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Issues and Trends

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Ethiopia

***THE EXISTING STATUS OF BILATERAL INVESTMENT TREATIES IN ETHIOPIA: ISSUES
AND TRENDS***

**A Thesis Submitted in Partial Fulfillment of the Requirements of LL.M Degree in Public
international Law**

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October, 2011

Approval sheet by Board of Examiners

The Existing Status of Bilateral Investment Treaties in Ethiopia:

Issues and Trends

I do hereby declare that the Existing Status of Bilateral Investment Treaties in Ethiopia: Issues and Trends is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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LIST OF ABBREVIATIONS

- ACP -Asian, Caribbean and Pacific countries
- ACHAP -African Comprehensive HIV/AIDS Partnership
- AGOA -African Growth and Opportunities Act
- AU-Africa union
- BIT -Bilateral investment treaty
- BITs- Bilateral investment treaties
- DTT -Double taxation treaty
- EIA- Ethiopian Investment Authority
- EPRDF-Ethiopia Peoples Revolutionary Democratic Front
- EPZ -Export processing zone
- EU -European Union
- FAP- Financial Assistance Policy
- FDI -Foreign direct investment
- FDRE- Federal Democratic Republic of Ethiopia
- FRG- Federal German Republic
- GATT- General Agreement on Tariffs and Trade
- GDP -Gross domestic product
- GDS -Gross domestic savings
- GFCF -Gross fixed capital formation
- GNP -Gross national product
- HPR - House of Peoples Representative
- HQ- Head quarter
- ICSIDS- International Centre for Settlement of Investment Disputes
- IFSC -International Financial Services Centre
- IAs- International investment agreements
- ILO -International Labor Office
- LDC -Least developed country

MFN- Most Favored Nation

MIGA -Multilateral Investment Guarantee Agency

MIT- Multilateral Treaty

MITs- Multilateral Treaties

NAFTA- North American Free Trade Agreement

NT- National Treatment

NDP -National Development Plan

OECD- Organization for Economic Co-operation and Development

PDSF -Public Debt Service Fund

REP -Regional economic partnerships

SACU -Southern African Customs Union

SADC -Southern Africa Development Community

SWOT –Strengths, weaknesses, opportunities and threats

TNC- Transnational Corporation

UN- United Nations

UNCITRAL- UN Commission on International Trade Law

UNCTAD- United Nations Conference on Trade and Development

UNESCO-United Nations Educational, Scientific and Cultural Organization

WB- World Bank

WTO -World Trade Organization

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ABSTRACT

In the world we are living in, investment is a proper route to economic prosperity. Here, we have to discern the fact that this mainly implies foreign investment, and different countries endeavor to attract this kind of investment. Accordingly, there is a fruitful proliferation of foreign direct investment that presupposes well regulatory system which at the same time insures both investment liberalization and protection.

During the past few decades, many developing countries have begun to sign bilateral investment treaties (BITs) in an attempt to attract greater levels of foreign direct investment (FDI). By signing BITs, investment-seeking governments are thought to more credibly commit to protecting whatever FDI they receive, which in turn should lead to increased confidence among investors and ultimately greater FDI inflows. The writer finds that whether BITs increase FDI depends upon whether a government develops a reputation for actually upholding its BIT commitments.

For achieving those in an effective and efficient manner, nations of the world are entering into bilateral investment treaties (BITs) in which this study tries to explore by giving a due emphasis on Ethiopia. Currently, Ethiopia has entered into about 30 BITs with different countries, and it is the writer's contention that they will support the country's efforts in attracting foreign investment especially from those she has already entered that kind of treaty. They will have their own role for the development of the country if well regulated.

The basic purpose of this research is to analyze the trends and issues regarding BITs, and dispute settlement under Ethiopian law. The main issues of the research are how to appreciate the effects of BITs issues and trends. The research methods include review of literature and legal analysis. Primary and secondary sources were consulted in the research. Interview has been conducted in data collection.

The research findings reveal that bilateral investment treaties are not as such effectively implemented in Ethiopia and it is recommended that we should develop our capacity.

CHAPTER ONE

INTRODUCTION

1.1. Background of the study

International investment law is one of the fastest growing areas of international law today.¹ Every state endeavors to reach high stage of development particularly economic development that could serve as the basis for other sectors of development.² No state is self sufficient to achieve these objectives unless it secures some sort of external finance in the form of investment from abroad by entering into bilateral or multilateral treaties.³ Bilateral investment treaties (BITs) are those agreements concluded between the capital investing state (home state) and the capital receiving state (host state) whereas Multilateral investment treaties (MITs) are those agreements concluded between a home state and more than two host states or legal entities established and incorporated in the latter states.⁴

This research is concerned on bilateral investment treaties. Bilateral investment treaties (BITs) have greatly proliferated in the last two decades, and play an increasingly significant role in global trade and investment protection. Proponents argue that BITs, like multilateral investment agreements, serve to broaden global economic security and development.⁵ Although there has been much opposition to multilateral agreements by civil society, BITs have largely avoided similar scrutiny, despite the fact that they are far more widespread and contain essentially the same components.⁶

¹ Rudolf Dolzer and Christoph Schreuer (2008), Principles of International Investment Law, oxford university press, New York, p.471

² _____ (2008) Foreign Direct Investment in Latin America and the Caribbean, Briefing Paper, United Nation, p.7

³ Ibid

⁴ _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.13

⁵ _____ (2007) Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking, United Nations New York and Geneva, p.1

⁶ Mahnaz Malik (.2010) South-South Bilateral Investment Treaties: The same old story?, IV Annual Forum for Developing Country Investment Negotiators Background papers, New Delhi, October 27-29, 2010, p.1

As bilateral investment treaties (BITs) grow in number and prominence, an ongoing question is whether these treaties are effective.⁷ That is to say, do governments that sign these treaties, with the hope of increasing the flow of foreign investment to their respective countries as their primary goal, actually experience increases in inward flows of foreign direct investment.

Every bilateral investment treaty begins with a declaration relating to the purpose of the treaty. Reciprocal encouragement and protection of investments is one objective. The basic features common to BITs have changed little since their inception. The main provisions cover the scope and definition of foreign investment, admission of investments, national and most-favored nation status, fair and equitable treatment clauses, compensation guarantees for expropriation, war and civil unrest, guarantees of fund transfers the recuperation of capital gains, subrogation of insurance claims, and dispute settlement provision.⁸

The feature of bilateral investment treaties is that they are usually made between unequal partners. They are usually agreed between a capital exporting developed state and a developing state keen to attract capital from the former state. Developing countries may also enter into such treaties among themselves does not obscure the fact that one of these countries is an exporter of capital vis-à-vis the other.⁹ The rational for the treaty itself is to promote and protect for the capital that is so received.

1.2. Statement of the Problem

It is widely believed that bilateral investment treaties contribute to establish a favorable investment climate, building confidence and sending a positive signal to investors. For home countries, the most important purpose of bilateral investment treaties is to secure predictable conditions for their investment abroad, including certain standards of treatment and protection, as well as independent third-party mechanism for the settlement of investment disputes.¹⁰

⁷ Todd Allee and Clint Peinhardt (2008), *Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment*. The University of Texas at Dallas, USA, P. 1

⁸ Ibid

⁹ Sornarajah, M. (1994) *The International Law on Foreign Investment*.: Cambridge University Press, USA, P.207

¹⁰ Howard Mann (2008) *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*. IISD's at www.iisd/investment. p.18

In short bilateral investment treaties contain provisions guaranteeing fair and non-discriminatory treatment for investment, protecting investment against expropriation and other forms of non-commercial risk, and establishing mechanisms for third-party dispute resolution. Some bilateral investment treaties include other clauses, such as restrictions on performance requirements, provisions to promote transparency of national law and balance of payments issues.¹¹

Bilateral investment treaties are not necessarily consistent with some provisions of national law. In some cases, they influence national law by virtue of which Parties enact to meet the requirements of the treaties.¹² While bilateral investment treaties constitute *lex specialis*, establishing treaty rights and obligations for the Parties, it is questionable to what extent bilateral investment treaties would or could give rise to rules of customary international law.¹³ There is general agreement that the increasing number of bilateral investment treaties reflects the positive role that foreign investment plays in economic development. The widely held assumption is that bilateral investment treaties play an important factor in creating a favorable investment climate as well as to promote growth. Other factors that may play a greater role in attracting foreign investment include the size and growth of the market, the quality of infrastructure, human skills, political, economic and legal stability, and the new parameters of a globalizing world economy.¹⁴

Bilateral investment treaties must also take into account a host country's developmental objectives. For this reason, bilateral investment treaties need to strike a balance between providing predictable conditions for investment abroad and reserving for host countries the flexibility to pursue their economic development in the framework of their own laws. As regards the latter, agreements should indeed be constructed in a manner that promotes the economic development objectives of developing countries.¹⁵ Finding a balance between the rights and responsibilities of home countries, host countries and investors begins with an appropriate approach towards liberalization and transparency of measures on the one hand and promoting the socio-economic interests of host countries on the other. Developing countries can facilitate

¹¹ Karl P. Sauvant and Lisa e. Sachs (2009) *The effect of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties, and investment flows*, Oxford University Press, New York, p.121

¹² Ibid

¹³ Stephan W. Schill. 2008. *Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?* Paper for the 4th Global Administrative Law Seminar, Viterbo, June 13-14, P.20

¹⁴ Ibid

¹⁵ Ibid. p.23

investment through insurance programs, incentives to, the importation of technology, upgrading the importance of high quality investment especially in priority sectors, environmental and consumer protection, monitoring restrictive business practices, imposing performance requirements, in ways that promote the development of local enterprises in host countries and demanding the implementation of social responsibilities of investors.¹⁶ From a developing country's perspective, the ultimate test of any bilateral investment treaties is its development friendliness.¹⁷

Some of the main aims and objectives of this thesis is to examine some issues related to Ethiopian bilateral investment treaties in the context of development issues. It seeks to examine whether the existing Ethiopian bilateral investment treaties have positive or negative impacts on the socio-economic development of the country.

1.3. Literature Review

Numerous works and studies have been published in the area of international investment agreement over the years. Academic institutions and international organization including United Nations Conference for Trade and Development (UNCTAD) and International Institute for Sustainable Development (IISD) have undertaken extensive research on FDIs and BITs.

UNCTAD international investment agreement monitor provides the latest development in international investment agreements on various issues such as a discussion on settlement of disputes between investor and state. UNCTAD reports further analyze the nature and development implication of international investment agreements to developing countries. The reports have also dealt about the effectiveness of arbitral decision on the evolution of dispute settlement under BITs.¹⁸

¹⁶ Ibid. p.24

¹⁷ _____ (2000) International Investment Agreements: Flexibility for Development, UNCTAD series on issues in international investment agreements, UNCTAD, United Nations New York and Geneva, p. 36

¹⁸ UNCTAD (1999), Trends in International Investment Agreements: An Overview. UNCTAD Series on Issues in International Investment Agreements, United Nations, New York and Geneva

The study of Hailu Burayu¹⁹ discusses the settlement of investment dispute and the Ethiopian experience. The author gives the historical background of investor-state disputes settlement mechanisms. He points out the position of developing countries in 1960s when investor-state disputes were resolved through local courts to the present situation where almost all developing countries have fully accepted highly protective investor-state dispute settlement mechanism.

Assefa Ali²⁰ evaluates the problems of the incentive regimes of private foreign investment in Ethiopia: the law and the practice. He examines whether incentive regimes related to attract foreign investment into Ethiopia have been effective in facilitating, and encouraging foreign investment.

Getahun Seifu²¹ examines foreign direct investment in Ethiopia and the emergence of bilateral investment treaties and regulatory space of the respective country. He is of the view that the fundamental rights related to non discriminatory treatments, that are national treatment and most favored nation treatment of foreign investments are relative rights. They are granted, limited or denied depending on treatments that a country gives to either its own nationals or investors of third country. Thus, it is for the concerned country to appropriately regulate how much treatment it should give to its own nationals and third country nationals.

Peteros L.E has written extensively about the implications of BITs on sustainable development. In one of his works²² he argues that, state sovereignty includes the right of the government to regulate economic activities for the public interest. Most BITs limit this right by limiting ways in which the government can pursue their economic development policies. Investment promotion and protection must not be done at the expenses of other key policy objectives. He further argues that most notable feature of these investment treaties is that they permit foreign investors to sue host governments under international law in the event of an alleged breach of the treaty obligations.

¹⁹ Hailu Burayu (2009) Settlement of Investment Disputes and the ICSID Convention: Any Ethiopian Experience?, Unpublished, Addis Ababa University Law Faculty, Ethiopia.

²⁰ Assefa Ali (2005) The Problems of Incentives Regimes of private Foreign Investment in Ethiopia: The Law and the Practice, Unpublished, Addis Ababa University Law Faculty, Ethiopia.

²¹ Getahun Seifu (2008) Regulatory Space in the Treatment of Foreign Investment in Ethiopians Laws, 5 the Journal of World Investment and Trade, South Africa.

²² LE Peteros (2006) Bilateral Investment Treaties Implications for Sustainable Development and options for regulation, Friedrich Ebert Stiftung SAIIA IISD, Berlin.

In bilateral investment treaties and development policy-making,²³ he discusses among other things, the impact of BITs upon development policy making with particular focus on the treaty practice between Switzerland and the United Kingdom. The paper examines what BITs state and what the treaties exactly do. Most importantly the study gives specific implication of BITs on development which could give useful insight to developing countries before signing such BITs.

1.4. Objectives of the study

The general objective of this study is to examine and analyze the problems faced by developing countries like Ethiopia in attracting the much desired foreign investment, due to lack of protective legal frame work in either the host country or international body with the authority to handle effectively the disputes that could arise between investors and host countries. The research attempts to examine whether the Ethiopian bilateral investment treaties so far signed enhanced the flow of foreign investment. The specific objectives of the study are the following:

- To analyze the main reasons for concluding bilateral investment treaties.
- To identify issues of concern that arises from bilateral investment treaties.
- To evaluate and analyze the impact of bilateral investment treaties.
- To shed light on the challenges and prospects of the bilateral investment treaties in the development dimension in Ethiopia.

1.5. Research Questions

The study attempts to answer several questions. The main question is how to appreciate the effects of bilateral investment treaties issues and trends, among others the following questions that are considered in this respect include:

- Why do many countries conclude BITs, while others do not?
- What issues do these treaties cover? how are they covered? and what are the main similarities and differences in this respect?
- How are BITs implemented in so far as both protection and promotion are concerned?

²³ LE Peteros (2004), Bilateral Investment Treaties and Development policy making, IISD, Canada.

- What role do they play in shaping standards of international law?
- What impact do BITs have on FDI flows and development, and how can agreements be strengthened from a development perspective?

1.6. Significance of the study

This study will provide an in depth analysis of the bilateral investment treaties in Ethiopia. It will provide researchers, legal professionals and other interested entities to undertake an in depth study on the issues and to raise awareness among the various stake holders as to how the problems identified in the bilateral investment treaties can promote the socio-economic development of Ethiopia. This thesis will contribute its part in terms of furnishing an insight on the legal structure of the Bilateral Investment Treaties. In addition other significance of the study includes:

- To help professionals acquire national, regional and international experiences in investment treaties;
- To enable national, legal professionals appreciate the advantages and disadvantages behind policy decisions in signing bilateral investment treaties in the case of Ethiopia;
- To help persons authorized to sign bilateral investment treaties develop a clear understanding of the rules of settlement of disputes pertaining in investment treaties;
- To enhance awareness of all concerned stakeholders and help them appreciate the significance of foreign investment;
- To stimulate and encourage other researchers to undertake further study in relation to the topic.

1.7. Scope of the study

International investment law is not only the perhaps fastest growing area of international law and dispute settlement today, but also a field that faces considerable challenges and criticisms from States, investors, civil society, non-governmental organizations, and legal scholars. This study will not discuss the overall structure and content of international investment treaties in the

Ethiopian legal and constitutional context, but, as the title itself indicates, it will attempt to shed light as to the current problems connected to Ethiopian bilateral investment treaties.

1.8. Limitation of the study

The main limitation of the study is lack of adequate materials written on the issues in the context of Ethiopia pertaining to the area of a special focus. The other limitations are financial problems, time constraint and problems associated with access to internet facility.

1.9. Research Methodology

From the statement of the problem above, the thesis examines the existing status of Ethiopian bilateral investment treaties issues and trends. The thesis used both primary and secondary sources of data. The primary sources include basic documents such as international instruments and agreements, statutes, declaration, treaties, official circulars and publications by relevant government departments.

The substance of the thesis is based on research conducted from secondary sources. This includes library research, books, the internet, journal articles, magazines, conference and seminar proceedings and reports.

In addition, research was done through conducting interviews with the relevant government departments negotiating BITs. In the course of this study both structured and unstructured interviews were used. Further, a comparative analysis is done with other countries. This comparative analysis helped to assess the implication of the existing status of bilateral investment treaties in Ethiopia. All the persons interviewed remain anonymous and are referenced according to the name of their organization and date of interview.

1.10. Structure of the paper

The paper has six chapters. The first chapter will try to cover the proposal. This proposal generally introduces the background of the study, statement of the Problem, literature review, objective of the study, research questions, significance and scope of the study, limitation of the study, methodology of the study and organization of the paper.

The second chapter is all about the notion of bilateral investment treaties. Particularly, the origins of bilateral investment treaties, the reasons for entering in to bilateral investment treaties and characteristic features thereof. Chapter three deals on the relationship between investment treaties and other aspects of international law. This chapter focuses on introduction and sources of international law; some distinguishing features of investment treaties from general aspects of international law, why are bilateral investment treaties problematic? the impact of bilateral investment treaties on foreign direct investment, why developing countries continue to sign bilateral investment treaties ? and whether bilateral investment treaties promote the flow of foreign direct investment to Ethiopia.

The chapter four will focus on other provisions of bilateral investment treaties. Such as admission and establishment of investment, investment promotion, general standards of treatment, expropriation, war and civil disturbance, transfer of funds and the settlement of disputes. Chapter five examines on relationship between bilateral investment treaties and sustainable development. This chapter focuses on the meaning of development, the nexus between investment and other issues, new concerns in bilateral investment treaties, environmental concerns, and human rights concerns, protection of labor standards and bilateral investment treaties and sustainable development.

In chapter six, I have covered the Ethiopia's bilateral investment treaties and scope of application of the bilateral investment treaties. Finally the paper will be wound up forwarding some conclusions and recommendations for the problems identified.

CHAPTER TWO

BILATERAL INVESTMENT TREATIES

2.1. Overview and History of Investment Treaties in general

Investment defined

In the concept of investment is a household term. However, there is no uniform understanding of it. For this reason, many scholars have ventured to come up with the definition of investment. But there is still no universally accepted definition regarding investment. For the sake of convenient and clarity investment, it can be stressed that it has a higher risk and longer time scale than saving and the return come in the form of income, or gain or a mixture of two.²⁴

Encyclopedia Britannica explains the concept of investment as:

*a process of exchange income during one period of time for an asset that is expected to produce earnings in the future periods. Thus, consumption in the current period is for going in order for gain a great return in the future.*²⁵

Pursuant to this definition, saving is imperative to reap better profit or return on investment there after.

*Investment may be in the means of production and/or purely financial investment. At the individual level both types of investments may provide a monetary return to the investor. However from the stand point of the entire economy, purely financial investment appears only as title transfer and do not constitute as addition to productive capacity.*²⁶

This definition implies that investment encompasses tangible resources that brought investment in to being and intangible assets that are capital flow in terms of finance. Other economist scholars stress that there are two different attributes, namely time and risk. The scarify takes place in the present and in certain. The reward comes later, if at all, and the amount of reward is generally uncertain. In the case of investment risk is dominant factor (for example, with options

²⁴ Caudell Jane (2005) Investment, 5th ed., ICB publishing, New Delhi, p.5

²⁵The New Encyclopedia (2003) vol. VI, 15th ed. P.363

²⁶ Ibid

on common stocks). In both cases time and risk are important (for example, with share of common stock).²⁷

According to this definition time and risk or both are dominant or determinate factors or attributes in investment. It involves sacrifices of current capital for uncertain future. This is to stress that investors should realize that occasion and danger are inseparable when they decide to invest their capital.

World Book Encyclopedia on its part hand defined the term investment as:

*Investment is the use of saving to produce future income. The term more specifically refers to the use of funds to acquire capital goods.*²⁸

It shows that investment is the current wealth which in turn enables the investor to maximize his return on his investment in the form of real asset or capital goods. Some other also define

*investment as the spending by business such as machines and buildings, which can be used to produce goods and services in the product. The investment part of total income is the portion that will be used in the process of producing goods in the future.*²⁹

This means that investment may also be defined as the use of today's resources which consists of edifices and but investment can also be made in other than goods, real property etc... The Re-enacted Investment Proclamation No 280/2002 defines investment as:

*expenditure of capital by any investor to establish a new enterprise or to expand or upgrade one that already exists.*³⁰

However, the definition of investment under Ethiopia's BITs is very broad, and includes portfolio investments and intellectual property rights, etc.... Article (2) of the Ethio-Turkey bilateral investment treaty, for example, defines investment to include:

²⁷ Georan J .A, William F.S and Jeffery V.B (2003) Fundamental of Investments, 3rd ed., Parentice-Hall of India Limited, New Delhi, p.1

²⁸ World Book Encyclopedia (2001), vol. 10, Chicago, p.366

²⁹ Miller Roger Leroy (2000) Economics Today the Macro view, 1999-2000ed , Reading Massachusetts Addison-Wesley, Canada, p.67

³⁰ Investment Proclamation, Pro. No. 280/2002, Federal Negarit Gazeta, 8th year, No.27, Article 2(1)

- (a) Shares, stocks or any other form of participation in companies*
- (b) Returns reinvested, claims to money or any other rights having financial value related to an investment.*
- (c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights as defined in conformity with the laws and regulations of the Party in whose territory the property is situated,*
- (d) industrial and intellectual property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,*
- (e) Business concessions conferred by law or by contract, including concessions related to natural resources.³¹*

Unlike other definitions, the agreement defines investment in general or broad terms. Stock markets; financial activities; corporeal and incorporeal assets in general, and other rights that are to be governed by law where the property is located are treated as investment. In addition, the issues of intellectual properties are also addressed. Furthermore, it defines investment regarding natural resources, however.

Treaty defined

Article 2 (1 (a)) of the Vienna convention defines a treaty as “An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

Cardinal elements of the definition include:³²

- To be a treaty an agreement has to have an international character, i.e., an agreement concluded between a state and another state, a state or administrative agencies of the contracting state authorized to conclude such an agreement.

³¹ Agreement between the Federal Democratic Republic of Ethiopia and the Republic of Turkey (2000) Concerning Promotion and Protection of investment, Done at Addis Ababa, Art.2

³² Anthony Aust (2000) *Modern Treaty Law and Practice*, Cambridge University Press, New York, P.22

- To be a treaty the agreement shall be typed or printed i.e. the text shall be reduced to a permanent and readable form, an oral agreement can not be a treaty.
- The agreement shall also be signed by the parties to the treaty. A signature is presumed to make an integral part of the requisite written.
- To be a treaty it shall be governed by international law i.e. embracing the element of an intention to create obligations under international law. If there is no such intention the instrument will not be considered as a treaty.
- The treaty shall be contained in a single instrument. Additional instruments may be added in the form of protocol, agreement or additional notes to the treaty.
- The agreement shall be named a treaty excluding designations like compact, solemn declaration, administrative agreement, and protocol of decisions, platform concordant, agreed minute and terms of agreement with which a treaty used to be called.

Investment treaties are either bilateral or multilateral in character. Bilateral investment treaties (BITs) are those concluded between the capital investing state(home state) and the capital receiving state (host state) whereas Multilateral Treaties (MITs) are those concluded between a home state and more than two host states or legal entities established and incorporated in the latter state (s).³³

Foreign Investment in General

Investment is a process of economic activity which involves the capital, technology and technological know-how for the exploitation and exploration of natural resources, production in agriculture, manufacturing, trade and other economic activities. The dictionary meaning of it is the placing of capital or laying out of money in a way intended to secure income or profit from its employment.³⁴ Thus, it can be said that it is a process of exchanging consumption during one

³³ Konrad Von Moltk and Howard Mann (2004), Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, p.5

³⁴ Henry Cambell. Black (1991) Black's Law Dictionary.6th ed. P.572

period of time for an asset that is expected to produce earning in the future period, postponing consumption in the current period in order to obtain greater return in the future.³⁵

In economics, also the term is used to refer to the process or the result of an increase in the productive tangible assets of an entity whether in the form of a new tool, a new factory, or a new building.³⁶ For the individual investor, however, investment has the every-day meaning of more acquisition or creation of an asset,³⁷ like buying and a residential house for oneself. The reason for such individual conception of investment is that the terms investment and property are being wrongly treated as synonyms to cover all types of interest and right in property.³⁸ This is an erroneous conception because investment refers only to the acquisition of productive tangible assets.

The current investment proclamation of Ethiopia, (i.e. investment proclamation No 280/2002) defines investment as an expenditure of capital by an investor to establish a new enterprise or to expand one that already exists.³⁹ Here it sounds reasonable to add, though the provision does not mention, the capital outlay by an investor to buy existing investments such as the existing public enterprises. Thus it is evident and can be said that investment is the channeling of finance and know how to participate in the available economic sectors so as to earn a capital gain which would intern make one participate in the process of economic development.

In the preceding of this chapter, an attempt was made to define investment. This in principle also makes it easier to define what foreign investment is. However neither the investment proclamation nor the general public international law provides a better legal definition and clarity of international investment.⁴⁰

Even in the relevant multilateral treaties such as Conventions Establishing International Centre for Settlement of Investment Disputes (ICSIDS) and Multilateral Investment Guarantee Agency

³⁵ The New Encyclopedia Britannic (1993), Investment, vol. 6, 15th ed. , P. 363

³⁶ _____ (1989) .Foreign commerce and investment in market economy countries” International Encyclopedia of Comparative Law, Vol. 17, chapter 22, P.58

³⁷ Ibid

³⁸ George Schawarzinberger (1996) Foreign Investment and International Law. P. 17

³⁹ Investment proclamation, proclamation No. 280/2002, Negarit Gazeta, 8 Year No 27, Art 2 (1)

⁴⁰ _____.(1989) Foreign commerce and investment in market economy countries” International Encyclopedia of Comparative Law, Vol. 17, chapter 22,P.59

(MIGA), do not provide a clear definition thereby letting the numerous bilateral and regional treaties adopt their own definitions.⁴¹

The Ethiopian investment proclamation defines “foreign investors” as those foreign nationals or enterprises owned by foreign nationals having invested foreign capital in Ethiopia. It also includes Ethiopians permanently residing abroad and preferring treatment as foreign investors.⁴² Based on this definition we can safely say that foreign investment is expenditure of capital by a foreign investor to establish a new enterprise, or upgrade that one which already exists, or to buy an existing enterprise in a way intended to secure income or profit from it.⁴³

Here it is necessary to stress that in foreign investment the capital we are talking about is a foreign capital which is a transfer of funds from one country to another without any counter movement of goods or Services from the recipient country, to make it participate in the economic development or productive activities.⁴⁴ This excludes a mere foreign deposit in local banks.

Types of Foreign Investment

Foreign investment the first distinction that must be drawn is between public and private foreign investment. Public foreign investments are those cases where state is usually the investor, at present, in guise of leaders to another state.⁴⁵

Private foreign investment differs from that of public in its objective which is always to make a profit while in case of public foreign investment it may be merely to avoid economic losses. Public investments also emanate from governmental decision and are designed to meet some public demands whereas the private investments are always profit motivated. In short some of the main differences between private and public investment are that while the former s driven by profit motive, the latter takes in to account many diverse socio-economic factors such as delivery of public services at least cost for the public. Moreover, not only the aims and objectives but the ownership, structure and management of the organization and investment are also different. The latter has public interest at heart.

⁴¹ Ibid

⁴² Investment proclamation, proclamation No. 280/2002, Negarit Gazeta, 8 Year No 27, Art 2 (6)

⁴³ Ibid Art 2(1) cum Art 2 (6)

⁴⁴ Duri mohammed (1969) “Private foreign investment in Ethiopia (1950-1968)” Journal of Ethiopian Studies vol. 7 No 2 Addis Ababa University Institute of Ethiopian Studies, Ethiopia, P 53

⁴⁵ G Hornsey (1950) “Foreign investment and international law” international law quarterly, vol. 3, P.53

Apart from this distinction a further important distinction commonly made is between industrial or commercial investment and financial investment.⁴⁶ Commercial or industrial investments are those ventured through acquiring new buildings, machinery or Equipment where as financial investments are those made through acquiring shares, debentures, or other claims.⁴⁷ It also involves making more money from the financial transactions and investments done by financial institutions and investment banks.

Financial investment can also be divided into direct and portfolio investment depending on whether effective control of an enterprise is acquired or not. Foreign direct investment (FDI) occurs when the foreign investor has the power to control the operation of the business in the host country.⁴⁸ In portfolio financial investment, however, the foreign investor holds securities without having significant controlling power in the management of the business.⁴⁹ Thus it is the exercise of managerial control that distinguishes direct investment from portfolio or direct investment, which is determined by the level of the share holding and representation on the managerial board.

History of International Investment Treaties

International investment has a very long history but international investment agreements (IIAs) are a relatively recent phenomenon. The Havana Charter of 1948 was intended to form the basis of a universal trade agreement to complement the Bretton Woods institutions.⁵⁰ This is the agreement that, for example, spawned the General Agreement on Tariffs and Trade, the GATT. Articles 11 and 12 of the Charter both foresaw the future negotiation of an agreement on

⁴⁶ Grant L Reuber with H Crookell, M Emperson, G. Gallais Hammons (1973) private foreign investment in development, united states P. 100

⁴⁷ Ibid

⁴⁸ Hebert Brownell (1976) Foreign investment in united state should not be restricted, current legal aspects of foreign investment in the united states, P. 57

⁴⁹ Ibid

⁵⁰ Havana Charter for an International Trade Organization, at: <http://www.globefield.com/havana.htm>. Article 11 called for international negotiations on an investment agreement. Article12 sets out set specific guidelines for such negotiations.

transnational investment.⁵¹ Article 12 set out some parameters for such a negotiation. It recognized that host states have the right, in particular:

- (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
- (ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;
- (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;
- (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;

These negotiating guidelines were not intended to be legally binding. They did, however, recognize the tension between private rights and public goods, and between the movement of capital and the development of domestic economies, that is inherent in any investment. Article 12 of the Charter, whether fortuitously or presciently, suggested the use of bilateral investment agreements, bound by the same principles, if the international process did not generate the anticipated results.

The host-state centered approach of the Havana Charter is far removed from the investment agreements that were actually concluded, beginning with a bilateral agreement between Germany and Pakistan in 1959.⁵² The narrow scope of the issues addressed by foreign investment agreements was also partly consistent with the narrow scope of analysis of foreign investment as being an activity largely related to trade. Indeed, much investment was originally ancillary to trade. Colonial investment was designed to exploit natural resources for export. New investments in “developing” countries were thus designed to capture local markets that had previously been supplied through trade or to benefit from host country endowments natural resources and cheap labor to strengthen competitive positions in international markets.⁵³ Investment rules came to be based, in large measure, on the trade regime rather than on an analysis of the complex set of

⁵¹ For example, Art. 12 states that “the interests [of investor home and host countries] may be promoted if such [countries] enter into bilateral or multilateral agreements relating to the opportunities and security for investment.”

⁵² Konrad Von Moltk and Howard Mann (2004) Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, p.3

⁵³ Luke Eric Peterson (2004) Bilateral Investment Treaties and Development Policy-making, at <http://WWW.iisd.org>, p.4

relations between an investment and the host state that all required attention if balanced and, therefore, equitable international investment rules were to be drafted.⁵⁴

This narrow vision may have also been reinforced by the fact that one of the common goals of any IIA is to ensure non-discrimination, a concept that is at the core of the GATT. The underlying rationale is the disciplines that had served the GATT related to most-favored nation treatment, or national treatment, and a measure of transparency should be the same types of rules applied to transnational investments, and would, therefore, achieve the right approach to non-discrimination in an investment regime.⁵⁵ This in turn obscured the complex institutions employed at national levels to maintain a balance between investor rights and public goods institutions that needed to be mirrored or at the very least respected by any IIA.

It would not be an exaggeration to describe the conclusion of IIAs between unequal partners as a negotiation. This is because for the most part the investor countries, generally are able to dictate the terms of these agreements and the host countries desperate to attract FDI find themselves in a much weaker bargaining position..⁵⁶ Thus a large number of IIAs were concluded without real negotiations, giving a false sense of legitimacy to the approach that they represented. In light of the above, it is hardly surprising that the negotiation of IIAs between increasingly equal partners has now become a minefield.

Investments including investments that promote sustainability must generate returns, including the cost of replacing the investment when needed. Consequently, an approach to sustainable development that focuses on investment actually represents a dramatic reduction in the presumed costs to meet the requirements of Agenda 21 that have been cited ever since the United Nations Conference on Environment and Development.⁵⁷

⁵⁴ Konrad Von Moltk and Howard Mann, (2004), Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, p.5

⁵⁵ Von Moltke, Konrad (2000) Investment, Non-Discrimination, and the Environment, Paper prepared for the OECD Environment Directorate, p.22

⁵⁶ Ibid

⁵⁷ Konrad Von Moltk and Howard Mann (2004) Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, P.67

In the past decade, there has been a dramatic increase in international investment. There is little doubt that foreign direct investment (FDI) will play a significant role in the search for sustainable development, though the positive or negative direction of this role still remains unclear. IISD believes that IIAs that recognize the full panoply of issues can contribute to the transformation of a global economy that is known to be unsustainable into one that has a more hopeful future.⁵⁸

2.2. The Origins of Bilateral Investment Treaties

Bilateral investment treaties (BITs) have been negotiated since the late 1950s. Their number has increased to with 2,200.⁵⁹ The agreements were developed as a solution to the long-standing uncertainty as to the applicable international law standards governing the treatment of foreign property and property-owners.⁶⁰

States have traditionally welcomed foreign investment for a variety of reasons. Foreign investment has been regarded as; inter alia, an engine of economic growth, a source of foreign currency income, a stimulator of the local economy, and a source of foreign skills, information and know-how.⁶¹ Foreign investment takes place in different forms, including through committing capital resources abroad either directly or through portfolio investment and by licensing the use of technology, etc. Because of the form such investment takes, it requires special protection under the law of the country concerned. This is because foreigners who purchase land and other immovable property or enter into joint ventures to create a new company cannot leave the host country as and when they want.⁶² Their commitment to the host country is long term, and hence there is a need for long-term protection under special laws. Such protection has traditionally been sought under international law and more recently under BITs.⁶³

⁵⁸ Konrad Von Moltk and Howard Mann, (2004), Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, p.6

⁵⁹ UNCTAD (2003) World Investment Report, p. 21.

⁶⁰ Sornarajah, M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, P.208

⁶¹ Surya P Subedi (2008) International Investment Law Reconciling Policy and Principle, Hart Publishing, USA, p.83

⁶² Ibid

⁶³ Ibid

Since investment laws tend to change with a change of governments and their respective policies, BITs and international law have the effect of stabilizing protection of investor rights. No state can unilaterally change international law or the provisions of BITs. Such treaties are of long duration, usually ten or twenty years, with continuing coverage for 20 years after termination on investments made whilst they are in force. The formal safeguards and guarantees that BITs provide for non-commercial risks have acted as an incentive to potential investors and as a useful reassurance to those with existing investments in the signatory states. Therefore, when it comes to promoting foreign investment, states have sought additional safeguards and guarantees under international law and BITs, which are designed to set standards of protection. Although any protection provided for foreign investment is always under the law of the host country, this law has to conform to the commitments undertaken by the state concerned either under BITs, FTAs or other principles of international law.⁶⁴

Another distinct characteristic of BITs is that they are concluded mainly between developed and a developing countries. Among the thousands of BITs concluded thus far, only a tiny number are between two developed countries. Most developed countries are stable democracies where the right to property is protected by law, the judiciary is by and large independent, and there is little non-commercial or political risk involved in investments made there.⁶⁵

Although provisions included in these agreements differ, at a minimum they typically guarantee foreign investors a right to repatriate their profits and other investment-related funds; a right to most-favored nation (MFN) treatment and, almost as often, national treatment; a right to compensation in the event of nationalization, expropriation or indirect forms thereof; a guarantee of minimum international standards of treatment (e.g., fair and equitable treatment); and dispute settlement on a state-to-state and investor-to-state basis.

It is very difficult to determine the impact of the 2,000 or so agreements. They vary on the detail issues, have the covered issues evolved, the language used to do this is surprisingly variable. Formulations of standard treaty protections may vary somewhat from treaty to treaty and this has

⁶⁴ Ibid

⁶⁵ _____ (2007) *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD, United Nations, New York and Geneva, p.21

given rise to diverging interpretations of their meaning.⁶⁶ Even where formulations are very similar, tribunals are not bound to interpret the provisions in a standard light and in one notable instance; two tribunals offered broadly contradictory readings whether a given set of facts amounted to a breach of key treaty provisions.⁶⁷

A growing number of investor-state disputes based on BITs suggest that they are effective at least in providing investors valuable protection but the evidence is clouded by the lack of transparency associated with the arbitration procedures that are being used. It is literally impossible to know how many disputes have been initiated or how many have been decided let alone with what results and on what legal basis.⁶⁸ While there is suggestive evidence indicating a wide range of outcomes and even some contradictory results there is no way to determine what the overall universe looks like. Thanks to the characteristics of some of the common rules of arbitration, a portion of the arbitral iceberg remains hidden from view.⁶⁹

No clear evidence has emerged to show that BITs have made a difference, for example, by increasing investment flows between parties.⁷⁰ Yet a number of concerns have been documented. While the BITs seek to establish basic rules of governmental behavior for the host countries, they do not themselves meet the most essential standards of transparency and accountability. They do not contribute to the institutional development of host countries to enable them to meet requirements of due process, nor do they ensure that scarce resources are well allocated, in particular when disputes siphon off funding from agencies in developing countries that are under-funded in the first place.

⁶⁶ Peterson, Luke Eric (2004) "Investment Treaty Tribunal Looks under the Umbrella," *Invest-Sd News Bulletin*, p.20

⁶⁷ Peterson, Luke Eric, "Research Note on Emerging BITs Disputes," April 2003, available at <http://www.iisd.org/pdf/2003/investment.pdf>

⁶⁸ Ibid

⁶⁹ Konrad Von Moltk and Howard Mann, (2004), *Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements*, at <http://WWW.iisd.org>, p.7

⁷⁰ World Bank, *Global Economic Prospects and the Developing Countries: Investing to Unlock Global Opportunities*, (2003) World Bank, Washington, p. 129.

2.3. Significance and Role of Bilateral Investment Treaties

Despite many concerns bilateral investment treaties now enjoy widespread acceptance by countries from all regions. Indeed, these treaties which were originally concluded almost exclusively between developed and developing countries are now increasingly being concluded between developing countries and between these countries and economies in transition, although the great majorities are still concluded between home countries that are developed countries and host countries that are developing countries.⁷¹

The substantive rules of customary international law on the treatment and protection of investment, once established in a host country, are rather general, and the procedures for their implementation generally rely on consultations and diplomatic action; they are thus difficult to apply to particular situations. As a result, BITs constitute at present a principal source of substantive and especially procedural rules for the international protection of FDI.⁷² The protection issues addressed by BITs are, however, of particular concern to foreign investors.

The main objective of most capital exporting countries is to obtain legal protection for investment under international law and thus reduce as much as possible the non-commercial risks facing foreign investors in host countries.⁷³ The standards of protection in an international agreement are considered to be of a higher and more reliable nature than those provided under domestic law alone, which can be subject to unilateral modification.⁷⁴ Capital-importing countries conclude BITs in an effort to attract foreign investment in the interest of development, by protecting it and thereby demonstrating their commitment to providing a favorable investment climate.

⁷¹ _____ (1997) Bilateral investment treaties and their relevance to a possible multilateral framework an investment: issues and question, Trade and Development Board Commission an investment, Technology and Related Financial Issue Expert Meeting on Existing Agreements on Investment and their Development Dimensions Geneva, 28-30 may 19 97, United Nations, Geneva, pp. 5-6

⁷² Ibid, p.6

⁷³ Ibid, p.7

⁷⁴ Ibid

2.4. Reasons for Bilateral Investment Treaties

There were several unsuccessful attempts at multilateral treaties on foreign investment protection.⁷⁵ The reasons for the failure of these attempts are obvious. The issues that relate to foreign investments made by large multinational corporations give rise to sensitive issues of sovereignty, exploitation of natural resources and internal economic policies. It is unlikely that developing states will commit themselves readily on such issues in a binding multilateral treaty, though developed state will be keen to realize such a treaty.⁷⁶

Bilateral treaties, on the other hand, are different in that they are made on an ad hoc basis and their ability to give rise to general principles is remote.⁷⁷ In addition, such treaties could be negotiated in such a manner as to suit the mutual interests of the parties, whereas a multilateral treaty cannot be. Bilateral solutions become necessary simply because of an absence of a consensus to create multilaterally acceptable norms.

2.5. Characteristic Features of bilateral investment treaties

The structure of bilateral treaties has a basic similarity.⁷⁸ The treaty begins with a prefatory statement as to the aim of the treaty, which is usually the reciprocal encouragement and protection of investment flows between the two states. This is followed by an identification of the types of property which are protected and the nature of the link of nationality to one of the parties that entitle the foreign investor to the protection of the treaty.⁷⁹ The standard of treatment to be accorded to the foreign investor is established. The right of repatriation of profits is asserted. There are statements on the nature of the compensation, if any, to be provided to the foreign investor for loss occurring during wars and civil riots. The standard of compensation in the event of a take over of the foreign investor's property is identified. The procedure for the settlement of disputes arising from the investment by arbitration is stated. These are standard contents in all bilateral agreements. But, there are variations of the statements of the rule that are

⁷⁵ Konrad von Moltke. (2000) An International Investment Regime?, Issues of Sustainability, international institute for sustainable development, USA, P.15

⁷⁶Sornarajah, M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, P.212

⁷⁷ Ibid

⁷⁸ Ibid, P.217

⁷⁹ Ibid

to be applied as between the parties on each area. To understand these variations, it is necessary to analyze the contents thereof.

Format of BITs

Investment treaties more or less share a standard format. They start with the preamble. In the preambles they spell out the principal objectives intended to be achieved by the contracting parties, then comes defining terms that require clarity to avoid misunderstanding at the time of implementation of the treaty.

Definitions

The term investment, parties to the treaty, returns, territory, etc is frequently defined in all BITs as they are essence of the treaty itself. Having an unequivocal meaning in advance by the contracting parties is commendable to avoid misunderstanding that could possibly arise in the future. In the sample of BITs the writer surveyed the term investment includes every kind of rights, properties and assets constituted or recognized in the territory of one contracting party according to its laws and regulations, including: all movable and immovable properties as well as property rights thereto; shares, stocks and other forms of participation in business enterprise or companies, claims to money invested for the purpose of certain economic values related to investments; exclusive rights to intellectual and industrial property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial design, trade secrets, technical processes and knowhow and good will; business concessions conferred by law or under contract including concessions to search for, cultivate or exploit natural resources.⁸⁰ The definition also recognizes as an investment any change in the form in which assets or capitals have been invested or reinvested.⁸¹

⁸⁰ _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.13

⁸¹Ibid

Parties to the investment Treaty

Investors are either natural persons or legal entities. The state itself may directly or through the use of state owned legal entities participate in foreign investment of all sorts. Hence, all BITs uniformly define the term investor as a natural person who is a national (citizen) of the contracting party without at the same time being a national or permanent resident of the other contracting state, or any legal entity, including a corporation, a firm, an association or a partnership consisted or otherwise duly organized under the laws of one of the contracting parties and has its principal seat and economic activities in the territory of the same contracting party.⁸²

Territory

Means the territory in which each contracting state party exercises sovereign rights or jurisdiction in accordance with its legislation and international law including its exclusive economic zone, land and seas, continental shelf over which the contracting state party has power.

Returns

No one treaty missed to define this term as it is related with the purpose of entering in investment activity itself. It is understood to include amount yielded by investment such as profits, dividends, interests, capital gains, royalties and other fees. After definition, the protection that is intended to be provided by the signing of the treaty is reflected in detail.

Treatment

Bilateral treaties are signed between two contracting states to create favorable conditions for investment by investors of one state in the territory of the other state. Each contracting party takes the responsibility in accordance with the legislation, guarantee to investors of the other contracting party. Full protection security to investments made by investors of one state, to bring an action at international arbitration forum against the other contracting party that has done harm to the investments carried out by the investor in the territory of the other state. States enter into such agreements to provide and attract investors. The type of protections granted are stated below..

⁸² _____ (2007) Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, UNCTAD, United Nations, New York and Geneva, p.23

Discriminatory Treatment

Treating one of contracting parties differently from the other is prohibited. An action is deemed to be, discriminatory in effect if it results in treatment of an investor that is different from that accorded to other investor that is different from that accorded to other investor in a similar or comparable situation. China is presently entering in to many investment honoring treaties seriously as it is now investing in other countries. It wants to be recognized as a non-discriminatory state so that its nationals investing in other countries too would not be discriminated.

Expropriation

The right to expropriate properties operation in the territory of a given sovereign states is inherent to the right of statehood. Treaties therefore do not generally prevent states from taking the property of an investor but they prohibit expropriation without compensation.

Most Favored nation Clause

A state must not treat less favorably to the nationals of a contracting state than accorded to the host state or any other state. Each contracting, state must provided treatment at least as favorable as that provide by international law.

National Treatment

Each contracting party has to render foreign investors as favorable as that provided to the host country's citizen (s) and provide full protection and security for foreign investment. Investors are, in any case, granted either national or most favored nation treatment, whichever may be better.

Equally important is the responsibility that falls on each contracting party to avoid unreasonable conduct that restricts the operation, management, maintenance or expansion of the investment.

Besides, each contracting party shall comply with obligation that each contracting party has undertaken with the investor.

CHAPTER THREE

RELATIONSHIP BETWEEN INVESTMENT TREATIES AND OTHER ASPECTS OF INTERNATIONAL LAW

3.1 Introduction to the sources of International Law

International law is that element which binds the members of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in creation of contracts, and coercive, as it punishes those that infringes its regulation.⁸³ International law consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations as well as with some of their relations with persons, whether natural or juridical.⁸⁴ International law has a number of special characteristics making it completely different from highly developed national legal systems which are connected with the existence of the modern state and its apparatus. There is a dispute on the issue whether all aspects of international law are hard and binding laws. The controversy has focused on the lack of sanctions in cases of violation of international norms as compared to municipal law and it has often confused the question of whether international law is a binding law with the problem of the effectiveness and enforcement of international law.⁸⁵ Treaties could be bilateral or multilateral. They are used by countries of the world to supplement issues of global nature which are not governed by customary international law. In short, treaties are concluded to govern a number of international affairs between and among states of the world.

Treaties are one of the main sources of international law. Treaties are more specific statements of international obligation than customs, and the consent of the parties to the treaty is clearly expressed. In modern times the number of treaties in force has increased dramatically such that treaties often cover all the major issues that come up in a particular international dispute.⁸⁶ A treaty is an agreement governed by international law. This definition is meant to distinguish

⁸³ Akehurst's (1997) Modern Introduction to International Law , 7 ed. ,Taylor and Francis Group, USA, p.8

⁸⁴ M N. Shaw(1998) International Law, 6 ed., Grotius publication , Cambridge university press, UK, p.6

⁸⁵ S.K Kapoor(1969) International Law and Human Rights, 1 ed., Central Law Agency, Indian, p.57

⁸⁶ L.Oppenheim (1963) International Law A Treatise , 7 ed., Longmans Green &CoLTD , Britain,p.165

between treaties on the one hand and contracts entered into by States on the other. States may enter into contracts, commercial or otherwise, that are governed by the national laws of one of the States involved.⁸⁷ Treaties may be bilateral or multilateral. Bilateral treaties are treaties between two contracting states. Multilateral treaties are treaties among three or more parties. Usually the same legal rules apply to the different types of treaties. The claims relating to norms of an international law of foreign investment can be accepted as principles of international law only if they are based on an accepted source of public international law. These sources of international law are stated in Article 38(2) of the Statute of the International Court of Justice. It will be useful to indicate the sources available to build up the principles of an international law on foreign investment.

3.2. Some Distinguishing Features of Investment Treaties from General Aspects of International law

Investment treaty is not like a friendship and cooperation treaty. The obligations of the parties emanating from the agreements variations indicate the impossibility of customary principles arising from these treaties, however many of them there are.⁸⁸ There are no bilateral investment treaties between developed countries. The reference made to the existence of treaties between developing countries does not affect the fact that one of them is an exporter and the other a receiver of foreign investment.⁸⁹ Two receivers of foreign investments do not sign such treaties.

The fundamental elements of BITs, cover areas of the regulation of foreign investment scope and definition of investment, admission and establishment, national treatment, most-favored nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds and dispute settlement mechanisms, both state to state and investor to state. These are to show that distinguishing features of investment treaties from general aspects of international law.

⁸⁷ Ibid

⁸⁸ Sornarajah, M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, P.217

⁸⁹ Ibid

3.3 Why are Bilateral Investment Treaties problematic?

First of all, the treaties' main aim is to create a stable investment climate in a country, as well as to increase the flow of investment into countries. They aim at taking away a number of uncertainties that investors are confronted with when investing in another country. However, the protections given to foreign investors and the way these protections can be enforced mean that developmental or public interests, or interests of national investors, are made secondary to foreign investor interests.

Secondly, although the investment treaties are signed between two governments, the investors of one state can challenge the other state's government if their interests are at stake. In general, governments might tend to be rather reluctant and to think twice before bringing another country to dispute settlement, but experience shows that investors clearly do not.

Thirdly, a balance between rights and obligations of investors is absent. The treaties provide protection of investors' interests and rights, but do not enter into commitments on obligations of investors, for example in terms of their contribution to sustainable development, respect for local laws and regulations, workers' rights and so forth. For example, the Chad-Cameroon pipeline investment project contract included clauses barring interference in the pipeline which could also be used to prohibit activities such as interrupting work in order to contact a labor inspector because of a concern about health and safety.⁹⁰

And fourthly, in the case of disputes, most of these treaties refer to international dispute settlement mechanisms whose record demonstrates a bias towards the interests of foreign investors. The dispute mechanisms available are all non-transparent, secretive, and arrive at decisions that do not take into account their developmental impact. Moreover, the costs involved and payments in case of loss are often soaring and could drain government budgets, including for social spending, health and education.

⁹⁰ Contracting out of human rights, The Chad-Cameroon pipeline project, Amnesty International UK, 2005

3.4. Treaty Practice and Treaty Interpretation

Treaties represent negotiated compromises reconciling often wide differences. The greater the number of negotiating states, the greater the need for imaginative and subtle drafting to bridge the gap between opposing interests. Inevitably this sometimes produces texts that are unclear or ambiguous. There is no treaty that cannot raise some question of interpretation, and most disputes submitted to international adjudication involve a problem of interpretation.⁹¹ Although Articles 31 and 32 are concerned with interpretation, they contain much that is of practical value to the treaty-maker or to anyone involved in implementing a treaty. These provisions read as follow:

Article 31 General Rule of Interpretation

1. *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.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*

⁹¹ Anthony, Aust (2005) Handbook of International Law, Cambridge University press, New York, pp.88-89

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.⁹²

The basic provision relating to interpretation is found in Article 31(1) 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. This is not a step by step analysis. Rather, when we interpreting a treaty, we should apply all these elements, at the same time. To start, with the treaty must be interpreted in good faith. In other words, a party should not attempt to twist the language of the treaty in order to secure some selfish benefit for it that was not contemplated by the other parties.⁹³ Good faith requires neutrality.

The manners in which bilateral investment treaty is interpreted and the way in which it is to be made effective ultimately determine whether its objectives structure and substantive provisions produce the desired developmental effects. The degree of flexibility allowed for the interpretation and application of bilateral investment treaties depends to a large extent on the legal character of the agreement, the formulation of individual provisions and the institutional machinery involved in its application.⁹⁴ Bilateral investment treaties are intrinsically intended to

⁹² Vienna Convention on the Law of Treaties (1969), United Nation, Article 31 & 32

⁹³ M N. Shaw (1998) International Law, 6 ed., Grotius publication, Cambridge university press, UK, p.933

⁹⁴ _____ (2000) International Investment Agreements: Flexibility for Development, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.18

have certain effects, both at the national and international levels, even when they do not provide for follow up mechanisms specific to them.

According to article 31 (2) of the Vienna Convention on the Law of Treaties the preamble is part of a treaty for the purpose of interpretation. It is the repository of the general aims and purposes of the agreement and offers a summary of the grounds upon which it is concluded. Thus, while preambles and similar declarations normally do not directly create rights and obligations for the parties to an instrument, they are relevant for the interpretation of its provisions. In fact, the texts of preambles are often the result of hard bargaining. Therefore, to the extent that preambles reflect the will of the participating countries, they reaffirm development as a central purpose of international arrangements⁹⁵. Moreover, as preambles are an important aid to the interpretation of specific provisions, an express reference to development in the preamble is a factor that would contribute to their interpretation so as to further development goals. This means when we interpret the bilateral investment treaties we should also refer the preamble of the treaty. But one of the main issues is whether the over all treaty interpreted relating to public international law also apply to bilateral investment treaties.

3.5. The Impact of Bilateral Investment Treaties on Foreign Direct Investment

An increasing awareness on the part of international investors of the advantages of BIT protection is now driving the structure of overseas investments, particularly in the developing world where there is perceived to be an element of political risk or instability.⁹⁶ Whereas in the past many transactions were structured to obtain favorable tax treatment or maximize tax concessions, for investors in many parts of the world it is now just as important to ensure the security of their investment from the consequences of State interference, and the maximization of investment treaty protection is therefore their prime concern.⁹⁷

⁹⁵ _____ (2004) International Investment Agreements: Key Issues, Vol. I, UNCTAD, United Nations, New York and Geneva, p.59

⁹⁶ Watson, Farley and Williams (2009) Introduction to Investment Treaties, at www.wfw.com, p.11

⁹⁷ Ibid

Depending upon the terms of the particular BIT, it is often a relatively straightforward task to structure a transaction in a way which maximizes BIT protection. In many cases it is sufficient simply to channel an investment through a company incorporated in a jurisdiction which has signed a BIT with the host State.⁹⁸ Bilateral investment treaties vary across countries, but they generally share similar features of defining foreign investment and laying out various principles regarding treatment, transfer of funds, expropriation, and mechanisms for dispute settlements. Because the central piece of a BIT is the assurance it gives investors regarding their property rights, it is important to look more closely at what these rights are.⁹⁹

One common clause included in many BITs is the right the investor to sue the host country if actions undertaken by the government are deemed to substantially expropriate the business of the firm.¹⁰⁰ Two points should be highlighted: First, this right of an individual investor to sue the government is in itself an expansion of investor's rights. In most cases, the government can claim sovereign immunity, leaving little recourse in the legal system. The remaining alternative is to seek the assistance of the investors' own home country in gaining diplomatic protection. This may not be granted and makes the entire process a political one. Instead, with the investment treaty, the host country consents to a standing offer to arbitrate disputes covered by the treaty. Second, BITs outline the terms under which expropriation could be deemed lawful and compensation would be due. The exact wordings of such clauses vary by signatory countries. But there is broad agreement on the thrust of the terms. Property can only be legally expropriated if it is for a public purpose, if it is done in a non-discriminatory way, if compensation is paid, and if the expropriation is done in accordance with due process of law. Of these conditions, the one with the largest consequences is the compensation clause.¹⁰¹

While it should be recognized that a BIT could be an important commitment device, the nature of the commitment can vary enormously depending on the terms of the BIT. Too much attention has been placed on whether or not a BIT exist than on the strength of the property rights actually

⁹⁸ Ibid

⁹⁹ Karl P. Sauvant and Lisa e. Sachs (2009) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press, New York, p.352

¹⁰⁰ _____ (2004) *Key Terms and Concepts in IIAs: A Glossary*, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.67

¹⁰¹ Ibid

being enshrined in these agreements.¹⁰² To date there is no discussion in the economic literature of whether the strength of the rights enshrined in a BIT would provide adverse incentives to potential investors, or provide insurance well beyond what domestic investors enjoy or that foreign investors would require with consequences that could potentially have enormous impact on the feasible policy choices available to host governments.¹⁰³ In addition, we look at potential anticipation effects after signing and before ratifying a BIT. Below we concentrate on FDI and analyze whether outward FDI stocks rise as new bilateral treaties are signed or implemented. My hypothesis is that bilateral investment treaties increase FDI.

3.6. Why Do Developing Countries Sign Bilateral Investment Treaties?

Developing countries often compete for foreign investment with the hope that foreign direct investment will bring a wide range of economic benefits.¹⁰⁴ These benefits include increased levels of investment and economic activity, worker training, well paid jobs and technology transfers that enhance the productivity of local firms.¹⁰⁵ In addition, foreign investment may be viewed as a particularly attractive means of increasing developing country investment stocks since foreign investment is much less likely than other financial flows to leave the host country if the host country experiences a financial crisis. Although multinational firms may have negative effects on host country markets, such as intensified competition with local firms, policy makers generally assume that FDI is generally beneficial.¹⁰⁶

Since BIT signing appears to be correlated with the presence of foreign investment, one may also ask whether countries signed BITs as a means of gaining contemporaneous FDI flows. While BITs may have had no observable effect on future foreign investment flows, it may be the case that countries signed BITs in order to secure immediate foreign investments that were realized at

¹⁰² Karl P. Sauvant and Lisa e. Sachs (2009) *The effect of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties, and investment flows*, Oxford University Press, New York, p.352

¹⁰³ Ibid

¹⁰⁴ Emma Aisbett (2008) *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, Australian National University, Australian, p.5

¹⁰⁵ Ibid

¹⁰⁶ Ibid

the time of BIT signing.¹⁰⁷ To consider this issue, a final variable supplements the analysis FDI flows that occurred during the period of BIT signing. Once again, the general economic variables introduced earlier continue to perform as before. BIT signing, country per capita incomes, and country risk are still positively related. However, the new results show that the inclusion of contemporaneous FDI flows provides additional explanatory value to the regressions.¹⁰⁸ Countries that were in the midst of FDI surges are more likely to sign BIT agreements.

Therefore, the above facts show that the signing of BITs was positively correlated with previous investment levels. Such a correlation suggests that countries may have agreed to sign these treaties since foreign investors located in their borders were lobbying for the investor protections they could gain from BITs. In addition, BITs depend on country characteristics, as the number of treaty signings was positively correlated with per capita income and country risk. So by signing BITs developing countries hope that foreign direct investment will bring a wide range of economic benefits.

3.7. Bilateral Investment Treaties and Promotion of Foreign Direct Investment in Ethiopia

For a long time, the justification for the conclusion of BITs has been that countries sign these treaties to help increase, promote and encourage new investment flows between the parties to the BITs thereby increasing the amount of capital and associated technology that flows to their territories. In actual fact, there is a hope that the treaties will encourage new investment, which will, in turn, bring a wide range of benefits to the host state. Let's suppose the FDI can contribute to economic development, it remains uncertain whether BITs enable countries to attract a higher level of foreign investment.

Some investment lawyers have highlighted the lack of tangible evidence to demonstrate investment flows and a link to investment treaties in reality two self described proponents of the investor protections contained in such agreements concede that the agreements may be negatively linked to investment flows. Countries like Brazil and Nigeria saw large investment

¹⁰⁷ Jan Peter Sasse (2011) *An Economic Analysis of Bilateral Investment Treaties*, Research, Gabler Verlag, Netherlands, p.6

¹⁰⁸ Ibid

flows despite not concluding such treaties. Moreover many Central African or Latin American nations have seen little investment despite having entered in to many of BITs.¹⁰⁹ Moreover, countries such as China and Cuba are said to have seen sizable flows of investment from countries with which they have not concluded BITs.¹¹⁰ Astonishingly many analyses examining the economic effects of signing BITs have generally come to the rather disappointing conclusion that BITs are not linked with large increase in foreign investment. For example, The World Bank's 2003 report on the global economic prospects of the developing countries conclude that, even the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries.

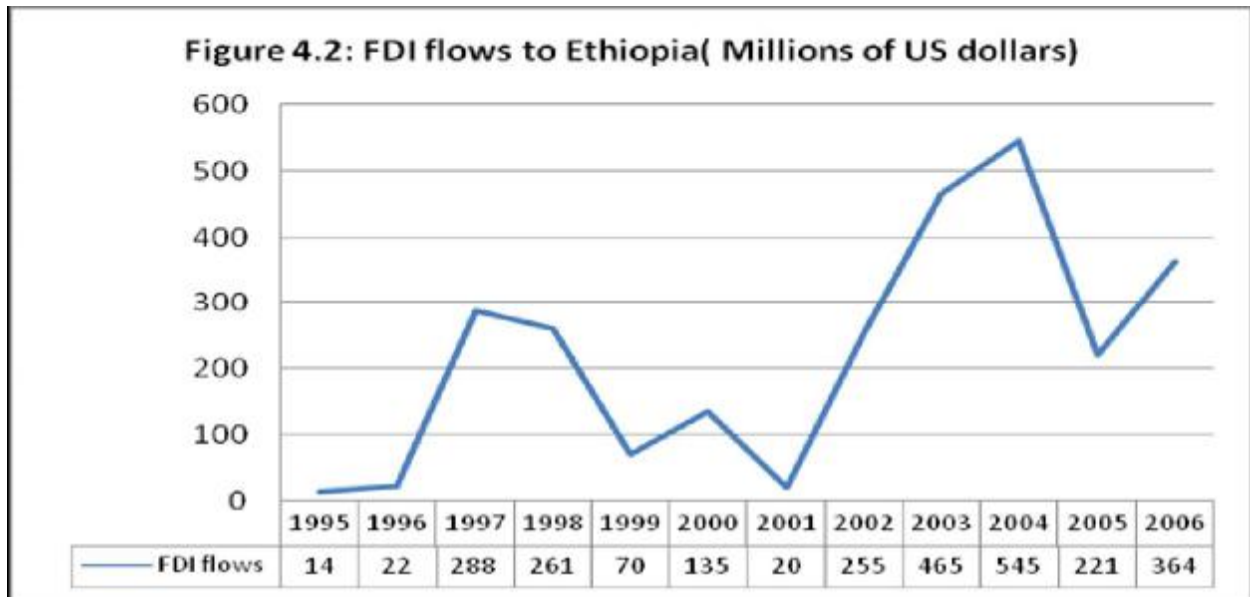
Notwithstanding these irritating doubts about the impact of BITs upon investment flows, developing countries have continued to champion the agreements despite lack of evidence to show their efficacy in increasing FDI flows to developing countries.

Likewise, in Ethiopia, looking at the flow of FDI, flows of the net sales of FDI, from the year 2005 to 2010 in Ethiopia, are 265 million dollars, 545 million dollars, 222 million dollars, 109 million dollars, 221 million dollars, and 374 million dollars, respectively the report reads.¹¹¹ Therefore, it is observed that many investment projects in Ethiopia are from countries which have BITs with Ethiopia. See evidence the following figure.

¹⁰⁹ Interview with Ato Tewodros Tamiru, Director Legal Directorate in Ethiopian Investment Agency, Intervened at his office, on Aug 17, 2011, Ethiopia

¹¹⁰ Ibid

¹¹¹ Ethiopia's share of FDI inflows to Africa is just to percent, see the report released by the UN Conference on Trade and Development (UNCTAD), 2010, p.41



Source: world investment report 2001, 2003, 2006 and 2007, UNCTAD

More mystifying, however is the eagerness of many developing countries including Ethiopia to continue to enter in to these treaties with developed states and increasingly with their counterparts in the developing world. Even if investment treaties play a relatively marginal role in the promotion of new investment, it needs to be asked to what extent the protective function of the treaties will impact upon the ability of governments to regulate investments in the public interest, including for the furtherance of development goals. The writer argues that Ethiopia bilateral investment treaties may help in the promotion of foreign direct investment in Ethiopia.

CHAPTER FOUR

OTHER PROVISIONS OF BILATERAL INVESTMENT TREATIES

BITs exhibit a certain pattern of uniformity in their structure and content. Elements common to virtually all such treaties are the use of a broad definition of the term “investment”, the inclusion of certain general standards of treatment of foreign investment, such as fair and equitable treatment and constant protection and security, and more specific standards of protection regarding expropriation and compensation, transfer of funds, and the protection of foreign investment in case of civil strife. Most such treaties also provide for national and MFN treatment, although this is frequently limited to the treatment of foreign investment after admission. Many such treaties provide for the ability of States as well as foreign investors to resort to international arbitration.¹¹²

In practice, BITs vary widely in scope and content. The majority, however, includes provisions on investment protection, investment promotion, capital flows, and direct payment liberalization, as well as post-admission issues such as non-discrimination and bans on certain performance requirements.¹¹³ Some BITs go further, including pre-admission issues (i.e. establishment and acquisitions) across the board of economic activities, and more explicit protection provisions in the form of expropriation and compensation clauses.¹¹⁴ In most cases, BITs cover only the post establishment phases of investment. They confer rights to investors regarding treatment by host governments of a wide range of types of investment after they have been established in the host country. Some of these are examined in greater detail below.

4.1. Admission and establishment of investment

The issue of admission and establishment refers to the entry of investments of investors of a contracting party into the territory of another contracting party. According to customary international law, countries have the right to regulate the admission of foreign investors and their

¹¹² _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.13

¹¹³ _____ (2004) International Investment Agreements: Key Issues, Vol. I, UNCTAD, United Nations, New York and Geneva, p.18

¹¹⁴ Ibid

investments in their territories. Most countries refrain from granting foreign nationals and companies an unrestricted right to invest in their economies.¹¹⁵ Access limitations imposed on foreign investment have been justified on economic, social, political or national security grounds. The negotiation of BITs has evolved within this context. Two basic models are currently used. One makes the admission and establishment of foreign investment subject to the domestic laws of the host country (called the “admission clause” model), and the other grants foreign investors a right of establishment, although not in an absolute manner (called the “right of establishment” model).¹¹⁶ Most BITs have not been conceived as instruments to provide foreign investors with a right of establishment. Rather, these agreements only impose a duty on the contracting parties to admit foreign investment in accordance with their national legislation.

For example, when we see Article 2(1) of Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Russian Federation, they stipulate admission clause as follows:

*Each Contracting Party shall encourage and create favorable conditions for Investors of the other Contracting Party to invest in its territory and admit such investments in accordance with its laws and regulations.*¹¹⁷

In principle, market access provisions give investors the same right to make investments as domestic or other foreign investors. Usually BITs do not offer much market access but rather focus on protecting investments that have already been allowed to enter into the country. True to this tradition, Ethiopia’s BITs encourage Contracting parties to admit investments by investors of others in accordance with its laws and regulations.¹¹⁸ Hence, the existing market access limitation in Ethiopian investment laws will apply. Investment admission coverage includes not

¹¹⁵ _____ (2007) Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, UNCTAD, United Nations, New York and Geneva, p.21

¹¹⁶ Ibid

¹¹⁷ Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Russian Federation(2000), Addis Ababa, Art.2

¹¹⁸ Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia (2011) Final Report, 24 January 2011, Ministry of Trade of Ethiopia, p.31

only capital but also natural person such as executive, managers, specialists or technical personnel.

The effects of FDI on a host country's economy, in particular its growth and development prospects, are of special interest to developing countries. Concerns in this respect have sometimes led to controls over admission and establishment.¹¹⁹ Various considerations have figured in host government limitations on admission and establishment: infant industry considerations, defense capabilities, employment effects, technology transfer, and environmental and cultural effects.¹²⁰ Host government policies in this respect emerge from the specific mix of political and economic circumstances characterizing particular countries.

4.2. Investment promotion

Most of the BITs reviewed do not specify any promotional activities that should be undertaken by the Governments of the BIT partners to encourage investment flows between the two countries, either as host or home countries.¹²¹ The approach to promotion of foreign investment taken by BITs is mainly indirect, relying in the first place on their protection provisions to create a favorable investment climate.¹²² This in turn is expected to deliver FDI flows. Thus, as in earlier practice, and in spite of BITs clearly stated objective of promoting FDI flows between the countries, there is only a vague and general commitment of the contracting parties to encourage or promote investment, usually formulated in connection with the preamble, where the language tends to be hortatory in nature, or with the admission provisions.¹²³ For example, when we see the preamble of Agreement between the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China concerning the encouragement and reciprocal protection of investments they state as follows:

Intended to create favorable conditions for investments by investors of one contracting party in the territory of the other contracting party;

¹¹⁹ _____ (2000) International Investment Agreements: Flexibility for Development, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.81

¹²⁰ Ibid

¹²¹ _____ (2007) Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, UNCTAD, United Nations, New York and Geneva, p.26

¹²² Ibid

¹²³ Ibid

*Recognizing that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both states;*¹²⁴

Ethiopia's BITs recognize that the promotion and protection of investments and creating favorable conditions for investments as the central objectives.

4.3. General standards of treatment

Bilateral investment treaties usually contain obligations specifying the treatment that the parties to the treaties are required to provide to the investment once it has been established. In many instance it has been contended that an international minimum standard exists.¹²⁵

There are a variety of standards of treatment provided for in bilateral investment treaties. They would usually contain one article on treatment standards but that article would identify several different standards of treatment. These include national treatment, fair and equitable standard of treatment, international minimum standard of treatment and full protection and security.¹²⁶ Many treaties also contain clauses protecting the observance of obligations entered into between the investor and the host country.¹²⁷

4.3.1. National treatment (NT)

This clause relates to investments to be accorded by reference to treatment to other investment. National treatment may be interpreted as formal equality of treatment between foreign and domestic enterprises.¹²⁸ However, where countries at different levels of development are parties to an IIA, such formal equality may disregard important differences in the actual situation and capabilities of the enterprises on each side.¹²⁹ In such a context, application of the national

¹²⁴ Agreement between the Federal Democratic Republic of Ethiopia and the Government of the people's Republic of china concerning the encouragement and reciprocal protection of investments(1998), Addis Ababa, p.1

¹²⁵ _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.123

¹²⁶ ¹²⁶ _____ (2004) International Investment Agreements: Key Issues, Vol. I, UNCTAD, United Nations, New York and Geneva, p.25

¹²⁷ Ibid

¹²⁸ _____ (2000) International Investment Agreements: Flexibility for Development, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.95

¹²⁹ Ibid

treatment standard may require more than formal equality, so that the development needs of a developing country party to an IIA are taken into account in the definition and application of the standard.

The standard of national treatment could be defined as a principle whereby a host country extends to investors treatment that is at least as favorable as the treatment that it accords to its national investors in like circumstances.¹³⁰ Thus the national treatment standard lays down the principle for non-discrimination between national investors and foreign investors concerning investment. But it is a contingent standard, as its level of protection is to be inferred from the laws and regulations of the host state on its own nationals.¹³¹ It is very important, however, as it treats foreign investors on equal footing with the host state's own investors.

The national treatment provision is included in most investment treaties. Some treaties combine both national treatment and most favored nation treatment. 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. Article 3(1) provide as follows:

*Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.*¹³²

Article 3(2) further provides:

Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that

¹³⁰ Getahun Seifu (2008) Regulatory Space in the Treatment of Foreign Investment in Ethiopians laws, 5 the Journal of World Investment and Trade , South Africa, p.11

¹³¹ Ibid

¹³² 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(2009), Addis Ababa, Art. 3(1)

*which it accords to its own nationals or companies or to nationals or companies of any third State.*¹³³

National treatment gives foreign investors at least the same treatment and protection as domestic investors or Ethiopia's own investors or investors of a third country whichever is more favorable to the investors concerned.

4.3.2. Most Favored Nation (MFN)

The basis for comparison under MFN standard differs from national treatment standard because one contracting state is obliged to give investors or investments from the other contracting state no less favorable treatment than it grants to investors or investment from third countries. This levels the playing field for all foreign investors protected by bilateral investment treaties.

The MFN standard means that a host country must extend to investors from one foreign country the same or no less favorable treatment than it accords to investors from any other foreign country.¹³⁴ The primary aim of MFN principle is to establish equality of competitive opportunities between investors from different foreign countries. It prevents competition between investors from being distorted by discrimination based on nationality.

The MFN treatment takes as its reference point the best benefit, advantage or privilege a country gives to its friendliest country. It takes this best treatment offered to the friendliest country and extends it to investors originating from other countries. In other words, the MFN treatment multilateralizes the arrangement concluded between the friendly countries with the purpose of "providing] a level playing field for all investment players."¹³⁵ In any event, the foreign investors from third countries shall be given no less favorable treatment when compared with the investors of the other country that made the best deal. Though it is observable that the standard is expansive in its nature, it is not without limitation, however. The main limitation on MFN treatment is that the treatment should apply to investors operating under 'like circumstances' or 'like situations'. Consequently, there would seem to be an element of flexibility for a host

¹³³ Ibid, Art. 3(2)

¹³⁴ Watson, Farley and Williams (2009) Introduction to Investment Treaties, at www.wfw.com, p.8

¹³⁵ Getahun Seifu (2008) Regulatory Space in the Treatment of Foreign Investment in Ethiopians laws, 5 the Journal of World Investment and Trade 40, p.11

country that wishes to treat different investors or categories of investment differently as long as fairly objective and defensible criteria are used in making such a distinction¹³⁶.

Some BITs promise that the other signatory State shall be accorded “most favored nation” status. This means that the host State must not treat investments made by investors from the other signatory State less favorably than an investment made by an investor from any other country.

If an investor is protected by a BIT containing this kind of clause, it frequently means that he is also able to take advantage of the protection offered by every other BIT signed by the host State. This is because he is entitled to no less favorable treatment than investors from any other State. In effect, an investor can “cherry pick” the most favorable terms from any BIT signed by the host State and rely on them to found a claim.¹³⁷ This also means that a properly advised investor should be looking at the terms of several BITs entered into by the host State.

All of Ethiopia’s BITs have the MFN provision. Pursuant to Article 4(3) of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, the provision of MFN incorporated as follows:

The treatment granted under paragraph 1 and 2 of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the benefit of any treatment, preference or privilege resulting from:

a) Its membership of or association with any existing or future free trade area, customs, economic or monetary union or other similar international agreements including other form of regional economic organization, or

b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.¹³⁸

These provisions guarantee the signatories, and their investors, treatment equal to the country with which the host has the most favorable terms.

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments (2009), Madrid, Art.4(3)

4.3.3. Fair and Equitable Treatment (FET)

Ethiopia BITs also refer to the notion of fair and equitable treatment to foreign investors. This phrase somehow seems to be vague and open to different interpretations. According to UNCTAD the contents of this standard has caused much concerns.¹³⁹ It is said that the standard offered under fair and equitable treatment seems to be higher than the international minimum standard.

The fair and equitable standard plays a significant role in IIAs. In addition to filling gaps and providing a context for the interpretation of specific provisions, it seeks to provide a means for resolving problems not only by reference to strict legal rules but on the basis of equity, taking into account the surrounding circumstances of each individual case.¹⁴⁰

Nearly all BITs promise to accord “fair and equitable treatment” to investors from the other signatory State. This imposes a general obligation on the host State to maintain a stable investment environment in accordance with the reasonable expectations of the foreign investor.¹⁴¹

The meaning of this kind of clause, and the scope of a host State’s obligations under it, is an area of public international law which is constantly evolving, any legislative, judicial or executive acts of central or local government which impact negatively on an investment can amount to unfair treatment and give rise to a BIT claim.¹⁴²

Under Article 3(1) of Agreement between the Federal Democratic Republic of Ethiopia and the Government of the People’s Republic of China concerning the encouragement and reciprocal protection of investments the term fair and equitable treatment stipulates as follows:

¹³⁹ _____ (1999) Fair and Equitable Treatment, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.10

¹⁴⁰ _____ (2000) International Investment Agreements: Flexibility for Development, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.108

¹⁴¹ Watson, Farley and Williams (2009) Introduction to Investment Treaties, at www.wfw.com, p.7

¹⁴² Ibid

*Investment and activities associated with investments of investors of either contracting party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other contracting party.*¹⁴³

While national treatment and most favored nation take the treatment of domestic and other foreign investors as a reference point, fair and equitable treatment offers a minimum or specific level of protection. In the past this has been interpreted very broadly by arbitration panels.¹⁴⁴ All Ethiopia's BITs guarantee protection against unreasonable or discriminatory measures in managing, maintaining, using and enjoying such investments.

4.3.4. Full Protection and Security

Investment treaties in the provisions on treatment standards include the requirement that the foreign investment should be given full protection and security. This standard has a firmer basis in customary international law as developed by the United States.¹⁴⁵ It has been recognized, in a long series of awards, that the failure to provide protection to an alien who is threatened with violence creates responsibility in the host state.¹⁴⁶

The obligation of the host State to accord full protection and security to an investment means that it must take reasonable protective measures to prevent the physical destruction of the investor's property.¹⁴⁷ This kind of clause is of obvious value to any investor in a jurisdiction where there are concerns about security, civil disorder or unrest.

Ethiopia BITs also provides for the provisions on full protection and security to the foreign investment. Full protection and security offers protection against damage caused by third parties.

4.4. Expropriation

Most BITs always protect investors against the free of being expropriated unlawfully. State are allowed to expropriate foreign investments if it is done on a non discriminatory basis, for public

¹⁴³ Agreement between the Federal Democratic Republic of Ethiopia and the Government of the People 's Republic of china concerning the encouragement and reciprocal protection of investments (1998), Addis Ababa, Art.3(1)

¹⁴⁴ Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia (2011) Final Report, 24 January 2011, Ministry of Trade of Ethiopia, p.31

¹⁴⁵ Sornarajah, M. (1994), The International Law on Foreign Investment. Cambridge University Press, USA, P.342

¹⁴⁶ Ibid

¹⁴⁷ Watson, Farley and Williams (2009) Introduction to Investment Treaties, at www.wfv.com, p.7

purpose, under due process of law, and based upon payment of prompt, adequate and effective compensation.

Most BITs prohibit arbitrary expropriation without fair compensation to the investor. In addition, they commonly prohibit any measures having an equivalent effect to expropriation. In practice this means that a variety of actions taken by a State, which might not at first appear expropriators, can potentially infringe the prohibition on expropriation if those actions significantly diminish the value of an investment.¹⁴⁸

For example, where the value of an investment is tied up in a long term contract made between the investment vehicle and a counter-party connected to the host State, the unlawful termination of that contract by the counter-party might amount to an expropriation of the investment. The investor may then have the option of bringing a treaty claim against the government of the host State as well as a contractual claim against the counter-party.

BITs that Ethiopia has signed also guard against fear of investor being expropriated or nationalized unlawfully. Ethiopia is allowed to expropriate foreign investment only if it is for a public purpose and is done on none discriminatory bases and upon payment of prompt, adequate and effective compensation.

According to Article 5 of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of investments the term expropriation as follows:

Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having equivalent effect to nationalization or expropriation (hereinafter referred to as “expropriation”) except for public interest, in accordance with due process of law, on a non-discriminatory basis and against the payment of prompt, adequate and effective compensation.

¹⁴⁸Ibid, p.6

*Such compensation shall amount to the market value of the expropriated investment immediately before the expropriation or before the impending expropriation became publicly known.*¹⁴⁹

Restrictions on expropriations limit the possibilities for public authorities to expropriate foreign investors and oblige to pay full and prompt compensation in case of expropriation for public interest.

4.5. Compensation for losses

Investment treaties contain provisions for compensation in the event of damage to the foreign investor's property as a result of war, civil unrest or other national emergencies also provide for liability where the armed forces requisition the foreign investors property where such property is destroyed by the armed force.¹⁵⁰

BITs signed between Ethiopia and other countries also guarantee that if a national or companies of the other contracting states suffer losses due to war or other armed conflict or revolution, or a state of national emergence, Ethiopia shall accord the other party compensation, restitution or indemnification or other settlement not less favorable than that which Ethiopia accord its own nationals companies or companies of any third states.

Under Article 7 of the Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands the provisions Compensation for loss stipulates:

*Nationals of one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favorable to the nationals concerned.*¹⁵¹

¹⁴⁹ Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of investments(2009), Madrid, Art.5

¹⁵⁰ Sornarajah, M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, P.246

¹⁵¹ Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands(2003), Addis Ababa, Art. 7

Investors, who suffer losses owing to war, or other armed conflict, state of national emergency, revolution, etc..., shall be accorded the same right like national investors regarding restitutions, indemnification, compensation or other settlements.

4.6. Transfer of funds

The aim of foreign investment is to make profit and to send that profit to the home state or any other destination such as to offshore companies registered in other countries territories. If the transfer of such profit is barred by the host state, this purpose of the foreign investor will be frustrated. In cases of extreme balance of payments or financial crises the application of the treaty obligation to permit reparation can be suspended until this situation improves.¹⁵²

This clause included in Ethiopia BIT and assures investors that they will move their funds from Ethiopia to the home states without any restriction, delay and to use a particular currency at a specified exchange rate. Ethiopia does not impose any restrictions to this. Article 7 of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of investments on the provision transfer of funds state:

1. Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of all payments relating to their investments. Such transfers shall include, in particular, though not exclusively:

- a) The initial capital and additional amounts to maintain or increase the investment;*
- b) Investment returns, as defined in Article 1;*
- c) Funds in repayment of loans related to an investment;*
- d) Compensations provided for under Articles 5 & 6;*
- e) Proceeds from the total or partial sale or liquidation of an investment;*
- f) Earnings and other remuneration of personnel engaged from abroad in connection with an investment;*
- g) Payments arising out of the settlement of a dispute.*

¹⁵² Sornarajah . M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, PP.238-239

*2. Transfers under the present Agreement shall be made without delay in a freely convertible currency at the market rate of exchange applicable on the date of transfer.*¹⁵³

Ethiopia's BITs allow investors to repatriate funds related to investments (capital, profit, interests, fees, funds in repayments of loans, payments arising out of settlement of a dispute and other earnings).

4.7. The Settlement of Disputes

The procedure for resolving any claim by an investor based upon an alleged breach of a bilateral investment treaty will be determined by the dispute resolution clause in the treaty. Usually BITs provide for international arbitration of one form or another. This means that the investor is not necessarily stuck with a dispute resolution mechanism involving the domestic courts of the host State.¹⁵⁴

Disputes are referred to international arbitral body for a resolution. By so doing both parties seem to have agreed to depoliticize the process of settling the dispute. There is no involvement of any of the states parties other than the disputing parties. The two states could continue their relations as if the dispute did not affect their mutual relations while the case is pending.

Submitting dispute to international investment arbitral forum- ICSID arises from the fact that the foreign investor does not have the confidence in the impartiality of domestic tribunals and courts. In almost all of the BITs of Ethiopia, the parties shall have to first try to settle their dispute amicably. Resort to other mechanisms commences only after this step is undertaken and proved to be failure. The fact that there is no fixed time limit attached to this step may affect the interest of the home state. But, it carries no weight when compared with other advantages the home state has taken over the host state.

Dispute settlement mechanisms relating to investments are provided after the core investment protection provisions. By examining the BITs, we can discover easily that there are two provisions dealing with settlement of investment disputes that might arise between contracting

¹⁵³ Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of investments(2009), Madrid, Art.7

¹⁵⁴ Watson, Farley and Williams (2009) Introduction to Investment, at www.wfw.com, p.9

states' parties themselves and the provision governing the dispute between a private investor and a state contracting party.

1) **Disputing state parties (state v. state):** - are normally expected to first exhaust the diplomatic channel to resolve their disputes. They have to undertake consultation through diplomatic channel to resolve their dispute. The dispute must have erupted from interpretation or application of the BIT. If the consultation fails to bear fruit, any of the contracting party is entitled to initiate an action in front of an ad hoc arbitral tribunal against the other contracting state party within six months. The tribunal will be composed of three arbitrators- one arbitrator each appointed by each of the disputants and these two arbitrators shall agree upon the national of a third state as their chairman to be appointed by the governments of the two contracting states' parties. The appointments of the two arbitrators shall be completed within two months, and that of the chairman within three months. If the disputing states' parties fail to appoint their arbitrators to the tribunal or the arbitrators fail to agree on the appointment of the umpire, the President of the ICJ will be entitled to effect the appointments. All the BITs of Ethiopia fix the period of six months within which such appointment shall be made. Only the BIT with Germany (Art 10) stipulates a period of two months. The ad hoc tribunals determine the procedure and finally render decision which is binding on the parties. In like manner, the BIT with Israel under Art 9 stipulated the Secretary General of the Permanent Court of Arbitration (PCA) at The Hague to be invited to carry out the appointments. The arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rule and all nearing shall be completed within six months of the date of selection of the Chairman and the panel shall give its reasoned decision within two months after dosing of the hearing. Each of the contracting state party bears the cost of its own member of the arbitral tribunal and its presentation in the arbitral proceedings. The cost of the chairman and the remaining fees and expenses shall be borne by the states contracting parties equally or as the tribunal determines in the award.

2. Private investor V. State party: - The second mechanism of settlement involves an investment dispute where one of the contracting parties is a private investor and the other contracting party is a state, its subdivision or its agencies. Before resorting to an international arbitral tribunal, the private party shall first make attempt to settle the dispute amicably with the contracting state party. Of course, this does not rule out the use of diplomatic channel in an

informal way to solve the hanging problem. The private party seeking the amicable solution shall notify the contracting state party of its grievance. If the dispute is not resolved within six months from the date of notification, the aggrieved private party may then initiate an action at the competent (domestic) court where the investment has been made, or it may submit it to an international ad hoc arbitral tribunal. The tribunal shall apply the UNCITRAL Arbitration Rules for settlement of the dispute. The tribunal renders its award by majority vote; the decision is final and binding on the parties and shall be executed according to the national laws of the contracting state party. Apart from this, there are some other alternative mechanisms left to the discretion of the private investor. The next alternative is that the private contracting party is empowered to submit to ICSID at Washington D.C directly provided that each contracting party is a signatory to the ICSID Convention. It means the state which conferred nationality to the private party shall be a signatory to the ICSID Convention for the private party to bring an action against a sovereign state at the Centre. Statistical data show cases brought to the Centre by individual investors against states parties to investment contracts to be very few.

Another alternative left to the investor is to make use of the doctrine of "privity of arbitration". Here, the aggrieved party can initiate an arbitration proceeding without having a prior contractual relationship with the host state as the latter has agreed to treat other investors in similar situation.

In both approaches, a host state generally has no right to commence such arbitration. It may however, raise a counterclaim if permitted under the rules applicable to arbitration as provided under Art 46 of the Convention or Art 40 Rules of Arbitration. In both cases, once the private contracting party has chosen one of the above alternative mechanisms, it can no longer be allowed to resort to any of the other options. This is known as a fork-in-the-road provision. Once the private investor has opted for road A, or for road B or for road C, he has to pursue it up to the end. He can not drop the road it has already chosen and pick up one of the other alternate roads.

In all the Ethiopian BITs the clauses leading contracting states parties to submit to an international arbitral forum (ICSID) are similarly worded. . For instance, the Ethio-Yemen BIT under Art 9(b) states dispute "shall at the request of the investor concerned be submitted for settlement to ICSID if both contracting parties are members of this Convention. In like manner the Ethio- Turkey BIT under Art VII (2(b)) states dispute shall be submitted to international arbitral forum, "If the disputes can not be settled by consultations and negotiations within 6

months, the dispute can be submitted as the investor may chose to ICSID. The Ethio-China BIT compels states' parties to submit to ICSID only if a dispute involving the amount of compensation can not be settled within 6 months after resort to negotiation (Art 9(3)). The BIT with the Russian Federation and with that of the Federal Republic of Germany do not contain a provision of this kind whereas the rest of the provisions create jurisdiction in the Center by giving consent in anticipation of dispute.

Ethiopia has signed BITs with countries like China and Russian Federation with the firm believe to receive investment but unlikely for these countries to receive in investments form Ethiopia.

Knowing this, such rich capital exporting countries have demonstrated willingness to extend wide and unqualified access to international arbitration. Art 9(3) gives investors form china in simple unqualified language the right to seek ICSID arbitration. These and many other states that have concluded BITs with Ethiopia opted to submit to ICSID because they are unwilling to permit disputes to be resolved in Ethiopian territory. Nor are the courts of third neutral country like to be appropriate for one or cumulative reasons set here under:¹⁵⁵

- First it may be unwise to entrust a dispute governed by a different or "foreign", system of law to national judges whose qualifications and training are deeply rooted in their own legal system.
- Secondly, the contract and all the correspondence and documents relating to the dispute may have to be translated into the working language of the judge of the National court. Furthermore, the oral proceedings will necessarily have to be in the judges own language, which means that the persons most connected with the transaction may not understand what is being said-or be able to make themselves understood and advocates unfamiliar with the parties and the transaction may have to be retained to play the lead role.
- Thirdly, it is not always certain that the courts of a country having no connection with either the parties or the subject matter of the dispute will allow their judicial resources (generally paid for by that third country's tax payers) to be used for resolving disputes

¹⁵⁵ Robert Pritchard (1996) Economic Development Foreign Investment and the Law, Internal anal Bar Association series, Kluwer Law International, London, pp.210-211

between foreign parties. The jurisdiction of a chosen national court may also be open to attack by one of the parties on grounds of forum non-convenience) notwithstanding the agreement to refer the dispute to those courts.

- Fourthly, the network of treaties for recognition of national court judgments is incomplete. By contrast with some exceptions (e.g. cases within the EU), arbitration awards are more readily enforceable across national frontiers than judgments of national courts, particularly when the losing party has refused or failed to appear in the proceedings. The NY Convention of 1958 ensures that arbitral awards may be enforced in most countries around the world.
- Fifthly, court actions are open to public scrutiny. These factors taken cumulatively, show why most international contracts contain arbitration clauses.

So far an attempt has been made in the previous chapters to examine and describe the national and international challenges related to the definition, characteristic features aims and objectives of investment in general and foreign investment in particular.

Moreover, an attempt has been made to brief highlight the origin and historical development of bilateral investment treaties, the contents, format structure as well as aims and objectives, role significance characteristics and contents of investment treaties in general and BITs in particular. The relationship on distinguishing features between general aspects of public international law and bilateral investment treaties have been brief dealt. Moreover, an attempt has also been made to highlight the problems, challenges and controversies associated with BITs with special focus from the view point of developing countries in general and Ethiopia in particular. Whether such treaties really help to facilities the flow and attract FDI and why developing countries sign such BITs has also been dealt.

Some of the above issues have also been dealt in the context of some concrete examples related to Ethiopian bilateral investment treaties. The following chapter examines whether FDI promotes development in general and sustainable development in particular.

CHAPTER FIVE

RELATIONSHIP BETWEEN BILATERAL INVESTMENT TREATY AND SUSTAINABLE DEVELOPMENT

5.1 What is Sustainable Development?

Different people define sustainable development in different ways and coming up with a universally accepted yet specific enough definition is a big challenge. In this guide, sustainable development is broadly defined as the policy imperative to balance economic, social and environmental considerations so as to meet the needs of today's generation without compromising the ability of future generations to meet their own needs.¹⁵⁶

Structuring contracts to maximize sustainable outcomes recognizes that, from a host country perspective, attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve the living conditions and enable people to have greater control over their lives, whilst respecting the environment. Therefore, offering safeguards to prospective investors to encourage them to invest is only part of the story. The other part is to establish proper safeguards to ensure that the investment does contribute to pursuing that ultimate goal.¹⁵⁷ This entails:

- *Maximizing economic benefits for people in the host country including affected communities, Economic benefits may include public revenues and non-revenue benefits such as capital contributions, income generation through the creation of employment and business opportunities, capacity building, technology transfers and infrastructure development (economic pillar);*
- *Minimizing negative impacts on people's lives, for instance linked to land takings or resource degradation, and ensuring that economic benefits are distributed equitably and used for poverty reduction and broad-based development (social pillar); and*
- *Minimizing environmental damage from project implementation and promoting investments in more environmentally friendly sectors such as renewable energy (environmental pillar).*

¹⁵⁶ Lorenzo Cotula (2010), Investment Contracts and Sustainable Development, International Institute for Environment and Development, United Kingdom, p.7

¹⁵⁷ Ibid, p.8

In addition, the 1992 Rio Declaration on Environment and Development clarifies that sustainable development entails putting people at the centre of the development process. This means more than just enabling people in poorer countries to have access to consumer goods. It means empowering people to have greater control over decisions and processes that affect their lives, including choices on the type of development and the development pathways pursued.¹⁵⁸

5.2 The Nexus between Bilateral investment treaties and sustainable development

5.2.1 New concerns in bilateral investment treaties

The globalization protests against multilateral investment agreements were generated by the fact that these agreements showed little concern for the environmental and human rights interests involved in foreign investment. The charge was that investment agreements focused entirely on the protection of the interests of the foreign investor and did not concern the interests of the rural and urban communities of the world or the host state in the protection of the values that were of concern to them. These values generally involve the areas of environmental protection, human rights and economic development.

5.2.2 Environmental concerns

Environmental groups have regarded multinational corporations as having been responsible for pollution caused particularly in developing countries, where environmental standards are lax. As a result of lax laws, multinational corporations see developing countries as havens where they may make profits without having to bear the costs associated with compliance with the strict regulatory standards they face in their home states. NGOs believe that investment treaties deter actions being taken against polluters as the treaties ensure that infringements of existing rights of investors are regarded as expropriations under the treaties.¹⁵⁹ The argument has also been made that investment treaties secure the export of highly polluting or what is often called the dirty

¹⁵⁸ Ibid

¹⁵⁹ Sornarajah, M. (1994) *The International Law on Foreign Investment*.: Cambridge University Press, USA, P.260

industries into the developing world. For this reason, these groups have argued that investment treaties should contain exemptions for interference by host states to protect the environment.¹⁶⁰

There are BITs that address the importance of protecting the environment in their preambles. They not only have very similar wording, but also stress the idea of compatibility between investment protection and environmental protection. An example is the preamble of the BIT 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 which states:

...Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application¹⁶¹

Other BITs deal with the issue of environmental protection in the main body of the agreement. For instance, numerous BITs have provisions that are subject to domestic legislation. This includes laws and regulations protecting the environment. Article 5 of the BIT 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 reads:

1. Recognizing the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation.

2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure

¹⁶⁰ Surya P Subedi (2008) International Investment Law Reconciling Policy and Principle, Hart Publishing, USA, p.165

¹⁶¹ 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(2006), Addis Ababa, Preamble.

that such commitments are fully recognized and implemented by their domestic legislation.

4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.¹⁶²

This approach has the same legal effect as an admission clause. If the latter provides that the BIT shall apply only to those investments admitted into the host country in accordance with the host country's domestic legislation, it is evident that such laws and regulations include rules related to environmental protection. Thus, this approach is particularly useful for political purposes, because it is in line with the interests of civil society and the international community that the contracting parties take environmental concerns into consideration when admitting foreign investment.

5.2.3 Human rights concerns

Again, human rights are seldom, if at all, referred to in bilateral investment treaties. But, violations connected with the suppression of dissent against particular projects initiated by multinational corporations have come to light in recent years. Recent litigation before domestic courts against parent companies of multinational corporations allege violations of human rights committed by agents of those multinational corporations in association with the political elites of developing countries illustrates the extent of the problem. Investment treaties may deter a state from interfering to correct a human rights situation that may have arisen. Often, however, the states, or the elites which control it, are also participants along with the multinational corporation in the violation of the human rights abuse. Succeeding governments may, however, want to

¹⁶² 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(2006) Brussels, Art.5

remedy the situation but may be deterred from doing so by the fact that such interference may be regarded as an infringement of investor rights under the treaty.¹⁶³

There are few treaties which address this issue. Issues related to health, morals and public welfare, a formula that is used in international trade law, has found its way into some investment treaties. But, the scope of the use of the phrase in investment treaties has yet to be determined.

In international trade, tribunals have not given the term such a scope as would enable the interests contained in the formula to trump the interests of free trade.¹⁶⁴ There is little room to believe that the situation will be any different when the phrase is considered in relation to investment treaties. The general trend to interpret these treaties as giving primacy to investment protection will probably be continued. But, the seeds of discontent will multiply as a result.

5.2.4. Protection of labor standards

The inclusion of employment issues into BITs is a relatively new phenomenon. On the other hand, the development of international labor standards has a long history, dating back to the establishment of the International Labor Organization (ILO) in 1919.¹⁶⁵ Unions in capital importing countries have raised concerns about BITs on the grounds that patterns of international production in general, and FDI in particular, would result in an increase in unemployment in their economies.¹⁶⁶ It is argued that FDI inflows into developing countries would be partially generated by practices of social dumping, as investors would prefer to locate in countries with lower labor protection standards.¹⁶⁷

As a result, capital exporting countries have been confronted with pressure from their domestic constituencies to incorporate labor protection issues in the agenda of international investment negotiations. An increasing group of countries have therefore started to introduce this subject in investment rulemaking. However, at least among the BITs under review, the number of

¹⁶³ Sornarajah, M. (1994) *The International Law on Foreign Investment*.: Cambridge University Press, USA, P.261

¹⁶⁴ Ibid

¹⁶⁵ _____ (2004) *Key Terms and Concepts in IIAs: A Glossary*, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.57

¹⁶⁶ ¹⁶⁶ _____ (2007) *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD, United Nations, New York and Geneva, p.96

¹⁶⁷ Ibid

agreements addressing this issue is lower than the number of BITs dealing with environmental protection.

Another rarely used means of stressing the commitment of the contracting parties in favor of protecting labor standards is, once again, to provide that they shall strive to abstain from relaxing them as a means of attracting or maintaining investment in their territories. Article 6 of the BIT between Belgium–Luxembourg and Ethiopia for example provides as follows:

1. Recognizing the right of each Contracting Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor legislation, each Contracting Party shall strive to ensure that its legislation provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 of Article 1 and shall strive to improve those standards in that light.

2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic labor legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

3. The Contracting Parties reaffirm their obligations as members of the International Labor Organization and their commitments under the International Labor Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 of Article 1 are recognized and protected by domestic legislation.

4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve labor standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.”¹⁶⁸

The approach expressly recognizes that international cooperation provides contracting parties with enhanced opportunities to improve labor standards. This feature is an important conceptual innovation, as it perceives consultations between the contracting parties not only as a mechanism

¹⁶⁸ 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(2006) Brussels, Art.6

to promote the enforcement of commitments, but also as a means to devise joint initiatives in favor of effective development of labor rights.

5.3. Bilateral investment Treaty and Sustainable development

Investment is the engine of development and required to make a more sustainable global economy possible. Yet, investment has not moved to the center of the debate about sustainable development. This may be due in part to the complexity of the investment process. On the one hand, investments depend on a range of public goods and services. On the other hand, private capital is at risk and consequently public authorities have a circumscribed role to play in relation to such investment decisions.¹⁶⁹

The paramount objective for developing countries in seeking foreign investment is to promote their economic development. To that end, they conclude IIAs at various levels, because they believe that, on balance, these instruments help them to attract FDI and benefit from it.¹⁷⁰ By their nature IIAs like any international agreement limit to a certain extent the policy options available to governments to pursue their development objectives through FDI. The challenge in IIAs is to strike a balance between the potential contribution of such agreements to increasing FDI flows and the preservation of the ability of countries to pursue development-oriented FDI policies that allow them to benefit more from FDI that is, the right to regulate in the public interest.¹⁷¹ This requires maintaining sufficient policy space to give governments the flexibility to use such policies within the framework of the obligations established by the IIAs to which they are parties.

Beyond the inherent objective of investment protection that BITs pursue, the vast majority not directly address specific development related issues. As in the past, most recent BITs include language stressing the importance of encouraging foreign investment, creating favorable conditions for it, and the like. However, they rarely contain an obligation to promote sustainable developments, whereas there is a duty on the part of the host countries to protect investment,

¹⁶⁹ Konrad Von Moltk and Howard Mann (2004) Towards A Southern Agenda on International Investment: Discussion Paper on the role of International Investment Agreements, at <http://WWW.iisd.org>, p.23

¹⁷⁰ _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.37

¹⁷¹ Ibid

there is no quid pro quo in treaties that would oblige home countries to promote flows of investment.¹⁷²

Some BITs concluded in the review period have explicitly adopted development oriented provisions that refer to the notions of investment promotion and facilitation, including home country measures.¹⁷³ A number of BITs contain provisions for the exchange of information with regard to investment opportunities, and some go so far as to call for the offering of incentives and the establishment of investment promotion offices. Few BITs also contain provisions concerning the establishment of institutional mechanisms to follow up on the application and interpretation of the treaty a matter that has been identified as development friendly, as it allows the contracting parties to review their obligations and to adapt them to changing circumstances. A few BITs also contain specific exceptions and safeguards that are intended to cater for the different objectives and needs of parties at different levels of development although most exceptions in BITs are of a general nature and apply irrespective of the level of development of a country. These qualifications may apply to all substantive provisions and are particularly frequent with regard to the establishment of foreign investment and the repatriation of funds.¹⁷⁴

In sum, current BIT practice does not, in general, expressly deal with development matters. For most BITs concluded over the past decade, the striking feature is the multiplicity of provisions they contain that are specifically designed to protect foreign investments, and the absence of provisions specifically designed to ensure economic growth and not to mention sustainable development.¹⁷⁵ The need is, therefore, for further clarification of the interrelationship between existing standards of investor protection and investment promotion, on the one hand, and the best means by which development concerns can be expressed in the future evolution of BITs, on the other hand.

¹⁷² _____ (2007) *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD, United Nations, New York and Geneva, p.145

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ Surya P Subedi (2008) *International Investment Law Reconciling Policy and Principle*, Hart Publishing, USA, p.171

5.4. To What Extent Do the Existing Bilateral Investment Treaties Promote Sustainable Development of Ethiopia?

As to the objectives of IIAs, many such agreements incorporate the objective of development among their basic aims, purposes or principles, as a part of their preambular statements, or as specific declaratory clauses articulating general principles.¹⁷⁶ The main advantage of such provisions is that they may assist in the interpretation of other substantive obligations, permitting the most development-friendly interpretation to be adopted. This, in turn, assists in the promotion of flexibility for development by ensuring that the objective of development is implied into all obligations and exceptions thereto, and that it informs the standard by which the legitimacy of governmental action is to be assessed under an agreement.¹⁷⁷

It is important for Ethiopia to note that, in many BITs concluded by the government the preamble is drafted in narrow terms with lack of broader policy objectives. This may have implications on sustainable development. Generally in the preamble parties state their intentions and objectives when concluding the agreements. For instance in Ethiopia-UK BIT the preamble provides that:

*....Desiring to create favorable conditions for greater investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party;*¹⁷⁸

In the Ethiopia- UK BIT there is absence of references to development objective and interest goals in the preamble. It only shows the need for creating a favorable investment climate and little else is stated.

Parties to a BIT must insure that preamble take note of broader policy objectives such as sustainable development, environment protection or raising the standards of living. The preambles play an important role in guiding the interpretation of the treaties where treaties are

¹⁷⁶ _____ (2004) Key Terms and Concepts in IIAs: A Glossary, UNCTAD series on issues in international investment agreements, United Nations, New York and Geneva, p.37

¹⁷⁷ Ibid

¹⁷⁸ 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(2009), Addis Ababa, preamble

ambiguity in the language. Lack of reference to development objectives goals strengthens the case for investors to argue that the primary objectives of BITs are to protect interests of investors.

The main objective of the Ethiopian Investment Proclamation is encouraging, promoting and improving the conditions of investment with the view to accelerating the country's economic development. In relation with foreign investment, it aims at enabling foreign investment increase the country's foreign exchange earnings and foster transfer of technical know-how, managerial skills and technology.¹⁷⁹ As a poor country in dire need of attracting as much foreign investment as possible, Ethiopia has repeatedly amended its investment laws. Between 1991 and 2008 alone, the investment laws have been amended for about five times to accommodate new progresses and provide competitive incentives for investors.

Many developing countries including Ethiopia in order to increase FDI flows and promote sustainable development have significantly liberalized their investment regime to create an enabling FDI regulatory framework. FDI flows occur within a complex of national and international laws. The most significant recent development in the international FDI regulatory framework has been the creation of BITs to promote and protect foreign investment.

The criticism of BITs in promoting sustainable development in host countries is often expressed. For example academicians argue that unequal and exploitative investment agreements, which prohibit the very policies developing countries, need to fight poverty, is no way to put trade and investment at the service of sustainable development.¹⁸⁰ Most Ethiopian BITs photo-up from European models BITs provision.¹⁸¹ This model not contains the obligation of the investor to promote sustainable development. It does not incorporate the protection of sustainable development in host countries. To date, Ethiopia has bilateral investment treaties with 30 sovereign states but the protection of environment only incorporate BIT between Belgium–Luxembourg and Ethiopia, the rest does not incorporate the protection of sustainable development. Therefore, most Ethiopia BITs does not promote sustainable development.

¹⁷⁹ Investment Proclamation, Pro. No. 280/2002, Federal Negarit Gazeta, 8th year, No.27, preamble

¹⁸⁰ Luke Eric Peterson (2006) Bilateral Investment Treaties- Implications for Sustainable Development and Options for Regulation, Friedrich-Ebert-Stiftung, Berlin, p.4

¹⁸¹ Interview with Ato Tewodros Tamiru, Director Legal Directorate in Ethiopian Investment Agency, Intervened at his office, on Aug 17, 2011, Ethiopia

CHAPTER SIX

ETHIOPIA'S BILATERAL INVESTMENT TREATIES

6.1 Introduction to Ethiopian Investment Treaties

Ethiopia has so far signed BITs with 30 sovereign states. The number cannot be under estimated when compared with the only 40 BITs that the USA signed up to the year 2005.¹⁸² Although the investment climate has improved greatly in recent years, there are still many aspects of investment promotion where improvements are urgently needed. More importantly, “Ethiopia doesn’t yet have an investment promotion strategy nor does it have a clear vision where it fits into the global investment strategies of Multinational Corporations”.¹⁸³ Furthermore, Ethiopia faces the following international investment challenges:¹⁸⁴

- (i) Poor infrastructure, transportation, power and telecommunication,
- (ii) Over regulation of the economy which diverts scarce management resources from more productive activities, state sector bureaucracy;
- (iii) Perpetuation of state control over important aspects of international business operations together with a myriad of regulatory procedures and approval proves associated with business activities; framework;
- (iv) Shortage of modern management skills;
- (v) Absence of an experienced business executive development;
- (vi) Instability in the regions.

Nevertheless, as UNCTAD remarks, “There are a number of positive strategic factors that makes Ethiopia an attractive location for foreign investment. “Some of these positive elements include:¹⁸⁵

- Large domestic market and, a unique geographical location enabling investment in Ethiopia to service markets and customers in East Africa, North Africa and the Middle East;

¹⁸² R. Doak Bishop. 2005. Foreign Investment Disputes, Kluwer Law International, Hague, p.10

¹⁸³ Hailu Burayu (2009) Settlement of Investment Disputes and the ICSID Convention: Any Ethiopian Experience?, Unpublished, Addis Ababa University Law Faculty, Ethiopia, p.125

¹⁸⁴ Ibid

¹⁸⁵ Ibid, p.126

- A comparatively safe and less corrupt business and social environment that stand out in stark contrast to many other countries; friendly and helpful attitude to foreigners.;
- Attractive climate; and.
- A capital city that hosts the Head Quarter of the African Union, the Economic Commission for Africa etc

Just like any other bilateral treaty, the typical Ethiopian BIT includes obligations that each contracting states' party undertakes towards investors from the other country. The obligation can be categorized under four headings:

- (1) General obligation towards the investment;
- (2) Standards for expropriation;
- (3) Currency transfer standard; and
- (4) Dispute settlement procedures.

The general obligation encompasses the duty to promote and protect investment, treat investors in a non-discriminatory way; i.e. for investment to be there, service required shall not be given by artificial and discriminatory fashion. The playing ground shall be leveled for all to enter into competition so that the winner will be determined by one's own performance. Anti-discriminatory principle is ensured through most favored nation (MFN) treatment and National Treatment (NT). The MFN treatment imposes the obligation to grant investors treatment no less favorable than that accorded to the investors of other states or even to its own nationals and the. NT clause obliges the investor to treat foreign investor on equal terms with the national investor.

The general term of understanding is that expropriatory measure is prohibited. Even where it is allowed in the exercise of sovereign right of its statehood, each contracting party cannot carry out the expropriation in a discriminatory way.¹⁸⁶ Expropriation may be allowable where public interest demands.

¹⁸⁶ Generally, expropriation or eminent domain may be defined as the power of a sovereign state to take or authorize the taking of private property for public purpose or use with out the owner's consent but conditioned up on payment of commensurate/just compensation in advance.

The standard for currency transfer demands profits, dividends, interest, royalties and other legitimate income from the investment in the territory of the contracting party is transferred freely.

Where the issue disputed raises substantive obligations, the consent of state concerned is required to submit to the jurisdiction of an international arbitration forum to resolve the dispute that can arise from the substantive obligations.¹⁸⁷

6.2 Aims, Scope of Applications and Objectives of Ethiopian Investment Treaties

Objectives of the BITs

Every bilateral investment treaty begins with a declaration as to the purpose of the treaty. This is usually stated to be the reciprocal encouragement and protection of investments. The statement disguises the important fact that the flow that is contemplated is in reality a one way flow of investment from the developed state to the developing state.¹⁸⁸

Every BIT starts with the preamble where the purpose of the treaty is set out. Parties to the treaty make a reciprocal encouragement and protection to investment to be undertaken in their territories by nationals of each state party. Both parties conclude the treaty with the belief that the flows of foreign investment between them would bring about mutual benefits to the economic development of each state. For example the preamble of bilateral investment treaties between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments states:

*The Republic of Turkey and the Federal Democratic Republic of Ethiopia
hereinafter called the Parties:*

*Desiring to promote greater economic cooperation between them, particularly
with respect to investment by investors of one Party in the territory of the other
Party*

¹⁸⁷ R. Doak Bishop(2005), Foreign Investment Disputes, Kluwer Law International, Hague, p.10

¹⁸⁸ Sornarajah, M. (1994), The International Law on Foreign Investment. Cambridge University Press, USA, P.218

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Parties.

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments¹⁸⁹

Ethiopia's BITs recognize that the promotion and protection of investments and creating favorable conditions for investments are the central objectives.

Scope of Application of the BITs

The treaty applies to investments made in the territory of either contracting party after the entry into force of the agreement. A treaty normally gains force for application after it is ratified by the legislative organ of a state. For example, Art 55(12) of the FDRE Constitution requires international treaties to be ratified by the national Legislative body to form integral part the law of the land.¹⁹⁰ Mere signing of a treaty is not sufficient by itself. The BIT Ethiopia signed with Germany Art 9, with Israel Art 12, with Russian Federation Art 11, and with Tunisia Art 10 contains a provision dealing with scope of application of the agreement. The repeated clause in each BIT- "The treaty shall apply to all investments made after the ratification" The treaty with Germany specifically mentions the Agreement to apply to investment made after April 21, 1964. The rest of BITs like the one with Art 11China, Art 10with the Sudan, and Art 10with Yemen, seem to have been copied verbatim from one another. The Agreement applies to investment made prior to or after the entry into force. It shall not be applicable to claims arising out of disputes which occurred prior to its entry into force. This means the agreement doesn't apply to claim arising out of disputes which occurred before entry into force of the Agreement.

¹⁸⁹ Agreements between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments (2000), Addis Ababa, p.1

¹⁹⁰ The constitution of the Federal Democratic Republic of Ethiopia (1995) proclamation No.1/1995, Negarit Gazeta, 1 Year No 1, p.112

Entry into Force and Termination

The Agreement gains the force of law after it is ratified by the proper legislative organ of each of the contracting state parties and both as such notify each other in writing. The same is reflected in Proclamation 517/2007, a Proclamation to provide for "Investment Protection, Ratification" which stipulated, the agreement shall enter in to force on the data of exchange of instrument of ratification through diplomatic channel. The duration of the BITs is commonly, ten years from the date of entry into force extendable if not terminated with a notice of one year before the due date of the tenth year. Thereafter, both parties may terminate it any time with written notice, The BITs with Russian Federation and the one with Germany extend their duration to 15 and 10 years (Art 12(2) respectively. The protection of investment is extensive in time since even in case of termination of the treaty it generally continues to apply to investment made prior to termination either for a determined period or without time limitation.¹⁹¹ For example, when we see Article 14 of Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands the provision related to entry into force and termination stipulated as follows:

“1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years.

2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

3) In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.

¹⁹¹ Wolfgang Peter(1986) Arbitration and Renegotiation of International Investment Agreements, Martinus Nijhoff publishers(Dordrecht), p.221

4) Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom".¹⁹²

Affixing Signature to the Treaty

The BITs Ethiopia so far concluded was signed either by the Minister of Foreign Affairs or by the General Manager of the Ethiopian Investment Authority. It is normal to produce a document evidencing each of them is authorized to represent his state in signing the BIT. "The production of full powers is a fundamental safeguard for representatives of other states that they are dealing with a person with the necessary authority".¹⁹³ In the event of negotiating MITs a delegate authorized to negotiate the treaty shall produce a document called "credentials" to the government hosting it.

6.3 A Survey of Bilateral Investment Treaties (BITs) Signed by Ethiopia

Many countries have some sort of bilateral investment treaties. In practice, BITs vary widely in scope and content. Most BITs include provisions on investment promotion, capital flows and direct payment liberalization, as well as post-admission issues such as non-discrimination and bans on certain performance requirements. Some BITs even go further, including pre-admission issue (establishment and acquisitions) across the board of economic activity, and more explicit protection provisions in the form of expropriation and compensation clauses. In most cases, BITs cover only the post establishment phase of investment. They confer rights to investors regarding treatment by host governments of a wide range of types of investment after they have been established in the host country.¹⁹⁴

To date, Ethiopia has bilateral investment agreements and treaties with 30 sovereign states China, Denmark, Italy, Kuwait, Malaysia, Netherlands, Russia, Sudan, Switzerland, Tunisia, Turkey, Yemen, Egypt, Germany, French, Libya, Iran, Belgium, Spain, Sweden, Algeria, Austria, Guinea, Finland, India, South Africa, Israel, Britain, USA, and with Djibouti. Ethiopia

¹⁹² Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands(2003), Addis Ababa, Art.14

¹⁹³ Anthony Aust (2000) Modern Treaty Law and Practice, Cambridge University Press,USA, p.57

¹⁹⁴ Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia (2011) Final Report, 24 January 2011, Ministry of Trade of Ethiopia, p.30

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concludes a bilateral investment treaty with the United States a Treaty of Investment Incentive Agreement. Ethiopia concludes a bilateral investment treaty with Djibouti Preferential Investment Facilitation and property Acquisition Agreement. All of the BITs Ethiopia signed so far are as follows:

No	Signatory countries	Date of Signature	Date of entry into force	Place of adoption	Duration	status	
1	Arab Republic of Egypt	July27,2006		Cairo	10 years	Ratified by Ethiopia Feb 19, 2007	New Draft has been proposed by the Egyptian side for renegotiation
2	Federal Republic of Germany	Jan19, 2004	June 25,2004	Addis Ababa	10 years		
3	French Republic	June 25,2003	August 7,2004	Paris	20 years		
4	Great Socialist people's Libyan Arab Jamahiriya	Jan27, 2004	June 25,2004	Addis Ababa	10 years		

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5	Islamic Republic of Iran	Oct. 21,2003	Dec. 15,2004	Addis Ababa	10 years		
6	Italian Republic	Dec. 23,1994	May 8, 1997	Addis Ababa	10 years		
7	Kingdom of Belgium & Luxembourg	Oct. 26,2006	May 1, 2008	Brussels	10 years		
8	Kingdom of Denmark	Apr. 24,2001	August 21,2005	Addis Ababa	10 years		
9	Kingdom of Spain	March 17, 2009		Madrid	10 years	Not yet ratified	Ratified by Ethiopia, July 10,2009
10	Kingdom of the Netherlands	May 16, 2003	June 1, 2005	Addis Ababa	15 years		
11	Kingdom of Sweden	Des. 10, 2004	August 1,2005	Addis Ababa	20 years		
12	Malaysia	Oct. 22, 1998	June 4, 1998	Kuala Lumpur	10 years		
13	People's Democratic Republic of Algeria	June 4,2004	Nov. 1,2005	Addis Ababa	10 years		
14	People's Republic of	May 11, 1998	May 1, 2000	Addis Ababa	10 years		

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	China						
15	Republic of Austria	Nov. 12,2004	July 20,2005	Vienna	10 years		
16	Republic of Djibouti ¹⁹⁵	Nov. 18,2006		Djibouti	20 years		Ratified by Ethiopia, Feb. 19,2007
17	Republic of Equatorial Guinea	June 11,2009		Malabo	10 years	Not yet Ratified	Ratified by Ethiopia, Jan.14,2010
18	Republic of Finland	Feb. 23, 2006	May 3,2007	Addis Ababa	20 years		
19	Republic of India	June 5, 2005		Addis Ababa	10 years	Not yet ratified	Ratified by Ethiopia, Aug. 11,2008
20	Republic of South Africa	April 17,2008		Pretoria	15 years	Not yet ratified by South Africa	Ratified by Ethiopia, July 10,2009

¹⁹⁵ The Agreement with Djibouti pertains to “Preferential Investment Facilitation and property Acquisition Agreement.” Concerning Agreement on Reciprocal Promotion and Protection of investment, there is only a MOU signed on Dec. 12, 1993 in Addis Ababa.

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21	Republic of Sudan	March 7,2000	May 15,2001	Khartoum	10 years		
22	Republic of Turkey	Nov. 16,2000	March 10,2005	Addis Ababa	10 years		
23	Republic of Yemen	Apr. 15,1999	April 15, 2000	Sana'a	10 years		
24	Russia Federation	Dec. 10,2000		Moscow	15 years	Ratified by Ethiopia Jan. 3, 2002	New Draft has been proposed by the Russia Side for Re-negotiation
25	State of Kuwait	Sept.14,1996	October 12,1998	Kuwait	30 years		
26	State of Israel	Nov. 26,2003	March 22,2004	Jerusalem	10 years		
27	Swiss Confederation	June 26,1998	Dec. 7,1998	Crans Montana	10 years		
28	Tunisian Republic	Dec. 14,2000		Tunis	10 years	Not yet ratified	Ratified by Ethiopia, July 21, 2004

29	USA ¹⁹⁶	Oct. 24,2000	March 4,2004	Addis Ababa	20 years after terminati on		
30	UK of Great Britain and Northern Ireland	Nov. 19,2009		Addis Ababa	10 years		

6.4 Comparative Aspects of Ethiopian Bilateral Investment Treaties

Among selected Ethiopia’s BITs that the writer has at hand i.e. the ones with China, Germany, Israel, Russian Federation Sudan, Tunisia, Turkey and Yemen carry in their preambles the objective of reciprocal encouragement. Promotion and protection of investment to stimulate business initiative to increase prosperity in both states is given priority. The desire to intensify economic cooperation of both states on the basis of equality and mutual benefit comes second while creating favorable condition for investment by investors of one contracting party trails the second in the list of priorities of objectives.

In all the BITs, terminologies like investment, investor, returns and territory are defined. The content of these terms are more or less the same except where one is more detailed than the other. Promotion and protection of the reciprocal investment to be carried out in each of the contracting states’ parties is given precedence over other objectives. All of the eight BITs considered selected treated promotion and protection of investments under Art 2 of their BITs. Only the agreements concluded with Sudan and Yemen use the term promotion and admission instead of promotion and protection of investment. Even then, the content of their Art 2 remains almost similar with that of the agreement concluded with others states.

¹⁹⁶ The Agreement with USA concerns “Investment Incentive Agreement.” No Reciprocal investment Promotion and Protection Agreement so far.

According to these provisions relating to promotion and protection each contracting party has voluntarily created the obligation to encourage investors of the other state to make investments in its territory and admit such investments in accordance with its laws and regulation. Each contracting state has consented to grant assistance, facilitate the obtaining of visa and working permit for easy entry and exit to carry out investment activities as agreed upon.

In a situation where the contracting party with the host state is an individual investor, there is a possibility that some individuals are found to have been engaged in activities not associated with their investment proposal and projects. From the discussion the writer had with the head of the legal Department of the Ethiopian Investment Authority (EIA),¹⁹⁷ some persons use the treaty as a means of entry into the host country. After entry, there is no effective mechanism to monitor and control whether the investor has actually brought in the capital required in the foreign currency agreed upon. Moreover, there exists no mechanism to control the investor who does not engage in activities other than those stipulated in the BIT.¹⁹⁸ That is why we see some 7 foreigners engaged (under Ethiopian citizen's licenses) in activities exclusively permitted for Ethiopian citizens. It is impliedly understood that the investor is not permitted to engage himself in activities not associated with the investment. The practice is not as simple as what is written on paper. Viewed from legal documents, it is only the BIT with Tunisia that deals with associated activities with the investment where an individual investor can engage himself. In all other BITs it allows foreigners to engage in investment activities only allowed for Ethiopian nationals would narrow the chance of self employment for Ethiopians when the number of foreign investors increases in the future.

In all of the BITs the term "investment" encompasses not only the traditional concession agreement related to extraction and exploitation for long duration and for the development of natural resource but every kind of rights, properties and assets, the claims to money or to any performance having an economic value. This seems congruent with the recent development of the service industry considered as one principal sector of investment. The area of shares and intellectual property too are today given recognition as another investment sector.

¹⁹⁷ Interview with Ato Tewodros Tamiru, Director Legal Directorate in Ethiopian Investment Agency, Intervened at his office, on Aug 17, 2011, Ethiopia

¹⁹⁸ Ibid

In addition to the conventional understanding related with the term investment, the definitions are broad enough in recognizing shares in a company, real property and rights under contracts issuance of promissory notes or making of loans for the development of a county's infrastructure have been held to constitute investment.¹⁹⁹ The only restriction it carries is that the investment shall be in the territory of Ethiopia, and the investment be made after the entry into force of the BIT. A typical example is the Ethio-German BIT where the treaty is made to enter into force after April 21, 1964. (Art 7 of the protocol Agreement). Presently, we see changes in the feature of issues raised before the center. "In addition to concession agreements and expropriation, such issues concerning civil strife, action of political arrangements privatizations, loans and the environment are also handled by the center".²⁰⁰ It is nowhere indicated in any of BITs that an investor has to bring- in its initial capital in foreign currency. Again the BITs do not specify subjects which are non arbitrable. Thus, the responsibility rests upon the arbitral tribunal to determine" an issue which is arbitrable and non arbitrable. As indicated above, the investment treaty with Federal German Republic (FRG) was concluded long ago. Since then tremendous changes have taken place in both state parties. Ethiopia has transformed her economy from feudal to that of socialism and is now having a free market economic system. For example, the province of Eritrea, which was part of Ethiopia when the treaty was signed, has seceded and established itself as a sovereign state. The states of East Germany and West Germany have been amalgamated. The former state of East Germany has been dissolved and is no more in existence. Even the very names of the states that signed the present active treaties have been changed. The former, name of the " Empire of Ethiopia" was once- changed to "Peoples Democratic Republic of Ethiopia" (PDRE) and now the county is called Federal Democratic Republic of Ethiopia (FDRE). On the other hand, the BIT between FRG and Ethiopia is still active and operative without being re-negotiated. Ethiopia's BITs seem to follow an open policy for entry of FDI. There is no clearly spelt out provision compelling an investor to get prior approval to invest in a given economic sector. The last paragraph of Art 2 (1 (e)) of the Ethio-Turkey BIT imposes a restriction which requires that the investment shall be the one made in accordance with the laws and the regulations in the territory where the investments are made. Thus, protection is not given

¹⁹⁹ R. Doak Bishop. 2005. Foreign Investment Disputes, Kluwer Law International, Hague, p.10. For definition of the term investment, see also Art 1(1) of Ethio-China BIT, Art. 8(2) of Ethio-German BIT and Art.1(1) of Ethio-Israel, Ethio-Russia Federation BITs

²⁰⁰ ICSID Law Review, Investment Law Journal, Vol. 13 No.1, ICSID, USA (1998), p.13

to investments not made in accordance with the laws and regulations of the host country. This is an implied restriction seeking approval before risking the adventure. Once the investment is allowed to enter the host country seem to find it hard to withdraw the protection except for objective reasons.

Regarding the word “investor” with the excepted of the BIT with that of the republic of Israel, the rest share the same view that natural persons having nationality of either states contracting parties or economic entities established in accordance with the laws of that contracting party domiciled in its territory qualify as investors. The BIT with Israel is rather exhaustive and excludes those natural persons who are permanent residents of the state of Israel as well the nationals of Ethiopia. In like manner, it sets out the economic entities to be considered as legal persons for purposes of the BIT. It incorporates corporations, firms, associations or partnerships as economic entities. Israel does not recognize an economic entity to benefit protection and treatment from Israel unless the entity is constituted under the law of Ethiopia or it is directly or indirectly controlled by persons who are nationals or permanent residents of Ethiopia. Furthermore, the economic entity shall fulfill one of the following conditions to be granted the protection and treatment from the state of Israel.

- It’s registered office, centre of management; or practical management is located in the territory of either contracting party or
- A substantial part of its economic activity is located in the territory of either contracting party; or
- It is incorporated or constituted under the law of Ethiopia.

The definition given to the term investor in the Ethio-Israel BIT is a typical modern definition of the term which excluded the coverage of individuals who have the nationality of both the host and the home state or companies which carry on no business in the home state.

The other commonly defined term in all of Ethiopia's BITs is "territory". The term is given meaning in the bilateral treaty of Ethiopia with Israel Art 1 (6), Russian Federation, Art 1 (4), Sudan, Art 1 (d), Tunisia, Art 1 (d), Yemen and Turkey. Art 1(4). The BIT with China and Germany doesn't provide for a definition for "territory". The definition given to the word is

uniform and not different from what is provided to it under Art 2 of the FDRE Constitution- "the territory in which the FDRE exercises sovereign rights or jurisdiction in accordance with international law".²⁰¹ Other contracting state parties have defined it to include territorial sea as well as the continental shelf and the exclusive economic zone over which the concerned state exercises sovereign right or jurisdiction in conformity with international law.

The other term defined in all BITs is the term "returns". Under Art1(c) of Ethio-Sudan BIT, Art 1 (b) of Ethio- Tunis BIT, Art 1 (3) of Ethio-Turkey BIT, it is commonly defined as the amount yielded by investments such as profits; dividends; interests; capital gains, royalties and other fees. Excepting the BIT with Israel the rest of the BITs do not seem to have left out the sum of money to be obtained from partial or total liquidation of an investment. All of the BITs imposed the obligation in respect of investment guarantee to investor of the other contracting party, the unrestricted transfer of their investment and returns in a freely usable currency in which the capital was originally invested or in any other freely usable currency agreed by the contracting parties. The term "freely usable currency" is nowhere defined except in the BIT with Israel which is to be determined by the IMF from time to time. Each contracting party to the BIT is entitled to repatriate the returns generated from the investment or sum of money gained in the above form of revenues with no limitation. The transfer is required to be effected without delay at the rate of exchange regulation in force at the time the transfer is requested. Both contracting parties have agreed not to impose any kind of restriction upon the repatriation of investment and returns. In the past, some states used to seek approval for foreign exchange repatriation for investments considered non productive to economic development. Still others allowed only certain percentage to the earnings to be exchanged for foreign exchange at the official rate and allowed the excess sum to be converted at "special" free' rates. Others provided waiting periods before any earnings may be' transferred. Ethiopia used to allow only 10% of the earnings to be repatriated.²⁰² It can no more dictate this rule because of the fact that there are many countries in the world competing to attract investors by showing readiness to allow 100% of the earnings to be repatriated. Restriction is allowable in the BIT where the contracting party is in a serious balance of payment difficulties or is in a serious difficulty for the operation of the exchange rate

²⁰¹ The constitution of the Federal Democratic Republic of Ethiopia (1995) proclamation No.1/1995, Negarit Gazeta, 1 Year No 1, p.77

²⁰² Ingrid Delupis. (1973) Finance and protection of investment in developing countries John wiley & co.Ny, New York, p.16

policy or monetary policy. In such situations, each contracting party is allowed to take measures strictly necessary for the maintenance or protection of its essential security interest. Such measures are taken and implemented in good faith, in a non-discriminatory fashion so as to minimize the deviation from the provision of the BIT relating to treatment. Where a bilateral treaty, containing clauses dealing with repatriation of profits without restriction is signed, host countries provide assurance against any kind of expropriation of or mistreatment; capital exporting states encourage their nationals to invest abroad. They even provide assistance and facilitate the out flows of capital so that both parties benefit from the investment. Besides, studies indicate that “MNCS earn higher profits abroad than at home”²⁰³ It is equally important to ensure success and profitability of the initial capital investment and to help the locally based FDI managers to win corporate HQ approval for further expansion and re-investment of profits and to strengthen their linkages with local suppliers and services as a means of reducing the national import bill. This aftercare support, increasingly called corporate development support, will become important in Ethiopia during the next decade.²⁰⁴ BITs of Ethiopia also carry stabilization clauses. These are specific contractual commitments that it has agreed to undertake, failure to fulfill any of them create liability hence the future changes that Ethiopia intends to make to its laws and regulations will not affect the interests of the foreign investors. Under the terms of these stabilization clauses each contracting party is obliged not to provide less favorable than that accorded to the investors of either contracting party. Each contracting party is obliged to extend to the investor of the others the benefit of any treatment; preference or privilege resulting from taxation; any existing or future customs union, intellectual property, and free trade area agreement.

The principle of most favored nation and national treatment are given solemn position to which each contracting party is obliged to submit. Fair and equitable treatment, full protection and security shall be granted to every state party to an investment without discrimination or favorable treatment only to ones own nationals. The BITs preclude any kind of preferential treatment in the laws and regulation of each state contracting party. No contracting party shall be granted less favorable treatment by a state party more than that which it accords to its own investors with

²⁰³ Sornarajah, M. (1994) *The International Law on Foreign Investment*. Cambridge University Press, USA, p.18

²⁰⁴ UNCTAD/ITE/IPC/Misc.4, (2002) *Investment and Innovation policy Review*, Ethiopia, p.39

respect to the management maintenance, use enjoyment or disposal of their investment. If a contracting state party is a party to a regional organization and as a result of the membership gives special privileges to the member states, it falls under obligation to extend same kind of treatment to other contracting state party on the basis of "most favored nation clause" or privities of arbitration principle unless such is excluded in their BIT. On the basis of fair and equitable treatment the states' contracting parties shall not discriminate between nationals and foreign investors. For instance, export quotas or local purchase requirement shall not be imposed upon the foreign investor particularly after the investor has commenced operational activities in the investment.

National investors of the contracting state party are not expected to fulfill either of these requirements. Sometimes a harsh measure taken against the national may equally affect the foreign investor on the basis of application of the principle of national treatment. A good example is the obligations imposed upon each enterprise to contribute human labor for the defense of the mother land during the Ethio-Somali War (1976-1978). Foreign companies were treated in the same way as the domestic companies and were forced to participate in the war. Foreign companies were paying the salaries as well as all other benefits to the employees without getting their services.²⁰⁵

The investment of each contracting party is well guarded from any kind of expropriation so far as it is in the territory of the contracting state. According to conditions set under each of the BIT expropriating the investment found in one's own territory is allowable so far as it is meant for public purpose and the measure is taken on a non-discriminatory basis and against prompt adequate and effective compensation.²⁰⁶ The adequacy of the compensation is assessed on the market value of the investment expropriated immediately before the expropriation is undertaken.²⁰⁷ The compensation amount shall also be paid to the investor in a short period of time in as much as possible. Where the investor is affected by valuation or delay in payment of

²⁰⁵ Hailu Burayu (2009) Settlement of Investment Disputes and the ICSID Convention: Any Ethiopian Experience?, Unpublished, AAU Law Faculty, p.135

²⁰⁶ Sornarajah M. (1994) The International Law on Foreign Investment. Cambridge University Press, USA, pp.359-362

²⁰⁷ Ibid

the compensation or has the desire to contest the legality of the expropriation itself he/it is entitled to initiate proceeding to the concerned judicial authority.²⁰⁸

The investment of the contracting party may be affected not only by expropriation but by loss owing to war or other armed conflict, revolution a state national emergency, revolt, insurrection, riot or such similar activity in the territory of the host contracting party. In such a situation the host state falls under contractual obligation to treat on equal terms all investors regardless of their nationality, volume or type of investment regarding restitution, indemnification, compensation or other settlement and the payment shall be freely transferable, The restitution or adequate compensation shall also extend to investment properties requisitioned by the host government or the destruction caused by the host state during the war, armed conflict, riot or revolution undertaken. Each of the contracting party has burdened itself with the responsibility of guaranteeing the payment emanating either from compensation, repatriation of investment returns etc. The host country enters into contract of insurance to protect itself against unexpected demand of payment from the investor. The investor then can be paid by the host state the amount of money due to him from the host state. After paying the investor, the host state will legally be entitled to benefit from the right of the investor by the use of the doctrine of subrogation. Provisions of subrogation are incorporated under all of the BITs that Ethiopia signed with the different countries. The content of the provision is more or less identical. The BIT Ethiopia signed with German lacks this provision.²⁰⁹

All of the BITs Ethiopia signed so far carry stabilization clause in which Ethiopia committed itself to obligation that restricts its own national sovereignty. The BITs also contain arbitration clauses to resolve disputes between state parties and state-investors as well. They also include undertaking limiting the right to nationalize and accepting an obligation to pay compensation. The application of the host country's national law to the agreement represent risk for the investor as state laws are vulnerable to unilateral change since the state is not only a partner to "the contract but a subject of public international law with legislative power. The state can anytime modify the agreement by way of legislation. MNCs try to minimize this kind of risk by seeking the exclusion of application of legislative change through "stabilization clauses" and to withdraw

²⁰⁸ Ibid

²⁰⁹ Ibid

dispute from the countries' national courts through a clause providing for international arbitration. A state violating its obligation may not only deter further investment, but may expose itself to a contraction of lending by the World Bank (WB) and its affiliated institutions.

6.5 Salient Features of Ethiopian Investment Treaties from other Treaties

As stated above bilateral investment treaties are agreements between two countries that protect and promote investments of investors of one contracting party in the territory of the other contracting party. Most BITs contain a number of standard provisions²¹⁰:

1. National Treatment: This ensures treatment of foreign investors that is equivalent or comparable to the treatment received by domestic investors.
2. Most Favored Nation (MFN) Treatment: This ensures the same treatment of all foreign investors, regardless of country of origin.
3. Fair and Equitable Treatment: This protection offers some minimum or specific level of protection, in contrast to other forms of protection which take as their reference point the treatment accorded to nationals or other foreign investors.
4. Restrictions on Expropriation and Indirect Expropriation: This provides protection in the event of direct or indirect expropriation. Generally, this includes a requirement that the host state pay full compensation for any investment subjected to such treatment.
5. Free Transfer of Funds: This allows for the repatriation of investment related funds (profits, interest, fees, and other earnings).

Ethiopia's BITs while deep and far reaching in other areas are less ambitious on the issue of investment liberalization. The BITs that we reviewed only require Ethiopia to admit investments in accordance with its laws and regulations. Full liberalization of the investment regime will have a very profound implication on legal and regulatory regime regulating investment in

²¹⁰ Luke Eric Peterson. May 2005. The Global Governance of Foreign Direct Investment: Madly off in all directions, FES Occasional Papers Geneva, No. 19, Geneva, p.38

Ethiopia as a number of sectors are not yet open to FDI in Ethiopia.²¹¹ According to Investment Proclamation 280/2002, foreign investors are permitted to invest in all economic sector service and non service alike except those reserved for domestic private sector or state investment.²¹²

The silent feature of Ethiopia's BITs, cover areas of the regulation of foreign investment scope and definition of investment, admission and establishment, national treatment, most-favored nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds and dispute settlement mechanisms, both state to state and investor to state.

²¹¹ Study on the Impact of the Trade Related Issues in the Economic Partnership Agreement on Ethiopia (2011) Final Report, 24 January 2011, Ministry of Trade of Ethiopia, p.47

²¹² Investment Proclamation, Pro. No. 280/2002, Federal Negarit Gazeta, 8th year, No.27, Article 8

CONCLUSIONS AND RECOMMENDATIONS

Conclusion

Investment is a process of economic activity which involves the capital technology and technological know how for the exploitation and exploration of natural resources, production in agriculture, manufacturing, trade and other economic activities. International investment law is one of the fastest growing areas of international law today and international investment treaties are instruments in the strategies of most developing countries, to attract foreign investment. Investment treaties are either bilateral or multilateral in character.

Bilateral investment treaties are agreements between two states aimed at promoting investment flows between them. They pursue this goal by establishing international obligations concerning the entry and treatment of investment by nationals of one state in the territory of the other state. Bilateral treaties on the promotion and protection of investments of investors of one contracting party on the territory of the other contracting party date back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan.

The main characteristic of BITs is that they are exclusively concerned with investment. The content of international investment agreements has been and continues to be shaped by the political, economic, and legal contexts in which they are negotiated. Bilateral investment treaties are often negotiated on the basis of model BITs developed by capital exporting countries and promoted by them as templates for agreement.

The basic features common to BITs provisions cover the scope and definition of foreign investment, admission of investments, national and most favored nation status, fair and equitable treatment clauses, compensation guarantees for expropriation, war and civil unrest, guarantees of fund transfers and the recuperation of capital gains, subrogation of insurance claims, and dispute settlement provision.

To date, Ethiopia has bilateral investment agreements and treaties with 30 sovereign states. These are China, Denmark, Italy, Kuwait, Malaysia, Netherlands, Russia, Sudan, Switzerland, Tunisia, Turkey, Yemen, Egypt, Germany, French, Libya, Iran, Belgium, Spain, Sweden, Algeria, Austria, Guinea, Finland, India, South Africa, Israel, Britain, USA, and with Djibouti. Ethiopia concluded a bilateral investment treaty with the United States, a treaty of investment incentive agreement. Ethiopia has also concluded a bilateral investment treaty with Djibouti regarding preferential investment facilitation and property acquisition agreement.

Ethiopian bilateral investment treaties are not mutually beneficial agreements and are one sided as they are favorable to capital exporting countries. They are unbalance and can hardly provide the basis for a durable investment regime though they are reciprocal in appearance. The existing Ethiopian BITs are photo up from European model that mainly focus on interest of foreign investors. Although they establish equal rights and duties for both sides, capital flows from one side only. Thus it is argued in this thesis that Ethiopian BITs lack clarity and consistency as benefits will give to the capital exporting countries.

The conclusion one can make with respect to Ethiopian BITs is that Ethiopia has no treaty negotiation capacity or treaty drafting department. The negotiation of BITs can be done by one expert but on the side of home states come to the negotiation different professionals group through the area of investment. Investment treaty is not like a friendship and cooperation treaty Ethiopia sign BITs if the home state offer to conclude the treaty but Ethiopia did not conclude bilateral investment treaties to the selective countries only.

Most Ethiopian bilateral investment treaties usually contain obligations specifying the treatment that the parties to the treaties are required to provide to the investment once it has been established, i.e., national treatment, most favored nation treatment, and the fair and equitable standard of treatment, of foreign investment are relative rights. They are granted, limited or denied depending on treatments that a country gives to either its own nationals or investors of a third country. Thus, the Ethiopian BITs do not appropriately regulate how much treatment it should be given to its own nationals and to third country nationals.

One of the findings of the research Ethiopia has bilateral investment treaties with 30 states, the provisions of environmental protection and labor rights did not include all Ethiopia bilateral investment treaties except 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. This is to show that most Ethiopian BITs do not promote sustainable development.

The research shows that the signing of BITs was positively correlated with previous investment levels. Such a correlation suggests that countries may have agreed to sign these treaties since foreign investors located in their borders were lobbying for the investor protections they could gain from BITs. In addition, BITs depend on country characteristics, as the number of treaty signings was positively correlated with per capita income and country risk. So developing countries including Ethiopia signing BITs hoping that foreign direct investment will bring a wide range of economic benefits. Most FDI coming to Ethiopia has a bilateral investment treaty concluded Ethiopia and their country.

Therefore, the research observed the existing of Ethiopian BITs is that there are no Ethiopian investors investing in the territories of the other contracting states, in reality such treaties benefit the nationals companies of other contracting states. There is no concrete evidence to convince us that Ethiopian BITs have been effective in realizing and implementing the objectives of Ethiopian investment policy and law.

Recommendation

- Ø There is a clear need for Ethiopia to review its BIT frame work as existing BITs are photo up from European model that mainly focuses on interest of foreign investors from developed countries. Ethiopia should learn from other countries such as South Africa which have already undertaken a review of their own BIT commitments and Ethiopia should prepare its own bilateral investment treaty model.

- Ø Investment treaty is not like a friendship and cooperation treaty and the consequence of concluding of BITs to pass the next generation. Ethiopia should give more attention for negotiation stage and to establish treaty negotiation capacity or treaty drafting department. There is also a direct need to enhance capacity building related to BIT negotiation process.

- Ø The number of bilateral investment treaties being concluded by Ethiopia is increasing over time, the model of BIT there is a need to standardize, to the extent possible, the contents of the treaties. Especially, regulating the contents of national treatment, most favored nation treatment, and the fair and equitable standard of treatment, becomes of the main importance. That is so because notwithstanding possible contradiction with domestic laws, varying treatments in BITs provisions could attract unintended the most favored nation treatment obligations forcing the country to open its investment areas to an undesired directions.

- Ø Most Ethiopian BITs are negotiated for a certain period only and are subject for renewed after that period. BITs should be identified that are to expire shortly. The Ethiopian Government should insist on building an adequate safeguards for developmental and public interests including as sustainable development concern as a condition for the renewal of BITs.

- Ø The Ethiopian Government should sign BITs only if they provide adequate balance between the rights and obligations of investors. New BITs need to include a provision that governments will protect, enhance and enforce basic labor rights.

- Ø States have the inherent right to exclude the investment that could cause harm to the environment. The exclusion can be right at the point of entry or after investment has been started. Ethiopia's BITs did not include provisions for environmental protection out of fear that investors would not be attracted to her territories. It is high time that due

consideration be given to environmental protection. The writer suggests that Ethiopia should include provisions for environmental protection on all her BITs.

- Ø The right to terminate the treaty on ground of failure on the part of the investor to bring in capital from abroad is nowhere stipulated under all of BITs to which Ethiopia is a party. Foreign investors should not be allowed to raise capital for their initial investment in Ethiopia nor should they be allowed to participate in economic activities solely reserved for Ethiopian nationals.

- Ø In order to rectify some of the existing weakness and deficiencies there is a direct need to review, assess and reevaluate whether Ethiopian BITs have really been effective in achieving the desired developmental goals of Ethiopia. There is a need to review how other countries like South Africa and other developing countries are using BITs to maximize their socio-economic activities.

- Ø Conducting a Workshop to introduce the issues of bilateral investment treaties shall be the responsibility of the National Bank, the Ethiopian Chamber of Commerce, the Ethiopian Conciliation and Arbitration Center all higher education institution like the Law Faculty of Addis Ababa University. Moreover, academic lawyers as well as the Ethiopian Bar Association shall take urgent step to enable Ethiopian professionals acquire the experience to competently participate in the negotiation of BITs and international investment arbitration.

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INTERVIEW

- ü Interview with Ato Tewodros Tamiru, Director Legal Directorate in Ethiopian Investment Agency, Intervened at his office, on Aug 17, 2011.

ANNEX