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The Need to Re-visit Ethiopia's Bilateral Investment Treaties with Particular Emphasis on Investment Dispute Settlement

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Plagiarism Declaration

This thesis is my original work, was not copied, has not been presented for a degree in any other university, and all the sources of the material used have been duly acknowledged.

Endegena Abebe Areru

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Acronyms and Abbreviations

BIT:	Bilateral Investment Treaty
CERDS:	Charter of Economic Rights and Duties of States
FET:	Fair and Equitable Treatment
FNC:	Treaties of Friendship, Navigation and Commerce
GAAT:	General Agreement on Tariff and Trade
ICC:	International Chamber of Commerce
ICJ:	International Court of Justice
ICSID	The Convention on the Settlement of Investment Disputes between States and Nationals of other States
IIA:	International Investment Agreement
IIL:	International Investment Law
ISDS:	Investor-State Dispute Settlement
ITA:	Investment treaty Arbitration
ITO:	International Trade Organization
MFN:	Most Favoured Nation
NAFTA:	North American Free Trade Agreement
NIEO:	New International Economic Order
NT:	National Treatment
OECD:	Organization for Economic Cooperation and Development
PSNR:	Permanent Sovereignty of States over their Natural Resources
UN:	United Nations
UNCITRAL:	Arbitration Rules of the United Nations Commission on International Trade Law
UNCTAD:	United Nations Conference on Trade and Development
UNGA:	United Nations General Assembly
VCLT:	Vienna Convention on the Law of Treaties

Abstract

Dispute settlement provisions contained in International Investment Agreements have been a headache for many developing countries. The main source of the problem emanates from interpretation of some core substantive and procedural standards contained in such agreements by different arbitral tribunals in a very inconsistent manner.

Such inconsistent interpretations have resulted in locking down host states from making regulatory policy reforms that are deemed necessary for the welfare of their citizens. In this context, some countries have started to re-visit their Bilateral Investment Agreements with an aim to re-calibrate or even do away with them completely.

The central thesis of this paper is, therefore, that substantive and procedural standard provisions found in BITs as interpreted and applied by different *ad hoc* arbitral tribunals do indeed have tremendous effect on the regulation of investment domestically and eventually stifle sovereign states from issuing regulatory policy reforms and are thus bottlenecks to development. It argues that Ethiopia should re-think its current BIT regimes and negotiate better ones; totally quitting from BIT regimes like South Africa is, however, not advisable as it would signal a wrong message.

Chapter One: Introduction

1.1. Background of the Study

International Investment Law (IIL) is one of the most dynamic fields of international law and over the years, multiple factors have expanded its reach.[1] The expansion of the reach of IIL has been underpinned by a highly dynamic process involving decentralised negotiations and contestation-including multiple bilateral investment treaty negotiations and the inter-play between arbitral jurisprudence and treaty practice.[2] Nonetheless, the proliferation of treaties and arbitrations has made it disputed as much as it has made it dynamic.[3]

The most contemporaneous issue surrounding Bilateral Investment Agreements (BITs) is that there is growing concern that the imprecise provisions of old-generation BITs create uncertainty and unacceptable risk both to serious investors and to governments, and that these agreements have increasingly become irrelevant to addressing emerging social, economic, environmental and developmental challenges. This has led to a controversy about the interface between investment promotion and regulatory space of host states. Experts and campaigners are thus enquiring substantive standards and dispute settlement mechanisms under BITs and commentators warning of a 'legitimacy crisis' or 'backlash' against an investment regime.[4]

Central to this interface is the fact that public-interest action can adversely affect investments, for instance if new social, environmental or economic regulations increase operating costs or undermine business prospects. Under such scenarios, actions taken in the name of public interest can enter into strain with investment protection standards contained in BITs. Case in point could be *Philip Morris Asia Limited v The Commonwealth of Australia*, where a tobacco company sued Australia over the adoption of a legislation to discourage smoking.[5]

Interpretation and application of IIA by arbitral tribunals is seen as undue bottleneck to regulatory space or even causing 'regulatory chill' on socially desirable action by some critics.[6] For example, the *Maffezini*[7] case has ushered a new version of the application of the Most Favoured Nation (MFN) clause under BIT's

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[1] Lorenzo Cotula, "Do Investment Treaties Unduly Constrain Regulatory Space?" QIL, Zoom-in9(2014), p. 19

[2] J Pauwelyn, 'Regime Composition, Emergence, and Change', in Z Douglas, J Pauwelyn, JE Vinuales (eds), Foundations of International Investment Law: Bringing Theory into Practice (OUP 2014) p. 11.

[3] Supra note 1.

[4] SD Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521. As cited in *ibid.*

[5] UNCITRAL, PCA Case Number 2012-12. Available at <http://www.ita.law.uvic.ca/chronological-list.htm.>

[6] E.g. UNCHR, High Commissioner for Human Rights, Trade and Investment' (2003) UN doc E/CN.4/Subs.2//2003/9, 35

[7] Emilio Agustin Maffezini v The Kingdom of Spain (ICSID, decision on Jurisdiction, Case No. ARB/97/7,) (January 25, 2000); all cited ICSID cases are available online at: <http://www.worldbank.org/icsid/cases/cases.htm> and at: <http://www.ita.law.uvic.ca/chronological-list.htm>.

dispute resolution mechanism and thereby engulf states to commitments that were not initially envisaged. In this nexus a number of countries- South Africa,[8] Indonesia, India and, some Latin America Countries are re-thinking their investment treaties to the extent of terminating them. In light of these developments, this paper aims at identifying if indeed substantive and procedural rights contained in BITs are undermining the sovereign rights of Ethiopia to regulate activities within its own territory.

1.2. Statement of the Problem

It is generally agreed that states have to exercise regulatory autonomy owing to their being sovereign or eminent domains. What are contentious are the limits of these regulatory powers. In this regard, BITs are viewed by critics as constraints on the policy space of host state in favor of foreign investors. BITs have created a situation whereby investors can bring claims against host states if such claims fall under the ambit of BITs.

A growing number of investment arbitration proceedings and a spate of large financial penalties against various host countries have thrust BITs and their dispute settlement mechanisms into the spotlight. Case in point could be *White Industries v Republic of India,* whereby an arbitral panel found that the Indian judicial system did not provide White Industries "effective means of asserting claims and enforcing rights", because of the delays inherent in the Indian system.[9] An interesting aspect of this finding was that the India-Australia BIT did not mention any such obligation. The tribunal borrowed the "effective means" provision present in the India-Kuwait BIT by relying on the MFN provision of the India-Australia BIT. It is this kind of creativity that has unsettled governments, as it encroaches on their policymaking space.

This reflects how the ineffectiveness of domestic institutions in implementing judicial decisions could be in violation of IIL. Indian courts are well known for having a serious backlog and the wheels of justice turn slowly.[10]Due to increased involvement with investment treaty arbitration (ITA), India has decided to review its model BIT.[11]

Unlike other fields of International law which are tarnished by enforcement problems, IIL is backed by multilateral agreements that facilitate the enforcement of pecuniary awards. Thus, the restrictions that IIL places on regulatory space can have a far reaching repercussion.[12]

As such, this paper aims to understand whether selected provisions of BITs are indeed encroaching upon the policy space of host countries thereby subtly paralyzing them from implementing legal reforms without

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[8] Almost every statute promulgated in post-apartheid South Africa states in the preamble that the state has a duty to take positive measures to redress the imbalances of the past.

[9] White Industries Australia Ltd. V The Republic of India (UNCITRAL), (Final Award, November 30, 2011.) paras 105–08.

[10]Cotula, *supra* note 1, p. 22.

[11] Press Release, "Bilateral Investment Treaties, Ministry of Commerce & Indus", Press Info. Bureau, Gov't of India , *available at* <http://pib.nic.in/newsite/erelease.aspx?relid=95593>

[12] Cotula, *supra* note 1, p. 22.

the threat of dispute settlement proceedings. In this regard the main focal point of this paper will be BITs signed by Ethiopia with different countries.

1.2.1. Objectives of the Study

Exploring the complex interrelationship between investment treaties and regulatory space requires tackling two interrelated questions- about the normative contents of investment treaties and, about mechanisms for control over treaty administration, interpretation and compliance. Therefore, the general objective of this paper will be to ascertain if substantive and procedural standards under BITs are bottlenecks to development. There are four specific objectives to be addressed by this paper, these are:

- Whether the MFN, NT, FET and indirect-expropriation, some of the core standards guaranteed by BITs that can be enforced via binding investor-state dispute settlement outside of domestic judicial system unduly constrain the regulatory space of host states.
- Whether BITs reflect the traditional law standards of compensation for expropriation.
- Whether the BITs that Ethiopia has ratified unduly constrain its regulatory space.
- Whether the BITs that Ethiopia has ratified needs re-thinking/re-calibrating.

1.3. Scope of the Study

The cardinal right given by BITs to foreign investors is first the right to invest. Next, the right to bring claims against the host state where the action of the state affects such rights unlawfully. The provisions of many BITs state that if a dispute between the contracting parties cannot be settled, it shall, upon the request of either Contracting Party, be submitted to an ad hoc arbitral tribunal.

The scope of this paper will thus be limited to finding out if these treaties by avowing the right of foreign investors to directly vindicate their rights by bringing claims against host states has locked down the latter from making developmental policy reforms.

1.4. Significance of the Study

The main significance of the study will be to understand the implications of signing BITs. Principally, as a developing country, Ethiopia will be prudent enough to calculate the cost-benefit analyses before signing future BITs and also re-think and/or re-calibrate the current ones. It will also be of great help to future academic researchers by creating scepticism to treaty regimes of such nature.

1.5. Research Methodology

This research is principally based on doctrinal assessment of existing literatures; legal and non-legal instruments pertaining to IIL. Thus, various source materials:

1. Books and journal articles related with IIL will be highly scrutinized.
2. Prominent cases decided by ICSID, NAFTA, UNCITRAL, ICC, ICJ, and other investment arbitral awards will be investigated
3. Important IIL documents like BITs, ICSID Convention, NAFTA, UNCITRAL Rules, and other relevant documents are also the points of emphasis.
4. Website information will be used when necessary to furnish the most up to date information.

Chapter Two

The Regulation of International Investment: A Brief Historical Overview

Introduction

Among the many areas of international law, the law relating to international investment has gone through numerous phases to attain its current state. What is more is, the phenomenal situation whereby during the past twenty-five years there has been an extraordinary increase in the number of agreements concluded relating to the protection or liberalization of foreign investment.

BITs have been signed since 1957 and the conclusion in 2014 of 31 IIAs – 18 BITs and 13 "other IIAs" - brought the total number of IIAs to 3,271 (2,926 BITs and 345 "other IIAs") by year-end.[13]

In this chapter a brief historical account of the regime that sought to protect foreign investment will be discussed. Three separate eras have been identified by scholars in their attempt to trace the history of IIA's.[14]

A similar approach has been taken by the current writer and has categorised the eras as: the early days of the treaty and customary international law regime, began at the end of the Eighteenth Century and culminated until the end of the Second World War; the post-colonial era treaty regime, began after the end of World War II and ended roughly in 1990's with the demise of the Soviet Union, and lastly the global era treaty regime, began in the 1990 and continues until the present.[15]

2.1. The Early Days of the Treaty and Customary International Law Regime

The history of international agreements associated with the protection of foreign investment dates as far back as the 18th Century.[16] Despite the fact that the main concern of the agreements being mainly focused on the establishment of trade relations, some provisions on the protection of property of nationals of one state in the territory of another state were inserted within these agreements.

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[13] United Nations Conference on Trade and Development (UNCTAD), "Reforming International Investment Governance" World Investment Report 2015, (2015), p. 106.

[14] According to Kenneth J. Vandevelde, the history of international investment agreements has passed through three eras: the colonial era, the post- colonial era and the global era. Kenneth J. Vandevelde, "A Brief History of International Investment Agreements", University of Califorinia Davis Journal of International Law & Policy Vol. 12 No. 157 (2005), p.158.

[15] Id.

[16] Id.

The development of BITs began in the 18th century with the signing of treaties of *friendship, navigation and commerce* (FNC)."[17] The first such agreement was the Treaty of Amity and Commerce of 1782, between the United States and France.[18]

These treaties included provisions guaranteeing "special protection"[19] or "full and perfect protection"[20] to the property of nationals of one party in the territory of another party. They also required payment of compensation for expropriation[21] and guaranteed to nationals of one party most favoured nation (MFN) and national treatment (NT) with respect to the right to engage in certain business activities in the territory of the other party.[22] Occasionally, they even provided limited protection for currency transfers.[23]

It's during this time that the principal sources of international law rules concerning the protection and treatment of aliens developed.[24] These rules were primarily part of customary international law.[25] "Customary international law comprised rules for the protection of aliens on foreign territory as part of the law of State responsibility."[26] The basic rules of state responsibility dictates that, whenever an injurious act of a state undermines the rights guaranteed to aliens, either under customary international law or under a treaty, that act gives rise to state responsibility.[27]

In this context, the fundamental principle that has been developed to avow safeguard to foreign investors is the principle of international minimum standard of treatment, at the centre of which is the "principle of fair and equitable treatment (FET)."[28] The status of the minimum standards of treatment has been explained by the arbitral tribunal in *Saluka Investments BV v the Czech Republic which* stated that:

> *It should be kept in mind that the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of 'FET' may in fact provide no more than 'minimal' protection. Consequently, in order to violate that*

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[17] Martha Belete Hailuand Tilahun Esmael Kassahun, "Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration", Mizan Law Review, Vol. 8, No.1 (2014) p. 120

[18] U.S.-Fr., July 16, 1782, 8 Stat. 12.

[19] Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Bol., art. 13, May 13, 1858, 12 Stat. 1003.

[20] Treaty of Friendship, Commerce, and Navigation, U.S.-Arg., art. VII, July 27, 1853, 10 Stat. 1005.

[21] Treaty of Amity, Commerce, and Navigation, U.S.-Congo, art. III, Jan. 24, 1891, 27 Stat. 926.

[22] Treaty of Commerce, U.S.-Yugo., art. I, Oct. 14, 1881, 22 Stat. 963.

[23] *Ibid.* art. II, 22 Stat. at 964.

[24] S. Schill, The Multilateralization of International Investment Law (2009) p. 25

[25] *Ibid.*

[26] *Ibid.*

[27] Draft Articles on Responsibility of States for Internationally Wrongful Acts developed and adopted by the International Law Commission in 2001.

[28] S Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" (1999) 70 *BYIL*99–164.

standard, States' conduct may have to display a relatively higher degree of inappropriateness.[29]

Customary international law, however, offered an insufficient mechanism for the protection of foreign investment. This is basically because, first, some countries disputed that customary international law imposed an international minimum standard on the treatment of foreign investment.[30] Most notorious were the Latin American States that adhered to the Calvo Doctrine. "Under this doctrine, NT, not an international minimum standard, was all an injured foreign investor could raise and national courts were the only forum competent for disputes between foreigners and host States."[31]

Second, even if there was an agreement that such a minimum standard does exist, the scope of application of the international minimum standard was "rather vague and arguably not particularly demanding."[32] It required, as put by the Mexican General Claims Commission in the *Neer* case, that:

> *the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*[33]

Third, if in the event whereby the host state refuses to submit the case to arbitration[34] the only remedy for an aggrieved party under customary international law was espousal.[35] Such course of action was regarded as unsatisfactory for many reasons, most importantly because there was a requirement by international jurisprudence to exhaust local remedies before resorting to espousal.[36]

What is evident from this era is that there was a divergence of political interests between the capital-importing and capital-exporting countries concerning the level of apt investment protection that should be accorded to them.

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[29]Saluka Investments BV (the Netherlands) v the Czech Republic (UNCITRAL), partial award para 292.
[30] Ian Brownlie, Principles of Public International Law (5th ed. ,1998), p.527-528.
[31]Schill, *supra* note 20. p 27.
[32]Vandevelde, *supra* note 12, p. 159.
[33]L. F. H. Neer and Pauline E. Neer (United States) v. Mexico, Opinion, October 15, 1926, U.N.R.I.A.A., vol. IV, p. 61–62.
[34] A state is not subject to the jurisdiction of an international tribunal without its consent. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 177-78 (April 11).
[35]Espousal is a method whereby an injured national's state assumes the national's claim as its own and presents the claim against the state that has injured the national.
[36] Interhandel (Switz. v. US.) 1959 I.C.J. 6, 27 (Mar. 21)

2.2. The Post-Colonial Era Treaty Regime

At the conclusion of the Second World War, there was an effort to create an International Trade Organization, and some of the rules of its charter would have had relevance for foreign investment.[37] In this era there was a shift in international trade from bilateral in to a multilateral one with the creation of the General Agreement on Tariff and Trade (GAAT) in 1947. A separate agreement, the Havana Charter which intended to create a liberalized trade and investment regime and establish an International Trade Organization (ITO) never came to being, mainly due to the failure of the US to ratify it. The failure of the Havana Charter was not only "a shift away from multilateralism in the coverage of investment instruments,"[38] "but also an expression of the fundamental political and ideological conflicts about the place of investment protection in the post-Second World War order."[39]

The FCN culture which began in the Colonial Era also continued in this period. There were however changes made to the contents of these agreements, for instance the post war FCN's guaranteed "equitable treatment"[40], and the "most constant protection security"[41] to property of foreign nationals and companies. Furthermore these properties could not be taken without payment of just compensation.[42]

Immediately following the decolonization of many Latin American and other states, the feeling of nationalism witnessed then was so intense to the extent of being anti-foreign investment and came to regard foreign investment as a form of neo-colonialism. There was also a need felt on the part of the newly independent states to recover control over vital sectors of their economies from foreign investors, largely nationals of the former colonial powers. The result was a wave of nationalisations of foreign property.[43] Gaining economic independence was a tricky task as many of the newly independent states

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[37] M. Sornarajah, The International Law on Foreign Investment, (2010) p. 79

[38]Kurtz, A "General Investment Agreement in the WTO?" 23 U. Pa. J. Int'l Econ. L. 713, 719 (2002). as cited in *Id.*

[39] Schill, supra note 20, p 34.

[40] For instance, the FCN with Greece provided that: "Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party." Treaty of Friendship, Commerce and Navigation, U.S.-Greece, art. I, Aug. 3, 1951, 5 U.S.T. 1829. [hereinafter FCN Greece].

[41] For example, FCN Greece, id, at art. VII (1), provided that: "Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party."

[42] For example, FCN Greece Supra note 35 provided that: Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof. It is understood that withdrawal of such compensation shall be in accordance with applicable laws and regulations consistent with the provisions of Article XV [relating to exchange controls] of the present Treaty. The provisions of the present paragraph shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party. FCN Greece, *supra* note 35, at art. VII (3)

[43] The most notorious expropriations are: the seizure of petroleum assets in Iran in 1951 and in Libya in 1955, and Castro's expropriation of the private sector in Cuba starting in 1959. These waves of expropriations continued in the 1970s. One study by the United Nations has identified 875 expropriations occurring in sixty-two countries between 1960 and 1974. Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46.HARV. INT'L L.J. 67, 68 (2005). 75 n.54. as cited in Vandevelde, supra note 12.

understanding of the notion was understood as in the Hull formula.[50] Thus, compensation is often meant to be *prompt, adequate and effective*, which implies that it should be paid without delay, based on the fair market value and in a freely usable currency.[51] Another group of scholars argued that *appropriate compensation* must be assessed through determination by equitable principles, taking into consideration the relevant situations such as condition of natural resources, state of economy and any possible environmental damage.[52]

When the Socialist Blocs and the developing countries gained majority within the UN, and driven by the 1970s oil crisis, they pushed to introduce a New International Economic Order (NIEO). As a result, on May 1, 1974, the GA adopted the Declaration of the NIEO[53] which declared that states have "full permanent sovereignty" over their natural resources and other economic activities.[54] State sovereignty includes "the right of nationalization or transfer of ownership to its nationals."[55] There was no mention of the duty to pay compensation for expropriation in the declaration. Few months after that, on December 12, by a vote of 120-6, with ten abstentions, the GA adopted the Charter of Economic Rights and Duties of States (CERDS).[56] The CERDS is perhaps the most comprehensive international instrument outlining the economic rights and duties of states.

The bone of contention in this charter was Article 2(2)(c) which provides 'each state has the right to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. This was a significant development as it put the debate with regard to manner of compensation to conclusion. Accordingly, where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought.[57]

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[49] E. Penrose *et al.*: "Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation", p. 352; T. W. Wälde & B. Sabahi: "Compensation, Damages, and Valuation, The Oxford Handbook of International Investment Law, P. Muchlinski *et al.* eds., Oxford *et al.* 2008, p. 1068-1069.

[50] P. M. Norton: "A Law of the Future or a Law of the Past? Modern Tribunals the International Law of Expropriation" (1991) The American Journal of International Law, vol. 85, no. 3, p. 475-476.

[51] UNCTAD "Taking of Property", *UNCTAD* Series on issues in international investment agreements, New York & Geneva 2000, p. 14, available atwww.italaw.com/documents/WorldBank.pdf

[52] *Ibid.*

[53] Declaration on the Establishment of a New Economic Order, G.A. Res. 3201(SVI), U.N. GAOR, 6th SpecialSess., 2229th plen. mtg., U.N. DOC. A/RES/3201(S-VI) (May 1, 1974), reprinted in 13 I.L.M. 715 (1974).

[54] *Id.*, Art. 4(e).

[55] *Ibid.*

[56] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974), reprinted in 14 I.L.M. 251 (1975).

[57] Bernard Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law", 14 Nw. J. Int'l L.& Bus. 327 (1994) p.332

Nonetheless, as this is a UN GA Resolution whose powers are limited to making recommendations under the UN Charter, it remains a soft law instrument. Thus, the apparent dichotomy in the norms that govern foreign investment militates against a conclusion that there exists an international consensus on what amounts to customary international law on foreign investments.[58]

At the same time, efforts to codify the law governing state responsibility for injuries to aliens, which continued under the auspices of the UN, completely failed to produce an acceptable document.[59] The response of the developed countries towards the failure of the UN in coming up with an acceptable document that foresees compensation for expropriation marks the genesis of the BIT's regime in attempting to discipline foreign investment at the international level. In other words, developed countries responded to the threat of uncompensated expropriation by creating BIT.[60]

2.3. The Global Era and the Emergence of BITS

The era of modern investment treaties had begun in 1959 when Germany and Pakistan adopted a bilateral agreement, which entered into force in 1962.[61] The impetus that led to the creation of the BIT on the part of Germany was that it had lost much of its foreign investment in negotiated settlements as a form of war reparation for instigating WW II contrary to the principles of international law.[62]The conclusion of this BIT coincided with the attempts within the Organization for Economic Cooperation and Development (OECD) in the 1960s to mount a multilateral framework for the protection of foreign investment, [63]and its content exhibited striking similarity with the OECD draft.[64]

Abs, in collaboration with Shawcross came up with what is known as the Abs-Shawcross Draft.[65] It proposed a regime that aimed at the comprehensive protection of foreign investment and contained provisions on FET, most constant protection and security, on the protection against direct and indirect expropriation, and on investor-State dispute settlement. It then culminated in the adoption of the *Draft Convention on the Protection of Foreign Property* by the OECD Council on 12 October 1967.[66]

Under Article 1 (a) "Treatment of Foreign Property: "Each Party shall at all times ensure FET to the property of the nationals of the other Parties..." The Draft Convention, although never opened for signature, represented the collective view and dominant trend of OECD countries on investment issues

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[58] *Ibid.*
[59] *Ibid.*
[60] Brownllie, *supra* note 25, p.168.
[61] R. Dolzer and C. Schreuer, Principles of International Investment Law, (2nd ed., 2012,) p. 18
[62] *Ibid.*
[63] Schill, *supra note 20,* p. 40.
[64] *Ibid.*
[65] *Ibid.*
[66] "Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention", *(1967) p.13-15.*

and influenced the pattern of deliberations on foreign investment in that period. The requirement to "ensure FET" in the Draft Convention placed greater emphasis on the standard than earlier instruments.[67] One of the most important purposes in the minds of the early proponents of BITs was to counter the claim made during the 1970s by many developing countries that customary international law no longer required that expropriation be accompanied by *prompt, adequate,* and *effective* compensation.

The initial stage of BITs had faced political predicaments and depicts some similarities with the earlier multilateral projects. Therefore, there were not much BITs until the 1990's. Between 1959 and 1969, the total number of BITs concluded came up to only 75 treaties, another 92 BITs were concluded between 1970 and 1979, and 219 BITs between 1980 and 1989.[68] From 1959 until 1989, the total number of BITs summed-up to 386, and accordingly covered only a relatively small number of bilateral investment relationships worldwide.[69] The implication of this is that there was a certain degree of scepticism on the part of developing countries towards the protection of foreign investment through BITs.

The 1990's were perhaps the year of BITs as the number of countries that engaged in the signing of these treaties showed a drastic change. In the year's from1990 to 2006, a total of 2500 BITs were signed, with almost every country having entered into such treaties.[70] The year 2014 saw the conclusion of 18 BITs, bringing the total number of agreements to 2,926.[71] Ethiopia has also been actively engaged in the BIT practice, and in fact the history goes as far back as 1960's when it signed the first of such treaties with Germany.[72]

The territorial scope of BITs has also widened analogous to their proliferation; and today all the major continents of the world are engaged in the signing of BITs. Today, BITs are very illustrious and accepted instruments to promote and protect the inflow of foreign investment and are frequently used by countries in Africa. Besides domestic law, provisions granting more or less similar opportunities for foreign investors have been included in the various BITs that have been signed by African countries over the years.[73]

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[67] OECD "Fair and Equitable Treatment Standard in International Investment Law" (2004), OECD Working Papers on International Investment p. 4-5

[68]UNCTAD, "Bilateral Investment Treaties in the Mid-1990s" (1998) p. 9

[69] Schill, *supra* note 20, p. 41.

[70]UNCTAD, "Recent Developments in International Investment Agreements (2007).p. 2

[71] UNCTAD, *supra* note 11, p.106.

[72] Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, signed on April 21, 1964, Terminated. A report by UNCTAD shows that "by the end of 2012, the country had signed 29 BITs." UNCTAD (2013), "World Investment Report 2013: Global Value Chains: Investment and Trade for Development", p. 101.Out of the top ten countries which were the main sources of FDI to Ethiopia in 2011/2012, Ethiopia has signed BITs with eight, namely Turkey, India, the Netherlands, United Kingdom, Sudan, China, Germany and Italy. The remaining two countries, the United States (US) and Qatar, are among the main sources of FDI even if they have not signed BITs with Ethiopia. Ethiopian Business Review, Top ten FDI Sources in Ethiopia in 2011/2012, (2013), available at <http://www.ethiopianbusinessreview.com/index.php/statistics/item/88-top-10-fdi-sources-in-ethiopia-in-2011-12> as cited in Martha, Tilahun supra note 13, p. 122.

[73]Mosoti, "Bilateral Investment Treaties and the Possibility of a Multilateral Framework in Investment at the WTO: Are Poor Countries Caught in Between?" 26 Nw. J. Int'l L. & Bus. 95 (2005) p. 97

One important aspect of BITs is that they do not change with change in government of the signatory countries. As indicated by Subedi, unlike local laws which can be changed overnight with the change of government, the protection under BITs will not be affected by the unilateral action of a state.[74] And again, many countries believe that signing of BITs will promote the inflow of foreign investment leading to the proliferation of these agreements.[75]

To wrap up this chapter, it is fair to say that the legacy of the first FCN agreements and the north-south political dichotomies of the post-WW II have had tremendous effects on the evolution of BITs. Despite the fact that customary international law offered mediocre protection against expropriation, the swift move by developed states to come up with BITs in the furtherance of their interests has paid off and now BITs are by far and large the ordering paradigms as regards IIL is concerned.

There is a great deal of similarity in the characteristics of the BITs signed by different countries. Thus, under the next chapter we'll look at what the content, form and shape of the BITs signed by Ethiopia look like.

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[74] Subedi, *supra* note 39, p. 83.

[75] Sornarajah, *supra* note 32, p. 172.

Chapter Three

Basic Characteristic Features of BITs Signed by Ethiopia

Introduction

The feature of the many BITs signed by different countries depicts a great level of similarity. In this regard, some have asserted that the similarity in the content, shape and form of BITs is not a coincidence but rather the result of multilateral aspirations.[76] Generally speaking, there are five substantive areas that BITs cover: (I) definition of investment and investor; (ii) admission of investment; (iii) Treatment of investment; (IV) Protection of Investment; and (v) methods of settling disputes.

Differences, however, exist in the semantics used in different BITs and as such due regard has to be given to such differences. The Tribunal in *AES Corporation* v. *Argentina,* for instance, underscored that "each BIT has its own identity" and thus "its very terms should be carefully analysed for determining the exact scope of consent expressed by its two Parties."[77] The Tribunal gave particular attention to cases whereby "striking similarities in the wording" of BIT should not have the effect of hiding under a false appearance "real differences in the definition of some key concepts... or the precise definition of rights and obligations for each party."[78]

This chapter looks into matters covered in the different parts of BITs, particularly those signed by Ethiopia.

3.1. Preamble

The usual place to look into in pursuance of the object and purpose of treaties is the preamble. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides the general rules of interpretation; and as such a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[79]

The preamble of BITs usually states that the purpose of such treaties is the reciprocal encouragement and protection of investment flows between the two states. The preambular part of BITs reflects the belief by their signatories that foreign investment promotes the economic development of the states into which the investment flows.[80] As a result, all BITs include a prefatory declaration "to the effect that such

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[76] Schill, *supra* note 20, p. 69.
[77] AES Corporation v. Argentina, (ICSID) (Decision on Jurisdiction, April 26, 2005), para. 24.
[78] *Id.*, para. 25.
[79] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html> [accessed 23 September 2015]
[80] Dolzer and Schreuer *Supra* note 55, p. 154.

development takes place as a result of investment flows."[81] For instance the preamble of the Ethiopia-Israel BIT provides that:

> "...the reciprocal promotion and protection of investments on the basis of the present Agreement will be conductive to the stimulation of individual business initiative and will increase prosperity in both States..."[82]

What can be inferred from this is that, multinational corporations which make investment in host states are required to promote economic development, "or at the least, should not conduct themselves in such a manner as to hinder such development."[83]

3.2. Provisions Defining the Scope of Application of the Treaty

The substantive and procedural rights avowed under BITs are available for investors to benefit from if the treaty under consideration is applied *ratione materiae, ratione personae*, and *ratione temporis*. "This requires that a covered investment has been made by a covered investor and that the State's measure that interferes with the investment in question is subject to the treaty in time."[84]There are some common definitions that BITs incorporate; such as investor, investment, and specifications of the temporal component. All these definitions are there with the basic purpose of determining "the scope of application of the obligations States incurs under their investment treaties."[85]

3.2.1. Investors

IIL does not operate in vacuum and thus needs role players for its existence and operation. The major role players which IIL seeks to protect and promote are foreign investors and can either be individuals (physical persons) or companies (juridical persons).

Nationality is the determining factor as to whether an investor is domestic or foreign. In Investor-State treaty arbitration, only foreign investors get the privilege of directly claiming against the State in which they invested. A cardinal requirement of all such arbitral tribunals is that an investor (individual or corporation) be a national of a specific foreign country. Nationality of investors also determines from which treaty it may benefit. If benefit is sought from BITs, an investor must show that it has nationality of one of the state parties. If benefit is sought from The Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) investor has to show that it has the nationality of one of the state parties to the Convention. The relevance of nationality can be looked at from two perspectives.

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[81] *Ibid.*

[82] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investment signed on 26 November 2003, entered into force 22 March 2004.

[83] Sornarajah, *supra* note 32, p. 154.

[84] Schill, *supra* note 20, p. 71.

[85] *Ibid.*

First, guarantees of substantive nature in a treaty will only be extended to the relevant national, and secondly the jurisdiction of international tribunals will be established, among other things, based on the nationality of the claimant.

3.2.1.2. Physical Persons

Under customary international law, the decision of the International Court of Justice (ICJ), dealing with the *Nottebohm* Case[86] somehow has solved the enigma associated with foreign investments made by individuals: the *"genuine link"* between a state and person prevails at the international level.[87]

But under BITs, an individual's nationality is determined primarily by the law of the country whose nationality is at issue.[88] A certificate of nationality, issued by the competent authority of a state is strong evidence for the existence of the nationality of that state but it is not necessarily conclusive.[89] Therefore, the "genuine link" is not the applicable law under BITs regime.

Most BITs that Ethiopia has ratified follows the definition which does not require that any genuine link exist. For instance, Article 1(c) of the Ethiopia-Tunisia BIT provides that:

> "Investors" means in respect of each Contracting party, Physical persons who
> are nationals of this contracting party in accordance with its legislation.[90]

Some BITs require an additional link other than nationality[91] such as domicile or permanent residence. Such an approach may be applied in addition or alternatively[92] to the requirement of citizenship.

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[86] Liechtenstein v Guatemala (Nottebohm), I.C.J, Reports, 1955, p. 4-56.

[87] Id., ICJ Reports, 1955, p. 23; 22 ILR, p. 359, the Court emphasised that, according to state practice, nationality was a legal manifestation of the link between the person and the state granting nationality and the recognition that the person was more closely connected with that state than with any other.

[88]Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2 - Award 8 May, paras. 254-60.

[89]Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20) (Decision on Jurisdiction, 24 September 2008) paras 70-106; Señor Tza Yap Shum v. The Republic of Peru (ICSID Case No. ARB/07/6) – (Decision on Jurisdiction, 19 June 2009) paras 42-77. See also Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba and Timothy T. Wahba v. Arab Republic of Egypt (ICSID Case No. ARB/02/9) (Decision on Jurisdiction, 21 October 2003); Hussein Nuaman Soufraki v. The United Arab Emirates (ICSID Case No. ARB/02/7) Award, 7 July 2004) para 55.

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

[91] See for example Ethiopia-Israel BIT, *supra* note 77, Article 5(a)(1) and (5)(a)(2) provides that:

> "with respect to the Federal Democratic Republic of Ethiopia: a natural person who is a national of the Federal Democratic Republic of Ethiopia who is not also a national or permanent resident of the State of Israel; with respect to the State of Israel: a natural person who is a national or permanent resident of the State of Israel who is not also a national of the Federal Democratic Republic of Ethiopia."

[92] Article 1(b)(I) of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments, signed on October 22, 1998, entered in to force on June 4, 1999, which provides that:

> "investor" means: (I) any natural person possessing the citizenship of or permanently residing in the territory of a Contracting Party in accordance with its laws)."

3.2.1.3 Juridical Persons

Different legal entities can be granted or denied the status of investors through BITs. For example, the BIT between Ethiopia and Finland[93] includes non-profit entities as investors. Non-profit entities may engage in research facility or a hospital, and this may produce desirable forms of investment.[94] This is perhaps the reason for their inclusion as investors in BITs. On the contrary, "states that actively pursue investment activities, either directly or through government-owned entities, including sovereign wealth funds, may wish to ensure that the relevant entities are also covered."[95] The Ethiopia-Kuwait BIT[96], as well as the Ethiopian Investment Proclamation[97] includes the Ethiopian government as investor, for it plays the major role in the economic activities of the country.

The most commonly used criteria for corporate nationality under BITs are incorporation[98] or the main seat of the business[99] ('siège *social*').[100] Alternatively, the place of central administration or effective seat may also be taken into consideration.[101] Control is also another criterion used under BITs.

Since states are free to choose the criteria for the attribution of nationality to legal persons, such criteria – be it incorporation, seat or control, etc. – may vary in accordance with the specific provisions of the

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[93]Article 1(3)(b) of the 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 on February 23, 2006 entered in to force on May 3, 2007, which states:

> The term "investor" means "...any legal entity such as company, corporation, firm, partnership, business association, institution or organization, incorporated or constituted in accordance with the laws and regulations of the Contracting Party and having its registered office or central administration or principal place of business within the jurisdiction of that Contracting Party, whether or not for profit and whether its liabilities are limited or not".

[94] UNCTAD, "*Scope and Definition: UNCTAD Series on International Investment Agreements II*"(2011). p. 81.

[95] *Ibid.*

[96] Agreement Between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investment, signed on September 14, 1996, entered in to force on November 12, 1998, Article (1)(2)(b), in its relevant part states:

> "The term "investor" with respect to a Contracting State shall mean...the Government of that Contracting State..."

[97]Investment Proclamation, 2012, Proc. No 769, Neg. Gaz. Year 18, no.63.

[98] See Article 1(b)(I) Ethiopia-Malaysia BIT, *supra* note 87, relevant part of the article reads:

> "Any legal person, such as corporation, partnership, trust, joint venture, organization, association or enterprise, who undertakes economic activities and are incorporated or duly constituted in accordance with applicable laws of either of the contracting parties";

Article 1 Ethiopia-Tunisia BIT *supra* note 85, reads:

> "Legal persons constituted under laws and regulations of the Contracting Party and which made investments in the territory of the other Contracting Party".

[99] None of the BITs signed by Ethiopia use the main seat of the business alone. 15 BITs signed by Ethiopia use double standard test, i.e. incorporation and main seat of the business. See Article 1(1)(b) of the 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 Investment, signed on February 10, 2000, entered into force on June 6, 2000, it reads:

> The term "investor" shall mean with regard to each Contracting Party: any legal person constituted or otherwise duly organized under the laws of that Contracting Party and has its principal seat and economic activities in the territory of that same Contracting Party

[100] Dolzer and Schreuer, *supra* note 55, p. 47

[101] *Ibid.*

applicable laws of each contracting party.[102] The Ethiopian- Netherlands BIT under article 1(b) (ii) defines national (investor) as,

> "legal persons constituted under the law of that Contracting Party or 1 (b) (iii) Legal persons not constituted under the law of that Contracting Party but controlled by natural persons."[103]

We can see from this article that both incorporation and alternatively control are used as thresholds for ascertaining corporate nationality.

The test of incorporation as criteria has pitfalls like "the reliance on a relatively insignificant link between the legal entity and the country of incorporation."[104] To rectify such snares, BITs set a higher threshold, i.e. not only do they require that the corporation be "constituted or otherwise duly organized under the law" of the home State, but also requires that its "effective economic activities" be in that State.[105]A point worth noting here is that, in cases in which the relevant BIT provides for incorporation as the relevant criterion, tribunals have refused to pierce the corporate veil[106] in order to look at the nationality of the company's owners.[107]

As for ICSID Convention, Article 25(2)(b) provides that its forum is offered to:

> "... any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

Plus, Article 25(2(b) has provided for a leeway to treat a local company as a foreign national because of foreign control.

Investor-State arbitral awards have tried to grapple with different aspects of nationality problem. The level of contradictions and baffling nature of the awards deserve a full-fledged analysis of its own and as such difficult to cover within the scope of this paper.

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[102]International Investment Law: "Understanding Concepts and Tracking Innovations", OECD (2008), p. 19.

[103]Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, signed on May 16, 2003 Entered into force on July1, 2005.

[104] Martha Belete Hailu, "Teaching Material on Economic and Legal Aspects of Foreign Direct Investment, Localization for Ethiopia, Investment Policy of Ethiopia" (2013), p.9. Available at <http://vi.unctad.org/resources-mainmenu-64/teaching-materials-mainmenu-65/71-vi-training-package-on economic-and-legal-aspects-of-international-investment-agreements>

[105] See Ethiopia- India BIT.

[106] A situation in which tribunals put aside limited liability and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts. Veil piercing is most common in close corporations.

[107] Dolzer and Schreuer, *supra* note 55, p. 46.

3.2.2. Investments under Ethiopian Law (Both BITs and National Law)

In this section, we will look at the definition of 'investment' under both international law and Ethiopian law. Generally, for the purpose of IIL, the definition of investment falls under three broad models; asset based, transaction based and enterprise based models. [108]

The 'asset-based' model holds wide variety of specified assets that can be protected under the law or treaty in question.[109] The large majority of BITs define investment broadly using this model. The Ethiopia-China BIT is a classic example of this model and defines investment in the following manner:

> "every kind of asset invested by investors of one contracting party in accordance with the laws and regulations of other Contracting Party in the territory of the latter, and in particular, though not exclusively, includes:
>
> (a) movable, immovable property and other property rights such as mortgages and pledges;
>
> (b) shares, stock and any other kind of property and other kind of participation in company;
>
> (c) claims to money or to any other performance having an economic value;
>
> (d) copyrights, industrial property, know-how and technological process;
>
> (e) concessions conferred by law, including concessions to search or exploit natural resources."[110]

The purpose of such a broad definition of investment is to guarantee that all essential rights and interests necessary for engaging in economic activities in a host State are protected by the substantive protection of the relevant investment treaty.[111] Plus, it "dispels any lingering doubts that may exist from early ideas that intangible property is not protected by international law."[112]

Some BITs contain a narrower definition. Only one Ethiopian BIT has a more restrictive definition of "investment", with South Africa (excludes short-term portfolio investment). Some Ethiopian BITs expressly provide that they cover "indirect" investment. For instance, the Ethiopia-Kuwait BIT states that:

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[108] E. C. Schlemmer, "Investment, Investor and Nationality and Share Holders", Peter M., Federico O., and Christoph S. (ed) International Investment Law, p. 52.

[109] *Ibid.*

[110] Article 1(1), 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 on May 11, 1998, entered into force on May 1, 2000.

[111] Schill, *supra* note 20, p. 72.

[112] Sornarajah, *supra* note 32, p. 190.

"the terms 'investment' shall mean every kind of asset, owned or controlled directly or indirectly by an investor of one Contracting State..."[113]

It is widely accepted in investor-state investment treaty case law that, even without express language, indirect investments are protected by BITs unless treaty provides otherwise, for example, indirect shareholding in a locally-incorporated company. Assume for instance Swiss company holds shares in US Company which in turn owns shares in Ethiopian company. Shares in Ethiopian company are an indirect investment of the Swiss company protected by the Ethiopia-Switzerland BIT. [114]

Additional exception arises where the BIT extends protection to any kind of asset provided that the "investment has been made in accordance with the laws and regulations of the party receiving it."[115] The effect of including such provisions under BITs is that the investment will only be accorded protection in so far as it has obtained any required approval under the national laws of the host Contracting Party. BITs signed by Ethiopia, with the exception of few, include such limitation in the definitional part.

In general, we can conclude that all BITs signed by Ethiopia follow the "illustrative" model while majority of "the BITs attempt to narrow the scope of the term by recognizing only investments permitted under the laws of the host country."[116]

The second model, transaction based model, safeguards the core capital transfer as opposed to the assets owned or controlled by the investor.[117] Under this model, a list of transactions that are covered and considered as investments are provided. This approach considers only the transaction of establishing or liquidating an investment, not the protection of assets.[118] This model is not adhered to by Ethiopian BITs.

The enterprise based model defines the protected investment in terms of the business organisation of the investment through an enterprise.[119] Adherence to such an approach typically confines the protection accorded to a foreign direct investment made by a foreign-owned and controlled company or other types of enterprises.[120] Such approach is followed by the Ethiopian domestic investment laws.

Ethiopian investment proclamation[121] provides under Article 2, that "investment" means expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists." This is an enterprise model approach as the phrase "the establishment of a new

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[113] Ethiopia-Kuwait BIT, *supra* note 91, Article 1(1).

[114] Language arguably limiting treaty coverage to "direct" investments: Article 2 of the Ethiopia-Switzerland BIT the said term [i.e. investment] shall refer to all direct investments made in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made."

[115] Ethiopia-Finland BIT, *supra* note 88, Article 1.

[116] Martha, *supra* note 99, p. 3.

[117] Schlemmer, *supra* note 103, p.52.

[118] Martha, *supra* note 99, p. 4.

[119] Schlemmer, *supra* note 103, p. 52.

[120] *Ibid.*

[121] Investment Proclamation, 2012, Proc. No 769, Neg. Gaz. Year 18, no.63.

enterprise or expansion or upgrading of an existing enterprise" is provided as an element of the definition of the term "investment".

3.2.2.1. 'Investment' under the ICSID Convention[122]

The present legal debate on the precise definition of investment finds its origin from the definition of investment, or the lack thereof, from the ICSID Convention. Article 25 of the ICSID does not define investment and leaves the understanding of the term to the negotiating parties.[123] To this end, the executive committee has a procedure for countries to submit in writing the types of disputes they would or would not consider presenting to the ICSID.[124]This is what can be inferred from the *travaux préparatoires* which asserts that the ICSID negotiations have not based their approach on any specific traditional (economic or legal) etymology.[125]

Unfortunately, the signatories' decision to leave out the term undefined has still caused enigmas. States indeed do define what an investment is under their specific BITs, and through the modalities provided by the ICSID Convention. But, arbitrators quickly realized that consent alone could not make something an investment.[126] There had to also be an objective definition of investment to set the outer bounds of ICSID authority.[127] Without such a definition, countries could use BITs to submit any dispute they chose to ICSID arbitration regardless of the subject matter.[128]

The concept of investment has been looked at from different vantage points by different ICSID tribunal; let's take a look at some of them.

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[122]ICSID is an organization created by the Washington Convention ("the Convention" or "the ICSID Convention ") to facilitate international investment by creating a body to settle disputes between investors and states that may arise from such investments.' International Centre for the Settlement of Investment Disputes Convention, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159. [Hereinafter ICSID Convention], although Ethiopia has signed the ICSID Convention in Sep. 21, 1965 it has not yet ratified it. Ratification notwithstanding, a case can be processed under the ICSID Additional Facility Rules if one of the parties to the dispute is either not a contracting member state or a national of a contracting member state. Proceedings under the Additional Facility are not governed by the ICSID Convention. In accordance with Article 5 of the Additional Facility Rules, however, certain provisions of the Administrative and Financial Regulations of ICSID apply mutatis mutandis in respect of proceedings under the Additional Facility. The Administrative and Financial Regulations are reprinted in ICSID Convention, Regulations and Rules, Document ICSID/15 (April 2006).

[123] ICSID Convention, *supra* note 117, art. 25(1).

[124] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Doc. ICSID/2, 1 ICSID Reports, 1993, 23, para. 27.

[125] Dolzer and Schreuer, *supra* note 55, p. 65.

[126] Grabowski, Alex "The Definition of Investment under the ICSID Convention: A Defence of Salini, (2014) " Chicago Journal of International Law: Vol. 15: No. 1, Article 13. p. 289 Available at: <http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13>

[127] *Ibid.*

[128] *Idid.*

3.2.2.2 Investments as a Complex Interrelated Operations

Tribunals have, on many occasions, asserted that investment naturally comprises of numerous interconnected "economic activities each of which should not be viewed in isolation."[129] The tribunal in *Enron v Argentina*[130] noted that:

> *"an investment is indeed a complex process including various arrangements, such as contracts, licenses and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty."*

At this juncture, it is worth pointing out that costs incurred in furtherance of reaching an agreement to make an investment do not amount to investment, i.e., "the applicability of the BIT presupposes the existence of an investment."[131] The reputable case, *Mihaly v Sri Lanka* stated that:

> *"The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment."*[132] *It went on further to elaborate that, "the Tribunal finds that the Claimant has not provided evidence of such an investment in being (in esse) which qualifies for "full protection and security."*[133] *"Failing to provide evidence of admission of such an investment, the Claimant's request for initiation of a proceeding to settle an investment dispute is, to say the least, premature."*[134]

3.2.2.3 Investment as Defined by Tribunals

Numerous tribunals have attempted to look in to the issue of what constitutes an investment but the leading case on the subject matter is the case of *Salini et al v. Morocco.*[135]The so called *Salini* test or criteria defines an investment as having four elements: (1) a contribution of money or assets; (2) a certain duration ; (3) an element of risk; and (4) a contribution to the economic development of the host state.[136] "The criteria had their origin in the manner in which 'investment' was understood in economic

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[129] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), *(Award,* May 2007) para. 70.
[130] *Ibid.*
[131] Dolzer and Schreuer, *supra* note 55, p. 62.
[132] Mihaly International Corporation V. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) (Award, March 2002) para. 61.
[133] *Ibid.*
[134] *Ibid.*
[135] Salini et al v. Morocco (ICSID Case No. ARB/00/4) (Decision on JurisdictionJul. 31, 2001) para. 52
[136] *Ibid.*

terminology."[137] Since then, numerous cases have dealt with the same issue. Many accept the *Salini* test,[138] while other panels move in a variety of directions.[139]

New emerging cases under the ICSID are still not at a consensus as to what constitutes an 'investment', and therefore give diverging decisions and come up with a new synthesis from that of the *Salini* test. It is therefore fair to leave the point without any conclusion, but it is the opinion of the current writer that a synthesis that totally detracts from the *Salini* test would create more ambiguities rather than solve it.

3.3 Standards of Treatment

The most common standards of treatment in use in BITs are the "most-favoured-nation" (MFN) standard, the national treatment standard (NT) and the standard of "fair and equitable" treatment (FET).[140] Let us now take a look at the nature and purpose of these standards.

3.3.1 Fair and Equitable Treatment and full Protection

Today, the majority of BITs include the FET standard which has become the most common standard for the resolution of investment disputes in recent years, particularly those involving tensions between an investor's rights and the state's legitimate interest in regulating in the public interest.[141] Nonetheless, the concept has been the subject of discussions among scholars and arbitral tribunals alike and has resulted in different formulations as to its scope. A significant part of this discussion centres on whether the standard is:

- A minimum standard of treatment under customary international law;
- A minimum standard of treatment under international law, including all sources; or
- A free-standing, autonomous requirement that should be interpreted according to the plain-meaning of "FET".[142]

The notion of minimum standard of treatment is a norm of customary international law which was enunciated in the 20th century.[143] Root asserted this stance in a prominent article a century ago.[144] In

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[137] Schill, *supra* note 20, p. 66.

[138] See for example, Saba Fakes v. Republic of Turk., (ICSID Case No. ARB/07/20) Award, Jul. 14, 2010*)* para. 110.

[139] See for example, Quiborax v. Bol. (ICSID Case No. ARB/06/2) (Decision on Jurisdiction, Sept. 27, 2012). para. 220.

[140] UNCTAD, "International Investment agreements: Key Issues", Vol 1, (2004) p. 25

[141] Suzanne A. Spears, "The Quest for Policy Space in A New Generation of International Investment agreements", Journal of International Economic Law 13(4), 1037–1075, p. 1052.

[142] Fiona Marshall, "Fair and Equitable Treatment in International Investment Agreements", Issues in International Investment Law: Background Papers for the Developing Country Investment Negotiators' Forum (2007) p. 6.

[143] See Neer case, *supra* note 18.

[144] Elihu Root, "The Basis of Protection to Citizens Residing Abroad", 4 AM. J. INT'L L. 517, 521-22 (1910); He states: "there is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not

comparison to the national standard of treatment that envisages that aliens be put on equal footing with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens.[145] The implication of the standard is clear; while dealing with aliens, states are duty bound to exercise a certain (minimum) degree of caution which customary international law expects them to do.

The international minimum standard has been defined in the following terms: "The international standard of justice...is the standard required for the treatment of aliens by: (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems".[146]

The source of contention "on whether the FET standard is to be measured against the international minimum standard stems from the fact that many BITs and other IIAs link the two standards."[147] Thus far, apart from a case under the North American Free Trade Agreement (NAFTA)[148], other tribunals have been reluctant to look into whether the FET standard is an autonomous standard or that it should be measured against the international minimum standard. In the Pope and Talbot case, the NAFTA tribunal made a ruling that the FET standard is additive to the international minimum standard and that investors under NAFTA are entitled to the international law minimum standard plus the fairness elements.[149] Such a ruling was reached on relying on Article 1105/1 of NAFTA, which states: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including FET and full protection and security".

A different view was, however, enshrined under interpretative note of the NAFTA Free Trade Commission in 2001. Under the interpretive note, the FET standard under Article 1105/1 reflects the customary international law minimum standard and does not require treatment beyond what is required by customary international law. As NAFTA is a regional agreement and considering that it does not represent the majority of states, such interpretation cannot be regarded to have gained wide acceptance.

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conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."

[145] OECD, "Fair and Equitable Treatment Standard in International Investment Law", Working Papers On International Investment, No. 3 (2004), p.8.

[146]The American Law Institute's Restatement (Second) of Foreign Relations Law of the United States, 1965, par. 165.2

[147] Martha, *supra* note 99, p. 20.

[148]Pope & Talbot Inc. v. The Government of Canada, (*UNCITRAL)* Interim Award.

[149]*Id.*, para 110.

Consequently, "the better view would seem to be that, in the absence of a clear indication to the contrary, the FET standard contained in BITs is an autonomous concept."[150]

The BITs that Ethiopia has signed usually contain the unqualified FET standard. For example, Article 3(2) of the BIT signed with India states:

> "Investments and returns of investors of each Contracting Party shall at all times be accorded Fair and Equitable Treatment in the territory of the other Contracting Party."

In such construction, the understanding that the FET standard is an autonomous concept should be adhered to while interpreting it.

It would not be an injustice to assert that in the presence of a nexus of the FET standard with international law, the notion of the standard will be qualified to mean the international minimum standard. For example, Article 3 of the Ethiopia-France BIT provides:

> "Either Contracting Party shall extend Fair and Equitable Treatment in accordance with the principles of international law to investments made by nationals and companies of the other Contracting Party on its territory..."[151]

Such a method avoids a purely semantic approach to the interpretation of the FET standard and is intended to warrant that the interpreter makes use of principles of international law, including, but not limited to, customary international law.[152] Therefore, in such constructions, a tribunal may not go beyond what the sources of international law dictate in seeking the scope and meaning of FET to be.[153]

Most of the BITs signed by Ethiopia also follow another approach whereby the unqualified FET standard is combined with the full protection and security standard in a single clause. Article 3(1) of the Ethiopia-Spain BIT reads:

> "Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall be accorded Fair and Equitable Treatment and shall enjoy full protection and security.[154]

Such a formulation would not modify the interpretation of the FET standard; it merely lists both standards of treatment in the same provision.[155]

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[150]Christoph Schreuer, "Fair and equitable Treatment in Arbitral Practice", The Journal of World Investment and Trade, Vol. 6 No. 3, (2005), p. 364.

[151]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 Investments, signed on June 25, 2003, entered in to force on August 7, 2004.

[152] UNCTAD, "Fair and Equitable Treatment": UNCTAD Series on Issues in International Investment Agreements II. (2012) p. 22.

[153]*Ibid.*

[154] Agreement Between the Federal Democratic Republic of Ethiopia and The Kingdom of Spain On the Promotion and Reciprocal Protection of Investments, signed on March 17, 2009, not entered in to force; see also Ethiopia-Finland BIT, supra note 88, Article 2(2); Ethiopia-Turkey BIT Article II (1); Ethiopia-China BIT, supra note 105, Article 3(1)

[155] UNCTAD, *supra* note 135, p. 21.

When we come to the nature and function of the FET clauses, principally, their inclusion in BITs serves the purpose of filling gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.[156] Rudolf Dolzer asserts "the acceptance of the standard is directly linked to the fundamental moral and legal grounding of the notion of fairness, anchored in a universally accepted sense of justice, but also in classic rules of customary law governing the protection of foreign nationals and companies."[157] In general, arbitral tribunals regularly apply the FET standard in a broad manner, using it as a yardstick for the conduct of the national legislator, of domestic administrations, and of domestic courts.[158] They do challenge it, however, primarily on a pragmatic basis.

From the different holdings of arbitral tribunals, we can identify certain conducts which may be considered as forming the FET standard. The first one is transparency and legitimate expectation of the investor. Transparency and protection of the investor's legitimate expectation are closely correlated. "Transparency means that the legal framework for the investor's operation is readily apparent and that any decision affecting the investor can be traced to the legal framework."[159]

In 2012, the Tribunal in *Electrabel v. Hungary*[160] highlighted that "the most important function" of the FET standard is the protection of the investor's legitimate expectations. Investors make their calculations and decisions in the light of the law of the host state as it is made available to them by the host state, and the investors assumptions about the return for their investment will depend upon the stability and predictability of those laws."[161] "Had the legal order been different, this decision to invest might have been different."[162]

The second component is freedom from coercion and harassment.[163] This set of facts as applied by different tribunals' concerns coercion and harassment by organs of the host state. Coercion and harassment can manifest itself in many forms such as arresting or jailing of executives or personnel; threats of or initiation of criminal proceedings; deliberate imposition of unfounded tax assessments; criminal or other fines; arresting or seizing of physical assets, bank accounts and equity; interfering with, obstructing or preventing daily business operations; and deportation from the host state or refusal to extend documents that allow a foreigner to live and work in the host state.[164]

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[156] Sempra Energy International v. The Argentine Republic (ICSID Case No. ARB/02/16) (Award, 28 September 2007) para 297.
[157] Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" 12 Santa Clara J. Int'l L. 7 (2014). p. 12. Available at: <http://digitalcommons.law.scu.edu/scujil/vol12/iss1/2>
[158] *Ibid.*
[159] Schreuer, *supra* note 145, p 374.
[160] Electrabel S.A. v. Hung. (ICSID Case No. ARB/07/19, Decision on Jurisdiction) (Nov. 30, 2012), para 7.75
[161] Dolzer, *supra* note 152, p. 16.
[162] *Ibid.*
[163] Metalclad Corporation v. The United Mexican States (ICSID Case No. ARB(AF)/97/1) ICSID Additional Facility; Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, (SCC) (AWARD, 19 Dec 2013)
[164] UNCTAD, *supra* note 135, p.82.

The third component is lack of due process[165] and denial of justice[166] Procedural fairness is an elementary requirement of the rule of law and vital element of FET.[167]Denial of justice is traditionally defined as any gross misadministration of justice by domestic courts resulting from the ill functioning of the State's judicial system.[168] This obligation may be violated not only by the courts but also through the actions of the executive.[169]

The fourth component of the FET standard is absence of arbitrariness. FET requires that the host state does not affect the foreign investor's rights without cause. Acts of an official vis-à-vis an investor because of reasons of a personal nature, the host state government acting out of xenophobic motives and more importantly in practice; conduct of the host state that is driven by domestic politics instead of arising out of considerations related to the investment will violate the FET standard.[170] Governmental action will also be suspect in case it is not based on a proper review of facts relevant to a decision.

Another element of the FET standard is good faith. The principle of good faith is recognized as a general principle of law, and thus a source of international law under Article 38 of the Statute of the International Court of Justice.[171] As to the significance of good faith in investment law, it has been said that the principle "permeates the whole approach"[172] to investor protection and, more particularly, that is "at the heart of the concept of FET,"[173] as a "guiding beacon . . . to the obligation[s]."[174]

In general, arbitral tribunals have applied the FET standard in a number of cases. The cases seen above in no way exhaust the different applications of the FET standard. It is to be expected that through time other tribunals are likely to come up with additional dimensions to the notion of the FET standard.

As to the notion of full protection and security, there is a consensus that the standard does not obilige an absolute protection against physical or legal infringements from the part of the host state. A state is rather

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[165] Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/99/6) (Award, 12 April 2002) Para 143; Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, (ICSID Case No. ARB/05/15) (Award, 1 June 2009) ; Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (UNCITRAL) PCA Case No. 2009-23.

[166] For a general description of denial of justice, See Azinian, Davitian and Baca v. United Mexican States, (ICSID)(Award, 1 November 1999) paras 102 and 103:

"102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way...

"103. There is a fourth type of denial of justice, namely the clear and malicious misappropriation of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation international law"

[167] Shreuer, *supra* note 145, p. 381.

[168] UNCTAD, supra note 135, p. 80.

[169] Shreuer, *supra* note 145, p. 381.

[170] Dolzer, *supra* note 152, p. 32.

[171]Statute of the International Court of Justice, art. 36, para. 1, available at, <http://www.icjcij.org/documents/index.php?p1=4&p2=2&p3=0.>

[172] Sempra Energy Int'l V. Argentine Republic (ICSID Case No. ARB/02/16) (Award, Sept. 28, 2007) para. 299.

[173]*Id.* para. 298.

[174]*Id.* para. 297.

obliged to excersise 'due deligence' and will have to take such measure to protect the foreign investment as are reasonable under the circumstances.[175]

The duty to avow physical protection and security may operate in relation to encrochment by state organs or non state acts. Violence by organs of the state was under scrutiny in AAPL V Sri Lanka ,[176] a case in which security forces had destroyed the investment in the course of counter-insurgency operation. The decision of the tribunal was that the acts were unwarranted and excessive.

In AMT v Zaire,[177] Zaire[178] was held liable under the a protection and security clasue in the applicable BIT after incidents of looting by elements of the armed forces.

In conclusion, meeting the legitimate concerns of the investors in regards to legal consistency, stability and predictability remains a key, but not the only, ingredient of an investment-friendly climate in which the host state in turn can reasonably expect to attract foreign investment.

3.3.2 National Treatment

National Treatment (NT) clauses aim at creating a level playing field between local and foreign investors as a prerequisite for equal competition. Such clauses "belong to the core and standard repertoire of BITs."[179] The NT standard serves to eliminate distortion in competition by requiring a level playing field for both national and foreign investors.[180] It is to be noted that "the possibility that national law could actually be less protective for the foreign investor than the general rules of international law is anticipated in the current BITs by the words 'no less favourable', thus recognizing that other rules may be more favourable."[181]

All NT clauses apply once a business is established (post-entry national treatment). This covers both regulatory and contractual matters.[182]

3.3.2.1 Nature of NT

One of the principal characteristics of the NT standard is its relativity. Given that the standard invites a comparison in the treatment accorded to foreign and domestic investors, this makes a determination of its

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[175] Elecrtonica Sicula SpA(ELSI) (US v Italy), ICJ Reports (1989) 15, para 108.

[176] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (ICSID Case No. ARB/87/3), (Final Award, June 27 1990) paras 45 et seq, 78 et seq.

[177] American Manufacturing & Trading, Inc. v. Republic of Zaire (ICSID Case No. ARB/93/1) (Award, Feb 21 1997) paras 6.02 et seq.

[178] Now officially known as Democratic Republic of Congo.

[179] Dolzer and Schreuer, *supra* note 55, p. 198.

[180]UNCTAD, National Treatment, UNTAD Series on Issues in International Investment Agreements, United Nations New York and Geneva, 1999, p. 3.

[181] Dolzer and Schreuer, *supra* note 55, p. 198.

[182] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29) Award, August 27 2009) para. 388.

content dependent on the treatment offered by a host country to domestic investors and not on some *a priori* absolute principles of treatment.

The major issue surrounding the NT is, "what is the meaning of NT where States have sub national authorities exercising constitutional powers to make investment policy?"[183]

Three steps of analysis will be necessary to determine whether the standard has been respected. First, there has to be a determination as to whether the foreign investor and the domestic investor are placed in an analogous situation. Next, it has to be investigated whether the treatment accorded to the foreign investor is at least as favourable as the treatment accorded to the domestic investor. Finally, in the existence of a treatment that is less favourable, it has to be assessed if the differentiation was justified. It has to be noted that, all three analysis requires that the factual and legal circumstances that exist at the time the issue arose has to be taken into account to reach at a solid conclusion.

The yard stick to measure the activities of the foreign investor with that of a domestic one is still unresolved. The tribunal in *Feldman v Mexico* 'in like circumstances' was interpreted to refer to the same business, that is, the exporting of cigarettes.[184] In contrast, the tribunal in *Occidental v Ecuador* referred to local producers in general,' and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken'.[185]

According to *Lauder v Czech Republic*, a discriminatory measure is simply one that fails to provide NT.[186]

The tribunal in in *Siemens v Argentina*[187] explicitly held that:

> The tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.[188]

3.3.3 Most Favoured Nation Treatment

"A clause that is now commonly included in BITs has been handed down from old FCN treaties"[189], and offers for most-favoured-nation treatment (MFN), allowing the nationals of the parties to earn from favourable treatment that may be given to nationals of third states by either contracting state.

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[183] UNCTAD, *supra* note 165, p. 10.

[185]Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11) Oct. 5, 2012) para. 173.

[186] Ronald S. Lauder v. The Czech Republic, (UNCITRAL) (Award, 3 September 2001) para 220.

[187] Siemens A.G. v. The Argentine Republic (ICSID Case No. ARB/02/8) Award, Jan 17, 2007)

[188] *Id.* atpara 311.

[189] Sornarajah, *supra* note 32, p. 204

The ordinary result of the MFN clause in a BIT is to "widen the rights of the investor."[190]The introduction of MFN treatment has been the subject of great predicaments for host states as "foreign investor could latch onto more favourable treatment"[191] avowed in past or future treaties.

As the central agenda of this dissertation revolves around the MFN treatment, this issue will be dealt with in depth in the third chapter of this paper.

3.4 Specific Standards of treatment

BITs usually give standards of treatment that are not contingent upon other standards. The main specific standards of treatment that are given to investors include repatriation of profits, compensation for losses due to armed conflict and compensation for expropriation. This section will briefly look at this standard.

3.4.1 Compensation for Expropriation

Ever since the large scale expropriations that ensued following the First World War,[192] one of the major rights of foreign investors under BITs has been protection against expropriation.

Expropriation can either be direct or indirect.[193] In cases of direct takings, the state, through a decree or other means, expressly acknowledges that it takes or will take the property. Indirect taking refers to a situation in which measures taken by the state tantamount to taking as they result in the effective loss of management, use or control, or a significant depreciation of the value of the assets of the investor.

All BITs contain provisions that prohibit unlawful, direct or indirect expropriation. Article 5(1) of the Ethiopia-Denmark BIT reads:

> Investments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measure having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party.[194]

This notwithstanding, "consistent with the notion of territorial sovereignty, the classical rules of international law have also accepted the host state's rights to expropriate alien property in principle."[195] Thus, expropriation is legal if, it is done for a purpose which is in the public interest,[196] on a non-

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[190] Dolzer and Schreuer, *supra* note 55, p 206.

[191] *Ibid.*

[192] See *supra*, chapter one.

[193] Also known as disguised or creeping expropriation.

[194] Agreement Between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed on April 24, 2001, Put in to force on August 21, 2005.

[195] Dolzer and Schreuer, *supra* note 55, p. 98.

[196] For a comprehensive analysis on this and other issues regarding compensation for expropriation, see Santiago Montt, State Liability in Investment Treaty Arbitration, Global Constitutional and Administrative Law in the BIT Generation, (2009, Chapter 4,

discriminatory basis, in accordance with due process of law, and accompanied by payment of prompt, adequate and effective compensation. [197]

The public purpose principle signifies a means of differentiating takings for purely private gain on the part of the ruler from those for reasons related to the economic preferences of the country concerned. Taking without due process of law would entail a taking in contravention of the principle of equality before the law, fair hearing and other principles of natural justice generally recognised by the world's principal legal systems. Discriminatory taking would entail unlawful discrimination between domestic and foreign investors engaged in like business and in like circumstances as well as between foreigners of different nationalities. The presence of these four conditions in almost all BITs and other IIAs has led some to conclude that the conditions have seeped in to the corpus of customary international law on expropriation."[198]

An issue worth raising as regards the lawfulness of expropriation is whether or not the non-payment of compensation causes the expropriation to be considered as unlawful in case the other three conditions are fulfilled. In this regard some argue that the modern view is that the question of legality is independent of the payment of compensation.[199] Some others observe that numerous awards of the Iran-United States Claims Tribunal "recognize the payment of prompt compensation to be a consideration relevant to the lawfulness of a taking under customary international law."[200]An assessment of the BITs signed by Ethiopia suggests that the four requirements must exist cumulatively for an expropriation to be lawful. Plus, the Hull formula is adopted in BITs signed with both developed and developing countries. "Many of the BITs qualify the term "adequate" as referring to the "market value" of the investment on the day the expropriation measure was taken or publicly known."[201] Whereas the Ethiopia-France BIT and Ethiopia-Kuwait BIT, use the phrase "actual value", the Sweden-Ethiopia BIT, Netherlands-Ethiopia BIT, and Austria-Ethiopia BIT, use the phrase "fair market value" in describing the word "adequate". The

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[197]Article 5 of the 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 reads:

> (1) A Contracting Party shall not expropriate or nationalise directly orindirectly an investment of an investor of the other Contracting Party or take anymeasures having equivalent effect (hereinafter referred to as "expropriation") except:
> (a) for a purpose which is in the public interest,
> (b) on a non-discriminatory basis,
> (c) in accordance with due process of law, and
> (d) accompanied by payment of prompt, adequate and effective Compensation..."

[198] UNCTAD "Expropriation" UNCTAD Series in Issues in International Investment Agreements II. (2012a) p. 27.

[199] Sornarajah, *supra* note 32, p. 364, (he underscores "non-payment of compensation does not make an otherwise lawful nationalisation unlawful. The scope for the illegality of an expropriation in modern law is confined to situations where the expropriation was discriminatory or lacked a public purpose. It is generally accepted that a lawful taking creates an obligation to pay compensation, whereas an unlawful nationalization creates an obligation to pay restitutionary damages."

[200] UNCTAD, *supra* note 193, p. 43.

[201] Martha, *supra* note 99, p. 25.

other[202]BITs Ethiopia has signed use a different terminology and refer to "fair and equitable compensation", meaning the market value of the investment at the time of expropriation.

Concerning the other two elements of the Hull formula, Ethiopian BITs explicitly mention that the compensation must be effectively realizable (paid in a convertible currency) and payment must be made promptly (without undue delay). It is, therefore, fair to conclude that the modes of assessment of compensation Ethiopian BITs follow adheres to the Hull formula.

3.5 Settlement of Investment Disputes

The International Court of Justice has in the past dealt with investment disputes through what is known as diplomatic protection.[203] But, the most adequate and appropriate mechanism to settle investment disputes has been through arbitration. Nearly all BITs contain arbitration clasuses for the settlement of disputes arising from their application between the contracting states.[204]

There are two clauses contained in BITs on dispute settlement: "one offers arbitration between the host state and an investor ; another provides for arbitration between the contracting parties to the treaty."[205]

3.5.1 Investor-State Disputes

In so far as there is no agreement to the contrary, an investment dispute between a foreign investor and a host state would usually have to be settled by the courts of the latter. Ther is no doubt that, from the vantage point of the foreign investor, such an arrangement is not an appealing way out. "Where the money involved in the dispute is substantial, the possibility that the executive branch may infiltrate and unduly influnce the out comes of the court proceedings is high."[206] In fact, case law shows that, courts themselves may be the culprits of the purported violations of the investors rights.[207] For this and other reasons, domestic courts are not a viable means of settling investment disputes. That is why another method, that is, the possibility for the foreign investor to take investment disputes directly to arbitration, concilitaion or mediation is crafted. From among these, the prominently used means of settling investor-state disputes is arbitration.

Nearly all BITs provide for international arbitration between investors of one Contracting Party and the other Contracting Party, albeit sometimes with important qualifications. Investor-State arbitration was intended to provide a mechanism for claimants to pursue claims that previously had only been possible

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[202]With Denmark, Russia, Turkey, Spain Sudan, UK, Malaysia Israel and Benelux.

[203] See Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain), Judgement, 5 February 1970, ICJ Reports (1970) 44; Case Concerning the Electronica Sicula SpA (ELSI) (US v Italy), Judgement, 20 July 1989, ICJ Reports (1989) 15.

[204] See Ethiopia-Netherlands BIT *supra* note 98, Article 9.

[205] Dolzer and Schreuer, *supra* note 55, p.234.

[206]Id., p. 235.

[207]*Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07) (Award June 30 2009)

through diplomatic espousal, a lengthy process subject to political pressures. BITs allow qualifying investors to go to neutral arbitration against host state with or without prior contractual arbitration clause. All Ethiopian BITs contain an investor-state dispute resolution clause, providing for international arbitration. Article 9 of the Ethiopia-Netherlands BIT reads:

> *"(1) Disputes which might arise between one of the Contracting Parties and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall, whenever possible, be settled amicably between the parties concerned. (2) If the dispute [between one of the Contracting Parties and an investor of the other Contracting Party] has not been settled within a period of six months from the date either Party requested amicable settlement, the dispute shall at the request of the national concerned be submitted to: a) the competent court of the Contracting Party in the territory of which the investment has been made; or b) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States entered into force on October 14th, 1966 after accession by the Contracting Parties; or c) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph 2 b) of this Article; or*
>
> *d)an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)".* [208]

The most essential characteristics under Investor-State arbitration is that remedies are usually pecuniary and sometimes non-pecuniary remedies are sought, unless treaty provides otherwise. Generally, investors most commonly seek compensation.

Investor-state arbitrations (under IIA's) are very recent phenomenon. The first is thought to be *AAPL* (of Hong Kong) *v. Sri Lanka*, which ended in 1990. About 500 since then have followed suit. Investor-state arbitration happens across the world, but especially in NAFTA countries and South America, and increasingly in Africa and Eastern Europe.

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[208] Ethiopia-Netherlands BIT, *supra* note 98.

As of 2013, there had been 95 States that had been sued in investment treaty arbitration. There is one known case against Ethiopia to date, by a French investor under Ethiopia-France BIT, tribunal however denied jurisdiction.[209]

[209] Compagnie International de Maintenance (CIM) v Ethiopia, UNCITRAL. According to the tribunal the contract and the debt owing to the claimant did not meet the BIT's requirements for an 'investment', when interpreted through the ICSID criteria.

State) to extend rights and benefits granted in a specific context to any third State C. The consequence of the MFN clause in the treaty between A and B[221] is that State B can invoke and rely on all benefits State A grants vis-à-vis State C as long as the granted benefit is within the scope of application of the MFN clause in the relationship between A and B.[222]

There are a few general principles that are related to the MFN clause. First is the principle of *res inter alios acta*[223] which touches upon whether a more favourable treatment in a third-party treaty referred by recourse to the MFN clause can affect the rights of an investor who is not a party to the treaty. Second is its relative nature.[224]It's relative in the sense that a comparison has to be made between two foreign investors or investments to determine the existence of discrimination.[225] Another nature is its coverage to both *de facto* and *de jure* discrimination[226], i.e. prohibition of discrimination on the basis of nationality, suggesting the possibility of discrimination on other objective grounds.[227] Moreover, "it requires a comparison between two foreign investors in like circumstances, being therefore a comparative test not contingent to any arbitrariness or seriousness threshold."[228] Another very important nature of MFN clause is that the principle of *ejusdem generis*[229]governs it, "in that it may only apply to issues belonging to the same subject matter or the same category of subjects to which the clause relates."[230]

The main objective of the MFN clause in BITs is to avoid discrimination among signatories.[231] Over and above, MFN clauses[232] multilateralise the bilateral inter-state treaty relationship and harmonize the

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[221] Schill, *supra* note 20, p. 126, The treaty containing the MFN clause between A and B is designated as the "basic treaty" because it contains the basis for incorporating more favourable conditions granted in a third-party treaty into the treaty relationship between A and B.

[222] *Ibid.*

[223] *Res inter alios acta* (Latin): "a thing done between others". If answered in the negative, the investor could not invoke the provision in the third party provision. A third party treaty "independent of and isolated from the basic treaty," can't legally affect the relation between the parties- it would be *res inter aliso acta.* This discussion has practical impact on the application of the MFN clause. If and only if the third-party treaty deals with a subject matter to which the basic treaty, the beneficiary can invoke the MFN clause in the basic treaty for more favourable treatment. See *Maffezini*, supra note 6, para. 45.

[224] Martha, Tilahun, *supra* note 13, p. 123.

[225] *Ibid.*

[226] There is discrimination *"de jure"* when the measure formally targets the covered foreign investor. There is discrimination *"defacto"*, when the measure, while apparently being of general application, only affects the covered foreign investor.

[227] Martha, Tilahun, *supra note 13, p. 123.*

[228] UNCTAD, *supra* note 193, p. 23.

[229] *Esjudem generis* is "[a] canon of construction holding that when a general word or phrase follows a list of specific words, the general word or phrase will be interpreted to include only items of the same type as those listed." Black's Law Dictionary p. 594 (9th ed. 2009). The *esjudem generis* principle essentially restricts any broad words or phrases by the preceding list. *Id.* The International Law Commission's ("ILC") Draft Articles on Most-Favoured-Nation Clauses to the UN General Assembly endorsed the doctrine of *esjudem generis* when interpreting most-favored-nation clauses. Draft Articles on Most-Favoured-Nation Clauses, 30 Y.B. Int'l L. Comm'n 27 (1978), Commentary to Articles 9 and 10, para. 1.

[230] UNCTAD, *supra* note 214, p. 24.

[231] *Id.*, p. 14 (explains that "foreign investors seek sufficient assurance that there will not be adverse discrimination which puts them at a competitive disadvantage. Such discrimination includes situations in which competitors from other foreign countries receive more favourable treatment. The MFN standard thus helps to establish equality of competitive opportunities between

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The Need to Re-visit Ethiopia's Bilateral Investment Treaties with Particular Emphasis on Investment Dispute Settlement

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protection of foreign investment in a specific host state.[233]MFN clauses in BITs are of a particularly general variety.[234] Although in some treaties they will be restricted in their operation to a particular article, overwhelmingly MFN clauses in BITs are generalized promises of MFN treatment with respect to all areas addressed by the BIT, modified sometimes by certain limited carve outs.[235] The voracious nature of the MFN clause under BITs[236] has caused numerous debates especially with regard to dispute settlement issues.

An epitome of a general MFN clause as envisaged under Article 3(2) of the Ethiopia –Netherlands BIT reads:

> Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investment of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.[237]

Other breeds of BITs[238] with general MFN clauses provide that the treatment accorded to the investor be applied in relation to "the management, maintenance, use, enjoyment, or disposal of the investment."[239] Consequently, "different tribunals have reached different conclusions as to whether dispute resolution may be considered to be a normal part of the 'management, maintenance, use, enjoyment, or disposal' of investments."[240] The voracity of such clause is "in that nowhere do they define the precise meaning of the word 'treatment', nor do they specify whether the scope of the MFN obligation comprises all or merely some of the matters covered by the treaty."[241]

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investors from different foreign countries. It prevents competition between investors from being distorted by discrimination based on nationality considerations.")

[232] See Parker, Stephanie, *supra* note 209, p. 34 (providing that there are 4 types of clauses that are found within BITs) "1st: clauses that explicitly affirm they are intended to apply to dispute settlement provisions. 2nd: Broad Clauses that refer generally to "all matters," "all rights," or "treatment," without express mention of dispute settlement provisions. 3rd: Narrow Clauses that make no specific reference to dispute settlement provisions. 4th: clauses that expressly prohibits application to dispute settlement provisions); See also Julie A. Maupin "MFN-Based Jurisdiction in Investor–State Arbitration: Is There Any Hope for A consistent approach?" (2011), 14 Journal of International Economic Law1, p. 163.

[233] Martha, Tilahun, *supra* note 13, p. 125.

[234] Cole, *supra* note 206, p. 557.

[235] *Ibid.*

[236] Maupin, *supra* note 227, p. 165 (notes that these treaties do not specify the precise scope of their application.)

[237] Ethiopia-Netherlands BIT, supra note, 98.

[238] See for Example Ethiopia-Kuwait BIT, *supra* note 91, Article 4(2); Likewise, the BITs Ethiopia has signed with Islamic Republic of Iran, Germany, Kingdom of Spain, the State of Israel, Equatorial Guinea, Republic of Tunisia, People's Democratic Republic of Algeria, and the Republic of Austria encompass similar words.

[239] Maupin, *supra* note 227, p. 165.

[240] *Ibid.*

[241] *Ibid.*

There are some BITs that provide either explicitly or implicitly that the MFN clause be applied to dispute resolution provisions.[242]

Some other BITs specifically mention that the MFN clause be applied to dispute settlement and thus categorized as broad MFN clause. For example, Article 3(3) of the UK-Ethiopia BIT reads:

> Except provided otherwise in this Agreement and for the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 10 of this Agreement.[243]

Whereas the conventional mode of drafting MFN clause is amalgamating it with the NT standard, some BITs sew it with the FET standard. Two paragraphs are used here; one requires the contracting parties to extend FET to one another's investors. The other specifies that 'such treatment'—referring back to FET—shall in no case be less favourable than that accorded by the contracting parties to their own investors or the investors of third states.[244] See for example Article 3 of the Ethiopia-Russian Federation BIT, it reads:

1. Each Contracting Party shall ensure in its territory FET of the investments made by Investors of the other Contracting Party and activities in connection with such investments and exclude the use of discriminatory measures that might hinder management, maintenance, use, enjoyment, extension and administration of investments.
2. The treatment referred to in paragraph (1) of this Article shall not be less favourable than that granted to the investments and activities in connection with such investments by its own Investors or Investors of a third state.

Such clauses create confusion for they stitch the relative standard of MFN treatment to the objective standard of FET, and it is not clear in what way the two are supposed to interact.[245]

4.2. Interaction between Substantive and Procedural Provisions of BITS: Particular Emphasis on MFN Clauses in Dispute Settlement

Traditionally, the MFN clause had been relied on regarding substantive[246] rights. But now, from the general wording of most MFN clauses arises the problem of competing interpretation as to whether or not

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[242]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 on October 26, 2006, not entered into force. Article 4(1) reads: In all matters relating to the treatment of investments, the investors of each Contracting Party shall enjoy national treatment or most-favoured nation treatment in the territory of the other Contracting Party.

[243] he Ethiopia-UK BIT, *supra* note 192, under Article 8 talks of dispute settlement between an investor and the host state. Therefore, the provision contains a broad MFN clause as it is applicable with regard to the settlement of investor-state investment disputes.

[244] Maupin, *supra* note 227, p. 166.

[245] *Ibid.*

the parties intended the clause to extend to dispute resolution regimes. The lively debate evoked by *Maffizeni* and subsequent decisions of arbitral tribunals, which often conflict, illustrate the great importance ascribed to the effect of MFN clause to dispute settlement mechanism. Given the existing uncertainty,[247] disquiet,[248] and fear of undesirable "treaty shopping", this thorny area"[249] yet awaits consensus. Let's see how it has been applied thus far with particular focus on Ethiopian BITs.

3.2.1. Application of MFN clauses in procedural matters and Practices of International Arbitral tribunals

Four types of MFN-based jurisdiction questions may arise in investor–state arbitrations.

4.2.1.1 Alterations to Arbitral Procedure

Under this category of cases a claimant will attempt to make use of a BITs MFN clause in order to jump procedural hurdles by importing from another comparator treaty with less stringent procedural prerequisite to arbitration.[250] The hurdles sought to be avoided could relate to the use of domestic courts as forum for settlement of the dispute or longer consultation period before resorting to arbitration or adjudication.

In *Maffezini, Simens*[251]*, Camuzzi, Gas Natural, Suez and National Grid*, the respective claimant(s) successfully invoked MFN treatment and relied on dispute settlement provisions in other BITs to which the host state had consented that merely set forth a six- month negotiation period as opposed to eighteen – months.[252]

4.2.1.2 Extension of Temporal Scope of Application of Arbitral Clause

Under this category, a claimant might rely upon the general temporal scope of some comparator treaty under which a tribunal would, on the facts, have jurisdiction over the dispute in order to overcome the

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[246] See Maupin, *supra* footnote 227. Here, the beneficiary of the MFN clause invokes it in order to obtain the benefit of some more favourable substantive treatment that has been granted by the host state to third state's investors via the host state's domestic legislation. Under a second scenario, the claimant invokes a treaty's MFN clause in order to import into the treaty, the more favourable substantive protections that have been granted by the host state to some third state's investor by means of a separate treaty concluded with the third state.

[247] UNCTAD: "Development in International Investment Agreements in 2005", IIA MONITOR No. 2 (2006) p.9.

[248] Telenor Mobile Communications A.S. V Republic of Hungary (ICSID, Case No. ARB/04//15) (Award 13 September 2006), para.89.

[249] Freyer, Dana H. and Herlihy, David: "Most-Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just how "Favoured is "Most-Favoured"?" Foreign Investment Journal, p.58.

[250] Maupin, *supra* note 227, p. 168.

[251] *Siemens AG v. The Argentine Republic* (ICSID, Case No. ARB/02/8,) Decision on Jurisdiction, 3 August 2004), paras 105 and 104 et seq (Argentina argued that the requirement in Article 10(2) of the Germany-Argentina BIT only alleviated the local remedies rule and could thus be implicitly waived. It contended further that this cooling-off period touched the core of its consent to arbitration and pertained to "sensitive economic and foreign policy issues". The tribunal noted that the dispute may possibly be settled on the domestic level pursuant to this provisions. Still, it held like all other tribunals that the clause at dispute only required the passing of time and was thus "not compatible to the local remedies rule.")

[252] The respective respondents contested jurisdiction on the ground that the requirement to file a legal action at its national courts prior to the institution of arbitration and to wait until either the competent court had ruled on the dispute or eighteen months had expired with no decision.

tribunal's lack of jurisdiction *ratione temporis* to hear the dispute under the basic treaty.[253] Such method was once attempted under investor-state arbitration[254] to apply a BIT retroactively which was, however, denied by the tribunal.

4.2.1.3 Expansion of Jurisdiction to "New" Claims

If the subject matter jurisdiction of an arbitral tribunal is deemed to be narrow under the basic treaty's dispute settlement clause, an investor will try to overcome it by importing via the MFN clause, broader subject matter jurisdiction granted under some comparator treaty. This scenario manifested itself particularly in Communist-era arbitration clauses, where international arbitration was allowed only regarding the amount or method of compensation in case of expropriation. This category can also be applied to import 'umbrella clauses'[255] from the comparator treaty to the basic treaty.[256]

4.2.1.4 Changes to Arbitral Forum or Reliance on Specific Type of Arbitration

This category comprises those that would rely upon a comparator treaty in order to change the forum or displace the entire dispute resolution system selected by the basic treaty. Such recourse has not yet happened thus far in investment arbitration case law.

4.3. Assessing the Ethiopian BITS

In light of the above discussions, let us now investigate the Ethiopian BITs with the purpose of understanding circumstances of 'treaty shopping' whereby an investor can possibly use BITs signed by Ethiopia, other than the investor's home state, to benefit from treaty obligations entered by Ethiopia with other partners.

4.3.1. Circumvention of Six Months Waiting Period

Most Ethiopian BITs[257] provide for six months 'cooling off' period before a dispute can be submitted either to national courts or international arbitration tribunal. This being the case, the BITs signed with the UK[258],

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[253] Maupin, supra note 215, p.169.

[254] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/00/2) (award, may 29 2003) para. 69.The tribunal refused the claimant's attempt, stating that 'matters relating to the application over time of the Agreement [. . .] due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties'...., See also Anglo-Iranian Oil, for the invocation of such method under state-state dispute resolution context.

[255] Umbrella clauses are clauses through which the contracting parties assume-as a matter of treaty law-additional substantive and/or procedural obligations with regard to undertakings contained in instruments extraneous to the treaty. Tracisio Gazzini and Attila Tanzi "Handle with Care: Umbrella Clauses and MFN Treatment in Investment Arbitration" 14 The Journal of World Investment andTrade, (2013), p. 985. As cited in Martha, *supra* note 99, p. 138

[256] In the Salini case, the investor intended to borrow the dispute resolution clause of the Jordan-US and Jordan-UK BIT by virtue of the MFN clause contained in the Italy-Jordan BIT to "widen" the consent to arbitration to contract claims which was not provided in Article 9(20) of the basic treaty. But the tribunal didn't address this issue. Nonetheless, given the more narrowly worded MFN clause than in *Maffezini* and lack of submission from which the common intention of the parties to extend MFN treatment to dispute resolution might have been established, the tribunal denied the claimants' request.

[257] With Algeria, France, Iran, Israel.

Finland, and South Africa provide for a shorter consultation waiting period of three months before the same could be done. By far the shortest 'cooling off' period within the Ethiopian BITs framework is provided in the BIT with Austria.[259]

It is thus possible for investors from other BITs to circumvent the six months 'cooling off' period and rely on their basic treaty's MFN provisions to claim a more preferable (shorter waiting /consultation period) as found in the Ethiopia-Austria BIT.

4.3.2. Change to Arbitral Forum

Sometimes BITs may provide for dispute settlement mechanism short of type of arbitration which the investor may opt from, such as ICSID, ICSID Additional Facility, Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC). In such circumstances, the question would be, is it possible for the investor to invoke the MFN clause to seek benefit of 'investor's-option' offered in a third-party treaty?[260]

In this context the BIT Ethiopia has signed with Denmark[261] could be a case in point. Although usage of the term "may" does not signify a strong obligation on the part of the investor, one would be curious to see the outcome of a claim based on MFN clause of this basic treaty from other BITs signed by Ethiopia which does not have such a requirement to agree.

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[258] Ethiopia-UK BIT, *supra* note 192, Article 8 reads:

> Any dispute between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which has not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to the competent courts or administrative tribunals of the Contracting Party, to the dispute, or to international arbitration if the national or company concerned so wishes, Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and protection of investment, signed on 19 November 2009.

[259] Article 12(2) of Agreement Between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments, reads: A dispute may be submitted for resolution…after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute. Signed on November 12, 2004, entered into force on November 1, 2005.

[260] Emmanuel Gaillard "Establishing Jurisdiction through A Most-Favoured-Nation Clause" International Arbitration Law, (2005), 233New York Law Journal *105*, p. 123.

[261] Ethiopia-Denmark BIT, *supra* note 189, Article 9 reads:

> 2. Where the dispute is referred to international arbitration, parties in the dispute may agree to refer the dispute either to:
> a) the International Centre for Settlement of Investment Disputes (ICSID) …
> b) the International Centre for Settlement of Investment Disputes under the rules governing Additional Facility …
> c) an international ad hoc tribunal…

4.3.3. 'Period of Limitation'

The Austria-Ethiopia BIT[262] provides for 5 years period of limitation against admissibility of a claim which we don't find in other BITs. The issue here would be whether an investor can utilize the MFN clause in the Austria-Ethiopia BIT to circumvent the five years' period of limitation and thereby avoid his claim from being barred as almost all other BITs do not have such a prerequisite.

4.3.4. **Expansion of Jurisdiction to "Different" Claims**

The Ethiopia-China BIT is an epitome of a treaty which restricts the subject matter jurisdiction of arbitral panels only to disputes in the amount of compensation.[263] Case law is not consistent in this issue; some have expanded[264] the jurisdiction to new claims while others have rejected it.[265] A guarantee for Ethiopia against such a recourse could be that the tribunal in RosInvest decided to expand its subject matter jurisdiction based on a general MFN clause whereas the MFN clause in the Ethiopia-China BIT is sewed to FET.

As far as umbrella clauses are concerned, some Ethiopian BITs contain it.[266] "The effect of such umbrella clauses is that a contractual obligation which the Ethiopian state entities owe the investors from one of these countries, if not respected, will give rise to treaty claim. Investors whose basic treaty contains a general and broad MFN clause, but not an umbrella clause, may attempt to import the umbrella clause from any one of these comparator treaties."[267]

4.4. Other standards and Concern for Ethiopia

We have seen how the MFN standard can possibly have undesirable effects and present problems for the Ethiopian government from making desirable public policy reforms. Let's now take a look at other substantive standards found within BITs and what ramifications they may have as regards constraining the government from making public policy reforms.

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[262] Article 12(2) of the BIT states:

> A dispute may be submitted for resolution pursuant to paragraph 1(c) of this Article after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute, but not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.

[263] Ethiopia-China BIT, *supra* note 105, article 9(3)

[264] RosInvestCo Uk Ltd. Vs The Russian Federation, Case No. Arbitration Award V 079/2005, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction (October 2007).

[265] Plama Consortium Ltd v. Bulgaria (ICSID Case No. ARB/03/24) (decision on jurisdiction Feb 8, 2005) ; see also Austrian Airlines v. The Slovak Republic, (UNCITRAL) Final Award October 9, 2009).

[266] See for example, Article 8(2) of the Ethiopia-Germany BIT which states:

> A Contracting Party shall adhere to any other obligation deriving from a written commitment undertaken by it in favour of an investor of the other Contracting Party with regard to an investment in its territory. See also, Ethiopia-Denmark BIT *supra* note 189, article 2/3, and Ethiopia-Kuwait BIT, supra note 91, article 3/3. which states:
> 'Each Contracting party shall observe any commitment it may have entered into with regard to investments of investors of the other contracting party.'

[267] Martha, Tilahun, *supra* note 13, p. 139,

4.4.1. Indirect Expropriation

"Indirect expropriation" covers acts, or series of acts, whose effects are "tantamount to" or "equivalent to" a direct, formal taking. These are acts that generally involve total or near-total deprivation of an investment or destruction of its value but without a formal transfer of title to the State or outright seizure.[268]

Discussions above[269]have demonstrated that all Ethiopian BITs prohibit indirect expropriation. But, the line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated. Provisions on indirect expropriation have been used by investors to challenge general non-discriminatory regulations that have had a negative effect on their investments (e.g. a ban or the imposition of restrictions on a certain economic activity on environmental or public health grounds).[270] This raises the question of the proper borderline between expropriation (for which compensation must be paid) and legitimate public policymaking (for which no compensation is due).

Arbitral tribunals have, in broad terms, used the following criteria to distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.[271] But, due to the ad hoc nature of the tribunals and lack of stare *decisis* within the IIL regulatory regime, some inconsistencies are apparent.

"Coming to the issue of indirect expropriation under Ethiopian law, the domestic legislations on expropriation do not recognize the concept in a similar manner as it is reflected in the BITs the country signed."[272] The Ethiopian BITs could thus be problematic if regulatory measure that could have a negative effect on an investment are regarded as expropriations and thus compensable. The effect of this is locking down the Ethiopian government from issuing regulatory measure for fear of claims from investors.

4.4.2. FET

Almost all ISDS cases to date have based their claim on the breach of the FET standard.[273]The FET standard is by no means a means of stabilization clause but should leave a measure of governmental

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[268]UNCTAD, *supra* note 11, p. 139.

[269]See *supra*, Chpter 3, section 3.4.1.

[270] UNCTAD,supra note 11, p.139.

[271]OECD "Indirect Expropriation" and the "Right to Regulate" in International Investment Law" OECD Working Papers on International Investment, (2004) Available at, http://dx.doi.org/10.1787/780155872321 OECD

[272]Martha Belete Hailu"Standard of Compensation for Expropriation of Foreign Investment in Ethiopia: The Tension between BITs and Municipal Law", Journal of Ethiopian law, Volume 26, no 2, (forthcoming, draft with author)

[273]UNCTAD, *supra* note 11, p. 137.

space for regulation. Nonetheless, we have seen in a number of cases whereby the degree of freedom generally considered appropriate in domestic legal orders being affected.

Particularly, the potentially far-reaching application of the concept of "legitimate expectations"[274], has raised a concern that the FET clause can restrict countries' ability to change investment-related policies or introduce new policies– including those for the public good – if they have a negative impact on individual foreign investors.[275]The UK-Ethiopia BIT for instance merely refers to FET – a standard that arbitral tribunals have interpreted to include a wide range of situations.[276]

IIL raise regulatory space issues not only for deliberate policy choices but also for capacity challenges.[277] One arbitral tribunal found a violation of investment protection in a case partly rooted in a coordination failure among multiple ministries involved in investment approval.[278] Another tribunal found that a five-year delay in proceedings before the Indian Supreme Court (a body catering for a one billion people in a poor country in per capita terms) breached investment treaty commitments.

Therefore, claims that can have bearings on capacity problems, as in the above cases could be brought against Ethiopia, for it is well known that our judicial as well as other administrative organs of government face sufficient technical and institutional capacity challenges.

4.5. Experiences of Other Countries on Re-visiting Dispute Settlement Provision of BITs

Other developing countries that had faced similar challenges and also need policy space have taken different paths to the same objective. South Africa, Indonesia and India warrant comparative scrutiny in this regard. South Africa is chosen because, apart from being located within the African Continent, like Ethiopia, it is an emerging economy and has considerable diplomatic weight within its region. India and Indonesia are selected because they are leaders in their own regions in addition to being middle powers in a global context, their conduct in this sphere might be a pointer as to whether or not Ethiopia should follow their path. In March 2014, Indonesia[279] joined South Africa[280], Ecuador, Venezuela, the Czech

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[274]See *supra*, chapter 3, section 3.3.1

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[276]See *supra*, Chapter 3, section 3.3.1.

[277]Cotula, *supra* note 2, p. 28.

[278] MTD Ewqiuity Sdn. Bbd. V Republic of Chile (ICSID ARB/01/7) (Award, 25 May 2004).

[279] Indonesia announced to the Dutch Embassy in Jakarta its intention to terminate the two countries' BIT (IND-NL BIT) with effect from July ,2015; Indonesia is only seeking to 'update, modernize and balance its BITs. Trakman LE & S Kunal, *op. cit.*; Berger and Knorich have done extensive research on Indonesia's investment protection regime. One of the most important findings of their research is the intricate but invaluable way in which Indonesia has succeeded in engaging in what is termed 'localised globalism'. This is the weaving of international investment protection and promotion norms into a domestic regulatory instrument without upsetting the international regime while reserving regulatory space. The Indonesians have achieved this by instituting a domestic investment regulatory statute encompassing international investment law principles from the beginning. Berger A & J Knorich, 'Friend or foes? Interactions between Indonesia's international investment agreements and national investment law'. Bonn: German Development Institute, (2014).

Republic and Bolivia in terminating BITs.[281] It was the Foresti case[282] which had challenged South Africa's Black Empowerment (BEE) programme that triggered the BIT review programme, which culminated in the decision to terminate treaties with most EU member states.[283] There is a growing concern on the part of South Africa[284] that the imprecise provisions of old-generation BITs create uncertainty and unacceptable risks both to serious investors and to governments.[285]

These terminations follow a set of rules on the law of treaties. Most BITs can be unilaterally terminated at any-time if the initial fixed term has expired by giving notice("anytime termination"); the minority of BITs – if not terminated at the end of the initial term – are extended for subsequent fixed terms and can be unilaterally terminated only at the end of each subsequent term ("end-of-term termination").[286]

Such clauses allow the contracting parties to revisit their BITs to adopt to changing circumstances. Changing circumstances for Indonesia include, a series of arbitration decisions favouring investors, amendment to model BIT frameworks, and growing perception among less-developed nations that tribunals at ICSID[287] favour investors.[288]

As opposed to South Africa, India[289] has taken a different approach; it has decided to review all its BITs with a view to renegotiating them. It wants to reserve policy space for itself in future BITs. It seems India draws help from its experience as a multilateral player. It has a history of negotiating policy space in the

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[280]Jonathan Lang, Bowman Gilfillan, 'Bilateral Investment Treaties – a shield or a sword?" Bowman Gilfillan, (The Department of Trade and Industry (DTI) carried out a review of South Africa's BITs and concluded in 2010 that South Africa's BITs extend too far into the policy sphere, as the first generation of BITs, which the Government entered into post-1994, were allegedly skewed towards investors and that aspects of its BIT s were incompatible with the Constitution and other South African laws. It further concluded that BITs allowed for legal challenges to regulatory changes, which the Government considered to be in the public interest.)

[281] Rick Bechmann, Ramco Smorenburg, Jessica De Rooiji and Kyla Feld, "BIT by BIT in Indonesia, Signs of Push-back on foreign investment" International arbitration report (2014) issue 3, p.3.

[282]Piero Foresti, Laura de Carli & Others v. The Republic of South Africa. (ICSID Case No. ARB(AF)/07/01)

[283] Azwimpheleli Langalanga, "Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context" South African Institute of International Affairs, Occasional Paper 214(2015) p. 25

[284] South Africa has given notice to terminate three of its most important bilateral investment treaties: those with Germany, Switzerland and The Netherlands. South Africa had already given notice of termination of at least two other BITs with EU states: those with Belgium & Luxembourg (on 7 September 2012) and with Spain (on 23 June 2013), Robert Hunter, "South Africa terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland" available at <http://www/rh-arbitration.com> , [accessed on June 26, 2015].

[285]<http://www.bdlive.co.za/ opinion/letters/2012/10/01/letter-critical-issues-ignored> , [accessed on June 26, 2015].

[286] UNCTAD, "International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal", No. 4,(2003), p. 3.

[287] ICSID tribunal rejected Indonesia's jurisdictional Challenges and allowed a US$1 Billion investment treaty arbitration (Churchill *Mining Plc. V Indonesia*) to proceed.

[288] Rick et al. supra note 276, see also Prof Michael Ewing-Chow and Mr Junianto James Losari, Indonesia is letting its Bilateral Treaties Lapse so as to Renegotiate Better ones, *Financial Times*, April 15, 2014, online version available at <http://www.ft.com> , [accessed on June 26, 2015].

[289]The main impetus to do so came following White Industries case. See *supra* note 8.

multilateral environment, especially in trade.[290] India thus believes that space can still be reserved at an international level.

The initial minimum period that most[291] Ethiopian BITs provide for is 10 years. Plus, almost all the BITs have "anytime termination" clause. Taking into account that the majority of BITs entered into force in the early 2000, such scenario provides an apt opportunity for the government of Ethiopia to learn from the experience of other countries and revisit its BITs.[292]

[290] Langalanga, *supra* note 278, p.26

[291] Only a few BITS provide for longer periods. The initial minimum period contained in the BIT signed with Kuwait is for 30 years, with Finland 20 years, and with Russia 15 years.

[292] Martha, Tilahun, *supra* note 3 p. 144.

Chapter Five

Conclusion and Recommendations

The issues surrounding BITs and their dispute settlement mechanism as regards Foreign Direct Investment (FDI) regulatory framework and the attendant policy decisions have been topical within the IIL framework. This is principally due to the fact that arbitral tribunals have in a number of disputes interpreted some key unqualified language of substantive provisions contained within BITs to cover areas that were not initially foreseen by host states and has resulted in locking them down from making regulatory policy that are necessary for the public good.

BITs are an integral part of investment policymaking that supports investment promotion objectives but that can also constrain investment and development policymaking.[293] They create challenges to regulatory space in different ways that may be difficult for states to predict, influence, revise or terminate and can expose states to liabilities for public action shaped by capacity challenges as well as deliberate choice.

Given such potential constraints on policymaking, it is important to ensure the coherence of BITs with other economic policies (e.g. trade, industrial, technology, infrastructure or enterprise policies that aim at building productive capacity and strengthening countries' competitiveness) as well as with non-economic policies (e.g. environmental, social, health or cultural policies).[294]Policymakers should carefully set out an agenda for international engagement and negotiation on investment (including the revision and renegotiation of existing agreements).

What this paper has tried to do is assess the Ethiopian BITs in light of the existing IIL regime and arbitral jurisprudence with a view to comprehend if there is indeed an encroachment upon the regulatory policy space of the country. In this regard, the paper gave particular attention to the MFN standard of treatment.

It is evident from the October 2014 World Investment Forum of UNCTAD, the heated public debate taking place in many countries, and from various parliamentary hearing processes, including at the regional level, that a shared view is emerging on the need for reform of the BIT regime to ensure that it works for all stakeholders. The question is not about *whether* to reform or not, but about the *what*, *how* and *extent* of such reform.[295]

This paper therefore argues that Ethiopia should revisit its existing BITs while remaining within the IIL and policy regulatory framework. While the need for regulatory space is legitimate, Ethiopia should seek to carve out that policy space within a transnational legal system, as India and Indonesia did. Ethiopia is

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[293] UNCTAD, "Investment Policy Frame Work for Sustainable Development, p. 72

[294]ibid

[295]UNCTAD, *supra* note 11, p. 120.

therefore advised to remain within the international investment agreements regime. It should be an integral player in the negotiation and formulation of third-generation BITs.

Therefore, on the bases of the above findings and in depth discussions under the main body of the paper, the following areas are identified for possible recommendations for future course of action and taking other concrete measures with a view to achieving an IIL regulatory regime that meets the Ethiopia's developmental goals and objectives.

i) Safeguarding the right to regulate

BITs reform needs to ensure that countries retain their right to regulate for pursuing public policy interests, including sustainable development objectives (e.g. for the protection of the environment, the furtherance of public health or other social objectives. At the same time, however, policymakers must be vigilant that providing the necessary policy space for governments to pursue bona fide public goods does not inadvertently provide legal cover for investment protectionism or unjustified discrimination.

Options include clarifying or circumscribing provisions such as MFN treatment, FET and indirect expropriation, as well as including exceptions, e.g. for public policies or national security. A first option is to specify that the MFN clause does not allow for the importation of substantive or ISDS related elements contained in older treaties.

Qualifying the FET standard by reference to the minimum standard of treatment of aliens under customary international law may raise the threshold of State liability (e.g. the challenged conduct will need to be found to amount to egregious or outrageous mistreatment of foreign investors) and help to preserve States' ability to adapt their policies in light of changing objectives.

A second option is to clarify the FET standard with an open-ended list of State obligations. The formulation may be "positive", specifying what the standard includes (e.g. the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings), or "negative", explaining what the standard does not include (e.g. establishing that the FET standard does not include a stabilization obligation that would prevent the host State from changing its legislation), or a combination thereof.

(ii) Reforming investment dispute settlement

This can be achieved by having Clauses that fix the existing Investor-State Dispute Settlement (ISDS) mechanism by improving transparency, limiting investors' access, enhancing the contracting parties' control and introducing local litigation requirements. Adding new elements to the existing ISDS mechanism (e.g. building in effective alternative methods of dispute resolution, introducing an appeals facility) replacing the existing ISDS mechanism (e.g. by creating a standing international investment court, reliance on State-State dispute settlement and/or reliance on domestic dispute resolution)

(iii) Ensuring responsible investment

One objective of BIT reform therefore is ensuring responsible investor behaviour. This includes two dimensions: maximizing the positive contribution that investors can bring to societies ("doing good") and avoiding negative impacts ("doing no harm"). This can be achieved by having Clauses that prevent the lowering of environmental or social standards, ensuring compliance with domestic laws and strengthening corporate social responsibility (CSR) and foster cooperation in this regard.

(v) Enhancing systemic consistency

In the absence of multilateral rules for investment, the atomised, multifaceted and multilayered nature of the BIT regime gives rise to gaps, overlaps and inconsistencies, between BITs, between BITs and other international law instruments, and between BITs and domestic policies. BIT reform therefore should seek coherence in these various relationships.

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