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NATIONAL TREATMENT IN ETHIOPIAN BITS IN LIGHT OF DOMESTIC POLICIES TARGETING DISADVANTAGED GROUPS.

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DECLARATION

I *Wakjira Abebe*, do hereby declare that the thesis entitled ‘’NATIONAL TREATMENT IN ETHIOPIAN BITS IN LIGHT OF DOMESTIC POLICIES TARGETING DISADVANTAGED GROUPS’’ is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Title **Page**

ACRONOYMS

BIT-Bilateral investment treaties

IIA- International investment agreements

ICSID - International Centre for Settlement of Investment Disputes

OECD- organization for economic cooperation and development

UNCTAD –United Nations Conference on trade and development

FNC-Friendship, navigation and Commerce

US-United States

FDRE- Federal Democratic Republic of Ethiopia

ABSTRACT

The purpose of this research is examining the Ethiopia's Bilateral Investment Treaties particularly emphasizing on Standards of National Treatment and Its on Implications disadvantaged groups in Ethiopia (women, children, socially, economically, culturally deprived sections, disabled, minorities) This study fully employed doctrinal type and accordingly, primary and secondary sources, mainly legal documents, Bilateral Investment treaties including domestic laws are analyzed in detail.

For this research, certain Ethio-BITs were purposively selected. Accordingly, Ethio-Austria, Kuwait, Iran and kingdom of Sweden BITs were extensively analyzed in this paper. As the result of the study, national treatment in these BITs, were found generally crafted and /or vague which could have a far reaching implications on domestic public policies of Ethiopia in general and policies targeting disadvantaged groups in particular.. Based on the analyses conducted, Ethio-BITs failed to provide policy flexibility room so as to allow Ethiopian government to act domestically for public policy justification. 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 disadvantaged groups. Therefore, depending on the finding of the study, this paper recommends that, to strike the balance of interests, mainly Ethiopian governments need for public policy flexibility and the need for protection of foreign investment, the Ethiopian government should re-think towards the making of BITs to become consistent with domestic and international laws by avoiding vague and general formulation of Ethio-BITs NT clauses.

CHAPTER-1

1. INTRODUCTION

1.1. Background of the study

National treatment is one of the basic non-discrimination disciplines in international investment law meant to give protection to the foreign investors and their investments. It obliges the host state to give protection to foreign investor and its investments *no less favorable treatment than that accorded to their nationals and their investments.* Due to this, almost all BITs contain national treatment provisions requiring contracting states to provide investors and investments from other contracting parties treatment no less favorable than that accorded to their own investors and investments.

National treatment is the relative standard as it compares domestic investor with foreign investor on the basis of nationality of an investor. This makes a determination of its content dependent on the treatment offered by a host country to domestic investors and not on some known absolute principles of treatment.[1]

The standard of national treatment serves to eliminate distortions in competition and thus is seen to enhance the efficient operation of the economy enabling foreign investors to get access to foreign markets under non-discriminatory condition for it is necessary for the effective functioning of an increasingly integrated world economy[2].On the other hand, the formulation of national treatment provision in Investment treaties in general terms is feared as it limits regulatory flexibility of the host states to enact policies and laws in their sovereign capacity[3].

For this, States and developing countries in particular have responded to the general formulation of national treatment provision in their respective BITs by devising various techniques;so that

[1]International center for settlement of investment disputes, Building International Investment Law,2016,pp-389

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

[3]ibid

they can promote their own development objectives[4].The most common approach is to have a wide formulation of the national treatment standard followed by exceptions reflecting each contracting party's needs in terms of protecting essential interests[5].On the other hand, ''many BITs preserve the regulatory power of the host state by either confining the scope of the treaties by restrictively defining the type of property protected by the treaty, by extending protection only to investments made in accordance with the laws, policies and regulations of the host state or by extending protection to an investment 'made in accordance with the laws, policies and regulations from time to time in existence.''[6]

Ethiopia, with the aim of attracting FDI into her economy, signed more than 31 BITs since 1994.[7]Critically seen these treaties are framed in more general terms as to the formulation of the national treatment standard of protection. This in turn limits the Ethiopian government's sovereign power to enact domestic social and economic policies for development. To this end, when we have a look at the BIT between Ethiopia and kingdom of Sweden, it states under Art.3 as follows;

> *Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party a treatment which is no less favorable than that accorded to investments made by its own investors or by investors of third states, whichever is the more favorable.*[8]

This treaty provision limits the Ethiopian government's duty to enact policies and laws on its own domestic affairs as the national treatment standard of treatment is formulated in general terms limiting the government of Ethiopia to issue domestic policies targeting disadvantaged groups intended to boost their prospects in their social and economic life.

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[4] See supra note no.2

[5]United Nations, national treatment, united nations conference on trade and development, unctad serieson issues in international investment agreements unctad/ite/iit/11 (vol. iv) New York and Geneva, 1999,pp-43.

[6] M. Sornarajah: The International Law on Foreign Investment,3rd ed, Cambridge University press,2010,pp-232

[7]UNCTAD report available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67 > Last accessed 27 December 2017.

[8]The Agreement between the kingdom of Sweden and the Federal Democratic Republic of Ethiopia for the promotion and reciprocal protection of investments, 10th December,2004

For the purpose of giving policy flexibility for the host state it is now common in BITs to extend protection to an investment made in accordance with the laws, policies and regulations of the host states or to have a wide formulation of the national treatment standard followed by exceptions reflecting each contracting party's needs in terms of protecting essential interests. Though not all, some Ethiopian BITs lack this qualification. This in turn limits Ethiopia's sovereign authority to act domestically.

This scenario is manifested in a case between Ecuador (defendant) and Occidental Exploration and Production Company (claimant).The Claimant brought a claim to arbitration for the breach of national treatment under US-Ecuador BIT following the issuance of the law by the defendant of the Resolution no.664 of the *Servicio de Rentas lnternas(*SRI)on August 28, 2001, which denied the reimbursement of certain amounts of VAT paid by OEPC, and Resolution no. 23.4 of the same entity on April 1,2002 requiring OEPC to return to the SRI VAT refunds previously submitted[9]. The claimant is of the view that Ecuador has breached this obligation because a number of companies involved in the export of other goods, particularly flowers, mining and seafood products are entitled to receive VAT refund and continuously enjoy this benefit.[10]Although, the respondent argued that there is nothing in the policy that is intended to discriminate against foreign companies and also explained that other foreign producers, such as flower exporters are granted the VAT refund because the law and the policy so allow,[11]the tribunal established the breach of national treatment arguing that *intent to discriminate is not essential and that what mattered was the result of the policy in question*[12]and also considering as *SRI did what it thought was its obligation to do under the law*.[13]Here, although the Tribunal was convinced that there had been no discriminatory intent in Ecuador's actions against foreign

[9]Occidental Exploration and Production Company V the Republic of Ecuador, London Court of International Arbitration Administered Case No. UN 3467, award of 1st July, 2004, pp-14, para-1.

[10] Id,pp-59, para-2

[11] Id, no.9, pp-60

[12]Nicholas Di Mascio and Joost Pauwelyn, Non-discrimination in trade and investment treaties: worlds apart or two sides of the same coin?, the American journal of international law,vol.102,2008,pp-77

[13] See supra note no.9,pp-61,para-3

investor, and the Ecuador's action is as the result of the policy enacted domestically, the breach of national treatment was established by the tribunal**.**[14]

When we have a look at the experience of other states; South Africa, taking into account the effect of general term formulation of national treatment clause in her BITs enacted Model BIT so as to empower the south African government to take policy action domestically regarding measures taken to address historically based economic disparity suffered by identifiable ethnic or cultural groups. To this end, South African Development Community Model Bilateral Investment Treaty Template provides under article 21(3) for the right to pursue development goal for the home state as follows;

> *Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.*[15]

From this extract, we can understand that South Africa have put a limitation to a broad and a general formulation of national treatment clause in her BITs as this benefits the country by enabling the country to take domestic policy action to address historically based disparities as such to give affirmative action to these disadvantaged identifiable or cultural groups with no fear with regard to the national treatment provision breach in her BITs.

Although not at all, national treatment provisions under Ethiopian BITS do not allow for Ethiopian government to discriminate foreign investors and their investments in an attempt to accomplish commitments which the government has given under national and international instruments targeting disadvantaged groups.

[14]Case summary on Occidental Exploration and Production Company Vs The Republic of Ecuador,2008,pp-4
[15]South African Development Community, Model Bilateral Investment Treaty Template, July, 2012 art.21 (1).

For instance, The International Convention on the Elimination of All Forms of Racial Discrimination on General Assembly resolution 2106 under its annex A [XX] permits temporary discrimination in favor of disadvantaged groups: obliging as States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them.[16]

In addition, similar wording is adopted in article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women on General Assembly resolution under its annex 34/180, states as adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.[17]As such these conventions allow for governments to give preferential treatment to women for the purpose of raising their economic and social life in their respective countries.

Domestically, the government of Ethiopia is constitutionally empowered to enact policies with the aim of raising the social and economic life of the disadvantaged nations, nationalities and peoples in Ethiopia and to take affirmative measure to enable women's participate on the basis of equality in social and economic as well as in public and private institutions domestically. For this Article 89(4) of FDRE constitution puts as follows;

> *Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development.*[18]

In addition, Art. 35(3) of FDRE constitution puts as follows;

> *The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable*

[16] International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly resolution 2106 (XX) of 21 December 1965, art.2(2)

[17] ibid

[18] The Constitution of the Federal Democratic Republic of Ethiopia, proclamation no. 1/1995,Negarit Gazette, year 1, No. 1, Art -89(4).

them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.[19]

What is more, Ethiopian government issued National Employment Policy and Strategy that urges accelerating private sector development for employment generation and the country has taken policy action that forces the private sector to undertake employment promotion to women, youth and people with disabilities.[20]

In addition, the government of Ethiopia has enacted the law enabling the establishment of small and micro enterprises and is assisting and following up their operation with the aim of poverty reduction.[21] All these policy/legal measures taken by government of Ethiopia to boost the economic prospects of the economically disadvantaged groups comes in contradiction to the national treatment treaty obligation in her BITs as the formulation national treatment provision restricts Ethiopia to take policy action domestically. So, the way out from this problem is required.

Hence; it would be a challenge for Ethiopia to bind herself to the national treatment provision in her BITs commitment as the provision doesn't leave a room for domestic policy flexibility allowing Ethiopia to treat her nationals and their investments favorably than foreign investor and their investments for domestic policy reason for the government is under duty to issue domestic policies aimed at boosting the prospectus of the disadvantaged groups socially and economically.

In this paper, the implication of national treatment treaty commitment in the Ethiopian BITs on the domestic policies of Ethiopia in general and on policies targeting disadvantaged groups in particular will be analyzed.

[19] Id.art-35(3)

[20] National Employment Policy and Strategy of Ethiopia, Addis Ababa, November, 2009,pp-45-47.

[21] See preamble of Regulation No.374/2016, Federal Urban Job Creation and Food Security Agency Establishment Council of Ministers, Federal Negarit Gazette, 22nd Year, No.41, ADDIS ABABA, 16th February, 2016.

1.2. LITREATURE REVIEW

The issue as to the formulation of national treatment in investment treaties has been addressed in a number of studies. Among them, OECD while promoting its member states to liberalize barriers to investment also recommends the promotion of investment by member countries to be in line with the national development objectives of the states as this can be reflected in the policies and laws of the member states concerned.[22] So, for OECD the promotion and protection to be given to foreign investor should be subjected to the domestic/national development objective of its member states. As this writing indicates, countries discriminate foreign controlled enterprise motivated by reasons of public order and essential security interests, while others discriminate based on nationality, for strategic purposes such as the protection of domestic interests. This writer shares the idea for a country motivated solely by domestic policy interest; discrimination based on nationality for public order and essential security interests of the host state should be justified.

UNCTAD puts, as government might take action to enforce laws or policies against one entity before or without taking similar enforcement actions against others or change in the existing law or policy for legitimate domestic policy reason resulting in de facto differential treatment of the foreign investor violates national treatment standard of protection. Hence, as investment treaties gives the right to the foreign investor to sue host state before international arbitration tribunal, the tribunal entertaining such a matter solely focuses on the impact of the measure and does not view the reasons for the differential treatment as being relevant to whether there is a breach of the national treatment obligation resulting in hindrance for governments' abilities to apply, enforce, and modify laws and policies serving legitimate and important public interest goals[23]. Due to this reason, UNCTAD puts as *a number of states have inserted explicit reservations and limitations into their treaties to preserve their rights to take measures that will intentionally or foreseeably discriminate against foreign investo*r *for legitimate public policy reason.*[24]This work is different in that analysis will be made to absence of limitations/reservations in the formulation

[22]OECD, Foreign Direct Investment for Development,2002,PP-5

[23]ICSID, Investment treaties and why they matter to sustainable development.2002,pp-22
[24]Id,pp-24

of national treatment under Ethiopian BITs and its impact on domestic policies aimed to lift the status of disadvantaged group in Ethiopia.

Luke Eric Peterson, under his report to FES Berlin summarizes the results of the international workshop on "Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation "puts as many investment treaties fail to provide adequate safeguards for the ability of developing countries to take certain measures which would benefit domestic firms such as subsidies for infant industries or give preferential treatment to disadvantaged persons such as indigenous persons who might require special or differential treatment[25]. In particular, the Republic of South Africa has been buffeted by threats of international lawsuits as a result of its Black Economic Empowerment policies. These policies are designed to remedy past discrimination and to provide preferential treatment to black employees, managers and business-owners, could run against investment treaty structure particularly against the duty of home state to accord national treatment standard of protection to foreign investors resulting in the entertainment of the public policy issue to be resolved before international arbitration tribunals as investment treaty obligations have been breached.[26]This writer also shares the idea as taking policy measures that would benefit the disadvantaged groups in the host state leads to the breach of national treatment obligation of the country. But he also entertained the implication the other investment treaty provisions: expropriation and transparency on the domestic policy action of the host state and also this work is different from his work as his work solely emphasizes on the implication of national treatment on policies targeting disadvantaged groups in Ethiopia. In addition, his work is also not related in time and geographical delimitation to the current research to be conducted.

Collins examines the impact of national Treatment in Emerging Market economies arguing as blanket national treatment requirements may be unfair to countries in a less advanced stage of development precisely for host states are denied a crucial means of controlling the inward flow of capital to suit their own economic needs and also uncertainty with respect to the assessment of national treatment provisions by investment tribunals is rightly viewed as infringements on

[25]Luke eric Peterson, bilateral Investment Treaties-Implications for Sustainable Development and Options for Regulation, FES Conference Report, February 2007,p-3
[26]Ibid.

host state economic sovereignty. He puts, due to this reason, National treatment is usually refined through exceptions, such as requirements of conformity with host state laws.[27] But, Collins assessed the implication of national treatment standard only from an angle of host state's political autonomy (economic sovereignty) leaving its implication on the social development (uplifting the prospectus of disadvantaged groups) of the host state.

Getahun Seifu puts as the formulation of non-discriminatory treatment provisions in Ethiopian BITs becomes difficult for Ethiopia to advocate for important and also even at times inevitable national policies He mainly entertained the non-discriminatory treatment provisions in Ethiopian BITS and their effect on the opening or non-opening of investment sectors/areas to foreign investor. For him Ethiopian BITs should expressly leave discretionary power that would depend on the need of the country from time to time or expressly include expressly and consistently in their contents investment areas open or not open to foreign investors.[28] This research is different from his work as this work emphasizes only on national treatment only among non-discriminatory standards of treatments excluding most favored nation treatment and it will deal with the national treatment treaty commitment under Ethiopian BITs and its impaction domestic policies in general and on policies targeted at disadvantaged groups in particular.

This work is different in that it will show the implication of the blanket formulations of national treatment on the Ethiopia's and on domestic policies aimed to lift the status of disadvantaged groups in the country.

1.3. STATEMENT OF THE PROBLEM

Ethiopia, has signed BITs with different countries in an attempt to attract foreign Investment. Among the substantive provisions of these BITs, provisions dealing with National treatment have been constructed in broader context, which would limit the sovereign right of the government of Ethiopia to take domestic policies aimed to uplift the social and economic life of the disadvantaged groups.

[27]Collins, A, National treatment in emerging market investment treaties, London: The City Law School of City University London,2013,pp-27-29

[28]Getahun Seifu, "Regulatory Space" in the Treatment of Foreign Investment in Ethiopian Investment Laws, Journal of International Investment and Trade, 2008, pp-21

Though not at all, National treatment provision in Ethiopian BITs has shown their peculiarity with regard to their formulation as it does not include a clause that allows Ethiopian government to act nationally enacting domestic policies/law favoring nationals and their investments for public policy purpose. For instance, Ethio- Austria BIT puts the provision of national treatment under art.3 (3) as follows;

> *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.* [29]

Although the BIT Ethiopia signed with the state of Austria is exemplified here, Similar BITs Ethiopia had signed with the other states has founded the same phrasing problems. Here, the problem is attributed to it does not leave a room for Ethiopian government to act domestically for public policy interest. In such circumstances, it becomes difficult for Ethiopia to take domestic policy actions in general and policy action targeting disadvantaged groups in particular coupled with the duty of the government of Ethiopia to provide special assistance to disadvantaged nation, nationality and peoples in their social and economic development domestically(constitutionally)[30]

The experience of other states; South Africa and Malaysia shows us they have put qualification to the applicability of national treatment. This can be done by assuring a certain percentage of ownership of various investment projects, most notably those in the natural resources sector to the disadvantaged ethnic groups as in South Africa and Malaysia.[31] This is done to empower their government to act domestically.

In addition the government of Ethiopia is under duty under international instruments in which Ethiopia is a party to it; specifically the International Convention on the Elimination of All Forms of Racial Discrimination on General Assembly resolution 2016 under its annex A [XX]

[29]Agreement between the republic of Austria and the federal democratic republic of Ethiopia for the promotion and protection of investments 12 November 2004,art.3(3)
[30] See supra note no.18
[31] See supra note no.6, pp-344.

permits temporary discrimination in favor of disadvantaged groups' and permits temporary discrimination in favor of disadvantaged groups.

Besides, Ethiopia enacted legislation with the aim of improving the livelihood of citizens who are unable to work or able to work but unemployed due to different conditions and live under poverty line. The proclamation empowers the Federal Urban Job Creation and Food Security Agency to coordinate and support micro and small enterprises under art.6 (6) as follows;

> *''based on the value chains and the demand of micro enterprises and small enterprises that do not fall under the manufacturing sector; coordinate institutions providing support to the micro enterprises and small enterprises that do not fall under the manufacturing sector in soliciting training, finance and technological consultancy service.''*[32]

Ethiopia has taken this measure by enacting legislation for the purpose of creating employment opportunity for the poor to empower them economically. This enacted legislation is contrary to national treatment treaty obligation in her BITs although small and micro enterprises may not be able to withstand full competition with foreign investor. If not assisted by the government, these enterprises are acutely vulnerable to foreign competition because of lower levels of skill and technology they have.

Here, the problem comes as Ethiopian BITs do not make explicit reference to these policies enabling Ethiopia to take positive discrimination within general public policy exceptions to national treatment given Ethiopian government's duty domestically and internationally to enact policies/laws aimed at uplifting the prospectus of disadvantaged groups. Hence, policy *measures taken or to be taken domestically to boost the prospectus of disadvantaged groups contradict with national treatment provision in Ethiopia BITs as they have no room for Ethiopia to take domestic policy action for public policy justification.*

Due to this reason, Ethiopia needs to revisit national treatment standard of protection provision in her BITs, for as they stands now, limit the power of the government to enact domestic policy in general and policies aimed at uplifting the prospectus of disadvantaged groups in particular.

[32]See supra note no 21, Article 6(6).

This paper is intended to analyze national treatment provisions in Ethiopian BITs and its impact on domestic policies targeting disadvantaged groups on the basis of analysis to be made.

1.4. Objectives of the study

1.4.1. General Objective

The general objective of the study is to explore the effect of national treatment standard treatment on domestic policies with a particular emphasis on policies targeted at disadvantaged groups.

1.4.2. Specific Objectives

- To assess whether national treatment treaty obligation in Ethiopian BITs allow for Ethiopia to enact domestic policy affecting the interest of foreign investor for public policy purpose.
- To analyze the effect of national treatment in Ethiopian BITs on domestic policy action taken by the government in its sovereign authority.
- To cross analysis the applicability of national treatment in Ethiopian BITs in light of foreign countries experience.
- To consider the possible problem national treatment clause in Ethiopian BITs creates on her domestic policies targeted at disadvantaged groups.

1.5. Research Questions

This research will try to seek answers to the following main research questions:

- What challenges would exist to enforce national policies inline of the national treatment in the Ethiopian BITs?
- What lesson does Ethiopia would take from the experience of other countries?
- What possible problem does national treatment clause in Ethiopian BITs could pose on domestic policies on policies targeted at disadvantaged groups?

1.6. Significance of the study

This paper has important contributions to;

- First, it will serve as an instrument to further research in the area of Ethiopian BITs and its jurisprudence.
- Second, the findings and recommendations of the study will serve as a base for further review of Ethiopian BITs in light of developments in the contemporary investment law.
- Third, the finding of the study will serve as a guideline to Ethiopian delegates negotiating on BITs with the needed clarity as to the national objectives, domestic policies and national interest of Ethiopia.
- Finally, the study will enable investors, policy makers and other Stakeholders to rethink and to make reasoned decisions whether allowing domestic policy flexibility for development need of the host to the national treatment clause has implication on investor-state dispute before arbitral tribunal.

1.7. Research Methodology

1.7.1. Methodology

In doing this paper, the researcher will use descriptive and analytical research methods. Descriptive method will be used because the research aims to describe circumstances or a set of circumstances and also analytical as the researcher uses facts or information already available and makes their analysis to make a critical evaluation of them.

This research is Doctrinal as it is appropriate to collect the legal rules, treaty practice, and Jurisprudences and Qualitative since this research will rely on literature review and legal analysis. It also employs comparative study as the experience of other countries on the construction/applicability of national treatment will be analyzed.

1.7.2. Sources of Data

Both primary and secondary sources will be used as necessary data for this study. The primary sources include analysis of different laws. So, BITs that Ethiopia has signed with different countries and other IIAs, Ethiopian National Employment Policy and Strategy of Ethiopia, The FDRE Constitution, Regulation on Federal Urban Job Creation and Food Security Agency Establishment will be analyzed. The experience of countries treaty practice that has a direct or indirect relation on shaping the National treatment will be explored. Thus, analysis will be made to 10(ten) of Ethiopian BITs as far as a resource allows, though not all. So, Ethio-BITs with Austria, Belgian Luxemburg, Greece, Britain, Iran, kingdom of Sweden, Kuwait, Russia, South Africa, Swiss confederation and Tunisia will be analyzed. These BITs were selected for the fact that they lack a policy room for Ethiopian government to allow the government to act domestically for public policy objectives. In addition, Secondary Data will be gathered from literature review of different materials, like law Books, Journals, Articles, and Cases having relevance to this paper.

1.8. Scope of the study

This research will be limited to examining the availability of domestic policy flexibility for the government of Ethiopia to uplift the prospects of disadvantaged groups in national treatment standard of protection in selected Ethiopian BITs. In doing so, the study will not search in to the attitudes of investors towards the availability of domestic policy flexibility for the government in national treatment clauses in Ethiopian BITs.

1.9. Limitation of the study

This study may confront financial problems, time constraint and unavailability of materials; especially books and relevant literatures was the major problems likely to be encountered in conducting this study.

1.10. Organization of the Thesis

This thesis will be organized in five chapters.

The first chapter will be designed to draw the attention of the reader-, to the general picture of the study- giving insights about the general background, the principal issues addressed, objectives sought to be achieved, significance, methodologies used, limitations and scope of the study.

The second chapter will discuss on issues, the genesis, nature, types of national treatment and limitations/reservations made to it. In doing so, it will make literature and case analysis as to the implication national treatment would have on domestic policy of the host state and also with its implications for dispute resolutions before arbitration tribunals.

Chapter three will deal with the experience of foreign countries on the application national treatment under their BITs national treatment provision. Specifically the experience of South Africa and Malaysia will be dealt with.

Chapter four will specifically deal with national treatment clauses in Ethiopian BITs and its impact on Ethiopian domestic policies targeted at disadvantaged groups.

Finally, under chapter five the main findings of the study and the potential solutions for the major problems will be indicated, in the conclusions and recommendations part of this thesis respectively.

CHAPTRE-2

2. GENERAL OVERVIEW OF NATIONAL TREATMENT IN INTERNATIONAL INVESTMENT AGREEMENTS

2.1. HISTORICAL ORIGINS OF NATIONAL TREATMENT

2.1.1. Historical origins of national treatment under customary international law

Under international law the national treatment standard has been invoked theoretically with the context of International minimum standards in building the investment protection. With regard to entry of foreign investment in to the host country, customary international law supported the position that nations were always free to keep foreigners out. 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*[33]. For this doctrine, Calvo was persistently challenged advocating for National treatment for foreign properties and aliens as he advocated the same treatment to apply both to foreign and domestic investors.

Contrary to this theory, 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.[34]

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 aliens and nationals alike. 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.

[33] 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),pp-

[34] United nations, UNCTAD Series on issues in international investment agreements, New York and Geneva, 1999,pp-33

Nonetheless, it is a principle of universal application, and found in the municipal law of all civilized nations.[35] However, national treatment is a treaty made standard that does not exist in customary international law on its own rather it is defined by reference to the treaty in which it appears which in turn dictates how the national laws relating to relevant economic activities must be written and applied.[36]

To conclude, principle of national treatment under customary international law does not exist on its own rather it is a principle of universal application (a belief that the practice of states is based on legal obligation) and found in the municipal law of all civilized nations opposed to national treatment under IIA's which is treaty based principle emanating from the agreement of nations and put explicitly in IIA's.

2.1.2. Historical origins of national treatment under IIAs

In treaty practice, national treatment has its origins in trade agreements and 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.[37]By the nineteenth and twentieth Century's, national treatment had became standard provisions in trade treaties.[38] 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 and After WWII, National Treatment was incorporated in to the GATT as a pillar of the international trading system, serving to insure that GATT contracting parties did not avoid their market access commitment by providing less favorable regulatory or tax treatment to like products of foreign origin.[39]

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

[36] See supra note no.27,pp-10

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

[38] ibid

[39] ibid

The movement towards liberalization, in the form of FDI Guidelines, BITs and NAFTA established national treatment signaling a departure from customary international law.[40]Although these instruments played much role for the development of national treatment standard; the real development came from the OECD Codes on Liberalization in the 1960s, the National Treatment Instrument in 1976 and various investment treaties that came afterwards dictating the contracting states to grant no less favorable treatment to foreign investor than domestic investors.[41]

To have a look at the United States experience, US began to sign FCNs, soon after the birth of the country.[42]As the name of these treaties suggests, they were not exclusively, or even primarily, vehicles to protect investments abroad. Nevertheless, these treaties included some protections for American investors in foreign countries. Because many of the objectives of the FCNs were met by the GATT, these treaties were supplanted by it and, by the mid 1960s; the American FCN program had extinguished.[43]

By the time the American FCN program had completely shut down, several European countries were busy negotiating and signing bilateral investment treaties with developing countries. Unlike the FCNs, these treaties focused exclusively on the protections of investment among them national treatment is one. The first BIT was signed between West Germany and Pakistan 1959.[44] As such; between1962 to 1972, Germany concluded forty-six of these agreements.[45] Then, many states followed this trend of concluding BITs afterwards.

[40]Don Wallace Jr. and David B. Bailey, The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions, article 7 , volume 31, issue 3,pp-628

[41] ibid

[42] Kenneth j. Vandervelde, the bit program: a fifteen-year appraisal, in the development and expansion of bilateral investment treaties,pp- 532,-533

[43] Andrew t. Guzmán explaining the popularity of bilateral investment treaties: why ldcs sign treaties that hurt them,26 august, 1997,pp-24

[44] UNITED NATIONS CENTER FOR TRANSNATIONAL CORPORATIONS AND INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL INVESTMENT TREATIES 1959-1991,1992

[45] ibid

2.2. NATIONAL TREATMENT IN IIA'S DEFINED

National Treatment is one of legal instruments employed in IIA for the promotion and protection of foreign investment. It is one of the main general standards used in international practice to secure a certain level of treatment for FDI in host countries. National treatment rule in an IIA typically requires that host countries to accord to foreign investor/s and their investment/s treatment that is no less favorable than the treatment accorded to domestic investor/s and their investment/s[46] it deals principally with national measures of legislative, administrative or judicial nature taken to regulate the internal market, by requiring each member to treat investors of the other member at least as it treats its own investors.[47]For a sovereign state can take legislative, executive and judicial measure in their own affairs, national treatment in IIAs require states not to treat foreign investors less favorably than their domestic investor/s.

While the underlying objective of the National Treatment principle is the promotion and protection of investment, its basic function has focused more strictly on investor's compared with internal regulation affording more favorable treatment to domestic investors. In order to ensure the protection for foreign investors, national treatment standards in IIAs prohibit discriminating investors on the basis of their nationality. The standard seeks to ensure that there is a degree of competitive equality between foreign and national investors. thus, National treatment principle is simply an application of the better known general prohibition of discrimination based on nationality as discrimination in favor of domestic investors by a host state; since such discrimination on the basis of nationality of an investor can result in distortion in competition.

As to the construction of national treatment in IIAs, variation exists within IIAs.some agreements doesn't grant national treatment standard of protection to foreign investor. The omission of National treatment is justified on certain ground that, host state are most of the time not willing to extend the preferential treatment that its domestic state owned enterprises were receiving to be enjoyed by other foreign enterprises/investments. The reasons for not including

[46]United Nations, key terms and concepts in IIAs:a glossary UNCTAD series on issues in international investment agreements, new York and Geneva, 2004,pp-123.

[47]Federico Ortino, From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?Jean Monnet Working Paper 01/05,NYU school of law, New York,2005,pp-4

the standard may be granting national treatment has been complicated by the provision of price subsidies for national State owned enterprises for utilities such as water and electricity.[48]

The other type of construction of national treatment in IIA's is combining national treatment with the other non- discriminatory treatment; most favored nation treatment and some agreements combine it with the fair and equitable standard of treatment.[49]

In others IIA's national treatment stands alone. For instance, OECD national treatment instrument focuses on this standard and requires that member countries consider applying National Treatment in respect of countries other than Member countries as such while member countries apply national treatment among their members, they give due emphasis to this provision and formulate stand alone national treatment provision in their agreements.[50]

What is more, national treatment is a relative standard of treatment as it compares foreign investor with domestic investors to determine the existence of discrimination in a host country. Being a contingent standard of treatment, the specific content of the National treatment obligation is determined in relation to the treatment granted to domestic investments or investors compared with foreign investors as application of the national treatment standard necessarily entails a comparative analysis between the treatment granted by the host country to its domestic investments or investors on the one hand and the treatment granted by the same host country to the investments or investors of the other contracting party on the other hand.[51]

2.3. SCOPE OF APPLICATION OF THE NATIONAL TREATMENT IN IIAs

IIAs address the scope of applicability of national treatment standard in different manners. Some IIAs provide national treatment, but limits its coverage to established investments only and the second group comprises those agreements that provide national treatment to the investor in the pre- and post-establishment phase. Each of these approaches has different implications and raises other more specific issues.

[48]UNCTAD, international investment agreements: key issues, UNCTAD/ITE/IIT/2004/10 vol. I (UN, publications, New York and Geneva, 2004,pp-166
[49] See supra note no.40
[50] See supra note no.8,pp-41
[51] Id,pp-7

2.3.1. Agreements with national treatment applying to established investment/post-establishment approach

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. It grants non-discriminatory treatment to foreign investor only after the investment has entered the host country. They focus on investment protection rather than on liberalization of investment flows as they contain an admission clause limiting the scope of the protection standards in the agreements. As such, the typical formulation of this approach/model is to provide national treatment to investments covered by an agreement once it has been admitted into the host country according to the latter's domestic laws and regulations.[52]

Within this group of BITs, some agreements apply the standard only to the *investments*, while other agreements provide that national treatment shall also apply to the *investors* of the other party and others allow the host country to discriminate against foreign investment not only at the stage of entry, but also afterwards as they make the national treatment standard *contingent on the domestic legislation of the host country*; giving host countries ample discretion to enact new legislation in favor of domestic investment/investor.[53]Finally, the other approach allows all legislation non-consistent with the national treatment obligation to remain applicable after the BIT enters into force, but at the same time prohibits new non-conforming measures that would increase the degree of discrimination.[54]

2.3.2. Agreements with national treatment applying in the pre- and post- establishment phase

This approach makes entry of foreign investor/investment to the host State subject to the national treatment standard in addition to post-entry treatment. This general commitment is typically made subject to the right of each party to adopt or maintain exceptions falling within one of the sectors mostly inside BITs or matters listed in the annex to the BITs.[55] As such, these type of

[52] UNCTAD, Bilateral investment treaties,1995–2006:Trends in investment rulemaking, united nations, New York and Geneva, 2007,pp-33
[53] Id,pp-33-35
[54] ibid
[55] See supra note no.7,pp-22

BITs pursuing the liberalization of investment flows in parallel with investment protection usually extend the scope of the national treatment obligation as foreign investors are entitled to be treated with regard to the making of investment no less favorably than domestic investors in the host country in this approach.

Even if investments not established/admitted in the host state the application of national treatment both at pre-establishment and post- establishment can bring liability upon the host state. This is for the fact that this approach obliges the host state to guarantee the non admitted/non established investment.

Under this approach, foreign investor who is attempting to invest in the host country can claim the breach of national treatment. So a host state may be made liable even though no investment is made in the host state for the breach of national treatment standard as the national treatment standard of protection to be extended to investments not actually made in the host state but aimed at to guarantee market access to foreign investors at the same level as domestic investors.

2.4. NATIONAL TREATMENT; SOME CONCEPTS

2.4.1 De facto vs. De jure discrimination

As to the application of the national treatment standard, it does not matter whether the difference in treatment specifically provided in a law or regulation of the host country is *de jure discrimination* or is the consequence of a measure apparently non-discriminatory, but in fact resulting in different treatment amounts to discrimination; *de facto discrimination*.[56]

Though not explicitly included in IIAs De *facto* discrimination results from the non apparent acts of the home state. In principle, national treatment is primarily concerned with provisions in the national laws and regulations of host countries which specifically address the treatment of foreign investors. But, there is circumstances in which foreign investors may find themselves in disadvantageous situations compared to local investors as a result of regulations or practices that,

[56]See supra note no.52

although not apparently discriminatory against them but have a detrimental effect on their ability to operate in practice, because of nationality of foreign investor and such type of host state measure amounts to *de facto* discrimination.

2.4.2. Factual situations used to determine the applicability of national treatment

Many IIAs subject the comparison to be made to determine the existence of discrimination in the host state to either *same circumstances or like/similar situation/like circumstances qualifications.* Hence, such terms have been made in the formulation of national treatment provisions to determine as to the factual situation when the national treatment standard of protection applies.

Among factual situations used to compare domestic investor with foreign investor to determine when national treatment applies in IIA's, the same or identical circumstances formulation limits the applicability of national treatment to the same or identical economic sector. So, for the application of national treatment, operators' i.e. foreign and domestic investors should operate in the same economic sector. This would offer a narrow scope to national treatment as the incidence of an identical situation may be hard to show.

The operation of "same circumstances" is not an easy task, however, such narrow scope to national treatment is applied given the elasticity of the terms and its ability to cast too wide or too narrow a net, depending on the level of abstraction or detail.[57]For instance, BIT between Belize and the United Kingdom, article art.3 (1) provides that "Neither Contracting Party shall... subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords in *the same circumstances* to investments or returns of its own nationals."*[58]*

The second factual situation used to compare domestic investor with foreign investor to determine when national treatment applies is the formulation *like circumstance/situation*. Here, what is a like situation or circumstance is a matter that needs to be determined in the light of the facts of the case. This assumes that clear comparisons of business situations are possible, and

[57]Marcos Orellana, Investment Agreements & Sustainable Development: the Non-Discrimination Standards, article 4,volume 11,issue3,spring 2011,pp-5

[58] See BIT between Belize and United Kingdom, art.3 (1).

that agreement can be reached on what is a like circumstance as it does not oblige the determination as to discrimination to be made upon operators in the same economic sector/area.[59] Though not at all, in such situations the existence of discrimination would be made by assessing cases in good faith and in full consideration of all available relevant facts. So, qualifications such as like situation/like circumstances may be less restrictive of national treatment in that they may apply to any activity or sector that is not subject to exceptions as it does not oblige the economic sectors to be in the same economic area/sector.[60]

2.5. LIMITATIONS/RESERVATIONS TO NATIONAL TREATMENTS

Blanket type of national treatment in IIA's restricting regulatory flexibility of host state has favored foreign investors. For this reason, states have responded in various ways to concerns that IIA's limit regulatory power of the host states. Among them putting general or specific country/industry exception or development policy exceptions as to the application of national treatment is common.

2.5.1. General exceptions

General exceptions to the application of national treatment have been incorporated in a limited, but growing, number of IIAs in order to set a necessary balance between regulatory purposes and protection of foreign investors by establishing an exhaustive list of legitimate objectives and the nexus between a measure and the said objectives as such investment tribunals are neglected from interpreting to these issues covered under reservations.[61]Such exceptions are present in many IIAs and they often appear in a separate provision and apply to all provisions in the agreement, not only to national treatment.[62] As such, General exceptions are operative exceptions as they set a balance between regulatory purposes of the host state and protection of foreign investors since they are not interpretative statement as arbitration tribunals cannot give meaning to these exceptions rather than applying these exceptions as they are in IIA's in a case containing this issue may come under their jurisdiction.

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[59]United Nations conference on trade and development, national treatment, United Nations New York and Geneva, UNCTAD/ITE/IIT/11, (Vol. IV), 1999, pp-33

[60]United nations, UNCTAD Series on issues in international investment agreements, New York and Geneva, 1999,pp-33

[61]Louis-Marie Chauvel,The influence of general exceptions on the interpretation of national treatment in international investment law,volume14,no.2,2017,pp-156

[62] See supra note no.2,pp-44

The rationales for including general exception clauses in IIAs are twofold. On the one hand, the clauses are meant to enhance regulatory flexibility, by allowing host states to regulate foreign investment without incurring international liability for their actions. Hence the more comprehensive the list of permissible objectives is, the more regulatory flexibility the clause will grant to a host state. On the other hand, general exceptions are intended to increase legal certainty in investment adjudication. By offering express points of reference to which public interest considerations may be attached, they help host states ensure that tribunals consider the public interest rationales of a challenged measure.

Even though general exceptions provide legal certainty by offering express points of reference to which public interest considerations may be attached, uncertainty arises for the investor as to what point of reference tribunals consider the decide public interest rationales of a challenged measure.

To make issues clear, when we have a look at Ethio-Malaysian BIT, it provides under art.2 as follows,

> *Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to invest in its territory and shall admit such investment in accordance with its laws, regulations and national policies.*[63]

From the formulation of general exception under Turkey model BIT one can understand the applicability of general exception to all substantive provisions included in the agreement. Since national treatment is one of the substantive provision in investment agreements, such exceptions also have an application on the national treatment provisions in such BITs.

2.5.2. Industry/subject specific exceptions

A Contracting parties to an investment agreement may reserve the right to treat domestic and foreign investors in certain types of activities or industries differently under its laws and regulations for reasons of national economic and social policy. The standard of national treatment is an important principle for foreign investors, but it may raise difficulties for many

[63]Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of Malaysia for the promotion and protection of investments, 22nd of October,1998 art-2

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 to competition; especially when they compete with the large Trans-National Corporations having a number of branches in different countries added with huge amount of capital and skill they have. For this reason, host Governments sometimes have special policies and programs that grant advantages and privileges to domestic enterprises in order to stimulate their growth and competitiveness. So, for the host government; in granting the same privileges and benefits to foreign investors and domestic investors in such instances, makes domestic investors vulnerable to competition.

Developing countries have at times sought to qualify or limit the application of national treatment in their negotiations through the introduction of a development clause in the form of a development exception to the general principle of national treatment. developing countries, by virtue of their weaker economic position and their development needs, should receive special and differential treatment as this serves the purpose of allowing for policy flexibility while maintaining the commitment to the basic principle that is the national treatment standard of protection.[64]

The Tanzania-Republic of South Africa BIT also provides for national treatment in Article 3(2), while Article – 3(6) contains an exception to the national treatment provision. It reads as follows:

> *The united republic of Tanzania may grant incentives to its nationals and companies for the purpose of development of national entrepreneurs and infant industries in order to stimulate their entrepreneurship without giving the incentives to a foreign investor*.[65]

From this extract we can understand the policy flexibility room left for the host state to regulate with regard to development of national entrepreneurs and infant industries in order to stimulate their entrepreneurship thereby discriminating the foreign investor while giving assistance to local entrepreneurs.

[64] See supra note no.18, pp-47-48

[65] Agreement between the government of the republic of South Africa and the government of united republic of Tanzania for the promotion and reciprocal protection of investments,22september,2005,art.3(4)(c).

Besides, IIAs put certain subject matters that do not fall under the coverage of national treatment standard of protection. subjects matters like; taxation, intellectual property rights guaranteed under international intellectual property conventions, prudential measures in financial services, temporary macroeconomic safeguards, public procurements, special formalities in connection with establishment like information and registration formalities and exceptions for the protection of cultural industries. Hence, these exceptions are common exceptions that exist in IIA's.[66]

Modern BITs put industry/subject specific exceptions as to the applicability of national treatment. For example, US model BIT put certain subject matters in which substantive provisions of US model BITs doesn't have applicability. As such, matters like-duty to disclose information, taxation, financial services and essential security interests were put in specific manner. To put it more specifically, art. 20 read as follows,

> *Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.*[67]

Hence, under US model BIT parties to an agreement shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons. Here as the model BIT puts, although there exists Party's commitments or obligations under this Treaty parties to an agreement are allowed to take this measure.

To conclude, states have responded in various ways to concerns that IIA's limit regulatory power either by providing for general treaty exceptions or make qualification to the applicability of

[66] Id,pp-45-46

[67]Treaty between the government of the united states of America and the government of [country] concerning the encouragement and reciprocal protection of investmentart.,2002,art.20

national treatment provisions, mostly by employing a phrase *'in accordance with the law'*' after the wordings of national treatment provisions. States stipulate that national treatment is subject to special laws and regulations of the host state/ international agreements or exclude certain economic sectors /activities or certain specific matters from the scope of national treatment through negative listings.[68]. Here, the problem is that these exceptions are drafted in vague manner inviting arbitration tribunals to give meaning to it. For instance, the phrase mostly following the national treatment provisions ''*in accordance with the law''* is vague as to which law whether national or international instruments it refers to.

[68] UNCTAD, Investment and the digital economy, World investment report,2017,pp-108-109

CHAPTER-3

3. EXPRIENCE OF FOREGN COUNTRIES ON THE APPLICABILITY OF BITS NATIONAL TREATMENT STANDARD UNDER THEIR BITs.

To make issues clear as to the applicability of national treatment under other countries BITs, the writer explores the Republic of South Africa and Malaysia policy measure taken to empower the previously disadvantaged groups in their respective countries as this would help Ethiopia to show the way out from the problem at hand by doing the same similar to these countries.

3.1. SOUTH AFRICAN EXPRIENCE

Under Black Economic Empowerment policy measure, South Africa has taken a policy measure to uplift the economic status of the previously disadvantaged group/blacks. The government of South Africa implemented broad based black economic empowerment (BBBEE) as a nation building strategy. The act intends to empower all blacks listed as Africans, Color reds and Indians and the strategy is based on the Broad-Based Black Economic Empowerment Act No. 53 of 2003 in conjunction with its Associated Charters, the Codes of Good Practice and various Scorecards. It was noted that South Africa signed a number of investment treaties in the immediate post-Apartheid period. However many of these agreements do not discuss the politically sensitive matter of Black Economic Empowerment. South Africa has embarked upon an ambitious social and economic program to advance the standing of historically disadvantaged persons. This program has attracted criticism and scrutiny from foreign and also some domestic investors for the reason that an unresolved issue as to whether foreign investors must comply to black economic empowerment policies and obligations like to hire black managers, partner with black shareholders, and provide social preferences.[69]. Due to this policy measure taken by South Africa, some foreign investors are threatened to sue South Africa, arguing that Black Economic Empowerment policies breach undertakings to foreign investors including providing them with National Treatment.

The government made changes to the way in which protections to be given to the investor are ensured, while maintaining its right to implement policies to address the country's social and

[69]See supra note no 25,pp-5

economic requirements and to redress the injustices of past through its affirmative action policies. This policy measure taken by South Africa resulted in national treatment treaty breach in BITs with different countries. For instance; the case of *Piero Foresti, Laura De Carli and others v. Republic of South Africa*, is a claim in which Italian investors' alleged breaches of South Africa's investment treaties with Italy and Luxembourg as a result of South Africa's black economic empowerment laws.[70]In this case, Claimants (*PieroForesti, Laura De Carli and others*) alleged that the Mining Charter law enacted by South African government that required foreign investors engaged in mining to have comply with the Mining Charter by making a 21% beneficiation offset (*i.e.*, beneficiating – processing and adding value to the quarried stone – in South Africa and to provide a 5% employee ownership program for employees of the Operating Companies. As such it gives affirmative action to blacks (the disadvantaged groups).The claimants brought a claim for the breach of the Respondent's (*The Republic of South Africa*) national treatment obligations under the Italy and Luxembourg Bits, even though the claim by the claimant was dismissed for the Claimants sought the Respondent's consent to discontinue the proceedings pursuant to Article 50 of the Additional Facility Rules On 2 November 2009.[71] In this case the policy action taken by the government of South Africa so as to give affirmative action to the blacks resulted in the claim to be brought against the government of South Africa for the breach of national treatment under her BITs with foreign investors from Italy and Luxembourg although the case was dismissed for the claimants sought the respondents consent to discontinue the proceedings.

Here, South Africa for domestic policy justification issued the law that obliges foreign investors to observe the laws that give affirmative action to the disadvantaged groups. Foreign investors sued the government of South Africa as they are not duty bound to enforce the laws that give affirmative action to the disadvantaged groups, claiming the breach of national treatment under South African BITs. Blanket national treatment have a potential to make host state liable for a sovereign host state can issue policies/laws for public interest justification.

[70]See supra note no pp-4.pp-1

[71]Foresti, Laura De Carli and others v. Republic of South Africa, In the matter of an arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes Case No ARB(AF)/07/1, 4 August 2010,pp-20-21.

To provide for the protection of investors and their investments and achieve a balance of rights and obligations that apply to all investors, South Africa has enacted the protection of investment act in 2005.[72]This act affirmed the Republic's sovereign right to regulate investments in the public interest; and confirming the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.[73] This investment protection act puts national treatment under art.7, and its non applicability to measures taken by government is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic is put under art 7(4) (d). It reads as follows;

> *(4) Subsection (1) shall not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from;*
>
> *d) any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic.[74]*

Hence, national treatment in South African investment protection bill empowers the Government to take affirmative action policies, designed to redress the inequalities of the apartheid era in favor of previously disadvantaged South Africans, to prevent the risk of being incompatible with national treatment principles in her BITs. From this extract it seems that the Government's intention here is to subject national treatment to the supremacy of domestic legislation to prevent foreign investors from enjoying greater rights than domestic investors. When we have a look at BIT treaty of other states; they have explicitly made it an exception to the applicability of national treatment for government to take preferential or differential measure to assist these disadvantaged groups. For instance, national treatment provision in South Africa- Tanzania BIT

[72]See preamble, South African Protection of Investment Act No.39514, GOVERNMENT GAZETTE, 15 December 2015, No. 39514

[73].ibid

[74] See supra note no.41,art.7(4)(d)

was formulated in a way to allow the host state to take preferential/differential measure discriminating the foreign investor for public policy purpose. The Tanzania-Republic of South Africa BIT of 2005 provides for national treatment in Article 3(2), while Article – 3(4) (c) contains the exception to the national treatment clause. Article-3(4) (c) reads as follows:

> *4. The provisions to sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from;*
>
> *(c) any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.*[75]

Thus, from this extract we can understand that national treatment provision in South Africa Tanzania BIT was formulated in a way to allow the host state to take preferential/differential measure discriminating the foreign investor for public policy purpose. So the contracting states governments can take domestic measure aimed at giving assistance to the disadvantaged groups.

The other area that needs to take affirmative action; as the development of the country needs is assisting and subsidizing national entrepreneurs and infant industries, discriminating foreign investor. Such policy action taken by the host state can result in the breach of BITs national treatment clause if exception to its applicability is not put. The Tanzania-Republic of South Africa BIT also provides for national treatment in Article 3(2), while Article – 3(6) contains an exception to the national treatment provision. It reads as follows:

> *The united republic of Tanzania may grant incentives to its nationals and companies for the purpose of development of national entrepreneurs and infant industries in order to stimulate their entrepreneurship without giving the incentives to a foreign investor.*[76]

[75] Agreement between the government of the republic of South Africa and the government of united republic of Tanzania for the promotion and reciprocal protection of investments,22september,2005,art.3(4)(c).
[76] See supra note no.77,art.3(6)

In addition, while South African protection of investment act provides the national treatment provision under art.4, it puts under art.7 (4) (b) as to the non applicability of national treatment standard on special advantage given to the development of small and medium businesses or new industries by the government. It reads as follows;

> *(4) Subsection (1) must not be interpreted in a manner that will require the Republic to extend to foreign investors and their investments the benefit of any treatment, preference or privilege resulting from;*
>
> *(c) Subsidies or grants provided by the government or any organ of state.*[77]
>
> *(f) Any special advantages accorded in the Republic by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.*[78]

From the formulation of national treatment in Tanzania-Republic of South Africa BIT and the South African protection act we can understand states have given policy flexibility room on the formulation of national treatment provision so as to enable the host state to regulate the domestic affair in general and to give special advantage/assistance to small and medium businesses/infant industries justified by the need for the development of the host state. Contrary to Tanzanian – South African BIT, Some Ethiopian BITs lack flexibility room so as to allow the government to act locally thereby to assist infant domestic industries in particular. This can be observed from the formulation of BITs national treatment clause under Ethio- Swiss confederation BIT.[79]

3.2. MALAYSIAN EXPERIENCE

In 1969, the Malaysian government launched the New Economic Plan (NEP), which aimed to eliminate poverty and promote greater economic equality between the different racial groups. Specifically the Bumiputra (indigenous groups, principally Malays) were empowered through expanded educational opportunities, employment quotas and incentives for corporate

[77] See supra note no.41,art.7(4)(c)
[78] See supra note no.41,art.7(4)(f)
[79] See supra note no.79

restructuring.[80]If a non-Malay company wanted to bid for government contracts, for example, or if they wanted to go public, they had to restructure the company and 30% of their stocks were to be sold to Bumiputras at a discount and also in order to promote the growth of an industry and commerce of Bumiputra community the government also used the allocation of contracts, quotas and licenses.[81]

The Malaysian government grants preferential treatment to specific ethnic groups in an attempt to redress historic discrimination inflicted upon indigenous minorities. Such ethnic groups are often assured a certain percentage of ownership of various investment projects, most notably those in the natural resources sector.[82] These laws are difficult to reconcile with national treatment because they clearly disadvantage foreign investors.[83] In order to allow for the government to enforce these obligations, Malaysia has made national treatment protection to be given to foreign investor subjected to her domestic laws. This can be exemplified by looking at the wordings of national treatment provision in UK-Malaysian BIT. It reads under art.2 (1) as follows;

> *Each Contracting Party shall encourage and create favorable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*[84]

Hence, as per this provision, the government of Malaysian is empowered to favor disadvantaged groups and thus give preferential/differential treatment; to the Malayans.

[80]Ceciliaeng Dahlhannele Hauki, black economic empowerment, an introduction for non-south African businesses, Gothenburg, July 2001,pp-17
[81] Ibid.
[82] See supra note no.27, pp-22-23
[83] Ibid pp-23
[84] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments ,21 May 1981.art.2(1).

CHAPTER-4

4. EVALUATION OF THE IMPLICATION OF NATIONAL TREATMENT IN ETHIOPIAN BITS ON DOMESTIC POLICIES TARGETING AT DISADVANTAGED GROUPS.

4.1. INTRODUTION

National treatment, if not properly crafted, limits discriminatory treatment by the host state in favor of host state nationals/investors by issuing policies, laws and regulations though the host state acts in her sovereign capacity justified by public policy needs. At this point, improperly crafted national treatment in BITs goes contrary to national policies, laws and regulations of the host state. They grant international legal protection to foreign investors from certain types of adverse action by the governments of the host states in which they invest. In addition to granting protection to foreign investor, host states have sovereign right to regulate domestically by enacting laws and policies of the host state in which an investment is to be made.[85].Relying on national treatment among standard protections of investment treaties, foreign investors have brought claims and demanded compensation for government decisions to introduce changes in regulatory regimes like in the areas of: labor, environmental, competition law, public health and tax increases measures and also for alleged mistreatment by the judiciary in host states.[86]

What is more, social and economic policy action taken by the host state to advance the standing of disadvantaged groups: like women, ethnicity, and social class can attract criticism and scrutiny from foreign investors. These policies require the foreign investor obligations to give special/differential treatment/preferences to these disadvantaged groups. In such cases if reservations/limitations to the applicability of national treatment are not put, by subjecting the foreign investor to be regulated by national and international laws, there is no way to require the foreign investor to be observe domestic laws. In such circumstances, foreign investor can bring a claim before international arbitration for the breach of BITs national treatment standard of protection.

[85]Jonathan Bonnitcha, Assessing the impacts of investment treaties: overview of the evidence,IISD report, September 2017,pp-1,see also UNCTAD preserving flexibility in IIAs: the use of reservations, UNCTAD serious on international investment policies for development ,united nations ,new York and geneva,2006,pp-5

[86] ibid

For this, IIAs can allow countries a certain policy space to promote their development by putting exceptions to the applicability of standard protections in BITs.[87] In such cases the principal responsibility for the design and implementation of development objectives and policies remains in the hands of the individual countries' governments.[88]

To this end, a number of countries agreed investment protection made must not be pursued at the expense of other legitimate public policy concerns. Specifically, as most developing countries are net capital importers relative to their developed country; investment treaty partner's interests lie in the potential ability of investment treaties to attract additional investment in flow into their economies; as such resulting in more exposure of developing countries to the costs associated with investment treaties, including loss of policy space in their BITs.[89]

The putting of reservation/limitation so that favoring nationals over foreign investors is justified particularly by the host state's domestic policy objective motivated by development goal as the government of the host state is dictated by policies/laws favor nationals over foreign investors. Since BITs impose on the States signatories a legal obligation under international law to comply with their provisions, they can limit the freedom of a state to regulate domestically. Here, the extent by which such an obligation will actually limit the subsequent freedom of action of the States concerned largely depends on the language of the treaty standard of protections in BITs.[90]

As practice shows, arbitration tribunals when rendering awards interpret the BITs national treatment terms without taking into account the legitimate public policy purpose for the breach of national treatment by the host country. This can be seen when we take the practices of current arbitration tribunals into consideration. For instance; The Claimant (Occidental Exploration and Production Company) brought a claim to arbitration for the breach of national treatment under US-Ecuador BIT following the issuance of Resolution no.664 of the *Servicio de Rentas*

[87]UNCTAD, International investment agreements: flexibility for development, UNCTAD Series on issues in international investment agreements, united nations new York and Geneva, UNCTAD/ITE/IIT/18,2000,pp-1

[88] ibid

[89]Jonathan Bonnitcha ,Assessing the impacts of investment treaties: overview of the evidence, IISD report, September 2017,pp-10

[90] See supra note no-73, pp-4

*lnternas (*SRI) on August 28, 2001, which denied the reimbursement of certain amounts of VAT paid by OEPC, and Resolution 23.4 of the same entity on April 1, 2002 requiring OEPC to return to the SRI VAT refunds previously made submitted.[91] The claimant based his claim on Article II (l) of the Treaty as it establishes the obligation to treat investments and associated activities on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable.[92]

The Claimant is of the view that Ecuador has breached this obligation because a number of companies involved in the export of other goods, particularly flowers, mining and seafood products are entitled to receive VAT refund and continuously enjoy this benefit. There is in this situation, the Claimant argues, a violation of the national treatment obligation.[93] Claimant argued that the government of Ecuador discriminated the claimant on the basis of nationality by enacting the tax law/resolution; thus treating the claimant less favorably comparing itself with exporters of other goods.

The Respondent also explains that the treatment of foreign-owned companies and national companies is not different as Petro Ecuador (the government itself is the joint owner with the company) is also denied VAT refunds. The respondent further argued that there is nothing in the policy that is intended to discriminate against foreign companies. It is also explained that other foreign producers, such as flower exporters, are granted the VAT refund because the law and the policy so allow.[94]

Finally the tribunal established violation of the national treatment obligation. Although the Tribunal was convinced that there had been no discriminatory intent in Ecuador's actions against this foreign investor and the resolution/law was the result of the policy enacted; on denying VAT

[91]See supra note no.9, pp-14, and para-1.
[92] Id, pp-59, para-1
[93] Ibid, Para -2
[94] Supra note no.3,pp-60

refund to this claimant; interpreted national treatment provision in US-Ecuador BIT breach as the investor is in fact has been treated less favorably.[95]

Contrary to Occidental exploration and Production Company tribunal, the other tribunal entertained as such similar public policy measure taken by home state doesn't amount to the national treatment obligation breach. For instance, In the case between Pope & Talbot, Inc. v. Canada, The tribunal stated that when the difference in the treatment of domestic investors and that of foreign investors bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments, such differentiated treatments would be justified and doesn't amount to the breach of national treatment.[96]

From these trends of arbitral awards we can see the differences/inconsistencies among arbitral tribunals on weighing policy reason justification as to the breach of national treatment standard of protection in IIA's.

Inconsistencies among arbitral awards as to establish national treatment breach resulted in the increment of investor-State disputes in recent years. Due to such in consistencies, foreign investors have realized the potency of this adjudicative mechanism and brought developing countries, in particular, on the respondent end of often costly claims concerning a wide range of regulatory actions/policy actions.[97]

Given the existence of inconsistencies on the interpretation of national treatment by arbitral tribunals and as decisions of arbitral tribunals' impact domestic administrative, legislative and judicial decision and policymaking, the issue of balancing investor's rights with host countries policy space and regulatory flexibility has become a priority issue in terms of IIA formulation.[98] This problem is attributed to while tribunals cannot compel States to bring their domestic legal order into line with investment treaty obligations or quash domestic acts, the monetary sanctions

[95] See supra note no.3,pp-61

[96]Pope & Talbot, Inc. v. Canada, in the matter of arbitration under chapter eleven of the North American free trade agreement, Award on the Merits of phase-2, April 10, 2001.pp-36, para-2.

[97] See Supra note no.1.

[98] Vicente Yu and Fiona marshal, investors obligation and host state policy space,2nd annual forum of developing countries investment negotiators,morocco,3-4 november,2008,pp-3

they can impose exert considerable pressure on States to bring their domestic legal orders into conformity with their investment treaty obligations.[99]

It was due to these reasons that States structured their BITs to grant them the discretionary power to deny national treatment at any stage of investment by putting exceptions to the applicability of the national treatment. This in turn potentially allows them flexibility to regulate domestically for public policy interest.

Although not all, National treatment provisions in Ethiopian BITs doesn't allow for the government to uplift the social and economic status of disadvantaged groups. Hence, it would be a challenge for Ethiopia to bind herself to the national treatment provision in her BITs commitment as the provision doesn't leave a room for domestic policy flexibility allowing Ethiopia to treat her nationals and their investments than foreign investor and their investments for domestic policy reason for the government is under duty to issue domestic policies aimed at boosting the prospectus of the disadvantaged groups socially and economically.

4.2. Definition of disadvantaged group

As to the definition of disadvantaged groups, despite the commitment of international law towards the promotion and protection of rights of these groups, there is no agreed standard definition, concept, or standard classification of list of people who are to be classified as disadvantaged groups. Hence, classification of disadvantaged groups varies from country to country based on the socio, economic and cultural perspectives of the country concerned.

For instance, Steven E. Mayer, on his part defined who disadvantaged group is by stating as follows

> *Based on the socio, economic, cultural perspectives, the classification of these groups vary from country to country. In general, women, children, socially, economically and*

[99] Stephan W. Schill, System-Building in Investment Treaty Arbitration and Lawmaking German law journal, Vol. 12 No. 05,2011,pp-1085.

culturally deprived sections, disabled, minorities etc. form part of disadvantaged groups.[100]

4.2.1. Definition of disadvantaged groups under international law

Under international law, there is no comprehensive convention on disadvantaged groups as conventions dealing with these disadvantaged groups (*women, children, socially, economically, culturally deprived sections, disabled, minorities*) exists separately dealing with particular type of disadvantaged group.

The commitment of international community has been shown by adoption of conventions meant to eliminate discrimination against those disadvantaged groups thereby obliging state members to take affirmative domestic measures with regard to disadvantaged groups in their respective countries. This can be seen when we have a look at The International Convention on the Elimination of All Forms of Racial Discrimination on General Assembly resolution 2106 under its annex A [XX] permits temporary discrimination in favor of disadvantaged groups: obliging as States Parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them.[101]

In addition, similar wording is adopted in article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women on General Assembly resolution under its annex 34/180, states as adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.[102]As such these conventions oblige for governments to give preferential treatment to women for the purpose of raising their economic and social life in their respective countries.

[100]"What is a disadvantaged group? "- Steven E. Mayer, 2003-; www.effectivecommunities.com
[101] See supra note no.16
[102]ibid

4.2.2. Definition of disadvantaged groups under national law

Nationally, although FDRE constitution under art.89 (4) puts an obligation upon the government to give special treatment to the disadvantaged groups, it no where provided the definition of disadvantaged groups. Laws dealing with disadvantaged groups are scattered in laws of the country. To mention in constitution, employment policy, Federal Urban Job Creation and Food Security proclamation and Federal Government Procurement and Property Administration

Besides, under domestic laws Ethiopia is under duty to take affirmative action in favor of these disadvantaged groups. Among others, FDRE constitution under art. 89(4) puts an obligation on the government to provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development[103].and also Art. 35(3) of FDRE constitution obliges the government to give affirmative action to women in order to remedy past legacy.

In addition, Ethiopian employment policy, youth policy, the federal urban job creation and food security agency establishment council of ministers regulation no.374/2016 and the Ethiopian federal government procurement and property administration proclamation no.649/2009 treat foreign investors less favorably.

To conclude, given the blanket construction of national treatment under Ethiopian BITs, there is a possibility that foreign investors might argue that certain obligations such as those prescribed under those national and international laws may discriminate against foreigners. One of such particular concern is that of affirmative action's/ measures reserved for Ethiopians, and which are in accordance with the international instruments Ethiopia is a party to it and her domestic laws.

In sections that follow, evaluation is to be made to Ethiopian domestic laws having the effect of affirmative action targeted to uplift the socio-economic life of the disadvantaged

[103]See supra note above no.18.

groups/previously discriminated groups in the country and at the same time might be construed by foreign investors as breaching treaty guarantee of National Treatment for foreign investors pursuant to national treatment in Ethiopian BITs.

4.3. THE IMPACT OF NATIONAL TREATMENT ON FDRE CONSTITUTION

Taking into consideration the strong commitment the nation, nationality and peoples of Ethiopia have to advance their own economic and social development, [104]FDRE constitution under the economic objective to be guided by the government obliges the government to give special assistance to the nations, nationalities and peoples of Ethiopia least advantaged in social and economic development as stated under Art-89(4) as follows;

> *Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development.*[105]

Domestically, given the constitutional duty of Ethiopian government to give assistance to nation, nationalities and peoples, the government may attempt to take such a measure of giving assistance to these groups. The problem is that Ethiopian BITs does not allow for the government as no flexibility room is left for the government to take preferential or differential measure to assist these disadvantaged groups. In case the government wants to issue specific laws with the aim of uplifting the social and economic status of these disadvantaged group's thereby discriminating foreign investor, such act of government amounts to national treatment violation under Ethiopian BITs. In such circumstances foreign investor can sue the government before international arbitration and can incur the government to incur much cost.

In addition, International Convention on the Elimination of All Forms of Racial Discrimination (CERD) adopted by General Assembly resolution 2106 under its annex A [XX] in which Ethiopia is a signatory, obliges member states to take temporary discriminatory measure in favor of disadvantaged racial groups or individuals belonging to them. It reads under art.2 (2) as follows;

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[104] See preamble, Supra note no.18

[105] See supra noteno.18

> *States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.*[106]

Thus, Ethiopia is under an obligation under an international instrument to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. It obliges Ethiopia to take discriminatory measures domestically so as boost social and economic life of these disadvantaged group. Here the problem is that BITs are international laws and left no room to allow Ethiopian government to enforce constitutional duties accordingly. For instance; Ethio-Kuwait BIT puts national treatment provision without leaving a discretionary power for the host state to regulate domestically on such matters. It reads under art. 4(1) as follows;

> *Each Contracting State shall accord investors of the other Contracting State:, as regards any activity carried on in connection with their investments including, management, maintenance, use, enjoyment disposal or compensation of such investments, treatment not less favorable than that which it accords to its own investors or to investors of any third state, whichever is the most favorable*.[107]

Here, national treatment in Ethio-Kuwait BIT does not leave a room for Ethiopian government to act domestically for public policy interest. In such circumstances, it becomes difficult for Ethiopia to take domestic policy actions targeting disadvantaged groups in particular coupled with the duty of the government of Ethiopia to provide special assistance to disadvantaged nation, nationality and peoples in their social and economic development.

[106] see supra note no.16

[107] Agreement between the Federal Democratic Republic of Ethiopia and the state of Kuwait for the encouragement and reciprocal protection of investment,14 September, 1996,Art.4(2)

4.4. THE IMPACT OF NATIONAL TREATMENT ON NATIONAL EMPLOYMENT POLICY AND STRATEGY OF ETHIOPIA

National employment policy and strategy of Ethiopia puts the comprehensive strategy of employment creation and seeks to promote job creation in the private sector. This is for the fact that accelerating private sector development is needed to enhance opportunities for job creation in the country.[108] To this end, the policy urges Accelerating private sector development for employment generation and the country has taken policy action that forces the private sector to undertake employment promotion to women, youth and people with disabilities.[109] Here, the problem is that national treatment obligation under BITs emanate from treaty obligation which is one of source international law. So, unless BITs provide for exceptions to the applicability of national treatment, there is no way to oblige foreign investor to obey such domestic laws.

In addition to this Ethiopian government has given commitments both under international instruments and domestically under the FDRE government to raise the social and economic life of women so as to enable them to participate on the basis of equality in social and economic as well as in public and private institutions.

Besides, Ethiopia is a member party to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and this instrument under its annex 34/180 obliges states to adopt temporary special measures aimed at accelerating de facto equality between men and women and puts as such measures taken by member states shall not be considered as discrimination. It reads under art.3 as follows;

> *Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal*

[108] National Employment Policy and Strategy of Ethiopia, Addis Ababa, November,2009, pp-16.

[109] Ibid,

or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[110]

Domestically, the government of Ethiopia is constitutionally under an obligation to give affirmative action to women's to raise the social and economic life of women so as to enable them to participate on the basis of equality in social and economic as well as in public and private institutions as provided under Art.35 (3). it reads as follows;

The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.[111]

As can be inferred from these extracts, Ethiopia committed herself under these legal instruments. Legal obligations under these instruments contradict with the national treatment provisions in Ethiopian BITs as neither general exception nor reservation/limitation to the formulation of national treatment provisions is not put to the application of national treatment. This limits the regulatory power of the government in case it wants to enforce these obligations by taking domestic measures by obliging foreign entities to enforce these measures (domestic measure) in their activities particularly on employment matters. This is because measures taken by government may go against the profit motive driven domestic firms operating in Ethiopia as such these entities may deny observing these measures.

For this, we can see blanket national treatment provision in Ethiopian BITs as they leaving no room for a discretionary power of the host state to regulate the activities of foreign investor operating in Ethiopia so as to provide special privilege/undertake employment promotion to women, youth and people with disabilities. For instance; Ethio-Iran BIT puts national treatment

[110]Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180 of 18, December 1979, 3 September 1981,art.3

[111] See, supra note no.15,art.35(3)

provision mixing with other standard of protections; without leaving a discretionary power for the host state to regulate domestically on such matters. It reads under art. 4(1) as follows;

> *Investments of investors of either Contracting Party effected within the territory of the other Contracting Party, shall receive the latter's full and constant security and protection and fair and equitable treatment. Such investments shall be accorded a treatment which is not less favorable than that the latter accords to the investments of its own investors or investments of the investors of the most favored nation, which is more favorable to the investor.*[112]

This blanket national treatment provision in Ethio-Iran BIT was drafted in a way to restrict for a contracting party to exercise discretionary power to regulate the activities of foreign investor operating in the host state in general and to provide special privilege/undertake employment promotion to women, youth and people with disabilities in particular.

4.5. THE IMPACT OF NATIONAL TREATMENT ONTHE FEDERAL URBAN JOB CREATION AND FOOD SECURITY AGENCY ESTABLISHMENT COUNCIL OF MINISTERS REGULATION NO.374/2016

The standard of national treatment guarantee offered in Ethiopia's BITs is meant to provide foreign investments treatment which is as favorable as that enjoyed by local businesses that is owned by Ethiopians. Beyond this, there are concerns that the concept of blanket national treatment might entitle foreigners to special incentives, treatment or perquisites which have been given exclusively for local business actors as they may claim the same treatment (like incentives) from the government.

Ethiopian council of ministers has passed regulation no.374/2016 with the aim of improving the livelihood of citizens who are unable to work or able to work but unemployed due to different conditions and live under poverty line. To this end, the regulation obliges the government to support and coordinate institutions assisting the micro enterprises and small enterprises do not fall under the manufacturing sector to make them competitive, sustainable and strong foundation for industrial development with a view to make these sectors competitive, sustainable and

[112]Agreement on reciprocal promotion a protection of investments between the government of the federal republic of Ethiopia and the government of the Islamic republic of Iran, oct.21, 2003,art.4(1).

thereby create employment opportunities in urban centers, improve their income and create fair resource distribution.[113]

This regulation has the development goal for those groups disadvantaged economically and living under the poverty standard. Specifically Federal Urban Job Creation and Food Security proclamation as stated under art.6 obliges the government to grant assistance to micro and small enterprises on training, finance and technological consultancy service. For this Purpose, The proclamation empowers the Federal Urban Job Creation and Food Security Agency to coordinate and support micro and small enterprises as put under art.6 (6) as follows;

> *based on the value chains and the demand of micro enterprises and small enterprises that do not fall under the manufacturing sector; coordinate institutions providing support to the micro enterprises and small enterprises that do not fall under the manufacturing sector in soliciting training, finance and technological consultancy service.*[114]

Here also Ethiopia's domestic law aimed at improving the life standard of the poor go against national treatment treaty obligation in her BITs when the government wants to grant assistance to micro and small enterprises on training, finance and technological consultancy service. The foreign investor may perceive the assistance given to them as discriminatory act of the host state claiming as they are *in like/similar circumstances or in the same economic sector*. This was attributed to lack of policy flexibility room in Ethiopian BITs, Thus, Blanket national treatment in BITs goes against national treatment provisions in Ethiopian BITs as the exception/limitation to its application is not put. This can be exemplified by looking at the construction of national treatment in Ethio-Islamic Republic of Iran BIT.[115]

To solve such problems states have undertaken measures usually by putting an exception to the national Treatment provisions in their BITs. China's BIT with Guyana permits parties to grant special privileges to their own nationals in order to stimulate the growth or creation of local industries, provided that these do not impair the activities of foreign investors. Hence, Subsidies

[113] See preamble of Regulation No.374/2016, Federal Urban Job Creation and Food Security Agency Establishment Council of Ministers, Federal Negarit Gazette, 22nd Year, No.41, ADDIS ABABA, 16th February, 2016.
[114], id, art-6(6).
[115] See supra note no.49

can be used by the government of the parties to the agreement in order to provide assistance to struggling sectors or industries or to encourage the development of impoverished groups or regions.[116]

4.6. THE IMPACT OF NATIONAL TREATMENT ON THE ETHIOPIAN FEDERAL GOVERNMENT PROCUREMENT AND PROPERTY ADMINISTRATION PROCLAMATION No.649/2009

Nowadays many BITs contain numerous exceptions to the national treatment applicability. One of such exception is a limitation put to restrict the applicability of national treatment through granting preferential treatment to domestic firms by discriminating foreign firms in the supply of government services.

The government of Ethiopia in order to realize the economic benefit and efficiency flowing from bulk purchase is in place enacted proclamation no.649/2009 on government procurement and property administration .Although this proclamation under art.4 puts the non discriminatory principle as candidates shall not be discriminated against in the proceeding of public procurement on the basis of nationality, race or any other criterion, it puts an exception to this provision under art.25 which permits discrimination on the basis of nationality as stated as follows;

> *1/ a preference margin which shall be determined by a directive to be issued by the Minister for goods produced in Ethiopia, for works carried out by Ethiopian nationals and for consultancy services rendered by Ethiopian nationals shall be granted in the evaluation process[117].*
>
> *2/ In addition to the preference provided for in sub-article (1) of this Article, further preference of such margin as to be determined by the directive to be issued by the Minister may be allowed for small and micro-enterprises established in accordance with Small and Micro-Enterprise Proclamation.[118]*

[116]See supra note.no.43, pp-20.

[117]Proclamation No. 649/2009,The Ethiopian Federal Government Procurement and Property Administration, Negarit Gazette, 15th Year, No. 60,ADDIS ABABA 9th September, 2009,art.25(1).

[118] Id,art.25(2)

Pursuant to government procurement and property administration proclamation, ministry of finance and economic development has issued a directive. It reads under Art.16 as follows;

> *Pursuant to Article 25 of the proclamation, with the exception of request for quotation and single source procurements, preference shall be granted in any procurement to locally produced goods, to small and microenterprises established under the relevant proclamation and to local construction and consultancy companies.*[119]

2. The margin of preference to be so granted and applied when comparing prices during evaluation of bids shall be as follows:
a) For procurement of drugs or pharmaceutical products or medical equipments 25%,
b) for procurement of other products 15%,
c) For construction and consultancy services 7.5. %.[120]

3 .The preference to be granted to drugs, medical equipments or other products as per article 16/20/2(a) and (b) shall be effective where it is certified by a competent auditor that no less than 35% of the total value of such products is added in Ethiopia.[121]

From these extracts we can understand that in order to uplift the economic life of the poor as it is a tool to contribute to the development goal, Ethiopia has taken a legislative measure by enacting law discriminating a foreign companies and favoring the nationals as preference is to be granted in procurement to small and microenterprises as stated in the above provisions. This in turn goes contrary to the national treatment in Ethiopian BITs as reservation so as to allow for the government to take such measure was not provided in Ethiopian BITs as this can be exemplified from the formulation of national treatment in Ethio-Islamic republic of Iran BIT.[122]

Summing up, blanket national treatment provisions under Ethiopian BITs I tried to see under chapter-4 did not leave a policy space room for the host state so as to allow regulating

[119] Federal procurement directive, Ministry of finance and economic development,june2010,art.16(20)(1)
[120] Id,art-16(20)(2)
[121] Id,art.-16(20)(3)
[122] See supra note no.49.

domestically. In addition, the practice of arbitral tribunals also show us inconsistent decisions given by them on the same factual situation while establishing breach of national treatment. This in turn restricts Ethiopian government to take domestic policies in general and policy action targeted at disadvantaged groups aimed to uplift their socio- economic life.

CHAPTER-5

5. CONCLUSSION AND RECOMMENDATIONS

5.1. CONCLUSION

Under this paper, Ethiopian investment treaties were analyzed in relation to national treatment standard including its implication on domestic policies targeting disadvantaged groups. For the sake of this paper, analysis of Ethio-Austria, Ethio-Iran, Ethio-Kuwait and Ethio-kingdom of Sweden BITs have been undertaken. National Treatment clauses in these BITs are defined in considerably broad manner. These BITs construct the language/wording of the National Treatment in general terms without leaving a room for Ethiopia to regulate domestically. This would have far reaching implications with regard to disadvantaged groups as no room is left that allows for Ethiopia to take affirmative action to uplift the life of these disadvantaged groups(*women, children, socially, economically and culturally deprived sections, disabled, minorities).*

Countries to reserve their policy flexible, while negotiating their particular BITs designed their language of aspiration to be included; specially, by including the phrase *in accordance with the law* thereby allowing the host state to regulate domestically for public policy justification. Nonetheless, **Ethio-BITs** under investigations did not contain "*in accordance with the law*" but, it is better to inculcate within the ambit of Ethio-BITs- under investigations national treatment clauses while negotiating a new and time ended in investment treaties.

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. This research indicates, none of the BITs under investigation contained "exceptions" to the applications of NT. However, treaty practice of South Africa and Malaysia in particular shows, countries maintains either public policy matters, subject/industry specific exceptions including development objectives.

Ethiopian has enacted laws favoring nationals over foreign investors. Among others: FDRE constitution, employment policy, federal urban job creation proclamation, federal government procurement proclamations gives favorable treatment to economically disadvantaged groups in the country discriminating the foreign investor. This discriminatory treatment can result in national treatment breach under Ethiopian BITs as exceptions are nowhere provided to the applicability of national treatment. Therefore, it seems that BITs and domestic laws, as to national treatment clauses are inconsistent. So BITs must provide with clear power of states to provide reservation by domestic laws and regulations. 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 subject/industry specific exceptions.

5.2 RECOMMENDATIONS

- While bargaining Ethiopia should add permissive terminology to BITs national treatment provision to preserve regulatory freedom to act domestically which permits certain degree of autonomy for the government of the country to regulate locally for public purpose justification. Thus, giving better treatment to nationals justified by domestic policy need should be made an exception to the applicability of national treatment while negotiating a new and time ended investment treaties.

  .

- Ethiopia's Domestic law gives special attention to economically disadvantaged groups in Ethiopia. Among others FDRE constitution, employment policy, urban job creation proclamation, government procurement proclamation gives special/preferential treatment to the economically disadvantaged ones. But, the now existing National treatment provision does not leave regulatory flexibility for Ethiopia and the government provides differential treatment to grant right and privileges for disadvantaged groups (*women, children, socially, economically and culturally deprived sections, disabled, minorities).* So, the way out from this problem is needed. 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*; *by making national treatment not to preclude a differential treatment in the laws/regulation of the contracting parties to its own investors or to investments or returns of investments of its own investors.*
  - ✓ *Through insertion of Industry specific exceptions and/or development exceptions clauses or*
  - ✓ *By adding qualification to the phrasing of national treatment by adding in accordance with the law; by explicitly putting to include both national and international laws.*

- Thus, it is recommended that to make Ethio-BITs consistent with domestic policies/ laws and to avoid potential discrepancies, Ethiopian government should negotiate on national treatment clause provision by allowing a room for policy flexibility through these three above mentioned available options.

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