

Most Favored Nation Clauses and their Potential Effect on Ethiopia's Bilateral Investment Treaties: Substantive Protections, Perspectives and Stepping the Reconsiderations

Feven Aberham*

Abstract

Under the disguise of MFN treatment, claims to import protections from third party BITS by overriding the independently negotiated basic BITS with home state has caused the purpose and scope of MFN clauses in BITS to be contested. Substantive protections are among the subjects of MFN based allegation. Supplemented with international investment tribunals' blessings to liberal MFN clauses having loose components, host states are repeatedly exposed to international litigations and payments of damage for the violation of unconsented protections. In response to this, the wake up calls by international organizations has led states to reconsider the context of their BITS' MFN clauses. Up-to-date, Ethiopia has signed 35 BITS. All the BITS grant MFN treatment. Thus, this piece of writing aims to examine the MFN clauses under Ethiopian BITS against the divisive international investment law jurisprudences on using MFN clauses to shop substantive rights. Accordingly, it has been found out that Ethiopian BITS MFN clause have major problems in incorporating key components. This would subject the BITS to importation claims and put the country at the most disadvantageous position exposing it to unintended litigation. Thus, it is recommended that Ethiopia is required to either cautiously reconsider the BITS in light of the suggested options of incorporating MFN clauses or to their abrogation at all. This calls for policy level decision, relatively clear guidance informing the country's position to the issue with farsighted negotiation efforts.

Keywords: Most Favoured Nation, Basic Treaty, Bilateral Investment Treaty, Comparator Treaty, International Investment Tribunal

* LLB, LLM, Lecturer College of Law and Governance, School of Law, Hawassa University.
Email: fevenabera@gmail.com

1. Introduction

Bilateral investment treaties are agreements between two countries on the reciprocal promotion and protection of investment comprising various substantive and procedural protections.¹ Most favoured nations principle (hereinafter MFN) is a treaty-based substantive protection principle that obliges contracting states to treat each other's investors and investments not less favourably than investors and investments from third state.² MFN is introduced under Bilateral Investment Treaties (hereinafter BITs) to prohibit discrimination on foreign investors and investments from different countries by host states.³ MFN under BITs context presupposes the existence of relation among three states namely granting, beneficiary and third states by which the status of a state under any of this categories is determined when MFN claims are instituted.⁴

While basic treaty refers to the BITs between the MFN granting and beneficiary state, the comparator treaty denotes the BITs of the granting state with any other third state.⁵ Investors tendency to create juridical link between basic and comparator treaty with the aim to import what they deemed is more beneficial protection than what is provided under the basic treaty⁶ has resulted to pose different questions on the purpose and scope of MFN clauses under BITs. Above

¹ M. Sornarajah, *International Law on Foreign Investment* (Cambridge University Press 2010) 79.

² Christoph Schreuer, *Investment, International Protection* (Cambridge University Press 2020) 71.

³ Catharine Titi, 'Most favoured Nation Treatment : survival clauses and Reform of International Investment Law' (2016) 33 *Journal of International Arbitration* 427.

⁴ Stephan W. Schill, 'Multilateralizing Investment Treaties through Most-Favoured-Nation Clauses' (2009) 27 *Berkeley Journal of International Law* 506-507.

⁵ Ibid 506, the granting state is the state that is expected to provide the MFN treatment or the host state, the beneficiary state refers to the state that would receive the MFN treatment and the third state refers to any other state other than the beneficiary but has BIT relation with the granting state.

⁶ Tony Cole, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2012) 33 *Michigan Journal of International Law* 568 .

all, International Investment Tribunals (hereinafter IIT) divisive approaches in interpreting the essence of MFN treatment have made the liability of host states, on the ground of their BITs protections, to be unpredictable.

Ethiopia is a developing and host state of different types of foreign direct investments. Up-to date in general Ethiopia has signed 35 BITs.⁷ Martha and Tilahun, under their article, have made basic exposition on the relation between Ethiopian BITs MFN clauses with dispute resolutions provision. Accordingly, it has been indicated that Ethiopian BITs requires rethinking against the new IIT jurisprudences basically focusing on their dispute resolution provisions as part of MFN treatment.⁸ This article claims that the issue of MFN, in the context Ethiopian BITs, shouldn't only be limited to be reconsidered in light of its' effect on dispute resolution protections but it has to be also examined in terms of its' prospective consequences on substantive protections which establish the essences of signing independent BITs. Thus, the article contends that the issue needs to be further investigated on the basis of the newly emerged debated matter against the long held approach of taking substantive protections as part of MFN treatment.

The paper tries to indicate the possible measures to step to the rethinking phase. Thus, it discloses the key components of MFN clauses in terms of their role in determining the scope of MFN protections. It also reviews the options suggested by international organizations with due emphasis to their wakeup calls for host states

⁷UNCTAD, Investment Policy Hub available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>>, accessed on 16th November 2021. 12 are not entered in to force & the 2 are terminated. In order to examine the feature of Ethiopian BITs in incorporating MFN clause and so as to be able comprehend the tendency in incorporating the clause with their possible implication, all Ethiopian BITs regardless of their status in relation to entrance in to force, are made to be subject of analysis.

⁸ For the detail discussion on the other aspect of the contemporary debate on MFN clauses: Its' role to import procedural protections see Martha Belete and Tilahun Esmael, 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration' (2014) 8Mizan Law Review 1.

who are victims to the evils of the unsettled scope of MFN clauses.⁹ Further than this, the article attempts to address the experiences of different countries; both of those who have passed through the flame of MFN claims as well as those who opted to take lessons from others by taking measures on their BITs early. In response to this endeavour, qualitative doctrinal legal analysis using both primary and secondary sources of data has been made.

In line with the aforementioned issues, this article is organized into six sections. The first part gives brief introduction about Bilateral Investment Treaties and MFN concept in general. The second part discusses the MFN treatment and the contemporary contested issues. The third part covers key components of MFN clauses and their role in determining the scope of MFN protections. The fourth section provides an overview regarding the wake-up calls by international organizations and the measures taken by different countries accordingly. The fifth section covers the analysis on Ethiopian BITs MFN clauses in light of the contemporary controversies on MFN concept. Finally, concluding remarks are given under the sixth part of the paper.

2. General overview on BITs and MFN Treatment

2.1. Bilateral Investment Treaties

Bilateral investment treaties (BITs) are agreements independently negotiated between two countries to regulate the undertaking of foreign investment in a host

⁹ Organization for Economic Cooperation and Development, *Most Favoured Nation Treatment in International Investment Law*, 2004, see also United Nation Conference on Trade and Development, *Most Favoured Nation Treatment*, 2010 and International Institute for sustainable development, *The most favoured nation clauses in investment treaties* (IISD Best Practices Series 2017)

state.¹⁰The foremost BIT was signed between the Federal Republic of Germany and Pakistan for promotion and protection of investment in 1959.¹¹ Since then, BITs have become widely used sources of international investment laws that grant multiple protections for foreign investors and their investments. Currently from the number of International Investment Agreements (IIAs) that have reached more than the 3000 above the 2500 are BITs.¹²

BITs uphold the aim of providing reciprocal promotion and protection to foreign investments.¹³The forms of protections conferred by BITS are mainly two types in nature i.e. substantive and procedural. While the substantive aspects of the protections deal with the various forms of rights granted to foreign investors and their investment,¹⁴the procedural parts cover issues of investment dispute settlement mechanisms.¹⁵ Of the various types of substantive protections, MFN is one of the widely recognized as well as most debated form of protection provision under BITs.

¹⁰Kenneth Vandeveld, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 The American Journal of International Law 4.

¹¹Kenneth Vandeveld, 'A Brief History of International Investment Agreements' (2005) 12 Thomas Jefferson School of Law 1.

¹²UNCTAD Investment Hub, available at <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed December 2021.

¹³Salacuse J, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer 3.

¹⁴BITs substantive protections mainly comprise Full Protection and Security (FPS), Fair and Equitable Treatment (FET), Prohibition from Unlawful Expropriation, Prohibition of Discrimination and Arbitrary Measure, Compensation for Loss, Repatriation Right, Stabilization and Umbrellas Clauses, Most Favoured Nation (MFN) and National Treatment(NT).See Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Business & Development Law Journal 337, 341-342.

¹⁵Concerns with regard to competent organs, procedures , period of limitation, waiting period , jurisdiction and applicable rules to remedy investment disputes form the procedural protection.

2.2. Most Favoured Nation Treatment: Origin, Meaning, and Purpose

Commercial treaties in the 11th and 13th centuries are evoked as the roots of MFN treatment.¹⁶ However, the wider incorporation of MFN clauses was made under the 18th and 19th centuries Friendship, Commerce, and Navigation treaties (FCN).¹⁷ Modern MFN treaty clauses which are reciprocal and unconditional in their nature were introduced in the 15th century.¹⁸ These forms of MFN clauses have retained to be the governing modality of incorporating MFN clauses under various legal frame works including that of World Trade Organization legal frame works.¹⁹ The introduction of MFN concept to IIAs trace back to 18th and 19th FCN treaties which are regarded as the earliest forms of investment agreements.²⁰ The incorporation of MFN clauses, particularly under BITs, began since the signing of the very first BIT which was between the Federal Republic of Germany and Pakistan in 1959.²¹

¹⁶Thomas Barclay, 'Effect of "Most-Favoured-Nation" Clause in Commercial Treaties' (1907) 17 The Yale Law Journal 1891 1892. See also Endre Ustor, 'Most-Favored-Nation Clause' (1969) 2 Yearbook of International Law Commission 157 15

¹⁷John F. Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) Columbia Journal of Transnational Law 311.<<http://jtl.columbia.edu/wp-content/uploads/sites/4/2015/01/51ColumJTransnatIL302.pdf> ,accessed 6 January 2018.

¹⁸ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 4. see also Seymour J. Rubin, 'Most Favoured Nation Treatment and the Multilateral Trade Negotiation a Quiet Revolution' (1981) 6 (2) Maryland Journal of International Law 221 222-223

¹⁹See WTO economic regulatory legal frame work provisions such as The General Agreement on Trade and Tariff (GATT), Agreement on Technical Barriers to Trade (TBT), art. 5.1.1 The General Agreement on Trade in Services (GATS) art II and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) art 4

²⁰Kenneth J. Vandewelle, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017) 179

²¹Vorgelegt Von, 'The Most Favoured Nation Clause in International Investment Agreement Law ' (Dissertation, Hamburg University 2018) 352

With the proliferation of BITs, the insertion of MFN in the treaties has also simultaneously expanded.²² Despite its' wider usage under various agreements, there is no universally agreed meaning on what particular elements constitute as MFN treatment. Although different international organizations such as International Law Commission had exerted their effort to codify MFN principles in a single document, it was not successful.²³ Nonetheless, the draft article of the commission is the commonly referred source to capture the general definition of MFN. Accordingly, MFN is defined as “a clause” as well as “treatment” as follow:

“Most-favoured-nation clause is a treaty provision whereby a state undertakes an obligation towards another state to accord Most-favoured-nation treatment in an agreed sphere of relations.”²⁴

“Most-favoured-nation treatment is a treatment accorded by the granting state to the beneficiary state, or to persons or things in determined relationship with that State, not less favourable than treatment extended by the Granting State to a third State or to persons or things in the same relationship with that third State.”²⁵

In the context of investment agreement, MFN is a standard of protection in which an investor from a party to an agreement, or its' investment, would be treated by the other party “no less favorably” with respect to a given subject-matter than an investor or an investment from any third country, in like circumstance.²⁶

²²Jeswald W. Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’(1990) 24 (3)The International Lawyer 655 668.

²³Vorgelegt (n 21) 38-44. Another institution that has tried to codify MFN principles was Insititute de Driot International.

²⁴ United Nation International Law Commission, *Final Draft Articles on Most Favoured Nation Clauses in Treaties Between States*(ILC International Legal Materials 17 (6) 1978) Art 4

²⁵Ibid Art 5

²⁶Andrew and Lluís, (n 18) 225.

The introduction of MFN principle under international investment law is triggered by different justification. First, originally, MFN protection in investment treaties was granted with the aim to prevent arbitrary discrimination between foreign investor by host state national laws, regulations and administrative decisions or by its actions, measures and practices. Second, in early BITs, MFN was incorporated to ensure the observance of National Treatment (NT) i.e. as a means to warrant that the NT is applied to all foreign investors regardless of their origin.²⁷ Third, MFN is seen as legal machinery that helps to prevent states from forming economic alliances in a way that negatively affects other states which could increase the potential economic tension resulting military conflict. Fourth, it aims at averting monopoly and keeping the value of original concession made between the granting and beneficiary states.²⁸

Generally, the introduction of MFN principle in economic treaties is prompted by both economic and political rationales.²⁹ Laying a fair playing ground by creating equal competitive opportunities for foreign investors of different nationalities, protecting the rights of investors and maintaining sovereign equality of states through preventing nationality based discrimination among foreign investors of different countries by host states are the major reasons justifying the inclusion of MFN in investment treaties.³⁰

²⁷ United Nation Conference on Trade and Development, *Most Favoured Nation Treatment*, (UNCTAD Series on Issues in International Investment Agreements II, 2010) 13

²⁸Robertus Bima, Wahyu Mahardika1 and Emmy Latifah, 'Varying Application of Most Favoured Nation Principle in International Investment Treaty'(2018) 7 392

²⁹Ibid 392 and 394.

³⁰International Law Commission, *Most-Favoured-Nation clause* , *Final Report of the Study Group on the Most-Favoured-Nation clause* (ILC 2015) 8-10

3. MFN Treatment and the Contemporarily Contested Issues

As the consequence of international investment tribunals new and divisive jurisprudences on MFN, the purpose and the scope of MFN treatment in the context of BITs has grown to be the most debated and controversial standard of investment protection.³¹ Foreign investors' tendency of using MFN clauses under basic treaties to import what they considered as relatively better granted protections from comparator treaty is the source of the contemporary debate regarding the function and scope of MFN under BITs. The unintended utilization of MFN clauses by investors has expanded than ever imagined and taken the concern of states, international investment tribunals themselves, scholars and international organizations.

BITs uniquely entitle individual investors to institute claims against host states before international investment tribunals.³² Accordingly, more than 20 MFN based claims with aim to import substantive protections were brought before these tribunals and host states were exposed to frequent litigations and were made to pay huge amount of compensation.³³ Though countries sign BITs in consideration of several socio-economic and political based strategic alliances,³⁴ the MFN claims of investors by shopping rights from third party BITs have rendered the role of MFN under BITs to be contested from different perspectives.

Generally, the function of MFN under international investment treaties can be categorized into two contradictory scholars view. While some scholars argue that MFN clauses under BITs are apparatuses to multilateralization, hence, claim easing

³¹Tarcisio Gazzini and Attila Tanzi, 'Handle with care: Umbrella Clauses and MFN Treatment in Investment Arbitration' (2013) 14 *The Journal of World Investment & Trade*, 978 983.

³² Scott Vesel, (Clearing a path Through a Tangled Jurisprudence: Most-Favoured –Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties) (2007)(32) 126 *Yale Journal of International Law*

³³International Institute for Sustainable Development, *The Most Favoured Nation Clause in Investment Treaties* (IISD Best Practices Series 2017 10-17

³⁴M.Sornarajah (n1) 183

treaty negotiations, promoting economic liberalization and providing uniform high standards of protections for foreign investors are their major purposes by admitting that protection under third party treaty constitute MFN treatment.³⁵ On the contrary, other scholars debate that such approach of utilizing MFN defeats the purpose of independent negotiation, affects regulatory autonomy of host states, elevates and renders the scope of obligation of host state unpredictable. It also disregards the significant variations that exist among the different substantive as well as procedural standards of protections under separate BITs. Moreover, the scholars invoke that it violates the sovereign right and freedom of making independent negotiation by states. In this reasoning,³⁶ Kenneth has briefly expressed the essence of the counter argument stating:

“As result of the MFN treatment provision, every BIT concluded by a country is as strong as the strongest BIT concluded by that country”³⁷.

3.1.Importing substantive protections via MFN: Tribunals’ Jurisprudences and the divergences

BITs provide various forms of substantive protection for foreign investors and their investment. Full Protection and Security (FPS), Fair and Equitable Treatment (FET), Prohibition from Unlawful Expropriation, Compensation for Loss, Repatriation Right, Umbrella and Stabilization Clauses, National Treatment (NT) and Most Favoured Nation Treatment (MFN) are among the various forms of

³⁵Stephan W. Schill, ‘Allocating Adjudicatory Authority: Most Favored Nation Clauses as a Basis of Jurisdiction A Reply to Zachary Douglas’ (2011) 2 (2),Stephan (n4) Catharine Titi (n 3) Aron (n 39)

³⁶YannickRadi, ‘The Application of the Most-Favored-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the ‘Trojan Horse’”(2007) 18(4) EJIL, 757, 764,Simon & Benton (n 61) Patric(n56)

³⁷Kenneth Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010) 339-346

protections.³⁸ The majority of the substantive protections are fluid concepts and complex in their nature.³⁹ MFN adds fuel to this through creating juridical link among the substantive protections under different BITs paving the way for investors to shop rights from one BIT to another BIT which reciprocally extend the obligation of host state.⁴⁰ For instance, FET is one of the repeatedly claimed substantive protections for its' importation through MFN clause by investors before IIT.⁴¹

In light of substantive protections, MFN clauses under basic treaties are invoked by investors for various purposes:⁴² Such purposes are to import substantive provisions from comparator treaties which they deem are more beneficial than that exist in the basic treaty as in the cases of *ADF v. United States*⁴³ and *CME v. Czech Republic*⁴⁴, to avoid provisions of obligations that exist in the basic treaty but not under comparator BITs of host state as in the case of *CMS v. Argentina*⁴⁵, to widen the scope of application of the basic treaty such as the definition of investor and investment as in the case of *Tecmed v. Argentina*⁴⁶ and to amend the date of the entry into force of a given BIT so as to bring prior claims through packages of

³⁸Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 119-191

³⁹ Aaron M. Chandler, 'BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice' (2009) 43(3) *The International Lawyer*, American Bar Association 1301, 1302-1310.

⁴⁰Stephan (n 4) 5.

⁴¹United Nation Conference on Trade and Development, *Fair and Equitable Treatment* (UNCTAD Serious on issues in International Investment Agreements II 2012)

⁴²International Institute for Sustainable Development, *The Most Favoured Nation Clause in Investment Treaties* (IISD Best Practices Series 2017) 10-17

⁴³*ADF Group Inc. v. United States of America*, ICSID, Case No ARB (AF)/00/1, 2003 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/53/adf-v-usa> accessed 10 December 2021

⁴⁴*CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, 2003, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/52/cme-v-czech-republic> accessed 10 December 2021

⁴⁵*CMS Gas Transmission Company v. The Argentine Republic*, ICSID, Case No. ARB/01/8, 2005, https://www.biicl.org/files/3913_2005_cms_v_argentina.pdf accessed 13 October 2021

⁴⁶*Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID, Case No. ARB(AF)/00/2, 2003, <https://www.iisd.org/itm/2018/10/18/tecmed-v-mexico/> October 2021

protections provided in a BIT as in the case of *Societe Generale v. Dominican Republic*.⁴⁷

The utilization of MFN clauses to import substantive protection from comparator BITs has been an accepted jurisprudence for long period of time.⁴⁸ *AAPL v. Sri Lanka* is the pioneer BIT case to recognize the right to import better substantive provision through MFN clause.⁴⁹ Later, different tribunals such as *MTD v. Chile* ruled that more beneficial substantive provision in third party BITs form MFN treatment and the tribunal justified its' ruling providing that the MFN exception of the basic BIT doesn't restrict from utilizing MFN in such way.⁵⁰ In the *White Industries vs. The Republic of India* case, the tribunal passed,

“The role of MFN for importation of substantive provisions is not at all controversial”.⁵¹

Similarly, *Vladimir Berschader and Moise Berschader v. Russian Federation*, tribunal pointed out, ‘it is universally agreed that the very essence of an

⁴⁷*Societe Generale v. Dominican Republic*, UNCITRAL, Case No. UN 7927,2008, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/250/soci-t-g-n-r-ale-v-dominican-republic> accessed 18 June 2018

⁴⁸ Aaron (n 39) 1

⁴⁹*Asian Agricultural Products Ltd v Sri Lanka*, ICSID, Case No/ ARB/87/3 ,1990, https://www.biicl.org/files/3937_1990_aapl_v_sri_lanka.pdf accessed 18 June 2018

⁵⁰*MTD Equity SdnBhd and MTD Chile SA v Chile*, ICSID, Case No ARB/01/7 2004, <http://oxia.oupplaw.com/view/10.1093/law:iic/174-2004.case.1/law-iic-174-2004> accessed 17 December 2021

⁵¹ *White Industries Australia Limited v. Republic of India*, UNCITRAL, 2011 <https://www.italaw.com/cases/documents/1170> accessed 17 December 2021

MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties⁵²

Conversely, the above interpretation of the tribunals with regard to the scope and function of MFN clauses is rejected by another investment tribunal as well as received criticism from other concerned bodies. For example, in the case between *Ickalelnsaat Limited Sirketi vs. Turkmenistan* the tribunal ruled that claimant can't invoke MFN clause to import substantive protections from third party BIT unless it is clearly provided to do so.⁵³ Likewise, states acting as litigants, non-disputing parties and treaty drafters have in several instances voiced that common terms in MFN clauses such as “*treatment*” do not necessarily permit the importation of substantive standards from third-party treaties.⁵⁴

In response to the above IIT experiences, different scholars have forwarded their arguments and perspectives regarding the particular role of MFN clause to import substantive protections. For instance, Patrick has argued that unless similar measure that restricts the scope of application of the MFN clause under the basic treaty is taken, the effort of restricting other substantive protections such as FET under new BITs of host states would be futile.⁵⁵ He questions,

“if contracting states intended to reject a stand-alone FET clause, why were they not sufficiently prudent in drafting the MFN clause in order to give full effect to this exclusion?”⁵⁶

⁵²Vladimir Berschader and Moise Berschader v. Russian Federation, SCC, Case No. 080/2004, 2006, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/155/berschader-v-russia> accessed 21 December 2021

⁵³*Ickalelnsaat Limited Sirketi v. Turkmenistan*, ICSID, Case No. ARB/10/24, 2016 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/387/i-kale-v-turkmenistan> accessed 3 December 2021

⁵⁴ UNCTAD Most Favoured Nation Treatment (n 27)

⁵⁵*Ibid* 11

⁵⁶ *Ibid* 8 - 9

This inquiry leads to the need to adjust the scope of MFN clause by giving due emphasis to its' pillar components that are treatment, beneficiary, like circumstance and MFN exception.⁵⁷

Criticizing the importation role of MFN, Jeswald, states that in granting substantive protections under BITs variation in a given particular substantive provisions can be made in line to economic strategic alliance a specific developing country want to develop with a particularly industrialized state.⁵⁸ Thus, he argues MFN is hindrance to make negotiation with such variations.⁵⁹ Correspondingly, Simon and Heath, criticize the multilateralization role of MFN clauses in BITs in general, and its' applicability on substantive protection, in particular. They characterize the trend of using MFN to multilateralize substantive protection as "*a conventional wisdom*" which relied on mere presumption on the role of MFN as means for importation of substantive rights.⁶⁰ They claim that such lean has led to "top-down" approach of interpreting MFN clauses resulting uniformity. They argued this inclination of using MFN clauses disregards and conflict with the meaningful differences that exist among substantive protections including MFN clauses themselves.⁶¹

On the contrary, Stephan, in his reply to Simon and Heath, has brought the counter argument that MFN clause is a tool for bilateral commitments to shift to

⁵⁷Kenneth (n 10) (n 11)

⁵⁸ Jeswald (n 22) 667, He mentions the specific instances in which variations could be manifested these are definition of investment and investors, principles concerning repatriation of capital, elements on compensation for loss, protection and security and principles of prohibition of expropriation against compensation.

⁵⁹Ibid 665

⁶⁰ Simon Batifort and J. Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2017) 111(4) The American Journal of International Law 873, 873-876.

⁶¹Ibid

multilateralism.⁶² He argues that when countries incorporate MFN clauses in their bilateral investment treaties, it demonstrates their intention to multilateralise the substantive obligation under the bilateral treaty, thus, he concludes that the issue is not the approach of interpretation or presumption rather it is about accepting the inherent nature of MFN principle that is multilateralization.⁶³

4. Components of MFN clauses and their role in determining the scope of MFN obligation

MFN protection promotes equal treatment by host state towards foreign investment. In line with this the protection clause has components that help to determine the scenario of granting the protection. The four components of MFN clause comprise treatment, beneficiary, like circumstance and MFN exception. These elements are vital in the formulation and determination of the scope of MFN obligations of contracting states. The forthcoming sub-sections will discuss about each elements of MFN clause.

4.1.Treatment

Treatment refers to the specific subject matter or substance that is accorded through MFN as protection.⁶⁴ It is also defined as the conduct or behavior towards another party referring state acts towards investor.⁶⁵ Defining the term ‘treatment’ requires specifically diagnosing the wording of the term within MFN clause of the respective BIT and this makes finding uniform meaning of the term very difficult.⁶⁶ The term ‘treatment’ in context of investment treaties carry two main aspects;

⁶² Stephan (n 4) 10-11

⁶³ Ibid

⁶⁴ Rudolf and Christoph (n 38) 186-191

⁶⁵ Stephanie L. Parker, ‘A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties’ (2012) 2(1) Arbitration Brief 30 and 45.

⁶⁶ Ibid 44-46

measures by host states on foreign investment and the actual material treatment granted to them in relation to creating competitive conditions.⁶⁷

In terms of clarifying the content of the protection, MFN clauses take two major forms: stand alone and qualified clauses.⁶⁸ MFN clause in BITs that merely incorporate the term ‘treatment’ stating “no less favourable treatment” to be accorded is referred as “Stand Alone MFN Clause” or “Unqualified MFN”. Such MFN clause is not restricted in its scope to any particular part of the treaty containing it or to any other subject matter. As result it is characterized as very general MFN clauses subjected to wide interpretation and rendering host states’ scope of liability unpredictable.⁶⁹ Whereas, MFN clauses providing normative content of treatment or with identified specific subject matter are regarded as qualified or narrow MFN clause; they are less prone to broad interpretations and make the states’ scope of liability to be predictable.⁷⁰

4.2. Like Circumstance

Like circumstance is also known as “the same circumstances”, “like situations” or “similar situations”. It is a comparison standard that has to be fulfilled so as to allow foreign investors and investments enjoy similar protection through the means of MFN.⁷¹ Like circumstance requires an assessment of a number of factors related to the nature and impact of foreign investments and could result a given foreign

⁶⁷ UNICTAD, *Most Favoured Nation Treatment* (n 27) 17-18

⁶⁸ Scott Vesel, ‘Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’ (2007) 32 *Yale Journal of International Law* 126, 136-138.

⁶⁹ Andrew Liluis (n 18) 7-10 see also Rudolf and Christoph (n 38) 188-191

⁷⁰ Ibid

⁷¹ Marilda Rosado De Sa Riberio and Guterres Costa Junior, ‘Global Governance and Investment Treaty Arbitration: The Importance of the Argentine Crisis for Future Disputes’ (2015) 14 *The Law and Practice of International Courts and Tribunals* 20

investment not being comparable to the others, thus, warranting a differential treatment.⁷²If the need for foreign investment is not only for the matter of increasing economic aggregate but also to achieve sustainable development policies; it requires to be selective on the type of FDI countries are looking for and be strategic on the grant of protections accordingly.⁷³In this regard like circumstance has the role of dissecting the level and type of protections that can be granted by host states via MFN.

4.3. Beneficiaries of MFN Treatment

Beneficiary refers to the specific subjects that are entitled to enjoy the MFN protection and it determines to whom host states' specific liability would be. Under the majority of BITs "investment" and "investor" are named as beneficiaries of MFN treatment⁷⁴where as some BITs restrict the beneficiaries of MFN treatment only to "investment".⁷⁵Beside this "activities related to investment" such as acts of management, maintenance, operation, use, conduct, enjoyment and disposal of investment are also mentioned as beneficiaries of MFN treatment in BITs.⁷⁶In this regard, it is claimed that BITs that explicitly grant MFN treatment to both investment and investor create more favourable investment climate.⁷⁷Conversely, it is argued that naming investor as well as the inclusion of activities related to investment as beneficiary adds pressure up on the host state by expanding the scope of the particular BIT obligation.⁷⁸

⁷²Soniae. Rolland & David M. Trubek, 'Legal Innovation in Investment Law : Rhetoric and Practice in Emerging Countries' (2018) 39 (2) Penn Law: Legal Scholarship Repository 335, 405.

⁷³Ibid 366 -383

⁷⁴ International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses*(n 24) 27

⁷⁵Robertus, Wahyu and Emmy (n 28) 403

⁷⁶ UNICTAD *Most Favoured Nation Treatment* (n 21)

⁷⁷ Kenneth (n 20) see also UNICTAD *Most Favoured Nation Treatment* (n 27)

⁷⁸ IISD *The Most Favoured Nation Clause in Investment Treaties* (n 22) 32

4.4. MFN Exceptions

MFN exception sets reservations for the extension of MFN treatment. It is a mechanism to deviate from granting MFN protection. It has key role to retain regulatory freedom for host states and helps to keep socio-economic and political practicality by being responsive to pragmatic situations.⁷⁹ BITs as sovereign acts of states they shall balance the interest between foreign investment protections with that of public interest issues. In this regard, MFN exception is instrumental to retain the balance by making the discrimination by host states to be backed by legal ground.⁸⁰ In order to get proper attention of international investment tribunals', state interest has to be clearly provided under BITs.⁸¹ Most of the international investment tribunals have directed contracting states to use their MFN exception in a way that is responsive to the contemporary issue i.e. whether states desire protections provided in third party BIT to form MFN treatment or not. For instance, the *Siemen Vs. Argentina* tribunals have rendered,

*“The purpose of MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.”*⁸²

Thus, providing clear MFN exception in this regard has the role of mitigating the complex effects of MFN clauses in BITs and warrant providing preferential treatment.⁸³

⁷⁹ David Schneiderman, 'The Constitutional Structures of the Multilateral Agreement on Investment' (1999) 9 (2) *The Good Society* 757, 758-760.

⁸⁰ Ahmad Ali Ghouri, 'Investment Treaty Arbitration and Development of International Investment Law as a 'Collective Value System': A synopsis of a new Synthesis' (2009) 10(6) *Journal of World Investment and Trade* 921, 925-928.

⁸¹ Giovanni Zarra, 'The Relevancy of State Interest in Recent ICSID Practice' (2016) XXVI *The Italian Yearbook of International Law* 510, 511-512.

⁸² *Siemens A.G. vThe Argentine Republic, ICSID, CaseNo.ARB/02/8,2007* <https://cil.nus.edu.sg/wp-content/uploads/2015/10/Day4-11-Case-24.pdf> accessed 29 December 2018

5. Wake-up calls: An overview of international organizations and countries' reactions

Different international organizations have expressed their concerns on the dissected issues of MFN.⁸⁴ These bodies, through their analysis, options and comments, have made call for states to give due care incorporating MFN clauses in their BITs. They have also stressed that the complexity of the subject matter demands to exert the required level of professionalism intelligence and an open specific diplomatic dialogue on the issue.

For instance, the ILC has undertaken different studies on MFN with the aim to consider contemporary issues. Accordingly, though it couldn't turn it into a convention, ILC had prepared draft article on MFN.⁸⁵ The Commission analyzing the trends of interpretation of MFN clauses by tribunals has provided detail guidance for treaty negotiators, policy makers and practitioners.⁸⁶ UNCTAD has also provided several options that may assist for states to determine on what the interaction between MFN treatments of basic BIT and protections under third party BITs could possibly be. The major options provided by this organ are: 1, accepting the multilateralization role of MFN with clear consent, 2, absolute prohibition of importation, 3, qualifying MFN through providing the contents of MFN components such as treatment, beneficiary, like circumstance & MFN exceptions, 4, taking radical approach or avoiding MFN clause from BIT.⁸⁷ In line with each

⁸³ UNCTAD, *Most Favoured Nation Treatment* (n 27) see also Ahmad Ali (n 80)

⁸⁴ The International Law Commission (ILC), United Nations Conference on Trade and Development (UNCTAD), International Institute for Sustainable Development (IISD) and the Organization for Cooperation and Development (OECD) are among the organization that voiced their concern on the controversies of the concept of MFN treatment under investment treaties

⁸⁵ Vorgelegt (n 21)

⁸⁶ See the details of the guidance from ILC document (n 24)

⁸⁷ UNCTAD (n 27) 102-114

option, UNICTAD has also further brought model MFN clauses that can be sample in crafting MFN clauses in BITs.⁸⁸

IISD suggests that in all future treaties there is a need to adopt a consistent national position on the negotiation of investment treaties in general and on MFN clause in particular.⁸⁹ For the existing treaties with vague clauses, the options recommended by IISD are renegotiation or joint interpretation by the signatory states. Failing to do these, the concerned state could proceed to a unilateral interpretation of the treaty or the termination of the agreement on its expiry date.⁹⁰ For new BITs, the IISD has provided the option of avoiding MFN in the first place⁹¹. The second option is excluding all prior or subsequent investment treaties (or both) from the scope of MFN, starting with statement such as “for greater certainty” or a similar expression. It also suggests MFN to be made applicable at the post-establishment stage and to include “like circumstances” component with “*indicative list of factors*” to be taken into account in assessing “*like*” character so as to provide similar protection. On MFN exceptions, it recommends the exceptions to include specific measures and sectors that are sensitive for the respective states.⁹²

Based on the aforementioned points, different countries have taken different types of measures on their bilateral treaties. For instance, some countries under their BITs such as the Colombia-United Kingdom BIT, Switzerland–Georgia BIT, Canada-Peru BIT, Japan-Switzerland BIT, and China- New Zealand BIT have restricted the applicability of MFN clauses to be exclusively on procedural matters

⁸⁸ Ibid

⁸⁹ IISD. *Best Practices* (n 33) 23 - 25

⁹⁰ Ibid

⁹¹ Ibid

⁹² Ibid

excluding substantive matters.⁹³ Again, the Central America Free Trade Agreement (CAFTA) has explicitly recognized the Maffizini approach by directly referring to the “*Maffizini Note*” under its’ foot note which restrict the applicability of MFN on dispute settlement.⁹⁴

Other countries have excluded the applicability of MFN on both procedural and substantive matter. For instance USA Model BIT has adopted that the MFN clause will not apply to future treaties of the state aiming to lesser its obligation.⁹⁵ The 2004 Canadian Model BIT provides that MFN doesn’t apply to treatments under any prior treaties.⁹⁶ The EU-Canada Comprehensive Economic and Trade Agreement (CETA) MFN exception reads:

*“For greater certainty, the [most-favoured-nation treatment] does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute ‘treatment,’ and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.”*⁹⁷

The other approach which is practiced to restrict the scope of MFN is defining the term treatment. In this regard the Germany-Egypt, and the Italy and Jordan BITs

⁹³ see also UK Model BIT (2014), Republic of Colombia and the Swiss Confederation BIT (2006) cited in ILC Most Favoured Nation Clause (2018) (189), Colombia-United Kingdom BIT(2010) Switzerland–Georgia BIT (2014) New Zealand and China BIT(2000), Switzerland–Georgia BIT (2014) cited in International Institute for Sustainable Development (IISD) Best Practices, *the Most-Favoured Nation Clause in Investment Treaties* (IISD best practices 2017) 23, see also Andrew and Liuis (n 36) 26, Patric (n 56) and Soniae,Rollan and David (n 73)

⁹⁴ IISD, Best practices (n 33) 22-24

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ EU-Canada Comprehensive Economic and Trade Agreement Art 8.7 <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 9 October 2021 . See also The China-Canada BIT excludes from the ambit of its MFN clause treatment by a contracting party pursuant to any existing or future bilateral or multilateral agreement.

can be taken as an example.⁹⁸ Further than this, inserting like circumstance requirements and avoiding expansive terms are also used as a tool to limit the scope of application of MFN. In this regard, the India-Mexico BIT can be mentioned as instance.⁹⁹ The most radical approach adopted by some other countries to rescue themselves from the evils of MFN clauses is wholly abrogating the clause from their BITs. In this aspect, the India new Models BIT, the India-Singapore Comprehensive Economic Co-operation Agreement¹⁰⁰ and the 2012 SADC model BIT can be mentioned as examples.¹⁰¹

Other than the above approaches, BITs as another method may incorporate clauses that give the chance for parties to have deliberation on new issues in applying their BIT. For instance, USA BITs with Senegal, Zaire, Morocco and Egypt have integrated provisions that read;

*“Either Party may take all measures necessary to deal with any unusual and extraordinary threats to national security and interest.”*¹⁰²

⁹⁸Germany-Egypt BIT (2005) cited in UNICTAD (n 27) 114 , and Italy-Jordan BIT Art 3 cited in Stephanie (n 4) 13 for example the particular elements of treatment s constitutes and provided as “All activities relating to the procurement, sale and transport of raw and processed materials, energy, fuels and production means shall be accorded no less favourable treatment than the one accorded to similar activities taken by investors of third States “

⁹⁹India-Mexico BIT(2002) Art 4(1)(2) https://arbitrationlaw.com/sites/default/files/free_pdfs/mexico-india_bit.pdf accessed 9 October 2019, see also Biswajit Dhar, Reji Joseph and T C James , ‘India's Bilateral Investment Agreements: Time to Review’ (2012) 47 (52) Economic and Political Weekly 119-120 the expansive terms such as "whichever is more favourable", "enjoyment", and “effective means of asserting claims” that can be subjected to broad interpretation are avoided.

¹⁰⁰India Model BIT (2016) <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1824&context=njilb> accessed 20 December 2021, see also IISD Best practices (n 22) 24

¹⁰¹See South African Development Community, Model Bilateral Investment Treaty ,2012

¹⁰² Ibid see alsoJeswald (n 22) 658

In line to this, the contemporary debatable issues on MFN can be taken as one example of extraordinary practical threats to national interest. Hence, incorporating such provision can help to circumscribe the employment of MFN in a way that cost the national interest of host state by providing legal capacity to have dealing on the issue when it encounters.

6. Analysis on Ethiopian Bilateral investment treaties MFN Clauses

6.1.General overview on Ethiopian BITs

Ethiopia envisions becoming a middle-income country and a leading manufacturing hub in Africa by 2025.¹⁰³The economy policy of the country encourages foreign direct investment that lead to industrialization.¹⁰⁴Hence, as a host state of investment creating conducive legal environment is key for the smooth functioning of such investments. BITs in this regard play their own role from different dimensions. In order to benefit from foreign investment it is important to make sure that the legal frame works are designed in a way that balance the interest of foreign investors and Ethiopia, as a host state. Ethiopia's experience of regulating foreign investment through BITs started since April 21, 1964, which marked the signing of the first Ethiopian BIT with Germany.¹⁰⁵Since then, the trend of signing BITs has increased and reached 35 including the latest Ethio-Brazil BIT signed in 2018.¹⁰⁶

Ethiopia BIT signatory states are namely Brazil, United Arab Emirate (UAE),Qatar, Morocco, United Kingdom (UK),Equatorial Guinea, Spain, South Africa, India, Belgium Luxembourg Economic Union(BLEU), Egypt, Finland,

¹⁰³ Ethiopian Investment Commission, *Ethiopian Investment Policies and Incentives and Opportunities*, 2021,3

¹⁰⁴Ibid

¹⁰⁵UNCTAD, *Investment Policy Hub*, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> accessed 7 December 2021

¹⁰⁶Ibid, see Agreement between the Federal Republic of Brazil and The Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed in April 11 2018

Sweden, Austria, Libya, Germany, Nigeria, Israel, Iran, France, Netherland, Algeria, Denmark, Tunisia, Turkey, Sudan, Russia, Yemen, Malaysia, Switzerland, China, Kuwait, and Italy.¹⁰⁷ As it can be grasped from the preambles, Ethiopian BITs majorly aim at granting reciprocal promotion and protection to foreign investments and creating favorable conditions for the undertaking of the investments. Accordingly, all the BITs provide both substantive and procedural protections.

The following section provides analysis on the MFN clauses of the BITs against the general jurisprudences on MFN concept and their subjection to the contemporary controversies on scope and purpose of MFN protection. Of the 35BITs, 29of them are made part of the analysis.¹⁰⁸

6.2. Analysis on the components of MFN clauses under Ethiopian BITs

6.2.1. Treatment

Ethiopian BITs MFN clauses depict inconsistency in terms of elucidating what constitutes the particular subject of MFN as treatment. The BITs have incorporated both stand alone and qualified forms of MFN clauses. However, the majority of the clauses falls under stand alone or liberal MFN clause category in which they have incorporated the term treatment without providing the specific subject matters or substances that can establish the MFN protection.¹⁰⁹ These BITs are vulnerable to any forms of MFN claims rendering the BIT obligations of Ethiopia wholly unpredictable. The MFN clauses are subject to investment tribunals' discretion of

¹⁰⁷UNCTAD , Most Favored Nation treatment (n 27)

¹⁰⁸The remaining 6 BITs are not included on the ground of accessibility on line and some language of the BITs being different

¹⁰⁹ For instance see Ethio-Tunisia, Ethio-South Africa, and Ethio-Netherland, Ethio-Sudan, Ethio-Finland BITs despite these BITs are concluded after the Maffizni case they are not reactive to the issue.

interpretation and prone to all legal regimes including third parties BITs and government measures towards investments and investors to be regarded as treatment.

Very few BITs such as the BITs with Yemen, China, Russia, Malaysia, Denmark, Egypt, Libya, and German have qualified MFN clauses. Of these, the first seven BITs have no separate MFN clause; rather they have only recognized certain substantive protections to have MFN status. The Ethio-German BIT grants MFN treatment with regard to inputs of production and marketing. Exceptionally, the Ethio-Britain BIT MFN clause has explicitly recognized the whole part of the treaty to form treatment of the MFN clause and it is qualified in the way that subjects the whole part of the BIT for importation. Above all, the inconsistencies of the MFN clauses are also susceptible to the new dimension of utilizing MFN clauses to import other MFN provisions from third party BIT as independent substantive protection.

In terms of relating MFN clauses with the substantive protections under Ethiopian BITs , it can be said that almost all the BITs have recognized certain substantive protections such as Fair and Equitable Treatment, Compensation for loss,¹¹⁰

¹¹⁰Ethio-Yemen (to provide FET art 3(2)) and (compensation for loss art 5),Ethio-Sudan (art)Ethio-Turkey art 4 (compensation for loss),Ethio-Spain BIT (Art 6),Ethio-South Africa BIT (for compensation in case of loss art 4) Ethio-Britain BIT(Compensation for loss 4(2)),Ethio-Brazil (Compensation for loss),Ethio-German (Compensation for loss) Ethio-France (in case of loss),Ethio-China BIT Art 5 (For compensation in case of loss, for FET and protection: the BIT simply state protection not clear whether it refers to full protection and security or mere protection and security),Ethio-Russia (to provide FET Art 3(2) and Compensation for loss Art (5)),Ethio-Netherland BIT (for compensation in case of loss),the Ethio-Iran BIT Art 4(1) (for FET, full and constant security and protection ,for compensation in case of loss),Ethio-Austria art 6 (for compensation of loss),Ethio-Algeria Art 5(7) (For compensation in case of loss),Ethio-UAE (For compensation in case of loss, Art 3(4),Ethio-Morocco BIT (for compensation in case of loss),Ethio-Tunisia (for compensation for loss, Art 4),Ethio-Swiss (Art 6(2), Ethio-Sweden (art 5),Ethio-Finland (art 6 in case of compensation for loss),Ethio-Kuwait Art 4(1) and 5 (to provide FET and Compensation for loss or damage),Ethio-Malaysia art (Art 3 for FET and Art 4 in case of compensation for losses), Ethio-Libya BIT (Art 3(2 for FET and compensation for loss), Ethio-Israel BIT(art (4) for compensation in case of loss), Ethio-Denmark art 3 and 6, Ethio-Egypt art 3(2) and 4,Ethio-India art 6.

Prohibition of expropriation against compensation,¹¹¹Protection and security,¹¹²Taxes and other fiscal matters ¹¹³ to form MFN treatment. Few BITs such as BITs with Yemen, China, Russia, Malaysia, Denmark, Egypt, and Libya have MFN clauses with identified subject matters. ¹¹⁴ These BITs have no independent MFN clause but only have provision that recognize certain substantive protections to be provided not less favorably than investors and investments from a third state. These BITs depict the systematic restriction of the scope of MFN protection and attempt the scope of obligation of the states to be relatively predictable. In contrast, there are also Ethiopian BITS that partially excluded protections provided under third party BITs from forming MFN treatment. For instance, the Ethio- Brazil MFN provides,

“A bilateral investment treaty or free trade agreement that entered into force prior to this agreement is not part of MFN”¹¹⁵

Similarly the Ethio-Israel MFN states,

“Any Agreement for the Reciprocal Promotion and Protection of Investments between Israel and a third state as well as Ethiopia and a third

¹¹¹Ethio-Turkey, Ethio-France (Art 5(3))

¹¹² The Ethio –German BIT art 3(4) it provided the FPS to be provide for investor not less favourable than investor from third state, Ethio-Morocco art 3(1)(for protection and security),Ethio-Libyan BITs Art 3(2) (for protection)

¹¹³Ethio-Netherland BIT art 4. All Ethiopian BIT, Except for the Ethio-Britain BIT has provided MFN and NT separately provide MFN together with NT but this has no problem with the scope of MFN protection.

¹¹⁴Ethio-Yemen art 3(2) Ethio-China art 3(3) and (5), Ethio-Libya (art 3(2), Ethio-Denmark art 3 and 6, Ethio-Egypt art 3(2) and 4 these BITs make FET and compensation for loss to have MFN status, Ethio-China Art 3(3),Ethio-Libya (art 3(2) these BITs make protection, to have MFN status.

¹¹⁵Ethio-Brazil BIT (n 105) Art 6(2)(c)

*state, that was signed before 1st of July, 2003 are out of the scope of MFN protection.*¹¹⁶

According to these provisions neither substantive nor procedural protections granted under third state BITs can be regarded as part of MFN protection. Nonetheless, they have limitation for not excluding or restricting BITs that are signed on the latter dates from being potential MFN claims. Thus, their exclusion is partial comparing to the experience of other countries BITs which wholly excluded any third party BITs, regardless of the period of the signing, from being taken as MFN treatment. Conversely Ethiopia has a BIT that fully recognized both substantive and procedural protections in third party BIT to be part of MFN treatment. For instance Art 3(3) of Ethio-Britain BIT states,

“The MFN treatment applies to the provisions of Articles 1 to 10 of this Agreement”

Articles 1 to 10 of the BIT cover all contents such as the definition of investment and investors, scope of applications of the BIT and all other substantives and procedural protection matters. Thus, investors from Britain would be fully entitled to raise MFN claim with regard to any part of the agreement as long as they deemed it is provided in a more favourable way under third party BIT; thus the whole part of the BIT is prone to replacement or amendment.

Ethio-Kuwait and Ethio-German BITs have exceptionally provided the definitional elements for the term treatment. It reads,

“The following shall, in particular, be deemed "treatment less favourable" within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in

¹¹⁶Agreement Between The Government of The Federal Democratic Republic Of Ethiopia And The Government of The State of Israel for the Reciprocal Promotion and Protection Of Investments, signed on 26 January 2003 Art 7(d)

the case of impeding the wholesale marketing of products inside or the marketing of products outside the country, as well as any other measures having similar effects”¹¹⁷

Based on this provision, MFN claims can be brought if and only if the host state makes discrimination on the aforementioned subject matters which are also called material or operational treatment. Hence, the BIT excludes procedural and substantive protections in third party BITs from being subjects of MFN claim on the ground of treatment. This makes the clause to have the future of systematic restriction on its scope. Hence, such MFN clause helps to limit the utilization of MFN clauses to import substantive or procedural protection from third party BITs. However, since there is no clear MFN exception clause prohibiting MFN extension on substantive or procedural protection under third party BITs, as per to the international jurisprudence, it would be difficult to take such MFN clauses as a full warranty in restricting the MFN scope.

6.2.2. Beneficiary

The beneficiaries of MFN protection under the BITs are not uniform. The BITs with Yemen, Turkey, Sudan, Netherland, Sweden and Malaysia have made investment the sole beneficiary of MFN protection. Whereas the BITs Spain, South Africa, Brazil , German, France, Iran, Austria, Algeria, UAE, Morocco, Finland, Kuwait, Tunisia, Denmark, Egypt, and Belgium Luxemburg have entitled the MFN protection for both investor and investment.¹¹⁸On the other hand under the BITs with China, Russia and Libyan investment and activities related to investment

¹¹⁷Ethio-German art 3(3), See also the Ethio-Kuwait BIT art (3)(5),other than having separate MFN, it has also recognized similar subject matters to have MFN status.

¹¹⁸Ethio-Spain Art 4(1) and 4(2),Ethio-South Africa (Art 3(2),Ethio-Morocco Art 5 (1) and 5(2)

are the direct beneficiaries of MFN clause.¹¹⁹Also the BITs with Swiss, India, Israel and Britain have recognized investors, investment and return on investment as beneficiaries of MFN.¹²⁰The majority MFN clauses make investors beneficiaries of MFN protection with regard to activities related to investment and they are similarly formulated as follow:

*“Contracting Party shall accord, in its territory, to investors of the other Contracting Party as regards their management, maintenance, use enjoyment or disposal of their investments treatment no less favorable than that which it accords to its own investors or to investors of any third State, whichever is more favorable to the investor concerned.”*¹²¹

Only two BITs provide the elements of activities related to investment. For instance, the Ethio-Tunisia BIT provides activates related to investment in separate provision with new elements.¹²²Likewise the Ethio-Kuwait BIT defines “associated activities” very broadly.¹²³Whereas the BIT with Morocco makes the investor beneficiary of the MFN protection with regard to activities in relation to the investment in general without stipulating the elements of the activities unlike to the other BITs.¹²⁴

¹¹⁹Agreement between the Governments of the Federal Democratic Republic of Ethiopia And The Government Of The People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, signed on 11 May 1998 art 3(1)(2) and (3)

¹²⁰Ethio-Swiss art 4(2)&(3), Ethio-India ,Ethio-Israel art 3(1) and (2), Ethio-Britain Art 3(2)

¹²¹Such formulation are available in Ethio-Spain BIT art 4(2), Ethio-Britain BIT art 3(2),*Ethio-Swiss BIT art 4(3)*, the Ethio-Algeria BIT art 4(2),Ethio-Brazil art (6), Ethio-UAE, Ethio-Austria art 3(3), Ethio-Iran art 4(2), Ethio-German BIT art 3(2),Ethio-Kuwait Art 4(2),Ethio-Israel Art 3(2) ,Ethio-Belgium Luxemburg BIT art (4(2),Ethio-Denmark BIT art 3(2),Ethio-Egypt art 3(2)

¹²²Ethio-Tunisia BIT art 1(4) state *“Associated activities” includes the organization, control, operation, maintenance, and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds.*

¹²³Ethio-Kuwait BIT art 1(6) *the establishment, control and maintenance of branches, agencies, offices or other facilities for the conduct of business; The organization of companies, the acquisition of companies or interests in companies or in their property, the management control, maintenance, use, enjoyment and expansion, and the sale, liquidation, dissolution and others*

¹²⁴Ethio-Morocco art 5(2)

It has been indicted that Ethiopian BIT MFN clauses that protect investors with regard to management, maintenance, use, enjoyment and disposal of their investments have limited role to invite the importation of procedural protection and should be encouraged.¹²⁵ Nonetheless, now it is reached on the position that granting MFN protection for investors with regard to activities related to investment such as management and maintenance directly gives investors the right to import more beneficial procedural rights from third party BITs on the ground that it constitutes part of managing and maintaining of investment.¹²⁶

Thus, Ethiopian BITs MFN clauses that recognize activities related to investment in particular attaching to investors as beneficiary would bear disadvantages to the country in two ways. First, since the elements that establish activities related to investment have no clear reference it is subjects to open interpretation. Second, it makes procedural protections provided under third party BITs to be considered as treatment, and this would result the violation of the specific consent of the country to arbitrate. Additionally, the BITs with beneficiary statement that say “*Whichever is more favorable to the investor concerned*”¹²⁷ seem to allow seeking rights from any BITs of Ethiopia with third states.

6.2.3. Like Circumstance

Out of the 29 Ethiopian BITs, 24 of them are silent on like circumstance requirement. The 5 Ethiopian BITs that have incorporated explicit like circumstance requirements are Ethio-Turkey, Ethio-Spain, Ethio-Brazil, Ethio-

¹²⁵Martha and Tilahun (n 8)142

¹²⁶IISD (n 9) (n 33)

¹²⁷For instance see Ethio-Spain BIT, Ethio-Tunisia BIT, The Ethio-Iran BIT art 4(2), The Ethio-Turk BIT, Ethio-Finland art 3(1), Ethio-Kuwait art 4(2), Ethio-Denmark art 3(1)

Morocco, and Ethio-UAE.¹²⁸ However, except the BIT with UAE and Brazil others have not provided the required elements to establish like circumstances. The Ethio-UAE BIT art (1) provides,

“Like circumstance means an overall examination on case by case basis of all the circumstances of an investment including, inter alia its’ effect on the national environment, the sector of investment and the aim of the laws and regulations concerned.”

This BIT can be taken as good experience in terms of guiding the elements that can establish like circumstance for investors and investment to enjoy the same protection through MFN. However, the lists are very shallow in light of the suggested elements in establishing like circumstance.¹²⁹ The Ethio-Brazil BIT in general has stipulated legitimate public welfare objectives to be considered in evaluating the existence of like circumstance among investments and investors.¹³⁰

Conversely, parts of the MFNs of the Ethio-Netherland and Ethio-Denmark BITs provide,

*“Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investment of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.”*¹³¹

The term **“in any case”** directly assert that the treatment in these BITs is not qualified to like circumstance and such formulation could result the country to grant similar protection to investors and investments governed under this BIT despite they are on unlike circumstance.

¹²⁸Ethio-Spain BIT art 4(1) and 4(2)

¹²⁹ See Kenneth (n 37) and the SADC Model BIT discussion on elements of like circumstance (n 10) (n 100)

¹³⁰Ethio-Brazil BIT art (6)(2)(c)

¹³¹Ethio-Netherland Art 3(2), Ethio-Denmark art 3(1)

Like circumstance requirement is pillar in maintaining the socio-economic objectives of a country.¹³² Ethiopia prioritizes sectors of investment based on their contribution to the country economy and accordingly grants various incentives. The investment priorities of the country are manufacturing, agriculture (commercial farming), and service, energy, and mining sectors. Each major sector has sub-sectors prioritized based on the investment policy direction of the state.¹³³ Ethiopian BIT MFN clauses require explicit like circumstance requirement that give emphasis to the specific area of engagement and the inclusion of such requirement shall promote sameness but not similarity.

Ethiopia looks for foreign investment for various reasons such as with the aim to foster transfer of technology, create employment, knowledge transfer and potential for foreign capital. Accordingly, the role of foreign investments has to be evaluated based their potential contribution to the transfer of technology, creation of employment, the amount of foreign currency to be brought, and knowledge transfer. Beside this, foreign investments in the country are expected to go along with public policy directions of the country and sustainable development agendas such as maintaining high environmental standards through the use of renewable energy and zero liquid discharge (ZLD) technology and local linkages, maintain human rights standards, public morality, health and other public policy considerations.

¹³² Kenneth (n 37)

¹³³For instance under the manufacture from the top to the least includes; Textile & apparel, leather & leather products, agro processing, pharmaceuticals, chemical products, metal & engineering industry, electronics & electrical products, paper & paper products, and construction materials. For agriculture investment it follows; Horticulture (flowers, fruits, vegetables and herbs), plantation of cotton, palm tree, rubber tree, coffee, tea, sugarcane, oilseeds, livestock, apiculture, and high-value crops such as barley for malting. see Ethiopian Investment Police Guide Line

Thus, this issues need consideration through like circumstance parameter because it warrants differential treatment on the basis of priorities of the country, their role to the transfer of technology, foreign currency, the legal of the entities and knowledge transfer and other public policy considerations. As result, the like circumstance requirement can be a positive tool for the country to promote productive investment and demote extractive investments.

6.2.4. MFN Exceptions

The two BITs that have incorporated dispute settlement matters under their MFN exceptions are Ethio-UAE and Ethio -Morocco. Though these BITs MFN exceptions seem to be reactive to the contemporary issues of applying MFN on procedural matters they have limitations from protecting the utilization of the clauses to import procedural aspects from future BITs. The other two BITs that have made both substantive and procedural protections part of their MFN exception are the Ethio-Brazil and Ethio-Israel.¹³⁴

MFN exception is basic tool to protect public interest issues, warrant differential treatment and determine the operation of MFN right.¹³⁵ The three Ethiopian BITs that have made public interest issue part of their MFN exception are Ethio-Britain, Ethio-Morocco and Ethio-German.¹³⁶ Comparatively, The Ethio-Britain BIT MFN has integrated national security, public security or public order matters under its exceptions in addition to the common elements.¹³⁷ The Ethio-Belgium Luxemburg BIT has provisions that obligate the observation of environmental and labor legislation. The provisions discourage the expansion of investment through compromising labor and environment standards.¹³⁸ However, such stipulations are

¹³⁴ See the discussion under component of treatment under Ethiopian BIT

¹³⁵ David (n 80)

¹³⁶ Ethio-Britain BIT art 3(2), Ethio-German art 3(3), Ethio-Morocco, Art 2(5) & 6

¹³⁷ Ethio-Britain BIT art 3(2)

¹³⁸ Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia On The Reciprocal Promotion And Protection Of Investments, signed in Brussels 26 October 2006, art 5 and 6

not available in many other Ethiopian BITs. Thus, this can be viewed as less favourable treatment in the eye of investors and be requested for the avoidance of the obligation through the general MFN clause of the BIT.¹³⁹

Generally, all Ethiopian BIT MFN exceptions have the commonly mentioned elements such as rights and privileges gained from being a member of existing or future customs unions, regional economic organization, agreements in relation to taxation, membership in monetary or economic unions, advantages that result from existing or future free trade areas and so on.¹⁴⁰ Other than the above discussed BITs, the MFN clause exceptions in the remaining BITs lack to be responsive for the contemporary issue of the clause as means for importation and this would expose the BITs for broad interpretation.

6.3. An overview on the substantive protections variations under Ethiopian BITs

Variation of protection under Ethiopian BITs is not only limited to procedural protections¹⁴¹ but it also exists under substantive protection clauses. Ethiopian BITs have incorporated different substantive protection such as Fair and Equitable Treatment, Full Protection and Security, National Treatment, Prohibition of Expropriation against Compensation, Umbrella and Stability Clauses. One very crucial point that can be understood from an in depth exploration of Ethiopian BITs

¹³⁹Ibid art 4 (1)

¹⁴⁰Ethio-Yemen, Ethio-Turk, Ethio- Sudan, Ethio-Spain, Ethio-South Africa, Ethio-France, Ethio-China, Ethio-Russia, Ethio-Netherland, Ethio-Iran, Ethio-Austria, Ethio-Algeria Art 4(3), Ethio-UAE (Art 5(2), Ethio-Morocco art 5(4), Ethio-Tunisia (Art 3(3), Ethio-Swiss (art 4(4), Ethio-Sweden (Art 3(2), Ethio-Finland Art (4) Ethio-Kuwait Art 4(3), Ethio-Malaysia (art 3(2), Ethio-Libya (art 3(3), Ethio-Belgium Luxemburg (Art 4(3)

¹⁴¹For in depth explanation on the variation of procedural protection see Gidey Belay, *Investors-State Arbitration Under Ethiopian Bilateral Investment Treaties* (Omni.Univ.Europ 2018) 85, 56 -64 & Marta and Tilahun (n 8)

is that the BITs are inconsistent in granting substantive protection to investors and their investment in terms of the elem. This is on the grounds that, 1, the substantive protections are not uniformly recognized under all BITs, 2, though similar protections are granted under some of the BITs, the way the protection clauses are formulated in terms of content depict variation which directly have implication on the scope of the obligation of Ethiopia as host state.

For example, FET is one of the widely provided substantive protections under Ethiopian BITs. However, the FET is not granted consistently i.e. under some of the BITs such as the Ethio-Kuwait, the Ethio-Morocco, and the Ethio-Brazil BITs, it is incorporated in qualified way by which the elements of the protection are known whereas in case of the other BITs like Ethio-India, Ethio-Egypt, Ethio-Finland Ethio-Turk and Ethio-Belgium is granted in its stand-alone form. The stand-alone FET easily provides investments and investors to be accorded fair and equitable treatment in the territory of the other contracting party, and many of the BITs have recognized this form of FET.¹⁴² Contrarily, few other Ethiopian BITs have incorporated qualified FET requiring the protection to be accorded in accordance with the minimum standard under customary international law or with respect to identified subject matter.¹⁴³ However, the MFN clauses under the latter BITs, as it is analysed under section 5.2, are susceptible to importation invocation of the standalone FET clauses from the other BITs.¹⁴⁴

¹⁴² Such unqualified FET provisions are available in BITs Ethiopia has signed with India, Egypt Finland ,Belgium Sweden ,Israel Netherlands ,Austria ,Turkey, South Africa ,Spain ,Tunisia Swiss confederation , Germany ,United kingdom . see also SelamawitGetahun, The right to regulate under Ethiopain International Investment Agreements ,(LLMthesisHU university) (2019) (85)

¹⁴³ The protocol of Ethio-France BIT provides non exhaustive list host state behavior that could amount to de jure or de facto impediment to the fair and equitable standard. The list include any restriction on purchase or transport of raw materials and auxiliary materials energy and fuels, any restriction on means of production and operation and on sale and transport of products within the country and abroad. The Ethio-Kuwait, the Ethio-Morocco, and the Ethio-Brazil BITs, have also recognized qualified FET. see also Selam (n 142) 88

¹⁴⁴ See the dissections under components of MFN clauses under Ethiopian BITs

Ethiopian BITs have also incorporated MFN clause that can be invoked to import new FET protection from third party BIT which was not at all intended to be granted under the basic BIT. For instance, the Ethio-UAE BIT is devoid of FET protection. However, the MFN clause of the BIT is formulated as:

*Contracting states should provide no less favorable treatment to the investor of the other contracting party, than it accords in like circumstance, to the investors of third states. The MFN shall not apply to treatment accorded under any bilateral agreement in force or signed prior to the date of entry into force of this agreement, for more certainty, MFN shall not apply to any procedural or judicial matters’.*¹⁴⁵

The MFN exception of this provision excludes only the importation of procedural matter but not substantive protection. Thus, for instance, an investor from UAE using this MFN clause would be able to import FET from any third party BITs of the country. As pointed by Patric, this shows avoidance of certain obligations from BITs with the above form of MFN clause is meaningless.

The other substantive area that has variation under Ethiopian BITs and possibly be subject to MFN claims is prohibition of expropriation against compensation. This is on the ground that while the majority of the BITs recognize both direct and indirect expropriation the others BITs such as BITs with Brazil, Malaysia and South Africa are restricted only to granting direct expropriation protection.¹⁴⁶ Equally, Umbrella clauses and Denial of benefit provisions which are available provisions under some of the BITs but absent in others are also subjected

¹⁴⁵Ethiopia-UAE BIT Article 5(1) and 5(3)

¹⁴⁶Ethio-Brazil Art 7(1) & (5) ,Ethio-Malaysia BIT Art 5and Ethio-South Africa Art 6

to the same issues of MFN.¹⁴⁷ The variation of Ethiopian BITs extends also to the definition they provide for investors and investment¹⁴⁸ and the respective MFN clause can have the role of widening the scope of the BITs protections through enlarging the subjects of the protection in a given BIT.

Selam in her study on Fair and Equitable treatment has appreciated the emphasis given to the public policy objectives and obligations in some of the BITs of Ethiopia such as the BITs with United Arab Emirates, South Africa, Finland, Belgium and Brazil.¹⁴⁹ Now, the question is whether the appreciated BITs would be effectively observed by the investors or not. The answer would be adverse. This is because none of the MFN clauses of the BITs, except for the Ethio-Brazil to some extent, have excluded the applications of the MFN treatment on substantive provisions.¹⁵⁰

6.4. MFN and Host States: Brief review on its impacts

The effect of MFN on host states can be seen from different perspectives. First, it affects strategic alliance. Countries that look for industrial growth prefer foreign investments that contribute to such advancement.¹⁵¹ On this ground, the special economic interest makes certain countries strategic partners requiring for the

¹⁴⁷ Umbrella clause helps to encompass any obligations that emanate from national and international laws of the state. This clause is available in Ethiopia BIT with Belgium, Algeria, China, Iran, Israel, Kuwait, Morocco, United Kingdom, Finland, Germany, South Africa, Spain and Swiss but absent in other BITs of the country. Denial of benefit provision denies investors rights in a given BIT if national of third state own or control the investment or national of contracting party acquire nationality of third state with the aim benefiting from the BIT. The Ethiopia BIT with United Arab Emirate and Austria have incorporated denial of benefit clause but the remaining BIT doesn't contain this clause. Thus, investors from the former countries can invoke the MFN clause in their BIT to avoid the denial clause since it gives wide standing opportunity for the investors. For further see Gidey (n 11) 57-59

¹⁴⁸ See for example BITs with Austria, UK and German require mere incorporation based on the law of the other contracting state, the BITs with Algeria, Denmark, Morocco, Egypt, Yemen, Libya and South Africa put further criteria, other than incorporation, such as head office, having economic activity or significant economic activity, and effective control by the national.

¹⁴⁹ Selam (n 142) 52

¹⁵⁰ See the discussion under components of MFN clauses under Ethiopian BITs: Treatment and MFN exception

¹⁵¹ UNCTAD, *Most Favoured Nation Treatment*, (n 27)

extension of special protection to investors and investments from such countries. Nonetheless, for host states, arbitrarily granted MFN makes to extend similar protection to non-strategic states too and this would undermine strategic alliance.¹⁵²

Second, since investors are entitled to directly sue host states without being mediated by the foreign policy goals of the party states, this would force host states to abandon social policy initiatives they intended to achieve through investment activities.¹⁵³ Third, MFN widens the scope of obligation of host states exposing them to unintended international litigation, which adversely affect their economy. Investor-state dispute settlement has become a way for investors to enhance profit through the arbitral awards when they encounter loss in the profit margins of their companies by searching loopholes in BITs.¹⁵⁴ And for this, MFN is the most convenient clause that opens a fertile ground to bring multidimensional claims for the violations of different protections under various BITs against host states and this makes host states to face frequent litigation, unintended liabilities and costs.¹⁵⁵ Fourth, it affects the investment climate of host states. Checking the existence of smooth relationship between investors and their host is among the preliminary assessment that is undertaken by developed countries before concluding BITs.¹⁵⁶ In relation to this, the frequent litigation of host states before IIT would have a negative story telling role that would negatively influence the foreign investment climate of the states. Fifth, above all, MFN has the potential to result in state-state dispute since it shakes the scope of the application of BITs. This would also disturb

¹⁵² Ibid (n27) 93-94

¹⁵³ David(n79) 95

¹⁵⁴ Biswajit, Reji and James (n 99) 119

¹⁵⁵ Catharine (n 3) 428

¹⁵⁶ Jeswald (n 22) 663

diplomatic relations between home and host states, and defeat the purpose of recognizing investor-state dispute settlement mechanisms under BITs.

Sixth, it affects the sovereignty of the hosting states and their freedom of negotiation. Developing countries have begun to question the value of many aspects of BITs after passing through certain experience in terms of social, political, and economic cost. One of the aspects that is questioned by host states is MFN treatment clauses under their BITs which has resulted unpredictability on scope of their commitment by establishing juridical link among their BITs and challenge their police making capacity.¹⁵⁷ MFN makes them to provide extended foreign investment protection and affect their sovereign right to determine on their natural resources, economic activities and freedom of negotiation.¹⁵⁸ Further, MFN limits the freedom of host states to make legal innovation in their new treaties.¹⁵⁹

Generally, MFN intensifies the contention that exist between developed and developing countries regarding the level of protection toward foreign investment.¹⁶⁰ For instance, from BIT cases filed before international investment tribunals, 170 claims were against Latin American countries and the 51 arbitrations were against Argentina.¹⁶¹ Seeking for more favourable treatment through MFN from another BIT including dispute settlement provisions will not get support from many states.¹⁶² Developing countries prefer the restrictive interpretation approach

¹⁵⁷Soniae. Rolland & David (n 72) 358 -359

¹⁵⁸ Ahmad (n 80) 920-923

¹⁵⁹Catherine Titi (n 3) 425, see also UNCTAD, *International Investment Agreements* (n 3) 428 - 429 ,UNCTAD *Most Favoured Nation Treatment*(n 27)98 Countries for different reasons may need to reduce their treaty obligation in their future BITs. China, India, Brazil and south African can be mentioned as an example in this regard by limiting their obligation of FET,FPS and indirect expropriation.

¹⁶⁰Jeswald (n 22) 660

¹⁶¹Marilda Rosado De Sa Riberio and Guterres Costa Junior, 'Global Governance and Investment Treaty Arbitration: The Importance of the Argentine Crisis for Future Disputes' (2015) 14 *The Law and Practice of International Courts and Tribunals* 426-428

¹⁶²Anthony C. Sinclair and Lucia Raimanova, 'MFN Treatment and the Adjudication of Investment Disputes' (2009) 21 (2) *National Law School of India Review* 123

of MFN; however, unless the MFN clauses in their BIT speak to that extent their preference to restrictive interpretation would be mere wish.¹⁶³

Conclusion

The international jurisprudence depict that either retaining the status quo of basic BITs as independent negotiations or accepting the multilateralization role of MFN under BITs are the two options availed. This requires countries to pass particular decision in line with their foreign investment policy. Though there is no comprehensive ruling in this regard, various approaches are recommended to remedy the challenges faced by host states. Under the majority of Ethiopian BITs, the overall formulations of the MFN clauses shows inconsistency confined with the generic term “treatment”. In general, the MFN components are loose with the potential to be subjected to liberal interpretation and importation role. This would render the scope of BIT based international obligation of Ethiopia unpredictable subjecting the country to unintended litigations and to other unwanted consequences as a host state.

The international experience explains the key role of MFN components to mitigate the challenge. Above all, the suggested model MFN clauses and the specific mechanism of adjusting the scope of MFN obligation are much helpful for Ethiopia in terms of making the scope of her BIT obligation predictable, retaining her regulatory autonomy, building strategic alliance, and maintaining freedom of negotiation by being innovative in signing future BITs. However, this demands detail work with professionalism in approach and considering the MFN clauses under the BITs in light of the suggested options while drafting the BITs.

¹⁶³Jeswald (n 22) 658-660

Ethiopia as host state of various forms of foreign direct investment can't escape this issue unheard off. Thus, Ethiopia shall stair to the reconsideration by being responsive to the waking up calls. Recognizing some of the positive developments under the recent Ethiopian BITs, the state demands to lay strong foundation in order to make up to the required level with consistency. This call for the concerned government body policy level decision in granting MFN protection to foreign investment via BITs and back it by skill full diplomatic negotiation efforts for the realization.