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UMBRELLA CLAUSE IN ETHIOPIA'S BILATERAL INVESTMENT TREATIES (BITs) IN LIGHT OF STATE RESPONSIBILITY: ETHIOPIA'S BITs WITH GERMANY, FRANCE AND TURKEY

A thesis submitted in partial fulfillment of the requirements for the Conferment of Master of Laws (LLM) in Public International Law at School of Law, College of Law and Governance Studies Addis Ababa University

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Declaration

I YOHANNES ENEYEW AYALEW, do hereby declare that the thesis *‘UMBRELLA CLAUSE IN ETHIOPIA’S BILATERAL INVESTMENT TREATIES (BITS) IN LIGHT OF STATE RESPONSIBILITY: ETHIOPIA’S BITS WITH GERMANY, FRANCE AND TURKEY’* is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Dedicated to:

My Sister Ms.Tsegie Eneyew Ayalew

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Abbreviations

ACP	African-Caribbean Partnership
AEC	African Economic Communities
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
BRICS	Brazil-Russia-India-China-South Africa
COMESA	Common Market for Eastern and Southern Africa States
CRCICA	Cairo Regional Centre for International Commercial Arbitration
CTEA	Comprehensive Trade and Economic Agreement
ECT	Energy Charter Treaty
EIC	Ethiopian Investment Commission
EU	European Union
FCN	Friendship, Commerce, and Navigation
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
FET	Fair and Equitable Treatment
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Dispute
ICTY	International Military Tribunal for former Yugoslavia
IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
MCCI	Moscow Chamber of Commerce and Industry
MFN	Most Favored Nation
MENA	Middle East and North Africa
MIA	Multilateral Investment Agreement

MIGA	Multilateral Investment Guarantee Agreement
MNC	Multi-National Corporations
NAFTA	North America Free Trade Area
OECD	Organization for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
TRIMs	Trade Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nation Commission for Trade and Investment
UNGA	United Nations General Assembly
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Abstract

Umbrella clause is a clause in bilateral investment treaties (BITs) which guarantees the observance of obligations by host states entered with investors. This clause enables the investor to have direct recourse before arbitral bodies and elevates contractual breaches to a treaty breach, which will in turn attract the international responsibility of the host state. This thesis will discuss the advent of umbrella clause under international law and its subsequent adaptation by various BITs. The study has used both doctrinal and non-doctrinal method of legal research. Ethiopia has signed 31 BITs out of them 35% of such BITs have had an umbrella clause. However, the Ethiopian BITs are marked by dissimilar treatment in relation to umbrella clause. For instance, the Ethio-Germany BIT has an umbrella clause whereas Ethio-France and Turkey BITs have no such clauses. This thesis raises the following principal questions. What are the policy and legal implications of dissimilar treatment of umbrella clause under Ethiopian BITs? Is that a matter of bargain, strategic partnership or another? What will be the implication with regard to state responsibility when inclusion or absence of umbrella clause is made in Ethiopian BITs? After examining tribunals' experiences, comparative study of model BITs and commentators on the field, the study found that while umbrella clause is an imperative arsenal for investor to claim before arbitral bodies, it makes the obligation of host states more burdensome. Therefore, this thesis argues, in order to avoid dissimilar treatment, amending the existing BITs having umbrella clause via eliminating such clause and followed by observing the 2016 Ethiopian model BIT as guidance for future BITs will be a solution.

Key Words: BIT, Standards of Protection, Umbrella Clause, Investor, Host state, Contract Breach, State Responsibility, Ethiopia

CHAPTER ONE

1. INTRODUCTION

1.1. Background

The jurisprudence of international investment law has been largely defined by the unprecedented rise and proliferation of bilateral investment treaties (BITs), meant to replace traditional treaties of Friendship, Commerce, and Navigation (FCN)¹, and designed to encourage foreign investment by offering a standard of substantive protection to investors entering a foreign state.² Beginning in the 1960s, the 1980s saw the rise of BITs as the 1990s did the rise multilateral investment agreements (MIAs) referred jointly as international investment agreements (IIAs).³ Such spread of BITs marked as one of the most remarkable phenomena in international law during the past quarter of a century as part of the extraordinary increase in the number of agreements concluded relating to the protection or liberalization of foreign investment. More than 2960 BITs now exist and 2329 are now in force, with the great majority having been concluded since 1990's. ⁴This figure includes more than 368 trade agreements that contain investment provisions.⁵

Under international law dealing with BITs, there are plentitude of investment protections which can be taken as minimum standards and guarantees of investment. Among other things, protection against arbitrary and discriminatory measures, full protection and security, national treatment, most favored nation (MFN) treatment, repatriation and transfer of capitals, nationalization and effective compensation and umbrella clauses could be taken as few instances⁶.

¹M.Sornarajah, The International Law on Foreign Investment, (3rd ed, 2010), P.180

²Jonathan B. Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization', Virginia Journal of International Law Vol. 51:4 (2011) P.1005

³Jarrold Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, and the Divide Between Developing And Developed Countries In Foreign Investment Disputes', George Mason Law Review vol. 14:1, (2006), PP. 139-142

⁴United Nation Commission for Trade and Development (UNCTAD), International Investment Agreements (IIAs) Issue Note No.1, March 2016, P.9. For comparison with the past 10 years See also Kenneth J. Vandeveld (2005), 'A Brief History Of International Investment Agreements', Journal of University of California, Davis Vol. 12 (2005) P.157

⁵ UNCTAD(2017) report available at <<http://investmentpolicyhub.unctad.org/IIA>> Last accessed 26 February 2017

⁶ Christoph Schreuer, Investments, International Protection, 2011 PP.48-80

To this end, the significance of umbrella clause in BITs as standard of protection would be praiseworthy despite its invitation for exorbitant application of other obligations, ultimately making states responsible for private undertakings too.

The *fons et origo* of the term ‘umbrella clause’ under international investment law dates back at least half a century ago in the early 1950’s when an advice was provided by Sir Elihu Lauterpracht in 1953-54 to the Anglo-Iranian Oil Company in connection with the settlement of the Iranian oil nationalization dispute. The so-called “umbrella” or “parallel protection” treaty was again proposed in Lauterpracht’s advice given in 1956-57 to a group of oil companies contemplating a trunk pipeline from Iraq in the Persian Gulf through Syria and Turkey to the Eastern Mediterranean.⁷ However the concept of umbrella clause was practically tested in arbitration case between SGS v. Philippines and SGS v. Islamic republic of Pakistan.⁸

However the extent of subject matter jurisdiction of Umbrella clause is not uniform under BITs and manifested by divergent treatment. Some BITs cover only disputes relating to an “obligation under this agreement”, *i.e.* only for claims of BIT violations. Others extend the jurisdiction to “any dispute relating to investments”. These provisions are commonly called ‘umbrella clauses.’

[t]hough other formulations have also been used such as “mirror effect”, “elevator”, “parallel effect”, “sanctity of contract”, “respect clause” and “pacta sunt servanda”. Clauses of this kind have been added to provide additional protection to investors and are directed at covering investment agreements that host countries frequently conclude with foreign investors.”⁹

Most importantly, in relation to State responsibility, umbrella clauses are praised of being stepping stone for internationalization of private undertakings of states. Umbrella clause has been dubbed as an additional protection to other substantive rules and it is seen as a clause that would enforce state's private undertakings under international law.¹⁰ Since the breach of private undertakings is seen as a breach of umbrella clause under international treaty, international state

⁷Anthony C. Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’, *Arbitration International*, Vol. 20: 4 (2004), pp. 411-434.

⁸SGS *Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6 (Award, 29 January 2004); *SGS v. Pakistan*, ICSID Case No. ARB/01/13, (2004) ICSID Rev 307

⁹ Katia Yannaca-Small, ‘Interpretation of the Umbrella Clause in Investment Agreements’ in *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Working Paper, 2008. Available at <<http://dx.doi.org/10.1787/9789264042032-3-en>> Last accessed 27 February 2017 P.102

¹⁰ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (1st ed, 2008), p. 166.

responsibility arises. Practically, in the absence of such clause, private undertakings of every state are seen as a domestic law matter unless those breaches amounted to breaches of treaty standards or customary international law. To this end, the researcher will try to discuss Ethiopian selected BITs in relation to umbrella clauses and analyze whether there is divergent or similar treatment having implications to its responsibility under general international law as well as other standards of investment protection.

In closing, the umbrella clauses found in Ethiopia's BITs with Germany yet it is absent in France and Turkey will be discussed thoroughly in light of contemporary arbitration decisions and the norms of international responsibility of states.

1.2. Statement of the Problem

Ethiopia has signed more than 31 BITs since 1994¹¹. Such unprecedented propagation of BITs in Ethiopia's investment climate could result in some confusion in treatment of investments and potential investor-state dispute resolution since some BITs extend protection to "any commitments/obligations", others cover to "any written obligation", and still others circumvent using such clauses. For instance the Ethio-Germany BIT calls for Contracting Parties to adhere to any other obligation deriving from a written commitment undertaken in favor of an investor of the other Contracting Party.¹² Thus, as per such provision umbrella clause encompasses any written obligation including contractual commitments.

On the other hand, the Ethio-Denmark BIT states; "parties must adhere to any commitments." Thus, obviously it is too broad and includes any obligation according to law, specific contract or any other form of agreement.¹³ Thus, this umbrella clause includes commitments arising from contract or law such as extra-contractual liability. Still, no mention of umbrella clause is made under Ethio-Turkey BIT¹⁴.

¹¹UNCTAD report available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/67> > Last accessed 27 February 2017.

¹² Treaty between the government of Federal Democratic Republic of Ethiopia(FDRE) and The Federal Republic of Germany concerning the Encouragement and reciprocal protection of investments, signed on 19 January 2004 and entered in to force 04 May 2006, Art. 8

¹³Agreement between the FDRE and the Kingdom Of Denmark Concerning The Promotion and Reciprocal Protection of Investments, signed 24 April 2001 and entered in to force 21 August 2005, Art 2(3)

¹⁴Agreement between the Republic of Turkey and the FDRE concerning the Encouragement and reciprocal protection of investments, signed on 16 November 2000 and entered in to force on 10 March 2005

Thus, the first problem is that there is dissimilar treatment in Ethiopian BITs. Whether such disparity is owing to bargaining position, absence or presence of model Ethiopian BIT or other factors going to be examined.

The second problem might be how such divergent treatment could be addressed with regard to MFN obligations of Ethiopia stemming from treaties¹⁵ and other commitments.¹⁶ For instance, how would Ethiopia adhere to its MFN obligations between German and Turkish investors? As to German investors there is an umbrella clause protecting investment stemming from contractual or other commitments yet for Turkish investors due to omission of umbrella clause in the BIT; there are likely to be obstacles during investor-state disputes.

The other potential gap might be the divergent treatment of BITs resulting in far-reaching consequences on state responsibility. For instance, Ethio-Germany BIT has umbrella clause, the breach of which might entail state responsibility against Ethiopia. On the other hand, the Ethio-Turkey BIT does not have an umbrella clause, making the invocation of international responsibility of the state difficult for breach of commitments with individual investors. In normal course of things, if there is no umbrella clause in the BITs, breaches remain matters of private undertaking and ultimately results in no responsibility of states save diplomatic protection or domestic lawsuit.

For various reasons, Ethiopia has witnessed dissimilar treatment even conflicting protections in relation to umbrella clauses which in some cases will potentially be costly during dispute settlement. The researcher is enthusiastic to work on issues of umbrella clauses and BITs and to contribute his part. Hence, the main focus of the research is to pinpoint some issues associated with umbrella clauses in Ethiopia's BITs and the divergent trajectories in light of norms of state responsibility.

1.3. Objective of the study

1.3.1. General Objective

The general objective of the study is to explore issues related to the Ethiopian BITs regime with a particular reference to umbrella clauses and the effects of their inclusion or omission in the BITs in light of responsibility of states under international law.

¹⁵ Above note at 12, Art. 3

¹⁶Tarcisio Gazzini and Attila Tanzi, 'Handle with care: Umbrella clauses and MFN treatment in investment arbitration', *The Journal of World Investment & Trade*, Vol.14 (2013) pp 978-994, 979

1.3.2. Specific Objectives

- To describe the meaning, scope and rationale of umbrella clauses in investment treaties.
- To scrutinize the implication of inclusion or non-inclusion of umbrella clauses and the possibility of importing umbrella clause via comparator treaty by virtue of MFN.
- Pinpoint the effects of dissimilar treatment of umbrella clauses in Ethiopian BITs; particularly by comparing with the experiences of other model BITs.
- Assess the rationale for dissimilar treatment if it is in the nature of South-South BITs with no umbrella clause or the Turkey case or Europe, or it is about democracies.
- Identifying basic challenges in Ethiopian BITs on issues of umbrella clause.
- To address the norms of state responsibility in relation to BITS regime with reference to internationalization clauses.

1.4. Research Questions

This research will strive to seek answers to the following main research questions:

- What are umbrella clauses and their scope under Ethiopian BITs?
- What are the policy and legal implication and rationale of dissimilar treatment of Umbrella clause in Ethiopian BITs?
- Does the absence or presence of umbrella clauses affect investor-state dispute resolution and the protection for investors?
- Should the traditional diplomatic protection rules in lieu of state responsibility norms apply for non-inclusion of umbrella clauses since the breach is generally contractual and not treaty violations under international law?

1.5. Significance of the study

This research hopes to have important contributions. First, it will serve as an instrument to further research in the area of Ethiopian BITs and its jurisprudence. Second, the findings and recommendations of the study will serve as a springboard for further review of Ethiopian BITs in light of developments in the contemporary investment law. Third, the finding of the study will serve as a guideline to Ethiopian delegates negotiating on BITs with plethora of states with clarity on national objectives of umbrella clauses such as the protection of investors, national interest and strategic alliance. Finally, the study will enable investors, policy makers and other

stakeholders to rethink and to make reasoned decisions whether the presence or absence of such clause has implication.

1.6. Research Methodology

The methodology that was used in this study is both doctrinal and non-doctrinal research which includes an analysis of the existing literatures from Economics, Investment, Business, Policies and Laws. This study is used survey cases while analyzing the survey of cases brought before arbitral tribunals using BITs standards of protection and Ethiopian BITs having umbrella clause. Among other things, the researcher also used primary and secondary sources including, bilateral investment treaties, customary international law, general principles of international law and case laws related to the subject at hand. Concerned officials and experts from Ethiopian Investment Commission (EIC) and FDRE Ministry of Foreign Affairs International Law Directorate and also Lawyers working on foreign investment, were interviewed. Information was gathered from books, articles and journals printed or online. The UNCTAD and Organization for Economic Cooperation and Development (OECD) websites were frequently used for furtherance of the study on the status of international investment agreements.

1.7. Scope of the study

The subject matter of umbrella clause encompasses many issues including protections arising from the investment contract between states, investor-state and other commitments. This research will be limited to examining the presence or absence of umbrella clauses in selected Ethiopian BITs inter alia, Ethio-Germany, Ethio-France and Ethio-Turkey. In doing so, the study will not delve in to matters of attitudes of investors towards inclusion or non-inclusion of umbrella clauses. However, this research will look Ethiopian BITs, decided cases, if any, and the jurisprudence of ICSID. In addition, under the shawl of umbrella clauses, this paper also looks at nature of BITs and their standard of protection as well as norms of state responsibility.

1.8. Limitation of the study

The study faced limitations with regard to relevant information and data as concerned stakeholders are unwilling to provide information. And obviously, there were financial problems, time constraint, erratic connection of the internet, network jamming and unavailability of

materials especially books and relevant literatures was the major problems likely to be encountered in conducting the study.

1.9. Ethical Considerations

In the process of data collection due care was taken in order to make this study ethically sound. Key informants have been informed that their contribution was sought for exclusive academic purpose. Their consent was also obtained on the basis of consensus to fully respect their rights and desires as far as the issue of this thesis is concerned.

1.10. Organization of the Thesis

This thesis is organized in six chapters. The first chapter is designed to draw the attention of the reader-, to the general picture of the study giving insights about the general background, the principal issues addressed, objectives sought to be achieved, significance, methodologies used, limitations and scope of the study. Since it is necessary to understand first the meaning, importance and scope of the subject matter of the study, before addressing issues of concern, the nature of BITs and their standards of protection are described in Chapter two.

The third chapter is discusses on issues, the genesis and types of umbrella clause in doing so it deals with the implications for dispute resolutions before arbitration tribunals. In addressing these, therefore, the thesis in this chapter systematically tries to discharge the problems inherent in the current international arbitration and the possibility of narrow or broad approaches in the interpretation of umbrella clauses, in light of their efficacy in achieving the stated objectives.

Chapter four specifically deals with umbrella clauses in Ethiopian selected BITs including Ethio-Germany, Ethio-France and Ethio-Turkey. It has addressed issues whether the inclusion of umbrella clause in Ethio-Germany vis-à-vis non-inclusion in Ethio-Turkey and France BITs have practical legal and policy implications.

Chapter five raises matters dealing with what would be the fate in dealing with contract breaches under the guise of umbrella clause whether resort to the norms of state responsibility, diplomatic protection rules or domestic lawsuits.

Finally, the main findings of the study will be outlined and the potential solutions for the major problems will be indicated, in the conclusions and recommendations part of this thesis.

CHAPTER TWO

2. BILATERAL INVESTMENT TREATIES (BITs)

2.1. Introduction

As umbrella clause is a standard of protection for investors under BITs, this chapter will discuss preliminary issues regarding the notion of investment, types of investment and some foundational norms of investment. Basically, the norms of investment include international investment agreement, customary international investment law, general principles of international law, writing of well-known publicists and soft laws. At the heart of such norms, bilateral investment treaties (BITs) take the lion's share of the law governing foreign investment. Besides, this chapter focusing on BITs will address issues relating to history of BITs, admission and establishment of foreign investment, nature of BITs and also the role of BITs in attracting foreign investment. The chapter will be concluded by discussing eight standards of investment protections under BITs including umbrella clause.

2.2. Definition of Investment

The definition of the term investment is among the key elements determining the scope of application of rights and obligations of investors under international investment agreements.¹⁷

Basically, there is no all curing definition for the term 'investment' in the literatures of law in general, business, economics and international investment law¹⁸ and it is difficult to give objective definition to the term investment as the word bid different situations in to account for the definition.

Etymologically the term 'investment' is derived from the Medieval Latin term '*investire*' meaning to install money or invest money. Historically, the term investment is appears neither in customary international law nor early international agreements. Yet both customary international law and past treaties used the notion of "foreign property"¹⁹ dealing in a similar manner with imported capital and property of long-resident foreign nationals.²⁰

¹⁷OECD, 'Definition of Investor and Investment in International Investment Agreements', International Investment Law: Understanding Concepts and Tracking Innovations, 2008 P. 9

¹⁸D. Carreau & P. Juillard, *Droit international économique* (3rd éd, 2007), P.403

¹⁹ UNCTAD, 'Scope and Definition', UNCTAD Series on issues in international investment agreements, Vol.2 (1999) P. 7

²⁰ The OECD Draft Convention on the protection of foreign property (OECD, 1967).

By and large, any definitions of investment for the purposes of investment law fall under three broad models. The first is the ‘asset-based’ model, which contains a broad range of specified assets that can be protected under the legislation or agreement in question.²¹ The second model is ‘transaction-based’ model, which protects the underlying capital transfer rather than the assets owned or controlled by the investor.²² In other words, investment presupposes the movement of capital from host state to sending state or vice versa. And the final model is an ‘enterprise-based’ model, which defines the protected investment in terms of the business organization of the investment through an enterprise. To put differently, such kind of approach usually limits the protection afforded to a foreign direct investment made by a foreign-owned and controlled company or other type of enterprise.²³

The Ethiopian investment proclamation adopted enterprise model since the investment proclamation defines the term investment as expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists.²⁴ Nevertheless, the definition did not escape from criticisms since it seems tenuous due to the fact that investment is only made via establishing new enterprises yet there are investments installed without establishing enterprises including asset or capital transfers.

Paradoxically, the ICSID Convention²⁵ does not define the term investment²⁵ save as the phrase that grants jurisdiction under the Convention.²⁶ Yet the drafting history leaves no doubt that “it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction no matter how far-reaching the parties’ consent might be.”²⁷

The ICSID jurisprudence adopted double layer test to define the term investment and examine whether the alleged issue falls in its *ratione materiae* used simultaneously both under the ICSID

²¹ Albanian Law on Foreign Investments, Law No. 7764 of 2 November 1993, Art. 1(3)

²² Code on the Liberalization of Current Invisible Operations (OECD/C(61)95)

²³ Engela C.Schlemmer, ‘Investment, Investor, Nationality, And Shareholders’, in Peter Muchlinski and et al (eds), Oxford Handbook of International Investment Law, P.144

²⁴Investment Proclamation No.769/2012, Fed. Neg. Gaz. of the FDRE, 18th Year No. 63 Addis Ababa 17th September, 2012, Art. 2(1), The term enterprise refers any undertaking established for profit and includes business organizations see Arts 2(2) and 10

²⁵The Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, IBRD, 18 March 1965 Par.47 stipulates that: “no attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Art. 25(4))”

²⁶Convention on Settlement of Investment Disputes (ICSID) Between States and Nationals of Other States, Opened for Signature At Washington, On 18 March 1965 and entered in to force 15 October 1966, Art 25

²⁷ Christoph Schreue & et al , The ICSID Convention: A Commentary (2nd ed, 2010), p. 117

convention and the BITS.²⁸ It is however, possible to identify basic elements of investment under the Convention which have been increasingly used by arbitral tribunals. For instance the Salini test is adopted by Salini V Morocco case²⁹: duration of the project, *regularity* of profit and return, risk for both sides, a substantial commitment; and *the* operation should be significant for the host state's development.³⁰ One writer argues the term investment under the ICSID convention purports any economic activity or asset and urges for exorbitant jurisdiction for tribunals in defining the term.³¹

When we come back to the definition of the term investment under the BITs paradigm i.e. treaty based definitions, they are usually drafted in an elaborate manner, combining general definitions for example "all assets" with illustrative lists of categories of such assets.³² Similarly the Ethiopian BITs regime also defines the term investment for example some BITs define with broad and open-ended approach of what constitutes an investment.³³ On the other hand there are BITs which contain narrower definitions, for example those which focus only on a 'closed list' of investments protected in conformity with domestic laws and regulations.³⁴

The conventional meaning of investment refers to the expansion of capital or resources to acquire or establish certain asset in order to gain profit over a certain amount of time.³⁵

Similarly, Black's law dictionary defines investment as an expenditure to acquire property or assets to produce revenue; a capital outlay.³⁶ Here again to say investment first there must be expenditure may be capital or knowledge and second the aim of the investment is to generate revenues through the acquired assets. However, the definition is criticized as very narrow and being myopia since it fails to mention duration of the project, regularity of profit and returns, risk for both sides, substantial commitment and the operation should be significant for the host state's development.

²⁸ Also called "double keyhole approach see ICSID Case(1993) CSOB V Slovakia or "double barreled Test" see also Malaysian Historic Salvors case(2007)

²⁹ Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No.ARB/00/4, Decision on Jurisdiction, July 23, 2001

³⁰ OECD above note at 17 P. 9

³¹ Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law', Harvard International Law Journal, Vol. 51: 257 (2010) P.261

³² Dolzer & Schreuer above note at 10 P. 61

³³ Ethio-Germany BITs above note at 12, Art 1(1) It defines "investments" as every kind of asset & is used in a significant number of Ethiopian BITs

³⁴ Ethio-Turkey BITs above note at 14, Art 1(2) See the Framework Agreement on the ASEAN Investment Area 1998, for example, explicitly exclude portfolio investments from its coverage. Art 2

³⁵ Oxford English Dictionary, (3rd ed.,2007) P. 789

³⁶ Black's Law dictionary 9th, Bryan A. Garner(eds), (9th ed, 2009), P.902

In conclusion, the term investment could be defined differently based on the asset, enterprise, transaction or property transacted.

2.3. Types of Investment

To serve the purposes of delimitation of the proper legal regime, various authorities classify investment based on their respective needs. Based on the source of capital, Investment can be categorized into domestic and foreign investment. Fleetingly, a domestic investment is expenditure of assets whose source of capital is the host state and funds are mobilized domestically. On the contrary, foreign investment means the transfer of tangible or intangible assets from host state to home state.

According to UNCTAD, based on companies control and management, foreign investment further could be classified as foreign direct investment (FDI) and portfolio investment.³⁷

During the 19th and the early years of the 20th century, the predominant form of foreign investment was portfolio investment, mainly in the form of bonds issued by governments of developing countries floated in the financial markets. The first half of the 20th century was marked by the withering of investment flows brought about by the two Wars, stagnation of FDI and virtual collapse of portfolio investment in developing countries. The post-war period was characterized by the growing expansion of multinational corporations (MNCs) setting up wholly or majority owned subsidiaries with the consequent change in the form of foreign investments which became predominantly FDI in character.³⁸

An investment is considered FDI when the investor's share of ownership is sufficient to allow control of the company. In addition, under FDI there is the transfer of physical property such as equipment or the physical property that is bought or constructed such as plantations or manufacturing plants. On the other hand, Portfolio investment is basically represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments through which capital is raised for ventures. The distinguishing element is that, in portfolio investment, there is a divorce between management and control of the company and the share of ownership in it. In other

³⁷ See UNCTAD above note at 19 P. 8

³⁸ Juillard above note at 18 P. 11

words, while investment that provides the investor with a return, but not control over the company, generally is considered portfolio investment.³⁹ Professor M. Sornarajah reiterates that:

“In the case of portfolio investment, it is generally accepted that the investor takes upon himself the risks involved in the making of such investments. He cannot sue the domestic stock exchange or the public entity which runs it, if he were to suffer loss. Likewise, if he were to suffer loss by buying foreign shares, bonds or other instruments, there would be no basis on which he could seek a remedy. Portfolio investment was not protected by customary international law. Such investment was attended by ordinary commercial risks which the investor ought to have been aware of. But, customary international law protected physical property of the foreign investor and other assets directly invested through principles of diplomatic protection and state responsibility.”

However, the researcher is at odds with the above arguments since for one thing, these days the definition of investment both in multilateral and bilateral investment treaties completely avoided the dichotomy of FDI and portfolio investments and blended them together with full legal protection. For another thing, as to the argument customary law protects only FDI, again it is a blurred submission since portfolio investment is known by customary international law since the beginning of 19th Century. And finally there is no distinction between the risks taken by either type of investor, both being voluntarily assumed as most BITs incorporated them to the extent that insurance coverage for non-commercial risks.⁴⁰

In closing, under the current international investment law parlance, the dichotomy of FDI and portfolio investment is old fashioned without any legal currency other than a matter of purely academic discussion due to the fact that there is a move towards blanket ban of such classification in various BITs concluded world-wide.

2.4. The Norms of Investment under International Law

Under this section attempt is made to discuss the legal framework governing investment under international law. Among other things, multilateral investment agreements (MIAs), bilateral investment Treaties (BITs), customary international investment law, general principles of international law, judicial decisions and soft laws will be discussed thoroughly.

³⁹ M.Sornarajah above note at 1 P.9

⁴⁰ Ethio-Turkey BIT above note 14 Art. 6 and Ethio-Germany BIT above note 12 Art. 7

2.4.1. International Investment Agreements (IIAs)

International investment treaties broadly refer to a set of agreements whether bilateral or multilateral in type governing investment under international law. To be brief, International investment treaties basically encompass multilateral investment agreements (MIAs) and bilateral investment treaties (BITs). Currently, the IIA in the universe grew to 3,271 treaties.⁴¹

I. Multilateral Investment Agreements (MIAs)

Multilateral treaties are those international instruments signed by large number of states across the world and its membership is not as limited by geographical location except regional treaties. Basically, states reluctant in adopting multilateral investment agreements (MIAs). The non-existence of multilateral instruments on foreign investment is not the result of failure to make efforts to formulate such treaty but rather the result of states' disagreements over issues of foreign investment. There have been a number of efforts to formulate multilateral agreement on foreign investment that proved to be fiasco.

The first cited endeavors date back to the late 1940s when attempts were made to establish the International Trade Organization.⁴² To this end, UN Conference on Trade and Employment was held at Havana, Cuba, between 1947 and 1948. However, the draft Havana Charter submitted to the Conference contained no provision on the regulation of foreign investment save the initial draft proposal having investment clauses⁴³ though the Charter itself never came into force.

Later the General Agreement on Tariffs and Trade 1947 (GATT), which then formed the cornerstone of world trade law, never extended protection to investments.⁴⁴

In 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded, facilitating the enforcement of international arbitral awards including investment settlements.⁴⁵

The other multilateral framework in relation to investment is the 1962 UN Declaration on Permanent Sovereignty over Natural Resources.⁴⁶ Newly independent states sought to rely on

⁴¹ UNCTAD, World Investment Report, Reforming International Investment Governance, 2015 P. 11

⁴² Surya P Subedi, International Investment Law Reconciling Policy and Principle, (1st ed, 2008), P.19

⁴³ The Draft Havana Charter 1948, Arts. 11 and 12

⁴⁴ Campbell McLachlan, 'Investment Treaties and General International Law', International and Comparative Law Quarterly, Vol.57 (2008), PP. 361-401, 368

⁴⁵ UNCTAD 2015 above note at 45 P. 122

⁴⁶ United Nations, General Assembly Resolution 1803 (XVII): Permanent sovereignty over natural resources, (A/5217) 1963, PP. 15-16

economic sovereignty originating from the UN reaffirmation of sovereign equality of States under the Charter⁴⁷ enabling them to claim permanent sovereignty over their natural resources, which would in turn let them negotiate their way out of the old agreements and concessions. This was not an attempt to rewrite the law, but an attempt to give a new direction to foreign investment law on the basis of certain rules of public international law, including economic sovereignty and the right to self-determination of states.⁴⁸

There was also a remarkable MIA in 1965 that is the ICSID convention, which is negotiated as a mechanism for settlement of investment disputes but remained quiescent until the early 1990's with only a handful of cases decided.⁴⁹

The other MIA, denounced at draft stage, was the 1967 Organization for Economic Cooperation and Development (OECD) draft Convention on the Protection of Foreign Property. However, the Convention was never opened for signature; and seen as embodying the perspective of capital-exporting countries.⁵⁰

Later the UN General Assembly in 1974 adopted a Declaration on the Establishment of a New International Economic Order on 1 May 1974 through Resolution 3201 (S-VI) and a programme of Action on the Implementation of the Declaration through Resolution 3202 (S-VI) which called for full permanent sovereignty of every State over its natural resources and all economic activities including also nationalization and expropriation. The Declaration further stressed the need to regulate and supervise the activities of transnational corporations (TNCs) by taking measures in the interest of the host countries.⁵¹

The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), as a member of the World Bank Group⁵², was concluded in 1985 and the World Bank adopted a multilateral standard in its Guidelines on the Treatment of Foreign Direct Investment of 1992.⁵³

The World Bank guideline obliges states to extend protection to investments established in its

⁴⁷ The United Nations Charter Art 2(1)

⁴⁸ Surya P Subedi above note at 42 p.21

⁴⁹ Dolzer & Schreuer above note at 10 P. 2

⁵⁰ Draft OECD convention above note at 20

⁵¹ The General Assembly Resolution 3202 (S-VI) of 1 May 1974 Art IV(a)

⁵² UNCTAD 2015 above note at 49 P. 123

⁵³ World Bank Group, Guidelines on the Treatment of Foreign Direct Investment, 1992 pp. 35-44

territory by nationals of any other State with fair and equitable treatment⁵⁴ including most favored nation (MFN)⁵⁵ and other obligations.⁵⁶

Under the auspices of WTO, the Marrakech agreement establishing the international organization for trade came up with an agreement governing investment in 1994. Trade related investment measures (TRIMs) agreement aimed at avoiding restrictive and distorting effects of investment measures on flow of international trade.⁵⁷

To this end, the TRIMs agreement obliges members to observe national treatment and quantitative restriction⁵⁸ and also transparency⁵⁹ duties save for general exceptions⁶⁰ and also exemptions given to developing member countries.⁶¹ However, the WTO regime governing investment through TRIMs could be easily circumvented by plethora of BITs commitments.

In ensuing years, different attempts have been made with a view to come up with comprehensive international instrument in which large number of countries would be parties to such instrument. Such attempts have been made by organizations like OECD, the World Bank Group, and WTO. In general, some of them proved to have little success while others had caught up with fiasco.

Needless to mention, there was MAI proposed by the OECD in 1995, which would have provided a general framework for multilateral investment commitments. The MAI was seen by the OECD as largely a harmonization exercise, and an attempt to address the fragmented nature of investment protection through BITs⁶².

However, it provoked intense opposition from NGOs on the grounds that it would weaken the regulatory capacity of host States in favor of investor protections⁶³ and internal disagreement between Canada, USA and EU⁶⁴. Finally efforts to conclude MAIs collapsed in 1998.⁶⁵

⁵⁴ Ibid, Art III(2)

⁵⁵ Ibid, Art III(4)

⁵⁶ Ibid, Art III(10)

⁵⁷ Annex 1A of the Marrakech Agreement on Multilateral Agreements on Trade in Goods, Agreement on Trade-Related Investment Measures (TRIMs) 1994, Preamble Par.I

⁵⁸ Ibid, Art 2

⁵⁹ Ibid, Art 6

⁶⁰ Ibid, Art 3

⁶¹ Ibid, Art 4

⁶² OECD, A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) (1995) annex ('CIME/CMIT Report') 1995. Available at <<http://www.oecd.org/daf/mai>> Last accessed 13 March 2017

⁶³ Jürgen Kurtz, 'NGO's, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment', *Melbourne Journal of International Law*, Vol. 3(2002) P.213

⁶⁴ Ibid P. 220

⁶⁵ McLachlan above note at 44 P. 369

In the last couple of years, negotiations of stand-alone BITs have plunged in number, as they are generally supplemented by negotiations of comprehensive investment agreements at the regional level.⁶⁶ Negotiations of regional international investment agreements (IIAs) likewise continued in 2012 and 2013, involving major regional blocks, such as the EU, the ASEAN⁶⁷, NAFTA⁶⁸, the Energy Charter Treaty⁶⁹, The Cotonou agreement of 2000, between African, Caribbean and Pacific (ACP) Countries and EU States⁷⁰ and The Abuja treaty establishing African Economic Communities (AEC).⁷¹

Most importantly, Ethiopia is party to regional MIAs in Africa as well as other partnership agreements having investment provisions. For instance, Ethiopia is signatory to the Investment Agreement for the COMESA Common Investment Area⁷², the IGAD establishing agreement⁷³, the Washington agreement between USA and COMESA of 2001⁷⁴ and Cotonou agreement.⁷⁵

To conclude, despite efforts for comprehensive MIAs yet they have caught misfortune, still the moves by regional economic communities in Africa and elsewhere around the world seems encouraging.

II. Bilateral Investment Treaties (BITs)

Bilateral investment treaties are treaties concluded between two countries. The significance of BITs has grown recently. They are currently one of the most important norms that govern foreign investment even to the extent that seemingly multilateral norms are non-existent. Many countries

⁶⁶UNCTAD, 'The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?' IIA Issues Note 3, June 2013, p. 4, available <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d8_en.pdf> Last accessed 14 March 2017

⁶⁷Marc Bungenberg and Catharine Titi, 'Developments in International Investment Law', in C. Herrmann et al. (eds.), *European Yearbook of International Economic Law*, 2014, P. 425

⁶⁸North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entry into force 1 January 1994) Chapter 11

⁶⁹Energy Charter Treaty (ECT) (signed 17 December 1994, entry into force 16 April 1998)

⁷⁰The Cotonou Partnership Agreement Between The Members Of The African, Caribbean And Pacific Group of States Of The One Part, And the European Community and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000, Chapter 7 Arts 74-78

⁷¹The Abuja Treaty establishing AEC 1991, Chapter VI & VII

⁷²Investment Agreement For the COMESA Common Investment Area(2007)

⁷³Agreement Establishing the Inter-Governmental Authority on Development (IGAD), Nairobi, 21 March 1996, Art 6 & 7

⁷⁴Agreement Between the Government of the United States of America and the Common Market For Eastern And Southern Africa Concerning the Development of Trade and Investment Relations, Done at Washington, D.C. on October 29, 2001, Arts 1-10

⁷⁵Above note at 70

of the world have concluded such treaties for reciprocal promotion and protection of investment and also as part of free trade areas (FTAs).

The idea of enacting BITs in the modern usage came at the end of 1950's credit to the works of German born banker-Hermann Josef Abs, who prepared the so called "Magna Charta" of foreign investors and their properties in 1957.⁷⁶ Dolzer and Schreuer reiterate the efforts of Abs as:

"The draft work of Abs on foreign investment had the form [of] global treaty which was to establish not only just specific standards of protection but also a permanent arbitral tribunal charged with the application of the treaty and with the power to lay down economic sanctions against violating states, including non-signatories. When it soon became apparent that the time was not ripe for grand approach, Abs has approached Sir Hartley Shawcross for multilateral initiatives. These efforts finally culminated in the Abs-Shawcross BIT draft. Later the 1959 Abs-Shawcross BIT model used as the template for a bilateral investment treaty, which came to have so much impact on subsequent treaty practice."⁷⁷

However, in the face of strong opposition from the capital importing (host) countries this Draft Convention was not adopted. Although most of its provisions found their way once again into the 1967 Draft Convention on the Protection of Foreign Property proposed by the OECD, this too was not adopted and remained as a draft.

The first BIT was concluded in 1959 between Germany and Pakistan⁷⁸. The rationale behind for conclusion of the first BIT was the fact that Germany had lost the majority of its foreign investments in negotiated settlement after 1949 with a view to repairing in part the damage it had brought about when starting World War II in violation of international law.⁷⁹ Later Germany continued to negotiate more such BITs and soon other European and developed nations followed suit.⁸⁰

⁷⁶ Herman Abs & Hartely Shawcross, 'Draft Convention on Investments Abroad', 1960

⁷⁷ Dolzer & Schreuer above note at 10 P.18

⁷⁸The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 25 November 1959, entered in to force in 1962.

⁷⁹ Ibid

⁸⁰ McLachlan above note at 52 P. 367

The number of BITs that have been concluded has grown significantly, particularly since the early 1990s, a trend that now overwhelms countries at all levels of development.⁸¹ The growth of the number of BITs was not rapid during the 1960s, 1970s and 1980s as compared with the period in the 1990s and onwards. According to a study of World Bank made in 1994, there were over 700 such treaties⁸². By the end of the millennium, the figure had moved towards 2,600 treaties.⁸³ Currently there are more than tally of 2968 BITs concluded.⁸⁴

Being fundamental instruments of international investment law, BITs remained important due to the following rationales. First, the absence of MIAs on foreign investment paves the way for BITs to take the place since bilateral solutions become necessary simply because of an absence of a consensus on multilateral agreements.⁸⁵ Second, they are made on an ad hoc basis meaning they are signed for years to be renewed based on parties' agreement. In addition, such treaties could be negotiated in such a way as to suit the mutual interests of the parties, whereas a multilateral treaty cannot be.

2.4.2. Customary International Investment Law

Principally, custom is one primary source of international law which is expressed as evidence of a general practice accepted as law⁸⁶. Under international law custom comprises two elements. These are the material facts, that is, the actual behavior of states, and the psychological or subjective belief that such behavior is 'law'.⁸⁷ Thus, customary international law is composed of state practice and *opinio juris*. As the International Court noted in the *Libya/Malta* case, the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'.⁸⁸

⁸¹Americo B. Zampetti and Pierre Sauvé, 'International investment', in Andrew T. Guzman & et al (eds), Research Handbook in International Economic Law, 2007,PP.214-215

⁸² R. Dolzer and M. Stevens, Bilateral Investment Treaties, 1996 p. 1.

⁸³ M.Sornarajah above note at 1 P. 172

⁸⁴ UNCTAD 2017 above note at 5

⁸⁵Carty A, 'Critical International Law: Recent Trends in the Theory of International Law', European Journal of International Law Vol. 2(1991), P. 66 cited at M.Sornarajah above note at 1 P. 183

⁸⁶ Statute of the International Court of Justice, 1945, Art 38(1)(b)

⁸⁷ Malcolm N. Shaw, International Law, (6th ed,2008) P.74

⁸⁸Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986 pp. 13, 29

In the first half of the 20th century, customary international law was the primary source of international legal rules governing foreign investment.⁸⁹ The customary basis for the protection of foreign investment is related with the traditional notion of diplomatic protection⁹⁰ and the treatment of aliens. It is the notion of diplomatic protection of citizens and their property abroad by the home country that gave rise to the modern rules of foreign investment law. The idea that once admitted into the country a host state was required to extend the international minimum standard of protection to both aliens and their property under international law has been the foundation of foreign investment law.⁹¹

However, the high degree of international consensus required to create and uphold custom started to erode due to the economic interests and political inclinations of capital-exporting and importing States increasingly diverged in the course of the 20thC and its normative role is diminishing.⁹²

There is, nonetheless, a customary international law when property is taken over by a state, otherwise than in the exercise of its regulatory powers, there must be payment of compensation⁹³, even though there is still disagreement on the manner in which this compensation is to be calculated whether it is ‘appropriate compensation’⁹⁴ or ‘prompt, adequate and effective compensation’⁹⁵.

The divergence of customary international law is also observed not only about the manner of compensation but also in the treatment of aliens. For instance, Carlos Calvo, the Argentine jurist vehemently opposed special treatment of aliens. He submitted in his study appeared in 1868 that foreigners must assert rights before domestic courts and that they have no diplomatic protection by their home state or access to international tribunals.⁹⁶ Later, The Soviet-Bolsheviks 1917 revolution rejects the idea of private property and claims that States have no international obligation with regard to aliens’ property, and that a nation’s right to nationalize property is a

⁸⁹ UNCTAD 2015 above note at 48 P.121

⁹⁰ Surya P Subedi above note at 46 P. 12

⁹¹ Surya P Subedi above note at 46 P. 55

⁹² Jan Wouters & et al, ‘International investment law, The perpetual search for consensus’, in Olivier De Schutter & et al (eds), Foreign direct investment and Human development: The Law and Economics of International Investment Agreements, 2013 P.25

⁹³ M.Sornarajah above note at 1 P.82

⁹⁴ UN GA Resolution 1803 above note at 55

⁹⁵ See further discussion on Hull doctrine Section 2.7.6 *infra note*

⁹⁶ Dolzer & Schreuer above note at 10 P. 12

corollary of its right to self-determination.⁹⁷ Subsequently, Mexico nationalized the US interests in Mexican agrarian lands and oil business in 1938. US however reacted through diplomatic exchanges with the then Secretary of state, Cordell Hull, who claimed the rule of international law protected aliens and their properties yet in case of expropriation, there must be prompt, adequate and effective compensation.⁹⁸

Again after the demise of colonialism, newly independent countries claimed economic sovereignty over their natural resources. As a result, they used forums such as UN General Assembly to express their interests via resolutions. Thus, the 1962 UNGA Res/1803 officially proclaimed 'sovereignty over natural resources' including expropriation with 'appropriate compensation'. Seemingly the relationship between developing and developed world were bellicose. Albeit one can argue that the UN General Assembly resolutions despite having no legally binding effect, if backed by state practice reflects customary international law.⁹⁹

Against the background of Calvo doctrine, Russian Bolsheviks revolution and States nationalizations, customary international law adopted international minimum standards¹⁰⁰, payment of compensation and protection of foreigners' property.¹⁰¹

Equally important, even after the collapse of socialism and post 1990's there was a major shift of attitude coming from global south and developing states. As the debate of protecting customary rules of foreign investment has shortly become anachronistic and obsolete, capital importing states started negotiating with capital exporting countries for a better protection with the instrumentality of BITs than customary international law.¹⁰² However the customary status of foreign investment protection under BITs could be also questioned since even the same state pledged different commitments with other countries about protection of investment. They differ depending on the perceptions and needs of the different times at which they were made.¹⁰³

⁹⁷ A. Lowenfeld, International Private Investment, 1982 p. 151

⁹⁸ Dolzer & Schreuer above note at 10 P. 13

⁹⁹ The International Court of Justice has treated General Assembly resolutions as evidence of opinio juris, not as State practice. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, paras 184-188

¹⁰⁰ Dolzer & Schreuer above note at 10 P. 13

¹⁰¹ Kate Miles, 'The Origins of International Investment Law', Empire, Environment and the Safeguarding of Capital, 2013 P.47

¹⁰² Dolzer & Schreuer above note at 10 P.16

¹⁰³ The survey of Chinese practice in N. Gallagher and W. Shan, Chinese Investment Treaties: Policy and Practice, 2009 Cited at M.Sornarajah above note at 1 P. 85

2.4.3. General Principles of Investment Law

There are various views as to what the general principles of law¹⁰⁴ is intended to refer; ¹⁰⁵Some writers regard it as an affirmation of natural law concepts which used as a litmus test for validity of positive laws¹⁰⁶ while others especially positivists, treat it as a sub-heading under treaty and customary law and incapable of adding anything new to international law unless it reflects the consent of states.¹⁰⁷

Aside to such theoretical debates, the practical currency of general principles of law is commendable when there is no treaty or customary international law to be relied on. Nevertheless many claims as to the existence of principles of the international law on foreign investment have been based on general principles of law.¹⁰⁸ Thus, much of the support for the payment of compensation upon expropriation of foreign property is based on arguments relating to notions of unjust enrichment and acquired rights being general principles of law¹⁰⁹. The principle that compensation must be paid is itself said to be a general principle of law. Likewise, notions of equity¹¹⁰, estoppel¹¹¹ and good faith¹¹² are also general principles of international law. Moreover, the notion of sanctity of contract is stated to be a general principle of law. Thus, parties are duty bound to respect their words as notice is also made from the Latin maxim '*pacta sunt servanda*'¹¹³ or the idea that international agreements are binding. Thus, the bid for the protection of umbrella clauses¹¹⁴ under the cloak of general principles of investment law therefore emanates from the notions of sanctity of contract.

The main principle that has been developed to provide protection to foreign investors is the principle of an international minimum standard of treatment, at the core of which is the principle

¹⁰⁴ ICJ Statute above note at 86, Art 38(1)(c)

¹⁰⁵ M. Shaw above note at 87 P. 99

¹⁰⁶ D. McNair, 'The General Principles of Law Recognized by Civilized Nations', British Yearbook of International Law, Vol.33(1957) p. 1 Cited at M. Shaw above note at 87 P. 99

¹⁰⁷ Ibid

¹⁰⁸ M.Sornarajah above note at 1 P. 85

¹⁰⁹ Chorzow Factory Case(Albania v. UK) (1928) PCIJ Series A No. 17, p. 29

¹¹⁰ The Diversion of Water from the river Meuse (The Netherlands v. Belgium) case PCIJ 1937, Series A/B, No. 70, pp. 73, 77 see also Libya/Malta Case ICJ Reports, 1985, pp. 13, 39

¹¹¹ Italy/US case ICJ Reports, 1989, pp. 15, 44 see infra note 123

¹¹² UN Charter, Art 2(2), The Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10) 1982, section I, par. 1

¹¹³ Vienna Convention on the Law of Treaties(VCLT) 1969, done at Vienna on 23 May 1969, Entered into force on 27 January 1980, Art 26

¹¹⁴ See Chapter Three for further discussions on umbrella clauses

of fair and equitable treatment including non-discrimination.¹¹⁵ However, it is questionable as to: what is included in the ‘international minimum standard’ of treatment? What constitutes ‘fair and equitable treatment’¹¹⁶? Who is entitled to ‘fair and equitable treatment’? Mainly these questions are the subjects of intense debate in the literature on foreign investment.¹¹⁷

Therefore, the norms based on general principles of law are generally puny and subsidiary norms of investment. They cannot resist norms proceeding from sources which rely on consensual processes among states.¹¹⁸

2.4.4. Judicial Decisions

Judicial decisions are subsidiary sources of international law.¹¹⁹ Although stated to be a subsidiary source, the decisions of the International Court of Justice and its predecessor have had an immense influence in shaping the principles of international law and having persuasive value. There are six significant decisions of these courts in the area of foreign investment. The first, the 1928 Chorzów Factory Case a decision of the PCIJ remains the basis for any discussion of issues of compensation for the taking of foreign property.¹²⁰ The second, the 1957 Certain Norwegian Loans case dealing with issuance of bonds in France market by Norwegian Mortgage Bank related to portfolio investments.¹²¹

The third, the 1970 Barcelona Traction Case concerned corporate nationality and the diplomatic protection of shareholders of corporations.¹²² The fourth, the 1989 ELSI Case concerned issues as to what amounts to a taking and whether liquidation of a foreign corporation by a court could provide the basis of a claim that there was denial of justice for which responsibility arose in the state.¹²³ Fifth, the 2007 Pulp Mills case dealing with joint investment projects over river Uruguay stems from the 1975 bilateral treaty that two countries signed.¹²⁴

¹¹⁵ S Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’, British Yearbook of International Law, Vol.70 (1999) P. 99–164.

¹¹⁶ For different interpretations of the term “fair and equitable treatment” See Roland Kläger, ‘Fair and Equitable Treatment’ in International Investment Law, 2011,P.9

¹¹⁷ Surya P Subedi above note at 46 P.57

¹¹⁸ M.Sornarajah above note at 1 P.87

¹¹⁹ ICJ statute above note at 99 Art 38(1)(d)

¹²⁰ PCIJ 1928 PCIJ Series A No. 17.(Germany v. Poland)

¹²¹ ICJ Reports 1957, Certain Norwegian Loans, ICJ, (France v. Norway)

¹²² Barcelona Traction, Light and Power Company, ICJ reports 1970 (Belgium v. Spain)

¹²³ Elettronica Sicula S.p.A. (ELSI) case, ICJ 1989 reports 15 (United States of America v. Italy)

¹²⁴ ICJ reports 23 January 2007 Pulp Mills on the River Uruguay (Argentina v. Uruguay)

The last cited is the 2012 Ahmadou Sadio Diallo case that dealt with the issue of corporate nationality and essentially confirmed the view taken in the Barcelona Traction Case that corporate nationality was determined by the place of incorporation and investor rights.¹²⁵ Recently, there is also one pending 2016 ICJ case related to protection of foreign property and expropriation arising from the treaty of amity and economic relation between United States and republic of Iran.¹²⁶

To conclude, judicial decisions also include awards from arbitration and conciliation commissions. Arbitral awards made on disputes arising from foreign investment transactions also contribute to the subject, although many of the early awards were made unilaterally and their value is diminished for this reason¹²⁷.

Yet, both the awards made by ad hoc tribunals as well as those made by institutional tribunals such as the International Chamber of Commerce (ICC)¹²⁸, ICSID¹²⁹, Permanent court of arbitration(PCA)¹³⁰, provide evidence of possible norms of international law.

2.4.5. Writings of Publicists and Soft Laws

‘Teachings of the most highly qualified publicists of the various nations’ constitute the last source of international law mentioned in the Statute of ICJ.¹³¹ Scholarly writings also include numerous references to soft law instruments, and preparatory works leading to non-binding instruments. Writers’ publications are extensively used with regard to specific treaty interpretation and questions concerning rules of international customary law.¹³²

However, the practical use of treatises, writings and soft laws is limited to clarification and persuasions of the primary sources. In stark contrast to the practice of the ICJ, the WTO Appellate Body and the European Court of Human Rights, which rarely refer to writers’

¹²⁵ Ahmadou Sadio Diallo, ICJ judgment 2010 (Republic of Guinea v. Democratic Republic of the Congo)

¹²⁶ Iran V USA ICJ case No. 2016/19, 15 June 2016

¹²⁷ M.Sornarajah above note at 1 P. 87

¹²⁸ See for example the 2001 ICC arbitration between Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Arbitration Case No. 10623/AER/ACS

¹²⁹ Permanent court of arbitration 2015 case between Khan Resources Inc. v. Mongolia

¹³⁰ ICSID 2016 Case between Garanti Koza v. Turkmenistan

¹³¹ ICJ statute above note at 86 Art 38(1)(d)

¹³² Moshe Hirsch, ‘Sources of international investment law’, in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012, PP.9-38, 33

opinions; investment arbitrators and tribunals refer to scholarly writings in almost all instances.¹³³

When I see the efforts to codify soft and rudimentary standards on investment, MNCs and code of conducts scattered here and there, the International Law Association (ILA) is extensively working on studies and codification of soft law in the realm of International Economic Law including international investment law since 2008.¹³⁴

Soft laws on the other hand refer to norms that are neither law, nor mere political or moral statements, but lie somewhere in between;¹³⁵ and generally seen as intentionally non-binding arrangements.¹³⁶ In regulating foreign investment, soft law instruments help to regulate behavior that spans national boundaries and that is not easily controlled by a single state's laws by filling the gap.¹³⁷

2.5. Genesis of BITs

The history of BITs is as wide as ocean. However, for sake of understanding, the researcher tried to present in to four historical epochs. The first epoch was the pre-colonial period, during such times powerful European states began expedition of overseas, exploration and navigation across all parts of the world. Early writers such as Vitoria recapped that aliens were treated by host states.¹³⁸ There was freedom of seas as confirmed by Hugo Grotius, was taken as enabling condition for entry of Europeans in to Asia and Africa. There is an effort to attempt to impose standards of investment protection preferred by the more powerful states on other states through the instrumentality of international law.¹³⁹ The pre-colonial period was marked as the period of agenda setting despite no formal BITs.

¹³³ Ibid

¹³⁴ Andrea K. Bjorklund and August Reinisch, 'Introduction: the ILA Study Group on the role of soft law instruments in international investment law', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012, PP.1-8

¹³⁵ Melaku Geboye Desta, 'Soft law in international law: an overview', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012, PP. 39-50, 40

¹³⁶ Michael Reisman, 'Soft Law and Law Jobs', Journal of International Dispute Settlement Vol. 2:1(2011), PP 25–30, 25

¹³⁷ Andrea K. Bjorklund, 'Assessing the effectiveness of soft law instruments in international investment law', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012, PP.51-81, 56

¹³⁸ Antony Anghie, Imperialism, Sovereignty and the Making of International Law, 2004 P.13

¹³⁹ M.Sornarajah above note at 1 P. 19

The second epoch was the colonial period, at that time investment was largely made in the context of colonial expansion and the applicable law governing investment protection was colonial law. But in areas not colonized, both diplomacy and force were used.

In general, during colonial period, imperialists used plethora strategies to secure foreign investment. These are: securing of FCN treaties, the acquiring of concessions, diplomatic pressure, capitulation treaties, extraterritorial jurisdiction¹⁴⁰, military intervention, and colonial annexation of territory.¹⁴¹

The most widely used BITs during colonial period were FCN treaties. The United States, for instance, as early as the 18thC began to conclude bilateral treaties of FCN, the purpose of which was to establish trade relations with its treaty partners. The first such agreement was the Treaty of Amity and Commerce, between U.S. and France concluded in July 16, 1782.¹⁴² These treaties have had standards of protection with full and perfect protection to the property of nationals of one party in the territory of another party.¹⁴³ They also had clauses which required payment of compensation for expropriation¹⁴⁴ and guaranteed to nationals of one party MFN and national treatment.¹⁴⁵

During the colonial period, BITs were marked by trade and property protection provisions appeared in the same agreement as states did not negotiate separate agreements on property or investment. Second, the emphasis of the treaties was on establishing commercial relations. Importantly, treaties were limited in scope and the protection afforded was weak, lacking enforcement. Therefore, the non-legal mechanisms of military force and diplomacy were left to provide the primary means for protecting foreign investment.¹⁴⁶

The third epoch was the post-colonial period and until 1990, in the wake of colonialism starting 1945, three events had shaped international investment *inter alia*, BITs.¹⁴⁷ First, as a reaction to the world great economic depression as a result of protectionist policy victors forged a consensus

¹⁴⁰ In Ethiopia extraterritoriality application of European Laws was officially began by The *Franco–Ethiopian Treaty of Amity and Commerce of 1908* ('*Klobukowski Treaty*') despite existence of earlier FCN treaties of Europeans with Shewan Kings. See Hailegabriel G Feyissa, 'European Extraterritoriality in Semi-colonial Ethiopia', *Melbourne Journal of International Law*, Vol. 17(2016), PP.1-28, 7

¹⁴¹ Kate Mills above note at 101 P. 23

¹⁴² Walker, 'Modern Treaties of Friendship, Commerce and Navigation', *Minnesota Law Review* Volume 42(1958) P.805

¹⁴³ Treaty of Friendship, Commerce, and Navigation, between U.S.A and Paraguay, Feb. 4, 1859, Art IX

¹⁴⁴ Treaty of Amity, Commerce, and Navigation, between U.S.A and Congo, Jan. 24, 1891, Art III

¹⁴⁵ General Treaty of Amity, Commerce, and Navigation, between U.S.A and Yugoslavia, Oct. 14, 1881, Art I

¹⁴⁶ Kenneth J. Vandeveld above note at 4 P. 161

¹⁴⁷ Ibid PP. 161-175

in favor of liberalizing trade via the 1947 GATT framework this in turn shifted the primary legal framework for international trade relations from bilateral to multilateral agreements¹⁴⁸.

The second major event shaping the BITs regime of the Post-Colonial Era was the process of decolonialization that began after the war and led to the creation of newly independent but economically undeveloped countries and regard foreign investment as a form of neocolonialism because it involved foreign control over the means of production. The third event was the emergence of the socialist bloc led by the Soviet Union. Immediately following the World War II, the socialist states undertook massive expropriations of the private sector, including foreign-owned assets. Paradoxically, developed countries reacted via introducing modern BITs. In 1959, Germany concluded the first BIT with Pakistan and later many developed countries followed the footsteps of Germany.

The third epoch were marked by the advent of modern BITs with major innovation including liberalization of standing for private investors to claim before tribunals against states, the very purpose of BITs were to protect investment of developed countries in the territory of developing countries primarily against expropriation and also placed investment protection in the realm of law rather than politics.¹⁴⁹

Last epoch is the post socialism era since 1990's, also called the "global era". One of the most important changes was the combination of trade and investment provisions in international agreements under the auspices of WTO.¹⁵⁰ The global era is characterized as the explosion in the number of BITs¹⁵¹, the rise of mega regional FTAs with investment promotion, the decline of MIAs and the purpose of investment agreements is shifted from protection from expropriation to liberalization of investment barriers.

2.6. Admission and Establishment of Investments under BITs

Customarily, States have rights to control the admission and establishment of aliens, including foreign investors and types, forms and manners of investment on their territory¹⁵² arising from their sovereignty which is recognized under international law.¹⁵³

¹⁴⁸ Ibid

¹⁴⁹ Kenneth J. Vandavelde above note at 4 P. 175

¹⁵⁰ Ibid

¹⁵¹ UNCTAD above note at 5

¹⁵² UNCTAD, Admission and Establishment, UNCTAD Series on issues in international investment agreements, vol. II, 2002 P.3

¹⁵³ P. Juillard above note at 18 P.361

In the wake of the 1980's Latin American and African national sentiments, there was a growing consensus that economic liberalism promised more growth and innovation than economic protectionism with in closed national or regional boarders. Later the move for economic liberalism is intensified by J. Williamson paper what also known as "Washington consensus".¹⁵⁴ Nevertheless, the issue of more open and attractive policies regarding the admission and establishment of investment by foreign investors is receiving increased attention. This may be based on a variety of concepts, including the notions of non-discrimination standards ordinarily met in international trade treaties, particularly national treatment (NT) and MFN.¹⁵⁵

Admission is different from establishment of investment. Admission involves issues related with entry for example definition of relevant sectors, registration, license, form of business organization and ownership restrictions whereas establishment of investment pertains to the conditions under which the investor is allowed to carry out his business during investment for example, expansion of investment, payment of taxes and transfer of funds.¹⁵⁶

There are various BIT models dealing with investment admission arising from differences in regulatory approaches.¹⁵⁷For instance, the European model BITs such as Germany¹⁵⁸ did not allow right of admission to the investors but reserved it to host states. The implication of such kind of treatment is the host state is under no obligation to revise its domestic laws after BITs signed. Whereas the United States, Canada or Japan model BITs allowed right to admission to investors.¹⁵⁹ The Ethiopian BITs practice in relation to investment admission is mostly similar with European countries as it was influenced by Germany and France¹⁶⁰ model BITs. However, the Ethio-Turkey BIT gives more leverage for states to admit investment based on MFN principle in light of domestic laws.¹⁶¹

2.7. The Role of BITs in Attracting FDI

There are different views regarding whether conclusion of BITs enhance FDI or not. Recently there are various prominent empirical studies regarding the relationship between BITs and FDI

¹⁵⁴ Dolzer & Schreuer above note at 10 P. 79

¹⁵⁵ Ibid

¹⁵⁶ Dolzer & Schreuer above note at 10 P. 81

¹⁵⁷ Thomas Pollan, Legal Framework for the Admission of FDI , 2006 P.199

¹⁵⁸ The Germany Model BIT 2008 Art 2(1) and Ethio-Germany BIT above note at 12 Art 2(1)

¹⁵⁹ The USA Model BIT 2012, Art 3(1)

¹⁶⁰ The France Model BIT 2006, Art 2

¹⁶¹ Ethio-Turkey BIT above note at 14 Art 3(1)

despite the findings of all remain conflicting. The first one is the Hallward-Driemeir research¹⁶² which reiterates that BITs have not succeeded in improving property rights in developing countries which have weak domestic institutions, but that they do improve property rights in developing nations that already have convincingly strong home institutions.¹⁶³

The second study is undertaken by Tobin and Rose-Ackerman in 2005 found that BITs do have a positive impact on FDI flows to developing countries. This positive effect is, however, greatly dependent on the political and economic contexts.¹⁶⁴ Thus, it is unlikely to have FDI in weak investment environment and fragile institutions.

The third notable study was done by Eric Neumayer and Laura Spess in 2005, provides evidence that a greater number of BITs signed with OECD member countries actually increases FDI flows to developing countries even countries with poor domestic institutional quality and high investment risk stand the most to gain from BITs.¹⁶⁵

In general, the interplay between BITs role and FDI flows are multifaceted as empirical studies resulted in heterogeneous findings since BITs can have huge positive impacts on foreign investment¹⁶⁶, others show BITs have modest impact for FDI promotion.¹⁶⁷ Still others show no impact at all¹⁶⁸, or even a negative impact.¹⁶⁹ Recently one research found that the content of BITs matters: the FDI impact of BITs is dependent on the presence of certain substantive treaty provisions. For example, the national treatment clause was found to be important in order for BITs to be effective¹⁷⁰.

¹⁶²Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite', World Bank, Development Research Group Policy Research Working Paper No. WPS 3121 Vol. 19(2003) P.4

¹⁶³ Ibid

¹⁶⁴Jennifer L. Tobin & Susan Rose-Ackerman, 'When BITs have some bite: The political-economic environment for bilateral investment treaties', Review of International Organizations Vol.6(2011), PP 1–32, 7

¹⁶⁵Eric Neumayer & Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' World Development Vol. 33:10 (2005), PP. 1567-1585.

¹⁶⁶ Eric Neumayer & Laura Spess above note 177 at 1582

¹⁶⁷ Jeswald W Salacuse & Nicholas P Sullivan, 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain', Harvard International Law Journal, Vol. 46(2005) PP. 67–130, 105

¹⁶⁸Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence,' Virginia Journal of International Law, Vol. 51(2011). PP.397-442

¹⁶⁹ Hallward-Driemeier above note at 162 P.4

¹⁷⁰ Berger & et al , 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box', International Economics and Economic Policy, Vol. 10:2 (2013) pp. 247-275.

After all, conclusion of BITs will boost investors' confidence¹⁷¹ since developing countries concluding BITs is clearly associated with the belief that they will lead to greater investor confidence by curbing any impression of risk associated with the country in the past. The assumption behind BITs is that the framework they create leads to increased flows of foreign investment and legal certainty.¹⁷²

Finally, there is no hard and fast rule to argue BITs attract FDI since it needs interdisciplinary research, mixed methodologies and up to date empirical data.¹⁷³ In case of Ethiopian Investment climate, some foreign investors even from USA, Saudi Arabia and other Gulf countries came in Ethiopia and invested irrespective of BITs conclusion.¹⁷⁴

2.8. Nature of BITs

Seeing the large number of BITs in force, they are remarkably related. The similarity of these BITs is mainly on the structure of the treaties as many BITs also share similar natures in contents. This is however not to propose that all BITs always share common nature as far as the contents are concerned. Yet, BITs have the following commonalities.

Almost all BITs begin with introductory statements as to the aims of the treaty, which are usually the reciprocal encouragement and protection of investment flows between the two states.¹⁷⁵ Then it is followed by definition of investment and investors which provide for the types of property which are protected and the nature of the link of nationality to one of the parties that entitles the foreign investor to the protection of the treaty.¹⁷⁶

The other nature of BITs is a provision that sets fundamental standards of protection and guarantees of investment.¹⁷⁷ Finally, BITs have typical nature as they have dispute settlement clauses which in turn give standing for investors to sue before tribunals. Thus, the procedure for the settlement of disputes arising from the investment by arbitration is specified.¹⁷⁸ Nonetheless,

¹⁷¹ Yackee above note at 168 P. 400 See also Dr A Rohan Perera, 'The role and implications of bilateral investment treaties', *Commonwealth Law Bulletin*, 26:1(2000), PP 607-614, 607

¹⁷² M.Sornarajah above note at 1 P. 187

¹⁷³ UNCTAD 2015 above note at 41 P.126

¹⁷⁴ Interview with Mr.Tilahun Esmael, Bilateral Treaties Expert at Ethiopian Investment Commission, 9 March 2017, Addis Ababa Ethiopia

¹⁷⁵ Ethio-Germany BIT above note at 12 preamble and Ethio-Turkey BIT above note at 14 Preamble V

¹⁷⁶ Agreement between the government of FDRE and The Government of the Republic of France concerning the Encouragement and reciprocal protection of investments, signed on 25 June 2003 and entered in to force 7 August 2004, Art. 1 See also the Ethio-Germany BIT above note at 12 Art 1

¹⁷⁷ See section 2.9 below

¹⁷⁸ Ethio-France BIT above note at 176 Art 9

there are disparities on the contents of the rules that are to be applied as between the parties in each BIT.

2.9. Standards of Protection under BITs

Treaties for the protection of investment, especially BITs, provide for certain standards of protection.¹⁷⁹ These are guarantees and safeguards of investment under international law and at the same time BITs should take them in to consideration. These standards are fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, national treatment, MFN, repatriation of capital, compensation for nationalization and expropriation and umbrella clauses.¹⁸⁰

2.9.1. Fair and Equitable Treatment (FET)

Fair and equitable treatment (FET) is one of the most known safeguard of investment under the BITs regime¹⁸¹. It is an “absolute”, “non-contingent” standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application.¹⁸²

The central purport of FET as gathered from the jurisprudence of arbitral bodies are transparency, consistency, stability and protection of the investors’ legitimate expectations, compliance with contractual obligations, procedural propriety and due process, prohibition of denial of justice, non-discrimination, good faith, avoiding unilateralism in adopting terms and freedom from abusive treatment of investors like coercion or harassment.¹⁸³ Some writers argue FET is associated with the concept of legality since rule of law is the unifying theory behind the FET via substantive and procedural due processes.¹⁸⁴ Others said the concept of FET is determined by the subgroups to be seen on case by case basis not on the arbitrators’ subjective

¹⁷⁹ Christoph Schreuer above note at 6 P. 48

¹⁸⁰ Ibid

¹⁸¹ Roland Kläger above note at 116 P.113

¹⁸² OECD, ‘Fair and Equitable Treatment Standard in International Investment Law’, OECD Working Papers on International Investment, 2004, P.2

¹⁸³ UNCTAD, ‘Fair and Equitable Standard’, UNCTAD Series on Issues in International Investment Agreements II, 2012 P.11-35

¹⁸⁴ Kenneth Vandeveld, ‘A Unified Theory of Fair and Equitable Treatment’, New York University Journal of International Law and Politics, Vol. 43 (2011) P.49

view of fairness.¹⁸⁵ However, as the concept of FET is evolving, by no means exhaust the possibility of other fairness standards to be applied.

FET is found in Ethiopian BITs. For instance, the Ethio-Germany BIT provides right for investors to be treated in fair and equitable manner.¹⁸⁶

2.9.2. Full protection and Security

Most BITs contain clauses promising “full protection and security” though the exact meaning of it obviously varied. The idea is that the host state is under an obligation to take active measures to protect investment from adverse effects including duty to grant physical protection and security against encroachment by state organs.¹⁸⁷ Full protection and security is an overarching standard that obliges the host state to have a system capable of protecting and securing the investment both legally and physically.¹⁸⁸ ICJ in *Elettronica sicula* case¹⁸⁹ further affirmed that the notion of full protection and security also includes legal and judicial protections beyond safeguards from physical violence. The standard may also go further than general international law despite it is mentioned in each BIT to that effect.¹⁹⁰

Similarly, the Ethiopian BITs are accustomed with the notions of full protection and security.¹⁹¹

2.9.3. Protection from Arbitrary and discriminatory Measures

BITs offer protection against arbitrary and discriminatory measures. ICJ also noted in the *Elettronica sicula* case that “*arbitrariness is not so much something opposed to the rule of law...it is willful disregard of due process of law, an act which shocks or at least surprises, a sense of judicial propriety.*”¹⁹² The practice of arbitral decisions shows arbitrary measures refers actions against investors based on discretion, prejudice or personal preferences.¹⁹³ As to non-

¹⁸⁵Rudolf Dolzer, ‘Fair and Equitable Treatment: Today's Contours’, *Santa Clara Journal of International Law*, Vol. 12: 7 (2014), P. 33

¹⁸⁶ Ethio-Germany BIT above note at 12 Art 2(2), Ethio-France BIT above note at 176 13 Art 3 & Ethio-Turkey BIT above note at 14 Art 2(2)

¹⁸⁷ Christoph Schreuer above note at 6 P.53

¹⁸⁸ George K. Foster, ‘Recovering ‘Protection and Security’: The Treaty Standards Obscure Origins, Forgotten Meaning, and Key Current Significance’, *Vanderbilt Journal of Transnational Law*, Vol.45:1095 (2012), PP.1097-1156, 1144

¹⁸⁹ *Elettronica sicula* case above note 123 , Paras 102-112

¹⁹⁰ Dolzer & Schreuer above note at 10 P.153

¹⁹¹ Ethio-Turkey BIT above note at 14 Art 2(2), Ethio-France BIT above note at 176 Art 5 & Ethio-Germany BIT above note at 12 Art 2(2)

¹⁹² Ibid, Par.128

¹⁹³ *Azurix Corp. and et al v. Argentina*, Award of 14 July 2006, ICSID Case No.ARB/01/12, paras.392-393

discrimination, the term bids different meanings yet in relation to investment the issue arises with regard to the nationality of the investors. However, the concept of non-discrimination also arouse along with national treatment and MFN standards. Manifestly, the Ethiopian BITs incorporated it as one safeguard of investors.¹⁹⁴

2.9.4. National Treatment (NT)

Under international law, national treatment has its origins in trade agreements.¹⁹⁵ National treatment seeks to grant treatment comparable to domestic investors operating in the host country.¹⁹⁶ The scopes of national treatment in most BITs are limited only to the post-establishment phase of an investment.¹⁹⁷ However, the 2012 USA model BIT allows national treatment protection to pre-establishment¹⁹⁸ too. Coming back to substantive contents of national treatment under BITs, they include narrower treatment of ‘same’¹⁹⁹ or ‘identical’ situations and also broader treatment of ‘like’²⁰⁰ or ‘similar’²⁰¹ situations. Nevertheless, both the Ethio-Germany and France BITs did not incorporate any such qualified terms regarding national treatment.

2.9.5. Most Favored Nation (MFN)

MFN treatment became the central pillar of the international trading system, in order to ensure that member country would not discriminate between their trading partners. Thus, the purpose of MFN clause is to ensure that parties treat each other in a manner at least as favorably as they treat third state since the playing field is equal for all investors.²⁰² It is a relative standard as the treatment is dependent on the benefits enjoyed by third state investors. Therefore, MFN clauses are a means of providing equality with competitors, not superiority²⁰³.

¹⁹⁴ Ethio-Germany BIT above note at 12 Art 2(3) & Ethio-Turkey BIT above note at 14 Art 2(2)

¹⁹⁵ Paris Convention for the Protection of Industrial Property, 1883 Art 2 see also GATT 1947 Art III

¹⁹⁶ UNCTAD, ‘National Treatment,’ UNCTAD Series on issues in international investment agreements, Vol. IV (1999) P.3

¹⁹⁷ Ethio-France BIT above note at 176 Art 4 and Ethio-Germany BIT above note at 12 Art 3

¹⁹⁸ USA model BIT above note at 145 Art 3

¹⁹⁹ The BIT between Belize and the United Kingdom, 1982 Art 3 (1),

²⁰⁰ Agreement between the government of FDRE and state of Kuwait concerning the Encouragement and reciprocal protection of investments, signed on 14 September 1996 and entered in to force 12 November 1998 Art 4(1)

²⁰¹ Ethio-Turkey BIT above note 14 Art 3(2)

²⁰² UNCTAD, ‘Most-Favored-Nation Treatment’, UNCTAD Series on Issues in International Investment Agreements II, 2010 P.1

²⁰³ Tony Cole, ‘The Boundaries of Most Favored Nation Treatment in International Investment Law’, Michigan Journal of International Law, Vol.33:537 (2012) P.564, 584

Obviously, The MFN clause is governed by the *Ejusdem Generis* principle, in that it may only apply to issues belonging to the same subject matter since treaties have no effect on third parties.²⁰⁴

Some authorities claim that MFN clauses are portrayed as comprehensively multilateralizing investment treaties in spite of their bilateral form since the clauses break its bilateralist rationale and also afforded favors whether substantive or procedural one.²⁰⁵ However, the researcher is at odds with such assertions since currently MFN clauses are losing their currency due to expansion of free trade area, customs union or regional commitment exceptions.

2.9.6. Repatriation or Transfer of Capital

Transfer of capital is another protection found in BITs. Repatriation of capital means the investors right to transfer the returns of investment from host state to home state. The most critical question to be posed at this junction will be is the transfer of capital with restriction or not. Some BITs especially European models allow free flow of capital without any restriction. However, other BITs restrict capital flow due to domestic law measures, balance of payment crisis or other measures of criminal or bankruptcy proceedings against the investors²⁰⁶. Similarly, there is dissimilar treatment in Ethiopian BITs practices as some BITs allow free flow of capital while others restrict it.²⁰⁷

2.9.7. Compensation for Nationalization and Expropriation

Protection against expropriation or nationalization is one of the best protections of investors under BITs. Although states have sovereign rights over natural resources including requisitioning private property and nationalization measures still there should be conditions to be fulfilled such as public purpose, due process, non-discrimination and with compensation.²⁰⁸ Albeit as to the manner of compensation and definition of expropriation, still it was subject of stern debate not only from academic circles but also policy makers too.

²⁰⁴Pia Acconci, 'Most-Favored-Nation Treatment', in Peter Muchlinski and et al (eds), Oxford Handbook of International Investment Law, P.654

²⁰⁵Stephan W. Schill, 'Multilateralizing Investment Treaties through Most-Favored-Nation Clauses', Berkeley Journal of International Law, Vol. 27: 496 (2009) P.566

²⁰⁶Uche E. Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique', Michigan Journal of International Law, Vol. 35:131 (2013) P. 172

²⁰⁷For further discussion about capital flow controls in Ethiopia See Yohannes Eneyew, 'Balancing Foreign Investment and Free Flow of Capital', Addis Fortune Vol. 17:877(2017), February 19, 2017 P.36-40

²⁰⁸ UNCTAD, 'Expropriation', A sequel, UNCTAD Series on Issues in International Investment Agreements II, 2012, P.1

Most BITs prohibits expropriation measures whether it could be direct or indirect.²⁰⁹ The former is about an open, a mandatory legal transfer of the title to the property or its outright physical seizure to government or state affiliated third party. The latter involves total or near-total deprivation of an investment but without a formal transfer of title. To the extreme, indirect expropriation is extended to “*an egregious failure to create or maintain the normative ‘favorable conditions’ in the host state*”.²¹⁰

As to payment of compensation, there are two contending doctrines under international law. These are:-

A. Calvo Doctrine

The Calvo doctrine stated that, in cases of expropriation, international law did not impose any particular obligation on a State towards aliens, except that of nondiscrimination. Therefore, aliens were to be subject to the same law as nationals, and could not rely on any international standard of treatment.²¹¹ Currently, this doctrine is discarded due to being unfriendly to investor.

B. Hull Doctrine

Hull contended that, in cases of expropriation, it was a ‘self-evident fact’ that international law obliged the expropriating State to pay ‘prompt, adequate and effective compensation’ to the foreign investor, on the basis of ‘applicable precedents and recognized authorities on international law’.²¹² The current trend of BITs is hugely influenced by this doctrine.

2.9.8. Umbrella Clause

The last protection of investors under BITs is umbrella clause. Umbrella clause is a provision in an investment protection treaty that guarantees the observance of obligations assumed by a host state with respect to investments.²¹³ Yet various BITs include this clause still others cast it off.

²⁰⁹August Reinisch, 'Expropriation', in Peter Muchlinski et al. (eds.), The Oxford Handbook of International Investment Law, 2008, P.727

²¹⁰Max Gutbrod & et al, ‘Protection against Indirect Expropriation under National and International Legal Systems’, Göttingen Journal of International Law, Vol. 1:2 (2009) P.298 See also M. W. Reisman & R. D. Sloane, ‘Indirect Expropriation and its Valuation in the BIT Generation’, British Yearbook of International Law, Vol.74 (2003), P.119

²¹¹ Surya P Subedi above note at 46 P.14

²¹² Ibid, P.16

²¹³ Christoph Schreuer above note at 6 P.80, see umbrella clause in details at chapter Three & Four

CHAPTER THREE

3. THE NOTION OF UMBRELLA CLAUSE UNDER INTERNATIONAL LAW

3.1. Introduction

This chapter will discuss the notion of umbrella clause under international law of foreign investment. Umbrella clause is a clause in BITs which obliges host states to observe or respect specific commitments or obligations made with investors. So this chapter will look in to the meaning, origin, nature, purpose and potential pitfalls of umbrella clauses. Besides, there is brief discussion about the scope of umbrella clause both from the literatures and arbitral tribunal decisions. In addition, this chapter will address recent arbitral jurisprudences *inter alia*, the SGS v. Paraguay, Khan v. Mongolia and Granati Koza v. Turkmenistan cases.

In order to draw the picture of umbrella clause thoroughly, US model BIT, EU countries experience, Canada Model BIT and South-South BIT will be addressed and followed by discussion of the contemporary trends of umbrella clause.

3.2. Meaning

The term ‘umbrella clause’ does not take the same meaning as the original intents expressed in French or German terms.²¹⁴

The historic emergence of the umbrella clause was dominated by the desire to protect mainly concession contracts from interference and abrogation based on governmental powers.²¹⁵

There is no uniform definition to the axiom ‘umbrella clause’ because there is continuing uncertainty surrounding its meaning. Umbrella clauses create a reciprocal international obligation owed by the Contracting States to each other that requires them, as host states, to observe obligations they have entered into with investors of the other Contracting State with regard to their investments.²¹⁶ However one can make a workable definition of the term- ‘umbrella clause’ as a provision in an investment protection treaty that guarantees the adherence

²¹⁴The term umbrella clause doesn't inherit the meaning of the French term "*traite de couverture*" (treaty of coverage) nor does the German term "*Abschirmungsklausel*". See Thomas Wälde, 'The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases', The Journal of World Investment and Trade, Vol. 6:2 (2005), PP.183-236, 202

²¹⁵ Ibid

²¹⁶ Sinclair above note at 7 P.411

of obligations assumed by the host state for the investor.²¹⁷ The 1959 Abs and Shawcross Draft Convention on Foreign Investment introduced the wordings of modern ‘umbrella clauses’.²¹⁸ Later the 1967 OECD Draft Convention on the Protection of Foreign Property²¹⁹ provided a similar wording save replacing the term ‘investment’ for ‘property’.

Schreuer defined umbrella clause by giving its functional definition as “*A clause that put contractual commitments under the BITs protective umbrella since umbrella clauses have been added to some BITs to provide additional protection to investors beyond the traditional international standards.*”²²⁰ Thus, as per the above definition umbrella clause is a provision in the BITs under which parties undertake to observe any obligation they may have entered in to with respect to investments.

Finally various nomenclatures given to the term umbrella clause such as 'elevator', 'mirror effect', 'parallel effect', 'umbrella' or 'sanctity of contract', 'pacta sunt servanda', 'respect clause' and 'arch of the covenant' clearly shows there is growing uncertainty in the meaning of the term.

3.3. The Advent of Umbrella Clause under International Law

The notion of modern umbrella clause emerged under international law in 1950's thanks to Mr Elihu Lauterpacht for his advice in a dispute settlement over Anglo-Iranian Oil dispute in 1953²²¹. Thus, umbrella clause can be used effectively to elevate a contract between an investor and a host state to the level of an inter-state obligation between the host state and the home state of the investor.

Sinclair iterates that *[T]he so-called 'umbrella clause... can then be traced to the Abs-Shawcross Draft Convention on Foreign Investment of 1959 in which Lauterpacht was closely involved and the subsequent OECD draft Conventions on the Protection of Foreign Property of 1962 and 1967, all of which contained umbrella clauses*”²²²

The rationale behind for the introduction of umbrella clause was a reaction to nationalizations and concession breaches in the post-colonial periods. It was part of a larger package of

²¹⁷ Dolzer & Schreuer above note at 10 P.153

²¹⁸ Abs and Shawcross above note at 84 Art 2

²¹⁹ Yannaca-Small above note at 9, Art 2

²²⁰ Christoph Schreuer, ‘Travelling the BIT Route Of Waiting Periods, Umbrella Clauses and Forks in the Road’, *Journal of World Investment and Trade*, Vol. 5:2 (2004), PP.231-256, 250

²²¹ Sinclair above note at 7 P.414

²²² Sinclair above note at 7 P.412

investment protection measures, of which the deployments of investment protection treaties, the creation of international institutions such as ICSID and MIGA along with contractual risk management techniques predominantly stabilization and international arbitration clause were the main constituents.²²³

However, some writers claimed the concept of umbrella clause is not new rather it is an ‘old wine in the new bottle’ since the issue restates the concept of ‘*pacta sunt servanda*’²²⁴ and also its advent under international law is rooted in the 1921 Agreement between the UK and Peru in respect of a mineral concession over *La Brea y Pariñas*.²²⁵

Unlike the umbrella clause found in 1921 *La Brea y Pariñas* Agreement aimed at elevating an arbitral award, modern umbrella clauses seek to create an inter-state obligation to observe investment agreements themselves, whatever their proper law, which may be enforced by investors where the treaty confers a direct right of recourse to arbitration.²²⁶ In any case, the inclusion of umbrella clause in the Abs-Shawcross Draft, Germany-Pakistan BIT²²⁷ and OECD Treaty undoubtedly shows that it is for the first time a treaty transformed a private claim into an obligation between nation states.

In addition the major MIAs such as the Energy Charter²²⁸ also incorporated umbrella clause albeit it is not found in the NAFTA and COMESA treaties.

Therefore, the advent of umbrella clause under international law is generally seen as the result of capital exporting countries’ effort to counter the nationalization measures of capital importing countries.

Before winding up, it is worthy to ask whether umbrella clause is provided by customary international law. Obviously, it is hard to find consistent state practice with obligatory stipulation regarding umbrella clauses. Therefore, the researcher contends that the customary law status of

²²³Wälde above note at 229 P.192

²²⁴ E. Snyder, ‘Foreign Investment Protection: A Reasoned Approach’, Michigan Law Review Vol.61:1087(1963) P.1110

²²⁵Sinclair above note at 7 P.413

²²⁶Sinclair above note at 7 P.414

²²⁷See Germany-Pakistan BIT above note 86, Art 7 of which reads: “Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.”

²²⁸The Energy Charter Treaty above note at 26, Art 10(1) requires that “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

umbrella clause is controversial since obviously there is lack of precision and certainty²²⁹ about the scope of umbrella clause and also BITs state practice is inconsistent and contradictory.²³⁰

3.4. Merits and Demerits of Umbrella Clause

Basically, the *raison d'être* for inclusion of umbrella clause under BITs is perhaps closely associated with_ the absence of international protection of investors contractual rights.²³¹

Similarly, Professor Christoph_ Schreuer contends that the object and purpose of observance of commitments clauses is 'to add extra protection to the investor'.²³²

The very purpose of umbrella clause is elevating contract claims in-to treaty breaches.²³³ This elevator effect claim is further affirmed by Ibrahim Shihata, former Secretary General of ICSID, who contended that umbrella clause may have an elevating effect on investors' contract claims 'by stipulating that breach by one State's contract with a private party from the other State will also constitute a breach of the treaty between the two State'.²³⁴

Emmanuel Gaillard, the attorney of SGS in *SGS v. Pakistan case* seems to endorse the 'elevating theory' as he advocates characterization of contract breaches as violations of a treaty by operation of observance of commitments clauses.²³⁵

In addition, umbrella clauses as safeguards of foreign investment protection can be seen as investors' arsenal²³⁶ to claim their substantive and procedural rights since umbrella clause spreads the application of BIT through offering better protection to the investor.²³⁷

²²⁹Wälde above note at 229 P.183

²³⁰Asylum Case ICJ Reports, 1950, p. 266; see also Anglo-Norwegian Fisheries case ICJ Reports, 1951, pp. 116, 131 and 138

²³¹Elvira R. Gadelshina, 'Hermeneutic Reflections on the Specific Purpose of Umbrella Clauses', Journal of World Investment & Trade, Vol. 14 (2013) PP.804–828,809

²³²Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered', in: Todd Weiler (ed.), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005 P.301

²³³Stanimir A. Alexandrov, 'Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*', Journal of World Investment and Trade, Vol.5 (2004) P. 556

²³⁴Ibrahim Shihata, 'Applicable Law in International Arbitration: Specific Aspects in Case of the Involvement of State Parties', in I.F.I. Shihata & et al (eds.), The World Bank in a Changing World: Selected Essays and Lectures, Vol. 2(1995), P.601

²³⁵Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *SGS* Cases Considered', in Todd Weiler (ed.), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005 P.345-346

²³⁶Matthew Wendlandt, '*SGS v. Philippines* and the Role of ICSID Tribunals in Investor-State Contract Disputes', Texas International Law Journal, Vol.43:523(2008), P.532

²³⁷Chaisse, J. and Bellak C, 'Navigating the Expanding Universe of International Treaties on Foreign Investment Creation and Use of a Critical Index', Journal of International Economic Law, Vol. 18:1(2015), pp. 79–105

In this regard, one commentator reasonably suggests that umbrella clauses are designed to provide substantive protection for investors, not just ‘a thin sliver of security akin to a friendly reminder of the host state’s other commitments under the treaty’.²³⁸

The other purpose of umbrella clause is its suitability for investors’ standing since it provides direct *locus standi* for investors to litigate before arbitration tribunals. In this connection, Stephan Schill_ argues that the function of the clauses consists in stabilizing investor-State relations by opening recourse to dispute settlement by arbitral tribunals for breaches of specific and individual promises made by the State vis-à-vis investors.²³⁹ In other words, umbrella clauses can give foreign investors standing rights. BITs should be interpreted to confer jurisdiction on investment treaty tribunals to hear the contract claims. This default rule places a thumb on the scale in favor of the law market for foreign investment law because it fosters state efforts to provide broader investor protections, while also fostering the state’s ability to fine-tune its obligations through investment contract provisions.²⁴⁰

Basically, umbrella clause is designed in BITs to elevate private contractual claims and allows direct recourse. Imagine without an umbrella clause, a foreign investor may typically bring its breach of contract claims in a state court with jurisdiction and this likely means suppose that foreign investors will bring investment disputes against the state in the host state’s courts where using the state’s conflicts of law rules, the state would resolve the dispute under its national law. If state law is weak and/or the courts are biased, then investor rights can only be protected by enabling the investor to opt out of local law and courts. Logically, if umbrella clause is not included, the eggs of the investor are in the domestic law basket and returning to Calvo doctrine. This in turn resulted in moving in to dead end and miscarriage of justice.

When we look at the demerits of umbrella clause it is clear that it makes the commitment of host states very burdensome. Since under international law, the obligation of states comes in to picture when there is treaty breach and the same is attributed to the state. There are authors who argues umbrella clauses purport ‘to circumvent’ the traditional notion of international customary law which states that ‘mere violation’ of contract or other undertaking cannot give rise to treaty-

²³⁸ Potts above note at 2 P.1033

²³⁹ Stephen W. Schill, ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties’, *Minnesota Journal of International Law*, Vol.18 (2009), PP.36-37

²⁴⁰ Erin O’Hara O’Connor and Susan D. Franck, ‘Foreign Investments and the Market for International Law’, *University of Illinois Law Review*, Vol.5:1617 (2014) PP.1650-53

based claims.²⁴¹ In this regard, Professor James Crawford argues advancing integrationist approach_ will be a solution since the claims under umbrella clause are still contractual and governed by their own applicable law. The actual distinction between treaty and contract is maintained. Umbrella clause allows enforcement without internationalization and without transforming the character and content of the underlying obligation.²⁴²

The other skepticism towards umbrella clause is the fact that it makes other BITs standards of protection superfluous.²⁴³ Though the ICSID tribunal failed to show exactly how umbrella clause could plunder other BIT standards of protection, such kind of allegation is raised in SGS V Pakistan case:

“There would be no real need to demonstrate a violation of those substantive standards if a simple breach of contract...[sic] by itself would suffice to constitute treaty breach by the party and engage on the international responsibility of the party.”²⁴⁴

Finally, an umbrella clause creates uncertainty and inconsistency²⁴⁵ in international investment arbitration as the interpretation of the clause remains ambiguous in different tribunals²⁴⁶.

As result, states have begun omitting the clause in their BITs and moving in to elimination trend, _ instances being French, Canadian and Colombian Model BITs.²⁴⁷

3.5. The Nature of Umbrella Clause

From arbitral jurisprudence, general consensus has developed that the nature of umbrella clauses extends at least to contractual obligations and potentially to specific legal or oral commitments entered into with regard to an investment.²⁴⁸

²⁴¹ Potts above note at 2 P. 1006

²⁴² James Crawford, ‘Treaty and Contract in Investment Arbitration’, Arbitration International, Vol.24:3(2008), PP.351-374,370

²⁴³ Prof. Dr. August Reinisch, ‘Umbrella Clauses’, Seminar on International Investment Protection, winter Semester 2006/2007, P.24

²⁴⁴ SGS V. Pakistan above note at 8 Par 168

²⁴⁵ Daniel Behn, ‘A theory of configurative fairness for evolving International legal orders’: Linking the scientific study of value subjectivity to Jurisprudential thought, A PhD dissertation 2013.PP.256-258

²⁴⁶ Kathryn Ballantine, ‘How Far Do Bits Bite – A Comparison of SGS v. Pakistan and SGS v. Philippines: Interpreting Umbrella Clauses in Bilateral Investment Treaties’, Cambridge Student Law Review Vol. 2(2006) p. 33

²⁴⁷ Raúl P. de Souza Fleury, ‘Umbrella clauses: a trend towards its elimination’, Arbitration International, Vol. 34:4 (2015), PP 679-691

²⁴⁸ Jude Antony, ‘Umbrella Clauses since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus’, Arbitration International, Vol 29:4(2013) PP.607-639

The other feature of umbrella clauses is that almost all BITs follow similar wordings since model-BITs and other investment treaty models show that formulations of the investment treaties are becoming more harmonized.²⁴⁹ Thus, a typical umbrella clause in a BIT has the following wordings:

“A Contracting Party shall adhere to **any other obligation** deriving from a written commitment undertaken by it in favor of an investor of the other Contracting Party with regard to an investment in its territory.”²⁵⁰ Or

“Each Contracting Party shall **observe any commitment** it may have entered into with regard to investments of investors of the other Contracting Party.”²⁵¹

So as per the above mentioned provisions, umbrella clause’s typical location may be every part of BITs.²⁵²

In this regard, the tribunal in *SGS v. Pakistan* noted that the location of umbrella clause in BITs is worthy considering matter. Since the said clause in the present case is found at the end of the BIT_ between dispute settlement and final provisions, shows that it is not as such substantive clauses than article 3-7(MFN, national treatment or expropriation clauses) of the Swiss-Pakistan BIT.²⁵³ On the contrary the tribunal of *SGS v. Philippines* concluded that the location of the umbrella clause whether at the beginning or the end of the BIT does not matter.²⁵⁴ The researcher is of the opinion that the placement of the clause is irrelevant so long as parties insert it in the BIT.

As mentioned in the introductory part, the wording of the umbrella clause is dissimilar in a sense that some BITs say “any obligation”, others provide “specific commitment” and others concern “any investment commitment”.

Before looking at the scope, it is better to pay attention to the relationship between umbrella clauses and forum selection clauses under BITs. BITs may provide the ‘fork in the road’_ provision. A ‘fork in the road clause’ (Latin: *‘una via electa non daturrecursus adalteram’*) in the investment treaty provides that the investor is made to choose between the domestic courts

²⁴⁹Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, British Yearbook of International Law, Vol. 74(2004) pp.151–290, 159

²⁵⁰ Ethio-Germany BIT above note at 12 Art 8(2)

²⁵¹ Ethio-Denmark BIT above note 13 Art 2(3)

²⁵² Prof. Dr. August Reinisch above note at 243 pp.30-32

²⁵³ *SGS v. Pakistan* above note at 8 Par 170

²⁵⁴ *SGS v. Philippines* above note at 8 Par 124

and international arbitration to litigate its claims, and that choice, after it has been made, is final.²⁵⁵

Tribunals are frequently confronted with declining or upholding jurisdiction based on claims arising from umbrella clause by investors and forum selection clause by state contracts when they try to make dichotomy of contracts in to public_/private²⁵⁶. The mere existence of umbrella clause does not suffice to plead before tribunals. So the forum selection clause made by the investor and state is an exception to the treaty based umbrella clause.²⁵⁷

However, the experience of tribunals shows that-, forum selection clause is not a bar for them to entertain contractual claims.²⁵⁸

3.5.1. The scope of Umbrella clause

The scope of umbrella clause is the subject of intense debate amongst commentators, arbitrators and organizations. To understand the scope of the clause, For instance, Article 2 of the 1959 Abs-Shawcross Draft reads:

“Each Party shall at all times ensure the **observance of any undertakings** which it may have given in relation to investments made by nationals of any other Party.”

The consistent understanding of commentators and drafters alike is that while umbrella clause probably did cover international obligations²⁵⁹ and the ultimate focus of an umbrella clause was contractual obligations and unilateral commitments accepted by the host state with regard to foreign property.²⁶⁰ Since there is no indication in the preparatory work for the Abs-Shawcross Draft or the OECD Draft or the commentaries thereon, the scope of the ‘undertakings’ referred to in the umbrella clauses should be limited only to other international obligations.

While Brower has raised the possibility that article 2 of the Abs-Shawcross Draft’s scope may have been limited so as only *“to apply specifically to large-scale investment and concession*

²⁵⁵Schreuer above note at 222 , pp. 239-240 see also Ethio-Germany BIT above note at 12 Art 11(2) and Ethio-Turkey BIT above note at 14 Art 7(2)

²⁵⁶Heikki Marjosola, ‘Public/Private Conflict in Investment Treaty Arbitration– a Study on Umbrella Clauses’, Helsinki Law Review 2009 pp. 103–134

²⁵⁷Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’, International and Comparative Law Quarterly, Vol.56:2 (2007) pp. 371-394

²⁵⁸Salini V Morocco above note at 34, Par 59-62 see also SGS V Philippines above note at 8 Par 177

²⁵⁹Georg Schwarzenberger, ‘The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary’, Journal of Public Law, Vol.9:147 (1960) P.154 cited at Sinclair above note 7 P.422

²⁶⁰ Sinclair above note at 7 P.429

*contracts, in the making of which the state is deliberately 'exercising its sovereignty' and thus it might be argued that the ordinary commercial contracts are an implied exception to the general rule set forth in Article 2".*²⁶¹

In stark contrast, Georg Schwarzenberger commented that an umbrella clause is the '**arch of the covenant**'²⁶² and its effect "is to transform obligations towards objects of international law, which as such are beyond the pale of international law, into obligations under international law"²⁶³ Thus, he explained that the scope of Article 2 of the Abs-Shawcross Draft "covers undertakings by contracting parties both to subjects and objects of international law."²⁶⁴ Therefore, based on the above argument the scope of umbrella clause is multidimensional as it encompasses undertakings from sovereign states to private individuals.

Seidl-Hohenveldern argues that umbrella clause_ may secure international protection for undertakings._ However it is clear that such protection is not absolute and allows some degree of flexibility and also like any other treaty it is subject to the '*clausula rebus sic stantibus*'.²⁶⁵

He has again recognized that the scope of umbrella clause will extends to any undertakings having internationalization effect albeit such clause is limited by fundamental change of circumstances under treaty law.

UNCTAD understanding of the umbrella clause's scope is too indefinite. It notes that "*the language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally. A provision of this kind might possibly alter the legal regime and make the agreement subject to the rules of international law*"²⁶⁶

The researcher argues that the scope of modern umbrella clause such as that of article 8(2) of Ethio-Germany BIT, words like..."any other obligation deriving from written commitment"

²⁶¹ C.N. Brower, 'The Future of Foreign Investment-Recent Developments in the International Law of Expropriation and Compensation', in V.S. Cameron (eds.), Private Investors Abroad – Problems and Solutions in International Business, Private Investors Abroad,1976), pp. 93, 105 cited at Sinclair above note at 7

²⁶² Shwarzenberger above not at 259 P.160

²⁶³ Ibid pp. 154-155

²⁶⁴ Ibid, P.154

²⁶⁵ Ignaz Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table', Journal of Public Law Vol 10(1961) P.104 cited at Sinclair above note at 7

²⁶⁶ Bilateral Investment Treaties in the mid-1990s, United Nations, 1998, p. 56

should be understood in light of the context as well as object and purpose of such BIT. In this regard, the VCLT²⁶⁷ provides a key to unlock the deadlock of umbrella clause:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Thus, the scope of umbrella clause may be interpreted contextually via their ordinary meaning. So the word ‘any other obligation’ could mean any obligation like contractual, oral or written legal promises given to the investor by host states yet strictly written one. In the meantime, both the investor and the host states should be in good faith while observing, claiming or terminating their undertakings. Besides, the term “any obligation” may be seen in light of the object and purpose of the treaty. Thus, in our case the object and purpose of Ethio-Germany BIT is reciprocal encouragement and promotion of investment between the two nations²⁶⁸. Therefore, if that is really the case, then exact scope of umbrella clause will hinge up on balancing investors’ interest through better umbrella protection by extending to any commitments and States’_ sovereign interests including reaping FDI.

3.5.2. The underlying difference with Stabilization Clause

While umbrella clause is observance clause obliging parties to respect their obligations, stabilization clause is a clause which provides that future changes of the host state’s law that works to the investor disadvantage will not be applied to it.²⁶⁹

Stabilization clause is inserted at the request of the investor by relying on domestic laws and not international law.²⁷⁰ In *EDF v. Romania*, for instance, the tribunal explicitly acknowledged that an investor “*may not rely on a bilateral investment treaty as a kind of insurance against the risk of any changes in the host State’s legal and economic framework ... except where specific promises or representations are made by the State.*”²⁷¹ Therefore, stabilization clause is a contractual clause commonly found in investment contracts such as concession agreement where in the host state grants some concession and make itself refrain from sovereign functions.

²⁶⁷VCLT above note at 113, Art.31(1)

²⁶⁸ Ethio-Germany BIT above note at 12 Preamble Par.III

²⁶⁹ Dolzer & Schreuer above note at 10 P.75

²⁷⁰ Ibid

²⁷¹ *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, (Bernardini, Rovine, Derains), Oct. 8, 2009, Par 217

3.6. Types of Umbrella Clauses

Although there is high tendency of resemblance in drafting of umbrella clause, one can easily find dissimilarity in wording and scope even within one state's treaty practice.²⁷² There are debates among writers and tribunals whether umbrella clause is actually divided based on their wordings and scope. For instance, Anthony Sinclair said the dichotomy or any divide is improper and he submitted that they are similar provisions²⁷³. To the contrary, Jaime Lucas argued umbrella clauses can be divided into three groups by looking at the scope that they try to cover, including narrowest umbrella clause²⁷⁴, historic-umbrella clause prototype²⁷⁵ and widest type.²⁷⁶ While tribunals were tempted to interpret the clause in to restrictive and expansive, the researcher will use the tribunals as a bench mark of classification and try to differentiate the two below.

3.6.1. Restrictive Umbrella clause

Restrictive umbrella clause is first conceived in SGS v. Pakistan case, by which the tribunal while interpreting article 11 of the Switzerland-Pakistan BIT to the SGS v. Pakistan conflict. Such article provides that: *“Each contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investment of the other contracting party”*. The tribunal textually noted *“while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion and also broad interpretation would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor*

²⁷²Jaime B. Lucas, ‘Umbrella clauses: uncertain contract protection under IAS’, Georgetown University Journal of Globalization, competitiveness and Governability, Vol.10:2(2016) PP.100-113, 102

²⁷³Anthony C. Sinclair, “The Umbrella Clause Debate” on International Investment Law, Current Issues III, Remedies in International Investment Law, in Andrea K. Bjorklund and et al (eds), Emerging Jurisprudence of International Investment Law, British Institute of International and Comparative Law 2009, PP 281-284

²⁷⁴Ibid, P.103, umbrella clauses that are so narrowly drafted that is clear that they try to exclusively include investment contracts. For example: Ethio-Germany BIT above note at 12 Art 8(2): “any obligation from written commitment”...The expression “*written commitments*” clearly refers to contracts in writing so oral commitments are excluded.

²⁷⁵ Ibid, Prototype umbrella clauses are clauses modeled from the first BIT of Germany-Pakistan. Example: Ethio-Denmark BIT above note at 264... the phrase “observe any commitment related to investment.”

²⁷⁶ The widest type provides general intention of states providing protection. Example Pursuant to article 2(4) of the 1996 BIT between Italy and Jordan: “Each contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith of ‘**all undertakings**’ assumed with regards to each specific investor.”

of the other contracting party... ”²⁷⁷ Finally, mere breach of commercial contracts between host state and investor will not trigger internationalization.²⁷⁸

3.6.2. Broad Umbrella Clause

Broad umbrella clauses refers an expansive interpretation which requires that breaches of obligations the host-state has undertaken with respect to foreign investors are elevated to the level of international treaty breach. Therefore, a simple breach of a commercial contract between a host-state and an investor could be transformed into a breach of a treaty²⁷⁹.

The tribunal in *SGS v. Philippines* reaffirmed expansive interpretation of umbrella clauses. Thus, investment arbitration tribunals adopting a broad interpretation have turned to the objective and purpose of the investment treaties in which umbrella clauses are found.²⁸⁰

3.7. Tribunals’ Jurisprudence on Umbrella Clause

Investor-state dispute settlement has come in to being when there are breaches by parties in investment contract especially the persistent violation by host states or when the exercise of governmental powers has impacted, interfered or terminated a contract.²⁸¹ Thus, tribunals are entertaining cases arising from such breaches. However the emerging jurisprudence has been marked by inconsistencies and incoherence.²⁸²

The invocation of umbrella clause in investor-state Investment dispute was first known in the *Fedax N.V v. Republic of Venezuela*²⁸³, the tribunal ordered that Venezuela was bound “*to honor precisely the terms and conditions governing such investment, laid down mainly in the Agreement, as well as to honor the specific payments established in the promissory notes issued*”, yet the tribunal did not give any particular weight to umbrella clause.²⁸⁴

²⁷⁷*SGS v. Pakistan* above note at 8 Par.166-168 See also other ICSID cases for restrictive interpretation: *El Paso Energy International Company v. Argentine republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 Par.72

²⁷⁸*Ibid*, Par.167

²⁷⁹Jonckheere Katherine, ‘Practical Implications from an Expansive Interpretation of Umbrella Clauses in International Investment Law’, *South Carolina Journal of International Law and Business* Vol. 11: 2 (2015), PP.113-161,148

²⁸⁰ *Eureko BV v. Republic of Pol.*, Partial Award, (Aug. 19,2005), 12 ICSID Rep. 335 (2007) Par 247

²⁸¹Lise Johnson & Oleksandr Volkov, ‘Investor-State Contracts, Host-State “Commitments” and the Myth of Stability In International Law’, *The American Review of International Arbitration*, Vol.24:3(2013), PP.361-415,363

²⁸² Jürgen Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents’, *European Journal of International Law*, Vol.20: 749 (2009), P.750

²⁸³ *Fedax N.V. v. Republic of Venezuela*, Award, 9 March 1998; ICSID Rep. 186, Par 25-30

²⁸⁴ *Ibid*

The interpretation of umbrella clause in previous cases may not be used as an interpretive tool for pending cases since umbrella clause is formulated in each particular BIT with different wordings.²⁸⁵

The ICSID case laws regarding the interpretation of the umbrella clause in some case are reluctant to confer legal value on the host State's observance clauses.²⁸⁶ This refusal is made as a result of the dualist distinction between violations of treaty in one hand and contractual breaches on the other hand. Yet dualist distinction is not perhaps a peremptory norm so in the event that the umbrella clause is clear, tribunals are under the obligation to confer an effective interpretation to the clause.²⁸⁷ The most contentious issue before tribunals is that the existence of forum selection clause along with umbrella clause and ascertaining jurisdiction based on the traditional dualist distinction of treaty and contract dichotomy.²⁸⁸ However, there is also growing consensus that the jurisdiction of an international arbitral tribunal to hear umbrella clause claims is not affected by the presence of a contractual forum selection clause in an underlying contract.²⁸⁹ Before looking at recent tribunals jurisprudence, it is worthy of mentioning cases addressed having umbrella clauses.²⁹⁰

According to UNCTAD data base accessed up to April 2017, there are around 469 cases brought to the following arbitral tribunals: ICSID, PCA, ICC, CRCICA, LCIA, MCCI and SCC based on the alleged violations of BIT standards or protections under investment.

By using census, out of 469 alleged cases only 150 are said to be substantiated and found on the said count. Accordingly, out 469 cases brought, Expropriation claims remain the foremost cause of action before investment arbitral tribunals with 128 cases (27.25%) followed by Fair and Equitable treatment (FET) with 113 cases (24.18%), Full Protection and security claims with 58 cases (12.57%), Arbitrary and unreasonable measures with 49 cases (10.43%). Whereas umbrella

²⁸⁵ Noble Ventures v. Romania, ICSID Award of 12 October 2005, ARB/01/11, para. 48-50

²⁸⁶ Joy Mining Machinery Ltd v. Arab Republic of Egypt, ICSID Award on Jurisdiction of 6 August 2004, para. 75-78; Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Decision on Jurisdiction of 22 April 2005, ARB/03/3, para. 259-266

²⁸⁷ Bjørn Kunoy, 'Singing in the Rain – Developments in the Interpretation of Umbrella Clauses', Journal of World Investment & Trade, Vol.7: 275 (2006), P.275-300

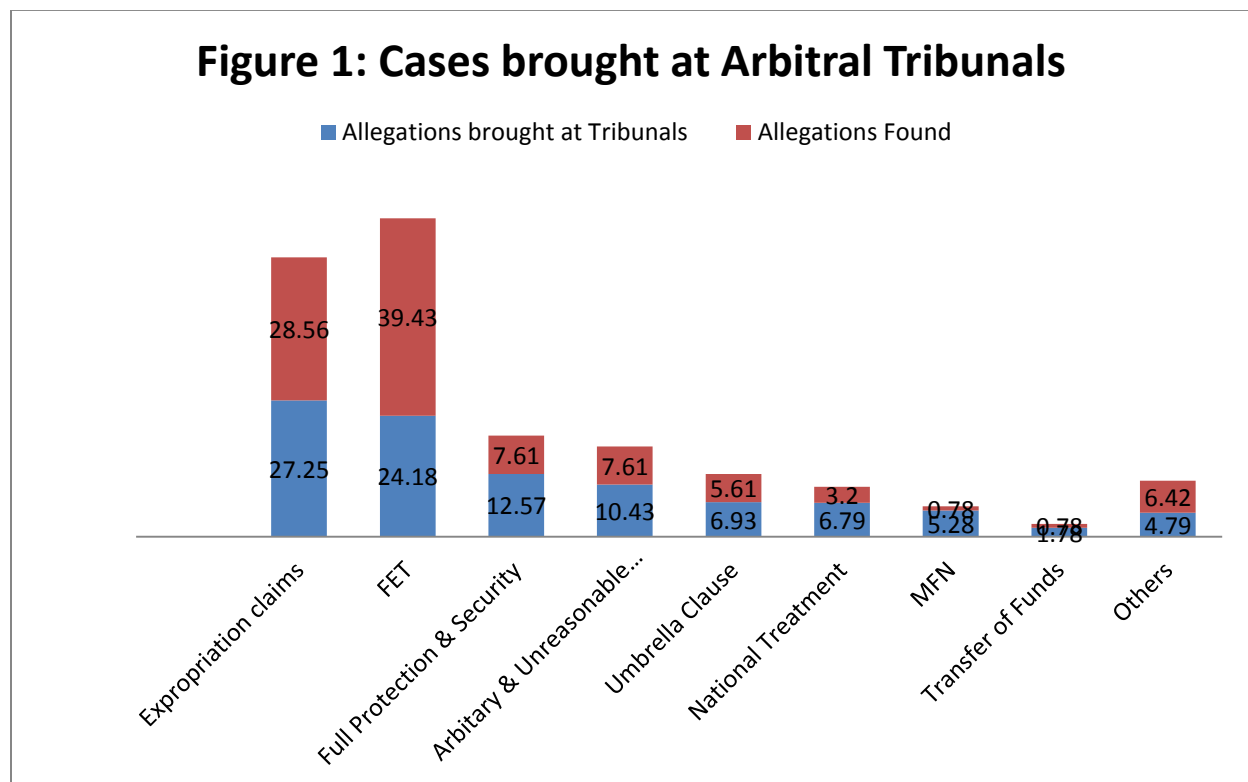
²⁸⁸ Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims', American Journal of International Law, Vol.99(2005), PP.839–842

²⁸⁹ Jude Antony above note at 264 pp.626-628

²⁹⁰ Available at <<http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>> Last accessed 28 April 2017. These are cases initiated mainly on umbrella clause: Fedax v. Venezuela (2001), CMS v. Argentina (2001), Enron v. Argentina (2001), LG & E v. Argentina (2002), Sempra v. Argentina (2002), BG v. Argentina (2003), EDF and others v. Argentina (2003), Eureko v. Poland (2003), Duke Energy v. Ecuador (2004), Al-Bahloul v. Tajikistan (2008) and OIEG v. Venezuela(2011).

clause is the least cause of action with 33 cases (6.93%) but better than National Treatment with 32 cases (6.79%), MFN cases 25(5.28%), Transfer of Funds with 8 cases (1.78%) and others with 23 cases (4.79%).

Similarly, Out of 150 cases found and succeeded based on violation of BIT Standards of protection, FET leads with 59 cases (39.43%) followed by Expropriation Claims with 43 cases (28.56%), Full protection and security with 11 cases (7.61%) and also Arbitrary and unreasonable measures 11 cases (7.61%). While umbrella clause is the least cause of action succeeded with 9 cases (5.61%) but better than National Treatment with 5 cases (3.2%), MFN with 1 case (0.78%), Transfer of funds with 1 case (0.78%) and others with 10 cases(6.42%). See the full data below:



♣The above data is taken from UNCTAD website on 28 April 2017 and the chart analysis is mine

With these figures, umbrella clause remains the least popular cause of action in investor-state dispute settlement than other BIT standards of protection such as expropriation claims, fair and equitable treatment, full protection and security etc. But it is better cause of action than MFN, national treatment or transfer of funds claims. So this data can be analyzed from two points. From investors' right point of view, the existence of umbrella clause is really better safeguard and litmus test for future investment decisions. While, from host state point of view, it is time to

rethink their decision to include or omit umbrella clauses as the figure point out the inclusion of umbrella clause makes their defense arguments before tribunals more burdensome.

3.7.1. SGS v. Paraguay

The fact of the case is related with providing “pre-shipment” inspection services.²⁹¹ SGS claimed for its inspection works asked the unpaid invoice amount of \$39,025,950.86²⁹² and alleges that Respondent breached its obligations under Article 11 of the BIT to observe commitments it entered into with SGS...[sic] basing on umbrella clause.²⁹³

First the tribunal decided on its jurisdiction over the contractual claims in spite of parties’ intentions requiring conflicts to be resolved in the courts of Paraguay. Yet the tribunal rejected Respondent’s argument that the forum selection clause in the Contract deprived the Tribunal of jurisdiction to hear Claimant’s Article 11 claims or rendered such claims inadmissible to the extent such claims were premised on a theory that Respondent breached the Contract.²⁹⁴

As to the SGS claim of umbrella clause under article 11 of the BIT, the tribunal concluded that Article 11 *“creates an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other Party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract, law, unilaterally or bilaterally, etc. Oral and written representations outside the Contract could, therefore, be enforceable under Article 11 in certain circumstances.”*²⁹⁵

Finally the tribunal found that the Republic of Paraguay has breached its contractual obligations with SGS arising from the umbrella clause and interpreted umbrella clause very broadly and made Paraguay to pay the unpaid money to SGS.

²⁹¹SGS Société Générale de Surveillance S.A v. The Republic of Paraguay, ICSID Case No. ARB/07/29. 2012

²⁹² Ibid, Par 39

²⁹³ Ibid, par 66

²⁹⁴ Ibid, Par 173-185

²⁹⁵ Ibid, Par 167

3.7.2. Khan Resources Inc v. Mongolia

The case was initiated by three joint companies against Mongolia on the issue of joint exploration of natural resource.²⁹⁶ The claimants argue Mongolia unlawfully deprived the Claimants of both their investment and their contractual rights under the Agreements²⁹⁷ via the new the Russia-Mongolia joint venture to exclude Khan from the Dornod Project. Yet Mongolia dismissed the allegations that the two state ties is conducted at “a general level,” these were not aimed at ousting Khan from the Dornod Project.²⁹⁸ One of the key legal provisions cited during the suit was article 10(1) of the Energy Charter on umbrella clause.

The Tribunal found that a breach by Mongolia of any provision of the Foreign Investment Law and article 8(2) by expropriating the Mining License and the Exploration License unlawfully would then constitute a breach of the ECT’s umbrella” clause²⁹⁹, Article 10(1) and interpreted it broadly:

*“The Claimants submit that the terms “any obligations” [in Article 10(1) of the ECT] encompass the statutory obligations of the host state and in this case, Mongolia’s obligations under the Foreign Investment Law. Given the ordinary meaning of the term “any” and the fact that the Respondents have not submitted any arguments or authorities to the contrary, the Tribunal accepts the Claimants’ interpretation of Article 10(1) of the ECT.”*³⁰⁰

Finally, the PCA tribunal found Mongolia liable among other things, umbrella clause violation, made liable to pay \$80,000,000.

3.7.3. Garanti Koza v. Turkmenistan

The case was initiated with the alleged violation of contract dated March 18, 2008 between Garanti Koza and Turkmenistan’s State Concern for construction of 28 highway bridges in Turkmenistan.³⁰¹ The claimant asserted that the government of Turkmenistan expropriated the investment via the 2007 Presidential decree and breached umbrella clause under the BIT

²⁹⁶Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. The Government of Mongolia MonAtom LLC,(Khan v. Mongolia) Award on the Merits, Arbitral Tribunal Permanent Court of Arbitration PCA Case No. 2011-09, 2 March 2016

²⁹⁷ Ibid, Par 101

²⁹⁸ Ibid, Par 97

²⁹⁹ Ibid, Par 295

³⁰⁰ Ibid, Decision on Jurisdiction, Par 438.

³⁰¹Garanti Koza LLP v. Turkmenistan, ICSID CASE NO. ARB/11/20, Award December 19, 2016

obligations with the claimant home state, UK.³⁰² Albeit, the respondent argues the tribunal lacks jurisdiction, there is domestic courts, inadmissible, contested the elevating effect of umbrella clause and the acts can't be attributed to Turkmenistan.³⁰³

The tribunal found jurisdiction over claims pleaded and arising under the BIT despite forum selection clause and also applies to umbrella clause by quoting SGS Paraguay case.³⁰⁴ Then the tribunal concluded that State's failure to pay invoices for works amounts breach of commitments and its obligations under Article 2(2) of the BIT to observe the obligations entered into with Garanti Koza³⁰⁵ and interpreted umbrella clause by using ordinary meaning of VCLT treaty interpretation yet the broad sweep of the umbrella clause casts doubt as unrelated transactions to the said investment will not fall in its ambit. Thus, the tribunal concluded Turkmenistan to pay compensation to Garanti Koza for its breaches of Article 2 of the BIT in the amount of USD 2,529,900.

In conclusion, Professor Crawford once said that *'arbitral tribunals' positions—particularly on the question of umbrella clauses, reflect a level of dissent that one may regard as disturbing; the carpet looks as if different people have started from different ends without many common threads—a crazy quilt rather than a Persian rug*³⁰⁶ Yet the researcher argues the recent arbitral jurisprudence clearly shows that there is common understandings towards the interpretation of umbrella clause pertaining to jurisdiction and broadness tailor-made scope.

3.8. Selected Countries Umbrella Clause Experience

In this section, the researcher tried to look at the experience of some selected countries using functional and parent test approaches of comparative study. Umbrella clauses have been included in around 40 percent of investment agreements.³⁰⁷ Thus, in order to draw the picture of umbrella clause thoroughly the US model BIT, EU countries experience, Canada Model BIT and South-South BIT are discussed below.

³⁰² Ibid Par.5, see also Turkmenistan and UK BIT Art 2(2)

³⁰³ Ibid, Par.6

³⁰⁴ Ibid, Par 245

³⁰⁵ Ibid, Par 328-330

³⁰⁶ Crawford above note at 242 P.354

³⁰⁷ UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, 2007,p. 73

3.8.1. The US Model BITs

The treaty practice of United States using earlier model BITs such as the 1983, 1984 and 1987 models shows that there is inclusion of an umbrella clause in its BITs. For instance, the 1983 US Model BIT has typical clause which reads: “*Each Party shall observe any obligation it may have entered into with regard to investors or nationals or companies of the other Party.*”³⁰⁸

Later US under its 2004 Model BIT discarded umbrella clause yet it allows direct standing right for investors to bring a case to arbitration for claims under investment agreements and authorizations.³⁰⁹ However, such standing doesn't in anyway mean observance of commitments under umbrella clauses. So such moves are generally considered as alternatives not substitutes for umbrella clause as they enhance internationalization.³¹⁰ Similarly, the 2012 US new model BIT has no umbrella clause in spite of allowing recourse right for investors.³¹¹

Therefore, the practice of US seemingly influenced by its respective model BITs. For instance, BITs concluded before the 2004 US Model have umbrella clause. Example: the 1992 US-Romania BIT has umbrella clause³¹² due to the 1987 US model BIT whereas BITs conclude after 2004 lacks umbrella clause. Example: the 2005 US-Uruguay BIT and the 2016 Trans-Pacific Partnership (TTP) has no umbrella clause as it is influenced by the 2004 and 2012 US model BITs respectively.

3.8.2. EU Countries BIT Experience

Individual European countries such as Germany, Switzerland, Denmark, the Netherlands and the United Kingdom had developed umbrella clause experiences. For instance, as mentioned earlier Germany was the pioneer country in introducing modern Umbrella clause in 1959. Later its 2004 and 2008 model BITs clearly incorporated umbrella clauses.³¹³

At the European Union (EU) level, the European commission firmly working for the protection of investors rights including umbrella clauses. For example: The 2014 EU-Singapore Free Trade

³⁰⁸ US Model BIT 1983, Art 2(4) see also The US Model BIT 1984, Art 2(2) and the US Model BIT 1987, Art 2(2)

³⁰⁹ The US Model BIT 2004, Art 24(1)

³¹⁰ Laura Henry, ‘Investment Agreement Claims under the 2004 Model U.S. Bit: A Challenge for State Police Powers?’ University of Pennsylvania Journal of International Law Vol. 31:3(2010) P.946

³¹¹ The US Model BIT 2012, Art 24(1)

³¹² Treaty Between The Government Of The United States Of America and Government of Romania Concerning reciprocal encouragement and protection of Investment, Signed May 28, 1992; Entered into Force January 15, 1994, Art 2(2)(c)

³¹³ Germany Model BIT 2008, Art 7(2)

Area has an umbrella clause for written contractual commitments.³¹⁴ In the ongoing Transatlantic Trade and Investment Partnership (TTIP) between EU and US, the Commission's proposal also contains an umbrella clause for written agreements between states and investors.³¹⁵ However, the Comprehensive Trade and Economic Agreement (CTEA) between EU and Canada made in 2016 have no Umbrella clause despite EU proposal for inclusion was rejected by Canada.

3.8.3. Canada Model BIT

Canada is the only OECD member state examined which has never included an umbrella clause in its BITs.³¹⁶ The researcher also looked at the 2004 Canadian Model BIT however it did not incorporate such clause. In addition, the 2016 Canada-Mali BIT fails to mention such clause. Perhaps it will be Canadian national interest and policy, in any case their treaty practice shows they omitted umbrella clause in their BITs.

3.8.4. South-South BITs

South-South Countries are generally developing countries in the global south.³¹⁷ Traditionally, investment is presumed to be made between capital exporting (north world) and Capital importing (global south). However such presumption is currently taken as flawed. South-South BITs refers a BIT framework for collaboration among countries of the south in investment domains. According to UNCTAD, the number of BITs between developing countries has grown.³¹⁸ The first South-South BIT was signed between Kuwait and Iraq in 1964 despite had no umbrella clause. The trend of South-South BITs results in interesting relationships between Latin American, Asian and African countries. Outwardly, the typical feature of South-South BITs is the inclusion of restrictions to their national treatment and transfer of capital³¹⁹ in all other BIT

³¹⁴ EU-Singapore Free Trade Area agreement 2014, Chapter 9 Investment, Art 9.5(5)

³¹⁵ Transatlantic Trade and Investment Partnership (TTIP) Trade In Services, Investment and E-Commerce, between EU and US 2015, EU draft, Chapter II Investment, Art 7

³¹⁶ Yannaca-Small above note at 9 P.105

³¹⁷ UN office For South-South Cooperation, available at <<http://ssc.undp.org/content/ssc.html>> Last accessed 29 April 2017

³¹⁸ UNCTAD, 'South-South Cooperation in International Investment Arrangements' UNCTAD Series on International Investment Policies for Development, 2005, PP 5-47

³¹⁹ Lauge S. Poulsen, 'The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis', Northwestern Journal of International Law & Business Vol.30: 1 (2010) PP.101-130

standards including umbrella clause however they are directly replicated from European BIT templates³²⁰.

To conclude, delving in to the experience of South-South BITs on umbrella clause, there is no consistent state treaty practice. For instance, the 2011 Singapore-Libya BIT has umbrella clause³²¹ while the 2007 Singapore-Saudi Arabia has no such clause. Likewise, the 1998 Ethiopia's BIT with Kuwait³²² has umbrella clause yet 1999 Ethio-Malaysian BIT has no such clause. In general, the notion of south-south BITs has not come up with significant experience and missed the God-sent opportunity to counter the hegemonic western BIT-bite³²³ though the notion and countries list of global south remains confusing.

3.9. Contemporary Trends and Umbrella Clause Trajectory

The inclusion or omission of umbrella clause is not a matter of drafting it is rather seen as the investor-state interest debate. Some writers like Raúl Fleury argue there is a trend of umbrella clause elimination: *“when one look at the treaties ratified by some countries after taking part in cases based on the application of the umbrella clause. For example, Argentina and Paraguay both adversely affected more than once by the application of the umbrella clause. To the worse, Philippines, the first State to suffer the broad interpretation of the clause, and Romania, affected by a very strict ordinary meaning interpretation, did not sign many BITs in the past decade, but the ones signed did not include an umbrella clause.”*³²⁴

However, the above assertion could be argued otherwise that countries bargaining power, economic policies and BIT models really matter rather than practical tribunal battle. My random survey below also dismissed the above argument even though the majority of BITs ratified by countries have no umbrella clause still countries incorporate such clauses to protect investors' rights.

In order to fully understand the contemporary trends of umbrella clause inclusion or omission under BITs, the researcher purposively used 16 BITs ratified over the past two years of 2015 and

³²⁰Mahnaz Malik, 'South-South Bilateral Investment Treaties: The same old story?' Background Papers for IV Annual Forum for Developing Country Investment Negotiators New Delhi, October 27-29, 2010 P.2

³²¹Agreement Between The Government of The Republic of Singapore And The Great Socialist People's Libyan Arab Jamahiriya on The Promotion And Protection of Investments, 8 April 2009 & entered in to force 22 December 2011, Art 12

³²² Ethio-Kuwait BIT above note at 200, Art 3(3)

³²³Yohannes Eneyew Ayalew, 'South-South Bilateral Investment Treaty (BIT): A Missed Opportunity?', The Reporter Vol.21:1080(2017),May 20,2017 pp.22, 29

³²⁴Raúl P. de Souza Fleury above note at 247 P.12

2016. In doing so, I have used 11 BITs ratified in the year 2016 and 5 BITs ratified in the year 2015. Perhaps the analysis only took two years' time factor but did not take any economic variables and assumed *ceteris paribus*, among global south and north. Thus, out of 16 BITs ratified in the said years, only 3 BITs (18.75%) such as Swiss-Georgia BIT 2015³²⁵, Japan-Ukraine BIT 2015³²⁶ and Japan-Iran BIT 2016³²⁷ have umbrella clauses and the rest 13 BITs (81.25%) have no umbrella clause. These include: The 2016 BITs of Canada-Mali, Chile-China, Argentina-Qatar, Nigeria-Singapore, Rwanda-Turkey, Morocco-Rwanda, Japan-Kenya, Mexico-United Arab Emirates (UAE), Slovakia-Iran and Nigeria-UAE. Among the 2015 BITs: Pakistan-Bahrain, Kuwait-Kyrgyzstan and Australia-China.

Thus, With the exception of global north BITs of Canada and Japan, most of recently concluded South-South BITs has no umbrella clause. Finally, I submitted that the contemporary umbrella clauses tendency apparently seems increasing omission from BITs and waning trajectory.

³²⁵Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, 3 June 2014 and entered in to force 2015, Art 12(2)

³²⁶Agreement Between Japan and Ukraine For The Promotion And Protection Of Investment, 5th February, 2015, Art 6(3)

³²⁷Agreement Between Japan and The Islamic Republic of Iran on Reciprocal Promotion and Protection Of Investment, 5th February 2016, Art 6

CHAPTER FOUR

4. UMBRELLA CLAUSE UNDER ETHIOPIAN SELECTED BITs

4.1. Introduction

Ethiopian investment climate is developing over the past years. This chapter introduces issues related with Ethiopian investment climate and its openness in attracting FDI. The chapter will strive to make comparisons of Ethiopian BITs *inter se*, focusing on selected BITs of Ethio-Germany, Ethio-France and Ethio-Turkey.

As mentioned earlier, umbrella clause is a commitment obliging host states to observe their obligations made with investors. Ethiopia has signed a plethora of BITs albeit without any model BIT and treating umbrella clause on case by case basis. This chapter winds up discussing the relevance of having model Ethiopian BITs, *inter alia*, dealing on umbrella clause.

4.2. Proliferation of Ethiopian BITs and its Investment Climate

According to governmental reports, Ethiopia has achieved a period of rapid growth in the past decade growing annually 11.2 %³²⁸. However, the IMF 2016 report shows Ethiopia's macroeconomic growth to have slowed down to 6.5 %.³²⁹

Building on the expanding economic base along with the developmental state model, the government is seeking to transform the economy based on major investments.³³⁰

Coming back to its investment climate, the IMF 2016 report unveiled that FDI posted strong growth, helping to limit the deterioration of the external position. The report also noted Ethiopia's gross domestic investment has shown progress and boosted from 38 % in the year 2013/2014 to 39.7 % in the year 2015/2016.³³¹

Aside to that, Ethiopia's attractiveness for FDI is also related to its geographic location since Ethiopia is found nearly at the center of the globe, within non-stop transport distance to all major markets, almost equidistant between the United States and Japan, between China and Brazil, between Europe's largest economy and India, and between Russia and South Africa.³³²

³²⁸Ethiopian Investment Commission(EIC), 'Invest in Ethiopia Guide 2014 report', P.5

³²⁹The International Monetary Fund (IMF), Ethiopia: IMF Country Report No. 16/322, Press Release No. 16/443, October 4, 2016, P.1

³³⁰Henok Assefa & et al, 'Ethiopia's Investment Prospects: A Sectoral Overview', African Review of Economics and Finance, Vol. 4:2(2013) pp.203-246,204

³³¹ Ibid, P.4

³³² Henok above note at 330 P.205

Moreover, the legal frameworks are investment friendly and provide plethora of protections for investors both under the Federal Constitution³³³ and the 2012 investment proclamation, *inter alia*, incentive packages³³⁴, ownership of immovable for requisite of investment³³⁵, guarantees from expropriation³³⁶ and remittance of capital and profit³³⁷.

Ethiopia remains sound market for investors. China, India, Germany, Italy, Sudan, Turkey, Saudi Arabia, Yemen, United States and Canada are the major sources of FDI.³³⁸

As discussed above the conclusion of BIT is one push factor in attracting FDI. As a result, with exception of Saudi Arabia FDI inflows, the FDI flow with countries concluded BIT with Ethiopia reveals it is better inflow than non-signatories.

For example, in the year 2016 Ethiopia received FDI from China worth 754.6 million dollar, followed by 730.4 million dollar from Saudi Arabia, 381.6 million dollar from Turkey, 288.5 million dollar from India and 97.6 million dollar from France.³³⁹ Nevertheless, it is flawed assumption that concluding BITs with umbrella clause will generate more FDI since in the year 2014 Ethiopia received FDI worth nearly 1billion USD from China(no umbrella clause) than Germany worth 500 USD(with umbrella clause)³⁴⁰.

Therefore, the FDI flow is not affected by inclusion of umbrella clause yet I am not suggesting umbrella clause doesn't generate FDI since Ethiopia is very desperate to get more FDI irrespective of the BIT content. However, such kind of argument should be backed by up-to-date data and different scientific variables.

In Ethiopia, looking at the flow of FDI to its soil, it looks like from the year 2005 to 2010 it has received 274.5 million dollars, 626.5 million dollars for the year 2011,278.6 million dollars for the year 2012, 1.2813 billion dollars for 2013, 2.132 billion dollars for the year 2014 and 2.1676 billion dollar for the year 2015. Therefore, it is observed that Ethiopia had received many investments in the past few years in astonishing manner. See the full data in the following figure.

³³³Constitution of the Federal Democratic Republic of Ethiopia, *Fed. Neg. Gaz.*, 11th Year No.1 Addis Ababa 21st August, 1995, Art 40. See The 1960 Ethiopian Civil code Arts 390-392

³³⁴ Investment Proclamation above note at 24, Art 23

³³⁵ Ibid, Art 24

³³⁶ Ibid, Art 25

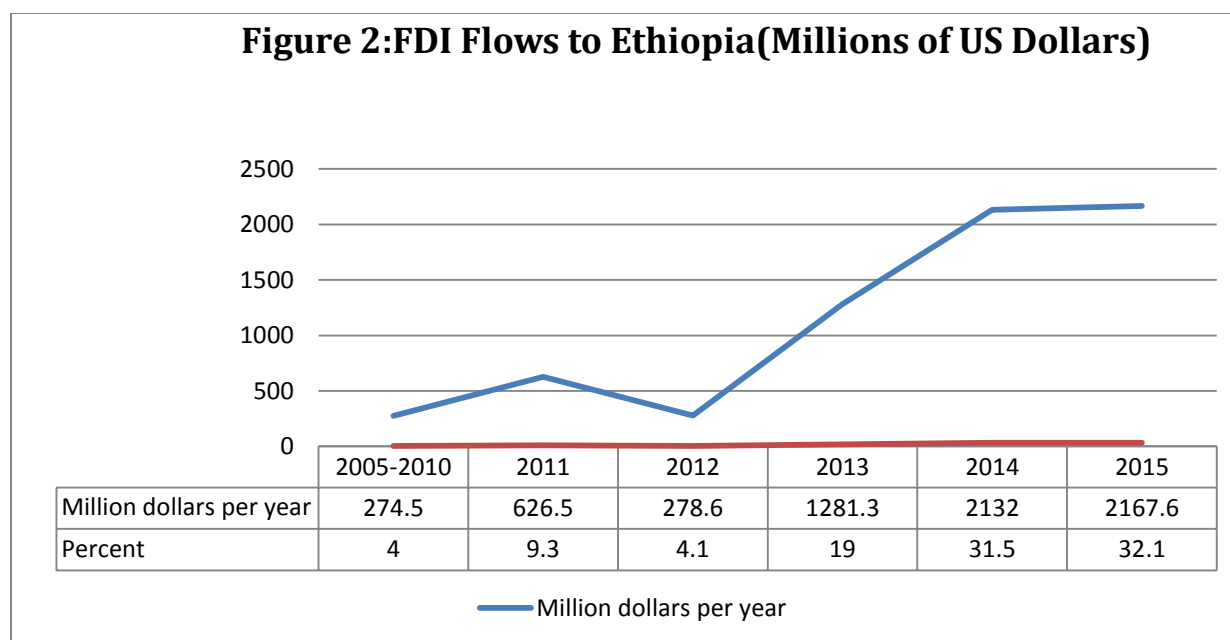
³³⁷ Ibid, Art 26

³³⁸ EIC above note at 328 P.7

³³⁹EIC March 2016 report available at <<https://www.export.gov/article?id=Ethiopia-Foreign-Direct-Investment-Statistics#>> Last accessed 4 May 2017

³⁴⁰ Robel Yohannes, 'Will African Lion, Ethiopia, Sustain Fast Growth?', *The Ethiopian Herald*, 3 March 2017

Figure 2: FDI Flows to Ethiopia (Millions of US Dollars)

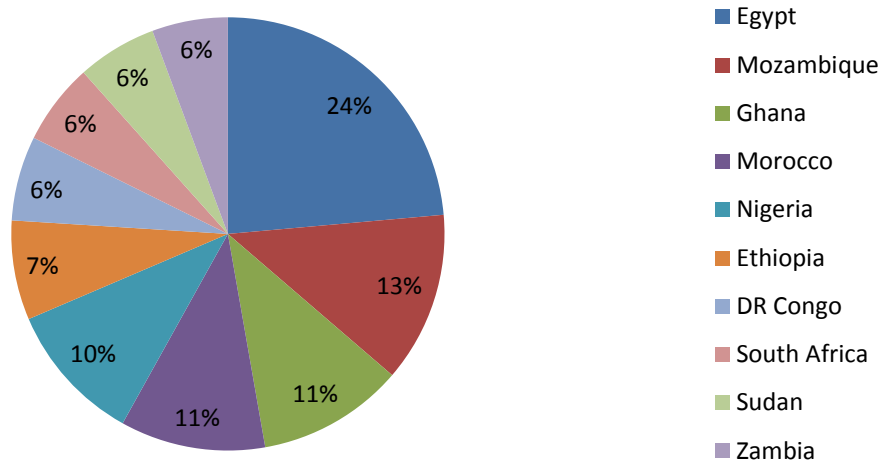


Source: UNCTAD World investment report 2016, Ethiopia country Fact Sheet, released on 21 June 2016, Chart and percentage analysis is mine

Based on figures especially in the 2015, Ethiopia ranks sixth in Africa. Egypt is top in Africa in the year 2015 with FDI inflows 6.8850 billion USD, followed by Mozambique with 3.7108 billion USD, Ghana with 3.1923 billion USD, Morocco with 3.1623 billion USD, then by Nigeria with 3.0642 billion USD and Ethiopia with 2.1676 USD. The seventh up to tenth spot is held by DR Congo, South Africa, Sudan and Zambia with FDI inflows 1.8432, 1.7724, 1.7368 and 1.6530 billion USD respectively.³⁴¹ Thus, Ethiopia is expected to work more to attract FDI than ever. See the full figure in the chart below.

³⁴¹ UNCTAD above note 338

**Figure 3: Top 10 FDI Inflows in Africa in 2015
(Billion USD)**



Therefore, Ethiopia’s investment climate is the recipients of huge billion dollars in few years and still will boost up better in the future if other indicator such as easing of doing business is shown progress for the coming years.³⁴² Since unless the pre-investment activities are attractive, FDI flow will be at stake and to this effect the Ethiopian Investment commission must take such assignments.³⁴³

4.3. A Survey of Ethiopia BITs having Umbrella Clause

In modern times, Ethiopia’s investment treaty commitment through BITs dates back at least half a century ago when the first BIT is concluded with Germany in 1964.³⁴⁴ Surprisingly, the first Ethiopian BIT has had an umbrella clause³⁴⁵.

³⁴²Ethiopia ranked 159 out 190 countries and 40 out of Sub-Saharan Countries in the 2017 ease of doing business, *Doing Business 2017 World Bank Ethiopian Economy* see full report at <http://www.doingbusiness.org/data/exploreeconomies/ethiopia> Last accessed 4 May 2017

³⁴³“The government pledges to work as much as possible not for the sake of rank rather to be pro-investment country and to be genuine gateway for investors” emphasis added Mr.Abebe Ababayehu, Deputy Commissioner of The EIC Speech at Ease of Doing Business in Ethiopia Consultative Workshop held at 24th February 2017, Addis Ababa

³⁴⁴Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, done at Addis Ababa on April 21, 1964

³⁴⁵ Ibid, Art 7(2)

So far Ethiopia has signed 31 BITs, of which 11 are with individual European Union Member States. Significant other partners include China, India, South Africa, and Russia (BRICS) minus Brazil, and a number of Middle East and North Africa (MENA) economic partners such as Algeria, Egypt, Israel, Kuwait, Morocco, Sudan, Tunisia, Turkey and UAE.³⁴⁶

The following table summarizes all BITs Ethiopia signed until April 2017 and the researcher tried to compare by taking 26 available BITs out of the 31st of the signed BITs whether they have umbrella clause or not: **Table 1:-**

S N	Partners	Status	Date of Signature	entry in to force	Inclusion of Umbrella Clause
1	Algeria	In force	04/06/2002	01/11/2005	No
2	Austria	In force	12/11/2004	01/11/2005	No
3	Belgium- Luxembourg Economic Union	Signed(not in force)	26/10/2006		No
4	China	In force	11/05/1998	01/05/2000	No
5	Denmark	In force	24/04/2001	21/08/2005	Yes, Art 2(3)
6	Egypt	In force	27/07/2006	27/05/2010	No
7	Equatorial Guinea	Signed(not in force)	11/06/2009		NA
8	Finland	In force	23/02/2006	03/05/2007	Yes, Art 12(2)
9	France	In force	25/06/2003	07/08/2004	No
10	Germany	In force	19/01/2004	04/05/2006	Yes, Art 8(2)
11	India	Signed(not in force)	05/07/2007		No
12	Iran	In force	21/10/2003	15/12/2004	No
13	Israel	In force	26/11/2003	15/02/2006	No
14	Italy	In force	23/12/1994	08/05/1997	NA
15	Kuwait	In force	14/09/1996	12/11/1998	Yes, Art 3(3)
16	Libya	In force	27/01/2004	25/06/2004	No
17	Malaysia	In force	22/10/1998	04/06/1999	No
18	Morocco	Signed(not in force)	01/11/2016		NA
19	Netherlands	In force	16/05/2003	01/07/2005	No
20	Nigeria	Signed(not in force)	19/01/2004		NA

³⁴⁶ UNCTAD above note at 11

21	Russia	Signed(not in force)	10/02/2000		No
22	South Africa	Signed(not in force)	18/03/2008		Yes, Art 10(2)
23	Spain	Signed(not in force)	17/03/2006		Yes, Art 3(2)
24	Sudan	In force	07/03/2000	15/05/2001	No
25	Sweden	In force	10/12/2004	01/10/2005	Yes, Art 2(5)
26	Switzerland	In force	26/06/1998	07/12/1998	Yes, Art 10(2)
27	Tunisia	In force	14/12/2000	02/10/2004	No
28	Turkey	In force	16/11/2000	10/03/2005	No
29	United Arab Emirates	Signed(not in force)	03/12/2016		NA
30	United Kingdom	Signed(not in force)	19/11/2009		Yes, Art 2(2)
31	Yemen	In force	15/04/1999	15/04/2000	No

*NA-No Available data

Based on the above survey, the researcher purposively used 26 Ethiopian BITs³⁴⁷ and examined whether each of them have an umbrella clause or not, so the result shows 9 of Ethiopian signed BITs (34.6 %) have an umbrella clause while the remaining 17 Ethiopian BITs (65.4 %) did not incorporate such clause. Although BITs have some effective dates to enter in to force, practically in Ethiopia, BITs are exceptional and have effect up on signature.³⁴⁸ Recently, the new model BIT of Ethiopia adapted in 2016 omits umbrella clause. Therefore, the Ethiopian BITs often omits an umbrella clause.

4.4. Ethio-Germany BIT

Ethiopia and Germany have had long-standing Economic, political and social ties. As mentioned elsewhere their investment relationship through BIT was officially made in 1964. Later the two states signed new BIT in 19 January 2004.

Germany has been the number 1 importer of coffee from Ethiopia.³⁴⁹ For years the trade and investment volume between Germany and Ethiopia has been developing in a very positive way. The German Embassy briefing noted that:

³⁴⁷The Survey is conducted based on Ethiopian BITs texts available at UNCTAD Website

³⁴⁸Interview with Mr. Ephrem Bouzayhue, Director, International Law Affairs, FDRE Ministry of Foreign Affairs, May 18, 2017

³⁴⁹German Embassy in Addis Ababa briefings on Bilateral Economic relations available at<http://m.addis-abeba.diplo.de/Vertretung/addisabebe/en/06_20-20Wi/Wi_20-20Startartikel.html> Last accessed 4 May 2017

[I]n 2014, German exports to Ethiopia jumped by 38 % to 238 .8 million Euro, largely due to the interest of Ethiopian and foreign investors in German machinery and vehicles. The impressive economic growth in Ethiopia is partly powered by machines ‘Made in Germany’ .German imports from Ethiopia have also risen by 14 .4 % to 185 million Euro. Germany mainly imports coffee and textiles from Ethiopia.”³⁵⁰

According to Ethiopian Ministry of Foreign Affairs report, there are some 160 investment projects in Ethiopia made by German investors with the total value close to 500 million USD.³⁵¹

The 2004 BIT will protect the bilateral investment and trade relations of the two nations. When we look at the standards of protection under the said BIT, it has included almost all available guarantees of investors *inter alia*, umbrella clause. Truly, it is expected that bilateral relation with Germany will include an umbrella clause since Germany was the forerunner state to indoctrinate the world about umbrella clause in 1957.

As explained above, the scope of article 8(2) of Ethio-Germany BIT includes observance of any obligations in written form, obviously contractual commitments. Thus, oral commitments or invitations to invest in various business forums can’t fall in the ambit of the provision.

In this regard, the researcher asked why the Ethio-Germany BIT had an umbrella clause. Is that really a matter of bargaining? Or absence of model Ethiopian BIT? In reality, Ethiopia has new model BIT made by the current EIC in 2013 and modified in 2016³⁵² but the model BIT has no umbrella clause. So when different countries come to Ethiopia to have bilateral treaty ties, they negotiate and bargain about it and also officials will make deliberations about it before signature. Therefore, the inclusion of umbrella clause in Ethio-Germany BIT is not matter of policy choice rather it is a bilateral bargain though Ethiopia lacks model BIT at that time.³⁵³

4.5. Ethio-France BIT

The economic relation between Ethiopia and France dates back to the 1908 Franco–Ethiopian Treaty of Amity and Commerce. Later modern BIT was concluded between the two countries in

³⁵⁰ Ibid

³⁵¹ Ethiopian Ministry of Foreign Affairs briefing available at <<http://www.mfa.gov.et/web/guest/-/ethiopia-germany-relations>> Last accessed 4 May 2017

³⁵² Interview with Mr.Mesay W/Semayat, Investment Treaties Team Leader at EIC, 18 May 2017 Addis Ababa, The full text will be annexed.

³⁵³ Ibid

25 July 2003 and become operational in 7 August 2004. The French investment in Ethiopia amounts to 377.3 million USD and also there are 91 French investment projects in Ethiopia, out of them 29 are operational.³⁵⁴

The two countries incorporated fundamental guarantees of investors³⁵⁵ with the exception of umbrella clause. The researcher tried to investigate whether the absence of umbrella clause in Ethio-France BIT is the due to Ethiopian strong bargaining position or the influence of French model BIT. Apparently, it seems the latter since the Ethio-France BIT is directly copied from the 2000 France model BIT.

The majority of BITs concluded by France contain a very peculiar provision on special commitments undertaken by the host State.³⁵⁶ Yet the actual effect of such special commitments³⁵⁷ is not that of an umbrella clause. Principally such kind of stipulation does not attract the effect of umbrella clause. But special commitments rather have the effect that *[i]nvestments protected by particular undertakings between the host State and foreign investors (i.e. contracts) remain governed by the provisions of these undertakings whenever the later are more advantageous for the foreign investor*".³⁵⁸

Likewise, The Tribunal in *Arif v. Moldova*³⁵⁹, noted that the provision "special commitments" is used as one simply preserving the rights previously acquired by foreign investors that would be more favorable than those stemming from the BIT.³⁶⁰

However in case where there is no express umbrella clause, there is a trend of importation argument that attempts to introduce it via the application of MFN under the guise having treaties with third-state³⁶¹ since MFN creates obligation between investor-state but also between host state and third state³⁶². Albeit, I argue such kind of moves will violate host states sovereignty, consent and principle of *ejusdem generis* (issues belonging to same subject matter will be interpreted similarly but States cannot be regarded as being bound beyond the obligations they

³⁵⁴Ministry of Foreign Affairs briefings available at <<http://www.mfa.gov.et/web/guest/-/ethiopia-farnce-relations>> last accessed 4 May 2017

³⁵⁵ Ethio-France BIT above note at 187

³⁵⁶ Tarcisio Gazzini above note at 16 P.979

³⁵⁷ Ethio-France BIT above note at 176 Art 7 See France Model BIT 2006, Art 9

³⁵⁸ Tarcisio Gazzini above note at 16 P.988

³⁵⁹ Mr. Franck Charles Arif v. Republic of Moldova, ICSID ARB/11/23, Award, 8 April 2013

³⁶⁰ Ibid, Par 388

³⁶¹ Tarcisio Gazzini above note at 16 P.993

³⁶² Stephan W. Schill, The Multilateralization of International Investment Law, (1st ed 2009) p.195

have undertaken³⁶³) yet in case where states are already ousted, then applying them would be contrary to the principle of '*res inter alios acta nec nocent nec prodest*' (a treaty has no effect on third parties).

Against this background, the tribunal in *EDF International S.A. et al v. Argentina*³⁶⁴ and *Mr. Franck Charles Arif v. Moldova*, allowed the claimants to benefit, through the MFN clause, from umbrella clauses contained in BITs with third States. Gazzini et al argued that *[n]either tribunal has rigorously interpreted the relevant provisions in the basic treaty, nor ensured compliance with the ejusdem generis principle.*³⁶⁵

Therefore, the Ethio-France BIT has no umbrella clause though there is a possibility of importing umbrella clause via MFN cloak as observed from arbitral cases.

4.6. Ethio-Turkey BIT

Diplomatic relations between Turkey and Ethiopia started in 1896 with the exchange of delegations during the rule of Sultan Abdülhamid II and Emperor Menelik II.³⁶⁶ Such historic ties is changed in to bilateral investment treaty only very recently when the two countries investment and trade tie is heading to formal BIT signed in 16 November 2000.

When we look at the investment and trade volumes of the two countries, it is clear that at the end of 2015, the number of Turkish firms active in Ethiopia is around 150 and the number of employment by these firms has reached about 30,000 although it was only 1 and 5 respectively, in 2003.³⁶⁷ The total amount of investment by the Turkish firms in Ethiopia is around 2.5 billion USD. The export from Turkey to Ethiopia was 383 million USD while the import from Ethiopia to our country was 35.7 million USD in 2015.³⁶⁸ Ethiopia and Turkey agreed to give investors many protections yet without an umbrella clause due to the influence of Turkish model BIT.

Finally when I look in to the particulars of the agreement of the two countries, it had incorporated various standards of investment protection but not umbrella clause.

³⁶³ *Yearbook of International Law Commission* Vol.30:2(1978), Par.11,P.30

³⁶⁴ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID ARB/03/23, Award, 11 June 2012

³⁶⁵ *Ibid*

³⁶⁶ Turkish Ministry of Foreign Affairs web briefings available at <<http://www.mfa.gov.tr/reactions-between-turkey-and-ethiopia.en.mfa>> Last accessed 4 May 2017

³⁶⁷ *Ibid*

³⁶⁸ *Ibid*

CHAPTER FIVE

5. UMBRELLA CLAUSE AND STATE RESPONSIBILITY

5.1. Introduction

This chapter will deal with different levels of state responsibility though the main focus is traditional state responsibility found under ILC norms, it will also look at responsibility of states under domestic law suits and diplomatic protection.

As far as claims brought before tribunals based on umbrella clause is concerned, the most quarrelsome issue is state responsibility of host states. Traditionally, State responsibility is understood as the liability of states for internationally wrongful acts arose from the breach of treaty or customary international law and the said act is attributable to the state.³⁶⁹

However, such traditional norms are becoming antediluvian because the inclusion of umbrella clause under BITs elevates and internationalizes mere contractual breaches in to treaty breach of host states and attracting state responsibility of the latter.

This chapter will discuss the norms of state responsibility especially focusing on the International Law Commission (ILC) Draft Rules 2001. The crux of this chapter will be addressing the implication of inclusion or exclusion of umbrella clause under BITs on state responsibility. In doing so, I have pinpointed practical insinuations regarding the interplay of umbrella clause and state responsibility.

Therefore, this chapter will investigate whether the inclusions of umbrella clause under Ethio-Germany and Ethio-Denmark BITs have real implication of internationalization in one hand and exclusion of umbrella clause in Ethio-Turkey and Ethio-France BIT has resulted in no direct responsibility of state under international law or just resort to diplomatic responsibility of states as if the matter is inter-state than investor-state.

5.2. Norms of International State Responsibility

State responsibility comes in to being when a state breaches obligations under international law and eventually became duty bound to pay reparation. Conversely, the customary and treaty norms of state responsibility oblige states to respect obligations stemming from treaty or custom.

³⁶⁹Shaw above note at 87 P.778

This norm is also supported by number of case laws. For example: in the *Chorzów Factory* case, PCIJ held that:

[i]t is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.”³⁷⁰

The normative framework of state responsibility was formally set up in 2001 by ILC.³⁷¹ Later the ILC recommended the UN General Assembly for further action. As a result, the UN General Assembly adopted resolution 56/83 of 12 December 2001 and annex on responsibility of states for wrongful acts. In 2008, the UNGA further commended the Articles on State Responsibility to states and decided to examine the question of a convention on the issue.³⁷² Although the ILC Articles is not binding treaty, tribunals³⁷³ and commentators³⁷⁴ alike consider the Articles to reflect customary international law on state responsibility.

Examining the contents of the provisions of the UN Resolution, it for instance reaffirms the cause of international responsibility as wrongful acts, both action and omission, of the state.³⁷⁵

State responsibility covers many issues including unlawful acts or omissions directly committed by the state and openly affecting other states: such as, the breach of a treaty, the violation of the territory of another state, or damage to state property.³⁷⁶ Besides, the characterization of wrongful acts is established by international law.³⁷⁷

There are two yardsticks to establish state responsibility under international law. These are: attribution and breach of international obligation.³⁷⁸ Attribution infers that who will ultimately bear the alleged wrongful act, thus, the ILC Draft Articles designates as acts of states acts committed in legislative, executive or judicial capacity.³⁷⁹ For instance, a state is under an international obligation to comply with, or to enforce investment arbitral awards, the refusal or failure of a state or its courts which undoubtedly constitute an ‘organ’ of a state to do so thus

³⁷⁰Chorzów Factory case above note at 109, p. 29

³⁷¹Martins Paparinskis, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’, European Journal of International Law, Vol. 24: 2(2013), pp. 617–647,618

³⁷²The UN General Assembly resolution 62/61 of 8 January 2008

³⁷³Noble Venture Case above note at 285, Par. 69

³⁷⁴Kaj Hobér, ‘State Responsibility and Attribution’, in Peter Muchlinski et al. (eds), The Oxford Handbook of International Investment Law 2008 P.961

³⁷⁵UN General Assembly Resolution 56/83 of 12 December 2001 and annex Articles on the responsibility of states for internationally wrongful acts, Art 1

³⁷⁶ Shaw above note at 87 p.785

³⁷⁷ Ibid, Art 3

³⁷⁸ Ibid, Art 2

³⁷⁹ Ibid, Art 4

incurs international responsibility.³⁸⁰ Whereas breach of an international obligation said to existed when an act of a state is not in conformity with what is required by international law.³⁸¹

The norms of state responsibility are repeatedly applied in foreign investment *inter alia* rules pertaining to attribution have come to play an important role because states and their representatives often seem to be unaware of their existence and also surprised when an opposing party invokes the rules so as to hold the state responsible for certain conducts.³⁸²

In relation to investors' protection, one can ask the question whether the existing state responsibility norms applied to private investors or separate legal regime is required.

The Law of State Responsibility was originally conceived for the purpose of protecting individual aliens and subsequently extended to foreign companies and other foreign business concerns.³⁸³ Against this background, the 2001 ILC Articles did not give substantial coverage for the protection of investors. The only cited provision read:

“This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”³⁸⁴

The ILC Commentary on the above provision affirms circumstances where the primary obligation is owed to a non-State entity; ‘it may be that some procedure is available’ whereby that entity can invoke the responsibility on its own account and without the intermediation of any State... [sic]... It is also true in the case of rights of investors under bilateral or regional investment protection agreements.³⁸⁵

Thus, the scope of the above provision is meant to protect individual investors. Professor Crawford clarifies that *[i]nvestment protection obligations are ‘primary obligations’ (example, fair and equitable treatment) that are owed to the qualified investors directly, or only to the other contracting state(s)’.³⁸⁶* In the former case, an interstate treaty may create individual rights,

³⁸⁰Bernardo Sepúlveda-Amor and Merryll Lawry-White, ‘State responsibility and the enforcement of Arbitral Awards’, Arbitration International, Vol.33 (2017), P.36

³⁸¹Ibid, Art 12

³⁸² Kaj Hobér above note at 374 pp.960-1016

³⁸³Samuel K. Asante, ‘International Law and Foreign Investment: A Reappraisal’, International and Comparative Law Quarterly Vol 37:3(1988) pp 588–628, 590

³⁸⁴ Ibid, Art 33(2)

³⁸⁵Commentaries’ for the draft articles on Responsibility of States for Internationally Wrongful Acts, UN 2008, P.95

³⁸⁶James Crawford, ‘ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, American Journal of International Law Vol.96:4 (2002), pp 887-888

whether or not they are classified as “human rights” as affirmed under the LaGrand case³⁸⁷ while in the latter case the rights concerned are those of the state, not the investor’ as BITs reinforce diplomatic protection so that the right holder is the state than investors as per Mavrommatis formula.³⁸⁸

The researcher argues that the article 33(2) is inadequate for investors’ rights since ILC Draft is designed to govern state-to-state responsibility rather than Investor-state responsibility. Importantly, investors are not party to BITs so how can they claim entitlements unless our interpretation is based on an exception to ‘*res inter alios acta nec nocent nec prodest*’ of the VCLT article 34 cumulatively with article 36. Finally, the ILC is praised for its Articles, which helps for the codification and progressive development of international law.³⁸⁹

5.3. Substantive Rules

The ILC Articles have both substantive and procedural rules. The substantive rules basically dealt with establishing attribution and breach. Accordingly, attribution includes conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.³⁹⁰ The general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.³⁹¹ In addition, organs exercising governmental authority other than article 4 are subjects to the norms of state responsibility.³⁹² They may include public corporations, semipublic entities, public agencies and private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs.³⁹³ Thus, the conducts of State-Owned entities are unequivocally attributed to the state.³⁹⁴ The other issue to be mentioned will be abuse of power either in the form of intra-vires or ultra-vires doesn’t alter the obligation of state under international law.³⁹⁵

³⁸⁷LaGrand case(Germany v. US), Merits ICJ 2001, Par 77-78

³⁸⁸Mavrommatis Palestine Concessions(Greece v. UK), PCIJ on Jurisdiction,1924 p.12

³⁸⁹UN General Assembly resolution above note at 375 Par 3

³⁹⁰Commentaries ILC above note at 385 P.38

³⁹¹Ibid, Par.2

³⁹²Ibid Art 7

³⁹³Ibid P.43

³⁹⁴Michael Feit, ‘Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity’, Berkeley Journal of International Law, Vol.28:1 (2010), PP.142-177,147

³⁹⁵ Ibid, P.45

The conducts of a person or groups are considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State.³⁹⁶ However, the degree of control is subject of contention. For instance, ICJ in the Nicaragua case noted that State needs to exercise effective control³⁹⁷ whereas the International Criminal Tribunal for former Yugoslavia (ICTY) in Prosecutor v Tadić case³⁹⁸ indicated that State only need to exercise overall control³⁹⁹ yet ICJ revisited such norms and upholding ‘effective control test’ in 2007 Genocide case⁴⁰⁰. However, the effective control test is not supported by state practice or case law⁴⁰¹.

To sum up, the most important element of state responsibility is breach of the obligation and is addressed under articles 12-19 of the ILC rules. Equally important, mention should be made to situations’ by which states are exonerated from responsibility including consent⁴⁰², self-defense⁴⁰³, Counter-measures⁴⁰⁴, force majeure⁴⁰⁵, distress⁴⁰⁶ and necessity⁴⁰⁷.

5.4. Procedural Rules

There are different procedural rules of state responsibility starting from invocation, admissibility, enforcing reparation to cessation of wrongful acts and the ILC Articles gave attention to it from articles 42-48. Invocation is related with rights to invoke responsibility with in explicit terms of qualification for the procedural right under the particular treaty. For instance, if the investor is the beneficiary of the obligation, it is entitled to invoke responsibility as an injured entity yet if the investor is the agent of diplomatic protection then it is entitled to invoke responsibility on behalf of its home state that is an injured state.⁴⁰⁸ Yet, though the claim is purely investors matter, the ILC Articles mandated the injured state to invoke as if individually sustained.⁴⁰⁹

³⁹⁶ Ibid, Art 8

³⁹⁷ Nicaragua v US above note at 88, Par.86,109 & 115

³⁹⁸ Prosecutor v. Duško Tadić, ICTY, Case IT-94-1-A (1999)

³⁹⁹ Ibid, Par.145

⁴⁰⁰ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 Feb. 2007, Par 398

⁴⁰¹ Antonio Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, European Journal of International Law, Vol. 18:4(2007), pp649–668,665

⁴⁰² Ibid, Art 20

⁴⁰³ Ibid, Art 21

⁴⁰⁴ Ibid, Art 22

⁴⁰⁵ Ibid, Art 23

⁴⁰⁶ Ibid, Art 24

⁴⁰⁷ Ibid, Art 25

⁴⁰⁸ Martins Paparinskis above note at 371 P.640

⁴⁰⁹ Ibid, Art 42

The other procedural rule required to invoke responsibility is admissibility⁴¹⁰ among other things, substantiating nationality nexus and exhaustion of local remedies. Therefore, the victim state after fulfilling the above procedures can claim reparation and satisfaction.⁴¹¹

5.5. Implications of Umbrella Clause for State Responsibility

After discussing the norms of state responsibility, this section tries to answer the major research questions of the study i.e. whether the inclusion or exclusion of umbrella clause has had any significant implication on contracting states in relation to responsibility.

The nexus between contract breaches and international responsibility of a state is properly explained in the often cited Oppenheim's International Law:

“It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility.”⁴¹²

But currently, the above argument is unsound since the inclusion of umbrella clauses under the BITs is aimed at internationalizing purely contractual breaches in to treaty breaches in turn resulting state responsibility without extraneous standards of BITs.

At this junction, it is worthy to discuss how the ILC Articles are applicable to umbrella clause and the way it attracts state responsibility. For instance, ICSID in *Noble Ventures case held that* the acts of the Romanian state-owned entities allegedly in violation of the BIT between the US and Romania were attributable to Romania and the latter bear state responsibility by virtue of umbrella clause.⁴¹³

One thing that could be emphasized is the fact that umbrella clause is observance of obligation though it is originating from mere contract and whenever states inserted such clause under their BITs; they have intentionally committed to accept the effects of such clause. Hence, the original BIT will absorb contractual commitments as a treaty duty. Now, let's revisit the ILC Articles, it is obvious that state responsibility arose whenever a state violates *inter alia* treaty obligations.

⁴¹⁰ Ibid, Art 44

⁴¹¹ Ibid, Art 34

⁴¹² Robert Jennings and Arthur Watts, Oppenheim's International Law, 9th ed, Vol. 1 (1992), P.927

⁴¹³ Noble Venture Case above note at 300, Par.70-86

Yet the thresholds of state responsibility such as attribution must be fulfilled since the mere violation of treaty doesn't attract responsibility per se.

Therefore, from the interplay of umbrella clause and state responsibility, the researcher pointed out three potential implications. The first scenario is the inclusion of umbrella clause will internationalize private contracts. The second scenario is that omission of umbrella clause will lead the investor to search domestic avenues by instituting municipal law suits. And the final scenario is that after exhausting local remedies, the investor will resort to diplomatic protection and will delegate its home state to sue the host state.

5.5.1. Internationalization of Private Contacts

The first implication of inserting umbrella clause under the BITs regime is elevation effect since private contractual commitments will be internationalized and elevated in to treaty level. If private contracts are absorbed as a treaty breach, then state responsibility⁴¹⁴ obviously will follow. Noticeably, the Ethio-Germany and Ethio-Denmark BIT have had an umbrella clause so that private contracts between individual investor and the host state are elevated as a treaty if there is breach and the state will bear state responsibility. For instance assume that a contract between a Germany Volkswagen company and Ethiopian government is made to develop subsidiary plant in the host state. Later the government of Ethiopia is breached payment of invoices for phase-based plant installations. So if the said company brings a claim against Ethiopia based on umbrella clause, then Ethiopia may face state responsibility for breach. However, if the said dispute is for example brought by French, Turkish or Chinese companies, and assume if the facts are similar, due to the non-inclusion of umbrella clause in their respective BITs with Ethiopia, the alleged contractual breach will not be claimed along the traditional ILC state responsibility norms rather scenario two or three will proper.

Claiming state responsibility by applying umbrella clause should at least observe two things. First, there must be breach of the treaty and second such breach attributed⁴¹⁵ to the state since Contracts concluded between the investor and legal entities separate from the state would not fall

⁴¹⁴ ILC Articles above note at 375 Art 2

⁴¹⁵Michael Feit, 'Attribution and the Umbrella Clause: Is there a Way out of the Deadlock?', Minnesota Journal of International Law, Vol.21 (2012),P.22

within the scope of the umbrella clause so that no discussion based on state responsibility rules will be made.⁴¹⁶

5.5.2. Domestic Law Avenues

The other way out investors relies as a penultimate to violations made by host state will be resorting to domestic forums. Thus, the investor is going to local remedies available under the host state. Notably, investors who rely on Ethio-Turkey and Ethio-France BITs though they can't claim under state responsibility rules for alleged breaches due to omission of umbrella clause, still they can assert their rights via domestic remedies.

Some countries have started ousting Investor-State investment arbitration and resorting to domestic avenues. For instance, Nicaragua and Venezuela have both signaled their intention to terminate existing BITs including provisions for investment arbitration while Bolivia and Ecuador have denounced the ICSID as dispute settlement body.⁴¹⁷

Similarly, Australia is the first developed state openly indicate that it will no longer agree to the adoption of arbitration within its BITs and in effect the Australian government may negotiate that investment disputes with investors be heard by domestic courts rather than be resolved by international arbitration.⁴¹⁸ The implication arising from resorting domestic avenues is that a domestic court can protect the rights of foreign investors while preventing them from receiving investment benefits beyond those provided to domestic investors⁴¹⁹ and also presumed that, if investment arbitration privileges foreign investors, it undermines the national interest; and if it detracts from the national interest, local courts ought to replace it.⁴²⁰

When we look at the availability of domestic remedies under Ethiopian BITs, it is clear that there is an investor-state dispute resolution clause which gives primary jurisdiction for domestic courts. For example, the Ethio-Turkey BIT⁴²¹, Ethio-France BIT⁴²² and Ethio-Germany BIT.⁴²³

⁴¹⁶Hamester v. Ghana, ICSID Case No. ARB/07/24. Award of 18 June 2010, Par.342-350

⁴¹⁷Scott Appleton, 'Latin American Arbitration: The Story Behind the Headlines', International Bar Association, 31 March 2010 available at <www.ibanet.org/Article/NewDetail.aspx?ArticleUid=78296258-3b37-4608-a5ee-3c92d5d0b979> Last accessed 12 May 2017

⁴¹⁸Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo', *University of New South Wales Law Journal* Vol.35:3(2012), p.981

⁴¹⁹ Ibid

⁴²⁰ Ibid, P.982

⁴²¹Ethio-Turkey BIT above note at 14 Art 7(2)(a)

⁴²²Ethio-France BIT above note at 176 Art 9(a)

⁴²³Ethio-Germany BIT above note at 12 Art 11(2)(a)

5.5.3. Diplomatic Protection

Diplomatic protection refers to submission of claims using home state diplomatic channels and seizing the investor contractual breach as state matter. The rules relating to diplomatic protection were developed at a time when it was considered that only States were subjects of international law.⁴²⁴ In fact, this way allows investors who feel that their rights have been violated can seek diplomatic intervention by their home states whenever direct recourse under the BITs or umbrella clause is not there.

ICJ in *Diallo* case affirmed the content of ILC draft on diplomatic protection definition that diplomatic protection⁴²⁵ consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁴²⁶

There are two thresholds' for the exercise of diplomatic protection. First, that the person who has suffered the wrong was a national of the State seeking to protect that person. Second, that the person that has suffered the wrong has exhausted the domestic remedies available in host state.⁴²⁷

Therefore, investors who have left with no option to claim either absence of BIT with umbrella clause, impropriety of domestic law avenues or compliance in enforcement of arbitral awards⁴²⁸ may resort to diplomatic protection⁴²⁹ and his/her home state, as an agent of the investor, will seek diplomatic protection against host state. However, that is not a practical mechanism for resolving all disputes and governments are generally loath to intervene on behalf of private investors which may be resource intensive and may undermine state to state relations in turn becoming waned⁴³⁰. In closing, under the contemporary international law resorting to diplomatic protection is becoming old-fashioned and faded.

⁴²⁴Ben Juratowitc, 'The Relationship between Diplomatic Protection and Investment Treaties', ICSID Review—Foreign Investment Law Journal, Vol.23:1(2008) p.12

⁴²⁵ILC Draft articles on Diplomatic Protection, adopted by the ILC at its 58th session, in 2006, Art 1

⁴²⁶*Diallo* case above note at 134, Preliminary Objections, ICJ, May 24, 2007, Par.39

⁴²⁷*Interhandel Case* (Switzerland v. USA), ICJ Rep. 1959 Par.27

⁴²⁸Victorino J. Pérez, 'Diplomatic Protection Revival for Failure to Comply With Investment Arbitration Awards', Journal of International Dispute Settlement, Vol. 3: 2 (2012), pp. 445–475

⁴²⁹ ICSID Convention above note at 26 Art 27 and 64

⁴³⁰Interview with Dr.Dereje Zeleke, Associate Professor of International Law at School of Law Addis Ababa University, May 16 & 23, 2017

CHAPTER SIX

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. Conclusions

Investment is an interdisciplinary concept discussed from different areas of studies including economics, foreign trade, law and politics. Yet for the sake of understanding the term investment can be defined in different ways. For instance, ‘asset-based’ model contains a broad range of specified assets that can be protected by law or agreements concluded. The second model is ‘transaction-based’, which protects the underlying capital transfer rather than the assets owned or controlled by the investor. The final model is _an ‘enterprise-based’ defining the protected investment in terms of the business organization of the investment through an enterprise. The Ethiopian investment laws have adopted a blend of enterprise and asset based models.

Under international law, foreign investment is governed by different norms *inter alia* IIAs either MIAs or BITs, customary international investment law, general principles of international law, judicial decisions and soft laws. BITs are currently the most widely used norms that govern foreign investment and are so rampant that it appears multilateral norms do not exist. BITs evolved from four different epochs from pre-colonial to colonial period, all the way to post-colonial and the global era of 1990’s. The first modern BIT was concluded between Germany and Pakistan in 1959.

The interplay between BITs’ role and FDI flows are multifaceted due to _ heterogeneous findings of empirical studies. For instance, some studies show BITs can have huge positive impacts on foreign investment, others show BITs have modest impact for FDI promotion. _Still others show no impact at all, or even a negative impact. Recently one research found that the content of BITs matters: the FDI impact of BITs is dependent on the presence of certain substantive treaty provisions. For example, the national treatment clause was found to be important in order for BITs to be effective in attracting FDI.

Almost all BITs begin with introductory statements as to the aims of the treaty, which are usually the reciprocal encouragement and protection of investment flows between the two states. This is followed by definition of investment and investors which provide for the types of property protected and the nature of the link of nationality that entitles the foreign investor to the protection of the treaty. The other nature of BITs is a provision that sets standards of protection

such as fair and equitable treatment, full protection and security, protection against arbitrary and discriminatory measures, national treatment, MFN, repatriation of capital, compensation for nationalization and expropriation and umbrella causes. In addition, BITs have typical nature as they have dispute settlement clauses which in turn give standing for investors to litigate before tribunals.

The study has examined that umbrella clauses as one standard of protection under BITs and has addressed issues of historic origin, merits and demerits, nature, classification and scope of umbrella clauses. Among other things, the study has examined how an umbrella clause is interpreted under recent arbitral jurisprudence such as the *SGS v. Paraguay*, *Khan v. Mongolia* and *Granati Koza v. Turkmenistan* cases. Besides, the experiences of US model BIT, EU countries, Canada Model BIT and South-South BIT with regard to umbrella clause have been examined.

The study has found that the current trend appears to be omission of umbrella clauses from BITs. Out of 16 BITs ratified for the past two years world-wide, only 3 BITs (18.75%) have umbrella clauses and the rest 13 BITs (81.25%) have no such clauses.

The Ethiopian investment climate has improved over the past years and generated enormous amount of FDI inflows to the country. In line with this development, Ethiopia has signed 31 BITs. Out of 26 reviewed, the result shows 34.6% Ethiopian BITs have umbrella clauses while the remaining 65.4 % of BITs do not incorporate such clauses. Moreover, the research found that the Ethio-Germany BIT has an umbrella clause while Ethiopian BITs with France and Turkey do not. This dissimilar treatment is mainly arisen from weak bargaining and absence of the model Ethiopian BIT save the 2016 model BIT.

Finally, the study suggests that the inclusion of umbrella clause under Ethiopian BITs has implications on state responsibility. Thus, the Ethio-Germany and Ethio-Denmark BITs gives ‘the concerned states on behalf of their investors’ to rely on international rules of state responsibility due to inclusion of umbrella clause while France or Turkey with no umbrella clause has no recourse to state responsibility on behalf of their citizen investors if potential breach happens, leaving the investors in the hands of domestic courts or the traditional diplomatic protection.

6.2. Recommendations

- First as to the problem of bargain, the Ethiopian Investment Commission should follow the 2016 model BIT template as guidance for future BITs and must prepare detailed policy in relation to the contents of guarantees.
- Second, as to dissimilar treatment of umbrella clause, the existing BITs should be renegotiated and amended to have consistency through elimination of umbrella clause from BITs since the recent ICSID decisions shows that inclusion of umbrella clause hugely costs host states millions of USD and also the contemporary state practice of BITs shows almost all current BITs (81%) eliminated umbrella clause, so that Ethiopia should take lessons from contemporary BITs.
- Third, as to the scope of the umbrella clause, if the government of Ethiopia is willing to remain with BIT having umbrella clause, thus, the researcher alternatively suggests the existing BITs with umbrella clauses should be rewritten from broad to specific formulations. i.e. from ‘any commitment/obligation’ to only ‘written commitments.’
- Finally, in some tribunals through MFN cloak, investors import umbrella clauses from comparator treaties (between host state and third state) where no umbrella clause is included in the BIT between home and host states. For this, the researcher submits that the importation argument should be cast-off since it makes the obligation of states more onerous and violates bilateralism of BITs.

BIBLIOGRAPHY

I. Legal Instruments

1. Abuja Treaty establishing African Economic Communities 1991
2. Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning The Promotion and reciprocal protection of Investments, signed 24 April 2001 and entered in to force 21 August 2005
3. Agreement between the government of FDRE and state of Kuwait concerning the Encouragement and reciprocal protection of investments, signed on 14 September 1996 and entered in to force 12 November 1998
4. Agreement between the government of FDRE and the Government of the Republic of France concerning the Encouragement and reciprocal protection of investments, signed on 25 June 2003 and entered in to force 7 August 2004
5. Agreement between the government of the Republic of Singapore and the Great Socialist People's Libyan Arab Jamahiriya on the Promotion and protection of Investments, Libya on 8 April 2009 and entered in to force 22 December 2011
6. Agreement between Japan and The Islamic Republic of Iran on reciprocal Promotion and Protection of Investment, 5th February 2016
7. Agreement between Japan and Ukraine for the Promotion and protection of Investment, 5th February, 2015
8. Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, 3 June 2014 and entered in to force 2015
9. Agreement between the Republic of Turkey and the FDRE concerning the Encouragement and reciprocal protection of investments, signed on 16 November 2000 and entered in to force on 10 March 2005
10. Agreement Between the government of the United States of America and the Common Market For Eastern and Southern Africa Concerning the Development of Trade and Investment Relations, on October 29, 2001
11. Agreement Establishing the Inter-Governmental Authority on Development (IGAD), Nairobi, 21 March 1996
12. Albanian Law on Foreign Investments, Law No. 7764 of 2 November 1993
13. Code on the Liberalization of Current Invisible Operations (OECD/C(61)95)

14. Constitution of the Federal Democratic Republic of Ethiopia, Fed. Neg. Gaz, 11th Year No.1 Addis Ababa 21st August, 1995
15. Convention on Settlement of Investment Disputes (ICSID) Between States and Nationals of Other States. Opened for Signature at Washington, on 18 March 1965 and entered in to force 15 October 1966
16. Cotonou Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin on 23 June 2000
17. Energy Charter Treaty (ECT) (signed 17 December 1994, entry into force 16 April 1998)
18. EU-Singapore Free Trade Area agreement 2014
19. Framework Agreement on the ASEAN Investment Area 1998
20. Investment Agreement for the COMESA Common Investment Area(2007)
21. Investment Proclamation No.769/2012, Fed. Neg. Gaz. of the Federal Democratic Republic of Ethiopia, 18th Year No. 63 Addis Ababa 17th September, 2012
22. Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10) 1982,
23. Marrakech Agreement on Multilateral Agreements on Trade in Goods, Agreement on Trade-Related Investment Measures(TRIMs) 1994
24. North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entry into force 1 January 1994)
25. OECD Draft Convention on the protection of foreign property” (OECD, 1967)
26. Paris Convention for the Protection of Industrial Property, 1883
27. Statute of the International Court of Justice, 1945
28. Treaty between the FDRE and the Federal Republic of Germany concerning the Encouragement and reciprocal protection of investments, signed on 19 January 2004 and entered in to force 04 May 2006
29. Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 25 November 1959, entered in to force in 1962
30. Treaty Between the government of the United States of America and the government of Romania Concerning the reciprocal Encouragement and Protection of Investment, signed May 28, 1992; entered into Force January 15, 1994

31. Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, done at Addis Ababa on April 21, 1964
32. Treaty of Amity, Commerce, and Navigation, between U.S. A and Congo, Jan. 24, 1891
33. Treaty of Friendship, Commerce, and Navigation, between U.S.A and Paraguay, Feb. 4, 1859
34. Vienna Convention on Law of Treaties 1969
35. World Bank Group, Guidelines on the Treatment of Foreign Direct Investment, Legal Framework for the Treatment of Foreign Investment: Vol. II: Guidelines,1992
36. United Nations Charter
37. United Nations, General Assembly Resolution 1803 (XVII): Permanent sovereignty over natural resources, Official Records of the General Assembly: Seventeenth Session, Supplement No. 17 (A/5217) 1963
38. UN General Assembly Resolution 56/83 of 12 December 2001 and annex Articles on the responsibility of states for internationally wrongful acts

II. Cases

1. Ahmadou Sadio Diallo, ICJ judgment 2010 (Republic of Guinea v. Democratic Republic of the Congo)
2. Asylum Case ICJ Reports, 1950
3. Azurix Corp. and et al v. Argentina, Award of 14 July 2006, ICSID Case No.ARB/01/12
4. Barcelona Traction, Light and Power Company, ICJ reports 1970 (Belgium v. Spain)
5. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 Feb. 2007
6. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986
7. Chorzow Factory Case(Albania v. UK) (1928) PCIJ Series A No. 17
8. CME Czech Republic B.V. v. Czech Republic, UNCITRAL (Award), para. 34 (Mar. 14, 2003)
9. Certain Norwegian Loans, ICJ, (France v. Norway) 1957
10. Diversion of Water from the river Meuse (The Netherlands v. Belgium) case PCIJ 1937, Series A/B, No. 70
11. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID ARB/03/23, Award, 11 June 2012

12. EDF v. Romania, ICSID Case No. ARB/05/13, Award, (Bernardini, Rovine, Derains), Oct. 8, 2009
13. Elettronica Sicula S.p.A. (ELSI) case, ICJ 1989 reports 15 (United States of America v. Italy)
14. El Paso Energy International Company v. Argentine republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006(El Paso V Argentina)
15. Fedax NVw v. Republic of Venezuela, Award, 9 March 1998; (2002) 5 ICSID Rep. 186
16. Garanti Koza LLP v. Turkmenistan, ICSID CASE NO. ARB/11/20, Award December 19, 2016
17. Hamester v. Ghana, ICSID Case No. ARB/07/24. Award of 18 June 2010
18. Joy Mining Machinery Ltd v. Arab Republic of Egypt, ICSID Award on Jurisdiction of 6 August 2004
19. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Decision on Jurisdiction of 22 April 2005, ARB/03/3
20. Iran v. USA ICJ case No. 2016/19, 15 June 2016
21. Interhandel Case (Switzerland v. USA), ICJ Rep. 1959
22. Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v. The Government of Mongolia MonAtom LLC, Arbitral Tribunal Permanent Court of Arbitration PCA Case No. 2011-09, 2 March 2016
23. LaGrand case(Germany v. US), Merits ICJ 2001
24. Mavrommatis Palestine Concessions(Greece v. UK), PCIJ on Jurisdiction,1924
25. Mr. Franck Charles Arif v. Republic of Moldova, ICSID ARB/11/23, Award, 8 April 2013
26. Noble Ventures v. Romania, ICSID Award of 12 October 2005,ARB/OI/11
27. Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999)
28. Pulp Mills on the River Uruguay (Argentina v. Uruguay) ICJ reports 23 January 2007
29. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No.ARB/00/4, Decision on Jurisdiction, July 23, 2001
30. Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Arbitration Case No. 10623/AER/ACS, ICC,2001
31. SGS v. Pakistan, ICSID Case No. ARB/01/13, (2004) ICSID Rev 307

32. SGS Société Générale de Surveillance SA v. Philippines, ICSID Case No. ARB/02/6, Award, 29 January 2004
33. SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29. 2012

III. Books

1. Americo B. Zampetti and Pierre Sauvé, 'International investment', in Andrew T. Guzman & et al (eds), Research Handbook in International Economic Law, 2007
2. Andrea K. Bjorklund and August Reinisch, 'Introduction: the ILA Study Group on the role of soft law instruments in international investment law', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012
3. Antony Anghie, Imperialism, Sovereignty and the Making of International Law ,2004
4. Anthony C. Sinclair, "The Umbrella Clause Debate" on International Investment Law, Current Issues III, Remedies in International Investment Law, in Andrea K. Bjorklund and et al (eds), Emerging Jurisprudence of International Investment Law, British Institute of International and Comparative Law 2009
5. August Reinisch, 'Expropriation', in Peter Muchlinski et al. (eds.), The Oxford Handbook of International Investment Law, 2008
6. Black's Law dictionary 9th, Bryan A. Garner(eds), (9th ed, 2009)
7. Christoph Schreuer, Investments, International Protection, 2011
8. Christoph Schreue & et al , The ICSID Convention: A Commentary (2nd ed, 2010)
9. Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered', in: Todd Weiler (ed.), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005
10. Commentaries' for the draft articles on Responsibility of States for Internationally Wrongful Acts, United Nations 2008
11. D. Carreau & P. Juillard, *Droit international économique* (3rd éd, 2007)
12. Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *SGS* Cases Considered', in Todd Weiler (ed.), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005

13. Engela C.Schlemmer, 'Investment, Investor, Nationality, And Shareholders', in Peter Muchlinski and et al (eds), Oxford Handbook of International Investment Law
14. Ethiopian Investment Commission(EIC), Invest in Ethiopia Guide 2014 report
15. Ibrahim Shihata, '*Applicable Law in International Arbitration: Specific Aspects in Case of the Involvement of State Parties*', in I.F.I. Shihata and J.D. Wolfensohn (eds.), The World Bank in a Changing World: Selected Essays and Lectures, Vol. 2(1995)
16. Jan Wouters & et al, 'International investment law, The perpetual search for consensus', in Olivier De Schutter & et al (eds), Foreign direct investment and Human development: The Law and Economics of International Investment Agreements, 2013
17. Kaj Hobér, 'State Responsibility and Attribution', in Peter Muchlinski et al. (eds), The Oxford Handbook of International Investment Law 2008
18. Kate Miles, 'The Origins of International Investment Law', Empire, Environment and the Safeguarding of Capital, 2013
19. Lowenfeld AF, International Economic Law (1st ed, 2002)
20. Marc Bungenberg and Catharine Titi, 'Developments in International Investment Law', in C. Herrmann et al. (eds.), European Yearbook of International Economic Law , 2014
21. Malcolm N. Shaw, International Law, (6th ed,2008)
22. Melaku Geboye Desta, 'Soft law in international law: an overview', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012
23. Moshe Hirsch, 'Sources of international investment law', in Andrea K. Bjorklund & August Reinisch (eds), International Investment Law and Soft Law, 2012
24. OECD, 'Definition of Investor and Investment in International Investment Agreements', International Investment Law: Understanding Concepts and Tracking Innovations, 2008
25. Oxford English Dictionary, (3rd ed.,2007)
26. Pia Acconci, 'Most-Favored-Nation Treatment', in Peter Muchlinski and et al (eds), Oxford Handbook of International Investment Law,2008
27. Reisman M.W. & R. D. Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', British Yearbook of International Law, Vol.74 (2003)
28. Robert Jennings and Arthur Watts, Oppenheim's International Law, 9th ed, Vol. 1 (1992)
29. Roland Kläger, 'Fair and Equitable Treatment' in International Investment Law, 2011

30. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (1st ed, 2008)
31. Sornarajah M. *The International Law on Foreign Investment*, (3rd ed, 2010)
32. Stephan W. Schill, 'The Multilateralization of International Investment Law', (1st ed 2009)
33. Surya P Subedi, *International Investment Law Reconciling Policy and Principle*, (1st ed, 2008)
34. Thomas Pollan, *Legal Framework for the Admission of FDI*, 2006
35. United Nation Commission for Trade And Development (UNCTAD) *International Investment Agreements (IIAs) Issue Note No.1*, March 2016
36. UNCTAD, 'Expropriation', A sequel, *UNCTAD Series on Issues in International Investment Agreements II*, 2012,
37. UNCTAD, 'Most-Favored-Nation Treatment', *UNCTAD Series on Issues in International Investment Agreements II*, 2010
38. UNCTAD, 'Scope and Definition', *UNCTAD Series on issues in international investment agreements*, Vol.2 (1999)
39. UNCTAD, *World Investment Report, Reforming International Investment Governance*, 2015
40. UNCTAD, *Investment Policy Monitor 9*, March 2013
41. UNCTAD, 'National Treatment,' *UNCTAD Series on issues in international investment agreements*, UNCTAD/ITE/IIT/11, Vol. IV (1999)
42. UNCTAD, 'Fair and Equitable Standard', *UNCTAD Series on Issues in International Investment Agreements II*, 2012
43. UNCTAD, *Admission and Establishment*, *UNCTAD Series on issues in international investment agreements*, UNCTAD/ITE/IIT/10 vol. II, 2002
44. UNCTAD, 'South-South Cooperation in International Investment Arrangements' *UNCTAD Series on International Investment Policies for Development UNITED NATIONS*, 2005
45. *Yearbook of International Law Commission* Vol.30:2(1978)
46. Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', *British Yearbook of International Law*, Vol. 74(2004)

IV. Journal Articles and Law Reviews

1. Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', *Arbitration International*, Vol. 20: 4 (2004)

2. Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', European Journal of International Law, Vol. 18:4(2007)
3. Ben Juratowitc, 'The Relationship between Diplomatic Protection and Investment Treaties', ICSID Review—Foreign Investment Law Journal, Vol.23:1(2008)
4. Berger & et al (2013), 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box', International Economics and Economic Policy, Vol. 10:2 (2013)
5. Bernardo Sepúlveda-Amor and Merryl Lawry-White, 'State responsibility and the enforcement of arbitral awards', Arbitration International, Vol.33 (2017)
6. Bjørn Kunoy, 'Singing in the Rain – Developments in the Interpretation of Umbrella Clauses', Journal of World Investment & Trade, Vol.7: 275 (2006)
7. Campbell McLachlan, 'Investment Treaties and General International Law', International and Comparative Law Quarterly, Vol.57 (2008)
8. Chaisse, J. and Bellak C, "Navigating the Expanding Universe of International Treaties on Foreign Investment Creation and Use of a Critical Index", Journal of International Economic Law, Vol. 18:1(2015)
9. Christoph Schreuer, 'Travelling the BIT Route Of Waiting Periods, Umbrella Clauses and Forks in the Road', Journal of World Investment and Trade, Vol. 5:2 (2004)
10. Dr A Rohan Perera, 'The role and implications of bilateral investment treaties', Commonwealth Law Bulletin, 26:1(2000)
11. Elvira R. Gadelshina, 'Hermeneutic Reflections on the Specific Purpose of Umbrella Clauses', Journal of World Investment & Trade, Vol. 14 (2013)
12. Eric Neumayer & Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' World Development Vol. 33:10 (2005)
13. Erin O'Hara O'Connor and Susan D. Franck, 'Foreign Investments and the Market for International Law', University of Illinois Law Review, Vol.5:1617 (2014)
14. George K. Foster, 'Recovering 'Protection and Security: The Treaty Standards Obscure Origins, Forgotten Meaning, and Key Current Significance', Vanderbilt Journal of Transnational Law, Vol.45:1095 (2012)

15. Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims Against The State', International and Comparative Law Quarterly, Vol.56:2 (2007)
16. Hailegabriel G Feyissa, 'European Extraterritoriality in Semi-colonial Ethiopia', Melbourne Journal of International Law, Vol. 17(2016)
17. Henok Assefa & et al, 'Ethiopia's Investment Prospects: A Sectoral Overview', African Review of Economics and Finance, Vol. 4:2(2013)
18. Heikki Marjosola, 'Public/Private Conflict in Investment Treaty Arbitration– a Study on Umbrella Clauses', Helsinki Law Review 2009
19. James Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', American Journal of International Law Vol.96:4 (2002)
20. James Crawford, 'Treaty and Contract in Investment Arbitration', Arbitration International, Vol.24:3(2008)
21. Jarrod Wong, "Umbrella Clauses In Bilateral Investment Treaties: Of Breaches Of Contract, Treaty Violations, And The Divide Between Developing And Developed Countries In Foreign Investment Disputes", George Mason Law Review vol. 14:1, (2006)
22. Jaime B. Lucas, 'Umbrella clauses: uncertain contract protection under IIAS', Georgetown University Journal of Globalization, competitiveness and Governability, Vol.10:2(2016)
23. Jason Webb Yackee(2011), 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence,' Virginia Journal of International Law, Vol. 51(2011).
24. Jennifer L. Tobin & Susan Rose-Ackerman, 'When BITs have some bite: The political-economic environment for bilateral investment treaties', Review of International Organizations Vol.6(2011)
25. Jeswald W Salacuse & Nicholas P Sullivan, 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain', Harvard International Law Journal, Vol. 46(2005)
26. Jonathan B. Potts, "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization", Virginia Journal of International Law Vol. 51:4 (2011)

27. Jonckheere Katherine, 'Practical Implications from an Expansive Interpretation of Umbrella Clauses in International Investment Law', South Carolina Journal of International Law and Business Vol. 11: 2 (2015)
28. Jude Antony, 'Umbrella Clauses since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus', Arbitration International, Vol 29:4(2013)
29. Julian Davis Mortenson, 'The Meaning of “Investment”': ICSID's *Travaux* and the Domain of International Investment Law', Harvard International Law Journal, Vol. 51: 257 (2010)
30. Jürgen Kurtz, 'NGO's, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment', Melbourne Journal of International Law, Vol. 3(2002)
31. Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', European Journal of International Law, Vol.20: 749 (2009)
32. Kathryn Ballentine, 'How Far Do Bits Bite – A Comparison of SGS v. Pakistan and SGS v. Philippines: Interpreting Umbrella Clauses in Bilateral Investment Treaties', Cambridge Student Law Review Vol. 2(2006)
33. Kenneth J. Vandeveld (2005), "A Brief History Of International Investment Agreements", Journal of University of California, Davis Vol. 12 (2005)
34. Kenneth Vandeveld, 'A Unified Theory of Fair and Equitable Treatment', New York University Journal of International Law and Politics, Vol. 43 (2011)
35. Lauge S. Poulsen, 'The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis', Northwestern Journal of International Law & Business Vol.30: 1 (2010)
36. Laura Henry, 'Investment Agreement Claims Under The 2004 Model U.S. Bit: A Challenge For State Police Powers?' University of Pennsylvania Journal of International Law Vol. 31:3(2010)
37. Leon E Trakman, 'Choosing Domestic Courts over Investor–State Arbitration: Australia's Repudiation of the Status Quo', University of New South Wales Law Journal Vol.35:3(2012)
38. Lise Johnson & Oleksandr Volkov, 'Investor-State Contracts, Host-State “Commitments” and the Myth of Stability In International Law', The American Review of International Arbitration, Vol.24:3(2013)

39. Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', European Journal of International Law, Vol. 24: 2(2013)
40. Matthew Wendlandt, 'SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes', Texas International Law Journal, Vol.43:523(2008)
41. Max Gutbrod & et al, 'Protection against Indirect Expropriation under National and International Legal Systems', Göttingen Journal of International Law, Vol. 1:2 (2009)
42. Michael Feit, 'Attribution and the Umbrella Clause: Is there a Way out of the Deadlock?', Minnesota Journal of International Law, Vol.21 (2012)
43. Michael Feit, 'Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity', Berkeley Journal of International Law, Vol.28:1(2010)
44. Michael Reisman, 'Soft Law and Law Jobs', Journal of International Dispute Settlement Vol. 2:1(2011)
45. Raúl P. de Souza Fleury, 'Umbrella clauses: a trend towards its elimination', Arbitration International, Vol. 34:4 (2015)
46. Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours', Santa Clara Journal of International Law, Vol. 12: 7 (2014)
47. Samuel K. Asante, 'International Law and Foreign Investment: A Reappraisal', International and Comparative Law Quarterly Vol 37:3(1988)
48. Stanimir A. Alexandrov, 'Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines', Journal of World Investment and Trade ,Vol.5 (2004)
49. Stephen W. Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties', Minnesota Journal of International Law, Vol.18 (2009)
50. Stephan W. Schill, 'Multilateralizing Investment Treaties through Most-Favored-Nation Clauses', Berkeley Journal of International Law, Vol. 27: 496 (2009)
51. Tarcisio Gazzini and Attila Tanzi, 'Handle with care: Umbrella clauses and MFN treatment in investment arbitration', The Journal of World Investment & Trade ,Vol.14 (2013)
52. Thomas Wälde, 'The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases', The Journal of World Investment and Trade, Vol. 6:2 (2005),

53. Tony Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law', Michigan Journal of International Law, Vol.33:537 (2012)
54. Uche E. Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique,' Michigan Journal of International Law, Vol. 35:131 (2013)
55. Victorino J. Pérez, 'Diplomatic Protection Revival for Failure to Comply With Investment Arbitration Awards', Journal of International Dispute Settlement, Vol. 3: 2 (2012)
56. Walker, 'Modern Treaties of Friendship, Commerce and Navigation', Minnesota Law Review Volume 42(1958)
57. Yuval Shany, Notes and Comments, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims', American Journal of International Law, Vol.99(2005)

V. Working Papers

1. Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' in *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives*, OECD Working Paper, 2008.
2. Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite', World Bank, Development Research Group Policy Research Working Paper No. WPS 3121 Vol. 19(2003)
3. Mahnaz Malik, 'South-South Bilateral Investment Treaties: The same old story?' Background paper for IV Annual Forum for Developing Country Investment Negotiators New Delhi, October 27-29, 2010
4. OECD, 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, 2004

VI. Newspapers

1. Robel Yohannes, 'Will African Lion, Ethiopia, Sustain Fast Growth?', *The Ethiopian Herald*, 3 March 2017
2. Yohannes Eneyew, 'Balancing Foreign Investment and Free Flow of Capital', *Addis Fortune* Vol.17:877(2017), February 19, 2017
3. Yohannes Eneyew Ayalew, 'South-South Bilateral Investment Treaty (BIT): A Missed Opportunity?', *The Reporter* Vol.21:1080(2017), May 20, 2017

VII. Web Pages

1. <<http://investmentpolicyhub.unctad.org/IIA>>
2. <<https://www.export.gov/article?id=Ethiopia-Foreign-Direct-Investment-Statistics#>>
3. <<http://www.oecd.org/daf/mai>>
4. <<http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>>
5. <<http://ssc.undp.org/content/ssc.html>>
6. <<http://www.doingbusiness.org/data/exploreeconomies/ethiopia>>
7. <http://m.addis-abeba.diplo.de/Vertretung/addisabeba/en/06_20-20Wi/Wi_20-20Startartikel.html>
8. <<http://www.mfa.gov.et/web/guest/-/ethiopia-germany-relations>>
9. <<http://www.mfa.gov.et/web/guest/-/ethiopia-farnce-relations>>
10. <<http://www.mfa.gov.tr/relations-between-turkey-and-ethiopia.en.mfa>>
11. <www.ibanet.org/Article/NewDetail.aspx?ArticleUid=78296258-3b37-4608-a5ee-3c92d5d0b979>

ANNEX

Annex I: List of Key Informants

SN	Name of Interviewees	Title and position of Interviewee's	Place and Date of Interview
1	Mr. Tilahun Esmael	Legal Expert, EIC	Addis Ababa, March 9, 2017
2	Mr. Mesay W/Semayat	Investment Treaties Team Leader, EIC	Addis Ababa, May 18, 2017
3	Mr. Ephrem Bouzayhue	Director, International Law Affairs, FDRE Ministry of Foreign Affairs	Addis Ababa, May 18, 2017
4	Dr. Dereje Zeleke	Associate Professor of International Law, School of Law Addis Ababa University	Addis Ababa, May 16, 2017

Annex II: Interview Questions

Below are questions designed to collect data for my research on Umbrella clause from different experts on the area:-

Name of Interviewee: _____

Title/Occupation: _____

Date of Interview: _____

Place of Interview: _____

Q1. What are the policy and legal implication and rationale for dissimilar treatment of Umbrella clause in Ethiopian BITs?

Q2. Does the absence or presence of umbrella clauses affect investor-state dispute resolution and the protection for investors?

Q3. Should the traditional diplomatic protection rules in lieu of state responsibility norms apply for non-inclusion of umbrella clauses and absence of domestic law avenues?
