, there will be no stopping the practice for some considerable time to come.

Cold War politics dramatically shift the attention from colonialism to ideological confrontation between capitalism and communism. The communism, propagated by former Russia, which emerged as the voice of third world countries, argues that it is the perfect antidote for the problems and imperialist tendency of capitalism.[117] Many socialist countries driven by communism ideology[118] took drastic measures which have a lasting effect on foreign investors. For instance, the government of Romania, which at the time follow communist ideology, issues a Nationalization Act of 1948. In this act, it is quietly stated the effect of ideology in foreign investment when it said;[119]

> The nationalization of the principal enterprises consolidates our economic and political independence, fortifies the forces in their struggle against the attempts of interference with our

[113] FO Viecuno 'Some international Law problems posed by the nationalization of copper industry by Chile'(1973) 67 *American Journal of International Law* 711-727 at 718.
[114] As Above at 713.
[115] As Above at 719.
[116] F Tanneubaum Ten Keys to Latine America (1992) NY:Knopf Publisher at 234 as quoted by Ray (n 110) at 124.
[117] JD Hasken and BN Mamlyuk 'Capitalism, communism and colonialism: Revisiting transitology as the ideology of informal empire'(2009) 9 *Global Jurist* 1-35 at 2.
[118] Karl Marx's, the master mind behind this ideology, believes that certain laws are a means for social and economic change. He argues that communism will create a system whereby society will be satisfied without affecting its member. See C Bowles 'Is communism Ideology becoming irrelevant'(1962) 40:4 Foreign Affairs 555-565 at 553.
[119] NR Doman 'Postwar Nationalization on foreign property in Europe'(1948) 48:4 *Columbia Law Review* 1125-1161at 1128.

> internal matters and rape of our independence, carried on by the Anglo-American imperialists. It stresses our role as an active factor of the democratic and anti-imperialistic front.

As a result of this, there were pressing needs from capital exporting countries to come up with a comprehensive multilateral agreement. The USA for instance, during the Uruguay round of General Agreement on Tariff and Trade (GATT) negotiation process from 1986-1994, proposed the idea to embody comprehensive international legal frameworks to govern the issue of investment. However, it was rejected by many developing countries.[120] Similar efforts were exerted by the USA while in discussion to establish an International Trade Organization (ITO), to embody provisions concerning foreign investors. Although the USA was very successful in including investment terms, the treaty has never come into force.[121] On top of this, there is no agreement as to the minimum international standard of treatment of foreign investors. Developed nation argues that hull formula which stated that in case the host states expropriate foreign property, it should be accompanied by prompt, adequate and effective compensation.[122] They argued that this rule is well established under customary international law and case laws by invoking Norwegian ship owners' case, the Spanish-Morocco claims arbitration and the permanent court of International Justice in the Chorzow factory case.[123] Whereas, developing countries reject hull formula and restrict compensation to 'appropriate standard' in case of expropriation.[124] Therefore, the only visible option was to conclude BITs with capital importing countries.

Republic of Germany becomes the pioneer country to enter into proper BIT with Pakistan in 1959 and because Germany has lost a lot of foreign investment aftermath of the Second World War there was a special concern for protection of foreign investments and investors and they concluded the highest BITs.[125]

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[120] J Kurtz 'A general investment agreement in the WTO: Lesson from Chapter 11 of NAFTA and the OECD multilateral agreement on Investment' (2002) 23:4 *University of Pennsylvania Journal of Law* 713-901 at 717.
[121] As Above pp. 717-718.
[122] R Dolzer 'New foundation of the law of expropriation of alien property' (1981) 75 *American Journal of International Law* 553-589 at 558.
[123] As Above pp. 558-559.
[124] Z Elkins, AT Guzman and BA Simmons 'Competing for capital: the diffusion of bilateral investment treaties,' 1960-2000(2006)60:4 *International Organization* 811-846 at 818.
[125] Gunawardan and Alvarez (n 1) at 545.

As of May 2019 we have 2932 BITs out of which 2346 has come into force.[126] Although there is no global investment agreement, BITs together with the 1958 Convention on Recognition and Enforcement Award (commonly known as the New York Convention), the 1965 Convention on the Settlement of investment disputes between states(commonly known as ICSID Convention) and the 1985 Convention Establishing the Multilateral Investment Agency constitute the international investment legal regime.[127]

2.2 Justifications for BITs

The protection of foreign investment through customary international law failed to provide adequate protection for foreign investors since many developing countries refuse to accept the existence of such practice[128] and the content of customary international law found to be very vague and illusive.[129] More importantly, the enforcement of customary international law was only through espoused.[130][131] After the Second World War various efforts to establish a multilateral investment treaty failed.[132] Thus, developed countries responded to expropriation of foreign asset with mainly developing countries through bilateral investment agreements.[133] Germany, a country which lost substantial amount of foreign asset aftermath of Second World War, became the pioneer in concluding bilateral agreement with Pakistan in 1959.[134] Followed the footstep of Germany the United Kingdom, the Netherland, France, Switzerland and Belgium

[126] This information is available at https://investmentpolicyhubold.unctad.org/IIA (accessed 19 May 2019).
[127] UE Ofodile 'Africa-China bilateral investment treaties: A critique' (2013) 35 *Michigan Journal of International Law* 131-212 at 135.
[128] This was a widespread stance by Latin America the so-called Calvo doctrine which in most BITs it referred as Calvo clause. As per this doctrine any disputes should be resolved locally and foreign should be treated in the same manner as domestic investors see JC Baker and J Yoder 'ICSID and the Calvo Clause a hindrance to foreign direct investment in LDCs' (1987) 5 *Ohio State Journal on Dispute Resolution* 75-96 at 75.
[129] This is well noted by Karol Wolfker when he said the main problems of customary international law 'lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved.' Karol Wolfker(1993) Custom in present international law 2nd ed. Nijhaff Publisher at Xiii as quoted in AT Guzman 'Saving customary international law'(2005) 27 *Michigan Journal of International Law* 115-176 at 124.
[130] KJ Vandevelde 'A brief history of international investment agreement' (2012) 12 *University of California Davis Journal of International Law and Policy* 157- 194at 160.
[131] Espouse means to bring an action by state on behalf of its nationals see AL Palenzuela 'The International Court of Justice and the standing of corporate shareholders Under international law: Elettronica Sicula v Raytheon(U.S v. Italy) (2015)' 1 *University of Miami International and Corporate Law Review292-308* at 292.
[132] See the above discussion.
[133] Vandevelde(n 130) at 168.
[134] JW Salacuse and NP Sullivan 'Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain' (2005) 67 *Harvard International Law Journal* 67-130 at 73.

concluded bilateral agreements with developing countries.[135] The USA during President Carter Administration also decided to launch BITs despite the fact that the negotiation did not complete until 1980s.[136] This is pretty much attributable to the difference point of view between capital importing and exporting countries.

Historically, there were divergent of point of view regarding the benefit and purpose of foreign investment. The classical school of thought on foreign investment believes that foreign investment is wholly beneficially to the host country.[137] They argue that foreign capital brought to host country increase the domestic capital and increase the leverage to spend other capital for social and public benefit.[138] They also strongly assert that the employment opportunity and skill transfer were not possible without foreign investment.[139] On the contrary, the dependency school of thought is of the opinion that foreign investment is wholly beneficial to home country and investors. The proponent of this idea, Raul Prebisch, clearly state that:[140]

> As things stand, the Latin American industrialist finds himself at a disadvantage in trying to meet foreign private competition. Healthy competition must be based on equality of conditions; otherwise it leads to the destruction or subordination of the weaker party. The resulting conflicts, then overflow into political fields, causing tensions and antagonisms.

Even the USA study on expropriation find out that most of the least developed countries believe that their 'economies are excessively dependent on foreign companies.'[141] The third and the most pragmatic approach is a middle path school of thought. As per this theory aftermath of the Cold war and collapse of communism, which enable capitalism to emerge as the hegemony of ideology, makes it was not possible for developing countries to stick the dependency point of view.[142] On the other side of the ledger, with the ongoing globalization and economic crisis, it is unacceptable for developed countries to stick to the classical point of view.[143] Thus, countries have now adopted and function under the middle path theory.

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[135] As Above at 73.
[136] Vandevelde (n 130) at 170.
[137] Sornarajah(n 102) at 48.
[138] As Above.
[139] As Above.
[140] R Prebisch 'Joint responsibility for Latin America progress' (1961) 39 Foreign Affairs pp. 630-631.
[141] Bureau of intelligence and research, USA Department of State, Nationalization, Expropriation and other taking of united states and creating foreign investment since 1960(1971) as quoted in Ray (n 110) at 129.
[142] Sornarajah (n 102) at 55.
[143] As Above at 55.

Although the governing theory is a middle path theory, there is variance as to the purpose of foreign investment in general and BITs in particular.

From the developing country's perspective the crux policy justification for concluding BIT is to enhance FDI which otherwise unavailable.[144] This is well reinforced for instance, in Ethiopia-Austria BIT when it says 'desiring to create favourable conditions to the investments of investors of a Contracting Party in the territory of the other Contracting Party.' [145]

Although South-South BITs are systematically varied from their counterpart of North-South BITs, in a sense that they are not comprehensive and a lot of caveat and restriction, the purpose is still the same: to attract FDI.[146] This is well reflected, for instance, BIT concluded between Iran and Ethiopia when it says'……to create and maintain favourable conditions for investments of the investors of one Contracting Party in the territory of the other Contracting Party.'[147]

However, the Model BIT provided by Southern African Development Community (SADC) expands the purpose of BIT to include, among other things: to enhance sustainable development,[148] human rights and human development.[149]

From a developed country's perspective, it is an effective mechanism of extending security for any investment made by their citizen in the host country. Before any investment has taken place the investors have in a better position to dictate the terms and condition of the contract over the host state which is in need of foreign investment for various reasons.[150] However, after the investment is made the host state can change the promise and commitments, single handle usually through domestic law. Thus, the whole purpose of BITs for capital sending country is to avert this 'credible commitment problem.'[151] The USA Model BIT reinforce this when it says

[144] AR Johnson Rethinking Bilateral Investment treaties in Sub-Sharan Africa(2010) 59 *Emroy Law Journal* 920-967 at 919.
[145] Ethio-Austria BIT.
[146] IT Odumosu-Ayanu The significance of south-south BITs for the international investment regime: a qualitative analysis(2010) 30 *South Caroline International Journal Law and Business* 101-130 at 102.
[147] BIT between Ethiopia and Iran.
[148] As per the Model BIT sustainable development requires fulfillment in three pillars: economic, social and environmental. See also T Gazzini Bilateral 'Investment treaties and sustainable development' (2014) 15 *Journal of World Investment and Trade 929-963.*
[149] As Above preamble.
[150] T Allee and C Peinhardt 'Evaluating three explanation for the design of bilateral investment treaties' (2014) 66:1 *World Politics* 47-87 at 58.
[151] As above at 58.

'the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration.'[152] Despite seeking of security is emerged as forefront reason, developed countries also look to enhance resource utilization, living standard, environmental standard and labour rights.[153]

2.3 Pattern in use of BITs

Traditionally BITs were assumed to be concluded between capital exporting countries, developed countries and capital receiving countries, developing countries.[154] However, the South-South BITs began to emerge in the early 1960s when Kuwait and Iraq concluded BIT in 1964. The numbers of BITs concluded amongst developing countries sharply rose from about 63 at the end of the 1980s to 833 at the end of the 1990s.[155] To date, South–South BITs account for 25% of the universal investment treaties which involve 104 developing countries.[156]

Due to narrow technology and developmental gaps between host and home state and the ability of Third World investors to cope up with uncertainty enables them to deliver product and service which suit the developing countries and make a successful venture.[157] The presence of China investment in Africa contributes a lot of tremendous growth of south-south BITs. For instance, China concludes only one BIT in 1980s and 13 in 1990s, but as of May 2019 China concluded 145 BITs.[158]

South-South BITs have salient features which distinct from their counterpart North-South BITs. First and foremost, unlike North-South BITs, which focus on protection of investors and liberalization of investment areas, South-South BITs focus more on FDI flow and they usually limit transparency requirement only after the adoption of laws and regulations, more exceptions caveat and embodied the so-called folk-in-the-road clause, which compel investors to make a choice between domestic and international dispute settlement before resorting to litigation.[159]

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[152] USA Model BIT.
[153] As above the preamble.
[154] UNCTAD (n 72) at 31.
[155] UNCTAD Bilateral Investment Treaties 1959-1999(2000) at iii.
[156] UNCTD South-South Cooperation in International Investment arrangements(2005) at 5.
[157] Odumosu (n 146).
[158] For a list of China's BITs together with their signing countries and effective date can be found at https://investmentpolicyhubold.unctad.org/IIA/CountryBits/42 (accessed 19 May 2019).
[159] UNCTAD (n 72) pp. 31-32.

The second feature, unlike its counterpart North-South BITs, South-South BITs are usually concluded without much consideration and deliberation. The underlying assumption is that south-south economic transactions are good-nature, mutually-beneficial and always create win-win outcome.[160] The third feature is that usually South-South BITs concluded on a certain geographical sphere.

2.4 The efficacy of BITs in formulation of customary international law

The source of international investment law can be inferred from the source of international law provided under Article 38 (1) of the Statute of the International Court of Justice. Accordingly, the sources of international investment law are treaties, customary international law, general principles of law recognized by civilized nation, judicial decision and writing of the most highly qualified publicity of the various nation.[161] Customary international law emerged when there is a pattern of actual behaviour on the parts of states in conformity with the rule and the feeling to abide by the rule also known as *opinio Juris*.[162] Jurists argue that from consistence state practice it is possible to deduced the presence of tacit consent.[163] To state differently, unlike official acceptance in a manner evidently show their feeling to be abided by the practice, the similarity of taxonomy of patter implicitly exhibit their feeling to be abided by the established custom.

Some scholars argue that the fact that developing countries sign BITs in such large scale unequivocally can be cited as evidence of their willingness to conform customary international law.[164] The fact that states sign up to treaties that totally opposite to their previous stance on the non-existence of customary international law show their adherence for 'traditional conceptions of the law of state responsibility for foreign investment.'[165] Dr. Mann tries to provide his argument by posing the question:[166]

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[160] Ofodile (n 127) at 135.
[161] See The statute of International Court of Justice. See also L Dingle Sources of Public International Law(2009) 9 *Legal Information Management* 273-283 at 273.
[162] SJ Anaya 'Customary international law' (1998) 42 *America Society International Law Proceeding* pp. 41-42
[163] E Kadens and EA Yonge 'How customary is customary international law'(2013) 54:3 *William and Mary Law Review* 886-920 at 892.
[164] AZ Gunawardana 'The inception and growth of bilateral investment promotion and protection treaties'(1992)86 *America Society International Law proceeding* 544-549 at 549.
[165] FA Mann 'British Treaties for the promotion and protection of investments' (1982) 52 *British Yearbook of International Law* 241-254 at 249-51 as quoted in B Kishoiyian 'The Utility of bilateral investment treaties in the

> Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law yet to accept it for the purpose of these treaties?

This stance was vehemently advocated by the legal adviser of USA Department of state when he said 'the history of these agreements indicates that the parties recognized that they were thereby making the customary rule of international law explicitly in the treaty language and reaffirming its effect.'[167]

However, for varieties of reasons it is possible to argue that BITs do not lead to establishment of customary international law for the following reasons. First and foremost, the very inceptions of BITs were absent of uniform standards for treatments of aliens. There were two opposite sets of view and norms from developing and developed world. Sornarajah following this makes a conclusion that:[168][169]

> It was in this context that investment treaties came into play so that states could bilaterally decide on what rules of protection would apply. These treaties were intended to be *lex specialis*, the general rules being unclear.

Second, customary international law is of general applicability[170] whereas BITs do not extend to all investors rather they are limited to those who fail under the definition of investors. Even more, some treaties even required the investment to be approved[171] and some other requires the

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formulation of customary international law'(1993) 14:2 *Northwestern Journal of International Law and Business* 327- 375 at 328.

[166] As Above.

[167] DR Robinson 'Expropriation in the restatement (Revised)'(1984) 78 *America Journal of International Law* 176-178at 177 as quoted in PJ Smith 'Determining compensation for the Expropriation of Nationalized Asset'(1997)23:1 *Monash University Law Review* 159-170 at 163.

[168] Sornarajah (n 102).

[169] This argument also very substantially supported by Kishoiyian (n 165).

[170] Unlike treaties, which have binding effects between and among member states, the rules emanated from customary international law are binding on all state unconditionally see Cheng Custom The future of state practice in Macdonland and Johanston(ed.) The structure and process of international law(1985) Martinus Nijhoff publisher at 539 as quoted in O Elias The Relationship between General and particular customary international law(1996)8 *African Journal of International and Comparative Law* 67-88at 67.

[171] For instance Article 6(e) of French Model BIT provided that 'The nationals of either Contracting Party, who have been authorized to work on the territory or in the maritime area of the other Contracting Party, as the result of an approved investment, shall also be permitted to transfer to their country of origin an appropriate proportion of their earnings.'(My emphasis).

investment should be in accordance with the laws and regulations.[172] In such narrow application, it is not visible to argue they will create customary international law.[173]

Third, for customary international law establish not only consistence state practice, but also a sense of legal obedience is required. Since the existing BITs neither presents a feeling to abide by it (*opinio juris*) nor serves as evidence of the existence of such obligation. In the absence of this element, it is not logical to infer customary international law from BITs.[174]

Fourth, to determine whether BITs reflect *opinio juris* of states it is imperative to examine the policy justification for conclusion of BITs.' If BITs are signed out of a sense of obligation or to clarify a legal obligation, they must be considered evidence of customary international law.'[175] However, the main rationales behind the conclusion of BITs are to attract foreign investors and to extend security for foreign investors.[176]

The fifth, on many occasions UN General Assembly provided a resolution which rejects the very content of minimum customary international law. Although the resolution of UN General Assembly has not binding role, it has a certain level of normative value. This is well noted by the International Court of Justice (ICJ) when in its advisory jurisdiction said:[177]

> General Assembly resolutions, even if they are not binding, may sometimes have a normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.

UN General Assembly Resolution on Permanent Sovereignty over Natural Resource of 1962 and 1973, UN General Assembly Resolution on a New International Economic Order of 1974, UN General Assembly on the Charter of Economic Rights and Duties of States of 1974 explicitly or impliedly reject the notion that there is customary international law for protection for aliens.

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[172] For instance Norway Model BIT under Article 2(i) while defining what means by investor provide that 'any entity established in accordance with, and recognised as a legal person by the law of a Party, whether or not their activities are directed at profit.'(My emphasis).
[173] As Above at 233.
[174] Guzman (n 33) pp. 685-686.
[175] As Above.
[176] See the above discussion.
[177] International Court of Justice Legality of Use of the Threat or Use of Nuclear Weapons(1996) Paragraph 70 at 226.

2.5 The impacts of BITs on FDI

Although scholars have devoted to finding out the impact of BITs on FDI, they is no consensus as to the impact and consequence of concluding BITs on FDI.[178] The result of research output ranges from the positive contribution to counterproductive of BITs for developing countries. After examining 119 developing countries during 1970 to 2001 Neumayer and Spess concluded that there is consistent and robust positive effect of BITs on FDI inflows to host country.[179] Some other argue that although BITs do stimulates FDI flow between contracting states, the moment the host country subject to arbitration it will decline.[180] After analysing twenty years of BITs Hallward-Driemeier made a conclusion that those countries which have strong domestic institutions benefit a lot from concluding BITs whereas those countries which have weak domestic institution benefit little from BITs.[181]

Tobine and Busch come up with a different finding which makes them to conclude that although BITs always attract FDI, 'this positive association will decrease as the overall number of BITs signed by the developing country with the other wealthy states increase.'[182] Thus, as per there finding there is an inverse relationship between the number of BITs developing countries and positive impacts on FDI.

Still some argue that BITs have a neutral effect on FDI. They argue that BITs have never mattered for investor in making a crucial decision when and where to invest.[183] Even after making an investment, it is rare to find investors count on BITs to strengthen their security and

[178] This is partly because the methodology employed are quite different. For instance JW Yackee(n 183) employed multi-method of regressional analysis; E Aisbett Bilateral investment treaties and foreign direct investment:Correlation versus causation(2007) *CUDARE Working Papers* employed model and empirically account for endogneneity of BITs adoption; E Aisbett; M Busse and P Nunnenkamp (n 179) and W Mine 'Do bilateral investment treaties encourage FDI in the GCC Countries?'(2010)2:1 *African Review of Economics and Finance* employed impact of claim test; M Hallward- Driemeier (n 181) employed pure empirical test.

[179] E Neumayer and L Spess 'Do bilateral investment treaties Increase foreign direct investment to developing countries' (2005) 33:10 *World Development* 1567-1585 at 1568.

[180] E Aisbett; M Busse and P Nunnenkamp 'Bilateral investment treaties do work: Until they don't'(2016) *Kiel Working Paper* No. 2021 1-22 at 1.

[181] M Hallward-Driemerier 'Do bilateral investment treaties attract FDI? Only a bit….and they could bite'(2003) *Working Paper No.* 3121 World Bank Development Research 1-36 pp. 22-23.

[182] JL Tobin and ML Busch 'A BIT is better than a lot: Bilateral investment treaties and preferential trade agreement'(2010) 62 *World Policy* 1-26 at 13.

[183] JN Yackee 'Do bilateral investment treaties promote foreign investment-some Hints from alternative evidence'(2011) 51 *Virginia Journal of International Law* 397-442 at 400.

concluded that 'BITs have probably caused of the massive increase in foreign investment to the developing world that began in the 1990s.'[184]

The latest research output and government position of developing countries seems to acknowledge the zero or negative and hand tying impact of BITs. It is quite impossible to attract FDI by mere conclusion of BITs without having a domestic institution link an independent judiciary which is capable of enforcing contractual agreement and property rights, an effective bureaucracy, transparent and rational policy making process.[185] Moreover, BITs have counterproductive effect in a sense that those countries which have ineffective domestic institutions are highly likely to experience inward flow of FDI by concluding BITs.[186] This implies developing countries tend to forget the need to have reform in domestic institutions because of smoke screen effects of BITs. The government of South Africa made it clear that' due to the severe impact that BITs may have on both constitutional imperative and government's policy space, coupled with the financial liability, no further BITs should be entered into.'[187] As a matter of fact, the South Africa has not entered into BIT since then.[188]

Concluding remarks

Although the history of investment is as old as the history of human being, the proper investment protection extended to foreign aliens is a very recent phenomenon. Before the Second World War the need to introduce a comprehensive legal regime to protect foreign investors were no pressing because of the capital exporting countries exert their leverage on the capital importing countries either in the form of colonization or use of force. However, after the Second World War most countries got their independence and begin to exercise their sovereignty, which include expropriation of foreign investors' property. As a result of this new development, countries began to conclude BITs. From capital importing countries' perspective the main

[184] As Above pp. 400-401.
[185] RC Chen 'Bilateral investment treaties and domestic institutional reform'(2017) 55 *Columbia Journal of Transitional Law* 547-591 PP. 570-572.
[186] Neumayer and Spess (n 179) at 1568. The authors assert there is no strong evidence BITs might be served as substitutes for domestic institutions.
[187] Republic of South Africa bilateral investment treaty policy framework review Government Position Paper(2009) at 24.
[188] See the official document released by the South African government which is acceptable at www.dirco.gov.za (accessed 14 September 2019).

justification for concluding BITs is to attract FDI. Whereas, for capital exporting countries the main driven is to secure permanent protection for their investment and investors in the host state. At the early stage, BITs used to be concluded between developing countries, as capital importing and developed countries, as capital exporting countries. However, through time it becomes quite common to find BITs concluded between two developing countries. Even if there is a tremendous pattern similarity in various BITs as to their content and taxonomy, for a variety of reasons, it is quite difficult to reach a conclusion that this pattern similarity will lead to the establishment of customary international law. Despite the fact that, there is tremendous growth in BITs amongst state, there is no consensus as to the impact of BITs on FDI. Some argue that conclusion of more BITs implies the country's willingness to extend protection to foreign investors and this will help FDI to flock to the host state. Some others argue that, the host state by engaging in serious of commitment expose itself for narrowing its policy space which has a negative impact. Still others hold that the impact of BITs on the host state is conditional in a sense until the host state sued the effect is positive but afterwards it will have a declining effect.

Chapter Three

A brief overview of legal and institutional framework for investment in Ethiopia

Introduction

Although with the collapse of communism[189], capitalism emerged as the dominate economic ideology, which heavily relied on private sector as to the production and distribution of service, countries still retain the power to regulate.[190] This is well supported by market failure to the economy, which can be 'corrected by politically directed adjustments in the rules guiding market participants.'[191] On top of this, a recent and unprecedented economic crisis of 2008 wakes up countries for tight regulation in the economy and investment.[192][193]

Every state has its own national framework that governs investment.[194] Despite the difference in degree and balance, national framework governing investment revolving around two issues: to encourage or incentivise[195] and control investment.[196] Countries usually implement their regulation in terms of the licensing system and penalized those who failed to live up to their expectation by revoking their license.[197] This chapter discuss about the legal and institutional framework put in place for investment and investor under Ethiopian law.

[189] Communism is an ideology which strive to achieve common life by abolishing private or family property. see R Kaye 'Capitalism and communism: property in divergent world'(1971) 13 *Kingston Law Review* 13- 24 at 13.
[190] O Raban 'Capitalism, liberalism and the right to privacy'(2012) 86 *Tulane Law Review* 1243-1288 at 1244.
[191] B Buchana 'Market failure and political failure' (1988) 8:1 *Cato Journal* 1-13 at 3.
[192] For discussion please see A Supiot 'A legal perspective on the economic crisis of 2008'(2010) 149:2 151-162 *International Labor Law.*
[193] The champion of capitalism or neo-liberal economic ideology, USA, were forced to intervene in the market to prevent the spill over effect and system risk in the whole structure of the economy. This is well manifested when government bailout big companies like AIG and inject money to banking sector. For more enlighten discussion on this point please see K Rasmussen and A Skeel 'Government intervention in an economic crisis'(2016) 19:1 *University of Pennsylvania Journal of Business Law* 7-48.
[194] Salacuse (n 618) at 36.
[195] Investment incentive could take various forms: reduction or elimination of tax, free land and employee's share from home country which otherwise were not permissible.
[196] As Above.
[197] Soronaja(n l02) at p. 77.

3.1 Legal framework for investment in Ethiopia

3.1.1 Constitution

The constitution is the supreme law of the land[198] and any law, practice and decision of officials contradict this grand norm it will become null and void.[199] Although with the exception of Article 51(4) which empower the federal government to come up with foreign investment policies and strategies, there is no provision which deal about investment. However, there are provisions which are far reaching impact on investment. For instance, there is a high FDI in agricultural sector into Ethiopia[200] and one of the factors for such flow is access to land.[201] One of the hallmark features of FDRE Constitution is the ownership of land and natural resources are belonging to the state and the people of Ethiopia.[202] To put differently, land is communally owned property and it is impossible to own land privately. Nevertheless, the government shall ensure right of private investor to use the land with payment.[203] Quite interestingly, both tiers of government, i.e. Federal and regional government[204] have the competency to administer land issues.[205]

The other issue which has a tremendous effect on investment is tax law and policy.[206] As indicated under the constitution both federal and regional government have the competency to

[198] Article 9(1) of the FDRE Constitution. There is unsettle controversy concerning the status of constitution vis-à-vis international law. For more detail discussion on this debate please see T Bulto The Monist-Dualist divide and the supremacy clause: Revising the status of human rights treaties in Ethiopia(2009) 23:1 *Journal of Ethiopia Law* and I Idris 'The place of International human rights conventions in the 1994 Federal Democratic Republic of Ethiopia(FDRE) Constitution'(2000) 20 *Journal of Ethiopia Law.*

[199] As above.

[200] S Mekohnen 'Rights of citizens and foreign investors to agriculture land under the land policy and laws of Ethiopia'(2012) 1 *Haramaya Law Review* 33-42 at 31.

[201] As above.

[202] Article 40(3) of the FDRE Constitution.

[203] Article 40(6) state that'… government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law…' (My emphasis). Therefore, the right to investors still is to use and collect the fruit i.e. usufractury right rather than owning the land.

[204] Ethiopia follow Federal form of government which presuppose the existence of two co-ordinate but not subordinating relationship between federal and regional government. For more enlightened discussion please see A Fiseha Federalism and the accommodation of diversity in Ethiopia: a comparative study (2005) Enfield Publishing

[205] Article 51(5) cum Article 52(2)(d) of the Constitution.

[206] Please see T Smith 'Tax policy and foreign investment'(1969) 34 *Law and Contemporary Problems* 146-156.

levy and collect taxes.[207] These two tiers of government should take necessary steps to protect taxpayers from the arbitrary imposition of tax.[208]

3.1.2 Subsidiary legislatives

With the view to encourage and expansion of investment which in turn leads to economic growth,[209] Ethiopia put in place comprehensive investment laws. According to investment proclamation,[210]investment is defined as the expenditure of capital[211] by investor to existing or newly established enterprises.[212213] For the purpose of differentiating from domestic investor, the investment proclamation defines foreign investor as a foreigner or enterprise wholly owned by foreigners or jointly owned by foreign and domestic investors.[214] As per the investment proclamation there are four kinds of investment. First, those areas of investment which are exclusively reserved for government.[215216] Second areas of investment reserved for domestic investors.[217] Third, areas of investment allowed[218] for foreign investors[219] and finally, areas of investment which can be conducted through public-private partnership.[220221]

The investment proclamation is silent as to which areas are reserved for domestic investors and which areas are permitted for foreign investors. However, under Article 3(1) of regulation no.

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[207] Article 97, 98 and 99 of the FDRE Constitution.
[208] T Lencho 'The Ethiopia income tax system: policy, design and practice'(2014) PhD Dissertation (file with the author) at 108.
[209] The first and the second paragraph of preamble to Investment Proclamation No. 769/2012 *Fed. Neg. Gaz*. 18th Year No. 63(investment proclamation).
[210] As above.
[211] This can be either in cash or in kind or both.
[212] Article 2(1) of the investment proclamation.
[213] The investment proclamation define enterprise in broad way as any undertaking establish to make profit see Article 2(2) of the proclamation.
[214] Article 2(6) of the Investment Proclamation.
[215] As per Article 6 of the Proclamation transmission and distribution of electric energy, postal service with the exception of courier and air transport with the capacity of more than fifty passenger are exclusively reserved for government.
[216] Currently there is a serious move to liberalize this sectors for private investors for more information see Xinhua Ethiopia to evaluate privatization of large state-owned enterprise 05 August 2018. The full news is available at http://www.xinhuanet.com/english/2018-08/05/c_137368315.htm(accessed 29 June 2019).
[217] Article 7 of the Investment Proclamation.
[218] Here it is very important to note the fact that the wording is different. For domestic investor those areas are reserved but in case of foreign investors it said allowed which means if domestic investor has the willingness and the ability, they can engaged in those business.
[219] Article 8 of the Investment Proclamation.
[220] Article 9 of the Investment Proclamation.
[221] The issue of PPP is well regulated under in Proclamation No. 1071/2018.

270/2012, it is indicated that financial institution,[222] shipping service,[223] preparation of indigenous medicine, advertisement[224] and air transport which carry below fifty passengers are reserved only for domestic investors. On the other hand, Article 4(1) of the same regulation provided that' A foreign investors shall be allowed to invest in areas of investment specified in the schedule attached hereto, except those areas provide for in number 1..3.3,[225] 1.4.2., [226]1.7,[227] 1.11.3,[228] 1.11.4,[229] 5.3, [230]6.2, [231]8.2,[232] 9.2,[233] 9.3,[234] and 12[235] of the schedule' This is a positive list approach which implies foreign investors are in principle allowed to engage in any areas than those prohibited once.[236]

The same proclamation provides that the permit and renewal requirement that should be complied by investors[237] and in case the investor violates the relevant laws; the authority may revoke or suspend the license.[238] There is also an incentive regime for investors like ownership of immovable property,[239] guarantee and protection,[240] remittance of fund, tax exemption[241] and other incentives.[242]

[222] This include banks, insurance and micro-credit and saving service.
[223] This include packaging and forwarding service.
[224] This include mass media and broadcasting service.
[225] Finishing of fabric, yarn, warp and weft, apparel and other textile products by bleaching, dyeing, shrinking, sulfurizing, mercerizing or dressing.
[226] Tanning of hides and skins below finished level.
[227] Printing Industry.
[228] Manufacture of cement.
[229] Manufacture of clay and cement products.
[230] Tour operation below grade 1.
[231] Construction contracting below grade 1.
[232] Provision of kindergarten, elementary and junior secondary education by constructing own building.
[233] Provision of diagnostic center service by constructing own building.
[234] Provision of clinical service by constructing own building.
[235] Capital goods leasing, excluding leasing of motor vehicles.
[236] For more information regarding positive and negative list approach please see S Yang China's administrative mode for foreign investment: from positive list to negative list(2015) 33 *Singapore Law Review.*
[237] Article 12-17 of the Investment Proclamation.
[238] Article 19 of the Investment Proclamation.
[239] As per Article 390 of Civil Code in principle no foreigner is allowed to own immovable property.
[240] The investment proclamation made it clear that no foreign investor is expropriated for public purpose, in conformity with the law with payment of compensation. Expropriation proclamation i.e. Proclamation No.456/2006 under Article 2(5) made it clear that what constitute public purpose is defined by appropriate body. Furthermore, under Article 7(2) of the same proclamation, the compensation is based on replacement cost of the property.
[241] Exemption of various taxes see Article 5-15 of the regulation.
[242] For instance access to land for long terms urban licensing system under Proclamation No. 271/2011.

3.2 Institutional framework for investment in Ethiopia

3.2.1 Ministry of Trade

One of the most important organs in the administration of investment is Ministry of trade.[243] One of its mandates is to provide commercial registration and license for investors in accordance with the relevant law.[244] However, after the license is issued it will be the mandate of the Ethiopia Investment Agency to register and to revoke the license.[245] On top of this, it is the mandate and competency of Ministry of Trade to give approval when foreign investors desire to buy shares or the whole enterprise of existing venture.[246] The main objective of the Ministry is to establish globally competitive trade sector.[247] One key policy strategy to achieve this grand objective is through implementation of effective domestic-foreign investor partnership.[248]

3.2.2 Ministry of Industry

The other key administrative organ which has many intersection points with investment is Ministry of Industry.[249] One of the main mandates of the Ministry is to enhance expansion of industry[250] and investment by way of supporting their investment.[251] This is also recognized as a mission of the Ministry when it said: 'promote and expand the development of industry by creating conducive enabling environment for the development of investment.'[252](My emphasis) Moreover, the Ministry has the final decision maker in the privatization process and public-private partnership proposed by private investors.[253]

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[243] Out of twenty five Ministry recognized under Ethiopia law, Ministry of trade is one of them. Please see Article 9(10) of Proclamation No. 916/2015.
[244] Article 22(6) of Proclamation No. 916/2015.
[245] Article 30(2)(e) of Investment Proclamation.
[246] Article 12(3) of the Investment Proclamation.
[247] This information is accessed from the official website of the Ministry which is available at http://www.mot.gov.et/vision-mission-objectives(accessed 29 June 2019).
[248] This information is accessed from the official website of the Ministry which is available at http://www.mot.gov.et/policies-and-strategies(accessed 29 June 2019).
[249] This Ministry is well recognized under Article 3(9) of Proclamation No. 916/2015.
[250] Article 21(2) of Proclamation No. 916/2015.
[251] Article 21(14) of Proclamation No. 916/2015.
[252] This information is accessed from the official website of the Ministry which is available at http://www.moin.gov.et/-4(accessed 29 June 2019).
[253] Article 9 of Investment Proclamation.

3.2.3 Ethiopia Investment Commission

The Ethiopia Investment Commission (the Commission)[254] is the main organ entrusted to administer the day to day activities related to investment.[255] The Commission has jurisdiction competency, both in domestic and foreign investors.[256] The Commission is led by the Investment Board, which in turn headed by the Prime minister.[257]

The Commission will cause the registration of foreign currency brought by foreign investors,[258] a technology transfer agreement[259] and collaboration agreement between the foreign and domestic investor.[260] The Commission among other things is mandated to initiate policy and implement any measures that create a conducive investment environment, to negotiate bilateral investment agreements, serve as liaison between investors and other relevant organ and to provide advisory service to investors.[261] With the view to create conducive investment environment, the Commission also provide a one-stop shop service.[262] The Commission on the behalf of foreign investor can execute land request and residence permit.[263]

Concluding remarks

Investment and investors are well regulated under the Ethiopian legal system. Although the grand norm of the country's legal system, the Constitution, does not explicitly address the issue of investment and investors, it deals about various issues the implication of which has far reaching consequence. However, the issue of investment and investor is well regulated under subsidiary law principally investment proclamation, Proclamation No. 769/2012. Generally speaking, there are four classifications of investment areas under Ethiopia legal system: areas of investment exclusively reserved for only government, areas of investment exclusively reserved only for domestic investors, areas of investment which is permitted for both domestic and

[254] Although under the parent Proclamation i.e. Article 2(14) of the investment proclamation the Commission was express as agency when it established as per regulation no. 313/2014 it came out as Commission.
[255] This can be inferred from the close reading of Article 4 of the Investment Proclamation.
[256] As above.
[257] Article 4 of regulation No. 313/2014.
[258] Article 11(5) of the Investment Proclamation.
[259] Article 21(1) of Investment Proclamation.
[260] Article 22(1) of Investment Proclamation.
[261] Article 28 of Investment Proclamation.
[262] Article 30 of the Investment Proclamation.
[263] Article 30(4) of the Investment Proclamation.

foreign investors and finally, areas of investment which can be conducted by public-private partnership.

On top of legal framework, institutional framework for investment also put in place. The principal institution which follow-up and provide assistance is the Ethiopia Investment Commission, which is headed by the prime minister. Ministry of trade and the Ministry of industry also have a role to play in regulating and facilitating investment and investors.

Chapter Four

Basic structure of Ethiopia's BITs

Introduction

The whole purpose of this Chapter is to examine the core elements of Ethiopia's BITs. Ethiopia is a country located in Africa and it covers more than 1,000,000 square kilometres of land, of which 104,300 square Kilometres are covered by water.[264] This makes the country the 27th largest nation in the world.[265] Ethiopia is the second most populous country in Africa next to Nigeria with approximately 105, 350,020 million people.[266] Ethiopia share border with Kenya, South Sudan, Sudan, Djibouti, Eretria and Somalia.[267]

The country which for long was ruled by feudalism came to an end during 1974 when the country was torn with social and class struggle which leads to the emergence of socialist ideology and political system.[268] During May 1991 however the *Mengistu* regime, which official submit and adopted socialism ideology, was overthrown by the combine effort of the *Tigrean* People's Liberation Front(commonly known as TPLF) and the Eritrean People's Liberation Front(commonly known as EPLF).[269] The ruling party, Ethiopia People's Revolution Democratic Front (commonly known as EPDRF) drastically shift the economic strategy of the country since 1991 from socialism to market economy in a way of 'neo-liberalization rooted in the TPLF's Leninist Origins.'[270] Since the turn of the Century Ethiopia is witnessing unprecedented economic growth in the content. With the exception of few instances the country managed to register double-digit economic growth.[271] World Bank in its 5th report on Ethiopia Economy stated that:' a decade of remarkable double digit growth rates helped the economy to

[264] This information is available at https://www.worldatlas.com/af/et/where-is-ethiopia.html(accessed 24 May 2019).
[265] As Above.
[266] This information is available at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (accessed 24 May 2019).
[267] This information is available at http://worldpopulationreview.com/countries/ethiopia-population/(accessed 24 May 2019).
[268] John Markakis Garrison 'Socialism: The case of Ethiopia'(1979) *MERIP Reports No.* 79 3-17 at 3.
[269] M Ottaway 'The Ethiopian transition: Democratization or the new authoritarianism'(1995) 2:3 *Northeast African Studies* 67-87 at 70.
[270] T Hagmann and J Abbink 'Twenty years of revolutionary democratic Ethiopia 1991 to 2011'(2011) 5:4 *Journal of Eastern African Studies 579-595* at 587.
[271] NH Broussar and TG Tekleselassie 'Youth unemployment: Ethiopia countries study'(2012) *Working Paper 12/0592* 1-37 at 3.

cope well with the most recent challenges encountered in 2015/16.'[272] The report also appreciates and expects the completion of the Addis Ababa-Djibouti railway line and the commencement of new industrial parks i.e. *Hawassa* and *Bole-Lemi* phase III, to enhance the export performance of the countries.[273]

Because of different factors, there is a high flow of FDI to Ethiopia. Although globally FDI flow fell by 23 percent in 2016 and the sharp decline of cross-border investment, both in developed and transitional economies, still Ethiopia manage to attract a substantial amount of FDI.[274]According to UN finding' East Africa, the fastest growing in Africa, received $7.6 Billion in FDI in 2017 and Ethiopia absorbed nearly half of this amount.[275] With the view to keep the momentum Ethiopia concluded various BITs with different countries. Thus, this Chapter assess the key feature of Ethiopia's BITs.

4.1 Definition of investment and investor

Historically, investment protection was analogized with the protection of' property, rights and interests.'[276] The definition of investment is crucial in any BIT because it demarcates the scope of application of the treaty and it is also the base line for assumption of jurisdiction[277] where in case dispute arises.[278] This implies that the arbitrators shall not entertain the case if there is no investment.[279] There are four different ways of defining investment: an open-list asset-based approach, a closed-list asset based approach, enterprise-based approach[280] and circular or tautological approach.[281]

An open- asset based approach of the definition of investment goes beyond FDI and usually cover any kind of asset or every kind of asset which accompanied by illustrative list.[282] Usually

[272] World Bank Why so idle? Wages and employment in a crowed Labour Market(2016) 5th Ethiopia Economic update at X.
[273] As Above.
[274] UNCTAD World Investment Report 2018: investment and new industry policies(2018) at III.
[275] As Above at 41.
[276] Schefer (n 279).
[277] For instance Article 25 of ICSID state that' the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting state…' (My emphasis).
[278] H Schreur The ICSID Convention: A Commentary (2001) Cambridge University Press pp. 121-122.
[279] N Schefer International investment law: text, cases and materials (2013) Edward Elgar Publisher at 59.
[280] SADC Model Bilateral investment treaty template with commentary(2012) at 8.
[281] UNCTAD Bilateral Investment Treaties 1995-2006 : Trends in international rulemaking(2007) at 7.
[282] SADC Model BIT(n 49) at 10.

such illustrative list includes five categories of asset: movable or immovable,[283] interest,[284]claims for money, intellectual property and finally, business concession.[285] Such listing method in no way tantamount to excluding those activities not mentioned in the list. This is well noted in *Siemens* v Argentina case when the tribunal said:[286]

> The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words "not exclusively" before listing the categories of "particularly" included investments. (My emphasis)

This approach is adopted by USA Model BIT when it says:' investment means every asset that the investor own….forms that an investment may take include… '(My emphasis).[287]

A close asset-based approach is very similar to open asset based approach except it exhaustively list out what constitute investment.[288] Thus, any activity which does not fall under the list is deemed to be not an investment for the purpose of that particular treaty. This type of approach is adopted by Canada Model BIT when it said: 'investment means an enterprise, an equity of security of an enterprise….'[289]

Under enterprise approach the investor is required to establish an enterprise as one crucial link with FDI.[290] Usually this model will have the exclusionary clause of asset which does not constitute investment.[291] In this regard, this model is pretty much similar with commercial presence under GATS.[292] Tautological model is the most capital sending friendly definition in a

[283] Movable property are those move or to be moved but immovable property are those can not move or to be moved without altering the nature of the thing. This category in turns include mortgage, security established over immovable property; pledge, security over movable property and liens right.
[284] This in turn includes share, bond, stocks and debenture.
[285] UNCTAD(n 40) at 8.
[286] *Siemens A.G v. the Argentina Republic* ICSID Case No. ARB/02/8(decision on jurisdiction) paragraph 137. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0788.pdf(accessed 17 June 2019).
[287] Article 1 of USA Model USA BIT.
[288] SADC(n 49) at 9.
[289] Article 1 of Canada Model BIT.
[290] SADC (n 49) at 12.
[291] As above.
[292] Article XXVIII of the GATS define commercial presence as' any type of business or professional establishment including through the constitution, acquisition or maintenance for juridical person or the creation or maintenance of a balance or a representative office.'

sense it requires not only the broader definition of investment, but also it will require the definition to be flexible enough to embody novel concepts in the future.[293]

Although there is divergence as to the definition of investment, in one case, which subsequently famously referred as *Salini* test, the arbitration tribunal provided us the basic feature of investment which is endorsed by the subsequent arbitration tribunal.[294] The tribunal point out that for an economic activity to be considered as an investment it should involve in 'a certain duration, a certain regularity of profit and return, assumption of risk, a substantive commitment and a significance for the host state's development.'[295] However, it is important to note that this test should not be construed as requirement of jurisdiction rather merely clarify the feature of investment.[296]

Generally investor can be either physical person (also known as a natural person) or legal person. When a physical person becomes investor one has to see the nationality,[297] citizenship or

[293] UNCTAD (n 72) at 10.

[294] For instance in the following cases the tribunal more or less adopt Salini test: *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt* Case No. ARB/04/13 Para 91, in this case the tribunal state that in the absence of clear definition of investment under ICSID Convention, it concur with precedent decision of salini test. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0439.pdf(accessed 18 June 2019), *Mr. Saba Fakes v. Republic of Turkey* ICSID Case No. ARB/07/20 Para. 110 in this case the tribunal consider the yardstick saline case i.e. contribution, certain duration and an element of risk is sufficient to constitute definition of investment under ICSID. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf(accessed 18 June 2019) for more discussion on these issue please see A Grabowski The definition of investment under the ICSID Convention: A defence of Salini(2014) 15 *Chicago journal of International Law*. There are also tribunal which reject salini test. For instance *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* ICSID Case No. ARB/09/11 Para 56, in this case the tribunal reject developed by various precedent decision including salini test and held that purchase and sale contract does not constitute investment as per Article 25(1) of ICSID Convention since it is purely commercial in nature. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0379.pdf (accessed 18 June 2019), Hassan Awedi, Enterprise Business Consultant,INC. AND Alfafel Corporation v. Romania Para. 197. The tribunal in this case state that although salini test is important to find out the main feature of investment, it does not override the free and full consent of the Contracting Parties. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/italaw4208.pdf (accessed 18 June 2019). For more enlightened discussion please see L Ngobeni A Critical analysis of the security of foreign investment in the Southern African Development Community (SADC) Region University of South African PhD Dissertation (2018)(file with the author) pp. 82-83.

[295] *FEDAX NV v the republic of Venezuela* ICSID Case No. ARB/96/3 decision of the tribunal on objections to jurisdiction (1997) Para. 43. The full case is available at https://www.italaw.com/sites/default/files/case-documents/ita0315_0.pdf(accessed 18 June 2019).

[296] H Schreuer (n 279) at 140.

[297] It is important to note that under international law there is no rule, with the exception of statelessness, governing the issue of nationality rather it will be determine by domestic law. In recognition to this, under European Nationality Convention under Article 3(1) it is indicated that' each state shall determine under its own law who are its nationals.' The full version of the Convention is available at https://rm.coe.int/168007f2c8(accessed 19 June 2019). This is well stressed by arbitral tribunal when it said' application of international law principles requires an

domicile[298] to determine whether or not they are covered by the treaty.[299] Likewise, the same nationality principle will be extended when the investor is a legal entity. Generally speaking, there are two criteria determine the nationality of legal person: incorporation and effective control test.[300] The former look into the place where the legal entity is duly constituted whereas the latter look into the place where the effective decision making or centre of administration coming from.[301]

Almost all Ethiopia's BITs adopt open-list asset based definitional approach to the investment. For instance, under Article 1(a) of Yemen-Ethiopia BIT provided that investment means' Every kind of asset invested by investors[302] of one Contracting Party in the territory of the Contracting Party, in accordance with the laws and regulations of the latter and in particular, though not exclusively includes.'[303](My emphasis). The list of what's meant by investment usually constitute of movable and immovable property, shares/stocks/debentures, a claim for money, intellectual property and business concession.[304]

The only exception in this regard is Brazil and Ethiopia BIT, in which enterprise based definitional approach to the investment. Accordingly investment is defined as' a direct investment of an investor of one Contracting Party, established or acquired in accordance with the laws and regulations of the other Contracting Party, that, directly or indirectly, allows the investor to exert control or significant degree of influence over the management of the production of goods or provision of services in the territory of the other Contracting Party…' (My emphasis). Therefore, as per this definition the investor should commercial presence in the

application of the Egyptian nationality laws with reference to international law as may be appropriate in the circumstance.'(My emphasis) see the case *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* ICSID Case No. ARB/05/15 para. 153.

[298]These issues are determined by national law.

[299] K Chi-Chung 'Definition of investors and related issued in investment treaty arbitration under the proposed Taiwan-China bilateral investment agreement'(2011) 4 *Contemporary Asia Arbitration Journal* 179-213 at 183

[300] As above at 186.

[301] Engela C. Schlemmer, Investment, Investor, Nationality, and Shareholders, in The Oxford Handbook of International Investment Law in Peter Muchlinski et al. eds., (2008) at 76 as quoted by Chi-Chung (n 299) at 186

[302] On this point Belgium-Luxembouge Economic Union - Ethiopia BIT goes further and said that there should be contribution in the form of cash, kind or service.

[303] The same hold true for other Ethiopia's BITs too.

[304] Article 1(1) of Germany and Ethiopia BIT.

other country to be considered as an investment. The change of legal form of the asset[305] or reinvestment[306] does not affect the designation of the asset as an investment.

Generally, under Ethiopia's BITs there is no exclusionary clause of what do not constitute investment. However, under Ethiopia-Brazil BIT it is indicated that the judgement of the court, debt security, portfolio investment and claim of money that arise solely from commercial contracts,[307] shares or stocks that acquired for the sole purpose of speculation[308] shall not constitute investment.

Under Ethiopia's BIT the test to consider the physical person as investors are: nationality,[309] citizenship,[310] or permanent residence.[311] Regarding legal entity the criteria range from incorporation,[312] effective control[313] to head office test.[314] Usually there is an illustrative list of what form the legal entity might take. These include: corporation, partnership, trust, joint venture, organization, association, business enterprise.[315] The absence of legal personality to the entity does not prevent from being covered by the treaty.[316] Although business incorporated under the law of third party state, it might be covered by the BIT if the substantial business activity is controlled by nationality of the Contracting Parties. [317]

4.2 Standard of treatment

There are different types of standard of treatment provided in various BITs. Although it is quite common to find one single article deals with the issue of standard of treatment, usually that article identify several types of standard of treatments.[318] The standard of treatment accorded to

[305] Article 1 of Austria and Ethiopia BIT.
[306] Article 1(f) of Kuwait and Ethiopia BIT.
[307] Article 1 of Ethiopia and Brazil BIT.
[308] Article 1 of Ethiopia and South Africa BIT.
[309] Article 1 of BIT between Ethiopia and Israel.
[310] Article 1 of BIT between Ethiopia and Denmark.
[311] Article 1 of BIT between Ethiopia and Brazil.
[312] Article 1 of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[313] Article1 of BIT between Ethiopia and Israel. Under Article 1 of Ethiopia and Swiss BIT effective control is defined as'….more than 50 percent of the equity interest is beneficially owned by persons of that Contracting Party.'(My emphasis).
[314] Article 1 of Ethiopia and Turkey BIT.
[315] For instance Article 1 of Kuwait and Ethiopia BIT.
[316] Article 1 of Ethiopia and Germany BIT.
[317] Article 1 of Ethiopia and Brazil BIT.
[318] Sornarajah(n 120) at 201.

foreign investors in BITs among other things includes fair and equitable treatment, most favoured treatment, national treatment, full protection standard.

It is possible to classify these standards of treatment into two broad categories: Contingent or non-contingent standard of treatment. Generally, Most Favoured Nation and National Treatment are contingent entitlement in a sense that its contents are determined in reference to the domestic laws of host state or in reference to treaties host state enter into with third countries.[319] On the other hand, fair and equitable treatment which understood also to include international minimum international standard is non-contingent because it does not depend on external factors.[320] The full protection and security standard also regarded as one of absolute entitlement which does not contingent upon the host state treatment to other investors and investments.[321]

a. Fair and equitable treatment

Fair and equitable treatment (FET) is one of the most prominent standards of treatment which is found in different BITs and it is one of the most frequently invoked standards in investment arbitration.[322] Despite the popularity of this treatment in BITs, there is no uniformity in terms of qualification and wording. Some treaties simply state FET without any qualification,[323] some treaties opt to link FET with international law,[324] some treaties prefer to link FET with the minimum customary international law[325] and there are also a few instances in which treaties rather provide illustrative ground for breach of FET,[326] are provided in BITs.[327]

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[319] A Falsafi 'International minimum standard of treatment of foreign investors' property: A contingent standard'(2007) 30 *Suffolk Transitional Law Review* 317-364 at 354.

[320] T Kill 'Don't Cross the Streams: Past and present over statement of customary International law in connection with conventional fair and equitable treatment obligations'(2008) 106 *Michigan Law Review* 853-880 at 855.

[321] N Junngam 'The full protection and security standard in international investment law: What and who is investment fully protected and secured from?'(2018) *American University Business Law Review* 1-100 at 4.

[322] Y Zhu 'Fair and equitable treatment of foreign investors in era of sustainable development'(2018) 58 *Natural Resource Journal* 319-364 at 321.

[323] This is the case of China Model BIT as per Article 3(1) states that 'Investments of investors of each contracting party shall all the time be accorded fair and equitable treatment in the territory of the other contracting party.' (My emphasis).

[324] This is the case in BIT agreement between the republic of Croatia and the sultanate of Oman under Article3 (2) state that'….Contracting party shall be accorded fair and equitable treatment in accordance with international law.'(My emphasis).

[325] This is the case of USA Model BIT which under Article 5(1) state that 'Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.. .'(My emphasis).

[326] This is the case of Asean Comprehensive Investment Agreement which under Article 11(1) cum (2) state that each Member states shall accord fair and equitable treatment which include not to deny justice in any legal or

Arising with the very open end nature of the standard there is no uniform meaning as to what means by FET and its substance. Even some suggest that the clause may be interpreted to mean a catch all provision which include very broad acts of government.[328] Although there is a lack of clarity as to whether the two standards, namely fair and equitable, denoted similar or different treatment, there is a general assumption that these two terms are the same and hence 'represent a single, unified standard.'[329]

The close examination of Ethiopia's BITs reveals that it is not in all instances FET is recognized. For instance, in BITs Ethiopia Concluded with Turkey and Brazil there is no mentioning of this standard. However, in those BITs which FET is employed, there is no uniformity and consistency. In some instances FET is used without any qualification. For instance, under Article 3(1) of BIT between Ethiopia and Austria it is stated that' Each Contracting Party shall accord to investments by investors of the other contracting party fair and equitable treatment.' [330] Whereas, some BITs preferred to put as to what means by FET. For instance, under Article 2(3) of Ethiopia and Sweden BIT it is stated that:[331]

> Each Contracting Party shall at all times ensure fair and equitable treatment of the investment by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, nor the acquisition of good and service or the sale of their product, through unreasonable or discriminatory measures.

This treaty provided the yardstick in understanding what means by FET and the Country is liable for the violation of FET if it is proven one of those rights is impaired.

In some other BITs FET is employed in connection to most favoured and national treatment. For instance, as per Article 3(1) of Denmark and Ethiopia BIT it is stated that' ….Contracting Party, fair and equitable treatment which in no case shall be less favourable than accorded to its own

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administrative proceeding and full protection and security measures which is reasonable necessary to protect investors.(My emphasis).

[327] Y ZHU (n 322) at 324.

[328] R Dolzer Fair and equitable treatment: A key standard in Investment Treaties(2005) 39 *The International Lawyer* at 88.

[329] As Above at 91.

[330] This is the same exact situation in BITs Ethiopia concluded with Belgium- Luxembouge Economic Union, Article 3(1); Article 3(1) of Libya; Article 4(1) of Kuwait, Article 3(1) of Iran; Article 3(1) of Malaysia; Article 2(1) of Finland and Article 3(1) of Spain.

[331] This is the same exact situation BITs Ethiopia concluded with Netherland, Article 3(1); Russia, Article 3(1); Swiss, Article 4(1) and United Kingdom, Article 2(2).

investors or to investors of any third state.'[332] On top of this, it is possible to infer that some BITs limited the applicability of FET to investment and investor return,[333] whereas some other extended the applicability of this standard to any benefit arise from the treaty.[334]

b. Most Favoured Treatment

Most-Favoured-Treatment (MFN) is one of the most important provisions in any BITs agreement and regarded as 'the corner stone of all modern commercial treaties'.[335] MFN is a promise made by contracting parties that neither state will extend more favoured treatment to third states than what is given to investors from the other state party.[336] The policy justification behind MFN treatment is not to create the most favoured nation that is more favoured than the rest but to the contrary it is to secure equality of treatment between states by extending any treatment to each state as the most favoured one.[337] ICJ reinforces this purpose when it said:'…the intention of the MFN clauses was to establish and maintain at all time fundamental equity without discrimination among all of the countries concerned.'[338] Incidentally, MFN clauses are a significant tool in preventing fragmentation of legal regime in international investment law[339] and mitigate the risk of over interpretation.[340] From investor perspective, it has an important role in stabilizing their expectation over time to commit themselves for long term investment.[341]

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[332] This is the same exact situation for BITs Ethiopia concluded with Egypt, Article 2; Sudan, Article 3(2) and Yemen, Article 3(2).
[333] For instance Article 3(1) of BIT between Ethiopia and South Africa state that' Investments and return of investors of either party shall at all time be accorded fair and equitable treatment.'
[334] For instance Article 2(2) of BIT between Ethiopia and Israel stated that' Investment made by investors of each Contracting Party shall be accorded fair and equitable treatment in accordance with the provisions of this Agreement.'
[335] SK Hornbeck 'The Most-Favored-Nation Clause(part 1) (1909) 3 *America Journal of International Law* at 395 as quoted in S Vesel Clearing a path through a tangled jurisprudence: Most-Favored-Nation Clauses and dispute settlement provisions in bilateral investment treaties'(2007) 32 *Yale Journal of International Law* 125-190 at 126.
[336] T Cole 'The boundaries of most favoured nation treatment in international investment law'(2012)33 *Michigan Journal of International Law* 537-586 at 539.
[337] WS Culbertson 'Most-favored-national treatment'(1973) 31 *America Society International Law Proceeding* at 76
[338] Right of Nationals of the United States of America in Morocco France v United States Para 176. The whole judgement is available at http://www.worldcourts.com/icj/eng/decisions/1952.08.27_rights_of_nationals.htm(accessed May 25 2019).
[339] In the absence of MFN state will enter into competition to secure the most favoured terms for their investors which fragment the international investment law.
[340] Cole(n 336) at 540.
[341] Vesel(n 335)' at 142.

MFN clauses in BITs have also an effect of multilateralization in a sense that it gives direct access to an investor who is covered under basic treaty to rely on a completely different treaty concluded between the host state and third states which provided more favourable treatment.[342]

Early MFN Clauses were unilateral, specific and retrospective in nature.[343] Unilateral in a sense there was no agreement between two states to extend MFN treatment reciprocally rather only one state promises to extend MFN to another state. 'Specific' in a sense they were not general entitlement rather MFN extends only for identifying benefit in the agreement. 'Retrospective' in a sense MFN has extended to those benefits already provided to third party states.[344]

However, it must be noticed that MFN clause is not an absolute entitlement. There are several exceptions have been recognized which includes free trade area,[345] regional trade agreement[346] and preferential and different treatment,[347] custom union[348] exceptions. Although in a different context, it has been said that non-discrimination under international trade tantamount to discrimination against developing and less industrialized countries.[349]

Each BITs Ethiopia concluded has an element of MFN. However, there are differences in the wording and scope of MFN. In some BITs it provides the obligation to extend MFN principle without any qualification. For instance, in a BIT between Ethiopia and Israel under Article 3(1) it does provide that:[350]

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[342] SW Schill 'Mulitilateralizing investment treaties through most-favored-nation clause'(2009) *27 Berkeley Journal of International Law* 496-569 at 519.
[343] As Above at 545.
[344] As Above at 545.
[345] Free Trade Agreement is an agreement between two or more states to enhance cooperation by reducing trade barrier. The aim of Free Trade Areas exception is to enhance liberalization of substantially all trade between the member belong to such area. See SK Yadav The proliferation of free trade areas: A threat to multilateralization (2014) 22 *International Trade Law Journal* at 9.
[346] Regional Trade Agreement is reciprocal preferential trade agreement between two or more states. The main purpose is to enhance global economic integration. See JH Mathis Regional Trade Agreement in the GATT/WTO: Article XXIV and Internal Trade requirement(2001) T.M.C Asser Press.
[347] An arrangement in which developed country provided different and special treatment without reciprocity with the view to enhance trade opportunity for developing countries.
[348] It is an agreement in which member states agree to zero duty imposed to import goods and service and they will have common external tariff. See B Neyapt; F Taskin and M Ungor 'Has european customs union agreement really affected Turkey's trade?' (2007) 39: 16 *Applied Economic* at 2121.
[349] S Rubin'Most favoured nation treatment and the multilateral trade negotiations: a quiet revolution'(1980) 6:2 *International Trade Law Journal* 221-241 at 225.
[350] See Article 3 of BIT between Ethiopia and Israel. This agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed 26 May 2019).

> Neither Contracting Party shall, in its territory, subject investments or returns of investments of investors of the other Contracting Party, to treatment less favourable than which is accorded…to investments or returns of investments of an investor of any third party state.

Whereas, in some other BITs the application of MFN is qualified and limited. Ethiopia's BITs used two ways of limiting the applicability of MFN.

The first way is by qualifying the benefit of MFN to those 'like circumstance'. This has been used for instance, under Article 6 of BIT between Ethiopia and Brazil when it state that: 'Each Contracting Party shall accord to investors of another Contracting Party and their investments treatment no less favourable than that it accords, in like circumstances, to investors of any third State.'[351] This BIT tries to explain what means by like circumstances and as per the treaty, it depend on the totality of the circumstance among other thing includes whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objective. From the very beginning the standard of like circumstance is very vague and illusive and the explanation parts of the treaty do not add anything but more confusion.

In this regard India Model BIT comes up with more comprehensive yardsticks as to what means by like circumstance. As per footnote to Article 4(1) of the Model BIT some of the criteria are: the goods and services consumed or produced by the investment, the actual and potential impact of the investment on third person whether the investment is public, private or state owned or control and the practical challenges of regulating the investment. Likewise, the Draft Pan African Investment Code while tries to flesh out what means by like circumstance state that the following criteria should be taken into account: the effect on third person and local communities, its effect on the environment and health, the sector in which the investment is active, the objective of the measure in question, the regulatory process, company size and other factors which have directly related with the investment.[352]

[351] See BIT between Brazil and Ethiopia. The agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed May 2019).

[352] Article 7(3) of the Draft Pan-Africa Investment Code(2016) available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf(accessed 5 August 2019).

The second mechanism for limiting the applicability of MFN is by restricting its scope only to certain benefits. This has been used for instance, in BIT between Austria and Ethiopia under Article 3(3) when it state that:[353]

> Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords -----to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor.

Thus, from this provision we can infer than the MFN is limited to those mentioned benefits.

Germany and Ethiopia BIT, provides illustrative grounds for violation of MFN under Article 3(3) when it says:[354]

> The following shall, in particular, be deemed "treatment less favourable" within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of the means of production or operation of any kind, unequal treatment in the case of impeding the wholesale marketing of products inside or the marketing of products outside the country, as well as any other measures having similar effects.

And it continues and state grounds which do not constitute a violation of MFN under the same Article that 'any measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed treatment less favourable within the meaning of this Article.'[355]

Finally, in all Ethiopia's BITs without any deviation, it is possible to find exception to MFN treatment. However, there is some variance in the wording of those limitations. Generally with the exception of Ethiopia- Israel BIT, in all BITs, any preference or privilege arising from customs union, free trade agreement, economic community, common market and tax related treaties shall not be covered under MFN. However, in some BITs exceptions are drafted in a broad manner which endangers the very existence of the principle. For instance, under Article 7 of BIT UK-Ethiopia, on top of the general exception, it also provide that' The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to ------ any

[353] See BIT between Austria and Ethiopia. This agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed May 2019).
[354] See BIT between Germany and Ethiopia. This agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed May 2019).
[355] As Above.

third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order.'[356][357] Likewise, Ethiopia's BIT with South Africa under Article 3(4)(c) provided that 'any law or other measure the purpose of which is to promote the achievement of equality in its territory or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.' [358][359]

c. National standard of treatment

OECD Draft consolidated Investment Law defines national treatment as:[360]

> Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment, it accords [in like circumstances] to its own investors.

The main purpose of national treatment in BIT is to create a level playing field by subjecting both domestic and foreign investors to the same rule and regulation by the host state and accordingly 'domestic measures should not unduly favour domestic investors.'[361]

Although there are similarities between the national standard of treatment in trade, i.e. under World Trade Organization (WTO),[362] and in investment, there are also substantial differences. First, under WTO rule likeness is more concerned about the negative impact of the regulation on

[356] See BIT Between Uk and Ethiopia. This agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed 26 May 2019).

[357] It is quite difficult to interpreted what are public security or public order means. This difficulty is well noted in one of the old England Court in a case between *Richardson v Mellish* when the judge said' public policy;-it is a very unruly horse, and when once you get astride it you never know where it will carry you.' The full judgement is available at http://www.uniset.ca/other/css/130ER294.html(accessed 26 May 2019). For more elaborated discussion on vagueness of public policy see HT Edwards 'Judicial review of labour arbitration awards: The clash between the public policy exception and the duty to bargain'(1988) 64 *Chicago-Kent Law Review.*

[358] See BIT between South Africa and Ethiopia. This agreement is available at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55(accessed 26 May 2019).

[359] This provision seems envisage the South African situation of Black Economic Empowerment (BEE) which aim to address the power difference between historically disadvantaged majority black and white minorities. See R Southall 'Ten propositions about black economic empowerment in South Africa'(2006) 34 *Review of African Political Economy.*

[360] OECD(1998) The multilateral agreement on investment draft consolidated Text Article 3(1).

[361] R Al-Louzi 'A Coherence review of investment protection under bilateral investment treaties and free trade agreement' (2015) 12 *Manchester Journal of International Economic Law* 270-286 at 279.

[362] Basically there are three similarities: the obligation not to discriminate, the need to prove the existence of nexus between measure taken and its negative impact and the measure should be regulator nature. See I Galea and B Biris 'National treatment in international trade and investment law' (2014) 55 *Acta Juridica Hungarica* 174-184 at 181.

the competitiveness of two products, whereas likeness in investment is more concerned about like circumstance and its impact on foreign investors.[363] Second, less favoured treatment in the WTO is assessed based on the competitiveness of the product, but in investment the criteria is whether a single foreign investor treated differently from any single domestic investor irrespective of the competitiveness.[364] Third, under the WTO individual investor cannot directly invoke national treatment to invalidate domestic legislation,[365] but it is quite possible under investment treaties.[366]

In all Ethiopia's BITs without any exception, the principle of national treatment is embodied. In most BITs the applicability of the principle is restricted to post-admission of the investment. For instance, under Article 3 (2) of Turkey-Ethiopia BIT made it clear that the principle of national treatment only once the investment is accepted. However, in some instances the applicability of the principle to pre and post admission is not well stated.[367] Nevertheless, in certain instance Ethiopia's BITs seem to suggest that the principle will extend to pre-admission of an investment.[368]

In most of the BITs the applicability of national treatment is wide to any rights emanated from that treaty. All the same, some treaties opt to limit the scope of the principle to' management, operation, maintenance, use, employment, sale and liquidation of an investment.'[369] Still in some other treaties the scope of national treatment extends only to like circumstance.[370] Interestingly, as per Article 5 of the BIT between Brazil and Ethiopia, the principle applies only prospectively, not retrospectively.

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[363] As above.
[364] As above.
[365] WTO dispute settlement is state-state dispute settlement system see NB Osterwalder State-state dispute settlement in investment treaties: best practices series(2014) International Institution for sustainable development at 6.
[366] Galea and Biris (n 362).
[367] For instance as per Article 3(1) of BIT between Israel and Ethiopia' Neither Contracting Party shall, in its territory, subject investments or returns of investments of investors of the other Contracting Party, to treatment less favourable than that which it accords to investments or returns of investments of its own investor.'
[368] Article 4(1) of the BIT between Ethiopia and Brazil state that 'Each Contracting Party shall admit and encourage investments of investor of the other party, according to their respective laws and regulations.'(My emphasis).
[369] See for instance Article 3(3) of Ethiopia and Austria BIT.
[370] As per Article 4(1) of BIT between Spain and Ethiopia state that'…..no less favourable than that which it accord, in like circumstance, to the investment made by its own investors.'

d. Full protection and security treatment

Full protection and security or also known as constant protection and security standard involves the obligations of the host state to protect foreign investors from negative consequence arise from state or individual action.[371] The Arbitral Tribunal in one case made it clear that this standard 'obliges the state to provide a certain level of protection to foreign investments from physical damage.'[372] The same Tribunal clarify that the obligation of state is due-diligent the mere absence of it trigger the violation of the standard without any need to prove the existence of malice or negligent from the host state.[373] However, some argue that legal protection is within the ambit of this principle. They argue that not only commission, but omission on the part of the government to prevent anything which hinders the proper function of foreign investors may be tantamount to a violation of this principle.[374]

The close examination of Ethiopia's BITs exhibit that with the exception of BIT with Brazil, the standard of full protection and security is provided. However, variations on the wording of the standard: full protection and security,[375] full protection,[376] continuous protection and security,[377] adequate protection and security,[378] protection,[379] full and adequate protection and security,[380] and finally, full and constant protection and security.[381]

It is quite clear that in most instances the full protection and security standard of treatment is treated as a separate and standalone standard. However, in a BIT between Libya and Ethiopia

[371] C Titi 'Full protection and security, arbitration or discriminatory treatment and the invisible EU model'(2014) 15 *The Journal of World Investment and Trade* 534-550 at 540.
[372] *Rumel TelekomA.S and Telsim Mobil Telekomikasyon Hizmetleri A.S v Republic of Kazakhstan* ICSID Case No. arb/05/16 Para. 668. The full version of the Arbitral Tribunal decision is available at https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf(accessed 28 May 2019).
[373] As Above Para 658-660.
[374] TW Walde 'Energy charter treaty-based investment arbitration'(2014) 5 *Journal of World Investment and Trade* 373-412 at 390 as quoted in C Schreuer 'Full protection and security'(2010) 1 *Journal of International Dispute Settlement* at 7.
[375] For instance Article 2(2) of BIT between Israel and Ethiopia.
[376] For instance Article 2(2) of BIT between Denmark and Ethiopia.
[377] For instance Article 3(2) of BIT between Belgium- Luxembouge Economic Union and Ethiopia.
[378] For instance Article 2(2) of BIT between Egypt and Ethiopia.
[379] Article 3(1) of BIT between Libya and Ethiopia.
[380] Article 2(2) of BIT between Malaysia and Ethiopia.
[381] Article 2(2) of BIT between Finland and Ethiopia.

this standard is found together with fair and equitable treatment. This approach is lined with some arbitral tribunal decisions.[382]

Although there is tremendous consensus as to the non-contingent of full protection and security treatment among scholars, there are instances whereby some Ethiopia's BITs opt the exercising of this standard contingent upon fulfilment of certain conditions. For instance, as per Article 2(4) of BIT between Ethiopia and Sweden state that:

> Investment by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with the recognized principles in international law, the municipal law of the Contracting Party and the provisions of this Agreement as applicable.(My emphasis)

This makes the exercise of this right contingent upon the existence of international law and more importantly its consistency with national laws. Thus, as per this provision the content of this standard will be determined in reference to international and national laws.

4.3 Expropriation and compensation

The term expropriation is foreign origin, which means compulsory taking of property.[383] This term is usually taken as synonymous with *Eminet Domain,* which represent the power of the state to take private property, however, unlike the case of expropriation, in case of *Eminet Domain* there is no compensation.[384]

In its political sense expropriation began in early 1970's as the confrontation between defender of international law on the existence of treatment of aliens and those who seek a shift in this perception by rejecting its existence.[385] States began to reject the absolute nature of private property and expropriate for public purpose. This is well stated by Mexico Supreme Court when it said:[386]

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[382] *Wena Hotels Ltd v Arab Republic of Egypt* ICSID Case No. ARB/98/4 Para 89 as quoted in R Islam Interplay between fair and equitable treatment(FET) standard and other Investment protections and standards(2014) 1:2 *Bangladeshi Journal of Law* 117-142 at 119.
[383] AB Hammond Expropriation(1955) 3 *Proceeding of the Australia Institute of Mining Law* 18-50 at 18.
[384] As Above.
[385] R Dolzer 'New foundation of the law of expropriation of alien property'(1981) 75 *American Journal of International Law* 553-589 at 555.
[386] Levy (n 389) at 425.

> [T]he right of property as an absolute untouchable right, and to replace it with a concept which recognizes private property as a social function. Thus, private property would not be the exclusive right of one individual, but a right subordinated to the common welfare. (My emphasis)

From economical point of view, it was assumed as the cornerstone for a new international order.[387] In corollary of the principle of state sovereignty over their natural resource, contemporary international law recognized the right of the state to expropriate private property although there is contrary provision in bilateral or multilateral treaties.[388]

It is generally accepted that as a general rule state must provide compensation for expropriation and any measure of taking of private property without compensation is nothing but confiscation.[389] The main policy justification behind the duty to compensate is deeply entrenched under the doctrine of unjust enrichment. If the host state were allowed to expropriate without compensation, it would enrich itself unjustifiably at the expense of foreign investors and foreign state.[390] Thus, in the contemporary world there is no disagreement on the obligation of the state to compensate, but 'on how much compensation should be paid.'[391]

Although the controversy surrounding the proper compensation in case of expropriation is old as expropriation itself, in terms of legal precedent *Chorzow* case laid down the foundation. In this case a Permanent International Court of Justice stated that' restitution in kind or if this is not possible, payment of a sum of corresponding to the value which restitution in kind would bear…'[392] needless to say the Court failed to put the exact standard of compensation. Just ten years after this decision, the then USA secretary of state, Cornell Hull, provides his infamous statement in which he declares that in case of expropriation the host state should provide' prompt, adequate and effective' compensation to the investors.[393]

In this standard 'prompt' means payment of compensation without delay or anticipate immediate recovery, 'effective' means compensation in investors' own currency in which the maximum

[387] Dolzer(n 385) at 556.
[388] D Arechaga 'State responsibility for the nationalization of foreign owned property'(1978) 11:2 *Journal of International Law and Politics* at 179.
[389] T Levy 'NAFTA'S Provision for compensation in the event of expropriation: A reassessment of the prompt, adequate and effective standard'(1995) 31 *Stanford Journal of International Law* 423-454 at 425.
[390] Arechaga (n 388) at 182.
[391] A O'Connor (n 12) at 357.
[392] The Factory at Chorzow Germany v Poland permanent court of international justice 14th ordinary session (1928) Para 125. The full judgment is available at http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm.
[393] SH Nikiema Compensation for expropriation(2013) The International Institute for sustainable development at 9.

value of the deprive alien property and 'adequate' means the compensation should be in correspond to the value of the property taken.[394]

The USA later in the revised foreign relation law, retreats from its position from prompt, adequate and effective compensation standard for just compensation by reason out that hull formula 'cannot be considered as existing international law applicable in all cases of expropriation of alien property.'[395]

On the flip side, Carlos Calvo, Argentine international Lawyer and diplomatic, argue that every state is free and equal and foreign does not deserve a special and differential treatment than those rights accorded to domestic investors. Thus, it is up to each state to determine the standard of compensation in case of expropriation.[396] This stance was adopted by Latin America and African countries and later reflected in UN General Resolutions.[397]

Without any variation, in all Ethiopia's BITs expropriation and compensation is provided. In principle, all BITs prohibit expropriation or nationalization[398] of foreign investor property by the host state. For instance, under Article 4 of Sudan- Ethiopia BIT, it is stated that 'Neither contracting Party shall take <u>any measure of expropriation, nationalization or any measures having the same nature or the effect against investment or investors</u>..' (My emphasis).

What is prohibited is not only expropriation or nationalization but also any measure which has similar nature like dispossession, taking, deprivation or privation.[399] The close reading of the second line of the article under consideration also reveal that any measure which has the effect of crippling the rights of investor will be tantamount to expropriation i.e. indirect or creeping

[394] FG Dawson and BH Weston 'Prompt, adequate and effective: a universal standard of compensation'(1961) 30 *Fordham Law Review* 727-758 pp. 736-739.
[395] PB Gann 'Compensation standard for Expropriation'(1985)23 *Columbia Journal of International Law* 615-654 at 616.
[396] W Shan 'From north-south divide to private-public debate revival of the Calvo doctrine and the changing Landscape in international Investment Law' (2007) 27 *Northwestern Journal of International Law and Business* 631-664 at 632.
[397] See common Article 2(2)(c) of UN General resolution on New International Economic resolution, Charter of Economic Rights and Duties of State and Resolution on Permanent Sovereignty over natural resource.
[398] Although expropriation and nationalization are portrayed as synonyms, these terms are different. Nationalization is a socialist ideology driven, more specifically socialist theory of property, as a means of transferring property from private property to public domain. Whereas, expropriation can happen in the most democratic and liberal system. See YI Kouatly Issues in Private Property and nationalization(1975) 42 *Insurance Counsel Journal* 386-398.
[399] R Dolzer and M Stevens 'Bilateral Investment Treaties'(1995) International Centre for Settlement of Dispute at 98.

expropriation.[400][401] Kuwait and Ethiopia BIT made it clear that any regulation that freeze or block the investment, levying of arbitrary or excessive tax or compulsory sale of whole or parts of investment shall construe to mean expropriation.[402] In some BITs the applicability of expropriation provisions to joint venture between foreign and domestic investors.[403]

Although BITs in principle prohibit expropriation, there are exceptional circumstances in which host state is allowed to expropriate private property if it proves the existence of public purpose which is taking place in line with the principle of non-discrimination and payment of compensation.[404] In some BITs there is a fourth requirement that expropriation should be taking place in due process of law.[405] Quite interestingly, BIT between Ethiopia and Belgium-Luxembouge Economic Union extend the exceptions to include national security or national interest.[406]

Most Ethiopia's BITs adopted prompt, adequate and effective standard of compensation. Under Article 6 (c) of BIT between Netherland and Ethiopia it states that the measure should be taken against payment of adequate, prompt and effective compensation. However, most BITs are silent as to the meaning of those terms.

All the same, in some BITs there are efforts to clarify the matter. 'Prompt' means the compensation should not cause unreasonable delay.[407] Under Ethiopia- Kuwait BIT 'without delay' is defined as:[408]

> [S]uch period as is normally required for the completion of necessary formalities for the transfer of payments. The said period shall commence on the day on which request for transfer has been submitted may on no account exceed one month.

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[400] R Dolzer 'Indirect Expropriations: New Development'(2002) 11 *New York University Environmental Law Journal* . 64-93.
[401] The only exception which discard indirect expropriation is BIT between Brazil and Ethiopia under Article 7(5) state that' for garter certainty, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriating through formal transfer of title or ownership rights.'
[402] Article 6(4) of BIT between Kuwait and Ethiopia.
[403] See for instance Article 5(5) of Ethiopia and Spain BIT.
[404] For instance Article 5(1) of Israel and Ethiopia BIT state that'….except for public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation.'
[405] For instance see Article 5(1) of BIT between Spain and Ethiopia.
[406] Article 7(2) of BIT between Ethiopia and Belgium- Luxembouge Economic Union. However, one may argue that national security or interest are part and parcel of public security.
[407] See the above discussion.
[408] See Article 1(8) of Kuwait and Ethiopia BIT.

Therefore, as per this standard any payment of compensation goes beyond one month is a violation of prompt criteria. It has been indicated that any delay payment shall bear interest at the normal commercial rate[409] or fair and equitable rate.[410]However, there are instances whereby the interest will be determined by the agreement between host state and investor. [411]

By the same token, most BITs failed to define the standard of 'adequate compensation', but it is understood to mean payment in convertible currency.[412] There are, however, instances whereby BITs try to define what means by convertible currency means. Under Malaysia- Ethiopia BIT convertible currency is defined as:[413]

> [T]he United States dollar, pound sterling, Deutschemark, French franc, Japanese Yen or any other currency that is widely used to make payments for international transactions and widely traded in the international principle exchange markets namely London, New York and Tokyo.

On the contrary, in most Ethiopia's BITs 'adequate compensation' is well stated to mean as the fair market value[414] or equivalent to the value[415] of the investment immediately before the measure is taken. Strangely, BIT between Ethiopia and Egypt opt for adequate indemnity in contrary to prompt, adequate and effective compensation.[416]

Finally, in most instances Ethiopia's BITs provide a mechanism in which an investor can bring his claim regarding valuation of his investment and payment of compensation to the competent court.[417]

4.4 Repatriation of profits

One typical feature of BIT is the assurance extends to foreign investment to repatriate their profit.[418] From investors perspective the main motive for investing in other country is to make profit and repatriate this profit to their home country.[419] This is more important when the host country is developing countries. In developing countries because of severe balance of payment

[409] Article 5(3) of BIT between Denmark and Ethiopia.
[410] Article 5(1) of Indian and Ethiopia BIT.
[411] Article 5(d) of BIT between Ethiopia and Malaysia.
[412] See the above discussion.
[413] Article 1(d) of BIT between Malaysia and Ethiopia.
[414] Article 5(2) of BIT between Finland and Ethiopia.
[415] Article 4(2) of BIT between Ethiopia and Libya.
[416] Article 5 of BIT between Ethiopia and Egypt.
[417] For instance Article 5(3) of Austria and Ethiopia BIT.
[418] Soronaja (n 120) at 188.
[419] As above 206.

problem they are unwilling or unable to give unrestricted entitlement of foreign currency.[420] Thus, if the repatriation of profit is crippled by the host state, the whole point of an investment will be frustrated.[421]

As one of the most important rights of the investors, in all Ethiopia's BITs the right to repatriation or transfer of investment is provided. In some BITs the entitlement is without any condition and limitation. For instance, under Ethiopia-Belgium- Luxembouge Economic Union BIT it is indicated that 'the Contracting Party shall grant to the investor of the other Contracting Party the free transfer without undue delay[422] of all payments related to investment.'[423] Thus, the host country is under obligation to make available convertible currency for foreign investors of all time. Although there is no yardstick as to what means by' without delay', in some BITs it is indicated that transfer without delay shall be deemed to have been made if the payment is effected' within such period as in normally required for the completion of transfer formalities'[424] but this should in no account exceed two months.[425]

In most BITs what constitute the rights to repatriate is provided in illustrative manners. These include the right to compensation as a result of expropriation, return, proceeding as a result of sale or liquidation of any investment, reimbursement, interest, payment arise from an investment, salary and wage of the nationality of other Contracting Party,[426] initial capital,[427] the amount necessary for payment of under contract,[428] unspent earnings,[429] proceeds received from sale of shares,[430] royalties,[431] funds necessary for acquisition of new or auxiliary material,[432] and payment to technical assistance.[433]

[420] W Salacuse (n 443) at 393.
[421] Soronaja (n 120)at 206.
[422] Some BITs employed 'without unreasonable delay' and some other use' without delay' standard see Article 6(1) and Article 5(1) of Ethiopian BITs with Malaysia and Netherland respectively.
[423] Article 8(1) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[424] Article 9 of BIT between Ethiopia and Iran.
[425] Article 6(2) of BIT between Ethiopia and Germany.
[426] These list is found under Article 5(1) of BIT between Ethiopia and Turkey.
[427] Article 7(1)(a) of BIT between Ethiopia and Austria.
[428] Article 8(1)(b) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[429] Article 7(1)(F) of BIT between Ethiopia and Denmark.
[430] Article 7(1)(e)of BIT between Ethiopia and India.
[431] Article 7(1)(d) of BIT between Ethiopia and Kuwait.
[432] Article 5(1)(b)(i)of BIT between Ethiopia and Netherland.
[433] Article 6(1(d) of BIT between Ethiopia and Sudan.

In a few instances the right of repatriation is contingent upon what is provided by national laws.[434] However, in some instance, despite the BITs recognized the existence of national regulation regarding repatriation of profit only as to regulate procedural matters, but laws should not be intended to limit the right to repatriate profit.[435]

Although a substantial part of the Ethiopia's BITs do not recognize any types of exceptions, there are a handful of BITs which recognized escaping clause to the host country. For instance, under Ethiopia-Israel BIT, it is indicated that:[436]

> When a Contracting Party is in serious balance of payments difficulties[437] or in serious difficulties for the operation of the exchange of rate policy or monetary policy, or under threat thereof, that Contracting Party may, in conformity with the conditions laid down within the framework of the GATT and with Articles VIII and XIV of the Statutes of the International Monetary Fund,[438] adopt restrictive measures which may not go beyond what is necessary to remedy the situation, for a period not exceeding six months. The Contracting Party shall notify the other Contracting Party, as soon as possible, as to the measures taken, and the expected timetable for their removal.

Thus, the host state to benefit from this exception must demonstrate three things: its action is in line with GATT or IMF, the measure does not exceed the necessary dosage to control the situation and it should notify the other party about the measure. All the same, this exception should be applied in a non-discriminatory, equitable and good faith manner.[439]

Some other Ethiopia BITs opt to provide an exhaustive list of what constitute exceptional grounds in which deviation from the principle is permissible. Accordingly, the host state might deviate from its obligation to make available foreign currency if the measure is taken to: protect the rights of creditors, ensuring compliance in connection with criminal offenses,[440] bankruptcy, to enforce judicial or administrative decision and for formalities required by the Central Bank.[441]

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[434] Article 5(1) of BIT between Ethiopia and Turkey provide that' …in accordance with its laws and regulations.'
[435] Article 7(3) of BIT between Ethiopia and India.
[436] Article 6(3)(a) of BIT between Ethiopia and Israel.
[437] It seems the host state determine the seriousness of the deficit since the next lines discuss about situations which are determined in reference to their instrument. Thus, the only way the first line make sense is if the host state single handily determine the situation.
[438] The close reading of these two articles reveals that state party may deviate from the obligation provided under Article XIII after consulting with the Fund for necessary in exceptional circumstance. The full agreement is available at https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf(accessed 15 June 2019).
[439] Article 6(3)(b) of BIT between Ethiopia and Israel.
[440] Article 7(4) of BIT between Ethiopia and Austria.
[441] Article 10(2) of BIT between Ethiopia and Brazil.

Interestingly, in Ethiopia and Malaysia BIT it is indicated that repatriation of profit shall be made based on most-favoured nation treatment standard.[442]

4.5 Dispute settlement mechanisms

From the foreign investors' perspective, the main loophole in the existing customary international law is lack of dispute settlement mechanism.[443] Thus, the investor-state dispute has become an effective tool to remedy this defect. In BITs it is quite common to find two types of dispute clause: Investor-state and state-state dispute resolving mechanism.[444]

Investor-state dispute settlement (ISDS) can be defined as:[445]

> [T]he legal mechanism that allows multinational corporations a forum, other than the court system of the country, in which the dispute arose (host country) to arbitrate a controversy between a corporation and the host country.

ISDS is not a new phenomenon which emerges with BITs rather; it is a decade old mechanism which first crafted in Europe with the view to enforce those rights emanated from international laws without any discrimination between investors.[446] Before the incorporation of investors-state dispute in the treaties, foreign investors were compelled to bring their allegation to domestic courts which solve the matter in line with national laws.[447]

During the early 20th century, international trade between the developed countries the likes of USA, UK and Canada grow with significant amount. Needless to say, create a more possible ground of conflict between states and investors.[448] With the view to address the ever growing

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[442] Article 6(3) state that the right to repatriate of profit should be treated' as favorable as that accorded to transfer originating from investments made by investors of any third party state.'
[443] W Salacuse The three laws of international investment: National, contractual, and international frameworks for foreign capital(2013) Oxford University Press at 397.
[444] As Above.
[445] Christoph Schreuer Investment Dispute in Max Planek Encyclopaedia of Public International La(2010) as quoted by E Osmanski 'Investor-state dispute settlement: Is there a better alternative'(2018) 43:*3 Brook Journal of International Law* 639-664 at 639.
[446] L Demopsey ISDS- a Fact- and experience based review (2014) Trans-Atlantic Business Council. The full version of the analysis is available at http://transatlanticbusiness.org/news/isds-a-fact-and-experience-based-review/(accessed 7 June 2019).
[447] N Schefer 'International investment law: Text, cases and materials'(2013) Edward Elgar Publishing Limited at 364.
[448] Osmanski(n 445) at 145.

dispute between the state and investors, the successor to the earlier arbitration tribunal,[449] London Court of International arbitration was established in early years of 1990's.[450] In 1917 the Stockholm Chamber of Commerce (SCC) was established as part of, but independent from the Stockholm Chamber of Commerce.[451]

Aftermath of the First World War in 1919 International Chamber of Commerce (ICC) was formed with the ardour that the private sector is the best qualified institution for global business.[452] And in 1923 ICC established the International Court of Arbitration (ICA).[453] In the League of Nations effort were exerted to extend legal protection for alien property which never realized. This is followed by massive expropriation of foreign investors' property of the newly independent countries which activate the need to have a separate global state-investor dispute platform.[454] On top of these, the states were very sceptical to use those arbitration institutions and by the time the only international arbitration, permanent court of arbitration was not open to private sector.[455] These all pushing factors lead for establishment of International Convention Settlement of Investment Dispute Convention (ICSID) in 1966 and as of June 2019 it has been ratified by 154 countries.[456] Since then ICSID became the principal platform and the number of caseload is ever increasing, partly because of the proliferation of BITs.[457][458] Although ICSID provides arbitration and conciliation for any dispute between member states and investors, it also

[449] The first sort of arbitration tribunal was established in 1895 following the demand of the London City business community to have specialized tribunal manned by judges who have the necessary expertise in the commercial areas. Please see Court and Tribunal Judiciary official website which is available at https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/about-us/(accessed 7 June 2019).

[450] R Abbott, F Erixon and F Ferralane 'Demystifying Investor-state dispute settlement'(ISDS) ECIPE *Occasional Paper* No. 5(2014) at 4.

[451] Please see the official website of Arbitration Institution of Stockholm Chamber of Commerce which is available at https://sccinstitute.com/about-the-scc/(accessed 7 June d019).

[452] Please see the official website of International Chamber of Commerce which is available at https://iccwbo.org/about-us/who-we-are/history/(accessed 7 June 2019).

[453] As Above.

[454] Abbott, Erixon and Ferralane(n 450) at 5.

[455] J Cherian 'Foreign investment arbitration: The role of the International Court of Settlement of International Dispute'(1983) Third World Legal Study 172-201at 174.

[456] Please see the Official website of ICSID which is available at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx(accessed 8 June 2019).

[457] D Collins 'Reliance remedies at the International Center for the Settlement of Investment Dispute' (2009)29:1 *Northwestern Journal of International Law and Business* 195-216 at 197.

[458] It is very important to note that almost all BITs mention ICSID as the principal body to arbitrate any dispute arise from the agreement.

provides similar services for non-members and investors through Additional Facilitation Rules.[459]

The very purpose of ISDS is to protect the foreign investors from their fear that the unfamiliar and unsophisticated legal system[460] of host country will not jeopardize their investment and investment related rights.[461] The incorporation of ICSID[462] or any other international dispute settlement[463] transcend any conflict between investors and host state from a domestic issue, since it could be solved through informal mechanism or domestic court,[464] into public international law dispute.[465] Although from practical point of view it is a rare occurrence, there is a possibility whereby the home state of the investors' may bring action against the host state for failure to protect the interest of its investors.[466]

In all Ethiopia's BITs invariably two types of dispute settlement are provided: state to investor dispute settlement[467] and state to state dispute settlement[468] mechanism.

In all instances it is common to find the escalation clause in a sense that the investors before resorting to international arbitration, they should try to resolve the dispute through amicable dispute settlement including negotiation, conciliation and mediation.[469] In most instances the investors are not obligated to resolve the dispute amicably.[470] However, in most BITs the

[459] Collins(n 457).
[460] This is especially very true when the host state is developing countries.
[461] Osmanski(n 445) at 642.
[462] As per Article 54(1) of the Convention' Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by the award within its territories as if it were a final judgement of a court in that state.'(My emphasis).
[463] The Contracting Parties might opt to include non-ICSID dispute resolution. In such case the applicable Convention as to the enforcement of the arbitration award is Convention on the Recognition and Enforcement of Foreign Arbitral Award (also known as New York Convention) of 1958. As per Article 3 of the Convention' Each Contracting State Shall recognize arbitral awards as binding and enforceable in accordance with the rules of procedure of the territory where the award is relied upon.'(My emphasis).
[464] C Ryngaert 'Universal Jurisdiction in an ICC Era'(2006) 14:1 *European Journal of Crime, Criminal Law and Criminal Justice* 46-80 at 51.
[465] W Salacuse 'Is there a better way-alternative method of treaty-based, investor-state dispute resolution'(2007) 31 *Fordham International Law Journal* 138-185 at 139.
[466] Schefer(n 447) at 365.
[467] Therefore dispute arise between the nationality of capital sending country and host state.
[468] Therefore dispute between Contracting Parties: sending state and host state.
[469] For instance under Article 8 of the Israel-Ethiopia BITs it is indicated that' Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled by negotiation or conciliation…'
[470] Under Ethiopia-Kuwait BIT under Article 9(1) it is stated that' Disputes arising between a Contracting state and an investor of the other contracting state in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.'(My emphasis).

investor should seek negotiation before resorting to international arbitration. For instance, under Ethiopia-Israel BIT it is indicated that: 'Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled by negotiations.'(My emphasis) And the investor should wait six months from the commencement of the negotiation before resorting to other options.[471] In one instance with the view to enhance the objective of BIT, the contracting party established joint committee, which has among other thing, the competency to examine any dispute between state party and investors.[472]

After exhausting amicable dispute settlement, especially the compulsory negotiation, the investor will have the right to access other formal dispute resolution. In most Ethiopia's BITs, it is indicated that the investor can submit his claim to the competent domestic court, administrative tribunal or international arbitration court.[473] The fact that the investor submits his claim to national court does not prevent him from submitting his claim to international arbitration unless the domestic court rendered a final judgement.[474] On the contrary, once the international arbitration commenced, the party can not pursue diplomatic channel to resolve the matter.[475]

With the exception of Australia-Ethiopia BIT, in all instances there is no indication that the investor should exhaust local remedies before resorting to an international arbitration tribunal. Under BIT between Australia and Ethiopia it is indicated that the fact that the Contracting Parties submitted its consent by treaty implies 'the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted.'[476]

In general Ethiopia BITs fail to incorporate period of limitation for which the investor should bring his claim before the attention of the competent body. However, in some instance, it has been indicated that the investor should bring his claim within three[477] or five years[478] since the

[471] Article 8(1) cum (2) of Ethiopia and Israel BIT.
[472] Article 17 of BIT between Ethiopia and Brazil.
[473] For instance please look Article 8 of BIT between Russia and Ethiopia.
[474] For instance Article 8(4) of Israel and Ethiopia BIT.
[475] Article 8(4) of BIT between Swiss and Ethiopia.
[476] Article 13(2) of BIT between Australia and Ethiopia.
[477] Article 24(4) of BIT between Ethiopia and Brazil.
[478] Article 12(2) of BIT between Ethiopia and Austria.

date on which the investor knew[479] or should have known[480] of the facts giving rise to the dispute.

In most instances ICSID arbitration is used as an arbitration tribunal if both Contracting Parties are party to the convention.[481] Even if one of the states is not member state to the ICSID Convention the same tribunal might be used through additional facility rule.[482] In addition to ICSID, it is quite common to find UNCITRAL dispute resolution mechanism.[483]

There are polarities as to the applicable law used by the arbitral tribunal to resolve the matter. In some treaties reference is only made to BIT,[484] in some BITs widen the applicability to any international rules and principle[485] and in some rare instance reference has been made to national laws.[486] Moreover, despite the fact that there is a general principle that law apply prospectively, in some BITs the applicability of dispute resolution is extended to dispute arise even before the ratification of the BITs.[487]

Although in principle the government as a litigant party is entitled to any defence, in some BITs the defence of the government is limited at least in the area of set-off and counter claim. For instance, under Ethiopia-Australia BIT it is mentioned that:[488]

> A contracting Party shall not assert as a defence, counterclaim, right offset-off or for any other reason, that indemnification or other compensation for all or part of the alleged damage has been

[479] This requirement is subjective in a sense that the state should prove the state of mind of the investor. For more detailed discussion please see D Kamarek and S Collier 'Knew or should have known lessons from the EU securities fraud regime'(2004) 10 *Columbia Journal of European Law* 561-576.
[480] This requirement is uses an objective rationality test and this does not imply the state prove the state of mind but material evidence which prove the investor should know the violation of his rights. Kamarek and Collier (n 479) at 567.
[481] As per Article 25 of the Convention the center shall extend for any legal dispute arise between a Contracting Party and a nationality of other contracting state.
[482] As per Article 2 of the Additional Facility rule, the Center may assume jurisdiction for conciliation or arbitration which otherwise was impossible because either the state or the nationality of the investor state is not party to the Convention.
[483] For instance please see Article 9(d), Article 9(2) (d) and Article 11(2) (b) of Ethiopia's BIT with Yemen, Sudan and Spain respectively.
[484] Article 24 of BIT between Ethiopia and Brazil'…unless the Contracting Parties decided otherwise, such institution shall apply the provision of this agreement.'
[485] Article 15 of BIT between Ethiopia and Austria.' A tribunal established under this part shall decide the dispute in accordance with this Agreement and applicable rules and principle of international law.'
[486] Article 8(3) (b) of BIT between Ethiopia and Egypt. 'The national Law of Contracting Party in whose territory the investment was made.'
[487] Article 10(6) of BIT between Ethiopia and Sweden.
[488] Article 14 of Austria and Ethiopia BIT.

> received or will be received pursuant to an indemnity, guarantee or insurance contract. (My emphasis)

Generally, under Ethiopia's BITs there is no substantive limitation imposed on international arbitration not to entertain certain issues. This implies that as far as the dispute arise from the treaty; the tribunal will have the competency to entertain the matter. However, in Ethiopia-Brazil BIT, it is indicated that environmental, national security, corporate social responsibility, labour and corruption matters are out the ambit of the arbitration tribunal.[489]

On top of this, it is well known fact that once the dispute is referred to institution arbitration, the quality and qualification of the arbitrator shall be determined by the institution concerned.[490] However, in one Ethiopia's BIT the minimum qualification of the arbitrator is well stated. Accordingly, the arbitrator should have the necessary expertise and experience in public international law and investment rules and he/she should be independent.[491]

Concluding remarks

As one of the least developed country, Ethiopia with the view to attract FDI and enhance economic growth concludes various BITs with both developing and developed countries. Like other countries' BITs there is a high similarity in terms of taxonomical pattern amongst Ethiopia's BITs. Basically, Ethiopia's BITs addressed the main and core issue of investment areas: definition of investment and investors, standard of treatment, expropriation and compensation, settlement of disputes and repatriation of profit.

In contrast to the closed listed asset based and enterprise approach of the definition to investment, most Ethiopia's BITs adopt open-list asset based definition of investment. Regarding the criteria of who is investors, nationality, citizenship and permanent residence criteria are employed to determine whether or not a given physical person is an investor or not. Whereas, incorporation, effective control and head office test are employed to determine whether or not a given judicial person is investor under a given bilateral investment agreement. If the investors once accepted and recognized as an investor, the investment and the investor will get protection

[489] Article 24(3) of BIT between Ethiopia and Brazil.
[490] For instance under Article 11(1) of ICC Arbitration Rule it is stated that' Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.'
[491] See for instance Article 24(7) of BIT between Ethiopia and Brazil.

from the host state. The standard of treatment can be ranged from fair and equitable treatment to full security and protection.

Under Ethiopia's BITs, in principle the host state is prohibited from expropriating the property of investors in the form of either direct or indirect. Only in case of public purpose, in due process of law, in a non-discriminatory manner and with payment of compensation, this should be prompt, adequate and effective to the investor, that expropriating investor's property is allowed. Moreover, be aware of the fact that the main motivate of the investor is to get profit from the investment and repatriate the profit to the home state, under Ethiopia's BITs in the principle repatriation of of profit is provided as of right.

Recognizing the fact that there might be disputed between the investor and the host state and between the Contracting Parties, in all Ethiopia's BITs dispute settlement mechanism is put in place. There are two types of dispute settlement mechanisms: state-state dispute mechanism, which usually resolved in diplomatic and amicable manner and investor and state dispute settlement, which usually resolved through international arbitration rules and procedure.

Chapter Five

Critical examination of the Symmetry of Ethiopia's BITs

Introduction

There is no disagreement as to the cru

cial role of investment in the economic development of a given country. With the view to demonstrate they are investor-friendly and eventually to attract FDI, developing countries enter into various BITs with developing and developed countries, however, the adverse effect and the consequence attached to it is not well considered. As the existing BITs are the result of a century old model of western countries,[492] it is investors oriented and crippled the policy space and sustainable development of the host state which disregards the contemporary and vexing issues like human rights protection, labour and environmental standards.

Although BITs are concluded between the host and home state, the investors come as one of the most important beneficiaries of this bilateral arrangement. The main focus of various BITs is investors' rights rather than corresponding investors' duties. It is true that the right to get safe and predictable system is believed to be one of the integral parts of investment and investors rights, but also the host state has the right and obligation to regulate the investment through various legal frameworks and enforced the same through various institutional frameworks.[493] On top of being the host state assume colossal obligations, the rights of the investors are drafted in so illusive and broad manner make it difficult to identify which act is permissible and non-punishable and which conduct is prohibited and results regulatory chill effect. Even in some BITs, they envisage internationalization of private claim into treaty claim through umbrella clause[494] which empowers any contractual and other transactional commitment assumed by the host state will be protected under the shadow of BIT. This in turn opens the avenue to drag the host state to an expensive arbitration proceeding for even trivial and insignificant breach of

[492] One may trace it back to Friendship commerce and navigation agreement of the USA.

[493] This is emanated from John Locke social contract theory which advocate the establishment of positive law guarded by government.

[494] A typical umbrella clause will be drafted like 'Each contracting party shall observe any obligation it may have entered into with regards to investments of nationals or companies of the other contracting parties.' See A Oniyinde and E Ayo 'The protection of energy investors under umbrella clauses in bilateral investment treaties: a myth or a reality?' (2017) 61 *Journal of Law, Policy and Globalization* 161-169 at 162.

contractual commitment. It is also quite common to find a stabilization clause[495] which freeze the regulatory power of the host state by preventing from amending or change of laws which potentially affect the interest of investors.

As any type of contractual or negotiation process, BIT should reflect the balance rights and obligations between investors and host state.[496] Naturally, any right come with the corresponding obligation. This chapter assesses the balance in Ethiopia's BITs in terms of the corresponding obligations and rights of the host state and investors'.[497] There are two criteria employed to measure the symmetry or otherwise of Ethiopia's BITs: minimum customary international law for treatment of aliens, which were advocated by developed countries, but rejected by developing countries and the contents of Ethiopia's BITs by way of comparative analysis.

5.1 The symmetry of Ethiopia's BITs *vis- à -vis* minimum standard under customary international law

The close examination of the historical background of BITs can be traced back to absence of agreement on the existence and non-existence of international minimum standards under customary international law that extend protection to foreign aliens. The developed nations, the USA being the forefront, argue that there is customary international law for the protection of foreign investment and investors which is backed by several international arbitrations and judicial decisions.[498] Whereas, the developing and least developed countries, Mexico being the forefront leader, deny the existence of such norm and claim.[499] They argue that the foreign investors do not deserve no more treatment than national investors[500] and even in Marxist

[495] Generally speaking stabilization clause can be broadly classified into three: freezing clause, which focus on prohibit any change of legislation, economic equilibrium clause, which focus on freezing the fiscal and non-fiscal legislation until the end of the investment project and hybrid clause which prohibit any change of law and compensation of investors whenever there is change of law. For more detailed discussion please see L Cernic 'Corporate human rights obligations under stabilization clauses'(2010) 11:2 *German Law Journal* 210-229.

[496] Although the home state is one of the forefront stakeholders under BITs, it is quite rare to find obligation imposed on it.

[497] Therefore, according to the principle of reciprocity of contract the obligation of host state is the right of investor and vice versa.

[498] J Vandevelde 'The bilateral investment' treaty program of the united states'(1988) *Cornell International Law Journal* 201-276 at 231.

[499] J Daly 'Has Mexico crossed the border on state responsibility for economic injury to aliens? Foreign investment and the calvo clause in Mexico after the NAFTA'(1994) *St. Mary's Law Journal* 1147-1194 at 1163.

[500] Calvo provide three reasons for this assertion: every state are equal and independent, non-interference by other states and the fact that foreign investors reside in host state necessarily mean they are abided by domestic law

countries they adopt no compensation policy.[501] This is again reflected in the international arena and Ethiopia with a like-minded developing countries vote in favour three resolutions which indirectly reject the argument of developed countries: resolution on permanent sovereignty on natural resource[502], resolution in a new International Economic order[503] and resolution on Economic rights and duties of states.[504] The lingering question is that, what was the content of customary international law advocated by developed countries? Is Ethiopia better off by rejecting customary international law and concluding BITs?

Although there is no precise content of what is the exact content of customary international law advocated by developed nation, it is possible to infer from the argument of the USA that it is all about in case there is expropriation, the capital importing countries should paid 'prompts, adequate and effective' compensation which is also known as Hull formula.[505] This formula acknowledges the fact that states have inherent power to expropriate, but simply argue in doing so; they should pay compensation which is prompt, adequate and effective. Ethiopia together with other nation rejects this assertion by citing that every nation has inherent power to determine domestic matters including compensation for expropriation.

While Ethiopia and other developing nation seem to win the battle, however, closer examination of Ethiopia's BITs reveals otherwise. In almost all treaties Ethiopia concluded the Hull formula is recognized. For instance, under Article 5(1) of BIT between Ethiopia and UK state that:'

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without invoking diplomatic protection. Please see R Garcia-Mora 'The calvo clause in Latin American Constitutions and international law'(1988) 33:4 *Marquette Law Review* 205-219 at 206.

[501] J Vandevelde 'The political economy of a bilateral investment treaty'(1998) 92 *The American Journal of International Law 621-641* at 627.

[502] This resolution is pass in favor of 87 votes, 2 opposed (France and South Africa, at the time South Africa were under colonial rule) and 12 abstention (including United States and UK) . Please see G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). The full document is available at http://legal.un.org/avl/ha/ga_1803/ga_1803.html (accessed 19 July 2019). For more enlighten discussion on this point please see Y Tyagi 'Permanent sovereignty over natural resources'(2015) 4 *Cambridge Journal of International and Comparative Law 588-615.*

[503] UNCTAD Res. 88, 12 U.N. TDOR, 12th Sess. Supp. No. 1, at 1, U.N. Doc. TD/B/ 421 (1972). The Pdf version of this resolution is accessible at http://legal.un.org/avl/pdf/ha/ga_3201/ga_3201_ph_e.pdf(accessed 19 July 2019). For more information on this point please see J Ferguson A conversation on the new international economic order(1984) 1 Blackletter Journal.

[504] G.A. Res. 3281, 29 U.N. GAOR, Supp. 31, at 50, U.N. Doc. A19631 (1974). The full version of this resolution is available at http://legal.un.org/avl/ha/cerds/cerds.html(accessed 19 July 2019). The resolution is approved by overwhelming majority the super power like the USA, UK and Canada vote against the resolution. For more discussion on this point G White A new international economic order?(1976) 16:2 *Virginia Journal of International Law.*

[505] Levy (n 389)at 426.

Investments of nationals or companies of either Contracting Party shall not be nationalized or expropriated…. against prompt, adequate and effective compensation.'[506]

Under customary international law in which developed nations advocated for, it only deals about the direct expropriation. We can infer from the historical context of the dispute that the very concern for BITs come after massive nationalization.[507] To put differently, in nowhere, it is indicated that indirect expropriation should be compensated. However, under various treaties Ethiopia's BITs not only acknowledge the fact that direct expropriation is subject to prompt, adequate and effective compensation but also explicitly give recognition to indirect expropriation. For instance, under Article 5(1) of Israel and Ethiopia's BIT, it is indicated that' investments of investor of either Contracting Party shall not be nationalized, expropriated or subjected to measure having the effect equivalent to nationalization….'[508](My emphasis)

Under customary international law developed nation advocated for, there was no precondition for capital importing countries to exercise the right of expropriation. This can be inferred from the Cordell Hull statement which state that'… no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment…'[509](My emphasis). To put differently, the capital importing country had unfettered power as to the substantive and procedural aspect of expropriation but to provide prompt, adequate and effective compensation. However, under Ethiopia's BITs it is not uncommon to come across three main procedural requirements: public purpose, non-discrimination[510] and in accordance with the due process of law. Usually what constitute a public purpose is defined under national law. Under Proclamation No. 455/2005, Article 2(5) state that what means of a public purpose will be defined by the appropriate body.[511]

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[506] Article 5(1) of BIT between Ethiopia and UK.
[507] J Vandevelde 'A brief history of international investment agreements'(2005) 12 *University of California Davis of International Law and Policy* 157-194 pp. 166-167.
[508] Please see Ethiopia and Israel BIT.
[509] Note of Secretary of state Hull press release 22 August 1938 as quoted by H Weston Prompt, adequate and effective: a universal standard of compensation(1961) 30 *Fordham Law Review* 727-758 at 734.
[510] This is what Vandevelde describe as the neutral effect of investment in which the political situation of the home and host state shouldn't be translated to investors and their investment. See Vandevelde(n 501) at 629.
[511] A proclamation to provide for the expropriation of land holdings for public purposes and payment of compensation Proclamation No. 455/2005 Fed. Neg. Gaz. 11th Year No. 43 . The full version of this proclamation is available at http://goalgoole.com/proclamation-no-4552005-expropriation-of-landholdings-for-public-purposes-and-payment-of-compensation-proclamation/(accessed 20 July 2019).

Nevertheless, the same provision state that the definition of a public purpose in such case should' ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.'[512] The expropriation process should not discriminate between foreign and national investors[513] just not to mention it should follow the due process. As per the expropriation proclamation, the main due process of law is that the *Woreda* [514] or urban administration shall notify in writing the landholding as to when to vacate and indicate the compensation he/she entitles.[515]

In the customary international law developed nation advocated for, the term compensation was limited to mean compensation for expropriation.[516] However, under Ethiopia's BITs the term compensation is expanded even to represent any lose arise out of war, civil disturbance and other similar events.[517] On top of this, in the customary international law developed nation advocated for, they never request for guarantee for repatriation of profit and dispute settlement clause.[518] However, in almost all Ethiopia's BITs the issue of repatriation of profits in principle is available in the currency, which is easily convertible and dispute settlement between state and state and state-investor is embodied.

All in all, Ethiopia in particular and developing countries in general by rejecting a customary international law and reaffirm the same content and even more in their BITs which ultimately hurt them. Therefore, one can safely conclude that in comparison to the obligation Ethiopia would assume had she accept the minimum customary international law advocated by capital exporting countries was way lighter than the obligation she assume by concluding BITs and hence, the existing BITs in this regards are asymmetrical.

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[512] Article 2(5) of the Proclamation No. 455/ 2005 (n 511).
[513] This seems well enforce through instrumentality of national treatment and most-favored-nation treatment
[514] This is the similar with district administration.
[515] Article 4 of Proclamation No. 455/ 2005.
[516] Vandevelde(n 507) at 171.
[517] For instance under Article 7 of BIT between Ethiopia and Netherland it is indicated that' Nationals of one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.'
[518] Vandevelde (n 507) at 244.

5.2 Symmetry of Ethiopia's BITs vis-à-vis its content

5.2.1 Scant attention to sustainable development

Unlike the previous model of freedom of investment, which built on the fundamental assumption that all investments are good for the economic development of the host state, contemporary and the prevailing model is investment for sustainable development, which in turns based on the fundamental pragmatic believe that despite the fact that FDI coming through BITs benefit the host state, the benefit is not automatic.[519] In sustainable development approach the investment and investor should contribute among other thing in the protection of human rights, Labour and environmental rights. The Ethiopia's BITs either does not deal or give scant attention to this issue.

A. Human rights provisions

With the increase in globalization,[520] there is a high level of openness amongst states, which facilitate the free flow of factors of production: Labour, capital, goods and services. This phenomenon leads to the creation of giant Multinational Companies (MNCs)[521] which operate in different parts of the world. Citing United Nation report, one author stated that the world's top 100 MNCs account for 4.3% of the global economic activities.[522] These MNCs is also contributing 2.7 trillion dollars to the world's gross product in total.[523] Yet again, 'the top 200 corporations' combined sales are bigger than the combined economies of all countries minus the biggest 10.'[524] As a result of this, their influence and control in individual life becomes evident.

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[519] Speech delivered by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand available at https://unctad.org/meetings/en/Miscellaneous%20Documents/South-Africa-Investment-statement_Rob_Davies.pdf(accessed 4 August 2019).

[520] As per Peterson institution globalization can be defined as ' the growing interdependence of the World's economics, cultures, and population, brought about by cross-border trade in goods and services, technology and flows of investment, people and information.' Please see what is Globalization? And How Has the Global Economy Shaped the United States? Peterson Institution for International Economics. The full article is available at https://piie.com/microsites/globalization/what-is-globalization.html(accessed at 21 July 2019).

[521] Usually it used interchangeable with transnational corporation and global corporation.

[522] B Roach Corporate power in a global economy(2007) Global Development and Environment Institute at 4.

[523] As above.

[524] S Anderson and J Caranagh The rise of corporate global power(2000) at 1.

One of the main policy justifications for developing countries to conclude BITs is to enhance FDI.[525] Its goes without saying that sustainable development requires both FDI and human rights protection.[526] Despite the fact that the MNCs presence in developing countries is engines for economic development, they are also engaged in gross violation of human rights. The drastic impact of MNCs in human rights violation is well manifested in Shell's oil production in the Niger delta[527] and Rana Plaza incident.[528] On top of being the violator of human rights, they might also hinder human rights protection and promotion by government.

Because of the traditional concept of treaties, including human rights treaties, are concluded amongst states,[529] shall not directly apply to MNCs.[530] This gap can be filled by providing human rights protection under BITs. Even in those BITs which recognized human rights provision there are three problems.

The first, the way the existing BITs design seems to offer a unilateral way of settling disputes by the investor only.[531] To put differently, the investor will have an automatic right to drag the host state for alleged violation of the any provisions of BITs whereas the host state will not have such entitlement. This simply means that even if the host state has concrete evidence in which the investor engaged in gross human rights violation, it cannot bring an arbitration claim for the violation. Second, even in those rare instances whereby the host state brings a human rights violation claim against the investors, the arbitrators decline to entertain the matter by citing non-commerciality of human rights.[532] Third, the presence of a stabilization clause makes it very difficult for host state to comply with their human rights obligation. Human rights advocacy

[525] Guzman (n 33) at 669.
[526] W Sheffer'Bilateral investment treaties: a friend or foe to human rights?'(2011) 39:3 *Denver Journal of International Law and Policy* 483-522at 483.
[527] For more detailed discussion on this case please see E George and E Thomas 'Bringing human rights into bilateral investment treaties: south Africa and a different approach to international investment disputes'(2018) 27 *Transnational Law and Contemporary Problem* 403-450 pp.432-434.
[528] T Thapo Remember Rana Plaza: Bangladesh's garment workers still need better protection Reuters 24 April 2017. The full version of this news is available at https://www.youtube.com/watch?v=8xUmgEFhiLk(accessed 21 July 2019) and please also see The full story of the Rana Plaza factory disaster https://www.youtube.com/watch?v=pEbFnAMHHps(accessed 21 July 2019).
[529] Article 2(1) of VCLT state that' treaty means an international agreement concluded between states….'(My emphasis).
[530] S Doddamani 'Fighting for the rights to hold multinational corporation accountable: Indonesia villages battle oil giant Exxon Mobile' (2003) 49 *The Wayne Law Review* 835-860 at 842. However, there is a move to regulate this MNCs through binding treaties.
[531] G Noemi 'The investor and civil society as twin global citizens: proposing a new interpretation in the legitimacy debate'(2009) 32:2 *Suffolk Transnational Law Review* 271-302 at 281.
[532] Schreuer (n 445) at 493.

group like Amnesty International express their concern over stabilization clause by alleging the fact that although human rights are none negotiable item between government and investor, the stabilization clause makes it difficult for any meaningful progress and protection of human rights.[533]

With the exception of one BIT, under Ethiopia's BITs in nowhere, it is indicated that the investor has the obligation to protect human rights. The policy justification behind is that invoking human rights obligation under BITs means giving recognition for the regulatory organ to interfere with investors' investment activities whenever there is allegation of human rights and this might be a pushing factor for FDI.[534] However, under Ethiopia and Brazil BIT, it is stated that 'investors and their investment shall….respect the internationally recognized human rights of those involved in the investors' activities.'[535] (My emphasis). From this provision it is possible to infer the investors obligation is the full gamut of human rights, i.e. both socio-economic rights and civil and political rights. Furthermore, it seems to suggest the obligation extend to any companies involved in the supply chain. On top of this, it is indicated that the investor should refrain from seeking and accepting any exemption of, which might involve human rights violation.[536]

The fact that there is no human rights obligation imposed on the investors under BITs does not mean they will not be liable for any violation of human rights. In various Ethiopia's BITs there is a provision which indicates that the investor among other thing has the obligation to observe the laws of the host state.[537] Ethiopia is a member state to various human rights treaties[538] and as per Article 9(4) of the supreme law of the land; once these treaties are ratified they become part and parcel of the law of the land. Therefore, human rights provisions have indirect application to investors.

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[533] Amensty International Baku-Tbilisi- Ceyhan pipeline project puts human rights on the line. The full press release is available at https://www.amnesty.org.uk/press-releases/baku-tbilisi-ceyhan-pipeline-project-puts-human-rights-line(accessed 23 July 2019).

[534] Sornarajah (n 102) at 77.

[535] Article 14(b) of BIT between Brazil and Ethiopia.

[536] Article 14(e) of BIT between Brazil and Ethiopia.

[537] For instance under Article 12(1) of the Indian and Ethiopia BIT state that' Except as otherwise provided in this agreement, all investment shall be governed by the laws in force in the territory of the Contracting party in which such investment is made.'

[538] Just to mention a few: International Covenant on Civil and Political Rights(ICCPR) (11 June 1993), Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW) (10 December 1981), Convention on the Rights of the Child(CRC) (14 May 1991). For more information about the number of human rights treaties Ethiopia ratified and accede please see Human rights Library available at http://hrlibrary.umn.edu/research/ratification-ethiopia.html(accessed 21 July 2019).

However, the major difference between direct application, i.e. through the clear stipulation of human rights obligation under BITs like the case of Brazil and Ethiopia, and indirect application i.e., through domestic legal framework, is that under the latter case the host state can sue the investor only under domestic court rather than international arbitration since there is no breach of BIT rather breach of domestic law. This will lead us to labelled once was the human rights violation into civil or tort liability.[539] Moreover, knowing the reluctance of Ethiopia's Court to invoke and give meaning for international treaties,[540] by no embodied explicit human rights obligation Ethiopia's BITs left human rights in peril.

b. Environmental provision

The term environment can be defined as' the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival.'[541] Environment is a right which has a sentimental relationship with other rights. As ICJ well noted' the environment is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generation unborn.'[542]

The public at large were by and large ignorant about the issue of environment until 1970 in which because of many special televisions broadcast the serious threat to the environment change and pollution. This community activity reaches its climax on April 22, 1970 where various environmental activists gather at Earth Day.[543] As a result of the profound impact of human activities on the environment, many environmentalists the world is back to the 'anthropocene' era[544]- era which denote a momentous impact of human on the environment.[545] This leads to the first environmental conference, i.e. Stockholm conference in 1972. Although

[539] W Mouyal International Investment law and the rights to regulate: a human rights perspective(2016) Rutledge Publisher at 133.
[540] T Bulto (n 198).
[541] Webster's Ninth New collegiate dictionary(1988) at 382.
[542] Legality of the treaty or use of nuclear weapons advisory opinion(1996) ICJ Reports at 241 as quoted by D Benedetto International Investment Law and the Environment(2013) Edward Elgar Publishing Limited at 19.
[543] AB Murch 'Public concern for environmental pollution'(1971) 35:1 *The Public Opinion Quarterly* at 100.
[544] D Hunter Introduction to international environmental Law: international treaties and principles protect the environment and guard against climate change(file with the author) at 1.
[545] Environmental reflection The Anthropocene: The beginning of the End?(2017) available at https://environmentalreflections.wordpress.com/2017/11/01/the-anthropocene-the-beginning-of-the-end/(accessed 22 July 2019).

the states were in agreement as to the spillover effect and common concern of environmental change and pollution, they were not ready to accept legally binding obligations.[546] After Stockholm declaration, we have Rio Declaration,[547] Johannesburg declaration,[548] and Paris agreement[549] none of them are strictly binding.

As we saw above, one of the effects of globalization is a proliferation of MNCs which operates worldwide. Any economic activities taken place in one state directly or indirectly has an adverse or negative impact on the rest of the world. Although most of these industries are a lucrative business, there environmental impact is high. Most of the times, the environmental impact of MNCs is localized within the local communities.

Despite this, there are instances whereby it has transboundary effect through like gas flaring. For example, because of Nigeria oil exploitation the neighbouring states suffer environmental degradation which in turn deprives means of livelihood.[550] As a result of common but differentiated treatment principle,[551] developing countries have weak environmental regulation and that become an incentive for MNCs to flow to these countries. In the absence of comprehensive multilateral agreement, BITs become one of the enviable options to impose binding obligations on MNCs which appears in the form of investors and investment. However, because BITs do not deal about the substantive obligation to protect non-commercial interest, environmental issues arise in negative point of view.[552]

With the exception of two BITs, closer examination of Ethiopia's BITs reveals that environmental concern is not dealt at all. Under Article 5 of Belgium- Luxembouge Economic Union -Ethiopia BIT it is indicated that, it is inappropriate to enhance investment at the cost of

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[546] M Pallemaerts 'International environmental law from Stockhom to Rio: Back to the Future'(1992) 1 *Review of European Community and International Environmental Law* at 225.
[547] The Rio Declaration on environmental and development (1992). The full version of this document is available at http://www.unesco.org/education/pdf/RIO_E.PDF(accessed 22 July 2019).
[548] The Johannesburg declaration on sustainable development, also known as Earth submit,(2002). The full version of this document is available at https://www.mofa.go.jp/policy/environment/wssd/2002/document/dec.html(accessed 22 July 2019).
[549] Paris Agreement (2015). The full version of this agreement is available at https://www.mofa.go.jp/policy/environment/wssd/2002/document/dec.html(accessed 22 July 2019).
[550] M Baghebo, UP Samuel and EN Nwagbara 'Environmental damage caused by the activities of multinational oil Giants in the Niger Delta Region of Nigeria' (2012) 5:6 *Journal of Humanities and Social Science* 9-13at 10.
[551] As per Principle seven of Rio Declaration'…in views of the different contributions to global environmental degradation, states have common but differential responsibilities..'
[552] D Benedetto(n 542) at 13.

environmental protection. Therefore, Contracting Party shall not offer any waiver or derogate to the existing environmental protection standards.[553] Furthermore, this agreement also enables Contracting Party to adopt an environmental legislation which provides a higher benchmark.[554] Ethiopia-Brazil BIT rather opts for more caution and qualified environmental provision. Under Article 16 it is indicated that as far as the measure is not arbitrary and unjustifiable discrimination, Contracting Party can come up with different environmental legislation and policy.

Although this provision seems to grant Ethiopia the right to adopt any environmental legislation, investor might bring an arbitration claim for violation of BIT and from prior arbitration ruling the chances are very high host state found to be in violation of the treaty. One of the cases which involve BIT and environment is the case between *Techical Medioambientales Tecmed*, S.A v The United Mexican State case.[555]The issue of which were the claimant won a bid in Mexico, which enable it to access land and other assets to operate a hazardous waste landfill in one of the provinces in Mexico, Hermosillo. However, the government of Mexico refuses to renew its license by invoking environmental concerns. The Arbitral Tribunal after reading Article 5(1) of the BIT between Spain and Mexico[556] cumulative with Article 3(1) of the Vienna Convention concluded that if any regulatory measure affect the economic interests of investors' it will tantamount to violation even if such regulation are beneficial to society as a whole.[557] The tribunal by cross refer to previous decision held that:[558]

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains. (My emphasis)

Arbitral Tribunal are very consistent in their investors' friendly interpretation. They even deliberately refuse to extend other rules of interpretation which might jeopardize investors'

[553] Article 5(2) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[554] Article 5(4) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[555] ICSID Case No. ARB(AF/0012)between *Techical Medioambientales Tecmed, S.A v The United Mexican State*. The full decision is available at https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf(accessed 22 July 2019).
[556] Article 5(1) state that 'Nationalization, expropriation or any other measure of similar effects ….which may be adopted by the authorities of a Contracting Party against investments in its territory made by investors from the other Contracting Party…(My emphasis). This provision is taken from the Tribunal decision at 20.
[557] As Above Para. 121.
[558] As Above.

rights. For instance, in a case between *Metaleid Corporation* v The United Mexican States[559] the Tribunal state that the refusal to grant permits on the part of government by invoking environmental concerns was inappropriate since environment does not fall under the exception. The Tribunal in this case can apply the dynamic rule of interpretation which state that any law should be interpreted in line with the current context and dynamic.[560]

It seems those arbitrators only concerned about the investment and trade impacts and implication of BITs than environment. This leads one author, after examining many cases, to conclude' they do not indicate any particular sensitivity of the arbitrators to environmental considerations.'[561] To curve this problem, Ethiopia's BIT should adopt India-model which clearly mentions that any environmental measure shall not constitute as expropriation and violation of the treaty.[562]

c. Labour provision

It is quite evident that there is an increase in FDI in developing countries.[563] Because of 'classic sources of comparative advantages' like market size are not amenable for short term policy manipulation, developing countries enter into a race to the bottom by making concession to another malleable determinate factors like that of tax laws and labour regulation and law.[564] Generally, investors prefer lower labour standard countries than countries which have tighter and higher labour standards since it will lead to lower labour cost which in turn means lower cost of production.

All often, MNCs flock to developing countries to engage in 'dirty industry' by exploiting the scarce natural resource and cheap labour cost. This is especially evident if the type of investment is low-technology and labour intensive. To mention a few instances, an Adidas sweatshop scandal which exposes the manufacturing process in the two Indonesia factories are using forced labour, sexual harassment, child labour with extremely low wage i.e. below $60 per month and

[559] ICSID Case No. ARB (AF)/97/1 *Metaleid Corporation v The United Mexican States*. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 29 May 2019).
[560] As Above Para 86.
[561] P Sands Litigating Environmental dispute: courts, Tribunal and the progressive development of international environmental law(2008) *Global Forum on International Investment* 1-10 at 10.
[562] Please see Article 4.5 and Article 5.4 of Indian Model BIT.
[563] P Nunnenkamp FDI and economic growth in developing countries(2002) 3:4 597-614 *Journal of World Investment*.
[564] D Kucera Core labor standards and foreign direct investment(2002) 141:1 *International Labor Review* 31-70 at 31.

in a clear contradiction with core ILO Conventions.[565][566] Likewise the other brand shoe producer Nike also engaged in child labour and very low wage scandal in Bangladesh and Pakistan. Unlike Adidas, Nike admit their mistake and add the fact that' ending the practice might be difficult.'[567]

The main contentious issue in such labour violation is subsidiary and parent company dichotomy. The parent company usually resides in the developed countries argue that the subsidiary companies have their own legal personality which is quite distinct from the parent company and hence any liability of the subsidiary company shall not extend to parent company.[568] However, in a case between Due v Unocal, the USA court assumes jurisdiction and ruled that the parent company is liable for the situation because' the parent company exercised managerial control and hence had engaged liability for the acts of the subsidiary in the host state.'[569] On top of this, as a result of parent and subsidiary company engaged in a common interest and enterprise, the parent company benefit from the wrongdoing of the subsidiary and hence, it should also held liable for the same exact situation which give rise for the benefit.[570]

There is credible fear from the investors' perspective that the inclusion of non-commercial matters in the BITs will undermine the standard of treatment and protection accorded in the treaty. Although with the view to get social license and bring sustainable development, now days MNCs pursuing a voluntary approach in developing their own corporate social responsibility (CSR) policy, such 'fig leaf' shall not be a substitution for hard law that governing the matter.[571] Moreover, the proliferation of CSR will have a detrimental effect in undermining the globally establish standard like ILO.[572]

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[565] The employee were fired for asking leave and 23 employee also fire for their effort to form trade union.
[566] See Jason Burke Child labor scandal hits Adidas: brutality, poor wages and 15-hour days in the Asian Sweatshop 19 November 2000 The Guardian. The full version of this news is available at https://www.theguardian.com/uk/2000/nov/19/jasonburke.theobserver(accessed 23 July 2019).
[567] S Boggan 'We blew it': Nike admits to mistakes over child labor 20 0ctober 2001 The independent. The full this news is available at https://www.commondreams.org/headlines01/1020-01.htm(accessed 23 July 2019).
[568] B Stephens The amorality of profit: Transnational corporations and human rights(2002) 20:1 *Berkeley Journal of International Law* 45-90 at 88.
[569] Sornaraja (n 102) at 150.
[570] Stephens(n 568) at 56.
[571] C Neal 'Corporate social responsibility: governance gain or laissaz-faire fig leaf?'(2008) *29 Contemporary Labour Law and Policy Journal 459-474* at 463.
[572] As above at 471.

Like the case of environmental provision, with the exception of two BITs, there is no Ethiopia's BIT which deals the issue of labour rights and standard of treatment. Under Article 6(1) of BIT between Ethiopia and Belgium it is stated that Contracting Party can come up with labour standard which is in line with internationally recognized labour rights. Although this provision seems to talk about the all types of labour standard, i.e. core and non-core labour standards,[573] the same treaty narrows down the meaning of internationally recognized labour rights. It is indicated that such rights are the right to association,[574] the right to organize and bargain collectively,[575] a prohibition of the use of any form of or compulsory labour,[576] a minimum age for employment of children,[577] and the accept level of working condition.[578][579] Therefore, in terms of compatibility of domestic labour standard *vis-à-vis* international standards, the BIT under consideration limited to the five core labour standards provided in eight conventions. It also states that Contracting Party shouldn't lower labour standard for sake of attracting investment.[580]

Although this 'no-lowering' criterion seems reasonable and fairly wide, it is subject to marginal application.[581] This standard seems benefit Ethiopia, which has low labour standard from the start and thwart any lobby for improvement of labour standard and hence block the possibility of 'upward harmonization' between labour rights and investment flow.[582]Furthermore, the flip side of this provision exhibits that if the Contracting Party minimized labour rights for purposes other than attracting investment it is not a problem.

This provision has at least two problems. First, it is next to impossible to find out and establishing the causal link in whether a country weakens their labour law to attract investment or not. Second, the provision is not drafted in obligatory manner and has served no purpose than

[573] Core Labor standard, sometimes referred as human rights standard, are universally accepted norms whereas non-core labor standard, also known as economic standards, are those differ from country to country depend on the level of development. See Compel (n 581) at 685.
[574] ILO Convention No. 87.
[575] ILO Convention No. 98.
[576] ILO Convention No. 29 and 105.
[577] ILO Convention No. 138 and 182.
[578] ILO Convention No. 100 and 111.
[579] Article 1(6) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[580] Article 6(2) of BIT between Ethiopia and Belgium- Luxembouge Economic Union.
[581] L Compa 'The multilateral agreement on investment and international labor rights: a failed connection'(1998)31:3 *Cornell International Law Journal* 683-712 at 689.
[582] As above.

persuasive value in terms of good to do and hence it is toothless provision. By the same token, BIT between Brazil and Ethiopia provided that as far as the applicability is not arbitrary and unjustifiably discriminate between foreign and domestic investors, Contracting Party can come up with any labour standards.[583] Unlike Ethiopia and Belgium BIT, under this BIT there is no qualification and can be interpreted to mean contracting party can come with any labour standards, i.e. core and non-core labour standard and by doing so it widens the applicability.

In both BITs the rights and obligations are imposed on Contracting Parties, whereas as we saw above, the main violator of labour rights, investors are excluded. As things stand, a host state in no way brings an action against the investor for breach of treaty based on labour rights and standards. Thus, it is important to provide a clear legal provision which imposed binding legal obligation on investors. In this regard, the USA model BIT provides us a sound solution.[584] As per Article 12 of the Model BIT investor and investment among other things, has an obligation for payment of minimum wage, prohibition of child labour, special conditions of work, social benefit and security scheme of arrangement.

5.2.2 Vagueness under fair and equitable treatment

With the view to secure the special benefit of the investors and restrain the possible negative action of the host state, in almost all BITs there is standard of treatment provisions. Standard of treatment can be defined as' …the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investment made by investors covered by the treaty.'[585] One of the most controversial standards of treatment is fair and equitable treatment. Despite the fact that there is no precise meaning and definition of this standard, it is possible to find it in most BITs. The fact that the term is illusive, abstract and subjective make is easy for investors to invoke before international arbitration tribunals. As one author well noted 'nearly every claimant

[583] Article 16(1) of BIT between Ethiopia and Brazil.
[584] As per Article 12 of the Indian Model BIT also provide the same solution like that of USA model BIT.
[585] ICSID Case No. ARB/O3/19 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic* Para. 212(2010) Decision on Liability The full version of this case is available at https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf(accessed 25 July 2019).

or counsel who brings a suit feels tempted to argue that the treatment accorded by the host state was in violation of the standard of fair and equitable treatment.'[586]

There are two divergent points of views: those who argue that fair and equitable treatment is stand alone and autonomous standard of treatment which imposed more obligations on the host state than what is provided under minimum customary international law. Their base of argument is that in most BITs there is minimum customary international law standard on top of fair and equitable treatment, therefore, if the Contracting Parties to BITs wouldn't provide two different standards to mean one and the same thing.[587] This line of argument should be seen in corollaries to *effet utile* (*ut res magis valeat quam pereat*) rule of interpretation. As per this interpretation, the court must interpret every word of the treaty in such a manner to give meaning and effect than rendering it ineffective.[588] Thus, fair and equivalent treatment can be construed standard beyond and above the minimum customary international law.

On the other hand, those who argue that fair and equitable standard of treatment is one and the same thing with minimum customary international law and does not provide an additional obligation of the host state.[589] The second line of argument is well supported by arbitration decision and state practice. In occidental Exploration case, the arbitration tribunal note that: '….a minimum fair and equitable treatment must be equated with the treatment required under international law,'[590] under the USA model BIT it is indicated that the Contracting Party should accord customary international law which included fair and equitable treatment. Under Article 5(2) state that'…. the concept of fair and equitable treatment …do not require treatment in addition to or beyond that which is required by that standard..'[591] (My emphasis) The ASEAN Investment Framework rather than equivalent fair and equivalent treatment with minimum customary international law, come up with a yardstick as to when to say fair and equivalent

[586] R Dolzer 'Fair and equitable treatment: key standard in investment treaties'(2005) 39:1 *International Law* 87-106 at 87.
[587] Salacuse(n 443) at 384.
[588] This rule of interpretation is coined by WTO appellate body when it said:' one of the corollaries of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty.' See WTO WT/DS2/AR/R United States-Standard for reformulated and convention gasoline(1996) at 23. The full version of this decision is available at https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf(accessed 25 July 2019).
[589] As above.
[590] Occidental Exploration and Product Company v. the Republic of Ecuador Final Award Para. 188 The full version is available at https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf(accessed 25 July 2019).
[591] The same is provided under Colombia Model BIT(Article 3.4) and Canada Model BIT(Article 5.2).

treatment is violated. Accordingly, when Contracting Party, not in line with the principle of due process, deny justice in any legal proceeding and administrative proceeding, then it is possible to say fair and equitable treatment is violated.

There are two categories of Ethiopia's BITs. The first categories are those BITs which recognized 'fair and equitable treatment' as standalone provision.[592] From three perspectives this approach is problematic. First, the investor might argue that fair and equitable treatment standard provided a higher standard of treatment than what is provided under minimum customary international law which imposes surmount obligation on the host state Ethiopia.

Second, because the term is illusive and subjective, the investor will have unfettered power to invoke this standard for any reasons which might lead for breach of treaty. This is partly because the 'role of fair and equitable treatment change from case to case.'[593] This is well noted when one author said: 'minimum standard of treatment of aliens is an elusive concept in public international law, whose nature and content, or contents, remain to be determined.'[594](My emphasis)

Third, one of the most prominent functions of fair and equitable standard as recognized by arbitration tribunal is 'protect of the investor's reasonable and legitimate expectation.'[595] Thus, practically speaking the investors may come up with any conceivable reasons as their legitimate expectation before the investment is made and it will automatically shift the burden to the host state Ethiopia to prove otherwise. Logically speaking, the foreign investors do many calculations and consideration before investing in a give country and one of these is the legal framework of the host state and as per this standard change or even amendment of one of the laws might be interpreted as inconsistency of behaviour from host state Ethiopia which in turn means breach of legitimate expectation of investors as a result breach of fair and equitable treatment. In enforcing

[592] For instance under Article 2(2) of Israel-Ethiopia BIT it is indicated that' Investment made by investors of each Contracting Party shall accord fair and equitable treatment in accordance with the provision of this agreement.'
[593] ICSID Case No. ARB/02/5 *Pseg Global INC. AND Konyailgin Elektrk Üretm Ve tcaret Lim!ted "!rket! v. Republic of Turkey* (2007) Award Para. 239. The full version of this case is available at https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf(accessed 25 July 2019).
[594] A Alvarez-Jimenez Minimum standards of treatment of aliens, fair and equitable treatment of foreign investors, customary international law and the Diallo case before the international court of justice(2008) 9:1 Journal of World Investment and Trade at 52.
[595] ICSID Case No. ARB/07/19 *Electrabel S.A. v The Republic of Hungary* (Decision on Jurisdiction), applicable law and liability 7.75. The full version of the case is available at https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf(accessed 25 July 2019).

this, in one case the Tribunal assert that '…….the tribunal held that fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes.'[596] Therefore, any change or amendment of laws might interpret as 'roller-coaster' to the investors and the lawmaker will be crippled the legislator from enacting a new law and the right to regulate with the fear of breach of this illusive obligation.

The second categories of BITs are those that equate fair and equitable treatment with minimum customary international law.[597] This approach also full of problem in a sense the content of customary international law to which fair and equitable standard of treatment is equated with is also unknown and have different rule of interpretation. This is well captured by Borchard when describes this standard as:' vague, deceiving and confused properly calculated to produce an error, for it pretends to express a conception which is reality seldom, if ever exits.'[598] Needless to say, for establishing international customary international law there must be two elements: *opinio juris* and uniform state practice. The fact that the state failed to reach an agreement on multilateral investment agreement is partly because of lack of consensus on minimum customary international law. Because developing countries were objecting to the very existence of customary international law and hence it is difficult to find out what constitute it.

In one case the Tribunal tries to flesh out the content of minimum standard of treatment based on reasonable man standard when it said: 'The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of International standards that every reasonable and impartial man would readily recognize its insufficiency.'[599] Even if one argue

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[596] *Pseg Global inc. and konya ilgin Elektr!k üret!m ve t!caret l!m!ted "!rket! v. Republic of* Turkey (n 593) Para. 250.

[597] Actually the comparison is with MFN principle which is attain customary international law see M Paparinskis The international minimum standard and fair equitable treatment (2013) Oxford University Presspp. 105-112. Such Ethiopia's BITs are numerous for instance under Article 3(2) of BIT between Ethiopia- Denmark state that' Contracting party fair and equitable treatment which in no case shall be less favorable than accorded to its own investors or to investors of any kind state.'

[598] M Borchard Diplomatic Protection on Citizens abroad(1916) as quoted in A Falsafi 'The international minimum standard of treatment of foreign investor's property: a contingent standard'(2007) 30:2 *The Suffolk Transnational Law Review* 317-364 at 336.

[599] Report of International Arbitration Awards *L.F.H Neer and Pauline Neer(USA) v United Mexican States*(1926)Volume IV at 61. The full version of this case is available at http://legal.un.org/riaa/cases/vol_IV/60-66.pdf(accessed 26 July 2019).

that there are investors' rights which believe to attain customary international law status, still it is not important to provide under BITs. This is because once customary international law is established, then it binds all countries except those consistently object the practice(consistent objector),[600] then to provide what is binding on all countries under BITs will be very superfluous and do not serve any purpose than putting more confusion and becoming a leeway for investors' to manipulate the situation. Therefore, equating fair and equitable with a minimum standard of treatment does not help that much since the interpretation become unmanageable and unpredictable.

All in all, both of these approaches are problematic and put the host state Ethiopia in a more precarious position in narrowing down the policy space for regulatory framework. The most enviable option to avoid this asymmetric is by adopting Indian Model BIT which cancels out the requirement of minimum customary international law and fair and equitable standard of treatment altogether.

5.2.3 Absurdity in indirect expropriation

One of the main purposes of any BIT is to protect investors from expropriation or nationalization of their investment. From historical perspectives, expropriation was the main bone of contention which gave rise for emergency of BITs.[601] Although historically expropriation was synonymous with direct expropriation, in the contemporary world, it is rare to find this type of expropriation.[602] Therefore, the most predominant form of expropriation is indirect expropriation. Unlike direct expropriation which usually taken place through notification to the investor and the result of a clear national policy, indirect expropriation is systematic and difficult to recognize.[603] Indirect expropriation usually used in interchangeable with 'wealth deprivation', 'constructive', '*de facto'* and 'creeping' expropriation.[604] In consideration of this, under

[600] E Kadens and E Young 'How customary is customary international law?'(2013) 54 *William and Mary Law Review* 885-920 at 889.
[601] See the discussion on Chapter two.
[602] However, the cases of nationalization of Banks and Insurances business in Iran in 1979 and Bolivia expropriation decree of 2006 can be taken as an exception.
[603] A Zayad 'Indirect expropriation in the field of petroleum'(2004)5:6 *Journal of World Investment and Trade* 897-926 at 902.
[604] As above at 900.

Ethiopia's BITs it is quite common to find indirect expropriation provision. For instance, under Ethiopia-Kuwait BIT it indicates that:[605]

> Investments made by investors of one Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subjected to direct or indirectly measure having effect equivalent to nationalization, expropriation or dispossession.(My emphasis)

However, what constitutes an indirect expropriation became the bone of contention and sources of asymmetry of BIT. As noted above, the government might not engage in directly taking investor's property, however, if the measure has the effect of 'loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor'[606]then it will be construed as indirect expropriation. There are various efforts to define and clarify the meaning of indirect expropriation. The 1961 Harvard draft described indirect expropriation as 'any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.'[607] Some other author rather than defining the term come up with an illustrative list of what would constitute indirect expropriation. Accordingly, excessive or arbitrary taxation, compulsory loan, prohibition of removing staff/employee, prohibition or refusal to access raw material and other similar nature.[608] On top of this, the series act or omission and event of the government may lead to indirect expropriation.[609]

By now it should be a matter of common knowledge that every nation has the rights to regulate its internal matter. On the other hand, investors also have the corresponding rights to get a predictable and stable system. The change in regulation might construe as indirect expropriation. Therefore, finding the striking point between these two competing interests become one of the most painstaking and aching tasks. This is well noted in one case when the Tribunal said:' a

[605] Article 6 of Ethiopia and Kuwait BIT.
[606] UNCTAD Taking of Property (2000) at 2. The pdf version of this document is available at https://unctad.org/en/docs/psiteiitd15.en.pdf(accessed 27 July 2019).
[607] Article 7(3) of Harvard Draft on International Responsibility of States for injuries to Aliens in Robert Ago First report on state responsibility (1970). The full version of this document is available at http://legal.un.org/ilc/documentation/english/a_cn4_217.pdf(accessed 27 July 2019).
[608] OECD Draft Convention on the protection of foreign property: Text with Notes and Comments(1967)2:2 *International Lawyer* at 338.
[609] This is also known as creeping expropriation see ICSID ARB/94/2 Tradex Hellas v Republic of Albania decision on award at 245. This decision is available at https://www.italaw.com/sites/default/files/case-documents/ita0871.pdf(accessed 27 July 2019).

governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose.' This is reaffirmed by another Tribunal when it said:[610]

> That being said, international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law. (My emphasis)

Cognizant to this difficulty, under various BITs they provided what are the yardsticks to constitute indirect expropriation. Under the USA Model BIT, for instance, it is indicated that the interference from the government should be 'serious of action' to categorize as indirect expropriation.[611] Despite the fact that, as to what constitute serious of action is assessed by case by case basis, the Model BIT provided three criteria that should be taken into account to determine the seriousness: the economic impact of the government action on the economic activities of the investor, an action should be unreasonable[612] in relation to investors' expectation and the character of the government.[613][614]

Under ASEAN Model BIT what is meant by 'character of the government' is well flesh out to mean 'objective and whether the action is disproportionate to the public purpose.'[615] Although Indian Model BIT also recognized the fact that only serious actions of government are considered as indirect expropriation, it employed the heavy-duty criteria as to the determination of seriousness of an action.[616] According to Indian Model BIT for government action to be considered as 'serious action' it should be related to deprivation of the investment in such permanent and complete manner, deprivation of the investor's rights to manage and control in

[610] The Matter of an arbitration under the UNCITRAL Arbitration rules 1976 *Saluka investment BV v The Czech Republic*(Partial award) Para. 263. The full version of this case is available at https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf(accessed 27 July 2019).
[611] See Annex 2(4) of the USA Model BIT.
[612] Under Article 5(2)(b) Colombia Model BIT it add 'distinguishable expectation.'
[613] Annex 2(4)(A) of the USA Model BIT.
[614] The same is provided under Annex B.13(1) of Canada BIT.
[615] Annex 2(3) of ASEAN Model BIT.
[616] Article 5.2 of Indian Model BIT.

such permanent and complete manner and any appropriate of investment by the host state in such a manner that transfer the investment value to another party.[617]

Unlike those Model BITs, under the Ethiopia's BITs there are no clear criteria as to what constitutes an indirect expropriation. This implies the investors can invoke an indirect expropriation claim even for minor interference and insignificant and unsustainable effect on their investment. This leads for investors claiming any conceivable breach of BITs under this 'catch all phrase' indirect expropriation claim and to make it worse in the absence of clear criteria in the BITs, the arbitrators are free to determine the issue based on any standards, which might adversely affect the host state Ethiopia.

As thing stands, even a measure which is pursued purely for legitimate purpose and *bona fide* regulatory measures like public health, tax, protection of antiquities, environment and safety might be constituted as indirect expropriation. This again leads to regulatory chill effect for fear of possible violation of BITs obligations. Thus, the absence of hard and fast yardstick makes the whole process unpredictable. Therefore, the absence of criteria for indirect expropriation becomes one source of asymmetry under Ethiopia's BITs. As a result, it is recommended Ethiopia's BITs to adopt clear criteria for what should be considered as indirect expropriation.

5.2.4 The pandemonium in international arbitration system

From the foreign investors' perspective the main loophole in the existing customary international law is lack of dispute settlement mechanism.[618] Generally speaking, in the absence of choice of forum clause under BITs for dispute arise between investors and host state; the national court will have the jurisdiction to entertain the matter.[619] However, for lack of expertise to deal with sophisticated legal issues, perceived prejudice toward foreign investors, defence of sovereignty immunity, political consideration and other factors makes the domestic court unattractive for any investors.[620] Thus, the investor-state dispute has become an effective tool to remedy this defect.

[617] As above.
[618] W Salacuse The Three Laws of International Investment: National, contractual, and international frameworks for foreign capital(2013) Oxford University Press at 397.
[619] United Nations Selecting the Appropriate Forum (2013) at 7. The pdf version is available at https://unctad.org/en/Docs/edmmisc232add1_en.pdf(accessed 31 July 2019).
[620] As above at 10.

In various treaties, it is quite common to find two types of dispute clauses: Investor-state and state-state dispute resolving mechanism.[621]

Since the establishment of ICSID, it become of the principal platform and the number of caseload is ever increasing, partly because of the proliferation of BITs.[622][623] Although ICSID provides arbitration and conciliation for any dispute between member states and investors, it also provides similar services for non-members and investors through Additional Facilitation Rules.[624]

Under all Ethiopia's BITs there is a provision of dispute settlement clause between investors and host state is provided. Under those BITs, ICSID arbitration is the principal, if not the only, forum to address the matter. For instance, under Ethiopia and South African BIT it is indicated that any dispute between the investor and the host state 'which has not been amicably settled, shall at the choice of the investor….be submitted to…international arbitration.'[625] The same BIT also provided that 'where the dispute is referred to international arbitration, the investor and the party concerned in the disputes may agree to refer the dispute… the international centre for settlement of investor dispute.'[626] In the pages to come, the study discusses the loophole in international arbitration inline with how the Ethiopia's BITs try to address the issue.

a. Lack of transparency

One of the criticisms against the existing international arbitration dispute settlement is lack of transparency.[627] With the view to protect sensitive business information, one integral feature of investor-state dispute settlement mechanism is the confidentiality of the whole process.[628] Article

[621] As Above.
[622] D Collins 'Reliance remedies at the international center for the settlement of investment dispute' (2009) *Northwestern Journal of International Law and Business* 195-216 at 197.
[623] It is very important to note that almost all BITs mention ICSID as the principal body to arbitrate any dispute arise from the agreement.
[624] Collins (n 622).
[625] Article 7(1) of BIT between Ethiopia and South Africa.
[626] Article 7(2) of BIT between Ethiopia and south Africa.
[627] See A Rogers Transparency in international commercial arbitration(2006) 54 Kansas Law Review 1301-1338.
[628] S Boyarsky 'Transparency in investor-state arbitration'(2015) 21 *Dispute Resolution Magazine* 34-36 at 34.

48(5) of ICSID Convention provided that the Centre without the consent of the parties shall not disclose its award.[629] The problem with lack of transparency is well-noted by many reporters.[630]

This confidentiality puts shadow on the legitimacy of the arbitration award, which is paid out of public money, tax.[631] Such process even leads for people protest in some countries.[632] With the view to address this problem and public concerns various BITs provided transparency clauses. For instance, under Indian Model BIT it is indicated that the respondent, which is usually the host state, should make public available regarding the notice of arbitration, any pleading concerning jurisdiction and merit based submission, transcripts of the hearing and any decision, order and award of the arbitrators.[633] By the same token, ASEAN investment framework provided that the disputant parties should 'publicly available all awards and decision produced by the tribunal.'[634] Likewise, the USA Model BIT provides that on top of the notice of intent and pleadings, the submission of non-disputant party and amicus curiae[635] should be available to the public.[636] Furthermore, under the same Model BIT it is indicated that hearing of the Tribunal should be open for public.[637]

Contrary to this, under Ethiopia's BITs there is no indication that the proceeding, order and award of the Tribunal should be publicly available. Under Article 12(1) of the FDRE Constitution, it is indicated that the government should be transparent. The Ethiopia's BITs seem to ignore the fact that access to information, which has tremendous impact of the country at large, is both a means to enhance and integral parts of transparency. By doing so the most

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[629] The full version of this convention is available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf(accessed 30 July 2019)

[630] For instance A depalma Nafta's powerful little secret; Obscure tribunals settle disputes, but go too far, critical say, The New York Times available at https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html(accessed 15 June 2019).

[631] As Above.

[632] This is the case in Bolivia and Philadelphia please see YouTube Video https://www.youtube.com/watch?v=mTVGQx3ghlc(accessed 15 June 2019) and T Brower The tide of the times? A sectoral approach to latin america's resistance to the investor-state arbitration system(2016) 56:1 Virginia Journal of International Law.

[633] Article 14.8 of Indian Model BIT.

[634] Article 39(1) of the ASEAN Comprehensive Investment Agreement.

[635] Amicus curiae literally mean 'friends of the court' which assist the court in providing additional legal and scientific information for the court to rule in favor of one party. see M Collins Friends of the court: examining the influence of Amicus curiae participation in U.S. supreme court litigation(2004)38:4 *Law and Society Review* 807-832.

[636] Article 29(1) of the USA Model BIT.

[637] Article 29(2) of the USA Model BIT.

important organ, i.e. the public is left out of the whole process and this become one source of asymmetry in Ethiopia's BIT.

b. Lack of appeal

One of the criticisms against the existing ISDS is that even if the decision of the arbitrators is patently incorrect and unjustifiable it is not possible to appeal against the decision.[638] As per Article 53(1) of ICSID Convention the decision of the Tribunal is not subject to appeal or any other review mechanisms save otherwise provided under the convention. Lack of consistency and predictability in the decision of various *ad hoc* and institutional arbitrations which entertain similar matter differently is becoming the common thing.[639] This is well demonstrated under *Lunder* arbitration where by the arbitral tribunal seat in Stockholm come up with completely different judgement from the one seat in London on the same exact matter.[640] To fuel this problem the decision of an arbitration award is final and binding, which meaning appeal is not an option.[641] Therefore, one of the suggestions is to come up with an appeal mechanism for arbitration award especially from the European Union.[642] According to this proposal, the appellate body will have six members: two judges from European Union, two from the USA and two other persons from other third states.[643] Introducing appeal system will improve the consistency of decision in international investment law and unify the existing fragmented system.[644] Anticipating the likelihood of this option being real is the matter of time, under various BITs incorporates an appeal mechanism. For instance, under the USA Model BIT it is provides that:[645]

> In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional

[638] This is emanated from finality of the arbitration award. For instance under Article 53 of ICSID Convention state that decision of arbitral award' shall not be subject to any appeal.'
[639] M Lopez-Rodriguez 'Investor-state dispute settlement in the EU: Certainty and uncertainty'(2017) 40:1 *Houston Journal of International Law* at 147.
[640] M Howad Creating consistency through a world investment court(2017) 41:1 *Fordham International Law Journal 1-52* at 28.
[641] P Lalive Absolute finality of arbitral awards? At 5.The full version of this article is available at https://www.arbitration-icca.org/media/0/12641359550680/lalive_absolute_finality.pdf(accessed 15 June 2019).
[642] K Yu Cross-fertilizing ISDS with TRIPs(2014) 49 Loyola University Chicago Law Journal 321-359at 344.
[643] As above.
[644] J Tams 'An Appealing option? The debate about an ICSID appellate structure'(2007) 57 *Essay in Transnational Economic Law* 1-59 at 17.
[645] Please see Article 28(10) of USA Model BIT.

> arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism.(My emphasis)

Likewise, the SADC Model BIT also provided that Contracting Party will have the right to appeal against the decision of the Tribunal if a separate multilateral agreement introduces an appeal mechanism.[646]

However, under Ethiopia's BITs it is in nowhere envisage the possibility of appeal if there is any chance of introducing an appeal under separate agreement. Appeal system is believed to be the core antidote for correct wrong interpretation and decision of arbitrators. As we will see below, there is a high probability of impartiality under international arbitration and hence the appeal system will provide an alternative fair and reliable mechanism. As per the existing Ethiopia's BITs incorrect and grave mistake of the Tribunal will not be rectified and remain valid and enforceable even if the appeal system eventually established.

c. Lack of impartiality and independence

Although in almost all the major international arbitrations provides impartiality and independence requirement, but still another problem in the existing arbitration system is the lack of impartiality and independence on the part of arbitrators.[647] According to systematic-bias argument arbitrator with the view to promote arbitration and secure future appointment favour investor over states in state-investor dispute.[648] According to 'double hatting' or revolving door argument an arbitrator who acts as a counsel in one case becomes an arbitrator in another case and professional witness in some other cases.[649] As a result handful of people controls, sometimes they are referred as 'inner mafia'[650], the whole business and compromise the impartiality and independence of the arbitrators.[651]

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[646] Article 29.20 of the SADC Model BIT.
[647] Tupman(n 658) at 28.
[648] W Park 'Arbitrator Integrity: The Transient an the permanent' (2009) 46 *San Diego Review* 629-704at 658.
[649] M Langfod, D Behn and H Lie 'The revolving door in international arbitration'(2017) 20 Journal of International Economic Law 301-332 at 320 as quoted in T Ngodeni 'A critical Analysis of the security of foreign Investments in the Southern African Developmental Community(SADC) (2018) PhD Dissertation(file with the author) at 95.
[650] Who benefits? A deep dive into the incestuous world of ISDS arbitration(2016) available at https://thenextturn.com/who-benefits-a-deep-dive-into-the-incestuous-world-of-isds-arbitrations/(accessed 30 July 2019).
[651] F Cristani Challenge and disqualification of arbitration in international investment arbitration: an overview(2014) 13 *The Law and Practice of International Court and Tribunal* 153-177 pp. 153-154 .

With the view to curve this investor-friendly approach and conflict of interest in the arbitrators, various BITs come up with detail rules about impartiality and independence of the arbitrators. Under Indian Model BIT it is clearly indicated that the arbitrators should stay impartial, independent and avoid any actual or potential conflict of interest in the entire process of arbitration.[652] The arbitrators also expected to immediately disclose any fact which might leads compromise their impartiality and independence.[653] The litigant party may challenge the arbitrator's appointment if there is any circumstance which compromise their impartiality and independence.[654]Furthermore, it also put in place instances whereby the existence of which leads to presumption of impartiality on the parts of arbitrators.[655] By the same token, the Canada Model BIT provides that the arbitrators should be independent and in any way shouldn't affiliate with and received instruction from the litigant parties.[656] There is also strong recommendation for ICSID to embody impartiality and independent requirement from commencement to the end of arbitration proceeding.[657]

However, under Ethiopia's BITs in nowhere, it is indicated the requirement of impartiality and independence of the arbitrators. This implies that even if the arbitrator is clearly biased and impartial it will be difficult to challenge based on the legal rights emanated from the BITs. Absence of impartiality requirement will put a tremendous amount of obligation to challenge the arbitrators since unless a clear standard is put in place mere appearance, quasi-certain or possibility of impartiality is not sufficient to disqualify the arbitrator rather there should be 'manifestly or high probability' of impartiality should exist to challenge the arbitrators.[658] Furthermore, in the absence of clear criteria, the investor might argue that some level of association and *ex parte* communications is foreseeable in case of party-appointed arbitration. In the world which getting impartiality from ISDS is considered to be illusion,[659] especially the

[652] Article 14.6(i) of the Indian Model BIT.
[653] Article 14.6(ii) of the Indian Model BIT.
[654] Article 14.6(iii) of the Indian Model BIT.
[655] Article 14.6(x) of the Indian Model BIT.
[656] Article 29(2)(b) of the Canada Model BIT
[657] ICSID Possible improvement of the framework for ICSID Arbitration (2014) Discussion Paper at 13. The full version of this document is available at https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf(accessed 30 July 2019).
[658] ICSID Case ARB/81/1 *Amcov Republic of Indonesia* Decision to disqualification of an arbitrator(unreported) as quoted in M Tupman Challenge and disqualification of arbitrators in international commercial arbitration(1989) 38 International and comparative law quarterly at 45.
[659] CEO (n 668) at 11.

possibility of impartiality is very high in case of party-appointed arbitrators and as one of the fundamental and essential part of due process in any arbitration proceeding, it is always advisable to put less strange standard that leads to challenge arbitrators under Ethiopia's BITs.

d. Lack of slow down mechanisms

There is no disagreement as to the proliferation of investors-state arbitration[660] and this becomes the growing concern for host states especially when the host state is developing country.[661] One mechanism to mitigate the number of the case file in international arbitration is by limiting the access road. There are different mechanisms for doing so. The first one is require the investor to exhaust all available domestic remedies before resorting to international arbitration.[662] Under Article 26 of ICSID Convention it is indicated that the contracting state may put the exhaustion of local remedies as precondition for their consent to international arbitration. This is employed under the SADC Model BIT which point out that the investor before resorting to international arbitration should seek local remedies which includes remedies from domestic court and administrative measures.[663] Likewise, the Indian Model BIT indicated that the investor before resorting to international arbitration should 'first submit its claim before the relevant domestic court or administrative bodies in the host state.'[664]

The second mechanism is by limiting the jurisdiction of international arbitration not to entertain certain matters,[665] and provide what type of remedies they cannot provide. For instance, under most BITs they provided a national security exception in which the Tribunal neither examine the existence or non-existence of national security defence nor order the information to be public.[666]

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[660] CEO(n 668) at 7.

[661] In 2010 alone among 68 cases filed 51 of them against developing countries and only 17 cases are against developed countries. Argentina which concluded 58 BITs has been sued 51 times but Germany which concluded 136 BITs sued only once. Please see C Olivet The dark side of investment agreements(2011) at 4 available at https://www.tni.org/files/the_dark_side_of_investment_treaties-final.pdf(accessed 30 July 2019).

[662] Article 14(3) of Indian Model BIT state that 'The investor or investment must first submit its claim before the relevant domestic courts or administrative bodies of the host state.. .' (My emphasis).

[663] Article 29(b)(i) of the SADC Model BIT.

[664] Article 14.3(i) of the Indian Model BIT.

[665] Therefore in effect making the matter non-arbitrable.

[666] Under Article 18(1) of the USA Model BIT it is indicated that ' nothing in this Treaty shall be construed to require a party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.' Furthermore, the Indian Model BIT provide that ' where the party asserts as a defense that conduct alleged to be a breach of its obligation under this Treaty is for the protection of its essential security interest protection….arbitration proceedings shall be non-justiciable.'

Furthermore, the Tribunal usually precluded from rendering punitive damage.[667] Finally, stipulate denial of benefit clause if the investor is intentionally set up to access and manipulate the international arbitration system,[668] if the investment is substantially controlled by non-Party and does not maintain diplomatic relations with other parties.[669]

Under Ethiopia's BITs none of these 'slow down' mechanisms to access arbitration and putting limitations on arbitration tribunal are put in place. To put differently, the investor can at any time trigger arbitration proceeding without much difficulty and the Tribunal can access any material from the host state Ethiopia despite the document is classified as confidential and the disclosure of which adversely affect the national security of the country. Thus, this becomes one source of asymmetry of Ethiopia's BITs by too much exposing the country to international arbitration.

All in all, under arbitration provisions of Ethiopia's BITs failed to incorporate transparency clause, possibility of appeal and the various slow down mechanisms.

Concluding remarks

Although Ethiopia concludes various BITs with the view to attract FDI and eventually to enhance economic growth, there is imbalance exhibited in terms of the reciprocal rights and obligations of the investor and the host state. Historically, Ethiopia with other like minded countries rejects the minimum customary international law for the protection of aliens which was advocated by the capital exporting countries. The argument of developed countries was quite simple and easy: in case the host state expropriates investor's property, it should provide prompt, adequate and effective compensation. By rejecting this standard and enter into BITs, Ethiopia in particular and developing countries in general assume more obligations.

[667] Under Article 44(4) of the Canada Model BIT, Article 34(3) of the USA Model BIT, Article 29.19(c) of SADC Model BIT, Article 41(4) of ASEAN comprehensive investment agreement, Article 14.10(iii) of India Model BIT made it clear that the tribunal may not order punitive damages.

[668] This is well expressed a report express the ISDS system as '….Yet rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritizes the rights of investors at the expense of democratically elected national governments and sovereign states.' See CEO Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom (2012) Nouvelles Imprimeries Havaux at 7. The full version of the report is available at https://www.tni.org/files/download/profitingfrominjustice.pdf (accessed 30 July 2019).

[669] Article 20(iii) of the Indian Model BIT, Article 18 of the Canada Model BIT, Article 19 of the ASEAN investment comprehensive framework, Article 17 of the USA Model BIT.

A deeper look at of Ethiopia's BITs reveals that it is built on the old model of all forms of investment is good for the host state and gives no or scant attention to sustainable development issues, particularly labour, human rights and environmental concerns. Once the investment and the investor met the definition, they will get the full fledge benefit. One of such benefit is the standard of treatment accorded to the investment and the investor. Fair and equitable treatment among other standard of treatment become very notorious for being invoked by the investors as a result of illusive and very subjective nature of the term. This term exposes the host state for unnecessary international arbitration proceeding and narrow down the policy space. The same can be said concerning indirect expropriation.

If there is any dispute between the investor and the host state, the suspect areas to go is international arbitration. The existing international arbitration is facing backlash because of lack of impartiality and independence, lack of appeal system and lack of transparency. Only a handful of renowned international arbitrators are rolling themselves in various cases which in turn make them vulnerable for impartiality and independence in favour of investors. More importantly, the confidential nature of the proceeding makes it very difficult for the public and other concerned parties to see what is going behind the scene. Although various contemporary BITs provide an antidote for the existing international problem and provide slow down mechanism, Ethiopia's BITs in general failed to do so. Thus, in many aspects, it is possible to hold that Ethiopia's BITs are asymmetry in favour of investor rights at the expense of host state.

Chapter SIX

Some conclusion thought and recommendations

6.1 Conclusion and findings

The first question of this mini-dissertation, which is all about the historical context to the rise of BITs, is answered in Chapter two and the findings can be summarized as follows. Although the history of investment is as old as human beings, the proper use of the term to extend protection for home state investors was employed in friendship commerce and navigation (FNC) treaty. On account of colonization, the home and host state were one and the same and hence the need to extend protection to foreign investors were not pressing need in 18th and early 19th century. However, after decolonization and the prohibition of the use of force under the UN Charter, it becomes imperative to come up with comprehensive multilateral investment treaties. However, this effort never been realized because of major differences between developed and developing on the standards of treatment.

Developed nations argue in support of the existence of minimum customary international law standards for treatment of aliens. They also argue that in case of expropriation of investors property, the host state should provide adequate, prompt and effective compensation, this formula also known as Hull formula. Whereas, developing countries categorically reject the existence of minimum customary international law standards for treatment of aliens and further argues that in the case of expropriation the foreign investors should be treated in equal level with domestic investors, this also known as Calvo doctrine. As a result this irreconcilable difference, the only mechanism to protect investors and investment were through BITs. Traditionally, BITs were concluded between developing countries and developed countries, however, through time there is a tremendous amount of BITs concluded between developing countries.

The main policy justification behind the conclusion of BITs is quite different from developing and developed countries' perspectives. From capital exporting countries, home state, the main driven motive is security of investment and investors, whereas the rationale behind for capital importing countries, host state, is to attract FDI. There is no consensus among scholars as to the impact of BITs in attracting FDI. Some argue there is positive and direct causal link between

FDI and BITs. The more BITs the country concluded the more they attract FDI. On the other hand, some argue that there is zero at best negative relationship at worse between FDI and BITs. They argue that the binding commitment the host state made has the counterproductive effect of narrowing down the policy space and produce a regulatory chill effect.

The second question of this mini-dissertation, which is all about the domestic legal and institutional framework for investment, is well addressed in chapter three and the finding can be summarized as follows. Like any other country, investment and investor are well regulated under Ethiopia's domestic law. The normative framework for investment regulation ranges from the constitution, which is the basic norm of the country, to directives. Although under the constitution, there is no provision which directly address the issue of investment, there are various provisions which are far reaching consequence and implication to the investment and investors like that of expropriation and land rights. The issue of investment and investors, however, is in detail regulated under investment proclamation, Proclamation No. 769/2012 and investment regulation, regulation No. 270/2012. According to Ethiopia's investment legal regime, not all investment areas are open for foreign investors. Some of the areas are exclusively reserved for government and domestic private investors. On top of the normative framework, institutional framework also sets up to enforce investment rules and facilitate investment.

The third question of this mini-dissertation, which is all about finding the basic structure of Ethiopia's BITs, is addressed under chapter four and the findings can be summarized as follows. With the view to exploit its natural resource and attract FDI, Ethiopia concluded various BITs, with both developing and developed countries. The classic Ethiopia's BIT has at least five basic elements: definition of investor and investment, standard of treatment, expropriation and compensation, repatriation of profit and dispute settlement clause.

The good numbers of Ethiopia's BITs adopt a broader asset base definition of investment which followed by an illustrative list of what constitute investment. The criteria of nationality, citizenship or permanent residence test are also employed to identify who is an investor in any given treaty. The main benefit of being categorized as an investor is to get special benefits like that of standard of treatment. The large portion of Ethiopia's BITs employed four types of standard of treatment: fair and equitable treatment, full security treatment, most favoured national treatment and national treatment. Although fair and equitable treatment is one of the

notorious contingent types of entitlement for investors, uncharacteristically some Ethiopia's BITs adopt FET without any condition attached to it and makes it non-contingent type of entitlement. Likewise, usually a RTAs or customs union is mentioned as exception to the MFN standard of treatment. Paradoxically, under some Ethiopia's BITs the MFN standard is employed without any exception attached to it and this will make it difficult to implement RTAs to which Ethiopia is a party like that of COMESA and AfCFTA.

Under most Ethiopia's BITs, expropriation is prohibited unless and otherwise, the host state demonstrates the existence of public purpose, non-discrimination, payment of compensation and in compliance with due process of law. As to the standard of compensation, most Ethiopia's BITs adopt the Hull formula of adequate, prompt and effective compensation. Picturing the possibility of any dispute, Ethiopia's BITs provided two types of dispute settlement mechanism: state to state and investor to state dispute settlement mechanism. Usually, the dispute between Contracting Parties is resolved through amicable dispute mechanism and diplomatic channel. Whereas, for investor-state disputes usually there is an escalation clause i.e. first through amicable dispute mechanisms like that of negotiation, conciliation or mediation, but if this does not work the investor might resort to international arbitration. As one of the crucial driven motive behind in any given country, investors have the right to take the return of investment to the home state. The Ethiopia's BITs also recognize this right to repatriate profits in convertible currency and the host state has an obligation to make available the money without delay.

The fourth question and the first hypothesis of this mini-dissertation, which was all about assessing whether or not Ethiopia's BITs are balancing the reciprocal rights and obligations of investors' and the host state, is answered under chapter five and the finding can be summarized as follows. Although everyone agrees on the importance of investment to exploit the natural resource and to facilitate the economic growth, it should not come at the expense of the host state right to regulate and sustainable development. Developing countries, including Ethiopia, reject the old notion of minimum customary international law standard, which content was the need to provide adequate, prompt and effective compensation for foreign investors whenever there is expropriation. Ironically, the same countries which reject this standard concluded BITs which have more drastic and far reaching consequence. By rejecting the existence of minimum customary international law and various multilateral investment treaties, developing countries

are trapped in undesirable but necessary competition of the race to the bottom to attract FDI and shoulder much burdensome obligations than what was provided under minimum customary international law which the developed countries were advocating for.

The Ethiopia's BITs either not adequately deal or never deal at all, the burning issues of human rights, environmental standards and labour standards. To make thing worse, any measure Ethiopia as a host state will take to comply with international treaty standards like human rights and environmental agreement, will be construed as a violation of stabilization and indirect expropriation entitlement. Despite the fact that an investor needs protections and entitlement, some of the rights of investor are so illusive and broader, which make it difficult to preciously define neither its content nor the term. For instance, FET standard is in nowhere defined and its content is yet to determine. However, this becomes blessing in disguise for investor to include any claim under the dress of violation of FET. Likewise, the content of indirect expropriation is so abstract even if there is a classic definition of the terms as any measure which have the effect equivalent to expropriation. As per this standard despite the fact that a measure is purely the results of legitimate and genuine policy of the host state, it will be interpreted as indirect expropriation and hence, the host state is expected to pay huge amount of compensation.

Furthermore, the illusive nature of these two standards makes it impossible for the host state to demarcate which measure is permissible and which is not. For fear of litigation and payment of damage, the host state will refrain from issuing necessary and desirable regulations and result in regulatory chill effect. Moreover, if the dispute arises, the investor can drag the host state to international arbitration proceedings. The existing international arbitration system is full of holes and mysteriously complex: lack of impartiality and independence, lack of appeal and lack of transparency just to mention quite a few. The Ethiopia's BITs in nowhere try to rectify the defect exhibit in the existing international arbitration system. All in all, the existing Ethiopia's BITs are asymmetry in a sense they till much towards investors' rights and the host state obligation and hence failed to balance with the right of the host state with obligation of investors.

6.2 Recommendations

This part will address the final question and the second hypothesis of this mini-dissertation: what should be done to rectify the imbalance exhibited under Ethiopia's BITs in particular and developing countries in general.

Detail and specific recommendations to rectify the imbalance or asymmetry exhibited under Ethiopia's BITs are provided together with the analysis. Therefore, it is neither necessary nor logical to repeat those recommendations and hence this part of the recommendation is very brief and portrays the broader picture of the way forward. As we saw the existing Ethiopia's BITs in particular and developing countries BITs in general (by way of analogy) are asymmetrical in favour of investors' rights and imposed so much constraint and obligations on the host state.

If the existing Ethiopia's BITs are asymmetry and full of holes what should be the way forward? The following can be taken as the possible antidote for the existing imbalance exhibited in Ethiopia's BITs in particular developing countries in general.

1. Multilateral Investment Treaty: - one of the causes for the existence of BITs was the absence of multilateral investment agreement. This leads developing countries to enter into a race to the bottom competition to attract FDI by lowering their regulatory framework, granting unlimited and wide rights to the investors which expose them to multi-million dollar claim. Any treaty is the result of negotiation and when the contracting parties are only two, the one who has the leverage and power will have an upper hand and hence dictate the content of the treaty. When the BIT is concluded between developed and developing countries the former one has the capacity and influence to shape the content as they wish. Therefore, one enviable option for weaker contracting parties is increasing their leverage by merging together and air their message as one-voice and in anyways avoids division. Needless to mention, in multilateral international negotiation the need to have well qualified and skilled negotiator is necessary which developing countries lack and developed nations might exploit this loophole. If developing countries established their minimum reservation point before negotiation is started, they will out voice the other side and secure their interests.

Although developing countries are fairly diverse and fragile, the asymmetry of the existing BITs is their common concern. In this regard, we can take a good lesson from the history of the same nature.[670]

2. Introduce a comprehensive and binding African Investment Treaty: - Recognizing the importance and spill over effect, African countries are eager to regulate investment. However, the big concern is that the existing investment frameworks are neither comprehensive nor unified. For instance, among the eight regional blocks recognized by the AU,[671] SADC, COMESA, UMA, ECOWAS and EAC are trying to regulate investment. On top of this, there is Pan-African investment code. SADC introduces model BIT which does not have any binding effect than serving as 'good to do' and this will not deter race to the bottom problem. The binding SADC investment agreement[672] is also paralysed by making the Tribunal ineffective. The SADC Tribunal, which is established in 2005 was suspended by head of state submit in 2011[673] and amended the agreement to exclude any claim being brought by natural and legal person. Furthermore, in 2016 the SADC agreement was amended among other things, entirely cancel out the ISDS annex by saying the mechanism failed to balance investor interest and the right to regulate of the host state.[674] Although the draft pan-Africa investment code try to balance the interest of the investors *vis a vis* the right of the host state to regulate and sustainable development, as provided under the preamble and Article 2, the Code is meant to be 'a comprehensive guiding instrument on investment' for member states and it is not binding as such.[675] Furthermore, as per Article 3 of the Draft Code it will not replace BITs. Likewise COMESA investment agreement is only concerned about intra-COMESA

[670] This is to mean as to how the developing countries reject hull formula and voice the Calvo doctrine under UN General Assembly. For more detailed discussion on the point please see Chapter two.

[671] These are SADC, IGAD, ECOWAS, ECCAS, CEN-SAD, COMESA and UMA avaialebe at https://au.int/en/organs/recs(accessed 5 August 2019).

[672] SADC Protocol of Finance and Investment available at https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf(accessed 5 August 2019)

[673] For more detailed discussion please see L Nathan The disbanding of the SADC tribunal: A cautionary tale(2013) 35:4 *Human Rights Quarterly pp. 870-892.*

[674] T Childede Amendements of the Annex to the SADC Finance and Investment protocol: are they in force yet? Avaialbe at https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html(accessed 5 August 2019).

[675] See African Union Commission Draft Pan-african Investment Code(2016) available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf(accessed 5 August 2019) .

investment, which is very insignificant.[676] one of the main areas of focus as per Article 13(ii) of decision to establish AfCFTA empower AU Ministers of Trade to negotiation and come up with comprehensive investment protocol,[677] which is expected to take place in the second phase.[678] As per Article 8(1) of the agreement to establish AfCFTA envisage the possibility of investment and dispute settlement protocol, which upon adoption will constitute part and parcel of the agreement.[679] If these two protocols come into existence, it will substantially improve the asymmetry exhibited under the existing BITs. One may legitimately ask, do we really need BITs afterward? The answer seems in the affirmative since unless member states contradict the protocols, based on their specific situation, may provide higher and more rigorous requirements under their BITs. Therefore, even after coming into force of these two protocols BITs are still important.

3. Until the above two recommendations come into effect Ethiopia should develop a model BIT that addresses the current asymmetry of obligations: - BITs have a very drastic effect on the sovereignty, especially right to regulate of the host state and hence need careful and well prepared negotiation approach is indispensable. One way of doing this is through drafting Model BIT. A Model BIT of a given country is neither binding nor final, but it is a basis for any bilateral investment negotiation. This will help Ethiopia to have consistent and unified BITs and result in predictability of the system. The fact that many countries develop their own model BIT as a starting point for the further negotiation exhibit the significance of it. Usually BITs extend protection to investors by way of imposing regulatory non-interference from the government. This non-interference provision of BITs is enlarged by the international arbitration Tribunal under the guise of interpretation. However, it is also important to note the fact that as the guardian and protector of its citizen, the government has the rights and obligation to regulate the investment and investors and bring sustainable development. Thus, it is a high time for

[676] Please see the second Paraph of the agreement avaialeba at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download(accessed 5 August 2019).
[677] Decision on the African Continetal Free Trade Area Doc Assembly AU/04/XXXII avaialbe at https://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf(accessed 5 August 2019).
[678] AfCFTA enter into force; phase II on investment, competition, IPRs to last through 2020-2021 availabe at https://iisd.org/itn/2019/06/27/afcfta-enters-into-force-phase-ii-on-investment-competition-iprs-to-last-through-2020-2021/(accessed 5 August 2019).
[679] Agreement Establishing the African Continental Free Trade Area Assembly AU/ Dec. 394(XVIII) avaialbe at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf(accessed 5 August 2019).

Ethiopia to come up with its own model BIT which strikes both the interest of the host state and investors. The future Ethiopia's Model BIT among other things, should address the following issues:

a. Sustainable development provisions: - it is quite evident that the existing model of BITs which advocate that all forms of investments is good and bring economic development to the host state is obsolete to say the least. There is a consensus that the new generation of BITs should follow a sustainable development model, which advocates that the host state cannot achieve its developmental goal without achieving its human right, social and environmental goals.[680] The existing BITs with the view appease the investors weaken their labour, environmental and human rights.

   Generally speaking, due to the absence of international legal personality, MNCs is not directly governed by international law. The state has quarter layers of obligations: the obligation to respect, protect, promote and fulfil towards human rights. The Obligation to respect is a negative right in such a way the government is expected from refrain from interference with individual rights, whereas the obligation to protect is a positive obligation of state in a sense, it should take appropriate action so that third parties will not violate individual rights. On top of the foreign investors are the causes for violation of human rights,[681] the host state Ethiopia is also on many occasions failed to live up its obligation of protect and respect.[682]

   The MNCs are notorious for their non-compliance with environmental standards to avoid the compliance cost and Ethiopia's BITs tend to relax by not regulating the issue to create 'environmental heaven' investment condition. Ethiopia is a party to many international environmental conventions and hence, has an obligation to live up to its obligations. Furthermore, Ethiopia is one of the countries which does not stipulate minimum wage under its labour law.[683] This has become one of the loopholes for foreign investors to hire

[680] E Mc Taggart 'Promoting agenda 21 and the development of sustainable development indicators'(1997) 2:2 *Enviromental Law and Policy* pp 6-9 at 8 .
[681] See for instance sexual abuse Profile Organization (n 684).
[682] The Okaland Institute report Unheard voice: The human rights impact of land investment on indigenous communities in Gambella(2013) available at https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_Unheard_Voices.pdf(accessed 5 August 2019).
[683] See Labour Proclamtion, Proclmation No. 377/2003 Fed. Nez. Gaz. 10th Year No. 12 Addis Ababa 26th Feburaray 2004.

workers below a living wage.[684] On top of being not adequately deal the issue of labour rights under its BITs, the draft Ethiopian labour law, even weaken the standard with the view to attract investment.[685] Therefore, it is strongly advisable to embody sustainable clause under its Model BIT which can be drafted in two ways: negative obligation of the host state and positive obligation of the investors.

In its model BIT negative obligation of the host state can be drafted in the following manner:

> It is inappropriate for the Contracting Party to encourage investment by lowering environmental, Labour and human rights standards. The Contracting Party shall not provide any waiver or any other form of derogation and concession to investors with regards to environmental, Labour and human rights standards. Save otherwise the measures are applied in an arbitrary and unjustified manner, the Contracting Party has the right to come up with a higher standard and this shouldn't construe as a violation of its treaty obligation.

The positive obligation of the investor can be drafted in the following manner:

> The investor and its investment at all time shall observe and comply with domestic and international standards concerning human rights, Labour and environmental Law.

b. The host state right to regulate provisions: - As per one of the integral components of state is government, whose mandate is to regulate the internal matters.[686] This regulatory power is effected through policy and legislative measures. There is a growing tension between the host state and investors as to which act of the state is legitimate and non-punishable. There is a natural tendency from the investor side to paint any measure of the host state as a prohibited act and make the biggest scene out of it. If the measure affects their interest, they will bring an arbitration claim even if the measure is legitimate and *bona fida*. The investors are not only looking into the sole effect of the measure, but they also examine the intention behind the measure. To put differently, even if the measure does not substantially affect their economic interest, they tend to argue the measure violate their entitlement by pointing towards the motive behind the measure.

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[684] Profile: Organizing in the garment and textiles sector in Ethiopia available at http://www.industriall-union.org/profile-organizing-in-the-garment-and-textile-sector-in-ethiopia(accessed 6 August 2019).

[685] For more detailed discussion please see Y Tamiru Hammering Labour rights: succinct summary of the darft Labour Proclamation https://www.abyssinialaw.com/blog-posts/item/1770-hammering-labor-rights-succinct-summary-of-the-draft-labor-proclamation?tmpl=component(accessed 8 Augus 2019).

[686] The other three elements are permanent population, capacity to enter into relations with other states and territory. See Article 1 of the Motovideo Convention available at http://publicinternationallaw.in/sites/default/files/salient/01-General/03-Montevideo%20COnvention.pdf(accessed 6 August 2019).

This argument is usually forwarded under the guise of the minimum customary international law standard, FET and indirect expropriation. The content of the minimum customary international law standard and FET aren't precise and subjective. Likewise, in case of indirect expropriation what criteria should be employed to measure the effect on investor's interest and is it only economic or other interest of the investor's are taken into account is still the bone of contention. This argument has at least two effects on the host states.

First, the legislature be will afraid to make any measure which has the potential effect on the investors even if the measure is desirable and beneficial to the public at large. Thus, the regulator by involving in such self-censorship will trap in regulatory chill effect. Second, the arbitrator while examining the intent behind the measure may reach the conclusion that the measure is meant to attack the investors. In this case, the host state should withdraw the measure which means the sovereignty of the host state, which resides in the legislature, is overturned and countermand by the three arbitrators. This leads to counter-majoritarian dilemma. Therefore, the future Model BITs of Ethiopia should remove the requirement of FET and minimum customary international law standard altogether and put qualification toward indirect expropriation which can be drafted in the following manner:

> Any measure taken by the Contracting Party to pursue a legitimate welfare objective, such as public health, safety and environment shall not constitute an indirect expropriation[687]
> The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:
> a. Permanent and complete or near complete deprivation of the value of Investment; and
> b. Permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment and
> c. An appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party.[688]

[687] This is taken from Draft Pan-African Investment Code.
[688] This is taken from Indian Model BIT.

c. Restrict the discretion of arbitrators and access to arbitration:- one of the typical feature of any BIT is ISDS mechanism. If there is any dispute which arise from the treaty, then the investor will have the right to bring claims against the host state. There is immense suspicion that the existing international arbitration is investor friendly and the arbitrators are not independent and impartial. Moreover, the overextended interpretation of treaty provisions by Tribunal enables them to make a new law under the guise of interpretation and that has an adverse effect on the sovereignty of the host state. Even worse, by virtue of the umbrella clause, the investor is entitled to bring an international arbitration claim against the host state.

   In the absence of any limitation, the arbitration tribunal in principle is entitled to provide any type of award even if it adversely affects the public interest at large. Moreover, there are no procedural barriers for the investor to bring an international arbitration claim against the host state. Therefore, it is very important to put exception and limitation as to the type of award and jurisdiction of the international arbitration tribunal. In this regards, it is advisable to adopt the Canada Model BIT which state that 'a Tribunal may not order a disputing Party to pay punitive damages and the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.' Moreover, it is imperative to limit the jurisdiction of the international arbitration only to disputes arise from the treaty and this can be framed: 'The Tribunal shall have the jurisdiction to examine any dispute arise out of the treaty.'

   By the same token as per the principle of margin of appreciation[689] the local courts are in a much better position to examine the situation and solve the matter than international arbitrators sitting in Washington. Therefore, it is quite imperative to put the exhaustion of local remedies before resorting to international arbitration. This can be framed: 'Unless the procedure is unduly prolonged; the investor should exhaust all available local remedies before resorting to international arbitration.'

[689] This principle is coined by European Court of Human Rights. For detailed discussion on this principle please see D Moral 'The increasingly marginal appreciation of the margin-of-appreciation doctrine'(2006) 7:6 *German Law Journal 611-624*

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