

**IBN HALDUN UNIVERSITY
SCHOOL OF GRADUATE STUDIES
DEPARTMENT OF
INTERNATIONAL AND COMPARATIVE LAW**

MASTER THESIS

**ETHIOPIA'S BILATERAL INVESTMENT TREATIES:
SUBSTANTIVE AND PROCEDURAL ISSUES**

ABDUROZACK SEID YIMER

**THESIS SUPERVISOR
PROF. ALİ YEŞİLIRMAK**

ISTANBUL, 2022

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by

ABDUROZACK SEID YIMER

**A thesis submitted to the School of Graduate Studies in partial
fulfillment of the requirements for the degree of Master of Arts in
International and Comparative Law**

**THESIS SUPERVISOR
PROF. ALİ YEŞİLIRMAK**

ISTANBUL, 2022

APPROVAL PAGE

This is to certify that we have read this thesis and that, in our opinion, it is fully adequate, in scope and quality, as a thesis for the degree of Master of Arts Department of International and Comparative Law.

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ÖZ

ETİYOPYA İKİLİ YATIRIM ANLAŞMALARİ: MADDE VE USUL KONULARI

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Uluslararası yatırım hukuku, çok taraflı bir anlaşmaya veya birleşik bir uluslararası yapıya dayanmadığı, birkaç ikili, bölgesel ve dünya çapında anlaşmalar ile sınırlı kaldığı için oldukça merkezi olmayan bir yapıya sahiptir. 1959'da Batı Almanya ve Pakistan arasında ilk modern ikili yatırım anlaşmasının (IYA) imzalanmasının ardından, IYA'ların sonuçlandırılması, sonraki on yıllarda yabancı yatırım korumasına ilişkin uluslararası kamu hukuku faaliyetlerinin en aktif sektörlerinden biri olmuştur. IYA'ların temel amacının, yabancı yatırımlar için temel koruma sağlamak, taraf devletlerin bu konudaki yükümlülüklerini belirlemek ve ev sahibi ülkeye yatırım girişlerini teşvik etmek olduğu ifade edilmektedir. Etiyopya, ilk IYA'ın kurulmasından beş yıl sonra, 1964'te Almanya ile ilk IYA'ı imzalayarak IYA sistemine katılan öncü ülkeler arasında yer almıştı. Bu çalışma, Etiyopya'nın IYA'larının maddi ve usul çerçevesini ele alacaktır. Ülkelerin IYA deneyimleri ve ilgili tahkim mahkemeleri kararları ışığında IYA'ların çoğunluğu kapsamında sağlanan maddi ve usule ilişkin haklar hakkında genel bir tartışma yapılacaktır. Özellikle âdil ve eşit muamele (fair and equitable treatment), milli muamele prensibi (national treatment principle) ve en çok gözetilen ulus kaydı (most favoured nation clause) durumu tartışılacak, Etiyopya'nın IYA'larının kapsamındaki standartların statüsü, asli haklar açısından ele alınacak ve usule ilişkin meseleleri ele almak için yatırımcı-devlet anlaşmazlık çözüm hükümlerini de değinilecektir. Bu koruma standartlarının yapısını ve içeriğini,

Etiyopya IYA'larının bunları ele almada kaydettiği ilerlemeyi ve ele alınması gereken boşlukları kapsayacaktır.

Anahtar Kelimeler: Adil ve Eşit Muamele, En Çok Gözetilen Ulus Kaydı, İkili Yatırım Anlaşmaları, Kamulaştırma, Milli Muamele Prensipleri.



ABSTRACT

ETHIOPIA'S BILATERAL INVESTMENT TREATIES: SUBSTANTIVE AND PROCEDURAL ISSUES

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International investment law has a decentralized structure since it is not based on a multilateral agreement or a unified international body. It is highly decentralized, with several bilateral, regional, and worldwide agreements. Following the signature of the first modern bilateral investment treaty (BIT) in 1959 between West Germany and Pakistan, the conclusion of BITs has been one of the most active sectors of public international law-making in terms of foreign investment protection in succeeding decades. The primary goal of BITs is believed to be offering essential protection for foreign investments, specifying the obligations of state parties in this regard, and promoting investment inflows to the host country. Ethiopia was also among the pioneer countries to join the BIT system, signing its first BIT with Germany in 1964, five years after the first BIT was established. The thesis will address the substantive and procedural framework of Ethiopia's BITs. After having a general discussion on the substantive and procedural rights provided under the majority of BITs in light of countries' BIT experience and relevant arbitration tribunals decisions, we will specifically discuss the status of fair and equitable treatment (FET), national treatment (NT), and most favored nations (MFN) treatments standards status under Ethiopia's BITs from the substantive rights point of view and investor-state dispute settlement provisions to deal with procedural issues. The analysis will encompass the structure

and contents of these standards of protection, the progress the Ethiopian BITs have in addressing them, and the loopholes to be addressed.

Keywords: Bilateral investment treaties, Expropriation, Fair and Equitable Treatment, Investor-state dispute settlement, National Treatment.



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TABLE OF CONTENTS

ÖZ.....	iv
ABSTRACT	vi
ACKNOWLEDGEMENT	viii
TABLE OF CONTENTS.....	ix
LIST OF SYMBOLS AND ABBREVIATIONS	xi
CHAPTER I INTRODUCTION.....	1
CHAPTER II BILATERAL INVESTMENT TREATIES: GENERAL OVERVIEW ..	8
2.1. History of Bilateral Investment Treaties	8
2.1.1. Colonial Era.....	8
2.1.2. Post-Colonial Era.....	10
2.2. Reasons for Signing BITs	13
2.3. Scope of BITs	17
2.4. Standards of Protection	19
2.4.1. Fair and Equitable Treatment.....	19
2.4.1.1. Turkiye.....	24
2.4.1.2. Germany	26
2.4.1.3. Switzerland.....	26
2.4.1.4. United Kingdom	27
2.4.2. National Treatment Standard	27
2.4.2.1. Germany	32
2.4.2.2. United Kingdom	32
2.4.2.3. Swiss	33
2.4.3. Most Favored Nations Treatment Standard	33
2.4.4. Full Protection and Security	37
2.5. Expropriation	38
2.6. Transfer of Funds	43
2.7. Procedural Issues in the BITs.....	45
2.7.1. The Umbrella Clause.....	45
2.7.2. Investor-State Dispute Settlement	48
2.7.2.1. Exhaustion of Local Remedies	53
2.7.2.2. The Purpose of MFN in the International Investment Arbitration	54
2.7.2.3. Fork in the Road Clause (FITR).....	57
2.7.3. State-State Dispute Settlement.....	57

CHAPTER III ANALYSIS OF ETHIOPIA’S BITs.....	58
3.1. General Overview	58
3.1.1. History of BITs in Ethiopia.....	58
3.2. Domestic Regulatory Frameworks for the Protection of Foreign Investment.....	60
3.2.1. The FDRE Constitution	60
3.2.2. Investment Proclamation No 1180/2020	61
3.2.3. The Power to Make Investment Treaties in Ethiopia.....	62
3.3. Preamble of Ethiopia’s BITs	63
3.4. Standards of Protection Under Ethiopia’s Bilateral Investment Treaties.....	66
3.4.1. Fair and Equitable Treatment and Full Protection and Security Standards	66
3.4.2. The Application and Status of National Treatment Standard in the Ethiopia BITs	71
3.4.3. Ethiopia’s Approach to the MFN Clause	75
3.4.4. Expropriation.....	78
3.5. Procedural Issues in the Ethiopian BITs.....	81
CHAPTER IV CONCLUSIONS	87
REFERENCES	94
CURRICULUM VITAE.....	102

LIST OF SYMBOLS AND ABBREVIATIONS

BIT	Bilateral Investment Treaties
CEFTA	Central European Free Trade Agreement
DSPs	Dispute Settlement Procedures
FDRE	The Federal Democratic Republic of Ethiopia
FITR	Fork-in-the-Road clause
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
ICSID	The International Centre for Settlement of Investment Disputes
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
MFN	Most Favored Nations
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	The Organization for Economic Co-operation and Development
Para.	Paragraph
SSDS	State-State Dispute Settlements
SADC	Southern African Development Community
UNCITRAL	The United Nations Commission on International Trade Law
VCLT	Vienna Convention on The Law of Treaties

CHAPTER I

INTRODUCTION

In the past two decades, countries opened themselves to foreign investments, advanced the working environment to foreign affiliates, and provided robust mechanisms of treatment and protection.¹ Foreign investments are one of the most important sectors where international rules and treaties apply.² Since the beginning of the twentieth century, Foreign Direct Investment (from now on referred to as FDI) has shown significant importance and began to assume the forms prevalent today.³

Developing countries, emerging economies, and countries in transition increasingly see FDI as a source of economic development, modernization, income growth, and job creation. Countries have liberalized their FDI rules and adopted various initiatives to attract investment. They have looked at how to effectively pursue a domestic policy to maximize the benefits of foreign investment in the home economy.⁴

In addition, countries have enacted rules and regulations aimed primarily to protect foreign investments. The lack of adequate guarantees to foreign investment is not apprehensive for investors of capital-exporting states alone but also a concern for the host states that aim to increase an inflow of foreign investment.

The existence of adequate legal protection would help assure investors by eliminating any preconceived fear associated with the country, making them confident to invest in a particular state. In other words, globalization has resulted in reasonably precise,

¹ Lisa E. Sachs and Karl P. Sauvant, “Bits, DTTs, And FDI, Flow: An Overview,” *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, And Investment Flows*, Oxford University Press, 2009, xxvii.

² Jeswald W. Salacuse. “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,” *The International Lawyer*, 1990, 665.

³ UNCTAD, Trends in International Investment Agreements: An Overview, International Investment Agreements: Key Issues Volume I, United Nations New York and Geneva, 2004, 6.

⁴ OECD, “Foreign Direct Investment for Development Maximizing Benefits, Minimizing Costs: Overview”, 2002. 5.

reliable details about economic and legal matters worldwide. The absence of legal stability surrounding a potential project in a particular area may impede the investor from making a beneficial decision. The foreign investor's assessment of a suitable level of legal stability will be a factor in deciding whether or not to invest in a specific country. However, legal stability is not the only factor that attracts potential foreign investment.⁵

One of the most stunning trends in international law is the phenomenal growth of International Investment Agreements (hereinafter referred to as IIAs). IIAs are a treaty between governments that cover issues such as cross-border investment protection, promotion, and liberalization.⁶ International investment law, as is well known, has a decentralized structure, as it is not based on a multilateral agreement or a united international agency. It is somewhat decentralized, consisting of various of bilateral, regional, and global agreements.⁷

The most common types of IIAs are bilateral investment treaties (BITs), Free Trade Agreements (FTAs), and other international treaties containing investment provisions. The introduction of BIT'S is one of these endeavors.⁸

The conclusion of BITs has been one of the most active fields of international public law-making in the previous decades, following the signing of the very first modern BIT between West Germany and Pakistan in 1959.⁹ The purpose of BITs is to create a treaty-based structure that tries to establish both parties' regulatory behavior,

⁵ Rudolf Dolzer, and Christoph Schreuer, *Principle of International Investment Law*, Oxford University Press, 2008, 8. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3rd Edition, Cambridge University Press, 2010, 187. Shah Mumtaz Hussain. "Bilateral Investment Treaties and Multi-national Investors: Evidence from FDI in the MENA States," *A Research Journal of Commerce, Economics, and Social Sciences*, 2018, Vol. 12, No. 1, 100. David Gaukrodger, Business responsibilities and investment treaties, *OECD Working Papers on International Investment* 2021/02 <https://dx.doi.org/10.1787/4a6f4f17-en>.

⁶ Kavaljit Singh & Ilge Burghard, ed. "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices." Amsterdam: BOTH ENDS. 2016, 2. Jeswald W. Salacuse. "The Treatification of International Investment Law," 13 *LAW & BUS. REV. AM.* (2007), 155. Bungenberg Marc, Jörn Griebel, Stephan Hobe, August Reinisch, and Yun-i Kim. *International Investment Law*. 1st ed. Hart Publishing, (2015) 1. UNCTAD, *International Investment Agreements: Key Issues, Volume I.* (2004) 1.

⁷ Zachary, Douglas, Pauwelyn Joost, and Jorge E. Vinuales. *The Foundations of International Investment Law*. 1st ed. Oxford University Press. (2014) 14.

⁸ UNCTAD, Volume I. 2.

⁹ See, "Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments," 25 November, 1959.

restricting arbitrary interference with foreign investor's rights.¹⁰ There are currently over 2800 BITs and more than 420 treaties with investment provisions, with over 2200 BITs in force.¹¹

There were some established mechanisms before the introduction of BITs. Scholars who wrote about the history of BITs classified different phases of investment protection agreements. Some of them used the pre-colonial, colonial and global eras as the different eras of BITs. At the same time, some other scholars limited the scope to a colonial and post-colonial era. We can also define it as the era of hard power (military), soft power (diplomacy), and the treaty era.¹²

Before World War II, foreign direct investment protection was rarely a priority in international accords. The majority of international economic agreements focused on establishing trade links, while some of these accords included provisions for the protection of nationals of one country in the territory of another. Countries like the US; tried to establish trade relations and provide terms that protect their investment abroad by concluding independent bilateral agreements with some countries.

These treaties were known as "Friendship, Commerce and Navigation" (FCN).¹³ The international investment policy in the Colonial Era had various characteristics. For instance, the agreement included both trade and property protection provisions. States; did not usually establish separate agreements on property or investment during the Colonial Era.

In addition, the status of protection clauses in those agreements can be considered secondary compared to the palace given to commercial provisions. The network of treaties was limited in scope, and the protection offered was unsatisfactory. Especially,

¹⁰ Kenneth J. Vandavelde, *Bilateral investment treaties, History, Policy, And Interpretation*, Oxford University Press. 2010, 1-2.

¹¹ See, UNCTAD World Investment Report 2021, UNCTAD/WIR/202, and ICSID Database of BITs <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties>, last accessed 30 May; 2022.

¹² See Vandavelde, History of Bilateral Investment Treaties, 158-194, Suzanne Kirayoglu, *The Bilateral Investment Treaty: Its Origins and Effects*, A Dissertation Submitted to The Department of Political Science In Partial Fulfillment of The Requirements for The Degree of Doctor of Philosophy, Florida State University, ProQuest LLC (2014).

¹³ Katen Miles, *The origins of international investment law, empire environment and the safeguarding of capital*, Vol 99, Cambridge University Press, 2013, 24, Sornarajah, 180.

since the treaties did not provide for implementation; the protections were enforced in either military or diplomatic ways.¹⁴

When it came to the post-colonial era, both developing and developed countries were afraid of each other's expected concerns. The former group of states was scared of neo-colonialism by the name of multi-national investment, and the latter category needed of mechanism to safeguard their nation's investments from expropriation in their previous colonies.¹⁵ These worries have driven states to conclude bilateral investment treaties, which are separate from the rest of the trade agreements.

The post-colonial agreements (BITs) have the following features. First, they are concerned exclusively with investment issues. Furthermore, due reasons as mentioned above, the agreements were mainly concluded between developed and developing countries. The motivation for developing countries was to attract foreign investment, while the developed countries' concern was ensuring that their foreign investment was protected.¹⁶

The contents and structure of most BITs appear to be relatively similar. However, when we look at the contents of these agreements, we may see certain discrepancies and new aspects that have been added throughout time.¹⁷ Fair and equitable treatment, comprehensive protection and security, protection from unjustified expropriation without effective compensation, national and most favored nation treatment, free transfer of funds, and dispute resolution processes are the essential elements that make up BITs.

As previously noted, the majority of BITs are signed between developed and developing countries to protect citizens' investments against arbitrary treatment and illegal expropriation while also attracting foreign direct investment. Ethiopia, as a developing country, is no exception, especially regarding FDI, which is the principal

¹⁴ Vandevelde Kenneth J. "A Brief History of International Investment Agreements," University of California, Davis, Vol. 12:157, (2005), 161.

¹⁵ Ibid, 166.

¹⁶ Jeswald W. Salacuse, "The Treatification of International Investment Law", *13 LAW & BUS. REV. AM.* 155 (2007), 158, Sornarajah, 173-174.

¹⁷ Stephan W, Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009. 65, UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, (2007). executive summary, Xiii, Sornarajah, 187.

target of Ethiopia's investment policy. Ethiopia formulated investment policies and passed domestic investment laws that include investment protection measures to attain this goal. These efforts can be seen from the laws Ethiopia enacted starting from the constitution¹⁸, investment proclamations,¹⁹ and different treaties concluded concerning protection clauses to make the foreign investment environment broad and fertile.

Since 1991, Ethiopia has also been a member of the Multilateral Investment Guarantee Agency (MIGA), which offers "political risk insurance (guarantees) for projects in a wide range of sectors in developing member countries, encompassing all parts of the world."²⁰ MIGA provides consultancy services to developing nation governments and offers political risk insurance to firms trying to invest in developing countries. The group provides advice on the policies and processes that these governments should implement, as well as the best approaches for these nations to attract international investment.²¹ For example, MIGA approved a political risk insurance policy for the Tulu Moye geothermal project in 2021, offering an additional layer of financial protection to an Ethiopian government sovereign guarantee.²²

Ethiopia's first BIT, in 1964, with Germany, set the pace for bilateral investment treaties with more than 35 countries concluded hitherto. Twenty-one of these treaties is currently under operation.²³ Although the content of most BITs has remained essentially unchanged since then, there have been some changes over the years. It is also recommended that the country conclude more BITs to attract Foreign Direct Investment by providing better protection in addition to domestic investment laws.²⁴

¹⁸ See *Constitution of the Federal Democratic Republic of Ethiopia* [], 21 August 1995, available at: <https://www.refworld.org/docid/3ae6b5a84.html>.

¹⁹ See, FDRE "Investment Proclamation No1180/2020", Investment Proclamation No. 769/2012, Amendment Proclamation No. 849/2014, Investment Regulation No. 270/2012, Amendment Regulation No. 312/2014, Investment Directives - Directive on Duty-free Import of Motor Vehicles No. 4/2005 (E.C), Ethiopian Investment Board and the Ethiopian Investment Commission Establishment Regulation No. 313/2014.

²⁰ See, <https://www.miga.org>

²¹ <https://www.miga.org/what-we-do>.

²² <https://www.rg.is/tulu-moye-geothermal-project-approved-for-miga-coverage-of-the-world-bank-group>.

²³ See UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> last accessed 30 May; 2022.

²⁴ Amanuel D. Gebregergis. "The Role of Bilateral Investment Treaties in Securing Foreign Investments in Ethiopia," LLM thesis, University of South Africa, 2015. 68.

Although there are pieces of literature written on Ethiopia's BITs, they focus on pinpointing some specific issues and showing their status in the BITs concluded by Ethiopia. This research will try to answer the following questions: The substantive and procedural structure of Ethiopia's BITs, the gaps to be filled, and the contemporary issues to be incorporated.

The emphasis of this study will be on evaluating Ethiopia's BITs which are operational now. This study will be conducted in light of BITs that have been implemented by countries all over the world. We will employ comparative legal research methodology due to its value as a tool for expanding experiences and the necessity of having fundamental information in different systems in filling the knowledge gap while bearing in mind better comprehension, a broader range of reform, and harmonization options that comparative legal research methodology offers.²⁵ We will examine Ethiopia's BITs to see what they entail in terms of substantive and procedural provisions of agreements. The progress and concepts introduced to the BITs will also be discussed under their respective title. For specificity in the analysis of Ethiopia's BITs, we will focus on the substantive aspects of fair and equitable treatment, national treatment, most favored nation treatment standards, and expropriation. In contrast, the procedural elements will focus on investor-state dispute settlement. In addition to, primary sources like investment laws and proclamations, case laws, international instruments, books, academic articles, and non-academic sources will also be consulted.

This thesis will be organized into four sections, each of which comprises subtopics. The first chapter introduces the background that explains where this thesis is going and what concerns are anticipated to be addressed. The second chapter will provide an overview of bilateral investment treaties in general. Throughout this chapter, we will look at the history of BITs from their origin to the present, as well as the features that they have added throughout time. In addition, this section will show the fundamental aspects of most BITs as well as a variety of academic viewpoints on these topics.

²⁵ Muhammad Imran Ali, "Comparative Legal Research-Building A Legal Attitude for A Transnational World," *Journal of Legal Studies*, 2020-26(40), 66, Ishwara Bhat, "Comparative Method of Legal Research: Nature, Process and Potentiality," *Journal of The Indian Law Institute*, April-June 2015, Vol. 57, No. 2, 147, Eberle Edward J. "The Methodology of Comparative Law," *Roger Williams University Law Review*: (2011) Vol. 16: Iss. 1, Article 2, 51. Available at: http://docs.rwu.edu/rwu_LR/vol16/iss1/2.

Under this sub-topic, we will specifically discuss the core substantive and procedural elements of BITs, such as admission, fair and equitable treatment, transfer of funds, expropriation, and dispute resolution methods.

The analysis of Ethiopia's BITs will be the exclusive emphasis of the third chapter. We will begin with an overview of the regulatory environment for investments in general and go on to the substance of Ethiopia's BITs and the history of Ethiopian investment rules. In addition, we will evaluate the substantive and procedural contents of Ethiopia's BITs, their development, and limits, in light of the elements of BITs across the world. Furthermore, whenever appropriate, we will provide a comparison with and information from other countries' experiences.

Conclusion and recommendations are the subjects of the fourth and final chapter.

CHAPTER II

BILATERAL INVESTMENT TREATIES: GENERAL OVERVIEW

2.1. History of Bilateral Investment Treaties

It is more than vital to deal with the history and progress of these treaties from the past to the present to understand the substantive and procedural concerns covered by BITs in general and Ethiopia's BITs in particular. Doing so will guide us in comprehending the rationale behind treaty provisions, as well as the developments and advancements that these treaties have made. Scholars used different grounds and time phases to analyze the history of BITs. For instance, K. J. Vandeveldel classified the periods as the colonial, cold war, and global eras.²⁶

On the other hand, Kirayoglu demonstrates the history depending on a pre-war and post-war investment climate. For this study, we found presenting a colonial, post-colonial, and present era is way better and easy to comprehend. Hence, we will see the history of BITs on a colonial, post-colonial, and present-era basis.

2.1.1. Colonial Era

International Investment laws are not a new phenomenon. They are, in fact, inextricably entwined in the worldwide growth of European commerce and investment operations from the seventeenth to the early twentieth century. During the eighteenth, nineteenth, and early twentieth centuries, foreign investments expanded and developed with colonial expansions. Since the Europeans had full control over their colonies, they felt no need to have the treaty to protect their foreign investment.²⁷

²⁶ Vandeveldel, *Bilateral investment treaties, History, Policy, And Interpretation*, 37-77.

²⁷ Jeswald W. Salacuse. *"The Law of Investment Treaties."* 3rd ed. Oxford University Press. 2021, 98.

The foundations of international investment law can be traced back long before the current system of bilateral investment treaties emerged in the second half of the twentieth century.²⁸ For instance, the treaties on “Friendship, Commerce, and Navigation” (FCN), which were signed from the seventeenth century forward, were the precursor of the contemporary bilateral investment treaty. The United States made many of these treaties aiming to protect its business abroad and to connect a significant number of countries around the world to the alliance with the US.²⁹

In the nineteenth century, a branch of international law known as diplomatic protection of aliens gave birth to the foreign investment protection law.³⁰ It created a worldwide minimum standard for treating foreigners, including foreign enterprises, and addressed their personal and property security while overseas. The violation of such rules resulted in international state responsibility and triggered the home state’s authority to intervene.³¹ During this time, powerful countries’ diplomatic protection was backed by ‘Gunboat diplomacy,’³² which entailed the threat or use of force to achieve political objectives.³³

Espousal was one of those diplomatic majors taken by home states to protect their citizens’ business abroad. It is a practice in which the state of an injured national takes responsibility for the national’s claims and pursues it against the state that caused the nationals injury.³⁴ Although states sometimes espouse their national’s in some human rights claims, it is more concerned with national’s property interests when residing in

²⁸ *Ibid*, 99, Mile, 2.

²⁹ Sornarajah, 180, Vandeveld, A Brief History of International Investment Agreements, 158, Kenneth J. Vandeveld, "U.S. Bilateral Investment Treaties: The Second Wave," *Michigan Journal of International Law* 14, no. 4 (Summer 1993): 624, Wayne Sachs, "The New U.S. Bilateral Investment Treaties," *International Tax & Business Lawyer* 2, no. 1 (Winter 1984): 195-197, Stephan W, Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009.

³⁰ UNCTAD, “Trends in International Investment Agreements: An Overview, International Investment Agreements: Key Issues,” Volume I, United Nations New York and Geneva, 2004, 5.

³¹ Mile, 47.

³² According to the definition provided under Oxford Reference, “Gunboat Diplomacy” “means diplomacy supported by the threatened use of force by one country in order to impose its will on another. The term is used specifically with reference to the 19th century when, in furtherance of their own interests, the great maritime nations, notably Britain, employed their naval power to coerce the rulers of small or weak countries.”
<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095912387>.

³³ Stephan Hobe. “The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law,” *International Investment Law*, 2015, 8, Bernard Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law," *Northwestern Journal of International Law & Business* 14, no. 2 (Winter 1993): 329.

³⁴ Vandeveld, A Brief History of International Investment Agreements, 160.

a foreign country. There must be a link of nationality between the offended individual and the state espousing the claim. This refers to the concept of “continuous nationality,” which demonstrates that the offended individuals must bear the nationality of the espousing state continuously between the date the claim arises and the date the claim is resolved. Furthermore, the state had an unfettered discretion to decide whether to pursue or compromise the claim in whichever manner it saw fit.³⁵

Customary international law was the primary source of norms for protecting of foreign investments during the colonial era, which required nations to protect foreign investments in line with international minimum standards.³⁶ The investment regime in the colonial era can be characterized by the following features. Firstly, states during this era were not concluding separate agreements for property or investment protection. Instead, both, investment and property agreements appeared in the same trade agreement. Furthermore, the emphasis on commercial relations was at the top of the ladder of importance, and the investment protection clauses were given secondary importance next to commercial ties. The other most important feature is, that the protections provided were not as strong as the other treaties due to mainly the non-existence of enforcement mechanisms.³⁷

2.1.2. Post-Colonial Era

After the end of the second world war, the world economic regime shifted from a colonial investment regime to a post-colonial era.³⁸ The investment environment has also shown a significant change regarding the protection of investment with the establishment of newly independent countries and the tension between the newly independent states and their former colonizers.

Foreign investors, too, faced problems due to the new orders which came with decolonization and the deficiency of the international legal order to provide sufficient answers for existing issues, especially regarding the protection of foreign investment.

³⁵ David J. Bederman. “State-to-State Espousal of Human Rights Claims,” *Virginia Journal of International Law Online*, Vol 1:3, (2011), 4-5, see also Maximilian Koessler, "Government Espousal of Private Claims Before International Tribunals." *The University of Chicago Law Review* 13 (2): (1946), 180. Doi:10.2307/1597633.

³⁶ Vandeveld, A Brief History of International Investment Agreements, 159.

³⁷ Ibid, 161.

³⁸ Ibid, 161.

The international legal order was insufficient to accommodate modern investment practices and key investment concerns. Furthermore, while there were formulated investment rules in the previous era, the nature of those existing principles was imprecise and open to several interpretations. Another gap that had to be filled was the need to take into consideration newly decolonized states as well as industrialized states' respective interests. Moreover, existing international law provided no mechanism for foreign investors to litigate their claims against host nations that failed to fulfill their contractual obligations or caused harm to their investments.³⁹

During the post-colonial period, developing countries' move to nationalize and renegotiate agreements established during the colonial era caused certain issues regarding prior commitments made to foreign investors. Moreover, following decolonization, many developing countries became suspicious of foreign investments by considering them a new weapon to maintain neocolonialism. This made them move towards expropriation and close their door to foreign investments.⁴⁰

Capital-exporting nations sought to develop a treaty system that is as clear and detailed as possible, enforceable, comprehensive, and incontestable to avoid the risk of expropriation and nationalization of their nationals' investments.⁴¹ These efforts resulted in the coming existence of different bilateral investment and multilateral trade and investment treaties, including the Havana charter in 1948⁴², which focuses on international trade and intends to encourage economic development, especially in developing countries, and to foster 'the international flow of capital for productive investment.'⁴³

The post-war FCNs incorporated a few new features such as extending the protection to corporate entities in addition to the protection of individuals, the protection against exchange controls, and the inclusion of a dispute resolution clause which entitled the

³⁹ Salacuse, 155. See also, Borzu Sabahi, In A. Laird and Giovanna E Gismondi, "International Investment Law and Arbitration: History, Modern Practice, and Future Prospects, International Investment Law and Arbitration, 1.1, 2017, 13-14.

⁴⁰ Vandeveld, A Brief History of International Investment Agreements, 166.

⁴¹ Salacuse, *The Law of Investment Treaties*, 96, Vandeveld, A Brief History of International Investment Agreements, 168.

⁴² United Nations Conference on Trade and Employment. Havana charter for an International Trade Organization, 24 March; 1948, including a guide to the study of the charter, 1948.

⁴³ Salacuse. "*The Law of Investment Treaties*." 105, Vandeveld, A Brief History of International Investment Agreements, 162.

International Court of Justice (ICJ) over any disagreements over the agreement's interpretation or applicability.⁴⁴

During the post-colonial period, the FCNs also began to give priority to investment protection and make foreign investment protection its goal. However, those FCN agreements were seen as a trade agreement, and replaced by agreements like General Agreement on Tariffs and Trade (GATT).⁴⁵ Nevertheless, the protection principles, like most favored nations' principles, were taken to BITs from FCNs, and the treaties concluded after the second world war offered national treatment regarding entry and establishment of a corporation of the state parties.⁴⁶ The last of such treaties was made by the US in 1966, and there was no FCN concluded after that.⁴⁷ All in all, it is plausible to say that FCNs played a crucial role in shaping the substantive and procedural features of BITs, especially regarding protection clauses.

Since the GATT covered commercial aspects, the new BITs, as their name implies, are solely concerned with investment protection. BITs used to be negotiated primarily between a developed and a developing country for the apparent reason of protecting the developed states' investment in the territory of the developing countries and the developing countries' desire to attract foreign investment. As a result, the agreements are non-reciprocal, and developing countries bear responsibility for protecting their investments.⁴⁸ This is the main difference between the early BITs and FCNs. Because the nature of BITs, especially, until the late 1980s, was non-reciprocal, and they were between capital-exporting(developed) and capital importing(developing) states. On the other hand, FCNs were concluded amongst developed countries, and they have reciprocal nature.⁴⁹ The most significant advancement of BITs in this era is that they provide dispute resolution procedures that allow investors to seek arbitration against the host state before even exhausting local remedies. The host nations have also agreed to these terms. By providing a legal mechanism to enforce claims, instead of espousal

⁴⁴ Vandeveld, A Brief History of International Investment Agreements, 164-166.

⁴⁵ General Agreement on Tariffs and Trade, Oct. 20, 1947, 61 Stat. A-11, 55 U.N.T.S. 188.

⁴⁶ Sonarjah, 180-181.

⁴⁷ Vandeveld, A Brief History of International Investment Agreements, 164-166.

⁴⁸ Ibid, 170-171.

⁴⁹ Joost Pauwelyn. "Rational design or accidental evolution? The emergence of International Investment Law". *The Foundations of International Investment Law: Bringing Theory into Practice*, eds Zachary, Douglas, Joost Pauwelyn & Jorge E. Viñuales, Oxford University Press, 2014. 26.

or other diplomatic means, states transform the investment issues from the arena of politics to the area of law.⁵⁰

In the global era, the goal of BITs has shifted from mere investment protection, particularly against arbitrary expropriation, to liberalization of investment flows. Furthermore, since some developing nations have become capital-exporting countries, developing states have also begun to make BITs amongst themselves.⁵¹ The breakdown of the Soviet camp and the adoption of international investment treaties by developing countries becomes an endeavor to establish an international investment regime. Investment treaties, in general, and BITs in particular, have become a tool for fostering confidence and economic cooperation among states.⁵²

To summarize, BITs have gone through several phases and eras, bringing numerous breakthroughs. They are successfully defining the international investment regime and acting as a weapon to defend investments, and a powerful bond in fostering economic integration between governments. In the following subsections, we shall examine the relevance and criticisms in greater depth.

2.2. Reasons for Signing BITs

Investment treaties and protection are inseparably connected concerns that cannot exist without the other. Although some of the attributes of international investments like BITs need to be demonstrated by empirical evidence, we can at least superficially put the significance and expected outcomes of BITs in light of their objectives.

The primary motives of most BITs, as their name, “Treaty Concerning the Promotion and Protection of Investment.,” or some little difference shows, is investment protection and investment promotion.⁵³ Dealing with the motives of investment treaties is equivalent to researching their importance and vice versa.

⁵⁰ Ibid, 174-175.

⁵¹ Ibid, 183.

⁵² Ibid, 193-194.

⁵³ Jeswald W. Salacuse. *The Three Laws of International Investment*. 1st ed. Oxford University Press. 2013, 355.

States are expected to enter into treaty obligations after conducting a cost-benefit analysis and revising their policies, and BITs are no different. As previously noted, earlier BITs were negotiated between developing and developed countries. The intention of the states had an essential part in defining the aspects of these treaties, and their intention could be extracted from them. Therefore, the states' motives usually differ while negotiating BITs. For instance, the motive of capital-exporting nations is the protection of the existing and future investments by their nationals, while the motive of the developing states is encouraging foreign investment. The difference in the intention and these particular intentions have their effect during the conclusion of BITs.⁵⁴

Firstly, the signature of BITs would demonstrate the host nations' commitment to implementing investment protection standards and the non-discriminatory treatment of international investors. Developing countries especially want to show foreign investors how they are ready to protect investments. As they are competing between themselves, they want to assure foreign investors that they have the same standards as the other countries.

In addition, under international customary law, countries have exclusive sovereign power regarding a foreign investor who wishes to undertake investment activities in the host state. The state's power includes regulating the admission of investments, and movement of capital into its territory, to govern all aspects of property acquisition and transfer within its national borders.⁵⁵ For this reason, investors and capital-exporting countries want a regime that incorporates more protective substantive elements and could subject states to an independent and neutral organ to resolve their disputes.

Considering BITs acknowledge investor-state dispute resolution procedures, governments' commitment might be signaled by including a clause in their BITs that obliges them to engage in an international investment arbitration based outside of their country. Accordingly, the case would be adjudicated in a state that does not host the investment.⁵⁶ Hence, developing states sign BITs to show their policy commitments,

⁵⁴ Salacuse. "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries," 661.

⁵⁵ *Ibid*, 660.

⁵⁶ Matthew R. Hummer, "Do bilateral investment treaties accomplish their policy objectives? A case for developing & OECD member countries", Georgetown University, 2009, 2, A. Rohan Perera, "The

and BITs are an excellent tool to achieve their goal if there is a commitment and willingness from the host states to accept and implement legal obligations provided under the treaties.⁵⁷

Another aim commonly mentioned while discussing the reason for signing BITs is the flow of foreign investment. As shown in the preambles of most BITs, increasing FDI is the justification for signing BITs, and policymakers in developing countries endorse this idea. Although most countries, particularly developing countries, sign in to BITs to attract foreign investment, academics have yet to establish a positive relationship between foreign investment and BITs empirically.⁵⁸ Sornarajah, for instance, argues that the decisive element in attracting foreign investment flows is the political and economic climate of a particular state than formatting legal structure to protect foreign investment.⁵⁹ However, developing nations argue that establishing BITs will enhance investor confidence by removing any perception of risks connected with the state. This would help in attracting international investment flows. According to research made by Tatiana Vashchilko, it is recommended for countries with a higher risk of expropriation to conclude BITs, and she puts her conclusions as follows:

This study assesses empirically whether or not BITs design variations have an effect on FDI inflows using an original dataset on the design variations in expropriation provisions of BITs and a new measure of the level of legal protection from expropriation. Availability of data on bilateral FDIs' and BITs designs determines the time span, 1984-2007, and a sample of countries. The empirical results demonstrate that the diversity of BITs has a statistically significant positive impact on bilateral FDI inflows for high-risk countries, no impact for the middle-risk countries, and a surprisingly negative effect for low-risk countries. On average, the stronger legal protection from expropriation in a BIT leading to higher levels of FDIs in countries with high levels of expropriation risk does not change FDI inflows to the countries with

Role and Implications of Bilateral Investment Treaties," Commonwealth Law Bulletin 26, no. 1 (2000): 607 Sornarajah, 172-173.

⁵⁷ Vandeveld. "Bilateral investment treaties, History, Policy, And Interpretation," 2. See also Alex, Mills, "The Public-Private Dualities of International Investment Law and Arbitration," in *Evolution in Investment Treaty Law and Arbitration*, ed Chester Brown and Kate Miles, Cambridge, Cambridge University Press, 2011, 104-105.

⁵⁸ Erick Neumayer & Laura Spess. "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?": The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows, Oxford University Press, 2009. 225. See also UNCTAD, World Investment Report, 2003, 89: "An aggregate statistical analysis does not reveal a significant independent impact of bilateral investment treaties in determining FDI flows. At best, bilateral investment treaties play a minor role in influencing global FDI flows and explaining differences in their size among countries", Michael, Frenkel & Benedikt, Walter, "Do bilateral investment treaties attract foreign direct investment? The role of international dispute settlement provisions," *The World Economy*, 42, 2019, 1335.

⁵⁹ Sornarajah. *The international law on foreign investment*, 187.

expropriation risks in the middle ranges and has a negative impact on FDI for the low-risk countries.⁶⁰

Another study that was done in India stated that India accomplished the desired goal of more significant FDI inflows after signing BITs. They have contributed to boosting FDI inflows by giving international investors planning to invest in India protection and commitment. An atmosphere of confidence is established, facilitating FDI flows, by establishing explicit investment criteria, and broadening the area of investment activities covered by a bilateral agreement.⁶¹

Other motivations for states to conclude BITs could be the need to encourage market liberalization within their negotiating partners when attempting to implement treaty provisions. Developing countries seek to sign BITs with capital-exporting countries to enhance their relationship with those countries and obtain the advantages and favors, such as increased trade or international assistance, that such a treaty would provide. Furthermore, by signing BITs, several nations want to rectify loopholes and shortcomings in their legislation.⁶²

To sum up, the reasons for concluding BITs differ owing to a range of conditions. The reasons for governments establishing treaties vary depending on their economic strength and bargaining power. However, we can state that encouraging foreign investment flows and the need to protect investments overseas are at the heart of all BITs.

There is a criticism of signing BITs between capital-exporting and capital importing nations, particularly Least Developed Countries (it may hereinafter be referred to as LDCs). By signing BITs to promote FDI inflows, LDCs may become engaged in a treaty that may compromise their sovereignty. Furthermore, the non-reciprocal character of BITs is another complaint directed at these treasuries. In essence, although they impose requirements on host countries to safeguard alien investors' investments,

⁶⁰ Tatiana Vashchilko. "Three Essays on Foreign Direct Investment and Bilateral Investment Treaties," Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy, The Pennsylvania State University, 2011, 126.

⁶¹ Niti, Bhasin & Rinku, Manocha. "Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India". VIKALPA The Journal for Decision Makers 41(4), 2016, 285, see also Peter, Egger & Valeria Merlo, "BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms," The Scandinavian Journal of Economics, December 2012, Vol. 114, No. 4, 1263.

⁶² Salacuse, The Three Laws of International Investment, 357-359.

there is no obligation on home countries to encourage their investors to invest in the contracting party's territory. Additionally, host countries may enter into BITs with the expectation of receiving some promises or avoiding sanctions from home countries. Sometimes they may even conclude these agreements to avoid possible economic sanctions, aid suspension, or even the creation of the treaty is made a condition for obtaining a loan.⁶³ In this case, we can understand how the inequality between the two contracting parties would affect the sovereignty of the LDCs. However, the inequality in bargaining has no relevance to invalidating the treaty.⁶⁴

In addition, if the goal of BITs could not come true, the only party which can be benefited from the treaty would be multi-national companies (hereinafter will be referred to as MNCs). For instance, in the *Philip Morris v. Uruguay case*,⁶⁵ Based on the BIT signed between Switzerland and Uruguay, the corporation filed a lawsuit against Uruguay, seeking arbitration court reimbursement for damages caused by Uruguay's anti-smoking legislation on its cigarette trademarks and investments in the country. Even though the arbitration tribunal ruled in favor of Uruguay, it is easy to foresee how the country's sovereignty would be challenged if the judgment had been reversed.⁶⁶

2.3. Scope of BITs

Investment regimes must specify their scope *ratione materiae*.⁶⁷ As it defines the investor and the investment that will be protected by the treaty, the implementation of BITs relies on the scope of application of the treaty as it may be specified under a particular treaty, putting the scope of application of BITs a critical component of any BIT. The scope determines the protected investments and investors. We can extract the scope of application from the definitions given under BITs to the term

⁶³ Sornarajah, 187.

⁶⁴ Ibid, 188, see also Nitish, Monebhurrun, "Essay on Unequal Treaties and Modernity Through the Example of Bilateral Investment Treaties," Brazilian Journal of International Law, VOLUME 11 • N. 1 • 2014, 211-212.

⁶⁵ *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay*, ARB/10/7, 8 July; 2016.

⁶⁶ See, Prabhash, Ranjan, "Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay", Asian Journal of International Law, 9, 2019, 99.

⁶⁷ Dolzer & Schreuer, 60.

“investment,” “company,” “investor,” “nationals,” or “territory” of the contracting parties.⁶⁸

The substantive terms of a BIT typically apply to assets that fulfill the investment criteria and are located in the territory of one of the BIT parties. BITs Mostly define "investment," but they hardly define "territory." BITs do not define geographical boundaries. Instead, where one exists, the conventional definition is that the term "territory" refers to all of the state's land territory and the sea regions over which it has jurisdiction.⁶⁹ The investor's nationality also plays a crucial impact in assessing whether the investor would benefit from a bilateral or regional treaty. Hence, if the investor seeks to depend on a BIT, it must demonstrate that it is a national of the home state.⁷⁰

Almost all investment treaties define the term investment, and typically, investments are defined as widely as possible. They also avoided the earliest belief that dispels intangible properties of aliens from the international investment law protection horizon. The reason for not considering intangible properties of aliens as incapable of protection by international law is presumably because the creation of intangible property is dependent on the laws of the host state. However, intangible properties were eventually recognized as an essential component of investment protection.⁷¹

Except for a few, all BITs define the term “investment” in a relatively similar way. However, this does not imply a universally binding definition for all uses. Most treaties have established an open-ended definition. The fact that the definition is open-ended means, the list is simply illustrative and that assets of a type that do not exist at the time the BIT is signed may still come under the definition when they are formed.⁷² This, in effect, will help to accommodate potential future developments and implementation of the treaty.⁷³

⁶⁸ Salacuse. “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,” 664.

⁶⁹ Vandeveld. “Bilateral investment treaties, History, Policy, And Interpretation.”

⁷⁰ Dolzer & Schreuer, 46.

⁷¹ Sornarajah, 190-191.

⁷² Vandeveld. “Bilateral investment treaties, History, Policy, And Interpretation.” 139.

⁷³ Rudolf, Dolzer & Margrete, Stevens, “Bilateral Investment Treaties”, Kluwer Law International, 25-26, Sornarajah, 190.

The word "investment" has generally been defined in BITs and regional agreements modeled on such treaties to include various assets. This asset-based approach differs from enterprise-based and transaction-based approaches, which define investment to be the ownership and management of a business or the transfer of funds. The asset-based definitions of investment provide that investment means "every kind of asset" and contains an illustrative list of assets that comprise typically (1) movable and immovable property and other property rights such as mortgages, liens, and pledges; (2) shares, stock and debentures and any other kind of participation in companies; (3) claims to money and titles to performance having a financial value; (4) intellectual property rights; and (5) concessions conferred by law or under contract".⁷⁴

The asset-based definition does not need an investor to have a controlling interest in a company. That is why it encompasses both portfolio and direct investments. Furthermore, the inclusion of different types of property and property rights demonstrates that the term "investment," as defined in this asset-based approach, has more enormous scope than the term "capital," which is commonly believed to relate to productive capacity.⁷⁵

Some BITs limit the scope of application by putting some additional requirements such as "investments approved by the state parties." This may create a category of two investments from the same state party as a protected and non-protected investment. In other words, the former will be subject to the protections provided under the BIT, while the latter is protected by whatever investment protection standards exist in international law. Unapproved investments are subject to general investor protection regulations, if they exist, whereas approved investments are subject to the treaty regime, and this shows the *lex specialis* nature of BITs.⁷⁶

2.4. Standards of Protection

2.4.1. Fair and Equitable Treatment

⁷⁴ UNCTD, "Key Terms and Concepts in IIAs: A Glossary," *UNCTAD Series on Issues in International Investment Agreements*, New York: United Nations, (2004): 93.

⁷⁵ *Ibid*, 93.

⁷⁶ Sornarajah, 195.

“Fair and equitable treatment” is a standard provision in international investment treaties.⁷⁷ This standard, most of the time, comes together with other protection standards as part of the protection offered by the host state to a particular foreign investment. The nature of standards of protection incorporated in BITs may provide an absolute or relative treatment. Absolute treatment provisions define the treatment regardless of the treatment made to the other investor or investment. On the other hand, relative treatment provision, as the name refers to, defines the treatment that must be provided by reference to the treatments provided to the same investors.⁷⁸ Fair and equitable treatment standard, has the former feature. This means that the standard of fair and equitable treatment may be violated even if the foreign investor enjoys the same favorable treatment as a local investor.⁷⁹ FET provisions could be grouped under the absolute treatment provisions category. For instance, when we look at the national treatment or most favored nations’ treatment standards, they require the treatment based on the treatment granted to other investments. However, compared to the other standards, fair and equitable treatment is an "absolute" and "non-dependent" standard of treatment.⁸⁰ Its flexibility to encompass and adopt new treatment concepts is also another essential factor. Especially it becomes the primary treatment standard to be discussed in the investment arbitrations on the claims brought by foreign investors against states.⁸¹

As with many terms in the legal environment, there is no single definition for the phrase "fair and equitable" treatment, and the meaning it provides may alter depending on the treaties in which it appears.⁸² Until recently, there had been minimal attempts

⁷⁷ Roland Kläger. *'Fair And Equitable Treatment' In International Investment Law*. Vol. 83, Cambridge University Press. 2011, 9, Deyan Draguiev, “Bad Faith Conduct of States in Violation of the ‘Fair and Equitable Treatment Standard in International Investment Law and Arbitration,” *Journal of International Dispute Settlement*, 5, no.2, 2014, 273.

⁷⁸ Guiguo Wang, *International Investment Law: A Chinese Perspective*, Routledge, 2015, 263, Vandeveld, *Bilateral Investment Treaties; History, Policy and Interpretation*, 5.

⁷⁹ Klager, 285.

⁸⁰ Eric De Brabandere, "States' reassertion of control over international investment law-(Re) Defining Fair and Equitable Treatment and Indirect Expropriation." *States' Reassertion of Control over International Investment Agreements and International Investment Treaty Dispute Settlement (Cambridge: Cambridge University Press, 2016)*, *Grotius Centre Working Paper (2016)*, 2. OECD, Working Papers on International Investment Number 2004/3, Fair and Equitable Treatment Standard in International Investment Law, 2004, 2.

⁸¹ Yannan- Small, 386.

⁸² Fulvio M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principle*, T.M.C. ASSER PRESS, The Hague, 2018, 1, Mujeeb R. Emami. "Fair And Equitable Treatment Standard in International Investment Law: The Customary Status." *Journal Of Law, Policy and Globalization* 105 (2021): 111.

to define the normative substance of the standard itself. Some scholars argue that the phrase's vagueness allows arbitrators to specify the range of principles required to fulfill the treaty's goal in specific disputes.⁸³ However, this argument is challenged by some states as it may give more discretion to arbitrators, and the decision will be influenced by the arbitrator's conception of fairness and equity.⁸⁴

Arbitration tribunals interpret the standard in light of other related concepts such as legitimate expectations, fair procedure, proportionality, transparency, and non-discrimination.⁸⁵ In the case of legitimate expectations, for instance, the tribunal stressed that fair and equitable treatment requires the protection of investors' legitimate expectations, which covers the adherence to promises and covenants made to the investor and on which the investor has depended.⁸⁶ States may argue against this argument depending on the point that the investor shall assume the risks that may come with government decrees or regulations. In the *ADC & ADNC Management Limited Vs. Hungary* case,⁸⁷ the tribunal pointed out that the investor may only be required to act according to the domestic laws and regulations, which does not, however, imply the investors' obligations to accept whatever the host state decides to do to it. Hence violating FET in the shield of acting the government's power to regulate was rejected by the tribunal.

The other most important thing to be determined here is the relevant time for forming the investor's expectation. In this regard, the tribunal seems to refer to take the position that, the expectation that must be taken is, the expectation that exists when the investor

⁸³ Michael Waibel. "Fair and Equitable Treatment as Boilerplate." *University of Cambridge Faculty of Law Research Paper* 16, 2019, 2.

⁸⁴ Yannanca- Small, 2-3.

⁸⁵ See the opinion of Judge Steven Schwebel on the case "*MTD Equity Sdn. Bhd. and MTD Chile S.A. Vs. The Republic of Chile*" (hereinafter will be referred to as "*MTD Vs. Chile*"), para 23.

⁸⁶ See, for instance, in the case between *Tethyan Copper Company Pty Limited v. the Islamic Republic of Pakistan*, the tribunal strength the legal expectation of the investor as one decisive factor by saying "a dominant principle of the FET standard is the protection of the investor's legitimate, investment-backed expectations" (para. 811). *Tethyan Copper Company Pty Limited v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, <https://www.italaw.com/sites/default/files/case-documents/italaw10737.pdf>. *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)00/2, award dated May 29, 2003, para. 154. *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Date of Award 16 September; 2003.

⁸⁷ *ADC & ADNC Management Limited Vs Hungary*, ICSID Case No. ARB/03/16.

decides to invest.⁸⁸ The tribunal may use "all circumstances, including not only the facts surrounding the investment but also the political, socio-economic, cultural and historical conditions prevailing in the host State."⁸⁹ As the tribunal mentioned in the *Bayindir v. Pakistan* case, if the investor could expect potential political instability and policy shifts in the future while deciding to invest, it is difficult to accept the investors' expectations of stability and predictability to justify protection under the FET standard.⁹⁰ Moreover, the expectation requirement shall be presented by the investor precisely and evaluated by the tribunal carefully.⁹¹

On the other hand, the proportionality element assumes that: every state measure influencing investment is based on a reasonable and verifiable basis; the measure limits investment to no more than required, and the interests of the state and the foreign investor should be balanced.⁹² Hence, as it could be noted from the tribunal's evaluation method, the fairness and equity of the particular state's measures can be evaluated by considering various factors.

There are two views regarding the purpose of fair and equitable treatment standards in BITs. According to the first view, this standard encompasses several international legal concepts, such as non-discrimination, the duty to protect foreign property, and the international minimum standard.⁹³ This view is demonstrated by the commentary to the OECD convention. According to this commentary, "the phrase "fair and equitable treatment" indicates the minimum international standard which forms part of customary international law."⁹⁴ The international minimum standard is a customary international law norm that governs the treatment of foreigners by establishing a minimum set of standards that states must follow when dealing with foreign

⁸⁸ *BG Group Plc v. The Republic of Argentina*, UNCITRAL Final Award 24 December; 2007, para 298,

⁸⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş Vs. The Islamic Republic of Pakistan* (hereinafter will be referred to as *Bayindir Vs. Pakistan*), ICSID Case No. ARB/03/29, Occidental Exploration and Production Company v. The Republic of Ecuador, *Duke Energy v. Ecuador*.

⁹⁰ *Bayindir Vs. Pakistan, BG Group Plc v The Republic of Argentina*, para 310.

⁹¹ *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, para 421.

⁹² Kläger, 117, see, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award of 3 September; 2001), *Eureko BV v. Poland*, UNCITRAL (Partial Award of 19 August; 2005).

⁹³ UNCTD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, 53.

⁹⁴ OECD, *Draft Convention on The Protection of Foreign Property*, 1967, 9.

individuals and their property, independent of their domestic legislation and customs.⁹⁵

According to another point of view, the fair and equitable treatment standard's strength and use stem from its relative lack of abstract substance, which appears to be targeted at guaranteeing the prudent and just implementation of legal norms. Furthermore, beyond serving as a treatment standard, it is a fundamental auxiliary element for interpreting the agreement's other clauses and filling the gaps inside the treaty. Its gap-filling purpose and strategic location in investment treaties are analogous to the "good faith" clause, which frequently appears alongside specific articles in civil laws to ease the interpretation of these provisions primarily.⁹⁶

Moreover, FET can be raised independently regardless of a problem with national treatment or MFN. In other words, the FET may be breached if the investor receives equivalent treatment to investors of the host country's nationality, or he cannot benefit from the MFN because he fails to demonstrate that investors of other nationalities have better treatment.⁹⁷

FET may come with the violation of other standards like expropriation or transfer of funds. In the *Wena Hotels Limited v. Egypt case*,⁹⁸ the tribunal considered the inaction of Egypt when the Egyptian Hotels Company (EHC) illegally seized the hotels of the claimant. At the same time, the relevant ministry was aware of the incident through the communications and notifications made by the claimant and the absence of any positive move from the Egypt side to restore the hotel to the claimant's control as a breach of FET obligation. Furthermore, the tribunal assumed Egypt's failure to sanction EHC as an approval of the state.⁹⁹

The FET standard may address several government actions that influence investment but are inappropriate for addressing more specific laws. Generalization, on the other hand, should be approached with caution. As with other standard clauses of the

⁹⁵ OECD, *Fair, and Equitable Treatment*, 8. Draguiev, 281.

⁹⁶ UNCTD, *Bilateral Investment Treaties in the Mid-1990s*, 53-54, Dolzer & Schreuer, 122

⁹⁷ Dolzer & Schreuer, 123.

⁹⁸ *Wena Hotels Limited v. The Arab Republic of Egypt*, Case No. ARB/98/4.

⁹⁹ *Ibid*, para 83-85.

investment treaties, there is no one fixed form. As a result, the interpretation of this standard shall be decided per Article 31 of the Vienna Convention on the law of treaties,¹⁰⁰ taking into account its context and history as relevant.¹⁰¹ The drafting committee of "The Southern African Development Community (SADC) Model Bilateral Investment Treaty with Commentary" advised nations not to use the word "FET" in treaties indicating its contentious character in arbitrations since it opens up a wide range of interpretations. As an alternative, the committee advises that the treatment be incorporated as a "fair administrative treatment."¹⁰²

It would be essential to show how BITs incorporate fair and equitable treatment standards by taking some countries' experiences. The clause has no effective form to follow in BITs, and it may come in a different structure. The three known drafting models are; the standard alone, together with the full protection and security standard, or together with the national treatment and most favored nations' treatment standards.¹⁰³ It would be essential to demonstrate the three models by showing some states' treaty experiences. For this purpose, we chose to see the BITS of Turkiye, Germany, the United Kingdom, and Switzerland.

2.4.1.1. Turkiye

The Turkish model BIT incorporates the FET under its preamble and as part of the details of the treaty provision. Accordingly, the preamble stipulates that: "Agreeing that **fair and equitable treatment of investment** is desirable in order to maintain a stable framework for investment....." (Emphasis added)

And article 2(2) of the model provides that: "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party."

¹⁰⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May; 1969, United Nations, Treaty Series, vol. 1155, 331, available at: <https://www.refworld.org/docid/3ae6b3a10>. HTML [accessed 29 November 2021], MTD Vs Chile, para 112.

¹⁰¹ Dolzer & Schreuer, 121.

¹⁰² SADC, Model Bilateral Investment Treaty with Commentary, Southern African Development Community, 2012. 22.

¹⁰³ Palombino, 13.

Although the model adopts this style, Turkey's BITs show slight variation from what is stipulated under the model BIT. For instance; The BIT between The Government of The Republic of Turkey and The Government of Burkina Faso **Article 3:**

Investments made by investors of each Contracting Party shall at all times be accorded treatment in accordance with **the minimum standards of treatment** established by international law, including **fair and equitable treatment** and full protection and security in the territory of the other Contracting Party.....” (emphasis added).¹⁰⁴

Here we can see the express equation of international minimum standards with the fair and equitable treatment to be accorded to the investor. However, this provision seems ambiguous regarding the status of the FET standard, whether it is part of the international minimum standard by itself or establishes new substantive rights beyond the standards that are required by the standard.

Some treaties with similar forms provide further clarification to avoid potential ambiguities. As we can, for instance, see in Art. 5 of the Uruguay / US BIT:

- (1) Each Party shall accord to covered investment treatment in accordance with customary international law¹⁰⁵, including fair and equitable treatment and full protection and security,
- (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens... The concepts of ‘fair and equitable treatment and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. ...” and defines the standard as “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings under the principle of due process embodied in the principal legal systems of the world.¹⁰⁶

The preceding exception is analogous to the NAFTA Free Trade Commission's (FTC) binding interpretation of Article 1105. (1). According to the interpretation, “The concepts of “fair and equitable treatment” and “full protection and security” do not

¹⁰⁴ Agreement Between the Government of The Republic of Turkey and The Government of Burkina Faso Concerning the Reciprocal Promotion and Protection of Investments, 2019 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty--les/6087/download>.

¹⁰⁵ The BIT defined international customary law in its “annex A” as “With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

¹⁰⁶ Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, November 2005.

require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”¹⁰⁷

2.4.1.2. Germany

The Germany Model BIT,¹⁰⁸ unlike Turkey, which does not provide any reference to international minimum standards. It instead stipulates the state’s obligation to provide fair and equitable treatment together with full security and protection for investors, and it warns the state parties from taking discriminatory measures: “Each Contracting State shall in its territory in every case accord investment by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty.”¹⁰⁹

We may witness the inclusion of FET alone in several treaties, such as the Germany-Bahrain BIT. BIT between the Federal Republic of Germany and the Kingdom of Bahrain¹¹⁰ Article 2(1) stipulates that: “Each Contracting State shall in its territory promote as far as possible investments by nationals or companies of the other Contracting State and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.”

2.4.1.3. Switzerland

The Swiss BIT has comparable experience with Germany in terms of FET, as well as commonalities in the rest of the protection measures. According to Article 2(1) of the Swiss model BIT:

Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or

¹⁰⁷ See, Article 9.5 of Israel-Republic of Korea FTA, Agreement Between the Government of The Hong Kong Special Administrative Region of The People’s Republic of China and The Government of The United Mexican States for The Promotion and Reciprocal Protection of Investments, 2020, Article 8(2).

¹⁰⁸ German Model Treaty -2008.

¹⁰⁹ Ibid, Article 2(2).

¹¹⁰ Treaty between the Federal Republic of Germany and the Kingdom of Bahrain concerning the Encouragement and Reciprocal Protection of Investments, 2007 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/251/download>.

discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.¹¹¹

2.4.1.4. United Kingdom

The UK model BIT also adopts quite a similar provision.¹¹² It incorporated both the foreign investors' right to enjoy fair and equitable treatment and the host state's obligation to refrain from unreasonable and discriminatory measures. Although the model BIT does not mention the international minimum standard, the BITs concluded by the UK show otherwise. For instance, we can see in the Colombia-UK¹¹³ and Mexico-UK¹¹⁴ BITs, both make a reference to international law in the FET clause provisions. Furthermore, both BITs provide that a violation of other articles of the agreement or another treaty does not amount to a breach of the FET standard.

2.4.2. National Treatment Standard

The national treatment standard is defined in two ways, and the concept's essence fluctuates from time to time. Formerly, national treatment standard was seen as the host nation's commitment to treating foreign investments equally with domestic investments.

In the early eras, this standard was designed to prevent the implementation of international minimum standards on the idea that because the investor is coming to invest in the host country's territory, he must abide by the host country's laws and would be treated similarly to domestic investments. Currently, as shown in the majority of BIT wordings, "National treatment can be defined as a principle whereby

¹¹¹ Switzerland Model BIT, 1995.

¹¹² The Government of The United Kingdom of Great Britain and Northern Ireland Model BIT-2008.

¹¹³ Bilateral Agreement for The Promotion and Protection of Investments Between the Government of The United Kingdom of Great Britain and Northern Ireland and The Republic of Colombia, Date of signature 17 March; 2010, Date of Entry into Force 10 October; 2014, Article 2.

¹¹⁴ Agreement Between the Government of The United Kingdom of Great Britain and Northern Ireland and The Government of The United Mexican States for The Promotion and Reciprocal Protection of Investments, Date of signature 12 May, 2006, Date of entry into force 25 July, 2007, Article 3.

a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances.”¹¹⁵

The term "national treatment" (NT) refers to the host state's obligation to provide no less favorable treatment than that the host state offers to its investors.¹¹⁶ One of the primary characteristics of the national treatment standard is its relativity. In essence, considering that its criteria invite a comparison of the treatment granted to international and domestic investors, determining its content relies on the treatment accorded to domestic investors by a host country.¹¹⁷ NT protects the foreign entity from both de facto and de jure discrimination, and there is no need to show the intention of the state from the side of the investor to prevail on an NT claim.¹¹⁸

The degree of treatment that host countries should offer aliens has been a source of debate between capital-exporting and host countries. Latin American and capital-importing countries called for a national standard of treatment for foreign investments. Capital-exporting countries rejected the viewpoint mentioned above, arguing that treatment should be based on the international minimum standard. They argued that, if the national treatment standard is recognized, foreign investor protection will become negligible, since legislation affecting the property that is passed uniformly to apply to everybody in the state, regardless of nationality, will leave the foreigner without any recourse under international law.¹¹⁹

Here it would be essential to discuss the Calvo doctrine named after its initiator, Carlos Calvo. This doctrine advocates that those foreign investments be treated the same way domestic investors are treated under national law.¹²⁰ The essence of this doctrine is based on the non-intervention and absolute equality of aliens with nationals. It is backed by the equality of sovereign states. It, however, goes beyond and rejects

¹¹⁵ National Treatment, UNCTAD Series on Issues in International Investment Agreements, 2001, 1.

¹¹⁶ UNCTAD, International Investment Agreements: Key Issues, Volume I, 2004, 161, Dolzer & Schreuer, 178.

¹¹⁷ Andrea K. Bjorklund, "The National Treatment Obligation," *Arbitration Under International Investment Agreements; A Guide to Key Issues*, ed Catherine Yannanc-Small, Oxford University Press, 2010, 411, see also UNCTAD, National Treatment, 7, UNCTAD, International Investment Agreements: Key Issues, Volume I, 162, Wang, 334.

¹¹⁸ Bjorklund, 411-412.

¹¹⁹ Witness Nabalende, "Protecting Foreign Investments Using the Calvo Doctrine," *Financing for Development Vol 1(2)*, 2020, p 169, Sornarajah, 201-202.

¹²⁰ UNCTAD, International Investment Agreements: Key Issues, Volume I, 163.

the superiority or imperial prerogatives of powerful states and their citizens. The doctrine does not deny foreigners to enjoy the special privileges offered to the nationals; it, instead rejects the special benefits enjoyed by foreign states and their citizens.¹²¹

National treatment may be used by the foreign investor to avoid the performance requirement that could generally be imposed by states upon foreign investments. The national treatment standard may offer a foundation for a claim that performance requirements should not be placed upon the foreign investor. The requirements may include export quotas or local purchasing restrictions that are not imposed upon local investors. In such instances, the foreign investor is immune from the performance requirement unless the responsibilities are exempted expressly from the national treatment criterion. Perhaps most treaties provide an express clause to except performance requirements from the scope of national treatment standards.¹²²

When we talk about applying the NT standard, we have some issues to consider to determine whether the foreign investment is getting no less favorable than the local investors are enjoying. Firstly, since the treaties incorporate the phrase “like circumstance,”¹²³ the question we need to answer is, which investment is relevant to evaluate the treatment in light of the same circumstance? Is it the investor in the same business or the investor in the same investment sector? is still argumentative and not yet defined by most BITs.

We have two approaches to dealing with situations of like or similar circumstances: narrow and broad interpretation. According to the former point of view, an investment in a similar situation indicates that the appropriate comparative is an investor or investment identical to the beneficiary in every way but nationality. This view may have the effect of avoiding a large number of potential comparators and may also

¹²¹ Wenhua, Shan, “Is Calvo Dead?”, *The American Journal of Comparative Law*, Winter, 2007, Vol. 55, No. 1 (Winter, 2007), 124, Wenhua Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 *Nw. J. Int'l L. & Bus.* 2006-2007, 632, El-Din Izzeddin, Ahmed Kamal, *Calvo Doctrine and The Hull Formula*, Book VENTURE Publishing L, 2007, 9-12.

¹²² *Ibid*, 202.

¹²³ Klager, 283, See, for example, Article 5(1) of “the Agreement Between the Government of The Republic of Mauritius and The Government of The Arab Republic of Egypt on The Reciprocal Promotion and Protection of Investments.”

weaken the provision.¹²⁴ The arbitration tribunal used both methods depending on the context of the case.¹²⁵

For instance, in the *Champion Trading Company Ameritrade International, Inc. v. The Arab Republic of Egypt* case,¹²⁶ the claimant argues that the state discriminated against foreign investment by compensating native cotton firms. The tribunal was principally concerned with whether the firms were in "similar circumstances." The court made references to the facts on which the payment was based. As stated in the case, the payment was paid for those firms that made purchases through the government collecting center rather than directly from marketplaces. So, because claimants were making their purchase directly from the market, the tribunal determined that they were not in the same situation as other companies in terms of compensation payment.

Yet the arbitrations position, in general, seems to favor the broad interpretation of the like circumstances phrase to fully assess the measure in light of the national treatment standard.¹²⁷ Sornarajah further reinforced this point by using certain huge multinational organizations as examples. Due to their size and structure as a vertically integrated global company, it may be challenging to locate similar businesses to examine the treatment in light of it.¹²⁸

In rare circumstances, it might be hard to find a single comparator to show the less favorable treatment or the existence of discriminatory treatment. This is especially dangerous in cases of de facto national treatment allegations since it is difficult to demonstrate a discriminatory effect when there is no comparator to get any treatment.

¹²⁴ Vandeveld, *Bilateral investment treaties, History, Policy, And Interpretation*, 341.

¹²⁵ In the *Feldman v. Mexico, Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/, case the arbitration evaluated the issue by comparing the treatment provided for the same investments, which is the cigarette business. On the other hand, in the "*Occidental Exploration and Production Company v The Republic of Ecuador*" case, The Tribunal agreed with Occidental's argument that its treatment should be compared to that of actors in other (i.e., non-oil) economic sectors, and expressly rejected a WTO/GATT-style analysis of the national treatment obligation, which would restrict its comparison to "directly competitive or substitutable products." *Pope & Talbot v. Canada*, Award of 10 April 2001, para. 78. *Champion Trading Company & Ameritrade International, Inc. V. Arab Republic of Egypt*, ICSID Case No. ARB/02/9. *Eastern Sugar B.v. The Czech Republic*, UNCITRAL ad hoc arbitration in Paris SCC No. 088/2004. *EDFI et al. v. Argentina*, ICSID Case No. ARB/03/23.

¹²⁶ *Champion Trading Company & Ameritrade International, Inc. V. Arab Republic of Egypt*, para 154-156.

¹²⁷ Dolzer & Schreuer, 180.

¹²⁸ Sornarajah, 203.

Perhaps, if the case is founded on *de jure* measures and no domestic investor benefits from the opportunity, the sheer existence of investment incentives available solely to domestic investors would prove an NT violation.¹²⁹

As we have seen above, the NT is offered mainly to protect foreign investors from facing discrimination in the state party's territory. However, as with the rest treatment standards, this favor is also subject to several limitations, and the claim depending on this standard shall be evaluated in light of these exceptions. Although the treaties do not explicitly provide it, the differentiation could be justifiable if the existence of rational ground could be proved.¹³⁰ These exceptions help states to exclude some kinds of industries or enterprises from the NT coverage.¹³¹

The exceptions are generally based on public health, order, morals, and national security considerations, subject-specific or country-specific exceptions wherein a contracting party retains the right, for reasons of national economic and social policy, to distinguish between domestic and foreign investors under its rules and regulations, particularly those pertaining to certain sectors or activities.¹³²

The Central European Free Trade Agreement (CEFTA) nations have the following restrictions in their BITs. Some imposed restrictions on foreign ownership in industries and sectors related to arms manufacturing, trading, and production. Nearly all imposed restrictions on foreign ownership of agricultural land and on the purchase of a real estate in sensitive areas such as border zones, national parks, and historical sites.¹³³

Below we will state some nations' BIT experiences with the NT standard and how they handle exceptions.

2.4.2.1. Germany

¹²⁹ Bjorklund, National Treatment, 6.

¹³⁰ Dolzer & Schreuer, 181 Sornarajah,

¹³¹ UNCTAD, National Treatment, 1280.

¹³² Ibid, 12, Sornarajah, 203, Andrea, 440, Pope & Talbot, Inc. v. The Government of Canada, para 80.

¹³³ CEFTA. "National Treatment Restrictions and Review of Bilateral Investment Treaties," Issue paper. 2, 2010, 9-10.

Germany's model BIT adopts the national treatment standard and the most favored nations' treatment standards under the same provision. It also puts some illustrative lists of examples of less favorable treatments.

According to article 3 of the model BIT, “Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favorable than it accords to investments of its investors.”¹³⁴ The lists of treatments listed as ‘less favorable’ in the said model BIT includes different treatments in the case of procurement limits on raw or auxiliary materials, energy, and fuels, and all sorts of production and operation methods and varying treatments in the case of product sales obstructions at home and abroad.¹³⁵

Regarding the exceptions on the NT treatment, the German model seems to generally mention them as “Measures that have to be taken for reasons of public security and order shall not be deemed treatment less favorable within the meaning of this Article.”¹³⁶ The model BIT does not, however, provide the “like circumstance” or “like situation references.” The reference may be left to be incorporated in a particular BIT to be negotiated by Germany following the interests of the other state party.

2.4.2.2. United Kingdom

The NT provision in the UK BIT is similar to the NT provision in the Germany model BIT.¹³⁷ The distinction in the UK, which is also unique, is in the structure in which they offer the exception. The UK BIT offers specifics of anomalies in an independent provision. The exclusions are not confined to the NT treatment; they are also available for the remaining treatment standards.

As discussed in the Germany BIT, measures taken by the state to sustain peace and order or for public security reasons are not considered a breach of the treaty obligation of the NT standard. Furthermore, any current or prospective customs, economic or monetary union, common market or free trade zone, or similar international

¹³⁴ Germany Model BIT, Article 3.

¹³⁵ Ibid, Article 3(2).

¹³⁶ Ibid, Article 3 last para.

¹³⁷ UK Model BIT, Article 3(1).

agreement; agreements concerning taxes, or privileges resulting from the UK's membership in a specific union are excluded from the scope of the NT standard.¹³⁸

2.4.2.3. Swiss

The Swiss experience with NT is similar to the above two discussed countries. The Swiss Model BIT incorporated both the NT and MFN clauses under the same provision, which is titled “protection, treatment.” Article 4(2) of the model BIT stated that;

Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment no less favorable than that which it accords to investments or returns of its investors or to investments or returns of investors of any third State, whichever is more favorable to the investor concerned.¹³⁹

Unlike the BITs used in Germany and the United Kingdom, the Swiss model omitted to provide for exceptional circumstances that would justify less favorable treatment, such as public security and public interest grounds.

2.4.3. Most Favored Nations Treatment Standard

The most-favored-nation (MFN) standard is a crucial component of international investment treaties and par excellence in the treatments offered for foreign investments.¹⁴⁰ Any state during negotiating BITs aim at protecting the right of its citizen’s investment abroad and make sure that they will get a treatment which is not less favorable than other third states’ investments enjoy in a particular state.¹⁴¹ MFN treatment offers that a host nation treats investments from one country no differently from those from any other third state. The MFN treatment protects investors from some types of discrimination by host nations, and it is critical for establishing equality of competitive possibilities among investors from various foreign countries.¹⁴²

¹³⁸ Ibid, Article 7(1).

¹³⁹ Swiss Model BIT, Article 4(2).

¹⁴⁰ OECD, Most-Favored-Nation Treatment in International Investment Law, 2004, 2.

¹⁴¹ Tony Cole, The Boundaries of Most Favored Nation Treatment in International Investment Law, 33 MICH. J. INT'L L. (2012), 556.

¹⁴² UNCTAD, Most-Favoured-Nation Treatment, *Series on Issues in International Investment Agreements*, UNITED NATIONS New York and Geneva, 1999. 1.

Foreign investors want guarantees that they will not face discrimination that will place them in a disadvantageous position. Such an act includes circumstances in which businesses from other nations are treated preferentially. As a result, the MFN standard benefits the equality of competitive possibilities among investors from various foreign countries. It protects investors' competitiveness from being impacted by discrimination based on nationality.¹⁴³

On the other hand, the clause obliges the states to distract from the general international law standard, which allows the state; to offer differential treatment to different nations. MFN provisions prevent states from entering into bilateral *quid pro quo* agreements, a practice acceptable under customary international law, and that extends preferential treatment to some states while excluding it from others.¹⁴⁴ Moreover, MFN plays a significant role in international investment liberalization.

The MFN treatment operation is inclusive of three state parties. In the two states (the granting and the beneficiary) agreement; (the basic treaty), having a clause to make the treatment extended to the other third state works for the beneficiary state in the main agreement. The granting states' agreement with the third state does not modify the relationship between the parties in the basic treaty, or regulate their relationship. Instead, the basic treaty; makes the content of the third-party treaty operational.¹⁴⁵

MFN is, as the case with NT, a relative standard that depends on its reach and scope upon the state's treatment of the third party. Therefore, the treatment can only be raised when there is a treatment provided for the third state party national by the host state. Thus, the standard will not have any significance if the state; does not offer any favorable treatment to the third party.¹⁴⁶

There are two understandings regarding the obligation that the MFN clause in a particular treaty could bring. The first is the "right to claim" understanding of the MFN clause. According to this understanding, the beneficiary of the MFN clause would automatically get the "right to claim" for equivalent treatment when it is noticed that

¹⁴³ UNCTAD, Most Favored Nations Treatment, 8.

¹⁴⁴ Stephan W. Schill, "Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses," *Berkeley Journal of International Law*, 27(2), 2009, 502-503.

¹⁴⁵ *Ibid*, 506-507.

¹⁴⁶ Dolzer & Schreuer, 186 UNCTAD, Most Favored Nations Treatment, 9.

some third party is receiving favorable treatment. Although there is no obligation upon the state, which provides favorable treatment to the third party and at the same time provides similar treatment for the beneficiary of the MFN clause, the treatment must be provided when requested by the beneficiary. This would help the state, with the duties to offer treatments, to know what its obligations are precisely. This understanding is hardly desirable to the beneficiary since it requires the beneficiary to regularly examine the treatment offered by the granting state to third countries to secure that they are not losing out on any benefits they should be getting under the MFN provision.¹⁴⁷

The "Instantaneous Obligation" method of understanding the MFN clause is another way of understanding the MFN clause. Unlike the "right to claim" understanding, the "Instantaneous Obligation" method of understanding evinces that the beneficiary will get the favorable treatment provided for the third party without the need to go after and monitor the treatments made by the granting state. This understanding presupposes the state's willingness to offer favorable treatments while inserting the MFN clause in a particular treaty. This view is also the one employed by the international investment arbitration than the "right to claim" understanding.¹⁴⁸ For instance, in the *MTD Equity Sdn. Bhd. & the MTD Chile S.A. v. The Republic of Chile*¹⁴⁹ case, the court applied the MFN clause to broaden the definition of "fair and equitable treatment" without necessitating a claim from the claimant's home state.

The "Instantaneous Obligation" understanding seems more plausible from the beneficiary's point of view because since the granting State included the MFN clause without reservation, it is in a better position to calculate the burdens or opportunities this clause is about to bring. Hence the burden of monitoring favorable treatments should not fall upon the beneficiary. In addition, interpreting the MFN must be positive to give a broad space to the protection regime. However, the overlapping nature of international treaties may make the task of predicting and following up on favorable treatments in every treaty and identifying the most favorable treatment is not easy for

¹⁴⁷ Cole, 569-570.

¹⁴⁸ Ibid, 570-571

¹⁴⁹ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, 2004

the host state.¹⁵⁰ Given that it is a necessary evil, I believe it is preferable to embrace the "right claim" interpretation.

Some countries tried to limit the scope of the MFN clauses and keep themselves safe from future claims on their treatment of the third party based on their membership to membership of, or association with a custom, economic or monetary union, a common market, or a free trade area.¹⁵¹

Beyond the protection the MFN treatment is offering for investors, it is simultaneously bringing some concerns to the state parties due to its relatively broad scope and the difficulty of lining the border in delimiting the protection sphere.¹⁵² Investors, for instance, are entitled to indirectly enjoy favors offered for other nationals' investments by BITs or multilateral investment treaties. This may open the space to inappropriate usage by "free riders" via treaty shopping. Treaty shopping "includes all legal operations aimed at invoking or creating a qualifying nationality and, or a qualifying investment, for example, by structuring or restructuring an investment or by otherwise conferring an entitlement or property right to an investment, to benefit from a particular international investment agreement granting an investor direct standing (*ius standi*)."¹⁵³ Some countries expressly excluded some issues from the scope of MFN treatment. For instance, the BIT between Japan and Jordan specifically avoided the dispute settlement clauses which are provided in bilateral or multilateral agreements from the scope of the treatment:¹⁵⁴ Article 4 "Note: For greater certainty, the treatment referred to in this Article does not encompass the provisions on dispute settlement contained in any bilateral or multilateral international agreement."¹⁵⁵

¹⁵⁰ Evode Kayitana, "The Scope and Applicability of Most-Favored-Nation (MFN) Clause in Investment Treaties: A Survey of the Jurisprudence of the International Centre for Settlement of Investment Disputes," *NAUJILJ* 9 (1) 2018, 103.

¹⁵¹ See, Article 3(5(b)) of the Agreement Between the Government of The Republic of Turkey and The Government of The Socialist Republic of Viet Nam Concerning the Reciprocal Promotion and Protection of Investments, 2014.

¹⁵² Sornarajah, 205.

¹⁵³ Jorun Baumgartner, *Treaty Shopping in International Investment Law*, Oxford University Press, 2016, 12.

¹⁵⁴ This issue will be discussed in detail under the procedural issues part of the paper.

¹⁵⁵ Agreement Between Japan and The Hashemite Kingdom of Jordan for The Promotion and Protection of Investment, 2018. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5808/download>.

Furthermore, MFN may affect the contractual balance between the two contracting states since the benefiting state gets double advantages from the basic treaty and the treaty made by the host state and the third party without reciprocal obligation.¹⁵⁶ In order to remedy such kinds of imbalances, some countries initially interpreted the MFN provision to entail a duty on the side of the country benefiting from its operation to modify the original agreement to attempt to re-establish the contractual balance between the original parties. This was known as the "conditional" MFN provision, which meant that MFN treatment was provided subject to tight and explicit reciprocity.¹⁵⁷

2.4.4. Full Protection and Security

In addition to the NT and MFN treatments, international investment treaties incorporate the requirement to give “full protection and security” (further text: FPSS) for foreign investment. This standard obliges the state to protect the foreign investment from violence and provide full protection. Individuals may do some injurious acts against foreigners, but they cannot be found to have violated international law under international law. It is the state's responsibility to prevent and protect foreigners from injury. The state's commitment is dual: positive and negative. These responsibilities include administrative and legislative acts, as well as abstention or repatriation where appropriate.¹⁵⁸ Failure to safeguard the investment of a foreigner who is threatened with violence, as evidenced by arbitration tribunal awards, establishes responsibility in the host state.¹⁵⁹

Regardless of the range of linguistic terms used in investment agreements, it is an absolute standard that is present in practically all international investment treaties and has been established through arbitration experience. Although the common phrase used in the majority of IIA is “full protection and security,” it is also possible to see usages like ‘full legal security and full legal protection’ or ‘the most constant

¹⁵⁶ UNCTAD, Most Favored Nations Treatment, 8.

¹⁵⁷ Ibid, 9.

¹⁵⁸ James W. Garner, “Responsibility of States for Injuries Suffered Foreigners Within Their Territories on Account Mob Violence, Riots and Insurrection,” Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969), APRIL 28-30, 1927, Vol. 21, Cambridge University Press, 50.

¹⁵⁹ Sornarajah, 359.

protection.¹⁶⁰ The first BIT also included this standard “Investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party.”¹⁶¹ According to this standard, the objects of this protection might be both investors and investments, and it imposes a dual responsibility on states. In other words, there is a need to take active measures to avoid, and correct a breach or to punish violators and there is, at the same time, an obligation to refrain from any activity that may harm foreign investment.¹⁶²

The following elements must be met to hold the host state liable for FPSS violations. The first is that there is a requirement to demonstrate the host state's failure to undertake due diligence in the protection of foreign investments. If the state's efforts were adequate in protecting the investments, there would be no way to hold it accountable. The actual infliction of harm or damage caused by the state's inability to protect comes next. Furthermore, as a complement to the 'diligence' feature, the protection responsibility is best stated as a positive obligation FPSS forces the host state to take positive actions. As a result, FPSS violations are always in the form of omissions.¹⁶³

2.5. Expropriation

International investment agreements, BITs, and customary international standards guarantee the foreign investor not to be subject to arbitrary takings of his properties by the host state. The name given to the term expropriation may differ according to the legal tradition and translation used in a particular state. Hence the word expropriation may sometimes be referred to as taking, nationalization, deprivation, and dispossession.¹⁶⁴

Nationalization denotes large-scale takings backed by policy considerations of a state to have complete control over properties by altering privately owned properties into

¹⁶⁰ Giuditta C. Moss, *Full protection and Security, Standards of Investment Protection*, ed August Reinisch, 2008, 131.

¹⁶¹ *Supra* note 9, Article 3.

¹⁶² Orsat Miljenić, "Full Protection and Security Standard in International Investment Law." *Pravni vjesnik* 35, no. 3-4 (2019): 35. <http://doi.org/10.25234/pv/8128>.

¹⁶³ Sebastián M. Blanco, *Full Protection and Security in International Investment Law*, Springer Nature Switzerland AG, 2019. 330-333.

¹⁶⁴ Dolzer and Stevens, "Bilateral Investment Treaties," ICSID 1995 at 98

public ownership. This happened in the period of decolonization by many colonies to create a state monopoly. Expropriation, on the other hand, refers to property-specific or enterprise-specific takings in which the state retains or transfers property rights to other participants in the economy.¹⁶⁵

Expropriation is every State's inherent right under customary international law, and it is also recognized under the modern BITs due to its strong relationship with the notion of territorial sovereignty.¹⁶⁶ Customary international law grants state the authority to expropriate foreign investments on the condition that the expropriation is non-discriminatory, for public purposes, and with fair, appropriate, and adequate compensation.¹⁶⁷ Thus taking must take the following considerations into account. Firstly, the taking must be made for a public purpose and should not be discriminatory. Moreover, the expropriation shall not be arbitrary and should be undertaken based on due process of law in line with the principle of natural justice. Furthermore, the foreign investor shall get appropriate and proportional compensation.¹⁶⁸

It is the responsibility of the state to demonstrate the public interest that would be served by the specific expropriation. Furthermore, the "public interest" rationale must not be deceptive, and it must highlight the genuine public interest. When it comes to the due process requirement, it emphasizes the transparency of the system as well as the opportunity to be presented to the investor while the expropriation is taking place. In the context of expropriation, "due process of law" necessitates the existence of a genuine and substantive legal system via which a foreign investor can submit claims against depriving measures that have already been taken or are about to be implemented against it. Several key legal procedures, including proper advance notice, a fair hearing, and an unbiased and impartial adjudicator to investigate the actions in dispute, are expected to be publicly available and accessible to the investor to make such legal procedures relevant. In general, the legal system must be constructed in

¹⁶⁵ UNCTAD, "Expropriation," *Series on Issues in International Investment Agreements II*, 2012, 5-6.

¹⁶⁶ Anne K. Hoffmann, *Indirect expropriation*, Standards of Investment Protection, ed August Reinisch, 2008, 151, Dolzer & Schreuer, 89, Malkom N. Shaw, *International Law*, Cambridge University Press, 7th ed, 2014, 602, Borzu, Sabahi, Ian A, Laird, Giovanna E, Gismondi, "International Investment Law and Arbitration: History, Modern Practice, and Future Prospects," *International Investment Law and Arbitration* 1.1 (2017), 27.

¹⁶⁷ Peter D. Isakoff, "Defining the Scope of Indirect Expropriation for International Investments," 3 *Global Bus. L. Rev.* 189 (2013). 191.

¹⁶⁸ L. Yves Fortier and Stephen L Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor," *Asia Pac. L. Rev* 13(1), (2005): 81.

such a manner that an impacted investment has a fair chance to establish its legitimate rights and have its claims considered within a reasonable time limit.¹⁶⁹

Expropriation can take several forms depending on the nature of taking. Direct expropriation occurs when there is a legal transfer of legal title or its physical seizure for the benefit of the state or another third party authorized by the state. In such cases, there is a manifest intent to deprive the owner of his or her property by either title transfer or outright seizure.¹⁷⁰ Unlike indirect expropriation, direct expropriation is explicit and intentional, with the state either seizing foreign-owned property directly or forcing an enforced transfer of title.¹⁷¹

Expropriation can also take a much less clear and indirect form. Indirect expropriation is defined as the complete or relatively close deprivation of an investment without a clear transfer of title or outright seizure.¹⁷² This may not occur overnight and may be the consequence of a sequence of events that result in expropriation.¹⁷³ This is shown in many BITs and international trade and investments.¹⁷⁴

Due to its hidden nature, determining the existence of indirect expropriation is not as easy as determining direct expropriation. The difficulty of lining the border, the legal state's police power, and when exactly such action transformed into an indirect expropriation is another sophisticated issue in this area.¹⁷⁵ Unlike direct expropriation or nationalization, in indirect expropriation, the investor may still have the patrimonial attributes of the investment or the nominal ownership of the investment. However, the restriction on the investment may only affect one of the three constitutive elements of the essence of property which is *usus*, *Fructus*, or *abusus*. The restriction on the utility of such investment shall amount to the quasi-expropriation of the investment.¹⁷⁶ Such

¹⁶⁹ *ADC Affiliate Limited - and - ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16. Para, 432-435.

¹⁷⁰ UNCTAD, Expropriation, 7.

¹⁷¹ Isakoff, 191-192.

¹⁷² *Ibid*, 7.

¹⁷³ Fortier and Drymer, 82.

¹⁷⁴ See Article 1110(1) NAFTA stipulates that “*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment.*”

¹⁷⁵ Santiago Mont, *State Liability in Investment Treaty Arbitration Global constitutional and administrative law in the BIT Generation*, Oxford, and Portland, Oregon 2009, 231, Isakoff, 193.

¹⁷⁶ Bjorn Kunoy, "Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration," *Journal of World Investment & Trade* 6, no. 3 (June 2005): 468, Sean Corrigan, "Drawing

limits may result from state regulatory efforts. Although the title is not taken from the investor, there can, nevertheless, be an indirect expropriation due to regulatory taking if states may reduce the importance of the investment while pursuing legislative or administrative measures.¹⁷⁷

Sometimes the effect of action or omission of the state may amount to indirect expropriation in the absence of economic loss from the investor's side, and the interference on the investor's right might be sufficient. The lack of financial loss or damage is essentially an issue of causality and quantity – rather than a required component of the cause of action of expropriation itself. As a result, the investor's experience of substantial and verifiable economic loss is not a prerequisite for determining an expropriation. In such cases, a non-compensatory remedy for expropriation may still be available.¹⁷⁸

The expropriation may not happen by the existence of a single action. Sometimes, the expropriation may result from a sequence of actions. These measures may not constitute expropriation on their own, but when combined, they would establish the effects of expropriation.¹⁷⁹ We call such expropriations ‘creeping expropriation’ because they are gradual and incremental acts that impair the ownership rights of foreign investors and reduce investment. Even though the investor retains the ownership title, the investment will lose significant value due to the state's actions.¹⁸⁰ Forced divestiture of a company's shares, interference with management rights, selection of managers, rejection of access to labor or raw materials, and excessive or unfair taxes are all examples of such kind of expropriation.¹⁸¹

In determining the existence of expropriation, both direct and indirect, evaluating the existence of three essential elements is vital. The first element is there should be an

the Line: The Impact of Arbitral Decisions on Indirect Expropriation in Canadian International Investment Agreements." *Asper Rev. Int'l Bus. & Trade L.* 18 (2018), 6.

¹⁷⁷ UNCTAD, Expropriation, 11.

¹⁷⁸ *Biwater Gauff (Tanzania) Ltd V. United Republic of Tanzania (BIWATER v. Tanzania)*, ICSID CASE NO. ARB/05/22, para 464-465.

¹⁷⁹ *Telenor Mobile Communications A.S. V. The Republic of Hungary (Telenor v. Hungary)*, ICSID Case No. Arb/04/15, para 63, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, a decision on liability, 2010.

¹⁸⁰ UNCTAD, Taking of Property, UNCTAD Series on issues in international investment agreements, 2000, 11, UNCTAD, Definition of Terms, 69.

¹⁸¹ UNCTAD, Taking of Property, 12.

appropriable investment of a Claimant. Next, we need to see the measure taken by the host state and make sure whether the measure taken shall amount to expropriation or not in light of the treaty provision on which the claim is based.¹⁸²

The BITs also do not offer an explicit definition for the phrase indirect expropriation. They prefer defining by referring to direct expropriation and using phrases like "equivalent to" or "tantamount to."¹⁸³ Some BITs, on the other hand, do not expressly refer to indirect expropriation.¹⁸⁴ Sometimes the word expropriation may not also clearly come in the BITs. They use terms like deprivation or takings.¹⁸⁵ But that does not affect the scope of the provision.¹⁸⁶

Some key features that constitute indirect expropriation can be extracted from state practice and arbitral awards: The conduct must be primarily attributable to the state, and there must be an interference with property rights or other legally protected legal interests.¹⁸⁷ Furthermore, such interferences must affect the investor's relevant interests or reduce the property's value, including deprivation of control over the investment, regardless of the owner's physical ownership.¹⁸⁸ Regardless of the government's lack of direct participation in the expropriation, it is nevertheless accountable if it is carried out through an entity over which the state has adequate authority to prevent such illegal takings.¹⁸⁹

Looking at the arbitration tribunal decisions in this respect would be essential to understand indirect expropriation. The first ground which could constitute an indirect expropriation is the denial of some fundamental right that amounts to or results in the deprivation of a specific right over a property by the host state. The tribunal accepted the claimant's request for compensation based on expropriation in the *Tethyan Copper*

¹⁸² *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, para 129.

¹⁸³ UNCTAD, Expropriation, 8.

¹⁸⁴ See, the Lebanon-Malaysia (BIT) (2003), which provides, "Neither Contracting Party shall take any measures of expropriation or nationalization against the investments of an investor of the other Contracting Party except under the following conditions...".

¹⁸⁵ See, Article 4 of "The Agreement between the Government of the Hungarian People's Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment ("BIT"), which entered into force on May 24, 1989.

¹⁸⁶ *ADC Affiliate Limited - and - ADC & ADMC Management Limited v. Hungary*, para 426.

¹⁸⁷ Isakof, 197.

¹⁸⁸ UNCTAD, Expropriation, 12.

¹⁸⁹ *Wena Hotels Limited v. Arab Republic of Egypt Case No. ARB/98/4*, 2000, para 99.

Company Pty Limited v. Islamic Republic of Pakistan case by saying, “the Tribunal finds that the denial of TCCP’s Mining Lease Application was a measure having an effect equivalent to expropriation.”¹⁹⁰

The tribunal, on the other hand, refused the claimant's allegation of expropriation based on the respondent's refusal to renew an operation license for one of their investments. The tribunal’s analysis stipulates that the investor had no right to renew the license, and it failed to apply for renewal.¹⁹¹ If the state's restrictions amount to expropriation, the state's intention to expropriate is irrelevant. The tribunal's decision in the *Starrett Housing* case supported this view as follows:

...it is recognized under international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.¹⁹²

2.6. Transfer of Funds

The issue of the transfer of funds concerns both the investor and the host state. The ultimate goal of one investor is to make investments and make profits. To undertake these investment activities or expand their business, investors import funds from their countries. In return, they want to repatriate capital or profits to their home state or other third parties. On the other hand, it is a concern of the host state to administer and watch over the flow of currency from and to the state. Mismanagement of the currency and short-term capital inflows may trigger volatility in the domestic financial markets.¹⁹³ Hence, a transfer provision's principal aim is to establish a host country's commitment to allow the payment, conversion, and repatriation of money related to investment while keeping the balance by providing the scope and limitations.¹⁹⁴

¹⁹⁰ Supra note 76, paragraph 156.

¹⁹¹ *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, and *Sanum Investments Limited v. Lao People’s Democratic Republic*, UNCITRAL, PCA Case No. 2013-13.

¹⁹² *Starrett Housing Corporation et al. v. The Government of the Islamic Republic of Iran* (“*Starrett Housing v. Iran*”). Interlocutory Award No. ITL 32-24-1 of 19 December; 1983. 4 Iran-United States Claims Tribunal Reports 122.

¹⁹³ Dolzer & Schreuer, 191.

¹⁹⁴ UNCTAD, *Transfer of Funds*, UNCTAD Series on issues in international investment agreements, 2000, 5

When we come to the BITs transfer provisions, they try to balance two competing interests from the investor and the host state's point of view. The objective of this BITs provision is, on the one hand, to provide the investor the freedom to transfer funds for investment purposes, and on the other side, to give the state considerable autonomy to adequately run its monetary and financial policies. To attain these objectives, BITs, incorporate the right of the investor to make capital transfers without unnecessary delay at a specified exchange rate.¹⁹⁵

The transfer of funds clause may cover inward investments, outward investments, or both. Inward investment refers to the investment that is made by foreign investors in the host state. The money required to make the initial investment by the foreign investor, as well as the returns of any such investments, including profits and the revenues of any sale or transfer, are normally covered by transfers. On the other hand, if the deal involves an outward investment that is undertaken by the national or resident of the home state in another foreign country, the clause will concern the finances required to make a such an outward investment.¹⁹⁶

The other point of difference is whether the transfer covers both inward and outward payments.¹⁹⁷ Some treaties provide a term to solely cover the outward transfer, while most treaties cover both directions. If there is no explicit phrase provided in the treaty, the general term that authorizes transfer could be considered as it covers both inward and outward payments.¹⁹⁸ We can demonstrate the last two scenarios by looking at different BITs. The Belgium–Luxembourg and Hong Kong (China) BIT could be an example of the transfer, which covers only funds out of the country. As it is provided in Article 6(1) of the following provision: “Each Contracting Party shall, in respect of investments, guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns abroad.”

On the other hand, we can see in the Japan-Jordan BIT Article 14 that it encompasses both inbound and outbound transfers from the following text of the treaty: “Each Contracting Party shall ensure that all transfers relating to investments in its Area of

¹⁹⁵ UNCTAD, *Bilateral Investment Treaties from 1995-2005*, 56

¹⁹⁶ *Ibid*, 5

¹⁹⁷ *Ibid*, 57

¹⁹⁸ Dolzer & Schreuer, 192-193

an investor of the other Contracting Party may be freely made into and out of its Area without delay...”

The type of currency that is subject to the agreement is another challenging issue in this area. Some countries' BITs enable transfers to be made in any convertible currency. Still, others limit transfers to the currency in which the investment was first made, or any convertible currency agreed upon by the parties.¹⁹⁹

2.7. Procedural Issues in the BITs

2.7.1. The Umbrella Clause

Whenever the issue of the scope of application boundary of the BIT obligation arises, determining the subject matter jurisdiction becomes vital. The umbrella clause, which is sometimes called as '*pacta sunt servanda*' clause, the sanctity of contract clause, or observation of obligation clause, is a treaty provision prevalent in many BITs that demands each Contracting State uphold all investment obligations it has accepted concerning investors from the other Contracting State. It aims to create an inter-state commitment to follow investment treaties, which investors can enforce if the BIT incorporates a direct right to arbitration. Moreover, an umbrella clause enables the resolution of breaches of investment contracts under the international forum.²⁰⁰

Umbrella clauses are not a recent addition to BITs. They have been a part of BITs since the first BIT was signed between Pakistan and Germany. In addition to BITs, numerous international draft agreements attempted to include similar sections.²⁰¹ However, little attention was given to the clause, and the specific issues we are

¹⁹⁹ UNCTAD, Transfer of Funds, 59

²⁰⁰ Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treat Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes," George Mason Law Review 14, no. 1 (Fall 2006): 142-143, August Reinisch, Umbrella Clauses, Seminar on International Investment Protection, winter semester 2006-2007, 5, Katia Yannaca-Small, "Interpretation of the Umbrella Clauses in Investment Agreements," OECD Working Papers on International Investment, 2006/03, 3, Dolzer & Schreuer, 153, Jonathan B. Potts, "Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization," Virginia Journal of International Law 51, no. 4 (Summer 2011): 1011

²⁰¹ See, Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (the Abs draft) (article 4), "Draft Convention on the protection of foreign property and Resolution of the Council of the OECD on the Draft Convention," OECD Publication No 23081, November 1967, Article 2, Sabahi, Laird, and Gismondi, 30.

experiencing in this era were silent until 2003. The efforts in this respect were likewise confined to presenting the clause's purpose of elevating violations of investment contracts to international law.²⁰² The dispute over the scope and interpretation of the umbrella clause provision arose for the first time in 2003, with the arbitral decision in the case *SGS v Pakistan* based on the Pakistan-Switzerland BIT.²⁰³

The language employed while incorporating umbrella clauses matters, and also has a significant role in determining the scope of the clause. Perhaps it is the common feature of umbrella clauses to use mandatory languages. BITs share standard features regarding the obligations to whom they relate. Except for a few BITs, most of them pertain to commitments undertaken by the State and do not refer to obligations between private investors.²⁰⁴

The fundamental issue of debate is whether umbrella clauses should be interpreted narrowly or broadly. Three points of argument are available regarding the scope of application of umbrella clauses: The first argument considers umbrella clauses as merely aspirational with no substantive right to be entertained by the individual investor. On the other hand, the second point empowers all umbrella clauses to elevate breaches of contractual obligations into international law. The third perspective is relatively balanced. It classified the states act as a sovereign power and the states act with a commercial nature. The umbrella clause would work when the state has exercised its sovereign power.²⁰⁵

Arbitration tribunals interpret the clause differently since the decision given by one tribunal has no binding nature on the other. The narrow interpretation of the tribunal is backed by two concerns. The first, as seen in the *SGS v Pakistan*,²⁰⁶ *Joy Mining Machinery Limited v. The Arab Republic of Egypt*,²⁰⁷ and *El Paso Energy*

²⁰² Dolzer & Schreuer, 155.

²⁰³ *SGS Société Générale de Surveillance SA v Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/13, (2003).

²⁰⁴ *Katia*, 9.

²⁰⁵ Samantha J Rowe and Svetlana Portman, Current trends in 'umbrella clause' claims arising from breaches of contractual obligations, International Bar Association, 2021.

<https://www.ibanet.org/current-trends-umbrella-clause-claims> last accessed, January 6; 2022.

²⁰⁶ *GS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (SGS v. Pakistan)*, ICSID Case No. ARB/01/13.

²⁰⁷ *Joy Mining Machinery Limited v. The Arabic Republic of Egypt, Award on Jurisdiction, ICSID Case No. ARB/03/11, August 6; 2004.*

International Company v. The Argentine Republic case,²⁰⁸ is that elevating the breach arising from the contractual obligation between the state and the investor is too remote and has far-reaching consequences. Furthermore, this may allow investors to ride freely without adhering to necessary rules. The other yet related to the first concern is that the obligation may create imbalances since it gives broad rights to the investor than the sovereign state. The tribunal provided that the state shall only be held responsible when governments or public entities significantly interfere with the investor's rights, and protection is likely to be available.²⁰⁹

The broad interpretation of the umbrella clause advocates an inclusive nature of the umbrella clause. Accordingly, a review of the language of this clause in a representative sample of treaties reveals that, while some differences exist, the ordinary meaning of "shall observe" and "any commitments/obligations" seems to mark an inclusionary, broad interpretation that would encompass all obligations assumed/entered into by the States Parties, which would include contracts, unless otherwise asserted. Reinisch contends that since the goal of incorporating umbrella provisions from the beginning is to internationalize state contracts, along with the BIT's purpose of promotion and protection of investment, narrowly interpreting the clause may render the clause's purpose worthless. Hence, broadly interpreting the clause may enable the purpose of umbrella clauses to materialize.²¹⁰

In the *SGS v. Philippine*²¹¹ case, the tribunal changed its mind and decided in favor of broad interpretation, unlike its previous decision made in the case of *SGS v. Pakistan*. The tribunal asserts that there is a variety in the languages used under the BITs concluded between Switzerland and Pakistan, and Switzerland and Philippines. The former used the phrase "the commitments . . . entered into concerning the investments," while the latter referred to "any obligation ... assumed concerning specific investments." The tribunal stated that the phrase any obligation should be

²⁰⁸ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, A Decision on Jurisdiction, 27 April; 2006.

²⁰⁹ Katia, 17-18.

²¹⁰ UNCTAD, International Investment Agreements: Key Issues Volume II, United Nations, 2004, 8, Reinisch, 38.

²¹¹ *SGS Société Générale de Surveillance, S.A. v. the Republic of the Philippines*, ICSID case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004. Available at <https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf>. Last accessed on 7 January; 2022.

interpreted broadly to incorporate any commitment assumed by the state, including contractual obligations. Furthermore, referring to the preamble of Switzerland-Philippine BITs preamble, provided that “It is legitimate to resolve uncertainties in its interpretation to favor the protection of covered investments.”²¹² The tribunal preferred extensive interpretations in other decisions too.²¹³

As we have seen in the above discussions, it would be plausible to say that the issue of interpreting the umbrella clause and internationalization of a contractual obligation shall be examined on a case-by-case basis. In doing so, the representation of significant protection under the treaty of umbrella clause, the state’s action with a particular breach of contract (whether the state is exercising its sovereign power or not), and whether the violation of a particular contract is capable of “internationalizing” the contract or not must be taken into consideration.²¹⁴

2.7.2. Investor-State Dispute Settlement²¹⁵

Under traditional international law, it was the state's right to espouse the claim of its citizens and seek either diplomatic or international judicial remedies.²¹⁶ The state could turn to diplomatic protection after the private party has exhaustively used all the existing dispute settlement alternatives in the host state.

Diplomatic protection has contributed to the stability of international relations. Moreover, it enabled relatively weaker parties, legal or physical persons, to be assisted by their home states. At the very least, the power of states to defend their citizens can serve as a warning signal to governments that are likely to disregard treaty or customary law responsibilities.²¹⁷ However, diplomatic protections or espousal has the

²¹² Ibid, par 116.

²¹³ See, *Noble Ventures, Inc. v. Rom.*, ICSID Case No. ARB/01/11, Award, 2 (October 12, 2005), *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Rep. of Para.*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, 58 (29 May; 2009).

²¹⁴ Potts, 1045.

²¹⁵ It may hereinafter be written as ISDS to refer to “investor-state dispute settlement” or ISD to refer to “investor-state dispute.”

²¹⁶ Dolzer & Schreuer, 211.

²¹⁷ David Gaukrodger and Kathryn Gordon, “Investor-State Dispute Settlement: A Scoping Paper for The Investment Policy Community,” OECD Working Papers on International Investment, 2013, 7.

effect of politicizing the issue, and it may eventually lead to the creation of frictions between the states, or sometimes the state may refrain from representing its citizen for the sake of keeping their diplomatic relation unaffected. Because of the flaws of the old paradigm, numerous notable international law scholars have advocated for a change that would empower individuals to seek adjudication by international courts in their capacity.²¹⁸

It is one of the hallmarks of BITs that allows individual investors to pursue their claims to an international arbitral tribunal before exhausting local remedies. In recent years, the number of cases brought to arbitration tribunals has grown, as has the number of awards, which has a substantial impact on the procedural and substantive aspects of investment rulemaking, including BITs.²¹⁹

One may ask about the importance of international arbitration to settle investor-state disputes while there are plenty of local remedies available in the host state. Moreover, the applicable laws concern could also be resolved by referring to conflicts of laws. This could be the best option for the host state to entertain the case that happened in its jurisdiction by its courts. However, this is not an attractive deal for foreign investors due to the fear of not finding an impartial judiciary that is independent of executive interventions. Furthermore, local courts may not be capable of solving sophisticated technical issues in international investment law. In addition, the host state does not consent to the settlement of investment disputes in the home state or other third-party states. This can also be seen in light of the rules of state immunity. Since states are exercising their sovereign power, not in their commercial capacity, such issues are hardly admissible in foreign state courts.²²⁰

The investor-state dispute settlement advantage is for both the investor and the host state. It allows the investor to have an arbitration with the host state, which is less

²¹⁸ Won-Mog Choi, "Investor-State Dispute Settlement Paradigm," *Journal of International Economic Law* (JIEL) 10(3), 2007, 726-728.

²¹⁹ UNCTAD, *Investor-State Dispute Settlement, and Impact on Investment Rulemaking*, New York And Geneva, United Nations, 2007, ix.

²²⁰ Eric De Brabandere. *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, Cambridge University Press, Vol 12, 2014, 19-20, Christoph Schreuer, *Investment Arbitration*, The Oxford Handbook of International Adjudication, Eds Cesare P. R. Romano, Karen J. Alter, and Yuval Shany, 2013, 296, Dolzer & Schreuer, 214-215.

costly and easy concerning procedural rules. On the other hand, by agreeing to investor-state arbitration, the host state can safeguard itself from alternative forums for foreign or international lawsuits. Further, it will increase the number of investment flows to the host country.²²¹ According to the findings in the Frenkel and Walter article, ISDS plays a significant role in attracting foreign investment inflows. Especially when the investment dispute resolution clauses are stricter enough to enable the investor to have a standing in an international tribunal and protect its rights, the effectiveness of BITs in attracting FDI becomes higher.²²²

Although IIAs are allowing investors to have access to international investment arbitrations, some scholars are forwarding their criticisms on the existence of international investment arbitrations while there are domestic dispute resolution alternatives in the host state. The first criticism is that the insufficiency of domestic courts, as urged by proponents of international arbitration, is presumed not to be proved; if this is the case, there is no need to maintain a global system. Moreover, allowing investors to resort to international arbitration without exhausting local remedies may amount to eroding the sovereignty of the host state.²²³ The other critique is that since the right to bring cases to international arbitration is limited to foreign investors covered under an investment treaty, it would be unfair and negatively affect domestic and international investors who are not covered by IIA. This would potentially make domestic investors disadvantaged competitors.²²⁴

Trakman provided some regulatory recommendations in response to minimizing the above-discussed criticisms.²²⁵ According to him, it is recommended that treaties clearly provide for the preservation of signatory governments' core public interests, such as in natural resources, agriculture, and financial markets. This would allow the state to obtain treaty exemptions or exclusions to fit its national interests without renouncing investor-state arbitration utterly. Furthermore, before commencing

²²¹ Choi, 735

²²² Frenkel And Walter, 1335.

²²³ Gabrielle Kaufmann-Kohler and Michele Potestà. "Investor-State Dispute Settlement and National Courts," *European Yearbook of International Economic Law*, Springer Nature, 2020, 8.

²²⁴ Leon E. Trakman. "Forum: Choosing Domestic Courts Over Investor-State Arbitration," *UNSW Law Journal*, Volume 35(3), 2012. 1006-1009.

²²⁵ The recommendations are forwarded to Australia, yet I believe that the points are essential for every state to consider.

investor-state arbitration, investment chapters in treaties should provide for negotiation and mediation between conflicting parties. This would help to keep the investor-state cooperation safe and protect both parties from costly international arbitration processes in terms of time and money. Moreover, treaties should control the standing of investors to file a claim against host nations in order to dissuade adventitious investors from making premature, manipulative, and destructive claims against vulnerable host states.²²⁶

As it is provided in BITs and international agreements regarding investments, they give a special role to an arbitration tribunal in order to settle transborder investor-state disputes. ISDS procedures are one of the areas where significant developments in IIAs have taken place over the last decades.²²⁷ The arbitration tribunal may be an ad hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or institutional arbitration tribunals.²²⁸

BITs incorporate provisions that deal with details of procedures regarding the ISDS. Most of them prioritize settling disputes through consultation and negotiation in good faith within a prescribed period. For instance, the Turkey model BIT requires the applicant to notify the respondent state in a written form and seeks both parties to settle their dispute by negotiation within six months. If they cannot agree, the case can be brought to the ICSID or ad hoc arbitration tribunals.²²⁹

An investor who wishes to pursue his case to the arbitration tribunal should prove the existence of a BIT between his country of nationality and the state in which he is investing, and the treaty must be in effect while the investment is operational. Then, based on the references established in the treaty, it must be demonstrated that the investment and the investor fall within the scope of that particular treaty.²³⁰ This

²²⁶ Trakman, 1009.

²²⁷ Roberto Echandi, "Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rule-making," *Arbitration Under International Agreements A Guide to the Key Issues*, ed Katia Yannaca-Small, Oxford University Press, 2010, 22.

²²⁸ Ucheora Onwuamaegbu, Institutional Dispute settlement mechanisms choosing between institutionally supported and Ad hoc and between institutions, *Arbitration Under International Agreements A Guide to the Key Issues*, ed Katia Yannaca-Small, Oxford University Press, 2010, 64, Douglas, the international law of investment claims, 4

²²⁹ Turkey Model BIT 2000.

²³⁰ Barton Legum, "An Overview of Procedure in An Investment Treaty Arbitration," *Arbitration Under International Investment Agreements, A Guide to the Key Issues*, ed Katia Yannaca-Small, Oxford

requirement is provided under article 25 of the ICSID convention “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre....”²³¹ Even though the convention includes the term "out of an investment," we cannot locate a definition of investment in the ICSID convention. As a result, the definition supplied under the BIT upon which the claim is founded will have to be used.²³²

The level of "directness" needed under Article 25 of the ICSID convention is still up for debate. The tribunal believes that the meaning of directness should not be limited and that it should be based on the relationship between the dispute and the investment rather than the relationship between the measure and the investment.²³³

2.7.2.1. Exhaustion of Local Remedies

The other issue concerning arbitration tribunals is when there is a requirement to exhaust local remedies before resorting to international arbitration. Article 26 of the ICSID convention stipulates that states may require the exhaustion of local remedies as a condition of consent to investor-state arbitration.²³⁴ Some treaties excluded the need to exhaust local remedies, while others made it mandatory to attempt local remedies within a prescribed period.

The latter stand of the tribunal can be demonstrated by the *Impregilo S.p.A. v. Argentina* case²³⁵. According to this case, Argentina challenged the tribunal's jurisdiction based on Article 8 of the Argentina-Italy BIT. According to this article, the investor is required to submit its claim before domestic courts for 18 months before resorting to international arbitration. The tribunal stated that the term "may" in the

University Press, 2010, 92, Ali Yesilirmak, *Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim*, On İki Levha Yayıncılık, 2011, 167-168, Sornarajah, 308.

²³¹ ICSID, Article 25.

²³² ICSID, Decisions: International Centre for Settlement of Investment Disputes (ICSID), The Global Community Yearbook of International Law & Jurisprudence 2005, 5 (II), 2005, 1657.

²³³ *AES Corporation vs. The Argentine Republic*, ICSID Case No. ARB/02/17.

²³⁴ Dolzer & Schreuer, 215.

²³⁵ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17

provision demonstrates its permissive nature, allowing the claimant to attempt various amicable discussions for as long as he likes without being required to present his case to a formal resolution mechanism. This does not, however, exempt the claimant from the 18-month waiting period. The tribunal stated that:

As Impregilo failed to meet the requirement contained in the Argentina-Italy BIT to submit the dispute to the jurisdiction of the competent administrative or judicial bodies of the Argentine Republic for 18 months before filing the arbitration proceedings, this claim must be rejected.²³⁶

Although some scholars commended the existence of limitations, this does not seem to work when claimants recourse to MFN.²³⁷

2.7.2.2. The Purpose of MFN in the International Investment Arbitration

The limits of the MFN clause are still a point of argument among scholars and arbitration tribunals. It is understandable from the interpretation of the MFN clause based on good faith that the claimant can import standards of treatments such as FET, FPS, and NT by using the MFN clause provided under the main BIT if they are not part of the main BIT.²³⁸ The divergence arises when the importation of dispute settlement clauses by using MFN clauses.

Claimants attempting to avoid or excuse non-compliance with the exhaustion of local remedies have consistently argued that MFN clauses in BITs between the claimant's country and the host country allow the applicant to benefit from more generous dispute resolution provisions in a BIT entered into by the host state with another country. The importation of dispute resolution clauses by employing the MFN clause is the point of argument in the arbitration tribunals and scholars.

²³⁶ Ibid, para 53, see also, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, para 127

²³⁷ Sornarajah, 323, ICSID, Decisions: International Centre for Settlement of Investment Disputes (ICSID), 1662.

²³⁸ Turgut Aycan Ozcan, Assessment of Most Favored Nation Clauses in Terms of Ejusdem Generis Principle and Its Impact Over Some Bilateral Investment Treaties Executed by The Republic of Turkey In the 1990s, 2020, <https://www.mondaq.com/turkey/trials-appeals-compensation/981468/assessment-of-most-favored-nation-clauses-in-terms-of-ejusdem-generis-principle-and-its-impact-over-some-bilateral-investment-treaties-executed-by-the-republic-of-turkey-in-the-1990s>. Last accessed March 26, 2022.

The advocates of MFN's use to import dispute resolution provisions bring two points. Firstly, they believe that the right to arbitrate is, in actuality, a type of investment protection that is essentially the same ("ejusdem generis") as the material protection provided by the Treaty. As a result, any provision providing for MFN treatment of investment protection must include this right to arbitration. Secondly, they argue that since the arbitration right is the basic protection provision excluding it from the scope of MFN protection may amount to going against the primary intent and purpose of BITs.²³⁹

This was what happened in the **Maffezini** Case.²⁴⁰ In this famous case, the tribunal allowed the claimant to bring his case without waiting for the prescribed time in the treaty (18 months waiting period) depending on the Spain-Argentina BIT by using the MFN clause.²⁴¹ This approach was also adopted by the tribunal in the Suez case. The tribunal discussed the nature of the provision in the main treaty that it excludes matters which will not be covered by the scope of the MFN while omitting the exclusion dispute settlement procedures (DSPs), and this implies the inclusion of DSPs under the MFN.²⁴² However, some of the decisions of the tribunal show that, it is rarely interpreting the MFN's application narrowly regarding the application of the standard to the procedural rights.²⁴³ In the "*Vladimir Berschader v. Russian Federation*" case,²⁴⁴ although the BIT provides the MFN clause's scope as: "in all matters covered by the present Treaty and in particular in Article 4,5,6", the statement is not clear and ambiguous. The court assumed this from the emphasis added in the account as 'in particular in Article 4,5,6'. It concluded that the provision does not cover the dispute resolution clause stipulated under Article 10 of the treaty".²⁴⁵

²³⁹ See the arbitration tribunal analysis in the "*Vladimir Berschader and Moïse Berschader v. The Russian Federation*," SCC Case No. 080/2004, para 195-196.

²⁴⁰ *Emilio Agustín Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7)*, The Decision on Jurisdiction of 25 January 2000, <https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf>

²⁴¹ See also, *Siemens v. Argentina* ICSID Case No. ARB/02/8.

²⁴² *Suez, Sociedad General de Aguas de Barcelona S.A, and Inter Aguas Servicios Integrates del Agua SA. v. Argentina*, ICSID Case NO. ARB/03/17, Decision on Jurisdiction, 16 May 2006, paras. 55-56. See also *Ros Invest Co. UK Ltd v. Russia*, scc Case No. 079/2005, Award on Jurisdiction, October 2007, para. 130.

²⁴³ See, *Plama v. Bulgaria Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24)*, *Telenor Mobile v Hungary* (ICSID Case No ARB/04/15).

²⁴⁴ *Vladimir Berschader v. Russian Federation* (Case No. 080/2004), April 21; 2006. ("Vladimir v. Russian Federation").

²⁴⁵ *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, para 202 -208.

Similarly, In the *Telenor v. Hungary* case,²⁴⁶ the tribunal took the stand that the investment that shall enjoy the MFN protection is only the substantive rights stated under a particular BIT. To incorporate procedural rights, there should be a context or language that suggests the incorporation of MFN.²⁴⁷ This is also addressed in the *Salini vs. Jordan* case²⁴⁸ by the tribunal's rejection of the MFN application to dispute settlement provisions by mentioning the possible risk of treaty shopping and the difficulty in the application in practice. Thus, it favored restricting the MFN applicability to import substantive favorable treatments while dismissing the clause's expansion to dispute settlement provisions.²⁴⁹

As a result, while concluding BITs or drafting model BITs, nations must examine both the applicability reach of the MFN clauses and procedural clauses such as ISDS. For example, although it is not included in the Swiss model BIT, certain Swiss BITs demonstrate the exclusion of MFN's application to the BIT's dispute settlement provisions. This is what the Swiss-Egyptian BIT revealed. According to Article 4(5) of the BIT:

It is understood that the most favorable treatment referred to in this Article does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the Contracting Party concerned.²⁵⁰

It is plausible to infer that not all states have issued new model BITs or revisions to MFN clauses. Quite a few states have shown a tendency toward developing more detailed, appropriately crafted MFN clauses that allow no room for interpretational issues. The need for increased clarity, as reflected in several treaty rules, annexes, or

²⁴⁶ *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, *Australian Airlines v. The Slovak Republic*, UNICITRAL Ad Hoc Arbitration, 9 October; 2009.

²⁴⁷ Stephen Fietta, "Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?" 8 *International Arbitration Law Review* (2005), 138.

²⁴⁸ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13.

²⁴⁹ *Ibid*, para 115.

²⁵⁰ The Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments, 2010, Article 4(5). See also, The Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, 2014, 4(5).

footnotes on MFN treatment, appears to corroborate the theory that states do not want unexpected interpretations by certain tribunals, as in the Maffezini case.²⁵¹

I am also in the opinion that, since the argumentative nature of the MFN clause regarding its use as a tool to import dispute settlement clauses is understood by the states and arbitral tribunals discussions, the easiest way out would be promoting states to put their intention in their BITs expressly. If they failed to do so, employing MFN clauses for both substantive and procedural elements of the BIT would widen the investors' rights and help to achieve the promotion and protection of the investments objective of BITs.

2.7.2.3. Fork in the Road Clause (FITR)

FITR clauses restrict an investor from bringing an investment dispute to a particular court or tribunal if the same matter has already been entertained in another court or tribunal. It is similar to the Latin maxim, which says “*una via electa non datur recursus ad alteram*” meaning “when there is the concurrence of means, he who has chosen one cannot have recourse to another.”²⁵²

FITR statutes are preclusive, depriving the second court or tribunal of jurisdiction over the relevant case. Thus, when an investor picks a certain dispute resolution mechanism offered by an investment treaty, he is regarded to have "selected the fork in the road," with no future ability to take another way out.²⁵³

The FITR provisions are included in BITs in three ways. Some BITs allow the investor to present his case to the arbitration tribunal if he has not already submitted his case to the host state's domestic courts or other dispute resolution mechanisms. In this situation, if the claimant took the case to other courts before presenting it to the

²⁵¹ Pavel Sturma, "Goodbye, Maffezini: On the Recent Developments of Most-Favored-Nation Clause Interpretation in International Investment Law," *Law & Practice of International Courts and Tribunals* 15, no. 1 (2016), 93.

²⁵² A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. S.v. "Electa una via." Retrieved March 7, 2022, from <https://legal-dictionary.thefreedictionary.com/Electa+una+via>.

²⁵³ Markus A. Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash between Formalistic and Pragmatic Approaches," *Washington University Global Studies Law Review* 18, no. 2 (2019): 395. Dolzer & Schreuer, 267.

international tribunal, he is said to have chosen the fork in the road.²⁵⁴ The above-mentioned procedure is used in the adoption of FITR provisions in the majority of US BITs. For instance, Article VII (2) of the US-Argentine BIT stipulates that:

If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.²⁵⁵

The same provision requires the company or national who wanted to bring his claim to the binding arbitration tribunal not previously to submit the case to the above-mentioned alternatives.²⁵⁶

On the other hand, BITs may provide in the dispute resolution sections of their treaties the possible dispute mechanisms alternatives. They specifically provide that once the claimant has chosen one mechanism, the choice becomes final. The France-Argentine BIT demonstrates this experience as follows: "...once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final."²⁵⁷

The third way is not as straightforward as the first two forms, and the FITR clause is referred to impliedly from the provisions without an apparent finality reference. The provision offers the alternative and directs the claimant to opt for one of the listed dispute resolution mechanisms. This does not, however, get much recognition.²⁵⁸

2.7.3. State-State Dispute Settlement

BITs provide both investor-state dispute and state-state dispute settlement procedures. The latter applies to disputes regarding the interpretation or application of a treaty,

²⁵⁴ Petsche, 397.

²⁵⁵ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., Nov 14, 1991. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/162/argentina---united-states-of-america-bit-1991->

²⁵⁶ Ibid, VII (3).

²⁵⁷ See Agreement on the Reciprocal Promotion and Protection of Investments, Fr-Arg., art. 8(2), July 3, 1991.

²⁵⁸ Petsche, 398.

whereas disputes regarding the specific treaty provisions application remain the concern of investor-state dispute.²⁵⁹ Unlike investor-state disputes, in the state-state dispute, the treaties refer to the ad hoc arbitration tribunals, and provide the procedural rules to be determined by a particular tribunal.²⁶⁰ BITs seem to give a place for diplomatic solutions before the case is transformed to the arbitration tribunal. In such cases, the preclusive impact of the clause stems from the reference to the finality of the investor's option.

CHAPTER III

ANALYSIS OF ETHIOPIA'S BITs

3.1. General Overview

3.1.1. History of BITs in Ethiopia

As a state, which passed through a long history of nation-building and different form of regimes, Ethiopia's approach and practices towards foreign investment protection vary according to the policies framed by a particular regime and its ideologies. Since the purpose of this part is to highlight some significant historical moves toward investment protection, the discussion is limited to pinpointing the actions taken from the imperial to the current regime in short.

Before Haile Selassie's imperial regime (1930-1974), some international agreements show that, like most of the trade and investment agreements of the time, investment agreements got some place in international trade and diplomatic agreements. For instance, the Treaty of Wuchale²⁶¹, although, as it was revealed later, the intention from Italy's side was to prepare Ethiopia for its colonial rule, was named as "Treaty

²⁵⁹ Andreas Kulick, *State-State Investment Arbitration as A Means of Reassertion of Control – From Antagonism to Dialogue*, Cambridge University Press, 2016, 1, Douglas, 2-3.

²⁶⁰ Douglas, 5.

²⁶¹ "Treaty of friendship and trade between the kingdom of Italy and the Empire of Ethiopia" (The Treaty of Wuchale), May 2; 1889, https://gspi.unipr.it/sites/st26/files/allegatiparagrafo/17-02-2015/documenti_treaty_of_wuchale_1889.pdf

of friendship and trade between the kingdom of Italy and the Empire of Ethiopia (Treaty of Wuchale).” Its commercial and diplomatic concern was manifested in its preamble, which reads, “in order to make meaningful and lasting peace between the two Kingdoms of Italy and Ethiopia have agreed to conclude a treaty of friendship and commerce.”²⁶² Furthermore, the treaty's provisions also show the incorporation of basic investment protection standards like national treatment and most favored nation treatments.

The national treatment clause was included in article 8 of the treaty “The Italians in Ethiopia and Ethiopians in Italy or Italian possessions can buy or sell, take or lease and in any other manner dispose of their property no less than the natives.” In contrast, the MFN clause provision was not reciprocal and only obliged the empire of Ethiopia to give protections which they offered for third party states citizens as the provisions refers, “If His Majesty the King of Kings of Ethiopia intends to grant special privileges to nationals of the third state to establish businesses and industries in Ethiopia, will always be given, under equal conditions, preference to the Italians.”²⁶³ This treaty is one of the treaty experiences of Ethiopia regarding protecting foreign investment.

The Haile Selassie regime was the period when Ethiopia started to modernize the empire, and significant reforms were adopted, including legal reforms. These reforms include the adoption of the constitution, the civil code, and foreign investment policies. Accordingly, the 1960’s civil code,²⁶⁴ which survived the military regime also came into force with various contents, including contract, family, succession, property, and lease. Given that Ethiopia signed its first BIT with Germany in 1964, six years after the first BIT was signed, it is plausible to assume that Ethiopia was among the pioneer countries to embrace the modern BIT. No BIT was signed after it during the imperial era.

During the Derg regime (1974-1991), the policies adopted by the socialist government were said to be closed to foreign investment. The era was characterized as the era of

²⁶² Ibid, preamble.

²⁶³ Ibid, Article 7 and 8.

²⁶⁴ Civil Code Proclamation No. 165/1960, Negarit Gazeta Extraordinary Issue, 1960-05-05, Year 19, No. 2.

nationalization and public ownership of investments.²⁶⁵ Until the regime's collapse, the government; did not sign a single BIT and paid little attention to protecting private investments, even those of foreign nationals.

Ethiopia made a transition from a command to a market economy and made other economic reforms following the fall of the Derg regime. The economic reform initiatives implemented during the early ten years have primarily focused on the correction of pricing distortions, elimination of limitations on the private sector, establishment of markets for means of production, trade liberalization, and the reduction of imbalances.²⁶⁶

Furthermore, the government has attempted to re-establish the treaty experience that had been disrupted during the previous administration. Ethiopia began signing BITs during the early years of the Ethiopian People's Revolutionary Democratic Front (EPRDF) leadership. In the 1990s alone, Ethiopia signed six BITs, accounting for about 17% of all BITs. Regarding the number of BITs signed with other states, we would say the decade 2000-2009 was a golden age for Ethiopian BITs. During these years, Ethiopia signed BITs with around 24 nations, accounting for 69 percent of all BITs.²⁶⁷

3.2. Domestic Regulatory Frameworks for the Protection of Foreign Investment

3.2.1. The FDRE Constitution²⁶⁸

The constitution, in Chapter 43, commits to the government the task of consulting nationals on policies to be implemented or initiatives impacting them and the state's growth.²⁶⁹ It further emphasized that Ethiopia's decision to enter into any international

²⁶⁵ Ethiopian Treasures, <http://www.ethiopiantreasures.co.uk/pages/derg.htm>, last accessed March 11; 2022.

²⁶⁶ Prabhakar Reddy Tada, "Economic Reforms and Structural Changes in Ethiopia since 1992; An Inquiry" *International Conference on African Development Archives*. 18. 2001, 4.

²⁶⁷ The data is taken and analyzed based on the information provided under the UNCTAD investment hub; see, the details <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>.

²⁶⁸ Supra note 18.

²⁶⁹ FDRE constitution, Article 43(2).

agreement or relationship must be consistent with preserving and sustaining Ethiopia's right to sustainable development.²⁷⁰ As a result, investment policies, rules, and regulations must be framed following this constitutional purpose. Furthermore, IIAs, including BITs, must include concerns about sustainable development and the promotion and protection of foreign investments.

3.2.2. Investment Proclamation No 1180/2020

The proclamation came amending the previous investment proclamation, Proclamation No.769/2012. It came into existence, conceiving various objectives. Among those objectives, the aim “to further increase and diversify foreign investment inflow to accelerate inward transfer and diffusion of knowledge, skill, and technology,” “to maximize linkages between foreign and domestic investments, investments administration system has to be transparent, predictable, and efficient to increase investment attraction, retention, and expansion.”²⁷¹ also be seen as the government's dedication to attracting, promoting, and protecting foreign investment through domestic legislation.

The FDRE government intends to “create an integrated economy by strengthening inter-sectoral and foreign-domestic investment linkages.”²⁷² This is also clearly stipulated under this proclamation. Furthermore, the proclamation includes a separate chapter on the themes of investment incentives, protections, and facilitation.²⁷³ These rights include the right to own immovable properties, remittance of payments that are earned by the investor from the investment made and provision of loans are some of the rights offered to foreign investors.²⁷⁴

²⁷⁰ Ibid, Article 43(3).

²⁷¹ Ibid, preamble.

²⁷² Ibid, Article 5(7).

²⁷³ Ibid, Chapter Six.

²⁷⁴ Ibid, Article 17-21.

Moreover, it has provided investment areas that are open to foreign investors. The proclamation, in principle, allows foreigners to engage in any investment activity and make some exceptions as they will be specified by an independent regulation. The regulation is expected to stipulate areas of investment reserved for joint investment with the Government, for domestic investors, and joint investment with domestic investors.²⁷⁵ The proclamation is not the only instrument domestically adopted by the FDRE government, and there are also regulations and incentives.²⁷⁶

3.2.3. The Power to Make Investment Treaties in Ethiopia

Before moving to the power to negotiate BITs in Ethiopia, discussing the status and process of adopting (ratifying) the current constitutional order would make our journey smooth and coherent.

The status of international laws in Ethiopia continues to be a source of contention among attorneys, academics, and judges. There are three points of view on the position of international laws in the Ethiopian legal system's hierarchy, owing to the lack of a crystal-clear provision defining the order and status of international laws.²⁷⁷

The FDRE Constitution provides that, it is the power vested to the federal government to negotiate and ratify international agreements.²⁷⁸ The relevant ministry with a particular subject matter may negotiate international agreements according to Article 10(1(f)) of proclamation No 916/2015.²⁷⁹ The power to ratify the international agreements made by the executive is given to the house of people's representatives.²⁸⁰

Regarding the status of the international agreements ratified by the state, article 9(4) of the FDRE Constitution provides that "All international agreements ratified by Ethiopia are an integral part of the law of the land." Ratification means "a decision

²⁷⁵ Ibid, Article 6(2).

²⁷⁶ See, Investment Regulation No. 270/2012, Amendment Regulation No. 312/2014, Investment Directives - Directive on Duty-free Import of Motor Vehicles No. 4/2005 (E.C).

²⁷⁷ Getachew A. Woldemariam, "The Place of International Law in the Ethiopian Legal System." In: Yihdego, Z., Desta, M., Merso, F. (eds), *Ethiopian Yearbook of International Law 2016. Ethiopian Yearbook of International Law, vol 2016*, (2017), 72.

²⁷⁸ FDRE constitution, Article 51(8).

²⁷⁹ Proclamation No. 916 /2015, "Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation," No 12, 2015.

²⁸⁰ Ibid, Article 54.

made by the house of peoples representatives to make Ethiopia bound by an international agreement signed by the government.”²⁸¹ With the cumulative reading of this provision with the one mentioned earlier, we can understand that to consider a particular agreement as an integral part of the law of the land; it shall be ratified by the house of people’s representatives.²⁸²

When we came to power to negotiate BITs in Ethiopia, it was previously the power given to the ministry of foreign affairs to negotiate and sign international treaties unless it was exclusively granted for a specific organ on a particular subject matter.²⁸³ Later, The investment proclamation provides the power to negotiate and sign bilateral investment promotion and protection treaties with countries that can be sources of outward foreign investment in accordance with the procedure under the applicable law on international treaty-making and ratification,²⁸⁴ is vested in the Ethiopian investment commission, an organ established as an independent federal agency with direct accountability to the prime minister.²⁸⁵ The commission also has the power to administer wholly foreign-owned investments.²⁸⁶ Due to the necessity for expert knowledge on specific investment concerns, while concluding investment treaties, the government made a prudent move in appointing an appropriate agency to negotiate and sign bilateral investment treaties.

3.3. Preamble of Ethiopia’s BITs

Understanding the aim and purposes of a given treaty or agreement; is critical for understanding the logic behind the intricacies of the provisions contained therein and makes interpreting the treaty provisions easier. It is also adopted by the VCLT as an interpretation principle. According to article 31(1) of the said convention, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose."

²⁸¹ “International Agreements Making and Ratification Procedure Proclamation,” 2017, Federal Negarit Gazeta, Proclamation No. 1024, Year 23, No. 55, Article 2(10).

²⁸² Woldemariam, 72.

²⁸³ FDRE, “Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation,” Proclamation No.1097/2018, No 8, 2018, Article 15(3).

²⁸⁴ Proclamation No 1180/2020, Article 38(9).

²⁸⁵ Ibid, Article 35.

²⁸⁶ Ibid, Article 4.

In evaluating the treaty's purpose, preambles and Annexes naturally have to be taken into account.²⁸⁷ BITs often begin with a declaration of purpose, stating the goal of protecting and encouraging reciprocal investment, followed by a description of key terms used in the treaty.²⁸⁸ Contracting parties must verify that the preamble is compatible with the substantive provisions of the BIT. Given the rise in investor-state disputes, the wording in preambles may play a more prominent role in the interpretation of BITs in the future.²⁸⁹ Preambles may also be used by governments to demonstrate their political relationships or historical ties they have by conveying crucial statements to their citizens and the international community.²⁹⁰

By looking at the preambles of BITs signed by Ethiopia, we can understand the possible significance of the BITs and the benefit the country is going after. The majority of Ethiopia's BITs preambles provide the objective of intensifying economic cooperation for the mutual benefit of both states, creating favorable conditions for the investments of investors of contracting parties, and in effect, stimulating investment initiatives.²⁹¹ To see example, the preamble of Ethiopia-Egypt BIT states that:

Desiring to create favorable conditions for greater economic cooperation between them and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both Contracting Parties.²⁹²

The BIT between Ethiopia and Sweden also has the same meaning with quite a different form which reads as follows:

²⁸⁷ VCLT, Article 31(2).

²⁸⁸ Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties*, Dissertation Universität Hamburg, 2010, 48.

²⁸⁹ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 3.

²⁹⁰ *Ibid*, 3.

²⁹¹ See, preamble of the "Agreement for The Promotion and Protection of Investments Between The Arab Republic of Egypt And The Federal Democratic Republic of Ethiopia (Egypt-Ethiopia Bit)," 2006, The Government of The Federal Democratic Republic of Ethiopia And The Government of The Kingdom of Sweden on The Promotion and Reciprocal Protection of Investments (Ethiopia-Sweden BIT), 2004, Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (Ethiopia-Austria BIT), 2004, Between The Government of The Federal Democratic Republic of Ethiopia And The Government of The State of Israel for The Reciprocal Promotion and Protection of Investments (Ethiopia-Israel BIT), 2003.

²⁹² Ethiopia-Egypt BIT, Preamble.

Desiring to intensify economic cooperation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the promotion and reciprocal protection of such investments favor the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives.²⁹³

As discussed earlier, some BITs show the historical ties between the two countries and their socio-political relations. This is manifested in the preamble of post “normalization” BITs made by Israel with some gulf states.²⁹⁴ These BITs use the phrase “strengthen their traditional ties of friendship” in the preamble.²⁹⁵ The Ethiopia-Netherlands BIT’s preamble starts as “Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one contracting party and in the territory of the other Contracting Party...”.

Additionally, some treaties have incorporated technology transfer between the contracting states as the desired outcome from concluding the BIT.²⁹⁶ Furthermore, by including them in the preamble, a few BITs emphasized the need to provide fair and equal treatment.

Some preambles included essential points in detail, like the protection of labor rights, environment protection, utilization of economic resources, and improving living standards. The Ethiopia-Finland BIT pointed it out as:

RECOGNISING that a stable framework for investments can contribute to and increase the effective utilization of economic resources and improve living standards; NOTING that the development of economic and business ties can promote respect for internationally recognized

²⁹³ Ethiopia-Sweden BIT, Preamble.

²⁹⁴ See “AGREEMENT between The Government of the State of Israel and The Government of the United Arab Emirates on Promotion and Protection of Investments,” 2020. The preamble of this treaty provides “Reaffirming their shared belief that the establishment of peace and full normalization between them can help transform the Middle East by spurring economic growth, enhancing technological innovation, and forging closer people-to-people relations...”

²⁹⁵ Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of Yemen on The Reciprocal Promotion and Protection of Investment, 1999, Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The Republic of Sudan on The Reciprocal Promotion and Protection of Investment (Ethiopia-Sudan BIT), 2000, Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands (Ethiopia-Netherlands BIT).

²⁹⁶ See the preamble of Ethiopia-France BIT, Ethiopia-Netherlands BIT, and Ethiopia-Algeria BIT.

labor rights, and AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application.²⁹⁷

The Ethiopian Model BIT has included the above objective in the preamble and also has another important but not yet adopted in any BITs feature is the aim to combat corruption in international trade and investment, and promote corporate social responsibility.²⁹⁸ It is a wise idea to include such purposes in BITs; nevertheless, including more objectives may push the BITS beyond their limits and away from the core purpose of BITs, which is to safeguard and promote foreign investments.

The BITs objectives can be summarized as follows;

- Strengthening economic cooperation between the contracting states,
- Promoting and protecting investments of investors of the contracting parties,
- Facilitating technology transfer and foreign investment inflows,
- Making the historical ties of friendship strong.

3.4. Standards of Protection Under Ethiopia's Bilateral Investment Treaties

In chapter two of this research, we explored the common standards of protection in BITs in as much depth as needed, coupled with pertinent arbitration tribunal judgments analysis. The abovementioned principles included fair and equitable treatment, national treatment, most favored nation treatment, and full protection and security standards. Because of their structurally mixed presence in BITs, it is preferable to address the status of FET and FPS standards, as well as NT and MFT standards, under the same heading.

3.4.1. Fair and Equitable Treatment and Full Protection and Security Standards

²⁹⁷ Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments (Ethiopia-Finland BIT), 2006.

²⁹⁸ Draft Ethiopia Model BIT, 'Bilateral Investment Treaty between the Government of Ethiopia and _____'(Ethiopian Investment Commission and Ministry of Foreign Affairs), (Ethiopia Model BIT), 2018, preamble.

Fair and equitable, and full protection and security treatments appear together in numerous BITs due to their close but not identical nature. As we have seen above in chapter two of this paper, there is no single meaning for FET. When it is broadly defined, it encompasses the state's obligation to offer foreign investments fairly, and without discrimination, or as it is defined by the OECD convention, it is the indication of international minimum standards which forms the international customary law.²⁹⁹ While the latter obliges the state to protect foreign investments from violence and give full protection. Failure to safeguard the investment of a foreigner who is threatened with violence, as evidenced by arbitration tribunal awards, establishes responsibility in the host state.³⁰⁰

The absence of a relatively precise definition for FET gave rise to different opinions, and some argued in favor of its broadness to give arbitration tribunals broad discretion while assessing FET standard breaches. However, some scholars also argue about the difficulty that could come with the vagueness of the provision due to its wide range of interpretations.³⁰¹

The Ethiopian BITs incorporated the FET standard clauses in different ways. The BITs provide FET standards alone without associating with the rest treatment standards.³⁰² Some BITs incorporated the standard in both the preambles of the treaties and as an independent treaty provision. Making the FET standard part of the preamble may give two critical messages, the focus given to the standard and the fertile ground created by the parties for the arbitration tribunals to use the standard while evaluating violation of standards of treatment based on a particular treaty. We can see the incorporation of FET in the BITs signed with Sweden³⁰³, Netherlands³⁰⁴, Denmark,³⁰⁵ Tunisia, and Turkey,³⁰⁶ and the incorporation of the fair and equitable treatment standard in their preambles. For instance, the preamble in the Tunisia- Ethiopia BIT states that:

²⁹⁹ Supra note, 88 & 89.

³⁰⁰ Supra note, 145.

³⁰¹ Supra note, 96.

³⁰² See, "Agreement Between the Government of The Federal Democratic Republic of Ethiopia and The Government of The People's Democratic Republic of Algeria on The Reciprocal Promotion and Protection of Investments (Ethiopia-Algeria BIT)," 2002, Article 3(1).

³⁰³ Ethiopia-Sweden BIT, Article

³⁰⁴ Ethiopia-Netherlands BIT, Article 3(1).

³⁰⁵ Ethiopia- Tunisia BIT, Article 3.

³⁰⁶ Ethiopia-Turkey BIT, Article 2(2).

...Convinced that a reciprocal protection of investment by virtue of a bilateral agreement is likely to stimulate private economic initiative and to increase prosperity in both countries; Conscious of the necessity of according fair and equitable treatment to the investments of nationals of one of the Contracting Parties in the territory of the other Contracting Party....³⁰⁷

The other and most common structure is stating the FET standard and the FPS standard. This framework exists in the BITs made with Finland,³⁰⁸ Austria,³⁰⁹ Libya,³¹⁰ Germany,³¹¹ Israel,³¹² Iran, the Netherlands, Tunisia, Malaysia,³¹³ Switzerland, and China. For instance, Article 2(1) of the Germany-Ethiopia BIT states that: “Each Contracting Party shall in its territory in any case accord investments by investors of the other Contracting Party fair and equitable treatment as well as full protection under the Treaty.”

The third category associates the FET with either NT or MF standards or with both. We can find the BITS signed with Denmark,³¹⁴ Sudan,³¹⁵ Yemen,³¹⁶ and Kuwait³¹⁷. The Ethiopia-Denmark BIT has brought all three standards into one provision as follows:

Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favorable than that accorded to its own investors or to investors of any third state, whichever is the more favorable from the point of view of the investor.³¹⁸

Some BITs, as we discussed in the references, some BITs made to the international minimum standard treatment while addressing the FET standard.³¹⁹ Some BITs equate to the international minimum standard or make FET part of it. The Ethiopian BITs hardly incorporate this reference in the FET clauses, similar to the German Model

³⁰⁷ Ethiopia- Tunisia BIT, Article 4.

³⁰⁸ Ethiopia-Finland BIT, Article 2.

³⁰⁹ Ethiopia-Austria BIT, Article 3.

³¹⁰ Ethiopia-Libya BIT, Article 3(1).

³¹¹ Ethiopia-Germany BIT, Article 2(1).

³¹² Ethiopia-Iran BIT, Article 4(1).

³¹³ Ethiopia-Malaysia BIT, Article 2(2).

³¹⁴ Denmark-Ethiopia BIT, Article 3(1).

³¹⁵ Ethiopia-Sudan BIT, Article 3(2).

³¹⁶ Ethiopia-Yemen BIT, Article 3(2).

³¹⁷ Ethiopia-Kuwait BIT, Article 4.

³¹⁸ Denmark-Ethiopia BIT, Article 3(1).

³¹⁹ See the discussion 2.4.2 made on Turkey BIT.

BIT.³²⁰ This does not preclude the arbitration tribunal from using the minimum standards of customary international law if it is raised by the parties and deemed appropriate in the circumstances.³²¹

It seems that the Ethiopian draft model BIT has carefully followed the SADC commentary or preferred to limit the scope of the FET clause as much as possible. The SADC commentary regarding the FET states that;³²²

“The fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in several arbitral decisions. It requested the inclusion of an alternative formulation of a provision on “Fair Administrative Treatment.”

A similar provision is adopted by the draft model BIT, and they titled the provision “Fair Administrative Treatment.”³²³ The draft addressed key factors for implementing the FET clause, such as the requirement that state parties endeavor to make their legislative and administrative institutions transparent, efficient, and accountable.³²⁴ Furthermore, the investor's right to information³²⁵ will ensure that the treatment is carried out efficiently, and if implemented correctly, the possibility of resolving issues at an early stage will be conceivable.

Moreover, the violation of FET based on the legal expectation of the investor would be minimized by making the administrative proceedings transparent. Employing this structure is adopted by the SADC mainly to limit the risks of expansive rulings associated with the FET standard. As the phrase implies, the focus of the clause seems to shift from the “investor-right” centered to a governance standard.³²⁶ Ethiopia has not concluded any BIT since the approval of the revised draft. Therefore, we currently have no information on how it works to comment on its application on BITs.

³²⁰ Supra note 100-101.

³²¹ See, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, para 611, (hereinafter *Rumeli v. Kazakhstan*), *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), July 14, 2006, para. 361.

³²² Supra note 96.

³²³ Ethiopia draft model BIT, Article 4.

³²⁴ Ibid, Article 4(4).

³²⁵ Ibid, Article 4(3). See, para 585, (hereinafter *Rumeli v. Kazakhstan*), *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB (AF)/97/1), Award of August 30, 2000.

³²⁶ SADC, 24.

Even though the draft endeavored to be as specific as possible when dealing with this treatment by confining the clause, there are still some difficulties worth mentioning. The first is that, while such terms are helpful in starting negotiations, restricting the FET to fair administrative treatment may not be preferred by capital-exporting governments. Ethiopia, as a capital importing nation and a country in need of investment inflows, may not have comparable negotiating leverage, making acceptance of this provision a bit challenging.

The clauses' illustrative character is the second constraint. As previously stated, the goal of making the provision to governance focus is to restrict the concerns that might be brought before the arbitration tribunal and to minimize sweeping judgments related to the FET standard. That was also the goal of the SADC when they proposed "fair administrative treatment" over traditional "fair and equitable treatment." Nevertheless, due to the illustrative nature of the rules, it appears that there will be no mechanism to limit the tribunals' ability to deal with cases that could be brought according to the traditional FET clauses too. For instance, the Turkey-Kazakhstan BIT³²⁷ does not have a FET clause, yet this did not prevent the tribunal from applying the standard in *Rumeli v. Kazakhstan* case.

If such is the case, modifying the word to fair and administrative treatment, as described in the Ethiopia draft model BIT clause, will help promote and protect foreign investment more. However, despite their presence in the clause, this does not appear to preclude the arbitration tribunal from addressing such issues.

3.4.2. The Application and Status of National Treatment Standard in the Ethiopia BITs

National treatment clauses may be included on their own or in conjunction with other standards under the same provision as a framework. The most normal structure, however, is its coexistence with the MFN treatment standard. The purpose of their coexistence is to highlight their tight interrelationship, and the investor would select the more beneficial approach from the existing standards.³²⁸ Moreover, they share the

³²⁷ Agreement Between the Republic of Turkey and The Republic of Kazakhstan Concerning the Reciprocal Promotion and Protection of Investments, 1992.

³²⁸ UNCTAD, National Treatment Standard, 11.

same ultimate goal, avoiding or at least minimizing the existence of discriminatory treatment between domestic and foreign investors and between foreign investors in the host state.

Non-discrimination is at the heart of both NT and MFN standards, and it strives to provide a fair playing field between local and foreign investors, as well as between investors from various home countries, as a precondition for equitable competition.³²⁹ Except for three BITs,³³⁰ all the BITs concluded by Ethiopia that are in force have the NT clause.

There might be a variety of causes for the omission of the NT standard in some BITs. The first and most obvious reason is the host country's unwillingness to provide the same treatment to foreign investors as it does to domestic firms. Second, the rationale might stem from a special scenario, such as subsidies provided by the host nation to state-owned firms. This might make the issue difficult when most firms are state-owned, and making it for foreign investors would not be easy. The other reason is when the treatment provided under the national law is below a certain minimum standard, and the home state may not insist on the grant NT.³³¹

The reason for the absence of the NT standard in the above-mentioned Ethiopian BITs is obscure. The lack of an NT provision signifies the absence of one of the pillars of treatment that a foreign investor should be entitled to, and there should be a mechanism in place to remedy this void. There are two viable solutions. The first is to import NT clauses utilizing the MFN standard granted by the main treaty. As long as the BIT includes the MFN provision, both contracting parties' investments may benefit from the rest of the BIT's NT clause. For instance, the Ethiopia-Egypt BIT provides the FET and MFN standards while omitting the NT clause as follows:

Once an Investments is admitted, each Contracting Party shall in its territory accord investment and investors of the other Contracting Party treatment which is fair and equitable and not less favorable than that which it accords to investments and returns of investors of any third states whichever is more favorable.³³²

³²⁹ Schill, 76.

³³⁰ Ethiopia-Egypt BIT, Ethiopia-Libya BIT, Ethiopia-Malaysia BIT.

³³¹ UNCTAD, National Treatment, 16-17.

³³² Ethiopia-Egypt BIT, Article 3(1).

Hence, the investors from both contracting parties may import the NT standard offered for the third states through the MFN clause. The other option is both states could negotiate and add the clause upon or before the expiry of the treatment by amending the BIT.

When we look at the BITs with the NT clause, it would be essential to evaluate them in terms of their type as pre- and post-establishment, the place given to the “like circumstance” reference, and the exception they incorporate. One of the essential components of the national treatment requirement is whether it applies after investments have been admitted into the host country in line with its laws and regulations (post-establishment obligation), or whether it applies before or during the admission stage (pre-establishment commitment).

While developing market economies first gave almost solely post-establishment national treatment to preserve their domestic economy, pre-establishment protections are now being extended among parties with equal economic strength.³³³ Some BITs extend the scope of the NT clause to grant the investor treatment for both pre-and post-establishment stages. The US treaties are typical examples of these BITs. The US-Rwanda³³⁴ treaty can be taken as an example. Article 3 of the said BIT stipulates that; “Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its investors concerning the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory,” and its sub-article 2 provides the NT treatment for the covered investments.

Ethiopia has a post-establishment type NT provision in all of the BITs that are currently in force. The Ethiopia-France BIT’s NT provision can be taken as an example which states: “Each Contracting Party shall apply to the nationals and companies of the other Contracting Party, with respect to their investments, once admitted in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made, and activities related to the

333 Vrinda Vinayak, “The Pre-Establishment National Treatment Obligation: How Common Is It?”, European Federation for Investment Law and Arbitration (EFILA Blog), 2019, last accessed April 3, 2022.

334 Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 2005.

investments, a treatment not less favorable than that granted to its nationals or companies.”³³⁵

The investment that can benefit from the NT provisions in the BITs is the one that is admitted under the host country's laws and regulations. Most IIAs (particularly BITs) embrace this model, in which the admission of investments is entirely regulated by the host State's rules and regulations.³³⁶ This will allow Ethiopia, as a capital-importing country, to control over the type of investment it will enable. Allowing investors to use the NT protection, as stated in the SADC statement, amounts to investment liberalization, and the matter of investment liberalization must be dealt with by state legislation and policies, not through a treaty. Accepting such clauses as a treaty obligation may prevent a state from amending its national laws, eroding the state's sovereignty. And advised the states not to include such provisions in their BITs.³³⁷ As a result, Ethiopia's experience of removing (not including) the pre-establishment period from the scope of NT treatment is appropriate. However, we can see in a few instances the extension of the NT clause's scope to the admission stage of investments. For instance, article 3(2) of the Ethiopia-Finland BIT provides that; “Each Contracting Party shall apply to investors and to investments by investors of the other Contracting Party upon admission, a treatment which is no less favorable than that accorded to investors and to investments of any third State.”³³⁸

The second concern while discussing the NT clause in BITs is their reference to the ‘like circumstance’ or ‘like situation’ to evaluate the act as less favorable than the host state accords to its domestic investor. In this regard, we see that only a few BITs have included the “like circumstance” reference among Ethiopia's BITs, and only Ethiopia-Turkey³³⁹ and Ethiopia-Kuwait³⁴⁰ BITs, from those in force, have this phrase. Inserting the like situation (circumstance) was a source of contention among OECD delegates; some argue that the context for comparison should be left implicit and that

³³⁵ Ethiopia-France BIT, Article 4.

³³⁶ UNCTAD, Most Favored Nations Treatment Standard, 38.

³³⁷ SADC, 15.

³³⁸ Ethiopia-Finland BIT, Article 3(2).

³³⁹ Ethiopia-Turkey BIT, Article 3.

³⁴⁰ Ethiopia-Kuwait BIT, Article 4(1).

inserting the term "like circumstance" is redundant and vulnerable to abuse. Others, on the other hand, argued that it was necessary to use explicit words for comparison.³⁴¹

When we see an example of BIT without like circumstance phrase, Article 3(1) of the Ethiopia-Tunisia BIT states that; “Neither Contracting Party shall in its territory subject investments of investors of the other Contracting Party to treatment less favorable than that which it accords to investments of its own investors...”.

The draft model BIT and some recently concluded but not yet ratified BITs show some variety regarding incorporating the word ‘like circumstance.’³⁴² The draft even goes further and offers the details of what “like circumstance” may entail as follows;

For greater certainty, references to “like circumstances” in paragraph 1 of this Article requires an overall examination on a case-by-case basis of all the circumstances of investment including, inter alia:

- (a) its effects on third persons and the local community;
- (b) its effects on the local, regional or national environment, on the health of the population, including the cumulative effects of all investments within a jurisdiction on the environment;
- (c) the sector in which the investor is active;
- (d) the aim of the measure concerned;
- (e) the regulatory process generally applied in relation to the measure concerned;
- (f) other factors directly relating to the investment or investor in relation to the measure concerned.”³⁴³

This demonstrates Ethiopia's preparedness to include the "like circumstance" reference in future BITs NT clauses. At the same time, the necessity to update the current ones should not be disregarded. As it is more favorable for the host state to include the word "like circumstance" in the NT clause of BITs, Ethiopia must closely examine it when signing new BITs or amending existing agreements.

³⁴¹ OECD, National Treatment, Non-Discrimination/MFN and Transparency, Negotiating Group on the Multilateral Agreement on Investment (MAI), 1996, 3.

³⁴² See, Agreement Between the Government of The Federal Democratic Republic of Ethiopia And The government of the state of Qatar For The Promotion And Reciprocal Protection of Investments, 2017, Article 5(1), Agreement Between The Federative Republic of Brazil And The Federal Democratic Republic of Ethiopia on Investment Cooperation And Facilitation, 2018, Article 5(1), Agreement Between the Government of The Federal Democratic Republic of Ethiopia And The Government of The United Arab Emirates Concerning The Promotion And Reciprocal Protection of Investment, 2016, Article 4, Agreement Between the Federal Democratic Republic of Ethiopia and The Kingdom of Spain on The Promotion and Reciprocal Protection of Investments, 2006, Article 4(1).

³⁴³ Ethiopian Draft Model BIT, Article 5(2).

3.4.3. Ethiopia's Approach to the MFN Clause

The most favored nation treatment standard has a significant role in extending to the investor of a home state in a particular BIT the favorable treatment made to the third-party states' investors in an independent treaty. This makes the MFN clause a multilateralizing instrument for an investment agreement.³⁴⁴ It has become controversial due to the difficulty in defining its area of application, which includes whether its applicability extends to dispute resolution or is restricted to importing substantive treatment standards. This necessitates assessing the structural and substantive presence of the MFN clause in Ethiopia's BITs', as well as Ethiopia's BITs position on the scope of the MFN provision. Technically, almost all of Ethiopia's BITs have contained the MFN clause, and there is no omission of this clause as there is with the NT clause.

As it has been passed in the NT clause discussion above, the MFN treatment could also be offered at the pre and post-entry level, depending on the country's agreement with the treaty. States like the USA and Canada are known for extending the obligation to the pre-entry stage in their treaties.³⁴⁵ For instance, the Canada-Moldova BIT³⁴⁶ shows both scenarios as:

“1. each contracting party shall accord to an investor of the other party treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party.....”

“2. Each Party shall accord to a **covered** investment treatment no less favorable than that it accords, in like circumstances, to investments of investors of a non-Party.....” (emphasis added).

Ethiopia adopts the post-entry approach in all BITs that apply the MFN standard, as in the NT clause. Hence the possible reasons to prefer the post-entry model discussed

³⁴⁴ Schill, 496.

³⁴⁵ UNCTAD, Most Favored Nations Treatment, 42.

³⁴⁶ Article 5(1) & (2), Agreement Between the Government of Canada and The Government of The Republic of Moldova for The Promotion and Protection of Investments, signed on June 12, 2018 (entered into force on 23 August, 2019).

above would also work here as the *raison d'être* for the adoption is quite similar.³⁴⁷ Keeping its sovereign right to regulate investor admission by not availing itself of treaty obligations that erode such inherent power should therefore be maintained until the state's political and economic strength becomes substantial.

The Ethiopia BITs' NT and MFN provisions have a similar stance on the general exceptions to the treatments. The benefits of membership in international investments or trade agreements, such as future free-trade zones, customs unions, common markets, or economic unions, to which either of the Contracting Parties is or may become a member, or the agreement concerning taxation or domestic tax regulations, are the exceptions. Although the structure of the rules enabling these exceptions varies, all BITs in force include them all save the Ethiopia-Libya BIT, which provides only economic integration agreements as an exception. An example of such provision can be seen in Article 4 of the Ethiopia-France BIT, states that,

This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third-party State by virtue of its participation or association in a free trade zone, customs union, common market, or any other form of regional economic organization. The provisions of this Article do not apply to tax matters.³⁴⁸

Some IIAs, especially after the Mafezzini case, started to provide specific exceptions to refer to the MFN's inapplicability in bringing the dispute settlement provisions from other investment agreements.³⁴⁹ A review of Ethiopian BITs reveals that the MFN clause is phrased in highly general terms in almost all of the BITs, leaving considerable leeway for competing interpretations and creating a matrix of obligations, with the effect of stretching the country's obligations under the respective agreements.³⁵⁰

³⁴⁷ See, discussion 3.4.2.

³⁴⁸ Ethiopia-France BIT, Article 4.

³⁴⁹ See, for example, Article 4(5) of the Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, signed on 03 June; 2014 (entered into force on April 14, 2015), Article 4(4(c)) of Agreement Between the Republic of Turkey and The Kyrgyz Republic Concerning the Reciprocal Promotion and Protection of Investments, signed on April 9, 2018 (entered into force on 18 March, 2020), Article 5(4), Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, signed on February 10, 2016 (entered into force 6 September, 2016).

³⁵⁰ Martha B. Hailu & Tilahun E. Kassahun, "Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration," *Mizan Law Review*, Vol. 8, No.1, 2014, 143.

This nature can be seen in the following provisions Article 3(1) of the Ethiopia-Sweden BIT, for instance, provides that “Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party a treatment which is no less favorable than that accorded to investments made by its own investors or by investors of third states, whichever is the more favorable.” Such provisions may leave the gap and open themselves for the arbitration’s interpretation. This may put the arbitration in the dilemma of standing in favor of importing the dispute resolution or denying the claim, as was seen in *Maffezzini and Salini v Jordan* respectively.

A significant advancement has been shown in the draft model BIT towards including the inapplicability of the MFN standard to exclude dispute settlement provisions in its article 7(6) as “The obligation referred to in paragraphs 1 and 2 above shall not apply to dispute settlement mechanisms provided under other bilateral or multilateral international agreements.”

Although they are not yet come into force, some BITs have also started to embrace inserting exceptions to the dispute settlement clause, as we can see in the Ethiopia-Brazil³⁵¹ and Ethiopia-UAE BITs as follows:

This Article shall not be construed to require a Contracting Party to grant to an investor of another Contracting Party or their investments the benefit of any treatment, preference, or privilege arising from: a) Provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement,³⁵²
“...for more certainty, MFN shall not apply to any procedural or judicial matters.”³⁵³

Such provisions play an important role in reducing uncertainty while narrowing the scope of MFN application, and they serve as a safety measure for both contractual parties and their investors.³⁵⁴ Countries are also amending their model BITs in a way that accommodates this interest.³⁵⁵ However, while removing DSPs from the MFN scope is not wanted by foreign investors because it offers them a broader scope to

³⁵¹ Agreement Between the Federative Republic of Brazil and The Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, Signed on April 11, 2018.

³⁵² *Ibid*, Article 6.

³⁵³ Ethiopia-UAE BIT, Article 5(3).

³⁵⁴ : Ylli Dautaj, “ITA: The MFN Clause and its Procedural Extension – a Case Study of the Ros Invest Co Case the MFN clause in light of treaty interpretation, Master’s Thesis in Investment Treaty Arbitration Law, UPPSALA UNIVERSITAT, 2015, 38.

³⁵⁵ *Supra note* 338.

enjoy both favorable substantive and procedural treatment, governments must decide on a case-by-case basis without a need to follow uniform hard and fast policy.³⁵⁶ Hence, Ethiopia shall keep including specific and clear MFN clauses in its BITs which is the fair approach to deal with the current investment arbitration jurisprudence properly.

3.4.4. Expropriation

Ethiopia's BITs provide a safeguard against expropriation by including it in nearly all BITs as protection against expropriation, nationalization, and direct and indirect actions with the same effect of nationalization or expropriation. We will see the scope of expropriation, the criteria to expropriate, the valuation of compensation, and reviews by the local judicial organ in Ethiopia's BITs as follows.

The scope of protection against expropriation is the fundamental concern of all BITs, especially since most countries gained independence after WWII. Safeguarding their people's investments abroad was the rationale that led most capital-exporting countries to join BITs. As a result, expropriation clauses are expected to be found in every BIT as it is its primary focus. Although the term provided for some provisions varied, most of them used the word 'expropriation' or 'expropriation and compensation' as their title.³⁵⁷ The clauses incorporate under the word expropriation takings such as nationalization, dispossession, or any act with the effect of expropriation, direct and indirect.

We can see this in Article 6 of the Ethiopia-Denmark BIT, “Investments of investors of each Contracting Party shall not be nationalized, expropriated, or subjected to measure having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party...”

Article 5 of Ethiopia-Finland BIT, on the other hand provides that,

³⁵⁶ Tanjina. Sharmin, “Should the MFN Within Investment Treaties Exclude Dispute Resolution? -An Evaluation of The Australian Approach,” Australian Yearbook of International Law, Vol 35, 2017, 45-46.

³⁵⁷ Some BITs, like Article 5 of Ethiopia-France BIT, use the word dispossession and indemnification or Article 6 of Ethiopia-Swiss BIT, which uses the word dispossession and compensation.

Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized, or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalization (hereinafter referred to as "expropriation") ...

Some BITs also attempted to illustrate measures that amounted to expropriation, such as the Ethiopia-Kuwait BIT, which provides some clarity regarding the scope of expropriation to include the contracting state's measure to expropriate the asset of a company or an enterprise established according to state law through the ownership of shares, stocks, debentures, or other rights.³⁵⁸

Surprisingly, certain newly signed Ethiopian treaties seem to omit indirect expropriation. For instance, the Ethiopia-Brazil BIT³⁵⁹ states that "Each Contracting Party shall not **directly** nationalize or expropriate investments of investors of the other Contracting Party" (emphasis added) without making any reference to indirect expropriation or even mentioning the measure which amounts to an expropriation even if it is not directly made.

It further stressed its position by adding another sub-article to manifest its clear intention when it meant directly expropriated by stipulating, "For greater certainty, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights."³⁶⁰ In this provision, the contracting parties expressly excluded indirect expropriation from being part of their agreement's protection. This will open a gate for controversy when the investor of any contracting party encounters a measure that amounts to direct expropriation in the host state. Moreover, since indirect expropriation is incorporated in many BITs, it may be less favorable for the investors of these contracting parties, and may adversely affect their competitiveness. The BITs MFN clause may be employed to bring more favorable treatments from the other BITs. Nevertheless, since the state's intention is plainly expressed in the treaty, controversy will inevitably come.

As previously noted, expropriation is an inherent right of the state,³⁶¹ although it is not in theory permissible to expropriate foreign investor investment under investment

³⁵⁸ Ethiopia-Kuwait BIT, Article 6(3).

³⁵⁹ Ethiopia-Brazil BIT, Article 7(1)

³⁶⁰ Ibid, Article 7(5).

³⁶¹ Supra note, 157.

treaties. The endeavor to strike the right balance between these interests resulted in the clause that authorizes states to expropriate under strict criteria.

The Ethiopian Investment Proclamation stipulates the government's right to expropriate “any investment undertaken under this Proclamation for a public interest, in conformity with requirements of the law, and on a nondiscriminatory basis.”³⁶²

The criteria adopted in almost all BITs signed by Ethiopia are; the expropriation shall be made for a public purpose, without discrimination, and carried out in accordance with due process of law against the payment of prompt, adequate, and effective compensation. Some BITs make the public purpose criteria limited to the public purpose related to the internal needs of the contracting party.³⁶³ For example, the Ethiopia-Sweden BIT states that:

Neither Contracting Party shall take any measure depriving directly or indirectly, an investor of the other Contracting Party of an investment (hereinafter referred to as “expropriation”) unless the following conditions are complied with: a. the measures are taken in the public interest and under due process of law; b. the measures are distinct and not discriminatory; and c. the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation.³⁶⁴

Regarding the valuation of the compensation to be made for the investments expropriated according to the BIT provisions, BITs seem to employ different values. Most of them adopt the fair market value of the investment,³⁶⁵ While some Treaties' position lacks clarity, for instance, Article 4 of the Ethiopia-Libya BIT provides that; “The compensation mentioned in paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investment at the time when expropriation is proclaimed,” without clearly stipulating how to determine the value as fair market or actual value. We can find the same provision in the Ethiopia-China BIT that stipulates only the property's value.³⁶⁶

If there is any ambiguity or the provision lacks clarity regarding the valuation of the compensation method, resorting to the following solution would be plausible. With

³⁶² Proclamation no 1180/2020, Article 19.

³⁶³ Ibid, Article 6(1). Ethiopia-Israel, Article 5.

³⁶⁴ Ethiopia-Sweden BIT, Article 4.

³⁶⁵ See, for example, Article 4 of Ethiopia-Sweden BIT, Article 5 of Ethiopia-Austria BIT, Article 4 of Ethiopia-Germany BIT, Article 5 of Ethiopia-Iran BIT, Article 6 of Ethiopia-Netherlands BIT, Article 5 of Ethiopia-Denmark BIT, Article 4 of Ethiopia-Turkey BIT.

³⁶⁶ Ethiopia-China BIT, Article 4(2).

this regard, the Ethiopian investment proclamation adopts the market value of the property as a standard to value the property.³⁶⁷ A similar proposal might be derived from general BITs practice, because most BITs embrace the 'market value,' and doing so will be the best method to minimize the existing ambiguity. The other option is using the MFN to import the fair market value from the other BITs signed by the host state when it is found favorable for the concerned investor.

Another aspect of Ethiopia's BITs regarding expropriation is that some of them include a mechanism for review of measures in connection to compensation, expropriation, or value of the investment by a competent judicial or administrative organ under the law of the host state without impacting the investors' right to submit a subsequent claim. Such a clause is included in the BITs signed with Finland,³⁶⁸ Austria,³⁶⁹ Germany,³⁷⁰ Israel,³⁷¹ Denmark,³⁷² and Kuwait.³⁷³ This would enable the investor to obtain a speedier and less costly way of settling his appeal.

To summarize, Ethiopia's BITs are akin to the rest of the BITs in terms of substance and form. They include both direct and indirect expropriation, as well as the requirements that must be met when the state wishes to expropriate foreign investments. Furthermore, the inclusion of domestic review procedures in both the investment proclamation and the BITs provision would serve to ensure the protection of foreign investments and boost investor trust.

3.5. Procedural Issues in the Ethiopian BITs

The number of ISDS cases has shown a significant increase in the last two decades and impacted international investment rule-making.³⁷⁴ Ethiopia introduced itself with

³⁶⁷ See, Proclamation no 1180/2020, Article 19(2).

³⁶⁸ Ethiopia-Finland BIT, Article 5(5).

³⁶⁹ Ethiopia-Austria BIT, Article 5(3).

³⁷⁰ Ethiopia-Germany BIT, Article 4(4).

³⁷¹ Ethiopia-Israel BIT, Article 5(1).

³⁷² Ethiopia-Denmark BIT, Article 5(4).

³⁷³ Ethiopia-Kuwait BIT, Article 6(2).

³⁷⁴ Echandi, 5.

investor-state dispute settlement clauses with its first BIT, and almost all BITs signed have an ISDS provision. Domestic rulemaking has also provided an enabling climate for foreign investors to have alternative dispute forums in the local jurisdiction and international investment arbitration.

The FDRE constitution grants everyone with a justiciable claim the right to present his case to a court of law or other competent entities with the competence to settle disputes.³⁷⁵ Furthermore, the investment proclamation states that disputes based on the proclamation would be resolved through consultation and negotiation. In addition, if the case concerns a foreign investor, the federal government may consent to settle it through arbitration.³⁷⁶ The proclamation further provides the Fork in the road clause provision that states, “Where a Foreign investor chooses to submit an investment dispute to a competent body with judicial power or arbitration, the choice shall be deemed final to the exclusion of the other.”

When it comes to Ethiopia's BITs' coverage of the ISDS provisions, it's essential, to begin with, the types of claims they entertain. The necessity comes from the ambiguous character of the phrases due to the variety used by the state parties in making the scope broad and limited. Some states include a phrase that refers to 'any dispute relating to an investment,' which is considered as it contains claims deriving from contractual commitments established between the investor and the host state. States limit this breadth by taking a more restrictive approach, subjecting to the jurisdiction of an arbitral tribunal only disputes originating under the IIA itself or alleging violations of international investment agreement standards.³⁷⁷

Ethiopia's BITs adopted the phrase, which seems to be a broad approach. For instance, the Ethiopia-Sweden BIT states that “Any dispute concerning an investment between investors of one Contracting Party...”³⁷⁸ without including a restrictive phrase to avoid

³⁷⁵ FDRE constitution, Article 37(1).

³⁷⁶ Proclamation no 1180/2020, Article 28.

³⁷⁷ August Reinisch, “The Scope of Investor-State Dispute Settlement in International Investment Agreements,” *Asia Pacific Law Review*, Vol.21 No.1, 2013, 9.

³⁷⁸ Ethiopia-Sweden BIT, Article 8(1).

claims that could arise from contractual obligations. This model is adopted by nearly all BITs signed by Ethiopia.

Since BITs and multilateral agreements are frequently the results of negotiations influenced by previous experience, substantive compromises, or unilateral negotiating power, it is sometimes difficult to ascertain the parties' underlying objectives. Furthermore, the wording controlling dispute settlement eventually agreed upon in IIAs commonly varies from vague, ambiguous, and infelicitous.³⁷⁹ The same difficulty happens while determining the scope of Ethiopia's BITs ISDS provisions, whether they intend to include claims based on a contract between the host state and an investor or only entertain a claim based on the treaty.

As discussed above, the primary objective of umbrella clauses in BITs is to internationalize contractual obligations between the host state and the investor. Eight of the 21 Ethiopia's BITs that are in force have included an umbrella clause, and these provisions may have the effect of transforming the contracts made by the host states. For example, Article 2(3) of the Ethiopia-Denmark BIT stipulates that "Each Contracting Party shall observe any commitment it may have entered into concerning investments of investors of the other Contracting Party."³⁸⁰ Although the scope of the ISDS provision does not expressly include additional commitments made by the host state to the investor, the umbrella clauses may potentially include them in the ISDS clause. Yet, this will be decided on a case-by-case basis, as in the previously mentioned arbitration tribunals decisions.

While the rest BITs make general remarks by providing 'any dispute' related to the investment under the scope of the ISDS provision, the Ethiopia-China BIT has undertaken caution in limiting the extent of the dispute settlement provision's material jurisdiction/'*ratione materiae*.' Only disputes over compensation are subject to investor-state dispute resolution.³⁸¹

³⁷⁹ Ibid, 7.

³⁸⁰ See also Ethiopia-Sweden BIT, Article 2(5), Ethiopia-Finland BIT, Article 12(2), Ethiopia-Germany BIT, Article 8(2), Ethiopia-Swiss BIT, Article 10(2), Ethiopia-Kuwait BIT, Article 3(3).

³⁸¹ Ethiopia-China BIT, Article 9(3).

The second issue we have in the ISDS discussion is the alternative forums provided in the BITs. In addition to the domestic forum, the following five forums are most frequently covered by BITs. These are ICSID arbitration, ad hoc UNICITRAL arbitration, arbitration at the Arbitration Institute of the Stockholm chamber of commerce (SCC Arbitration), Arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration), and Arbitration under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes (ICSID Additional Facility Arbitration).³⁸²

The Ethiopian BITs have essentially provided the ICSID when both parties are members of the convention and UNICITRAL forums as an option reserved for the investor. And some BITs like Sweden, Sudan, Netherlands, Kuwait, Israel, Malaysia, Yemen, Germany, France, Denmark, and Finland BITs offered ICSID “the ICSID under the Rules Governing the Additional Facility for the Administration of proceedings by the Secretariat of the ICSID Additional Facility Arbitration alternative provided that one of the Contracting Parties is a party to the Washington Convention.”³⁸³ This is a better option for the investor when the host state is not a party to an ICSID convention, as is the case with Ethiopia.

Although ICSID is already included in a majority of BITs to which Ethiopia is a party, Ethiopia is not yet a member of the ICSID convention. Ethiopia was one of the first signatory states to the convention in 1965. However, due to the failure to ratify the agreement, Ethiopia is no longer a member of the ICSID. This would effectively limit the investor's alternative arbitration forums. The point here is why, even though the negotiators are aware of Ethiopia's non-member status in the ICSID convention, they keep referring to ICSID arbitration in the BITs. What might be the cause of this is a crucial point and need to be addressed in detail.

³⁸² Steptoe & Johnson LLP, Choosing an arbitral forum for investor-state arbitration, <https://www.lexology.com/library/detail.aspx?g=119384b7-1f37-4b3d-8b20-7080b722d8db>, January 2015, last accessed 8 May. 22.

³⁸³ Ethiopia-Sweden BIT, Article 8(2)(ii).

While proposing more research on this topic, let us look at some plausible causes. The first reason is since least developed countries like Ethiopia³⁸⁴ are not in a position to bargain on every provision. They, most of the time, accept the draft prepared by the capital-exporting states, and the latter prefer to put ICSID as an alternative forum for ISDS.³⁸⁵ Hence, Ethiopia would have adopted such measures despite being aware of the difficulties in implementation. Regardless of the odds, the ICSID is a necessary evil for nations like Ethiopia to attract international investment by broadening dispute resolution choices is the other justification. The author also believes that considering ratifying the ICSID convention would help to achieve the rationale of incorporating the ICSID forum in the BITs while boosting the investors' confidence to invest in the country by demonstrating how the country is committed to complying with its treaty obligations.

The Ethiopia-Libya BIT has an entirely different position. It provides only the domestic courts as the only option for the investor to bring its case. Moreover, the investor can bring its claim to the ad hoc tribunal to be established "If a dispute involving the amount of compensation for expropriations cannot be settled within six months after resort to negotiations."³⁸⁶ So far, this is the narrowest choice for the investor among the signed BITs.

In the process of choosing the forums from the provided options, making sure of the existence of the FITR³⁸⁷ clause would benefit both the investor and the host state. We can infer the FITR clause from the structure of the Tunisia, Malaysia, and Algeria BITs. On the other hand, some BITs provide that as long as the domestic court has delivered a final judgment over the substance of the case, the investor may still have the chance to recourse to the arbitration tribunal.³⁸⁸

³⁸⁴ See the World Bank List of least developed countries, <https://data.worldbank.org/country/XL>, last accessed 8 May 2022.

³⁸⁵ Endryas, Tekalegn, "Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap," *Beijing Law Review* 10, no. 1 (March 2019), 120.

³⁸⁶ Ethiopia-Libya BIT, Article 9.

³⁸⁷ See the discussion on 2.7.2.3 to recall the concept of Fork in the Road clauses.

³⁸⁸ Ethiopia-Israel BIT, Article 8(4).

To summarize, the domestic proclamation and the BITs demonstrate Ethiopia's commitment to protecting investors' interests. Except for a few, the BITs signed by Ethiopia have a similar nature giving a greater possibility for the investor to appeal when there is a dispute.



CHAPTER IV

CONCLUSIONS

Bilateral investment treaties are aimed at establishing a central foreign investment protection framework and trying to fill the void left by the lack of multilateral investment treaties for foreign investment protection. The desire for BITs varies according to the state's economic and political status. The interest ranges from ensuring the protection of their citizens' investment abroad in a particular state to achieving global investment liberalization from the perspective of capital-exporting states. In contrast, the focus of capital importing states is, though the direct relationship between FDI and signing BITs has not yet empirically been proved, to attract foreign investment inflows by agreeing to offer fundamental procedural and substantive rights to a foreign investor. As it can be inferred from the preamble of BITs signed by Ethiopia, the country's interest while signing BITs is to intensify economic cooperation, strengthen historical ties of friendship, facilitate technology transfer and foreign investment flows, and promote and protect investments are among the reasons of Ethiopia to embrace BITs.

Investment protection is not a new phenomenon introduced by BITs; it has existed for centuries as part of trade and commercial relationship agreements. Many historical processes and alterations occurred before its current substantive and procedural appearance. Pre-colonial investment protection agreements, for example, focused on economic and political relations between nations and stimulating commerce, with efforts to settle investment disputes on behalf of their citizens or via political measures. It was simple for capital-exporting powers to secure their people's property under their colonies during the colonial period. This protection was accomplished through the use of both political and military power. Post-WWII, the protection regime got a new structure by transforming itself into BITs after signing the first BIT between West Germany and Pakistan in 1959. Although it took some time to be adopted in many

states, the number increased in the 1990s, and currently, we have 2794 BITs, and 2227 of them are in force.

Ethiopia's BIT experience journey also started a few years after establishing of the first BIT with Ethiopia-Germany BIT in 1964 during the imperial period. The journey was interrupted during the communist era and fastened its pace again after the downfall of the Derg Regime. Currently, Ethiopia has 35 BITs in Total, and 21 of them are functional.

The standards of protection offered by BITs could be classified into absolute and relative treatment. Treatments like Fair and equitable treatment and security and protection fall under the first category, which emphasizes providing the treatment regardless of the existence of a comparator. In relative treatment, the treatment provided for the investor is to be evaluated depending on whether it is less favorable or not based on the treatment offered for a domestic investor in a like circumstance, most of the time. The second treatment category is what we can see in the NT and MFN treatments.

As is with most legal phrases, there is no single definition attached to the phrase FET. For some, it is a good part of the standard since its vagueness could give broad discretion to the arbitration tribunal when disputes arise based on this standard. It is tried to define it by using other elements such as non-discrimination, the legitimate expectation of the investor, and fair and transparent procedure. Some BITs wanted to associate it with international minimum standards, the standard alone, or MFN and NT treatments while drafting the clause.

The Ethiopian BITs included the FET standard in conjunction with the FPS standard, and some BITs included it in both the preamble and the substantive section of the treaty. Although the BITs followed the traditional draft model, the Ethiopian draft model BIT adopts a more restrictive meaning for the FET treatment by naming it "fair administrative treatment" and providing the elements under this treatment in close detail. State's obligation to make their legislative, and administrative institutions transparent and investors' right to information are among those obligations. The purpose of introducing such a clause is to limit the arbitrator's increasing discretion in interpreting the clause. However, due to the clause's illustrative nature and the fact that

the treatment's presence in the preamble can be used as a tool to interpret treaty provisions under the VCLT, shifting away from the traditional presence of the FET standard is unlikely to result in the desired standard. As a result, Ethiopia's BITs position regarding incorporating FET provisions can be appreciated. Therefore, it would be preferable to maintain this status rather than adopt the structure described in the draft.

The second leading substantive standard is the national treatment standard. The standard often comes with the MFN due to its relative treatment nature. The essence of the NT standard is not offering less favorable treatment for the foreign investor than that is accorded to the domestic investor. The comparison here is between the foreign investor and the domestic investor in like circumstances. The phrase 'like circumstance' is a point of debate in the arbitration tribunals, and we have various judgments in this regard. Some tribunals interpreted it as a business sector, while others interpreted it more specifically by considering the details on a case-by-case basis. The fear scholars have with putting a comparator in 'like circumstance' is when the nature of the investment has no comparator in the same business sector or when the investment is new. It would be necessary to define the 'like circumstance' quite broadly.

Except for the Ethiopia-Egypt, Ethiopia-Libya, and Ethiopia-Malaysia BITs, all of Ethiopia's existing BITs have embraced the NT standard. However, due to the relevance of the criterion for investment protection and its inclusion at the heart of the substantive section of the BIT, its disappearance in such treaties is unclear, and Ethiopia must consider including this criterion during the amendment of these treaties.

The substance of the NT clauses in Ethiopia's BITs has similar content to most treaties worldwide. They stipulate it as a duty to provide no less favorable treatment than domestic investors. However, in terms of implementation, all BITs offer that it only applies when investments admission to the host nation in accordance with its rules and regulations (post-establishment obligation).

The issue we have in Ethiopia's treaties while dealing with NT clauses is the absence of the 'like circumstance' reference, except for Ethiopia-Turkey and Ethiopia-Kuwait BITs. Although there is a justification for including such a reference implicitly, it

would be preferable for both the investor and host states to have an explicit reference to the word "like circumstance" in the NT clause. Moreover, the presence of 'like circumstance' in the draft BIT indicates an intention to expressly include it while negotiating BITs, demonstrating Ethiopia's intent. Therefore, while we appreciate its inclusion in the draft, we urge that it be included in future BITs and examined during the amendment of current BITs.

MFN is another fundamental BIT clause. Like the NT standard, it is a relative treatment, but the comparator here is with the treatment provided to third-party state investors. The essence of this standard is that an investor should receive no less treatment than the host country does for third-party national investments. In addition, MFN plays a role in transforming BITs into defacto multilateral treaties by providing the opportunity to import favorable rights from other BITs or international trade and investment treaties that third-party nationals may enjoy in the host state.

There is no problem with employing MFN to import substantive rights; the issue is the importation of procedural rights. On separate occasions, the tribunal took both positions. Some decisions chose a broad interpretation to accommodate the importation of procedural clauses, arguing that procedural rights, like substantive provisions, must be provided to the investor. On the other hand, some tribunals defined the phrase rights in the MFN clauses to solely relate to substantive rights conferred by BITs. As a result, states have started to include exceptions in the MFN clauses to exclude procedural rights from the scope of MFN.

Ethiopia's BITs have a general approach without providing the scope of the MFN clause or exceptions to the general remark, which may open a controversy while interpreting the clause. However, the draft model BIT has included an exception to make procedural provisions out of the scope of the MFN clause. As a result, Ethiopia would benefit by explicitly stating in the MFN clause its intent to exclude procedural rights from being imported by the MFN provision. This move would reduce the possibility of treaty shopping and help to have consistent legal procedures when disputes arise with a specific investor.

Despite the state's inherent right to expropriate properties for public use by following the required legal procedure and paying adequate proportional and fair compensation, protection against arbitrary expropriation is at the heart of any BIT. Ethiopia guaranteed this protection by its domestic laws, from the constitution to the investment proclamation. Moreover, almost all BITs signed by Ethiopia include the following criteria: expropriation will be done for a public purpose, without discrimination, and carried out following due process of law in return for prompt, adequate, and effective compensation. However, some BITs limit the public purpose requirement to public purposes linked to the contracting party's internal needs. The other good element we have in some BITs expropriation clauses is the inclusion of a review procedure under the competent organ of the host state without affecting the investor's right to bring its case to arbitration as provided in the BIT. In terms of substance and form, Ethiopia's BITs are similar to the rest of the BITs. They cover both direct and indirect expropriation and the conditions that must be followed when the government intends to expropriate foreign investments. Furthermore, including local review mechanisms in the investment proclamation and the BITs clause would protect foreign investments and increase investors' trust.

BITs address concerns such as investor-state and state-state dispute settlement procedures. The latter is primarily concerned with disputes between states concerning the interpretation of a specific agreement provision. In contrast, the former is concerned with disputes arising from an investment relationship between the investor and the state based on the investment treaty or contractual rights established.

Although states offer domestic dispute resolution alternatives, ISDS allows investors to access an impartial arbitration capable of resolving sophisticated technical investment concerns. Ethiopia's BITs seem to broaden the scope by having a provision that says, "Any dispute concerning an investment between investors of one Contracting Party." Furthermore, despite the current arguments regarding the umbrella clause, the inclusion of an umbrella clause in various Ethiopian BITs may be utilized to internationalize the contractual obligations made between the investor and the state to be entertained by international arbitration, such as treaty-based claims. However, we still have a BIT narrowing the scope of the ISDS only to cover compensation disputes like the Ethiopia-China BIT. Since international investors place a high value

on ISDS, Ethiopia's BITs approach of offering a relatively broad scope would be appreciated.

The forum options we have in Ethiopia's BITs are, in addition to domestic alternative, ICSID arbitration, ad hoc UNICITRAL arbitration, arbitration at the Arbitration Institute of the Stockholm chamber of commerce (SCC Arbitration), arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration) and Arbitration under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes (ICSID Additional Facility Arbitration).

Although ICSID appears in almost all BITs, it is not yet ratified by Ethiopia due to unclear reasons. Consideration of ratification of the ICSID Convention would help to introduce the ICSID forum in the BITs while increasing investor confidence in the state by demonstrating the government's commitment to comply with its treaty responsibilities. Accordingly, we recommend considering ratifying the ICSID convention by Ethiopia and suggest researchers study the pros and cons of ratifying the convention while appreciating the commitment Ethiopia has shown by offering clear procedures regarding ISDS in both its domestic laws and the BITs.

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