Balancing Interests under Bilateral Investment Treaties of Ethiopia: Focusing on State Regulatory Rights

Desalegn Deresso Disassa[♣]

Abstract

Well-regulated foreign investment is an engine of economic growth. Hence, despite its negligible impact, investment treaties have been used as a tool for foreign investment attraction and protection. This resulted in one-sided regimes that protect investors at the expense of state legitimate regulatory rights. Following this, balancing the regulatory power of the state and the rights of investors is the central issue in the recent development of investment treaties. In Ethiopia, the impact of BITs on domestic regulatory space is under-researched. In this context, this article qualitatively assesses the status of Ethiopian BITs in balancing host state regulatory rights and investor rights. As the finding has revealed, despite the new global move toward a balanced approach, almost all BITs of Ethiopia are devoid of balancing the interest of states and investors because of its broadly crafted standard of protections, and definition of investment and investor as well as no or limited recognition for regulatory rights of the state. This has a huge practical impact on regulatory space and public interest thereof. Therefore, the author has called for reconsideration of investment treaties to widen the regulatory space of the state and to protect and promote public interests.

Keywords: Bilateral Investment Treaties, Investor, Foreign Investment, Ethiopaia

♣ The author holds LL.B in Law from Bahir Dar University (2014) and LL.M in International Economic and Business Law from Haramaya University (2020), currently working as a Lecturer of Law at Assosa University. He is also Ph.D. in Law Student at School of Law, College of Law and Governance Studies, Addis Ababa University, Ethiopia. He can be accessed at sifdese99@gmail.com. The author is grateful to anonymous reviewers for their constructive comments on the earlier version of this article. Any errors and omissions remain entirely author's responsibility.

1. Introduction

Nowadays, all countries seek foreign investment to advance their development process.[1] Foreign investment is the lifeblood of economic growth by creating a flow of capital, technology, skill, and employment.[2]In this era of economic globalization, countries seek foreign investment to advance their development process and hence compete over its attraction.[3]In deciding where to invest, among others, foreign investors consider the regulatory environment in the potential host state. Following this, to attract foreign investment, the countries try to create a protective legal environment.[4]Domestic investment laws reform and investment treaties conclusion are part of foreign investments attraction campaign through the creation of enabling and protective environments. In this sense, Bilateral Investment Treaties (*hereafter* BITs) are initially developed as a device for foreign investment protection and attraction with no or little consideration for the interest of public represented government regulatory power.[5]

The capital-exporting countries have also a strong desire to protect their investment abroad.[6]In this context, BITs give a broader set of rights without reciprocal obligations.[7]On the contrary, it subjects states to an array of obligations unaccompanied by rights.[8]In this sense, one-sidedness or investor bias is the main defining feature of most BITs, specifically the old generation ones. Such treaties limit the regulatory power of the state

[1]United Nation Conference on Trade and Development, *Bilateral Investment Treaties*,(UNCTAD/ITE/IIA/2, 2000)

[2]LyubaZarsky, 'Introduction: Balancing Rights and Rewards in Investment Rules' in LyubaZarsky (eds) *International Investment For Sustainable Development Balancing Rights and Rewards*,1 (2005)

[3]United Nation Conference on Trade and Development, *Bilateral Investment Treaties*, (UNCTAD/ITE/IIA/2, 2000)

[4]Mmiselo Freedom Qumba, 'Balancing the Protection of Foreign Direct Investment and the Right to Regulate For Public Benefit in South Africa'

[5]T Broude and Y Haftel, *Report on the Global Investment Regime and State Regulatory Space: Assessing the Governance Role of the European Union and Its Member States*, (2020), 8

[6]K Singh and B Ilge, 'Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices', 2

[7]Qumba (n 4) 2

[8] J Webb Yackee, "*Investment Treaties and Investor Corruption: An Emerging Defence for Host States* ?" (2012) 52 Virginia Journal of International Law 723; MavludaSattorova, *The Impact of Investment Treaty Law on Host States Enabling Good Governance?*, (Hart Publishing, 2018), 6

and place matters of national interest at risk.[9]Prevailing arbitral tribunal practices favor investors whereas bias against the state's regulatory rights aggravates the problem. In recent years, concerns have been rising over the asymmetric nature of BITs and arbitral tribunal bias. Following this, regaining the regulatory space of the state is at the nucleus of BITs negotiation.[10]Many countries with strong bargaining power have taken a big step to recover their regulatory rights.[11]

Up to date, Ethiopia has signed over 35 BITs (of which 21 are effective) with countries at different levels of development.[12]The impact of BITs on state regulatory space concerning particular aspects like dispute settlement and environment were the subject of scholars' writings.[13] Despite this, none of them examined the issue of balancing interests under bilateral investment treaties in a holistic term using the lenses of new development in the field. In this context, this paper aims to holistically explore the status of Ethiopian BITs in balancing host state regulatory rights and investor rights, and recommend the possible way forward to widen the regulatory power of the state and advance public interest without prejudice to the legitimate interest of the investor. In this sense, it is not the aim of this article to deeply securitize every issue as each title account for an independent article. To

[9]S Hindelang and M Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, (2022) 216

[10]Joerg Weber, *Balancing Private and Public Interests in International Investment IAs*, (2007), 2

[11] B Kingsbury and Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights With State Regulatory Actions in the Public Interest-The Concept of Proportionality*, (Oxford University Press, 2010) 76&77

[12]UNCTAD International Investment Agreements Navigator Ethiopia, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> (2022)

[13]Ayalew Abate, *Ethiopia's Bilateral Investment Treaties and Environmental Protection; The Need of Re-Negotiation for Corporate Responsibility*, De Gruyter, (2021), available at, https://doi.org/10.1515/gj-2020-0067 (last accessed on July 7, 2022);Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration*,Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022);Wakgari KDjigsa, *The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom*, Haramaya Law Review, Vol 6 No 1 (2017), available at, https://www.haramayajournals.org/index.php/hulr/article/view/615, (last accessed on July 7, 2022)

attain the objective, a qualitative documentary analysis approach was utilized to examine relevant BITs, case laws, and literature concerning identified matters which have an impact on balancing divergent interests. The analysis was made with the assumption that Ethiopia is a capital-importing country interested to use foreign investment as a tool for sustainable development.

This article has four main sections. The first section is an introductory one that discusses the conceptual underpinning and historical development of state regulatory space under bilateral investment treaties. The second section examines the state of Ethiopian BITs in balancing the interest of investors and the host state. To this end, it examines the impact of the definition of investor and investment, the standard of protection, and other matters under BITs on state regulatory space. The third section discusses the new development under-investment regime in balancing the interests of investors and the state to show the possible way forward for the policy maker. The final section provides a concluding remark on the issue under scrutiny.

2. Balancing Interests in Historical Context

Generally, the degree of the state's regulatory space over foreign investment has taken different shapes through the course of different historical periods: the pre-colonial era, the colonial era, the post-colonial era, and, the new era.[14]During the pre-colonial era, the host state has full regulatory autonomy in regulating men and thing including foreign investment within its territory. As a result, the domestic host state regulatory power is not constrained except by concession and diplomatic pressure. During the colonial period, the host state lacks regulatory autonomy over foreign investment within its boundaries as it is deemed as the property of the home state i.e., colonizing state, and falls within its jurisdiction.[15] The protection of foreign investment was subject to colonial power gunboat diplomacy, and not investment agreements.[16]The protection of foreign investment was not

[14] Kenneth J. Vandevelde, 'ABrief History of International Investment Agreements', University of California, Davis, Vol. 12 (2005), 157

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

[16] Jeffry A. Frieden, 'International investment and colonial control: a new interpretation', International Organization Vol. 48, No. 4 (Autumn, 1994),559-593, https://www.jstor.org/stable/2706896

a concern in BITs; rather the principal source of norms for the protection of foreign investment was customary international law, which obligated host states to treat investment per an international minimum standard.[17] Customary international law, however, offered an inadequate mechanism for the protection of foreign investment because of confusion over its content, opposition from proponents of national standards or the Calvo Doctrine, and a lack of strong enforcement frameworks.[18]

During the post-colonial period, the need for the protection of foreign investments under international law gets first attention following a massive nationalization project undertaken by a newly independent state as part of regaining economic sovereignty and/or prevailing state ideology.[19]The postcolonial need for legal tools for protection resulted in a proliferation of over 6000 investment treaties.[20]These BITs protect foreign investments against expropriation, discrimination, and unfair treatment.[21] In doing so, it restricts the regulatory power of the state over foreign investment through a standard of protection and rights it avails for foreign investors.[22]Asymmetric nature is the defining feature of old

[17] Jeffry A. Frieden, 'International investment and colonial control: a new interpretation', International Organization Vol. 48, No. 4 (Autumn, 1994),559-593, https://www.jstor.org/stable/2706896

[18]James Crawford, 'Brownlie's Principles of Public International Law' (9th edn), (2019)

[19] Elizabeth Whitsitt and Nigel Bankes, ' Evolution of International Investment Law and Its Application to the Energy Sector', Alberta Law Review, (2013), 208 and 209; David R. Adair, Investors' Rights: The Evolutionary Process of Investment Treaties, 6 Tulsa J. Comp. & Int'l L. 195 (1998); Sornarajah, (n 15), 19&20; Francisco O. Vicuña, 'Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society', 5 Int'l L.F. D. Int'l 188, 3 (2003);MeskeremMenamo, "Impact of Foreign Direct Investment on Economic growth of Ethiopia-A Time Series Empirical Analysis 1974-2011*"*, 6&7 (2014).

[20]Sornarajah, (n 15), 20&21; ViacheslavSemenko, "Duties of Investors in International Investment Law: Analysis of Model BITs of the Latest Generation", 7 (2018); International Investment Agreements Navigator Portal, Available at, https://investmentpolicy.unctad.org/international-investment-agreements (last accessed on May 2022)

[21]Semenko, (n 20), 7.

[22] Howard Mann, The Right of States to Regulate and International Investment Law 2 (2002) (n 23); David Gaukrodger, *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties*: *A Scoping Paper*, (OECD Working Papers on Int'l Inv, 2017); Sornarajah, (n 13), 22.

generation BITs signed following the postcolonial nationalization project.[23]BITs impose obligations on host states and limit their regulatory space, without matching investors' rights with obligations.[24]This goes against the grand principle of inseparability of rights and duties.

The state's right to regulate was not a point of focus during the early period of foreign investment law development.[25]The asymmetric nature of BITs is associated with unequal positions of capital-exporting and capital-importing countries. Besides, the capital importing countries were highly interested in attracting foreign investment through BITs that provide a higher level of protection against the risk of nationalization, discrimination, and expropriation. For many years, there was no strong movement to incorporate the obligations of investors and the regulatory rights of the host state under the BITs.[26]The investors' bias under the BITs is aggravated by arbitral practices that have imposed great restrictions on regulatory powers of the state by broader interpretation of investor rights and state duties, and narrow interpretation of investor duties and state rights.[27] The one-sidedness of BITs has caused a misconception that international investment law is a system designed only for the protection of foreign investors without concern for the public interest represented by the state. Besides, it creates the misperception that the regulatory power of the host state is an exception, while the right of an investor to be protected is a principle. The need to comply with the domestic laws of the host state was recognized long ago as the sovereign power of the state but the overprotection of investors under BITs ultimately shadowed the sovereign rights of host states to regulate.[28]

The race to protect investors at the expense of state regulatory power has created an imbalance.[29]The imbalance in the regime convinced me to rename international investment law as *international investor law* or *international foreign property law*. The negative impact of BITs on public interest is worsened by a vague standard of protection and the

[23] ibid
[24] ibid
[25]Semenko, (n 20), 7
[26] ibid
[27]Kingsbury and Schill, (n 11), 76
[28]Semenko (n 20), 7
[29]Semenko (n 20), 7

broader interpretation adopted by an arbitral tribunal. The arbitral tribunals usually give too little weight to the justification of regulatory measures undertaken by the state to protect the public interest.[30]Consequently, the power of host states to take legitimate regulatory measures was questioned.[31]It was at this moment that the issue of regaining domestic regulatory space was triggered and resulted in a new era in the development of BITs. Since then, the concern regarding the host state's right to regulate has been increasing and stakeholders are rethinking the future development of the law of foreign investment.[32]Among others, states are terminating BITs and replacing them with one i.e., new generation BITs that widen domestic regulatory space. Scholars are also working on developing concepts like proportionality as a tool for balancing the interests of investors and the host state during the arbitration.

3. Balancing Host State Regulatory Power and Investor's Interests

The law of foreign investment including arbitral tribunal decisions is often criticized for investor bias and neglecting state or public interest or limiting state regulatory space.[33]The asymmetric investment treaties accompanied by biased interpretation of arbitral tribunals not only limit the regulatory right of the host state but also put the public interest at risk. With this assumption, the impacts of BITs on the regulatory space of Ethiopia during different stages of foreign investment are examined as follows.

3.1. Entry Stage

The state has the unlimited sovereign power to regulate the entry of foreign investment.[34]This may conflict liberalist idea of a free flow of foreign investment.[35] The entry of any foreign investment can be excluded and subjected to conditions by a state but

[30]Kingsbury and Schill, (n 11), 76
[31]Semenko (n 20), 8
[32] Singh and Ilge, (n 6), 10-15
[33] Jürgen Kurtz, *Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex, and Vital Search for State Purpose*, Yearbook on International Investment Law and Policy (2015), 251
[34]Sornarajah, (n 15), 88&89
[35]Sornarajah, (n 15), 90

a sovereign entity may surrender such right by treaty. All BITs left untouched the sovereign power of Ethiopia to regulate the entry of foreign investment under its domestic law.[36] In doing so, it gives priority to state sovereign regulatory rights. Some of the BITs have even made clear that the standard of treatment and protection are applicable only after admission. Neither the investor nor the home state raises compensation against the host state based on violation standards of treatment concerning pre-admission matters.

The areas of investment to be open for foreign investors and incentives granted to foreign investors are left to domestic investment law.[37]Accordingly, foreign investors are entitled to engage only in the area open to them. For example, foreign investors (except of Ethiopian origin) may not claim to engage in insurance and banking business.[38]Such prohibition neither amounts to discrimination nor violation of fair and equitable treatment. In this context, it is possible to say the entry stage is a stage of state regulatory autonomy. Investment treaties recognize the absolute sovereignty of the state at the admission stage as there is no investment to be protected at this stage. The prevailing stand of BITs is clear and appreciated, but this does not guarantee freedom of the host state from diplomatic and other pressures of the home state and international economic organizations to open the door for foreign investors in the era of economic globalization where power is highly decentralized. The impact of such pressures on the regulatory power of the host state during the entry stage requires further study.

Globally, in recent years, a new trend has been emerging as some BITsgrant the right to entry to the nationals of contracting states.[39]Pre-establishment rights can be incorporated in

[36] Ethiopia-Brazil BIT,Art.3 (4)&4(1); Ethiopia-Qatar BIT,Art.3(1); Ethiopia-United Arab Emirate BIT, Art. 2(1); Ethiopia-United Kingdom BIT, Art.2(1); Ethiopia-Spain BIT, Art.2(1); Ethiopia-South Africa BIT, Art.2(1), Ethiopia-Egypt BIT, Art.2(1); Ethiopia-Germany BIT, Art.2(1); Ethiopia- Sweden BIT, Art.2(1); Ethiopia-Austria BIT, Art.2(1), Ethiopia-Libya BIT, Art.2(1); Ethiopia- Israel BIT, Art.2(1); Ethiopia-Iran BIT, Art.3(1); Ethiopia-France BIT, Art.2; Ethiopia-Netherlands BIT, Art.2; and Ethiopia-Algeria BIT, Art.3(1)

[37]Investment Proclamation No.1180/2020, Art 6

[38]Banking (Amendment) Proclamation No 1159/2019; Insurance Business (Amendment) Proclamation No.1163/2019

[39] Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment, art. II.1, Jul. 2, 1997; Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, art. II.3, Apr. 26, 1995; North American Free Trade Agreement between the United States, Canada and

BITs in various ways including an express embodiment in the national treatment clause or inferred from the definitions of 'investor' and 'investment'.[40]The best example is North American Free Trade Agreement (NAFTA) and European Union (EU) BITs.[41]The pre-establishment rights limit the regulatory power of the host state.[42]Some treaties guarantee against expropriation without compensation and guarantee the settlement of disputes by a neutral tribunal at the entry-level.[43]There is also a scenario in which the state may unilaterally guarantee such treatments by its domestic law. However, as a matter of strict law, such a unilateral guarantee has no international effect unless backed up by a treaty commitment.[44] Moreover, states have the right to change such guarantees and requirements at any time unless prohibited by treaties.

3.2. Operation Stage

The unqualified regulatory right to exclude the alien before entry becomes somewhat modified after entry. At this stage, there is an investment that is worth protecting, unlike the entry stage. The definition of investment and investor, non-discrimination, fair and

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Mexico, Dec. 17, 1992, art. 1139; Agreement between the United States of America, the United Mexican States, and Canada, art. 14.4, Nov. 30, 2018;Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, art.79, June 27, 2014; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, art. 205, June 27, 2014; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, art. 88, June 27, 2014; Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union (and its member states) of the other part, Oct. 30, 2016; Agreement between the European Union and Japan for an Economic Partnership, July 17, 2018

[40]VrindaVinayak, The Pre-Establishment National Treatment Obligation: How Common Is It?, (2019)

[41]North American Free Trade Agreement between the United States, Canada and Mexico;Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, the Republic of Moldova, and Ukraine on the other part; Comprehensive Economic and Trade Agreement between Canada, and the European Union (and its member states); Agreement between the European Union and Japan for an Economic Partnership

[42]Sornarajah, (n 15), 88

[43]Sornarajah, (n 15), 99-115

[44]Sornarajah, (n 15), 99&101

equitable treatment, expropriation, and dispute settlement clauses that are articulated or crafted under treaties have an impact on the regulatory space of the host state and the interests of investors. Based on this assumption, the manner those clauses are crafted under BITs of Ethiopia and their impact on the regulatory space during the operation stage is briefly and critically examined as follows.

3.2.1. Definition of Investment and Investor

The definition of investor and investment are keys in determining the scope of rights and obligations under BITs.[45]Usually, the nationality of investors who are natural persons is based exclusively on the law of the state of claimed nationality. However, BITs of Ethiopia signed with Brazil, Israel, and Sudan introduced permanent residence as an alternative criterion in defining investors.[46]The issues concerning the nationality of investors who are legal persons are more complicated. BITs may adopt the test of incorporation, seat, domicile, main or effective business, and/or control to determine nationality.[47]Under BIT signed by Ethiopia with Sweden and Netherlands, the investor who is a legal person is ambiguously and broadly defined to include "any legal person" without any connecting factors. Such broader meaning may affect the host state when the claim is made concerning an investment made person who was neither incorporated nor controlled by the home state nor made a substantial investment within the host state.

Investment agreements usually define investment broadly to refer to every kind of asset followed by an illustrative list of assets. This is good from the evolving nature of the investment but it has a huge negative impact on the interest of the host state. Under Ethiopia BITs, investment is defined as broadly as possible to cover *any or every asset,*

[45]Catherine Yannaca 'Definition of Investor and Investment in International Investment Agreements' in OECD
International Investment Law: Understanding Concepts and Tracking Innovations, 7&8 (2008)
[46] Brazil-Ethiopia Investment Agreement, Art.1 (1.4); Ethiopia -South Africa Investment Agreement, AdArt.6; ; -Israel Investment Agreement, Art.1 (5)
[47] Ethiopia-Brazil BIT, Art.1.4; Ethiopia-Qatar BIT,Art.1(5); Ethiopia-United Arab Emirate BIT,Art.1;Ethiopia-South Africa BIT, Art.(1), Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.(1) Ethiopia-Sweden BIT,Art.1(2), Ethiopia-Austria BIT,Art.1(1), Ethiopia-Germany BIT, Art.(1), Ethiopia-France BIT,Art.1(3), and Ethiopia-Netherlands BIT,Art.1(b))

property, interest, or right of the investor in an illustrative fashion.[48]Investment is every asset of an investor whether it is invested in an enterprise or not. For instance, the BIT signed between Ethiopia and the United Kingdom defines investment as *every kind of asset and in particular, though not exclusively*….Such a broader definition of an investment may subject the host state to an obligation to accord privileges, concessions, and protections even in a case the assets of the investor contribute nothing to its economy. As defined under Art.1.3 of Brazil-Ethiopia BIT, the investment includes even *concessions, licenses, or authorizations granted by the host state (law or contract) to the foreign investor.* Concessions, licenses, and authorizations are the result of state regulatory action and reflection of state autonomy. In this sense, revoking concessions, licenses, or authorizations granted to the investor may constitute a legitimate ground for claiming compensation against the host state before an international tribunal and impose fear on the state. The inclusion of concessions, licenses, or authorizations within the meaning of investment severely limits the regulatory power of Ethiopia. The investor spends no capital except efforts, limited transaction costs, and times to acquire licenses. The states also benefit nothing from granting concessions or licenses except a negligible amount of charges. Despite this, the revocation of license, concession, or authorization may trigger a claim based on expropriation, which is unfair.

The other important issue here is the absence or presence of "benefit denial clauses" and the manner it is crafted under the Ethiopian BITs. Since its first appearance, denial of benefits clauses have proliferated became more sophisticated, and evolved significantly.[49]

[48]Ethiopia-Brazil BIT, Art.1.3; Ethiopia-Qatar BIT, Art.1 (1); Ethiopia-United Arab Emirate BIT, Art.1; Ethiopia-UK BIT, Art.1 (1); Ethiopia-Spain, Art. 1(1); Ethiopia-South Africa BIT, Art.(1); Ethiopia-India BIT, Art.1; Ethiopia-Belgian-Luxembourg Economic Union, Art.1(2); Ethiopia-Egypt BIT, Art.1; Ethiopia-Finland BIT, Art.1(1); Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.(1) Ethiopia-Sweden BIT, Art.1(1), Ethiopia-Austria BIT, Art.1(2); Ethiopia-Libya BIT,Art.1(1); Ethiopia-Germany BIT, Art.1(1); Ethiopia-Israel BIT-Art.1(1); Ethiopia-Iran BIT, Art.1(1); Ethiopia-France BIT,Art.1(1); Ethiopia-Netherlands BIT, Art.1(a)); Ethiopia-Algeria BIT, Art.1(1)

[49]Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review - Foreign

Initially, denials of the denial of benefit of clauses in investment treaties were designed to empower the Host State to limit treaty protection to genuine investors of the other Party. Denial-of-benefits clauses are generally designed to exclude from treaty protections nationals of third States which, through mailbox or shell companies, seek to benefit from provisions that the State parties to the treaty did not intend to grant them. In doing so, it neutralizes the aggressive treaty shopping or abuse of rights by the investors. In this sense, it permits the Host State to exclude from treaty protection companies that formally have the nationality of the other Party, but are controlled or owned by nationals of a third State.

Traditionally, despite the controversies over the notions of "control" and "ownership", only the absence of ownership and control serve as a ground for exclusion of investors from treaty protection. In recent years, investment treaties have been extending the scope of denial of benefits clauses to cover the situations of corporate restructuring to access treaty protection. Some investment treaties require control or ownership by nationals of third States in cumulative with other situations such as (a) absence of diplomatic relations with the third State,[50] (b) absence of normal economic relations with the third State, (c) existence of unilateral and collective actions against the investor or third state because of serious deterioration of the political situation, (d) existence of measures that prohibit transactions with the enterprise, or would be circumvented in case of application of the treaty to such enterprise (e) enterprises lack substantial business in the host state, or (d) existence of measures against the third state related to the maintenance of peace and security.[51]Treaty like Cambodian model BIT further extended the denial benefit clause.[52]

Investment Law Journal, Volume 30, Issue 1, Winter 2015, Pages 78–97, https://doi.org/10.1093/icsidreview/siu030; Mistelis, Loukas A. and Baltag, Crina, '*Denial of Benefits' Clause in Investment Treaty Arbitratio*n (December 13, 2018). Queen Mary School of Law Legal Studies Research Paper No. 293/2018, Available at SSRN: https://ssrn.com/abstract=3300618

[50] Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, available at, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5849/download, last accessed on July 21, 2022)

[51]TarcisoGazzini, Francesco Seatzu, *The Strange Case of Denial of Benefits Clauses: The Italian and Colombian Model BITs,* (2021)

[52] Colombian Model Bilateral Investment Treaty, available at, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6082/download, last accessed on July 21, 2022

Accordingly, the host state may invoke the clause when the enterprise is controlled or owned by nationals of a third State and shareholders submit a treaty claim without the written authorization of the enterprise and this is designed to prevent parallel proceedings. In addition, the host state is entitled to deprive the investor of treaty protection where the investor has (a) committed serious human rights violations, (b) sponsored internationally-listed terrorist organizations or persons sentenced for serious violations of human rights (c) caused serious environmental damage, (d) committed serious tax fraud, (e) committed corruption, (f) caused grave violations of labour laws, or (g) engaged in money laundering. Such extension makes the denial of benefits clause makes it more of a political and vague measure which opens the clause for unnecessary litigation and abuse.

The practices of the tribunal substantiate the same. A review of recent investment cases reveals that tribunals have reached significantly diverging decisions as to when, how, and with what effect these clauses can and should be invoked.[53]The tribunals have not been entirely coherent in dealing with denial of benefits clauses, often due to their different or vague wording. Tribunals have treated denial of benefits clauses as a matter of jurisdiction or merits.[54] There is also divergence over whether the clause can be exercised at any time or only before arbitral proceedings.[55] Generally, the presence or absence, the wording or

[53]Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, ICSID Review - Foreign Investment Law Journal, Volume 30, Issue 1, Winter 2015, Pages 78–97, https://doi.org/10.1093/icsidreview/siu030

[54]*Ulysseas v. Ecuador*, available at, https://www.italaw.com/sites/default/files/case-documents/ita1045.pdf, last accessed on July 21, 2022; *Guarachi v. Bolivia*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf, last accessed on July 21, 2022; *Yukos v. Russian Federation*, available at, https://www.italaw.com/sites/default/files/case-documents/ita0910.pdf, last accessed on July 21, 2022; *Ascom v. Kazakhstan*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf, last accessed on July 21, 2022; Bridgestone v. Panama, available at, https://www.italaw.com/sites/default/files/case-documents/italaw9453.pdf, last accessed on July 21, 2022

[55]*Ulysseas v. Ecuador*, available at, https://www.italaw.com/sites/default/files/case-documents/ita1045.pdf, last accessed on July 21, 2022; *Guarachi v. Bolivia*, available at, https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf, last accessed on July 21, 2022; *Plama v. Bulgaria*, available at, https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf, last accessed on July 21, 2022; *Ascom v. Kazakhstan*, available at,

crafting, and as well as the interpretation of denial benefit clauses have a huge impact on balancing the interest of the host state and investor in general and the regulatory space of the state in particular. Against this backdrop, as the examination reveals all Ethiopian BITs lack a denial of benefits clause and thereby open the room treaty shopping and abuse of rights by an investor.[56]To address this gap, the recent development to amend the existing investment treaties should consider this issue and widen the regulatory space of the state. In this regard, it is good to consult the Colombian Model BIT which adopted the wider approach in crafting the denial of benefits clauses.

3.2.2. Non-Discrimination- Leveller Clauses

One policy justification for BITs is "levelling the playing field" between investors.[57]Non-discrimination clauses under investment treaties protect foreign investors and investments against discrimination and ensure equal treatment.[58]It is composed of national and most-favored-nation (MFN) treatments and constitutes the bedrock of BITs.[59]How Leveller clauses are crafted has an impact on the interests of the state and investors. Usually, these principles are applied in cases in similar or like circumstances. The non-discrimination doctrine neither imposes an obligation on the state to give positive discrimination nor entitle an investor to claim a favor or positive discrimination. Rather, it prohibits the host state, not to treat investors less favorably than national and other foreign investors.[60] It protects the foreign investor against less favorable treatment, but the state has the discretion to give more favorable than the established standard and this can in return be

https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf, last accessed on July 21, 2022

[56] UK-Ethiopia BIT, Turkey-Ethiopia BIT, Tunisia-Ethiopia, Sweden-Ethiopia BIT,Sudan, Spain, Malaysia, Russia,Neitherland, Libya, Kuwait, Israel, Iran, Germany, France, Finland, Denmark, China, Belgium

[57]Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence*, (The International Institute for Sustainable Development, 2017)

[58]Konrad von Moltke, *Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues, (*OECD Global Forum on International Investment Conference on Foreign Direct Investment and the Environment, 2002); Federico Ortino, *Non-Discriminatory Treatment in Investment Disputes, Human Rights in International Investment Law and Arbitration*, (2009)

[59] Nicholas DiMascio and JoostPauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?',American J. of Int'l Law , Vol. 102, No. 1, 48-89 (Jan., 2008)

[60] OECD (2004), *Most-Favoured-Nation Treatment in International Investment Law*,2 (OECD Working Papers on
International Investment, 2004/02)

applied to others under the same doctrine of the equalizer. Specifically, national treatment requires the state to treat foreign investors in the manner it treats or is not less favorable than domestic investors in like circumstances.[61]In this way, it seeks to ensure a degree of competitive equality between national and foreign investors. Most favored nation treatment entitles foreign investors and investment to get the favourable treatment that the host state accord to the investments or returns of nationals or companies of any third state.

Concerning the requirement of "like circumstance" to claim for or give MFN and national treatment (NT), the investment treaties signed by Ethiopia are highly problematic. As the scrutiny of the general MFN and NT clause reveals, with exception of four,[62]all BITs signed by Ethiopia lack like circumstance requirements.[63]In the former case, the existence of like circumstance between competing investors is not required to give or claim national and most-favored-nation treatment. This is an unconditional and blinded non-discrimination doctrine. The absence of likeness requirement not only dents regulatory power and affects public interest but also causes unnecessary future litigation in which investors claim for treatment given to an investor in a different circumstance. Even treaties like Turkey-Ethiopia BIT which set "similar situations or like circumstances" requirements to apply and claim for national and most favored nation treatments are silent as to what constitutes a similar situation. Such ambiguous wording may pose similar problems and trigger liberal interpretation of arbitral tribunal. To fill the gaps, the relevant WTO's jurisprudence and precedent set by an arbitral tribunal that adopted a broader interpretation to protect investors may *mutatis mutandis* applies in the prejudice of host state

[61] United Nations Conference on Trade and Development, *National Treatment*, UNCTAD/ITE/IIT/11 (Vol. IV), (1990)

[62]Ethiopia-Brazil BIT, Art.3; Ethiopia-Qatar BIT, Art.3; Ethiopia-United Arab Emirate BIT, Art.3; Ethiopia-Spain BIT, Art. 3

[63]Ethiopia-UK BIT, Art.3; Ethiopia-South Africa BIT, Art.3; Ethiopia-India BIT, Art.4; Ethiopia-Belgian-Luxembourg Economic Union, Art.4; Ethiopia-Egypt BIT, Art.3; Ethiopia-Finland BIT, Art.3; Ethiopia-Luxembourg, Belgium, & Finland BIT, Art.3; Ethiopia-Sweden BIT, Art.3; Ethiopia-Austria BIT, Art.3; Ethiopia-Libya BIT, Art.3; Ethiopia-Germany BIT, Art.3; Ethiopia-Israel BIT, Art.3; Ethiopia-Iran BIT, Art.4; Ethiopia-France BIT, Art.4; Ethiopia-Netherlands BIT, Art.3; Ethiopia-Algeria BIT, Art.4

interests.[64]Besides, an investor and home state whose agreement with Ethiopia provide likeness as a prerequisite may claim favorable treatment under treaties that do not set likeness requirement based on the MFN clause.

The wording of MFN clauses varies across BITs. Despite this, the MFN clauses under most Ethiopian BITs are crafted in broader terms, and this has an impact on limiting state regulatory space. The applicability of the MFN clause to the substantive right is clear. However, the applicability of the MFN clause to procedural matters including dispute settlement is less clear. In recent years, investment case law has dealt with the question of whether the MFN standard should apply to dispute settlement procedures.[65] There are various case laws regarding the importation of more favorable dispute resolution provisions from a comparator BITs to the basic treaty based on the MFN clause. For example, in *Maffezini versus Spain,* an Argentinean investor in Spain was allowed to use a more beneficial time requirement in the arbitration process found in the Chile-Spain BIT as opposed to the basic BIT under which the claim was filed.[66] In doing so, the arbitral tribunal has utilized the MFN clause to select the preferable arbitral procedure that avoids procedural hurdles like a longer period of consultation, period of limitation, and exhaustion of domestic remedies. In this sense, the MFN clause may multilateralize investment arbitration and expand the subject-matter scope of the arbitral clause. As a review of Ethiopian BITs reveal, in almost all of the BITs, the MFN clause is phrased in general terms which opens the room for competing interpretations and creates a state obligation to offer most-favored-nation treatment concerning the dispute settlement issues.[67]

[64]DiMascio and Pauwelyn, (n 59), 60-66

[65] Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration,*Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022);UNCTAD (2007), Investor-State Dispute Settlement and Impact on Investment Rule Making, (United Nations Publication, Geneva).

[66]Emilio AgustínMaffezini v.The Kingdom of Spain, ICSID Case No.ARB/97/7, available at, https://www.italaw.com/cases/64, last accessed on July 22, 2022

[67] Martha B Hailu and TilahunE Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration*,Mizan Law Review, Vol. 8, No.1(2015), https://www.ajol.info/index.php/mlr/article/view/111737 , (last accessed on July 7, 2022)

The subjection of the non-discrimination to exceptions like security exception, economic integration exception, public health and morality exception, and environment, and labor exception is common practice under investment treaties. Such an exception widens the regulatory space of the host state and promotes the public interest. On the opposite, the absence of limitations may subject the host state to unpredictable risks. Some of these exceptions are existing or future customs unions, regional economic organizations or similar international agreements, and taxation. However, whether this provision by itself would be removed by invoking the MFN clause or not is less clear. In contrast, some BITs like Turkey-Ethiopia BIT have not even recognized MFN exceptions.

3.2.3. Fair and Equitable Treatment and Full Protection and Security

The fair and equitable treatment (FET) and full protection and security of foreign investment have been alarmingly dominating the realm of international investment regimes.[68]It is an absolute, non-contingent standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the relative standards embodied in national treatment and most favoured nation principles which define the required treatment by reference to the treatment accorded to other investment.[69] Despite this, the precise scope and content of FET and full protection and security are unknown. In recent years, FET has been the most grounds for investor claims.[70] Most of the BITs signed by Ethiopia have recognized the right of foreign investment and investors to receive fair

[68]OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, (OECD Working Papers on International Investment, 2004/03)

[69] UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, (1998); A. A. Fatouros, *Government Guarantees to Foreign Investors*, (Columbia University Press, 1962) 135-141, 214- 215; OECD, International Investment Law: A Changing Landscape a Companion Volume to International Investment Perspectives, (2005),74

[70] Ian A. Laird, and et.al, *International Investment Law and Arbitration: 2013 In Review*, 100

and equitable treatment and full protection and security.[71]Beyond, the BITs are silent about the scope and content of FET and full protection and security. Some investment treaties are silent concerning the fair and equitable treatment and full protection and security.[72]

Unlike consistent use of fair and equitable treatment, different phrases like "full", "full and complete", "full and constant", "continuous", "enduring", and "adequate" are used to indicate the degree of protection and security provided by the host state for foreign investor and investment. The use of different terms has an impact on narrowing and widening the interest of the host state and investors. Moreover, the ambiguity of the term FET and full protection and security has a huge negative impact on the host state. This problem becomes acute when it is accompanied by broader interpretation techniques adopted by the arbitral award. The tribunal acknowledges breach of FET and full protection and security (FPS) standard even in the absence of bad faith.[73]As a previous study has revealed, most investors' claims instituted based on FET are usually decided in favor of the investor.[74]The thresholds for the conduct of the state to breach the FET and FPS standards are subjective and subject to abuse. The vagueness of the terms permits the investor to institute a claim against legitimate regulatory measures of the host state invoking violation. In doing so, it discourages the state from taking regulatory measures.

3.2.4. Expropriation

BITs do not prohibit expropriation per se, although it does expand the scope of indirect, creeping, or consequential expropriations and subject nationalization to stringent conditions.[75]Under Ethiopian BITs, the expropriation and nationalization clause, oblige the host states not to nationalize, expropriate, or subject foreign investment to measures having

[71]Ethiopia-UK BIT, Art.2 (2); Ethiopia-Spain BIT, Art. 3; Ethiopia-South Africa BIT, Art.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(2) & 3(1&2) Ethiopia-Sweden BIT, Art2(3&4), Ethiopia-Austria BIT, Art.3(1); Ethiopia-Libya 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)

[72] Ethiopia-Brazil BIT; Ethiopia-Qatar BIT; Ethiopia-United Arab Emirate BIT

[73] Laird, and et.al, (n 70), 103

[74]Laird, and et.al, (n 70), 102

[75]Surya P Subedi, *International Investment Law Reconciling Policy and Principle*, 100 (Hart Publishing, 2008).

an effect equivalent to nationalization or expropriation unless legitimate conditions are fulfilled. The way expropriation is defined has a huge impact on the host state's domestic regulatory space. Despite this, there is no one-size-fits-all way of defining it to strike the balance between the interests of foreign investors and the host state. Currently, almost all investment treaties define expropriation in a border way to include indirect expropriation or measures which have an effect equivalent to nationalization or expropriation.[76] The scope, content, and threshold of indirect expropriation are undefined. This is an acute problem in the period the broader approach of interpretation is adopted by the arbitral tribunal that reduces a threshold of measures to constitute indirect expropriation. Concerning the meaning of indirect expropriation, the arbitral award has investor bias degrading state regulatory rights.[77]In doing so, it discourages the state from exercising legitimate regulatory measures.

The second issue addressed by BITs is conditions of lawful expropriation. Usually, expropriation is legitimate where it is (1) taken for-public purposes, (2) non-discriminatory, (3) carried out under due process of law, and (4) accompanied by *prompt*, *adequate*, and *effective* compensation.[78]These requirements are recognized under customary law too. Fulfilling all these stringent requirements is difficult and limits the regulatory rights of the state and the public interest thereof.

[76]Ethiopia-Brazil BIT, Art.7; Ethiopia-Qatar BIT, Art.9; Ethiopia-United Arab Emirate BIT, Art.6; Ethiopia-UK BIT, Art.5; Ethiopia-Spain, Art. 5; Ethiopia-South Africa BIT, Art.5; Ethiopia-India BIT, Art.5; Ethiopia-Egypt BIT, Art.5; Ethiopia-Finland BIT,Art.5; Ethiopia-Sweden BIT, Art.4; Ethiopia-Austria BIT, Art.5; Ethiopia-Libya BIT, Art.4; Ethiopia-Germany BIT, Art.4; Ethiopia-Israel BIT, Art.5; Ethiopia-Iran BIT, Art.7; Ethiopia-France BIT, Art.5; Ethiopia-Netherlands BIT, Art.6; Ethiopia-Algeria BIT, Art.5

[77] University of Oslo Faculty of Law, *Striking a fair balance between foreign investor protection and host states' right to regulate: A review of the international investment law awards of 2016 through the lens of the principle of proportionality*, 33 (2017)

[78]Ethiopia-Brazil BIT- Art.7; Ethiopia-Qatar BIT-Art.9; Ethiopia-United Arab Emirate BIT-Art.6; Ethiopia-UK BIT-Art.5; Ethiopia-Spain-Art. 5; Ethiopia-South Africa BIT-Art.5; Ethiopia-India BIT-Art.5; Ethiopia-Egypt BIT-Art.5; Ethiopia-Finland BIT-Art.5; Ethiopia-Sweden BIT-Art.4, Ethiopia-Austria BIT-Art.5; Ethiopia-Libya BIT-Art.4; Ethiopia-Germany BIT Art.4; Ethiopia-Israel BIT-Art.5; Ethiopia-Iran BIT-Art.7; Ethiopia-France BIT-Art.5; Ethiopia-Netherlands BIT-Art.6; Ethiopia-Algeria BIT-Art.5; Art 3 of Turkey-Ethiopia BIT

At the beginning of this millennium, another direction of interpretation emerged regarding the relationship between indirect expropriation and regulation. Some tribunals openly acknowledged the host states' right to undertake ordinary regulations.[79]In doing so, *bonafide* regulations are *perse* excluded from the definition of expropriation. For instance, in *Feldman v. Mexico,*[80]*Chemtura v Canada,*[81]*Methanex v the United States,*[82]*Saluka v Czech Republic,*[83] *and El Paso v Argentina*[84]*cases,* the tribunals have given wider consideration to the policies and power of the state in determining whether regulatory measures of states amount to expropriation or not. In the first two cases, the tribunal held measures taken to protect human health and the environment is lawful non-compensable regulation and not amount expropriation as it is taken for a public purpose in a non-discriminatory manner, through a law enacted with due process.

3.2.5. Stabilization Clause

The stabilization clause is a contractual clause mainly designed to protect an investor from negative regulatory change and gives BITs plus protection for investors.[85]It limits the power of host states to take regulatory measures.[86]The clause usually addresses how changes in the law following the execution of the investment agreement are to be treated. It may take the forms of *freezing* clauses or *economic equilibrium* clauses or *hybrid clauses*. The freezing clause limits the applicability of post-treaty legislation unless the investors agree. The best example is an old investment contract between Ethiopia and a US company Called Baruch-Foster Corporation (Texas).[87] This clause replaces the doctrine of rule of

[79]Saluka v. Czeck Republic § 260, Pope & Talbot v. Canada § 99, and Feldman v. Mexico §§ 105-106.
[80] Feldman v Mexico, ICSID Case No ARB(AF)/99/1, Award (16 December 2002)
[81]*Chemtura Corporation v Government of Canada, NAFTA Tribunal, Award (2 August 2010)*
[82]*Metalclad Corporation v United Mexican States, ICSID Case No ARB(AF)/97/1, Award (30 August 2000); Methanex Corporation v United States of America, 44 ILM (2005) 1345*
[83]*Saluka Investments BV v The Czech Republic, UNCITRAL, Partial Award (17 March 2006)*
[84] *El Paso v Argentina, ICSID Case No ARB/03/15, Award (31 October 2011)*
[85]Subedi (n 75), 104
[86]Subedi (n 75), 104
[87] An old investment contract between Ethiopia and a US company, provided that the rights of the parties may neither be increased nor restricted or otherwise changed by means of current or future laws, regulations etc. See also, Investment Contract between Ethiopia and Baruch-Foster Corporation (Texas), 1966, Art. XXVII, para. 4b (reprod. in Merkt (1990), p. 267, emphasis added); JolaGjuzi, Stabilization Clauses in International Investment Law A Sustainable Development Approach, 68 (2018)

law by rule of the investor consent and goes against the principle of political democracy. E*conomic equilibrium* clauses do not prohibit changing the law without the consent of foreign investors but oblige the host state to indemnify the costs incurred by investors following the change. Under *hybrid* clauses, foreign investors are not automatically exempted from the application of new laws, rather the investors may be granted an exemption. It is possible to use the same clause for the benefit of the public interest without affecting the right of investors. This is possible by narrowing the scope of stabilization clauses. Narrowing the scope of the stabilization clause allows for limiting the regulatory measure to a limited number of new laws, and allows for more flexibility for the state regarding social and environmental issues.[88]Avoiding or removing the stabilization clause has a great impact on widening the regulatory freedom of the host state to act for public benefit. However, it negatively affects the protection available to investors and triggers disputes. To ensure the security of investors without negatively prejudicing the public interest or to strike a balance in the state-investor relationship narrowing the scope of stabilization clauses is less evil.[89]

3.2.6. Dispute Settlement Clause

Investment disputes can be settled by a court of the host state or international tribunal.[90]BITs usually provide for the settlement of investor-state disputes settlement before an impartial international arbitration tribunal. In Ethiopia, BITs give priority to the settlement of disputes amicable through consultation and negotiation within fixed periods.[91]Where amicable settlement fails, the treaty provides for settlement through

[88]Semenko (n 20),14

[89] Investment Contract between Ethiopia and Baruch-Foster Corporation (Texas), 1966

[90] Pohl, J., K. Mashigo and A. Nohen (2012), *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", 10 (OECD Working Papers on International Investment, 2012/02)

[91] Ethiopia-Brazil BIT, Art.23&24; Ethiopia-Qatar BIT-Art.16&19; Ethiopia-United Arab Emirate BIT-Art15&16; Ethiopia-UK BIT-Art.9&10; Ethiopia-Spain-Art.10&11; Ethiopia-South Africa BIT-Art.7&8; Ethiopia-India BIT-Art.9&10; Ethiopia-Belgian BIT-Art.11&12; Ethiopia-Egypt BIT-Art.8&9; Ethiopia-Finland BIT-Art.9&10; Ethiopia-Sweden BIT-Art.9&10; Ethiopia-Austria BIT-Art.11-22; Ethiopia-Libya BIT-Art.8&9; Ethiopia-Germany BIT Art.10&11; Ethiopia-Israel

adjudication before a court or arbitral tribunal.[92]The rationale behind availing access to an international tribunal is that the arbitral tribunal acts impartially and balances the interests of investors and states while interpreting treaties clauses. Unfortunately, the arbitral tribunal has been not functioning as expected impartially and objectively. The international investment arbitration has suffered from a legitimacy crisis because of the biased focus on the protection of investors without due regard for the state's right to regulate foreign investment for the public interest. However, there is an emerging tribunal that takes a balanced approach to address the concerns of investor protection and state regulatory right in a balanced and reasonable manner. The futurity of an arbitral tribunal concerning the issue of balancing the interest of the host state and investors is not yet certainly determined but the inclination toward investor protection is inevitable because of strong nudging from capitalists.

3.3. Exit Stage

The foreign investor has the right to exit his/her investment at any time unless agreed not to do so. The regulatory right of the state and the right of an investor during the exit stage of investment are mainly related to the transfer of funds and payment. The right to freely and without delay transfer fund (investment and its return) convertible currency is one fundamental right available for the investor. All BITs of Ethiopia and investment proclamation have expressly recognized the right of foreign investors to transfer funds and payment or repatriate their investment after payment of essential tax.[93]It also requires the

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BIT-Art.8&9; Ethiopia-Iran BIT-Art.12&13; Ethiopia-France BIT-Art.9&10; Ethiopia-Netherlands BIT-Art. 9&10; Ethiopia-Algeria BIT-Art.9&10

[92]Ethiopia-Brazil BIT- Art.23&24; Ethiopia-Qatar BIT-Art.16&19; Ethiopia-United Arab Emirate BIT-Art15&16; Ethiopia-UK BIT-Art.9&10; Ethiopia-Spain-Art. 10&11; Ethiopia-South Africa BIT-Art.7&8; Ethiopia-India BIT-Art.9&10; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.11&12; Ethiopia-Egypt BIT-Art.8&9; Ethiopia-Finland BIT-Art.9&10; Ethiopia-Sweden BIT-Art.9&10; Ethiopia-Austria BIT-Art.11-22; Ethiopia-Libya BIT-Art.8&9; Ethiopia-Germany BIT Art.10&11; Ethiopia-Israel BIT-Art.8&9; Ethiopia-Iran BIT-Art.12&13; Ethiopia-France BIT-Art.9&10; Ethiopia-Netherlands BIT-Art. 9&10; Ethiopia-Algeria BIT-Art.9&10

[93]Ethiopia-Brazil BIT- Art.10; Ethiopia-Qatar BIT-Art.10; Ethiopia-United Arab Emirate BIT-Art7; Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6. See also Art.20 of Investment Proclamation No1180/2020

transfer of funds and payment to be effected without delay in freely convertible currencies, at the official exchange rate prevailing on the date of transfer for the currency to be transferred.[94]The domestic investment law also has guaranteed the freedom to transfer funds.

The transfer of capital has a great impact on the economy of the host state, especially in the case of a huge investment. It may cause a big balance of payment (BOP) disequilibrium in countries like Ethiopia that suffer from a trade deficit. Balancing BOP is the sovereign regulatory power of the state. To this end, the host state has the power to suspend the transfer of investment and return thereof with the aim to balance the BOP. Except for Ethiopian BITs signed with Brazil, Qatar, UAE, UK, Israel, and France, all others do not expressly recognize the BOP problem exception.[95]In other words, most BITs have not expressly recognized the regulatory power of the host state to take BOP safeguard measures.[96]The absence of the BOP exception limits the regulatory power of the state. On the opposite, the BOP exception is essential in balancing the regulatory power of the state and the right of an investor. BOP exception is conditional safeguard measures that shall be temporary, necessary, non-discriminatory, legitimate consistent with IMF Article of Agreement, and imposed against the serious balance of payment disequilibrium.

[94] Ethiopia-Brazil BIT- Art.10; Ethiopia-Qatar BIT-Art.10; Ethiopia-UAE BIT-Art7; Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art.7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6.

[95] Ethiopia-Brazil BIT- Art.10(3&4); Ethiopia-Qatar BIT-Art.11; Ethiopia-United Arab Emirate BIT-Art.9; Ethiopia-UK BIT-Art.7; Ethiopia-Israel BIT-Art.6(3); and Ethiopia-France BIT-Art.6

[96]Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg EU BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-Netherlands BIT-Art.5; Ethiopia-Algeria BIT-Art. 6

3.4. New Development under Investment Regime

There is a concern that laws of foreign investment are blind concerning the state's right to regulate. In response to this, regaining the inherent regulatory right of the state is at the center of recent investment law development.[97]In recent years, there is a growing recognition of legitimate domestic regulatory measures.[98]This may reverse the trends of considering the right to regulate as something is exercised only in defined circumstances.[99] The new direction sees the right to regulate as something inherent in sovereignty.[100]This new direction is the main defining feature of new generation investment treaties. With the aim to create a regime in which the rights and duties of state and investor are balanced, the states have been adopting different measures or mechanisms of which some are briefly discussed as follows as a lesson for Ethiopia.

3.4.1. Interpretation Referring to a Broader Norm

The international investment law is criticized for being isolated from wider international law and focusing on investment protection. Save its special feature, it is a subset of international law. International law regulates wider competing and sometimes complementing interests such as human rights, labour standards, environment, trade, and investment. A foreign investor may abuse labour, human right, and the environment against international law regulating respective areas. In such a case, BITs should be interpreted in light of a wider international norm to protect other competing values and ensure the complementary operation of such norms. This leads to recognition of the regulatory right of the state to interfere in circumstances where the foreign investor abuses human rights such as labour rights, causes environmental damage, or poses a national security problem.[101] The increasing recognition of such a regulatory right may undermine the aim of investment protection. Hence, it needs due consideration to ensure equilibrium.

[97] Kurtz, (n 33), 8
[98] Mann,(n 22), 5
[99] ibid
[100] ibid
[101]Sornarajah, (n 15), 77 &78

3.4.2. Using Domestic Laws

In recent years, states have been using their domestic laws to balance the relationship between investors and states. Domestic law provides the duties of investors and the right of the host state. In Ethiopia, for instance, Article 54 of the investment proclamation has obliged investors to observe the laws of the country including environmental law in carrying out their investment activities. Host states use domestic labour law, environmental law, human rights law, tax law, and others to regulate foreign investors.[102] The foreign investor is bound by domestic law and bears relevant obligations. In the 17th century, Emer de Vattel wrote that foreigners cannot pretend to enjoy the liberty of living in the country without respecting the law.[103]However, this is not free from counterarguments; the host state cannot raise domestic law as a defense for its violation of international law like BITs.

Despite such controversies, without violation of international commitment, states have the freedom to regulate foreign investors in their territories. This is why it is argued that the potential conflict of interest between investor and state is taken care of by the inter-relationship between BITs and the domestic legislation of the host state.[104] The BITs protect the legitimate interests of foreign investors, while the national laws of the host state ensure that the investment remains subject to the regulatory powers of the host state. Hence, provided that host countries respect their international commitments deriving from BITs, they remain free to subject foreign investors in their territories to social, fiscal, environmental, and other regulations that they deem necessary to meet their national development objectives. The fundamental question is whether the interplay between BITs protection and domestic regulation achieves an appropriate balance of investor rights and obligations or not. Besides, the possible contradiction between the two regimes may lead to other controversies and problems. The most pressing problem is that the existing BITs

[102]Sornarajah, (n 15), 77
[103]Emer de Vattel, *The law of nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury,* (Liberty Fund, Inc 2008) para 108
[104]Weber, (n 10), 2

go well beyond supplementing one aspect of the legal and institutional infrastructure in host states and create both choices of law and choice of forum rules that allow foreign investors to completely replace the host state laws on how they may be treated with international laws and remedies.[105]

3.4.3. Adjustment of Investment Treaties

BITs have been accused of investor bias. In response to the imbalance of rights and duties of investors and states, in recent years, countries have been responding to this problem by adjusting their investment treaties.

A. Incorporation of Social and Environmental goals

One of the methods of adjustment is by setting social and environmental goals for the investment under the BITs. Previously, the preamble of BITs focuses on economic goals and investment protection. This trend is changing with some newly emerging BITs' incorporation of social and environmental goals along with the economic objective of investment in the preamble.[106]The preamble of BIT between Finland and Ethiopia provides that '… *these objectives can be achieved without relaxing health, safety and environmental measures of general application*.'[107]Likewise, the preamble of Ethiopia-Brazil BIT has recognized the regulatory autonomy and policy space of the host state and the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity, and human development. Though its degree is less clear, such a statement has an effect on balancing the rights and duties of investors and the host state. It widens the regulatory rights of the host state and the duties of an investor. Against this, some scholars argue that the preamble serves only less purpose only during interpretation by a tribunal as a guide. ViacheslavSemenko argues that apparently, setting social and environmental goals of investments enlarges the scope of responsibilities for investors without providing a list of specific duties.[108] This legal technique helps to presume that the investor is committed to following the BIT goals,

[105] Mann, (n 22), 4
[106] See the Preamble BITs signed by Ethiopia with UK, Brazil, Qatar, United Arab Emirate, and Algeria.
[107] See preamble of investment agreement between Finland and Ethiopia
[108]Semenko, (n 20), 16

which implies the fulfillment of relevant duties. On the other hand, such a goal gives power to the host state to undertake such measure which is relevant to achieve stated goals. This is true as the preamble sets the framework for the whole treaty.[109] Moreover, the commitment of the parties to pursue the aforementioned goals imposes respective responsibilities on investors. Consequently, the investor is expected to follow all the host state regulations that are adopted to promote the stated goals.[110] Furthermore, if some goals are part of international law, the investor is expected to ensure them without waiting for the enactment of relevant local laws.[111] Despite all these, most of the Ethiopian investment treaties are devoid of clear social and economic goal under their preamble and needs reconsideration.[112]

B. Recognition of State regulatory rights

The *second* adjustment method is through express recognition of state regulatory rights in BITs. The BITs had been considered a charter of investor protection. As a result, it imposes duties on the state unaccompanied by rights. On the reverse, entitle investors with rights without duties. Consequently, the state regulatory right was seen as an exception to protection. Such imbalance made the investment regime subject to a legitimacy crisis. This trend is changing to create a balanced regime. One of the measures taken to reduce the problem of imbalance is an express recognition of the regulatory right of the state. In this regard, the preamble of Brazil-Ethiopia BIT has expressly recognized the general

[109]Semenko, (n 20), 14
[110] ibid
[111] ibid
[112] See preamble of Ethiopia-UK BIT-Art.6; Ethiopia-Spain-Art. 7; Ethiopia-South Africa BIT-Art.6; Ethiopia-India BIT-Art.7; Ethiopia-Belgian-Lexumberg Economic Union BIT-Art.8; Ethiopia-Egypt BIT-Art.6; Ethiopia-Finland BIT-Art.7; Ethiopia-Sweden BIT-Art.6; Ethiopia-Austria BIT-Art.7; Ethiopia-Libya BIT-Art.6; Ethiopia-Germany BIT Art.6; Ethiopia-Israel BIT-Art.6; Ethiopia-Iran BIT-Art.9; Ethiopia-France BIT-Art.6; and Ethiopia-Netherlands BIT-Art.5. Some of these agreements have set "increasing prosperity" as an ambiguous goal of foreign investment

regulatory right and autonomy of the state.[113]Besides, the BIT of Ethiopia with the United Arab Emirate has also recognized regulatory autonomy of state under Art.18 entitled "**right to regulate**".[114] Other than these two, all investment treaties lack a general clause that expressly recognizes the regulatory rights of Ethiopia. Despite this, some investment treaties of Ethiopia addressed one or more specific circumstances in which the state undertakes regulatory measures concerning security, labor and environment, the balance of payment, health, public morality, tax, and prudence.[115]On the opposite, some treaties have neglected the regulatory right of the state.[116] Finally, the issue of how many rights of investors and host state counterweight obligations of the same is less clear.

C. Incorporation of Investor's Duties

The *third* new development is the imposition of an obligation on an investor.[117]Against this, some scholars argue that it is difficult to impose any liabilities on investors under BITs since they lack personality under international law.[118] This argument arises from a misunderstanding of the special nature of international investment law. Under the international investment law, investors have the right to institute an international claim against a host state before an international arbitral tribunal. This shows investors have a special international personality to carry out duties and responsibilities.[119] Hence, no longer does the hoary idea of lack of personality nullify the responsibility of investors for abuses of human rights. Otherwise, it is difficult to require foreign investors to behave in a certain manner. In recent years, the old trend in which investor is entitled only to rights while the state carries duties is shifting towards more balanced BITs or balanced investor-state relationship.[120]Among, there is a trend of imposing duties and responsibilities on an

[113] Preamble of Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation
[114] Ethiopia -United Arab Emirate BIT, Art.9, 11-13, 18 and 19
[115] Brazil-Ethiopia BIT-Art.10(3),11-13, &16, Qatar-Art.11, 13,14, United Arab Emirate –Art.9, 11-13, 18&19; UK-Art.7; Belgian-Luxemburg Economic Union-Art.5,6 ; Finland-Ethiopia BIT-Art.14, Netherlands- Ethiopia BIT-Art.4
[116] Spain-Ethiopia BIT; South Africa-Ethiopia BIT; India-Ethiopia BIT; Egypt-Ethiopia BIT; Sweden-Ethiopia BIT; Ethiopia-Austria BIT; Libya-Ethiopia BIT; Germany-Ethiopia BIT; Ethiopia-Israel BIT; Ethiopia-Iran BIT; France-Ethiopia BIT; and Algeria-Ethiopia BIT
[117]Mann, (n 22), 3; Semenko, (n 20), 3
[118]Sornarajah, (n 15), 174
[119]Sornarajah, (n 15), 78
[120]Semenko, (n 20), 3

investor. Usually, such duties are imposed under soft laws like codes of conduct, guideline, and declaration. Beyond, the model BITs developed recently by Norway, USA and others have imposed duties on an investor. Some BIT recently signed by Ethiopia has also expressly or impliedly recognized the duties of an investor concerning the protection of the environment, respecting human rights, labour, security, and health standard.[121] BIT with United Arab Emirate has devoted a separate section of duties of investor. Save the opposite debate, the implied duties of investors can be inferred from the contrary reading of rights and regulatory space of the host state.[122]

D. Clarification of standards of treatment

The *fourth* new development that promotes the state's regulatory right is a clarification of the standard of protection.[123] Usually, BITs set a standard of protection in vague and ambiguous terms lacking clarity. The lack of precision is being used by foreign investors to threaten states by arbitrations, leading in many cases to a phenomenon of regulatory chill, or fear of governments to take measures.[124] The best example is the scope of indirect expropriation. Now, states are responding with the clarity and precision needed to give governments security in their ability to act in the public interest.[125]In response to this, a few countries like Canada and the United States have revised their BITs. They spell out in more detail the content of some core provisions, in particular the minimum standard of treatment per international law (often also called the "fair and equitable treatment" standard) and the provision dealing with indirect expropriation.[126]Ethiopia should take a lesson from this, and clarify the vague standard of protection through the revision of BITs.

[121]Brazil-Ethiopia BIT-Art.12-16, 24
[122] Brazil-Ethiopia BIT-Art.10(3),11-13, &16, Qatar-Art.11, 13,14, United Arab Emirate –Art.9, 11-13, 18&19; UK-Art.7; Belgian-Luxemburg Economic Union-Art.5,6 ; Finland-Ethiopia BIT-Art.14, Netherlands- Ethiopia BIT-Art.4
[123] Mann (n 22), 8
[124] ibid
[125] ibid
[126] Kingsbury and Schill, (n11), 76

E. Recognition of Treaty Exceptions

The *fifth* important new development under BITs is the incorporation of treaty exceptions (general, security, cultural, BOP exceptions) to show that investment protection must not be pursued at the expense of other legitimate public interests. This is done in addition to the traditional exceptions that have been a common feature of BITs for many years, namely taxation and regional economic integration. Many BITs now also exempt host country measures related to such diverse fields as essential security and public order, protection of health, safety and natural resources, cultural diversity, and prudential measures for financial services fully or partially from the scope of the BITs. These exceptions clarify the scale of values in the policy-making of contracting parties and subordinate investment protection to these other key policy objectives. In Ethiopia, some treaties have expressly recognized legitimate exceptions to widen the regulatory space of the state. For instance, the Brazil-Ethiopia BIT has recognized the BOP exception, tax measure exception, prudential measures exception, security measures exception, and labor, environmental, and health measures exception.[127]However, most BITs of Ethiopia are devoid of treaty exceptions.[128]Those exception clauses in BITs impart flexibility to host states in enacting new legislation and enlarging their leeway to regulate.[129] On the one hand, this legally set leeway shields host states from potential claims. On the other hand, it may potentially result in new duties imposed by host states under newly adopted regulations.[130]

F. Revision of Dispute Settlement Clause

The *sixth* new development under BITs is the revision of the dispute settlement clause. The process for adjudicating disputes is essential in balancing the right to regulate and investor protection.[131] This issue is fundamentally important for three reasons. First, balancing the government's right to regulate is a matter of significant public interest that requires a public

[127] Brazil-Ethiopia BIT, Art.10(3), Art 11, Art. 12, Art.13 Art. 16
[128] Spain-Ethiopia BIT; South Africa-Ethiopia BIT; India-Ethiopia BIT; Egypt-Ethiopia BIT; Sweden-Ethiopia BIT; Ethiopia-Austria BIT; Libya-Ethiopia BIT; Germany-Ethiopia BIT; Ethiopia-Israel BIT; Ethiopia-Iran BIT; France-Ethiopia BIT; and Algeria-Ethiopia BIT
[129]Semenko, (n 20),14
[130]Semenko, (n 20),14
[131] Mann, (n 22), 9

hearing in an impartially chosen and open tribunal in a democratic society. Second, the concept of sustainable development is increasingly understood as incorporating public rights of access to information and decision-making processes, and accountability of decision-making bodies. The existing investor-state process fails to take into account these two. Finally, the credibility of BITs has been savaged by the secrecy of the investor-state process.[132]Recent BITs signed by the United States, Canada, and Mexico have introduced innovations concerning dispute settlement including greater and more substantial transparency in arbitral proceedings, open hearings, a publication of related legal documents, and the possibility for representatives of civil society to submit "amicus curiae" briefs to arbitral tribunals. Other new detailed clauses provide for more law-oriented, predictable, and orderly conduct at the different stages of the investor-State dispute settlement process, and envisage the possibility of setting up an appellate mechanism to foster a more consistent and rigorous application of international law in arbitral awards.

3.4.4. Principle of Proportionality

The other new development to balance investor rights and host state rights to regulate is the principle of proportionality.[133]There is an ongoing debate over the issue of whether the principle of proportionality constitutes a general principle of law and forms part of customary international law.[134]To the extreme, some scholars argue proportionality analysis is not an alternative to the rules on treaty interpretation.[135]Despite such controversies, some tribunals have employed it as an interpretation technique in settling investment disputes. The principle of proportionality comprises a three or four-pronged

[132] Mann, (n 22), 9
[133] Kingsbury and Schill, (n 11), 77
[134]N. Jansen Calamita ,*The Principle Of Proportionality And The Problem Of Indeterminacy, Yearbook On International Investment Law & Policy* 2013–2014 edited by Andrea K. Bjorklund, Oxford University Press, (2015), PP-159
[135] Kingsbury and Schill, (n 11), 78

test, which the measure under review has to pass through.[136] These are: (1) an assessment of the legitimacy of the objective of the measure, (2) an analysis of the measure's suitability to achieve this objective, and (3) a determination of whether there exist alternatives, which infringe the right in question to a lesser degree, and (4) a final balancing exercise evaluating the importance of avoiding the interference vis-à-vis the importance of achieving the objective.[137] The first, third, and fourth criteria of assessments are called the criterion of suitability, necessity, and proportionality in the narrow sense or *strictosensu*. As of today, there is no agreement among scholars about the role and effect of proportionality in balancing the right of the host state to regulate and the right of an investor to receive protection. Some scholars like Benedict Kingsbury and Stephan W. Schill view it as a tool to cope with the imbalance of the international investment regime by making the system: pay due regard to regulatory concerns, and overcome an excessive emphasis on the rights of the foreign investor.[138]Despite this, serious concerns and criticism have also been raised regarding its application and efficiency in addressing the problem.

Some scholars claim the fair and equitable standard is best suited to meet the concerns of both investors and states under the international investment regime. Likewise, some scholars claim that the international minimum standards solve the problem of imbalance. Despite such arguments, the content and threshold of these two standards are undefined. In this situation, it cannot able to be a solution. Rather, fair and equitable treatment and international minimum standard treatment are the major headaches in balancing investor-state rights and duties. To the extreme, they are a Pandora's Box of problems of imbalance of interest of the host state and investor under the investment regime.

Concluding Remarks

BITs are subject to backlash because of investors' bias to a degree of disregarding the inherent state regulatory space. The survey of Ethiopian investment treaties reveals the

[136] University of Oslo Faculty of Law, *Striking a fair balance between foreign investor protection and host states' right to regulate: A review of the international investment law awards of 2016 through the lens of the principle of proportionality*, 7 (2017); Kingsbury and Schill, (n 10), 86
[137] Kingsbury and Schill, (n 11), 87
[138] Kingsbury and Schill, (n 11), 78

same. In response to investor bias, there are multidimensional international moves including adjustment of investment treaties, use of domestic laws as a balancing tool, development of the principle of proportionality, and development of public-centric arbitral award. Among these, some treaties of Ethiopia have tried to consider the interest of the host state through express and implied recognition, which is a great step, but not enough as it may be devoid of value by the MFN clause which avails all available favorable treatments with no consideration of state regulatory rights. Beyond, the inherent right of the host state to regulate for the benefit of the wider public needs to be expressly and broadly recognized under BITs. In contrast to this, there is a capitalist move that calls plus protection. This is the state-investor (private-public) war of the 21st century and the question of who will get the trophy needs time to get an answer. This movement has a huge impact on capital-importing countries with weak bargaining power like Ethiopia. What makes the future direction more unpredictable is the dynamic and diversified nature of the interests involved. The direction of future development of BITs seems to fall in the hand of giant economies adjusting their treaties. With challenges ahead in mind based on the lesson from the new development under-investment regimes, the researcher calls for a reconsideration of investment treaties signed by Ethiopia.