

Ethiopia and Its FDI: Towards Domesticating BITs for Sustainable Development

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Abstract

The main objective of this article is to explore rooms for sustainable development friendly domestication of BITs in Ethiopia. It employed a doctrinal research approach and examined a range of policy documents, legal frameworks, interview data and scholarly literature. Bilateral Investment Treaties (BITs) are used as a tool for the promotion and attraction of FDI. However, the implementation of BITs without tailoring to the Ethiopian context would contravene the constitution and many international conventions to which Ethiopia is a party. Domesticating the BITs in support of Ethiopia's sustainable development agenda is desirable amid there is limited understanding of how the BITs could be domesticated and implemented in line with sustainable development within the Ethiopian context. Though Ethiopia's BITs lack alignment with the sustainable development agenda, customizing for alignment is required. As BITs require domestication for their domestic implementation, such a process opens a room for recalibrating rights and obligations in line with the sustainable development agenda. Both national and international policies for sustainable development agenda together with continued calls for reform to the BITs regime nurture customized domestications. In addition, BITs ratification in Ethiopia should go beyond the declaration of ratification and reproduce treaty provisions together with the interpretation of vague sustainable development impeding provisions.

Keywords: Bilateral Investment Treaty, Foreign Direct Investment, Sustainable Development, Sustainable Development–Friendly, Treaty Domestication

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1. Introduction

Economic globalization together with investment and trade liberalization is bringing new challenges to environmental and social well-being. Multinational corporations are one of the players and drivers in the economic globalization process.¹ As they are mainly profit-motivated, they tend to be profiteering and pose challenges to the sustainability agenda, especially in least-developed countries where law enforcement and regulatory institutions are weak.

Taking dangers posed by unregulated FDI and the profiteering nature of MNCs into consideration, sticking to principles that curve and mitigate problems like sustainable development is of paramount importance. As it has been sensed that unfettered FDI and globalization need reconsideration, some call this reconsideration and globalization slowdown as ‘deglobalization’ or ‘slobalization’.² From an international investment regulation perspective, deglobalization refers to the trend of countries adopting policies and measures that restrict or limit foreign investments and the activities of MNCs within their borders.³

Hence, debatably, deglobalization in the context of international investment regulation can manifest itself in the trend of current rethinking in the BITs-making process and ISDS process.⁴ As there are legitimacy concerns with regard to the unbalanced nature of BITs and ISDS mechanisms as they were found to be contrary

¹ Jeffrey A. Hart, *Globalization and Multinational Corporations*, 2017, pp 332-333 <https://hartj.pages.iu.edu/documents/harris.pdf>. Accessed June 21, 2024

² Julien Chaisse and Georgios Dimitropoulos, ‘Domestic Investment Laws and International Economic Law in the Liberal International Order’, *World Trade Review*, Volume 22, Special Issue 1 p.2, 2023 <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/BDF63F6BFCA83A91584538103CA26EC3/S1474745622000404a.pdf/domestic-investment-laws-and-international-economic-law-in-the-liberal-international-order.pdf>> accessed Dec. 10, 2023

³ Gong and et al, ‘Globalization in reverse? Reconfiguring the geographies of value chains and production networks’, *Cambridge Journal of Regions, Economy and Society* 2022, 15, 165–181, p166, <<https://doi.org/10.1093/cjres/rsac012>> accessed Nov. 12, 2023

⁴ Georgios Dimitropoulos, ‘National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform’, *The Journal of World Investment & Trade* 21(1):71-103, February, 2020, p71

to the police power of host states, call for governments to reconsider or terminate their BITs are intense.⁵ There are also calls for restricting the scope of ISDS mechanisms, which allow foreign investors to bring claims against host countries for alleged breaches of investment protection.⁶ These calls for revisions, if implemented, could relax policy spaces for host states and enable them to regulate in line with sustainable development issues.

In the context of FDI, sustainable development priority to Ethiopia should refer to a range of measures ensuring that FDI benefits are distributed equitably and reach different segments of society, particularly those who are traditionally marginalized or disadvantaged. It recognizes the importance of addressing social, cultural, and environmental concerns as it is evident from the unequivocal incorporation of sustainable development in the FDRE Constitution.⁷ The Constitution recognizes not only sustainable development in general terms but also the environmental and social dimensions of sustainable development in particular.

Ethiopia has signed BITs with about 35 countries to promote FDI inflow. Many BITs to which Ethiopia is a party did not embrace a sustainable development agenda.⁸ Direct application of these treaties poses problems on public interest objectives like ensuring sustainable development agenda. Hence, the quest for sustainable development-aligned investment treaty implementation needs careful academic scrutiny, and a search for Sustainable development-friendly BIT domestication requires discursive analysis.

⁵Ibid

⁶ UNCTAD, Taking Stock of IIAs Reform: Recent Developments, issue 3, 2019, p3

⁷ The Constitution of Federal Democratic Republic of Ethiopia, (1995), Art 43(1), Proclamation No.1/1995, Federal Negarit Gazeta, year 1. No 1. FDRE Constitution

⁸ See for instance agreements with Major sources of FDI to Ethiopia i.e. 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, 1998; Agreement Between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, November 2000

One of the mechanisms through which these treaties could be tailored to the host states' context for implementation is treaty domestication.⁹ Domestication of investment treaties refers to the process of incorporating and adapting BITs into the domestic legal framework of a country so that it can be implemented.¹⁰ The issue of domesticating BITs into the domestic legal system leads us to the 'Monist' and 'Dualist' conception of the relationship between the domestic legal system and the international legal system.

In Ethiopia, national and international legal systems are independent which would indicate that the Ethiopian legal system has a dualist nature. In dualist systems, whenever conflict arises between the international legal system and national legal system, the latter prevails or at least it is to be solved based on National courts and national laws.¹¹ Whatever nature the Ethiopian legal system may have in such monist and dualist categorization, host countries should be free to choose ways of domesticating to international treaties. Fortunately, textual analysis of all BITs Ethiopia signed indicates that they did not preclude making reservations and preferring ways of ratification.¹² Had there been any prohibition to that effect, making reservations would have been illegal as per Art 19 of the Vienna Convention on the law of treaties. Fortunately, Ethiopia is not a party to this treaty.

Currently, implementing BITs without tailoring them to the Ethiopian context would endanger the country's interests including the sustainable development agenda. Several studies are indicating that BITs to which Ethiopia is a party need

⁹ John H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', AM. J. INT'L L. vol. 86(2), (1992), p324

¹⁰ Hsieh PL, 'New Investment Rulemaking in Asia: Between Regionalism and Domestication.' World Trade Review Vol.22, 2023, P191 < <https://doi.org/10.1017/S1474745622000362>.> Accessed May 23, 2023

¹¹ James Crawford, Brownlie's Principles of Public International Law (OUP, 8th ed., 2012), p48

¹² UNCTAD, International Investment Agreements Navigator, available at: < <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>. > Accessed May 20, 2024

reconsidering.¹³ However, studies focusing on the implementation of these treaties and their synchronicities with domestic legal frameworks are scarce. This article tries to shed light on how these treaties could be domesticated in line with the sustainable development agenda. It has employed a qualitative research approach and examined a range of policy documents, legal frameworks, scholarly literature and some interview data and attempted to indicate possible ways of implementing BITs in line with the sustainable development agenda.

This article has six sections. This first section embodies an introduction where the background of the research problem is addressed. The second section attempts to conceptualize domestication. The third section deals with the significance of aligning BIT domestication with sustainable development and the place given to sustainable development both nationally and at the global level. The fourth section discusses the need to give protection for public interests. The fifth section is about the importance of subjecting the BIT regime to democratic scrutiny. The final section discusses the challenges and available opportunities in the process of BITs domestication for sustainable development.

2. Domestication of Investment Treaties and the Margin for Embracing Sustainable Development in Host States

Foreign investment treaty domestication refers to the process of incorporating international investment agreements, such as BITs or other treaties, into the domestic legal framework of a state and making them enforceable.¹⁴ ‘A rule of international law is domesticated when a state incorporates and weaves it into its domestic

¹³ Martha Belete and Tilahun Esmael, ‘Rethinking Ethiopia’s Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration’, *Mizan Law Review*, Vol. 8, No.1 September 2014, p117; Mekonnen Seid, ‘Renegotiating Ethiopian Bilateral Investment Treaties in line with the Constitutional Goal of the Right to Sustainable Development’, (City University of Kong Hong, PhD Dissertation, 2021); Desalegn Deresso ‘Balancing Interests under Bilateral Investment Treaties of Ethiopia: Focusing on State Regulatory Rights’, *Hawassa University Journal of Law (HUJL)* Volume 6, July 2022

¹⁴ Supra note 10

legislation and rule-making procedures.’¹⁵ In this context, domestication refers to the act of transforming and integrating international investment agreements into a country's national laws.¹⁶ This should give chances for host states to adapt the provisions of these treaties to the specific context and needs of the country in the ratification process. In the context of this article, international investment treaty domestication refers to sustainable development friendly if it recognizes or prioritizes and enhances sustainable development priorities of least developed countries. These sustainable development priorities include social inclusiveness, technology transfer, poverty reduction, environmental protection and economic growth.¹⁷

In conclusion, the discussion in this section implies those domestic regulatory norms are taking important places along with international orderings. We can take domestication/ratification of international investment treaties in this context. Our understanding of domestication could include the gradual establishment of rules within a domestic context, which may differ from or run alongside the rules of international investment law.¹⁸ Though there are diversities among countries in the process of domestication, ratification and transformation are major components in the domestication process. Ratification refers to the declaration by a state to be bound by a treaty, while transformation is about converting the treaty’s provisions into domestic law which refers to giving domestic legal effect to treaty provisions.¹⁹

¹⁵ Anthony D'amato, *The Coerciveness of International Law*, 52 *German year book of international law*. 437, (2009). (Northwestern University School of Law Public Law And Legal Theory Research Paper Series No. 10–60) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691367> Accessed Jan 22, 2024

¹⁶ Rommel J. Casis, *Domesticating International Law: Resolving the Uncertainty and Incongruence*, (Philippine Yearbook of International Law), 2020, p129

¹⁷ OECD, *Making Growth Green and Inclusive: The Case of Ethiopia*, p5, (OECD Green Growth Papers), 2013

¹⁸ *Supra* note 2.

¹⁹ Pieter van Dijk & Bahiyyih G. Tahzib, *The Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 *Chi.-Kent L. Rev.* 413 (1991). P417 Available at: <<https://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss2/7>> Accessed June 1, 2024

3. Importance of Aligning Foreign Investment Treaty Domestication with Sustainable Development Agenda

Aligning foreign investment treaty domestication with a sustainable development agenda is important for countries in general and the least developed countries in particular. Sustainable Development Agenda embraces a global commitment to achieving environmental sustainability, social inclusion and economic prosperity.²⁰ The agenda enshrines values which are essential to least developed countries. These include addressing vulnerabilities like poverty, inequality, climate change, and other development challenges.²¹ By incorporating these values into the domestication process, countries can ensure that foreign investment may not inhibit sustainability but also contributes to social progress, environmental protection, and human rights protection which are also values equally or more importantly competing together with investors' property rights protection.

The need for gearing development activities with sustainable development issues became more evident when the United Nations Member States adopted Sustainable development goals (SDG hereinafter) in 2015. In general, SDGs provide a comprehensive and universally accepted framework for addressing pressing challenges ranging from poverty and hunger to climate change and gender inequality.²² They particularly cover addressing global challenges such as poverty, inequality, climate change, and environmental degradation.²³

²⁰ UNDP Policy and Programme Brief, 2016, p6. Available at:

<https://www.undp.org/sites/g/files/zskgke326/files/publications/SDG%20Implementation%20and%20UNDP_Policy_and_Programme_Brief.pdf. > last accessed 3/30/2024

²¹ ____ UNSSC Knowledge Centre for Sustainable Development, the 2030 Agenda for Sustainable Development, p1. available at:

<<https://www.un.org/development/desa/jpo/wp-content/uploads/sites/55/2017/02/2030-Agenda-for-Sustainable-Development-KCSD-Primer-new.pdf>. > accessed Jun.28, 2023

²² J. Robert Basedow, The European Union's New International Investment Policy and the United Nation's Sustainable Development Goals Integration as a Motor of Substantive Policy Change? In Cosimo Beverelli et al (eds) *International Trade, Investment, and the Sustainable Development Goal*, (Cambridge University Press, 2020), pp52-53

²³ ____ Together 2030, Balancing the pillars: Eradicating poverty, protecting the planet and promoting shared prosperity (Together 2030 Written Inputs to the UN High-Level Political Forum (HLPF) 2017), April 2017, p2. Available at:

Implementing BITs without making adjustments may exacerbate inequality, poverty and environmental problems. BITs by their inherent nature are unbalanced and are tilted towards giving much protection to foreign investors. The importance of foreign investment treaty domestication aligned with the sustainable development agenda may mitigate the unbalanced nature of the treaties. By integrating the principles and objectives of the sustainable development agenda into implementing strategies of investment agreements, countries can ensure that foreign investments may not inhibit sustainable development but also contribute positively to economic, social, and environmental sustainability.²⁴

Foreign investment treaties focus on protecting investors' rights and providing favourable conditions for investment.²⁵ However, this narrow focus often disregards the potential negative impacts on host countries, including environmental degradation, social inequality, and the violation of human rights.²⁶ Aligning these treaties with the sustainable development agenda helps to address these concerns and foster a more holistic approach to investment as they emphasize the importance of leaving no one behind and ensuring inclusive development.²⁷

3.1. Sustainable Development Policy Space

While Ethiopia lacks a comprehensive and independent sustainable development policy, it is possible to derive the principles and objectives related to sustainability from various sources such as the constitution, fragmented legislations, and different existing policies. In addition to the constitutional provisions, sustainable

<<https://www.bing.com/search?q=Sustainable%20development%20addresses%20economic%20%2C%20social%20and%20environmental%20issuespdf#:~:text=Development%20Knowledge%20Platform-,https%3A//sustainabledevelopment.un.org/content/documents/150%E2%80%A6,%2C2%B7%20PDF%20file.>> accessed Jun. 20, 2023

²⁴ *ibid*

²⁵ Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' in Kavaljit Singh and Burghard Ilge (Eds) *Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices*, 2016, P53

²⁶ United Nations/Economic and Social Commission for Asia and the Pacific (ESCAP), Sustainable development provisions in investment treaties, 2018, p14

²⁷ SDGs 1, 2,4,5,10

development is referred to in different piecemeal Ethiopian legislations including the Investment Proclamation.²⁸, the Industrial Parks proclamation²⁹, and Mining operation proclamation³⁰.

The FDRE constitution provides under Article 43(1) that the People of Ethiopia have the right to get improved living standards and sustainable development.³¹ Article 43(3) also states that Ethiopia's right to sustainable development must be protected and upheld by all international treaties ratified by Ethiopia.³² The fact that the constitution has taken the right to sustainable development as one of the values to be protected with due care offers a good opportunity to make it a guiding principle in the process of FDI regulations. The constitution also provides that the principle for external relations should be based on the protection of the country's national interests. It is provided that international agreements should promote the interests of Ethiopia.³³ This process inherently allows for the examination and potential reordering of treaty provisions within the framework of our legal system. It involves ensuring that the provisions and obligations outlined in investment treaties are aligned with the principles and objectives of sustainable development such as environmental protection, social inclusiveness, poverty reduction, and economic growth.

Thus, the concept of integrating and balancing environmental, social and economic issues all together has a constitutional basis.³⁴ Therefore, giving primacy to economic growth at the expense of environmental and social dimensions of

²⁸ Investment Proclamation, 2020, Proc.No 1180/2020, Art 5. Federal Negarit Gazette, year 26. No 28

Arts .17-22, Art 5.

²⁹ Industrial Park Proclamation, 2015, Proc No. 886/2015, Art 4(5), Federal Negarit Gazette, year 21, no 39

³⁰ Mining Operations Proclamation, 2010, Proc. No. 678/2010, Preamble, Federal Negarit Gazette,

³¹ Supra note 7. Art 43(1)

³² *ibid*, Art 43(3)

³³ *Ibid*, Art 86(3)

³⁴ Jibril Abdi, 'The Right to Development in Ethiopia', p8. Available at: <https://www.academia.edu/9359320/The_Right_to_Development_in_Ethiopia> accessed Jun. 2, 2023

sustainable development is unconstitutional. This can be a guarantee for any government body that wishes to take measures with the purpose of aligning FDI activities with sustainable development.

The investment proclamation provides that one of the objectives of the proclamation is ‘to improve the living standard of the peoples of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development.’³⁵ This policy direction holds significance as it can aid in law enforcement and interpretation, even if it is not explicitly stated in the operational sections of the proclamation. This can be evident when we notice the powers and responsibilities of the Ethiopian Investment Commission (EIC) under Art 38 of the investment proclamation. The majority of the powers and responsibilities of the Commission are devoted to the promotion of investment and making the investment environment conducive for investors, not to a sustainable development agenda.

Ethiopian Industrial Park Proclamation has highlighted that one of the objectives is to attain sustainable economic development.³⁶ The Proclamation to promote the development of mineral resources provides its objective as ‘the Government must protect the environment for the benefit of present and future generations and to ensure ecologically sustainable development of minerals.’³⁷

Different Economic policy documents are prepared taking into account sustainable development agenda. For example, they are incorporated in the 1997 Environmental Policy of Ethiopia.³⁸ Ethiopia’s Climate-Resilient Green Economy (CRGE) does also embrace pillars of sustainable development. The CRGE vision and strategy are based on the Constitution of Ethiopia and the environmental policy of Ethiopia.

³⁵ Supra note 28, Arts .17-22,

³⁶ Industrial Park Proclamation, 2015, Proc No. 886/2015, Art 4(5), Federal Negarit Gazette, year 21, no 39

³⁷ Mining Operations Proclamation, 2010, Proc. No. 678/2010, Preamble, Federal Negarit Gazette,

³⁸ FDRE (1997), Environmental Policy of Ethiopia, EPA/MoEDC, Addis Ababa, Ethiopia, 3.

³⁹The first Growth and Transformation Plan (GTP I) has highlighted the crucial role of environmental conservation in achieving sustainable development.⁴⁰ The plan has also emphasized the importance of constructing a 'Green Economy' and implementing environmental laws as key strategic directions during its implementation period.⁴¹ Similarly, the successor to GTP I, the Growth and Transformation Plan II (GTP II), recognizes the necessity for coordinated and concerted efforts to ensure rapid, sustainable, and equitable economic growth.⁴² Furthermore, the Ten-Year Development Plan (2021-2030) has reiterated the significance of sustainable development.⁴³

By incorporating the principle of sustainable development in the constitution, various legislations and economic policy documents would imply that FDI legal frameworks should be implemented in a manner which enhances sustainability. Any concerned body in FDI regulation would have all these opportunities and get a foundation for aligning regulations of FDI with the goals of sustainable development. However, upon closer examination of sustainable development in general and within the context of Ethiopia, it becomes apparent that there is a lack of genuine commitment to this goal. There is a lack of enforcement mechanisms or lack of clarity as to what would happen to investors who have undermined the overall pursuit of sustainable development.

Currently, the practice of orienting BIT-making with a sustainable development agenda is observable. Several recent BITs and model BITs make at least a preambular statement about sustainable development. For instance, the Indian Model

³⁹ Environmental Protection Authority (EPA) (2012), United Nations Conference on Sustainable Development (Rio+20), National Report, 19. Available at: <https://sustainabledevelopment.un.org/content/documents/973ethiopia.pdf>. (accessed 28, May, 2024)

⁴⁰ The First Growth and Transformation Plan (GTP I) (2010-2014), P119

⁴¹ *ibid*

⁴² *ibid*

⁴³ Planning and Development Commission, Ten Year Development plan: a path way to prosperity, (2021-2030), p14, p22, p34, p48

BIT, the Norway Model BIT, the Dutch Model BIT, the International Institute for Sustainable Development (IISD) Model BIT, and the Southern African Development Community (SADC) Model BIT are acclaimed for their Sustainable development orientation.⁴⁴

Morocco - Nigeria BIT (2016),⁴⁵ Japan - Mozambique BIT (2013),⁴⁶ Argentina - Japan BIT (2018),⁴⁷ India - Kyrgyzstan BIT (2019),⁴⁸ Türkiye-Uruguay BIT (2022)⁴⁹ Brazil- United Arab Emirates BIT (2019)⁵⁰ These are some examples of BITs with good sustainable development orientation. These BITs inculcate provisions on one or more environmental standards, labour rights standards, and human rights protection. Even if there are some recent Ethiopian BITs which have sustainable development orientation, some others are not ratified yet.⁵¹ Interestingly, Ethio-United Arab Emirates BIT Ratified in 2021 should be praised for its sustainable development orientation. It incorporated sustainable development and its constituting elements in the preamble and specific treaty provisions.⁵² It indicates that sustainable development is penetrating recent treaty-making practices.

3.2. International Commitments for Sustainable Development

The Stockholm Declaration⁵³ laid the foundation for the idea of sustainable development, it was the 1987 Brundtland Report, titled "Our Common Future," that popularized the concept and provided a comprehensive definition.⁵⁴ The report

⁴⁴ International Institute for Sustainable Development (IISD) Model BIT (2006); Southern African Development Community (SADC) Model BIT (2012)

⁴⁵ Preamble of Morocco - Nigeria BIT (2016)

⁴⁶ Preamble of Japan - Mozambique BIT (2013)

⁴⁷ Preamble of Argentina - Japan BIT (2018)

⁴⁸ Preamble and Arts 11 and 12 of India - Kyrgyzstan BIT (2019)

⁴⁹ Preamble and Art 13 of Türkiye-Uruguay BIT (2022)

⁵⁰ Preamble and arts 15-17 of Brazil- United Arab Emirates BIT (2019)

⁵¹ Preamble of Ethio-Quatar BIT (2017) and Preamble of Ethio-Brazil BIT (2018)

⁵² Preamble and Arts 11-13 of Ethio-United Arab Emirates BIT (2016)

⁵³ Declaration of the United Nations Conference on the Human Environment, 1972, (Stockholm Declaration)

⁵⁴ World Commission on Environment and Development (WCED), Paragraph 27 of Brundtland Report, Our Common Future, 1987

defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."⁵⁵ Since then, the notion of sustainable development has lingered in many international policy formulation endeavours. Based on this, one can notice the commitment of the global community to sustainable development in various instances. For instance, the notion of sustainable development has been promoted in three consecutive UN conferences. In 1992 the Earth Summit/Rio Conference⁵⁶, in 2002 the World Summit on Sustainable Development or Johannesburg Conference⁵⁷ and in 2012 the Rio+20 Conference⁵⁸ on Sustainable Development, the notion was given emphasis and was reiterated.

These world conferences were large both in size and diversity of participants. Not only representatives of sovereign states but also representatives from international NGOs, businesses and intergovernmental organizations have participated in the conferences.⁵⁹ The adoption of the SDGs in 2015 marked a significant milestone in global efforts towards sustainable development. The goals provide a shared framework for countries, organizations, and individuals to work together to achieve a more sustainable and equitable world by 2030. Since their adoption, the SDGs have influenced policy-making, development planning, and investment decisions at the national and international levels.

⁵⁵ *ibid*

⁵⁶ The conference had produced as the final document the Rio Declaration and had opened for signature two conventions - the UN Framework Convention on Climate Change and the Convention on Biological Diversity

⁵⁷ Johannesburg Declaration 2002, World Summit on Sustainable Development (Johannesburg Summit) 'Report' (26 August-4 September 2002) UN Doc A/AC.257/32, Chapter 5 is devoted to trade and FDI [45]-[47], and the action plans – Agenda 21 and the Johannesburg Plan of Implementation, see also UN Conference on Environment and Development 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol I, 3.

⁵⁸ 64th Session of the United Nations General Assembly, UN General Assembly's Resolution 64/236.

⁵⁹ IIDS Reporting Service, Earth Negotiations Bulletin, A Reporting Service for Environment and Development Negotiations, Vol.27, No.6, 25 July 2011. Available at: <https://cites.org/sites/default/files/common/com/ac/25/enb_sum.pdf. >accessed Jan. 24, 2024

Ethiopia is a party to many international conventions embracing elements of sustainable development. Among other things, these include United Nations Framework Convention on Climate Change (UNFCCC)⁶⁰, United Nations Convention to Combat Desertification (UNCCD)⁶¹, the African Charter on Human and Peoples' Rights⁶², Right to Organize and Collective Bargaining Convention, 1949 (No. 98)⁶³, and Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).⁶⁴ All these will furnish legal grounds for reordering BITs contravening sustainable development agenda. Literal implementation of BITs will result in violation of labor rights, human rights and environmental standards enshrined in these international conventions.

In addition to all these, currently, there are soft law instruments which intend to regulate behaviors of multinational Corporations in line with sustainable development. Even if it may be contended that soft laws lack enforceability as binding agreements, we could not disregard their normative value. They could serve as a framework for behavior, shaping expectations, and embracing persuasiveness. Additionally, they lay the groundwork for future binding norms by establishing common norms and standards. These includes the UN Global Compact,⁶⁵ the UN Guiding Principles on Business and Human Rights (UNGPs),⁶⁶ OECD Guidelines

⁶⁰ Ministry of Planning and Development, Ethiopia's Third National Communication to the United Nations Framework Convention on Climate Change (UNFCCC), 2022, p86

⁶¹ The Federal Democratic Republic of Ethiopia Ministry of Environment and Forest, Second National Communication to the United Nations Framework Convention on Climate Change (UNFCCC), 2015, p217

⁶² African Union, List of Countries Which Have Signed, Ratified/Acceded to The African Charter on Human And People's Rights, available at: <https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf> accessed on 3/2/2024

⁶³ International Labor Organization (ILO), available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102950> accessed on 3/2/2024

⁶⁴ *ibid*

⁶⁵ United Nations Global Compact and the UN Human Rights Office of the high Commissioner, Embedding Human Rights into Business Practice II, available at: https://www.ohchr.org/Documents/Publications/Embedding_II.pdf.

⁶⁶ UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011)

for Multinational Enterprises.⁶⁷ The UN Global Compact provides 10 principles embracing fundamental responsibilities of Businesses in the areas of human rights, labor, environment and anti-corruption.⁶⁸ The UNGPs on human rights provides also a set of global standards on business and human rights.⁶⁹ They emphasize the state duty to protect human rights the corporate responsibility to respect human rights and access of effective remedy for victims' corporate abuse and violations.⁷⁰ The need for equitable and inclusive development has been also reiterated under the UN Declaration on the right to development.⁷¹ The declaration calls for stronger international cooperation and partnership between developed and developing countries to address global challenges and to bring about inclusive and equitable development.

Therefore, what is implicated in the above discussion is that there are important opportunities for host states indicating that the wind is blowing in their direction. The implication of all these global trends is that host states too need to take actions that are believed to be in line with sustainable development. Thus, host states have ample global policy support in the process of aligning FDI regulation with sustainable development.

4. Public Interest Protection

Under international law, including under international investment law, unilateral domestic actions taken by host States in the interest of the public would be legal if they are not used unpredictably, arbitrarily, discriminatorily, or to promote

⁶⁷ OECD Guidelines for Multinational Enterprises 2011 Edition, available at: <<https://www.oecd.org/daf/inv/mne/48004323.pdf>> Accessed Dec 22, 2023.

⁶⁸ African Union, List of Countries Which Have Signed, Ratified/Acceded to The African Charter on Human and People's Rights, available at: <https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf> accessed on 3/2/2024

⁶⁹ UN Human Rights Office of the high Commissioner, Guiding Principles on Business and Human Rights, available at: <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

⁷⁰ Ibid

⁷¹ UN, Declaration on the Right to Development, December 1986 (General Assembly resolution 41/128)

protectionism.⁷² Developing host states need to balance offering regulatory incentives with regulating for public interest. Investment treaties and ISDS offer little flexibility, emphasizing rigid adherence to agreements over public interest and thus this nature of the treaties and ISDS mechanism needs reconsideration in favor of public interest.⁷³ Jorge Viñuales rightly states ‘foreign investment agreements are exceptions to the principle that peoples and nations have sovereignty over their resources and that the public interest overrides the private interest.’⁷⁴ Therefore, measures by host states to protect public interest should be given supremacy as far as they are predictable, non-discriminatory and non-arbitrary.

Currently, considerable number of arbitral decisions from Investor State Dispute Settlement (ISDS herein after) process indicated that international investment treaties should balance investor protection and other legitimate public interests’ issue like human rights protection and environmental issue. In line with this the *Urbaser v. Argentina* Tribunal stated that:

International law recognizes that an investor accepts to become subject to the laws of the host state and it assumes the risk that there may be subsequent modifications to the regulations or that new measures may be adopted. The *Parkerings* Tribunal stressed that any businessman or investor knows that laws will evolve over time. The fair and equitable treatment standard requires good faith, transparency, reasonable treatment, free from arbitrariness and discrimination, and it does not protect any expectations that there will be absolute stability of the legal and commercial framework. The economic and social environment of a host State is relevant to such

⁷² Carlo De Stefano, ‘Litigating Climate Change Mitigation and Adaptation in Investment Dispute Resolution’, ISSN 2724-6299 (Online) <https://doi.org/10.6092/issn.2724-6299/18168>, (Athena, Volume 3.2/2023, pp. 187-208), p204

⁷³ Nicolás M. Perrone, *Investment Treaties and the Legal Imagination, How Foreign Investors Play by Their Own Rules*, (Oxford University Press, 2021), p200

⁷⁴ Jorge E. Viñuales, ‘Sovereignty in Investment law’, in Zachary Douglas, *The Foundations of International Investment Law: Bringing Theory into Practice* (Eds)

determination. In this regard, the State's leeway to issue regulations for reason of public order or interest is to be taken into account.⁷⁵

Therefore, a trend seems to emerge to recognize adapting investment treaty obligations to accommodate legitimate public interest objectives. Investors are expected to recognize host states authority to issue regulations for public interest reasons like environmental, social and economic reasons.

Similarly, the *Methanex* Tribunal confirmed legitimacy of host state measures for protection of legitimate health issues.⁷⁶ The tribunal meaningfully advanced the development of legal principles by affirming the significance of a state's authority to regulate health matters despite its obligations to protect investments.⁷⁷ The tribunal's recognition that regulations implemented for a public purpose, characterized by non-discrimination and adherence to due process, possess the capacity to impact foreign investments without being deemed as expropriation or necessitating compensation would encourage host states to protect public interests including sustainable development agenda.

5. The Need for Democratic Scrutiny on BITs

Until recently, in the investment treaty-making process public deliberation and participation is limited as it was considered only a technocratic process.⁷⁸ As studies indicate, it is doubtful that government officials thoroughly evaluated the advantages and disadvantages of these treaties when they signed them.⁷⁹ The scarcity in public debate and participation in the treaty negotiation process and limited parliamentary scrutiny is criticized as it undermines the democratic process. However, currently

⁷⁵ *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, Award, para 594, (Dec. 8, 2016).

⁷⁶ *Methanex Corp. v. United States*, UNCITRAL, Final Award (Aug. 3, 2005).

⁷⁷ *Ibid*

⁷⁸ Cotula, L., *Public Participation and Investment Treaties: towards a New Settlement? P42* (Brill, Leiden, 2021), available at: <<https://www.iiied.org/20116x>. > accessed Nove 10, 2023

⁷⁹ *Ibid*, see also Lorenzo Declaration on the Right to Development | OHCHR, 'International Law and Practice: Democracy and International Investment Law', Leiden Journal of International Law, (2017), 30, pp. 351–382, p370

there seems to be an inclination to intensify democratic scrutiny of investment treaties.⁸⁰

In line with this, Lorenzo Cotula stated that

[D]emocratic scrutiny of investment treaty making has evolved significantly in recent years, particularly in the context of negotiations among medium- and high-income polities that offer space for political contestation. The institutions of representative democracy have provided an important arena for these developments. As investor-state arbitrations highlight the implications that investment treaties can have in a wide range of policy areas, some parliaments are taking a more proactive role in investment treaty making, and NGOs have put pressure on parliaments to do so.

The need for democratic scrutiny of investment treaties arises from the belief that these agreements should not be negotiated and ratified behind closed doors without adequate public participation and oversight.⁸¹ It is suggested that decisions that can have significant impacts on a country's economic, social, and environmental policies should be subject to democratic processes and public debate. It entails involving a broader range of stakeholders, such as civil society organizations, affected communities, and national legislatures, in the negotiation, implementation, and review of investment treaties.⁸² Such process can open a room for the people's representatives to ascertain investment treaties are promoting sustainable development needs of a country.

⁸⁰ Elena Cima, 'Parliamentary Scrutiny over Investment Projects: The Case of Tanzania's Natural Resources

Regulatory Reform' in Eric De Brabandere and et al, *Public participation and foreign investment law: From The Creation of Rights and Obligations to Settlement of Disputes* (Brill | Nijhoff, 2021), p177

⁸¹ Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', *The International and Comparative Law Quarterly*, Jan., 2006, Vol. 55, No. 1 (Jan., 2006), pp. 121-159, p158

⁸² Supra note 79, p374

The inclination towards intensifying democratic scrutiny of investment treaties reflects a growing awareness of the need to align international investment rules with sustainable development and social justice objectives, while also respecting the principles of democratic governance and human rights.⁸³ The leaning in the arbitral jurisprudence to embrace legitimate public interest into the investment protection space would strengthen host state attempts to align investment protection with sustainable development objectives.

Treaty making practices are blamed for their democratic deficits. There are urges to give greater role to the legislative body in the treaty making process in some countries like Australia.⁸⁴ The legislative body as representative of the people and transparent forum is considered best suited to fill the democratic deficit in the treaty making process.⁸⁵

Though there is increasing interest in the democratic scrutiny attributable to increasing Investor State Arbitrations, a drive by NOGs and civil society organizations, and an increase in awareness of negative repercussions on BIT on local communities, there are challenges which shackled the democratic scrutiny.⁸⁶ In developing countries where there is less mature democracy, rooms for such scrutiny are reduced. Cotula stated this as ‘where parliament and the executive are politically aligned and party discipline is strong, scope for independent scrutiny would tend to be reduced.’⁸⁷

⁸³ European Union, ‘Parliamentary scrutiny of trade policies across the Western world’, 2019, p4. Available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603477/EXPO_STU\(2019\)603477_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603477/EXPO_STU(2019)603477_EN.pdf). Accessed March 6, 2023.

⁸⁴ Dinah Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, (Oxford University Press, 2011) P29

⁸⁵ *ibid*

⁸⁶ Joanna Harrington, ‘Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament’, 2005, McGill Law Journal 50: 465. available at: <http://lawjournal.mcgill.ca/userfiles/other/3959529-1225244248_Harrington.pdf> accessed May 28, 2024

⁸⁷ *Supra* note 79

This challenge to subject BITs to democratic scrutiny in the legislature is likely to face Ethiopia. There is fusion between the executive which is responsible to treaty signing and the legislature which is responsible to ratify BITs. The legislative body should have been one proper body which strike a balance between protecting foreign investors' rights and safeguarding public interest and thereby sustainable development.⁸⁸ This should have been a venue for identification and rectification of potential imbalances or negative impacts that may arise from BITs. Democratic scrutiny can contribute to greater transparency, accountability, and legitimacy in the implementation of investment treaties.

6. Challenges and Opportunities in Integrating Sustainable Development Agenda into Foreign Investment Regulations in Ethiopia

Integrating sustainable development into Ethiopia's FDI regulation is faced with both challenges and opportunities. One, among the challenges, includes maintaining delicate balance between investment protection and sustainable development. Foreign investment treaties often prioritize investor protection, while the sustainable development aims to promote economic growth, social inclusion, and environmental protection. Another challenge could be lack of commitment and institutional capacity to sustainable development friendly treaty implementation as evidenced from development first paradigm and reluctance to implement environmental standards.⁸⁹ In spite of such challenges, there are also opportunities for sustainable development friendly domestication and implementation of investment treaties including incorporation of sustainable development in the constitution and in different legislations.

6.1 Challenges

⁸⁸Supra note 80, p178

⁸⁹ Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023; see also Elias Nour, *The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture: The Legal Regime and Global Value Chain*, (University of Warwick School of Law, PhD Dissertation unpublished), 2012, p264

6.1.1. BITs Potential Restraint on Ethiopia's Regulatory Space

The content of BITs is primarily influenced by unbalanced negotiations between capital exporting states with higher bargaining power and capital importing states with lower bargaining power.⁹⁰ The party that holds greater negotiating power in a state-to-state interaction influences the treaty to align more closely with its own preferences, whereas the less powerful party tends to accept the terms set by the stronger party without much influence.⁹¹ Ethiopia as capital importing country is obviously with lower bargaining power in the treaty negotiation process as it is evident from nature of the BITs. They have given primacy to property rights protection of foreign investors with little attention to Sustainable development. Treaties are frequently negotiated with less consideration for the development priorities and needs of the host country since developed nations or multinational businesses frequently have stronger negotiating positions.⁹²

The majority of treaties are criticized for restricting the regulatory autonomy of the host country. This is technically known as regulatory chill effect. Tietje et. al. define regulatory chill as 'a state will fail to enact or enforce *bona fide* regulatory measures because of a perceived or actual threat of investment arbitration.'⁹³ It refers to a host states abstention from taking good faith regulatory measure for fear of arbitration with foreign investors.

Regulatory chill can be of three types: anticipatory regulatory chill, specific response regulatory chill and precedential regulatory chill.⁹⁴ Anticipatory regulatory chill refers to abstinence of policy makers from taking new public policy measures for

⁹⁰ Huikuri, Tuuli-Anna, 'Constraints and incentives in the investment regime: How bargaining power shapes

BIT reform', The Review of International Organizations vol. 18, (2023) p368 <<https://link.springer.com/article/10.1007/s11558-022-09473-1>. > accessed Jan. 24, 2024.

⁹¹ *ibid*

⁹² *ibid*

⁹³ Christian Tietje et al, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (2014) (Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands). P40

⁹⁴ *Ibid* p41

fear of the potential disputes with foreign investors.⁹⁵ Specific response regulatory chill refers to chilling effect of a specific regulatory measure once policy makers sensed actual or perceived notice of arbitration from investors.⁹⁶ Precedential regulatory chill happens when states hesitate to take regulatory measure for fear of arbitration taking experience from already settled disputes.⁹⁷ Though it is difficult to measure existence of one or the other kind of regulatory chill, increasing number of ISDS arbitrations would send signal to many host states including to Ethiopia. This is evident from the fact that currently, many states are trying to renegotiate or terminate existing treaties for fear of arbitral litigation.⁹⁸

Ethiopia, like other least developed countries, encounter similar challenges and face comparable problems. For example, foreign investment treaties have clauses that restrict Ethiopia's ability to pursue policies that are in line with its development objectives as many of the BITs contain broad and unqualified Fair and Equitable Treatment (FET) clauses, indirect expropriation clauses and full protection and security (PS) clauses.⁹⁹ Investor-state dispute resolution procedures may also limit the capacity of Ethiopia to take measures that serve sustainable development for fear of arbitration risk. In order to ensure and advance sustainable development, it is crucial to strike a balance between investor rights and Ethiopia's regulatory autonomy.

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ *ibid*

⁹⁸ Timothy Meyer, 'Power, Exit Costs, and Renegotiation in International Law', *Harvard International Law Journal*, Vol. 51, No. 2, Summer 2010, p395

⁹⁹ Art. 2(2) & 3(1&2) Ethiopia-Sweden BIT, Ethiopia-Libya BIT, Art. 3 (1); Ethiopia-UK BIT, Art.2 (2); Ethiopia-Spain BIT, Art. 3; Ethiopia-South Africa BIT, Art.3(1); Ethiopia-India BIT-Art.3(2); Ethiopia-Belgian-Luxembourg Economic Union, Art.3(1 &2); Ethiopia-Egypt BIT-Art.2(2); Ethiopia-Finland BIT-Art.2(1)& 4(1); Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.2(3&4), Ethiopia-Austria BIT, Art.3(1); Ethiopia-Germany BIT, Art.2(2)& 2(4); Ethiopia-Israel BIT, Art.2(2); Ethiopia-Iran BIT, Art.4(1); Ethiopia-France BIT, Art.3 & 5, and Ethiopia Netherlands BIT, Art.1(a)); Ethiopia-Algeria BIT, Art.3(1) &5(1)

Ethiopian BITs not only lack the necessary safeguards to the host states regulatory powers but also embrace vague standards like FET standards and indirect expropriation standards which are blamed to be sustainable development inhibiting.¹⁰⁰ These standards which are available in many BITs restrain host states regulatory space. Thus, there should be some mechanism to limit these provisions so that they should not limit host states regulatory autonomy unduly. In Ethiopia only few BITs try to maintain provisions having implication with host states regulatory power. Only the Ethiopia-France BIT¹⁰¹ recognizes a general right to regulate by giving explanation to FET. Additionally, a few additional BITs specifically include environmental regulation measures. Only the preamble of the Ethiopia-Finland BIT¹⁰² makes reference to the necessity for environmental protection. The Ethiopian-Belgian-Luxembourg BIT¹⁰³ includes a distinct provision for environmental protection, even though it has not yet come into effect.

To mitigate this problem, some countries are taking measures by clarifying vague investment protection standards. For instance, Morocco–Nigeria BIT and United Arab Emirates–Uruguay BIT provide that FET includes the obligation not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process of law.¹⁰⁴ European Commission and Canada in the CETA included textual clarification for some of the state’s responsibilities to protect foreign investors.¹⁰⁵ Canada and the United States in their post-2001 reforms of NAFTA have also included such textual clarifications of investment protection standards.¹⁰⁶

¹⁰⁰Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, 2018, p60

¹⁰¹ Ethio- France BIT, 2003(Explanation to Art 3 of the BIT)

¹⁰² Preamble of Ethio-Finland BIT

¹⁰³ Art 5 of the Ethiopian-Belgian-Luxembourg BIT

¹⁰⁴ Morocco–Nigeria BIT (2016), Art. 7.2(a); United Arab Emirates–Uruguay BIT (2018), Art. 3.2(a)

¹⁰⁵ Gus Van Harten, ‘Reforming the system of international investment dispute settlement’ in C.L. LIM, *Alternative Visions of The International Law on Foreign Investment: Essays in Honor of Muthucumaraswamy Sornarajah*, (Cambridge University Press 2016) p118

¹⁰⁶ *ibid*

Even with the presence of these challenges, host states have the potential to mitigate these risks by creating a well-designed regulatory framework for FDI that aligns with sustainability components. It is possible to carefully scrutinize and reject BITs that can limit regulation in the interest of sustainable development or can put reservations on some provisions of the BITs during the ratification process. All legitimate critics leveled against the BITs regime could strengthen sovereignty reassertion through the process of domestication.¹⁰⁷ Ethiopian parliament is mandated by the constitution to do this.¹⁰⁸ This can create opportunity for governments to introduce policies that require foreign investors to meet certain localization requirements, such as local content obligations, technology transfers, or employment quotas, and environmental safety standards which can help in achievement of sustainable development objectives. These measures aim to promote domestic industries and ensure that foreign investments contribute to local economic development, social inclusion and environmental protection.

Ethiopia has about 22 active BITs which are ratified and has become part of enforceable domestic law.¹⁰⁹ Textual analysis of the ratification proclamations indicate that the BITs are incorporated into Ethiopian legal system without harmonizing them with domestic law especially with the constitution.¹¹⁰

6.1.2. Lack of Political Commitment and Law Enforcement Problems

Another challenge in the process of sustainable development friendly domestication of investment treaties may be related to lack of political commitment and lack of law enforcement capacity.¹¹¹ Political leaders may prioritize short-term economic gains

¹⁰⁷UNCTAD, Taking Stock of IIAs Reform: Recent Developments, issue 3, 2019, p3

¹⁰⁸ Supra note 7, Art 43(3)

¹⁰⁹ UNCTAD, International Investment Agreements Navigator, available at: < <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>. > Accessed May 20, 2024

¹¹⁰ Supra Note 7. Art 43

¹¹¹ Interview with Addisu Tibebe, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

over long-term sustainability goals.¹¹² This can lead to the relaxation of environmental and social regulations, compromising sustainable development efforts.

Sometimes development promoting legal frameworks may fail to achieve their objective due to weak law enforcement.¹¹³ For instance, a study by Dejene (2013) revealed various factors for failure of EIA which would have been one of the tools to align FDI to sustainable development.¹¹⁴ According to Dejene, EIA has failed due to lack of political commitment, absence of implementing subsidiary legislation, conducting EIA only for simulation or formality or conducting it after some projects have started operation.¹¹⁵

In Ethiopia, it is also expected that effective implementing and monitoring FDI regulations in line with sustainable development can be challenged due to limited capacity and expertise, insufficient resources and technical knowledge.¹¹⁶ For instance environmental impact assessment experts provide factious study results without conducting real environmental impact assessment in the field.¹¹⁷ The same is true in producing some required documents, for instance work plan in Ministry of Mining to obtain exploration licenses, to obtain permits from the government.¹¹⁸

6.1.3. Higher need for attracting FDI and Economy First Paradigm

¹¹² Ghebretsele Tsegai, 'Interrogating the Economy-First Paradigm in "Sustainable Development": Towards Integrating Development with the Ecosystem in Ethiopia' (2017) 11(1) Mizan Law Review 64, 79.

¹¹³ Interview with Lemesa Erpie in Ethiopian Environmental Protection Authority Environmental Protection Audit expert, on 01/08/2023

¹¹⁴ Dejene Girma Janka, 'The Impact of Transplanting Environmental Impact Assessment Law into the Ethiopian Legal system', Jimma University Journal of Law, Vol. 5, 2013, p95

¹¹⁵ *ibid*

¹¹⁶ Adugna Feyissa Gubena, 'Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation', Journal of Environment and Earth Science, ISSN 2225-0948 (Online) Vol.6, No.1, 2016, p7.

¹¹⁷ Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023

¹¹⁸ Interview with Netsanet Melese, In Ministry of Mining Exploration Permit Expert, on 03/08/2023

BITs are used as tools of FDI promotion than the importance of investors and host states behavior regulation. Investment promotion agents in a country may have incentives to maintain weak regulatory standards and resist improved regulation.¹¹⁹ Typically, economic growth tends to prevail in the case of anticipated trade-off among the pillars of sustainable development.¹²⁰ Additionally, government may be hesitant to implement stricter FDI regulations for fear of deterring foreign investors, thus undermining sustainable development objectives.¹²¹ Taking sustainable development merely as a green-washing without considering in its genuine content presents critical challenge in the process of aligning FDI regulation with sustainable development.¹²² For instance, Ethiopian environment law enforcement was reported to be weak by BTI country report of Ethiopia in 2016. The possible reasons were stated to be the countries' higher desire for development/growth. The government did not need to scare FDI investors on ground of pollution and environmental regulations.¹²³ Similarly, focusing solely on economic growth without adequately considering the social and environmental dimensions of a country may be related to the development first paradigm. Elias (2012) stated this fact as "sustainable development' in its current mainstream interpretation, has been reduced to serve as the façade for the 'growth first' paradigm."¹²⁴ This setup can lead to unsustainable practices, such as exploitation of natural resources, labor rights violations, and disregard for environmental protection. Harmonizing FDI regulations with

¹¹⁹ Interview with Addisu Tibebu, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

¹²⁰ Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023; Nina Eisenmenger and et al., 'The Sustainable Development Goals prioritize economic growth over sustainable resource use: a critical reflection on the SDGs from a socio-ecological perspective', Sustainability Science (2020) 15:1101–1110, p1105

¹²¹ Beltersmann Stiftung, BTI 2016---Ethiopia country report. Gutersloh. 2016, 21 <https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2016_ETH.pdf> accessed Oct.15, 2023

¹²² Frank Vanclay, Impact Assessment and the Triple Bottom Line: Competing Pathways to Sustainability? (Sustainability and Social Science: Roundtable Proceedings, University of Tasmania) Jan, 2002, p28

¹²³ Ibid

¹²⁴ Supra note 89; Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on 01/08/2023

sustainable development requires a shift towards a holistic approach that balances economic growth with social and environmental considerations.

The problem of lack of commitment to embrace environmental and social responsibilities extends beyond BITs unbalanced nature. Ethiopia's increased eagerness to attract FDI poses challenges in fulfilling social and environmental responsibilities. This is evident from the foreign investment protection standards incorporated in the investment proclamation¹²⁵ and the range of fiscal incentives offered to foreign investors.¹²⁶ This is not special curse for Ethiopia, it is rather behavior of many developing countries which trying to lax environmental, labor and human rights standards to attract FDI.¹²⁷

6.1.4. Environmental Impact Assessment and Its Inefficacy in Ethiopia

In the course of evaluating certain initiatives' social and environmental effect, Sustainability Impact Assessment (SIA here after) and Environmental Impact Assessment (EIA hereafter), come to the table. SIA refers to a process by which the implications of an initiative on sustainability are evaluated, where the initiative can be a proposed or existing policy, plan, programme, and project, piece of legislation, or a current practice or activity.¹²⁸ The SIA is commended for its balanced representation of social, economic, and environmental sustainability and for its significance to complement existing environmental impact assessment approaches.¹²⁹ Inclusion of all sustainability dimensions i.e environmental, social

¹²⁵ Supra note 28, Arts .17-22

¹²⁶ Council of Ministers Investment Incentives Regulation No 517/2022, Art 4(2 and 4), Federal Negaret Gazette, no 28, year 39.

¹²⁷ Maryam Asghari, What is "Race-to-the-Bottom" Effect on FDI Inflow? Iranian Economic Review, Vol.16, No.32, Spring 2012, p75

¹²⁸ Jenny Pope and et al., 'Conceptualizing sustainability assessment', Environmental Impact Assessment Review, Volume 24, Issue 6, 2004, 595-616, ISSN 0195-9255, p595

¹²⁹ Suominen T, Modelling for Sustainability Impact Assessment, (School of Forest Sciences Faculty of Science and Forestry University of Eastern Finland, unpublished), (2021) p16, available at: <https://www.researchgate.net/publication/357069675_Modelling_for_Sustainability_Impact_Assessment> Accessed Oct. 10, 2023

and economic dimensions makes it preferable alternative among the realms of impact assessments.¹³⁰

The purpose of a SIA is to inform decision-making by providing evidence-based insights into the potential consequences of a project. This helps stakeholders understand the potential trade-offs, risks, and opportunities associated with different options, and supports the integration of sustainability considerations into the decision-making process.¹³¹ After the Brundtland Commission, the 'three-pillar' or 'triple bottom line' (TBL hereafter) model has come to be popular Sustainability impact analysis model.¹³² It emphasizes that material gains alone are insufficient measures of human well-being. In this context, the TBL model considers sustainability as a decision-making framework that gives equal importance to environmental, social, and economic considerations.¹³³

While SIA could be considered as a component of a more comprehensive EIA, there is uncertainty regarding its ability to encompass human rights impact assessment. It could be argued that expecting such assessments is a luxury for least developed nations like Ethiopia. Nevertheless, it is important to acknowledge that sustainable development is a fundamental principle and a desirable objective to pursue, irrespective of a country's level of development.

It is EIA which is legally recognized in Ethiopia though it is shackled with many problems including inadequate implementation of legislations, limited technical expertise and capacity, insufficient stakeholder engagement, lack of transparency, limited monitoring and enforcement, less political commitment and the like.¹³⁴ For

¹³⁰ Ibid, Jenny Pope, (supra note 127) p595

¹³¹ Ibid, p596

¹³² Janet Hammer, 'The triple bottom line and sustainability in economic development theory and practice', *Economic Development Quarterly* 31(1):25-36. November 2016, P25

¹³³ *ibid*

¹³⁴ Interview with Lemesa Erpie in Ethiopian Environmental Protection Authority Environmental Protection Audit expert, on 01/08/2023 and interview with Interview with Mulugeta Alemu, in Ethiopian Environmental Protection Authority Environmental Impact Assessment Expert, on

instance, experts from Ethiopian Environmental protection Authority indicated that investors are conducting EIA only as part of fulfilling formality.¹³⁵ They stated that sometimes experts conducting environmental impact assessment for investors directly copy and paste an environmental impact assessment made for one previous project. Ethiopian Investment Commission did not include it as one of the requirements to obtain investment permit for foreign investors.¹³⁶ There is tendency to consider environmental and social issues as costs by businesses and government.¹³⁷

A legal framework governing the EIA procedure has been put in place in Ethiopia.¹³⁸ The primary law controlling EIA in Ethiopia is the Environmental Impact Assessment Proclamation No. 299/2002. Before launching projects, major negative effects the projects could have on the environment and society must be assessed.¹³⁹ In Ethiopia, the primary regulatory organization tasked with regulating the EIA procedure is the Environmental Protection Authority (EPA).¹⁴⁰ The EPA is able to examine and approve EIAs, keep track of compliance, and enforce environmental laws.¹⁴¹

Even if there are so many problems and gaps in implementation, the EIA proclamation has provided chances through which Ethiopia could align FDI practices to sustainable development. The lack of implementation of laws related to

01/08/2023 see also Adugna Feyissa Gubena, Environmental Impact Assessment in Ethiopia: A General Review of History, Transformation and Challenges Hindering Full Implementation, *Journal of Environment and Earth Science* (ISSN 2225-0948 (Online) Vol.6, No.1, 2016, p7

¹³⁵ *ibid*

¹³⁶ Ethiopian Investment Commission, *Investment Guide to Ethiopia*, 2023, pp46-51

¹³⁷ Interview with Interview with Addisu Tibebu, In Ethiopian Environmental Protection Authority Business Enterprises Follow Up and Control Expert, on 01/08/2023

¹³⁸ Environmental Impact Assessment Proclamation, 2002, Proc. No. 299/2002, *Federal Negarit Gazeta*, year 9. No 11.

¹³⁹ *Ibid* Art 3.

¹⁴⁰ Environmental Pollution Control Proclamation, 2002, Proc. No. 300/2002, Art 3. *Federal Negarit Gazeta*, year 9. No 12

¹⁴¹ *ibid*

EIA in Ethiopia is highlighted in various studies.¹⁴² Despite the existence of the EIA Proclamation, there are weak enforcement mechanisms in place to hold project proponents accountable for conducting an EIA before obtaining an investment permit.¹⁴³

A number of studies conducted on different aspects of EIA revealed problems concerning its implementation. It is indicated that EIA has failed to achieve its objective due to lack of public participation in the process.¹⁴⁴ Jennifer stated that '[t]he spread of EIAs into less developed countries primarily is the result of external pressure by international conventions, international environmental organizations, the international donor community, and the international science community.'¹⁴⁵ This author has also indicated that EIAs in Africa still appear plagued by a lack of trained personnel, inadequate budgets, and the concern that EIAs might hold back economic development.¹⁴⁶ Unfortunately, due to the strong desire for promotion of foreign investment and development first paradigm of different government authorities, efficacy of existing slight practice of EIA is doubtful.

It is important to promote responsible corporate governance, environmental preservation, social accountability, and the protection of human rights. Despite the existence of Proc No 299/2002, which allows for the provision of incentives, its implementation is currently lacking due to partly the absence of prepared

¹⁴² Dejene Girma, 'Participation of Stakeholders in Environmental Impact Assessment Process in Ethiopia: Law and Practice'. Jimma University Journal of Law, Vol. 4 (1). 2009; Dejene Girma, The Impact of Transplanting Environmental Impact Assessment Law into the Ethiopian Legal system, Jimma University Journal of Law, Vol. 5: 75-109. 2013.

¹⁴³ Ibid; Gedifew Yigzaw, Assessment of Ethiopian Environment Impact Assessment (EIA) Proclamation No. 299/2002, Munich, GRIN Verlag, 2019, available at: <<https://www.grin.com/document/497750>> accessed Jul. 12, 2023; supra not 124, Art 18(3(d))

¹⁴⁴ Ibid

¹⁴⁵ Jennifer C. Li, 2008, Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security? P6. available at: <[template.pub \(fess-global.org\)](https://www.fess-global.org)> accessed Oct. 14, 2022

¹⁴⁶ Ibid

regulations.¹⁴⁷ By offering incentives and assistance to responsible investments, Ethiopia can attract investors who are dedicated to sustainable development and promote the alignment of foreign investment with the Sustainable Development agenda.

To sum up, with its own shortcomings had there been effective enforcement tools and institutions availability of legal frameworks for EIA in its broad sense, could assist in the effort to align foreign investment activities to sustainable development goals. However, it is SIA which is comprehensive in covering all dimensions of sustainable development than EIA.

6.2. Enabling Opportunities for Aligning Bilateral Investment Treaty Domestication with Sustainable Development in Ethiopia

6.2.1. Parliamentary Scrutiny in Investment Treaty Ratification Process in Ethiopia

Unbalanced nature of BITs can be mitigated in the ratification/domestication process. Investment Treaty ratification practices in Ethiopia indicate that domestication happens with ratification. Treaties are incorporated by mere legislation of ratification proclamation which declares ratification of a treaty without reproducing treaty provisions as they are or as per understanding of the law maker. Balanced approach recognizes the rights of host countries to regulate in the public interest and safeguards their sovereignty while maintaining responsible investment protection.¹⁴⁸ Ratification process opens a chance for the legislative body to scrutinize investment treaties compatibility with constitutionally protected sustainable development principle in Ethiopia.

Ethiopia domesticates international treaties by ratification. Ratified treaties are considered as part of the law of the land. This indicates that Ethiopia is dualist state

¹⁴⁷ Environmental Impact Assessment Proclamation, 2002, Proc. No. 299/2002, Federal Negarit Gazeta, year 9. No 11, Art 10.

¹⁴⁸ M. Sornarajah, *Resistance and Change in The International Law on Foreign Investment* (Cambridge University Press, 2015), p349

as it assumes independence between international and national legal systems. Breaches in rules of one system cannot be justified by invoking rules of another.¹⁴⁹ In dualist states, a treaty cannot be directly implemented without transforming a treaty with further legislation. In some dualist states ratification is just one step in the domestication process. Some state enacts domestic legislation directly reproducing provisions of a treaty and based on the legislatures understanding of treaty provisions.¹⁵⁰

Unfortunately, ratification process in Ethiopia is made simply by enacting ratifying proclamation which declares incorporation of the treaty without reproducing the treaty in the ratifying proclamation or in other independent legislation which would make the treaty ready for implementation. Making reservation, putting implementing direction, interpreting ambiguous terms in a treaty or total rejection unless terms of ratification are fulfilled should be under the mandate of the parliament so that it can discharge its duty to ratify a treaty which is in line with the constitution. The constitution clearly stipulated that treaties that should not uphold the people's right to sustainable development should not be ratified. This process can engage the legislative body in the treaty making process if the other contracting party accepts it tantamount to involvement of the parliament in renegotiation.

Ethiopian parliament is duty bound to ascertain that the BITs to be ratified by Ethiopia should not be prejudicial to sustainable development. The parliament as any government body is responsible to protect sustainable development protected by the constitution.¹⁵¹ Therefore, scrutinizing investment treaties sustainable friendliness and implementing them in a manner which upholds all sustainable development dimensions is essential for the need of the constitution among other things. The possible regulatory chill effects attending in Ethiopian international investment

¹⁴⁹ Peter Tomka et.al., *International and Municipal Law Before the World Court: One or Two Legal Orders?* XXXV Polish Year Book of International law. P15

¹⁵⁰ Raffaella Kunz, *International Law and Domestic Law*, p145

¹⁵¹ Supra note 7, Art 9(2)

agreements, the legitimacy crisis in the international investment law regime together with the above constitutional affirmation that treaties should ensure sustainable development should boost confidence of the legislative body for scrutinizing BITs at the point of ratification/domestication. This scrutiny allows the parliament and stakeholders to assess the compatibility of the proposed treaty with national sustainable development objectives. If this process is properly utilized, it can create one avenue for sustainable development- friendly implementation of Ethiopia investment treaties.

In Ethiopia, the two steps seem to be merged as treaties ratified become part of domestic law without further parliamentary legislation. Incorporation of treaties into domestic law can happen through directly reproducing provisions of a treaty as it is or by redrafting the treaty to be implemented in its own terms so as to adapt it to domestic law.¹⁵² This process of transforming ratified investment treaties into Ethiopian legal system is absent.

Ethiopia enacted a law which outlines the procedures for making and ratifying international agreements in 2017.¹⁵³ According to the proclamation, treaty adoption involves various government authorities from its initiation to its ratification including any government organ or ministry that initiates treaty adoption. These include Council of Ministers, Ministry of Justice, Ministry of Foreign Affairs and the House of Peoples Representatives.¹⁵⁴

Upon the completion of the negotiation process, the MoFA ensures that the treaty aligns with the country's interests and prepares the final draft for signature. The authority to negotiate and sign treaties lies with the Prime Minister and the Minister

¹⁵²Stéphane Beaulac and John H. Currie, Canada, in *Dinah Shelton, International Law and Domestic Legal Systems; Incorporation, Transformation, and Persuasion*, (ed) (Oxford University Press, 2011) p128.

¹⁵³ The International Agreements Making and Ratification Procedure Proclamation, 2017, proclamation No.1024/ 2017. Year 23, No 55. Federal Negarit Gazette.

¹⁵⁴ Ibid, Arts 4-12

of Foreign Affairs although this power can be delegated to other officials within government departments.¹⁵⁵

After the treaty is signed, the government body responsible for the negotiation submits a copy of the signed treaty, along with an explanatory note in Amharic (the official language), to the Council of Ministers.¹⁵⁶ The explanatory note includes comments from relevant stakeholders and a draft ratification proclamation. Subsequently, the treaty and its accompanying materials, including explanatory notes, are sent to the House of Representatives (Parliament) for ratification.¹⁵⁷

At this juncture it must also be noted that the explanatory note embraces only the obligations it imposes and the benefits it accrues, it will not embody the problems it may pose on Ethiopia, especially its regulatory chilling effect.¹⁵⁸ In ratifying treaties, the parliament would mention treaty implementing body too.¹⁵⁹ The parliament has constitutional mandate to give direction to treaty implementing government so that implementation may be sustainable friendly.

The adoption of legislation to implement a treaty creates additional opportunities for parliamentary and possibilities to deliberations.¹⁶⁰

Overview of BIT ratification proclamations manifest structural similarities. They embody preamble, short title of the proclamation, declaration of ratification and designating implementing body and effective dates.¹⁶¹ One can safely argue that potential danger of BITs in limiting government action in the interest of sustainable

¹⁵⁵ Ibid Art 6(2)

¹⁵⁶ Ibid Art10(1)

¹⁵⁷ Ibid Art 10(3)

¹⁵⁸ Ibid Art 10(2), Interview with Amaltias Zewdu, in Ministry of Foreign Affairs international treaties and contracts legal consultant, on 20/07/2023

¹⁵⁹ Supra note 153, Art 11(3)

¹⁶⁰ Supra note 79, P368

¹⁶¹ The State of Israel Agreement on Promotion and Reciprocal Protection of Investment Ratification, 2004, Proclamation No.389/2004. (Fed. Neg. Gaz.10th Year No. 24; Investment Reciprocal engagement and Encouragement Agreement with the Government of the Republic of France Ratification proclamation, 2004, proclamation No 405/2004

development is not understood by the parliament. This can be evident from all ratified Ethiopian BITs as there is lack of reservation or recorded rejection while majority of Ethiopian BITs are sustainable development unfriendly. The ratification process could be one important opportunity to ascertain Treaties sustainable development friendliness. Author of this paper argues that the parliament has missed its chance to revise or reject unconstitutional treaties.

6.2.2. Performance Requirements for Sustainable Development

Performance requirements (PRs) in relation to FDI refer to standards that countries set to gear behaviors of investors to certain specified goals so that FDI activities could positively contribute to achievement of those goals including sustainable development issues.¹⁶² To foster the good effects of FDI and enhance their contribution to sustainable development, specific intervention measures are required. Use of performance requirements by host states could be one such possible intervention measures.¹⁶³ They are among policy instruments to multiply benefits of FDI to the host economy.¹⁶⁴ Regulation of FDI, in line with sustainable development, involves guiding investors at the entry and operation stages. Putting regulatory prescriptions at all these stages aligned with sustainable development priorities to Ethiopia through the instrumentality of PRs is of paramount importance.

Performance requirements are also described as Host Country Operational Measures (HCOMs) in UNCTAD publications.¹⁶⁵ They refer to wide range of actions taken by

¹⁶² Suzy H. Nikièma, IISD, Performance Requirements in Investment Treaties: Best Practices Series - December 2014, p3. Available at: < <https://www.iisd.org/system/files/publications/best-practices>> accessed May 20, 2023

¹⁶³ Ibid p1

¹⁶⁴ Howard Mann, 'The New Frontier: Economic Rights of Foreign Investors Versus Government Policy Space for Economic Development', in C.L. LIM, *Alternative Visions of The International Law on Foreign Investment: Essays in Honor of Muthucumaraswamy Sornarajah*, (Cambridge University Press 2016) P291

¹⁶⁵ Z. Boroo (2012). 'Effective Use of Performance Requirement's and Investment Incentives' The Mongolian Journal of International Affairs 97, p. 98.

host states to regulate how foreign investors operate while subject to their laws.¹⁶⁶ HCOMs can be in the form of limits or performance standards and can include requirements on ownership and control, employment of staff, acquiring inputs, and sales conditions.¹⁶⁷ They are typically used to affect the type and location of FDI and, more specifically, to increase its advantages in light of national objectives including sustainable development. Some of them are Trade-Related Investment Measures (TRIMs) that have impact on trade flows. HCOMs are interventionist techniques used to address real or imagined market imbalances.¹⁶⁸

Even though PRs are criticized for the fact that they could impede inflow of FDI, some studies are indicating that some countries like those mentioned as the Asian tigers have successfully used them for their current economic success while attracting good deal of FDI.¹⁶⁹ Suzy H. Nikièma indicated countries that effectively used PRs in the process of their industrialization.¹⁷⁰ UNCTAD has also indicated that benefits associated with FDI can be increased through PRs/HCOMs.¹⁷¹

If the specific actions to be taken are not explicitly prohibited in BITs, regional investment agreements or multinational investment agreements, it is possible for a host country to impose certain measures aimed at improving the role of FDI in the socio-economic advancement and/or sustainable development of the host country. The measures could include requirements to establish a joint venture with domestic participation; requirements for a minimum level of domestic equity participation;

¹⁶⁶ UNCTAD, Host Country Operational Measures, 2001, p60(UNCTAD Series on issues in international investment agreements), available at: < <https://unctad.org/system/files/official-document/psiteiitd26.en.pdf>.> Accessed Aug. 20, 2023

¹⁶⁷ *ibid*

¹⁶⁸ *ibid*

¹⁶⁹ Suzy H. Nikièma, IISD, Performance Requirements in Investment Treaties: Best Practices Series - December 2014, p3, available at: < <https://www.iisd.org/system/files/publications/best-practices>> accessed May 20, 2023

¹⁷⁰ *ibid*

¹⁷¹ UNCTAD, Host Country Operational Measures, 2001, p60(UNCTAD Series on issues in international investment agreements), available at: < <https://unctad.org/system/files/official-document/psiteiitd26.en.pdf>.> Accessed Aug. 20, 2023, p60

requirements to locate headquarters for a specific region; employment requirements; export requirements; restrictions on sales of goods or services in the territory where they are produced or provided, requirements to supply goods produced or services provided to a specific region exclusively from a given territory; requirements to act as the sole supplier of goods produced or services provided; requirements to transfer technology, production processes or other proprietary knowledge; and research and development requirements.¹⁷²

Taking such measures would enhance many of the sustainable development dimensions. In this connection we can find two main types of performance requirements: mandatory and non-mandatory.¹⁷³ Let's delve into each type in a brief detail.

6.2.2.1. Mandatory Performance Requirements

The terms for the entry and operation of the investment are related to mandatory PRs.¹⁷⁴ The conditions governing the initiation and functioning of the investment are associated with obligatory regulatory provisions. In order to invest or engage in business activities, the investor is required to agree to these terms. Mandatory performance requirements, in the context of FDI, refer to the terms and conditions imposed by the host state on foreign investors prior to establishing their investment in that country.¹⁷⁵ These requirements are set by the host state and are considered non-negotiable. The foreign investors have the choice to either accept these requirements and proceed with their investment or decline and seek other opportunities.

¹⁷² UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, p3

¹⁷³ International Institute for Sustainable development (IISD), *IISD Best Practices Series: Performance Requirements in Investment Treaties*, p2, 2014

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*

These performance requirements are within the control of the host state, meaning that they have the authority to dictate the specific conditions that foreign investors must adhere to in order to operate within their jurisdiction. The purpose of imposing these requirements is often to protect the interests of the host country, promote economic development, and ensure compliance with local laws and regulations.

Ethiopia has set some requirements for foreign investors to obtain before issuance of investment permit. These requirements include minimum capital, willingness to invest in sectors permitted to foreign investors, documents evidencing financial position of the investor when it is considered necessary (this is optional) and other documents related to constitution of the enterprise like memorandum of association.¹⁷⁶ One can criticize that important mandatory requirements which are necessary in the process of aligning behavior of investors with sustainable development are not included. For instance, Environmental impact assessment is not set as requirement for establishment.¹⁷⁷

Moreover, investors are expected to act in compliance with laws of the country while implementing their projects. As such they are duty bound to respect environmental sustainability and social inclusion values.¹⁷⁸ They are also required to submit a quarterly progress report on the implementation of the investment project to the appropriate investment organ.¹⁷⁹ Such report may be required not only periodically but also whenever they are required.¹⁸⁰ These can provide an environment that encourages foreign investors to align their behavior with sustainability objectives, ensuring their projects are conducted ethically and responsibly. Compliance of labor, human rights and environmental standards can be ascertained by such reports had

¹⁷⁶ Investment Regulation, 2020, Reg. No. 474/2020, Arts 7 and 8, Federal Negaret Gazette, year 26, no 78

¹⁷⁷ Ethiopian Investment Commission Guiding procedures for foreign investors to establish a company in Ethiopia, pp1-5

¹⁷⁸ Supra note 28, Art 54

¹⁷⁹ *ibid*

¹⁸⁰ *Ibid* art 14

this report been made to pertinent regulatory bodies like Ethiopian Environmental Protection Authorities, Ministry of labor and skills, and Human Rights Commission.

States have unrestricted sovereign authority to control foreign investor entry.¹⁸¹ A state can forbid foreign investments and place restrictions on their entry, but a sovereign entity can give up this authority through a treaty.¹⁸² Ethiopia's authority to regulate foreign investment within its own laws remained unaffected by any BITs before establishment of the investment. This grants the country the priority to exercise its sovereign regulatory rights. Thus, Ethiopia can strengthen its FDI admission criteria so that sustainable unfriendly FDI could not get establishment rights. Some other BITs explicitly emphasize that the obligation to provide care and protection applies only after the foreign investment has been approved.¹⁸³ Neither the investor nor the home states seek reimbursement from the host state due to pre-admission treatment criteria violations.

6.2.2.2. Non- Mandatory Performance Requirements

Designing effective legal frameworks to utilize FDI to host states sustainable development, involves also use of non-mandatory performance requirements. Non-mandatory performance requirements, sometimes, are linked to obtaining specific advantages from the host countries, such as tax exemptions or financial support.¹⁸⁴ Certain incentives effectively leave the investor with no choice but to comply with the regulatory provisions.¹⁸⁵

¹⁸¹ M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 19&20, p88

¹⁸² Ibid, p90

¹⁸³ ibid

¹⁸⁴ United Nations Conference on Trade and Development (UNCTAD), *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, 2003, p15

¹⁸⁵ UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, p3

Some treaties like the Trade Related Investment Measures (TRIMs) and other BITs prohibit performance requirements as investment and trade restrictive.¹⁸⁶ There are various formulations of performance requirement prohibitions in treaties. Fortunately, Ethiopia has neither BIT nor multilateral international treaty prohibiting it from imposing performance requirements. Studies indicate that, even if there is a chance to use performance requirements, they are underutilized in the Ethiopian legal framework.¹⁸⁷ Ethiopia could benefit if it could prepare comprehensive policy and legal framework packages that would enable effectively utilize performance requirements in line with its sustainable development priorities.

Ethiopia gives fiscal incentives to investments with the purpose to attract more investment to specific sectors and areas as well as employment of domestic workers by FDIs.¹⁸⁸ However, there is a lack of incentives to encouraging adherence to environmental, labor, and human rights standards which are directly related to sustainable development.

7. Conclusion

BITs are important components of FDI regulation in Ethiopia. There is a growing concern that these treaties are not adequately addressing sustainable development objectives. This article suggests sustainable development-friendly domestication and implementation of BITs. By understanding global trends in the making in the area of international investment regime it is possible to embrace the legitimate purpose of promoting sustainable development. Adapting BITs either in the process of their ratification or in their implementation to enhance their alignment with sustainable development components should be legitimate.

¹⁸⁶ Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement], Art 2.

¹⁸⁷ Tihitina Ayalew Getaneh (2020). 'The Role of the Investment Legal Framework in Ethiopia's FDI-development Nexus: PhD Thesis (Tilburg University), pp160-161

¹⁸⁸ Council of Ministers Investment Incentives Regulation No 517/2022, Art 4(2 and 4), Federal Negaret Gazette, no 28, year 39., Regulation No 517/2022, Art 4(2 and 4)

The tension between sustainable development components and investment treaties can be addressed by recalibrating the rights and obligations enshrined in these treaties in the process of transposing them into the domestic legal frameworks. BITs require ratification for their domestic implementation. Through ratification BITs would be incorporated into enforceable investment legal frameworks. This opens one room to align them with constitutional principle of sustainable development. The parliament can take various measures including putting reservations, totally rejecting treaties and putting direction to the treaty implementing body so that it should implement the treaty in a manner which enhances sustainable development. During the ratification process of investment treaties, incorporating reservations allows countries to modify treaty provisions that may conflict with sustainable development objectives. This ensures that the treaty's obligations are consistent with domestic priorities, enabling a more sustainable implementation.

This article contends that there are national and international legal grounds to recalibrate Ethiopian BITs in line with Sustainable development agenda. Firstly, the constitutions prohibit ratification of such treaties which contravene Ethiopian interests including Ethiopian sustainable development agenda. Secondly, there are also ample international conventions to which Ethiopia is a party that can be violated with direct application of Ethiopian BITs. Taking these national and international legal grounds into consideration, arguably, it would be proper to hold that the process of domestication can open rooms for sustainable development -friendly transposing of BITs into the national foreign investment frameworks.

Absence of performance requirement prohibition in Ethiopian BITs could be taken as an opportunity to Ethiopia as a host state. Introducing performance requirements for foreign investors can promote sustainable practices. These requirements could include environmental protection measures, local job creation, technology transfer, and adherence to labor rights. These performance requirements could be taken with or without incentives. By imposing such obligations, investment projects can

contribute positively to Ethiopia's constitutionally guaranteed sustainable development objectives.

Making sustainability impact assessments mandatory requirement for foreign direct investment projects can help to evaluate the potential social, environmental, and economic impacts of such projects. This assessment should be conducted prior to approval, ensuring that only sustainable and socially responsible investments are allowed to proceed. The rush to only to increase the volume of FDI without ensuring its negative impact on sustainability should be reconsidered.

While recognizing the trade-offs between safeguarding foreign investment and sustainable development, preference for sustainability is grounded in multitude of compelling reasons. In addition to the global changing landscape in the investment treaty regime, the incorporation of sustainable development in the constitution and different piecemeal legislations and policy documents including the Investment Proclamation, Industrial Park Proclamation, Mining Proclamation, and the Ten Years Development plan could be taken as additional enabler to customize investment treaty domestication in Ethiopia.