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COLLEGE OF LAW AND GOVERNANCE
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**The Implications of Bilateral Investment Treaties on Environmental
Protection in Ethiopia: The Law and the Practice**

**A Thesis Submitted in Partial Fulfilment of the requirements of the LLM
Degree in Public International Law**

By: Hailu Abebe Endale

Advisor:

Fikremarkos Merso
(PhD, Associate Professor)

December 2020
Addis Ababa, Ethiopia

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Declaration

I, the undersigned hereby declare that this thesis is my original work, has not been presented for a degree in any other university, and that all materials used have been duly acknowledged.

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This Paper is Dedicated to:

The National Defense Force of Ethiopia, Amhara Police Special Force, and the Militias, who have sacrificed their blood and lives to protect Ethiopia's sovereignty.

Acknowledgment

Thanks be to the almighty God, who created the heavens and the earth and set my path to success. I also thank St. Virgin Mary, the Mother of Lord, for helping me with her intercession to achieve my today's triumph.

Next, I would like to express my deepest gratitude to my advisor, Associate Professor Fikremarkos Merse (PhD), for his support, advice, and constructive comments from the topic's selection to the end of the study.

Let me also take this opportunity to extend my deepest gratitude to my dear mother, Ayalnesh Damtew W/Mariam, who sacrificed a lot to flatten my life. No words are capable of expressing the sacrifice you made to me; simply congratulation on seeing the fruit of your effort. Further, I would like to thank my sisters Tesfanesh Abebe, Frehiwot Abebe, Seblework Abebe, Mehret Abebe, and my brothers Yelma Abebe and Tesfaye Abebe for your continuous help and prayer in my life.

I would also like to express my gratefulness to Meseret and Negatuwa Alemu, my teachers at Zeybela primary school, and my high school teacher Teshome for being the secret and foundation of my today's success. My university professors Andualem Nega, Solomon Girma (Assistant Professor), and Tewodros Lema, you too deserve my gratitude.

Finally, I would like to express my sincere appreciation to all of you who contributed to this study and my relatives and friends who I did not mention your name above.

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List of Acronyms/ Abbreviations

BIT	Bilateral Investment Treaty
CIAA	Common Investment Area Agreement
COMESA	Common Market for Eastern and Southern Africa
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
FCN	Friendship, Commerce, and Navigation
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
ICSID	International Center for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement System
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
POPs	Persistent Organic Pollutants
UNCTAD	United Nations Conference on Trade and Development

Abstract

Most countries adopt Bilateral Investment Treaties to drive their economic development and to get an increase in foreign capital. Yet, investment treaties are traditionally designed towards the protection of investors and investment. Usually, a government is held accountable under international arbitrations to make indirect expropriation when it passes a domestic regulation, including environmental laws that slightly affect host state investors' investments. However, as environmental concerns have risen to prominence nowadays, the nation state's importance in addressing the issues has been recognized. As a result, countries, especially developed countries, designed their contemporary BITs to integrate environmental protection as a vital matter. Therefore, this paper made an in-depth examination of the Implications of Bilateral Investment Treaties on Environmental Protection in Ethiopia. In doing so, both the law and the practical scenarios have been assessed. Accordingly, the study discovered that, with few exceptions, most BITs to which Ethiopia is a party has significant drawbacks concerning the environmental concern and portray features of old-generation investment treaties. The notion of sustainable development, which is the principal policy basis under the FDRE Constitution and subsidiary domestic laws, has not been incorporated in most BITs. Furthermore, most BITs to which Ethiopia is a party did not grant contracting state regulatory power for environmental protection. So, environmental measures that might be taken may be highly limited, and this will, in turn, finally pose a risk of environmental pollution. Therefore, the paper recommended a remedial measure, including reforming existing BITs through renegotiation and amendment to explicitly include environmental protection standards. Furthermore, Ethiopia needs to prepare an all-encompassing and carefully designed model of BIT promptly.

CHAPTER ONE

1. Introduction

1.1 Background

Bilateral Investment Treaties (BITs) are agreements that govern a host State and foreign investors' relationship by making an international agreement between the home State of the investor and the host State government. It is perceived but controversial that signing BITs contributes a lot to boost Foreign Direct Investment (FDI), which, as a result, enhances the economic growth of host countries. These benefits include stimulating the economic development of host states by supplying capital, technology, and management resources that would otherwise not be available; creates employment opportunities; affects the balance of payment positively through the initial capital inflow and substitutes imports of goods and services¹, and increases productivity through technological advancement, superior know-how, managerial enhancement, marketing strategies, and motivational lesson for employees.² Furthermore, FDI is an important source for local firms to gain information about how to export products & then launch distribution channels in foreign markets. Bearing in mind the benefits of FDI, almost all countries eagerly concluded BITs to attract more FDI.³

The history of bilateral investment treaties can be traced back to the Friendship, Commerce, and Navigation (FCN) treaties before the nineteenth century, providing protection of property and foreigners' commercial interests.⁴ The protection of alien property rights was a principal feature of early FCN treaties.⁵ Many of those BITs are of the first generation, concluded between 1959 and the early 1990s, and mainly involved developed countries and developing countries but reflect the significant capital-exporting developed states' demands.⁶ The conclusion of BITs realized an almost exclusive objective of protecting the foreign investment.⁷

¹ Selma Kurtishi-Kastrati, 'The Effects of Foreign Direct Investment for Host Country's Economy' (2013) 5 European Journal of Interdisciplinary Studies.

² Gusti Ngurah Parikesit Widiatedja and Gusti Ngurah Wairocana, 'The Lack of the Environmental Concern in Indonesia's Bilateral Investment Treaties' (2017) 3 Hasanuddin Law Review 231.

³ *ibid.*

⁴ *ibid* 234.

⁵ Wolfgang Alschner, 'Americanization of BIT Universe: The Influence of Friendship Commerce and Navigation Treaties on Modern Investment Treaty Law' (2013) 5 Gottingen Journal of International Law 461.

⁶ Mary E Footer, 'Bits and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 Michigan State Journal of International Law 37.

⁷ *ibid.*

The second generation of BITs contains individual investment sections, has distinct investment protocols devoted to them, or includes substantive provisions on investment protection & liberalization.⁸ In this generation, some International Investment Agreements, like the North Atlantic Free Trade Agreement (NAFTA), followed a more holistic approach to trade and the regulation of foreign investment, as evidenced by the preamble text to the Treaty, which seeks among other things, to promote sustainable development; and protect, enhance and enforce basic workers' rights.⁹ Furthermore, *Mary* argued that some arbitral tribunal's award concerning whether regulatory measures in the field of the environment, public health, & other social issues could possibly amount to compensable takings under the relevant treaty provisions indicated the emergence of social and environmental protection matters.¹⁰

Currently, third-generation BITs emerged by including a clause so-called "non-lowering of standards." In this period, countries started to have environmental concerns within their treaties expressly, both in the preambles and, or provisions, reflecting the balance between states and investors' rights and obligations.¹¹ These BITs

"...aims to suppress the temptation of host states to lower their environmental standards to attract foreign investment. It is intended to respond to the "pollution haven" hypothesis and the phenomenon of "social dumping"; whereby the host state pursues to attract foreign investment that is environmentally damaging... or by lowering its environmental as an inducement to inward investment".¹²

The USA and Norwegian model of BITs are the best indicators to forbid lowering of environmental standards in a manner that deteriorates or reduces adherence to the internationally recognized environmental commitments. This new generation of investment policies has been reflected in the dichotomy in policy directions over the last few years with simultaneous moves to liberalize investment regimes further and promote foreign investment, on the one hand, and to control investment in pursuit of public policy objectives, on the other hand. It reflects the recognition that liberalization, if it is intended to generate sustainable development outcomes,

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Widiatedja and Wairocana (n 2).

¹² Footer (n 6).

has to be accompanied if not preceded by the establishment of proper regulatory and institutional frameworks.¹³

Ethiopia started to conclude BITs early in 1964. Currently, Ethiopia is a state party to 34 bilateral investment treaties, of which 21 of them are in force, 11 of them are waiting for procedural requirements for entry into force, and 2 of them are terminated.¹⁴ These BITs are expected to be compatible with domestic environmental standards on the one hand and international environmental commitments on the other hand. Therefore, this paper will look into the implication of the BITs to which Ethiopia is a party towards environmental protection.

1.2 Statement of the problems

BIT provides security for the investor, mainly in developing countries where fear of harmonized confiscation of investments or "expropriation might otherwise deter investment."¹⁵ Most BITs are made between a developed and a developing country and represent a bargain whereby a host country promises to protect home country FDI in exchange for the prospect of increased foreign capital in the future. Due to the host state's weaker bargaining power to influence the negotiation (and renegotiation) result, the capital-exporting states can *de facto* unilaterally determine an investment treaty's structure.¹⁶ Typically, a developed country drafted the agreement and then offered it to a developing country for signature, with only minor changes in the final deal compared to the proposed draft.¹⁷ As a result, developing countries incur certain sovereignty costs in negotiating, ratifying, and complying with a BIT and finally regulating foreign investment results for sovereign liability upon breach of a BIT's provisions governing FDI treatment.¹⁸

¹³ UNCTAD, *Towards a New Generation of Investment Policies* (United Nations 2012).

¹⁴ UNCTAD, 'Ethiopia | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>> accessed 24 January 2020.

¹⁵ M Aji Satria, 'Social and Environmental Protection in Bilateral Investment Treaties: Foreign Investors' Perspective' (2011) 2 *Indonesia Law Review* 73.

¹⁶ *ibid* 71.

¹⁷ Kenneth J Vandavelde, 'A Brief History of International Investment' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. (Oxford University Press 2009).

¹⁸ Alec R Johnson, 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory law Journal* 71.

Investment instruments are traditionally geared towards the protection of investors and investment. Many of them now contain a *quid pro quo*, calling for corporate social responsibility¹⁹ standards on environmental harm. As environmental concerns have risen to importance over the past half-century, the nation state's role in addressing the issues has been recognized. As a result, states, especially developed countries, designed their BITs in a manner that reveals social and environmental protection.

However, by overestimating the benefits of BITs and ignoring the risks, governments of developing countries have often seen and concluded BITs as simple 'tokens of goodwill.'²⁰ Moreover, developing countries sign BITs to drive their economic development and increase foreign capital, regardless of domestic autonomy's potential negative ramifications.²¹ This results in a compromise on the domestic regulatory autonomy because a government may be held accountable if it passes a domestic regulation that violates investor protections afforded under BITs.

Loosely regulated BITs may result in an imbalance between economic development on the one hand and social and environmental protection on the other hand. Furthermore, it causes pollution, land degradation, and climate change, thereby harming society and the environment.²² Because the application of BITs unduly restricts the host state's regulatory space and causes a regulatory chill on socially desirable action.²³ Finally, even domestic business may be shoved to make itself foreign by creating a holding company in a state party to a bilateral investment treaty to get the advantage of the unregulated investment. Therefore, given the theory that BITs chill regulatory enactment, these agreements can negatively impact society and environmental quality at the national and global levels violating international commitments.

Therefore, for the continuity of economic development, the Treaty should consider sustainable development by integrating investment with social and environmental protection. Because; sustainability could be achieved through the effective balancing of social, environmental, and

¹⁹ Footer (n 6) 34.

²⁰ Lauge N Skovgaard Poulsen, 'Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality' (PhD Thesis, London School of Economics and Political Science 2011).

²¹ Jena R Shoaf, 'A Bit of Regulatory Chill? Assessing the Effect of Bilateral Investment Treaties on the Enactment of Environmental Regulations'' (Unpublished Master's Thesis, Georgetown University 2013).

²² Wakgari Kebeta Djigsa, 'The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom' (2017) 6 Haramaya Law Review 24.

²³ *ibid.*

economic objectives. Therefore, bilateral investment treaties need to consider social and environmental protection by systematically integrating into mainstream investment policymaking.

Ethiopia incorporated most of the international legal instruments into its legal framework to protect the environment. The notion of sustainable development has also been included in its constitution and subsidiary domestic laws. At the same time, Ethiopia is a state party to numerous BITs. Therefore, it is expected that BITs signed by Ethiopia needs to be compatible with its international environmental commitments and obligations stipulated by its constitution and subsidiary domestic laws. Therefore, this research paper tries to make an in-depth examination of the BITs and the Implications of these agreements for environmental protection. Furthermore, the existing practical scenarios of BIT and its regulatory issue in environmental protection has been assessed.

1.3 Literature Review

BITs are an agreement made between two countries containing reciprocal undertakings for the promotion & protection of private investments made by citizens of the signatories in each other's territories.²⁴ Similarly, Harten stated that bilateral investment treaties are a way for states to encourage foreign investment flows into their territory. He also added that investment treaties respond to the bias and unreliability of host state domestic courts and ensure fairness and the rule of law in resolving investment disputes.²⁵ While, Durosaro, in his PhD thesis, maintained that BITs are an alternative means of investment protection given the host state's weaknesses of domestic political and legal regimes in many countries, particularly developing countries.²⁶ BITs generally protect investors from legislative, regulatory, or judicial actions of the host State of their investment if those actions are: expropriatory, either directly or indirectly; unfair or inequitable, including measures that violate investors' legitimate expectations; discriminatory as

²⁴ 'Bilateral Investment Treaty (BIT)' (*Practical Law*) <[http://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](http://uk.practicallaw.thomsonreuters.com/4-502-2491?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed 19 April 2019.

²⁵ United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (United Nations 2015).

²⁶ Wuraola O Durosaro, 'Bilateral Investment Treaties and Its Implications on Health and Environmental Rights Protection: A Case of the Niger Delta Oil and Gas Sector' (Unpublished PhD Thesis, University of Manchester 2016).

compared to citizens or investors from other States; or in breach of investment obligations or undertakings of the host State.²⁷

On the other hand, Spears maintains that BITs must be construed as per general international law, which recognizes states' right to exercise police powers, including enacting and enforcing the regulation.²⁸ Similarly, UNCTAD stated that IIAs needs to include not only features of investment liberalization, protection, promotion, and facilitation but also features enabling host countries to minimize any negative social or environmental impacts.²⁹ A study from Gordon and Pohl (2011) revealed that 133 international investment treaties, equal to 8.2 % of the sample, contained environmental concerns.³⁰ Nevertheless, from 2002 onwards, 89 % of newly concluded agreements included environmental concerns in their preambles and/ or provisions.³¹

Wakgari argues that Ethiopian BITs heavily rely on attracting, promoting, and protecting foreign investment.³² However, the Article did not examine the effects of Ethiopian BITs on preserving national and international environmental standards. Furthermore, the practical issues arising concerning enforcing BITs and environmental commitments have not been dealt with. While Gizaw observed that it could be concluded that Ethiopia's BIT regime is a very old one, and he concludes that it poses a risk of expensive litigation before international investment tribunals for its unilateral measures.³³ However, the current development, the practical side, and the relation of BITs with international environmental commitments have not been addressed. In general, even if both papers are an excellent attempt to discuss environmental protection issues under BITs, they are not adequate and wide-ranging towards the subject. Therefore, in a way that ties the gaps of existing literature, the research has made an in-depth analysis of both the theoretical and the practical implications of BITs on environmental protection.

²⁷ *ibid.*

²⁸ SA Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037, 1046.

²⁹ United Nations Conference on Trade and Development (n 25).

³⁰ Kathryn Gordon and Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* (OECD Publishing 2011) <<http://dx.doi.org/10.1787/5kg9mq7scrjh-en>>.

³¹ *ibid.*

³² Djigsa (n 22) 89.

³³ Asamnew D Gizaw, 'Ethiopia's Bilateral Investment Treaties and Protection of the Environment' (Unpublished LLM Short Thesis, Central European University 2017).

1.4 Objectives of the Study

1.4.1 General Objective

The general objective of this study is to assess the Implications of Ethiopian BITs on environmental protection.

1.4.2 Specific Objectives

The specific objectives of this study are to:

- Explore the effects of BITs on protecting the national and international environmental standards;
- Ascertain whether or not the BITs Ethiopia has signed and the practice meet environmental commitments; and
- Identify elements that need to be included in BITs to attain sustainable development by balancing FDI with environmental protection.

1.5 Research Questions

The key research questions the study seeks to answer are the following:

- What are the effects of BITs on protecting the national and international environmental standards?
- What are the current trends in Ethiopian BITs vis-à-vis environmental commitments?
- What are the elements that need to be included to attain sustainable development by balancing FDI with environmental protection?

1.6 Research Methodology

1.6.1 Source and Types of Data

Based on the research's nature, qualitative data collected from primary and secondary sources have been utilized in undertaking this research. Accordingly, BITs to which Ethiopia is a party employed as primary data. As stated, above Ethiopia is a party to 34 BITs, of which two are currently terminated. Therefore, since it is difficult to assess all 32 treaties, a sample of seven has been taken. Accordingly, to sufficiently understand the treaties' trend, seven treaties (two from each earliest and latest, and three from the middle) generation of BITs have been used as primary data sources. An interview has also been conducted with two relevant Ethiopian investment

commission employees and three Environment, Forest, and Climate Change Commission employees to corroborate the theoretical analysis with a practical side.

Furthermore, an interview has been done with one employee of the Institute for Sustainable Development, a non-governmental organization working on the environment. The interview questions are semi-structured to collect sufficient data appropriately. Decisions/Awards given by international investment-related dispute settlement institutions have also been used as primary data sources. On the other hand, the secondary data has been collected from different documents, articles, and commentaries in journals, books, magazines, and annual reports.

1.6.2 Method of Data Collection

The researcher collected different BITs from the United Nations Conference on Trade and Development (UNCTAD) web site. Furthermore, Google's web engine has been used to gather various multilateral environmental agreements, articles, international dispute settlement awards, commentaries, and legal texts. Besides, personal visits to the Ethiopian Investment Commission, Environment, Forest and Climate Change Commission, and Institute for Sustainable Development (a non-governmental organization working on the environment) have been made to gather documentary sources and do an interview.

1.6.3 Method of Data Analysis

This research primarily relied on the text analysis approach. Therefore, a scrutiny of the selected BITs has been made. The interview has been conducted to complement the practical side of the research area. Furthermore, the realistic scenario in international dispute settlement bodies has been investigated from different tribunals' decisions. Hence the author will try to achieve the research objective and answer research questions by making an inference from various legal texts, interviews, and decisions of dispute settlement bodies. However, to reduce false data's tendency, all accessible materials on the internet will not be relied on in making an analysis. Instead, data collected from secondary sources such as books have been relied on after examining the author's creditability or journal.

1.7 Scope of the Study

i. Thematic (Conceptual) scope

This study's conceptual scope focuses on BITs and the Implications of these agreements for social and environmental protection. Furthermore, the existing practical scenarios of BITs and its regulatory issue and environmental protection have been assessed.

ii. Institutional scope

The institutional scope of the study is limited to BIT negotiating, enforcing, and dispute settlement institutions. Furthermore, governmental and non-governmental institutions working on the environment has also been included within the scope

iii. Temporal Scope

The time frame required to do this research is nearly one year.

1.8 Organization of the Paper

This research has five chapters. The first chapter outlined the study's background, stated the research problem, clarified the objectives, listed the research questions, gave a brief review of related literature, defined the research method, and portrayed its scope. The second chapter outlined the theoretical framework of BITs, discussed their importance and elements of contemporary BITs. On the other hand, the third chapter answered the first research question of the research. Accordingly, it assessed the effects of BITs on protecting the national and international environmental standards. The fourth chapter strained to ascertain whether or not the BITs Ethiopia has signed and the practice compromises environmental commitments. Additionally, the chapter identified elements that need to be included to attain sustainable development in balancing FDI with environmental protection. The last chapter gave a conclusion from the lessons drawn and provided recommendations that might help to minimize BIT's adverse effects.

CHAPTER TWO

2 The Theoretical Framework

2.1 Bilateral Investment Treaties and Regulatory Measures

Under a standard investment treaty, the host state's regulatory measures to protect or promote social & environmental objectives could be deemed as regulatory expropriation if they diminish foreign investments' value. And the host state is required to pay compensation to the foreign investor under the shadow of direct investor-state arbitration.³⁴ Because a prohibition against expropriation, including indirect expropriation by regulation, is among the guarantees afforded to foreign investors under BITs. Therefore, Shoaf argues that, if a country were to enact an environmental ordinance having a negative financial impact on existing foreign investment, the affected investor could file a claim against the state for reimbursement of its "expropriated" asset.³⁵

However, Spears contends this Shoaf's argument and states that foreign investment encouragement needs to be compatible with international and national environmental commitments and rights. Accordingly, states have the right and the duty to enact regulations and take measures to protect society and the environment from harm by private actors. The right to regulate arises from sovereignty's essential attributes, while the duty to protect arises from a range of international & domestic legal instruments.³⁶ Under some international legal tools and domestic legislation, those commitments and rights extend to other states or affected persons to enforce a state's duty to protect and gain compliance or compensation upon showing a breach through quasi-judicial or judicial procedures.

Furthermore, albeit BITs are usually related to investment protection, several research pieces contend that concluding BIT is significant in capital-exporting states' protection of the environment and seeks sites with better environmental protection laws and regulations. In a way that reinforces this trend, foreign investors have been mounting pressure on the government of

³⁴ Shoaf (n 21).

³⁵ *ibid.*

³⁶ Spears (n 28).

Costa Rica to work on environmental care, considering that their European customers want "an environmentally sound product."³⁷

Mary Footer states that most of the existing BITs are of the first generation³⁸ drafted in the 1990s by Northern, capital-exporting states that subscribed to a market fundamentalist or 'neo-liberal' version of economic liberalism at the time.³⁹ Broadly speaking, neo-liberals do not envision any role for the regulatory state beyond the establishment and protection of property rights, not even to correct market failures, the risk of which they discount.⁴⁰ The rise of investment treaties only focused on economic factors, ignoring the implications of certain detrimental impacts. Their silence on the subject is keeping with neo-liberalism, which, as noted above, is the version of economic liberalism that was in vogue when the majority of BITs were signed.⁴¹ However, it is crucial to balance investors' legitimate interests, such as maintaining a transparent and predictable investment policy and the host country's legitimate interests to reach its development targets, including a "right to regulate" for policy goals, especially an environmental concern.⁴²

Spears argues that while not preserved explicitly in most 1990s-era BITs, the sovereign right to regulate is preserved implicitly even in these economic neo-liberalism instruments and even while they also condition it. That is because BITs must be interpreted in accordance with general international law, which recognizes the right of states to exercise police powers, including through the enactment and enforcement of regulation.⁴³ Similarly, UNCTAD stated that IIAs need to include investment liberalization, protection, promotion, and facilitation and features enabling host countries to minimize any negative social or environmental impacts.⁴⁴ This process can then be reflected by including environmental concerns in the preamble and substantive provisions in the current international investment agreements, including BITs.⁴⁵

³⁷ United Nations Conference on Trade and Development and Sustainable Business Institute at the European Business School, *Making FDI Work for Sustainable Development* (UNCTAD 2004) <http://unctad.org/en/Docs/ditcted9_en.pdf> accessed 9 April 2019.

³⁸ Footer (n 6).

³⁹ *ibid.*

⁴⁰ Spears (n 28).

⁴¹ *ibid.*

⁴² United Nations Conference on Trade and Development (n 25) 33.

⁴³ Spears (n 28).

⁴⁴ United Nations Conference on Trade and Development (n 25).

⁴⁵ *ibid.*

2.2 Contemporary BITs, their Environmental Measures and Sustainable Development

A study from Gordon and Pohl (2011) unveiled that among 133 international investment treaties, equal to 8.2 % of the sample, contained environmental concerns.⁴⁶ Nevertheless, from 2002 onwards, 89 % of newly concluded agreements included environmental concerns in their preambles and/ or provisions.⁴⁷ The study also revealed that 30 out of 49 countries had put environmental concerns in at least one of their treaties.⁴⁸ Most of the existing references to environmental concerns seek to define aspects of the environment/investment relationship that fall into seven categories: contextual language in preambles; not lowering environmental standards to attract investment; general right-to-regulate language or reserving environmental policy space; right to regulate concerning specific treaty provisions (e.g., indirect expropriation); recourse to experts in dispute resolution; and intergovernmental consultation on environmental matters.⁴⁹

The obligation to consider any relevant rules of international law applicable between the parties may require BITs to be interpreted in light of international human rights and environmental law requirements, which impose positive duties on states to protect the environment.⁵⁰ The customary rules on state responsibility to aliens also anticipate that weighing the respective interests of sovereign and investor is part of determining whether a substantive guarantee has been breached.⁵¹ However, even today, the overwhelming majority of FDI does little to promote long-term economic development while frequently compromising the host State's regulatory sovereignty and endangering the environment, all in pursuit of more significant and secure home State investment returns, finally resulting in a "race to the bottom" practice.¹²

Environmental issues have become crucial if development is to be sustainable. Hence, the growing awareness of challenges to development thinking (that targeted only economic and social development) has headed to the increasingly wide acceptance of a new concept-sustainable development. It means economic development that protects the environment, and that

⁴⁶ Gordon and Pohl (n 30).

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid.* 7.

⁵⁰ Spears (n 28) 1046.

⁵¹ Spears (n 28).

brings economic growth with its social progress.⁵² Failure to embrace environmental matters in these laws may bring about environmental disregard on the side of investment organ by making them think that their main objective is to merely achieve economic growth. It may make people associate environmental issues with the concerns of the environmental groups only. Therefore, any investment policy or the law of a country that embodies development as its objective must take sustainable development into account.⁵³

2.3 BITs Signed by Ethiopia and Environmental Protection

Most of the BITs to which Ethiopia takes part, as a party, is either first-generation or second-generation⁵⁴ Wakgari argues that Ethiopian BITs heavily rely on attracting, promoting, and protecting foreign investment.⁵⁵ As a result, he generalizes that Ethiopian BITs have no adequate regulatory space to protect the environment.⁵⁶ Similarly, Asamnew stresses that all of the BITs signed by Ethiopia have the sole purpose of attracting foreign direct investment and affording protection to investors/investment/ companies of the other contracting states.⁵⁷ He further adds that this may be the absence of a clear policy of handling investment and environmental matters. The absence of a Model BIT of Ethiopia might manifest the lack of specific policy on the intricate subject of investment and the environment's protection. He also doubts this may result from the country's asymmetric relationship with the other contracting states.⁵⁸

Most of the BITs of Ethiopia do not incorporate the principle of sustainable development, which also demands a robust regulatory power by the state.⁵⁹ Furthermore, they do not have a general exception, which underlines the country's right to regulate the environment without fear of being held liable through indirect expropriation.⁶⁰ Such gaps may lead to an expensive litigation process before arbitral tribunals and subsequent payment of huge compensation to foreign investors/investments.⁶¹ Finally, he generalizes that the Ethiopian BIT regime appears devoid to

⁵² Mohammed Ibrahim Ahmed, 'Integration of Environmental Safeguards into Ethiopian Investment and Sectoral Laws' (2017) 8 Afe Babalola University Journal of Sustainable. Development, Law & Policy 23.

⁵³ *ibid.*

⁵⁴ Gizaw (n 33) 30.

⁵⁵ Djigsa (n 22) 89.

⁵⁶ *ibid.*

⁵⁷ Gizaw (n 33) 40.

⁵⁸ *ibid.*

⁵⁹ *ibid* 47.

⁶⁰ *ibid.*

⁶¹ *ibid.*

reflect the current development in international investment treaties seen relative to express right to regulate.⁶²

While Wakgari explicates that Ethiopian BITs lack provisions that impose parallel obligations on investors concerning environmental protection.⁶³ In the absence of such clauses in BITs, a resort to only domestic environmental rules and regulations may not effectively address environmental concerns. First, the protection offered to investors may limit governments' ability to regulate investment for the safety of the environment, natural resources, and other social goods & to ensure that foreign investment contributes to overall national development goals. Any attempt by the host state to impose environmental protection measures could violate its obligations under BITs.⁶⁴ Second, under the Vienna Convention on the Law of Treaties, states are precluded from invoking their domestic laws as a defence for the breach of their treaty obligations.⁶⁵

On the other hand, Mohammed relates the government's duty to protect the environment with the FDRE constitution and the Ethiopian environmental policy. Accordingly, as per Article 9(4) of the Constitution, all BITs ratified by Ethiopia are part & parcel of the law of the land. Furthermore, the Environmental Policy of Ethiopia is underpinned by sustainable development. Hence, it can be concluded that the government has to make sure that the BITs that it signs and ratifies should have sustainable development as a goal. It also means that the BITs should contain a safeguard mechanism that affirms the right to regulate critical policy areas like protecting the environment.⁶⁶ Unless Environmental damage, which is the consequence, destroys economic development obtained by the investment.

⁶² *ibid.*

⁶³ Djigsa (n 22).

⁶⁴ *ibid* 83.

⁶⁵ Vienna Convention on the Law of Treaties 1969 Art 27.

⁶⁶ Gizaw (n 33).

CHAPTER THREE

3. The Effects of BITs on Protecting Environmental Standards

3.1 Generations of BITs and Investment Adjudications Vis-à-vis Environmental Concerns

Customary international law almost entirely protects the foreign investment of aliens before BIT's were concluded. While some nominal protections were guaranteed to foreign investors who might find themselves suffering mistreatment at the hands of a host country, there was also ongoing disagreement about more specific treatment forms that should be extended by host governments. So, in an effort to supplement the slender protection afforded by customary international laws to aliens, the first generation of BIT's was developed.⁶⁷ Therefore it was hoped that those BITs could minimize legal uncertainties regarding investment issues beyond home state territory.

3.1.1 Old generation BITs

Historically BITs date back to 1959 when the first BIT was engaged between the Federal Republic of Germany and Pakistan.⁶⁸ Germany took the lead in treaty-making of bilateral investment treaties because it lost all of its foreign investments due to its defeat in the Second World War.⁶⁹ However, BITs that emerged in the second half of the 20th century were entirely designed as an instrument to protect investments and investors. It shows that BITs emerged as tools of investment protection, not as tools of environmental protection.⁷⁰

Based on their purpose, in old generation BIT's any act of host states, whether regulatory or judicial, is considered expropriation if the measure reduces/impairs the investment, to create fear on host states from taking those actions. This is because a broad definition of indirect expropriation may result in a situation where all state measures that harm an investor can be considered an indirect expropriation, irrespective of the reasons that underlie any such action.⁷¹ Although certain governments, commentators, and legal texts reject the position that regulatory

⁶⁷ Luke Eric Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (Rights & Democracy 2009).

⁶⁸ Durosaro (n 26) 29.

⁶⁹ Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Law* 657.

⁷⁰ Gizaw (n 33) 17.

⁷¹ Suzy H. Nikièma, *Indirect Expropriation-Best Practices Series* (International Institute For Sustainable Development(IISD) 2012) 3 <http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf>.

activity can constitute an expropriation, several arbitral decisions have decisively held that regulatory activity is not, per se, outside the scope of expropriation.⁷² This is because, in traditional expropriation, there is no need to involve the transfer of title to a given property to transpire expropriation.

On the other hand, the Treaty's framework is often revealed by the preamble as an element of textual and teleological interpretation. However, the preamble of old generation BIT's are brief or remain silent concerning public protection, precisely, environmental issues; at best, their preambles contain the reference to the promotion of economic development of the treaty Parties as their rationale merely.⁷³ Similarly, from the pragmatic point of view in interpreting the object and purpose of BIT's arbitral tribunals have arrived at opposing interpretations

Accordingly, in *Noble Ventures Vs. Romania*, *Agua del Tunari Vs. Bolivia* and *Siemens v. Argentina* case pro-investor awards were rendered to protect and give priority for investments. Consequently, the awards have interpreted the object and purpose of BIT to allow 'one-sided doctrinal advantage' for foreign investments.⁷⁴ As an example, in *Siemens Vs. Argentina's* case Tribunal justified the *pro-investor* interpretation as best serving the intentions of the contracting Parties of the German –Argentina BIT (1991). Accordingly,

*The Tribunal shall be guided by the purpose of the Treaty as expressed in its title And preamble. The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative.*⁷⁵

Dubava Argues that BIT's pro-investor approach was legitimately derived from the very titles of BITs; namely, they are agreements on the promotion and protection of foreign investment.⁷⁶ Therefore, the terminology given for most BITs is promotion and protection of investments, and these drive arbitrators to reach on pro-investor interpretation and award.

⁷² Spears (n 28) 1049.

⁷³ Ilze Dubava, 'Reconciling International Investment Law and Sustainable Development with Respect to Host State's Right to Regulate' (submitted for assessment with a view to obtaining the degree of Doctor of Laws, European University Institute 2013) 53.

⁷⁴ *ibid* 54.

⁷⁵ *Siemens Vs The Argentine Republic* [2004] ICSID Case No. ARB/02/8.

<<https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>> accessed 21 February 2020.

⁷⁶ Ilze Dubava (n 73) 55.

On the other hand, some arbitral tribunals have rejected *in dubio pro-investor interpretation* in construing old generation BIT's stating as it is not justified by Teleological interpretation and decided on the balanced approach concerning the understanding of the same BITs.⁷⁷

*This Tribunal considers that a **balanced interpretation** is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuous flow.*⁷⁸

Finally, in interpreting the old generation BIT's through teleological interpretation, tribunals arrived at conflicting outcomes. However, usually, the interest of investors was protected and got an emphasis. It is because the treaties themselves are devoid of provision, which explicitly deals with protecting the environment. Therefore in the absence of environmental provisions within the BIT's, even when the tribunal inclines to the balanced interpretation, the investor is favourable. As a result, the old generation bilateral investment treaties are favourable to the investors. At the same time, they are the source of trouble for the host states, mainly when a dispute arises between the two. Accordingly, a priority is given to protect investment, leaving aside safeguard the environment, which is one source of investment inflow. Therefore, old generation bilateral investment treaties are not pro-environmental protection both in theory and in practice.

3.1.2 Second Generation BITs

Taking into consideration the drawbacks of those BIT's After the early 1990s (as some authors claim, from the mid-1980s to the mid- 1990s), states came to the newer, i.e., the second generation of BITs and other international investment agreements.⁷⁹ As *Footer stated*, Many of these BITs were built on the first generation of investment treaties, focusing on investment protection and placing more importance on the liberalization of investment, as there is a

⁷⁷ *ibid.*

⁷⁸ *El Paso Energy International Company vs The Argentine Republic* [2006] ICSID Case No. ARB/03/15 240. <<https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>> accessed 21 February 2020.

⁷⁹ Gizaw (n 33) 20.

diminution of market access barriers.⁸⁰ Thus, the second generation of BITs has two essential objectives protection and promotion of investments on one hand and liberalizing investment.

Footer stated that Some of the IIAs signed during this time, like the NAFTA or the Energy Charter Treaty, offer sturdy investor protection standards & internationalized dispute settlement. Other IIAs, like the various Asian investment instruments, are pure market access instruments, which have more in common with modern trade agreements and specialized tools on trade in services.⁸¹ One of those additional agreements to NAFTA, the North American Agreement on Environmental Cooperation ("NAAEC"), also deals with environmental protection even if it was criticized for its inadequate environmental protection.⁸²

Some arbitration tribunals also provided an environmental pro award. In *Methanex Corporation v. United States* case, California state banned the manufacturing and sale of the gasoline additive methyl tertiary butyl ether('MTBE'), but the tribunal stated that;

"In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable..."⁸³

While this form of regulatory taking, or indirect expropriation, may potentially deprive interest and investors' right to invest in a significant way, it allows the state to encourage environmental & societal concerns without payment of compensation.⁸⁴ Therefore, even if NAFTA is not a bilateral investment treaty, it denotes the coincidental second-generation bilateral investment treaties. Generally, those second-generation BIT's are a continuity of the first generation of BIT's with a slight reform in embrace the concept of liberalization and environmental rights. Therefore, they are a bridge between the first generation BIT's which entirely protect investment and

⁸⁰ Footer (n 6) 37.

⁸¹ ibid 38.

⁸² North American Agreement on Environmental Cooperation 1993.

<https://www.canada.ca/content/dam/eccc/documents/pdf/international-affairs/compendium/2020/batch-11/north-american-agreement-environmental-cooperation.pdf> accessed 17 February 2020.

⁸³ *Methanex Corporation Vs United States of America* (NAFTA Arbitration Tribunal) 277. <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> accessed 21 February 2020.

⁸⁴ Footer (n 6) 40.

investors, with third-generation BIT's, which give clear protection for environmental and social rights.

3.1.3 New/Third Generation BITs

The whole discourse surrounding the first and second generation BITs has become so focused on the protection of foreign investment, and they tend to ignore critical domestic considerations and public issues to the detriment of states. Furthermore, host states' interest in regulating social and cultural policy fields was grown, and predicated claims arise out of the breach of property rights, or investor standards were increasingly challenged by the right of host States. So, a new generation of foreign investment policies is emerged, with governments pursuing a broader and more sophisticated development policy agenda while building or maintaining a generally promising investment climate. Likewise, new generation investment policies have been in the making for some time and are reflected in the contradiction in policy directions with simultaneous moves to liberalize investment regimes further in one way and to regulate investment in quest of public policy objectives, on the other way.⁸⁵

The new generation BIT's primary target is to integrate growth with sustainable development to attract and benefit from the investment. Furthermore, it tends to build responsible investor behaviour and incorporate principles of corporate social responsibility. The UNCTAD in its 2015 investment policy framework for sustainable development clearly stated that new generation investment policies generally and BIT's specifically are characterized by three broad aspects: -

"(i) a recognition of the role of investment as a primary driver of economic growth and development of the consequent realization that investment policies are a central part of development strategies; (ii) a desire to pursue sustainable development through responsible investment, placing social & environmental goals on the same footing as economic growth and development objectives and (iii) a shared recognition of the need to improve the effectiveness of policies to promote and facilitate investment."⁸⁶

⁸⁵ UNCTAD, *Towards a New Generation of Investment Policies* (n 13) 23.

⁸⁶ UNCTAD, 'Investment Policy Framework for Sustainable Development' (UNCTAD 2015) UNCTAD/DIAE/PCB/2015/5 17.

Unlike old generation BIT's, most of the new generation BIT's explicitly included a clause with an explanation that non-discriminatory regulatory measures of a member state that are designed and applied to safeguard legitimate public welfare objectives, such as public health, safety, and the environment, could not be categorized indirect expropriations.⁸⁷ Some experts distinguish this measure as a codification of states' customary police powers in a new generation BIT as an exception for indirect expropriation. The doctrine of police power represents the State's sovereign right, as the guardian of the general, public interest, to regulate economic activities on its territory with its Treaty or contractual obligations.⁸⁸ The right to regulate denotes the legal right exceptionally permitting the host state to handle in derogation of international commitments it has undertaken to employ an investment agreement without incurring a duty to compensate. The police powers of the State are primarily invoked in matters concerning the protection of the environment. Nowadays, even arbitration tribunals rendered an award in a manner that recognizes states police power. A good example is the *Chemtura v. Canada* Case:

"Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's *police powers*... The PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and *the environment*. A measure adopted under such circumstances is a valid exercise of the *State's police powers and, as a result, does not constitute an expropriation*."⁸⁹ [Emphasis added]

In general, under new generation investment policies, including BIT's, certain breaches of investment guarantees should not be subject to the requirement of compensation. Hence, in case of interference in the investor's property for reasons such as environmental protection, an expropriating State is exempt from the duty to compensate. Most investment agreements are also tending towards excusing investments for environmental protection. For example, Eastern and Southern African countries in their 2007 Common Investment Area Agreement (CIAA)

⁸⁷ Ilze Dubava (n 73) 143.

⁸⁸ Alain Pellet, 'Police Powers or the State's Right to Regulate' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2016) 447.

⁸⁹ *Chemtura Corporation V Government of Canada* (Ad hoc NAFTA Arbitration Tribunal) 78. <https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf> accessed 21 February 2020.

included an expression excluding measures taken to protect public welfare from taking as indirect expression: Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory actions taken by a Member State that is intended and applied to protect or enhance legitimate public welfare objectives, such as public health, safety, and the environment, shall not be considered an indirect expropriation under this Agreement.⁹⁰

3.2 Environmental Notions and Model Investment Treaties of the Present-Day

Over the long term, the proportion of BIT's that contain references to environmental concerns has increased. The frequency of using environmental language in BIT's has generally increased over time, but this increase is not monotonic.⁹¹ Therefore, environment-related provisions found in bilateral investment agreements broadly reflect three main themes. The first set of references recognizes environmental protection and conservation amongst the Treaty's objectives.⁹² This type of protection often appears in the preamble. The preamble of the 2012 U.S. Model BIT best describes this type of environmental provision: "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment..."⁹³ The 2018/19 Belgium-Luxembourg model BIT is also a good example: "Reaffirming their commitment to sustainable development and enhance the contribution of investment to sustainable development, in its economic, social and environmental dimensions, and to promote investment in a manner supporting high levels of environmental protection..."⁹⁴ Similarly, the Brazilian Model BIT encompassed a similar reference: "Recognizing the importance of fostering a transparent and friendly environment for investments..."⁹⁵ Generally, these types of clauses serve a useful function by confirming that environmental protection is a concern of the parties. Among BIT's

⁹⁰ Investment Agreement for the COMESA Common Investment Area 2007 Art 20(8).

⁹¹ Gordon and Pohl (n 30) 6.

⁹² Christina L. Beharry and Melinda E. Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2015) 30 383, 389.

⁹³ 2012 U.S. Model Bilateral Investment Treaty 2012 Preamble. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download>> accessed 10 February 2020.

⁹⁴ 2018/19 Belgium-Luxembourg Model BIT 2018 Preamble. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download>> accessed 10 February 2020.

⁹⁵ Brazil Model Bilateral Investment Treaty preamble. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>> accessed 10 February 2020.

which comprise an environmental language, these references are the second most commonly utilized.⁹⁶

The second category of provisions, which was also the oldest and most common category of environmental language, affirms a contracting party's right to regulate environmental matters.⁹⁷ These provisions intend to carve out regulatory space for States to achieve policy goals without breaching the Treaty's substantive obligations. The Norwegian Model BIT is an excellent example for this category of treaties; "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this agreement that it considers appropriate to safeguard that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns."⁹⁸

The third type of BIT's containing references to environmental concerns places States under a continuing obligation to uphold environmental standards.⁹⁹ This type of BITs contain statements that oblige States not to lower environmental standards and regulations to attract foreign investments.¹⁰⁰ These statements appear within BITs either in the preamble¹⁰¹ or as a free-standing clause.¹⁰² Christina L. et al. stated non-lowering environmental provisions that appear in BITs are hortatory and aspirational.¹⁰³ They aim to avoid a regulatory race to the bottom by States. Sometimes these clauses are complemented with recourse to consultations between the contracting states when one party is suspected of relaxing its standards.¹⁰⁴

⁹⁶ Christina L. Beharry and Melinda E. Kuritzky (n 92) 390.

⁹⁷ *ibid.*

⁹⁸ Norway Model Bilateral Investment Treaty 2015 Art 12. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download>> accessed 10 February 2020.

⁹⁹ Christina L. Beharry and Melinda E. Kuritzky (n 92) 394.

¹⁰⁰ Gordon and Pohl (n 30) 6.

¹⁰¹ Finland - Kenya Bilateral Investment Treaty(2008) 2008. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5534/download>> accessed 17 February 2020. The treaty under its preamble states that "...Agreeing that these objectives can be achieved without relaxing health, safety and **environmental measures...**"

¹⁰² Brazil Model Bilateral Investment Treaty Art 16(2). "...The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and **environmental** legislation or measures of health..."

¹⁰³ Christina L. Beharry and Melinda E. Kuritzky (n 92) 394.

¹⁰⁴ *ibid.*

3.3 Development of Environmental Standards in Ethiopia's BITs

As stated above, Germany has taken the lead in signing bilateral investment treaties internationally, and similarly, the first Ethiopian BIT was made in 1964 with the Federal Republic of Germany. The Treaty in its preamble specified that its fundamental aspiration is to intensify economic cooperation between both States.¹⁰⁵ The Treaty's ambition is premeditated to accomplish by creating favourable conditions for investments by nationals and companies of either State in the other State's territory.¹⁰⁶ Like first-generation BIT's, the Treaty emphasized the protection of all assets of citizens or companies of either contracting party in the other contracting party's territory.¹⁰⁷ However, like coeval BITs, Germany-Ethiopia BIT has failed to include environmental-related clauses either in its preamble or as a free-standing clause.

As the nomenclature indicates, the primary purpose of Ethiopia-China BIT signed in 1994 is encouragement and reciprocal protection of investments.¹⁰⁸ The preambular part further specified that the BIT intended to create favourable conditions for investments...in the territory of the other contracting party through reciprocal encouragement, promotion, and protection of such investments.¹⁰⁹ Like that of Germany-Ethiopia BIT, Ethiopia-China BIT's emphasis is economic reasons, and it states nothing about the safety of the environment. Similarly, under Ethiopia-Kuwait BIT¹¹⁰, no environmental clause has been included. Rather an economic motive, particularly reciprocal protection of investment to achieve prosperity in contracting states, is targeted. Nothing also differs in the 1999 Ethiopia-Yemen BIT¹¹¹ as it desires primarily to create favourable conditions for investment on the one hand and protect both contracting states'

¹⁰⁵ Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments 1964 preamble. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1165/download>> accessed 10 February 2020

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ Agreement between the government of the Federal Democratic Republic of Ethiopia and The Government of the People's Republic Of China concerning the encouragement and reciprocal protection of investments 1998 Nomenclature of the BIT. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/732/download>> accessed 10 February 2020

¹⁰⁹ *ibid* preamble.

¹¹⁰ Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments 1996. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1169/download>> accessed 10 February 2020

¹¹¹ Agreement between the government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the reciprocal promotion and protection of investment 1999. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1163/download>> accessed 10 February 2020

investments to promoting economic prosperity in both countries, setting aside environmental issues.

When we explore Ethiopia's bilateral investment treaties that originated in the 21st century, the Sudan-Ethiopia BIT comes to mind considering our long-established relationship with the foreign direct investment inflow between the two countries. Accordingly, the Sudan-Ethiopia BIT¹¹², which entered into force in 2000, states nothing about environmental protection. As there is a transformation during this period in the international arena towards a BIT's embracing clauses on environmental issues and sustainable development and based on an equivalent capacity of two states to negotiate, it is expected on their BIT to include clause/s for environmental protection. However, the BIT nowhere mentions the safety of the environment. Instead, the standard clause in BITs (to create favourable conditions for investments and reciprocal promotion and investment protection) was mainly incorporated. Nothing is different in the Ethiopia-Turkey BIT of 2000¹¹³, Ethiopia-Netherlands BIT of 2003, and Ethiopia-France BIT of 2003. Briefly, all of them were designed in a way that reveals the characteristics of first-generation BITs.

In the history of Ethiopian BITs, the Ethiopia-Finland BIT of 2006¹¹⁴ is the first to incorporate environmental protection as one of its objectives. The Treaty in its preambular part indicated that;

"...Recognizing *the need to protect investments of the investors* of one Contracting Party in the territory of the other Contracting Party...AGREEING that these objectives can be achieved without relaxing health, safety, and *environmental measures* of general application." [Emphasis added]

¹¹² Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the Republic of the Sudan on the reciprocal promotion and protection of investment 2000. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1175/download>> accessed 10 February 2020.

¹¹³ Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments 2000. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1179/download>> accessed 10 February 2020.

¹¹⁴ 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. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1162/download>> accessed 10 February 2020.

The Treaty expounded that investment activities will only be operated within the boundary of environmental protection. The words used within the Treaty is an implication of the third generation IIAs. However, environmental objectives stated in the preamble has not been extended to the Treaty's free-standing substantive provisions, and it failed to include consequences that will transpire for failure to comply with the environmental objectives of the Treaty.

The commencement of environmental subjects included in the Ethiopia-Finland BIT of 2006 has persevered in an advanced way in the 2006 Belgian Luxembourg-Ethiopia BIT.¹¹⁵ The preamble of the Treaty is very brief. It declares "strengthening economic cooperation by creating favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party." However, in achieving the objective stated under the preamble, the Treaty under Art 5 indicated that it should be environmentally pro way. The Treaty Under Art 5(1) utters that; "Recognizing the right of each Contracting Party to establish its levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify according to *its environmental legislation*, each Contracting Party shall strive to ensure that its legislation provides for *high levels of environmental protection* and shall strive to continue to improve this legislation." Furthermore, sub-article three extends the environmental obligation of states to the international environmental commitments they are a party with. Reflecting a modern third-generation feature of BIT's, it retained a continuing obligation on contracting states to uphold environmental standards.

"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."¹¹⁶

¹¹⁵ Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the reciprocal promotion and protection of investments 2006. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5345/download>> accessed 10 February 2020.

¹¹⁶ *ibid* Art 5(3).

Belgian Luxembourg-Ethiopia BIT is an excellent advancement for Ethiopia. Both the Finland-Ethiopia and Belgium- Ethiopia BITs are a good beginning in their progress from stagnated first-generation BIT towards a forward-looking environmental clause incorporated treaty regime.

The last two BITs of Ethiopia were concluded with Qatar and Brazil. Both Ethiopia-Qatar BIT of 2017¹¹⁷ and Brazil-Ethiopia BIT of 2018¹¹⁸ incorporated the issue of sustainable development in their preamble. Accordingly, Ethiopia-Qatar BIT States that; Recognizing the vital contribution of investments to the sustainable development of the Contracting Parties... while the Brazil-Ethiopia BIT under its preamble states that; Recognizing the essential role of investment in promoting sustainable development...the importance of fostering a transparent and friendly environment for investments... Therefore, in a way that divulges the features of third-generation IIAs, both treaties incorporated in their preamble the issue of sustainable development. Furthermore, environmental clauses were widely incorporated extensively in the Ethiopia-Qatar BIT of 2017¹¹⁹ and Brazil-Ethiopia BIT of 2018¹²⁰. Hence, when we explore the compositions of both BITs, although the principal aim of these treaties was the promotion of economic growth among state parties to the Treaty, they are a typical example of third-generation IIAs. However, BITs discussed above as incorporating environmental protection clauses, all except the Ethiopia-Finland BIT of 2006, have not yet entered into force. Therefore, it cannot impose a legal duty on the contracting states of the Treaty.

¹¹⁷ Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the state of Qatar for the promotion and reciprocal protection of investments 2017. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5982/download>> accessed 10 February 2020.

¹¹⁸ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation 2018. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5717/download>> accessed 10 February 2020.

¹¹⁹ Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the state of Qatar for the promotion and reciprocal protection of investments Art 7(1), 8(4) and 14.

¹²⁰ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation Art 14(2a,e), 16(1,2), 24(3).

3.4 The raison d'être Behind Protection of Environment through BIT

A. Ensuring an appropriate balance between protection commitments and environmental protection

With intensification in globalization and liberalization, States have become so interconnected and interdependent that they need FDIs from one another to achieve maximum developmental potentials. As stated under chapter one, FDI is identified as the main engine of economic growth, a potential source of employment, as well as a channel through which advanced technologies can be transferred to host countries. However, FDI is frequently criticized for its potentially harmful consequences on the environment. Realizing these potential environmental costs associated with FDI, most countries are now selective in the type of FDI that comes into their country. Many countries are now promoting the so-called "green" FDI that focuses on FDI that can promote economic growth and also internalizes the adverse environmental externalities associated with industrial production.¹²¹ Therefore, many states are in a continuous effort to balance FDI's negative impacts on environmental protection. One way to achieve this balance is by properly managing the foreign investors' legitimate expectations and understanding the potential adverse effects of investment liberalization on the host country's economy, and adequately indicating this in the BITs & other international investment agreements.

B. To re-establish the overlooked notion of sovereignty

As part of sovereignty, states have the police power to control and exercise over their territory. Accordingly, the customary international law entitled states with police power to regulate economic activities within their territory in the public interest. In contrast, a substantial number of the existing BITs have endowed investors with broad rights and protections that are backed by robust dispute settlement mechanisms. Hence when states introduce policies and regulations that aim to protect the environment, they were blamed for taking a measure of expropriation. Even if Arbitral practice has been inconsistent in this area, exercising regulatory powers has been constituted as indirect expropriation and required to pay compensation in many cases. As a result, states fearing this consequence made the police power of states part under their BITs.

¹²¹ Stephen S. Golub, Céline Kauffmann and Philip Yeres, *Defining and Measuring Green FDI: An Exploratory Review of Existing Work and Evidence* (OECD Publishing 2011) <<http://dx.doi.org/10.1787/5kg58j1cvevk-en>>.

Therefore, the acts of investors and Arbitral tribunals that driven states to include under their BITs the formerly implied police power explicitly. Generally, it is not a conception of a new right for host states' benefit but is an explicit re-establishment of implied police power derived from sovereignty.

C. The enforcement of investor obligations through counterclaims

Foreign investors have the right to benefit from the investment safeguard guarantees laid down in IIAs. Despite the fact the contracting parties to the IIAs are states, they confer certain rights and environmental responsibilities on foreign investors. Foreign investors can enforce these rights through an investor-state dispute settlement system (ISDS). Investors and their investments are the catalysts in stimulating sustainable development in a host state. From this perspective, investors are expected to comply with environmental and social standards to encourage sustainable investment.¹²² In principle, under an IIA, a host state may not initiate arbitration proceedings against an investor. Under some IIAs, a respondent state can file a counterclaim against an investor requesting financial compensation.¹²³ The possibility of bringing a counterclaim offers a state an opportunity to remedy the asymmetrical nature of investment treaties and get direct claims against investors for violations, including environmental pollution. Therefore, incorporating pragmatic environmental clauses within BITs will authorize states to take counterclaim measures and finally discourages investors from demanding arbitration for petty issues.

¹²² Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14 41, 49.

¹²³ *ibid.*

CHAPTER FOUR

4. The Trend of Ethiopia's BITs in Protecting the Environment

4.1 Introduction

In the 1990s, a surge of regional and bilateral investment agreements has promoted the liberalization of investment regimes. These agreements expand foreign investors' rights but, with few exceptions, didn't articulate the environmental or social responsibilities of either investors or states. Many in the sustainable development community are concerned that liberalization will accelerate environmental degradation without mandatory and enforceable guidelines.¹²⁴ As a result, many states started to incorporate environmental clauses under their investment treaties. Parallel to this, in 1987, the Brundtland Commission published a report named 'our common future' in an effort to link the issues of economic development with environmental stability. In doing so, this report provided the often cited definitions of sustainable development as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*"¹²⁵ Further, it acknowledges the need to further mainstream sustainable development at all levels, integrating economic, social, and environmental aspects and recognizing their interlinkages, to achieve sustainable growth in all its dimensions.¹²⁶

With the view of balancing economic development with social and economic protection, many states incorporated the concept of sustainable development under their international commitments, constitution, and subsidiary legal frameworks. Being part of the global community Ethiopia has also included the issue of sustainable development under its constitution. The deriving cause behind the environmental policy of Ethiopia is; "*...to promote sustainable social and economic development through the sound management and use of natural, human-made and cultural resources and the environment as a whole so as to meet the needs of the present generation without compromising the ability of future generations to meet*

¹²⁴ Kevin P. Gallagher and Lyuba Zarsky, 'No Miracle Drug: Foreign Direct Investment and Sustainable Development' in Lyuba Zarsky (ed), *International Investment for Sustainable Development: Balancing Rights and Rewards* (The Nautilus Institute for Security and Sustainable Development 2004) 26.

¹²⁵ United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future.' (1987) <<http://www.un-documents.net/our-common-future.pdf>> accessed 17 February 2020.

¹²⁶ *ibid.*

their own needs."¹²⁷ From its preliminary part to its end, the policy expounded on attaining sustainable development through balancing economic growth and environmental protection.

The recently enacted investment proclamation stated under Art 5 that the general "objective of the investment is to improve Ethiopia's peoples' living standard by realizing a rapid, inclusive and sustainable economic and social development."¹²⁸ Further, it specifically intended to encourage socially and environmentally responsible investments.¹²⁹ Therefore, achieving sustainable development is a driving force behind the statute, and in carrying out the investment projects, investors are duty-bound to give due regard to the social and environmental sustainability values, including environmental protection standards.¹³⁰

As stated in chapter two, the straightforward aim of BITs is the promotion and protection of private investments. However, as part of building a sustainable green economy, many states incorporated environmental protection issues under their BITs. In contrast, the BITs of many other countries did not raise the problems of environmental protection. Hence, states which intended to build a sustainable green economy require environmental measures and regulations. However, these measures may be depicted as indirect expropriation, later awarded as compensable by investment tribunals¹³¹, which finally brings an expensive burden on the state.

Therefore, under this chapter, taking Ethiopia's curiosity to achieve sustainable development, we have examined the current trend of BITs vis-à-vis environmental commitments. In doing so, among 34 BITs to which Ethiopia is a party, excluding terminated BITs, a sample of seven BITs (two from early, two from new, and three from middle generation) will be scrutinized. Sample BITs were selected based on the extent of investment relation they partake with Ethiopia (FDI inflow) on the one hand and the time of signing those treaties. Accordingly, Italy-Ethiopia and Ethiopia-China were selected from the old generation BITs. At the same time, UK-Ethiopia and Brazil-Ethiopia were chosen from the new generation BITs Turkey-Ethiopia, Ethiopia-

¹²⁷ Environment Policy of Ethiopia 1997, 3. <<https://www.abysiniaw.com/online-resources/policies-and-strategies?download=1187:environment-policy>> accessed 17 February 2020.

¹²⁸ Investment Proclamation, 2020, Proc. No 1180, *Federal Negarit Gazeta*, Year 26, No. 28, Art 5. <<https://www.abysiniaw.com/uploads/1180.pdf>> accessed 17 February 2020.

¹²⁹ *ibid* Art 5(8).

¹³⁰ *ibid* 54(2).

¹³¹ Gizaw (n 33) 30.

Netherlands, and Ethiopia-Sudan BITs were analyzed.¹³² In analyzing those BITs, their preamble and substantive provisions will be given due emphasis.

4.2 Regulatory Space in Ethiopian BITs for Environmental Protection

Regulatory provisions within BITs may be incorporated either under the preamble or substantive provisions. A virtuous bilateral investment treaty should involve consistent thoughts in its preambular objectives and substantive provisions. However, the role of environmental language in the preamble is different from the role of provisions in the Treaty's body.

Treaties are to be interpreted with reference to their declared or apparent objects and purposes, and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text and in such a way that a reason and a meaning can be attributed to every aspect of the text.¹³³

Therefore, under this section, we will discuss environmental provisions in Ethiopian BITs both under preamble and substantive provisions.

4.2.1 Preambles

The preamble is a pronouncement of a set of recitals that commonly include motivation, aims, and considerations, which are stated as having played a part in drawing up the Treaty.¹³⁴ The sovereign right to regulate and environmental protection may be expressly recognized in the preamble of BITs.¹³⁵ Because in searching for the true meaning of the Treaty, its preamble plays a vital role. The preambular part of BITs can be divided into traditional or progressive. The traditional BITs deals with the promotion and protection of investments and sometimes about liberalization, while progressive/advanced BITs supplement the notion of social and environmental protection/sustainable development. The preambles of some new generation and

¹³² UNCTAD, 'Ethiopia | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (n 14). All BITs were accessed in January 24 from single UNCTAD web page of <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>

¹³³ Richard Gardiner, *Part II Interpretation Applying the Vienna Convention on the Law of Treaties, A The General Rule, 5 The General Rule: (1) The Treaty, Its Terms, and Their Ordinary Meaning* (2nd edn, Oxford Public International Law) 7.

¹³⁴ *ibid* 34.

¹³⁵ Djigsa (n 22) 75.

progressive BITs also expressly provide that the parties do not intend to relinquish their right to regulate or their flexibility to address issues relating to the public interest.¹³⁶

Ethiopia-Italian bilateral investment treaty¹³⁷ under its preambular part deals merely with the importance of promoting investment in both countries. It says nothing about environmental protection or sustainable development. Similarly, among sample BITs, the 1998 Ethiopia-China, the 2000 Ethiopia-Sudan, the 2000 Turkey-Ethiopia, the 2003 Ethiopia-Netherlands, and the 2009 UK-Ethiopia BIT's do not articulate about environmental protection. Instead, their main focus is creating favourable conditions for more significant investment, Stimulating the flow of capital, technology, and economic development, and finally, reciprocal encouragement, promotion, and protection investments to achieve prosperity. Similarly, they do not leave room for the states to regulate the adverse effects of investments on the environment. Therefore, they are typical traditional BITs.

On the other hand, the Brazil-Ethiopia BIT¹³⁸ signed in 2018 comprehends elaborative clauses in its preamble. Accordingly, the preamble indicates that one object of the Treaty recognizes the essential role of investment to promote sustainable development, and for doing so, it acknowledged transparent and friendly environment investments. Furthermore, the preamble extends its positive role for environmental protection by recognizing contracting states' regulatory autonomy and policy space.¹³⁹ Hence, regulatory and legal measures taken to protect the environment cannot be merely categorized as expropriation.

Therefore, even though preambular texts do not establish rights and obligations between the parties but guide as to the context of the Treaty for the purpose of interpretation.¹⁴⁰ As a result, in interpreting this Treaty, environmental protection will be given due emphasis on environmental

¹³⁶ Spears (n 28) 1068.

¹³⁷ Agreement between the Government of the Italian Republic and the Transition Government of Ethiopia for the Promotion and Protection of Investments 1994. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1168/download>> accessed 10 February 2020.

¹³⁸ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation. <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5717/download>> accessed 10 February 2020.

¹³⁹ *ibid* Preamble.

¹⁴⁰ Vienna Convention on the Law of Treaties Art 31(1 & 2). <https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf> accessed 27 January 2020.

protection. Consequently, this makes the 2018 Brazil-Ethiopia BIT a classic example of progressive investment treaties. However, unfortunately, this Treaty has not entered into force yet.

4.2.2 Substantive Provisions

The second and prominent type of environmental protection is through incorporating substantive clauses under the investment treaty. Substantive provisions describe the rights and obligations of a Party under any existing international agreements. Substantive provisions serve to protect the environment in two ways: by specifying non-lowering standards and including the environmental exception clause.

I. Non-Lowering Standards

Certain countries include in their BITs a clause that discourages the lowering of standards and providing investment incentives to investors to the detriment of environmental protection. These provisions seek to ensure the respect of existing environmental standards and forbid States from competing for investment by lowering environmental standards.¹⁴¹ The Norwegian¹⁴² and Belgian model of BITs¹⁴³ is an excellent example of substantive provisions incorporating non-lowering standards to protect the environment.

However, when we see Ethiopian BITs, except for Brazil Ethiopia-BIT, six of the seven selected sample BITs do not encompass such phrases. Most of those six BITs dealt with investments and investors' protection and didn't concern environmental issues. It is the state who determines whether or not to relax its environmental laws. Therefore, there is no pressure posed by other contracting states. While the last sample, Brazil-Ethiopia BIT, incorporated with good articulation a prohibition of lowering environmental standards to encourage investment. Accordingly, it states that;

"... it is inappropriate to encourage investment by lowering the standards of their ...environmental legislation or measures of health. Therefore, each Contracting Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance, or expansion of

¹⁴¹ Gordon and Pohl (n 30) 21.

¹⁴² Norway Model Bilateral Investment Treaty Art 11(1).

¹⁴³ 2018/19 Belgium-Luxembourg Model BIT Art 15(3).

an investment in its territory, to the extent that such amendment or repeal involves decreasing their labour, environmental or health standards. If a Contracting Party considers that another Contracting Party has offered such an encouragement, the Contracting Parties will address the issue through consultations."¹⁴⁴

Unlike the remaining BITs, the 2018 Brazil-Ethiopia BIT's substantive provisions didn't allow encouraging investments by relaxing environmental standards or environmental legislation or measures of health. Failure to respect this responsibility also results in an action from another contracting state. Accordingly, a consultation will be made between the contracting states to resolve the issue, which may discourage states from deviating treaty provisions. Remarkably this is good progress from traditionally shaped investment treaties. Further, the substantive provisions of the Treaty make a typical example of the modern BITs. However, it does not seem that Ethiopia's effort, which resulted in the incorporation of an environmental provision under the Treaty because the 2018 Brazil-Ethiopia BIT is a direct copy of Brazil's BIT model.

II. Environmental Exception Clauses

An environmental exception clause is a general provision that excuses governments from treaty obligations where the challenged measures were taken for environmental purposes.¹⁴⁵ A growing number of investment treaties include clauses in the treaty body that seeks to reserve policy space to regulate environmental matters.¹⁴⁶ This way of reference to environmental concerns is the oldest form and the most frequent form of environmental texts observed in the international investment agreements.¹⁴⁷ Exceptions can be introduced in investment treaties in two ways; general and specific.

General exceptions refer to environmental concerns in general¹⁴⁸ and permit the Parties to the agreement to derogate from all of their obligations provided that specific requirements are

¹⁴⁴ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation Art 16(2).

¹⁴⁵ Meredith Wilensky, 'Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership' (2015) 45 *Environmental Law Reporter* 10683, 10693.

¹⁴⁶ Gordon and Pohl (n 30) 14.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

satisfied.¹⁴⁹ On the other hand, specific exceptions are aimed at preventing the application of specific commitments, such as those arising from the expropriation clause.¹⁵⁰

Similar to non-lowering environmental clauses, except Brazil Ethiopia-BIT, the remaining all deal merely about investor and investment protection and did not have an environmental exception clause. Terribly, despite being a recent one, the 2009 UK-Ethiopia BIT contains no environmental language either in its preamble or substantive provisions and designed traditionally. Therefore, it may results that UK companies in Ethiopia are more likely to be protected than vice versa. So Ethiopia is more likely to be sued than the UK.¹⁵¹ However, there has been even intense pressure on the parliament to reform the UK BIT regime.¹⁵² There is also opposition against the ratification of UK-Ethiopia BIT in the UK.¹⁵³

As stated above, the remaining BITs (the 1994 Italy-Ethiopia, 1998 Ethiopia-China, the 2000 Ethiopia-Sudan, the 2000 Turkey-Ethiopia, the 2003 Ethiopia-Netherlands) did not encompass clauses of exception. Therefore, Ethiopia is not allowed to take measures for environmental purposes. However, if Ethiopia took such an action and indirectly resulted in an adverse impact on the investors' assets, the affected investor may demand compensation. So, most BITs adopted by Ethiopia is susceptible to ensuing an allegation by investors.

Conversely, Ethiopia's investment treaty with Brazil, which is known for integrating investment with the environmental issue, has also supplemented environmental exception clauses. Accordingly, it states that;

“Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labour, environmental and health legislation of that Contracting Party provided

¹⁴⁹ Djigsa (n 22) 80.

¹⁵⁰ *ibid.*

¹⁵¹ Lorenzo Cotula, ‘Why Parliament Should Scrutinise the UK-Ethiopia BIT Ethiopia | International Institute for Environment and Development’ (19 January 2015) <<https://www.iied.org/why-parliament-should-scrutinise-uk-ethiopia-bit>> accessed 23 April 2020.

¹⁵² Gizaw (n 33) 33.

¹⁵³ *ibid.*

that this measures not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.”¹⁵⁴

In general, from the discussion, above we can sum up that, among the BITs, Ethiopia signed, with few exceptions, most of them have the sole purpose of attracting foreign direct investment and affording protection to investors/investment/ companies of the other contracting states. Of all seven samples, only Ethiopia-Brazil BIT incorporated environmental clauses. As discussed in chapter three few other BITs, Belgium-Ethiopia and Ethiopia-Finland BIT, provided environmental protection clauses. The fundamental reason behind this is not apparent. Still, it may be a byproduct of the country's asymmetric relationship with the other contracting states¹⁵⁵ and over expectation of the significance of investment treaties. It may also be the absence of a clear policy of handling investment and environmental matters.¹⁵⁶ The absence of a Model BIT of Ethiopia may be a manifestation of the lack of clear policy on the intricate value of investment and protection of the environment.¹⁵⁷

4.3 Environmental Consequences of Ethiopian BITs

In recent decades, human activities' harmful effects on the environment and the connection between environmental health and social well-being have become evident. Recognizing these relationships makes clear the necessity for governmental regulations on environmentally harmful activities.¹⁵⁸ However, state authorities' Regulatory measures in the exercise of their public order may have a negative effect on private property, including those of foreign investors, and these environmental regulations may be considered indirect expropriation. In an unprecedented move, companies have begun to use BITs to challenge measures promoted by governments as necessary to protect the environment and human health.¹⁵⁹ Because as stated under chapter three, promotion and protection of investments are the principal objective of BITs, mostly old generation BITs.

¹⁵⁴ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation 16(1).

¹⁵⁵ Gizaw (n 33) 34.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ J. Martin Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 465, 466.

¹⁵⁹ *ibid.*

In most international investment treaties, *any action, omission, or measure* attributable to a government that interferes with the rights in the significant loss of management, use, or control, or a substantial depreciation of the value of the properties of a foreign investor is considered as indirect expropriation.¹⁶⁰ Tribunals have also tended to adopt that an indirect expropriation occurs if the interferences economic impact is substantial and deprives most of the investment's benefits for a significant period of time.

As discussed above, measures like those pertaining to the regulation of the environment, health, morals, culture, or economy are considered a police power of state-recognized under the state's sovereign right in international law. Therefore, when states sign BITs that limit their regulatory authority, it is considered as they forbear their police power of regulating investment. As a result, any environmental regulatory measure/s taken by the state can be regarded as expropriation (usually indirect expropriation) and drive states to expensive and unintended arbitration requiring to pay compensation. However, in the new generation BITs, the overlooked notion of police (regulatory) power of states is re-established and incorporated to clarify the intent of the treaty even if old generation BITs prioritized protection of investment to the detriment of state regulatory power;

“...it is an accepted principle of international law that a State is not liable for an economic injury which is a consequence of bona fide ‘regulation’ within the accepted police power of states. Thus, antitrust, consumer protection, securities, environmental protection, land planning, and other legislation are non-compensable takings and are considered as essential to the efficient functioning of the state.”¹⁶¹

Although no international tribunal has yet applied the police power of the state to environmental regulations, many authors acknowledged it as customary international law;

“...the foreign investor entered the (host) state voluntarily, knowing the risk of such regulatory laws being applied against him, and that he should bear the risk of such adverse changes as any citizen of the state would. It was implicit in the

¹⁶⁰ Kyla Susanne, ‘The Expropriation of Environmental Governance Protecting Foreign Investors at the Expense of Public Policy’ (Degree of Doctor, VU University Amsterdam 2008) 124.

¹⁶¹ J. Martin Wagner (n 158) 509.

process of securing admission as a foreign investor that there would be regulation of the foreign investment. As long as the regulation was non-discriminatory and not accomplished through abusive processes, there should be an acceptance of the regulation's legitimacy. It should not be the function of international law to insulate the foreign investor from the regulatory regime of the host state's laws."¹⁶²

However, since arbitration tribunals favor the protection of investment, setting aside states' environmental regulatory power, it is vital to visibly include regulatory authority and issue of environmental protection within BITs. Therefore, under this section, the paper discussed the environmental consequences of BITs to which Ethiopia is a party.

As discussed above, most of the BITs to which Ethiopia is a party were designed with the sole purpose of attracting foreign direct investment and affording protection to investors/investment/companies of the other contracting states. Accordingly, the 1998 Ethiopia-China BIT under Art 4 demands that Neither Contracting Party shall expropriate or take similar measures. In addition to this, it requires that any lawful expropriation should have to be accompanied by compensation. But no provision recognizes the contracting states' regulatory power on investments to protect the environment. It may be either the implied recognition of the state's customary power to regulate the investment or envisage of state regulatory measures as expropriation. Therefore, the treaty's overall objective can be taken into account in finding the treaty's real intent pertaining to state regulatory measures. Accordingly, the general aim of the treaty is reciprocal encouragement, promotion, and protection of investment. Therefore, if the practical case has been submitted to the arbitration tribunal, there is a high prospect to characterize any environmental regulatory measure, which reduces the investor's property right as expropriation. It is because both the preamble and the treaty's standing clauses have not comprehended the environmental protection and state regulatory measure.

Similarly, Italy-Ethiopia BIT states nothing about the regulatory power of the contracting state. Even worse, under Art 3(1) of the treaty, it warns of any direct or indirect interference with the investment projects' operations. Further, it prohibits any measure that may have the effect of limiting, on a fixed or indefinite basis, the rights of possession, control, and enjoyment inherent

¹⁶² M. Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 389.

to them concerning investment.¹⁶³ However, if those measures are taken for public interest purposes, for reasons of national interest, on a non-discriminatory basis and following provisions and procedures of the law, a full and adequate compensation must be paid. Therefore, we cannot make an exception not to pay compensation for the regulatory measure of a state, which may partially limit the enjoyment of investors' property rights.

Equally, the 2000 Ethiopia-Sudan, the 2000 Turkey-Ethiopia, and the 2003 Ethiopia-Netherlands BITs prohibit direct and indirect expropriation with different languages. At the same time, one of the recently signed but traditionally modeled investment treaties of Ethiopia with the UK left a little room for the host state to take regulatory measures that are essential to protect national security, public security, or public order.¹⁶⁴ The last and typical model of modern BIT Ethiopia signed with Brazil has recognized in its preamble and substantive provisions the state's power to adopt, maintain or enforce measures appropriate to ensure investment activity undertaken in a manner according to labour, environmental, and health legislation.¹⁶⁵

Finally, most BITs to which Ethiopia is a party did not have a policy space and failed to grant contracting states a regulatory power for environmental protection. Technically speaking, this may harm both contracting states. However, pragmatically it is Ethiopia that will be most affected by this treaty. It is because most of the investment treaties are signed with economically advanced states in comparison with Ethiopia. As a result, most of the investment inflow is expected to Ethiopia, and in reality, there will be no or little investment inflow from Ethiopia to the other contracting state. Therefore it makes Ethiopia more likely to be sued than another contracting state. Thus, on the existence of Ethiopia's current BITs, it is easy to conclude that fearing the litigation on international tribunals, there is little probability to take environmental regulatory measures that may restrict foreign investors' property. As a result, most of Ethiopia's investment treaties are not environmental-pro and pose a risk of environmental pollution.

¹⁶³ Agreement between the Government of the Italian Republic and the Transition Government of Ethiopia for the Promotion and Protection of Investments Art 5(1).

¹⁶⁴ 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 Art 7(1). <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download> accessed 10 February 2020.

¹⁶⁵ Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on investment cooperation and facilitation the preamble and Art 16(1).

However, an interview made with the Ethiopian investment commission experts revealed that even if most BITs of Ethiopia were traditional and failed to incorporate environmental issues, there is a belief that environmental concerns were controlled with the investment and environmental proclamations. This thought arises from the perception that investors invest in recognizing the country's domestic rules and regulations where they invest.¹⁶⁶ However, the practice of many states specified that this may not always be true. Unless included explicitly within BITs, host states' police power to regulate environmental issues within investment may be categorized as expropriation by investment tribunals, subordinating environmental issues to investment protection.

As a prominent measure to reform the existing traditionally swayed investment treaty regime, research is underway to review the current BITs and develop a model investment treaty. The reform is broad, but primarily it will be expected to incorporate environmental concerns and regulatory autonomy of state under the new model BIT.¹⁶⁷

Finally, a mere preparation of Model BIT cannot help to protect the environment because the model should have to be signed and ratified. Further, the other contracting state may come with its different model. However, the preparation of a model is a good beginning towards recognizing the insufficiency of the current BITs and reforming them with a modern investment treaty.

4.4 Ethiopian BITs vis-à-vis the FDRE Constitution and International Environmental Commitments

4.4.1 The FDRE Constitution and BITs

The FDRE Constitution, under Article 44(1), proclaims the right of all persons to a clean and healthy environment. It further obliged all federal and state organs to ensure that all Ethiopians live in a clean and healthy environment.¹⁶⁸ In stating so, the constitution also obliges the legislature (HPR) to comply with these environmental provisions. Accordingly, the legislature needs to ensure that all international agreements signed and ratified by the country are in line

¹⁶⁶ Interview with Meron Amha, 'Legal Affairs Expert of Ethiopian Investment Commission' (25 April 2020); Interview with Kefle Asrat, 'Support and Follow up Senior Expert of Ethiopian Investment Commission' (25 April 2020).

¹⁶⁷ Interview with Meron Amha (n 166).

¹⁶⁸ Constitution of the Federal Democratic Republic of Ethiopia (Proc.No 1995), Art 85(1) and 92(1).

with the country's constitution and aim to achieve sustainable development.¹⁶⁹ Therefore, investment treaties need to be compatible with the constitution's environmental provisions and should not restrict Ethiopia's regulatory power and policy space to control its environment.

However, any treaty, including BITs signed and ratified contrary to the constitutional stipulations, will be subjected to nullification by the House of Federation.¹⁷⁰ On the other hand, if once a state signed and ratified investment treaties and if investors invested believing the accord signed, states could not cite their domestic laws as an excuse to alter its international obligations.¹⁷¹ As a result, to escape controversies that may transpire in the future, negotiated, adopted, and ratified treaties need to comply with the land's supreme law; the constitution. Gizaw, in his LLM thesis, preserved that "BITs should contain a safeguard mechanism which affirms the right to regulate in important policy areas like protection of the environment."¹⁷² Nevertheless, this view has not been reflected in the existing BITs since most Ethiopian investment treaties did not have a mien on environmental issues.

4.4.2 Ethiopian BITs and International Environmental Commitments

I. The Convention on Biological Diversity (CBD)¹⁷³

This Convention's objectives are the conservation of biological diversity, the sustainable use of its components, & the fair and equitable sharing of the benefits arising out of the use of genetic resources, including proper access to genetic resources and appropriate transfer of relevant technologies.¹⁷⁴ The Convention also reiterated the principle of "sovereign right to exploit their resources according to their environmental policies..."¹⁷⁵ However, in doing so, states are expected to take *In-situ* and *Ex-situ* Conservational measures.¹⁷⁶

The Convention under Article 22 stated its Relationship with Other International Conventions. Accordingly, "the provisions of the Convention shall not affect the rights and obligations of any contracting party deriving from any existing international agreement, except where the exercise

¹⁶⁹ *ibid* Art 43(3).

¹⁷⁰ *ibid* Art 9(1) and Art 62(1).

¹⁷¹ Vienna Convention on the Law of Treaties Art 27.

¹⁷² Gizaw (n 33) 36.

¹⁷³ The Convention on Biological Diversity 1992. <<https://www.cbd.int/doc/legal/cbd-en.pdf>> accessed 25th August 2020. Ethiopia adopted the convention on 10 June 1992, and ratified it on 5 April 1994.

¹⁷⁴ *ibid* Art 1.

¹⁷⁵ *ibid* Art 3.

¹⁷⁶ *ibid* Art 8 & 9.

of those rights and obligations would cause serious damage or threat to biological diversity."¹⁷⁷ However, even when there is actual damage to biological diversity by the company protected with BIT, it is bleak to take a measure that may directly or indirectly impact the extent of the investors' property unless otherwise, the BIT allows doing so. When we investigate Ethiopian BITs, none of them leaves room for states to take measures when damage or threat to biological diversity transpires. As a result, this Convention is an excellent foundation to protect the environment, which, however, did not relieve states from compensating companies for the reduced proportions of assets by their acts. Furthermore, to cite this provision in international arbitrations, state parties to BIT needs to adopt it.

II. United Nations Framework Convention on Climate Change (UNFCCC)¹⁷⁸

The ultimate objective of this Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.¹⁷⁹ The Parties have agreed, among other things, "to protect the climate system for the benefit of present and future generations of humankind, based on equity and under their common but differentiated responsibilities and respective capabilities."¹⁸⁰ Furthermore, the Convention recognizes states' right to and duty to promote sustainable development.¹⁸¹ In doing so, the Parties should take precautionary measures to anticipate, prevent, or minimize climate change causes and mitigate its adverse effects.¹⁸²

Ethiopian BITs with environmental clauses are in line with this Convention, especially Brazil-Ethiopia BIT. However, most BITs to which Ethiopia is a party never denote this issue. Failure to include the environmental issues at least within BITs signed after this Convention's ratification has two implications. First, it defeats the constitutional objects of Ethiopia, which propagate for sustainable and green development. Secondly, it is an inconsistency in one state's legal regime.

¹⁷⁷ *ibid* Art 22.

¹⁷⁸ United Nations Framework Convention on Climate Change (UNFCCC) 1992.

<https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf> accessed 25th August 2020. Ethiopia adopted the convention on 10 June 1992, and ratified it on 5 April 1994.

¹⁷⁹ *ibid* Art 2.

¹⁸⁰ *ibid* Art 2(1).

¹⁸¹ *ibid* Art 2(4).

¹⁸² *ibid* Art 2(3).

Therefore, it entails an immediate measure to resolve the misfit and secure uniformity in the legal regime.

III. The Stockholm Convention on Persistent Organic Pollutants¹⁸³

The Stockholm convention was aimed to protect human health and the environment from persistent organic pollutants (POPs)¹⁸⁴ by eliminating or reducing them.¹⁸⁵ POPs are chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of living organisms, & are toxic to humans and wildlife.¹⁸⁶ Under its preambular part, the convention reiterates the United Nations Charter and the principles of international law, the States' sovereign right to exploit their resources according to their own environmental and developmental policies. Besides state sovereignty, the convention specifies the state's responsibility to ensure that activities within their jurisdiction or control do not cause damage not only to their environment but also to the territory of other States or of areas beyond the limits of national jurisdiction.¹⁸⁷

The convention promotes precautionary measures to brawl against environmental pollution caused by persistent organic pollutants. However, once the companies caused environmental pollution taking remedial measures is very difficult. So, BITs requires to be compatible with this convention to protect the environment from dangerous POPs. Yet, as stated above, save Ethiopia-Finland BIT and Ethiopia-Brazil BIT, most of the existing Ethiopian BITs prioritize investment protection over the environment.

IV. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity¹⁸⁸

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is a multilateral treaty which aims to ensure an adequate level of protection in the field of the safe transfer,

¹⁸³ The Stockholm Convention on Persistent Organic Pollutants 2001.

<<http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>> accessed 25th August 2020. Ethiopia adopted the convention on 17 may 2002, and ratified it on 9 January 2003.

¹⁸⁴ *ibid* Art 1.

¹⁸⁵ *ibid* Art 3.

¹⁸⁶ United Nations Industrial Development Organization, 'Stockholm Convention' <<https://www.unido.org/our-focus-safeguarding-environment-implimentation-multilateral-environmental-agreements/stockholm-convention>> accessed 25 August 2020.

¹⁸⁷ The Stockholm Convention on Persistent Organic Pollutants Preamble.

¹⁸⁸ Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000.

<<https://bch.cbd.int/protocol/text/>> accessed 25th August 2020. Ethiopia adopted the protocol on 24th may 2000 and ratified it on 7th January 2004.

handling, and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity.¹⁸⁹

The protocol shall not be interpreted as implying a change in the rights and obligations under any existing international agreements.¹⁹⁰ Further, it is not intended to subordinate this Protocol to other international agreements.¹⁹¹ Instead, the protocol was made to achieve sustainable development by balancing trade and the environment.¹⁹² As stated above, the protocol explicitly exponents for sustainable development. However, it did not forbid corporations from claiming compensation for the reduced amount of their investment due to state regulatory measures. Likewise, it didn't relieve states from being contested for their acts, which may sometimes be considered indirect expropriation. To avoid this paradox, BITs to which Ethiopia is a party require integrating notions of the protocol explicitly, which yet didn't appear in reality.

V. The African Convention on the Conservation of Nature and Natural Resources¹⁹³

This convention aims to enhance environmental protection, foster the conservation and sustainable use of natural resources, and harmonize and coordinate policies in these fields to achieve ecologically rational, economically sound, and socially acceptable development policies and programs.¹⁹⁴ The convention identified guiding principles to achieve the objectives of the convention. Accordingly, all peoples' right to a good environment and the responsibility of States to ensure that developmental and environmental necessities are met in a sustainable, fair, and equitable manner were the basic principles.¹⁹⁵ Therefore, state Parties to the Convention shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and

¹⁸⁹ *ibid* Art 1.

¹⁹⁰ *ibid* Preamble.

¹⁹¹ *ibid*.

¹⁹² *ibid*.

¹⁹³ The African Convention on the Conservation of Nature and Natural Resources 2003.

¹⁹⁴ [https://au.int/sites/default/files/treaties/7782-treaty-0029 -
revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf](https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf) accessed 25th August 2020. Ethiopia signed the convention on 1st June 2004 and are awaiting for the ratification by the House of Peoples Representatives.

¹⁹⁴ *ibid* Art 2.

¹⁹⁵ *ibid* Art 3.

with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations.¹⁹⁶

Even though Ethiopia has not ratified this convention, expecting it to be ratified in the near future, other legal frameworks need to be consistent with this convention. This consistency can be realized, either by referring to the convention through domestic laws and BITs or by introducing principles of the convention in the domestic laws and treaties. Unless being a party to an environmental commitment, their sole existence cannot secure environmental protection. And the state cannot freely take a measure against foreign investors protected by BITs since they can appeal for compensation vindicating for indirect expropriation.

In general, environmental commitments to which Ethiopia is a party utters a lot for environmental protection. Yet, there is no linkage between BITs and those environmental commitments. In the absence of that linkage between two legal frameworks, it's difficult to enforce on investors. Because investors refer to BITs to contend states in investment tribunals, and the tribunals too frequently favour investment treaties over environmental commitments in their awards.

4.5 The Role and Views of stakeholder; Governmental offices and NGOs

I. Views of Government Agency Dealing with the Environment

Interviewees made with experts of the Environment, Forest and Climate change Commission confirmed that, theoretically, investment expansion could not be made at the expense of environmental pollution. Therefore, to minimize adverse environmental effects, various measures were taken. Hence, an environmental impact assessment (EIA) was made at the preliminary stage before the issuance of a license to the investors. An annual environmental audit can also supplement EIA. However, there were licenses issued before EIA was made, and this resulted in finally frequent difficulties. Yet, as per the experts, they have tried to resolve these problems by making environmental management plan (EMP).¹⁹⁷

After making an environmental management plan, several plants were found to cause environmental pollution. Except for flower farms, a measure including blackout was made on

¹⁹⁶ *ibid* Art 4.

¹⁹⁷ Interview with Mulugeta Alemu, 'Environmental and Social Impact Assessment Expert of Environment, Forest and Climate Change Commission' (26 August 2020).

other investments until they took corrective action. However, even if flower farms were found with many pollutive activities, no action was taken except for a warning. It is because of fearing its overwhelming impact on the investment. Failure to take action on flower farms was also related to a lack of coordination with the investment commission, the latter stressing investment over the environment.¹⁹⁸ It results in making a compromise on Ethiopia's environmental commitments.

The interviewees have also responded that They are not a participant in the negotiation of BITs. Even worse, they do not have awareness about BITs and even their existence. Further, the investors, too, have not relied on international action. But they have taken domestic administrative and unsuccessful judicial measures to restrain an effort taken on them.¹⁹⁹

II. Views and Role of Non-Governmental Organizations Working on Environmental Issues

NGOs are essential stakeholders for the protection of the environment. They can play an influential role in corporate environmental responsibility practice both in a collaborative and confrontational way.²⁰⁰ Respondents of the interview have also replied that Some environmental NGOs play a significant role in collaboration with the government, companies, and residents to create awareness of environmental pollution and bring critical environmental issues to the forefront.²⁰¹ Furthermore, some NGOs can also play a significant role by encouraging environmental pro investments by awarding and publicizing their better environmental performance. In exceptional circumstances, NGOs provide expertise or technical assistance to help companies comply with the country's domestic environmental legislation and international environmental commitments.²⁰²

In addition to this, NGOs can play a more positive role in environmental protection. Accordingly, they may exert pressure on companies to incorporate social and environmental responsibility in their decision-making process, and confrontation strategies such as boycott,

¹⁹⁸ Interview with Shimelis Wube, 'Agricultural Investment Monitoring and Control Expert of Environment, Forest and Climate Change Commission' (26 August 2020).

¹⁹⁹ *ibid.*

²⁰⁰ Tibebe Sirak Asfaw, Vida Botes and Lula G. Mengesha, 'The Role of NGOs in Corporate Environmental Responsibility Practice: Evidence from Ethiopia' (2017) 2 1, 2.

²⁰¹ Interview with Feseha Assefa, 'Communication Officer at Non Governmental Organization Working on the Environment' (27 August 2020).

²⁰² *ibid.*

demonstration, petition, monitor and expose actions (inaction) of others lead to moral stigmatization or “naming and shaming” of poor environmental performers.²⁰³ To realize sustainable development, the role and pressure of NGOs can also extend to the government. NGOs pressurize the government to reform its environment against investment treaties on the one hand and to enforce existing environmental laws on the other hand.²⁰⁴ Therefore, different stakeholders' roles and coordination are crucial to achieving sustainable development by balancing investment and environmental issues.

²⁰³ Tibebe Sirak Asfaw, Vida Botes and Lula G. Mengesha (n 200) 6.

²⁰⁴ Interview with Feseha Assefa (n 201).

CHAPTER FIVE

5. Conclusion and Recommendations

5.1 Conclusion

Considering the enormous benefits of the FDI for host countries, most countries especially developing states, concluded BIT with eagerness to attract more FDI. However, in recent decades, the harmful effect of FDI on the environment and the connection between environmental health and human well-being have become apparent. Recognizing these relationships makes clear the need for governmental measures on environmentally harmful investment activities. However, bilateral investment treaties are an obstacle to take environmental steps.

Old generation bilateral investment treaties are designed as an instrument to protect investments, and any act of host states, whether regulatory or judicial, is considered as expropriation if the action reduces/impairs the investment. Old generation BITs are not pro-environmental protection, and they are favourable to the investors; nevertheless, usually, they are the source of trouble for the host states. While most of the new generation BIT's explicitly include environmental clauses with an explanation that non-discriminatory regulatory measures to protect legitimate public welfare objectives, such as public health, safety, and the environment, is permitted and do not constitute indirect expropriations. Some experts categorize this measure as a codification of states' customary police powers to regulate economic activities on its territory for the public interest.

Environment-related provisions found in bilateral investment agreements are not monotonic and inserted either in the treaty's preamble or substantive provisions. Accordingly, the treaty's preambular part may recognize environmental protection and conservation amongst the treaty's objectives. BIT's may also contain environmental references under its substantive provisions placing States under a continuing obligation to uphold environmental standards and not to lower environmental standards and regulations to attract foreign investments. Investment treaties may also incorporate under its substantive provision environmental exception clauses-that seeks to reserve policy space to regulate environmental matters.

From other countries' practices, there is evidence suggesting that BITs can and do contain provisions aimed at facilitating environmental damage caused by FDI projects, both in the

preamble and the substantive provision. However, with few exceptions, most BITs to which Ethiopia is a party has significant drawbacks concerning the environmental concern and portray features of old-generation investment treaties. It is because the treaties did not have environmental clauses and failed to grant contracting states with regulatory power for environmental protection. Accordingly, investment treaties signed with countries sending investment to Ethiopia such as Ethiopia-China, Italy-Ethiopia, UK-Ethiopia, Turkey-Ethiopia, Ethiopia-Netherlands, Ethiopia Sudan BITs didn't incorporate environmental provisions.

Technically speaking, failure to incorporate environmental clauses have a negative effect on both contracting states. However, pragmatically, Ethiopia will be most affected by this treaty since investment inflow to Ethiopia prevails the investment outflow to other contracting states. So, this leads Ethiopia to expensive international arbitrations claiming compensation than other contracting states. So, fearing this arbitration, an environmental measure that might be taken may be minimal, and this will, in turn, finally pose a risk of environmental pollution.

Even among those BITs that incorporate environmental clause except the 2006 Ethiopia-Finland BIT, the remaining treaties have not yet entered into force. All this indicates they are contrary to the country's goal and policy of achieving sustainable investment. Further, it is an infringement of the Constitution of FDRE, which imposes the duty on the government to make sure that the international treaties that Ethiopia signs guarantee sustainable development

One reason for having such weak BITs in terms of environmental protection is the absence of a model investment treaty. Currently, research is underway to review the existing BITs and come up with a model investment treaty. However, a mere preparation of Model BIT cannot protect the environment.

Environmental commitments to which Ethiopia is a party utters a lot for environmental protection. Yet, there is no linkage between BITs and those environmental commitments. In the absence of that linkage between two legal frameworks, it's difficult to enforce on investors. Because investors refer to BITs to contend states in investment tribunals, and the tribunals too frequently favour investment treaties over environmental commitments in their awards.

In general, governmental and non-governmental stakeholders has a significant role in the protection of the environment. Yet, interviewees from the governmental office responded that

they are not a participant in the negotiation of BITs, with less awareness about BITs. Further, NGOs play an influential role in a collaborative and confrontational way to protect the environment.

5.2 Recommendations

- ❖ Reforming BITs through renegotiation and amendment, and if impossible, through termination. Some BITs have a clause leaving room for contracting parties to amend the treaty. Therefore, Ethiopia needs to renegotiate for an amendment to incorporate environmental standards in which investors can operate on such types of treaties. However, it is better to terminate the treaties if other options of reforming treaties are closed.
- ❖ The contents of BITs signed by Ethiopia lacks consistency. Thus, Ethiopia needs to have a model and a clear policy regarding the content of the BIT it adopts. So Ethiopia needs to promptly prepare all-encompassing and carefully designed its own model of BITs
- ❖ The model that is will be prepared and BITs that will be signed needs to accommodate environmental protection. The investor does have the right to protect its assets. But still, the State must retain the ability to protect the public interest, including environmental protection, of which it is a guarantor within its territory. So it is essential to move towards a better balance between the interests at issue. Further, the model BIT should secure uniformity between different laws of Ethiopia.
- ❖ The BITs should incorporate provisions that explicitly exclude measures taken for environmental protection from constituting indirect expropriation. Further, regulatory standards should be included explicitly as police power measures of state, whatever their adverse impact on the investments.
- ❖ It right that Investment Commission is the main concerned party on BITs. However, negotiation of BITs should involve other stakeholders, particularly, Environment, Forest, and Climate Change Commission.

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