

The Role of Bilateral Investment Treaties in Securing Foreign Investments in Ethiopia

by

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I declare that **The Role of Bilateral Investment Treaties in Securing Foreign Investments in Ethiopia** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

A handwritten signature in blue ink, consisting of several overlapping, stylized strokes, positioned above a horizontal line.

SIGNATURE

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2015/02/11

DATE

Abbreviations

BIT	Bilateral Investment Treaty
CIL	Customary International Law
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
FNC	Friendship, Navigations, and Commerce
GDP	Gross Domestic Product
ICSID	International Centre for Settlement of Investment Dispute
IAs	International investment agreements
LDCs	Least developed countries
MFN	Most Favoured Nation
MST	Minimum standard of treatment
NAFTA	North American Free Trade Agreement
OEDC	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Co-operation
TRIMs	Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Related Laws
UNCTAD	United Nations Conference on Trade and Development
U.S.A.	United States of America

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ABSTRACT and KEYWORDS

This study examines the role of bilateral investment treaties in securing foreign investment in Ethiopia. Using books, journal articles, and legislation, the study has found that those bilateral investment treaties have a role in securing international investments for Ethiopia. It has also found that BITs do not only safeguard foreign investors but can also attract more investment. The study concludes by providing a list of recommendations, highlighting the benefits of BITs for Ethiopia.

CHAPTER ONE

1.1. GENERAL INTRODUCTION

Economic history demonstrates the vulnerability of foreign investors.¹Treaties aimed specifically at protecting private foreign investment are called bilateral investment treaties.² Bilateral investment treaties are legal instruments under international law between two contracting countries.³ They set forth standards for the management of foreign investment in areas such as the expropriation of property, the repatriation of funds, and the settlement of disputes.⁴ Germany, having lost almost all of her foreign investment during the Second World War, was the first country to sign a BIT with Pakistan in 1959.⁵

At the highest level, BITs contain six core provisions which include: the right to national and most favoured nation treatment; protection against expropriation and fair, timely, and adequate compensation when it takes place; right to free transfer of capital and investment proceeds using a market-based exchange rate; a limitation on performance requirements, such as export

¹ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 1.

² Comeaux, PE and Kinsella, N.S “Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilisation Clauses, and MIGA & OPIC Investment Insurance” 1994 *New York Law School Journal of International and Comparative Law* 3 www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf Accessed on 2015-1-7.

³ Mina, W “Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?” 2010 *SALJ* 1 [http://www.african-review.com/Vol.%202%20\(1\)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf](http://www.african-review.com/Vol.%202%20(1)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf) Accessed on 2015-1-7.

⁴ Comeaux, PE and Kinsella, N.S “Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilisation Clauses, and MIGA & OPIC Investment Insurance” 1994 *New York Law School Journal of International and Comparative Law* 3 www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf Accessed on 2015-1-7.

⁵ Neumayer, E & Spess, L 2005 “Do bilateral investment treaties increase foreign direct investment to developing countries?” *London: LSER Research Online* 7 [http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

quotas; access to arbitration in the event of a dispute; and authority to select top managerial personnel of their choice.⁶

BITs have six core principles, which are access, reasonableness, security, non-discrimination, transparency, and due process.⁷ These six principles of BITs will be discussed in detail in Chapter Three. Any state could incorporate the substance of BIT obligations in its domestic legislation and thereby offer precisely the same protection without concluding a BIT.⁸

The issue is, therefore, what the use is of concluding BITs for Ethiopia? In other words, what is the role of bilateral investment treaties in securing foreign investment for Ethiopia, if the country can provide the protection provided by BITs in its domestic legislation?

1.2. ETHIOPIAN INVESTMENT LAW

The Ethiopian Investment Proclamation No. 769/2012 has as its purpose the encouragement and expansion of investment. The Investment Proclamation offers substantive protection, such as in the areas of access and remittance of funds, and safeguards against expropriation. For instance, the Investment Proclamation provides that, areas of investment open for foreign investors will be determined by a regulation. As in European countries access is subject to the application of local laws. It also allows any foreign investor to make remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance. This proclamation states further that no investment may be expropriated or nationalised, except when that is required on account of public interest, and then only in conformity with the requirements of the law. In addition, it provides that adequate compensation, corresponding to the prevailing market value, shall be paid in advance in a case of expropriation or nationalisation

⁶ Leo, B “Where are the BITs? How U.S. Bilateral Investment Treaties with Africa Can Promote Development” 2010 *Center for global development* www.cgdev.org/content/publications/detail/1424333
Accessed on 2015-1-7.

⁷ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 2.

⁸ *Idem* at 4.

of an investment for public interest. The Investment Proclamation has provisions similar to those of BITs and investment laws in other countries.⁹

⁹ Ethiopian Investment Proclamation “Investment Proclamation” No. 769/2012

<https://chilot.files.wordpress.com/2013/04/proclamation-no-769-2012-investment-proclamation.pdf>

Accessed on 2014-11-21.

CHAPTER TWO

2.1. HISTORY of BITs

The first BITs appeared during the closing years of the 1950s. Some trace their history back to the treaties of friendship, navigation, and commerce (FNC) concluded by the United States over centuries. The FNC treaties had the growth of international trade and the improvement of US international relations as their key goals, even though some investment provisions were included later. BITs, in contrast, are more clearly focused on foreign investment protection.¹⁰

At present we are in the era of economic globalisation. Economic globalisation refers to the fact that the increasing interdependence of world economies as a result of the growing scale of cross-border trade of commodities and services, flow of international capital and wide and rapid spread of technologies.¹¹ The new wave of globalisation, which began about 1980 and continues until present, differs from the previous waves of globalisation i.e. from the first wave of globalisation: 1870–1914 and the second wave of globalisation: 1945–80. This is shown by the facts that, firstly and most spectacularly, a large group of developing countries gained access to global markets. Secondly, other developing countries became increasingly marginalised in the world economy and suffered declining incomes and rising poverty. Thirdly, international migration and capital movements, which were negligible during second wave globalisation, have increased.¹²

¹⁰ Neumayer, E & Spess, L 2005 “Do bilateral investment treaties increase foreign direct investment to developing countries?” *London: LSE ResearchOnline* 7
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

¹¹ Shangquan, G “Economic Globalisation: Trends, Risks and Risk Prevention” 2000 *Committee for Development Policy (CDP) Background Paper* No. 1 ST/ESA/2000/CDP/1 1
http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf Accessed on 2014-12-30.

¹² Collier, P; Dollar, D; World Bank *Globalisation, growth, and poverty : building an inclusive world economy* The new wave of globalisation and its economic effects 2002 31
http://economia.unipv.it/pagp/pagine_personali/msassi/readinglist/globalization.pdf Accessed on 2014-12-24.

The global era in the history of international investment treaties began at the end of the 1980s.¹³ International investment agreements (IIAs) are a much broader concept than bilateral investment treaties. They include bilateral investment treaties, regional investment treaties signed by groups of states within a single region, and chapters of integrated trade and investment agreements that can be signed at the bilateral or regional level.¹⁴ This era reflects profound changes in the context in which international investment agreements were negotiated.¹⁵ In this era, the division that had characterised the Cold War era¹⁶ collapsed. For instance, in the Cold War era many writers had seen BITs as asymmetrical treaties to which developed countries unenthusiastically and, perhaps, unwisely adhered in order to stimulate and attract foreign investment. In the global era, states almost universally adopted the position that foreign investment could motivate economic prosperity, and they started jointly creating legal frameworks that would promote and defend international investment flows.¹⁷

¹³ Vandeveld, KJ "A brief history of international investment agreement" 2005 *University of California, Davis* Vol.12:157 183 <http://jilp.law.ucdavis.edu/issues/Volume%2012.1/van5.pdf> Accessed on 2014-6-16.

¹⁴ Mann, H "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities" February 2008 *International Institute for Sustainable Development* 3 www.iisd.org/pdf/2008/iaa_business_human_rights.pdf Accessed on 2015-1-7.

¹⁵ Vandeveld, KJ "A brief history of international investment agreement" 2005 *University of California, Davis* Vol.12:157 183 <http://jilp.law.ucdavis.edu/issues/Volume%2012.1/van5.pdf> Accessed on 2014-6-16.

¹⁶ The Cold War was the period from 1947-1988/9. The Cold War was driven by conflicting ideologies among the victorious allies in World War II. On one side stood the Soviet Union and the East European countries and, on the other side, stood the United States and Britain, supported by dozens of allied countries. (McNeill, J.R and Unger, C.R *Environmental histories of the cold war* 2010 1 [graduateinstitute.ch/files/live/sites/iheid/files/sites/international_history_politics/users/stratto9/public/Corinna_R._Unger_\(editor\)-Environmental_Histories_of_the_Cold_War.pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_history_politics/users/stratto9/public/Corinna_R._Unger_(editor)-Environmental_Histories_of_the_Cold_War.pdf) environmental histories of the cold war pdf Accessed on 2015-1-7).

¹⁷ Vandeveld, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 67.

Similarly, in the post-colonial era, BITs were concluded between a capital-exporting developed country and a capital-importing developing country.¹⁸ The post-colonial era began at the end of the Second World War (1945) and continued until the collapse of the Soviet Union (1991). Three events in particular describe this period. The first event was when the victorious allies began to show a consensus in favour of liberalising trade. The second event was the process of de-colonialisation that began after the war and that led to the creation of newly-independent but economically-undeveloped countries. The third event was the emergence of the socialist bloc led by the Soviet Union which led to massive expropriations of the private sector, including foreign-held assets.¹⁹ In the global era, the number of investment agreements among developing countries has grown remarkably as developing countries have become capital exporters, often to other developing countries.²⁰ According to the World Investment Report 2011, 20 of the 54 BITs signed in 2010 were between developing and/or transition economies.²¹

In the global era, the very objective of investment treaties has been undergoing changes. While in the Cold War era, BITs were meant to protect the investments of developed countries in the territory of developing countries, chiefly against expropriation, in the global era agreements are increasingly intended to liberalise investment flows. They have become instruments of globalisation, eliminating bottlenecks to trade and investment, much in the same way as in the eighteenth and nineteenth centuries when it was the objective to establish commercial relations between countries.²²

¹⁸ Vandeveld, KJ "A brief history of international investment agreement" 2005 *Universty of California, Davis* Vol.12:157 183 <http://jilp.law.ucdavis.edu/issues/Volume%2012.1/van5.pdf> Accessed on 2014-6-16.

¹⁹ *Idem* at 161.

²⁰ *Idem* at 183.

²¹ UNCTAD, *World investment report 2011—non-equity modes of international production and development* 2011 100 unctad.org/en/PublicationsLibrary/wir2011_en.pdf Accessed on 2015-1-17.

²² Vandeveld, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 67.

Finally, the global era is also characterised by the number of countries that are now party to the BIT; for instance, more than 170 countries are now party to at least one BIT. The programme of entering in to a BIT is a truly global programme.²³

There are only a few (11) BITs among developed countries. The reason for this is that investment relations among developed countries are addressed through numerous mechanisms adopted under the patronage of the OECD to which all developed nations belong.²⁴

Almost every provisions that are now considered characteristic came into being in at least a few BITs in the 1960s, some provisions, however, did not become widespread until much later. For instance, the investor-state dispute provision did not emerge at all until the late 1960s. The increase in the number of provisions generally has been to make the BITs stronger. Secondly, some provisions have become more complex and meticulous in due course. For example, the investor-state dispute provision at first contained little more than the assent to arbitration before the International Centre for Settlement of Investment Dispute (ICSID), while more recent forms of that provision frequently consist of consent to arbitration before multiple fora, and they deal with a range of other procedural concerns. Some recent BITs²⁵ also have specified substantive protective clauses in greater detail than existed in the earlier BITs, often with a view to clarifying their reach or substance. Thirdly, BITs more often take account of liberalisation obligations than

²³ Vandeveld, KJ "A brief history of international investment agreement" 2005 *Universty of California, Davis* Vol.12:157 183 <http://jilp.law.ucdavis.edu/issues/Volume%2012.1/van5.pdf> Accessed on 2014-6-16.

²⁴ Hamilton, CA and Rochwerger, PI "Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties" 2005 *International law review* 6
http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf
Accessed on 2015-1-7.

²⁵ For example, the US and Canadian Models and the Mexico-Korea BIT provide that a tribunal may award monetary damages or restitution of property only in the final award. If the tribunal, however, awards restitution, its award must also provide for the possibility of pecuniary compensation in lieu thereof where restitution is not practicable. But, in any case, the tribunal must not order punitive damages as an award. (Houde, M, OECD *International investment perspectives 2006* Novel features in recent OECD bilateral investment treaties 18 Sep 2006 174
<http://www.oecd.org/daf/inv/internationalinvestmentagreements/40072428.pdf> Accessed on 2015-1-7).

they did in the past. For example, some BITs provide national treatment with regard to the right to starting investment and prohibit the imposition of certain performance requirements as a condition for the establishment of investment. The provision on unhindered transfer, which has both a protection and liberalisation rule, is much less often subordinated to local law in later BITs than it was in earlier BITs. Fourthly, some modern BITs have included more provisions which are anticipated to promote transparency in the treatment of investment and investor-state arbitration. The BITs taken as a whole have, thus, become more protective, liberalised, transparent, and complex over time.²⁶

Generally BITs have come through three stage models. During the initial wave of these treaties, the adoption of a BIT helped to reassure foreign investors by offsetting weak and instable domestic institutions in host countries. These treaties provided capital-exporting countries with auxiliary commitment mechanisms in addition to those provided by the legal institutions of host countries. The majority of BITs were, thus, formed between an economically-advanced, capital-exporting country and a poorer "capital-hungry" nation.²⁷

During the second wave of BITs, on the other hand, the majority of these treaties were signed by pairs of developing countries. This shift symbolised a growing tendency for states to view the forming of BITs as a fitting act for states to provide institutional protection to foreign investments, irrespective of any specific pressure from a potential foreign investor or its government. The drive for such behaviour could have been a rational cascade in which countries sign such treaties because similar countries are doing so. Another supportive explanation is that developing nations began to enter into an increasing number of these treaties with the intention of demonstrating commitment to what has become a global standard or norm about the treatment of FDI by a host state.²⁸

The third wave of BITs started with the growing realisation of the impending cost associated with these treaties, set off in the aftermath of the 1998-2000 East Asian financial crises. As both the potential costs and benefits of signing of BITs have become easier to see, only a fewer

²⁶ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 7.

²⁷ Jandhyala, S, Henisz, WJ and Mansfield, ED "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy" 2011 *Journal of Conflict Resolution* 1048 <http://jcr.sagepub.com/content/55/6/1047> Accessed on 2015-1-7.

²⁸ *Idem* at 1049.

countries are now blindly emulating their peers, and BITs that have been entered into are being driven by strategic considerations.²⁹

2.2. DEFINITION of BITs

History demonstrates the vulnerability of the foreign investors in the territory of other states.³⁰ Political risk, i.e. non-commercial risk such as expropriation and civil disturbance³¹, may be considerably reduced if a treaty to defend private investment is in place between the country where the investment is to be made and the investor's country of origin. Treaties aimed specifically at defending private foreign investment are known as bilateral investment treaties.³² Bilateral investment treaties are legal instruments under international law between two contracting countries, the aim of which is to establish clear, simple, and enforceable rules for the reciprocal protection of foreign investment.³³ Those treaties set forth standards for the treatment of foreign investment in areas such as the expropriation of property, the repatriation of funds, and the settlement of disputes.³⁴

²⁹ Jandhyala, S, Henisz, WJ and Mansfield, ED "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy" 2011 *Journal of Conflict Resolution* 1049 <http://jcr.sagepub.com/content/55/6/1047> Accessed on 2015-1-7.

³⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 1.

³¹ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 405.

³² Comeaux, PE and Kinsella, N.S "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilisation Clauses, and MIGA & OPIC Investment Insurance" 1994 *New York Law School Journal of International and Comparative Law* 3 www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf Accessed on 2015-1-7.

³³ Mina, W "Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?" 2010 *SALJ* 1 [http://www.african-review.com/Vol.%202%20\(1\)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf](http://www.african-review.com/Vol.%202%20(1)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf) Accessed on 2015-1-7.

³⁴ Comeaux, PE and Kinsella, N.S "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilisation Clauses, and MIGA & OPIC Investment Insurance" 1994 *New York Law School Journal of International and Comparative Law* 3 www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf Accessed on 2015-1-7.

While investors can, and should, use other methods to reduce political risk, such as concession agreements and governmental sponsored insurance programmes, BITs provide a strong incentive for a host state to honour its obligations under both international law and its agreements with the investor. When the host state violates the rights guaranteed to the investor in terms of the BITs, the state has not only violated norms of customary international law, but has also breached a treaty with the investor's home state.³⁵

There is currently no comprehensive multilateral instrument for the regulation of foreign investment. Foreign investment is, therefore, subject only to a varied collection of BITs. Regional investment treaties, and, at the multilateral level, the World Trade Organisation's limited-scope Agreement on Trade Related Investment Measures, and the General Agreement on Trade in Services.³⁶

The success of a BIT programme depends upon the readiness of the host state to agree to the legal responsibility imposed by the treaties. More specifically, the intention of BITs is to create conditions under which foreign investors are more likely to enter the host state market.³⁷

2.3. GENERAL ELEMENTS of BITs

Typically, BITs contain six central provisions: the right to national and most-favoured nation treatment; protection against expropriation, and fair, timely, and adequate compensation when it takes place; the right to free transfer capital and investment proceeds using market based exchange rate; the limitation on performance requirements, such as export quotas; the access

³⁵ Comeaux, PE and Kinsella, N.S "Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilisation Clauses, and MIGA & OPIC Investment Insurance" 1994 *New York Law School Journal of International and Comparative Law* 3 www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf Accessed on 2015-1-7.

³⁶ Mosoti, V "Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?" 2005 *Northwestern Journal of International Law & Business* 101 <http://scholarlycommons.law.northwestern.edu/njilb/vol26/iss1/9/> Accessed on 2015-1-7.

³⁷ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 2.

to arbitration in the event of a dispute; and the authority to select top managerial personnel of their choice.³⁸

BITs confer rights upon a foreign investor, and, while the specific wording of BITs varies, it tends to contain the provisions described below. Most countries have a Model BIT which serves as a template and is typically used as a point of departure to conduct negotiations of new BITs. “The following provisions taken from the United State Model BITs are examples of rights BITs commonly confer.”³⁹

A national treatment provision provides that foreign investors have the right not to be treated less favourably than domestic investors in like circumstances.

A most-favoured-nation treatment stipulates that foreign investors have the right not to be treated less favourably than investors of any other country.

A fair and equitable treatment provision provides that foreign investors have the right to minimum standards of treatment.

The expropriation provision ensures that foreign investors have the right to be compensated for expropriations.”

Most BITs have a dispute resolution clause that constitutes unilateral readiness to resolve disputes by arbitration, extended to the investor by the state and which the investor accepts by initiating arbitration under the treaty.⁴⁰ BITs have a number of common elements. These treaties are bilateral, that is, they involve two states, often a capital-exporting and capital-importing state. They are formally reciprocal, that is, for example, the Germany-Pakistan treaty applies equally to German investors in Pakistan and to Pakistani investors in Germany. The treaties deal more or less exclusively with investment issues, excluding, for example, trade-related

³⁸ Leo, B “Where are the BITs? How U.S. Bilateral Investment Treaties with Africa Can Promote Development” 2010 *Center for global development* www.cgdev.org/content/publications/detail/1424333 Accessed on 2015-1-7.

³⁹ Sheffer, MW “Bilateral Investment Treaties: A Friend or Foe to Human Rights?” 2011 *Denv. J. Int’l L. & pol’y.* 488 <http://heinonline.org/> Accessed on 2014-3-25.

⁴⁰ *Ibid.*

issues, and they typically define investment very broadly. Most BITs extend to the investor a common core of substantive promises of favourable treatment.⁴¹

BITs seek to provide economic gains to both capital-importing companies as well as to firms from capital-exporting countries. For capital-importing countries, they help to attract foreign direct investment by companies located in the partner country's home territory. For capital-exporting countries, BITs provide protection to investors of those countries who are worried about the quality of institutions and the rule of law in developing countries.⁴²

While most BITs concluded in the last decade have a comparable basic structure and content, discrepancy exists both in respect of the underlying rationale and the degree of protection accorded by the specific provisions. There are, at present, two model BITs in operation, namely the 'European model', based on the Abs-Shawcross Draft Convention,⁴³ and the 'North American Model' developed in the early 1980s.⁴⁴ The Abs-Shawcross Draft Convention of 1959 was a revised version of a draft instrument entitled International Convention for the Mutual Protection of Private Property Rights in Foreign Countries. Which was published by the Society to Advance the Protection of Foreign Investments, an organisation of German business people. The aim of Abs-Shawcross Draft Convention was to create a multilateral agreement to protect private foreign investment.⁴⁵ The Draft Convention was considered by the Organisation for

⁴¹ Yackee, JW "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" 2011 *Virginia Journal of International Law* 402 <http://www.vjil.org/articles/do-bilateral-investment-treaties-promote-foreign-direct-investment-some-hints-from-alternative-evidence> Accessed on 2015-1-7.

⁴² Shoaf, JR, B.A. *A BIT of Regulatory Chill? Assessing the effect of bilateral investment treaties on the enactment of environmental regulations* 2013 Washington, DC Thesis 3 <https://repository.library.georgetown.edu/handle/10822/558655> Accessed on 2015-1-7.

⁴³ UNCTAD, "Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention)" United Nations, New York 2000 *International Investment Instruments: A Compendium Volume V, Non-Governmental Instruments* <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf>. Accessed on 2015-2-6.

⁴⁴ Eilmansberger, T "Bilateral Investment Treaties and EU Law" 2009 *Common Market Law Review* 386 www.cesruc.org/uploads/soft/130303/1-130303144F4.pdf Accessed on 2015-1-7.

⁴⁵ UNCTAD, "Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention)" 2000 *International Investment Instruments: A Compendium Volume V, Non-Governmental Instruments*

European Economic Co-operation (OEEC) and adopted by the OECD in 1962 with some revisions in 1967 as the OECD Convention on the Protection of Foreign Property.⁴⁶

The major distinction between the two models is that the former applies largely to the post-establishment stage⁴⁷, while the latter covers investment at the pre-establishment phase⁴⁸ as well. Although most recent BITs follow the traditional 'European model' approach, the number of agreements including pre-establishment rights is on the increase. Such BITs have been concluded primarily by Canada, the United States, and, more recently, Japan.⁴⁹

The two elements distinguishing contemporary BITs from previous bilateral agreements concerning investment are the pervasive use of MFN and arbitration clauses.⁵⁰

Recent BITs delineate investment to cover all descriptions of the transfer of, and ownership in, financial, tangible rights, and claims of an economic value which correspond to, or are linked to, an investment in the economic sense.⁵¹

<https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf>. Accessed on 2015-2-6.

⁴⁶ Eilmansberger, T "Bilateral Investment Treaties and EU Law" 2009 *Common Market Law Review* 386 www.cesruc.org/uploads/soft/130303/1-130303144F4.pdf Accessed on 2015-1-7.

⁴⁷ The post-establishment phase is the stage of the conditions of operation in the host country for enterprises owned or controlled by non-established or non-resident investors. (Negotiating Group on the Multilateral Agreement on Investment (MAI) (Note by the Chairman) "Treatment of investors and investments (Post/pre-establishment)" 11 October 1995 *Organisation for Economic Co-operation and Development* 3 <http://www1.oecd.org/daf/mai/pdf/ng/ng953e.pdf> Accessed on 2015-1-7).

⁴⁸ The pre-establishment phase is the stage of making new investments, including the participation in existing enterprises, by foreign or non-resident investors. (Negotiating Group on the Multilateral Agreement on Investment (MAI) (Note by the Chairman) "Treatment of investors and investments (Post/pre-establishment)" 11 October 1995 *Organisation for Economic Co-operation and Development* 3 <http://www1.oecd.org/daf/mai/pdf/ng/ng953e.pdf> Accessed on 2015-1-7).

⁴⁹ Eilmansberger, T "Bilateral Investment Treaties and EU Law" 2009 *Common Market Law Review* 386 www.cesruc.org/uploads/soft/130303/1-130303144F4.pdf Accessed on 2015-1-7.

⁵⁰ Schicho, L "Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?" 2012 *Department of European Legal Studies Research Paper in Law 2/2012* 13 http://aei.pitt.edu/39283/1/researchpaper_2_2012_schicho_final.pdf Accessed on 2015-1-7.

⁵¹ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 308.

2.4. THE DIFFERENT ACADEMIC OPINIONS on BITs and FDI

The UNCTAD's 1998 study provided the first important economic study of the relationship between BITs and FDI⁵² using both time series and cross sectional analyses.⁵³ The authors analyse time-series data for 200 BITs from the period 1971 to 1994. More specifically, they test the bilateral investment flows between two countries that have signed a BIT with each other for different time frames using T-statistics.^{54 55}

Test statistic (T-statistic) refers to a method of statistic by which a quantity is calculated from the sample of data.⁵⁶

The time series study (a time series is a sequence of data points, measured typically at successive points in time, spaced at uniform time intervals) found that BITs have an upbeat, albeit not so strong, effect on FDI, whilst the cross-sectional analysis showed a positive impact of BITs on the total level of FDI flow and on FDI flows relative to GDP. "The conclusion of the cross-sectional analysis generally is that the leading determinant is market size with BITs playing an insignificant and secondary role in attracting FDI."⁵⁷

⁵²Yackee, JW "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" 2011 *Virginia Journal of International Law* 407 <http://www.vjil.org/articles/do-bilateral-investment-treaties-promote-foreign-direct-investment-some-hints-from-alternative-evidence> Accessed on 2015-1-7.

⁵³ Mina, W "Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?" 2010 *SALJ* 6 [http://www.african-review.com/Vol.%20%20\(1\)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf](http://www.african-review.com/Vol.%20%20(1)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf) Accessed on 2015-1-7.

⁵⁴ This term will be explained below.

⁵⁵ Sasse, JP *An economic analysis of bilateral investment treaties* 2010 69 <http://s1.downloadmienphi.net/file/downloadfile1/147/1405300.pdf> Accessed on 2014-3-19.

⁵⁶ Stern, R, Dale, I and Leidi, S "Glossary of statistical terms" 20 http://www.reading.ac.uk/ssc/n/SADC%20DVD/Resources/Glossaries/Statistical_Glossary/Statistical_Glossary.pdf Accessed on 2015-1-7.

⁵⁷ Mina, W "Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?" 2010 *SALJ* 6 [http://www.african-review.com/Vol.%20%20\(1\)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf](http://www.african-review.com/Vol.%20%20(1)/Bilateral%20Investment%20Treaties%20and%20FDI.pdf) Accessed on 2015-1-7.

Up to now, there are only four eminent studies on whether BITs increase FDI flows to developing countries, all of which report conflicting evidence.⁵⁸

2.4.1. Hallward-Driemeir study

The first notable study was made by Hallward-Driemeir in 2003. Its aim was to look at whether BITs actually deliver their expected benefits of stimulating additional foreign direct investment in developing countries and providing fair protection to the property of foreign investors in high-risk business environments.⁵⁹

Hallward-Driemeir found little empirical support that BITs have actually encouraged additional investment in developing countries. She also found that BITs have not succeeded in improving property rights in developing countries which have weak domestic institutions, but that they do improve property rights in developing nations that already have convincingly strong home institutions.⁶⁰ Home institutions are such as non-corrupt, clean bureaucracies, clear and effective rulings by the courts, the rule of law, limits on the use and abuse of executive power, or the electoral accountability of the executive.⁶¹

2.4.2. Tobin & Rose-Ackerman study

The second study by Tobin and Rose-Ackerman in 2005 found that BITs do have a positive impact on FDI flows to developing countries. This positive effect is, however, greatly dependent on the political and economic contexts of both FDI and BITs. Tobin and Rose-Ackerman found that more stable political and economic environments are necessary for BITs to have an impact on FDI. More importantly, their results demonstrate that the impact of a BIT programme can be

⁵⁸ Hummer, MR, B.S *Do Bilateral Investment Treaties Accomplish their Policy Objectives? A Case for Developing & OECD Member Countries* 2008 Washington, D.C. Thesis 13
<http://hdl.handle.net/10822/553781> Accessed on 2015-1-7.

⁵⁹ *Ibid.*

⁶⁰ *Idem* at 15.

⁶¹ Rosendorff, B.P and Shin, K "Importing Transparency: The Political Economy of BITs and FDI Flows" August 4, 2012 *Wilf Department of Politics, New York* 4
<http://irworkshop.sites.yale.edu/sites/default/files/RosendorffShinAPSA2012.pdf> Accessed on 2014-3-23.

understood only within a broader context and understanding of the political and economic environment of the host country.⁶²

2.4.3. Neumayer and Spess study

The third study, by Erice Neumayer and Laura Spess in 2005, provides evidence that a greater number of BITs concluded with OECD member states truly increased FDI flows to developing countries.⁶³

2.4.4. Emma Aisbett study

The last study by Aisbett in 2007, claims that policy adoption to promote FDI is endogenously determined. In the case of BITs, there is potential internal cause owing to both⁶⁴ reverse causality (in the sense that increasing FDI flows increase the probability of a BIT being formed) and omitted variables (such as the host's investment climate).⁶⁵ For instance, increased FDI flows in one year may cause a BIT to be signed in the next, or an improvement in the investment climate of the host may cause a simultaneous increase in both FDI and BIT participation.⁶⁶

Aisbett's study concludes that while BITs and FDI appear initially to be highly correlated, this finding is not robust enough to conclude that BITs have a casual effect on FDI.⁶⁷

The view of the author of this dissertation is that BITs cause FDI to flow to developing countries. As can be seen from the above references, the studies support the position, albeit to varying degrees, that the signing of BITs can stimulate FDI. Only Aisbett has concluded that BITs do not

⁶² Hummer, MR, B.S *Do Bilateral Investment Treaties Accomplish their Policy Objectives? A Case for Developing & OECD Member Countries* 2008 Washington, D.C. Thesis 16
<http://hdl.handle.net/10822/553781> Accessed on 2015-1-7.

⁶³ *Idem* at 19.

⁶⁴ Aisbett, E "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation" 2007 *Munich Personal RePEc Archive* 3
<http://www.escholarship.org/uc/item/72m4m1r0.pdf;origin=repeccitec> Accessed on 2015-1-7.

⁶⁵ *Idem* at 13.

⁶⁶ *Idem* at 3.

⁶⁷ *Idem* at 37.

have a causal effect on FDI. Moreover, the study done by Neumayer and Spess has provided evidence that a greater number of BITs signed with OECD members actually increase the FDI flow to developing countries. There is, thus, evidence that can support my position, viz. that a BIT could actually increase FDI.

BITs are unlikely to be alike in their effect on incoming FDI flows. Signing a BIT with a major capital exporter such as Germany or the United States of America, therefore, has a larger impact on FDI inflows than signing a BIT with minor capital exporters such as New Zealand or Portugal. The signing of BITs, however, sends out a signal to potential investors that the developing country is generally serious about the protection of foreign investment. The encouragement of FDI flows, thus, needs not to be restricted to investors from developed countries that are BIT partners of the developing countries. Clearly, BITs can therefore, have a positive spill-over effect.⁶⁸

BITs derived their economic justification from two arguments both of which explain the fact that sometimes investment policies lack credibility. As a result of this lack of credibility, an efficient investment, which would otherwise have taken place, is not carried out in the absence of a BIT. These arguments are 'adverse selection' and 'time inconsistency'.⁶⁹

Time inconsistency refers to the fact that there is no long-term credible commitment possible from the side of the host country, i.e. the host country government will always have incentives, in the short run, to change the terms of existing foreign investments when the short-run benefits exceed the long-term costs.⁷⁰

Adverse selection is relevant to see how BITs can have a positive spill-over effect. *Adverse selection* refers to the fact that information about the true intentions of a government may be

⁶⁸ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 12
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

⁶⁹ Bellak, C "How Bilateral Investment Treaties Impact on Foreign Direct Investment: A Meta-analysis of Public Policy" August 2013 *Vienna University of Economics and B.A. Department of Economics* 8 http://www2.gre.ac.uk/data/assets/pdf_file/0006/822705/Christian-Bellak-How-Bilateral-Investment-Treaties-Impact-on-Foreign-Direct-Investment-A-Meta-analysis-of-Public-Policy.pdf
Accessed on 2014-3-21.

⁷⁰ *Ibid.*

private, i.e. when observers lack information about the beliefs and values that are motivating a government to pursue a certain policy.⁷¹

BITs can remedy the credibility problem by *ex-ante* costs (signals). *Signalling* in the context of BITs and FDI may be defined as sending a broadly received 'signal' that a country is trustworthy. In other words, doubts about the true intentions of the host state government, stemming from the information asymmetry can be reduced on the side of the investors as they "update" their beliefs when the host country signs/ratifies a BIT.⁷²

BITs, therefore, have the potential to overcome the problems of adverse selection (through signalling). An efficient agreement between the host state and the investor can be reached because the signalling mechanism enables commitments by the host state to be seen as credible by the investor and so helps to overcome the credibility problem arising from the information asymmetry. Efficient location choices can, thus, be made, and BITs should, therefore, have a positive effect on FDI.⁷³

Although the commitment effect may relate only to investors from BIT partner countries, the signalling effect which benefits investors from all countries has a positive spill-over effect on FDI.⁷⁴

2.5. CRITICS of BITs

Since its implementation the BIT initiative has come under fire. Criticisms relate, firstly, to the fact that, in practice, the scale of benefits is often seen to be in favour of the developed nation

⁷¹ Bellak, C "How Bilateral Investment Treaties Impact on Foreign Direct Investment: A Meta-analysis of Public Policy" August 2013 Vienna University of Economics and B.A. Department of Economics 8 http://www2.gre.ac.uk/_data/assets/pdf_file/0006/822705/Christian-Bellak-How-Bilateral-Investment-Treaties-Impact-on-Foreign-Direct-Investment-A-Meta-analysis-of-Public-Policy.pdf

Accessed on 2014-3-21.

⁷² *Idem* at 10.

⁷³ *Idem* at 11.

⁷⁴ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" London: LSE Research Online 12 [http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

over the host nation.⁷⁵ It was originally the OECD members that began concluding reciprocal BITs with developing countries who had demonstrated some willingness to co-operate. Developed countries made negotiation offers to these developing countries individually. These offers were made on the basis of the provisions in the draft OECD Convention for the Protection of Foreign Assets.^{76 77} Given the fact that the origin of BITs stems from these former colonial powers with the largest economies now, it should, therefore, be recognised that “existing international investment agreements are based on a 50-year-old model that remains focused on the interest of investors from developing countries”.⁷⁸ While a reform is now being made to the existing model BIT, the modern BITs are still largely drafted to benefit the developed countries investing in the developing nation. This often leads to a situation where the developed country is reaping the largest benefit from the agreement.⁷⁹

⁷⁵ Hamilton, CA and Rochwerger, PI “Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties” 2005 *International law review* 20
http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf
Accessed on 2015-1-7.

⁷⁶ Decisions, Recommendations and other Instruments of the Organisation for Economic Co-Operation and Development “Convention on the Protection of Foreign Property” drafted on 12 October 1967 not yet entered into force
<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=242&InstrumentPID=237&Language=en&Book=> Accessed on 2015-1-7.

⁷⁷ Juillard, P, Pro “Bilateral investment treaties in the context of investment law” 28-29 May 2001 *Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe (OECD)* 5
www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf Accessed on 2014-3-20.

⁷⁸ Sheffer, MW “Bilateral Investment Treaties: A Friend or Foe to Human Rights?” 2011 *Denv. J. Int'l L. & pol'y.* 491 <http://heinonline.org/> Accessed on 2014-3-25.

⁷⁹ Hamilton, CA and Rochwerger, PI “Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties” 2005 *International law review* 20
http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf
Accessed on 2015-1-7.

The second criticism relates to the BITs' ability to limit state regulatory power.⁸⁰ The extent of interference of BITs with domestic regulatory sovereignty is substantial. In fact, practically any public policy regulation can potentially be challenged through the dispute settlement mechanism as long as it impacts on foreign investments.⁸¹ Critics admit that "BITs seriously restrict the ability of the host states to regulate foreign investment". In concluding BITs, developing countries are "trading sovereignty for credibility".⁸²

Thirdly, the arbitration clauses of the BITs allow individual investors to force the government of a country into international arbitration if that country enacts any regulation that in some way affects their investment contract. These arbitration clauses could open the door for unhappy investors to sue the government of these countries for a breach of treaty rights. In this way the unhappy investor can use the clause for defending any failure resulting from his decision relative to his investment. Such litigation can be quite expensive and damaging to the developing country's government and economic soundness.⁸³

Fourthly, criticism of the BITs stems from the fact that BIT disputes are often resolved in secret. Preferences for commercial confidentiality often prohibit public knowledge of the arbitration process.⁸⁴ Although the resolution clause often requires the outcome of the arbitration to remain private and public access to the decision be restricted, from a public point of view this lack of

⁸⁰ Sheffer, MW "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" 2011 *Denv. J. Int'l L. & pol'y.* 496 <http://heinonline.org/> Accessed on 2014-3-25.

⁸¹ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 10
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

⁸² *Idem* at 11.

⁸³ Hamilton, CA and Rochwerger, PI "Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties" 2005 *International law review* 21
http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf
Accessed on 2015-1-7.

⁸⁴ Sheffer, MW "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" 2011 *Denv. J. Int'l L. & pol'y.* 494 <http://heinonline.org/> Accessed on 2014-3-25.

access could be harmful. Many argue that the public has the right to know about the outcome of cases.⁸⁵

The ICSID offers the greatest level of transparency; all ICSID pending and concluded cases are available to the public, including the subject matter of the arbitration, party names, date of registration, composition of the tribunal, and the procedural timeline. Actual ICSID arbitration tribunals, however, cannot be described as completely transparent. Information on the parties' arguments, the minutes, and other records of the proceeding are not made available, and the parties may agree to keep the contents of the final award confidential. Moreover, all proceedings are closed to the public unless both parties agree otherwise.⁸⁶

Other investment tribunals that offer much less transparency are, for example, the UNCITRAL whose rules require that awards are not published unless both parties consent to their being so. Consequently, an unknown number of BIT arbitration cases have been finished without any public disclosure or any ability of interested observers to monitor and analyse developments in the investment law system.⁸⁷

Fifthly, criticism of the BITs comes with the recognition that the BIT agreement is a finite measure of regulating trade. A BIT and the policies that it declares will last only as long as the agreement lasts. This could make for a somewhat insecure investment situation when a BIT is due to be terminated and not extended. As BITs last for a fixed period of time, the problem of having to renegotiate an agreement with a country every five or so years arises. The expense of this problem is somewhat lightened by the fact that the BIT is based on a model draft. However,

⁸⁵ Hamilton, CA and Rochwerger, PI "Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties" 2005 *International law review* 24

http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf

Accessed on 2015-1-7.

⁸⁶ Sheffer, MW "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" 2011 *Denv. J. Int'l L. & pol'y.* 494 <http://heinonline.org/> Accessed on 2014-3-25.

⁸⁷ *Idem* at 495.

the fact that BITs last for such a limited period of time makes them more expensive and time-consuming to maintain than other forms of trade treaties.⁸⁸

Sixthly, criticism of the BITs regime is that, thus far, international investment law and human rights law have existed in separate spheres. Human rights norms are absent in the development of domestic investment policies and in the formation of BITs. A state's duty to protect against non-state abuses is part of the very foundation of the international human rights regime. Governments, however, often keep human rights policy segregated from the development of policies regarding investment. This often results in circumstances where departments and agencies which directly shape business practices typically work in isolation from, and uninformed by, their government's own human rights obligations and agencies.⁸⁹

Arbitrations of investment disputes and disputes arising under BITs are generally treated as solely commercial disputes. Human rights, typically, have little if any role to play in such arbitrations. Moreover, the jurisdiction of the arbitral tribunal to address human rights violations will depend on the specific wording of the underlying BIT.⁹⁰

The fact that investment treaties are silent on human rights issues does not, however, mean that human rights issues are irrelevant to disputes that arise between investors and their host governments. Certainly, there are several ways in which human rights may be relevant to investment treaty disputes between governments.⁹¹

⁸⁸ Hamilton, CA and Rochwerger, PI "Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties" 2005 *International law review* 24

http://www.hamiltonabogados.es/downloads/publications/2005_New_York_Intl_Law_Review.pdf

Accessed on 2015-1-7.

⁸⁹ Sheffer, MW "Bilateral Investment Treaties: A Friend or Foe to Human Rights?" 2011 *Denv. J. Int'l L. & pol'y.* 493 <http://heinonline.org/> Accessed on 2014-3-25.

⁹⁰ *Ibid.*

⁹¹ Peterson, LE "Human rights and bilateral investment treaties: Mapping the role of human rights law within investor-state arbitration" 2009 *Rights & Democracy (International Centre for Human Rights and Democratic Development)* 23 www.business-humanrights.org/.../human-rights-and-bilateral-investment-treaties-peterson-2009.pdf Accessed on 2014-3-27.

In numerous arbitrations between foreign investors and their host governments, arbitrators (and/or counsel for investors) have referred to human rights jurisprudence in the course of interpreting and applying the protections owed to investors under investment treaties. This has, however, been done without much theoretical explanation for the reason for resorting to human rights jurisprudence.⁹²

The rise of a human rights discourse in investment arbitration has happened in two distinct ways. Investors have raised human rights arguments to support their claims that BIT provisions have been breached. On the other hand, governments have used the human rights of their citizens to defend allegations of treaty breaches.⁹³

The most visible circumstance where a government's human rights obligations to those living within its territory may come into the frame of investment arbitrations is in relation to foreign investments in the water and sanitation sector.⁹⁴

Arbitration tribunals have limited jurisdiction, and the function of arbitrators is usually limited to finding and determining whether breaches exist with regard to a particular BIT provision. The arbitrators are not empowered to look into whether human rights have been violated.⁹⁵ The

⁹² Peterson, LE "Human rights and bilateral investment treaties: Mapping the role of human rights law within investor-state arbitration" 2009 *Rights & Democracy (International Centre for Human Rights and Democratic Development)* 23 www.business-humanrights.org/.../human-rights-and-bilateral-investment-treaties-peterson-2009.pdf Accessed on 2014-3-27.

⁹³ Booth, C QC "Is There a Place for Human Rights Considerations in International Arbitration?" 2009 *ICSID Review-foreign investment law journal* 87 http://www.matrixlaw.co.uk/uploads/other/21_08_2013_11_50_47_Is%20there%20a%20Place%20for%20Human%20Rights%20Considerations%20in%20International%20Arbitration%20ICSID%20Review.pdf Accessed on 2014-3-27.

⁹⁴ Peterson, LE "Human rights and bilateral investment treaties: Mapping the role of human rights law within investor-state arbitration" 2009 *Rights & Democracy (International Centre for Human Rights and Democratic Development)* 26 www.business-humanrights.org/.../human-rights-and-bilateral-investment-treaties-peterson-2009.pdf Accessed on 2014-3-27.

⁹⁵ Ayala, YS "Restoring the balance in bilateral investment: incorporating human right clauses" 2009 *Article of investigation* 151 www.academia.edu/.../Restoring_the_balance_in_bilateral_investment_treaties_incorporating_human_rights_clauses Accessed on 2014-3-27.

arbitrators in investment treaty disputes, therefore, have no jurisdiction to hold states liable for any breach of their human rights obligations.⁹⁶

For example, the tribunal in *Biloune v. Ghana* found that it was not even competent to decide on the alleged human rights violations inflicted upon the investor. It held:

“... contemporary international law recognises that all individuals, regardless of nationality, are entitled to fundamental human rights..., which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign national are entitled, or that this Tribunal is authorised to deal with allegations of violation of fundamental human rights.”⁹⁷

Those tribunals can take into consideration the rules of international law in order to apply and interpret the BITs. They cannot, however, justify the breach of a BIT on the grounds of the state’s compliance with human rights obligations, especially when the breach of the BIT provision has not been in consideration of one of those principles that have been considered *jus cogens*.⁹⁸

Most BIT arbitrators, furthermore, have commercial backgrounds and are not familiar with matters relating to human rights related laws. Even if an arbitral tribunal found it appropriate to address human rights-related matters, the arbitrators may not be fully versed in how to proceed.

⁹⁶ Peterson, LE “Human rights and bilateral investment treaties: Mapping the role of human rights law within investor-state arbitration” 2009 *Rights & Democracy (International Centre for Human Rights and Democratic Development)* 25 www.business-humanrights.org/.../human-rights-and-bilateral-investment-treaties-peterson-2009.pdf Accessed on 2014-3-27.

⁹⁷ Case “Biloune and Marine Dive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, Award on Jurisdiction and Liability” 27 October 1989, 95 *ILR* 184. As cited by Reinisch, A and Kriebaum, U *The law of international relations: liber amicorum HansPeter Neuhold* Privatising human rights the interface between international investment protection and human rights 2007 187 www.univie.ac.at/intlaw/kriebaum/pub_uk_10.pdf Accessed on 2014-3-24.

⁹⁸ Ayala, YS “Restoring the balance in bilateral investment: incorporating human right clauses” 2009 *Article of investigation* 154 www.academia.edu/.../Restoring_the_balance_in_bilateral_investment_treaties_incorporating_human_rights_clauses Accessed on 2014-3-27.

Equally, many human rights experts would similarly lack the necessary expertise in international investment law to serve as arbitrators in investment arbitration.⁹⁹

The relationship between human rights and foreign investment law is recognised as complex, yet observers generally agree that international investment law and arbitration have an adverse impact on the promotion and protection of human rights.¹⁰⁰

⁹⁹ Sheffer, MW “Bilateral Investment Treaties: A Friend or Foe to Human Rights?” 2011 *Denv. J. Int’l L. & pol’y.* 495 <http://heinonline.org/> Accessed on 2014-3-25.

¹⁰⁰ Fry, JD “International human rights law in investment arbitration: evidence of international law’s unity” 2007 *Journal of comparative and international law* 77 <http://scholarship.law.duke.edu/djCIL/vol18/iss1/2/> Accessed on 2014-3-27.

CHAPTER THREE

3.1. PROTECTION OF BITs IN GENERAL

A provision of a BIT may relate to investment in any of four ways. Such a provision may protect investment, such as where it guarantees compensation for expropriation; it may liberalise investment, such as where it grants foreign investors the right to establish investment; it may promote investment, such as where it provides investment insurance; or it may regulate investment, such as where it prohibits corrupt payments by investors.¹⁰¹

The six principles, access, reasonableness, security, non-discrimination, transparency, and due process, are the core principles of BITs. These six core principles provide the conceptual foundation on which virtually all BITs rest.¹⁰²

Much of the BIT consists of investment protection provisions which afford protection that is either absolute or relative. Relative treatment provisions define the treatment that must be provided by reference to the treatment provided to the same investors or investments. In a broad sense, such provisions in general require that similar investments be treated similarly. Absolute treatment provisions define the treatment that must be provided without reference to any other similar or comparable investors or investments. These treatment provisions can be further categorised as either general or specific. General standards apply to the treatment of covered investment in virtually any act of discrimination relating to an investment. Specific standards apply to a narrower scope of circumstances, such as where a BIT prohibits discrimination with regard to compensation for losses suffered owing to war.¹⁰³

As important as those protections are, the BITs investment security provisions are subject to some momentous limitations. Typically, they provide very little substantive protection against private interference with investment, such as the pirating of intellectual property. Similarly, their

¹⁰¹ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 4.

¹⁰² *Idem* at 2.

¹⁰³ *Idem* at 5.

procedural protection provisions generally do not guarantee that foreign investors have a successful means of resolving private disputes pertaining to their investments.¹⁰⁴

A state could include the substance of BIT obligations in its domestic legislation and thereby offer precisely the same protections without concluding a BIT. Such legislation, however, is subject to amendments, and, thus, investors cannot put their faith in the continued existence of any protection that the legislation provides. The role of the BIT, then, is that it publicly obliges the host state to a particular kind of conduct, that is, it brings a greater security and transparency to the investment climate than could be achieved by domestic laws alone.¹⁰⁵

BITs are, a direct response to the basic 'dynamic inconsistency' problem. The dynamic inconsistency problem arises from the fact that, although host countries have a motivation to promise fair and equitable treatment beforehand in order to attract foreign investment, once that investment is established and investors have incurred significant costs the host country's incentive is to exploit, or even expropriate, the assets of foreign investors. Even those host states that are willing to give up taking advantage in these circumstances will find it very difficult to commit creditably to their position. Many developing countries have adopted domestic legal revisions over the last decade or so with a view to stimulating a greater FDI inflow. Those domestic legal rules, however, cannot be a substitute for the commitment device offered by entering into a legally binding bilateral investment treaty. BITs, and their binding investor-to-state dispute settlement provisions in particular, are meant to overcome the dilemma facing host countries that are ready to censure exploiting foreign investors after the investment has already been undertaken. Interestingly, at the same time as BITs blossomed in the 1980s and 1990s, complete expropriations of foreign investors, which were common during the 1960s and 1970s, practically ceased to take place.¹⁰⁶

¹⁰⁴ Vandevelde, KJ "Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties" 1998 *Columbia J Transnatl Law* 510

¹⁰⁵ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 4.

¹⁰⁶ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 10

[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

Preceding the emergence of BITs, the only protection for foreign investors was the customary international legal rule of a minimum standard of treatment and the so-called Hull rule.¹⁰⁷ International law requires only “a minimum of fairness in the treatment of foreigners and foreign investment”.¹⁰⁸ The Hull rule dealt exclusively with cases of expropriation and, therefore, provided no general protection against discriminatory treatment. The Hull rule grew out of a dispute between Mexico and US in the 1930s over properties expropriated by the government of Mexico. In one of diplomatic notes to the Mexican Minister of Foreign Affairs, the US Secretary of State, Cordell Hull, stated that ‘no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore’. Consequently, the rule of ‘prompt, adequate, and effective’ compensation would be the standard known as the Hull rule.¹⁰⁹

Considering the ambiguity of the obligations stemming from general international law, the spelling out of treatment in BITs in agreement with their purpose is clearly explicable and is one of their major objects.¹¹⁰

BITs are, thus, an important tool of protection for foreign investors, for whom there is currently not much legal alternative. Few regional free trade agreements contain investment protection provisions like the NAFTA. The World Trade Organisation’s Agreement on Trade-Related Investment Measures (TRIMs Agreement) imposes only simple disciplines on the regulation of foreign investments that are, by far, not as broad as, and fall much short of, provisions contained in BITs.¹¹¹

¹⁰⁷ *Idem* at 7.

¹⁰⁸ Shoaf, JR, B.A. *A BIT of Regulatory Chill? Assessing the effect of bilateral investment treaties on the enactment of environmental regulations* 2013 Washington, DC Thesis 4
<https://repository.library.georgetown.edu/handle/10822/558655> Accessed on 2015-1-7.

¹⁰⁹ Neumayer, E & Spess, L 2005 “Do bilateral investment treaties increase foreign direct investment to developing countries?” *London: LSE Research Online* 7
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

¹¹⁰ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 345.

¹¹¹ Neumayer, E & Spess, L 2005 “Do bilateral investment treaties increase foreign direct investment to developing countries?” *London: LSE Research Online* 10
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

3.2. PRINCIPLES OF BITs

3.2.1. REASONABLENESS

The reasonableness principle requires that the host state's treatment of foreign investment be based only on a legitimate exercise of its regulatory authority. It, therefore, prohibits treatment that is arbitrary or motivated by political or discriminatory considerations.¹¹²

The most typical provision requires that the host state accords covered investment fair and equitable treatment.¹¹³

3.2. 1.1. Fair and Equitable Treatment

Fair and Equitable Treatment (FET) is regarded as a non-contingent standard that provides treatment owed to foreign investors regardless of how a host state treats its own investors. Non-contingent standards require a host state to accord an absolute degree of protection to foreign investors, irrespective of the changes in the host state's law or its protection lapses with respect to treatment of its own nationals and companies. FET, thus, differs from contingent standards of investment protection such as the national or most-favoured nation treatment standards.¹¹⁴

The majority of BITs make reference to the FET standard. The precise formation of the FET obligation, and thus its scope and content, is, however, subject to variation. Studies have identified different models of the FET obligation in contemporary BITs. While some BITs contain a simple reference to 'fair and equitable treatment', others clearly state the standard together with a reference to the obligation of full protection and security or the standard of non-discrimination.¹¹⁵

Some BITs enunciate the FET standard regarding general international law. A more recent approach, found in the Canadian and US Model BITs, is to define FET expressly as the

¹¹² Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 189.

¹¹³ *Idem* at 191.

¹¹⁴ Ryan, MC "Glamis Gold, Ltd. V. The United States and the Fair and Equitable Treatment Standard" 2011 *McGill Law Journal* 927 <http://lawjournal.mcgill.ca/userfiles/other/1169738-Ryan.pdf>. Accessed on 2015-1-7.

¹¹⁵ *Idem* at 931.

customary international law Minimum Standard of Treatment (MST) applicable to foreign investors and their property. For example, Article 5 of the United States-Uruguay BIT, specifies that FET is a part of the customary international law MST and details the scope of the obligations governed by that standard.¹¹⁶

The diversity of treaty words rules out any authoritative statement on the FET standard in the BIT context. Investment tribunals have generally adopted the additive approach to FET, proceeding by way of a plain reading of the treaty's terms. The award in the *MTD Equity v Chile*¹¹⁷ case illustrates this trend.¹¹⁸ Very few arbitral tribunals have followed the traditional approach that equates the FET with the MST or have made a reference to international law.¹¹⁹

3.2.2. SECURITY

Security is possibly the oldest of the BIT principles to be found in an investment treaty. It is the principal concern of BITs. Provisions relating to security were present in the first BITs and are universally present in contemporary BITs. These security provisions do not provide investment with security against all events, but rather against particular kinds of host state conduct. The two common provisions that are universal in BITs protect investment against exchange controls and wrongful expropriations. An observance of the obligations provision preserves the security of obligations with respect to investment.¹²⁰

3.2.2.1. Full protection and security

¹¹⁶ *Idem* at 932.

¹¹⁷ ICSID Award, "MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile" 2004 Washington, D.C. Case No. ARB/01/7 31 http://italaw.com/documents/MTD-Award_000.pdf Accessed on 2014-3-18.

¹¹⁸ Ryan, MC "Glamis Gold, Ltd. V. The United States and the Fair and Equitable Treatment Standard" 2011 *McGill Law Journal* 932 <http://lawjournal.mcgill.ca/userfiles/other/1169738-Ryan.pdf> Accessed on 2015-1-7.

¹¹⁹ *Idem* at 934.

¹²⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 233.

Many BITs require that investments receive 'full protection and security'. Full protection and security is an established standard of customary international law that requires the host state to exercise due diligence or reasonable care to prevent injury to the property (and person) of foreign investors. The BITs that incorporate this standard thus make explicit that the standard applies to covered investment, although it would apply through customary international law even if it were not included in the treaty. Its inclusion, however, ensures that the standard is enforceable through the investor-state and state-state dispute settlement provisions.¹²¹

The full protection and security treatment provision may be a stand-alone provision or it may be incorporated into the fair and equitable treatment or the treatment provision of BITs.¹²² The formulation used in the current BITs confirms the autonomous character of the standard.¹²³

The Dutch Model Text of March 2004 qualifies the protection clause with the phrase 'physical'. This clearly implies that the standard is not meant to cover just any kind of impairment of an investor's investment, but rather to protect the investor and his property from physical threats and injuries, particularly from actions or armed insurgents, or disgruntled workers. This would preclude the legal security of the investor from the standard.¹²⁴

Two aspects of the full protection and security standard are important in establishing its content. Firstly, the standard does not impose stringent liability on the host state. The host state's obligation is met when the state takes action that is reasonable under the circumstances to protect investment, even if that action is unsuccessful in preventing damage to the investment. Secondly, it requires a host state to act to prevent injury by private parties as well as by state actors.¹²⁵

3.2.2.2. Observance of obligation

Foreign investor bargaining power rapidly declines after an investor has placed his investment under the host state. The purpose of the umbrella clause provision of BITs is to provide protection under international law for commitments assumed by the host state which were

¹²¹ *Idem* at 243.

¹²² Brown, C *Commentaries on selected model investment treaties* 2013 269.

¹²³ *Idem* at 564.

¹²⁴ *Idem* at 265.

¹²⁵ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 243.

conductive to the investment and on which the investor could rely in good faith. The observance of obligation aims at protecting the investor against opportunistic host state behaviour once the investment has been made, such as the risk of the state terminating a concessions agreement because a competitor of the investor promises a higher rent to the state.¹²⁶

This provision, thus, seeks to ensure that each contracting party to the treaty will respect the specific undertaking towards nationals of the other party. The umbrella clause provision is of particular importance because it protects the investor's contractual right against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts.¹²⁷ Many BITs unequivocally address the enforceability of contractual commitments of the host state to an investor.¹²⁸

Investment tribunals follow a divergence of interpretation of the umbrella clause in investment arbitration. Some arbitral tribunals have held the view that the observance of obligations clause elevates contractual breach to BIT breach with the implication that a host state violating a contractual obligation is automatically in breach of its BIT obligation to observe such obligation. In the Austrian Model BIT of 2008, Article 11(1) followed this approach according to which a breach of a contract between the investor and the host state will amount to a violation of the BIT. On the other hand, other tribunals have held that this is not the consequence of an umbrella clause.¹²⁹

3.2.2.3. Expropriation

Expropriation is the single greatest impairment of the security of an investment. It is an act that eliminates all or substantially all of the value of the investment to the investor.¹³⁰ "According to general international law, a state is free to adopt measures of expropriation or nationalisation of a foreign investment in its territory. In fact, following the changes that have affected the international community after the Second World War (namely, de-colonisation and the birth of many new state) such a freedom is no longer disputed because private property is no longer

¹²⁶ Brown, C *Commentaries on selected model investment treaties* 2013 683.

¹²⁷ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 81.

¹²⁸ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 257.

¹²⁹ Brown, C *Commentaries on selected model investment treaties* 2013 36.

¹³⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 271.

deemed to be basically inviolable.”¹³¹ The lawful recourse to these measures, however, is subject, under international law, to certain requirements. These requirements are, the requirement of, public purpose or interest, non-discrimination, the payment of compensation, and the procedural requirement of legality or due process.¹³² The peril of expropriation was a principal motivating factor in the origin of the BITs. Accordingly, BITs universally incorporated a provision limiting the right of the host state to confiscate covered investment.¹³³ Not all governmental deprivation of the property of foreign investors constitutes an expropriation. International law authorities have regularly recognised three broad categories of ‘public power’ regulation that might justify non-compensation where there is a deprivation: (1) public order and morality; (2) protection of human health and environment; and (3) state taxation.¹³⁴

3.2.2.3.1. Conditions for Expropriation

Various BITs have codified the elements of lawful expropriation. For expropriation to be lawful it shall, therefore, be carried out: for reasons of public or social interest; following due process of law; in a non-discriminatory and good faith manner; and accompanied by prompt, adequate, and effective compensation.¹³⁵ Some BITs also, in addition to those elements, make a condition for the lawfulness of expropriation, respect for specific commitments, either explicitly within the expropriation clause, or by reference to other articles in the BIT providing for the observance of undertakings.¹³⁶

With regard to the condition of compensation, many BITs have adopted the traditional Hull rule of the ‘prompt, adequate, and effective’ formula, though some BITs have instead employed more general terms, to describe the required compensation, such as ‘just’, ‘full’, ‘reasonable’ or ‘fair and equitable’.¹³⁷

¹³¹ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 380.

¹³² *Idem* at 380.

¹³³ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 271.

¹³⁴ Sheffer, MW “Bilateral Investment Treaties: A Friend or Foe to Human Rights?” 2011 *Denv. J. Int’l L. & pol’y.* 499 <http://heinonline.org/> Accessed on 2014-3-25.

¹³⁵ Brown, C *Commentaries on selected model investment treaties* 2013 223.

¹³⁶ *Idem* at 267.

¹³⁷ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 109.

For instance, most of the BITs entered into by Korea, consistent with the 2001 Korean Model BIT, require that any expropriation be accompanied by prompt, adequate, and effective compensation, and they define the phrase 'prompt, adequate, and effective compensation'.¹³⁸

3.2.2.3.2. Compensation

3.2.2.3.2.1. Adequate compensation

Many BITs refer to fair market value with respect to the value of the expropriated investment.¹³⁹ The fair market value would be the amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstance in which it would operate in the future, and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment, and other relevant factors pertinent to the specific circumstance of each case.¹⁴⁰

3.2.2.3.2.2. 'Prompt and effective' compensation

The 'prompt and effective' requirement imposes the additional requirement that compensation be paid without delay and in a freely convertible currency. Beyond the issue of the amount of compensation, therefore, matters of time and convertibility are dealt with.¹⁴¹

Promptness usually is described as payment without delay or without undue delay. Those BITs that attempt to define the requirement more precisely generally state that provision for payment shall be made at, or prior to, the time at which the expropriation occurs.¹⁴²

A few BITs admit that payment may be over a period of time in cases of exceptional balance of payment problems by the application of the relevant provision of the BIT in the matter of transfers generally.¹⁴³

Effective compensation is meant to guarantee that the investor realises, i.e. he is able to make use of, the benefit of the compensation. Commonly BITs require that the compensation be paid

¹³⁸ Brown, C *Commentaries on selected model investment treaties* 2013 409.

¹³⁹ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 109.

¹⁴⁰ *Idem* at 111.

¹⁴¹ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 401.

¹⁴² Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 274.

¹⁴³ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 401.

in a freely convertible currency, meaning a currency that is exchanged on the principal foreign exchange markets of the world.¹⁴⁴

The lapse of time that may occur between the time when the obligation to compensation has been definitively established and the date on which payment is made raises the issue of entitlement to interest. There is, however, no common approach to this problem in BIT practice. Some BITs specifically provide that compensation shall include interest from the date of expropriation; most BITs, however, fail to specify the date from when interest payments shall be calculated.¹⁴⁵

Expropriation provisions very often apply to both direct and indirect expropriation.¹⁴⁶ The legal consequences are the same whether the expropriation occurs instantaneously or over a long period of time, 'creeping expropriation'.¹⁴⁷ Direct expropriation occurs where an investment is nationalised or taken directly through formal transfer of title or outright seizure, and indirect expropriation occurs when an action or series of actions by a state party have an effect equivalent to a direct taking without formal transfer of title or outright seizure.¹⁴⁸

3.2.2.4. War and civil disturbance

Foreign investment may be affected by political and non-commercial risks other than expropriation, such as civil disorder.¹⁴⁹ With regard to such situations of war or armed conflict, etc., according to customary international law, the host state is not obliged to pay compensation in relation to a foreign investor for loss suffered.¹⁵⁰ Likewise BITs do not establish an absolute right of compensation for losses suffered in time of armed conflict or international disturbance, but merely require that the foreign investor be accorded national and MFN treatment with regard to any measures directed at offsetting or minimising such losses.¹⁵¹ Under this rule, if the host state awards a particular form of settlement or restitution to its own investor or the investor of a

¹⁴⁴ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 276.

¹⁴⁵ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 113.

¹⁴⁶ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 277.

¹⁴⁷ *Idem* at 278.

¹⁴⁸ Brown, C *Commentaries on selected model investment treaties* 2013 788.

¹⁴⁹ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 405.

¹⁵⁰ Brown, C *Commentaries on selected model investment treaties* 2013 678.

¹⁵¹ *Idem* at 578.

third country when their investment have suffered losses owing to these events at issue, the host state must award the same or an equivalent form of settlement or restitution to the investor of the other party whose investment may have suffered losses from such events.¹⁵²

3.2.2.5. Currency transfer

Restriction on the transfer of funds may have numerous adverse consequences. Such restrictions may weaken investor confidence and can reduce the inflow of foreign investment, involve significant administrative costs to regulate and enforce, artificially reduce the pressure for countries to institute needed economic reforms, and increase the risk to the domestic economy in a time of crisis.¹⁵³

One of the typical protective clauses for investment in BITs guarantees the remittance abroad both of current payments, concerning any investment covered by the treaty, and the proceeds of its sale or liquidation.¹⁵⁴

This clause, however, does not defend the investor against the general exchange risk relative to the currency of the host country in terms of the value of the investment as expressed in currency.¹⁵⁵

The currency transfer of BITs typically provides that each party shall permit the free transfer of certain payments related to an investment. The provision must identify the transfer to which it applies and define what is meant by free transferability.¹⁵⁶

Commonly, the transfer provision applies to all 'transfers' or 'payments' related to an investment. Usually, this language is accompanied by an illustrative list of transfers or payments to which the provisions apply.¹⁵⁷

Some BITs include an exception with regard to certain kinds of ordinary restrictions on the free movement of capital that are unrelated to investment policy. Most common is an exception

¹⁵² *Idem* at 229.

¹⁵³ *Idem* at 794.

¹⁵⁴ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 360.

¹⁵⁵ *Idem* at 361.

¹⁵⁶ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 317.

¹⁵⁷ *Ibid.*

relating to restrictions to implement the host state's tax law. For example, the U.S. BITs contain an exception to laws which impose the withholding of taxes, while other BITs specify that taxes must be paid prior to transfer. Further exceptions relate to equitable, good faith, non-discriminatory measures to protect the rights of creditors, to regulate the securities market, to enforce the criminal laws, and to enforce judgments. Numerous BITs also provide that transfers shall be in accordance with the exchange regulations in force.¹⁵⁸

3.2.3. NON-DISCRIMINATION

The principle of 'non-discrimination' is an important element of a favourable investment climate. At a minimum, non-discrimination permits the investor to operate free of competitive disadvantage. In some cases, it may improve the host state's treatment of covered investments or investors because the beneficiary of the protection gains the favourable treatment accorded to host-state investors or investors of third countries. That is, the principle multiplies the effect of host-state policies favouring a particular investment or investor by requiring the extension of these policies to all investments or investors entitled to non-discrimination.¹⁵⁹

Non-discrimination does not prohibit all differences between the treatment of covered investment and the treatment of other investments. Such a requirement would eviscerate the host state's legitimate regulatory authority, which necessitates treating differently situated investments dissimilarly. For instance, competition policy may require prohibiting the merger of two large investments, but not the merger of two much smaller investments.¹⁶⁰

The principle of non-discrimination, therefore, prohibits unreasonable discrimination. Discrimination is unreasonable if it is unrelated to a legitimate regulatory interest. For example, preferring one investment over another on the ground of nationality is not a legitimate regulatory interest.¹⁶¹

3.2.3.1. Most-Favoured Nation and National Treatment

¹⁵⁸ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 322.

¹⁵⁹ *Idem* at 337.

¹⁶⁰ *Idem* at 338.

¹⁶¹ *Ibid.*

Most BITs include guarantees of national treatment and most-favoured nation treatment for investments and investors which fall under the jurisdiction of the BITs.¹⁶²

The concept of MFN and national treatment assumes that the treatment of covered investments shall be compared only to the treatment of comparable investments. National treatment, for example, does not require that covered investments be treated as favourably as every investment in the host state in every respect. MFN and the national treatment standards must be interpreted to require that the treatment of covered investment or investors be evaluated only with respect to the treatment of comparable investments or investors. Even where a phrase such as 'in like situations' or 'like circumstances' does not appear in these provisions, such a limitation should be treated as implicit in the provisions.¹⁶³

In *Feldman v. Mexico* 2002,¹⁶⁴ the tribunal defined the term 'like circumstances' to mean domestic competitors in the same economic sector, which in *Feldman* happened to be the export of cigarettes. In *ADF v. United States* 2003,¹⁶⁵ identifying the relevant competitor was perhaps simpler insofar as the arbitral tribunal assumed that entities in direct competition were in like circumstances, in this case American-owned producers of steel were considered to be in like circumstances as Canadian-owned producers of steel.¹⁶⁶

Where an MFN provision requires no less favourable treatment and the host state provides more favourable treatments to the covered investment than it accords to investment of the other nations, the investors of these other nations can be expected to invoke the MFN provision so as to elevate the treatment they receive.¹⁶⁷

¹⁶² Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 339.

¹⁶³ *Idem* at 340.

¹⁶⁴ ICSID Award, "Marvin Feldman v. Mexico" December 16, 2002 Canada Case No. ARB (AF)/99/1 1-88 http://italaw.com/documents/feldman_mexico-award-english.pdf Accessed on 2015-1-7.

¹⁶⁵ ICSID Award, "In the matter of an arbitration under chapter eleven of the North American Free Trade Agreement Between ADF Group Inc. and United States of America" January 9, 2003 Washington, D.C., *ICSID Review—Foreign Investment Law Journal* Case No. ARB (AF)/00/11-99 <http://www.state.gov/documents/organization/16586.pdf> Accessed on 2015-1-7.

¹⁶⁶ Menezes, A *Developing States' Long Walk to Freedom: an examination of the principle of nondiscrimination, substantive equality and proportionality in Investor-State disputes* 2008 McGill University A thesis 38 digitool.library.mcgill.ca/dtl_publish/2/40845.html Accessed on 2015-1-7.

¹⁶⁷ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 343.

The MFN and national treatment provisions are more often subject to exceptions than other provision of the BITs. Two exceptions often appear.¹⁶⁸

Firstly, these treatment provisions are commonly subject to an exception for matters of taxation. The most common version of this exception provides that the MFN does not apply to any advantage granted pursuant to international agreements relating wholly or mainly to taxation.¹⁶⁹

Many countries have concluded international taxation treaties, especially treaties to prevent double taxation, and the effect of this formulation of the taxation is to exclude concessions made in those treaties from the MFN treatment or, in some cases national treatment, obligations.¹⁷⁰

The second exception commonly found in these provisions is one for advantages granted pursuant to an agreement establishing a customs union, free trade area, or other organisation for economic integration. As part of their integration into a customs union or free trade area, countries often make considerable concessions to other countries in exchange for similarly considerable concessions. A BIT party may be unwilling to grant those same concessions to any other country unless that country makes the same concessions.¹⁷¹

3.2.4. TRANSPARENCY

'Transparency' advances the basic element of the rule of law, i.e. that the laws be known. Transparency is necessary for the creation of a rule-based investment regime. It inhibits corruption, a classic form of government failure that is the antithesis of the rule of law and that has been demonstrated to inhibit investment flows. More generally, the principle of transparency improves governance, which in turn promotes development. It may reduce the probability of dispute over the interpretation and application of the law.¹⁷²

¹⁶⁸ *Idem* at 346.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Idem* at 347.

¹⁷² *Idem* at 397.

Despite those advantages of transparency, only a few BITs have included provisions that explicitly require transparency. Indeed, the BITs do not appear to have included any explicit provision in this regard until the United State concluded its first BITs.¹⁷³

A typical formulation requires each party to promote publication or otherwise make publicly available certain laws. Most commonly, these are laws that pertain to or affect investments, and, in some BITs, these are laws are in respect of matter covered by the BIT or that may affect the operation of the BIT. The transparency provisions may apply not only to legislation, but to judicial decision and administrative regulation and decisions.¹⁷⁴

3.2.5. ACCESS

'Access' is one of the core principles found in BITs, but the vast majority of BITs provide only a very limited right to access.¹⁷⁵

3.2.5.1. Establishment

There are two basic approaches to admission. In the vast majority of BITs, most of which have been concluded by European countries, the issue is dealt with in the general provisions on the 'encouragement' and 'promotion' of investments. In these BITs, the provisions typically envisage that each state concerned "shall" admit investments from the other state party. This provision is, however, generally qualified by a clause to the effect that the investment shall be admitted in accordance with the legislation of the host state. The domestic legislation of the host state may well allow for extensive restriction on the admission of foreign investments. In this larger group of BITs, the obligation to admit investments is subject to whatever restrictions on such admission that may exist in the law of the host state at the time of the conclusion of the BIT and subsequently.¹⁷⁶ Indeed, this fact is acknowledged by the Australia-Egypt BIT, which provides that,

¹⁷³ *Idem* at 398.

¹⁷⁴ *Idem* at 400.

¹⁷⁵ *Idem* at 405.

¹⁷⁶ Shihata, IF.I "Recent Trends Relating to Entry of Foreign Direct Investment" 1994 *ICSID Rev FILJ* 55.

“Each party shall encourage and promote investment in its territory by investor of the other party and shall, in accordance with its laws and investment policies, applicable from time to time, admit investment.”¹⁷⁷

The provision has the effect of incorporating local laws with respect to establishment into the BIT so that a failure by the host state to adhere to its own law violates the BIT. This would allow the investor to seek a remedy through the investor-state dispute provision or the home state to seek remedy through the state-state dispute provision.¹⁷⁸

The second principal approach taken towards the question of admission is that found in BITs concluded by the United States. Such treaties are relatively small in number. These BITs are based on international investment policy aimed at reducing foreign government actions that impede or distort investment flows and at developing an international system, based on national treatment and most-favoured nation principles, that permits investment flows to respond more freely to market forces.¹⁷⁹

In the U.S.A.’s BITs, the national and MFN standards are made applicable to the ‘establishment’ or ‘acquisition’ of investments, or, in other words, to their admission, as well as subsequent operation and disposition of the investments. In contrast, to the European BITs which leave investors subject to whatever restriction on admission that may be applied to them by the host country, the U.S.A.’s BITs in principle assure investors covered by the BITs that they will not, in comparison with any other investor, enjoy fewer rights in respect of market access.¹⁸⁰

BITs that grant national and MFN treatment with respect to access virtually always reserve for each party the right to designate sectors of the economy within which exception to national and MFN treatment may be made.¹⁸¹

3.2.5.2. Performance requirement

¹⁷⁷ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 413.

¹⁷⁸ *Idem* at 413.

¹⁷⁹ Shihata, IF.I “Recent Trends Relating to Entry of Foreign Direct Investment” 1994 *ICSID Rev FILJ* 55.

¹⁸⁰ *Ibid.*

¹⁸¹ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 414.

BITs contain a prohibition on performance requirements. Prohibited performance requirements usually are host countries' restrictions on the use of inputs and outputs by investments. These restrictions include local hiring requirements, domestic content requirements, import restrictions, technology transfer requirement, and export requirements. BITs provisions that prohibit performance requirements most often prohibit only those requirements that are included in an exhaustive list and those performance requirements off the list are permitted.¹⁸²

Two justifications for the prohibition of performance requirements can easily be mentioned. One is that such performance requirements interfere with the investor's control of the investment and, thus, potentially the security of the investment.¹⁸³ The other justification for such a requirement is that they are trade distorting. Since performance requirements often regulate the source of use of inputs or the destination of outputs, they restrict international trade.¹⁸⁴

3.2.5.3. Entry and sojourn

Few BITs have provisions that provide only a very limited right to access for investors or persons associated with an investment. A typical provision provides that, in accordance with national legislation relating to the entry and sojourn of aliens, individuals working for an investor, as well as members of their household, shall be permitted to enter into, remain in, and leave the territory of the host state for the purpose of carrying out activities associated with an investment. Some treaties limit the provision to persons in a managerial or technical position.¹⁸⁵

3.2.5.4. Employment

Following the U.S.A.'s BITs some other countries have incorporated an employment provision into their BITs. The most common form of this provision gives an investment the right to hire top managerial personnel of its choice regardless of their nationality. The provision, thus, prohibits the host state from prescribing the nationality of those who hold certain positions within the enterprise. An employment provision is, however, subject to the immigration laws of the host

¹⁸² *Idem* at 419.

¹⁸³ *Ibid.*

¹⁸⁴ *Idem* at 420.

¹⁸⁵ *Idem* at 423.

state. The host states, therefore, have some ability to control the nationality of employees by the application of their immigration laws.¹⁸⁶

The United States created exceptions to an employment provision. The first exception allows host states to require that a majority of the members of the board of directors be of a particular nationality, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment. Secondly, beginning from 2004, the U.S. BITs allow the parties to the treaty to specify exceptions to this provision in an annex to the treaty. A few BITs of other states have included these exceptions in their BITs.¹⁸⁷ BITs, thus, can contain a provision which gives the right to access not only for the investor but also for any top managerial personnel which the investor chooses to employ.

3.2.6. DUE PROCESS

The settlement of an investment dispute is a matter specifically addressed by BITs. In order to avoid legal insecurity and political conflict, and with a view to providing for a predetermined forum of the direct application of the treaty in case of disputes, so as to promote a generally favourable climate for covered investments, BITs include a dispute settlement provision.¹⁸⁸

BITs generally provide for two different types of dispute settlement procedures, for inter-state dispute and for host state foreign investor dispute.¹⁸⁹ Indeed, the investor-state dispute settlement provision is the principal way in which the BITs represent an advance in promoting the rule of law, in creating a liberal investment regime and in providing a favourable investment climate comparative to the post-war FNCs.¹⁹⁰

Arbitration clauses typically contain an offer of the host state to submit to investor-state arbitration in case of a dispute arising out of an investment. This gives the foreign investor an effective and reliable mechanism to enforce claims against the host state, insulating them from

¹⁸⁶ *Idem* at 424.

¹⁸⁷ *Ibid.*

¹⁸⁸ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 428.

¹⁸⁹ *Ibid.*

¹⁹⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 427.

the possible deficiencies of the local judicial system. Arbitration has also played a decisive role in de-politicising disputes arising from investment. The ICSID tribunal, in *SDG v. Argentina*,¹⁹¹ stated that the dispute settlement provision offered to investors the assurance that any dispute that might flow from their investment would not be subject to the perceived hazards of delays and political pressure of adjudication in national courts.¹⁹²

Investor-state arbitration clauses were not a feature of the BIT until the conclusion, in 1965, of the Convention on the Settlement of Investment Dispute between State and Nationals of other State. After this ICSID Convention had entered into force, contracting parties to a BIT began gradually to provide for investor-state arbitration in their BITs, beginning with a 1968 BIT between the Netherlands and Indonesia.¹⁹³

3.2.6.1. Investor-State Dispute Resolution

Investor-state arbitration clauses are among the most fundamental and typical provisions of BITs. They provide substantial innovation in respect of classic international law in affording individual investors the right to pursue claims against a foreign state in direct arbitration under an international treaty by application of both domestic and international law.¹⁹⁴

3.2.6.1.1. Consent to Arbitration

While the host state's consent to arbitration typically is given in the BIT itself, the common practice is that the foreign investor consents by submitting a claim to arbitration. Some BITs,

¹⁹¹ ICSID, "In the proceedings between Gas Natural SDG, S.A. (Claimant) and The Argentine Republic (Respondent) Decision of the Tribunal on Preliminary Questions on Jurisdiction" June 17, 2005 Washington, D.C. Case No. ARB/03/10 1-31 <http://italaw.com/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf> Accessed on 2015-1-7.

¹⁹² Schicho, L "Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?" 2012 *Department of European Legal Studies Research Paper in Law 2/2012 13* http://aei.pitt.edu/39283/1/researchpaper_2_2012_schicho_final.pdf Accessed on 2015-1-7.

¹⁹³ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 431.

¹⁹⁴ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 437.

however, provide that the investor may consent in writing to arbitration, after which either party may submit the dispute to arbitration.¹⁹⁵

3.2.6.1.2. Arbitration Mechanisms

The most common means of arbitration to which a host country consents is arbitration administered by ICSID under the ICSID arbitration rules. Most of the earliest investor-state arbitration provisions included the parties' consent to this single method of arbitration only. By the 1980s, some host states began to negotiate BITs that provided investors with other means of dispute resolution, and this practice became common in the 1990s. To date the greater majority of investor-state arbitrations, however, have been before the ICSID.¹⁹⁶

The most common alternative to ICSID arbitration is arbitration brought under the rules of the United Nations Commission on International Trade Law (UNCITRAL). The rules of arbitration under UNCITRAL differ from ICSID arbitration in that the former does not provide an institution to administer the arbitration. For this reason, UNCITRAL arbitration is described as *ad hoc* arbitration, meaning that a tribunal, support staff, and appropriate facilities must be assembled for each case.¹⁹⁷

The next most common alternative to ICSID arbitration is arbitration before the ICSID Additional Facility. The Additional Facility was created by ICSID in 1978 to arbitrate disputes that are outside the scope of the jurisdiction of the ICSID.¹⁹⁸

Other arbitral mechanisms, sometimes arises in the parties' consent to arbitration. The most common is arbitration before the Stockholm Chamber of Commerce of the International Chamber of Commerce. Other alternatives are used only occasionally in investor-state arbitrations. A few BITs provide for the creation of an *ad hoc* arbitral tribunal without reference to any specific set of rules.¹⁹⁹

3.2.6.1.3. Prerequisite to Arbitration

¹⁹⁵ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 434.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Idem* at 435.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Idem* at 436.

Many BITs require the disputing parties, prior to submitting the dispute to arbitration, to seek to resolve the dispute through negotiation. No arbitral tribunal, however, has yet declined jurisdiction because the parties failed to seek a negotiated settlement. A negotiated settlement cannot be compelled and, if either party does not wish to negotiate, little is achieved by requiring the parties to engage in futile and purely formal negotiations.²⁰⁰

BITs regarded investment arbitration as an alternative rather than as a subsidiary means of adjudication. As a result, most of the BITs do not require investors to exhaust local remedies as a condition for acceding to international arbitration. BITs, however, have been using different approaches in this regard. Most BITs even do not include a provision on exhaustion of local remedies. A few BITs concluded since 1995 explicitly obliged the parties not to request the investor to exhaust local remedies. For example, Article 10 of the BITs between Austria and the United Arab Emirate of 2001 shows this approach.²⁰¹

3.2.6.1.4. Choice of Law Clause

The investor-state arbitration clause sometimes includes a choice of law clause. Foreign investors generally prefer to have international law apply to any dispute, because international law often provides greater protection for investment than national law and because the host state can alter national law to the detriment of the investor. On the other hand, host states for the same reasons generally prefer that national law be applied.²⁰²

BITs generally do not designate local laws as governing law, although individual substantive provisions are sometimes subordinate to domestic law. A choice of law clause in a BIT is, thus, likely to specify either that international law applies or that both international law and domestic law apply. Some BITs provide that investment shall receive treatment not less favourable than that required by international law, a provision that effectively requires the application of international law in order to ensure that the investment receives the required treatment. International law addresses only a limited range of issues and, of course, investment located in the host state is subject to its law in the absence of an agreement to the contrary. Even where international law is designated as the applicable law, therefore, national law may be applicable

²⁰⁰ *Idem* at 439.

²⁰¹ UNCTAD, *Bilateral investment treaties 1995–2006: trends in investment rulemaking* 2007 108 unctad.org/en/docs/iteiia20065_en.pdf Accessed on 2014-12-22.

²⁰² Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 444.

to the extent that it is consistent with international law. Consequently, irrespective of the presence of a choice of law clause or the language of the clause, the situation that nearly always exists in investor-state arbitration is that international law, including, in particular, the provision of the BIT applies where it exists, while national law applies to the extent that it is not inconsistent with, or displaced by, international law.²⁰³

Where the dispute is submitted to the ICSID, arbitration is governed by Article 42 of the ICSID Convention, which states that, lacking agreements between the disputing parties with respect to the choice of law, the tribunal shall apply the law of the host state and any applicable rules of international law. Article 42 of the ICSID Convention is, thus, consistent with the practice of tribunals not subject to the ICSID Convention.²⁰⁴

3.2.6.1.5. Awards

Many BITs provide that any award under the investor-state disputes provision shall be final and obligatory. This clause makes it clear that an award is *res judicata* and not subject to appeal. The clause also obligates the host state to comply with the award. If the host state failed to comply with the award, it would give rise to a claim under the state-state dispute provision.²⁰⁵

Investor–state arbitral awards are not subject to appeal, but awards issued by ICSID tribunals are subject to an annulment proceeding. Awards that are not governed by the ICSID Convention may be subject to review under the arbitration law of the state where the arbitration takes place.²⁰⁶

Some BITs include clauses to facilitate the enforcement of arbitral awards. ICSID awards are enforceable under the ICSID Convention in the territory of any state party to that convention. The ICSID Convention, however, does not require enforcement of any awards issued by any other mechanism. Awards issued as a result of arbitration before the additional facility, under the UNCITRAL Rules, or through some other mechanism may, therefore, be enforced through

²⁰³ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 444.

²⁰⁴ *Ibid.*

²⁰⁵ *Idem* at 445.

²⁰⁶ *Idem* at 446.

the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.^{207 208}

3.3. ETHIOPIAN INVESTMENT LAW

In Ethiopia, the Civil Code and the Commercial Code serve as general frameworks for business activities. Within this broad framework, there are specific investment laws regulating investments. The investment laws have passed through various amendments and revisions with a view to creating a legal structure conducive to attracting foreign direct investment.²⁰⁹

The relevant laws currently in force in Ethiopia are: Investment Proclamation No. 769/2012; Investment (Amendment) Proclamation No. 849/2014; Investment Incentive and Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 270/2012; and Investment Incentive and Investment Areas Reserved for Domestic Investors Council of Ministers (Amendment) Regulations No. 312/2014.

3.3.1. INVESTMENT PROCLAMATION NO 769/2012

The Investment Proclamation No 769/2012 (hereinafter called the Investment Proclamation) has nine parts and 41 Articles. Part One deals with the short title and states that this proclamation may be cited as the 'Investment Proclamation No. 769/2012'. It provides definitions of what Investment, Enterprise, Capital, Investor, and the like are to mean in the context of the proclamation and the scope of application of the proclamation which states that the provision of this proclamation shall not be applicable to investments in the prospecting, exploration and

²⁰⁷ United Nations Conference on International Commercial Arbitration "Convention on the recognition and enforcement of foreign arbitral awards" 1958 United Nations. New York Entry into force: on 7 June 1959 (article XII) 1-54 http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf Accessed on 2015-1-7.

²⁰⁸ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 446.

²⁰⁹ Tamiru, TH "Some Brief Notes on Ethiopian Investment: BITs, FDI, and Development" 2009 *UNCTAD Multi-Year Expert Meeting on Investment for Development: The Development Dimension of International Investment Agreements* 3 http://unctad.org/sections/wcmu/docs/ciimem3_p03_en.pdf Accessed on 2014-3-30.

development of minerals and petroleum resources. Article 4 provides for the organs that have jurisdiction in the administration of investments.²¹⁰

Part Two deals with investment objectives and areas of investment. Article 5 states that the investment objectives of the Federal Democratic Republic of Ethiopia are designed to improve the living standards of the peoples of Ethiopia through the realisation of sustainable economic and social development. It then lists the details of those objectives.²¹¹

Articles 6-9 deal with areas of investments. Article 6 provides an exclusive list of areas of investment reserved for the government or joint investment with the government. Article 7 and 8 provide that areas of investment exclusively reserved for domestic investors or areas of investment open for foreign investors shall be determined by regulation to be issued by the Council of Ministers.²¹²

Part Three deals with forms of investment and capital requirements for foreign investors, Part Four deals with investment permits, and Part Five deals with the registration of technology transfer and collaboration agreements with domestic investors.²¹³

Part Six deals with investment incentives, guarantees, and protection. Article 23 provides that areas of investment specified by regulation to be issued by the Council of Ministers pursuant to the investment objectives stated under Article 5 of this Proclamation shall be eligible for investment incentives.²¹⁴

Article 25 deals with investment guarantees and protection. It provides as follows:

“1) No investment may be expropriated or nationalised except when required by the public interest and then only in conformity with the requirements of the law; and

²¹⁰ Ethiopian Investment Proclamation “Investment Proclamation” No. 769/2012

<https://chilot.files.wordpress.com/2013/04/proclamation-no-769-2012-investment-proclamation.pdf>

Accessed on 2014-11-21.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*

2) Adequate compensation, corresponding to the prevailing market value, shall be paid in advance in case of expropriation or nationalisation of an investment for public interest....”²¹⁵

Article 26 deals with the remittance of funds. Article 26 (1) provides that any foreign investor shall have the right, in respect of his approved investment, to make remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance, and it then lists the remittances that are allowed.²¹⁶

Part Seven deals with investment administration. It covers areas such as investment administration organs, power, and the duties of the agency (now the 'commission' as amended in the Investment [Amendment] Proclamation 849/2014), the power and duties of the investment board, one-stop shop service, and others.²¹⁷

Part Eight deals with the industrial development zone, and it states that, in order for the industrial sector to have a leading role in the economy of the country, the federal government shall establish industrial development zones.²¹⁸

The final part, Part Nine, has miscellaneous provisions. In this part, among other Articles, Article 37 provides as follows:

“1/ Any investor may employ duly qualified expatriate experts required for the operation of his business;

2/ An investor who employs expatriates, pursuant to sub-article (1) of this Article, shall be responsible for replacing, within a limited period, such expatriate personnel by Ethiopians by arranging the necessary training thereof; and

²¹⁵ Ethiopian Investment Proclamation “Investment Proclamation” No. 769/2012

<https://chilot.files.wordpress.com/2013/04/proclamation-no-769-2012-investment-proclamation.pdf>

Accessed on 2014-11-21.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

3/ Notwithstanding the provisions of sub article (1) and (2) of this Article, a foreign investor shall, without any restriction, have the right to employ expatriate employees on top management positions for his enterprise.”²¹⁹

Article 38 requires that any investor shall have the obligation to observe the law of the country in carrying out his investment activities. In particular, he shall give due regard to environmental protection.²²⁰

The Investment Proclamation has been amended by the Investment (Amendment) Proclamation No. 849/2014. This Investment (Amendment) Proclamation has introduced eight amendments to the Investment Proclamation No. 769/2012. But these amendments do not affect my work so I will not deal with them, except that, in this Investment (Amendment) Proclamation, Article 2(2) provides that any reference to the 'Agency' appearing anywhere in the proclamation is deleted and replaced by the 'Commission'.²²¹

²¹⁹ Ethiopian Investment Proclamation “Investment Proclamation” No. 769/2012

<https://chilot.files.wordpress.com/2013/04/proclamation-no-769-2012-investment-proclamation.pdf>

Accessed on 2014-11-21.

²²⁰ *Ibid.*

²²¹ Ethiopian Investment Proclamation “Investment (Amendment) Proclamation” No. 849/2014

http://ethemb.se/wp-content/uploads/2013/07/Investment_Amendment_Proclamation_No769-2012.pdf

Accessed on 2014-11-22.

CHAPTER FOUR

ANALYSIS

BITs are important instruments of protection to foreign investors, for whom there is currently not much legal alternative.²²² Although Ethiopia has a strong Investment Proclamation, since it has incorporated most of the significant provisions that are found in BITs, the conclusion of BITs has a greater role in the protection of investment and the attraction of more investors to Ethiopia.

The greater importance of BITs is due to the possibility that, although Ethiopia could incorporate the substance of BIT obligation in its domestic legislation and thereby offer precisely the same protections without concluding a BIT, any such legislation may be subject to amendment. Investors cannot, therefore, rely upon the continued existence of any protections that the legislation provides. A BIT brings greater security and transparency to the investment climate than could be achieved by the investment proclamation.²²³

Secondly, as stated in Chapter Two, BIT consists of more investment protection provisions than are provided in the Investment Proclamation.²²⁴

Those protections are summarised below in order to show the role BITs play in securing investment in Ethiopia.

To begin with, FET standards require a host state to accord an absolute degree of protection to foreign investors, notwithstanding the changes in the host state's law or its protection lapses with respect to the treatment of its own national companies.²²⁵

²²² Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 10
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

²²³ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 4.

²²⁴ *Idem* at 5.

The requirement of full protection and security requires the host state to exercise due conscientiousness or reasonable care to prevent injury to the property (and person) of foreign nationals.²²⁶

Observance of the obligation provision ensures that agreements reached by the host state and their investors are enforceable through the investor-state and state-state disputes provisions.²²⁷

BIT expropriation provisions at all times acknowledge the power of the host state to expropriate covered investment, but they impose conditions on the application of that power. The requirement of compensation, in most case, is the payment of prompt, adequate, and effective compensation.²²⁸

BITs most commonly provide that the national and MFN treatment standard applies to the compensation for losses of a party's investment owing to armed conflict, civil strife, or a natural disaster. Based on the national and MFN treatment standard, therefore, even though the host state has no obligation to compensate an investor for such loss, the investor will have the right to compensation if the host state compensates either its national investors or investors from third-countries.²²⁹

BITs guarantee the right of free transfer of payments for the investor in connection with his investment. In most BITs, similar to that provided in the Germany Model BIT of 2009, the right of transfer includes, capital, return, and, in the case of liquidation, the proceeds from liquidation, the principal and additional amounts to maintain or increase the investment, the payment of loans, the proceeds of sale of the whole or any part of the investment, and the compensation

²²⁵ Ryan, MC "Glamis Gold, Ltd. V. The United States and the Fair and Equitable Treatment Standard" 2011 *McGill Law Journal* 927 <http://lawjournal.mcgill.ca/userfiles/other/1169738-Ryan.pdf> Accessed on 2015-1-7.

²²⁶ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 243.

²²⁷ *Idem* at 260.

²²⁸ *Idem* at 271.

²²⁹ Brown, C *Commentaries on selected model investment treaties* 2013 92.

paid under the treaty's provision on full protection and security, expropriation, and compensation for losses.²³⁰

Most BITs, including the U.S.A. Model BIT of 2012, contain national and MFN treatments. The national and MFN treatments require that each party accord to investors and their investment treatment not less favourable than that accorded, in like circumstances, to investors and investment of the host state (national treatment) or to investors or investment of other countries (MFN treatment).²³¹ The national and MFN treatment, however, will apply only where the foreign and domestic investor or investor of other countries are in an 'identical' or 'similar' situation, or 'in like circumstances'.²³²

Few BITs have provisions that generally seek to promote transparency in the legal framework governing investment. In this regard, the U.S.A. Model BIT of 2012 Article 10(1) can be mentioned. This Article requires each party to promptly publish, or otherwise make publicly available, its laws, regulations, procedures, administration ruling of general application, and adjudicatory decisions respecting any matter covered by this treaty.²³³ Another similar provision is found in the Austria Model BIT of 2008 which contains a general transparency clause relating to the public availability of domestic law (as well as treaty law) that may affect the operation of the BIT.²³⁴

The majority of BITs retain the traditional approach which leaves the admission of investment to the discretion of the host state.²³⁵ Such European BITs generally stipulate that the host state will admit investment in accordance with its legislation.²³⁶ Those treaties do not, therefore, impose a duty to admit foreign investments.²³⁷ This means that each contracting party retains full discretion on the issue of establishing investments and does not make any undertaking in this

²³⁰ *Idem* at 312.

²³¹ *Idem* at 775.

²³² Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 63.

²³³ Brown, C *Commentaries on selected model investment treaties* 2013 801.

²³⁴ *Idem* at 30.

²³⁵ *Idem* at 24.

²³⁶ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 49.

²³⁷ Brown, C *Commentaries on selected model investment treaties* 2013 24.

regard.²³⁸ In the second group of BITs, we found the US BITs. The US BITs require the better of either the national or most-favoured nation treatment, not only in respect of post-establishment investments but also in respect of initial establishment. This is based on free market theories and the assumption that there is no rational economic justification for restrictive admission mechanisms.²³⁹ For instance, the Korea-Japan BIT of 2002, similar to the U.S.A. Model BIT, accords national and most-favoured nation treatment to investors of the other contracting party with respect to the establishment, acquisition, and expansion of investment.²⁴⁰

A few BITs contain a prohibition on performance requirements. Justifications for the prohibition of performance requirements are that the requirement interferes with the investor's control of the investment and that such prohibitions are trade distorting.²⁴¹

Some BITs provide for a very limited right of access for investors or persons associated with an investment.²⁴² Employment provision guarantees an investment the right to hire top managerial personnel of its choice, regardless of nationality. The provision, thus, prohibits the host state from prescribing the nationality of those who hold certain positions within the enterprise.²⁴³

Host state foreign investor arbitration clauses are among the fundamental and typical provisions of BITs. They afford private parties the right to pursue claims against a host state in direct arbitration under an international treaty by application of both domestic and international law.²⁴⁴

In some BITs, the host state foreign investor arbitration clauses include a choice of law clause. It is obvious that foreign investors generally prefer to have international law apply to any dispute because international law often provides greater protection for investment than national law and because the host state can alter national law to the detriment of the investor.²⁴⁵

²³⁸ *Idem* at 604.

²³⁹ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 56.

²⁴⁰ Brown, C *Commentaries on selected model investment treaties* 2013 404.

²⁴¹ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 419.

²⁴² *Idem* at 423.

²⁴³ *Idem* at 424.

²⁴⁴ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 436.

²⁴⁵ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 444.

A BIT is likely to specify either that international law applies or that both international law and local law apply. Even if international law is designated as the only applicable law, however, national law may be applicable to the extent that it is consistent with international counterparts since international law may not cover all issues that may arise in an investment dispute.²⁴⁶

In addition, many BITs provide that any award under the investor-state disputes provision shall be final and binding.²⁴⁷ Some BITs even include clauses to facilitate the enforcement of awards. ICSID awards are enforceable under the ICSID Convention in the territory of any member countries to that convention. Awards issued as a result of arbitration before the Additional Facility, under the UNCITRAL Rules or through some other mechanism, may be enforced through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).²⁴⁸

As was shown in Chapter Two, Ethiopia has a good Investment Proclamation. For instance, Investment Proclamation No 769/2012 provides that areas of investment open for foreign investors are to be determined by regulation to be issued by the Council of Ministers (Article 8), and any foreign investor is entitled to the right to make remittances out of Ethiopia in convertible foreign currency, as per Article 26/1. According to Article 25/1, no investment may be expropriated or nationalised except when required in consideration of the public interest and only in compliance with the requirements of the law. Adequate compensation, corresponding to the prevailing market value, is to be paid in advance in the case of expropriation or nationalisation of an investment for public interest (subparagraph 2). Furthermore, the investor is allowed to make a remittance of compensation due as a result of expropriation (subparagraph 26/g).²⁴⁹

As discussed above, firstly, the greater importance of BITs is due to the possibility that, although the substance of a BIT obligation could be incorporated into domestic legislation, such legislation may be subject to amendment. Investors cannot, therefore, rely on the continued existence of any protection that the legislation provides. BIT brings a greater security and

²⁴⁶ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 444.

²⁴⁷ *Idem* at 445.

²⁴⁸ *Idem* at 446.

²⁴⁹ Ethiopian Investment Proclamation "Investment Proclamation" No. 769/2012

<https://chilot.files.wordpress.com/2013/04/proclamation-no-769-2012-investment-proclamation.pdf>

Accessed on 2014-11-21.

transparency to the investment climate than could be achieved by the Investment Proclamation.²⁵⁰

Secondly, BITs have detailed provisions which are not found in the Investment Proclamations such as FET; full protection and security requires, the observance of obligation provisions relating to war and civil disturbance, national treatment, and most-favoured nation treatment, transparency, prohibition of performance requirements, entry and *sojourn*, and host state foreign investors arbitration, (which is the most important of all). The host state foreign investors' arbitration includes a choice of clauses.²⁵¹ BITs provide that any award under the investor-state disputes provision shall be final and binding and they include clauses to facilitate the enforcement of awards.²⁵²

Specifically the clause providing for host state foreign investors arbitration is among the fundamental and typical provisions of BITs because they affording private parties the right to pursue claims against a foreign state in direct arbitration under an international treaty by the application both of domestic and international law.²⁵³

Thirdly, even if such provisions of BITs are found in the Investment Proclamation, BITs have more detailed provisions. In this regard, the provisions on expropriation, admission, remittance of found, and employment provisions are worthy of mentioning.

Finally, according to a study by Neumayer and Spess, BITs fulfil their purpose, that is they attract more foreign direct investment to the signatory states. And those developing countries that have signed more BITs with major capital exporting developed countries are likely to have received more FDI.²⁵⁴ BITs, therefore, not only secure investment but also can attract more investment from developed countries to developing countries. BITs concluded by Ethiopia do not only benefit foreign investors but also benefit Ethiopia by attracting more investment from developed countries.

²⁵⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 2.

²⁵¹ *Idem* at 443.

²⁵² *Idem* at 446.

²⁵³ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 437.

²⁵⁴ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 28
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

CHAPTER FIVE

CONCLUSION and RECOMMENDATIONS

BITs may cover FDI, portfolio investment, and other personal investments from abroad, such as ownership of real estate. FDI is, however, the main object of BITs.²⁵⁵ Up to now Ethiopia has signed 30 bilateral investments, with countries like China (May 11, 1998) and India (June 5, 2005).²⁵⁶ Ethiopia is also one of the 49 countries that are currently designated by the United Nations as least developed countries (LDCs).²⁵⁷

Developing as well as developed countries need to attract FDI owing to the advantages that it offers for growth and development, especially for developing countries, the majority of which function in a low savings rate which is followed by a low investment rate resulting in low *per-capita* income growth rate. FDI may help them to avoid an unnecessary economic situation.²⁵⁸ A country is in unnecessary economic situation, when it is in a budget deficit i.e. when the government's expenditures are greater than its revenues.²⁵⁹

FDI is a dynamic force of globalisation and a decisive element of economic growth which provides numerous benefits to the host countries. FDI provides capital, foreign exchange, technology, competition, and increased access to foreign markets, to mention just a few advantages. It is the most important source of the external flow of resources to the developing

²⁵⁵ Sacerdoti, G *Bilateral treaties and multilateral instruments on investment protection* 1997 307.

²⁵⁶ Ethiopian Investment Agency "Bilateral investment treaties" last update October 30, 2012 Addis Ababa, Ethiopia http://www.eia.gov.et/english/articles/read_more/25/en/Bilateral_Investment_Treaties Accessed on 2015-1-9.

²⁵⁷ UNCTAD, *FDI in least developed countries at a glance* April 2001 1 unctad.org/en/docs/poiteiid3.en.pdf Accessed on 2015-1-9.

²⁵⁸ Shukla, L Dr. "Foreign Direct Investment & Developing Countries: Its Impact & Significance" May 2013 *Journal of Business Management & Social Sciences Research (JBM&SSR)* ISSN No: 2319-5614 Volume 2, No.5, 75 http://borjournals.com/Research_papers/May_2013/1286M.pdf Accessed on 2015-1-9.

²⁵⁹ Webb, D "The budget deficit: a short guide" 4 July 2012 *House of Commons Library, Economic Policy and Statistics Section 2* <http://www.parliament.uk/business/publications/research/briefing-papers/SN06167/the-budget-deficit-a-short-guide>. Accessed on 2015-2-10.

countries. Thus, FDI has played a vital role in the economic growth in developing countries by generating more benefits to the host economies rather than only filling the short-term capital deficiency problems.²⁶⁰

According to the World Investment Report, global FDI flows rose by 9 per cent in 2013 to \$1.45 trillion, up from \$1.33 trillion in 2012.²⁶¹ Taking East Africa in particular, FDI increased by 15 per cent to \$6.2 billion as a result of rising flows to Ethiopia and Kenya. Ethiopia's industrial policy is attracting Asian capital to develop its manufacturing base.²⁶²

Some large greenfield projects highlight the success of Ethiopia in attracting FDI, thereby enhancing its productive capabilities and generating employment. For example, Xinxiang Kuroda (China) invested \$67 million in a project in the textiles industry, creating about 1,100 jobs. An Indian-funded project in the food industry, also, is expected to create about 340 jobs.²⁶³

As I have tried to show in the preceding Chapters, BITs offer foreign investors great protection by providing a mechanism through which a foreign investor and a host country can establish a contract that is binding under international law. In addition, the investor-state dispute settlement procedures offer investors a neutral forum in which they can be heard equally with the host state and whose decisions bind the host state. The other provisions of BITs is that they also offer substantive protections such as national treatment, most favoured nation treatment, free transfer of assets, and a prohibition on performance requirements and prompt, adequate, and effective compensation for expropriation.²⁶⁴

²⁶⁰ Shukla, L Dr. "Foreign Direct Investment & Developing Countries: Its Impact & Significance" May 2013 *Journal of Business Management & Social Sciences Research (JBM&SSR)* ISSN No: 2319-5614 Volume 2, No.5, 75 http://borjournals.com/Research_papers/May_2013/1286M.pdf Accessed on 2015-1-9.

²⁶¹ UNCTAD, *World investment report 2014—investing in the SDGs: an action plan* 2014 2 unctad.org/en/publicationslibrary/wir2014_en.pdf Accessed on 2015-1-9.

²⁶² *Idem* at 39.

²⁶³ UNCTAD, *World investment report 2011—non-equity modes of international production and development* 2011 80 unctad.org/en/PublicationsLibrary/wir2011_en.pdf Accessed on 2015-1-17.

²⁶⁴ Guzman, AT "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" 1997 *Virginia Journal of International Law* Vol. 38:639 658 scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1903&context=facpubs Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties Accessed on 2015-1-9.

The time inconsistency problem is a significant barrier to efficient foreign direct investment. This is due to fact that a sovereign state is not able, to credibly bind itself to a particular set of legal rules when it negotiates with a foreign investor. Regardless of the assurances that the host state gives to the foreign investor and regardless of its intentions at the time of the contract, the host state can later change those rules if it feels that the existing rules are less favourable to its interests than they could be. Domestic laws, which are critical to the credibility of contractual promises among private parties, are no longer adequate to ensure compliance with the initial agreement in international investment contracts.²⁶⁵

Thus, as the foreign investor cannot rely on domestic laws to protect its interests, the only alternative legal structure is international law. International law, however, does not provide a way for a host country to make credible and binding commitments to an investor. The mechanisms of enforcing of an investment contract, in international law, also do not exist. This is to say that contracts with a host, by itself, do not offer a foreign investor any additional protections under international law. Assuming, furthermore, that protection exists, the investor cannot be sure that it will be enforced by an arbitral tribunal or that the host will accept the decision of a tribunal if the investor obtains a favourable ruling.²⁶⁶

By signing a BIT, however, the host country agrees, in a binding treaty under international law, to refrain from expropriation and to respect any contracts that it signs with investors. Not respecting such a contract is a violation of the treaty and, thus, a violation of international law that can be remedied through international commercial arbitration. Developing countries have an incentive to sign a BIT since such a treaty helps them to attract foreign investment.²⁶⁷

The binding effect of the contractual arrangement which is made possible by the dispute settlement provision of BITs²⁶⁸ allows the parties to avoid the dynamic inconsistency problem. The existence of a neutral dispute settlement mechanism that is capable of ensuring compliance by the host helps ensure that host states will honour their agreements. Thus, subject only to transaction costs, a BIT regime will cause capital to be invested where it stands to earn the greatest return.²⁶⁹

²⁶⁵ *Idem* at 659.

²⁶⁶ *Ibid.*

²⁶⁷ *Idem* at 679.

²⁶⁸ *Idem* at 680.

²⁶⁹ *Idem* at 681.

In concluding, I argue that it is advisable for Ethiopia to conclude more BITs. Being one of the least developed,²⁷⁰ Ethiopia needs FDI for its economic growth.²⁷¹ Even though, FDI inflow to Ethiopia is increasing,²⁷² signing of BITs will help Ethiopia to attract more foreign direct investment inflow than there is now. This is due to the fact that BITs will give the contract between an investor and Ethiopian government an international standing, and because BITs will provide more detailed investment protections than those are provided by Ethiopian Investment Proclamation. BITs also will allow any contracting foreign investor, whose country is party to the treaty, to submit any case that may arise from the investment contract to a neutral international dispute settlement tribunal provided in the BITs, whose decision will be binding on Ethiopia. Ethiopian BITs, thus, will offer great protection to any foreign investor who needs to invest in Ethiopia, and,²⁷³ thereby, attract more foreign direct investment to Ethiopia.²⁷⁴ My recommendations are presented in greater detail below.

My recommendations are that, when Ethiopia enters into BITs, it should try to give consideration to the following issues. Firstly, the exact meaning of most of the standards in BITs is controversial, apparently as a result of the vagueness of these standards.²⁷⁵ Three examples will suffice to show this defect of BITs. The first is that the exact meaning of the fair and equitable treatment standard is divisive. There is ongoing debate over whether the fair and equitable treatment standard merely reflects the protection offered through CIL or whether it

²⁷⁰ UNCTAD, *FDI in least developed countries at a glance* April 2001 1
unctad.org/en/docs/poiteiid3.en.pdf Accessed on 2015-1-9.

²⁷¹ Shukla, L Dr. "Foreign Direct Investment & Developing Countries: Its Impact & Significance" May 2013 *Journal of Business Management & Social Sciences Research (JBM&SSR)* ISSN No: 2319-5614 Volume 2, No.5, 75 http://borjournals.com/Research_papers/May_2013/1286M.pdf Accessed on 2015-1-9.

²⁷² UNCTAD, *World investment report 2014—investing in the SDGs: an action plan* 2014 2
unctad.org/en/publicationslibrary/wir2014_en.pdf Accessed on 2015-1-9.

²⁷³ Guzman, AT "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" 1997 *Virginia Journal of International Law* Vol. 38:639 658
scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1903&context=facpubs Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties Accessed on 2015-1-9.

²⁷⁴ Neumayer, E & Spess, L 2005 "Do bilateral investment treaties increase foreign direct investment to developing countries?" *London: LSE Research Online* 28
[http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) Accessed on 2015-1-7.

²⁷⁵ Sasse, JP *An economic analysis of bilateral investment treaties* 2010 51
<http://s1.downloadmienphi.net/file/downloadfile1/147/1405300.pdf> Accessed on 2014-3-19.

constitutes an autonomous standard on its own that goes beyond the minimum standard in international law. Arbitral tribunals are showing a tendency to treat the fair and equitable standard as an autonomous standard whose interpretation depends on the treaty context.²⁷⁶ Some Ethiopian BITs did not have a clear definition or explanation of the fair and equitable treatment standard. For example, in the Ethiopian BIT with China²⁷⁷ the fair and equitable treatment standard is stated without any explanation. In the Ethiopia-China BIT, Article 3 states that investments and activities associated with investments of investors of either contracting party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other contracting party.²⁷⁸ Ethiopian BITs must, therefore, define the fair and equitable standard and also follow the arbitral decisions and treat the fair and equitable standard as an autonomous standard.²⁷⁹

The second relates to the currency transfer of the BITs which typically provides that each party shall permit the free transfer of certain payments related to an investment.²⁸⁰ Even though, most Ethiopian BITs had provided an illustrative list of transfers or payments to which the transfer provision applies, the Ethiopia-Israel BIT²⁸¹ and the Ethiopia-United Kingdom BIT²⁸² did

²⁷⁶ Sasse, JP *An economic analysis of bilateral investment treaties* 2010 51

<http://s1.downloadmienphi.net/file/downloadfile1/147/1405300.pdf> Accessed on 2014-3-19.

²⁷⁷ UNCTAD, "Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the People's Republic of China concerning the encouragement and reciprocal protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 01 May 2000 Accessed on 2015-06-18.

²⁷⁸ *Ibid.*

²⁷⁹ Sasse, JP *An economic analysis of bilateral investment treaties* 2010 51

<http://s1.downloadmienphi.net/file/downloadfile1/147/1405300.pdf> Accessed on 2014-3-19.

²⁸⁰ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 317.

²⁸¹ UNCTAD, "Agreement 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" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 22 March 2004 Accessed on 2015-06-18.

²⁸² UNCTAD, "Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments"

not have this illustrative list. For example, in the Ethiopia-Israel BIT, Article 6 simply states that each contracting party shall guarantee to investors of the other contracting party the rights of unrestricted transfer of their investments and returns.²⁸³ Ethiopian BITs must, therefore, identify the transfers to which it applies and define what is meant by transferability.²⁸⁴

The third standard is in the requirement that expropriation be accompanied by compensation. Even though, most Ethiopian BITs had adopted as a condition for expropriation the traditional Hull rule of the 'prompt, adequate and effective' formula.²⁸⁵ Few Ethiopian BITs, however, had used more general terms to refer to the requirement of compensation when expropriation or nationalisation takes place. For example, in the Ethiopia- Belgian-Luxembourg Economic Union BIT Article 7/2/c provided that the measures of expropriation shall be accompanied by provisions for the payment of adequate and effective compensation. And sub-section 3 of this Article states that payment shall be made without undue delay.²⁸⁶ Similarly, in the Ethiopia-China BIT, Article 4/2 provided that the compensation shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable and shall be paid without unreasonable delay.²⁸⁷ Ethiopian BITs, therefore, should

Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Signed: on 19 November 2009 not yet entered into force Accessed on 2015-06-18.

²⁸³ UNCTAD, "Agreement 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" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 22 March 2004 Accessed on 2015-06-18.

²⁸⁴ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 317.

²⁸⁵ Dolzer, R and Stevens, M *Bilateral investment treaties* 1995 109.

²⁸⁶ UNCTAD, "Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the reciprocal promotion and protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Signed: on 01 July 2003 not yet entered into force Accessed on 2015-06-18.

²⁸⁷ UNCTAD, "Agreement between the government of the Federal Democratic Republic of Ethiopia and the government of the People's Republic of China concerning the encouragement and reciprocal

promote the principle that 'prompt, adequate and effective' compensation should be paid. And they should define in detail what is meant by the 'prompt, adequate and effective' requirement.²⁸⁸ Ethiopia must, therefore, try to define the BITs treatment standards very specifically in order to avoid legal insecurity.

Secondly, there are BIT protections that may be found in only few BITs, but which are of significant importance. For example, the transparency provision is found in only a few BITs,²⁸⁹ and a small number of BITs contain provisions on prohibition on performance requirements²⁹⁰ and a very limited right to access for investors or persons associated with an investment.²⁹¹ In Ethiopia, only the BITs with Austria,²⁹² Kuwait²⁹³, and Finland²⁹⁴ had included an explicit

protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 01 May 2000 Accessed on 2015-06-18.

²⁸⁸ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 273.

²⁸⁹ *Idem* at 398.

²⁹⁰ *Idem* at 419.

²⁹¹ *Idem* at 423.

²⁹² UNCTAD, "Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 01 November 2005 Accessed on 2015-06-18.

²⁹³ UNCTAD, "Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998 Accessed on 2015-06-18.

²⁹⁴ UNCTAD, "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" *Investment Policy, International Investment Agreement Navigator, Ethiopian-Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 03 May 2007 Accessed on 2015-06-18.

provision that requires transparency. For example, in the Ethiopia-Finland BIT, Article 15 states that each contracting party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the investments of investors of the other contracting party in the territory of the former contracting party.²⁹⁵

Only few Ethiopian BITs have provisions on prohibition on performance requirement. For example, in the Ethiopia-Kuwait BIT, Article 3/5 prohibited contracting parties from imposing mandatory measures which may require or restrict the purchase of materials, fuel, or of means of production, transport or operation of any kind, or restrict the marketing of products inside or outside its territory, or any other measures having the effect of discrimination against investments by investors of the other contracting party in favour of investments by its own investors or by investors of third states. Subsection 6 of this Article states that, once established, investments shall not be subject in the host contracting state to additional performance requirements which may hinder or restrict their use, enjoyment, management, maintenance, expansion or other activities in connection with such investments or adversely affect or be determinant to their viability.²⁹⁶

And most Ethiopian BITs did not have provisions that provide a right to access for investors or persons associated with an investment. Among the few BITs that had included provisions in this regard only the Ethiopian BIT with Kuwait had provided a detailed provision. In the Ethiopia-Kuwait BIT, Article 2/5 states that investors of either contracting states shall be permitted to engage top managerial and technical personnel of their choice regardless of nationality, and each contracting state shall in this respect make available all necessary facilities to the extent permitted by its laws and regulations. And each contracting state shall, subject to

²⁹⁵ UNCTAD, “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” *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 03 May 2007
Accessed on 2015-06-18.

²⁹⁶ UNCTAD, “Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments” *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998
Accessed on 2015-06-18.

its laws and regulations to entry, stay and work of a natural person, examine in good faith and give sympathetic consideration to requests by investors of the other contracting state and key personnel who are employed by such investors including family members, to enter, leave and remain temporarily in its territory for the purpose of carrying out activities connected with the making or the management, maintenance, use, enjoyment or disposal of an investment.²⁹⁷ Ethiopia, therefore, must give due consideration to such provisions, because their inclusion plays a great role in attracting foreign investment.

Thirdly, some BITs' provisions can be preferred to others. For example, in the treaties concluded by European countries, the issue of admission of foreign investors is subject to domestic law²⁹⁸ while in those BITs concluded by the U.S.A., the national and MFN standard are made applicable to the 'establishment' or 'acquisition' of investments.²⁹⁹ Except for the BITs concluded with Finland³⁰⁰ and Kuwait³⁰¹, Ethiopian BITs had followed the structure of the BITs concluded by European countries and left the issue of admission of investors or investments of investors of the other contracting parties to the discretion of the host state.³⁰² In the BITs

²⁹⁷ UNCTAD, "Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998 Accessed on 2015-06-18.

²⁹⁸ Shihata, IF.I "Recent Trends Relating to Entry of Foreign Direct Investment" 1994 *ICSID Rev FILJ* 55.

²⁹⁹ *Idem* at 56.

³⁰⁰ UNCTAD, "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" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 03 May 2007 Accessed on 2015-06-18.

³⁰¹ UNCTAD, "Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998 Accessed on 2015-06-18.

³⁰² Shihata, IF.I "Recent Trends Relating to Entry of Foreign Direct Investment" 1994 *ICSID Rev FILJ* 55.

concluded with Finland³⁰³ and Kuwait³⁰⁴, however, the Ethiopian government had followed the structure of the BITs concluded by the U.S.A.³⁰⁵ to some extent since those BITs concluded with Finland and Kuwait had only made provision for the most favoured nation standard for admission of investments of investors of the other contracting parties. But they had not included a national treatment standard. For example, in the Ethiopia-Finland BIT, Article 3/2 provided that contracting parties shall apply to investors and to investments by investors of the other contracting party upon admission, a treatment which is no less favourable than that accorded to investors and to investments of any third state.³⁰⁶ Therefore, Ethiopia has to try to make its BITs more liberal. I, thus, recommend that Ethiopia follows the model adopted by the U.S.A. and includes in its BITs the national and most-favoured nation treatment standard with regard to admission of investment. This will make Ethiopian's BITs more liberal and more investment friendly.

Finally, with regard to investor-state dispute provision, most Ethiopian BITs did not have a choice of law clause. And only the BITs with Austria³⁰⁷ and Kuwait³⁰⁸ had included a choice of

³⁰³ UNCTAD, "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" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 03 May 2007 Accessed on 2015-06-18.

³⁰⁴ UNCTAD, "Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998 Accessed on 2015-06-18.

³⁰⁵ Shihata, IF.I "Recent Trends Relating to Entry of Foreign Direct Investment" 1994 *ICSID Rev FILJ* 56.

³⁰⁶ UNCTAD, "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" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 03 May 2007 Accessed on 2015-06-18.

³⁰⁷ UNCTAD, "Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments" *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)*

law clause. In the Ethiopia-Austria BIT, Article 15 states that a tribunal established under this part (part 9 which deals with settlement of disputes between an investor and a contracting party) shall decide the dispute in accordance with this Agreement (the Ethiopia-Austria BIT), and applicable rules and principles of international law.³⁰⁹ The Ethiopia-Kuwait BIT, Article 9/7 also provided that an arbitral tribunal shall decide the issues in dispute in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, it shall apply the law of the host state, including its rules on conflict of laws, and such recognised rules of international law as may be applicable, taking into consideration also the relevant provisions of this agreement.³¹⁰ I, thus, recommend that Ethiopian BITs should include a choice of law clause, and that choice of law should be international law because investors generally prefer to have international law apply to any dispute since international law often provides greater protection for investment than national law, in view of the fact that the host state can alter national law to the detriment of the investor.³¹¹

<http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 01 November 2005
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³⁰⁸ UNCTAD, “Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments” *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)*
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³⁰⁹ UNCTAD, “Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the promotion and protection of investments” *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)*
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³¹⁰ UNCTAD, “Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the encouragement and reciprocal protection of investments” *Investment Policy, International Investment Agreement Navigator, Ethiopian- Bilateral Investment Treaties (BITs)*
<http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. Entry into force: on 12 November 1998
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³¹¹ Vandevelde, KJ *Bilateral investment treaties: history, policy, and interpretation* 2010 444.

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