RE-THINKING ETHIOPIA'S BILATERAL INVESTMENT TREATIES WITH PARTICULAR EMPHASIS ON STANDARDS OF NATIONAL TREATMENT AND ITS IMPLICATIONS ON DOMESTIC INVESTORS

BY: FUFA FILE

ADVISORS: ERMIAS AYALEW (LMM. ASIST PROF.) & WAK-GARI NEGASSA (LLM)

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DECLARATION

I Fufa File,do hereby declare that the thesisentitled "**Rethinking Ethiopia's Bilateral Investment Treaties With Particular Emphasis on Standard of National Treatment And Its Implication on Domestic Investors**"is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

By:Fufa File

Signature: _____

Date: _____

Confirmed by Advisors:

Principal advisorCo-advisor

Signature_____ Signature_____

Date_____Date_____

JIMMA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE SCHOOL OF LAW LL.M PROGRAM IN COMMERCIAL AND INVESTMENT LAW

Approval Sheet by the Board of Examiners

By: Fufa File

Approved By Board of Examiners

1. **Principal Advisor:** _____ _____

2. **Co-Advisor**_____

Signature

Examiners

1._____

Signature

2._____

Signature

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Abbreviations and Acronyms

AML Antimonopoly Law

BIT Bilateral investment treaty

EIC Ethiopian Investment Commission

EPAAge Economic Partnership

ETHIO-BITs Ethiopia's Bilateral Investment

Ethio-BITs Ethiopia's Bilateral Investment Treaties

FDI Foreign Direct Investment

GATS General Agreement on Trade and Service

GATT General Agreement on Trade and Tariff

ICSID International Convention on Settlement of Investment Dispute

IIA International investment law

MFN Most Favored Nation Treatment

MTBE Methyl Tertiary Butyle Ether

NT National Treatment

OECD Organization for Economic Cooperation and Development

TRIMs Trade Related Investment Measures.

UNCTAD United Nation Conference on Trade and Development

US United States

WGTI Working Group on Trade and Investment

WTO World Trade Organization

Abstract

National treatment standard is one of the relative standards that are used in international practice to secure a certain level of treatment for FDI in host countries. The very essence of this research is examining the Ethiopia's Bilateral Investment Treaties particularly emphasizing on Standards of National Treatment and Its Implications on Domestic Investors. This study is fully employed doctrinal type and accordingly, primary and secondary sources, mainlylegal documents, Bilateral Investment treaties including domestic Investment laws were analyzed in detail.

As collected data shows until 2015, Ethiopia has signed 29 BITs with other countries, among which the following Ethio-BITs were purposively selected. Accordingly, Austria,Algeria, Finland, UK, Germany, China, Malaysia, Kuwait, Israel, including Libya BITs extensively analyzed in this paper. As the result of the study, in these Bilateral Investment Treaties, it were found that, the scope of National Treatment Clauses were generally Crafted and /or vague which could have a far reaching implications on Domestic Investors. Based on the analyses conducted, Ethio-BITs failed to inculcate the NT clauses with appropriate comparator against which to measure the allegedly less favorable treatment, which most of the time crafted by the expression of like circumstances or situations. As opposed to domestic investors, foreign investors and investments claim every positive National treatment accorded to domestic one, regardless of actually making operation within a similar sector. Consequently, this would have negative implication to domestic investors. Except Ethio-Esrael BIT, the general nature of Ethio- BITs is further implied by the failure to maintain regulatory exceptions in a way to provide privileges to domestic investors. As a result of this, the finding has shown that, the Ethio-BITs has not consistent with domestic investment laws, since currently Ethiopia has retained larger regulatory power in investment, in effect the generality of NT clauses might eventually shorten, the hand of the government to assist the domestic investors. Therefore, depending on the finding of the study, this paper recommends that, to strike the balance of interests, mainly foreign and domestic investors, the Ethiopian government should re-think towards the making of BITs to become consistent with domestic investment laws through avoiding the generality of Ethio-BITs-NT clauses.

CHAPTER ONE:INTRODUCTION

1.1 Back Ground of The research

Modern international economic law is largely based on international agreements -- bilateral, regional,plurilateraland multilateral. They are the most effective means for developing and applying international norms, with respect to FDI as in other areas. On the one hand, their contents reflect the common, agreed positions of more than one State; on the other, they are legally binding, and States are under a duty to conform to their provisions.[1] Moreover, the expanding BIT network has developed principles directly concerned with the treatment and protection of FDI.[2] It prohibits host governments from discriminating against foreign investments in favor of domestic investments or investments from third states.[3] To put clearly, NT protects foreign investors and investments against discrimination of the host country in favor of the domestic investors and investment.

According to UNCTAD, in treaty practice, national treatment has its origins in trade agreements. The first treaties to apply a concept of non-differentiation between foreign and local traders can be traced back to the practices of the Hanseatic League in the twelfth and thirteenth centuries. More recently, United States FCN treaties included a clause offering national treatment equally; national treatment has been a long-standing standard in patent and copyright conventions.[4]

Indeed, the national treatment standard is one of the main general standards that areused in international practice to secure a certain level of treatment for FDI in host countries. Other general standards include principally, fair and equitable treatment and MFN treatment. National treatment is a contingent standard based on the treatment given to other investors. Thus, while MFN seeks to grant foreign investors treatment comparable to other foreign investors operating in the hostcountry, national treatment seeks to grant treatment comparable to domestic investors

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[1]. UNCTAD, international investment agreements: key issues, UNCTAD/ITE/IIT/2004/10 vol. I (UN, publications, New York and Geneva, 2004) at p. 166

[2].Ibid.

[3].International Institute for settlements of Disputes (IISD), Belgium's Model Bilateral Investment Treaty: a review Draft for discussions (March, 2010.) P.3

[4] . UNCTAD, National Treatment: UCTAD series on issues in International Investment Agreements, UNCTAD/ITE/IIT/11 Vol. 14(New York and Geneva, 1999.) P.7&8.

operating in the host country. For many countries, the standard of national treatment serves to eliminate distortions in competition and thus is seen to enhance the efficient operation of the economies involved. An extension of this argument points to the ongoing internationalization of investment and production and concludes that access to foreign markets under non-discriminatory conditions is necessary for the effective functioning of an increasingly integrated world economy.[5]

Others view, albeit the benefits accepted from foreign investment, from vantage point of Developing countries, especially BITs containing National treatment is feared for justifiable reasons. Since, it …narrows the scope for policies that a state can make in order to promote development within targeted sectors, it creates the fear that investors in entirely unrelated sectors could argue that they have been discriminated against. To that extent, national treatment curbs the regulatory freedom of the state [6]and perhaps undermines the interest of infant industries of developing countries ultimately.

So countries to make their policy flexible, while negotiating their particular BITs designed their language of aspiration to be included; thus, the national treatment analysis usually requires identifying an "*appropriate comparator*" against which to measure the allegedly less favorable treatment. In fact, in most IIAs, the national treatment clause is stipulated in similar expression (i.e., in like circumstances)[7] in order to limit the application of NT to unlike circumstances.

Hence, members of OECD have provided exceptions to their multilateral agreement meant for their individual economic policy space subject to conditions of notifications. Pursuant their agreement it states, "Member shall notify the Organization of all measures constituting exceptions to National Treatment within 60 days of their adoption and of any other measures which have a bearing on National Treatment." Further states, "Members shall notify the Organization within 60 days of their introduction of any modifications of the measures covered

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[5].Ibid

[6]M. Sornarajah: The International Law on Foreign Investment (3rd ed, Cambridge University press, 2010)

[7] .TAMADA Dai, Discriminatory Application of Competition law and International Investment Agreement,(Kobe University, School of Law, Nov. 2015).

in above paragraph."[8] This shows that countries to either multilateral or bilateral agreement were not requires the blanket type of agreement for NT in general.

As an independent and sovereign nation, Ethiopia has paid an effort in order to attract foreign investors and investment. And according to UNCTAD,by the end of May 2015, the country had signed around 29 BITs.[9]Deeply seen, Ethiopia's Bilateral Investment treaties were provided with general and perhaps with likely limiting the host states (Ethiopia) to pursue development policy objectives coupled with infant domestic industry through eventual extension of better treatment. For example**,Ethio-Austria BITs**

Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favorable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favorable to the investor.[10]

This agreement defines NT, as the concept *no less favorable treatment*requires treating foreign investors/investments, either equally or better than domestic investors/investments, which implicatesdiscrimination against domestic investors. In order to limit better treatment accorded to foreign investors and investments, it is common in IIA to see the language of "like circumstances" in constructing the NT provision. However, Contrary stanceis in **Ethio-BITs**.In the casebetween**S.D. Myers v. Canada**, investment tribunal interpreting article 1102 of NAFTA, stated, the concept of "*like circumstances*" invites an examination of whether a non-national investor complaining of "*less favorable treatment*" is in the broad''*Economic sector"*as the

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[8] .OECD, National Treatment for foreign controlled-enterprises: Including adhering country exceptions to national treatment, 2013.

[9]. **World Investment Report 2015: Reforming International Investment Governance,** Annex1, list of International Investment Agreements(IIA), at end May 2015 available athttp://unctad.org/en/PublicationChapters/wir2015ch3_Annex_en.pdf accesses on 06/15/2017 at 10:57

[10]. The Agreement between the republic of Austria and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments, 12 November, 2004 (emphasis added).

national investor.[11] On the other hand, in 1993 the OECD reviewed the "like situation" test in the following terms:

As regards the expression '*in like situations'*, the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the "*same sector*." More general considerations, such as the policy objectives of Member countries could be taken into account todefine the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment.[12]From these excerpts, we discern that, the stand alone, "*No less favorable treatment*" phrase with blanket kind of Like circumstances, or like situation, will benefit, foreign investor and investments better than domestic investors and investments, in relation to economic activities i.e., management, operation, maintenance, use, enjoyment, sale and liquidation of an investment.

But, the **Ethio-BIT** is vague or general which may help foreign investors claim every favorable treatment from all sectors i.e. Business/economic sectors as opposed to domestic investors since **Ethio-BITs** were blanket of appropriate sector comparator. This might be a challenge to a promotion of domestic investor and investments.To be specific, investment incentive is available measures undertaken by the government in order to promote foreign and domestic investments altogether.

On these issues, UNCTAD states, the principle of non-discrimination would therefore leave host countries considerable discretion to design their incentive programs according to their individual investmentpolicies and strategies.[13] Although, this is clear, pursuant the loopholes of **Ethio-BITs**, foreign investors may claim investment incentive provided for another sector within whichthey don't actually investing,which as a consequence, limits the regulatory space of the state.

However, as the practiceof other investment treaties indicated, terminology adopted in an IIA can be crucial to determine the sphere of applicability, a mention of 'to the extent possible' or 'in accordance with the laws of the contracting parties' can very well limit the functionality of a

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[11]. Howard Mann, The Final Decision in **Methanex v. United States**: Some New Wine in Some New Bottles,(August, 2005) p-4

[12] Ibid.

[13] .UNCTAD, Investment Incentive, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT 2003/5, (New York and Geneva, 2004) p.17

seemingly absolute national treatment obligation.[14]Thus, law of the contracting parties will complement the IIA. As opposed to these agreements, now, the impact of the BITs would be a challenge to the investment areas or sectors as it where enshrined in the investment legislation. Accordingly, pursuant Ethiopia's investment (amendment) proclamation, article 27(7) states:*"Whenever deems necessary, and without prejudice to article 6 of this proclamation authorize the opening of investment areas, otherwise exclusively reserved for domestic investors"* [15]

Looking to**Ethio- Austria** BIT above, without providing Equitable BIT frame work which may help level playing field between foreign investors and Domestic investor, it is difficult to determine for opening of these investment areas reserved for domestic investor. However, Banking, insurance, micro credit and saving services, Packing, forwarding and shipping agency services, Broad casting services, Mass media services, attorney and legal consultancy services, preparation of indigenous traditional medicines, including advertisement, promotion, and translation works, as well as air transport services using air craft with a seating capacity up to 50 passengers are un conditionally excepted from opening for foreign investors.[16]

This particular investment proclamation including the regulation has not expressly provided the objective standard to be fulfilled to allow foreign investors. Beyond this, these sectors are sensitive and sectors within the capacity of Ethiopians. After all, once these investment areas are opened for foreign investment, the principles of NT applies upon itimmediately with theseinvestment areas.

In this particular paper the definition of National treatment, scope, and analyses of implication on domestic investor would be made.Specially, the scope relating to technical exceptions, if any,maintained by **Ethio-BITs**or otherwise, and inclusions that out to have maintained within Ethiopia BITs in the light of other international treaty practice has been explored in general.

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[14] .*ShivamBhardwaj, National Treatment Clause In an international Investment Agreement: Determining the Standard of the enforcement, (2014) p.145.*

[15]. Investment (amendment) proclamation No. 849/2014, Federal NegaritGazete, (20th year No. 52 Addis Ababa, 22 July, 2014 (here in after "investment proclamation"))Article 27(7).

[16] .Investment Incentives and investment areas reserved for Domestic Investors council of ministers (as amended) regulation No. 769/2012, Federal NegaritGazzete, and 20th year No 62, ADDIS ABABA 13th August, 2014.

1.2. Literature Review

There is no hard and fast rule to define National Treatment in the foreign investment context. Different agreement defines National treatment differently. This caused difficulty to apply the standard similarly. However, according to UNCTAD, "National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances."[17]

UNCTAD reiterates National treatment has been identified by United National Conference on Trade and Development … as the "single most important standard of treatment enshrined in international investment agreements." Simply put, the national treatment clause in an IIA requires that the host state make no negative differentiation between foreign and national investors when applying its rules and regulations. This ensures that foreign investors enjoy the same level of treatment as nationals, allowing them to compete on an equal footing."[18] This argument is misleading arguments and this paper argues against this understanding by putting exceptional limitations. Government can have inherent regulatory power to regulate whenever deems necessary in the interest of domestic infant industry and as well for the purpose of public policy issues. This can be done through BITs or within domestic investment legislations.*Restrictions, or exceptions* concern, measures that do not conform to the national treatment principle because they treat foreign controlled-enterprises differently, *i.e., less favorably,* than their domestic counterparts in like situations. Measures which qualify as exceptions include restrictions banning foreign investment in certain sectors or requiring authorization or licensing as prerequisites for investment, setting ceilings on foreign ownership.[19]

UNCTAD also further briefs, "the national treatment standard is perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult standard to achieve, as it touches upon economically(and politically) sensitive issues. In fact, no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the

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17 .see supra note 4 above p.1.

18 .Collins, D. A. (2013), National Treatment In Emerging Market Investment Treaties. London: (The City Law School of City University London, 2013) p.7

[19] OECD and CEFTA, National Treatment Restrictions and Review of Bilateral Investment Treaties, (CEFTA, Serbia, 2010)

establishment of an investment."[20] Of course as this writing goes, the NT touches upon economically sensitive areas, due to this reason as this book reiterates, countries signing BITS or an agreement relating to investment provides the qualification, which could be absent in Ethio-BITs. So this research is intended to deal with qualification yet absent in Ethio-BITs.

As ShivamBhardwaj has wrote, National Treatment Clause in an International Investment Agreement: Determining the standard of Enforcement and opined that, "Since a foreign investor practically risks entering an unknown market, being exposed to instances of pecuniary losses, the presence of a 'national treatment' provision in the IIA helps the individual/corporation to attain a certain sense of security in its dealings."[21]This will enrich this paper, because, as this particular paper stressed, now a day's countries sign BITs which is one among other kind of IIA containing NT provisions and accepted as a sources of security by foreign investors. But, it not totally acceptable, however, it might have significance taken as one position, in orders to develop a concept or argue against the position. Hence, the stress has been towards a quid pro quo situation where more liberal national policies with regard to foreign investors shall result in more FDI inflow.[22]Howsoever, attractive this arrangement might seem, it has its inherent flaws.

Besides, He holds the view; "the International Investment Agreements (IIAs), often playing a crucial yet ambiguous role in the FDI regime, have increased such investments by several folds. Although the nations have been liberal, in the recent past, with the foreign entities but instances of protectionist attitude towards domestic producers are still dominant in most developing economies."[23]In this paragraph there are two conflicting views. 1.The frame work within IIA, in particular, provision on non-discrimination (NT) would encourage capital flow and investment from home country to the host country. The 2nd argument seems, realistically, the existence of differentiation or discrimination against the foreign investor is in evitable. Though discrepancies it might have, yet It can have a relevance to this paper, since the current research is concerned to analyze about the "standard of National Treatment" as it enshrined within the **Ethio-BITs** and in how much it leave policy space for the development of domestic industry. Besides, his work is

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[20] See supra note 4 P.1.

[21].see supra note 14 p.145-6

[22] *ibid.*

[23].Ibid.

different in that, it were limited to analyzing the standard of National treatment enforcement in emerging economies, as the research is also not related in time and geographical delimitation to the current research to be conducted.

Albert H. Cho and Navroz K. Dubash wrote in one illustrative exchange in the Working Group on Trade and Investment (WGTI), India noted that developing countries need "policy space" because there is "no single formula" for economic growth. Since multilateral disciplines reduce investment-related policy options as a means of promoting development, developing countries "must never subscribe to any doctrine that would limit policy flexibility in this important area". In response, the European Communities argued that investment rules would leave sufficient "policy space for development," since many policies addressing basic structural deficiencies in national economies would be left unaffected.[24]

These arguments where aired in the context of the General Agreement on Trade in Services (GATS) and a proposed Multilateral Investment Framework under discussionin the World Trade Organization. However, developed international jurisprudence, informs that ''there is no common way of interpreting international investment agreements" especially on the rules underpinning NT, and yet opens the issue unaddressed. The researcher could share the line of arguments with the European Communities that investment rules would leave "sufficient policy space for development," this has been suggested, assuming that countries will have " exception" or reserving the investment area they want to maintain. This couldn't realistically in build withinEthio-BITs.

More importantly, *Getahunseifu* puts, BIT provides for non-discriminatory treatment and does not leave "regulatory space" for the parties, it becomes very difficult, if not impossible, to advocate important, and at times inevitable, national policies, deviating from the BIT, through domestic legislations. Thus, there is a need to include the negative listing of investment areas not open for foreign investors to be expressly and consistently indicated in the BITs. This shouldbe done by mentioning the areas by name. If not, BITs should expressly leave discretionary power that would depend on the need of the country from time to time."[25]

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[24]. Albert H. Cho and Navroz K. Dubas, will investment rules shrink policy space for sustainable development? Evidence from the Electricity Eector, world resource Institute Working paper, (5 September, 2003).

[25] .GetahunSeifu, "Regulatory Space" in The Treatment of Foreign Investment in Ethiopian Investment LawsJournal of International Investment and Trade, (2008).

This paper is different from this writer work in that, mine analyzes, Ethiopia's Bilateral Investment Treaties, specially, Ethiopia's obligation on national treatment. We argue that the general nature of the obligation on this particular clauses gives raise to "better treatment" to foreigner investors as a result, it will discriminates against domestic investor. After all, this research is limited to analyzing Ethiopia's commitments under BITs-NT clauses, and its consequent implications, that is a-reverse discriminations it poses on domestic investors, as well as the limitation it poses in the development of domestic investors

1.3 Statement of the problem

Our Country, Ethiopia, has signed International Investment Agreement with other countries in order to attract foreign Investment. These agreements, for example, provisions dealing with National treatment,which is most of the time referredto as substantive part of the treaty have been constructed in broader context, which would potentially undermines the interest of the domestic Investor.

Normally,"*National Treatment*" is the commitment by a country to treat enterprises operating on its Territory, but controlled by the nationals of another country, no less favorably than `domestic Enterprises in like situation,[26] or like circumstances. In other word, Clauses on national treatment are part of the standard repertoire of bilateral investment treaties. In their typical version, the clauses state that the foreign investor is accorded treatment no less favorable than that which the host state accords to its own investors.[27]

In the past decades, the wording of the clauses has essentially remained the same. This is true at least for the practice of European states. The U.S treaties specify that the clause will apply when "like situations" exist. Presumably, this will not affect the meaning of the clause, even though the change in U.S. practice in recent years from the term "in like situations" to "in likecircumstances" may indicate that for the U.S. Government even between these two versions nuances exist which deserve attention.[28] But, The European practice is the same up to date with the phrase "*Like situation*."

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[26] . See supra note 8.

[27] Professor Rudolf Dolzer, national treatment: New Developments Symposium co-organized by ICSID, OECD and UNCTAD making the most of international investment agreements: a common agenda, (Rome, 12 December 2005)

*[28]*Ibid.

Currently, in relation to national treatment although there is differences in a languages used to compare the domestic investors with foreign investors for example, while, some BITs say "In like situations" and others used in like circumstances" the effect is the same. In other words, these terms shows the obligation of states to treat foreign investors in the same way it treats its investor and helps not to discriminate against foreign investor. Indeed, most of the bilateral investment treaties Ethiopia signed so far has shown it's oddness in relation to national treatment, in that the BITs particularly provisions dealing with standard of national treatment. For instance, Ethio-UK's BIT has recognized the standard of national treatment but, does not include "treatment in like circumstances" or "treatment in like situations." Or the definition of NT equally represents;

Neither Contracting Party shall in its territory subject "investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State."[29]Similarly, BITs-Ethiopia had signed with the other state,[30] has founded the same wording problems,so it is not only limited to Ethio-UK BIT, however.

The underlying purpose of national treatment is to maintain competitive environment between the domestic and the foreign investors '*in like circumstances*.' The principle clauses in an IIA, historically, have been drafted in accordance with the dominant party i.e. the developed country wanting to operate in a resource rich developing country.[31] Also has been further argues, thisdisproportionate power division, according to critics of national treatment clause, stands to be aggravated by a treaty obligation which makes it absolutely necessary not to differentiate between the domestic and foreign operators in any sphere possible. Where one view justifies the differential treatment of large multinational corporations, having diversified operations all across

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[29].BIT 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, 19 the day of November 2009.

[30] .For example see, agreement B/N the state of republic of Austria and the Federal Democratic Republic of Ethiopia, for the promotion and protection of Investments 12 November, 2004.

[31] .see supra Note 14. P.147.

the globe vis-à-vis concentrated local producers having limited sources to engage in an economic transactions the other view sides with the international players demanding '*no less favorable' treatment.*'[32]

*Dr.Uche E. Ofodile,*argues, the primary concern of developing countries, who have concluded most of their BITs with developed countries, were those agreements primarily reflect the interests of the latter. For example, there are concerns that most BITs afford foreign investors greater rights than domestic investors and force host governments to implement policies that either harm domestic investors or make it very difficult for them to compete vis-à-vis foreign corporations.[33] In doing so it limits the power of states to take development policy measures in favor of domestic investors.These arguments are live arguments depending on the circumstances on the ground.

The BITs Ethiopia concluded as exemplified before has not strike the balance, since other countries investment agreement including NAFTA and OECD countries limit standard of national treatment to extent aligned with like circumstances and situations respectively.The comparison is clear that, the standard applies if like situation or like circumstances exists. In this view the Ethiopia's BITs would be said general or vague which presumably raising issues of national treatment in to question. To be clear, the industries and sectors now require some sort of protection through application of scope limitation. But, contrary to this purpose the BIT as it stands now will odd the national treatment. So here we need to re-think Ethiopia's BITs to strike the balance of both interests specifically on national treatment of FDI.

The unique nature of the national treatment test in international investment law was illustrated by the arbitration tribunal in the **Methanvs USA** decision under the investment provisions in the North American Free Trade Agreement (NAFTA). That tribunal held that the foreign investor did not receive less favorable treatment than a similarly placed domestic investor in that instance. This was becausealthough the relevant law did discriminate against the production of different types of chemicals (**Ethanol and Methanol**) the regulation did not discriminate between

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[32] .ibid

[33].UcheEwelukwaOfodil,Africa-China Bilateral Investment Treaties: A Critique, Michigan, Journal of Int'l Law, Vol. 35 (2013) P.147

methanol producers themselves.[34] Had this type of problems where entertained against Ethiopia as a country given investment commitment we have signed, we could have encountered with critical problem with national standard of treatment since there is vague typeof agreement we do have.

Furthermore, the general nature of BITs can be expressed among others, in light of whether it maintains Exceptions to NT, meant to up hold regulatory/police space to home state or otherwise. The stance of **Ethio-BITs** as stands now would not provide exceptions which enable the host states (Ethiopia) to have express power to regulate in the interest of domestic investors. Domestically, Ethiopia has policies, and laws bestowing the states "*the police power*" to regulate in the interest of the Domestic investors. Policies and lawthat were domestically enshrined hasnot consistent with *Ethio- BITs* and vice versa. This research is generally meant toprovide a way out for this problem in detail. Under this scheme the researcher is intended to analyze Ethiopia's foreign Investment agreement on standard of national treatment including its Implication on domestic Investors, and eventually address this on the basis of data obtained.

1.4. Objectives

1.4.1 General Objectives

The researcher is intended to analyze, Ethiopia's Bilateral Investment Treaties with particular emphasis on "Standard of National Treatment, and its Implication on Domestic Investors."

1.4.2. Specific Objectives

The following questions are specific objectives to be answered in this particular research paper.

- To identify the problems associated with national treatment under Ethiopia'sBilateralInvestment Treaties.
- In order to know the scope and the commitment of Ethiopia's Bilateral Investment Treaties in built on standard of National Treatment clauses.
- In order to analyze the stage of the investment process national treatments apply in Ethiopia's Bilateral Investment Clauses.
- In order to consider the implications of Bilateral Investment treaties of National Treatment clauses pose on the Domestic investor.

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[34]. See supra note 11 above p.5.

1.5. Research Questions

The research question of this paper includes the following. These have been answered in due course in detail.

- What are the problems associated with Ethiopia's Bilateral Investment Treaties on standard of nationaltreatment?
- What Ethiopia's-Bilateral Investment Treaties commitment on standard of National Treatment looks a like?
- What the investment sectors/areas exempted from Ethiopia's Bilateral Investment Treaties standard of NT obligation?
- At what stage of the investment process does national treatment apply?
- What are the implications of Ethiopia's Bilateral Investment Treaties National Treatment clause poses on domestic investor?

1.6. Significance of the Research

The study findings will give a better insight to Ethiopia's government including legislators and policy makers. In particular, help to know the status of the country's obligations under the existing BITs national treatment provisions including Its Implications andwould help to best negotiates in the future investment agreements.

Further, this paper will provide vital opportunity in opening the way forward for conducting further research so that to add to existing knowledge in areas relating to Standard of national Treatment and commitment of home state including its implications on Domestic Investors.

1.7 Research Methodology

1.7.1 Method

In doing this thesis, the researcher has used descriptive and analytical research methods. Descriptive method will be used because the research aims to describe, in detail, a situation or set of circumstances.

1.7.2 Methods of Data Collection

This research is Doctrinal and Qualitative one. Doctrinal in essence appropriate to collect the legal rules, treaty practice, and Jurisprudences, and since the qualitative nature of this study equally requires, this research have been relied on literature review, andlegal analysis.

As this research is concerned in the problems of **Ethio-BITs**, Particularly National Treatment and Its Implications, analysis of the BITs in light of international Investment agreements have been under taken to clarify and find out the way forward for the problems. Consequently, these data have been interpreted by using qualitative data interpretative method.

1.7.3Sources of Data

The necessary data for this study were collected from both primary and secondary sources. The primary data have been gathered through analysis of different laws. In relation to this, a BIT that Ethiopia has signed with different countries and other international investment agreements including Ethiopia's investment laws have been analyzed. A number of countries treaty practice that have a direct or indirect bearing on shaping the NT of Ethiopian investment law havebeenexplored. According to 2015 UNCTADreport Ethiopia had signed around 29 BITs.Thus, as far as a resource allows, though not all, analysis will be madeto 10(ten) ofthese BITs.Hence, Secondary Data has been gathered through literature review of different materials, like lawBooks, Journals, Articles,and Cases having relevance to enrich this particular paper.

1.7.4 Sampling Techniques.

This research was done by employing doctrinal research methodology. In this case, this research used purposive sampling techniques by drawing attention to particular BITs Ethiopia signed so far.According to 2015 UNCTAD report, Ethiopia has signed BITs which are 29 in number. Among these, the researcher has selected Ten(10) of them purposively. Ethio- BITs with 10(ten) countries, namely, Algeria,Austria, Kuwait,Israel, Libya, UK, China, Malaysia, Germany and Finland were analyzed extensively.Purposive selections to these BITs were made, depending on the similar problem they have in construction of language relating to National Treatment provisions of the agreements. In other words, these BITs are generally constructed specially in their provisions dealing with standard of National treatment. Therefore,**Ethio-BITs** with these countries were subject to this study and accordingly analyzed.

1.8.The Scope and Limitation to the study.

In this paper,the study is, mainly delimited to "*The standard of National Treatment in **Ethio**-BITs and Its Implication on Domestic Investors*." Other standards including fair and equitable treatment and MFN treatment is out of purview of this paper. Procedural issues are also out of this particular study.

With regard to the limitation of the study, this research has been, mainly encountered by financial and time constraints. Largely, this research have been encountered with written resources limitation since to date there is no sufficiently conducted research on Standard of National Treatment in Ethiopia's- Bilateral investment treaties.

1.9.Organization of the Research

The main Body of research contains four chapters. The first chapter is designed to draw to the reader, the general picture of the study. And it gives an insight about the general background, review of literature, Statement of the problem, objectives sought to be achieved, research questions, significance, methodologies, the scope, and limitations of the research including Organizations of the research.

Chapter Two Deals with a General Overview of Standard of National Treatments in International Investment Agreements. Chapter three examines **Ethio-BITs** In light of International Investment agreements and Its Implications on Domestic Investors. While Chapter Four end up with Conclusions and Recommendations of the research.

CHAPTER TWO: THE GENERAL OVERVIEW OF STANDARDS OF NATIONAL TREATMENTS UNDER INTERNATIONAL INVESTMENT AGREEMENT

2.1 Introduction

In the last two decades of the 20th century, great changes have taken place in policies andlegal structures relating to foreign investment. The rapid changes in foreign investmenthave found their expression in numerous bilateral and multilateral investment treaties.The proliferation of such instruments has direct impacts on national sovereignty…. and states' ability to regulate in areas such as environmental protection and human health,[35] including other key economic objectives.

Analysis of the debate on the balance of investor protection and the right to regulate should take account of the broad range of techniques that governments can use to affect the balance. In order to mitigate the negative impact parties to the treaty leave regulatory space,[36]especially in the parts of investment agreement dealing with NT.In other words, Most BITsincluding multilateral agreements under review include reservations to one or more of the specific obligations in the agreement.

In addition, there is a trend towards making it clear that investment promotion and protection against discrimination based on Nationality must not be pursued at the expense of other key policy objectives. One technique used in this respect is to provide for general treaty exceptions.[37] They may cover a broad range of issues, including taxation, essential security interests and public order, protection of human health and natural resources, protection of culture and prudential measures for financial services.[38]Thus, this shows the effort exerted to strike the balances of the interests between foreign investors and its domestic counterpart includingregulatory spaces for the host country states.On the same taken, by using these or other

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[35] Nathalie Bernasconi, International Legal Framework on Foreign Investment, Center for International Environmental Law (CIEL) for the Fifth Ministerial Conference Environment for Europe Organized by the Regional Environmental Center for Central and Eastern Europe, 23 May 2003.

[36]David Gaukrodger,The balance between investor protection and the right to regulate in investment treaties, (OECD, 2017).P.29.

[37] UNCTAD, Bilateral investment treaties (1995-2006): Trend In Investment Rule Making, (UN Publications, New York ,2007) P.13

[38] ibid

methods, IIAs can be constructed in a manner that ensures an overall balance of rights and obligations for all actors involved, so that all parties derive benefits from it.[39]

Bilateral treaties on the promotion and protection of investments of investors of one contracting party in the territory of the other contracting party date back to 1959, when the first BIT was signed between the Federal Republic of Germany and Pakistan. Since that time, BITs had a relatively uniform content that had not changed markedly, apart from the introduction of provisions on national treatment and investor–State dispute resolution in the 1960s.Sincethe mid 1990's however, BITs shown variations in terms of investment protection,[40] and as UNCTAD reported the number of BITs including multilateral investment agreementcontinued to rise throughout the entire review period, reaching almost about 3,324 by the year 2017.[41]

Here in under theresearcher is going to deal with the overall overview of IIA's-National treatmentwhich is one among other available protection against discrimination under international investment agreements. It starts by discussingthe Historical origin, Nature of national treatment, including National Treatment practices under International organizations(some multilateral agreements affiliated to investment) in general and disciplines of NT clauses under BITs frame works in particular.

2.2.National Treatment: Historical origins and Nature of National Treatment under IIA'S

In conjunction with Historical Development NT is traced back to the Hanseatic League treaties of the twelfth and thirteenth centuries and earlier. Comprehensive trade treaties including NT began to appear in the seventh and eighteenth century. By the nineteenth and twentieth Century's NT had becomes standard provisions in trade treaties.[42] In the late nineteenth century, national treatment has also begun to appear in other types of treaties, such as the 1883 Paris Convention for industrial property.[43] After WWII, NT was incorporated in to the GATT as a pillar of the international trading system, serving to insure that GATT contracting parties did not avoid theirmarket access commitment (tariff concessions) by providing less favorable regulatory or tax treatment to like products of foreign origin.[44]

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[39]Id. p.15.

[40] Ibid.

[41].World Investment report 2O17, United Nations conference on Trade and Development, (UN Publications, Geneva &New York, 2017).

[42].Andrew Newcombe and LluísParadell, Law and Practice of Investment Treaties, Standards of Treatment ,(Kluwer Law International BV, The Netherlands, 2009) p. 152

[43] .Id. at p.153.

[44]. Ibid.

Everything has its own Nature. One of the principal natures of the national treatmentStandard is its relativity.Given that the standard invites a comparison in the treatment accorded to foreign and domestic investors, this makes a determination of its content dependent on the treatment offered by a host country to domestic investors and not on some a priori absolute principles of treatment.[45]In regard to Nature of NT,*TAMADA Dai wrote* … "national treatment clause is one of the most popular and traditional standards stipulated in IIAs."According to Him, there are four basic features. First, the national treatment clause aims at providing foreign investors with a level playing field, at least at the post-establishment phase.[46]

At the same time, the national treatment clause ensures that foreign investors gain "market access on an equal footing" with nationals, but it can also function to limit the rights of foreign investors in circumstances where nationals have only limited rights. Second, the national treatment clause is an obligation, imposed on the host States, not to discriminate against foreign investors from domestic or local investors. This obligation applies not only to the administrative acts of the host States, but also to the enactment and the application of the rules and regulations in the host States.[47]Third, the national treatment clause uses relatively homogeneous words. On the other hand, the practical implications can differ because of wide-ranging exemptions of certain business sectors. Fourth, the case law of ISDS is not uniform in the interpretation and application of the national treatment clause because of ……words commonly used (i.e., "*in like circumstances*"[48]and "*no less favorable*.")

In particular, the appreciation of national treatment depends on the particular facts of the matter, which leads tribunals to make case-by-case finding.[49]Nonetheless, a deep understanding of the first two features, *put by Tamada Dai*, seems the rationale behind the incorporation ofinvestment-NT-disciples. While the 3rd and 4th seems, the real features of the investment, NT-Clauses.

The national treatment not being a product of international customary law and the precedents having been evolved out of the decisions emanating out of NAFTA;[50] however, at least under

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[45] . see supra note 7 p.6

[46] See Id.p.8

[47] Ibid.

[48] Rudolf Dolzer, supra note 2 at p.1.

[49] .See supra note 7 at.p.8

[50] See supra note14 at P.152.

international law, the national treatment standard has been invoked theoretically with the context of International minimum standards in building the investment protection.

In one context, the standard represents one of the competing international law doctrines for the treatment of the person and property of aliens which has come to be known as the "*Calvo doctrine.*" Under this doctrine, which was supported especially by Latin American countries, "*aliens and their property*" are entitled only to the "*same treatment accorded to nationals of the host country under its national laws*."[51] In contrast with this doctrine, the doctrine of State responsibility for injuries to aliens and their property, which historically has been supported by developed countries, asserts that customary international law establishes a minimum international standard of treatment to which aliens are entitled, allowing for treatment more favorable than that accorded to nationals where this falls below the international minimum standard,[52] that is according to *Dumberry*, "the obligation for the host State to provide a "fair and equitable treatment"[53]

In relation to the first context, *WenhuaShan* put**, "**after dominating Latin American states for over a century, the Calvo Doctrine has been widely described as "*dead*," particularly in the wake of the global tide of economic liberalization that began in the 1990s.ThisDoctrine, named after Carlos Calvo, a nineteenth century Argentine international lawyer and diplomat."[54]It is important to note that neither the Calvo Doctrine in its general application, nor any specific Calvo Clause, has inhibited states outside the Latin American region from the espousal of the claims of their nationals against other states, when they deemed such action necessary or when deems appropriate.[55]

This principle of international law states that alien-owned property must not be the object of discriminatory legislation; that is, the legislation authorizing the seizure of property must affect

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[51] Bernard Kishoiyian, the Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, Nw. J. Int'l L. & Bus. Vol. 14 no.327 (1993-1994)

[52]. Ibid.

[53] .Patrick Dumberry, Are BITs Representing the "New" Customary International Law in International Investment Law?, Vol. 28, no. 4 State International Law Review, (2010), p.679

[54]. Wenhua Shan, From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law, Nw. J. Int'l L. & Bus. vol.27 no .631 (2007)

[55] See Supra note 51 above. P.11

aliens and nationals alike.[56] The rule which prohibits the discriminatory taking of alien property is, therefore, a principle of customary international law, and it has been embodied in conventions. Nonetheless, it is a principle of universal application, and found in the municipal law of all civilized nations.[57] The majority of the cases also resort to international minimum standard of treatment which has embodied into CIL (customary International Law) arising out of denial of justice in the matter of procedure, some deficiency in the vindication and enforcement of the investor's rights,[58] which calvo was persistently challenged advocating for NT for foreign properties and aliens whatever the matter is in general.

2.3. Notion of National Treatment under International Organizations.

As far as the aim of this investigation is concerned with Investment treaties-NT clauses, it is imperative under this sub-topic a researcher should try to discuss about Notion of National treatment so that to make clear to the reader what it meant to be under international organization, i.e. under GATT/WTO (or TRIMS), GATs including OECD multilateral investment frame works. In doing so a researcher would shed a light on one hand, what rights of investor would seem under these organizations and what flexible policy space (regulatory power) would the host states maintains on the other hand. Accordingly, the discussions would be made as follows.

2.3.1 National Treatment under GATT/WTO Agreement

As is well known, there is no currently comprehensive multilateral instrument for the regulation of foreign investment. Foreign investment is therefore only subject to motley[heterogeneous] of BITs, regional investment treaties, and, at the multilateral level, the World Trade Organization's ("WTO") limited-scope Agreement on Trade Related Investment Measures ("TRIMs") and the General Agreement on Trade in Services ("GATS").[59]

The World Trade Organization (WTO) was established on 1 January 1998 as a result of the Uruguay Round on trade negotiations. Under pre-WTO GATT law, the GATT applied only to a limited number of trade-related investment measures (TRIMs), primarily those that link foreign

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[56] .Francis J. Nicholson S.J, "The Protection of Foreign Property Under Customary International Law'', B.C.L. Rev.iew vol. 6 no. 391(1965)p.397.

[57]. See Id. at P.399

[58] .OECD (2004),Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers On International Investment, (OECD, 2004) P.28.

[59] .Wallace, Don Jr. and Bailey, David B. (1998) The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions,Cornell International Law Journal: vol. 31 no.3 (200) Article 7.

investment to a requirement to use domestic goods. During the Uruguay Round (1986-1994), the US pushed for greater discipline on TRIMs and sought a code that would further liberalize market access for investment.[60] The majority of the GATT members, however, rejected this proposal, preferring to clarify the types of measures that breached the existing GATT obligations. The accord attained as part of the Uruguay Round, Agreement on Trade-Related Investment Measures (TRIMS Agreement), reaffirms that WTO Members may not apply investment measures that are inconsistent with GATT national treatment obligations or that otherwise violate the general prohibition on quantitative restrictions on imports and exports of goods.[61]

Any rights or obligations that an investor may havewith respect to foreign investment in a host State are therefore born of treaties and other instruments of international law negotiated by choice with or among other States. National treatment for foreign direct investment is a rather modest norm against the background of post-World War II developments in international trade, investment, and related areas at both the national and international levels.[62] TRIMs and GATT/WTO have a positive relationship, in establishing favorable conditions in international frame work for investment, either directly or indirectly.

So far TRIMs is solely applies to investment measures related to trade in goods (referred to in this Agreement as "TRIMs")[63] as opposed to General Agreement on Trade in services(GATs.) Indeed, as it is discerned from the preamble part, it states "*TRIMs Desiring to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, by ensuring free competition*."[64]From this we caneasily infer that, facilitating investment across international frontiers is one of the objectives clearly settled by TRIMs. Nonetheless, among other measures claimed to be distorting trade is NT and quantitative restrictions; thus, TRIMS prohibit these measures administered by the host member states, unless provided otherwise.Pursuant article 2 of the TRIMs states, without prejudice to rights and

[60].see supra Note 42 above p.54.
[61] .Ibid
[62].supra note 59 P.615.
[63] WTO/Trade Related Investment Measures, Scope of the frame work, (Doha, 1994)
[64]Ibid.

obligations under GATT 1994, no member shall apply any TRIMs that are inconsistent with the provisions of article III, XII of GATT 1994.[65]

National laws ontouching upon investmentalso play a role in defining the rights and obligations of foreign investorsonce they have secured entry into the host state. In this regard, they arecomplementary to any rights and obligations contained in treaties and otherinternational law instruments.[66] However, sometimes it is not as it seems easy, because, national laws may contradict withits international laws counter parts. For example:

Article III, providing for national treatment, is the GATT provision that reaches most directly to the internal legal regime of a member, as any law, regulation or requirement may affect the treatment of goods after they are imported. This requires that internal laws and taxes shall not be applied so as to afford domestic protection. Although "internal" in its scope of application, it is also fundamentally supportive of the other obligations, since any residual ability to accord less favorable treatment to imported goods as compared with domestic goods would necessarily undermine the other stated obligations.[67] This is a true debate that where existing in between stake holders, on one hand, there is the sovereign power of state to execute its national policies and regulations, on the other hand, the interest of the foreigners operating across the border with their products.

For the core GATT Articles, only Article I MFN shares this same potential to reach within the market to affect internal government behavior. This flows from that article's enunciated application, "with respect to all matters referred to in paragraphs 2 and 4 of Article III."

This means in effect that a Member's internal laws, regulations, requirements, and taxes may not discriminate between like imported products (Art. I MFN), as well as between imported and like domestic products (Art. III, NT).[68] Indeed, this GATT/WTO provisions are used to govern the commitment that the members of the GATT/WTO entered to it, and in fact it governs liberalization of trade in goods as opposed liberalization of foreign direct investment, however, in limited scope TRIMs part of GATT/WTO affiliates with FDI.

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[65] Ibid article 2.

[66] UNCTAD, WTO core principles and prohibition: Obligations relating to private practices, national competition laws and implications for a competition policy framework,(Un Nations publications, New York and Geneva, 2003) p. 16

[67]. ibid

[68]. Ibid

But, in relation to GATS/WTO, it is different; NT applies to govern "in respect of all measures affecting the supply of services, treatment no less favorable than that itaccords to its own like services and service suppliers.[69]

2.3.2GATS Article XVII National Treatment

The General Agreement on Trade in Services (GATS) is the first multilateral trade agreement to cover trade in services. Its creation was one of the major achievements of the Uruguay Round of trade negotiations, from 1986 to 1993. This was almost half a century after the entry into force of the General Agreement on Tariffs and Trade (GATT) of 1947, the GATS' counterpart in merchandise Trade.[70]

The GATS covers FDI by including into the definition of "*trade in services"* the supply of a service "by a service supplier of one Member, through "commercial presence" in the territory of any other Member."The GATS adopts to a large extent a"*selective liberalization model"* regarding the admission and establishment of foreign investment.[71] GATS is especially relevant because Articles I and XVI (market access) explicitly cover **establishment** (although not using the word), which is a key to FDI.[72]

Whether a WTO member is obligated to permit the establishment of "*a commercial presence*" in a sector by a foreign service supplier depends upon whether that member has made specific commitments to accord market access and "national treatment" in the sector in question and upon whether any such commitments are subject to limitations or conditions. "*Market access*" in this context means that,in a sector in which market access commitments are undertaken, a member shall not apply certain restrictions enumerated in Article XVI of the GATS, unless otherwise specified in its Schedule of Specific Commitments. These restrictions include certain measures that relate specifically to FDI.[73]

According to Article I of the GATS, "trade in services" comprises four modes of international supply of a service, one of which is the supply of a service by a service supplier of one member "through commercial presence in the territory of any other Member."[74]

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[69]. See Id. P. 54

[70].WTO/General Agreement on Trade In Services, 31 January, 2013

[71] UNCTAD, key terms and concepts in IIA's: a glossary; series on issues in international investment agreements Sales No .E. 04.II.D.31, (UN publications, New York and Geneva, 2004)

[72]. See supra note 59 above at p.617

[73] ibid

[74] Id. p 17

As defined in Article XXVIII (d) of the GATS, "*commercial presence*" in this connection means: "*Any type of business or professional establishment, including through,*

(i) The constitution, acquisition or maintenance of a juridicalPerson, or

(ii) The creation, maintenance of a branch, or a representative office, within the territory of members for the purpose of supplying a Service"[75]

In GATS/WTO context, Precedents typically includes …..National treatment provisions requiring that "like" products receive non-discriminatory treatment. The interpretation of the word "like" is critical to an analysis of these precedents. Although there are some precedents for what "like" means for goods, the term is less clear with respect to matters more intricate than goods. How will these norms play out with respect to services, service providers, and most crucially for the purposes of this article, investments and investors?[76]In the GATS/WTO:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications setout therein, each Member shall accord to services and service suppliers of any other Member, inrespect of all measures affecting the supply of services, "treatment no less favorable" than that itaccords to its own "like services and service supplier."[77]

2. A Member may meet the requirement of paragraph 1 by according to services and servicesuppliers of any other Member, either formally identical treatment or formally different treatment tothat it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favorable ifit modifies the conditions of competition in favor of services or service suppliers of the Membercompared to like services or service suppliers of any other Member.[78]

On the similar basis, GATS article XIV provides general exception, thus accordingly state parties to the multilateral treaty would have the right to apply measures contrary to national treatment; so it reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like

[75] ibid
[76] ibid
[77] See Supra note 50 above at p.54
[78] *ibid*

conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures.[79]

The GATS (article XIV) also contains an exception clause concerning the protection of public morality and the maintenance of public order.An exception can also be made if this is necessary to protect human, animal or plant life or health, or to secure compliance with laws or regulations that are not inconsistent with GATS provisions, including those related to safety.[80]On these particular exceptions expressly provided under GATS /WTO the parties to it could have the right to discriminate between foreign and domestic nationals.

2.3.3National Treatment under OECD Multilateral investment agreement

"National Treatment" is the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, "no less favorably than domestic enterprises in like situations." This commitment is enshrined in the Declaration on International Investment and Multinational Enterprises, adopted in 1976 by the Governments of the OECD Member countries. It is supported by follow-up procedures in an arrangement known as the OECD National Treatment instrument.[81]

Countries which have adhered to the Declaration on International Investment and Multinational Enterprises, as well as the related Decisions and Recommendations by the OECD Council, including the National Treatment instrument, are the thirty-four OECD member countries[82] and eleven non-member economies.[83]

The multilateral agreement on investment draft consolidated text on NT provisionreads**:**

"Each Contracting Party shall accord to investors of another Contracting Party and to theirinvestments, treatment no less favorable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments."[84] Hence, the national treatment provisions of the MAI apply to all three phasesof FDI - entry, operations, and breakdown.

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[79] WTO/GATs, General Agreement on Trade in Services, annex B, article xiv.

[80] ibid

[81]See supra note 8.

[82] See the preamble of OECD, Commentary on OECD Guide Line for Multinational Enterprises,(27 June, 2008)

[83] Ibid.

[84] OECD, The multilateral agreement on inves*tment draft consolidated text article III (22 April 1998)*

OECD,declaration on international investment and multinational enterprises by adhering governments provides, and perhaps leave regulatory power for the adhering governments of OECD member states in applying NT, especially in relation to maintaining to necessary public order, essential security interests, in the fulfillments of international commitments and etc. the provisions on NT therefore, presented as follows:

That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government (hereinafter referred to as "Foreign-Controlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National Treatment");[85]

2.3.3.1 Notifications Constituting Exception to National Treatment

Third revised decision of the council on national treatment pursuant article 1 provides notification of measures constituting exception to NT. Indeed, the provision reads:

A. Members shall notify the Organization of all measures constituting exceptions to National Treatment within 60 days of their adoption and of any other measures which have a bearing on National Treatment. All exceptions shall be set out in Annex A to this Decision.
B. Members shall notify the Organization within 60 days of their introduction of any modifications of the measures covered in paragraph (a).
C. The Organization shall consider the notifications submitted to it in accordance with the provisions of paragraphs (a) and (b) with a view to determining whether each Member is meeting its commitments under the Declaration.[86]

   Then depending on the notification submitted, the Organization shall examine each exception lodged by a Member and other measures notified on the basis of intervals to be

[85]Supra note 83 p.5

[86] Supra note 59 above at p.1

determined by the Organization. Unless otherwise determined by councils the intervals would not be more than three years.[87]

As we have seen in above declaration, OECD adherent member states in providing commitment to NT, they need to be flexible than rigid enough; they could have the discretion to adopt certain measures, and/or new modifications subject tonotification within 60's days of their adoption or modification. This have a large deal in connection to providing level of policy space for investment hosting member country.Countries have agreed that measures intended to protect public order and security are outside the scope of their obligations under the Code. Likewise, the Code does not prevent adherents from taking measures to ensure the enforcement of national laws and regulations, including tax obligations. The Code also ensures ample scope for financial regulation and supervision.[88]

In order toput together, NT clauses are disciplined under GATT/WTO within limited scopes with TRIMs. Although as a matter of principle GATT/WTO governs trade in goods, the measures taken by the host states against foreign investment in discriminatory way may impair international trade. In other word, in the context of NT-clauses two interest were competing-that is the interest of the foreigners and domestic traders or investors, thus, wisely disciplining the two would be paramount importance. It that, the TRIMs are doing. Similarly, GATs/WTO also recognizes the NT provisions; this multilateral frame work recognizes FDI through the definition of modes of services that is "commercial presence "by the services suppliers. Once foreign service suppliers where presented, it could have the privilege to NT. In nutshell as we seen, the NT-Clauses under these organizations including OECD multilateral agreements provide the parties to the agreement Exceptions for "regulatory flexibility" through expressly providing within the substantive provisions.

2.4 Standards of National Treatment within Bilateral Investment Treaty Frame Works

2.4.1Absolute Standard vis-à-vis Relative Standard

Investment agreements contain obligations specifying the treatment that the contracting parties are required to provide to the investment once it has been established. One can distinguish

[87] Ibid.

[88] OECD, international capital flows: structural reforms and experience with the OECD Code of Liberalization of capital movements report from the OECD to the G20 sub-group on capital flow management, (June, 2011.)

between general treatment standards, that are standards relating to all aspects of the existence of a foreign investment in a host country, and specific treatment standards addressing particular issues.[89]Within the category of the general standard, further differentiations can be made. These are absolute standard and relative standard. Examples of absolute standards are the provisions on fair and equitable treatment, full protection and Security, expropriation and the transfer of funds including a Minimum standard of treatment. While some of the relative standard includes, National treatment and Most Favored Nation Treatment[90]standards. Thus, after dealing with the above standards here in under let we look briefly about the construction of BIT standards in relation to standard of National treatment.

2.4.2Construction of BITs Standards.

2.4.2.1An Agreement does not Mention National Treatment Model

Some agreements that otherwise provide standards of treatment for foreign investors do not grant national treatment. This (unusual) approach is exemplified by the Association of South- East Asian Nations (….) Agreement for the Protection and Promotion of Investments and the early BITs signed by China, Norway and Sweden, especially, Article 2 of China's BIT with Sweden spells out the general standards of treatment granted to foreign investors as follows:[91]

"(1) Each Contracting State shall at all times ensure fair and equitable treatment to the investments by investors of the other Contracting State."

(3)Notwithstanding the provisions of this Article, a Contracting State, which has concluded with one or more other States anagreement regarding the formation of a customsunion or free-trade area, shall be free to grant amore favorable treatment to investments by investorsof the State or States, which are also parties to thesaid agreement, or by investors of some of these states. A Contracting State shall also be free togrant a more favorable treatment to investments by investors of other States, if this is stipulated underbilateral agreements concluded with such Statesbefore the date of the signature of this Agreement."[92]

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[89] See UNCTAD Supra note 37above.

[90] Ibid

[91]Agreement On The Mutual Protection of Investments The Government of The Kingdom of Sweden And The Government of the People's Republic of China, signed 29 March, 1982.

[92] Ibid article 2(2)

The other example, **Ethio-China,**[93]BIT also supports the ASEAN Agreement on promotion and protection of investment in that it does not provides the "*National Treatment*"in investment provisions.The omission of NT is explained in certain ground that, host state are most of the time not willing to extend the preferential treatment that its domestic enterprises were receiving to be enjoyed by other foreign enterprises/investments. Other hand, the reasons for not including the standard may be very specific to the situation in question. In some cases, for example, granting national treatment has been complicated by the provision of price subsidies for national State enterprises for utilities such as water and electricity.[94]

In situations where many firms remain State-owned it is difficult to grant the same price subsidies to foreign investors (and perhaps also to national private investors). Finally, home countries might not have found it worthwhile to insist on the granting of national treatment standard in host countries where the conditions available to national firms were below a certain minimum. Specifically, over the years China has changed its policy towards national treatment and has agreed to grant it in certain treaties.[95]However, china is not yet consistent with her investment agreement in relation to the provisions of NT.

2.4.2.2The Combined National Treatment and Most-Favored-Nation Treatment Model

This model has its origins in United States BIT practice (now a day's many of BITs were maintained). The United States model BIT states in article II (1): "With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment"), or to investments in its territory of nationals or companies of a third country(hereinafter "most favored nation treatment"), whichever is most favorable(hereinafter "national and most favored nation treatment")" [96] In this case foreign

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[93] Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of Peoples Republic of China concerning the Encouragement, and Reciprocal Protection of the Investment, signed in 1998.

[94]See supra note 1 above p.166.

[95] ibid

[96] UNCTAD, admission and establishment, UNCTAD series on issues of International Investment UNCTAD/ITE/IIT/10 vol. II (UN Publications, 1999) P. 26.

investors receive these benefit whichever is most important from treatment granted to Nationals or foreigners on MFN basis.Indeed, National treatment may co-exist in an IIA with other standards of treatment, notably fair and equitable treatment. This raises the technical question of how the relevant clauses relate to one another.[97]

2.5. Application of National Treatment

2.5.1 Extent of coverage of the investment process

National treatment can apply either to the pre- and post-entry stage or to the post entry stage only. The post-entry model is at present much more common. However, some recent IIAs have extended national treatment to the pre-entry stage through a combined pre- and post-entry clause. Finally, the operation of national treatment in the General Agreement on Trade in Services (GATS) offers a unique hybrid approach which requires separate consideration.[98]

Therefore, here we could classify the stage of NT process to 3 models. These are:

1 The Post entry Model/Post-establishment applications

2 The pre-and post-entry model/pre-establishment and post establishment

3 The GATS hybrid model

Indeed, here under the researcher will discussthemin detail one by one.

2.5.1.1 The post entry model

This model is typified by IIAs that restrict the operation of the treaty to investments from other contracting parties that are admitted in accordance with the laws and regulations of the host contracting party.This is followed with a provision that accords national treatment to investments so admitted. For example, the BIT between Germany and Namibia stipulates in article 2 that each contracting party shall promote as far as possible investments by nationals or companies of the other contracting party and "admit such investments in accordance with its legislation." Then, in article 3, the national treatment standard is introduced,[99] which grants post national treatment.

2.5.1.2 Pre- and post-entry model/pre-establishment and post establishment

As a typical example of Japanese NT clause, the Japan–Uzbekistan BIT Article 2(1) providesthe combination of "pre-establishment" and "*in like circumstances*," as follows:

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[97] See supra note 94 above at p. 165

[98] See UNCTAD supra note 4 p.18

[99] See supra note 94 above at p.167.

"1. Each Contracting Party shall in its Area accord to investors of the otherContracting Party and to their investments treatment "no less favorable" than thetreatment it accords in "like circumstances" to its own investors and their investmentswith respect to the [**establishment],** acquisition, expansion, operation, management,maintenance, use, enjoyment, and sale or other disposal of investments (hereinafterreferred to as '*investment activities'*)."[100]Almost all of the BITs contain the pre-establishment and post- establishment NT clause and, at the same time, use the expression of "in like circumstances," as presented as follows.

IIA	Pre- establishment	Post-establishment	In like circumstances
Japan–Myanmar (2013)[101]	✓ Art. 1 (D)	Art.1(D)	✓ Art. 2(1)
Japan–Korea BIT (2002)[102]	✓ Art. 2(1)	Art.2(1)	✓ Art. 2(1)
Japan–Singapore EPA (2002)[103]	✓ Art. 73	73	✓ Art.73
Japan–Vietnam BIT (2003)[104]	✓ Art. 2(1)	Art.2(1)	✓ Art. 2(1)

One remarkable difference in national treatment exists between "pre-establishment" and "post-establishment." The former means the application of NT obligation before, or at the time of the establishment of the investment. In this case, the host State is obliged to guarantee {market

[100].Agreement between japan and the republic of Uzbekistan for the liberalization, promotion and protection of investment, 30 April, 1998 article 2.

[101] Agreement between the government of Japan and the government of the republic of the union of Myanmar for the liberalization, promotion and protection of investment, on this fifteenth day of December, 2013,

[102] Agreement between the Government of Japan and the Government of the Republic of Korea for the Liberalization, Promotion and Protection of Investment, signed in 2002.

[103]Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership, signed in 2002.

[104]Agreement between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment, signed in 2003

access} to foreign investors at the same level as domestic investors. A typical example of this is found in Article 3 USA model, which states the following:[105]

"1.Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the ***establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition*** *of investments.*

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment.[106]

Article 3(1) stipulates on "investors" and Article 3(2) relates to "investments." Both paragraphs use the same expression of "in like circumstances" and apply to the same mode of investment (i.e., at the moment of "establishment and acquisition" of investment (pre establishment) and "expansion, management, conduct, operation, and sale or other disposition" of investments (post-establishment)). The pre-establishment national treatment is one of the means of "liberalization" of investment by way of opening the domestic market and allowing market access.[107]

2.5.1.3 The GATS hybrid model/ GATS inspired agreements

The GATS is based on the principle of "*progressive liberalization*." Accordingly, the obligation of national treatment expressed in article XVII of the GATS is not a general obligation applicable to trade in services in all sectors and by all members, but a specific commitment that applies only in sectors inscribed in a member's schedule, and its application is to be gradually extended to other sectors through successive rounds of negotiations.[108]

Hence, treatment of investment in FTAs which is based on the WTO GATS Agreement combines a 'positive' scheduling of sectors (whereby party's list areas where they undertake commitments to liberalize) with a negative list of limitations that they wish to maintain.….transparency tends to be general obligations; with market access and national

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[105]Model BIT of the government of the United States of America and the government of_____concerning the encouragement,and reciprocal protection of investment, 2004

[106]Ibid

[107] Ibid.

[108].See UNCTAD supra note, 94 at p.169.

treatment granted only to the extent liberalization commitments are scheduled. GATS style agreements are generally favored by countries that wish to preserve a certain flexibility and progressiveness in their liberalization.[109]

The national treatment obligation in article XVII of the GATS requires each member to extend to services and service suppliers of other members treatment "*no less favorable than*" that it extends to like services and service suppliers of national origin.Paragraph 1 of that article states:

"1.In sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."[110]

This may be achieved by according formally identical or formally different treatment. In other words, a national treatment commitment under the GATS would prohibit any form of discrimination whether de jure or de facto.[111]Paragraphs 2 and 3 of article XVII state:

"2. A member may meet the requirement of paragraph1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member."[112]

To summarizes, stages on NT treatment process in international investment laws, inter alia, includes, post entry, Pre-entry and post entry, hybrid models typically exemplified within the GATS/WTO frame work in general.

2.6. Application of NT to the Issue of Antimonopoly Law(AML)

Developing countries commonly hold a social need to protect their own "infant industries," which are still vulnerable, compared to powerful foreign companies. In the application of the national treatment clause, if host States have to treat all industries equally, infant industries

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[109].Kristen Bondeitti, In consistencies in Treatment of foreign investment in trade Agreement,(Monash University, December, 2008)

[110]. See supra note at 79 above Article XVII GATS/WTO, paragraph 1.

[111].See UNCTAD Supra note 94 above at p.169.

[112] See GATs/WTO supra note 79 above article .xvii paragraph 2, and 3.

would disappear before they obtain sufficient competitiveness. However, contrary to popular conception not all foreign actors are large economic entities but can well be a relatively small initiative, in certain cases even a sole excursion outside the home state, owned and handled by individuals operating abroad.[113] These isolated individuals or entities are the ones at the highest risk parameter who stand to get affected by the political economy surrounding the foreign investment restrictions.[114] Hence, availability of constrained resources due to information asymmetry is a common place.

Therefore, according toShivamBhardwaj"*At least in these limited circumstances the investment arbitral tribunal should consider fairly distributing the burden of productionand the complementary burden of persuasionbetween the contesting foreign actor and the host state.Thence, operability of this clause, seemingly, can only be demanded when the investor is a non-dominant player in the host country[emphasis added].*[115]

Legally speaking, however, the protection of infant industries cannot be an exception to the national treatment obligation.As expressed by *Sornarajah*,"unless the investment treaty so provided, there will be a violation of the treaty if the protection given to the local industry is not given to the foreign investors as well. A solution would be to exclude sectors which require protection from the scope of the treaty or to preserve regulatory controls relating to competition and similar factors from the scope of national treatment."[116]

For example, looking in to the perspectives of the China, it should be noted that it has been, and still is, reluctant to acknowledge the national treatment obligation. With Japan, China recognized this obligation in its BIT of 1988 (the first Japan–China BIT), but this was exceptional. There are two reasons that explain China's reluctance. First, from the Chinese viewpoint, its domestic industries have been too weak to withstand international competition with foreign investors.Second, the central planned economy has been implemented in China since the 1950s. Thus; there was no "market" or "competition" in China.[117]

further, the protocol, attached to the BIT, stipulated as follows: "3. for the purpose of the provision of paragraph 2 of Article 3 of the Agreement, it shall not be deemed 'treatment less

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[113]See ShivamBhardwaj supra note 14 above at p 147&148.

[114] Ibid

[115] ibid

[116] See M. Sornarajah, supra note 6 above at p.343&344.

[117]See TAMADA Dai supra note 7 above at p.15

favorable' for either Contracting Party to accorddiscriminatory treatment, in accordance with its laws and regulations, to national andcompanies of the other Contracting Party, in case it is really necessary for the reasonsof public order, national security or sound development of national economy.Thus, it is clear that China could maintain some control of national industries by "its laws andRegulations" for the purpose of securing its "sound development of national economy.[118]In the new JCK treaty, this additional protocol disappeared but was replaced by the "non-complying measure" clause (Article 3 (2)). Thus, it states the following:

"2. Paragraph 1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Agreement in 2014 maintained by each Contracting Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Treatment granted to investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made."[119]

Thus, as was the case in the previous BITs, the new treaty exempts the application of national treatment to the "non-conforming measures" existing under the contracting party's laws and regulations in general.

[118] See Id.at p.16

[119] .Agreement among the government of Japan, the government of the Republic of Korea and the government of the people's republic of China for the promotion, facilitation and protection of investment, 2012

CHAPTER THREE:EXAMINING STANDARDS OF NATIONAL TREATMENT OF ETHIO-BITS IN LIGHT OF INTERNATIONAL INVESTMENT AGREEMENTS AND ITS IMPLICATIONS ON DOMESTIC INVESTORS

3.1. General Overview of Ethiopian Bilateral Investment Treaties (Ethio-BITs)

Usually countries all over the world sign BITs in order to create favorable conditions for foreign investment. Some recent treaties feature more …formulated investment protection and promotion provisions.[120]This can be discerned from the short statements of purposes within the BITs and other IIA's. As the preambles of most BITs states, desiring' to promote greater economic co-operation, 'recognizing' that an agreement on the treatment of investment will stimulate the flow of private investment, and 'agreeing' in this context on the importance of a stable framework for investment.[121]In nearly similar fashion, **Ethio-Russian Federetion** BIT provides:

"*Intending to create favorable conditions for the realization of investments by investors of one Contracting Party in the territory of the other Contracting Party,*

Recognizing that the promotion and reciprocal protection of investments on the basis of the present Agreement shall stimulate the development of the mutually beneficial commercial, economic, scientific and technical co-operation….."[122]

From this as discerned that, the intention of making and signing BITs is not blurred; it is clear. The intention behind the parties to the investment treaties is aspiring to gain favorable atmosphere, coupled with reciprocal encouragement, promotion and protection towards making their investment.

The increased Foreign Direct Investment ("FDI") flows in the past few years have strengthened the belief among many developing countries, especially African countries that such FDI flows could help in reducing the resource, technology and foreign exchange gaps that constrain their economic development. As a result, many developing countries have been diligently working to attract foreign investment, for which these countries give some of the highest returns; in the process, these countries make concessions that they would have found unthinkable in the past,

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[120] Andrew Newcombe,Canada'sNew Model Foreign Investment protection Agreement, (Faculty of Law, University of victoria, 2004)

[121]. See supra note 42 above at p.65.

[122]. See the preamble of An agreement Between FDRE and The government of the Russian Federation on promotion and reciprocal protection of investment, signed, 1999

when autarchic economic policies were prevalent.[123] …….{specially}, Provisions granting more or less similar opportunities for foreign investors have been included in the various Bilateral Investment Treaties ("BITs") that have been signed **by** African countries over the years.[124]

One of the issues raised in connection with the proliferation of BITs is the effect of these BITs on the flow of Foreign Direct Investment (FDI) to the signatory countries, especially developing countries. It has been said that BITs boost the confidence of investors which in turn will increase the flow of FDI to host states. This is so as BITs guarantee certain rights of foreign investors which will encourage the foreign investors to invest in that country.[125] The guarantee believed to be credible, in providing protection against discrimination, which can be termed as National Treatment (NT).

There are, however, also claims which shed doubt on this effect of BITs on Foreign Direct Investment (FDI). Authors like *Sornarajah* argue that, "*it is empirically untestable whether states will receive more investments if they conclude such treaties*."*Salacuse and Sullivan* also hold a similar view and attribute increase in flow of FDI to local political and economic conditions and government policies than BITs. Attributing increase in flow of FDI to BITs implies that the investors are aware and take into account the presence or absence of such treaties at the pre-investment stage, which in most cases is not true as many potential investors have little awareness or appreciation of specific BITs.[126]

Many developing countries signed them with developed as well as other developing countries. Ethiopia is no exception. In an effort to attract foreign investment, the government of Ethiopia has signed BITs with developed, as well as developing countries. According to 2015 UNCTAD report, Ethiopia had signed 29 BITs.[127]These agreements has been made on the conventional wisdom that, BITs will increase foreign investment flows and accordingly, contained definition of investment and investor, standards of treatment, provision of protection against expropriation

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[123].Victor Mosoti: Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?, Northwestern Journal of Law and Business, Vol. 26, (2005)P.95

[124] .Ibid

[125] .Martha BeleteHailu&TilahunEsmaelKassahun, Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration, MIZAN LAW REVIEW, Vol. 8, No.1 (September 2014) P.121

[126] .Ibid

[127] See supra note 9 above.

including procedural rights. Nonetheless, these provisions were usually seen in terms of its generality or vagueness.In particular, **Ethio-BITs** National Treatment standards are vague and perhaps raiseissuesof the reverse implication on domestic Investor, which mainly claimed will reduce regulatory spaces of the sates. Here in under, the researcher would analysis in detail and accordingly in light where the problem of **Ethio-BITs** National Treatment lies.

3.2. The National treatment Clauses under Ethio-BITs: The definition of National Treatment, and formulation of the National Treatment

3.2.1 Definition of National Treatment under Ethio-BITs

National Treatment (NT) Clauses in international investment agreement would entail an obligation of nondiscrimination. Nonetheless, **Ethio- BITs** defines the clause, for example, **Ethio-**Austria BITs on article 3goes as:

(*1) Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.*

(2) A Contracting Party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party

(3)Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment ***no less favorable than*** *that it accords to its own investors and their investments or to investors of any third country.*[128]

Further, similar to **Ethio-Austria's** article 3(3) BIT, Article 3 of **Ethio- Great Britain and Airland** BITs defines by combining the national treatment and most favored nation-clauses.

of course, the definition clearly provided as follows.

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

2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their **management, maintenance, use, enjoyment or disposal of**

[128] See supra note 30 above at article 3(Emphasis added)

their investments, to **treatment less favorable** than that which it accords to its own nationals or companies or to nationals or companies of any third State.[129]

As opposed to these BITs, **Ethio-China** and **Ethio-Malaysia**[130] BITs omitted to maintain the National Treatment clause. On this issues UNCTAD said, "*The omission of the national treatment standard may be explained in certain cases on the ground that the host country does not wish to extend* ***preferential treatment*** *enjoyed by its domestic enterprises to foreign enterprises*." On the other hand, the reasons for not maintaining the standard may be very specific to the situation in question. In some cases, for example, granting national treatment has been complicated by the provision of price subsidies for national State enterprises for utilities such as water and electricity. In situations where many firms remain State-owned it is difficult to grant the same price subsidies to foreign investors (and perhaps also to national private investors).[131]

Relating to Ethiopia's BITs, it can be clearly understood that, those BITs maintaining National Treatment clauses, were assumed as the policy behind determined to extend the "**preferential treatment"** accorded to domestic enterprises or investors on the same footing to those foreign enterprises or investors. This could be true, for most of Ethiopia's BITs, or eight (8)of them subject to this research, except **Ethio-China** and M**alaysia** BITs, which one can understand otherwise. To state clearly, Ethio-BITs containing National Treatment clauses were presumably enable one to know the determined Ethiopia as to extend "preferential treatment" provided to domestic investors, in turn to extend on similar footing to foreign investors, but, the opposite of this arguments, this particular treatment seems absent in **Ethio-China** and Malaysia BITs as a matter of fact.

3.2.2. The formulation of the National Treatment (NT) underEthio-BITs

As discussed under the definitional part, section 3.2.1above, the Investment agreement made between **Ethio-Austria**, is actually provided with multiple and general principles of Treatment which could become obligatory commitment on the parties to the treaties. For instance, Fair and equitable treatment,full and constant protection and security including standard of National

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[129] See supra note 29 above article 3.

[130] .See **Ethio-China BITs** Supra Note 93 above, and the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments, signed on 2 October 1998.

[131] See UNCTAD, supra note 4 above at. p. 14

Treatment[132]. While national and MFN treatment constitute relative standards that depend on the treatment accorded to a reference group, investment treaties also impose standards of treatment on host States, such as fair and equitable treatment and full protection and security, that are absolute in character and grant protection to foreign investors independent of the host State's treatment of its own nationals or of third-party nationals.[133]

Similarly, article 4(1) of Ethio-Kuwait BIT combines fair and equitable treatment with standard of national treatment, insuring all the times to be accorded to investments of foreign investor in like circumstances. However, pursuant 4(2) of the sameBITextended both combinations of clauses, National Treatment withMost Favored Nation treatmentclause, whichever is most favorable.[134]Besides, **Ethio-Algeria** BIT, pursuant article 4(1) combine standard of National Treatment with Most Favored Nation-Clauses, while 4(2) provides the investment activities to which these standards apply. These investment activities are signaled as regards to management, maintenance, use, enjoyment or cessation of their investment.[135]

Most investment treaties contain either a specific clause that prohibits "discriminatory measures [concerning] the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments," or a general nondiscrimination clause that either separates between national and MFN treatment or frames them as part of a single treaty provision.[136] The combination of relative standard with general standard is very cumbersome for implementation to the host country states. Thus, it is better for Ethiopia if she separates relative standards from absolute standards, including standard of National Treatment from MFN Treatment while negotiation is under gone.

3.2.2.1 .Alike Circumstances as comparable setting Under Ethiopia's BITs

Here in under, it is worthwhile to discuss about the terminologies just like the appropriate comparator of like circumstances which is common in most investment agreements containing

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[132] .see supra note 30 above article 3.

[133] .Stephan W.Schill, The Multilateralization of International Investment Law, ISBN-13, (Cambridge University Press, 2009) p. 78

[134] Agreement between the Federal Democratic Republic of Ethiopia and the state of Kuwait for the encouragement and reciprocal protection of investment,14 September, 1996

[135] Agreement Between the Government of the federal democratic republic of Ethiopia and the government of the people's democratic republic of Algeria on the reciprocal promotion and protection of investments, 4June,2005.

[136] See supra note 133 above at p .76.

NT.Qualifications such as "like situations", "similar situations" and "like circumstances" may be seen as synonymous.[137]The **Ethio-BITs** in particular provisions dealing with NT clauses were not provide with limitation, that means, neither "Like circumstances, nor like situation" which is most of the time assumed as *appropriate comparator*.SADC Model BIT Template provides a provision on NT and accordingly, recognized broad definition for appropriate comparator, which is commonly known as like circumstances.

Pursuant SADC Model BIT Template…*each State Party shall accord to Investors and their Investments treatment no less favorable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.*[138]

For greater certainty, references to "like circumstances" ……..require an overall examination on a case-by-case basis of all the circumstances of an Investment including, inter alia:

(a) Its effects on third persons and the local community;

(b) Its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;

(c) The sector the Investor is in;

(d) The aim of the measure concerned;

(e) The regulatory process generally applied in relation to the measure concerned; and

(f) Other factors directly relating to the Investment or Investor in relation to the measure concerned.[139] As we can see that SADC Model BITs Template is broad in providing the definition for "like circumstances". Indeed, it provided with illustrative listing for the definition of like circumstances.

According to an OECD report, among the most important matters to be considered are "whether the two enterprises are in the **same sector;** the impact of policy objectives of the host country in particular fields; and the motivation behind the measure involved.[140] The Ethio-BITs subject to this study were blanket type for appropriate comparator of sectors; we could far reaching negative implications to domestic investors and investments.

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[137] See supra note 4 above at p.33

[138] South African Development Community (SADC) Model Bilateral Investment Treaty Template, 2012,

[139]. Ibid. Article 4.2

[140]. See supra note 4 above at P.33

On this issue, GetahunSeifu said, "*Such a blanket provision makes the implementation of the provision difficult as an investor could claim such treatment in sectors where he is not investing, i.e. an investor investing in the leather industry could claim a nondiscriminatory treatment given to an investor engaged in the mining sector despite the fact that they are not operating under like circumstances.* "[141]

According to jurisprudence of the investment arbitration, there are three steps applied to the examination of national treatment. First, the tribunals examine whether the foreign investors and domestic investors are placed in a comparable setting (i.e., "in like circumstances" or "in like situations"). [142] Second, the tribunals examine whether the treatment accorded to foreign investors is at least as favorable as the treatment accorded to domestic investors. Third, the tribunals examine whether the differentiation by the host State can be justified by a legitimate regulation or any other reason.[143] Indeed, absence of the comparable setting will open larger loop hole and would most probably end up in different comparable setting which could be a strange.

Due to this consequences, *GetahunSeifu*, further argues "It is strongly advisable to include the condition of "*in like circumstances*" to national treatment provisions as it at least indicates possible comparison within similar sectors thereby tightening the scope of the treatment."[144]

On similar basis, the researcher also support that the inclusions of *"like circumstances*" to National Treatment provisions of **Ethio-Austria, andEthio-Airland, Ethio-Kuwait, Ethio-Germany** including to those BITs subject to this research so as to strike the balance of interests of Domestic investors with foreign investors operating within similar sectors and in effect in order to mitigate the potential negative implication it mighthave in general.

According to, UNCTAD, "*no less favorable treatment*" formulation leaves open the possibility of subjecting host country actions to review in accordance with standards of treatment that may be in practice more favorable for foreign, as compared to national investors. This may occur where standards of treatment accorded to national investors who are in situations comparable to those of foreign investors fall below international minimum standards.[145]This is prejudicial to the investor of the host state and investments as well.

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[141] .see supra note 25 above at p.14(emphasis added)

[142] See supra note 7 above at p.11

[143] .ibid

[144]. Ibid.

[145] .See Ibid. pp. 37

Though, the scope of activities of the national investors to be compared with those of a claimant remains Controversial;[146]as to the circumstances under which different treatment is allowed under **NAFTA, S.D. Myers v. Canada**stated that the assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.[147]

From this, excerpt we can understand that, unless the investment agreement (either, regional or BITs) is inclusive of appropriate comparator, that means, phrases, "*like circumstances or like situations"* it is difficult to make regulation for the purposes of public interest.

3.2.3. Interpretation of National Treatment by Investment Tribunals.

Most modern BITs include national treatment provisions that require signatory nations to provide foreign investors and investments with treatment "*no less favorable*" than they accord inlike circumstances or situations to their own investors and investments. Investor-state disputes involving national treatment provisions in BITs are resolved by arbitral tribunals organized under the rules of various organizations, most often the International Centre for Settlement of Investment Disputes (ICSID).[148]Like the WTO Appellate body in approaching GATT Article III, investment tribunals applying national treatment have addressed two central questions: (1) which domestic investments should become the foreign investment, and (2) what constitutes "*less favorable treatment*" of a foreign investment in violation of the provision. Also like the WTO Appellate Body, investments have ultimately struggled with the importance of creating a test that can parse discriminatory measures from those with legitimate regulatory objectives.[149]

In determining which foreign and domestic investments should be compared, the tribunals have departed from trade law's national treatment precedents and have their own somewhat conflicting tests. Investment treaties usually require a comparison of treatment afforded to investments "*in like circumstances" or "in like situations*."[150]The unique nature of the national treatment test in international investment law was illustrated by the arbitration tribunal in the **Methanexvs**

[146] .See supra note 27 above at p.3.
[147] .Ibid.(Emphasis added)
[148].Nicholas DiMascio and JoostPauwelyn, Non Discrimination in Trade and investment treaties: Worlds Apart or the two sides of the same coin? The American Journal of International Law, Volume No.1 (2008) p.71.
[149] Ibid.
[150]. Ibid

USAdecision under the investment provisions in the North American Free Trade Agreement (NAFTA).[151]

Methanexwas a major test of the meaning and scope of Article 1102 of NAFTA on national treatment. The key issue was the meaning of the phrase "*in like circumstances*," which defines the scope for comparison of domestic and foreign investors under Article 1102, because a NAFTA investor can only seek "*no less favorable*" treatment when compared to domestic investors (or other foreign investors under the most favored nation treatment clause) with which it is in like circumstances.[152]

When the foreign investor is compared with the domestic investor, is it necessary to identify a domestic investor who is in exactly the same business, or is it sufficient to point to an investor who is not in the same line of business but in the same economic sector? How do we define "business" and "sector" in this context?*Professor Rudolf Dolzer* stressed that, recent case law does not answer all these questions.[153] **In Occidental v Ecuador**case the issues whether comparators are only sought in the same Economic sector. The case was concerned a dispute of about a reimbursement of a value added tax paid by the claimant on purchases required for its activities, including export in the field of oil production.[154]

The tribunal had to apply a provision in a BIT that provided a national treatment "*in like circumstances.*" Theclaimant argued that Ecuador had breached this obligation because a number of other companies involved in export of other goods particularly, flowers, mining, sea food products, had received VAT refunds. The tribunal rejected the contention that national treatment would apply only to those industries or companies involved in the same sectors of activities.[155] The tribunal said that," in like circumstances" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as to compared to local producers.[156]

Thus, as opposed to**Feldman v. Mexico,** "*in like circumstances*" was interpreted to refer to the same business, i.e. the exporting of cigarettes, the Tribunal in **Occidental v. Ecuador** referred to

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[151]. See Supra note 11 above at p.5

[152] See supra note 27 above at p.2

[153]. Ibid

[154]Christoph H. Schrever, protection against arbitrary or discriminatory measures,(2d edition, Cambridge University Press, 2009) p.195

[155] .ibid

[156] *.ibid*

local producers in general, "and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[157] At the end the tribunal found that Ecuador breached its obligation under the provision guaranteeing of national treatment.[158]"*Over the past five years, the most contentious issue concerning the significance of the overall legal context concerned the relevance of WTO law and its jurisprudence on "like products" for the interpretation of a BIT*."[159]……NAFTA decisions in **S.D. Myers, Pope& Talbot v. Canada and Feldman v. Mexico** seemed to assume that the relevant WTO jurisprudence was indeed suitable to guide NAFTA tribunals.[160]

In ***Methanex,*** however, the Tribunal expressly rejected the general appropriateness of directly applying trade law concepts to investment law obligations, opting instead for a much narrower and more refined approach in which it required a comparison to other existing domestic investments in the *same situation*."[161]Clearly stated, most recently, the NAFTA tribunal in the **Methane**x dispute rejected the direct use of trade law "likeness" tests, including their focus on the competitive relationship between domestic and foreign companies. It emphasized that NAFTA Chapter 11's goal of protecting individual investors from injury, along with its use of the phrase "*inlike circumstances*"indicated the "intent of the drafters to create distinct regimes for investment.Further noted,in the major investment disputes have also decided that…"*in like circumstances*" test, only foreign and domestic investments that raise similar policy concerns should be compared.[162]

In considering whether Methanex was "*in like circumstances*" with domestic ethanol producers, the tribunal agreed that the function of NAFTA Article 1102 is to eliminate discrimination based upon nationality.[163]The **methanex**tribunals, instead of applying the business or economic test, it decided that the ideal comparison is with a domestic investment "*that is like investment in all relevant respects, but for nationality of ownership.*" Any different treatment between identical investments could be presumed to be attributed only to investment's nationality. The tribunal concluded that it would be "perverse" to identical investments where they exist, and therefore

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[157]. See supra note 27 above at p.2
[158] See supra note 154 above at p.195.
[159]. See supra note 27 above at P.4
[160].Ibid
[161] Nathalie Bernasconi-Osterwalder and LiseJohanson(Editors), International investment laws and sustainable Development, key cases, 2008 P.84&85.
[162]. Id p.72
[163] .Id.P.75

decided that the effect on the MTBE ban on **Methanex**was to be compared only to its effect upon domestic methanol producers,[164]butcould not be with Ethanol producers.

In sum, every major interpretation of the "*in like circumstances" or "in like situation" language in the national treatment provisions of investment agreements* has rejected the emphasis on alteration of the conditions of competition (the "*competition test*") in favor of a test that focuses on whether an alleged discrimination is effectively based upon nationality rather than some other policy reason (the "*regulatory context test").*[165]

The tests devised by investment tribunals have differed along several important factors. Most apparently tribunals have taken various positions on the breadth of the domestic investments to be compared. At one extreme, the Occidental tribunal compared all foreign and domestic exporters. At the other extreme, the ***Methanex*** tribunal compared only identical foreign and domestic exporters. The majorities have fallen between these two extremes, comparing foreign and domestic investments in the same business or economic sector based upon the presumptionthat such investments raise similar public policy.[166] From these discussions, based on decisions of the different tribunal it is possible to understand that,there is no comprehensive and binding decisions, but at least all of them were interpreting "national treatment clause with particular emphasis of like circumstances." At least it is possible to understand that, the interpretation have been given case-by case, than clear cut interpretation. Be this may as it is, it isimportant to inculcating the comprehensive National Treatment clauses with qualification of like circumstances as far as domestic Investors interest is concerned.

3. 3Determining the Scope of National Treatment Clauses in relation to Investor and Investments.

3.3.1. What Investment is a Beneficiary in "National Treatment Clauses?"

The principal beneficiaries of national treatment are "investments and investors." The scope and definitions of these terms varies depending on the parties negotiating the agreement. In the context of a national treatment provision, the question of whether the beneficiaries of the standard are foreign investors only or include also foreign investments can have important implications.[167] In what follows, the researcher would like to consider the stance of Ethio-BITs

[164] *Ibid*
[165] ibid
[166] *Id. P. 76*
[167]Supra note 1 above at p. 164.

premised upon the scope of protections available through treaties to "investments and Investors," including the relationship these context would have with National Treatment Clauses

Indeed, the agreement between Japan and Mongolia, on NT provision seems expressly incorporates investors and investment at once under single provision. Thus, it reads:

"Investors of either contracting Party shall within the territory of the other Contracting party be accorded treatment no less favorable than that accorded to investors of such other Contracting Party in respect of investments, returns and business activities in connection with the investment.[168]in the similar fashion to **Japan Mongolia** investment agreement, **Ethio-Algeria** BITs defines NTclauses as it is inclusive of both investor and investment of the investor under article 4/1/2. Thus, it reads as follows*:*

1) Once an investment is admitted in accordance with the legislation of a Contracting Party in the territory of which the investment is made each Contracting Party shall accord to the investors of the other Contracting Party, with respect to their investments, a treatment not less favorable than that granted to its own investors, or investments of investors of third State.
2) Each Contracting Party shall accord to the investors of the other Contracting Party as regards to management, maintenance, use, enjoyment or cessation of their investment on the territory, a treatment not less favorable than that it grants to its own investors or to the investors of any third State.[169]

Under Ethiopian Investment agreement, the definition of "*Investment*''has broadly constructed, for example, **Ethio- Algeria BIT**[170]**, Ethio-Kuwait BIT**[171]**, Ethio-UK. BITs,**[172]is largely noticeable one.In this case**,** once an investment is admitted in accordance with the legislation of a Contracting Party in the territory of which the investment is made each Contracting Party shall accord to the investors of the other Contracting Party, with respect to their investments, a treatment not less favorable than that granted to its own investors, or investments of investors of third State.[173]

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[168] Agreement between Japan and Mongolia concerning the promotion and protection of investment signed 15 February, 2002.(Emphasis added)

[169].supra note 134

[170].Ibid. article 1.

[171].See supra note, 134.

[172]See supra note 29.

[173] See ibid.

Indeed, **Ethio-Libya** Arab Jamahiriya BITs, defines, "Investment" as **every kind of asset invested** by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter and in particular, though not exclusively, includes;

a) Movable, immovable property and other property rights such as mortgages and pledges;

b) Shares, stock and any other kind of participation in companies;

C) Claims to money or to any other performance having an economic value;

d) Copyrights, industrial property, know-how and technological process;

e) Concessions conferred by law, includes searching for or exploiting natural resources.[174]

As seen from this provision on definition of investment, it is quite clear that, *"investment*" is defined as "*every kind of assets Invested*." This kind of phraseology in constructing BITs will raise legal issues not contemplated by the contracting parties; it will result "*no less favorable treatment*" claims by foreign investors under international investment tribunal and in effect impede "*regulatory power*" of the sates. In another word, the definition provided by Ethio-BITs could not clearly identify FDI and foreign portfolio investment.

BekiHaile, stressed that, Other than one BIT, "almost all BITs of Ethiopia under analysis neither defines portfolio investment nowhere nor excludes it expressly or impliedly. There are some techniques of limiting or narrowing the broader interpretation of investment in general and excluding portfolio investment in particular.

These techniques are: excluding portfolio shares by expressly or impliedly attributing the definition of investment to direct investment only, exclusion of debt securities from the scope of investment definition, using the closed list or enterprise definition approach, putting the objective factors for the definition of investment and other"[175]And none of these techniques are employed under the **Ethio- BITs** except under the Ethio-Turkey BIT.[176]

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[174].Agreement between the government of the federal democratic republic of Ethiopia and the great socialist people's Libyan Arab Jamahiriya concerning the encouragement and reciprocal protection of investments, signed 27 January, 2004**.**

[175].Beki Haile, The protection of foreign portfolio investment in Ethiopia: A Critical Analysis of the BITs andPractices,(LLM Thesis presented to Jimma University, un published, June, 2016)

[176] ibid

3.3.2. Implementation of National Treatment Clauses to Investors.

3.3.2.1. Which Foreign Investors?

As raised above, the definition of investor is very important to determine which investor could have been granted the benefit of BITs- National Treatment or otherwise. In other word, the definition of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements.[177] Investor addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude "treaty shopping." This occurs when investors adopt location choices as their Home State, where no substantive business is actually done, for the sole purpose of taking advantage of investment and/or taxation treaties.[178] Under the definitional part, **Ethio-Kuwait** BIT defines, "Investor" as follows:

A/ A Natural person holding the nationality of that contracting states in accordance with its applicable law; and

B/The government of that contracting states, and any juridical person or other entity legally constituted under the laws and regulations of that contracting states, such as Institutions, authorities, development funds, establishments, agencies, enterprises, cooperatives, partnerships, corporations, companies, firms, organizations, business associations, and or similar entities irrespective of whether their liabilities are limited or otherwise; and any entity established outside the jurisdiction of the contracting states as a juridical person, which such contracting states, or any of its nationals or any entity established within its jurisdiction owns or controls.[179]

The term "own" or "control" shall mean to include full or majority ownership or control exercised through subsidiaries or affiliates wherever located in a contracting state or any third state.[180] This agreement in particular, provides quite clear criteria, that is, regardless of the identity of the investor, the investor should "own" or "controlled" the company. Pursuant this agreement foreign investors who has controlled, would have the right to benefit from the protection of the agreement particularly on provision of NT; thus, Ethiopia as a contracting

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[177].OECD, Definition of Investor and Investment in International Investment Agreements,(OECD, 2008), Chapter 2, p.7.

[178] See supra note 138.

[179] See supra note 134 art. 2

[180].ibid.

parties to a treaty could provide foreign investors "*no less favorable treatment*" relative to, it treat its own investors.

Hence, article 4/2 of **Ethio-Kuwait** on provision of NT, elucidates, Each contracting states shall accord investors of other contracting states, as regards any activities carried on in connection with their investment including, management, maintenance, use, enjoyment, disposal, compensation of such investment "*treatment not less favorable"* than that which it accords to its own investors or to investors of any third states, whichever is most favorable.[181]

Tribunals have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person, unless the test of control is provided for in the agreement. Accordingly, it is the general practice in investment agreements to specifically define the objective criteria which make a legal person a national, or investor, of a Party, for purposes of the agreement. When the objective criteria used may include investors to whom a Party would not wish to extend the treaty protection, some treaties include "**denial of benefits**" clauses allowing exclusion of investors in certain categories.[182]

Ethio-Kuwait, provides, as it stands now, is susceptible to give protection of BITs-NT right for Ethiopian Nationals. Besides, it will causes international arbitration tribunals to hold jurisdiction, in case Ethiopia failed to fulfill her obligation, particularly on NT clause probably with her citizens.Some BITs provide exemplary role in excluding varieties of investors from the protection of agreements, in this case protection against discrimination. For instance, American Model BIT prohibits Protection, for a person having dual Nationality.

*It defines **investor of a Party** as a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*[183]

Pursuant American Model BITs, it has excluded protection of investment, particularly, BITs-NT privileges. This saves a country not to stand defending claims with its citizens at international investment tribunals. On the same basis Ethiopia should rigorously negotiate in excluding Nationals not to be assumed as foreigners. Further, Pursuant article 17 of American BIT Model

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[181] See supra note 134.
[182] See supra note 177 above at p.8
[183] See American Model BIT, 2004; supra note 105 article 1102(1) and (2) (emphasis added).

provided with "denial of benefit clauses" depending on objective criteria,[184] as opposed to Ethio-BITs. Here also, Ethiopia has to make the negotiation better, and correct by limiting the protection provided, as it stands now for 3rd party investors**.**

3.4. **Pre-establishment vis-a-vispost establishment of national treatment rights under Ethio-BITs.**

Most BITs provide expressly that they apply only for post-establishment or post entry stages of investment. The majority of bilateral investment agreements do not include binding provisions concerning the admission of foreign investments.[185] In other words, one remarkable difference in national treatment exists between "pre establishment" and "post-establishment." The former means the application of NT obligation before, or at the time of the establishment of the investment. In this case, the host State is obliged to guarantee market access to foreign investors at the same level as domestic investors.[186] Atypical example of this is found in Article 1102 of NAFTA, which states the following;

"1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[187]

Article 1102(1) stipulates on "investors" and Article 1102(2) relates to "investments." Both paragraphs use the same expression of "*in like circumstances*" and apply to the same mode of investment (i.e., at the moment of "establishment and acquisition" of investment (pre-establishment) and "expansion, management, conduct, operation, and sale or other disposition" of investments (post-establishment)). The pre-establishment national treatment is one of the means of "liberalization" of investment by way of opening the domestic market and allowing market access.

JCK (Japan, China,and Korea) treaty admits the applications of NT to both "*investments" and "investor* "in the same way as article 1102(1) & (2) of NAFTA (National Treatment). Art 3 of

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[184]Ibid, article 17
[185] See supra note 25 at p.14
[186] See supra note 7 at P.8
[187] North American Free Trade Agreement, signed 17 Dec. 1992, Article 1102 (1) &(2).

the treaty adopts the same criteria as that of NAFTA (i.e., "in like circumstances"). Further, the national treatment can be applied only to "*investment activities*,"[188]defined in Art 1(5) ofthe treaty, which states that "the term investment activities' means management, conduct, operation, maintenance, use, enjoyment, and sale or other disposition of investments.[189]

Furthermore, according to *Tamada Dai, "*The JCK, trilateral agreement does not contain Pre-establishment right, it only guarantees Post establishment phase. This is reflection of the preamble, which states: Recognizing that the reciprocal promotion, facilitation and protection of such investment and *the progressive liberalization ofinvestment* will be conducive to stimulating business initiative of the investors and increase prosperity among the Contracting Parties. According, to him since it does not contain Pre establishment, it is clear that, the JCK trilateral investment treaty is not an investment liberalization treaty but merely an investment protection treaty."[190]

As easily inferred from this, BITS-providing post establishment phase of National treatment does not believed to be guaranteed investment liberalization commitment. Developing countries fear that a problem comes from extending such right.Most of the time seen that, pre- establishment phase, is guaranteed by capital exporting countries. Coming to Ethiopia's BITs, the question we could have raised might be,at what stage of the investment process does **Ethio-BITs-** on national treatments apply? In order to answer this question, one should go to analysis Ethio-BITs-signed with other countries.

Article 4(1) and (2) **of Ethio- Algeria, Ethio-Germany BITarticle 3(1)& (2)and article 3(2) of Great Britai**n and **Northern Air land (UK)** respectively runs as follows:

1) Once an investment is admitted in accordance with the legislation of a Contracting Party in the territory of which the investment is made each Contracting Party shall accord to the investors

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[188] See supra note 134.Pursuant article 6(1) of **Ethio- Ethio**-Kuwait Bilateral Investment Treaties, "related the concept to associated activities." And thus, the term "associated activities" shall mean, activities connected with an investment and shall include without limitation, such activities as, a) the establishment, control and maintenance of branches, agencies, offices or other facilities for the conduct of business.

(b) the organization of companies, acquisition of companies or interests in companies or in their properties, the management, control, maintenance, use, enjoyment, expansion and the sale, liquidation, dissolution and other disposal of companies organized or acquired.

[189] .see supra note 7 above at p.9.

[190] Ibid.

of the other Contracting Party, with respect to their investments, a treatment not less favorable than that granted to its own investors, or investments of investors of third State.

2) Each Contracting Party shall accord to the investors of the other Contracting Party as regards to management, maintenance, use, enjoyment or cessation of their investment on the territory, a treatment not less favorable than that it grants to its own investors or to the investors of any third State.[191]

3(1)&(2) of Ethio Germany BIT, provides the clear stage of investment process stating "once an investment is admitted in accordance with the applicable laws of the respective Contracting party……. shall accord to this investment no less favorable treatment than that accorded to investments of its own investors or to investments of investors of any third State. Besides, sub-article two of the particular BIT relates to investment activities including management, maintenance, use, enjoyment and disposal of their investments in its territory, to treatment less favorable than it accords to its own investors or to investors of any third States.[192]

Article 3(2) of Ethio-UK (Great Britain);

2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.[193]

As infer from the construction of these**Ethio- BITs**, and hence the use of the economic activities like, managements, maintenance, use, enjoyment disposal, compensation of such investment, and so forth signals the application of post-establishment investment process. The problem those agreement encounters seems, it is a devoid of "like circumstances" or "like situations" as the case may be. As we have seen above the NAFTA article 1102 and JCK article 3 maintains with the limitation of the same that means, the agreement provided with "like circumstances."

*H*owever, some BITs do not provide expressly as to, at what stage a foreign investor will be protected. The BIT between Ethiopia and China is a good example. When, there are occasions

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[191] See supra note 135 article 4(1)&(2).

[192] Treaty Between, the Federal Democratic Republic of Ethiopia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection concerning the Encouragement and Reciprocal Protection of Investments, 29 January, 2004 article 3(1)&(2)

[193] See supra note 29 at article 3/2.

BITs provisions failed to identify the stage of investment process, *GetahunSeifu said* "*in such circumstances, resort to interpretation of some provisions of the specific BIT becomes necessary.*"[194]

Most BITs define investment; including investments made in accordance with the laws and regulations of the other parties. They also subject "admission of foreign investment in accordance with laws and" [195] regulations of the parties, while others sometimes add in accordance with their general policy frame work. However, such construction of BITs is general since it could not identify which law of country would apply. So making the commitment very clear is significantly important in this case.

3.5. Regulation of foreign Investment under Ethio-BITs and Domestic laws

3.5.1 Regulation of foreign investment under Ethio-BITs.

Under customary international law, the autonomy and ability of a State to regulate such inward foreign investment flows arises out of its sovereignty. As such, there is no right of admission or right to invest in a foreign country. States retain the power, at least theoretically, to determine which foreign investors or investments to allow, under what conditions, and in what sectors.[196]

This can be either expressly providing state reservation within states contract/investment agreement or through, the laws and regulations of domestic investment in order to govern the matters of investment; in doing so it gives the parties right to regulate foreign investment. For example, "The OECD National Treatment instrument permits distinctions of treatment for foreign affiliates consistent with the need to maintain public order, the protection of essential security interests and the fulfillment of commitments to maintain international peace and security. The interpretation of these exceptions in concrete situations is left to the member countries, although the need was recognized to apply them with caution, bearing in mind the objectives of the National Treatment instrument; in other words, they should not be used as a general escape clause from the commitments under this instrument."[197]

For members of OECD, deviations from NT clause, in relation to public policy matters, i.e., national security, maintain public order, the protection of essential security interests and the

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[194] See supra note 25 at p.15.

[195] Agreement between the FDRE and the kingdom of Denmark concerning the promotion and reciprocal protection of investments,22 April 2001.

[196] See supra note 123 at p.100

[197].see supra note 29 above at **P.43.**

fulfillment of commitments to maintain international peace and security are the justifiable defenses. Besides,NAFTA agreement specially, article 2102 contain the regulatory frame works for foreign investment. However, as regards exceptions to national treatment, the main approach is to use subject-specific and industry-specific exceptions.[198]

The standard of national treatment is an important principle for foreign investors, but it may raise difficulties for many host countries, since such treatment may make it difficult to foster the growth of domestic enterprises. This is especially the case for developing countries, since their national enterprises may be particularly vulnerable, especially visà-vis large TNCs. Indeed, host Governments sometimes have special policies, and program that grant advantages and privileges to domestic enterprises in order to stimulate their growth and competitiveness. If a national treatment clause in an IIA obliges a host country to grant the same privileges and benefits to foreign investors, the host Government would in effect be strengthening the ability of foreign investors to compete with local business.[199] Thus, the development exception to BITs provision on NT would give the host states flexible policy spaces in order to promote the domestic investment.

3.5.2. What about flexible policy space available for Ethiopia?

BITs, signed by Ethiopia would not provide with exceptions of sector or "*negative listing*" of sectors against NT clauses. Rather, the agreement generally leaves "Each Contracting Party to encourage and create favorable conditions for nationals or companies of the other Contracting Party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, admit such investment."[200] Departed from this, however, most BITs were maintained exception to BITs- NT in relation to custom union, and/or Free Trade areas, including, security exceptions as it provided by **Ethio-UK** BITs. **Ethio-UK** BIT Exceptions to NT, generally, stipulates as follows:

The provisions of this Agreement relative to the grant of treatment not less favorable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order. Hence, nor shall

[198]See North American Free Trade agreement, supra note 187 aboveart. 2102

[199] see UNCTAD VOL.14 Supra note 4 at P.47

[200] See supra note 29 above article, 2(1).

these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:

- ✓ Any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement to which either of the Contracting Parties is or may become a party, and includes the benefit of any treatment, preference or privilege resulting from obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area; or
- ✓ Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or
- ✓ Requirements resulting from the United Kingdom's membership of the European Union including measures prohibiting, restricting, or limiting the movement of capital to or from any third country.[201] Pursuant article 4 of **-Ethio-FinladBIT**also provides the broadest rights as possible in relation to exception,[202] which presumably gives the government of Ethiopia the regulatory power on foreign investment.

As easily understand that, **Ethio-UK** BITs is one of the broadest exceptions provided. That means, security exceptions, Free Trade integration exceptions, taxations, including payments and capital movements. In this case, it's provided that the contracting state parties would have regulatory power through exceptions to BITs-National treatment clauses. Thus, it is paramount importance, to inculcate such broad exceptions to all others **Ethio-BIT** so that the country would have ample investment regulatory power.

3.5.3 National Treatment Restrictions under Domestic Investment Laws

3.5.3.1 Theinvestment areas reserved for Domestic Investors.

For every sectors are not bound to opened under IIA, for sectors covered by separate legislative frameworks, screening mechanisms do exist, for example, in areas such as air and maritime transport, banking, financial services, and fishing. This is true under the Central European Free Trade Agreement …of 2006.[203]

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[201] .Ibid, article 7

[202].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 23 February, 2006

[203]See supra note above 19.

BITs and Domestic investment laws are complementary to one another. As entertained above, **Ethio-BITs** do not provide exception to sectors reserved for domestic investors, but, one of the BIT, provided flexible policy space for the states, in the interest of domestic investors. Indeed, article 3(3) of **Ethio-Israel** BIT "seems to establish such broader freedom as, save in the case of compensation and repatriation of investments and returns, the parties are free to use differential treatment to grant rights and privileges for their own investors."[204]

Pursuant this agreement, Ethiopia would have the right to impose restriction on foreign investors and in effect deviate from the very clauses of NT-principle. Actually, while some investment areas where exclusively reserved for government, others where for joint and in partnership with government and/or with domestic investors as requirements as provided.

For the matter of clarity, some of investment areas exclusively provided for the government are, postal services (except courier services), Transmission and supply of electrical energy through the Integrated National Grid System, and Passenger air transport services using aircraft with a capacity of more than 50 passengers. However, Production of weapons and ammunition, including, the Telecommunication services are allowed for Joint-venture investment with the government.[205] Also, investment areas exclusively reserved for Ethiopian nationals so include, Banking, insurance, micro-credit and saving services, Broadcasting and mass media services, attorney and legal consultancy services, preparation of indigenous traditional medicines, advertisement, promotion and translation works, domestic air transport services using aircraft with a seating capacity of up to 50 passengers; andPackaging, forwarding and shipping agency services. [206] These investment areas where reserved for domestic investors, provided that, business organization having Ethiopian nationality and the capital is fully owned by Ethiopians.[207]

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[204] .Agreement Between Federal Democratic Republic of Ethiopia and The government of the State of Israel for the reciprocal promotion and protection of investment, 26 November, 2003 article 3(3)

[205] www.ethiopian embassy.org/pdf/Ethiopian –Investment Guide 2015 PDF. accessed 6/4/2017 at 10:37 Local Time

[206].Investment incentives and Investment areas reserved for domestic investors Councils of Ministers regulation No 270/2012 (as amended by No 312/2014) article 3(1).

[207] Ibid. article 3(2).

Ethiopian Investment Guide to 2015, [208] proclaims the specific investment areas where exclusively reserved for domestic investors. Indeed, the Ethiopian new investment regulation provides the same thing, though not clearly. These areas, since it was reserved for domestic investors, it was not allowed to participate for foreigners provided that, the foreign nationals of Ethiopian origin are not intended to be treated as domestic investor.

As far as, "*domestic investors*" it refers an Ethiopian national or a foreign national treated as a domestic investor as per the relevant law, and includes the government, public enterprises as well as cooperative societies established as per the relevant law.[209] In other words, domestic investors, is an Ethiopian national, or foreign national having Ethiopian Origin, but interested to be treated as Ethiopian National would have the right to invest in areas reserved for "domestic investors." In relation to citizens having Ethiopian origin, such strategy seems to be opted by Ethiopian investment legal frame work, meant to enable foreigners of Ethiopian origin let them "*contribute to the development and prosperity of the peoples and country of their origin, provided the legal restrictions pertaining to the enjoyment of certain rights and privileges are lifted*."[210]

Further note that, restrictions imposed on foreign nationals regarding the utilization of economic, social and administrative services shall not be applicable to foreign nationals of Ethiopian origin holding the identity card.[211] Thus, the national treatment clauses, pertaining to "*no less favorable treatment*" could not apply between foreign investor and foreign national of Ethiopian origin, had foreign investor of non-Ethiopian origin claimed, no less favorable treatment clauses maintained by Ethiopia's BITs.

On the contrary, Ethiopians permanently residing abroad and opted to be treated like "foreign investor" would be treated as he/she is foreign and perhaps, has no right or privileges to engage *"in investment areas reserved*" for domestic investors. In these cases, Ethiopia has no obligation to treat as Ethiopian national. Besides, no national treatment clauses apply, since the investment area was excluded from national treatment obligation in advance through domestic investment

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[208] See supra note 205 above. Besides, see councils of ministers regulation no. 270/2012 as (amended by regulation No 312/2014) article 4(1) (2) also provides similar approach.

[209]Investment Proclamation no.769/2012, (as amended), Federal Negarit gazette, 18th year No. 63, ADDIS ABABA, September, 2012.

[210] .Preamble of proclamation No 270/2002 providing foreign Nationals of Ethiopian Origin with certain right to be exercised in their country of Origin, Neg. gaz.8th year No. 17, ADDIS ABABA, 5th February, 2002,Pharagraph 3.

[211]. Ibid. article 3(2).

laws and regulations as far as the investor is foreigner or opt to be treated as a foreigner. Pursuant article 2(6) of Ethiopia's investment proclamation No.769/2012 (as amended by proclamation No 849/2014) defines foreign investor as:

"*Foreign investor" means a foreigner or an enterprise wholly owned by foreign nationals, having invested foreign capital in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor*."[212]

The above restrictions of investment areas to foreign investors, more or less it….. enables host States impose prohibitions on foreign investment in sectors of significant importance such as military, environment and indigenous culture and sectors that threaten local industry.[213]

However, most BITs Ethiopia signed doesn't provide such clearest exception, which provides the privileges to discriminate in the interest of domestic investors in terms of its laws and regulations. As it stands now, it seems that, BITs and domestic investment laws, as to national treatment clauses, is inconsistent, so it must provide with clear power of states to provide reservation by domestic laws and regulations. Arguing in this way, however, the researcher is not asserting that a given or specific investment area could be opened or not, rather what must be clear is consistency of the international agreements(BITs) with Ethiopia's domestic laws, and policies , since those do have an expected implications to the interest of domestic industries.

3.6. National Treatment clauses implications to domestic Investor.

Ethiopian investment regulation provides that, Ethiopian Investment board may allow foreign investors to invest in investment areas reserved for domestic investors, except as provided on article 6(1) and (2) of the proclamation No. 679/2012 as amended by proclamation No. 849/2014) and regulation No. 270 3(2) as amended by regulation No. 312/2014.

These investment areas where sensitive areas, and perhaps thought as though allowed for foreign investor, less transfer of technology would be received, contrary to which the country (Ethiopia) need in areas which transfers technology.

These investment areas where operated mostly by Small scale enterprises and medium scale enterprises, including Cooperative societies considered vital for national development. If these investment areas opened, the national treatment obligation would immediately and equally applies, though at post establishment phase. The Ethiopian investment laws and regulations,

[212] .seeproclamation No.769/2012 supra note 209 above article 2(6).
[213] .See supra note 25 above at p.17.

after wards provide, "*No less favorabletreatment"*[214] between domestic and foreign investors in regard to economic activities, i.e., management, maintenance, use, enjoyment or disposal of their investments. As Ethio-Algeria goes:

"Each Contracting Party shall accord to the investors of the other Contracting Party as regards to **management, maintenance, use, enjoyment or cessation** of their investment on the territory, a treatment "*not less favorable than*" that it grants to its own investors....."[215]

Ethiopia's BITs-National treatment clauses, therefore, not consistent with National policies, Laws and regulations, but, let it's not misunderstood saying in relation to overall polices, laws and regulations. For example, policies and laws existing in relation to Cooperative law deviates, from Ethio-BITs –National treatment-clauses. According to, Ethiopian investment law, the definition of "domestic investor," embodies co-operative societies, so that at least the national treatment accorded for co-operative societies would be granted for foreign investors since in the context of national treatment what ought to be compared, or relatively seen is both investors. "Domestic investor" is an Ethiopian national or a foreign national treated as a domestic investor as per the relevant law, and includes the government, public enterprises as well as cooperative societies established as per the relevant law.[216]

Whereas cooperative society's establishment proclamation defines, cooperative society as, "Cooperative Society" means a society established by individuals on voluntary basis to collectively solve their economic and social problems and to democratically manage same.[217] In the context of these, definitions we found that, itt is "domestic investors" with whom we compare with foreign investors, to determine how they could be treated with each other.

In accordance with ***Ethio-Algeria*** BITs, in an occasion of un comparable setting" that is for one thing, foreign investor claim, better advantages given to those sector within which actually they are not operating/ involved, on the other thing, it might consequentially, have adverse implications for those domestic investors/the cooperative societies, getting the advantage- anti competitive investment would flourish. Investment laws in Ethiopia, depending on the national

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[214] .See UNCTAD, world investment Report, FDI Policies for Development: National & International perspectives (United Nations New York &Geneva, 2003). Chapter, 4 P. 108

[215] See Ethio-Algeria BIT, Supra note 135 article 4(2).

[216] See Investment proclamation supra note, 209 above article, 2(5).

[217].Proclamation to provide for the establishment of cooperative societies(as amended) No. 147/1998 Federal neg. gaz. 5th year No. 27 ADDIS ABABA, 29 dec. 1998, section 2 article, 1.

need and progress, provide incentives in order to promote investment; these incentives includes, but not limited to, income tax exemption, custom duty exemption, loose carry forward, which all can be referred to as " fiscal incentives."[218] Although, principles of national treatment applied here, however, a problematic one for National treatment clauses would appear due to government assistance for cooperative societies in general

3.6.1 Government Assistance to Domestic Investors.

Every government has a sovereign right toin hence and ultimately develops domestic Infant industry/ enterprises; in this regard, Ethiopia has pursued "*differential treatment*" more expressly, in the case for co-operative societies. The legal frame work inculcating government assistance presented as follows:

*"*1) without prejudice to incentives permitted under Investment laws and other laws, societies which are organized and registered under thisProclamation shall be entitled to the following:

a) To be exempted from income tax; provided however, members shall pay income tax on their dividends;

(b) To acquire land as determined by a Region or a City accountable to the Federal Government;

(c) To receive other assistance from the Federal Government or Regional Government or City administration accountable to the Federal Government.

2) An institute responsible for promoting cooperative movement, rendering man-power training and conducting studies and research shall be established." [219] As easily infer from this proclamation, it is the widest right accorded for domestic investor, namely cooperative societies. In effect , government assistances as per it provided in this proclamation, is intended to enable cooperative societies to actively participate in the free market economic system,[220] otherwise of which it was impossible to with stand the competition of foreign investor had equal favorable treatment was administered.

In the countries, were Infant Industries significant in an economy, like Ethiopia, differential treatment was in evitable. According to UNCTAD, faced with foreign affiliates that have

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[218] .see supra note 206 above .Councils of ministers regulation No 270/2012, is provided for the frame work for fiscal incentives, for instances, income tax exemption for new established enterprises and for exportation of products(which is additional) in this instances, these can be inferred pursuant article 5, 6 &7 including fiscal incentive presented for upgrading of existing enterprises.

[219] .See supra note 217 Section V.

[220] See ibid.

recourse to the skills, capital, technology and brand names of parent companies, local firms may not be able to build such capabilities. They may then be forced to withdraw to less complex activities or those with a lower foreign presence- perhaps selling their earlier facilities to foreign entrants, as happened in the automotive components industry in Brazil and Mexico.[221] However, protecting infant domestic entrepreneurs (and infant industries) is sound only if protected enterprises become fully competitive within a reasonable period.[222]

It is conventionally, believed that, foreign investment (FDI), would have positive spill over; on this issues, the world Bank guide line recognized that "a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade."[223]

These thoughts of positive spillovers might be intended to in courage foreign investment, however, the striking balance is important; without losing the benefits of FDI, maintaining ample regulatory power is fundamental one. Accordingly, the WB guide line ……declares, *"equal treatment of investors in similar circumstances and free competition among them*" are prerequisites of a positive investment environment. In these Guidelines therefore, suggests that foreign investors should receive no a privileged treatment denied to national investors in similar circumstances." [224] As already raised in this paper, Ethio-BITs-NT clauses and domestic investment laws would not provide consistent way of doing things, since the NT clauses are very vague and ultimately result foreign investor be treated " *either in equal manner or in better manner*" than domestic investor. For Ethiopia, the key matter to be re-considered would be to reconstruct stance of **BITs-NT**-clauses, by inculcating either *"likesituations, or like circumstances*" at least to create comparison of sectors or industries or government measures deemed necessary to apply to the beneficiaries, domestic and foreign investor.

Furthermore, the other way forward should be the inclusion and perhaps to consider through "*maintaining development clauses*" in order to justify differential treatment, on the basis of BITs-National Treatment exceptions. In relation to this, there was a debate during the

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[221] UNCTAD, world investment Report, FDI Policies for Development: National & International perspectives (UN. New York &Geneva, 2003). Chapter 4 P. 10

[222] Ibid

[223] **.Preamble of World Bank Guidelines on the Treatment of Foreign Direct Investment, available https://www.italaw.com/documets/World Bank, accessed on 21 may, 2017**

[224]. **Ibid. article I(3).**

negotiations on the draft United Nations Code of Conduct on Transnational Corporations (which was not adopted), a development exception was discussed in relation to national treatment. On the negotiation developing countries where insisted to maintain "*development clauses*" which would accord national treatment of TNCs only when the characteristics of those two types of enterprises were the same and the circumstances under which they operated were also similar to those of domestic enterprises.[225]

Accordingly, for example, Protocol 2 of the BIT between Indonesia and Switzerland allows derogation from national treatment of Swiss investors "in view of the present stage of development of the Indonesian national economy."[226] However, Indonesia would grant "identical or compensating facilities to investments and nationals of the Swiss Confederation in similar economic activities." Similarly, Germany has accepted certain exceptions to national treatment provided these are undertaken for "*development purposes*" only, for example, the development of small-scale industries, and that the measures do not substantially impair investments from a German investor. Jamaica, too, has sought in its BITs to reconcile its growth and development concerns with the needs of foreign investors in reference to the granting of incentives.[227]

Thus, Ethiopia has to re-consider in providing clear exceptions to BITs-in order to be consistent with domestic laws, regulations, policies, that in essence have a bearing with development objectives.

[225] See supra note 14 at. P.48
[226] Id.49
[227] Ibid.

CHAPTER FOUR

Conclusions and Recommendation

4.1 Conclusions

Under this thesis, Ethiopian investment treaties were analyzed in relation to standard of national Treatment and including its implication on domestic Investors. According to UNCTAD, report until 2015 Ethiopia has signed 29 BITs meant to attract FDI. For the matter of this paper, analysis of Ethio- Austria, Algeria, Ethio-Finland, Ethio-UK, Ethio-Germany, Ethio-china, Ethio-malaysia, Ethio-Kuwait, and Ethio-Isreal, includingEthio-Libiya BITs have been undertaken.

In these BITs, the national Treatment clauses are defined in considerably broad manner. Specifically, these BITs construct the language/wording of the NTNo less favorable Treatmentwithout maintain appropriate comparator (blanket type of like circumstances). This would have a far reaching implications in regard domestic investors, as it entails more favorable treatment for foreign investors and investments than domestic investors and investments in economic activities or as regards to management, maintenance, use, enjoyment or cessation in the host states. In light of this, Ethio-BITs under analysis requires better treatment for foreign investors and investments since it did not provided with comparable sectors, as a result of which foreign investor would claim every favorable treatment thought from every sectors of the economy. Besides, a reverse discrimination to domestic investors and investments, Blanket Model of **Ethio-BITs** would considerably narrow the police spaces of the host states in relation to investment regulation.

Countries to reserve their policy flexible, while negotiating their particular BITs designed their language of aspiration to be included; specially, the national treatment analysis usually requires identifying an "appropriate comparator" against which to measure the allegedly less favorable treatment. In fact, in most IIAs, the national treatment clause is stipulated in similar expression (i.e. in like circumstances) in order to limit the application of NT to unlike circumstances. Nonetheless, **Ethio-BITs** under investigations were avoided "*appropriate comparato*r" but, it is

better to inculcate within the ambit of Ethio-BITs-NT clauses while negotiating time ended investment treaties.

Of course, while many argue for maintaining the NT clause in to BITs-agreement, it is in evitable that others would raise it with reservations or totally avoid National Treatment obligation. In this cases, developing countries, including Least developing countries(LDC)fear that the BITs-NT clauses narrows the scope for policies that a state can make in order to promote development within targeted sectors; it creates the fear that investors in entirely unrelated sectors could argue that they have been discriminated against. Due to this, some country avoided provisions of National treatmentor negotiated with reservations.

As the investigations conducted shows, most of Ethiopia's BITs were maintained NT-Clauses. However, among BITs Under analysis, Ethio-China and Malaysia BITs were not maintained the provision of NT. Thus, it might seem that these BITs avoided the fears that, foreign investors in unrelated sectors would argue that they have been discriminated against.

Of course, National treatment is a contingent standard based on the treatment given to other Domestic investors. Most of **Ethio-BITs** under analysis provided the combination of both relative standards and general standards. BITs general standards include principally, fair and equitable treatment, and MFN treatment. Some of **Ethio-BITs** analyzed were maintained the combination of General standard with Relative standards of treatment.

The definition of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements. Almost all, **Ethio-BITs** defines the term investment and Investor, and thus, the extension/ scope of protection under NT clauses would be dependent upon the definition of the two. Nonetheless, **Ethio-BITs** chosen for this research shows that, the broad investment definition it provides and as a consequences, these investments not contemplated by Ethiopia-as a Host State would become investment and eventually receive/claim protection of NT clauses.

The definition of investor is also very important to determine which investor could have been granted the benefit of BITs- National Treatment or otherwise. Investor addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude "treaty shopping." Accordingly, Each contracting states shall accord investors of other contracting states, as regards any activities carried on in connection with their investment

including, management, maintenance, use, enjoyment, disposal, compensation of such investment "treatment no less favorable" than that which it accords to its own investors or to investors of any third states, whichever is most favorable. On the contrary, international investment Agreements limits the extension of investment protection through expressly putting, for example, pursuant article 17 of American Model Bits, clearly puts "denial of benefits clause*'s"*for3rd party investors. In this way countries limit the application of NT clauses to third party citizens or investors. Recognizing this technique, it is also paramount importance for Ethiopia, in order to limit the application of NT clauses for 3rd party investors.

The other thing worth mentioning in this thesis is stage of investment process. As international treaty practices shown, most BITs provide expressly that they apply only for post-establishment or post entry stages of investment. That means, the majority of bilateral investment agreements do not include binding provisions concerning the admission of foreign investments. However, treaty practice shows, whether granting or otherwise of pre- establishment NT is dependent on the level of economic development, since the pre- establishment investment process would restrict national development. In this case, the host State is obliged to guarantee market access to foreign investors at the same level as domestic investors which would be difficult for the developing countries.

A typical example providing National Treatment, both at pre-establishment and post establishment has shown, by NAFTA article 1102(1) and (2). In both sub-articles, National treatment (NT) apply to the same mode of investment (i.e., at the moment of "establishment and acquisition" of investment (pre establishment) and "expansion, management, conduct, operation, and sale or other disposition" of investments (post-establishment)).

Article 4(1) and (2) **of Ethio- Algeria, Article 4(2 Ethio-kuait), and article 3(2) of Great Britai**n and **Northern Air lan**d nearly provides, "each contracting states shall accord investors of other contracting states, as regards any activities carried on in connection with their investments including, **managements, maintenance, use, enjoyment disposal, compensation** of such investments, and treatment no less favorable than that which it accord to own investor.
These expressions of economic activities, like management, maintenance, use, enjoyment, disposal, including compensation provides protection of investment at post establishment phase. Thus, **Ethio-BITs** subject to analysis were not provides protection of NT at pre-establishment, signaled by economic activities, like, establishment and acquisition. *H*owever, some BITs do not

provide expressly as to at what stage a foreign investor would be protected. **Ethio-china** BIT-is an exemplary to this one. In occasions when BITs provisions failed to identify the stage of investment process, in such circumstances, resort to interpretation of some provisions of the specific BIT becomes necessary. In order to avoid ambiguity it is necessary to identify the stage of investment process, that is whether pre or post establishment and or both applications to NT-clauses.

The very important value in foreign investment is regulatory power of the host state. Due to this reason, under customary international law, countries have sovereign right to regulate investment, in their admission or in operations and/or at both investment processes. As this research indicates, except, **Ethio- Israel** BIT, none of the BITs under investigation contained "exceptions" to the applications of NT. However, treaty practice shows, countries maintains, either public policy matters, industry specific exceptions including development objectives.

For members of OECD, deviations from NT clause, in relation to public policy matters, i.e., national security, maintain public order, the protection of essential security interests and the fulfillment of commitments to maintain international peace and security are the justifiable defenses. Besides, NAFTA agreement specially, article 2102 contain the regulatory frame works for foreign investment. However, as regards exceptions to national treatment, the main approach is to use subject-specific and industry-specific exceptions.

Instead of including specific exceptions to Ethio-BITs, the domestic investment laws governed investment areas reserved for domestic investors. In those areas of investment reserved for domestic investors, the principles of NT would not apply. The host states, Ethiopia, would have the regulatory power to pursue favorable treatment discriminately. This scenario would be true for foreign national of Ethiopian Origin had he/she chooses to be treated like Ethiopian citizens.

Actually, there are sectors which have been reserved exclusively for domestic investors and perhaps where it deems necessary the Ethiopian investment board will open it for foreigners. However, it is not clear what conditions to be fulfilled or shown to open or allow these areas for foreign investors.

However, most BITs Ethiopia signed doesn't provide such clearest exception, which provides the privileges to discriminate in the interest of domestic investors in terms of its laws and regulations.

Therefore, it seems that, BITs and domestic investment laws, as to national treatment clauses, is inconsistent, so BITs must provide with clear power of states to provide reservation by domestic laws and regulations. Actually laws on cooperative societies provide, government assistance as "better treatment" provided for the investment activities. Consequently, this would Back fire to Ethiopia unless the construction of the Ethio-BITs were recognized clearly the power of the host states, Ethiopia, to do better treatment, for example, as treaty practice included , maintaining the development clauses, or industry specific exceptions or Inclusion of **Ethio-Israe**l BITs like exceptions.

4.2. Recommendations

Depending on the investigation the researcher has been conducted up to know, lacunas have been identified upon the selected **Ethio-BITs**. Indeed, the considerable work of investigation has been under taken paying special attention to the BITs-NT clauses, and thus, the followings are the recommendations forwarded by the researcher in order to be given attention by the government and implemented accordingly.

- ✓ The Ethio-BITs National treatment provisions as it where defined are vague and general. It obliges parties to Investment agreement to accord investors of the other contracting parties a treatment "*no less favorable treatment*" than that granted to its own investors. The investment agreements subject to analysis have been avoided appropriate comparator, as opposed to "*like situations*" that have maintained to OECD member countries multilateral agreement, or *like circumstances*, which is included in to NAFTA provisions. As the inclusion of this language limits the comparison, from which foreign investors would claim, it is very important for Ethiopia to consider carefully and while negotiating strive to include this language.
- ✓ Ethio-BITs subject to analysis were combined general standard with relative standards, as well as relative standards with general standard. Indeed, the general standards are fair and equitable treatment, full security and protection while, relative standards are NT AND MFN treatment. Ethiopia would single out these combined provisions of general standard with relative standards because, it becomes very general, besides of resulting implementation problems, sometimes goes to the very interest of the domestic investor. Therefore, it is advisable that the Ethiopian government should negotiate to single out these standards in detail.

- ✓ BITs national treatment clauses applies to investment and foreign investors, thus, the scope of protection extended by the host states and the boundaries of commitment on the basis of BITs-NT clause is dependent on the definition of the investment and investor. The **Ethio-BITs** as it stands now- is too broad so that extend extreme commitment towards Ethiopia on NT clauses, as a host states. Among others, Ethiopia would limit the extensions of languages, for example, "*every kind of assets*" and besides avoiding open ended expressions and employing close ended languages. On the similar basis, Ethiopia's government should at the forum of negotiation, make out of third party investors and national from the ambit of NT protection. With this regard, government should adopt American model BITs, third party investors "**benefits denial clauses**" in order to limit commitment to Ethio-BITs-on NT-clauses.
- ✓ Pursuant article 27(7) of amended investment proclamation No. 849/2014 provides, where necessary, Ethiopian investment board authorize the opening of Investment areas for foreign investors, otherwise exclusively reserved for domestic investors. This proclamation does not made clear by legislatures, the Ethiopian (domestic) Investment law Should be clearly framed that "since as it stand now- is vague when and what the conditions are required to opens investment areas reserved for domestic investors. In one way foreign investment are important for our country, in other way reserving regulatory power is also.To be consistent and perhaps having laws known to foreign investor is paramount importance. Therefore, the Ethiopian law makers should be better to make clear than as it stands now –vague context.
- ✓ Ethiopia's Domestic investment laws leave more lax rights of regulatory flexibility, so that that the government provides differential treatment to grant right and privileges for domestic investors. However, the Ethio-BITs subject to this research, except Ethio-Israel BITs, did not leave such lax regulatory power in the interest of domestic investors. Specifically, there are three options to use more lax right of regulatory flexibility against NT clauses: these are, through insertion of Ethio-Israel exception model, Industry specific exceptions and/or development exceptions clauses. Thus, it is recommended that, to make Ethio-BITs consistent with domestic investment laws and to avoid potential discrepancies, Ethiopian Government should negotiate on the available options, that is, Ethio-Israel BIT exception Model, or industry specific exceptions or development exception clauses, and accordingly incorporating it in to BITs-NT clauses.

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