ADDIS ABABA **UNIVERSITY**

COLLEGE OF LAW AND GOVERNANCE STUDIES

School of Law

SECURITY EXCEPTION UNDER ETHIOPIAN BILATERAL INVESTMENT TREATY

By

Girma Moges

Advisor: Martha Belete (asst. Prof.)

A Thesis Submitted in Partial Fulfillment of the Requirements for the Master of Laws (LL.M) in Business Law

Addis Ababa, Ethiopia

JULY, 2021

ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

School of Law

APPROVAL SHEET

SECURITY EXCEPTION UNDER ETHIOPIAN BILATERAL INVESTMENT TREATY

By

Girma Moges

Approved by:

Martha Belete (asst. Prof.)

Advisor‘s Name ______________ Signature ______________ Date

Mehari Redae (PhD)

Examiner/Reader‘s Name ______________ Signature ______________ Date

Fikremerkos Merso (PhD)

Examiner/Reader‘s Name fikremarkos merso Signature 05 July 2021 Date

DECLARATION

I, Girma Moges, hereby declare that the Thesis is my own work, that it has not been submitted for the award of any other degree, diploma, fellowship, or other equivalent title from any other university or institution, and that all origins of materials used in the Thesis have been properly recognized.

Declared by:

Girma Moges

Signature __________

Date ______________

Confirmed by:

Martha Belete (asst. Prof.)

Signature _________________

Date _________________

ACKNOWLEDGEMENT

First and foremost, I want to thank God Almighty for all of his assistance in this program. Second to God, I owe a huge debt of gratitude to my advisor, Martha Belete (asst.prof.) for her unwavering personal support and insightful academic advice in completing this work. I would like to share my sincere appreciation for her unfailing goodness in tolerating and unconditionally assisting me in rectifying my mistakes. I would like to express my gratitude and wish you God's blessings!!

I would like to express my gratitude to all of the organizations who provided critical evidence, as well as legal scholars and practicing lawyers who provided me with information and perspectives that acted as the foundation for this study. Last but not least, I'd like to express my gratitude to my wonderful wife, Misgane Daba, for her firm support, motivation, and patience during the course of writing this thesis, as well as my colleagues Lalisa Aseffa, Melkamu Damalash, and Abdi Kumara for their tremendous support.

Once again, thank you so much and God bless you all!!

Girma Moges

ACRONYMS

BITs	Bilateral investment treaties
FDRE	Federal Democratic Republic of Ethiopia
ESA	Environmental side agreements
UNCTAD	United nation commission on trade and development
IIAs	International Investment Agreements
FDI	Foreign Direct Investment
FCN	Friendship, Commerce and Navigation
MFN	Most Favored Nation
NT	National Treatment
NIEO	New International Economic Order
EU	European Union
US	United State
UNCITRAL	United Nations Commission on International Trade and Law
ICSID	International center on Settlement of Investment Dispute
NPM	non-precluded measures
SOEs	state-owned enterprises'
OECD	Organization of Economic cooperation and Development
ITO	International Trade Organization
GATT	General Agreement on Trade and Tariff
WTO	World Trade Organization
ODA	Official development assistance

Table of Contents

APPROVAL SHEET I

DECLARATION II

ACKNOWLEDGEMENT III

ACRONYMS IV

Abstract VII

CHAPTER ONE: Proposal of the Study 1

1.1. Background of the Study 1

1.2. Statement of the problems 4

1.3. Questions for research 4

1.4. The research's objectives 5

1.4.1. General objectives 5

1.4.2. The specific objectives 5

1.5. Significance of the Study 5

1.6. Scope of the study 5

1.7. Methodology of the study 6

1.10. Review of the literature 6

CHAPTE TWO 8

General Overview of Bilateral Investment Treaty 8

2.1. The Treaty of Friendship, Commerce and Navigation as Precursor of BITs 8

2.2. BITS's Evolution over Time 8

2.3. Generations of BIT 10

2.4. Revisiting BIT 11

2.5. Structures BITs. 12

2.6. Ethiopian bilateral investment treaty 13

2.6.1. General overview 13

3.1. National Security Exception in General ... 17

3.2. History of security exception ... 19

3.3. Security exceptions under customary international law ... 19

3.4. International trade agreements provide for a security exception. ... 20

3.4.1. GATT type security exception ... 20

3.4.2. ICSID Case Laws Security Exceptions ... 23

3.5. Security Exceptions in Bilateral Investment Treaties (BITs) with Selected Countries ... 27

3.6. National security exception under Ethiopian laws ... 40

3.6.1. National Security under 1995 FDRE constitution ... 40

3.6.2. Security exceptions under Ethiopian investment proclamation and regulation ... 40

CHAPTER FOUR ... 48

4. Conclusions and Recommendations ... 48

4.1. Conclusions ... 48

Abstract

Bilateral investment treaties are legal tools under international law between two contracting countries, the aim of which is to set up understandable, easy, and enforceable rules for the reciprocal protection of foreign investment. Contracting parties have an obligation to enforce BITs like other treaties. However, balancing protections for investment and investor on one hand and national security on the other hand is the area which needs attention for Ethiopia. Thus, this study would deal with how Ethiopian BITs give protection for security of the nation while signing and executing BITs by reviewing investment law, BITs signed by Ethiopia with other sovereign states and other relevant literatures. Ethiopia needs to have a specific and specified national security exception in both its domestic investment laws and BITs, according to the researcher.

CHAPTER ONE: Proposal of the Study

1.1. Background of the Study

The importance of engaging in international affairs cannot be overstated. Without the transfer of goods and services across continents, international commercial deals will be impossible. In reality, the trade of goods and services necessitates the presence of a set of multilateral laws that is predictable, open, and enforceable. Globally, bilaterally, and regionally, treaty devices are being made.[1]Africa, in general, and Ethiopia in particular, are working hard to boost their investment climate.[2]

Without a doubt, host countries have the sovereign right to control foreign investment, including the freedom to enforce restrictions for purposes of national security. It is therefore up to the host countries to identify "national security" and what constitutes a threat to this issue. This gives them a lot of leeway in determining whether or not to take a suggestion seriously. In the other hand, a multinational company considering an overseas project seeks legal assurance and clarification about the host country's investment conditions. As a result, a foreign investment policy based on a clear national security principle, regardless of whether it exists in a specific situation, may discourage foreign investors.[3]

Clearly, there is a tension between the ultimate goal of these treaties, which is to promote and secure international investment, and the right of host countries to protect their national security interests.[4] The countries hosting the event are concerned with their national security being jeopardized. When investing in a host nation, global investors, on the other hand, prefer the highest degree of security and predictability.

---

[1]united nation, economic commission for Africa, 'Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, available at https://repository.uneca.org/handle/10855/23035 2015, accessed on march 20, 2021,p,9

[2] ibid

[3]United Nations Conference on Trade and Development: The Protection Of National Security In IIAS, UNCTAD Series on International Investment Policies for Development, United Nations New York and Geneva, 2009, available at, https://unctad.org/system/files/official-document/diaeia20085_en.pdf" accessed on April, 3, 2021 p, 3.

[4] ibid

IIAs, in general, and BITs in particular, must thereby serve a dual purpose: on the one hand, they must provide sufficient security to international investors, thus attracting them to the host country; on the other hand, they must provide adequate protection to foreign investors, thereby attracting them to the host country.[5]They must persuade the Contracting Parties, on the other side, that they will be able to continue monitoring foreign investment for national security purposes.

In response to the developing countries' resistance and to defend their own interests, European countries began negotiating BITS. The number of Bilateral Investment Treaties (BITs) has grown substantially in the 1980s and 1990s since the first BIT was concluded between Germany and Pakistan in 1959.[6]

BITs have historically been signed between rich OECD nations and developing countries, but they have only recently been signed between developing countries.[7]

Bilateral investment treaties (BITs) are international legal agreements aimed at establishing simple, transparent, and enforceable rules for mutual investment protection between two contracting countries. Despite their gaps in quality, most BITs share a few things in common when it comes to their main content, Expropriation issues and policies, as well as dispute resolution mechanisms, transaction definitions, fund conversion strategies, treatment clauses such as most preferred country and national treatment clauses, and other fundamental values, are all included in most BITs.[8]

One of the concerns raised in connection with the proliferation of BITs is the effect of these agreements on the flow of Foreign Direct Investment (FDI) to signatory countries, especially developing countries. BITs are said to increase investor's confidence, resulting in increased FDI flows to host countries, but this is currently a highly contested subject among academics. This is because BITs give international investors those rights. Many developing countries, including

[5] ibid
[6] ibid
[7] Mary Hallward-Driemejer, 'do BITs attract FDI? Only a bit… they could a bit', World Bank, DERCG June 2003, available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.5.9668&rep=rep1&type=pdf", "p,9.
[8] ibid

Ethiopia, have signed these treaties with both developed and developing/least developed countries, regardless of the impact on FDI.[9]

Ethiopia has signed a number of bilateral investment treaties (BITs) in order to promote and protect investments while also assisting the country's growth. The standard BIT contains substantial investor rights such as bans on expropriation without compensation, as well as promises of equal and equitable care, complete privacy and security, and protections against unfair and unpredictable expropriation. It also provides legal safeguards, the most relevant of which is the right to use an impartial arbitral tribunal to settle conflicts with the host nation.[10]As a result, foreign investors may circumvent the host country's domestic judiciary to appeal government laws or other acts before an international arbitration tribunal and seek redress that is expected to be enforceable in the courts without further scrutiny.

While the primary goal of the provision is to defend the country and its citizens, one might argue that the term "national security" has been too vague and legally unclear. There are thought about risks to people's health and the environment, as well as threats to a country's overall political, economic, and financial structure, as well as its domestic framework and cultural values.[11]Similarly, various factors may contribute to a national security threat. Disease spread, natural disasters, civil war, drastic economic crisis, or attempted international takeovers of main national sectors are all possible targets of espionage and terrorism, for example. Since the definition of national security is evolving, new threats to national security can emerge in the future.

Countries have used a variety of strategies to accomplish their objectives. In IIAs, a national security exception is being drafted. The terminology used (for example, national security, essential security interests, international peace and security, or public order), the contexts in which the exception can be invoked, and the degree of autonomy reserved by Contracting Parties varies. As a result, countries seeking a national security exemption in IIAs must make a series of

---

[9]WakgariKebetaDjigsa ,'the Adequacy Of Ethiopia's Bilateral Investment Treaties In Protecting The Environment': Race To The Bottom, Haramaya Law Review 6 (2017): available at "file:///C:/Users/user/Downloads/165536-Article%20Text-427033-1-10-20180123.pdf", 67-90

[10]Richard C. Chen Bilateral Investment Treaties and Domestic Institutional Reform, Columbia Journal of Transnational Law [55:547], available at "https://core.ac.uk/download/pdf/234110204.pdf" p,8

[11]UNCTAD, at note, no.3, p.32

difficult decisions. It's impossible to pinpoint a dominant pattern in terms of the clause's wording and conditions of application. Much depends on how the Contracting Parties interpret "national security" and similar terms in their domestic legal codes, as well as whether they pursue solely protection.[12]

Another thing to think about is why the national security exception can be self-judgmental. The first option, obviously, gives Contracting Parties more latitude about how they enforce the clause, while the second option addresses the judicial review rights exception.

1.2. Statement of the problems

Bilateral investment treaties (BITs) are a form of international investment agreement (IIA) that provides all rights and obligations to contracting parties. Contracting parties must find a balance between the security of the host state and investor's interests when signing BITs. In addition to the BIT's goal of protecting foreign investments, the obligations of investors should be given further consideration. They do this by a number of mechanisms. They have express or implied security exceptions in their BITs, domestic legislation, and the ability to invoke customary international law; among others. Ethiopia has signed BITs with a variety of sovereign states in Africa and beyond, both existing and emerging. As a result, an appropriate and comprehensive security exception is critical to save the country in the event of various problems that prevent the country from fulfilling its BIT obligations. It is critical to review BITs from other countries, such as South Africa, India, and Japan, to learn how they deal with security exceptions in relation to BITs by reviewing the provisions of their BITs and sharing their experiences with Ethiopia.

Even if Ethiopia has appropriate and comprehensive laws that provide for national security, whether in investment laws or other laws, investor and investment protections will make it difficult for Ethiopia to enforce these laws. Furthermore, Article 27 of the Vienna Convention on the Rules of Treaties notes that states cannot use domestic law to shield themselves from treaty commitments. By analyzing Ethiopian investment laws and BITs signed with other countries, this study attempts to analyze the balance of protection provided for investors and investment on the one side, and the security of the host nation (Ethiopia) on the other.

1.3. Questions for research

- ❖ Are there any clear rules on national security exceptions in Ethiopian BITs?

[12] ibid

- How is security exception clauses incorporated into Ethiopian domestic investment laws?
- Do Bilateral Investment Treaties (BITs) strike a balance between encouraging and securing foreign investors and investment while still protecting national security interests?
- How would Ethiopia learn from other countries'/states' experiences in order to balance protection given to foreign investment with national security?

1.4. The research's objectives

1.4.1. General objectives

The key goals of this study are to examine the defense provided for Ethiopia's national security when she signed BITs with other countries after looking at the content of these BITs and Ethiopian investment rules, and to learn how other nations' BITs reconcile these two interests.

1.4.2. The specific objectives

- To asses and investigate the idea of a security exception in BITs between Ethiopia and other countries.
- To look at Ethiopian investment laws in relation to security exceptions.
- To learn how other countries dealt with the idea of a security exception in the case of BITs.
- To learn how Ethiopia strikes a balance between investor and investment rights on the one side, and national security on the other, while signing BITs.

1.5. Significance of the Study

Through making relevant recommendations, the study can serve a variety of purposes for academics, law and policymakers, and the judiciary. The study will serve as a foundation for future academic studies, and it has significant implications for the country in general and in several directions in the event of a security crisis that will arise in the country and prevent it from fulfilling its BIT obligations.

1.6. Scope of the study

The analysis will not address all issues with Ethiopian BITs; rather, it will attempt to shed light on the existing issues with Ethiopian investment laws and BITs in relation to security exceptions in the host country (Ethiopia).

1.7. Methodology of the study

The research approach used in this study is doctrinal research methodology. The review of legal provisions of the investment proclamation, regulation, and other laws in the field of study would be the main technique used to perform this research. In addition, unpublished and published materials, articles, and books would be evaluated, as well as international laws and related instruments. For other countries, a comparable review will be taken. As a result, it is hoped that a qualitative approach would help to further address the study's research questions.

1.8. Limitation of the study

The basic limitation of this research is the lack of relevant literatures, established jurisprudence, research, and other instruments related to security exceptions in Ethiopian case. Furthermore, owing to COVID-19, difficulty to directly approaching my advisor and other people to discuss my title, inadequacy of budget and time, to complete this thesis on time was a challenge.

1.9. Organization of the study

The research would be divided into four chapters: the first would attempt to define the study's background; the second would provide a general overview of BITs; the third would address and analyze the definition of security exceptions in Ethiopian laws and in selected foreign countries; and the fourth would conclude with recommendations.

1.10. Review of the literature

In various legal jurisdictions, there are several academic works on national security exceptions under BITs. In Ethiopia, on the other hand, there is no extensive literature on national security exceptions in relation to BIT.

UNCTAD, [13]Countries have a number of alternatives for modernizing their first-generation treaties, with at least ten policy options open for countries seeking to change existing treaties to match them with new policy objectives. These can be used in tandem with each other. Interpreting treaty clauses jointly, amending treaty provisions, and replacing treaties that have expired; To merge the IIA network, it replaces a first-generation treaty with a new treaty.

[13] UNCTAD, Reform of the international investment agreement regime: Phase 2, Fifth session Geneva, 9–11 October 2017, available at "https://unctad.org/system/files/official-document/diaepcb2017d3_en.pdf" accessed on December3, 2020, p 67.

Managing the interrelationships between coexisting treaties; Using international standards; Multilateral cooperation; Abandoning treaties of the first century that have not been ratified; Terminating existing first-century treaties and refusing to sign bilateral investment treaties.

In his book "European Yearbook of International Economic Law," Caroline Henckels writes, "Security exceptions are becoming more common in investment treaties, but confusion persists as to their relationship with the defenses of necessity and self-defense, both in general and in the case of armed conflict."Security exceptions," he continues, "shall be read as either excluding the application of treaty commitments or as affirmative defenses within the treaty." These differing interpretations of security exceptions have functional implications for the treatment of substantive obligations that could apply to investment claims arising from military conflict.

FlorenciaMontalJane Lawrence Sumne,CarlyPotz-Nielsenr,[14]When negotiating investment treaties, states balance two goals: offering good investor security (investor protection), which is thought to draw foreign direct investment, and retaining the right to control their economies, according to their article "What states want: Estimating ideal points from international investment treaty material" (regulatory autonomy).In this article they argue that treaty content can tell us about the latent preferences that states have over the level of investor protection enshrined in BITs. Thus, this thesis aimed to fill the gap of literature in this specific area 'security exception under' Ethiopian BIT.

[14]FlorenciaMontal, Jane Lawrence Sumne and CarlyPotz-Nielsenr, "What states want: Estimating ideal points from international investment treaty material" (regulatory autonomy), (Vol 57, Issue 6, 2020), available at https://journals.sagepub.com/doi/full/10.1177/0022343320959130, accessed on January 6, 2021, p, 78.

CHAPTE TWO

General Overview of Bilateral Investment Treaty

2.1. The Treaty of Friendship, Commerce and Navigation as Precursor of BITs

Though the modern BIT has been traced back to the 1959 BIT signed between Pakistan and Germany which was ratified in 1962, one can confidently argue that its concept was exist in bilateral trade treaties practiced by countries such as US and the treaty of friendship, commerce and navigation (FCN) rose as example. The treaty of FNCs was concluded starting from 18thc and US was one of the countries which had concluded this treaty with other states. However, unlike modern BITs which dealt with investment deeply, the treaty of FCN protects trade interests in general[15]

The treaty's main goal was to establish a trade relation between the United States and the rest of the world. Its scope included not only trade but also military matters, such as port access and navigation through internal waters in order to protect their country through military operations. At the time, the main goal of this treaty was to give individual aliens the right to free movement.[16] Many rights are included in the FCN Treaty, especially procedural rights in the event of foreigners' detention and criminal trials in the host state. The treaty's substance evolved over time, and new problems were introduced. The FCN treaty's contents, which were similar to modern BITs in several ways, such as the most favored nation (MFN) clause during entry and corporate formation[17] Furthermore, although the latter became stronger in modern BITs, some conflict resolution mechanisms were still available in FCN treaties, and countries have used them as a source to generate investment-specific BITs.

2.2. BITS's Evolution over Time

Prior to World War II, national or local legislation was the main tool used to address investment issues. Investment flowed from colonizer states to colonies during this period. When a foreign

---

[15]Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,' (Vol. 24, NO. 3), available at "https://scholar.smu.edu/cgi/viewcontent.cgi?article=2743&context=til" pp. 5.

[16] M. Sornarajah (2010) The International Law on Foreign Investment, (Oxford University Press, Oxford, 3rd ed.), available at "https://www.academia.edu/40472789/ acceesded on December, 2020, p180

[17] Ibid, pp, 8

investment treaty was absent, customary international law was used to fill the gap.[18] Prior to the use of BITs, there were few mechanisms for states to make guarantees about how foreign investment will be handled. Reasonable "No government is entitled to expropriate private property, for any reason, without provision for prompt, adequate, and efficient payment," says customary international law, summarized in the "Hull Rule."[19]However, in the United Nations, there was a growing chorus of opposition to the Hull Rule. In 1962, the United Nations General Assembly passed the "Resolution Permanent Sovereignty over Natural Resources," which only stipulated "reasonable" compensation in the event of expropriation.[20]

Customary international law and International laws stick do not have the same level of security for international investment as the BIT. Since, although the former lacks a widely accepted theory and binding force in the field, the latter failed due to the new international economic order (NIEO's) demand that states have "absolute permanent control" over their natural resources and other economic activities. Furthermore, developing countries take advantage of a clause in the United Nations Charter of Economic Rights and Duties of States that states explicitly in article 2 (c) that "every state has the right to nationalize or expropriate foreign investment, without any condition, by paying fair compensation."[21]This clause also gives the host state the right to renegotiate the contract entered into by the foreign company.

The best way for capital exporting countries to address this flaw was to enter into bilateral investment treaties (BITs) with capital importing countries in order to draw FDI from the former. However, developing countries, such as those in Latin America, invoke the calvo doctrine, which states that foreign investment receives no preferential treatment over domestic investment and that international investment disputes should be resolved by national courts.[22]

---

[18]Luke Eric Peterson And Kevin R. Gray 'International Human Rights In Bilateral Investment Treaties And In Investment Treaty Arbitration Published by the International Institute for Sustainable Development', (2003), available at https://www.escr-net.org/docs/i/404561, acceesed on january 9, 2021, pp, 190.

[19] Zachary Elkins, 'Andrew T Guzman, and Beth Simmons Competing for Capital:' The Diffusion of Bilateral Investment Treaties, (1960–2000), available at https://scholarship.law.upenn.edu/faculty_scholarship/1675/ accessed on May 3, 2021, pp, 912.

[20] ibid

[21]ibid

[22] Luke Eric Peterson And Kevin R. Gray at note, 18

The new and important period in the history of BITs began in the 1960s, when European countries began to negotiate them with other countries, and the negotiations were focused on investment rather than trade.[23]

Germany, Switzerland, France, the Netherlands, the United Kingdom, Sweden, and Italy led the bulk of the BITs signed in the 1960s and 1980s.[24]Similarly, by the beginning of 1980, a large number of BITs had been signed between European countries and developing countries. The United States then began negotiating BITs in the 1980s, and the process progressed in the 1990s with various developing countries after the Europeans. Other nations, such as Japan, China, and Morocco, have begun to sign BITs with other countries. While the majority of BITs were signed between developed and developing countries at the time, this trend has shifted since the late 1980s, especially in the 1990s, when developing countries and economies in transition began to sign BITs in large numbers with one another.[25]The 1980 BIT between Singapore and Sri Lanka is an example. These treaties are designed to safeguard foreign investment from the inconsistency of local rules.

2.3. Generations of BIT

BITs are generated in steps. The "three generations" of BITs are defined by Ernst-Ulrich Peterman. 1st Periodically, he referred to BITs signed between 1959 and 1969 as first generation BITs, which had the following characteristics: As he stated it, capital exporting/developed countries and capital importing/developing countries were parties to these BITs, i.e., during that years, the majority of BITs were signed between northern and southern states.[26]The investment standard is intended to alleviate "legal insecurity arising from post-colonial disputes on the customary international 'minimum standard' for the defense of foreign property and the payment

---

[23]Jeswald W. Salacuse, at note, no. 15

[24] In Elsig, Manfred, Micheal Hahn, andothers, 'The Regime Complex for Investment Governance: Overlapping Provisions in PTAs and Bits', (Cambridge University Press. Eds. 2020, available at, "file:///C:/Users/user/Downloads/The_Regime_Complex_for_Investment_Govern.pdf" accessed on may, 9, 2021. pp,4)

[25] UNCTAD, Bilateral Investment Treaties 1959-199, United Nation, New York and Geneva, (2000), available at " https://unctad.org/system/files/official-document/poiteiiad2.en.pdf, accessed on march 23, 2021,p,2

[26] Diane A. Desierto, 'Public Policy In International Investment And Trade Law: Community Expectations And Functional Decision-Making, Florida Journal Of International Law', Vol.16, available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1884&context=jil accessed on February 25, p, 108

of 'absolute, timely, and efficient compensation' in the event of expropriation of foreign property. "According to Peterman, the second generations of BITs were those signed between 1969 and 2003. The structure of BITs from this time period is nearly identical: they had similar goals such as mutual promotion and security of investment, as well as a level of protection because, BITs attract FDI, which helps host countries expand, as well as investor-state arbitration clauses, national treatment clauses, and most favored nation clauses. According to Peterman, the third generation of BITs recognizes the need to balance the needs of individuals such as investors and the public interest by giving some regulatory authority to states participating in the signing of BITs.[27]

2.4. Revisiting BIT

As tried to demonstrate above, emerging/developing and transitional economies raced to sign BITs in the 1990s in order to attract FDI by offering investor and investment security. However, their talks were rushed, and they failed to consider the consequences of the treaty's provisions. As a consequence, disputes with other entities, such as regional trade treaties and tax treaties, are possible.[28]Furthermore, most BIT treaties contain vaguely worded commitments, leaving the host state unsure of their regulatory power and relying on arbitration for interpretation, with ISDS tribunal interpretation being input for most states to reconsider their BITs.

States' attitudes about BITs changed after learning about these issues in their BITs, and they began to renegotiate them. Renegotiation can take two forms: the state can modify certain BIT provisions while leaving other BIT provisions unchanged; or parties to BITs can conclude a new investment treaty with a clause that explicitly terminates the previous one.[29]

Renegotiation started in 1986 with an adjustment to the 1974 France-Egypt Bilateral Investment Treaty (BIT), and it continued during the 1990s. Membership in different organizations, such as the EU, shifts in domestic political conditions, the need to have binding arbitration, and when previous BITs do not represent current trends and international norms are all possible reasons for

[27] ibid

[28]Yoram Z. Haftel& Alexander Thompson, 'When do states renegotiate investment agreements? The impact of arbitration, Department of International Relations', The Hebrew University of Jerusalem, Israel Department of Political Science, Ohio State University, Columbus, OH, USA, (published online 2017), available at "https://ideas.repec.org/a/spr/revint/v13y2018i1d10.1007_s11558-017-9276-1.html", pp, 4-24.

[29] Ibid

negotiation. Both developed and developing countries are paying much more attention to the extent of their treaty obligations today than they have in the past, and are finding a better balance between investor rights and the right to regulate in the public interest now more than ever before.[30]Academics, legal scholars, and civil society organizations have also raised questions about the nature of treaty commitments and the obstacles placed by BITs in achieving legitimate policy goals. As Howard Mann and several other scholars have pointed out, the current backlash against BITs does not only provide an opportunity to correct the BIT regime's flaws, but it may also usher in a new period of global economic involvement to support sustainable growth.[31]As a result, rebalancing the relationship between investor security and a government's right to control in the public interest has become a central issue in the debate over the future of IIAs, including BITs.[32]

2.5. Structures BITs.

Many investment treaties around the world have similar structures, despite slight variations. Clauses that are commonly used include the following:[33]

'National treatment' and 'most-favored-nation' provisions, which typically mandate states to handle foreign investors or investments no less favorably than investments made by their own nationals (national treatment) or by nationals of other states in comparable circumstances (most-favored-nation), as well as clauses forcing states to treat foreign investment with a certain (but undefined) degree of justice, restrain states from treating foreign investment unfairly..[34]

The term "absolute protection and protection" refers to clauses that require states to take steps to protect the physical integrity of foreign investment. Expropriation provisions, which laid out the criteria for the legitimacy of both overt and indirect expropriations, the latter relating to legislative actions that do not shift assets but have a substantial effect on investments, were

[30]Kavaljit Singh and Burg hard Ilge (ed.), 'Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices' (2016), available at https://www.iisd.org/itn/en/2016/05/16/rethinking-bilateral-investment-treaties-critical-issues-and-policy-choices/ accessed on March, 21,2020, pp, 4
[31] ibid
[32] ibid
[33]Lorenzo Cotula, XiaoxueWeng, Qianru Ma and others, 'China-Africa investment treaties; do they work? First published by the International Institute for Environment and Development (UK)'(2016), available at, https://pubs.iied.org/sites/default/files/pdfs/migrate/17588IIED.pdf, accessed on may 2020, p, 34.
[34] Ibid

understood more broadly.[35]These provisions normally specify that any expropriation must be for a public purpose, non-discriminatory, and that governments must follow due process and pay compensation based on specified requirements, normally market value, as well as 'Transfers' clauses that allow investors to move funds in accordance with their assets (for example, to a third party).'Umbrella' clauses obliging governments to keep commitments made to foreign investors, and dispute resolution agreements allowing investors to take issues with the government to international arbitration rather than national courts.[36]

2.6. Ethiopian bilateral investment treaty

2.6.1. General overview

Ethiopia has signed several BITs with both developing and developed countries since the early BITs between Ethiopia and Germany, which have now been terminated. Two of these BITs have been terminated.[37]Twelve of them have been signed but are not yet in force.[38]And 21 of them are currently in force[39]

Based on the time of their signature, we can split them into two classes. Those signed between 1900 and the early 2000s[40] and those which signed after 2016[41]. If we look at BITs signed in Ethiopia at different times, we can see that there are several variations. The following is a summary of the basic content of the BITs signed between Ethiopia and other countries:

a. *Definition of investment*

---

[35] ibid

[36] Ibid

[37] Agreement Between The Government Of The Federal Democratic Republic Of Ethiopia And India and Germany(signed in 1964)

[38] Agreement between the Government of The Federal Democratic Republic of Ethiopia and Brazil, Qatar, united Arab emirate, morocco, UK, Equatorial Guinea, Spain, south Africa, Belgium and Nigeria.

[39]Agreement Between The Government Of The Federal Democratic Republic Of Ethiopia and Egypt, Finland, Austria, Sweden, Libya, German, Israel, Iran, Belgium, France, Algeria, Netherlands, Denmark, Tunisia, turkey, Sudan, Russia, Yemen, Malaysia, Switzerland, Kuwait, china, Italy.

[40] Agreement Between The Government Of The Federal Democratic Republic Of Ethiopia and Yemen, Malaysia, Switzerland, china, Kuwait, Italy and Germany for protection and promotion of investment, UK, equatorial guinea, Spain, south Africa, India, Belgium Luxemburg economic union, Egypt, Finland, Sweden, Austria, Libya, Germany, Nigeria, Iran, Islamic republic, France, Algeria, Denmark, Tunisia, turkey, Sudan and Russia federation.
Between The Government Of The Federal Democratic Republic Of Ethiopia And morocco, united Arab Emirate, Qatar, Brazil

[41]Between The Government Of The Federal Democratic Republic Of Ethiopia And morocco, united Arab Emirate, Qatar, Brazil

Different countries' BITS define the term "investment" in different ways. Some, like the US 2012 US model BIT, may provide a non-exhaustive list of asset-based definitions, while others, like the 2016 Indian model BIT, may provide enterprise-based definitions, and the rest may provide an exhaustive list of asset-based definitions.[42]

Since the term covers movable and immovable, tangible and intangible properties, as defined in various Ethiopian BITs and articles of the BITs, how Ethiopian BITS define investment appears to be non-exhaustive lists of asset-based definitions.

b. Protection and promotion of investment

The basic elements of Ethiopian BITs are nearly identical. According to the preamble and provisions of the BITs signed at the time, the main goal was to create favorable conditions for mutual security and promotion of investment, admission of investment, facilitation of the creation and establishment of an acceptable legal entity, and admission conditions that were legal.[43]This security extends to investments and investors, who are completely safe and stable. As a result, the host state should not affect investors any way by arbitrary or discriminatory means; it should explicitly disclose all of its laws and regulations; and it should provide the investor with access to its courts of justice and other related organs, as well as the freedom to employ whomever they choose.

c. Treatment of investment

Ethiopian BITs cover how host countries handle the investments of other treaty members, with the core principles of equal and equitable treatment, most favored nation, and national treatment, as attempted to clarify below:

i. National treatment

[42] 2012 SADC Model Bilateral Investment Treaty Template with Commentary, Published by the Southern African Development Community, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf pp 9-11

[43] This protection and promotion of investment is available in all BITs of Ethiopia in both current and the earlier. The reader can find it simply and clearly in all BITs since the basic objectives of Ethiopian BITs are to attract foreign investment. See Ethiopian BITs available on, “https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopi, accessed on 13, February, 2021.

With a few variations and qualifications, such as certain regional economic agreements and other similar international agreements, Ethiopian bilateral investment treaties state that the host country must handle investments from treaty partners in the same way it treats investments from its own nationals and companies. There is no discrimination based on nationality between nationals or companies from the home and host countries.

ii. Most favored nation

This provision ensures that treaty-protected investments will be treated at least as well as investments made by citizens and companies of any third party in the host country in like circumstances. The Contracting Party shall accord nationals of the other Contracting Party treatment no less favorable than that accorded to third-country investments in its territory.

d. Monetary transfer

The majority of the time, international investors seeks to benefit by supplying capital and other services to host countries for investment. This will not happen unless the host state decided in the treaty to allow money to be transferred freely and without delay. The transfer of money, benefit, and other monetary value is included in this monetary transfer. This clause is available in most Ethiopian BITs.

e. Protection against Forcible Dispossession and Damage Reimbursement

Except as defined by treaty clauses, the host state cannot interfere with the investor's economic rights. Nationalization, expropriation, and other types of interference are examples of interference. Exceptions can be made for public reasons, non-discriminatory matters, and benefit payments.

f. Dispute settlement

Since there was no such binding dispute settlement clause in customary international law, the BITs dispute settlement provision is considered an innovation. Ethiopian BITs have two separate dispute resolution mechanisms: one for disputes between contracting states and the other for disputes between a host country and a foreign investor who has been wronged in the event of armed war or internal unrest, Ethiopian BITs offer compensation to investors.

i. Settlement of dispute between two contracting parties

This is a conflict between the host and home states that results from the failure of the host and home states to fulfill their treaty obligations. Ethiopian BITs included the means and procedures for resolving conflicts between contracting parties for this purpose.[44] To this end, the majority of BIT clauses specified that "disagreements between contracting parties should be resolved through diplomatic channels." Most Ethiopian BITs stipulate that in the case of a dispute over the understanding or implementation of the treaty, the two parties will attempt to settle their differences by negotiation first, and if that fails, by arbitration.

ii. Settlement of dispute between contracting states and investor

In most cases, concluding a BIT between an aggrieved foreign investor and the government of the host country provides the requisite consent to determine ICSID jurisdiction in the event of a potential conflict. Investors must, however, strive to avoid ICSID and other arbitral tribunals such as the United Nations Commission on International Trade Law (UNCITRAL) before heading to ICSID and other arbitral tribunals.[45]

3.6.2. Structure of Ethiopian BITs since 2016

BITs signed since 2016 include some new clauses, in addition to the common provisions mentioned above in BITs signed in the 1990s and early 2000s, i.e. (1964-2016). Since sustainable development is the key target of some Ethiopian BITs signed since 2016, the contracting party should use the investment opportunity to encourage sustainable development and investment commitment.[46]Other objectives, such as national security, environmental protection, and human rights, cannot be achieved before other objectives, such as sustainable development, have been achieved. As a result, contrary to older BITs that did not resolve sustainable development targets, Ethiopian BITs have started to improve in recent years.

[44]See For Example Article 9 of agreement between The Republic of India And Democratic Republic Of Ethiopia For The Reciprocal Promotion And Protection Of Investments (signed in July, 2007).
[45] Ibid article 10.
[46] Agreement between the Government of the Federal Democratic Republic of Ethiopia and state of Qatar on promotion and reciprocal protection of investment, preamble, signed in 2017, Agreement between the Government of the Federal Democratic Republic of Ethiopia and United Arab Emirate on promotion and reciprocal protection of investment, 2016.

CHAPTER THREE

3.1. National Security Exception in General

Before delving into the meaning of the phrase "security exception," it's critical to first identify th e term "national security." Countries describe national security in a variety of ways:

Given that it does not be stable over time, the definition of national security is difficult to define in categorical terms. As read in view of the margin of appreciation theory, ambiguous terminology used in national security laws have historically enabled states to deal with unanticipated national security risks.[47]

"National security deals with threats that have the potential to undermine the security of the state or of society. These threats generally require a national response, as they are beyond the capacity of individuals, communities or provinces to address alone. National security is closely linked to both personal and international security.[48] Its definition is broad and unclear. And, while the nation's and its people's safety is obviously in jeopardy, one might reasonably argue that threats to the population's health, the climate, military threats, espionage, terrorism, and threats to a country's general political, economic, and financial system are indeed in jeopardy. Disease spread, natural disasters, civil war, serious economic crises, or attempted foreign takeover of key national industries are all possibilities. Another security danger is a low-risk actor, such as climate change or pandemic disease, which threatens security even though it has no malice against the state or its people. The evolving definition of national security also means that new national security threats can emerge in the future that are currently unknown.[49]

[47]Adel IlsiyarovichAbdullin and LiliiaAzatovna Khasanova, 'The concept of "essential security interests" and justification of economic sanctions under WTO law, *RevistaPublicando, 4 No 12. (1). 2017, 450-458. ISSN 1390-9304, available at file:///C:/Users/user/Downloads/834-Texto%20del%20art%C3%ADculo-3420-1-10-20171228.pdf" accessed on October 8, 2020,*

[48]OECD (2009), Security-Related Terms In International Investment Law And In National Security Strategies, Investment Division, Directorate for Financial and Enterprise Affairs Organization for Economic Co-operation and Development 2 rue André-Pascal, Paris 75116, available at https://www.oecd.org/daf/inv/investment-policy/42701587.pdf " accessed on january12, 2021, P,32.

[49]UNCTAD, at note, no. 3, p, 17

Based on the specific bargains agreed by the states parties to a BIT, there are potentially an infinite number of possible security exception clause formulations.[50] Another factor to consider is the role of the actor in national security. During the 1990s, the rise of terrorism as a primary focus of security efforts effectively shifted national and international security from a state-centered to a person- or network-centered paradigm. Furthermore, the security is phrased differently in different places.[51] When Germany signed a BIT with China in 2003, for example, she used the word "public security," while India and the United States used the expression "essential security interests."

Notably, and somewhat contrary to standards, the term "national security" is rarely used; cognates like "internal or external national security" and "state security" are also uncommon. Non precluded measures are also authorized under Indian non-precluded measures (NPM) clauses in "circumstances of serious emergency," which may include both protection and other emergencies of particular gravity.

However, it is unavoidable that the range of national security varies between countries. According to Mark McLaughlin, the concept of a security exception may be dependent on circumstance or sector; as a result, circumstances involving an armed attack clearly fall within the scope of national security, and the measures used in such situations must be widely recognized.[52] Furthermore, economic crises of a certain severity can be included in a widely recognized concept of national security. Sector-based concepts of national security describe the economic areas and properties that would be considered to have an effect on national security if taken over or altered. Manufacturing of conventional and chemical weapons, transportation, telecommunications, and electricity are all common examples. Cryptographic services,

[50]J. B e n to n h e a t h, 'The New National Security Challenge to the Economic Order', the Yale law journal, vol. 129:1020, (2020), available at https://www.yalelawjournal.org/article/the-new-national-security-challenge" accessed on February, 1, 2021, p1030.

[51] Ibid

[52]Mark McLaughlin, 'State-Owned Enterprises and Threats to National Security under Investment Treaties,' Chinese JIL (Published by Oxford University Press), (2020), available at https://www.researchgate.net/publication/343906280" Pp, 10-14.

aerospace, oil and gas, gaming, television, and the media are less frequently mentioned but are still considered security-related by some countries.[53]

Regardless of situation or sector-based concepts, the OECD has established a classification of issues related to state-owned enterprises' (SOEs) non-commercial policy objectives that identify security-related risks.[54] The first is the threat to critical infrastructure, which is described as "real or intangible assets whose loss or disruption will seriously jeopardize public safety, social order, or the performance of key government functions." Bridges, railway lines, hospitals, telecommunication networks, seaports, and airports are examples of vital infrastructure. Ownership of SOEs puts sensitive facilities at risk of sabotage or a refusal to cooperate in their defense.

3.2. History of security exception

Security exceptions have a long history, dating back to treaties of friendship, commerce, and navigation, such as the 1931 US-Australia treaty, which stated that “in the event any High Contracting Party shall be engaged in conflict, it may impose such import or export restrictions as may be needed by the national interest.” This exception, however, was only in effect during wartime, and its aim was to maintain public order. Furthermore, the 1947 GATT agreement established the essential national security exception, and these terminologies were included in the US model. In separate cases against Argentina, ICSID tribunals interpreted these national security questions.[55] Furthermore, during the February 1947 negotiation session in New York, a national security exception was first included in a draft of the International Trade Organization (ITO) Charter, but the convention was not adopted.

3.3. Security exceptions under customary international law

In extraordinary circumstances, customary international law allows states some procedural flexibility. According to the International Law Commission (ILC), there have been occasions in customary international law where violating an international agreement was justified in such circumstances; these cases include force majeure, which may be used where an "act of God"

---

[53] ibid

[54] Ibid

[55] William J. Moon, ‘Essential Security Interests in International Investment Agreements,’ Article in Journal of International Economic Law,(2012), available at https://www.researchgate.net/publication/256017301” accessed on may , 28, 2021, p, 496.

outside of the state's authority intervenes and rends the agreement unenforceable.[56]Distress happens when the state has no choice but to violate the rule in order to secure a life in its care. When a state has no other option for safeguarding an important interest while not jeopardizing the essential interests of other states, need exists.[57]

In general, security exceptions provisions would exclude a wider spectrum of state acts from the safeguards of a single treaty, but customary international law will exclude the state after the fact by a comparatively narrow collection of ex-post defenses.[58]Secondary legal principles that relieve blame after the fact are known as customary protections. Security exception provisions, on the other hand, are primary legal guidelines that restrict the applicability of an international convention to such forms of conduct.[59]

3.4. International trade agreements provide for a security exception.

Since states rightly value their national security and that of their people more than the economic benefits generated by foreign trade, national security exceptions are common provision in international trade agreements.[60]When a controversy occurs, it is important to consider how national security provisions are used in international trading instruments, as well as how different tribunals view and perceive them.

3.4.1. GATT type security exception

Prior to the WTO's inception, GTT's contracting party had invoked terms of the GATT's protection exception, but this exception was not discussed during the WTO until 2016. The

---

[56] William W. Burke-White & Andreas Von Staden, 'Investment Protection In Extraordinary Times: The Interpretation And Application of Non-Precluded Measures Provisions In Bilateral Investment Treaties,' Virginia Journal Of International LawVol.48:2. ,(2008), available at "https://scholarship.law.upenn.edu/faculty_scholarship/146/" accessed on may 2020,

[57]Ibid, Pp, 321.

[58] ibid

[59] Ibid

[60]Peter Van den Bossche1 and Sarah Akpofure, 'The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, Beijing Conference on the New Global Economic Order,' University of International Business and Economics, Beijing , 26 and 27 September 2019, *WTI Working Paper No. 03/2020*, available at https://boris.unibe.ch/147028/1/WTI%20Working%20Paper%2003_2020.pdf accessed on April, 2, 2021

agreement's Article XXI stipulates unique security exceptions.[61]It did not, however, define "essential security interest," nor did it define the extent of "essential security interest." As a consequence, all members can invoke this exception if it is necessary to protect a member's essential security interest. The main goal of incorporating this exception in the GATT and WTO is to reach a balance between states' autonomy and their commitments under the free trade agreements.

Scholars disagreed about how to view Article XXI of the GATT and whether it is self-judging or not.[62] The WTO dispute settlement body (DSB) studied the *Russia – Traffic in Transit* case, which was handed to this organ on April 5, 2019, to better understand the issue.[63]In this situation, Russia took steps to control shipment traffic from Ukraine to Kazakhstan, arguing that it was appropriate to safeguard its "essential security interests," and that the DSB has no right to hear the case because the statute, as the clause states, is self-judging. Ukraine, on the other hand, argues that it is just a commercial dispute, not a national security problem. The DSB analyzed the wording of the chapeau of article XXI (b) and the enumerated subparagraph of paragraph 1 to address the issue at hand. The panel then decided that members have the right to determine what constitutes a "important security interest" and its necessity, but only in accordance with good faith obligations, implying that members cannot use the exception in Article XXI to avoid their GATT obligations since interpretation of Article XXI(b)(iii) as a totally 'self-judging' provision would be irreconcilable with the object and purpose of the *WTO Agreement* and the GATT 1994[64] and that good faith obligations must be followed. Article 26&31(1) of the VCLT notes that, "any treaty must be performed in good faith by the parties." In terms of the panel's jurisdiction, it states that we must differentiate between the article's self-judging existence and

---

[61]General Agreement on Tariffs and Trade 1947, Oct. 30, 1947, 55 U.N.T.S. 194 (entered into force Jan. 1, 1948), as incorporated in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (entered into force Jan. 1, 1995).

[62]Chao Wang, 'Invocation of National Security Exceptions under GATT Article XXI:' Jurisdiction to Review and Standard of Review Published by Oxford University Press, Chinese Journal of International Law, available at https://academic.oup.com/chinesejil/issue/18/3" accessed march 6, 2021, 695–712

[63]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm , accessed on January 14, 2021,

[64]ibid

the objective criteria fulfilled under article XXI of the GATT to raise security exceptions, the latter of which may be decided by the panel.[65]

In the Nicaragua v. USA[66] case, by laying mines, threatening Nicaraguan ports, violating Nicaragua's freedom of commerce and navigation under the convention, and violating the ban on the use of force, the United States violated the principle of territorial integrity and non-interference. The International Court of Justice investigated the two major security exceptions under the FCN, Treaty between the United States and Nicaragua, in 1986. It was concluded that the GATT-style terminology defines responsibility for treating the case and is not a self-judging, but rather a judgment from an outside decision maker. As previously mentioned, Article XXI provides for steps that are "essential to safeguard its fundamental security interests."[67]

i. Exceptions, both general and special

The term "general exception" is commonly used in international trade agreements such as the World Trade Organization (WTO), but not in international investment agreements. Many exceptions have recently become available in IIAs, and the majority of and specific exceptions, such as vital national security interests, public order, prudential regulation, or taxation and specific exceptions, such as vital national security interests, public order, prudential regulation, or taxation. Canada is the best example, as she incorporated GATT/GATS general exceptions into her BITs and BITs model. These exceptions are particular obligations such as national treatment, rather than general exceptions.[68]

---

[65]VeinnaConvention on Law of Treaty, 1969, article 31(1) &(26), available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, accessed on April 26, 2021,

[66]*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14, available at https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf , accessed on January 6, 2021,

[67]Nadia Garcia-Santaolalla, 'A Proposal To Reform "Security-Emergency" Exceptions In Trade', available at https://www.unescap.org/sites/default/files/57%20Final-Nadia%20Garcia-Mexico.pdf p,4.

[68]Andrew Newcomb, 'General Exceptions in International Investment,' Draft Discussion Paper Prepared for BIICL Eighth Annual WTO Conference (13th and 14th May 2008), available at https://www.biicl.org/files/3866_andrew_newcombe.pdf , accessed on October, 2020,

There are three ways to interpret exceptions: giving the host state more regulatory flexibility, seeing the clause as codifying the types of exceptions already established in IIA jurisprudence, and reading the exceptions restrictively, giving the host state even less regulatory flexibility[69]

3.4.2. ICSID Case Laws Security Exceptions

The Argentina case is the most useful in terms of how different tribunals interpret BIT provisions and customary international law while expressing security exceptions in determined cases. Argentina's economy began to decline in the late 1990s as a result of a number of reasons. Then, in 2002, political and social unrest was at an all-time high as a result of riots and looting.[70] To address these issues, countries have tried a variety of approaches, including replacing presidents and enacting emergency legislation freezing bank deposits, preventing funds from being sent overseas, and rescheduling term deposits and service contracts to peso value, and then compensate for inflation. Furthermore, regulatory measures in Argentina became extremely strict, resulting in a number of financial losses for investors, including foreign investors. These were the reasons why foreign investors filed lawsuits against Argentina, claiming that, Argentina's actions are in violation of key BIT obligations between the United States and Argentina. Argentina, on the other hand, defends itself, claiming that "the steps were taken to restore order and economic stability in compliance with the security exception under article XI of the USA-Argentina BIT."[71]

Alternatively, Argentina argued that any violation of the treaty was justified by customary international law because of the nature of a state of necessity. As a result, different tribunals examine these cases in the following ways:

a. CMS vs. Republic of Argentina (2005)[72]

CMS is a gas transportation company based in the United States. It owns a 30% stake in Argentina's Transportadora De Gas Del Norte, a gas transportation company (TGN). The crises arose when the CMS business was conducting this operation with TNG. CMS said that

---

[69] Ibid

[70]William. J. moon cited above at note no.55, p, 484.

[71] ibid

[72]*CMS Gas Transmission Co. v Argentine Republic* ICSID Case No. ARB/01/8, Award (12 May 2005), available at https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf , accessed on February, 20,2021.

Argentina's action in suspending the tariff adjustment formula for gas transportation modified Argentina's basic duty to treat investment as agreed. The CMS tribunals then agreed that Argentina's measure violated the umbrella clause without specifying why, which led to the annulment of the measure by the annulment committee.[73] The CMS tribunals then agreed that Argentina's measure violated the umbrella clause without specifying why, which led to the annulment of the measure by the annulment committee. Other issues included whether Argentina's protection of necessity under customary international law is sufficient to free her from her obligations or not, the tribunals concluded that, while the crises could have placed an important interest of the state in grave and imminent jeopardy, it was not clear that the measure adopted was the only means available, as would be expected by customary international security. Furthermore, in order to increase security of need, the state should not add to the problems; but, since the crises began in the 1980s, government policy failures in the 1990s have also contributed to the crises. Furthermore, according to Article XI of the BIT between the United States and Argentina signed in 1991, while there is no clear requirement on the topic, economic crises may be used as a shield to avoid treaty obligations since no law or customary law prohibits it. While the tribunal acknowledged the presence of economic crises, it argued that the crises did not result in complete economic and social collapse. As a result, BIT would supersede it, and the crises would be taken into account when assessing payments of compensation, though it could not completely relieve the nation of its obligations.

The annulment commission, on the other hand, opposed the tribunal's decision[74]for assimilating express treaty under article XI of the USA-Argentina BIT, which is applicable to particular treaties, with the justification of necessity under customary international law, which is applicable widely to all treaties.

b. LG and E V. Argentina cases

LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. (LG&E) were Kentucky and Delaware-based corporations that owned stakes in three local gas distribution

[73]Ibid

[74]*CMS Gas Transmission Company v Argentine Republic* ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007), available at https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf , accessed on January 8, 2021.

firms in Argentina. The tribunals use three legal instruments: treaties, general international law, and argentine domestic law, if applicable.[75] The tribunal also determined that the crises posed a danger to the "total collapse of the government and the economy of Argentina."[76] Argentina had breached the rules of fair and equitable treatment in this case, according to the tribunal. It did, however, acknowledge the existence of a state of emergency and accepted the invocation of the exception, thus legitimizing the steps for a limited time during the crisis. Furthermore, by rejecting the claimant's contention that "BIT exceptions should not extend to situations of economic crises," the court determined that when a state's economic base is under attack, the seriousness of the issue may be comparable to that of a military invasion.

C. Argentine republic v. Enron

Enron Corporation was founded in Oregon, and its Delaware-based subsidiary was founded under Delaware law. The complainant then claims that the tax assessment in Argentine provinces where an argentine corporation invests in a gas transportation company was unconstitutional under Argentina's tax law.[77]It amounts to expropriation under argentine law and the US-Argentine BIT. The Argentine defends herself, claiming that "under both customary international law and US-Argentine BIT article XI, these interventions are acts of necessity." Furthermore, the provision is self-judging, according to the Argentina. Claimant denied the provision's self-judgment as well as the provision's reference to economic crises. The tribunal considered both sides' arguments and concluded that while the clause is not self-judging, it can be applied to economic crises even though the economic crisis did not meet the criteria for applying the necessity protection. The annulment committee then challenged the tribunal's decision, claiming that the provisions of the US-Argentina treaty and customary international law article 25 of the ILC had different effects.

d. Argentine Republic v. Sempra

---

[75] *Enron Corporation Ponderosa Assets, L.P v Argentine Republic* ICSID Case No. ARB/01/3, Award (22 May 2007), available at https://www.italaw.com/sites/default/files/case-documents/ita0299.pdf , accessed on may, 2020
[76] Ibid
[77] ibid

Sempra Energy International (Sempra) was a California-based energy firm that bought shares in two of Argentina's natural gas distribution firms, which served seven provinces in Argentina.[78] The tribunals concluded that "the Treaty provision is inseparable from the customary law norm insofar as the definition of necessity and the requirements for its implementation are concerned, provided that such elements have been established under customary law" after reviewing the case and conflict between the parties. The Tribunal found further that there had been "a substantial contribution of [Argentina] to the situation giving rise to the state of necessity". In light of these findings, the Tribunal concluded that the conditions of ILC Article 25 were not cumulatively met.[79]

e. Argentine Republic v. Continental Casualty [80]

Continental Casualty Company (Continental Casualty) was an Illinois-based insurance company that made an investment in an Argentinean insurance company. Unlike the other cases, where the claimant was solely concerned with contractual rights to change tariff rates, the claimant in this case was also concerned with other issues Argentina's prohibitions on payments out of its territory, rescheduling of cash deposits, conversion of US dollar deposits to pesos, and default on its debt obligations are all suspected treaty violations.

To summarize, the tribunals have not followed a standard reading of the provision in the five cases that have been decided so far. While the CMS, Sempra, and Enron awards tribunals ruled that Argentina's crisis-related interventions were not appropriate under Article XI, the awards in the LG & E and Continental cases welcomed the chance to invoke the exemption, which legitimizes the interventions for a limited duration after the crisis and thereby breached the BIT. The CMS tribunal sought to distinguish between customary international law and the treaty's Article XI. It also agreed that the condition set forth in Article XI of the US-Argentina Bilateral Investment Treaty is not met. The Enron and Sempra tribunals, on the other hand, both held that Article XI was "joined at the hip" with the customary international law norm in terms of the concept of necessity and the requirements for its process. Following tribunals decision,

[78] Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award (18 September 2007), available at https://www.italaw.com/cases/1002, accessed on October, 2020.

[79] Ibid (paras.333-354)

[80] *Continental Casualty Co. v Argentine Republic* ICSID Case No. ARB/03/9, Award (5 September 2008), available at https://www.italaw.com/cases/329", accessed on may, 2020,

annulment committee as well as scholars by literatures, harshly criticized these decisions.[81] The other point raised was the question of lexspecialis, which states that in the event of inconsistency in interpreting a given issue, specific rules take precedence over general rules. As a result, the security exception in treaty will nullify the requirement defense to the degree that the two norms are incompatible.

As a result, for current BITs negotiators, the understanding of the tribunal of both the provisions of the US-Argentina BIT and customary international law in cases of national security exceptions is critical.

3.5. Security Exceptions in Bilateral Investment Treaties (BITs) with Selected Countries

Some foreign countries' BITs will be examined under this subheading. Their selection is based on their provisions, which include a national security exception that could assist them in defending their country in the event of a reasonable threat to their countries and the social and economic links they have with Ethiopia. Developed countries like Japan are included, as well as developing countries like South Africa and India. Ethiopia is classified as one of the world's least developed nations. The aim of this comparison is for Ethiopia to learn from these countries' experiences in order to improve her BITs, especially in the area of security.

a. JAPAN

Despite their differences in economic and technological development, some scholars argue that Japan, as a developed country, and Ethiopia, as a least developed country, have a historical relationship .Haile Selassie's decision to implement a constitution that was remarkably similar to the Meiji Constitution of 1889 in several ways. If properly studied, his preference for the Meiji constitution would undoubtedly reveal a development paradigm based on the need to recover much of the traditional structure. As a result, the strong point in favor of drawing a parallel between Japan and Ethiopia is modernization as a means of ensuring continued life and preserving tradition. Even if the methods used were different, the spirit remained the same.

[81]Caroline Henckels, 'Investment Treaty Security Exceptions, Necessity and Self- Defense in the Context of Armed Conflict,' Draft – March 2018, available at https://www.springerprofessional.de/en/investment-treaty-security-exceptions-necessity-and-self-defence/17039952 , accessed on October, 10, 2020, Pp, 3

Ethiopian leaders wanted to achieve the same goal as Japan, which wanted to apposite Western to protect its independence, values, and social system. It alluded to a modernization scheme[82]. Furthermore, the Japanese Embassy in Ethiopia conducted a series of studies in 2008 on various industries and sectors in Ethiopia, including the floriculture industry, the hotel industry, the leather footwear industry, the handicraft industry, and the Ethiopian investment climate. This study was undertaken for three reasons: to gain a better understanding of Ethiopia's economic situation, especially in light of substantial GDP growth, to encourage the private sector to explore the Ethiopian government's capacity and people's efforts to improve the region, to maximize Japanese ODA and identify areas in which the Japanese private sector can invest, and to optimize Japanese ODA and identify areas in which the Japanese private sector can invest.[83] Now that we've established the historical and economic ties between the two, let's look at Japan's BITs:

i. Examination of japans BITs

Japan has signed 35 bilateral investment treaties (BITs)[84]. Five are signed but not in force, while the other thirty are in force (as of the date of this writing). Japan, like Canada, the United States, and Turkey, enshrine a broad variety of public policy protections in her BITs, including national security. Though reviewing all provisions of Japan BITs is beyond the reach of my objectives, I'll go over the section dealing with security exceptions.

In the BIT between Japan and the Republic of China,[85] article 2 and 3 of the protocol set aside some exceptions that restricted the application of national treatment and most favored nation in cases where it is truly important for public order, national security, and sound economic growth of the national economy, as well as some other exceptions to protect industrial property in accordance with the Paris Convention According to the Paris Convention of March 20, 1883 and

[82]Messay Kebede, 'Japan and Ethiopia: An Appraisal of Similarities and Divergent Courses', Papers of the XILITH International Conference of Ethiopian Studies Kyoto, (vol.I.1997), available at https://core.ac.uk/download/pdf/232845407.pdf , accessed on April 27, 2021.
[83]A Series of Studies on Industries in Ethiopia, The Embassy of Japan in Ethiopia March 2008, available at https://www.et.emb-japan.go.jp/Eco_Research_E.pdf , accessed on January 24, 2021.
[84]Lists of japans' BITs available on, "https://investmentpolicy.unctad.org/international-investment-agreements/countries/105/japan" accessed on March 20, 2021.
[85]Agreement between Japan and People's Republic of china concerning the encouragement and reciprocal protection of investment, signed in 1988, protocol article, 2&3.

its modifications, industrial property is covered by the national economy and other exceptions. The exception is made for the growth of the national economy, as can be seen in the protocol's article 3, last paragraph. Article 15 of other BITs between Japan and Russia [86]stated that "... the provisions of the present Article shall not be read to obligate either Contracting Party to reveal confidential information that would obstruct law enforcement or otherwise be contrary to the public interest, or that would jeopardize the privacy or legitimate commercial interests of either Contracting Party." The protocol of this BIT also included some exceptions under article 5.1, which place some limitations on the most favored nation concept.

For example, the conditions of registration of aircraft in the registers of the competent authorities of any Contracting Party and matters arising from such registration, as well as matters relevant to or arising from the nationality of a ship; and the purchase of a ship or any interest in a ship, procedural formalities in connection with the activities of foreign nationals and companies within its territory are given.[87]

Later, several novel exceptions were introduced to the Japanese BITs: first, unlike previous Japanese BITs preambles, which focused solely on investment security, it began to include other issues without which the treaty's goal would not be achieved. Some BIT preambles, for example, include the phrase "these goals can be accomplished without relaxing general health, protection, and environmental steps." Each Contracting Party shall ensure that steps and efforts are taken to prevent and fight corruption in matters covered by this Agreement in compliance with its laws and regulations, according to Article 9 of the Japan-Argentina Republic.[88]As a result, corruption is one of the challenges to the country's national security, and the parties should work together to address it.

---

[86]Agreement between Japan and government of Russian federation concerning the encouragement and reciprocal protection of investment, signed in November,1988

[87]Agreement between Japan and Hong Kong, article, 12, 1997; Japan & Sri Lanka, article 15, 1998; Japan and Mongolia, protocol, article 5, 2001, concerning the encouragement and reciprocal protection of investment.

[88]Agreement between Japan and republic of Argentina, concerning the encouragement and reciprocal protection of investment, article 9 (signed in 2018)

Article 15 of the same treaty refers to Article XX of the 1947 GATT and Article XIV of the GATs about the general exception.[89]Under the same BIT protection exception, article 16 can be found, which reads as follows:

Except as given in Article 12, nothing in this Agreement prevents a Contracting Party from implementing or imposing the following measures:

(a) that it deems appropriate for the defense of its vital security interests:

I) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; (b) in accordance with the United Nations Charter's commitments to maintain international peace and stability.[90] As a result, countries should take steps to avoid security threats in the scenarios mentioned above.

Article 22 of the treaty also includes provisions for health, safety, and environmental measures, as well as labor standards.[91] Japan also lists various sectors and sub-sectors in which it can take annex steps, especially in her BIT with the Republic of Argentina. From all of this, it is clear that the Japan BITs contain broad and clear security exceptions.

Other BITs signed by Japan with the Republic of Mozambique have a general and unique security exemption set out in GATT 1994, which reads as follows:

Subject to the condition that such steps are not used in a way that would damage the environment Nothing in this Agreement, other than Article 12, shall be read to prohibit a Contracting Party from implementing or imposing measures that: constitute a means of unfair or unjustifiable discrimination against the other Contracting Party, or a veiled limitation on investments of investors from the other Contracting Party in the Area of a Contracting Party:

---

[89] Ibid, article 15
[90] Ibid ,article 16
[91] Ibid article 22

a) To protect human, animal, or plant life or health; (b) To protect public morality or preserve public order; (c) To ensure compliance with laws or regulations that are not in conflict with the provisions of this Agreement, including those relating to:

I) Preventing misleading and unethical practices or dealing with the consequences of a contract default; (ii) Individual privacy security in relation to the collection and distribution of personal data, as well as the confidentiality of personal records and accounts; or (iii) Safety; protection of personal records and accounts

(d) Which it deems appropriate for the defense of its vital national security interests:

It taken in the event of a war, military conflict, or other emergency in that Contracting Party's or foreign relations; or (ii) relating to the enforcement of national policies or international agreements concerning weapons non-proliferation;

(e) In pursuance of its obligations under United Nations Charter for the maintenance of international peace and security; or

(f) Imposed for the protection of national treasures of artistic, historic or archaeological value.[92]

Over time, the preamble of Japanese BITs began to involve legislative authority of the parties through the use of various steps in order to achieve national public policy. In the 2016 BIT between Japan and Kenya, a security exemption is given if the parties believe it is appropriate to protect their vital security.[93]

Temporary in nature Parties should also take precautionary steps in the event of financial difficulty or to safeguard monetary and exchange policy. Protection from hard circumstances affecting the parties' health, safety, and climate is also possible by safety, environmental, and health-related interventions.[94] BITs negotiated in 2018 and 2020 between Japan and the United Arab Emirates and Japan and the Kingdom of Morocco, respectively, featured separate

[92]Agreement between Japan and republic of Mozambique, article 18, 2013; Japan & oriental republic of Uruguay, article 27, 2005; Japan and Ukraine, article, 19, 2015, concerning the encouragement and reciprocal protection of investment.

[93]Agreement between Japan and Kenya, preamble, concerning the encouragement and reciprocal protection of investment (signed in 2016)

[94] Ibid article, 16 &17;22

exceptions. As a result, various generations of internally consistent treaties can be found in Japan. Prior to the year 2000, Japan BITs were only signed to protect investors, with a few exceptions that only limited the implementation of MFN and NT clauses. All of Japan's IIAs signed after 2000 have environmental protection exemption clauses.

Japan, on the other hand, restricts the extent of the exemption to measures required for the protection of human, animal, or plant life, and instead of chapeau, imposes additional notification requirements and clarifies that such measures shall not be used "as a means of escaping its obligations." In 2020, Japan lowered the prior notification threshold for foreign investment in listed Japanese companies that are applicable to national security from 10% to 1%.[95]

b. South Africa

South Africa is one of the continent's fastest-growing countries. The Countries have signed a number of BITs, as does the rest of the world. Between 1994 and 1998, the South African government signed 15 bilateral investment treaties with developing countries, the majority of which were European countries, in order to promote international investment in the new South Africa.[96]South Africa has been trying to develop BIT models on a regional and continental level. The new Southern African Development Community (SADC) Bilateral Investment Treaty Model, of which South Africa is a member, was designed to reduce the confusion associated with previous agreements by settling state-to-state conflicts with investors rather than state-to-investor disputes. The government has agreed to change its inward FDI policy from the present "freedom of investment model" to one that emphasizes "investment for sustainable development" (The key difference is that the former assumes that all investment is beneficial and encourages economic growth, while the latter needs legislation to align the incentives used to attract FDI

---

[95]Mossallam, Mohammad (2015) : Process matters: South Africa's experience exiting its BITs, GEG Working Paper, No. 2015/97, University of Oxford, Global Economic Governance Programme (GEG), Oxford, pp, 4
ibid

[96] United nation conference on trade and development, investment policy monitor, united nation , issue 24, February 2021, available at https://unctad.org/system/files/official-document/diaepcbinf2021d2_en.pdf , Pp, 4

with the need to ensure that these investments contribute positively to South Africa's long-term development goals.[97]

As a result, the South African government expressed concern in June 2009 that current BITs are built on an obsolete paradigm that prioritizes investor rights over national interests, endangering long-term development.[98]As a result, South Africa has conducted a thorough examination of BITs in order to balance its international commitments under them while also reviewing the government's approach to controlling investment activity in the public interest. The government then started terminating old BITs.

As a result, the Republic of South Africa gave notice to end three of its most important bilateral investment treaties between 2011 and 2014: those with Germany, Switzerland, and, thus, the Netherlands. All three BITs were given precedence because they were subject to immediate renewal provisions that would have been renewed if they had not been terminated on time. Furthermore, the South African government is negotiating other European and non-European BITs with their respective partner countries that do not have unconditional extension provisions and have passed their expiration deadlines.[99]

i. The arrangement of the South African BITs requirements in relation to security exception clauses is being examined.

South Africa has signed 50 bilateral investment treaties (BITs). Twelve are currently in service, eleven have been terminated, and 27 have been signed but are not yet in force.[100]The majority of previous South African BITs have similar mechanisms in place to secure foreign

[97]Mossallam, Mohammad (2015) : Process matters: South Africa's experience exiting its BITs, GEG Working Paper, No. 2015/97, University of Oxford, Global Economic Governance Program (GEG), Oxford, available at, "https://www.econstor.eu/bitstream/10419/196357/1/GEG-WP-097.pdf" p, 4

[98] ibid

[99] Ibid

[100] Lists of South African BITs available at "https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa,"(accessed on 12, February 2021.)

investment.[101]However, the country began notifying other parties of her intention to terminate her BITs.[102]

Article 7 (1) of the BIT between South Africa and Israel stipulated that "Any Party can take any action that is strictly appropriate to maintain or protect its vital security interests. Such steps must be taken and enforced in good conscience, without discrimination, and with the aim of minimizing deviations from the terms of this Agreement."[103]The BIT between South Africa and Ethiopia, which includes some indication in its preamble to that effect, is another BIT that implies some security for the host state:

Recognizing that, when supported by effective domestic policies, investment plays a critical role in ensuring long-term economic growth and development;

ACKNOWLEDGING the Parties' right to control the manner and movement of investments within their jurisdictions on a non-discriminatory basis in order to achieve national policy objectives;

Ensure an overall balance of rights and obligations among investors and host countries;[104]

The BIT between South Africa and Israel authorizes the host states to take steps to protect their fundamental protection, but these measures must be focused on good faith rather than bias. The BIT between Ethiopia and South Africa implies some protection for the host country because it addresses the problem of long-term economic development, which cannot occur without national security protection, and it attempts to balance the rights of host countries and investors.

Apart from these few examples, South African BITs only secure the rights of investors, leaving the rights of host states unprotected. As a result of these factors, the South African government

---

[101] Luke Eric Peterson, South Africa's Bilateral Investment Treaties Implications for Development and Human Rights Dialogue Globalization, On Occasional Papers Geneva, November 2006, available at " http://library.fes.de/pdf-files/iez/global/04137-20200117.pdf" pp,6

[102] By Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa, investment policy brief, no.4, august 2015, available at https://www.southcentre.int/wp-content/uploads/2015/08/IPB4 , p, 4

[103] Agreement Between The Government Of The Republic Of South Africa And• The government of The State Of Israel For The Reciprocal Promotion And Protection Of Investments signed in 2004(not in force), article 7(1)

[104] Agreement Between The Government Of The Republic Of South Africa And• The government federal democratic republic of Ethiopia For The Reciprocal Promotion And Protection Of Investments signed in 2008, preamble

attempted to take action. According to some scholars, such as Paulsen (2011), this uncertainty was caused by bureaucratic conditions, a lack of experience, and the government's inability to carefully evaluate the costs and benefits of the treaties.

The first serious lawsuit, Piero Foresti v. Republic of South Africa, was filed in South Africa in 2007. The Minerals and Petroleum Resources Development Act of 2002 included provisions for broad-based black economic empowerment (BBE).[105]The plaintiffs claimed that the Mineral and Petroleum Resources Development Act (MPRDA) of 2004 amounted to expropriation because it allowed mining companies to pass 26% of their shares to traditionally marginalize South African communities and the complainant also said that they disagreed with those responsibilities in South Africa's BITs. The South African government, on the other hand, maintained that the action was taken to uphold justice and equity, and that it was justified by both international and domestic law. It is an initiative taken by a country to fulfill its national and international human rights commitments. The case was settled against South Africa later that year, in 2010, and the nation paid the price.[106]Then there's South Africa, which is updating all of its investment treaties and developing a new strategy for the future.

For the reasons I listed earlier, South Africa stopped signing BITs after the last BIT in South Africa ended in 2009. South Africa then began to develop a BIT model known as SADC as a member, which attempted to balance the needs of both investors and host states.

The inclusion of security exceptions under article 25, which can be read as follows, gives some indication of this measure:

"25.1. Subject to the condition that such steps are not used in a way that is arbitrary or unjustifiable discrimination in violation of Article (4) Nothing in this Agreement obligates a State Party to pay compensation for implementing or imposing policies that were planned and implemented in good faith:

To safeguard the public's morals and safety;

b) To safeguard the life or health of humans, animals, or plants;

[105]Mossallam Mohammad at note no. 97, p, 7.
[106] ibid

c) To protect living or non-living natural resources that are being depleted; and

d) To safeguard the ecosystem.

25.5. Nothing in this Agreement shall apply to a State Party's measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.

25.5. Nothing in this Agreement applies to steps taken by a State Party in order to fulfill its commitments to maintain or restore international peace and stability, or to protect its national security interests.

25.6. Nothing in this Agreement obligates a State Party to provide or allow access to any information that it decides would jeopardize its national security interests if disclosed.[107]

The topic of sustainable development and regulatory power of states has been added to the preamble of SADC which is essential for determining the treaty's overall intent and objectives and providing the best reference for arbitrators. Article 13 of the SADC[108]Unlike previous BITs, which did not take into account the climate or other aspects of national security, parties are now expected to understand the environment at any stage of their investment activities. Human rights problems are also addressed in the SADC model under article 15. Article 17 of the SADC contains a novel clause relating to investor liability. The country's previous BITs, which did not provide security to the host.[109]Article 20 also states that the treaty does not affect the Host State's fundamental right to regulate, although it does not eliminate any of the investor safeguards' consequences. This clause expressly grants host states the authority to control their internal affairs while remaining compliant with their treaty obligations.[110]

c. INDIA

[107]The 2012 South-African Development Community (SADC) Model bilateral investment treaty (BIT),, article 25(1), (5), (6), available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf , accessed on march 8, 2021.
[108] Ibid article 13
[109] Ibid article 15 &17
[110] Ibid article 13

Since the first century A.D., when merchants traded Indian silk and spices for Ethiopian gold and ivory, Ethiopia and India have had trading ties. As Ethiopia's economy has opened up following the Derg period's closed years, commercial links have increased, especially in infrastructure projects such as ports, highways, power generation, and water supply.[111]The two countries have signed a number of bilateral agreements, including the Air Services Agreement (1967), which was renewed in March 2008, the Cultural Agreement (1983), the Trade Agreement (1997), the Bilateral Investment Promotion and Protection Agreement (2007), and the Educational Exchange Program (2007).[112]

In the early 1990s, India started signing BITs as part of its overall economic liberalization policy, which was introduced in 1991 and had the explicit goal of attracting foreign investment.[113]India has signed a slew of old-style treaties that make it vulnerable to legal challenges. It believes that such treaties, especially BITs, encourage FDI and that the BITs of the time were based on the 1993 model BIT. Later research failed to find any evidence of a connection between FDI and BIT.[114]Since the decision of tribunals based on investment rights has defeated the entire intent of Indian BITs, India has been revising its model BIT since 2001. Then, in 2012, a central government working group was formed to update the 1993 Indian BITs, sparking numerous debates.[115]

The Cabinet approved the new model text for BIT in December 2015, after taking into account public feedback. The drafting process can be best described as a never-ending quest for a middle ground between investors' conflicting interests in protecting their investments and governments'

---

[111] By VinayeAncharaz, Paolo Ghisu and Nicholas Frank (2014), published by international center for trade and sustainable development, development and least developed country, Geneva Switzerland, issue paper no.35, available at https://documents.pub/document/ethiopia-deepening-engagement-with-india-through-better-market-access.html , pp 9.

[112] Ibid

[113]Ranjan, Prabhash; Singh, HarshaVardhana; James, Kevin;Singh, Ramandeep (2018). "India's Model Bilateral Investment Treaty: Is India Too Risk Averse?" Brookings India IMPACT Series No. 082018. August 2018, available at https://think-asia.org/bitstream/handle/11540/8569/India-s-Model-Bilateral-Investment-Treaty-2018.pdf?sequence=1" pp, 10

[114] Jennifer Tobin and Susan Rose-Ack¬erman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties," Center for Law, Econom¬ics and Policy Research Paper No. 293, Yale Law School (New Haven, 2004), available at https://www.iilj.org/wp-content/uploads/2016/11/Ackerman-Foreign-Direct-Investment-and-the-Business-Environment-in-Developing-Countries-2005.pdf ,

[115] ibid

right to regulate in the public interest and to make clear the treaty's clauses that could be interpreted in a variety of ways. There were several improvements between the earlier model BITS of India and the later model BITS of India, but my aim here is to look at changes relevant to national security that can be supported by giving the government regulatory control. Another innovative feature of the Indian new model BIT is the abolition of the MFN clause, which is argued to make the BIT a multilateral treaty.

The purposes of new Indian model BIT are mainly two according to governments claim: to balance investment protection host state's right to regulate and aims to make treaty provision more precise so as to minimize arbitrary discretion.[116]

i. Analysis of 2016 Indian BITs in terms of security exceptions

To begin with, India has signed 86 BITs with other sovereign states (at the time of this research), ranging from her first BIT with the United Kingdom to the most recent one with Brazil in 2020. 74 of these BITs have been terminated, 14 have been signed but not implemented, and 8 are still in effect as of this writing.[117]

The NPM clause is found in Article 11 of the first BIT signed with the United Kingdom: "Despite the terms of paragraph (1) of this article, nothing in this arrangement forbids the host contracting party from taking fair and non-discriminatory steps to protect your fundamental security rights or from behaving in accordance with your legislation in acute emergency situations."[118]

Similarly, BIT between India and Senegal, which was signed in 2008, contains the following provisions about security exceptions:

"No clause of this Agreement shall be construed to prohibit the host Contracting Party from taking any action necessary to protect its essential interests in terms of defense, public health, or

[116]PrabhashRanjanandPushhkarAnand , the 2016 model indian BIT: a critical deconstruction, 38 NW.J. INT.L & B 1 (201-2018), available at "https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss1/1/", accessed on March 2, 2021.

[117] See https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india for a list of Indian BITs. On March 31, 2021, I was able to get a hold of this information.

[118]Agreement for the Promotion and Protection of Investments, U.K.-India, art. 11(2), Mar. 14, 1994, 1995 India T.S. No. 27 [hereinafter U.K.-India BIT],

the prevention of diseases affecting animals and plants, or in the event of an extreme emergency, in compliance with its laws ordinarily and fairly applied on a non-discriminatory basis," says the agreement.[119]Furthermore, the same treaty placed certain limitations under the article 5 expropriation clauses in order to protect legitimate public welfare goals such as public health, protection, and the environment under annex.[120]

ii. Analysis of 2016 Indian model BIT in terms of security exceptions

The preamble of the new [121]Indian BIT began by empowering the country's government to control investment in order to encourage long-term growth that goes beyond investor and investment security. “Nondiscriminatory regulatory measures taken to protect legitimate public interest or public purpose goals such as public health, protection, and the environment shall not constitute expropriation," says Article 5.5 of the new model BIT.[122]In addition, the new Indian model BIT imposes certain responsibilities on investors that were completely absent in the previous model. Article 12 of the model includes a social responsibility principle to protect human rights, labor rights, and the environment.[123]

Unlike the earlier Indian model BIT, which only included critical security exceptions, the new model includes a comprehensive list of exceptions to pursue public welfare goals. Since these exceptions are useful in allowing host countries to take steps to explore non-investment priorities while avoiding foreign liability. The following are list of general exceptions: Measures taken to safeguard public morality or preserve public order; to safeguard human, animal, or plant life or health; to safeguard and conserve the environment, including all living and non-living natural resources; and to safeguard national treasures or monuments of artistic, cultural, or historic significance or archaeological value and Measures taken by a central bank, or monetary authority of a Party in pursuit of monetary and related credit policies or exchange rate policies.[124]As a result, the above general exception clause in the 2016 Indian model BIT is simply drafted and

---

[119] Agreement Between The Government Of The Republic Of India And The Government Of The Republic Of Senegal For The Promotion And Protection Of Investments, article 13, 2018

[120] Ibid article 5(1), (3), (4) of annex.

[121] 2016 Indian Model BIT, preamble

[122] Ibid article 5.5

[123] Ibid article 12

[124]Ibid , article 32(1) (ii), (iii), (iv)

reduces arbitrarily application, but it lacked the chapeau available under GATT XX, which forced states to lift these exceptions in a non-discriminatory manner.

3.6. National security exception under Ethiopian laws

3.6.1. National Security under 1995 FDRE constitution

Security is prioritized in the FDRE constitution, and without it, other goals will be impossible to achieve. As a consequence, the constitution's article 14 declares that "every citizen has the inalienable right to life, personal security, and liberty."[125]

Article 44 (1) of the constitution addresses environmental rights; stating that "all citizens have the right to a safe and healthy environment, and the government has the responsibility to implement these rights."[126]

As a result, the Ethiopian constitution, which is the basis of the nation's fundamental laws, acknowledges the safety of both the nation and its citizens, and all legislations, including treaties, should prioritize the nation's and people's security, including Ethiopian BITs in our case.

3.6.2. Security exceptions under Ethiopian investment proclamation and regulation

a. Investment Proclamation No. 1180/2020

When it comes to areas of investment that are open to foreign investment, the proclamation under article 6 states that an investor can invest in any market, unless it is in violation of the law, morals, public health, or security norms.[127]As a result, every sector is open for investment in Ethiopia, with the exception of petroleum and minerals investments, which are subject to other strict investment regimes. As the term "...an investor can invest in any sector..." implies, "...an investor may invest in any sector". In comparison to prior legislation, this proclamation follows a more liberal stance. Investment, on the other hand, does not have an effect on legislation, public health, or welfare, both of which mean that host countries are protected in any way. Furthermore,

[125]*The Constitution of the Federal Democratic Republic of Ethiopia, article 4, Federal Nagarit Gazeta,1st Year No. 1, Addis Ababa.*

[126] Ibid articl 44.1

[127] Ethiopian investment proclamation No. 1180/2020, article 6,Negarit Gazette of The Federal Democratic Republic of Ethiopia(26th Year No. 28, 2020), Addis Ababa, Ethiopia

the new proclamation imposes a new duty on investors to uphold social and environmental sustainability ideals, such as environmental conservation requirements and social inclusion goals, while undertaking investment projects. Furthermore, Article 5(8) encourages socially and environmentally responsible investments, implying host state security protection.[128]

The proclamation's preamble, which states that "it has become important to further increase and diversify foreign investment inflow to facilitate inward transfer and diffusion of information, expertise, and technology," is another example of the proclamation's liberal approach.[129]

The majority of the reasons for suspension and revocation are mentioned in article 13 of the proclamation; however, these reasons are primarily related to non-compliance with investment obligations, such as failure to disclose details and timely report, as well as fraudulent acts, False information, failure to renew authorization, failure to complete the specified project within the prescribed time frame, and breaking the law are all reasons for suspension. Failure to start the investment on time, unlawful transfer of incentives to a third party, and other factors can lead to revocation. As a result, the nation's security is not explicitly stated as a reason for both the suspension and revocation of investment.[130]

As a result, Ethiopian investment proclamation No. 1180/2020 follows liberal approach by opening several sectors to foreign investors with restricted provisions that provide protection for the nation's security, which may be jeopardized by foreign investment, especially BIT.

b. Investment regulation No. 474/2020

This regulation provides no new material, with the exception of the expansion of Investment Proclamation No. 1180/2020. The regulation's main messages, as the proclamations, are to safeguard investors and investments rather than to offer security, like the provisions suggest. According to some evidence, article 6 included non-exhaustive lists (negative lists) of investment areas for foreign investors, which may include investments that jeopardize a country's and its citizens' protection.[131]Furthermore, the law fails to specifically list and explicitly specify what

[128] Ibid article 5.8
[129] Ibid, preamble
[130] Ibid, article 13
[131]Ethiopian investment regulation, no 474/2020, article 6, Negarit Gazette of The Federal Democratic Republic of Ethiopia(26th Year No. 78, 2020)

the proclamation means by "security protection" as specified in article 6 (1) of the proclamation as well as the situations and conditions under which the national security exemption is invoked.

3.6.3. National security exceptions under Ethiopian bilateral investment treaty

The BITs it has signed with different nations are the most relevant legal instrument to know how the country deals with the issue of national security under BITs, to align the needs of the home and host state (in our case, Ethiopia). Even if Ethiopia has comprehensive domestic legislation to that extent, the 1986 Vienna Convention on the law of Treaties, which is widely recognized as part of customary international law, requires states not to raise domestic laws prohibiting the enforcement of treaty commitments.[132]

As a consequence, it's critical to investigate how Ethiopian BITs deal with national security exceptions. To continue, one should ask oneself the following questions: Are there any national security exceptions or clauses in all Ethiopian BITs? What is the extent of this question's positive response? When we examine the consistency of Ethiopian BITs signed over time, we can see certain basic differences in how security exemption clauses are provided: security exceptions were not included in many of them, especially those that had previously been signed. Few of them had exceptions, such as applying and excluding special clauses like MFN and NT, and a few of them, including those signed after 2016, have undefined security exceptions. I grouped these BITs into two classes depending on the time period in which they were signed to help explain the problem, since they yield different outcomes when dealing with security exceptions and other problems related to it.

i. *Ethiopian BITs signed during 1900s and early 2000*

Ethiopia has signed more than 30 BITs since the first one with Germany in 1964, as indicated earlier.[133]Most of the structures of these BITs are nearly identical; this indicates that, beginning with the preamble, which contains the general goals of BITs, which suggest attracting FID to Ethiopia by using this instrument, they all contain nearly identical provisions. Furthermore,

[132] Vienna convention on law of treaty, article 27, 1986, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf accessed on July 2020

[133] BIT between Ethiopia and Germany signed in 1964

asset-based definitions have been used in the majority of them, as shown by provisions of Ethiopian BITs: take a look at how the Kuwait BITs are defined the word “investment”.[134]

"Investment" refers to any asset that is invested by investors of one Contracting Group... this phrase appears in all Ethiopian BITs if we read them all, and it has implications for national security because all investments, except those that are restricted by domestic law, are available for investment under this agreement. Unlike the Indian government, which has taken a variety of steps, including restricting the definition of investment to enterprises, Ethiopian BITs describe the term "investment" as a general term that we refer to as "asset."

Another basic issue posed in all Ethiopian BITs is investment security and promotion, which includes national treatment (NT), most favored national (MFN), and fair and equitable treatment (FETs). Despite their significance, these issues impose regulatory chill on the nation. Except for a few treaties listed below, Ethiopian BITs signed during the 1900s and early 2000s did not include provisions relating to security exceptions. There are the following:

Another BIT which exceptionally dealt with security exception is that provided under article 7 (1) of BIT between Ethiopia & Israel which contain clear provision about ‘essential national security’ as one can read as follow;

"Either contracting party may take measures strictly necessary for the maintenance or protection of its essential security interests. Such measures shall be taken and implemented in good faith, in a non-discriminatory fashion and so as to minimize the deviation from the provisions of this Agreement. "[135]

This is the first time in Ethiopian BIT that a security exception was explicitly stated, with the caveat that this measure must be interpreted and enforced in good faith, without discrimination, and without breaching the treaty's basic obligations. However, this exception is very specific when it says...The term "ESSENTIAL security EXCEPTION" is used because it excludes all securities that are not qualified by the word "essential." Due to the changing nature of national security, the concept of national security now has a far broader reach.

[134] Agreement between the federal democratic republic of Ethiopia and state of Kuwait for Encouragement Reciprocal protection of investment (signed in September 14, 1996)
[135]Ethiopia- Israel BIT, 2003.

There has also been an effort to include security exceptions in the BIT between the Governments of the Republic of Finland and the Federal Democratic Republic of Ethiopia on Investment Promotion and Protection. This attempt can be found in the preamble as well as article 14 of the BIT .Let me see it as follow:

"That these objectives can be achieved without relaxing health, safety and environmental measures of general application" (preamble) and article 14 (1) & (2):

Nothing in this Agreement is intended to prohibit a Contracting Party from taking any action necessary to protect its vital security interests in the event of war, armed conflict, or other inter2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order national emergency."[136]

While the preamble deals with environmental, health, and safety safeguards for the treaty's success, the clause in this BIT sheds some light on critical security by providing some conditions such as times of war or armed conflict, and other emergency in international affairs that may be difficult to predict. Under article 2 of the same provision, parties taking such measures are prohibited from using arbitrary and unjustified discrimination, and this prohibition extends to public order.

However, in the same year, Ethiopia and Egypt signed a Bilateral Investment Treaty (BIT).[137]There is no equivalent clause in the treaty, demonstrating the country's reluctance to include security exceptions in all of its BITs, also in the same year. Another clause in the Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the mutual promotion and defense of investments, implying a national security concern, is Article 7(2), which states:

If these steps are essential to national security or interest, expropriation and nationalization may be carried out with sufficient compensation, on a nondiscriminatory basis, and in accordance

---

[136] agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments(signed in February 2006)

[137] Agreement For The Promotion And Protection Of Investments Between The Arab Republic Of Egypt And The Federal Democratic Republic Of Ethiopia (Signed In July 2006)

with legal procedures.[138]Some BITs have security-related issues in the preamble but not in the provisions; for example, the preamble of the agreement between the Federal Democratic Republic of Ethiopia and the Government of the Republic of South Africa states:

SECURING an overall balance of rights and obligations between and among investors and host countries;

ACKNOWLEDGING the right of the Parties to regulate, on a non-discriminatory basis, the manner and flow of investments within their territories in order to meet national policy objectives;

RECOGNISING that investment has a vital role in ensuring sustainable economic growth and development, when accompanied by appropriate domestic policies"[139]

This is a smart step because the country will lift defenses based on what is claimed in the preamble when investments and investors pose a threat to their protection, and the preamble is used extensively by arbitrators and other judicial bodies to interpret treaties. Parties should, however, make it explicit in the clause to ensure consistency.

a. *Ethiopian Bilateral Investment Treaty (BIT) from 2016*

So far, I've looked at the arrangements of Ethiopian BITs signed in the 1990s and early 2000s based on how much national security was addressed in the treaty. Now let's take a look at what it's been like since 2016, and see if anything has changed. BITs are currently evolving around the world; earlier BITs that protected the interests of investors are evolving into BITs that balance the interests of investors and the regulatory power of host states by incorporating other policy goals such as sustainable growth.[140]

According to some writers, such as Lorenzo Cotula, the post-corona virus environment would necessitate a new strategic approach to a wider and deeper view of defense, with a focus on

---

[138] Agreement between The Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the reciprocal promotion and protection of investments(signed in October 26, 2006)

[139] Ethiopia -south African BIT

[140] Lorenzo Cotula, Do investment treaty unduly constraint regulatory space? QIL, Vol.9, 2014, available at https://pubs.iied.org/x00128 pp, 25

successful crisis-management mechanisms to counter non-traditional threats. He also suggests that, in order to address the needs of various economic agreements, security-emergency clauses be included.[141]

ii. *Let me now look at the provisions of a few Ethiopian BITs signed since 2016:*

There are some indications in the BIT between the Governments of Ethiopia and the United Arab Emirates Concerning the Promotion and Reciprocal Protection of Investment that the issue of national security is a concern in the BIT;[142]

This preamble differs somewhat from the preambles of earlier BITs signed in the 1990s and early 2000s, as one can see how it contained other investment goals besides security and promotion. It considers how host states control investment to meet their national policy and makes a connection between investment and sustainable development.

Article 19(1) Subject to the requirement that such measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between investors investments were like conditions prevail, nothing in this Agreement shall be construed oblige a Contracting Party to pay compensation by adopting or enforcing measures designed and applied:

(a) to protect public morals and safety;
(b) to protect human, animal or plant life or health;
(b) (c) for the conservation of living or non-living exhaustible natural resource

Article 19 (2) talks about prudential measures which states can take to protect their finances
19 (4) nothing in this Agreement shall apply to a Contracting Party's measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.
19(5) nothing in this Agreement requires a Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its national security interests[143]

[141] Nadia Garcia-Santaolalla at note no. 67.p, 20
[142] agreement between the United Arab Emirates and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments(signed in February 2016)
[143] Ibid article 19

This clause also includes some innovative ideas for protecting national security, such as the country's finances, which are critical to the country's survival, as well as the contracting parties' essential security measures.

The Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar signed another BIT during this time span[144].Both the preamble and the provision of this BIT includes references to national security. In the preamble, it is acknowledged that investments make a significant contribution to the contracting parties' long-term development, especially in terms of increasing productive capacity, economic growth, and technology transfer, desiring to foster corporate obligations and rights under international law, as well as the advancement of human resources. Inclusion of sustainable development and corporate responsibility, which can help to reduce the negative impact of investment on the country, is a new agenda included in BITs of various countries, and it is also a new development in Ethiopia.

Any non-discriminatory regulatory action taken by a Contracting Party that is intended and applied to protect or improve legitimate public welfare goals, such as public health, security, and the environment, does not constitute a violation of the most-favored nation treatment, according to Sub Article 1 of Article 7 of the same BIT.[145]In addition, article 13 stipulated other exceptions, including vital security exceptions in the event of a criminal offense, war, the implementation of national policy, and the protection of international peace and security as mandated by the United Nations.[146]

---

[144] Agreement Between Federal Democratic Republic of Ethiopia and government of the state of Qatar for the Promotion And Reciprocal Protection Of Investments article 7(1) (signed in 2017)

[145] ibid article 7.1

[146] ibid article 13

CHAPTER FOUR

4. Conclusions and Recommendations

4.1. Conclusions

Bilateral investment treaties (BITs) define the terms and conditions in which individuals and businesses from one country can invest in the other. BITs are legally binding agreements that govern how nations handle international investments, addressing issues such as fair and equitable treatment (also known as national treatment or most favored country treatment), expropriation rights, and free movement of capital.

Friendship, Commerce, and Navigation Treaties (FCNs) were the forerunners of these treaties, allowing the host state to treat foreign investments equally to domestic investments, including, in some cases, treatment as favorable as the host nation's own investments. It also spelled out the rules of trading and transportation between the two nations, as well as the rights of foreigners to do business and own land in the host country.

Prior to the establishment of the BIT, foreign investment transactions were governed by both customary international law and national law. There was an attempt to include Investment in international instruments such as the World Trade Organization (WTO) and others. States have also worked hard to develop multilateral investment control instruments. However, their effort failed, and they were forced to resort to BIT. Several BITs provide an alternative conflict settlement process that allows an investor whose interests under the BIT have been abused to go to international arbitration, usually under the auspices of the ICSID, rather than sue the host State in its own courts.

In the 1990s and 2000s, investment treaties, especially bilateral investment treaties (BITs), were very common. Their numbers have exploded, as has the involvement of developing countries. Most governments that were involved in BIT negotiations in the 1990s have checked their early investment treaties and made substantial improvements to their investment treaty strategy as they have learned about the defects, threats, and shortcomings of those first-generation BITs.

Concerns regarding the relationship between investment treaties and FDI flows, as well as the legal and policy implications of signing BITs, have led to a reconsideration of investment treaties.

States are increasingly integrating national security exceptions into international investment deals in order to balance investment rights with other policy concerns.

Ethiopia has ratified over 30 BITs, along with several other countries. These BITs are almost identical in structure, with definitions of terms like investment, as well as provisions comprising investment protection and contracts, dispute settlement processes, and expropriation. There are some slight distinctions between BITs signed in the 1990s and early 2000s and those signed after that. International investment treaties have only recently begun to routinely incorporate national security exceptions in differentiating clauses, in comparison to trade agreements such as the GATTs and WTO, where they are popular. Some ICSID cases are used as examples to explain the principle of national security exceptions under BITs in general and Ethiopian BITs in particular; some of them tried to separate national security exceptions under BITs from requirement under customary international law, while others combined the two in their judgment.

Based on their wording, national security exceptions are classified into two categories: (1) security exceptions modeled after international trade law, and (2) ban and exclusion clauses. The former is an anomaly in the GATT XXI style.

Today, a diverse group of countries, including Japan, routinely include such exceptions in their deals, and others, such as South Africa and India, have taken various measures to balance their country's needs with their investment. In Ethiopian law, however, there are only a few laws dealing with national security exceptions, including BITs. The lessons learnt from BITs, as well as the measures taken by governments in Japan, South Africa, and India to reconcile BITs and national security, highlight the greater difficulties of bringing substance and consequence to general agreements.

The researcher found that:

Despite their significant contribution to Ethiopia's economic development, Ethiopian bilateral investment treaties have largely concentrated on protecting investors and their investments. A

review of all Ethiopian BITs that have been signed up to the date of this analysis demonstrates this. After 2016, Ethiopian Bilateral Investment Treaties (BITs) have attempted to provide a provision that helps the country balance investment and the host state's right to raise national security concerns.

Ethiopian investment laws in general and Ethiopian Bilateral Investment Treaties in particular, lack sufficient and clear national security exceptions. The Ethiopian investment proclamation no. 1180/2020 and the Ethiopian investment regulation no. 474/2020 are the two legal frameworks in force to govern investment in Ethiopia. Except for a few provisions, these laws do not explicitly describe what "national security exception" means when foreigners invest in Ethiopia.

Most countries around the world have taken a series of steps to replace old BITs. Japan, for example, is the perfect examples since its BITs have national security exceptions. Furthermore, India and South Africa were selected for review because, after learning about the costs of BITs, which prevent them from managing their investments according to national policy, and the costs of international arbitration before the ICSID, they have taken various measures to balance national security priorities with foreign investment.

The Ethiopian government maintains the authority to determine which sectors are available to foreign investment and under what terms the investment should be made under Ethiopian investment laws. When a BIT is signed, however, it is normally covered by the treaty, which ensures that the investment is entitled to a set of basic guarantees. As a consequence, even if the Ethiopian government uses its legislation during BIT entry, later BIT clauses control the issue, and unless a security clause is expressly placed in BITs, investment laws, no matter how powerful, are insufficient to protect national security.

4.2. **Recommendations**

The researcher strongly advises the Ethiopian government to strike a balance between international investor rights and national security when it comes to BIT, based on their results. To do so,

1. Ethiopia, like Japan, needs specific and well-defined national security exceptions in its BITs, either as part of the main text or as annexes. If a dispute occurs as a result of its

failure to meet its treaty commitments under BITs due to conditions outside its control, it would be covered.

2. Furthermore, in exercising her sovereign right, Ethiopia needs well defined national security exception in its domestic investment laws, which clearly inform foreign investors about national security when entering into BITs and the circumstances under which Ethiopia can be relieved of its BIT obligations if problems outside the country's control arise.
3. It is not enough to include national security exceptions in future BIT negotiations; the country must also invite current BIT parties to renegotiate old BITs, especially those negotiated prior to 2016, and if the parties fail, the country must terminate the existing BITs, as South Africa did with the bulk of its BITs.
4. Furthermore, Ethiopia, like India and other countries, should use its own BIT model, which will aid in the development of standardized BITs and serve as a rule maker.
5. Ethiopia also requires more in-house expertise and best investment strategy in order to be more successful in negotiating the terms of BITs that enable the country to stick to its long-term investment agenda, including national security.

References

CASES

- Foresti v South Africa, (2010), Award, ICSID, Case No ARB (AF)/07/1.
- *Gas Natural SDG v the Argentine Republic*,(2005),Preliminary Questions on Jurisdiction, ICSID Case No. ARB/03/10
- LG&E Energy Corp. /LG&E Capital Corp./LG&E International Inc. v The Argentine Republic, ICSID case no. ARB/02/1, 3 October 2006.
- *CMS Gas Transmission Company* v. *The Republic of Argentina* (2003), Decision on Objections to Jurisdiction, ICSID, Case No. ARB/01/8
- Enron Corporation Ponderosa Assets, L.P v Argentine Republic ICSID Case No. ARB/01/3, Award (22 May 2007)
- Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award (18 September 2007).
- Continental Casualty Co. v Argentine Republic ICSID Case No. ARB/03/9, Award (5 September 2008)
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14, 102–103 (June 27)

Laws

- Ethiopian investment regulation, no 474/2020, article 6, Negarit Gazette of The Federal Democratic Republic of Ethiopia(26th Year No. 78, 2020)
- Ethiopian investment proclamation No. 1180/2020, article 6,Negarit Gazette of The Federal Democratic Republic of Ethiopia(26th Year No. 28, 2020), Addis Ababa, Ethiopia
- The Constitution of the Federal Democratic Republic of Ethiopia, Federal Nagarit Gazeta,1st Year No. 1, Addis Ababa.
- Agreement between the Belgian Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investments,(signed 26 October 2006)

- Draft Agreement between the Government of the Republic of Equatorial Guinea and the Government of the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investments(signed 11 June 2009)
- Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (signed 24 April 2004).
- Agreement between the Federal Democratic Republic of Ethiopia and State of Kuwait for the Encouragement and Reciprocal Protection of Investments (signed 14 September 1996)
- Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Protection and Promotion of Investments (signed 18 March 1998, entered into force 29 September 1999).
- Agreement between the Government of India and the Government of the Federal Republic of Ethiopia for the Reciprocal Promotion and Protection of Investments (signed 5 June 2005).
- Agreement between the Government of the Czech Republic and the Government of the State of Israel on the Reciprocal Promotion and Protection of Investments (signed 26 November 2003)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People‟s Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments (signed 4 June 2004)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia on the Reciprocal Promotion and Protection of Investments (signed 22 October 1998).
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Sudan on the Reciprocal Promotion and Protection of Investments(signed 7 March 200)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Kingdom of Sweden on the Reciprocal Promotion and Protection of Investments(signed 10 December 2004)

- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments (signed 11 May 1998)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and The Great Socialist People’s Libyan Arab Jamahiriya Concerning the Encouragement and Reciprocal Protection of Investments(signed 27 Jan 2004)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (signed 26 October 2006)
- Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investment (signed 15 April 1999)
- Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investment (signed 25 June 20003)
- Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments (signed 23 Feb 2006)
- Agreement between the Government of the Republic of South Africa and the Government of the Federal Democratic Republic of Ethiopia for the Promotion and Reciprocal Protection of Investments (signed 17 April 2008)
- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (signed 19 November 2009)
- Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments(signed 12 Nov 2004)
- Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments (signed 16 Nov 2000)
- Agreement between the Swiss Federation and the Federal Democratic Republic of Ethiopia on the Reciprocal Protection off Investments (signed 26 June1998)

- Agreement for the Promotion and Protection of Investments between the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia (signed 27 July 2006)
- Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands (signed 1 16 May 2003)
- Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Federal Republic of Ethiopia and the Government of the Islamic Republic of Iran (21 Oct 2003)
- Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments (signed 17 March 2009)
- Lists of japans' BITs available on, "https://investmentpolicy.unctad.org/international-investment-agreements/countries/105/japan" accessed on march 20,2021.
- Agreement between Japan and People's Republic of china concerning the encouragement and reciprocal protection of investment, (signed in 1988)
- Agreement between Japan and government of Russian federation concerning the encouragement and reciprocal protection of investment, (signed in November,1988)
- Agreement between Japan and Hong Kong, (signed in 1997); Japan & Sri Lanka, article 15, 1998; Japan and Mongolia, protocol, concerning the encouragement and reciprocal protection of investment (signed in 2001)
- Agreement between Japan and republic of Argentina, concerning the encouragement and reciprocal protection of investment, (signed in 2018)
- Agreement between Japan and republic of Mozambique, article 18, 2013; Japan & oriental republic of Uruguay, article 27, 2005; Japan and Ukraine, concerning the encouragement and reciprocal protection of investment (signed in 2015)
- Agreement between Japan and Kenya, preamble, concerning the encouragement and reciprocal protection of investment (signed in 2016)
- See,https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india for a list of Indian BITs. On March 31, 2021, I was able to get a hold of this information.

- Agreement for the Promotion and Protection of Investments, U.K.-India, Mar. 14, 1994, 1995 India T.S. No. 27 .
- Agreement Between The Government Of The Republic Of India And The Government Of The Republic Of Senegal For The Promotion And Protection Of Investments (signed in 2018)
- Agreement Between The Government Of The Republic Of South Africa And• The government of The State Of Israel For The Reciprocal Promotion And Protection Of Investments signed in 2004(not in force), article 7(1)
- Agreement Between The Government Of The Republic Of South Africa And• The government federal democratic republic of Ethiopia For The Reciprocal Promotion And Protection Of Investments(signed in 2008,)
- General Agreement on Tariffs and Trade 1947, Oct. 30, 1947, 55 U.N.T.S. 194 (entered into force Jan. 1, 1948), as incorporated in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (entered into force Jan. 1, 1995).

BOOKS,

- Ostelwakder N and Johnson L, *Key Cases from 2000-2010*: *International Investment Law and Sustainable Development* (edn, The International Institute for Sustainable Development)
- *Sornarajah M*, *The International Law on Foreign Investment*, (3rd edn. Oxford University Press, 2010)
- Luke Eric Peterson And Kevin R. Gray, International Human Rights In Bilateral Investment Treaties And In Investment Treaty Arbitration Published by the International Institute for Sustainable Development (2003)
- Zachary Elkins, Andrew T Guzman, and Beth Simmons Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000,
- In Elsig, Manfred, Micheal Hahn, and others, The Regime Complex for Investment Governance: Overlapping Provisions in PTAs and BITs, (Cambridge University Press. Eds. 2020)

- Yoram Z. Haftel& Alexander Thompson, When do states renegotiate investment agreements? The impact of arbitration, Department of International Relations, The Hebrew University of Jerusalem, Israel Department of Political Science, Ohio State University, Columbus, OH, USA, (published online 2017),
- VinayeAncharaz, Paolo Ghisu and Nicholas Frank, published by international center for trade and sustainable development, development and least developed country, Geneva Switzerland, issue paper ,(2014)
- Ranjan, Prabhash; Singh, HarshaVardhana; James, Kevin;Singh, Ramandeep "India's Model Bilateral Investment Treaty: Is India Too Risk Averse?" Brookings India IMPACT Series(No. 08, 2018)
- *Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration Implications for Regional Integration, united nation, economic commission for Africa,*
- Mark McLaughlin (2020), State-Owned Enterprises and Threats to National Security under Investment Treaties, Chinese JIL (Published by Oxford University Press) .
- Mossallam, Mohammad (2015) : Process matters: South Africa's experience exiting its BITs, GEG Working Paper, No. 2015/97, University of Oxford, Global Economic Governance Programme (GEG), Oxford, pp, 4

Article journals, reports and others

- United Nations Conference on Trade and Development: The Protection of National Security In IIAS, UNCTAD Series on International Investment Policies for Development, United Nations New York and Geneva, 2009.
- Mary Hallward-Driemejer, 'do BITs attract FDI? Only a bit… they could a bit', World Bank, DERCG June 2003,
- WakgariKebetaDjigsa ,the Adequacy Of Ethiopia's Bilateral Investment Treaties In Protecting The Environment: Race To The Bottom, Haramaya Law Review 6 (2017): 67-90
- Richard C. Chen,'Bilateral Investment Treaties and Domestic Institutional Reform', Columbia Journal of Transnational Law [55:547)

- UNCTAD, Protection of National security in international investment agreements, UNCTAD, series on international investment policies for development, New York and Geneva, 2009.
- Ayalew Abate, Ethiopia's Bilateral Investment Treaties and Environmental Protection; The Need of Re-Negotiation for Corporate Responsibility De Gruyter Published online(February 23, 2021)
- UNCTAD,Reform of the international investment agreement regime: Phase 2, Fifth session Geneva, 9–11 October 2017
- FlorenciaMontal, Jane Lawrence SumneCarlyPotz-Nielsenr, Vol 57, Issue 6, 2020
- Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, Vol. 24, NO. 3,
- UNCTAD, Bilateral Investment Treaties 1959-199, United Nation, New York and Geneva, 2000,
- Diane A. Desierto (2013), Public Policy In International Investment And Trade Law: Community Expectations And Functional Decision-Making, Florida Journal Of International Law, Vol.16,
- Kavaljit Singh and Burg hard Ilge (ed.), Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices (2016),
- Lorenzo Cotula, XiaoxueWeng, Qianru Ma and Pengren (2016), China-Africa investment treaties; do they work? First published by the International Institute for Environment and Development (UK)2012 SADC Model Bilateral Investment Treaty Template with Commentary, Published by the Southern African Development Community, pp 9-11
- Adel IlsiyarovichAbdullin and LiliiaAzatovnaKhasanova, The concept of "essential security interests" and justification of economic sanctions under WTO law, *RevistaPublicando, 4 No 12. (1). 2017, 450-458. ISSN 1390-9304*
- OECD (2009), Security-Related Terms In International Investment Law And In National Security Strategies, Investment Division, Directorate for Financial and Enterprise Affairs Organization for Economic Co-operation and Development 2 rue André-Pascal, Paris 75116,
- UNCTAD(2009), The Protection Of National Security In IIAs, Series on International Investment Policies for Development, United Nation, New York and Geneva,

- J. B e n to n h e a t h (2020), The New National Security Challenge To The Economic Order, the Yale law journal, vol. 129:1020
- William J. Moon (2012), Essential Security Interests in International Investment Agreements, Article in Journal of International Economic Law,
- William W. Burke-White & Andreas Von Staden (2008), Investment Protection In Extraordinary Times: The Interpretation And Application Of Non-Precluded Measures Provisions In Bilateral Investment Treaties Virginia Journal Of International Law, Vol.48:2.
- Peter Van den Bossche1 and Sarah Akpofure, The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994, Beijing Conference on the New Global Economic Order University of International Business and Economics, Beijing , 26 and 27 September 2019, *WTI Working Paper No. 03/2020*,
- Chao Wang (2019), Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review Published by Oxford University Press, Chinese Journal of International Law 695–712
- Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (Merits) [1986] ICJ Rep 14
- Nadia Garcia-Santaolalla A Proposal To Reform "Security-Emergency" Exceptions In Trade, (2020)
- Andrew Newcomb, General Exceptions in International Investment Agreements, Draft Discussion PaperPrepared for BIICL Eighth Annual WTO Conference 13th and 14th May 2008, London
- Caroline Henckels, Investment Treaty Security Exceptions, Necessity and Self- Defense in the Context of Armed Conflict, Draft – March 2018
- MessayKebede (1997), Japan and Ethiopia: An Appraisal of Similarities and Divergent Courses, Papers of the XILITH International Conference of Ethiopian Studies Kyoto, vol.I.
- A Series of Studies on Industries in Ethiopia, The Embassy of Japan in Ethiopia, March 2008

- United nation conference on trade and development, investment policy monitor, united nation, issue 24, February 2021,
- Luke Eric Peterson, South Africa's Bilateral Investment Treaties Implications for Developmentand Human Rights Dialogue Globalization, On Occasional Papers Geneva, November 2006,
- By Xavier Carim, International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa, investment policy brief, no.4, august 2015,
- The 2012 South-African Development Community (SADC) Model bilateral investment treaty (BIT),, article 25(1),
- By VinayeAncharaz, Paolo Ghisu and Nicholas Frank (2014), published by international center for trade and sustainable development, development and least developed country, Geneva Switzerland, issue paper no.35.
- Ranjan, Prabhash; Singh, HarshaVardhana; James, Kevin;Singh, Ramandeep (2018). "India's Model Bilateral Investment Treaty: Is India Too Risk Averse?" Brookings India IMPACT Series No. 082018. August 2018.
- Jennifer Tobin and Susan Rose-Ack¬erman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties," Center for Law, Econom¬ics and Policy Research Paper No. 293, Yale Law School (New Haven, 2004).
- PrabhashRanjanandPushhkarAnand , the 2016 model indian BIT: a critical deconstruction, 38 NW.J.LorenzoCotula, Do investment treaty unduly constraint regulatory space? QIL, Vol.9, 2014,
- Nadia Garcia-Santaolalla A Proposal To Reform "Security Emergency" Exceptions In Trade: A contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements, research paper.