COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

LEGITIMATE REGULATORY ACTS OF STATES UNDER INTERNATIONAL INVESTMENT LAW: A SCRUTINY OF ETHIOPIA'S BILATERAL INVESTMENT TREATIES

LL.M. THESIS IN COMMERCIAL AND INVESTMENT LAW

BY: MULATU GOBENA

ADVISOR: ABDATA ABEBE (Ass/Prof of Law)

CO-ADVISOR: GEBRE NEGASH (LLM)

JIMMA ETHIOPIA

JAN-12-2023

LEGITIMATE REGULATORY ACTS OF STATES UNDER INTERNATIONAL INVESTMENT LAW: A SCRUTINY OF ETHIOPIA'S BILATERAL INVESTMENT TREATIES

MULATU GOBENA LAELAGO

A THESIS SUBMITTED TO THE COLLEGE OF LAW AND GOVERNANCE SCHOOL OF LAW

JIMMA UNIVERSITY

JIMMA; ETHIOPIA

IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF LL.M IN COMMERCIAL AND INVESTMENT LAW

JAN.12/2023

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

ADVISOR'S APPROVAL

This is to certify that the thesis entitled: **"Legitimate Regulatory Acts of States Under International Investment Law: A Scrutiny of Ethiopia's Bilateral Investment Treaties"**; was submitted in partial fulfillment of the requirement for the degree of Masters of Law (LLM) with a specialization in Commercial and Investment Law to the Post Graduate Program of Jimma University School of Law, has been carried out by **Mulatu Gobena Laelago** under our guidance. Therefore, we recommend that the student fulfilled the requirements and hence hereby can submit the thesis to the school.

Approved by;

Name of the Advisors	**Signature**	**Date**
1. Abdata Abebe (Ass/Prof of Law)	_____	_____
2. Gebre Negash (LLM)		_____

_____

EXAMINERS' APPROVAL

SCHOOL OF LAW

JIMMA UNIVERSITY EXAMINERS' APPROVAL

As members of the board of examiners for the final master's degree open defense, we attest that we have read and assessed the thesis written by **Mulatu Gobena** with the title **"Legitimate Regulatory Acts of States Under International Investment Law: A Scrutiny of Ethiopia's Bilateral Investment Treaties"**; and recommend that it be accepted as fulfilling the thesis requirement for the degree of masters of law at Jimma University with specialization in commercial and investment law.

Name of Chairperson	Signature	Date
_____	_____	_____
Name of Internal Examiner	Signature	Date
_____	_____	_____
Name of External Examiner	Signature	Date
_____	_____	_____

CERTIFICATION OF THE FINAL THESIS

I **Mulatu Gobena** hereby certify that all the corrections and recommendations suggested by the board of examiners are incorporated into the final thesis entitled **"Legitimate Regulatory Acts of States under International Investment Law: A Scrutiny of Ethiopia's Bilateral Investment Treaties"**;

Name: **Mulatu Gobena** Signature: _____Date_____

DECLARATION

I **Mulatu Gobena** hereby declare that the thesis entitled **"Legitimate Regulatory Acts of States under International Investment Law: A Scrutiny of Ethiopia's Bilateral Investment Treaties"**; is my original work and has not been presented for a degree in any other university, and all sources of material used for this thesis have been duly acknowledged.

Name: **Mulatu Gobena** Signature: _____ Date: _____

ACKNOWLEDGMENT

First and above all, I would like to extend my deepest gratitude to the almighty God. My deepest gratitude goes to my advisors Abdata Abebe (Ass/Prof of Law) his invaluable scholarly and friendly advice, and insightful comments throughout this study. My sincere gratitude also goes out to my family and friends who have supported me throughout my quest to finish this thesis by providing financial, emotional, and moral assistance.

ACRONYMS /ABBREVIATIONS

BITs	Bilateral Investment Treaties
CCIA	Investment agreement for the COMESA
COMESA	Common Market Eastern and Southern Africa
IIAs	International Investment Agreements
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FDRE	Federal Democratic Republic of Ethiopia
ICSID	International Center for The settlement of Investment Disputes
IIDS	International Investment Dispute Settlement
ISDS	Investor state dispute settlement
NAFTA	North Atlantic Free Trade Agreement
MFN	Most Favored Nation Treatment
NT	National Treatment
SADC	Southern Africa Development Community
IITs	International Investment Treaties
TNCs	Transnational Corporations
UN Charter	United Nations Charter
UNCTAD	United Nations Centre for Trade and Development

Contents

ABSTRACT

While host states interest in concluding BITs is to have the BIT that incorporates terms that empower them to effectively regulate foreign investments situated in them, the home states interest on the other hand is to limit the regulatory power of host states over their investments situated abroad even up to taking away the inherent sovereign power of the host states of protecting their essential security interests. International investment agreements in general, and bilateral investment treaties in particular, very often disregard the interests of host states in favor of home states, since bargaining power of the countries are highly essential in negotiating the agreements. Ethiopia is one among the least developed countries of the world and parties to many bilateral investment treaties with various countries across the globe. A systematic analysis into the terms of all BITs concluded by Ethiopia reveals a serious issue of not uniformly incorporating terms that will allow the government of the country to exercise its legitimate regulatory powers and interests. This thesis analyzes BITs concluded by Ethiopia in line of their regulation of its legitimate regulatory powers the country with the objective of addressing three main questions; how the contemporary international investment agreements strike balance between the foreign investor need of protection for their investments and host countries power of exercising their regulatory powers/ interests? How BITs concluded by Ethiopia accommodate the sovereign power of the regulatory space of the country without violating the BIT obligations entered into? And finally, how other countries regulate their regulatory space in line with their BIT obligations they concluded with other countries? This thesis uses comparative doctrinal research methodology to analyze all Ethiopian BITs and laws with different literatures and some countries Model BITs concerning the host states' regulatory space, the thesis concludes that the majority of Ethiopian BITs do not adequately protect the legitimate regulatory powers, hence, the study forwards recommendations for the country to terminate most of its BITs that do not recognize the state's inherent power to protect its essential regulatory interests, and to adopt a Model BIT with which it will negotiate its future BITs.

Keywords: **FDI, *Host State's Regulatory Rights, Ethiopia, Bilateral Investment Treaties***

CHAPTER ONE

1. INTRODUCTION

1.1 Background of the Study

Investment is a major source of economic growth and development. Policy makers around the world are concerned on how to increase investment and thereby development.[1] On the other hand states also want to introduce new technologies and knowhow so that their nationals learn different types of skills to expand investments and technologies by themselves.[2]Developed countries want protection for the investments already existing and for the new investments in developing and LCD countries. However know a day's BITs between developing countries are growing remarkably since 2004, especially BRICS countries are becoming capital exporters.[3] For these reasons, developing states make investment treaties in which they commit to provide packages of investment protections to attract foreign investments.[4] These agreements are also used as means of attracting foreign investment for developing countries.[5] By signing BITs and other IIAs states aims' to give confidence for foreign investors that their investment will be protected under international law in cases of non-commercial risks.[6] Hence these treaties are

[1]BIAC,International Investment Agreements Matter, 2016, Available at; https://uscib.org/biac-international-investment-agreements-matter/, visited on August 10, 2022.

[2] Dominic Npoanlari Dagbanja, The Paradox of International Investment Law: Trivializing the Development Objective Underlying International Investment Agreements in Investor-State Dispute Settlement: papers presented at the congress. In *Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law* (Vol. 4,). UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL). http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/96-DAGBANJA-The_Paradox_of_International_Investment_Law.pdf visited on August 19, 2022

[3] Edited by Kavaljit Singa and Burghardilge, *rethinking bilateral investment treaties: critical issues and policy choices, (*First Published in 2016,amisterdam Netherlands)2

[4] M,Sornarajah, International Law On Foreign Investment, (Cambridge University Press, 3rd edition' New York, 2010), p-313

[5]Dagbanja,*supra note no2-, p-*2

[6]United Nations Economic Commission For Africa, Investment Policies Bilateral Investment Treaties In Africa, Implication For Regional Economic Integration,2016, p- 16, available at https://repository.uneca.org/bitstream/handle/10855/23035/b11559299.pdf?sequence=1&isAllowed=y Visited on Jan-13, 2022

used to guarantee foreign investors for stable and predictable international legal and institutional frameworks of investment.[7]

Most of the existing international investment treaties focus only on promotion and protections of foreign investments and investors and they do not concern much about public interests of host states communities even though there are recent developments. As the result, whenever host states make laws and regulations to protect public interest, foreign investors claim breach of IIAs or BITs commitments with their home states and claim to be compensated under international investment arbitration systems.

States want to justify their actions based on the regulatory rights to protect public interests as are provided on various domestic and international legal frameworks as duties of the state for the protection of environmental public health, safety and human rights. However ISDS system do not want to bother on interpretation of varies international and host states laws by considering that they are have no jurisdiction to entertain cases in that way only focus on BITs and IIAs between parties on dispute before them.

The right to 'regulate' can be defined as measures of states to protect interest, such as protection of human rights, environment public health and safety. Under customary international law the right of States to regulate its political, economic and social affairs and adopt laws to protect matters of public interest is well accepted principle that does not entail liability for a state.[8] The 1974 charter of economic rights and duties of states under art 2 (2) provided that every state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national

[7]Tarcisio Gazzini,Bilateral Investment Treaties,1 Gazzini, Tarcisio, Bilateral Investment Treaties (March 29, 2012). International Investment Law: The Sources of Rights and Obligations, T. Gazzini, E. De Brabandere, eds., The Hague: Martinus Nijhoff, 2012, p-1, Forthcoming, Available at SSRN: https://ssrn.com/abstract=2030872 Visited on; August 23-2022.

[8] *Texaco Overseas Petroleum Company v Libyan Arab Republic*, Award on the Merits, 19 January 1977 (1978) 17 ILM 3,[59]

objectives and priorities.[9] It means that one of the ways by which the right to state sovereignty is manifested is by the right to regulate.[10]

New and the existing international instruments on environmental, public health and human rights requiring states parties to them to enact laws and take administrative measures to implement the provisions of such treaties. In such occasions states should be abided by the international obligations. They should make legislative and administrative decisions to enforce the international obligations.[11] However the investment treaties and the enforcement mechanism are not favorable for states to enforce these international obligations. However international investment dispute settlement system or investment arbitration system do not accept other international and domestic laws rather than BITs and IIAs because they consider they only have jurisdiction on relevant international investment laws. Whenever states start to take the measures foreign investors raise the issues of breach of BITs or IIAs. International investment jurisprudence and literatures' in the area shows that the system is restricting the right of host states to regulate in the public interest.[12] ISDS system is awarding significant amount of compensations against host states for public interest measures of host states.[13] In adjudicating investment cases government evolving regulatory measures ISDs tribunals' award tax payers' money of host states to foreign investors.[14] These awards have potential chilling effects on the ability and willingness of governments to adopt and implement new environmental, human rights and other public welfare measures.[15]

The ways in which the regulatory acts of states are challenged by foreign investors is through the substantive and procedural standards of investment protection embodied on IIAs. The impacts of definition of investments and investors and languages of objectives and preambles of treaties

[9] Charter of Economic Rights and Duties of States GA Res. 3281(xxx), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50 art.2

[10]Jesse Coleman, Lise Johnson, Lisa Sachs, and Kanika Gupta, *International Investment Agreements, 2015–2016 A Review of Trends and New Appr*oaches,p-72

[11] Ibid.

[12]Andrew Newcombe Lluís Paradell,*Law and Practice of Investment Treaties Standards of Treatment*, (Kluwer law international, The Netherlands,2009)64,:www.kluwerlaw.com

[13] Ibid

[14]Ibid

[15]Nathalie Bernasconi, International Legal Framework on Foreign Investment,(Fifth Ministerial Conference Environment for Europe, Osterwalder,2003)

have also significance.[16] IIAs and BITs provide protection for foreign investments and investors through standards of protections or treatments. These standards are packages of protections for foreign investors and obligations for host states.[17] One of the problems with these provisions is vagueness of the provisions of the agreements that caused the inconsistent interpretation by arbitral tribunals that leave host states to be unsure about how to comply with their international commitments.

Whenever the formulations of investment treaty standards are vague the practice of international investment tribunals also shows they bend the interpretation in favor of foreign investors.[18] Another problem with IIAs or BITs system is the system doesn't provide the responsibilities of foreign investors. However states are making reforms to ensure countries their right to regulate for pursuing public interests without violating IIAs.[19] Accordingly states are revising their model BITs and BITs and states which do not previously have modeled BITs are also formulating to reflect states preference for scope, content and language of their BITs.[20]

Both developed and developing countries, are formulating their agreements more precisely than previously, by clarifying the scope and meaning of specific guarantees, in order to preserve regulatory space in their BITs particularly and in other types of IIAs.[35] Most countries are also terminating the existing BITs and claiming renegotiation. India and South Africa are examples among the developing countries that are revising BITs,[21] and Indonesia has revealed its plan to re-examine 60 BITs.[22] Some capital importing countries like Bolivia, Ecuador and Venezuela are withdrawing from ICSID,[23] because of the negative of the effects of ISDS decisions over

[16]Rudolf Dolzer, Impacts Of International Investment Treaties On Domestic Administrative Law',Vol. 37, p- 957

[17]Karl P. Sauvant and Federico Ortino 'improving international investment law and policy regime ;options for the future '(Ministry of Foreign affairs of Finland)21

[18] Edited by Kavaljit Singh and Burghard Ilge Rethinking bilateral investment treaties: critical issues and policy choices(First Published in 2016,Amisterdm, Netherlands)4

[19] World Investment Report 2015, 'Reforming International Investment Governance: an action menu' (chapter IV,2015) 120,129

[20] Hamed EL kady, revision of model BITs; salient features and global trends (training course for economies in transition on a new generation of international investment policies ,UNCTAD 2013

[21] Assefa lemma,When Does Government Regulatory Measure Amount to Expropriation? Looking a Workable Roadmap under the BITs of Ethiopia,(LLM Thesis, Haramaya university,2018) 6

[22] Said Mokonnen, 'A Proposal On Crowd-drafting: Designing a Human Rights-Compatible International Investment Agreement' (School of Law, City University of Hong Kong): Email. seid1429@gmail.com

[23] Stephan W. Schill,'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law'(2011) Vol. 22 no. 3) EJIL,875,888

regulatory acts of states.[24] To address the challenge recently new trends of IIAs are emerged. New BITs and model BITs and other types of IIAs have brought. This innovative feature is provided on UNCTAD, IISD, COMESA, SADC and other similar international organizations. As the result new trends in IIA are emerging in a manner participation on it may assist developing countries like Ethiopia in their efforts to advance their economic development by adopting flexibilities on IIAs to increase their policy space.[25]

Ethiopia has concluded around 34 BITs with various states. The structures and contents of the BITs and the draft model BIT shows similarity. As a capital importing country and in a condition where foreign investment is not made duty bounded to comply with state measure to protect public interest on the BITs, BITs standards Ethiopia is the only state that is taking the duty of with regards to the BITs. For these reason there are concerns that majority of the Ethiopian BITs provisions may not balance investment protection on the one hand and the regulatory space on the other hand. As result disputes that potentially arise between Ethiopia and foreign investors can bring different types of claims. Thus, this study examines the regulatory acts of the state of Ethiopia with regards to public interests such as human rights, environmental protections, labor rights and protection of public health and safety under its BITs.

1.2 Statement of the Problem

Nevertheless as indicated on the background of this paper, the existence of BITs may not guarantee the increase of foreign direct investment but vague BITs provisions surely brings liability. As the recent international investment arbitration jurisprudence in the absence of clear BITs provisions bend the interpretation of BITs in favor of investors and investments. In these scenarios the government regulatory acts or measures of the state with regards to public interest such as, the protection of public health, human rights and labor protection, public welfare and safety are going to be considered as violations of BITs provisions.[26]

[24] See also Vera Korzun,'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve Out' (2017) 50 Vanderbilt journal of transitional law 355,361

[25] UNCTAD,Trends in international investment agreements :an overview(United Nations New York and Geneva, 1999) 88

[26]Stephan W.Schill1 and Vladislav Djanic, Special focus Section Wherefore Ar Thou? Towards a PublicInterest Based Justification of International Investment Law,(oxford university press,(vol. 30),[2018])30

As indicated on the background of this paper almost all substantive and procedural provisions of BITs have their effect on the right to regulate. Therefore studying of single provision cannot address the issue as the result, the research wants to investigate all BITs standards and preamble s of all Ethiopian BITs with regards to the place for regulatory acts of the state.

In Ethiopia BITs almost all BITs provides a fair and equitable treatment standard to make stable frame work for investment. In most BITs the standard is constructed[27] on the preambles of the BITs despite the recent arbitral decisions are taking the assumption that bringing fair and equitable treatment to the preamble of BITs shows states strong determination to the protection of foreign investment. As treaty interpretations mostly focus on the preambles of treaties for the interpretations of the whole treaty's provisions. Bringing it to the preamble may imply the BITs strong determination for the protection of the investment; and this has the implication of reducing police space. The provision of FET is not specified in most of Ethiopian BITs sometimes it includes full protection and security in most BITs.[28] However Unqualified FET provisions in recent BITs for example Asian China investment agreement of 2009, US model BITs and most IIAs which have limited the provision to customary international law minimum standard equating it to denial of justice.

Indirect expropriation is one of the standards of IIAs that can be claimed by foreign investors following regulatory actions of states. However now a day's varies regulatory acts or measures taken by states for public interest are considered as expropriation and bringing liability. In Ethiopian BITs there are also unconditional most favored nation (MFN) provisions in almost all BITs, which may make possible to import favorable BITs provision from other BITs on which Ethiopia is party, this trend opens hole for MNCs for treaty or forum shopping. But States are narrowing MFN provision to reduce claims from FDI. Otherwise MFN provisions increases or multiplies once country's BITs obligation. Therefore the effect of MFN provision in Ethiopia BIT should be examined.

[27] Agreement between the federal democratic republic of Ethiopia and the kingdom of Denmark concerning the promotion and reciprocal protection of investments Addis Ababa on the 24th April, 2001, - agreement between the republic of Turkey and the federal democratic republic of Ethiopia concerning the reciprocal promotion and protection of investments, Addis Ababa on the 16th day of November 2000

[28] Treaty between the federal republic of Germany and the federal democratic republic of Ethiopia, concerning the encouragement and the reciprocal protection of investments, Addis Ababa,19 January 2004 2005 art.2.

National treatment (NT) is the standard which protects foreign investor from discrimination by host state in 'like' circumstance. The phrase like circumstances prevents governmental regulations that treat [non-national investors] differently in order to protect the public interest. Measures applied by a government in pursuance of legitimate public interest such as the protection of public health, safety and the environment, having a different effect on an investments or investors of another states can be considered as violation of provision of NT. In Ethiopian BITs the effect of NT with regard to public interest regulatory acts is not clear.[29] COMESA, to which Ethiopia is a member, the Investment Agreement for the COMESA Common Investment Area (CCIA) obliges member States not to waive or derogate from or offer to waive from measures concerning labor, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments under art.5 of COMESA (CCIA). Potentially this is the provision that is intended to prevent a _race to the bottom in terms of investment liberalization and promotion among COMESA member States.[30] Also SADC Model BITs investment template has made protection of public interest as objectives of the model BIT.

The human rights measures the country can take through legislative acts are not adequately addressed on the investment standards or other parts of BITs. whether the host state has the power to change its laws to address human rights concerns, environmental issues, tax policies, and health concerns or kept a situation of 'legislative standstill' so as to comply with the already signed investment agreement are thorny issues over which disputes may arise between investors and Ethiopia as a host state for foreign investment. And our BITs have lacuna on such matters. Ethiopia under its current BITs regime may face risks of expansive litigations before international tribunals for future regulator acts. This research will compare the regulatory standards with regards to the recent Indian model BIT, South African BITs, Brazil Model investment agreement. These countries resemble Ethiopia as developing countries. The research will also examine USA model BIT, UNCTAD model agreement and IISD models because they have innovative trends. SADIC model BITs template, COMESA model investment agreement

[29]Jan Wouters Sanderijn Duquet Nicolas Hachez,' International Investment Law: The Perpetual Search For The Consensus?'(2012) Leuven Centre for Global Governance studies 88/2012,31

[30]Vicente Yu and Faona marshal ,Investors Obligation And Host States Policy Space,(2nd annual forum of developing country investment negotiations ,Marrakech Maroc, IISD ,2008)5

will also be examined because for one thing they have innovative trends and Ethiopia as party to the COMESA there its BITs should comply with it. The model BITs and agreements described above are well known to include regulatory space for public interest. Therefore the research will examine the provisions of BITs of Ethiopia with regard the above model BITs and model IIAs provisions with regards to legitimate regulatory acts of host states.

1.3. Research Objectives

1.3.1 General Objective

The general objective of this research is to evaluate the Ethiopia's bilateral investment treaties on legitimate regulatory acts of the state and then to show the best options for the state to expand policy space on BITs of Ethiopia without losing FDI inflows.

1.3.2. Specific Objectives

The following are the specific objectives of the thesis;

1. To evaluate whether the Ethiopia's BITs and the BITs standards enhance the country's ability to legitimate regulatory measures.
2. To examine degree of flexibility of Ethiopian BITs and the BITs standards in order to protect vital public interests such as human rights, environmental measures, public health, tax measures, labor and public welfare and safety and to adapt policies for changing circumstances
3. To evaluate the place of Ethiopia's BITs and the BITs standards on legitimate regulatory acts to address human rights, health, and environment and tax concerns and in arresting the investments made through corruption.

1.4 Research Questions

The thesis has addressed the following major questions;

1. How the legitimate regulatory space of states for public interest is increased through BITs and BITs standards without violating bilateral investment treaty obligations?
2. Do Ethiopian BITs and the BITs standards enhance the country's ability to legitimate regulatory measures?
3. What are the possible options that Ethiopia can adopt in order to make investments responsible to its socio-economic and environmental concerns?

1.5 Literature Review

There is a scarcity of research on the area of legitimate regulatory acts of states: in evaluating Ethiopia's bilateral investment treaties. In academics it seems that on this aspect, Ethiopian BITs are disregarded. However there are some attempts to deal with some of the issues directly or indirectly. I reviewed some of the literatures in relation with regulatory space of states under international investment treaties in general and Ethiopian bilateral investment treaties in particular.[31]

The first literature examined was the work of Getahun Seifu, which mainly focuses on the emergence of FDI in Ethiopia's BITs and the Regulatory Space of the country. In the work, the author has argued that the investment protection standards of BITs, in particular the standards of protection as to the right to non-discrimination of FDI those are NT, MFN and FET are relative standards which host states can allow or restrict. According to the research the three standards deal with different aspects of non-discriminatory treatment. States should have regulatory space to get flexibility to make legislations in sensitive areas such military, environmental and cultural significance by making limitations and exceptions by using these standards. The research advises that Ethiopia to use such system.

Make discrimination against FDI in this way in order to get regulatory space to protect infant industries, public security and achieve other national policies. According to the research Ethiopia can also use domestic legislations to restrict FDI by Deviating from BITs provisions by negative listings and making limitations from certain areas of investment to expand policy space for the state.[32]According to the research such actions are justified under customary international law because states have a sovereign right to control entry and admission of investment. The research recommends that Ethiopia can use limitation and exception to deviate from BITs standards using relative or non-discrimination standards of its BITs.[33]

[31]Getahun Seifu,Regulatory Space" in the Treatment of Foreign Investment in Ethiopian Investment Laws,(Journal of world investment and trade,2008)17,: http://ssrn.com/abstract=1586888
[32] ibid
[33] ibid

The 2nd research is the research of Wakgari Kebeta focusing on examining adequacy of Ethiopian BITs with regard to legitimate regulatory space in order to implement environmental policies. The researcher used comparative doctrinal research methodology and found that the current BITs of Ethiopia does not have adequate regulatory space to protect the environment. The finding of the research showed that for inserting environmental protection provisions in investment agreements holistic approach should be used. The study recommended that reference in the preamble, main text, annex or separate agreement could produce a better result. The research further recommended amending or terminating the existing BITs of Ethiopia that lack room for the regulatory power of the state.[34]The research recommended that Ethiopia's BITs should be re-structured to include environmental protection. BITs should provide environmental measure to be excluded from indirect expropriation and the BITs of Ethiopia should eliminate FET from the BITs provisions.[35] However FDIs need the standard very much hence foreign investor's interest to invest in Ethiopia may be reduced significantly if the standard stroked out from BITs.

The 3rd literature is the work of Peteros L.E, Bilateral Investment Treaties and Development policy making, in this work the researcher argued that state sovereignty as the right of government to regulate economic activities for public interest. However BITs are limiting these rights because investment promotion and protection is being done at the expenses of other development policy objectives. He argued that the most notable feature of these investment treaties is that they permit foreign investors to sue host governments under international law in the event of an alleged breach of the treaty obligations.[36] In this work the author discussed among other things, the impact of BITs upon development policy making with particular focus on the treaty practice between Switzerland and the United Kingdom. The author tried to reveal the negative impact of BITs on development policy making and recommended that developing countries should examine the impacts BITs before signing.[37] The study mainly focuses in the general negative impacts of BITs on reducing regulatory power of states.

[34]Wakgari, supra note no-8
[35] ibid
[36]L.E, Peterson, Bilateral Investment Treaties and Development Policy-Making,International Institute for Sustainable Development,nov.2004, p-16
[37] Id,p-32

The 4rth and study reviewed was the study of Mekete Teferi that examines the status of Ethiopian BITs and claims that Ethiopia's BITs are not mutually beneficial agreements as they favor capital exporting countries. He stated that Ethiopia has no treaty making capacity because there is no treaty making department as compared to her BIT partners. The research found out that the Ethiopian BITs are having no adequate space for the protection of the environment. The study has not addressed on the way outs for making environment-friendly BITs for the country thereby realizing public interest.

The 5th work reviewed was the work of Rudolf Dolzer, on the impact of international investment treaties on domestic administrative laws. The article addressed the duties of host states to foreign investment treaties whenever they undertake binding themselves to investment treaties. These work indicated that foreign investment treaties reduces the sovereignty of states to subject foreign investors to domestic administrative laws.[38] The study found that all the main investment treaty clauses work in various ways to define and narrow domestic administrative regulation. Found that investors demand predictabilities and stabilities of host states legal frameworks. The priority of states has also shifted from sovereignty to attracting foreign investment by concluding favorable BITs provisions. According to these work the jurisprudence of investment tribunals as a whole contains ingredients of a growing system of international administrative law on for foreign investment. Hence administrative laws of states are subjected to be reviewed by international investment tribunals based on the investment treaty provisions to protect the legitimate expectations of FDI. The legitimate expectations of investors may depend on the wordings of clauses of investment treaties. There for the wording of the BITs clauses should be refined.[39]

The studies discussed above showed the impacts of IIAs in general and BITs in particular with regard to legitimate regulatory acts of states and provided possible recommendations. The literatures reviewed touch the areas under study in one way or another. However none of them addresses the title of the research in the way the title and research questions are framed.

[38] Rudolf Dolzer, The Impact of international Investment Treaties on Domestic Administrative Laws,International Law and Politics Vo.37, p-953
[39] Ibid

Therefore there is a literature gaps in both foreign and domestic literatures on the area under study.

1.6 Scope of the Study

The study doesn't evaluate all issues of BITs with regard to Ethiopian BITs. However the study will be limited on examining and evaluating BITs standards of Ethiopia with regard to legitimate regulatory acts of the country for public interest. Particularly the research evaluates the responsiveness of Ethiopia's BITs for states regulatory acts for the protection of public interest particularly for the protection of human rights, environment, and public health and safety measures to be exercised by the state as a host state for FDI. The bases of evaluations will be all Ethiopian BITs, BITs standards and preamble in holistic way because evaluating with regards to single BITs standard cannot address the issue.

1.7 Limitations of the Study

The limitation of the study is lack of adequate literatures and materials on the topic under study written on the Ethiopian contexts. The other limitations are financial and time limitations and the internet connection problems. The time constraint is significant as the researcher has government office duties. The researcher will try his best to manage all constraints.

1.8 Significance of the Study

The research will examines, evaluates and analysis BITs standards and preambles of all Ethiopian BITs with regard to the legitimate regulatory acts of the state. The research will provide researchers and legal professionals to undertake further study on the issues and areas under study. It can be used as guide for policy makers and other stake holders in creating awareness on how to promote and expand regulatory space of the state without compromising FDI. The results of the research and recommendation can serve as a guide line to Ethiopian delegates concerned with the negotiation of BITs of the country. The research can provide the means for policy makers to consider BITs of Ethiopia in light to recent developments of international investment laws concerning the issues under study.

1.9 Methodology of the Study

The methodology that will be employed in this research is comparative doctrinal legal research methodology. This methodology best addresses the research objective because this research tries to explore the jurisprudences and recent developments on the area and best practices of few countries and brings the trends to Ethiopian BITs. The research critically analyses the four Ethiopian BITs investment treatment standards with regards to regulatory actions to be exercised by the state. The research will be descriptive and evaluative; it describes and evaluates selected standards of Ethiopian BITs to indicate the place of Ethiopian BITs regarding regulatory space of the state.

Here, the relevant international and national legal instruments including existing literatures, policies and laws will be critically analyzed by using qualitative method of data analysis based on the primary and secondary data sources. The study uses primary and secondary data sources. Primary data sources include bilateral investment treaties and investment laws of Ethiopia; Model BITs of relevant countries, model international investment agreements, free trade agreements which have investment chapters and awards of different international tribunals such as (international center for investment disputes (ICSID) and United Nations Commission on International trade law (UNCITRAL), From the secondary sources, Information is gathered from books, articles and journals printed or online sources. The UNCTAD, IISD and OECD websites will be used for furtherance of the study on the status of international investment agreements.

1.10 Organization of the Paper

The paper has four chapters. The First chapter presents the introduction. This chapter generally introduces the background of the study, statement of the problem, objectives of the study, research question, scope of the study, limitation of the study significance and, methodology of the study and organization of the paper. The second chapter will be about general concepts of regulatory acts of states under international investment treaties. Special focus will be given to critical analysis of BITs standards of MFN, FET and indirect expropriation provisions on international investment treaties. The discussion will focus on the general overview of the issues under IIAs; international investment model agreements in some recent BITs and model BITs. In

chapter three the regulatory of Ethiopian BITs for future regulatory acts of the state will be critically analyzed and discussed. This chapter wills emphasis on examining the existence and adequacy of all Ethiopian BITs standards and preambles with regard to legitimate regulatory space. The scope and the effects of the clauses on the regulatory discretion of the state will be analyzed. Lastly chapter four forwards conclusions and recommendations for the problems identified.

CHAPTER TWO

2. AN OVERVIEW OF THE HOST STATES' FREEDOM TO REGULATE FDI AND PROTECTION OF FOREIGN INVESTMENTS IN GENERAL

2.1. The Host States Freedom to Regulate FDI vis-à-vis the Protection of Foreign Investments: An Overview

2.1.1 Regulation Defined

Compared to economic activity such as trade, investment especially inform of FDI by far have far reaching and broader range of consequences on host community/local people and host state.[40] This make relationship of investor protection and host state regulation function as one of the most complicated issues in international investment laws. Inevitably investment in all jurisdiction will continue to be regulated and it continue to change during life span of investment whether international or domestic investment. In fact this is both the right and duty of state that stems from the principle of state sovereignty to control economic activity within their jurisdiction or territory for broader public interest[41] Whilst the duty of host state to regulate investment/be it domestically or international/ emanates from domestic elements including , inter alia, constitutional and administrative requirement and legislative mandates as well as international level including international; trade law environmental law, competition policy, human rights, human health, etc. It also includes customary international law that imposes duty on state not to affect or harm beyond their border to other territory by activity within their territory.[42] It is common phenomenon all state for various purposes regulates investment whether tightly or loosely. Accordingly, thus, the growing question at international agreements is the extent to which such regulations continue or state establish new rule.[43] In simple proposition right to regulate may be understood in two concepts; the first one is the right to regulate foreign

[40] Howard.Mann, The Right of states to regulate and International Investment Law,/2002/p.6
[41] Howard Mann, Investment Agreements and the Regulatory state; can exceptions clause create a safe Haven for Governments,2017, p.2
[42] Id.p.2
[43] Ibid.

investment to promote domestic development priorities and linkages. The second refers to right to regulation host of state to protect the welfare from the possible negative externalities, individually or cumulatively, the foreign and domestic investments equally.[44]

2.1.2 Manifestations of Host States' Freedom to Regulate FDI

The state as a party to an investment agreement is in a position of some considerable power to impose conditions that suit its sovereign interests over and above commercial considerations.[45] The principle of sovereignty is outlined in Article 2 of the UN Charter of Economic Rights and Duties of States 1974, confirming that host states may regulate and supervise foreign direct investments in its territory.[46] This includes an inherent right to supervise foreign financed projects; to, for example, ensure compliance with national laws, environmental issues as well as other domestic socioeconomic requirements.[47] Inherent in the concept of state sovereignty is the necessary supervision that ensures foreign companies realize that they are not free to behave in a manner which may harm or show disrespect for their host; and therefore are subject to the same constraints as domestic businesses.[48] Such supervision can have a considerable influence on the operation of the investment. The paragraphs below will discuss the grounds in which the host states freedom of regulation of foreign investment is manifested in international investment agreements.

2.1.2.1 Preambles

Preamble of an agreements serve a lot and one is it can serve as reference to power of host government with regard to regulation. This is because of reference to the right of state to regulate in the preambles provisions of International investment Agreements are common although such reference vary and can be direct or indirect. The 2015 Australia such reference varies and can be direct or indirect. The 2015 Austria-china Free Trade Agreement constitutes direct or explicit reference and indirect reference as in NAFTA.[49] The former agreement reads; ''the right of

[44] Ibid.
[45] P-59
[46]
[47]
[48] P-60
[49] Gianna Kopoulos, The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach. Economic Thesis, Singapore: National University of Singapore. https://doi.org/10.2139/ssrn.2962686, 2017, p-11

governments to regulate in order to meet national policy objectives and to presence their flexibility to safeguard the public welfare' whilst the latter reads contracting parties resolve to 'preserve their flexibility to safeguard public welfare.''[50] Hence, it is imperative to refer and recognize preamble in treaty by decision –maker so that it gave principled interpretative stance in assuring right to regulate as legal rights and obligations of disputants in hard cases.[51] However, as preamble is not binding substantive to be invoked by parties rather offer interpretative guidance to decision maker its influence in practice is minimal**.**[52]

2.1.2.2 Right to Expropriation of Foreign Investments

As previously noted, the right to regulate is an inalienable right which comes with the sovereignty of a state. The second most frequently invoked right to regulate dispute emanates from the concept of indirect –or creeping- expropriation,[53] indirect expropriation may be understood as action taken by government which may result in effective taking of investment, but not through actually or directly taking of legal property but by putting in place a governmental board of directors[54] **(**may be by remove the legally elected members). According to John Linusson there is indirect expropriation when the host used its regulatory or legislative power with the intention to derive certain benefits from the investor and claim these benefits for themselves. This occurs without the legal relationship established between the investor and the investing.[55] In case of indirect expropriation the government takes measures that affect foreign investment or its profitability not with good faith or with the intention of public interest but for driving benefit from foreign investment.

[50] Id. p.11
[51] Katia yanna-small, Indirect expropriation and right to regulate; how to draw line in arbitration under International Investment Agreements; a guide to key Issue, 445-77/2010ed./as cited at Vera Kurzu at p.375/22
[52] IISD, p.15
[53] Salacuse, Jesward, The Law of Investment treaties Oxford University press,/2009/,p.297 as cited in Jon. Linusson, International Investment Law; Issues with Investment treaties and a suggestion on how to change calculation of compensation ,2014, pp.12-13
[54]Lise Johnson and Jesse Coleman, International Investment Law and Extractive Industries Sector, 2016, p.79 (Hereinafter Lise and Coleman) available at www.http//yearbook-2014-2015Chapter-2-LJ-LS-JC.pdf visited on 4-1-2022
[55] Giannakoloupos p.16

2.1.2.3 Fair and Equitable Standard of Treatments

In International Investment Agreements, the FET obligation usually does not contain direct reference to right to regulate owing to this tribunal do not have clear standards to follow to ensure that investor/foreign company do not demand protection to the detriment of public interest.[56] The FET obligation being the third way in which right to regulate at international investment law is particularly elated to the concept or principle of protection is what is termed as investor reasonable and legitimate expectation which is inherent in the FET standard of treatment or protection. Though FET encapsulates duty of state there is some version of right of state to regulate. This proposition has two ideas; first, as it is assumed that in choosing his country of investment investor is prudent and as such have carefully examined and taken the regulatory frame work of host state as seen in *MTP Equity Sdn Bhd MTP Chile S.A.v. Republic of Chile* case award in 25 may 2004 and other cases. Second the investor should not legitimately claim the competition or legal frame work of host state will not change forever or will not affect his interest in negative way as seen in *U.K vs Belgium*.[57] According to Salacuse there are five commonly used principles used by arbitrators whether or not state practice /behavior or action violated FET obligation. They are when state; a) failed to protect the investor's legitimate expectations, b) failed to act transparently, c) acted arbitrarily or subjected the investor to discriminatory treatment, d) denied the investor access to justice or procedural due process; e)acted in bad faith;[58]

2.1.2.4 Stabilization and Umbrella Clauses

Most existing investment treaties contain a clause called umbrella clause.[59] Though differ in wordings such clauses may generally use statement like; "Each party shall observe any obligation it may have entered in to with regard to investments" (the 1991 USA Argentina BIT, article 11/c).[60] It is called umbrella clause owing to wide range of obligations (catch all nature) they cover under umbrella by imposing commitment on host states both investment and non-

[56] Ibid.
[57] Ibid
[58] Ibid
[59] Investment Treaty and why they matter to Sustainable Development at p 32 citing Gill, Gearing and Birt (2004), Contractual claims and BIT; Comparative review of SGS cases' Int. Arb. 21(5) 397
[60] Id., P.32

investment treaty obligations. By importing such treaty it allow an investor a wide variety of host state obligations including legislative, contractual and treaty based via among other things power full to bust dispute settlement a first contract based domestically and in default treaty based legally.[61] Though there is no consistency in tribunal decision if we are to accept the view of tribunal in SGS vs Philippines 2004 Arb. ICSID the commitments avertedly host state by this clause, then vividly contractual commitment like stabilization clause will be covered by treaty obligation.[62]

One may wonder the implications of the umbrella and stabilization clauses in IIAs. Whilst expanding or broadening the protection of investor the two clauses shrink the regulation of state or policy space governments may have enact i.e. measures for public purposes such as protection of health ,environment and safety and other matters related to sustainable development. This is especially true for stabilization clause resulting even to changing nature of state duty under investment treaty, making public welfare action more likely to found in breach of commitment on expropriation and FET and is even more potent when combined with umbrella clause bring any commitments out of originally intended legal frameworks to make then subject to binding investor- state arbitration.

2.1.3. Conflict of Interests between Protection and Regulation

The main reason host states conclude BITs or FTAs is to attract foreign investment. Although states limit their sovereign rights when entering into international agreements, as sovereign states they retain the power to regulate their economic and financial activities. However, it has been argued that a clear conflict exists between the protection of investment and the regulatory power of the state. This is mostly the case in relation to the cases of expropriation of foreign investments. Some states tend to deny the existence of expropriation by resorting to regulatory measures in order to absolve themselves from the obligation to pay compensation as a consequence of expropriation.[63] The controversy is further aggravated by the fact that states seem to expropriate not because of some emergency situation, but because of nationalistic

[61] Ibid
[62] M. Sornarajah p.300
[63] N Al-Adba 'The Limitation of State Sovereignty In Hosting Foreign Investments and The Role Of Investor-State Arbitration To Rebalance.

feelings. [64] However, constraining state sovereignty severely would compromise the ability of the state to regulate for the public benefit.[65] There is no denying that, in terms of both doctrine and arbitral decisions rendered to date, a state regulation can give rise to indirect expropriation.

Historically, resistance to expanded rights of foreign investors has come from developing countries. There has been the fear of exploitation of multinational corporations supported by their governments.[66] The interests of the parties do not always coincide. Whereas foreign investors are interested in profit-making and market extension, the state usually sees foreign investment as an opportunity to boost its economy, create jobs and enhance the living standards of its people. The state also has an interest in exercising its sovereignty within its borders including regulating the business activities of investors.[67] As explained above, the right to regulate is an inalienable right of the host state arising from the exercise of its sovereignty within its borders.[68] Some writers suggest that BITs fail to address the balance of interests by offering solid legal protection to foreign investors without imposing corresponding responsibilities on them.[69] The consequence of too much protection for foreign investors and the neglect of development goals by BITs is that foreign investors and their investments may intrude upon the domestic interest and marginalize local investors, despite their potential to boost the economy and build the needed infrastructure for the host state.[70]

On the other hand, the formulation and application of BITs reflect the political and economic imbalances of the parties involved.[71] The best example which illustrates the conflict between BITs and a host state's right to regulate is when a foreign investor challenged South Africa's Minerals and Petroleum Resources Development Act (MPRDA) on the ground that it amounted to indirect expropriation, even though the legislation was in conformity with the constitution of the country aimed at addressing the imbalances of the past and thereby empowering black people

[64] Ibid.
[65]August Reinisch, standards of Investment protection, Oxford University Press, 2000, p-28, Available at; https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/legal_expropriation_ar.pdf Accessed on Sep-01, 2022
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Mossalam (n 7 above)
[70]LTrackman 'Foreign direct investment hazard or opportunity? (2009-2010) 14 George Washington International Law Review 12.
[71] Trackman (n 97 above) 13

to take part in the mining sector.[72] In a number of arbitral decisions, the actions of the South African Government have been found to be in conflict with BITs to which it was a party[73]. Besides, the fair and equitable treatment in BITs has been the subject of many disputes between foreign investors and host states. This concept is very elastic and has been interpreted differently by arbitrators. Given the indeterminacy of the fair and equitable standard, it cannot constitute a legal norm because it fails to give clear guidance on which conduct is prohibited.[74] Confidence in the international arbitration system is also low because of the perception of conflict of interest. Arbitrators sometimes act as counsels before international investment tribunals. The absence of an appellate mechanism to review decisions of arbitrators has also contributed to the lack of confidence in the current system. It is against this background that there have been suggestions for the creation of an international investment court.[75]

2.2. Balancing the Freedom of Host State to Regulate FDI and Protection of Foreign Investments

So far we have seen possible manifestation of freedom of regulation by host state on an investment for public welfare purpose including reference to preamble, indirect expropriation, FET analysis and the two clauses; stabilization and umbrella clause. Right of /freedom of host state to regulate investment occurs not only after establishment. It can be at entry of investment. The right to allow foreign investment operate in a territory state (to enter and function) is one of the inherent and firmly established. Principle in international law as one of the attribute and on anise station of state sovereignty /territorial jurisdiction which may only limited by state itself via consensual BIT agreement by which it may surrender such right (of entry, establishment Pretreatment). Apart from certain international standard on foreign investment bulky of regulation on foreign investment is found in domestic /host state legislation and regulation which also apply also to national/domestic investment. Though there is contrary perception, foreign

[72] Foresti

[99] Organization for Economic Cooperation and Development(OECD)' Essential Security interest under international Investment law'(2002)

[74] United Nations Conference on Trade and Development (UNCTAD)' Fair and Equitable Treatment' UNCTAD) Series on Issues in International Investment Agreements II http://uncatddiaeia2011d5-en.pdf.

[75]C.Rogers.'The Politics of international Investment Arbitrators' http://law.scu.edu/wp-content/uploads/investment/Rogers-The-Politics-of-International-Investment-Arbitrators-santa-clara 2.pdf.

investment are accorded better/more favorable legal treatment in form of standard such as FET, MFN, full protection and security, NT, umbrella clause, even by stabilization clause[76].

However, host government has freedom as well as duty called Hohfeldian right and duty, as discussed somewhere about to regulate foreign investment although guarantee/protection (adequate and effective) should be accorded to investor based on different standard of treatment /protection. There are at least three choices are suggested as a solution to this ongoing debate of right to regulate and restriction on it as right balance:

1. Including public policy exceptions (like "general exceptions" security exceptions" balance of payments Exceptions") in International Investment agreements, (IIAs) hence explicitly allowing measures (linked with legitimate public policy) otherwise in consistent with an IIAS.
2. Providing more detailed explanations of the core investment protection standard like definition of" indirect expiration "FET or defects discrimination"
3. Excluding certain investment protection guarantees that may be Perceived as limiting excessively governments regulatory sovereignty (such as the umbrella clause as in 2004 and 2012 US model BIT and many IIAS concluded by USA or the un qualified FET standard like UNCTAD, WIR 2012).[77]

According to Howard Mann we have two mechanisms by which host state can ensure greater degree of certainty that their normal regulatory measures will not breach IIA which generally fall under two broad categories; (a) Re-enforcement of CIL rule on police powers; (b) The drafting of the other treaty based exception or exclusions.

2.2.1. Re-Enforcement of police Powers Rule as CIL

If host state takes normal (police power rule) regulatory measures in good faith, the action is not compensable and is part of International law. It is not compensable because such measures do not fall within the definition or scope of expropriation as in chapter II of NAFTA on regulatory taking. The police power rule is "curve out" from definition or scope of expropriation, hence not

[76] www.http:eolss.net/Eolss-sample All chapter.aspex.pdf visited on August 19, 2022
[77] Id p.68-69

expropriation and compensable.[78] By stipulating regulatory rights of states on preamble or objective clause expressly can relieve state from liability for breach of investor right whilst improving chances of states police power unless not expressly putting may open room to be invoked as interpretation guide laid for tribunal and investor.[79] Another option to include regulatory measure in IIA is to include it in substantive provisions as specific reference as state regulatory right and duty. By doing so it has significant impact on the interpretation of treaty because contextual interpretation of treaty general principle that demand interpretation of one provision in light or other provision ensuring each provision due effect. Best example of this type is found in Energy charter Treaty of pan European and Asian Agreement) of 1994.[80]

2.2.2. The Drafting of the Other Treaty Based Exception or Exclusions

As to the second exception or exclusion article.1114 of NAFTA is important though it is deceptive. Andrew Paul new Combed proposed state responsibility do not arise for bona-fide, non-discriminatory measures that are commonly accepted within the taxation and police powers of state, anon compensated deprivation of property right can be justified under the state's police power to maintain the environment, public health safety and morality and enforce criminal law. There is also no precedent in international law where state has been held liable for regulatory expropriation because of effect of measures taken to protect the above mentioned and other public. Welfare, the state may exercise broad discretion in regulating the use of property that the state deems harmful or injurious. Furthermore, `though property owner cannot indefinitely deprive of property right, temporary deprivations are justifiable under police power for compelling reasons of state.[81] Some treaties impose obligations on investor not only right as balance to the two compacting approach. For instance, COMESA investment agreement contains an article requiring host state's comply regulation in all phases.

Other observer even suggest imposing of binding obligation under treaty on investor including on corruption, Environmental impact assessment and management, labor and human rights issue b/c in universe all protection goes from host states to investor on one side and no full duty on

[78] Howard man p.6
[79] Id.,p.7
[80] Id., p06
[81] Andrew Paul New Combe, Regulatory expropriation, Investment protection and International law when is Government regulation expropriator and when should be compensable Be paid?,1999, p.84

investor to receive such protection.[82] Regarding indirect expropriation to balance the competing right an increasing number of states are incorporating additional language in investment treaties clarifying the scope of in direct expropriation as in USA and Canada approach. This approach also found their way to Asia in (2009 ASEAN comprehensive Investment Agreement),in Africa (the 2007 Investment agreement for COMESA common Investment area) and some European countries like Austrian model of 2008 Investment treaty) etc.[83] As regards to the stabilization clause, the first option to maintain balance is by limiting the scope of the clause via exempting "Socially desirable" host state regulation from their limit as in human right standard (discussed publicly) and even to environment standard.[84]

2.3. Justifications for Host States Regulatory Rights under International Investment Law

2.3.1. States' Public Interest

The right to regulate as recognized under international law is also one of the main principles of customary international law. Under customary international law this right is known as "Police power "of the state, it provides a state with the power to take policing or regulatory measures. States are not obligated under customary international law to admit foreign investment on their territory. Customary international law recognized that the entry of foreign investment was entirely a matter for the sovereign prerogative of the state.[85] Under customary international law once foreign investment is admitted the investment and investors are entitled to the protection of minimum standard of customary international law in the absence of any type of treaty. Customary international law sets the minimum limits of treatment for foreign investment. However the scope of obligation of modern treaties goes much from these minimum standard.

Modern treaties can provide on the commitment issues which are internal and domestic for a host state depending on the conditions of commitment.[86] Sovereign states retain the power to regulate their economic and financial activities because every state is confronted with the challenge of

[82] Id.,pp35-36
[83] Id., 18
[84] Lorenzo Cotula p.13
[85] M. Sornarjah, p-9
[86] M.sornarjaha,p-231

addressing its changing domestic political, economic and environmental situations.[87] It is by using these rights states take measures for the protection of public interests. Among the method states protect public interests is protecting public health and safety, environmental and human rights protections and achieving social welfare objectives.[88]

2.3.2. The Concerns of Human Rights

As we already discussed in preceding sections investment treaties create state obligations for the protection and promotion of foreign investment. Main purpose of the treaties is to shield foreign investments and investors from state interferences and regulations that are unfavorable for foreign investors. IIAs by giving foreign investors unrestricted rights restricts host states regulatory capacity.[89] IIAs or BITs systems affect regulatory power of states through international investment arbitration systems. Whenever states make regulatory decisions to protect public interests among others things including human rights, international investment arbitration systems impose hundreds of millions or billions of dollars as a composition based on claims of break of BITs or other IIAs provision.

2.3.3. The Concerns of Public Health

Protection of Public health is the most important job for one state. States are under duty to protect public health under varies international treaties. Most International investment treaties do not provide public health friendly international agreements and investment disputes arbitration systems are also considering states regulatory measures for the protection of public health as investment treaty violations and imposing compensations. They way BITs or IIAs provisions became contradictory for the protection of public health in different ways. The substantive standards of BITs or other IIAs do not make exception regulatory measures of states to ensure public health. Investment treaties define investment broadly making different public health related activates as investment. Given the broad range of interests that can constitute an investment, many kinds of health related economic activity could fall within the coverage of

[87]Kate Mitchell, accommodating public interest international investment treaties :police powers expropriation and treaty interpretation(Phil. Thesis Resubmission, Faculty of Law, University of Oxford ,2014)1

[88]Vera Korzun,'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs'(2017) 50 Vanderbilt journal of transitional law 355,

[89]Adriana Espinosa González,' The conflict between international investment and human rights international regimes: effects and proposals',Universidad Carlos III de Madrid (Spain)1

investor protections under IIAs. Most IIAs, particularly older treaties, include a broad definition of the assets and rights that may constitute a covered 'investment.'

If a foreign investor has established a factory for the manufacture of a product that was hazardous to human health, that investor may hold a range of 'investments' that would qualify for protection under the IIA, including property rights in the land on which the factory is established and any building or plant; contractual rights under long-term supply agreements with local buyers; any permits or licenses required to manufacture, use or sell the hazardous product; and, if the enterprise was run by a locally incorporated subsidiary, shares or other ownership interests in that company. In addition, the inclusion of intellectual property rights (IPRs) as protected investments expands the coverage of IIAs, with potentially significant impacts on the ability of governments to enact public health regulations that may interfere with the use of trade mark or patent rights. These all rights of foreign investors prohibit states to take regulatory measures to protect public health.[90] Thus broadly defining investment increases investor claims against government measures on public health.

2.3.4. The Concerns of Environment

Under different international instruments states are under duty to protect the environment. For the implementation and enforcement of international instruments states also formulate different environmental laws, policies and strategies. However investment treaties are prohibiting states from taking such types regulatory action to protect the environments. For the states actions based on the protection of the environment international arbitrations are imposing large amount of compensation against states.. In the arbitration of *Técnicas Medioambientales Tecmed S.A.v. United Mexican States* the tribunal held that the non-renewal, which was predicated on environmental and health related violations of the permit conditions and on community opposition to the landfill, violated two of the investment protection provisions in the BIT.[91] Similarly different International investment tribunals jurisprudences shows that states moves for the implementations of different environmental protection legislative and regulatory measures are considering as violations of treaty standards.

[90]Elizabeth Sheargold & Andrew Mitchell, "Public Health in Investment Law and Arbitration' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy*(Springer, forthcoming)1

[91] *ICSID,* Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2

2.3.5. Concerns of Labor

Most of the international investment agreements do not address the protection of labor and international labor standards. Fundamental principles and rights at work cover, with regards to the ILO's terminologies, rights related to freedom of association and collective bargaining; nondiscrimination in employment and occupation; as well as prohibition of forced labor and child labor.[92] The principles of these conventions are binding even on those ILO member States that have not ratified them by virtue of them having accepted the ILO Constitution upon their adhesion to the ILO.[93] International investment treaties and its arbitration system now a day's do not give much place for labor rights. Foreign investors require lax labor laws in host states. FDI inflows into developing countries would be partially generated by practices of "social dumping", as investors would prefer to locate in countries with lower labor protection standards. Now, a day's increasing groups of countries are started to introduce the concerns of labor under international investment treaty making. They use similar techniques to incorporate concerns of labor in IIAs as other emerging concerns such as human rights and environment. Most frequent is a political statement in the preambles of BITs and other treaties having investment chapters. However, BITs or IIAs dealing with concerns of labor are less than environmental and human rights in amount.

2.3.6. Concerns of Taxation

The power of taxation is the sovereign power of every state. There is no any rule under international law that limits the power of a state to impose taxes within its territory. However international investment treaties and its arbitration system are limiting the power of taxation of states. International investment treaties guaranty foreign investment from different state measures that significantly affect the predictability and stability of legal framework of the host state that affect it. Among other things legislative, administrative and policy measures of host

[92] These principles and rights were enshrined in ILO instruments; such as in the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998. They also take the form of fundamental ILO Conventions in the mentioned areas, notably Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labor Convention, 1930 (No. 29) (and its 2014 Protocol); Abolition of Forced Labor Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labor Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, these all conventions have broad worldwide ratification.

[93] Johanna Silvander, *Balancing opposing goals and promoting sustainable development: an analysis of labor and employment related case law in international investment dispute settlement*

states on taxations affects the predictability and stability of the legal frameworks of host states in the determent of FDI. As the result the change of tax laws and policy can potentially bring the international responsibility for the host State under international investment arbitration system whenever they adversely affect foreign investors and investments. Regulatory measures of states on taxation aim to raise revenue and eliminate double taxation or limit opportunities to engage in tax avoidance or evasion. These and similar actions of states may affect the profitability of foreign investment. As the result states have been paying multimillion dollars whenever they lose cases. They ways that foreign investments claim tax measures as violations of BITs or IIAs is through break of BITs or IIAs standards. Foreign investments can claim direct restrictions on tax measures deriving mostly from non-discriminatory rules in the treaties and restrictions on future changes in tax policy due to general treaty protection standards that are designed to create a stable and predictable regulatory environment for foreign investors. UNCTAD data suggests that among 1000 cases brought against 120 countries on ISDS cases based on old generations of IIAs some 140 have challenged tax-related measures based on IIAs. The respondent States in these cases were developed countries, developing countries and countries with economies in transition.[94]

[94] UNCTAD, 'international investment agreements and their implication on tax measures ; what tax policy makers need to know' (a guide based on UNCTADs investment policy frame work for sustainable development ,2021)1

CHARTER THREE

3. LEGITIMATE REGULATORY ACTS OF STATES UNDER INTERNATIONAL INVESTMENT LAW: A SCRUTINY OF ETHIOPIAN BITs

3.1. The Host State Freedom to Regulate Foreign Investment under BITs: Introduction and the Historical Background

In many African countries despite their effort implementing aggressive business reform and attraction of foreign investment many of Africans especially sub- Sahara where Ethiopian located is one of the most vulnerable for business/investment.[95] According to 2010 world bank report investor protection are lower than in every other geographic region /on average/.[96] The cost of contract enforcement is half of underlying value and it takes two year on average to enforce law, corruption is also high and nearly three times OECD country and twice of East Asia**.** Over 50 investment dispute are also lodged against African before ICSID**.**[97]

Further because of failure to reach comprehensive multilateral agreement which is in turn owing to developed countries demand of progressive liberalization and developing countries demand for maintaining of broad right of freedom to regulate and the scattering few regional investment treaties and national investment laws necessitated BIT which tends to strike balance between the two worlds better than multilateral arrangement.[98] Consequently, BIT has the following merits, inter alia; a) Giving the great freedom to parties to negotiate on terms and condition of each contracting party as it impose mutual duty; (b) Enabling parties limit specific areas of investment to protect and its extent.; (c) Conclusion for temporary/ad hoc base fixed in BIT with possibility

[95] Benjamin Leo citing Transparency , 2009,Corruption Perception Index

[96] Benjamin Leo, Where is the BITS? How U.S.A BITs with Africa Can Promote,2010,p.4, available at www.http//1424333-file-leo-BITs- FINAL.pdf visited on 4/3/2019 (Hereinafter Benjamin Leo)

[97] Benjamin Leo citing ICSID available at www.http//icsid.worldbank.org visited on 4/03/2019

[98] Committee on Legal Aspects of Sustainable Development ,International Law Association, London Conference Report,(2004),as cited at p.8 of Getahun Seifu, ‘’Regulatory Space’’ in the Treatment of Foreign Investment in Ethiopian Investment Laws; The Journal of World Investment and Trade Law (Hereinafter Getahun Seifu)
s

of review /extension ; (d)Protecting the host state from obligation under international norm /standard they oppose emerge instantaneously; (e)Absence of trilateral solution necessities it.[99]

According to Benjamin Leo at high standard level BIT has six core provisions. These are:- (a) Right to national and most favored national treatment for respective investor and investment; (b) protection against expropriation, and fair, and timely and adequate compensative; (c) right to transfer capital and investment proceeds /remittance/repatriation on the prevailing exchange rates; (e) Access to international arbitration on the event of dispute, and (f) authority to select top managerial personal of their choice, particularly BIT commit signatory government to policy beyond simple guarantees and promotion rather imply maintaining rule of law respecting contracts related to government controlled asset combating corruption, promotion of transparency and allowing free capital mobilization[100]said Benjamin Leo.

Investment treaty practice and jurisprudence are dynamic and growing constantly and as such Ethiopia should re-think her treaty in line if this and evaluate the country's obligation under those treaties.[101] Thus, as was the case in the previous BITs, the new treaty exempts the application of non-discriminatory regulatory powers to the "non-conforming measures" existing under the contracting party's laws and regulations in general. Ethiopia has signed more than 30 BITs with different countries across the world so far.[102] Under this part, all BITs our country, Ethiopia concluded with countries across the world have been discussed in line of the regulatory rights of the contracting parties and preamble, since we can infer the very purpose of the agreement from its preamble.

The history of international regulation of foreign investment has also been fraught with series of problems. As noted in chapter one introduction parts, there had not been any significant progress on the area before the end of the cold war era. After the demise of the cold war era, however, several attempts were made at the multilateral level to regulate the conduct of foreign investment but none of them succeeded as a result of the fatly contradicting interests of countries based on

[99] Getahun Seifu at p. citing M. Sornarajah, International Law on Foreign Investment,(Cambridge University Press, Cambridge) 2004, p.2012
[100] Benjamin Loe, p.4
[101] Marta Belete and Tilahun Ismael,Re0thinking Ethiopia's BIT in light of recent Developments in International Investment Agreements ,2014,Mizan Law Review vol.8 no.1 p.117
[102] Supra note at 112.

their level of economic development. Dominant attempts worth mentioning at this juncture include the attempt of the Organization for Economic Cooperation and Development (OECD) to adopt a Multilateral Investment Agreement (MAI) in 1998; and that of the World Trade Organization (WTO) to adopt the same MAI between 1996 and 2003 (international investment being one of the infamous "Singapore issues"). Both of these multilateral attempts failed due to the prevailing conflicts of interests. Instead, agreement could only be reached on specific agreements, in different forums, covering only specific aspects of foreign investment.[103] It also intends to include the general principles on the promotion and protection of foreign investments within the framework of Economic Partnership Agreements. The negotiation for such a framework investment agreement under the Cotonou Agreement appears realizable within the framework of Economic Partnership Agreements being concluded between the African, Caribbean and Pacific Group of States and the European Union. In addition to being very specific, the aforementioned agreements do not deal with detailed substantive rules on foreign investment. Needless to state, the WTO agreements, i.e. TRIMS, GATS and TRIPS, govern investment only as far as it relates to trade distortion. The ICSID and MIGA agreements also deal only with fragmented aspects of foreign investment, which do not cover substantive issues of investment protection. Even worse, the regional agreements, besides focusing on trade liberalization, deal only tangentially with issues of investment.

3.2. The Requirement of Regulatory Space to Regulate Foreign Investment under BITs

Regulating foreign investment from its beginning to the end of the investment, with all the activities in between, constitutes the heart of the conflict in a BIT. States have sovereign prerogative, under customary international law, to control entry of foreign investors and regulate how their investment is conducted after admission. To this end, regulatory space is of profound importance as it enables the parties to effectively control foreign investment. What agreements such as BITs do is progressively liberalizing this limitation. However, complete liberalization of foreign investment is not possible and national laws and BITs regulate the entry as well as activities afterwards125. To this effect, host states can introduce performance requirements,

[103] Seifu_Jwit 95 6/10/08 Page 6

requirement to hire local personnel, requirement to transfer technology, local content in the form of joint venture, limitations on minimum capital requirement, exchange controls and so forth to protect local industry including important sectors, and control unemployment and capital flight. The extent of regulatory space provided in BITs is well-summarized as follows:

It has been seen that some treaties confine protection to investments specifically 'approved in writing' for purposes of protection of the treaty. Others contain formulations such as investments 'made in accordance with the laws and regulations' of the host state or the wider formula, 'made in accordance with the laws and regulations from time to time in existence'. These treaties conserve sovereign rights."126 Such BITs leave very broad flexibility to host States as the foreign investments have to a large extent depend on the domestic laws of the host State.

In addition, some BITs also enunciate specific sectors that are excluded from the scope of national treatment through what is commonly referred to as "negative listing". None of the Ethiopian BITs examined for the purpose of this research provide such specific sectoral exceptions to the obligation of nondiscrimination particularly on national treatment.

They just provide catchall exception provisions that subject the admission and treatment of investment to be in accordance with the legislations of the parties. Even if their exact formulations vary, the provisions of typical BITs run as follows: "Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to invest in its territory and admit such investments in accordance with its laws and regulations."127 Here as well, the host country might use its own domestic law to negatively list areas that are not subject to national treatment. Moreover, it is a common phenomenon in international trade treaties to carve out regional integration exceptions to the principles of nondiscrimination. Such exceptions allow the parties to the regional integration to treat each other in a more favorable manner than countries that are not within the regional integration. In other words, the parties in the regional integration can make a discriminatory treatment without violating their nondiscrimination obligation simply because it is provided for in the major treaties of international trade law. Unlike international trade, there is no comprehensive international investment law to allow or disallow exceptional treatments in the event of treaties dealing with international investment.

Apparently following a similar pattern, BITs also provide for an exceptional treatment in the event of regional integration. For instance, Article 4 (3) of the Ethio-Belgian BIT128 and Article 3 (3) of the Ethio-Netherlands BIT, which deal with MFN and national treatment, provide that such treatment shall not include the privileges granted by one of them to investors of a third state by virtue of its participation in a free trade area, customs union, common market or any other form of regional economic organization or on the basis of interim agreements leading to such organization. This certainly leaves some degree of flexibility for the parties.

Furthermore, some BITs leave more lax rights of regulatory flexibility to the parties. In this regard, Article 3(3) of the Ethio-Israel BIT seems to establish such broader freedom as, save in the case of compensation and repatriation of investments and returns, the parties are free to use differential treatment to grant rights and privileges for their own investors.

Although there are such variations in the formulation of nondiscriminatory treatment, it remains a right with paramount importance as it protects foreign investors and their investments from discrimination. It also enables host States impose prohibitions on foreign investment in sectors of significant importance such as military, environment and indigenous culture and sectors that threaten local industry; and limitations on exchange control, performance requirements, technology transfer and hiring local personnel.129 If a BIT includes a nondiscriminatory treatment provision and no exception or regulatory space is provided, then whatever sound economic reasons a state could come up with would not enable it to discriminate between investors.

3.2.1. Host States Regulatory Right: Early BITs vs. Recent Treaty Practice

Early bilateral investment treaties (BITs) concluded between 1960 and 2000 usually did not mention a State's right to regulate explicitly.[104] For example, in the German model BIT of 1991, like in many other model BITs of the era, the right to regulate could only be implied indirectly from the expropriation provision.4 The old BITs had provisions on the protection of investment, but they did not have any language on the State's right to regulate.[105] Probably the hope was that

[104] Inga Martinkute, Right to Regulate in the Public Interest: Treaty Practice, June 2022, available at https://jusmundi.com/en/document/wiki/en-right-to-regulate-in-the-public-interest
[105] Dolzer, R., Indirect Expropriation of Alien Property, ICSID Review 1/1, 1986, pp. 55-56

arbitral tribunals would be more successful, than negotiating States, in drawing a line between investors' rights and the public interests protected by regulations. However, the sole focus of the early BITs on the investment protections and their silence on how these protections interacted with various areas of public interest might have created an impression of the absolute rights and protections accorded to the investments that were not limited by other considerations. The arbitral tribunals hearing investment disputes frequently found that they lack jurisdiction or facts to address other complaints related to public interest regulation.

Due to the fragmentation of the field and relatively broad interpretation of indirect expropriation, among other reasons, the international investment law became susceptible to the criticism that it prioritizes investment protection over other public interests protected by the democratic legislative process. This legal framework for the protection of foreign investment was in contrast to the typical domestic legal framework where the right to manage and dispose of investment in the most profitable way may be limited by the democratic legislative process with public priorities in mind, such as environment and historical heritage protection, health and safety, etc.

Some authors have argued that the residual power of a State to legislate for the public interest remains sufficient despite the silence of the early BITs on how to resolve a conflict between investment protections and a State's regulatory power. The tide towards an affirmative protection of the State regulatory space began to change with the 2004 US Model BIT's approach to indirect expropriation, which reflected the US constitutional law jurisprudence on regulatory takings. The 2012 US Model BIT continued that trend. In their assessment of indirect expropriation claims, which are at the center of the clash between investment protection and a State's regulatory authority, the tribunals are called to conduct a "case-by-case, fact-based inquiry that considers, among other factors":

The investment arbitration practice also began to acknowledge the right to regulate by articulating expressly the features of legitimate regulation: as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

When we come to a Recent treaty practice; according to the data from the UNCTAD, nearly all newly drafted or revised investment treaties limit the scope of treaty protections, provide exceptions from the investment protection, narrow down the fair and equitable treatment obligation or omit indirect expropriation in order to balance investment protection with a State's right to regulate in favour of public interests. The right to regulate continues to be one of the most important issues on the agenda of the UNCTAD and its Working Group III on the reform of the Investor-State Dispute Settlement system. International instruments propose a variety of approaches to achieve a better balance between the right to regulate for a public interest and investment protection. The approaches range from including a reference to the right to regulate in the preamble, to explicitly carving out regulatory space in the context of various investment guarantees.

The first and probably the most abstract way to introduce the right to regulate into the equation is to mention it in the preambles or elsewhere in the text of international investment agreements, without necessarily providing further guidance on the content of the right. For instance, the EU-Vietnam Investment Protection Agreement reaffirms the State's right to regulate "to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity." Just acknowledging the right to regulate in treaty texts allows arbitral tribunals to balance investment protection with the public interest that is behind the general non-discriminatory legislations. The second approach to expand regulatory space for a State is through the limitation of the earlier investment protection standards or excluding some areas of public interest from the scrutiny of investment arbitration altogether. For example, the EU-Singapore Investment Protection Agreement recognizes that regulation for legitimate public policy objectives that negatively affect investments per se will not be treated as a breach of the agreement. To that end the CETA also limits the scope of fair and equitable treatment and limits legitimate expectations to situations where a specific promise or representation was made by the State.

There is a difficulty associated with the inclusion of a specific list of legitimate public welfare objectives in the international investment agreement. Such a list of public interests may be interpreted exhaustively, thus requiring compensation for any regulatory changes outside of such a list. The tribunal in Bear Creek adopted exactly such interpretation in its reading of the

regulatory exceptions permitted under the Canada-Peru FTA.23 This difficulty illustrates a conceptual question pertaining to the whole field of international investment law: whether regulatory powers are exceptions to the investment protection or vice versa investment protection is an exception to the customary and residual State's right to regulate in the public interest? Different legal traditions, societies and states will be approaching this question from very different perspectives depending on the prevailing political economy and historical circumstances.

The third method, to expand regulatory space in investment agreements are variations of the US model BIT approach providing a separate annex explaining what constitutes indirect expropriation and what does not.24 Other treaty standards, however, are not explicitly covered by this guidance on interpretation. Furthermore, different instruments attach safeguards of varying degrees requiring public regulation: to be bona fide, be "designed and applied to protect or enhance legitimate public welfare objectives," or be proportional and reasonable.25

International investment agreements usually employ a combination of the abovementioned approaches. The United States–Mexico–Canada Agreement (USMCA) (2018) provides an example of a mixed approach. It acknowledges in the preamble the State's right to regulate in different areas of public interest. Article 14.16 of the USMCA provides a self-judging clause that investment protection cannot be construed as preventing a State from taking regulatory measures that a State considers appropriate. The USMCA also contains Annex 14-B that is similar to the US earlier model BITs, providing that non-discriminatory regulatory actions do not constitute indirect expropriations, except in rare circumstances. The USMCA further expands regulatory space by excluding permits, licences and similar administrative acts that could be affected by regulatory measures from the definition of investment. The transfers related to covered investment also can be delayed and prevented due to a number of regulatory measures.A balance between private and public interests in the context of investment protection and regulation is often hard to reach, considering a rather dynamic nature of the public interest. The societies and the list of public welfare objectives continuously evolve. At the beginning of the twentieth century, the list included health and safety. Nowadays, the list includes preservation of the "environment or public morals, social or consumer protection or the promotion and protection of

cultural diversity" and probably other public interests, such as historical heritage, financial stability, etc.

3.3 Treatment of Foreign Investment under BITs Concluded by Ethiopia

3.3.1 Meaning and Types of Non- Discriminatory Treatment

The non-discrimination principle provides that a State should not treat its foreign investors less favorably than its national investors (the principle of national treatment) or treat some of its foreign investors better than other foreign investors (the most favored nation principle).[106]While there is a general consensus as to this definition of the non-discrimination principle, its exact scope and content are subject to debate.[107] Three different types of nondiscriminatory treatment standards were developed to afford protection to foreign investment. These are the most-favored nation (MFN) treatment, national treatment and fair and equitable treatment standards.

The MFN treatment takes as its reference point the best benefit, advantage or privilege a country gives to its friendliest country. It takes this best treatment offered to the friendliest country and extends it to investors originating from other countries. In other words, the MFN treatment multilateralizes the arrangement concluded between the friendly countries with the purpose of "providing] a level playing field for all investment players." [108] In any event, the foreign investors from third countries shall be given no less favorable treatment when compared with the investors of the other country that made the best deal. Though it is observable that the standard is expansive in its nature, it is not without limitation, however. The main limitation on MFN treatment is that the treatment should apply to investors operating under 'like circumstances' or 'like situations'. Consequently, there would seem to be an element of flexibility for a host country that wishes to treat different investors or categories of investment differently as long as fairly objective and defensible criteria are used in making such a distinction.[109] The standard of national treatment could be defined as a principle whereby a host country extends to investors

[106] Kamyar Assari and Andrew Willcocks, Non-Discrimination (Expropriation), 22 April 2022, Available at; https://jusmundi.com/en/document/wiki/en-non-discrimination-expropriation; visited on Sep-09,2022
[107] Ibid.
[108] Victor Musoti, Non-discrimination and its Dimensions in a Possible WTO Framework Agreement on Investment: Reflections on the Scope and Policy Space for the Development of Poor Economies, The Journal of World Investment (Werner Publishing, Geneva), Volume 4, December 2003, 1025.
[109] Id.

treatment that is at least as favorable as the treatment that it accords to its national investors in like circumstances.[110]

Thus the national treatment standard lays down the principle for non-discrimination between national investors and foreign investors concerning investment. But it is a contingent standard, as its level of protection is to be inferred from the laws and regulations of the host state on its own nationals. It is very important, however, as it treats foreign investors on equal footing with the host state's own investors. Nonetheless, it is important to note that in some circumstances such as dispute settlement, for instance, foreign investors could even obtain better treatment than the nationals of the host state as the former could sue the host state before international tribunals, which is not the case for nationals. It has to be noted that these MFN and national treatment standards bring about the equal treatment of not only a foreign investor and a third country foreign investor but also a foreign investor and a domestic investor. To put it differently, these standards of treatment create equality of treatment literally among all investors. Needless to state, this will have far reaching implications on the capacity of competition of the investors.

However, as referred to above, in the event of national treatment in particular countries appear to have broader flexibility as the points of reference of the standard are treatments provided to one's own nationals, i.e., countries can issue bad standards of treatment to their own nationals as that would be by and large a prerogative of their sovereign jurisdiction. To circumvent the extension of such discriminatory loopholes, BITs include a third type of standard of treatment, which is called the international minimum standard.

The international minimum standard of treatment is understood to encompass fair and equitable treatment and full protection and security. Though generally speaking, these standards refer to a requirement of impartiality, they still remain nebulous as the terms they use are 'fairness' and 'equitability'. This standard is practically tested in the NAFTA investment framework. In NAFTA, Article 1105 accords to investors of the other party minimum standard of treatment in accordance with international law, including fair and equitable treatment and full protection and security[111]. What constitutes "international law" to become minimum standard of treatment in

[110] UNCTAD, International Investment Agreements: Key Issues, Geneva, 2004, p-185
[111] UNCTAD, International Investment Agreements: Key Issues, Geneva, 2004, p- 26.

accordance with this Article has become highly debatable.[145] Obviously, the national treatment standard itself could be taken as an international law. It is obvious that such debate is prompted by how the treatments are drafted in the NAFTA Agreement. Subsequently, countries have taken lessons from NAFTA and some BITs concluded recently have been influenced by this experience.[146] The US 2004 Model BIT provides a good example in this regard. Sub article 2 of Article 5 of this Model BIT provides, in part, the following: The concept of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by [international minimum standard], and do not create additional substantive rights. The point of entry of these standards into operation depends on the process of admission as provided in the particular BIT and the local law of the particular country. While some BITs dictate that the treatment standards commence application upon admission (post-entry), others dictate that the standards apply even before the foreign investor is admitted to invest (pre-entry).

3.3.2 Variations in the Formulation of Non-discriminatory Treatments

The formulation of nondiscriminatory treatment varies from BIT to BIT. Some BITs are quite detailed as to the content of nondiscriminatory treatment while others are not precise enough. In general, the contents of nondiscriminatory treatment can be grouped as follows: (1) while some BITs express nondiscriminatory treatment in terms of according treatment by a State which shall not be less favorable than that accorded to its own or third country investors and their investments, others condition it to apply only to investors and investments "in like circumstances" or sometimes "in like situations"; (2) while some nondiscriminatory treatment provisions provide for pre-establishment rights and post-establishment rights expressly, others do not provide for pre-establishment rights; and (3) while some BITs provide for some exceptions or what could be referred to as "regulatory space", others do not mention any limitations. In what follows, the implications of these variations will be examined in turn,

Nearly all BITs provide for nondiscriminatory treatment and oblige the parties to accord investors and investments of nationals of the other party treatment no less favorable than that accorded to their own nationals or nationals of third countries. But the exact wordings of the

treatment have variations. In most BITs, the provisions on treatment of investment run more or less as follows: Each Contracting Party shall accord to [foreign] investments treatment which in any case shall not be less favorable than that accorded ... to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.[112] This is the case with almost all BITs to which Ethiopia is party with few exceptions such as the Ethio-China BIT and the Ethio-Malaysia BIT.[113] Such a blanket provision makes the implementation of the provision difficult as an investor could claim such treatment in sectors where he is not investing, i.e. an investor investing in the leather industry could claim a nondiscriminatory treatment given to an investor engaged in the mining sector despite the fact that they are not operating under like circumstances. To curb such potential problems, some BITs limit the application of nondiscriminatory treatment to investments in "like circumstances". BITs do not define what constitutes investments "in like circumstances" and clear jurisprudence on the issue is yet to develop.[114] Thus the term in "like circumstances" itself lacks clarity as it depends on several situations surrounding a particular agreement.

Most BITs provide expressly that they apply only for post-establishment or post entry stages of investment. "[T]he majority of bilateral investment agreements do not include binding provisions concerning the admission of foreign investments."[115] Rather, the rights of foreign investment normally begin to apply after the foreign investor is given an investment permit and is legally recognized to invest in the host country. Article 3 (5) of the Ethio-Netherlands BIT, for example, confirms that national treatment "applies to investments once legally admitted, through specific authorization, if applicable." Article 2 further subjects the admission of investment to be in accordance with the laws and regulations of the parties, which give them complete freedom to

[112] See e.g., Ethic-Netherlands BIT, Article 3 (2).

[113] See for e.g. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, signed on 3 May 1998 (Ethio-China BIT); and the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments, signed on 2 October 1998 (Ethio-Malaysia BIT). These BITs simply require equitable treatment and full security and protection for investments made under them.

[114] S.D. Myers, Inc. v The Government of Canada, paras. 243 and 250.

[115] See e.g. US-Azerbaijan BIT, Article II (1); See also Vandevelde, Kenneth J, The Economics of Bilateral Investment Treaties, Harvard International Law Journal, Vol. 41, No. 2 (2000), 493 (footnote 203).

issue a law that could circumvent the agreement. Such restrictions or listing the stages when investment is protected (operation, management, maintenance, use, enjoyment or disposal), signaling that the treaty applies to post-establishment, are common in BITs.

The reason behind such restrictions is clear: it is to identify foreign investments that add value to the economic objectives of the concerned states. As post-entry requirement entitles the receiving country to accept or deny admission based on justifiable and legal grounds, the issue that arises is what protection would be available for an investor until it is admitted by the host country. Apparently, in such an event, the investor will be subject to either general international law or the domestic legislations of the host country or to both regimes, as the case may be. Some BITs, primarily US and Canadian BITs, however, extend investment protection to pre-establishment preventing acts such as screening on the basis of nationality[41]. A provision on pre-establishment right is essentially a market access provision as it makes parties to such BITs open their investment markets for any potential investor. It grants foreign investors the right to be admitted to invest in the territory of the other party. Apparently, this equates foreign investors with nationals regarding investment but parties to such agreements expressly state exceptions where they would not allow foreign investment to certain areas.

Pre-establishment rights are pretty advanced for capital-importing countries as they tie their hands well in advance before they see the worth of a foreign investment to which they are going to give the protection. For the countries that export capital, it is the best protection available.
However, some BITs do not provide expressly as to at what stage a foreign investor will be protected. The BIT between Ethiopia and China is a good example. In such circumstances, resort to interpretation of some provisions of the specific BIT becomes necessary.

Most BITs define investment to include investments made "in accordance with the laws and regulations of the other party".[116] They might also subject admission of foreign investment to be "in accordance with the laws and regulations of the parties"[117] making it read in conjunction with an investment law. Such provisions might help to determine whether a particular BIT provides only for post-establishment rights or whether it includes pre-establishment rights as well. But it

[116] See e.g. Ethio-China BIT, Article 1 (1).
[117] See Ibid, Article 2 (1).

depends on the provisions of domestic investment laws. Such options are not advisable as they could be taken to the dispute settlement mechanism agreed up on in that same BIT. Therefore, making the obligation clear from the outset would be of paramount importance[118]

3.4. Ethiopia's Regulatory Rights on Foreign Investments

3.4.1 Freedom to Regulate Foreign investments under Ethio-BITs

Under customary international law, the autonomy and ability of a State to regulate such inward foreign investment flows arises out of its sovereignty. As such, there is no right of admission or right to invest in a foreign country. States retain the power, at least theoretically, to determine which foreign investors or investments to allow, under what conditions, and in what sectors.[119] This can be either expressly providing state reservation within states contract/investment agreement or through, the laws and regulations of domestic investment in order to govern the matters of investment; in doing so it gives the parties right to regulate foreign investment.

For example, "The OECD National Treatment instrument permits distinctions of treatment for foreign affiliates consistent with the need to maintain public order, the protection of essential security interests and the fulfillment of commitments to maintain international peace and security[120]. The interpretation of these exceptions in concrete situations is left to the member countries, although the need was recognized to apply them with caution, bearing in mind the objectives of the National Treatment instrument; in other words, they should not be used as a general escape clause from the commitments under this instrument."[121] For members of OECD, deviations from NT clause, in relation to public policy matters, i.e., national security, maintain public order, the protection of essential security interests and the fulfillment of commitments to maintain international peace and security are the justifiable defenses.

[118] See supra note 123 at p.100

[120] See supra note 29 above at P.43.
[120] See North American Free Trade agreement, supra note 187 above art. 2102
[120] See UNCTAD VOL.14 Supra note 4 at P.47

Besides, NAFTA agreement specially, article 2102 contain the regulatory frame works for foreign investment. However, as regards exceptions to national treatment, the main approach is to use subject-specific and industry-specific exceptions.[122] The standard of national treatment is an important principle for foreign investors, but it may raise difficulties for many host countries, since such treatment may make it difficult to foster the growth of domestic enterprises. This is especially the case for developing countries, since their national enterprises may be particularly vulnerable, especially visa-vis large TNCs. Indeed, host Governments sometimes have special policies, and program that grant advantages and privileges to domestic enterprises in order to stimulate their growth and competitiveness. If a national treatment clause in an IIA obliges a host country to grant the same privileges and benefits to foreign investors, the host Government would in effect be strengthening the ability of foreign investors to compete with local business.[123] Thus, the development exception to BITs provision on NT would give the host states flexible policy spaces in order to promote the domestic investment.

3.4.2 **Freedom to Regulate under Ethiopian Investment Laws**

All of the preambles of the investment proclamation largely or almost all talks about the need for the investment for country and the need to have transparent and efficient system of administration of investment, those preamble are pro investor but without any talk about regulation role that the government plays for the large public purposes. As it guide and some time even control interpretation of investment proclamation incase of doubt and need the preamble would have include the freedom that government have to take measures for public purposes. Other than the caption paragraph of article5 which talks under line 4 and 5 about sustainable economic and social development which may mean that the investment may have objective to safeguard economic and social development than clear objectives of investment law that empower government to regulate foreign investor for public purposes as the main target.

One of the implications of investment law (proclamation and regulation) is the approach they adopt with regard to entry or pre-establishment of foreign investment (FDI) in Ethiopia. Accordingly article 6 provides three areas where not only foreign investor domestic investors are not allowed to invest in. These are transmission and distributional of electrically energy through

the integrated national system; postal services except courier services; air transport services using air craft with as eating capacity of more than fifty passengers (article 6(1) (a),(b) and (c) respectively.

Two areas (manufacturing of weapons and ammunition and telecom services are that investor can only jointly invest with government as provided in article 6(2)(a) and (b) respectively. The monopoly area for government as well as joint- venture investment may be opened for private investor if the council of minister determines as per articles 6/3 of the proclamation. Based on article 3 of the regulation issued listed those activities reserved for Ethiopian domestic investor which may be for public purposes (national security) or interest. Article 3(1) lists activity like:-

a) Banking, insurance and micro-credit and saving services, b) Packaging, forwarding and shipping agency services, c) Broad cast services, d) Mass media services, e) Attorney and legal consultancy services, f) Preparation of tradition medicines services, g) Advertisement, promotion and translation works, h) Air transport services using aircraft with seating up to 50 passengers.

So long as the business organization have Ethiopian nationality and the capital is owned by them, it is also possible and it is area reserved for domestic investor as per article 3(2) of the Regulation No.270/2012. Another per-entry/establishment duty imposed as regulation by government even in areas allowed to them. Accordingly, article 4/1/ of the regulation provides that some of an investment areas specified in the schedule attached are allowed for Foreign Investors to invest. Hence, no discrimination among investor to be accepted to invest in those allowed areas so long as other criteria are fulfilled. Those sectors are also open to all foreign investor.[124] Article 4/2/ of the regulation allow board to allow foreign investor to invest except those reserved to government as provided under article 6/5/ and /2/ above proclamation and areas reserved for domestic investor under article 3 / of the regulation.

As per article of the proclamation foreign investor can acquire or own immovable property and house requisite for his investment though civil code prohibit foreigner do not acquire such right whilst article/ of regulation also allow them to acquire private commercial road transport vehicle

[124] Proclamation No.769/2012, article 6 and Regulation No.270/2012 article 3,4. See area of investment at where Foreign Investors are allowed to invest is specified and attached in the schedule of the Regulation No.270/2012.

necessary for his business operation and this is one guarantee the law grant to them and government cannot prohibit this and cannot discriminate them also one of the other regulation pre-abolishment or at entry for foreign investor in area allowed to them is the minimum capital requirement.

Article 11 /1/ of the proclamation provides that foreign investor are required to allocate minimum capital of 200.00 USD for single project but 1/1/ provides only 150.000 USD for joint-investment with domestic investor. Article 11/3/a/provides 100.000 used for foreign investor to solely invest whilst article 11/3/b/ provides 50.000 used for joint investment with domestic investor in areas of architectural or engineering or technical consultancy service, technical testing and analysis or publishing work. However, re-investment from profit and divided do not demand minimum capital. Article 11/5/ provides that foreign investor must declare and register to Investment commission capital for investment he brought and must get certificate and the commission must sent the certificate to the National Bank of Ethiopia and this may also regulation for national Security purposes that the law provides. As per article 12/1/a/ and b/ foreign investor whether investing solely or jointly with domestic investor must obtain investment permit.

Probably other regulation pre-establishment of investment is the requirement of prior approval of Ministry of Trade when foreign investor intend to buy existing enterprise in order to operate as it stands or to buy share, of existing enterprises. Ministry check whether are allowed for foreign investor and whether capital requirement as well as commercial registration and business licensing requirement are fulfilled /article 12/3/ and 4/ of proclamation one of the post establishment regulation the investment law impose on investor as duty is duty to observe of her laws and protection of environment. Accordingly not only foreign but also national investor also has duty to observe laws of country in carrying out his investment activity especially with regard to environmental protection.

We do have an environmental impact assessment proclamation (EIA) 299/2002 and pollution control proclamation 300/2002 with regard to protection of environment /apart from establishment of organ that enforce those laws/ protect environment. The African charter on human and peoples' right also have provision dealing with protection of environment. In Ethiopia despite its recent phenomena, especially environmental impact assessment/EIA/

attaches great importance to the procedure of EIA. Not only provide EIA but also best provisions that are effective produce intended result. But as intended subordinate laws /regulation, directives and guidelines / for its reality its ambitions objectives are simply unattended or hardly achievable. Although the investment proclamation under article 38 requires investor come across EIA, as there are no subsidiary laws and as the commercial registering and business licensing proclamation 980/2016 also have no such enforcement mechanism. Although the EIA proclamation deny the commencing of implementation of project that demand EIA as article 30/4/d/ seems do not require it but cumulative reading of article 30/4//d/ and 38 demand investor to pass through it. Article 19/1/and /2/of the proclamation also provides for suspension and revocation of permit may be made by appropriate investment organ which could be also be possibly for violation of EIA procedure during implementation also. If false EIA are submitted by investor the license may be revoked.[125]

However, according to Elias N. Stebek citing Imeru Tamirat "……investors have in large part not been required to conduct EIA during licensing of such investment or prior to the allocation of land. Equally, although the EIA laws and guidelines require conducting a social impact assessment of project, they have not been set as requirement for approval of large scale agricultural investment…….and regional and federal authorities also confirmed that such activities is not routine requirement…….[126] Hence although law exist that demand EIA especially large scale investment are not under giving EIA and social impact assessment prior approval procedure and if it exist it is not rigorous and effective. For instance I have repeatedly heard pollution of Awash River and the surrounding community from land and other river around Jaldu bor Ginchi by certain Indian investor on paper product. It is often source of complaint by community and even there is dying of their cattle , drying and damage of their crops etc…. leather factory around Michael church in Sebeta Almegana area also pose axiomatic pollution and they are all un regulated though the government can do this for public purpose health of society and environment purpose

[125] Id., pp.149-153

[126] Imeru Tamirat(2010) Governance of Large Scale Agricultural Investment in Africa(Paper presented at World Bank Conference held at Washington D.C Aprill,2010), p.9 as cited in Elias N. Stebek ,Between' Land Grabs' Agricultural Investment; Land Rent with Foreign Investors and Ethiopia' Normative Setting in Focus, Mizan Law Review,Vol.5 No.1,2011,at p.207

Apart from granting foreign investor to acquire right over immovable and special movable that are required for investment, the proclamation accord foreign investor some right which include the following one of the protection the one against expropriation according to article 25/1/ the proclamation "no investment may be expropriated or nationalized except for public purpose and then only in conformity with requirements of law the law that deals with expropriation.'' The right to expropriate private property including investment foreign got the constitutional guarantee.[127] Private property but for public purpose /interest government can expropriate this private property/investment. Article 25/3/ provides that nationalization is the term that can interchangeable used and both will result in payment of compensation. Article 25/2/ provides the amount of compensation to be paid. Accordingly, it must be adequate compensation, corresponding to the prevailing market value. The payment must be paid in advance so this is the great property right protection for investor but also leave room government to nationalization /expropriate investment for public purpose/ interest and sometimes this two right may be at cross road such that they may be competing and challenging. Another protection our investment proclamation accords to foreign investor is the right to remittance of funds.

Accordingly foreign investor can remit his profit and dividends form in convertible currency investment., principal and interest payment on external loans, payment on technology transfer agreement as per agreement as per article 21 of proclamation, payment on collaboration agreement pursuant article 22 of the proclamation, process from transfer of shares or partial ownership to domestic investor , proceeds from sale or liquidation of enterprise, compensation paid to an investor pursuant to article 25/2/ of the proclamation.

All this has to be only with regard to the approved investment and this seems regulation the government may demand from investor which is logical. Unless it is legal and approved investment remittance of fund should not be allowed, repatriation or remittance of fund is the sole right of foreign investor and joint local partner has no such right and article 26/2/ talk about this article 26/3/allows remittance of salaries and others payment in convertible currency. Article 37/1/ also allow foreign investor to employ expertise skilled foreign employer for operation of his business. However, the law under sub article 2 of the same oblique the investor

[127] Sefanit Mekonen, Rights of Citizens and Foreign Investor to Agricultural Land Under the Land Policy of Ethiopia, Haramaya Law Review pp.38-39

to replace those personal with Ethiopian by arranging necessary training. This has to be done with in time limited. It is one of duty of investor and vice right /freed one of government to enforce and to regulate such duty. But this is without prejudice to top management that runs the enterprise as such article 3 of same provides.

On January 30, 2020, the House of People's Representative approved a new Investment Proclamation No: 1180/2021 that replaces the Investment Proclamation No. 769/2012. The new proclamation has made a shift in approach to sector regulation that was implemented since 1991; Ethiopia has enacted four investment proclamations regulating FDI. Except for the Existing Proclamation, all three legislations followed what is known as a "negative-list" approach to foreign investment. A negative list approach provides an exhaustive list of investment areas that are restricted to foreign investments and makes all other sectors open for investment by foreigners.

This approach was changed in 2012 with the enactment of the Existing Proclamation which introduced a hybrid system of "negative" and "positive" listing. Currently, the areas that are restricted to foreign investment and the areas that are permitted for foreign investors are all expressly listed in the law. Sectors that are not on the list have been prohibited for foreign investors. While the current listing approach succeeded in attracting selected priority investment sectors, particularly in agriculture and manufacturing industries, it was proven restrictive in enabling the active participation of other sectors such as services and information technology. The New Proclamation reverses the current positive-listing approach to a negative listing approach whereby areas that will be restricted from foreign participation will be exhaustively provided in the New Regulation with the implication that all other areas will be permitted areas of investment for foreign investors. As part of the negative listing approach, the New Proclamation provides three categories of investment areas:

a. areas exclusively reserved for joint investment with government

b. areas exclusively reserved for domestic investors

c. area exclusively reserved s for joint investment with domestic investors.

All other sectors not reserved in accordance with (a)–(c) above will be open for foreign investment. The New law eliminates a category of sectors that will exclusively be held by the government and introduces a new category of sectors in which joint investment with domestic investors will be mandatory. An investment Regulation No: 474/2020 that was enacted to implement the new proclamation, by confirming the negative listing approach adopted by the proclamation, states that 'investment areas not listed under articles 3,4 and 5 of the regulation are open to foreign investment'[128]

3.4.3. Ethiopia's Regulatory Rights on Foreign Investments under BIT Signed by Ethiopia

In many African countries despite their effort implementing aggressive business reform and attraction of foreign investment many of African especially sub- Sahara where Ethiopian locate is one is the most vulnerable for business/investment[129]. According to 2010 world bank report investor protection are lower than in every other geographic region /on average/[130]. The cost of contract enforcement is half of underlying value and it takes two year on average to enforce law, corruption also high and nearly three times OECD country and twice of East Asia**.** Over 50 investment dispute are also lodged against African before ICSID[131].

Further because of failure to reach comprehensive multilateral agreement which is in turn owing to developed country demand of progressive liberalization and developing countries demand for maintain of broad right of freedom to regulate and the scattering few regional investment treaties and national investment laws necessitated BIT which tends to strike balance between the two worlds better than multilateral arrangement[132]. Consequently, BIT has the following merits, inter alia; a) Giving the great freedom to parties to negotiate on terms and condition of each

[128] Art-6 of investment Regulation No: 474/2020

[129] Benjamin Leo citing Transparency , 2009,Corruption Perception Index

[130] Benjamin Leo, Where is the BITS? How U.S.A BITs with Africa Can Promote ,2010,p.4, available at www.http//1424333-file-leo-BITs- FINAL.pdf visited on 4/3/2019 (Hereinafter Benjamin Leo)

[131] Benjamin Leo citing ICSID available at www.http//icsid.worldbank.org visited on 4/03/2019.

[132]Committee on Legal Aspects of Sustainable Development ,International Law Association, London Conference Report,(2004),as cited at p.8 of Getahun Seifu, ''Regulatory Space'' in the Treatment of Foreign Investment in Ethiopian Investment Laws; The Journal of World Investment and Trade Law (Hereinafter Getahun Seifu)

contracting party as it impose mutual duty; (b) Enabling parties limit specific areas of investment to protect and its extent.; (c) Conclusion for temporary/ad hoc base fixed in BIT fixed in BIT with possibility of review /extension ; (d)Protecting the host state from obligation under international norm /standard they oppose emerge instantaneously; (e)Absence of trilateral solution necessities it.[133]

According to Benjamin Leo at high standard level BIT has six core provisions. These are:- (a) Right to national and most favored national treatment for respective investor and investment; (b) protection against expropriation, and faire, and timely and adequate compensative; (c) right to transfer capital and investment proceeds /remittance/repatriation prevailing exchange rates ; (e) Access to international arbitration on the event of dispute, and (f) authority to select top managerial personal of their choice, particularly BIT commit signatory government to policy beyond simple guarantees and promotion rather imply maintaining rule of law respecting contracts related to government controlled asset combating corruption, promotion of transparency and allowing free capital mobilization [134]said Benjamin Leo. Investment treaty practice and jurisprudence are dynamic and growing constantly and as such Ethiopia should re-think her treaty in line if this and evaluate the country's obligation under those treaties.[135]

3.4.3.1. ''Necessary'' clause on states obligation regulation right under BITs

The absolute investment protection came to realize that host states necessary measures taken in god faith and non-discriminatory manner to domestic pressing needs where fair and equitable when arise. Because of regrettable arbitration award states have realized that homogeneous FET protection is to detriment of their policies.[136] In this regard most BITs Ethiopia in force and those signed and waiting to be ratified and enforced has FET, NT, MFNT, umbrella clause and investment Regulation No: 474/2020 have stabilization clauses. Most of those standards of treatment are broadly stipulated and this resulted in broadly construing those provision there by

[133] Getahun Seifu at p. citing M. Sornarajah, International Law on Foreign Investment,(Cambridge University Press, Cambridge) 2004, p.2012

[134] Benjamin Loe, p.4

[135] Marta Belete and Tilahun Ismael,Re0thinking Ethiopia's BIT in light of recent Developments in International Investment Agreements ,2014,Mizan Law Review vol.8 no.1 p.117

[136] Om Krishna Shrestha, A host states Regulatory Right in Fair and Equitable Treatment in BITs, a University of Lapland Master Thesis 2016 available at www.http//host-state-FET-in-BITs. Pdf visited on 12/1/2: Am(Hereinafter Shrestha)

multiplying countries obligation even if country take public measure in good faith and in no-discriminatory manner. It should be born in mind that though states are successful in claims against them under international arbitration the cost of defending the claim is born by states and this is huge money. Investor has also access to contingency fee and this also contributed for increasing arbitration claim against states.[137] Apart from this frequently international investment are criticized as excessive pro-investor, no duty on investor such as corporate social Responsibility.

3.4.3.2. Right to Protect Public Health under BITs

The inclusions of Public health in BITs show the concern of public policy to protect investor and promotion of public health. Strict public health and environmental protection regulation and implementation before and after investment show the compulsory but not strongly enforced in developing and emerging states. Investors are aggrieved by host states public measures alleging the action are indirect expropriation. The investor right and host states public measures dilemma are not only confusing but result in financial problems to states and public health.[138]

When we evaluate BITs enforce in Ethiopia and those signed but signed and not ratified not enforce most of the BITs do not have reference to freedom of host states. Most BITs have no regulatory space to accommodate emerging situations. There is no explicit and implicit reference to social investment human right, labor, health, corporate social responsibility, protection of environment, Climate change, plant varieties, etc. An instance is Ethio-Austria BIT,Ethio-Denmark, etc. The few exceptions BITs that have recognized regulatory space for social and environmental purpose from I reviewed are the Ethio-German, Ethio-Netherland Ethio-UK ,Ethio-Equatorial Guinea, Ethio-Finland, and the Ethio-Belgium Luxemberg Economic Union (BLUE).

3.4.3.3. Right to Protect Human Right under BITs

According to Shrestha Biwater Gauff vs Tanzania ICSID 2008 Arbitration accentuates host states duty to give due consideration to Human Right and Sustainable Development whilst privatizing and commodfying the natural resources which is essential to poorest people citing the

[137]MahnazMalik, Recent Developments in International Investment Agreements; Negotiations and Disputes p.8 available at www.http//dci-2010recent-developments-iias-pdf visited on 2/1/2018 at 2:34 Am

[138] Shrestha at p.28

Committee on Economic Social and Cultural Right regarding the termination of the contract by Tanzanian government for the failure of investor to supply sufficient, clean water to regarding Daresalem City and thus recognizing public interest.[139] In Ethiopia as to the best knowledge of the writer there was no such jurisprudence. According to Marta and Tilahun Almost all BIT s they have reviewed the MFN clauses are framed in general terms there by opening chance for tribunal to construe such provision thereby exaggerating the Countries obligation[140].

According to Business review, of top ten FDI sources to Ethiopia in 2012 Ethiopia has BIT with eight of them. Those Countries are China, German, Italy, India, Netherland, Turkey, Sudan and United Kingdom.[141] Most of the article that talks about Standard of treatment such as FET, NT, and MFN is not specific rather framed in general terms that beg interpretation and this will increase the countries obligation because tribunals are excessive pro-investor there by considering host states lawful public purpose as investor claim alleging violations of those treatment. Examples are article 3of Ethio-Finland and Ethio-Ethio-UK BIT.

There are few better BITs I have reviewed is giving chance to take regulatory measures for public purposes though framed in general terms such as Ethio-German, Ethio-Netherland, Ethio-UK ,Ethio-Equatorial Guinea, Ethio-Finland, and Ethio-BLUE. According to article 3/3 of the Ethio-German BITs mentioned what do not constitute or amount to in-equal treatment. Those are unequal treatment in restriction of purchases of raw or auxiliary materials, energy or fuel or means of production or operation of any kind. Further measures taken by host states for reasons of public security and order, public health or morality shall not amount to treatment less favorably. It is a public purposes which are right of states and hence no violation of BIT standard of treatment hence, no compensation.

Article 5(1) and 6(1) of Ethio-Netherland BIT also provides the right of host states right to establish its own standard of level of domestic environmental and labor developmental policy and priorities to adopt, or modify according to legislation respectively. Parties should as such

---

139 Id., p.41

140 Marta and Tilahun,p.125

141 Ethiopian Business Review, Top Ten FDI sources in Ethiopia available at www.http//ethiopianbusiness review .com.index.php/statics/item/88-to10-fdi-sources-in ethiopin-2011-12 as cited at p.122 in Marta and Tilahun.

provide high level of environmental and labor protection respectively and should improve it. Article 5(1) and 6(1) of the Ethio-BLUE also provides the same almost in the same terminology.

Article 5(2) and 6(2) of the Ethio-Netherland Provides that the parties should not encourage investment by relaxing their environmental and labor laws respectively rather such right are not waived and cannot be derogated and the other parties do not offer the same to encourage establishment, expansion, or maintenance of investment.

Article 5(2) and 6(2) of the Ethio-BLUE also provides the same almost in the same terminology. Article 5(3) and 6(3) of Ethio-Netherland reaffirm the duty of each parties' to observe the environment and ILO declaration on labor duty they entered at international level and it must be duly recognized and implemented under their respective environmental and labor law.

Article 5(3) and 6(3) of the Ethio-BLUE also provides the same almost in the same terminology. Article 5(4) and 6(4) of the Ethio-Netherland provides cooperation to enhance environmental and labor standard and if one party need consultation the expert of other should assist.

Article 5(4) and 6(4) of the Ethio-BLUE also provides the same almost in the same terminology. According to Marta and Tilahun some of the BITs are drafted broadly and this even includes explicit and implicit reference for the application of those standards to dispute resolution provisions. They say terminology like ''in all matter in similar situation…..'' and such framing broad since treatment whichever is better applicable.

There is also retro-active application of the MFN clause[142] as in article 12 of Ethio-Israel BIT and article 13 of Ethio-BLUE which only limits its application to dispute settlement. To some extent article 7(1) the introductory paragraph Ethio-UK has necessary measures for national or public security and public order and it demand party taking the action to inform the other.

Article 13 of Ethio-Equatorial Guinea provides that states can take any action to protect its essential security in time of war, armed conflict or emergency in international relations so long as it is not arbitrary and unjustifiable discrimination. This, however, do not apply to compensation paid for expropriation, compensation for loss, and subrogation. Article 14 of the

[142] Marta and Tilahun , pp.127-128

same provides requirement of transparency lest it is confidential which prejudice its law enforcement or purposes of confidential information parties' have duty to publish its laws and regulation. Article 14 and 15 of Ethio-Finland respectively provides what is in article 13 and 14 of Ethio-Equatorial Guinea BIT.

Article 4 of Ethio-Austria provides there should be transparency as in article 14 of Ethio-Finland provides article 14 of Ethio-Equatorial Guinea BIT. However, those Bits even lacks clarity as it is framed which pose difficulty in its enforcement. Another treaty shopping scenario MFN application is with regard to claiming the shorter period of limitation that the investor should wait before lodging arbitration before international tribunal.[143]

According to Getahun Seifu MFN clause are framed in blanket manner (…..accorded….to investments) that gives investor the chance to claim such treatment in sector when they did not invested. He also says BITs like article 3(3) of Ethio-Israel BIT leaves more lax right of flexibility to parties. This provisions left wide discretion for host states to grant foreign investment rights and privileges to establish investment with exception of repatriation and compensation where no discrimination is permitted. Accordingly, host states can impose restriction for military, environment and natives culture band sector that harm local community/industry.[144]

3.4.4. Ethiopia's Lack of Model BIT and Its Impact on Insuring the Country's Regulatory Rights at the time of BITs Conclusion

One of the main reasons for developing countries to sign BITs with capital exporting states is to attract FDI, and the increased inflow of FDI to such a capital-importing state in its part will, presumably, result in economic growth and development. However, the current FDI regime has not proved to support economic development, especially in developing countries, since they have overprotected home state investors and investments, at the expense of the host state's

[143] Id., p.128
[144] Getahun Seifu p.17

development. Because of this that many developing countries are refusing to conclude new BITs or terminating ones they already concluded in recent years. In this case developing countries are clearly condemning the discriminatory nature of the previous BIT structure in favor of developed countries that the other side of the BIT, the interests of developing countries should also be considered.

One of the major characteristics of developing nations in investment world is their lack of having model BITs and Ethiopia is not an island to this fact. We can easily understand the problem of not having a model BIT from BITs discussed above in light of essential security interests of Ethiopia. All of the BITs are concerned with promotion of investment for mutual economic and social development by disregarding issues related with essential security interests of the country that is one of the sovereign power of the country.

What developing states in general, and Ethiopia in particular should understand is that conclusion of BITs based on the full interest of capital exporting nations only do not attract FDI and boost their economy. Some authors like Sornarajah argue that it is empirically untestable whether states will receive more investments if they conclude such treaties.[145] Salacuse and Sullivan also hold a similar view and attribute increase in flow of FDI to local political and economic conditions and government policies than BITs.[146] Thus, Ethiopia have to take into account other factors that foreign investors need to be fulfilled other than conclusion of BIT, and should adopt a Model BIT that strike a balance between the interest of the country and foreign investors, particularly essential security interest of Ethiopia should be made part of the Model BIT, and subsequently of future BITs.

Adopting a Model BIT alone will not be enough to strike balance between the country's interests with BIT state parties in general and the protection of essential security interests in particular for Ethiopia. South Africa, for instance after being convinced that her BITs were not at equal point of respecting her different interests along with her BIT parties, she decided all "first generation" BITs that South Africa signed shortly after the democratic transition in 1994, many of which have reached their termination date, should be reviewed with a view to termination, and possible

[145] M. Sornarajah (2010) The International Law on Foreign Investment, (Oxford University Press, Oxford, 3rd ed), p. 187.
[146] Jeswald W. Salacuse and Nicholas P. Sullivan (2005), Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harvard International Law Journal, p. 96.

renegotiation on the basis of a new Model BIT to be developed.[147] This will help Ethiopia since majority of her BITs have been reached their termination.

In general, Ethiopian BITs can be classified into four based on their duration; ten years, fifteen years, twenty years and thirty years of duration.[148] Among them more than eighteen of BITs have just been reached their time of termination[149] and some will reach within the coming three years.[150] Therefore, those BITs will ease the process of terminating BITs that do not incorporated provisions of essential security interests since they can be terminated based on the agreement of both parties, mostly through only notifying of the intent to terminate the BITs in writing.

Fortunately, majority of Ethiopian BITs that doesn't incorporated provisions on essential security interests of the parties to the BIT have reached their termination date as expressed above, and a very few BITs are recently signed by the country.[151] This enables Ethiopia to terminate almost all of her BITs that affect her regulatory power to keep her essential security interests when necessary, without violating her agreement under the BIT, which eventually will help her to negotiate new BITs based on her future Model BIT that will possibly respect all interests of the country in general and essential security interests in particular regarding investment.

[147] Supra note at 169.
[148] We can understand their duration from BITs Ethiopia signed with different countries. Ten years of duration are BITs of Ethiopia with Iran, Egypt, Austria, Libya, Germany, Netherland, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Belgium and Spain. Ethio- South Afrrica and Russia are fifteen years, Ethio- Sweden and France are twenty years and Ethio- Kuwait is thirty years.
[149] Those which have already reached their date of termination are Ethio- Iran (2013), Egypt (2016), Austria (2014), Libya (2014), Germany (2014), Netherland (2013), Algeria (2012), Denmark (2011), Tunisia (2010), Turkey (2010), Sudan (2010), Yemen (2009), Malaysia (2008), Switzerland (2008), China (2008), Belgium (2013), Spain (2019) and Russia (2015).
[150] Those BITs that will reach their termination date within three years will be Ethio- Sweden (in 2024), Ethio- France (in 2023) and Ethio- South Africa (in 2023).
[151] Ethio- Kuwait BIT will terminate in 2018, and other newly agreed BIT that has been signed in 2016 (Ethio- Morocco) and in 2017 (Ethio- Qatar). Other formerly signed BITs like Ethio- Guinea in 2009 and Ethio- Nigeria in 2004 also couldn't on the website.

CHAPTER FOUR

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. Conclusions

Investment is a process of economic activity which involves the capital technology and technological knowhow for the exploitation and exploration of natural resources, production in agriculture, manufacturing, trade and other economic activities. From the preceding chapters, the Researcher concludes that before the Second World War international investment was by large governed by Customary International Law. Hereby, the significance of the customary international law is the principle of sovereignty and the need for the host country to exercise its prerogative within its territory by virtue of sovereignty. Particular emphasis is placed on the host country to act within the parameters of the law when exercising its sovereignty.

The basic features common to BITs provisions cover the scope and definition of foreign investment, admission of investments, national and most favored nation status, fair and equitable treatment clauses, compensation guarantees for expropriation, war and civil unrest, guarantees of fund transfers and the recuperation of capital gains, subrogation of insurance claims, and dispute settlement provision. It is safe to conclude that, even in the absence of BITs, foreign investors are still protected by customary international law principles and entitled to compensation by virtue of the application of customary international law principles. Although the scope and content of the conditions under which foreign investment may be expropriated is subject to much controversy, it is clear is that expropriation is permissible under customary international law. It is apparent from the discussion that the rule of the thumb is that, for expropriation to be lawful, it must be non- discriminatory and for a public purpose, due process must be followed, and the payment of compensation must be made.

Despite the positive impact it has in increasing FDI though still no absolute correlation that BIT s increase FDI for country like do without having much of it, many BITs itself failed to balance the competing interest; Protection of Investment and maintaining freedom of host government for the protection of public purpose/interest such as national security, environmental protection, labor, public health, human right, political and economic crises, protection of public morality, protection of criminal activity, protection of anti-competition and consumer protection, etc. This is because when BITS are framed they are framed in general or in blanket manner which open chance for investor to claim public and non-discriminatory action alleging this is violation of the protection of investor or manifestation of state regulation such as FET, MFN, NT, umbrella and stabilization clauses.

If a BIT provides for nondiscriminatory treatment and does not leave "regulatory space" for the parties, it becomes very difficult, if not impossible, to advocate important, and at times inevitable, national policies, deviating from the BIT, through domestic legislations. Thus there is a need to include the negative listing of investment areas not open for foreign investors to be expressly and consistently indicated in the BITs. This should be done by mentioning the areas by name. If not, BITs should expressly leave discretionary power that would depend on the need of the country from time to time. It is not unimaginable to think that a particular area where a foreign investor wishes to invest could conflict with the host country's essential interests such as

these. To one's surprise, such protections to the interest of the country are not inscribed in most of the BITs which are the subject of this research.

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

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

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

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

should be given to its own nationals and to third country nationals. The investor claims before the international that the measures of state are violation of international sources of investment or simply regulatory taking to deprive his investment enjoyment or is indirect/disguised expropriation and as a result demand the government to quit those public measures or to pay them chilly compensation.

The access of investor to the contingency fee arrangement of lawyer on investment claim, unfair or excessive pro- investor position of arbitration of in cases involving-state-investor, state usually bearing the cost of arbitration whilst defending suit or claimed file against them though still won the case or is successful the critical challenge developing countries like Ethiopia is facing which obliged those countries to terminate many treaty as seen in Indonesia, South Africa, Bolivia, Ecuador, etc and some of the countries even withdrawn from ICSID though the process is not easy no matter how long and costy it is.

The stabilization clauses under the Ethiopian investment Regulations No.270/2012 and 417/2017) makes the law to apply retro-actively that impeded application of legislation enacted under its sovereign power. It was few BITs like though in general manner that gave emphasis to environmental, labor, health and human rights in general.

One of the findings of the research Ethiopia has bilateral investment treaties with 32 worldwide states up to 2019, the provisions of environmental protection and human rights did not include all Ethiopia bilateral investment treaties except agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal Promotion and Protection of Investments.

Therefore, the research observed the existing of Ethiopian BITs do not promote host state right to regulate FDI and also there is no concrete evidence to convince us that Ethiopian BITs have been effective in realizing and implementing the objectives of Ethiopian investment policy and law.

4.2. Recommendations

Depending on the investigation, the researcher has been conducted up to know, lacunas have been identified upon the selected Ethio-BITs that many BITs itself failed to balance the

competing interest; Protection of foreign Investment and maintaining freedom of host government for the protection of public purpose/interest such as national security, environmental protection, labor, public health, human right, protection of public morality, protection of anti-competition and consumer protection, etc.

Based on the major findings of this research, the followings are the recommendations forwarded by the researcher in order to be given attention by the government and implemented accordingly.

1. First and foremost the country has to vigilantly or carefully negotiate the BITs that the country planned to enter or prepared to sign. The country has to re-think and evaluate those BITs in light of emerging and public issues or contemporary global concern to which Ethiopia is not exception and unless it result in multiple liability for investor and international community. Preambles, substantives, entry into force, Termination and procedural provisions or simply six provisions should be well framed and an instance and at least some controlling the meaning must be stipulated reaffirming the objective of BITs in promoting investment and protecting investor and host community. The frequently invoked standard of FET should also be precisely criteria in detailed and objective manner. The dangerous MFN clause should also be limited to substantive law but not to procedural law or should be without problem by exactly limiting its application.
2. The BITs must also be accompanied by certain annex how interpretation should be made so that tribunal wide discretion is controlled. Umbrella clause should be avoided or narrowly and wisely drafted. Stabilization clause should also analyzed case by case and should be restricted to certain category of investment and certain period or altogether avoided. It was a few BITs that have environmental protection, social development, and public heath like BITs with German, BLUE, Netherland, Finland, UK, and Equatorial Guinea out of which two are not enforce. Those treaties may be modified so as to protect and promote investor and investment whilst maintaining countries regulatory action without much complexity and subjecting country to arbitration and compensation.
3. After carefully evaluated those treaty which are about to end must not be renewed rather amended and adjusted in way that that accommodate the emerging and pressing issues like environmental protection (waste recycle and use of environment friendly technology), local community health, labor (such as Setting minimum wage, improving working

condition and safety measures replacement or transfer of skill in management, Human right (such as right to food and right to clean water),consumer safety ,etc.

4. States have the inherent right to exclude the investment that could cause harm to the environment. The exclusion can be right at the point of entry or after investment has been started. Ethiopia's BITs did not include provisions for environmental protection out of fear that investors would not be attracted to her territories. It is high time that due consideration be given to environmental protection. The writer suggests that Ethiopia should include provisions for environmental protection on all her BITs. In other words, the Ethiopian Government should sign BITs only if they provide adequate balance between the rights and obligations of investors. New BITs need to include a provision that governments will protect, enhance and enforce basic labor rights.
5. There is a clear need for Ethiopia to review its BIT frame work as existing BITs are photo up from European model that mainly focuses on interest of foreign investors from developed countries. Ethiopia should learn from other countries such as South Africa which have already undertaken a review of their own BIT commitments and Ethiopia should prepare its own bilateral investment treaty model
6. Pursuant article 27(7) of amended investment proclamation No. 849/2014 provides, where necessary, Ethiopian investment board authorize the opening of Investment areas for foreign investors, otherwise exclusively reserved for domestic investors. This proclamation does not made clear by legislatures, the Ethiopian (domestic) Investment law Should be clearly framed that "since as it stand now- is vague when and what the conditions are required to opens investment areas reserved for domestic investors. In one way foreign investment are important for our country, in other way reserving regulatory power is also. To be consistent and perhaps having laws known to foreign investor is paramount importance. Therefore, the Ethiopian law makers should be better to make clear than as it stands now –vague context.
7. Though the investment law or proclamation under article 38 obliged investor to observe environmental laws and regulation of country and also there is law on EIA pro-facto measure and post facto action should be taken. When granting license the investment commission at federal and investment Board, Investment commission, Zonal Investment committee, Investment council or whatsoever should at least moderate level at fist and

rigorously in progress because Author and researcher like Lorenzo Cotula argue investment law and BITs function under Utilitarian approach where cost-benefit analysis are made wisely. Not only EIA has to be made but also system of oversight and supervision by concerned organ at certain interval should be made so that problems are solved at grass root level.

Bibliography

1. Primary Sources

Bilateral Investment Treaties

1. The 2009 Ethio-UK Great Britain and Northern Ireland BIT
2. The 2004 Ethio-German BIT
3. The 2006 Ethio-Finland BIT
4. The 2000 Ethio-Sudan BIT
5. The 2003 Ethio-Israel BIT
6. The 2006 Ethio-Belgium Luxemburg BIT

7. The 2001 Ethio-Denmark BIT
8. The 2003 Ethio-Netherlands BIT
9. The 1999 Ethio-Russian Federation BIT
10. The 1196 Ethio-Kuwait BIT 11.
11. The Ethio-Equatorial Guinea BIT 12The 2000 Ethio-Turkey BIT
12. The 2004 Ethio-Austria BIT
13. The 1998 Ethio-China BIT

2. Secondary Sources

Books and Articles

1. Christopher Schruer, Sources of International Law: Scope and Application, Emirates Lecture Series 28
2. Christopher Schruer, Investment, International Protection,(2011)
3. M.Sornarajah, International Investment law, 2nd edition, (2004)
4. Charalampos Gianna Kolopoulos, The Right to Regulate in International Law and The Law of State Responsibility; A Hohfedian Approach,2017
5. Howard Mann, Investment Agreements and the Regulatory State; Can Exceptions Clause Create A Safe Haven for Governments, (2017)
6. Vera Kurzun, The Right To Regulate In Investor-State Arbitration; Slicing And Dicing Regulatory Curve Outs, (2017)
7. OECD, Fair and Equitable Treatment Standard in International Investment Law,2005
8. Investment Treaty and why they matter to Sustainable Development at p 32 citing Gill, Gearing and Birt (2004), Contractual claims and BIT; Comparative review of SGS cases' International Arbitration
9. Lorenzo Cotula, Regulatory Taking, Stabilization, and Sustainable Development, (2008)
10. Rudolf Dolzer, Impact of Investment Treaties on Domestic Administrative Law (International Law Politics vol.37:953)

11. Anthea Robert, Triangular Treaties: The extent and limits of Investment Treaty Rights (contribution, rearward International law Journal Vol.56, (2015)
12. Sefanit Mekonen, Rights of Citizens and Foreign Investor to Agricultural Land Under the Land Policy of Ethiopia, Haramaya Law Review
13. Dejene Girma Janka, The chance to Improve the system of Environmental Impact Assessment in Ethiopia; A look at the New Investment Proclamation (Oromia Law Journal),vol.2 No.2
14. Elias N. Stebek, Between' Land Grabs' Agricultural Investment; Land Rent with Foreign Investors and Ethiopia' Normative Setting in Focus, Mizan Law ReviewVol.5 No.1,2011
15. Marta Belete and Tilahun Ismael, Re-thinking Ethiopia's BIT in light of recent Developments in International Investment Agreements ,2014,Mizan Law Review vol.8 no.1
16. S.D. Myers, Inc. v The Government of Canada, paras. 243 and 250. 39 M. Sornarajah, 235. 40 Victor Musoti, 1025-1026.
17. Seifu_Jwit95 6/10/08 14:15 Page 14 (the journal of world investment & trade14)
18. Ardigo, I.A., Best practices in business integrity support provided by investment promotion agencies,(transparence international global coalition against corruption,2018)
19. Ayala,Y.S,Restoring The Balance In Bilateral Investment Treaties : Incorporating Human Rights, revista de derecho, universidad del norte, 32: 139-161, 2009 clauses,
20. BIAC, Voice of the Business at the OECD,(20016)
21. Butler,N,Subedi,S, The Future of International Investment Regulation: Towards a World Investment Organization?(Neth. Int. Law Rev (2017) 64:43–72)
22. Catula, L, 'Do Investment Treaties Unduly Constrain Regulatory Space?, QIL ZOOM-NI(2014)
23. Dagbanja, DN, the paradox of international investment law: trivializing the development objectives underlying international investment agreements investor state dispute settlement
24. Kady,H.E, revision of model BITs; salient features and global trends (training course for economies in transition on a new generation of international investment policies ,UNCTAD 2013)

25. Mann, H, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, international institute for sustainable development (IISD), (February 2008)
26. Malik,M., recent development in international investment agreements ; negotiations and disputes, (IV annual forum for developing country investment negotiators, IISID back ground paper new Delhi, October 27-29,210)
27. M,sornarajah, International Law On Foreign Investment,(Third Edition, Cambridge University Press, New York 2010)
28. -OCED, “"Indirect Expropriation" and the "Right to Regulate" in International Investment Law”, OECD Working Papers on International Investment, 2004/04, OECD Publishing. Http://dx.doi.org/10.1787/780155872321
29. LE, Peterson, Bilateral Investment Treaties and Development Policy-Making,(International Institute for Sustainable Development,Nov.2004)
30. Ranjan, p.,Singh,H.v., James,k. ,Singh., India’s Model Bilateral Treaty; is India too risky? (Brooking institution India center, New Delhi 2018)
31. Suzanne A. Spears, The Quest For Policy Space In New Generation Of International Investment Treaty
32. Smutny,A.C, and Stephen T. Ostrowski, Foreign Investment and Political Risk: What You Should Know About Investment Protection Treaties,(2008), Bloomberg European Law Journal
33. Seifu,G, Regulatory Space” in the Treatment of Foreign Investment in Ethiopian Investment Laws, the Journal of World Investment And Trade(,2008)17
34. Tadesse,M A, Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework,(Mekelle University Law Journal Vol. 4 June 2016)
35. United Nations Conference On Trade And Development, International Investment Agreements: Flexibility For Development, UNCTAD Series On Issues In International Investment Agreements (United Nations conference, New York and Geneva, 2000,) 8, (UNCTAD/ITE/IIT/18)
36. Wakgari Kebeta Djigsa, The Adequacy of Ethiopia’s Bilateral Investment Treaties in Protecting the Environment: Race to The Bottom, Haramaya Law Review 6 (2017)

37. -World Investment Report 2018 Investment and New Industrial Policies, Chapter III Recent policy developments and key issues,
38. -Yu,v, and Marshal,F., ,Investors Obligation And Host States Policy Space,2nd Annual Forum Of Developing Country Investment Negotiations ,(Marrakech Maroc,IISD ,2008)

Theses

1. -Lemma A, When Does Government Regulatory Measure Amount to Expropriation?Looking a
2. Workable Roadmap under the BITs of Ethiopia,(LLM thesis ,haramaya university,2018)-Teferi,M.,the existing status of bilateral investment treaties in Ethiopia: issues and trends,(LLM Thesis, Addis Ababa University,oct.2011)