# Rethinking the Standards of Treatment in the Ethiopian and Kenyan BITs: An Approach Towards Certainty

*Yehualashet Tamiru*[♦] *and Nelly C. Rotich*[φ]

## Abstract

*One of the policy justification behind concluding BITs is to extend protection of home state investors and investment to foreign investors. The typical mechanism for doing so is by providing entitlements and privileges to investors and imposing obligations on the host state in the form of standards of treatment. As such, conclusion of BITs send a signal to all investors that the host states are willing to protect the interest of foreign investors. With a view to demonstrate that they are investor-friendly and to attract foreign direct investment(FDI), Ethiopia and Kenya have entered into various Bilateral Investment Treaties (BITs) with developing and developed countries. This paper examines the standards of treatment in Ethiopia's and Kenya's BITs. A doctrinal research methodology has been employed to explore the issues surrounding this subject. The research found out that many of the existing BITs of the two countries are investor-oriented and have crippled the policy space and sustainable development of the two countries. This is largely attributed to the countries' adoption of century old models of FDI.*

**Keywords***: Bilateral Investment Treaty, Fair and Equitable Treatment, Full Protection and Security, Investment, Most-Favoured-Nation, National Treatment*

## Introduction

Currently, in almost all countries, there is a wave of movement to attract Foreign Direct Investment (FDI).[1] At the same time, since the aftermath of the First World War, capital exporting countries have been in a precarious position to enforce their conception of appropriate foreign investors' treatment in capital importing countries.[2] It can be observed that investment could not occur unless there is a reasonable prospect of profit and an assurance of security. In many undeveloped countries, though

♦ Yehualashet Tamiru Tegegn, LL. B (AAU), LL.M (University of Pretoria). E-mail address: yehuala5779@gmail.com

φ Nelly C. Rotich, LL. D Candidate (University of Pretoria), LL.M (University of Pretoria), LL. B (Kabarak University), PGD (Kenya School of Law) & Advocate of the High Court of Kenya. E-mail address: cnellyrotich@gmail.com

1 Tobin J and Ackerman S R, Bilateral Investment Treaties: Do They Stimulate Foreign Direct Investment?, unknown publisher (2006), p. 7-8. The Pdf is available at http://s3.amazonaws.com/zanran_storage/www.upf.edu/ContentPages/822485.pdf (accessed Feb. 23, 2021).

2 Lipson C, Standing Guard: Protecting Foreign Capital in the nineteenth and Twentieth Centuries, *University of California Press* (1985), p. 8-11.

the prospect of profit is present, the assurance of security is largely missing.[3] After the end of the First World War, various forms of effort to establish a comprehensive multilateral agreement on protection of foreign investors and investment was made. Yet the effort didn't bear any fruit,[4] and still there is no comprehensive single legal regime governing the issue of investment.[5]

Looking more into the historical developments, one can see that customary international laws concerning protection of foreign investors were under attack from developing countries in the 1950s. The nationalization of British oil assets by Iran in 1951, the expropriation of Liamco's concession in Libya in 1955, and nationalization of Suez Canal can be cited as typical cases in point.[6] Though states were in agreement as to the obligation of compensation, there were gulf of difference on the requirements and conditions of payment.[7] The emergence of Calvo Doctrine in the 1960s made things even worse[8]. As per this doctrine, because all states are equal and independent, where dispute arises between the host state and investor the latter is not entitled to a higher degree of protection than domestic investors, and therefore, foreign investors should submit their claim to the local courts.[9]

The United Nations General Assembly, in 1962, passed a resolution on Permanent Sovereignty over Natural Resources which provided that public utility, security and national interest were key driving forces behind the nationalisation, requisition or expropriation of natural resources.[10] Where this happens, the owner is to be paid the appropriate compensation by the state. Where there is controversy on compensation, the disputant(s) is called upon to exhaust all the dispute resolution measures available

[3] Wilcox C, *A Charter for World Trade*, The Macmillan Company, (1949), p. 145.

[4] Abs and Shawcross, The Proposed Convention to Protect Private Foreign Investment: A Round Table, *Journal of Public Law*, Vol. 9, (1960), p. 115.

[5] At different times, various efforts were made to establish a multilateral investment agreement which would have worldwide application like GATT. However, for many reasons it never come into force. For more detailed discussion concerning OECD initiative for such agreement see Canner J, The Multilateral Agreement on Investment, *Cornell International Law Journal*, Vol. 31, (1998).

[6] Elkins and others, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, *International Organization*, Vol. 60: No. 4, (2006), p. 813.

[7] Vicuna FO, Some International Law Problems Posed by the Nationalization of the Copper Industry in Chile, *The America Journal of International Law*, Vol. 67: No. 4, (1973), p. 722.

[8] Weston BH, The Chapter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, *The America Journal of International Law*, Vol.75: No.3, (1981), p. 438.

[9] Garcia-Mora MR, The Calvo Clause in Latin American Constitutions and International Law, *Marquette Law Review*, Vol.33: No.4, (1950), p. 206.

[10] United Nations General Assembly Resolution 1803 (XVII), Permanent Sovereignty Over Natural Resources, A/RES/1720, (Dec. 14, 1962), https://legal.un.org/avl/ha/ga_1803/ga_1803.html (accessed Oct. 26, 2021); See also O'Connor LA, The International of Expropriation of Foreign-owned Property: The Compensation Requirement and the Role of the taking Sates, *Loyola of Los Angeles International and Comparative Law Review*, Vol.6, (1983), p. 360.

in the state taking the measures.[11] This is further fuelled by the General Assembly resolution on New International Economic Order, which requires payment of appropriate compensation by the state adopting the measures of nationalisation.[12] In so doing, the state is required to take into consideration relevant laws and regulations.[13]This Resolution opens a space for integrating the principle of compensation into national laws.[14] Further, the General Assembly, which was dominated by developing states,[15] underscored once and for all its loyalty for 'appropriate compensation' standard by encompassing the same term under Article 2 (2) (c) of the Charter of Economic Rights and Duties of States.[16] As a result, the appropriate compensation standard is only subject to assessment of national law to which international law is not necessarily relevant.[17]

Parallel to these developments, there were pressing needs from capital exporting countries to come up with a comprehensive multilateral agreement respecting the principle of 'appropriate compensation'. The USA, for instance, during the Uruguay round negotiation process on the General Agreement on Tariff and Trade (GATT hereinafter), 1986-1994, proposed the idea to embody comprehensive international legal frameworks to govern the issue of investment. The idea was, however, rejected by many developing countries.[18] Similar effort was made by the USA duringthe discussion to establish an International Trade Organization (ITO) to embody provisions concerning foreign investors. Although the USA was very successful in including investment terms, the treaty has never come into force.[19]

In making such moves, developed nations insisted on the application of the hull formula which calls on host states to promptly, adequately, and effectively compensate

[11] Id.

[12] United Nations General Assembly Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, A/RES/S-6/3201, (May 1, 1974), http://un-documents.net/s6r3201.htm (Oct. 26, 2021), Article 2(2) (c).

[13] Id; see also Weston BH, The Chapter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, *The America Journal of International Law*, Vol. 75: No.3, (1981), p. 438..

[14] Declaration on the Establishment of a New International Economic Order, supra note 12.

[15] Unlike many other institution, as per rule 82 of the UN General Assembly each member has one vote regardless of any other factors like economy or population. See Rules of Procedure of the General Assembly, A/520/Rev.18, (Sept 2016), https://undocs.org/en/A/520/rev.18 (accessed Feb. 23, 2021).

[16] General Assembly Resolution 3281(XXIX), Charter of Economic Rights and Duties of States, A/RES/29/3281, (Dec. 12, 1974), https://www.un.org/documents/ga/res/29/ares29.htm (accessed Feb. 23, 2021).

[17] Brower CN and Tepe JB, The Charter on Economic Rights and Duties of States: A Reflection or Rejection of International Law?, *The International Lawyer*, Vol. 9: No.2, (1975), p. 305.

[18] Kurtz J, A General Investment Agreement in the WTO: Lesson from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, *University of Pennsylvania Journal of Law*, Vol. 23: No.4, (2002), p. 717.

[19] Id., p. 717-718.

investors in case of expropriation of foreign property.[20] This formula is well established under customary international law as is evident in cases such as the Norwegian ship owners' case, the Spanish-Morocco claim, and the Chorzow factory case.[21] Conversely, developing countries objected to the hull formula and restricted compensation to appropriate standard in case of expropriation.[22] Therefore, the failure of efforts to develop multilateral investment legal regime led to the development of BITs as a visible option.

Initially, BITs were intended as effective legal tools to protect and promote investments coming from capital exporting states to the developing countries.[23] This pattern, however, has drastically changed since the late 1980s and especially in the 1990s, as developing countries began to sign BITs between themselves with the view to enhance their economy.[24] The number of BITs concluded between and among developing countries leaped from 47 in 1990 to 603 by the end of 2004, involving 107 developing countries.[25] The rise in South-South FDI flows have been motivated by pushing and pulling factors like increased competition or limited growth opportunity in domestic markets, efficiency-seeking and procurement of raw materials.[26] This, in turn, has demonstrated that developing countries are more and more integrated than before.[27] Unlike BITs with developed states, developing countries are more likely to agree to a different set of rules which permit a substantial ground for developmental objectives than its coutnter part North-South BITs since the party states have relatively equal bargaining power. In case of South-South BITs, for instance, national treatment standard is either not legally binding or subject to domestic law.[28]

Kenya and Ethiopia, belonging to the south camp, have entered into BTIs with varying states at this point in time. For example, Kenya has signed twenty (20) BITs; of these

[20] Dolzer R, New Foundation of the Law of Expropriation of Alien Property, *American Journal of International Law*, Vol.75, (1981), p. 558.
[21] Id., p. 558-559.
[22] Elkins Z, AT Guzman and BA Simmons Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, *International Organization*, Vol. 60: No.4, (2006), p. 818.
[23] Poulsen LS, The Significant of South-South BITs for the International Investment Regime: A Qualitative analysis, *Northwestern Journal of International Law and Business*, Vol. 30, (2010), p. 101.
[24] United Nations Conference on Trade and Development, Bilateral Investment Treaties 1959-1999, (2000) p. 2, available at https://unctad.org/system/files/official-document/poiteiiad2.en.pdf (accessed Oct. 26, 2021).
[25] United Nations Conference on Trade and Development, South-South Cooperation in International Investment Agreements, (2013), UNCTAD Series on International Investment Policies for Development XIII, https://unctad.org/system/files/official-document/iteiit20053annex_en.pdf (accessed Oct. 26, 2021)
[26] Id.
[27] Id.
[28] Poulsen, supra note 23.

eleven (11) are in force,[29] eight (8) were signed but are not in force[30] and one (1) has been terminated.[31] Kenya signed its first BIT with the Nertherlands in 1970 and its latest in 2018 with Singapore.[32] Ethiopia has, on the other hand , signed thirty-five (35) BITs; of which twenty (20) are in force,[33] twelve (12) were signed but are not in force[34] and two (2) have been terminated.[35] Ethiopia signed its first BIT in 1964 with Germany and the latest in 2018 with Brazil.[36]

It is against this backdrop that this article proceeds to explore and analyze the standards of treatment in Ethiopia's and Kenya's BITs. The contents of exploration and analysis is organized in seven sections. The first section provides the background to the exploration of the subject. The second section contextualizes the standards of treatment in BITs. The Third section analyses the standard of fair and equitable treatment while the fourth section examines the most-favoured nation treatment. Section five explores the national treatment standard and section six is devoted to the examination of the standard of full protection and security. Finally, a concluding remark is providedin the the seventh section.

## 1. Contextualizing Standards of Treatment in BITs

With the view to secure the special benefit of investors and restrain the possible negative action of the host state, in almost all BITs there is standards of treatment provisions. This standar is defined as' … the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investment made by

[29] These include BITs between Kenya and Japan, United Arabs Emirates, Korea, Kuwait, Burundi, Finland, France, Switzerland, United Kingdom, Germany and Netherlands.

[30] These are BITs between Kenya and Singapore, Qatar, Turkey, Mauritius, Slovakia, Libya, China and Islamic Republic of Iran.

[31] The BIT between Kenya and Italy has been terminated.

[32] United Nations Conference on Trade and Development, International Investment Agreements Navigator-Kenya, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya> (accessed Feb. 29, 2021); see also Waruhiu PW, Kenya's Bilateral Investment Treaties: Rethinking the Vaguely Drafted Substantive Provisions, Thesis Submitted to the University of Nairobi, (2019).

[33] UNCTAD, supra note 32. These are BITs between Ethiopia and Egypt, Finland, Sweden, Austria, Libya, , Israel, Islamic Republic of Iran, France, Netherlands, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Kuwait and Italy..

[34] Id. These are BITs between Ethiopia and Brazil, Qatar, United Arabs Emirates, Morocco, United Kingdom, Equatorial Quinea, Spain, South Africa, BLEU (Belgium-Luxembourg Economic Union) signed in 2006, Nigeria, BLEU (Belgium-Luxembourg Economic Union) signed in 2003 and Russian Federation.

[35] These are BITs between Ethiopia, India and Germany.

[36] United Nations Conference on Trade and Development, International Investment Agreements Navigator-Ethiopia, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> (accessed Feb. 29, 2021).

investors covered by the treaty.'[37] There are different types of standards of treatment provided in various BITs. It is quite common to find such provisions in a treaty dealing with the issue of standard of treatment. Yet this provision usually encompases several types of standards of treatments.[38] The standards of treatment accorded to foreign investors in BITs, among other things, includes : Fair and Equitable Treatment (FET), Most Favoured Treatment (MFN), National Treatment (NT), full protection and security standard.

It is possible to classify these standards of treatment into two broad categories: Contingent or non-contingent standards of treatment. Generally, MFN and NT are contingent entitlements in the sense that their contents are determined in reference to the domestic laws of host state or in reference to treaties entered into by host states with third countries.[39] On the other hand, fair and equitable treatment which is understood also to include international minimum standard is non-contingent because it does not depend on external factors.[40] The full protection and security standard is also regarded as an absolute entitlement which is not contingent upon host state treatment to other investors and investments.[41]

## 2. Fair and Equitable Treatment

Although it's currently common to come across FET clause as one of the key features of any BIT, it was historically not recognized as an entitlement.[42] For instance, the first proper BIT concluded between Germany and Pakistan doesn't contain this entitlement as investor's right and the host state's obligation.[43] Likewise, the prominent early effort to come up with a global investment treaty, i.e the 1948 Havana Charter for establishment of International Trade Organization convention (Havana Charter), didn't

[37] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/O3/19, Para. 212 (2010), Decision on Liability, https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf, (accessed on Feb. 23, 2021).

[38] Sornarajah M, *The International Law on Foreign Investment*, 3rd ed. Cambridge University Press, (2010), p. 201.

[39] Falsafi A, International minimum standard of treatment of foreign investors' property: A contingent standard, *Suffolk Transitional Law Review*, Vol. 30, (2007), p.354.

[40] Kill T, Don't Cross the Streams: Past and Present Over Statement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations, *Michigan Law Review*, Vol. 106, (2008), p. 855.

[41] Junngam N, The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully Protected and Secured from?, *American University Business Law Review*, (2018), p. 4.

[42] Dolzer R and Stevens M, Bilateral Investement Treaties, *Martinus Nijhoff Publisher*, (1995), p. 58.

[43] According to Kalil around 28 of the early BITs don't contain FET as entitlement; see Khalil M, Tretament of Foreign Investment in Bilateral Investment Tretaies, *ICSID ReviewForeign Investment Law Journal*, Vol. 8, (1992), p. 351-355.

provide for a binding obligation rather it provided an aspirational or good to do clause. The Havana Charter calls on organizations, in collaboration with other organizations, to make recommendations on bilateral and multilateral agreements to provide for just and equitable treatment for the skills, enterprise, capital, technology and arts brought into a country by another.[44]

FET is one of the most prominent standards of treatment which is found in different BITs and it's one of the most frequently invoked standards in investment arbitration.[45] Despite the popularity of this treatment in BITs, there is no uniformity in terms of qualification and wording. Some treaties simply state the FET without any qualification[46] while others opt to link FET with international law.[47] Particularly, some treaties prefer to link FET with the minimum customary international law[48] and there are also a few instances in which treaties rather provide illustrative list of grounds[49] that constitutes breach of FET.[50]

## 2.1. Defining Underlying Notions

Although there is a lack of clarity as to whether the two notions ,— namely, fair and equitable — are either similar or different treatments, there is a general assumption that these two terms are the same and hence 'represent a single unified standard.'[51] Yet arising from the inherently open ended nature of the standard, there is no uniform

[44] The Havana Charter for an International Trade Organization, World Trade Organization, (Mar. 24, 1948), https://docs.wto.org/gattdocs/q/GG/SEC/53-41.PDF (accessed Oct. 26, 2021), (hereinafter 'Havana Charter'), Article 11(2); see generally the OECD Fair and Equitable Tretament Standard in International Investment Law Working Papers on International Investment 2004/2003, Fair and Equitable Treatment Standard in International Investment Law, (2004), p. 3, http://dx.doi.org/10.1787/675702255435

[45] Zhu Y, Fair and Equitable Treatment of Foreign Investors in Era of Sustainable Development, *Natural Resource Journal*, Vol. 58, (2018), p. 321.

[46] This is the case of China Model BIT, Agreement between the Government of the People's Republic of China and the Government of _____ Concerning the Encouragement and Reciprocal Protection of Investments, https://edit.wti.org/document/show/d30dc028-3527-4b44-96ee-990fcfa775c3 (accessed Oct. 26, 2021).Article 3(1) states that 'Investments of investors of each contracting party shall all the time be accorded fair and equitable treatment in the territory of the other contracting party.'

[47] See the BIT agreement between the Republic of Croatia and the Sultanate of Oman under Article 3(2) state that'….Contracting party shall be accorded fair and equitable treatment in accordance with international law.'

[48] Article 5(1) of the USA Model BIT which states that 'Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.. .'.

[49] Article 11(1) cum (2) of the Asean Comprehensive Investment Agreement which states that each Member states shall accord fair and equitable treatment which include not to deny justice in any legal or administrative proceeding and full protection and security measures which is reasonable necessary to protect investors.

[50] Zhu, supra note 45, p. 324.

[51] Id., p. 91.

meaning of FET and its substance. As such, it has been suggested that the clause may be interpreted to mean a catch-all provision which includes very broad acts of government.[52] In an effort to find out the meaning of FET, ICSID in a case brought to it under the Additional Facility rule,[53] encapsulated the minimum standard of treatment of FET in the following terms:

> *…the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process…*[54]

Thus, FET sets out the minimum terms/standards for treating an investor in the host state. It particularly employes descriptors that capture the notion of fairness and equitablity.

## 2.2. FET as a Standalone Entitlement

There are instances where FET is employed as a stand alone entitlement. The provision on FET would in such instances elaborate the terms for provision of FET.[55] Where FET has been employed as a stand alone entitlement, at least three problems against the host state would arise. First, the investor might argue that fair and equitable treatment standards provide a higher standard of treatment than what is provided under

[52] Dolzer R, Fair and Equitable Treatment: A Key Standard in Investment Treaties, *The International Lawyer*, Vol. 39, (2005), p. 88.

[53] The ICSID Additional Facility Rule was created in 1978 with the view to provide the same service which otherwise fall outside the jurisdiction of ICSID. This can be triggered in three instances. First, when the dispute arise between state and foreign investor (the home state) and one of them is not the member of ICSID Convention. Second, if the dispute arise between investor and the state which doesn't directly arise from investment and finally, institution of finding proceeding by any nation. For more information on additional facility rule please see https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx, accessed Feb. 24, 2021.

[54] *Waste Management Inc v United Mexican States( Award),* ICSID Additional Facility Rule Case No. AB(AF)/00/3, para. 98,https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf (accessed Feb. 24, 2021).

[55] For instance, Article 7 of the BIT between Kenya and Netherlands. Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, (Sept. 11, 1970), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1793/download.

minimum customary international law which imposes cumbersome obligation on the host state. Second, because the term is illusive and subjective, the investor will have unfettered power to invoke this standard for any reasons which might lead to breach of treaty. This is partly because the 'role of fair and equitable treatment varies from case to case.'[56] The nature and content of FET also remains to be determined.[57] The third one is related to FET's function in the protection of reasonable and legitimate expectation of investors[58], which is a presumption taken by the investor as to the overall investment environment and any explicit or implicit act of the host state, leading the investor to believe as its entitlement.[59]

Logically speaking, foreign investors make many considerations before investing in a given country. One of these is the legal framework of the host state. According to the FET standard, change or even amendment of one of the laws might be interpreted as an inconsistent behaviour from host states constituting breach of legitimate expectation of investors embodied in rules of FET. The ICSID Tribunal, in a case ivolving enforcement of this rule, observed that the FET obligation had been seriously breached in what the Tribunal termed as the "roller-coaster" effect of the continuing legislative changes.[60] Therefore, any change or amendment of laws might be interpreted as a 'roller-coaster' to the investors. This is more likely to cripple the lawmaker from enacting a new law for fear of breach of this illusive obligation.

## 2.3. FET and Customary International Law

In some other BITs, FET is employed in connection to MFN and customary international law. For instance, the BIT between Denmark and Ethiopia provides that the FET shall be accorded to foreign investors in no less favourable terms than that accorded to local investors.[61] Similarly, the BIT between Kenya and the Islamic

[56] *Pseg Global INC. AND Konyailgin Elektrk Üretm Ve tcaret Lim!ted "!rket! v. Republic of Turkey* (2007) Award, ICSID Case No. ARB/02/5, para. 239,https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf (accessed Feb. 24, 2021).

[57] Alvarez-Jimenez A, Minimum Standards of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice, *Journal of World Investment and Trade*, Vol. 9: No. 1, (2008), p. 52.

[58] *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, applicable law and liability, para 7.75, https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf, (accessed Feb. 24, 2021).

[59] Dolzer R and Schreuer C, Principle of International Investment Law, *Oxford University Press*, (2008), p. 134-140. See also *Parkering-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/ 8, para. 334.

[60] *Pseg Global inc. and konya ilgin Elektr!k üret!m ve t!caret l!m!ted "!rket! v. Republic of Turkey*, supra note 48, Para. 250.

[61] See Article 3(1) of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, (Apr. 24, 2001), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-

Republic of Iran provides that fair treatment shall be accorded by contracting parties to foreign investors in no less favourable terms than that accorded to its investors.[62] In another instance, the BIT between Kuwait and Ethiopia indicated that Contracting States should extend protection in a manner consistence with customary international law.[63] This implies that the applicability of FET is contingent on MFN and customary international law.[64] This approach is problematic in that the content of customary international law with which FET is equated is also unknown and have different rules of interpretation. This is well captured by Borchard when he describes this standard as "vague, deceiving and delebrately calculated to produce an error". Borchard further points out that " the standard pretends to express a conception of reality that barely exits".[65] Needless to say, to establish international customary international law there must be two elements: opioin juris and uniform state practice. The fact that the state failed to reach an agreement on multilateral investment agreement is partly because of lack of consensus on minimum customary international law. This is because developing countries were objecting to the existence of customary international law and hence, it's difficult to find out what constitutes it.

In the L.F.H Neer and Pauline Neer (USA) v United Mexican States case , the ICSID Tribunal tries to flesh out the content of minimum standard of treatment based on reasonable man standard. It reasoned in the ruling that : "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far

files/1005/download. This is the same exact situation for BITs Ethiopia concluded with Egypt, Article 2; Sudan, Article 3(2) and Yemen, Article 3(2).

[62] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments (Feb, 24, 2009), Legal Notice No. 150, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5535/download, Article 4.

[63] Article 3(1) of the BIT concluded between Ethiopia and Kuwait. Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, (Sept. 14, 1996), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1169/download.

[64] Actually the comparison is with MFN principle which is attain customary international law. see Paparinskis M, The international minimum standard and fair equitable treatment, *Oxford University Press*, (2013), p. 105-112. Such type of Ethiopia's BITs are numerous for instance under Article 3(2) of BIT between Ethiopia- Denmark state that' Contracting party fair and equitable treatment which in no case shall be less favorable than accorded to its own investors or to investors of any kind state.'

[65] Borchard M, Diplomatic Protection on Citizens abroad, (1916) as quoted in Falsafi A, The International Minimum Standard of Treatment of Foreign Investor's Property: A Contingent Standard, *The Suffolk Transnational Law Review*, Vol. 30: No. 2, (2007), p. 336.

short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[66]

One may, like the reasoning provided in this ruling, identify and show investors' rights which are believed to have attained status of customary international law. Yet it is not important to incorporate them under BITs. This is because, once customary international law is established, then it binds all countries except those consistently objecting to the practice (consistent objector).[67] Hence, providing what is binding on all countries under BITs will be very superfluous and fails to serve any purpose other than bringing more confusion and opening a leeway for investors' to manipulate the situation.

Therefore, equating FET with a minimum standard of treatment doesn't help much since the interpretation become unmanageable and unpredictable. Also, the approach of equating FET with customary international law is problematic and put the host state in a more precarious position. The most viable option to avoid this asymmetry is by adopting BITs which obviate the requirement of minimum customary international law and fair and equitable standard of treatment altogether such as Indian BIT Model.

## 2.4. Fair and Equitable Treatment in Ethiopia's and Kenya's BITS

Although most BITs concluded by Ethiopia largely recognize FET, there are still instance where this is not true at all. For example, in the BITs concluded by Ethiopia with Turkey and Brazil, in which FET is incorporated, no mention of this standard is made. As such, there is no consistency in the use of the standard. In some instances, FET is used without any qualification. For instance, Article 3(1) of the BIT between Ethiopia and Austria calls on the parties to accord FET to investors in their territory.[68]

[66] *L.F.H Neer and Pauline Neer (USA) v United Mexican States* (1926) Volume IV 61, Report of International Arbitration Awards, http://legal.un.org/riaa/cases/vol_IV/60-66.pdf, accessed Feb. 26,2021.

[67] Kadens E and Young E, How Customary is Customary International Law?, *William and Mary Law Review*, Vol. 54, (2013), p. 889.

[68] This is the same exact situation in BITs Ethiopia concluded with Belgium- Luxembouge Economic Union Agreement between the Belgian- Luxembourge Economic Union and The Federal Democraic of Ethiopia on Reciprocial Promotion and Protcetion of Investments 2006, Article 3(1); Article 3(1) of Libya, ; Article 4(1) of Kuwait Agreement between the The Federal Democraic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocial Proetction of Investments 1996, Article 3(1) of Iran; Article 3(1) of Malaysia Agreement between The Federal Democraic of Ethiopia and the Government of Malaysis for the Promotion and Protcetion of Investments 1996; Article 2(1) of Finland Agreement between the Government of the Republic of Finland and The Federal Democraic of Ethiopia on the Promotion and Protcetion of Investments 2006 and Article 3(1) of Spain Agreement between the Federal Democraic of Ethiopia and the Kingdom of Spain the Promotion and Reciprocial Protcetion of Investments 2006

In other instances, some BITs prefer to provide the terms for provision of FET. For instance, the BIT between Ethiopia and Sweden calls on the paties "not [to] impair the management, maintenance, use, enjoyment or disposal [of any interest in the the investment] , nor the acquisition of good and services or the sale of their product, through unreasonable or discriminatory measures," [69] which is stipulated in the FET clause.[70] It can be deduced from this provision that FET is a stand alone entitlement. Thus, practically speaking, the investors may come up with any conceivable reasons as their legitimate expectation before the investment is made and it will automatically shift the burden to the host state, Ethiopia, to prove otherwise.

On the other hand, a close examination of Kenya's BITs shows that all of the eleven BITs currently in force contain provisions on FET. The FET is provided either as stand alone entitlement, without any qualification, in accordance with the MFN treatment or in accordance with customary international law. For instance, in the BITs between Kenya and Switzerland,[71] and Kenya and the United Kingdom,[72] the FET is provided as a stand alone entitlement. FET is provided without any qualification in the BITs between Kenya and Burundi,[73] Kenya and Finland,[74] and Kenya and Germany.[75]

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[69] Article 2(3) of the BIT.

[70] This is the same exact situation in Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, (May 16, 2003), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download, Article 3(1); Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, (Feb. 10, 2000), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1173/download, Article 3(1); Agreement between the Swiss Confederation the Federal Democratic Republic of Ethiopia on the Promotion and Reciprocal Protection of Investments, (Jun. 26, 1998), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4813/download, Article 4(1) and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments, (Nov. 19, 2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download, Article 2(2).

[71] Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments, (Nov. 14, 2006), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3263/download,Article 4(1).

[72] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments,(Sept. 13, 1999), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1795/download, Article 2(2).

[73] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 151, (Apr. 1, 2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5533/download, Article 3(2).

[74] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 148, (Sept. 1, 2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5534/download, Article 2(2).

[75] Treaty between the Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments, (May 3,

Also, the BITs between Kenya and United Arabs Emirates states that FET is provided on MFN basis.[76] Following the same principle, the BIT between Japan and Kenya requires FET to be provided in accordance with customary international law.[77] This BIT sets out the minimum standard of treatment of aliens as "the minimum standard of treatment to be afforded to investments of investors of the other state".[78] This is similarly the case with the BIT between Korea and Kenya,[79] and the Netherlands and Kenya.[80] Finally, the BIT between Kenya and Kuwait provides for FET in accordance with "recognised principles of international law.[81]

## 3. Most Favoured Treatment

MFN is one of the most important provisions in any BITs agreement and is regarded as 'the corner stone of all modern commercial treaties'.[82] MFN is a promise made by contracting parties that neither state will extend more favoured treatment to third states than what is given to investors by the other state party.[83] The policy justification behind MFN treatment is not to create the most favoured nation that is more favoured than the rest, but, to the contrary, it is meant to secure equality of treatment between

1996),https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1350/download, Article 2(1).

[76] Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirates on the Promotion and Protection of Investments, (Nov. 23, 2014),https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5544/download, Article 4.

[77] Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, (Aug. 28, 2016), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download, Article 5.

[78] Id, under Note.

[79] Agreement between the Government of the Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investments, (Jul. 8, 2014), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5261/download, Article 2(2) & (3).

[80] Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, (Sept. 11, 1970), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1793/download, Article 7.

[81] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 170, (Nov. 12, 2013), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5539/download, Article 2(2).

[82] Hornbeck SK, The Most-Favored-Nation Clause( part 1), *America Journal of International Law*, Vol. 3, (1909), p. 395 as quoted in Vesel S, Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, *Yale Journal of International Law*, Vol. 32, (2007), p. 126.

[83] Cole T, The Boundaries of Most Favoured Nation Treatment in International Investment Law, *Michigan Journal of International Law*, Vol. 33, (2012), p. 539.

states by extending any treatment to each state as the most favoured one.[84] The international court of justice reinforced this purpose when it sated that " …the intention of the MFN clauses was to establish and maintain at all time fundamental equity without discrimination among all of the countries concerned".[85] Incidentally, MFN clauses are a significant tool in preventing fragmentation of legal regime in international investment law[86] and mitigating the risk of over interpretation.[87] From a foreign investor's perspective, it has an important role in stabilizing their expectation over time to commit themselves for long term investment.[88]

MFN clauses in BITs have also the effect of 'multilateralization'. Particularly, they give direct access to an investor who is covered under basic treaty to rely on a completely different treaty concluded between host and third states .[89] It is important to note at this juncture that while multilateralization is a feature of recent MFN clauses, the earlier ones were unilateral, specific and retrospective in nature.[90] They were 'unilateral' in a sense that prior agreement between states was not required to extend MFN treatment reciprocally; rather, only one of the party states promised to extend MFN to another state. Further, the early MFN clauses were specifically limited to items negotiated between two states. Finally, unlike the recent counterparts, the early MNF clauses were 'retrospective', extending MFN to those benefits already provided to third party states.[91]

Turning to another feature of MFN clauses, one would see that it is not an absolute entitlement. Exceptions to such rule have been recognized in instances such as free trade area,[92] regional trade agreement,[93] preferential and different treatment,[94] and

[84] Culbertson W S, Most-Favored-National Treatment, *America Society International Law Proceeding*, Vol. 31, (1973), p. 76.

[85] Right of Nationals of the United States of America in Morocco France v United States Para 176, http://www.worldcourts.com/icj/eng/decisions/1952.08.27_rights_of_nationals.htm, (accessed Feb.27, 2021).

[86] In the absence of MFN state will enter into competition to secure the most favoured terms for their investors which fragment the international investment law

[87] Cole, Supra note 82, p. 540.

[88] Vesel, Supra note 81, p. 142.

[89] Schill SW, Mulitilateralizing Investment Treaties through Most-Favored-Nation Clause, *Berkeley Journal of International Law*, Vol. 27, (2009), p. 519.

[90] Schill, Supra note 88, p. 545.

[91] Id.

[92] Free Trade Agreement is an agreement between two or more states to enhance cooperation by reducing trade barrier. The aim of Free Trade Areas exception is to enhance liberalization of substantially all trade between the members belonging to such area. See Yadav SK, The Proliferation of Free Trade Areas: A Threat to Multilateralization, *International Trade Law Journal*, Vol. 22, (2014), p. 9 .

[93] Regional Trade Agreement is reciprocal preferential trade agreement between two or more states. The main purpose is to enhance global economic integration. See Mathis JH, Regional Trade Agreement in the GATT/WTO: Article XXIV and Internal Trade requirement, (2001) T.M.C Asser Press.

custom union.[95] It has however been construed in other instances that non-discrimination under international trade is tantamount to discrimination against developing and less industrialized countries.[96]

Still another point worth considering is the scope of the MFN entitlement. In more general terms, there has been a consensus that the principle of MFN extends to only substantive entitlement. Yet recent developments demonstrate that there is an emerging decision and a trend which associates procedural matters to MFN principles.[97] The argument underlying such moves is that ,if there is no waiting period (the so called eighteen month law) or exhaustion of local remedy requirement under other BIT concluded by the host state, then — even if there is a clear waiting period or exhaustion of local remedies — the investor is not obliged to follow such procedure by virtue of MFN principle.

To illustrate this point , let's take the BIT between Ethiopia and Isreal. In this treaty, it is required that the investor should wait for six months to bring an international arbitration claim, whereas under BIT between Ethiopia and Turkey there is no such procedural requirement. Therefore, according to the above argument, an Isreali investor can invoke the MFN principle to escape procedural hurdle imposed by the treaty arguing that Turkish investors get more favoured treatment by accessing international dispute settlement without such requirement and hence, the act is discriminatory. The same issue was raised in Emilio Augustin Maffezini v. The Kingdom of Spain in which the Tribunal observed:[98]

> *…if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the*

[94] An arrangement in which developed country provided different and special treatment without reciprocity with the view to enhance trade opportunity for developing countries.

[95] It's an agreement in which member states agree to zero duty imposed to import goods and service and they will have common external tariff. See Neyapt B, Taskin F and Ungor M, Has European Customs Union Agreement Really Affected Turkey's Trade?, *Applied Economic*, Vol. 39: No.16, (2007), p. 2121.

[96] Rubin S, Most Favoured Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution, *International Trade Law Journal*, Vol. 6, (1980), p. 225.

[97] Teitelbaum R, Who's afraid of Maffezini-Recent Developments in the Interpretion of Most Favoured Nation Clauses, *Journal of International Arbitration*, Vol. 22: No. 3, (2005); see also Noh M, Establishing Jurisdiction through Most-Favoured-Nation Clause, *International Trade and Business Law Review*, Vol. 15, (2012); Further see Vesel S, Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation in Bilateral Investment Treaties, *Journal of International Law*, Vol. 32 (2007).

[98] ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Para. 56, https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (accessed Feb. 27, 2021).

*beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis[99] principle.*

### 3.1. Like Circumstances in MFN

The India Model BIT developed a more comprehensive measure on what constitutes 'like circumstances'. The Model BIT provides that the criteria for 'like circumstances' are the goods and services consumed or produced by the investment, the actual and potential impact of the investment on a third person, whether the investment is public, private or state owned or controlled and the practical challenges of regulating the investment.[100] Likewise, the Draft Pan African Investment Code, in explicating the notion of 'like circumstance', sets out four characterizing features. As such like circumstance is determined based on the effect of the investment on third person and local communities, its effect on the environment and health, the sector in which the investment is active, the objective of the measure in question, the regulatory process, company size and other factors which are directly related to the investment.[101]

Looking into the national context, the BIT between Ethiopia and Brazil states that like circumstances depend on the totality of the circumstance—among other things whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objective.[102] From this qualifying phrase, one could see that the standard of like circumstance is quite vague and illusive from the begining and the explanation under the treaty don't remedy this but instead brings more confusion.

### 3.2. Exception to MFN Treatment

In all BITs without any exclusion, it's possible to find exception to MFN treatment. However, there is a marked variation in the wording of those limits set out in these treaties Ethiopia entered with other counrtries. Generally speaking with the exception of Israel BIT, in others , any preference or privilege arising from customs union, free

[99] This is a latin jargon which means 'of the same kind', https://legal-dictionary.thefreedictionary.com/Ejusdem+generis (accessed Feb. 27, 2021).

[100] See footnote to Article 4(1).

[101] Article 7(3) of the Draft Pan-Africa Investment Code (2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed Feb. 27, 2021).

[102] BIT between Brazil and Ethiopia, Agreement between the Federative Republic of Brazil and The Federal Democraic of Ethiopia on Investment Cooperation and Facilitation Promotion and Protcetion of Investments 2018 https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

trade agreement, economic community, common market and tax related treaties shall not be covered under MFN.

Further looking into the documents, one can see that in some BITs exceptions are drafted in broad terms endangering the very existence of the principle. For instance, under Article 7 of the BIT between UK and Ethiopia, apart from the general exception, it provides:

> *…[t]he provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to …any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order.'*[103]

Likewise, the BIT with South Africaunder Article 3(4)(c) sanctions 'any law or other measures the purpose of which is to promote the achievement of equality in its territory or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.'[104] it is worth noting that the Ethiopia-Germany BIT excludes the application of MFN on measures taken for reasons of public security and order, public health or morality.[105]

In the Kenyan context some BITs provide very elaborate provisions on MFN exceptions. For instance, the BIT between Japan and Kenya exludes measures such as

[103] BIT Between UK and Ethiopia, Agreement between the Government of the United Kingdom of Great Britain and Northern Irland and and The Federal Democraic of Ethiopia for the Promotion and Protcetion of Investments 2009https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021). It's quite difficult to interpret what are public security or public order means. This difficulty is well noted in one of the old England Court in a case between *Richardson v Mellish* when the judge said' public policy;-it is a very unruly horse, and when once you get astride it you never know where it will carry you',http://www.uniset.ca/other/css/130ER294.html (accessed Feb. 27, 2021). For elaborate discussion on vagueness of public policy see Edwards HT, Judicial review of labour arbitration awards: The clash between the public policy exception and the duty to bargain, *Chicago-Kent Law Review*, Vol. 64, (1988).

[104] BIT between South Africa and Ethiopia,Agreement between the Government of the Republic of South Africa and The Federal Democraic of Ethiopia for the Promotion and Reciprocal Protcetion of Investments 2008https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021). This provision seems envisage the South African situation of Black Economic Empowerment (BEE) which aim to address the power difference between historically disadvantaged majority black and white minorities. See Southall R, Ten Propositions about black economic empowerment in South Africa, *Review of African Political Economy*, Vol. 34, (2006).

[105] BIT between Germany and Ethiopia, Agreement between the Federal Republic of Germany and The Federal Democraic of Ethiopia concerning the Ecouragement and Reciprocal Protcetion of Investments 2004https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

the acquisition of land property, subsidies, and government procurement. Further, this treaty elaborates the treatment accorded to investors on the basis of reciprocity, preferential treatment involving the "protection of new varieties of plants, aviation, fishery or maritime matters" and "any measure relating to investments in public law enforcement and correctional services, and in public social services such as income security or insurance, social security or insurance, social welfare, primary and secondary education, public training, health and child care." Finally, other BITs exclude MFN on judicial and procedural matters[106] and taxation.[107]

### 3.3. MFN in Ethiopia' and Kenya's BITs

All of the BITs to which Ethiopia or Kenya is a party have elements of MFN. However, there are differences in the wording and scope of MFN across the treaties. Some BITs provide for the obligation to extend MFN principle without any qualification.This is evident in Article 3(1) of the BIT between Israel and Ethiopia,[108] and in the BIT between Germany and Kenya,[109] and United Kingdom and Kenya.[110] Such an approach will make it very difficult to implement international agreements like that of regional arrangements and customs union, which inherently presuppose special and differential treatment for member states.

Whereas, in some BITs the application of MFN is qualified and limited. Ethiopia's and Kenya's BITs use two ways of limiting the applicability of MFN. The First way is by qualifying the benefit of MFN to those 'like circumstance'. This has been used, for instance, under Article 6 of the BIT between Ethiopia and Brazil [111] and Article 6 of the BIT between Japan and Kenya.[112] The second mechanism for limiting the applicability of MFN is by restricting its scope only to certain benefits. This has been used, for instance, in the BIT between Austria and Ethiopia under Article 3(3),[113]

[106] Article 4(3) of the BIT between Kenya and United Arabs Emirates
[107] Paragraph 1 and 2 of Article 3 of the Korea and Kenya BIT.
[108] Article 3 of BIT between Ethiopia and Israel, Agreement between The Government of The Federal Democraic of Ethiopia and the Government of Israel for Reciprocial Promotion and Protcetion of Investments 2002https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).
[109] Article 4(4).
[110] Article 3.
[111] BIT between Brazil and Ethiopia, Supra note 104https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).
[112] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download.
[113] BIT between Austria and Ethiopia,Agreement between the Republic of Australia and The Federal Democraic of Ethiopia for Promotion and Protcetion of Investments

which calls on states to "…accord to investors no less favourable than it accords […]) to investors of any third state and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor". This holds true in the BIT between Korea and Kenya as well.[114] Thus, from these provisions we can infer that the MFN is limited to those mentioned benefits.

The BIT entered between Ethiopia and Germany addresses the issue of MFN by sanctioning less favourable treatment moves by contracting states. As such the treaty defines " less favourable treatment as :

> *….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 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.* [115]

In conclusion, while the BITs entered by Kenya and Ethiopia, more or less, include MFN rules, the contents of these rules and the scope of application varies across the treaties. While some are exhaustive others are simply illustrative, making the obligations unpredictable .

## 4. National Treatment Standard

National treatment is defined under the OECD Draft Consolidated Investment Law as treatment accorded to investors by host states in no less favourable terms than the treatment accorded to own investors in like circumstances.[116] The primary purpose of national treatment in BITs is to create a level playing field by subjecting both domestic and foreign investors to the same rule and regulation by the host state and accordingly 'domestic measures should not unduly favour domestic investors.'[117]

2004https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

[114] Article 3(2) and (3).

[115] Article 3(3).

[116] OECD (1998) The multilateral Agreement on investment draft consolidated Text, Article 3(1).

[117] Al-Louzi R, A Coherence Review of Investment Protection under Bilateral Investment Treaties and Free Trade Agreement, *Manchester Journal of International Economic Law*, Vol. 12, (2015), p. 279.

Although there are similarities between the national standard of treatment in trade (i.e. under World Trade Organization ),[118] there are equally substantial differences among these standards. First, under WTO rules, likeness is more concerned about the negative impact of the regulation on the competitiveness of two products, whereas likeness in investment is more concerned with like circumstance and its impact on foreign investors.[119] Second, less favoured treatment in the WTO is assessed based on the competitiveness of the product, whereas in investment the criteria is whether a single foreign investor is treated differently from any single domestic investor irrespective of the competitiveness.[120] Third, under the WTO individual investor cannot directly invoke national treatment to invalidate domestic legislation,[121] yet it' is possible under investment treaties.[122]

### 4.1. Like Circumstances under National Treatment

In most of the BITs the applicability of national treatment extends to any rights emanating from that treaty. All the same, some treaties opt to limit the scope of the principle to 'management, operation, maintenance, use, employment, sale and liquidation of an investment.'[123] Still in some other treaties the scope of national treatment extends only to like circumstance.[124] There is no yardstick which serves as a benchmark for likeness of the investment and this will have a detrimental effect on the host state, Ethiopia and Kenya, by leaving wider discretion to the Tribunal in cases where dispute arises. The effect of yardstick manifested in two practical cases: Marvin Feldman v. Mexico and SD Myers v. Canada. In the ruling over the disputes in these cases , the Tribunal employed business sector criteria in justifying that "….there are at least some rational bases for treating producers and re-sellers differently, e.g., better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales, even if some of these may be anti-competitive.."[125]

[118] Basically there are three similarities: the obligation not to discriminate, the need to prove the existence of nexus between measure taken and its negative impact and the measure should be regulator nature. See Galea I and Biris B, National Treatment in International Trade and Investment Law, *Acta Juridica Hungarica*, Vol. 55, (2014), p. 181.

[119] Id.

[120] Galea and Biris,supra note 117.

[121] WTO dispute settlement is state-state dispute settlement system. see Osterwalder NB, State-State Dispute Settlement in Investment Treaties: Best Practices Series, *International Institution for sustainable development*, (2014), p. 6.

[122] Galea and Biris, Supra note 177.

[123] for instance Article 3(3) of Ethiopia and Austria BIT.

[124] As per Article 4(1) of BIT between Spain and Ethiopia state that''…..no less favourable than that which it accord, in like circumstance, to the investment made by its own investors.''

[125] *Marvinn Feldman v. Mexico*, (2002), ICSID Case No. ARB AR/99/1 para. 170,https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (accessed Feb. 27, 2021).

On the other hand, in SD Myers Inc. v. Government of Canada, the Tribunal employed both economic and business sector criteria cumulatively. As such, it reasoned out that ,"the concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'"[126] This is because 'like-circumstance' is inherently susceptible to wide and variety of interpretations. Evidencing this situation, the BIT between Korea and Kenya provides the standard for NT in respect of sub-national government as the treatment no less favourable than that provided in like circumstances to its investors and investments.[127]

Thus, in setting out the rule of standard treatment, this treaty does not distinictively indicate how and whther an economic or business sector chriteria can be employed in assessing the like circumstances. Thus, in conclusion , this scenario suggests the need for formulating more elaborate and clear criteria in the BITs for the determination of like circumstances.

## 4.2. Limits to National Treatment

Usually, there are limits set for national treatment as a way to give a policy space for the host state from its national treatment obligation. The limits may take general or specific forms with defining phrases to this effect. In case of general limitation, it is common to come across phrases like 'without prejudice to its laws and regulation and in accordance with its laws and regulation.'[128] This method is typically used in Chinese Model of BIT which states: "without prejudice to its laws and regulations, each contracting party shall accord [treatment] to investments and activities associated with such investment by the investors of the other contracting party not less favourable than that accorded to the investments and associated activities by its own investors."[129]

In contrast to the scenario in general limits, the specific forms impose fewer and predictable type of limits on the treatment. This type of limit is used under Indian Model of BIT which is evidenced by a stipulation reading as : "extension of financial assistance or measure taken by a party in favour of its investors and their investment in

[126] (Partial award) Para. 250 in NAFTA Arbitration under the UNCITRAL Arbitration Rules, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (accessed Feb. 27, 2021).
[127] Article 3(3).
[128] For more discussion see Zhu W, The National Treatment Clause in Chinese Bilateral Investment Treaties, *Journal of WTO and China*, Vol. 4: No. 2, (2014), p. 79-81.
[129] Article 3(2) of China Model BIT.

pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article."[130]

### 4.3. National Treatment in Ethiopia's and Kenya's BITs

The principle of national treatment is embodied in all Ethiopia's and Kenya's BITs without any exception. The definition of national treatment can be either the same standard criteria or no less favourable criteria. The same standard criteria is employed, for instance, in the BIT concluded between China and UK which mandates the states to accord the same treatment to foreign investors or companies as that accorded to nationals or local companies.[131] This phrasing is adopted in the BIT between the Netherlands and Kenya.[132] However, the Ethiopian BITs categorically adopt the not less favourable criteria. For instance, under Ethiopia-Turkey BIT it is indicated that 'once the investment is accepted, each Party shall accord to this investment, treatment no less favorable than that accorded in similar situations to investments of its investors…'[133] This is similarly the position in some of Kenyan BITs such as the BIT between Japan and Kenya that calls on a contracting party to "accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and to their investments with respect to investment activities".[134]

Further, in most BITs the applicability of the principle is restricted to post-admission of the investment. For instance, Article 3(2) of Turkey-Ethiopia BIT made it clear that the principle of national treatment only once the investment is accepted. However, in some instances the applicability of the principle of pre and post admission is not well stated.[135] In other instances the BITs seem to suggest that the principle will extend to pre-admission of an investment.[136]

[130] Article 4(5) of the Indian Model BIT.
[131] Article 3(3) of BIT between China and UK.
[132] Article 5.
[133] Article 3(2) of BIT between Ethiopia and Turkey Agreement between the Republic of Turkey and The Federal Democraic of Ethiopia concerning the Reciprocial Promotion and Protcetion of Investments 2000.
[134] Article 3.
[135] See for example Article 3(1) of BIT between Israel and Ethiopia. "Neither Contracting Party shall, in its territory, subject investments or returns of investments of investors of the other Contracting Party, to treatment less favourable than that which it accords to investments or returns of investments of its own investor.''
[136] Article 4(1) of the BIT between Ethiopia and Brazil state that ''Each Contracting Party shall admit and encourage investments of investor of the other party, according to their respective laws and regulations.''

Other BITs also provided national security or public order exception to the national treatment standard.[137] Yet no general or specific way of putting limits to national treatment is envisaged under Ethiopia's and Kenya's BITs. This implies that the host state doesn't give any leeway to deviate from the principle and provide differential and special treatment to its investors. Moreover, the existing Ethiopian and Kenyan BITs make it impossible to provide discriminatory measure against the foreign investor for essential security interest. This will in turn adversely affect the right to regulate and the policy space of the couuntries. Therefore, it is imperative to have limits or exclusionary clause in the BITs .

Some BITs entered by these countries also excludes the application of NT in respect of incentives meant to promote small and medium-sized enterprises. The cases in point in this respect are the BIT between Japan and Kenya, and [138] the BIT between Korea and Kenya which exclude NT in government procurement, tax measures and subsidies and grants provided by the host government.[139]

## 5. Full Protection and Security Treatment

Under international law, the term Full Potection and Security (FPS) refers to the standard of treatment accorded to investors and investors' property against physical damage.[140] Unlike NT or MFN principles, FPS is one of the most widely known non-contingent and absolute type of standard of treatment, not dependent on the host state treatment of third party investors or its own investors.[141] FPS is also known as constant protection and security standard involving the obligations of the host state to protect foreign investors from negative consequence that arise from state or individual action.[142]

[137] For instance the Protocol to BIT concluded between China and Japan state that' ….. it shall not be deemed " treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it's really necessary for the reason of public order, national security or sound development of national economy.'(emphasis supplied), https://www.meti.go.jp/policy/trade_policy/epa/bit/china_e.htm (accessed Feb. 28, 2021).

[138] Article 3(3).

[139] Paragraph 1 and 2 of Article 3.

[140] Collins D, Applying the Full Protection and Security Standard of Investment Law to Digital Asset, *Journal of Investmment and Trade*, (2011), p. 225.

[141] Salacuse W, *The Law of Investment Treaties* Oxford University Press, (2010), p. 229.

[142] Titi C, Full Protection and Security, Arbitration or Discriminatory Treatment and the Invisible EU model, *The Journal of World Investment and Trade*, Vol. 15, (2014), p. 540.

Evidencing this role of the FPS, the Arbitral Tribunal, in Rumel Telekom A.S and Telsim Mobil Telekomikasyon Hizmetleri A.S v Republic of Kazakhstan,[143] made it clear that this standard 'obliges the state to provide certain level of protection to foreign investments from physical damage.' In another instance, the Tribunal has clarified that this obligation of the state is due-diligent and the mere absence of it triggers the violation of the standard without any need to prove the existence of malice or negligence from the host state.[144]

Unlike strict liability or obligation of results, under FPS standard of treatment, the principal duty of the host state is to behave in a more reasonable and diligent manner.[145] However, it has been argued that legal protection is within the ambit of this principle. This argument is quite evident under ASEAN Comprehensive Investment Agreement which states that " if a member state denies justice in any legal or administarative proceeding, it is considered to have violated the FPS treatment."[146] It is further argued that not only commission but also omission, on the part of the government, to prevent anything hindering the proper function of foreign investors may tantamount to violation of this principle.[147]

### 5.1. Full Protection and Security Treatment and Customary International Law

There are divergent points of views on the content of the FPS standard vis-a-vis minimum customary international law. It is argued that FPS standard doesn't provide a higher standard than what is provided under minimum customary international law, and it is simply another way of referring to traditional customary international law accorded to the investor.[148]

Reflecting this view, Article 5 of the Canada Model of BIT provides that " the concept of […] full protection security […] do not require treatment beyond that which is required by the customary international law minimum standard of treatment of aliens."

[143].ICSID Case No. arb/05/16 Para. 668,https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf (accessed Feb. 28, 2021).
[144] Titi, Supra note 142, p. 658-660.
[145] Moss C, *Full protection and security in A Reinisch(ed.) Standards of Investment Protection* Oxford University Press, (2008), p. 139.
[146] Article 11(2) of the ASEAN Comprehensive Investment Agreement.
[147] Walde TW, Energy Charter Treaty-Based Investment Arbitration, *Journal of World Investment and Trade*, Vol. 5, (2014), p. 390 as quoted in Schreuer C, Full Protection and Security, *Journal of International Dispute Settlement*, Vol. 1, (2010), p. 7.
[148] Collins, Supra note 139, p. 229.

The same is provided under USA Model of BIT.[149] Such argument is further endorsed by various international arbitration cases. For instance, in El Paso v Argentina, the Arbitral Tribunal held that "[….] the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law[…]"[150]

In contrast to this positon outlined so far, it has been argued that FPS standard of treatment is a higher standard than what is provided under minimum customary international law. The historical background was also meant to accord foreign investor protection "which was more than their entitlement to non-discriminatory treatment under international law."[151] The Norway Model of BIT seems to adopt this approach. It provides that a contracting party has an obligation to extend FSP in accordance with customary international law.[152] This argument was adopted in Azurix v Argentina where the Tribunal held "fair and equitable treatment and full protection and security as higher standards than required by international law….It is further justified that the purpose of invoking these standards is to set a floor, not a ceiling; in order to avoidpossible interpretation of these standards below what is required by international law."[153]

Looking into the BIT between Japan and Kenya in this light , one can see that this BIT conditions the provision of FPS on customary international law.[154] It specifically notes that provision of FPS do not require any additional treatment or treatment beyond what is provided for under customary international law. No additional substantive rights is also created.[155] This is similarly the position in the BITs between Korea and

[149] Article 5(2) of the USA Model BITprovided that " for greater certainity.. full protection and security do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights,".

[150] *EL Paso Energy International Company v The Argentina Republic(award),* ICSID Case No. ARB/03/15, para. 522, https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (accessed Feb. 28,2021).

[151] Subedi P, The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Specific Reference to the Recent Trend in the Interpretation of the Term Expropriation, *The International Lawyer*, Vol. 40, (2006), p. 126.

[152] Article 5.

[153] *Azurix Corp. v. The Argentina Republic (award),* ICSID Case No ARB/01/12, para 361 https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf, accessed Feb. 28, 2021.

[154] Article 5(1).

[155] See the Note under Article 5(1).

Kenya,[156] and Kenya and Kuwait.[157] The Korea-Kenya BIT calls on the parties to engage the police in providing FPS.[158]

### 5.2. Full Protection and Security Treatment in Ethiopia's and Kenya's BITs

A close examination of Ethiopia's BITs exhibit that FPS is provided, with the exception of the BIT with Brazil. In the case of Kenya, all BITs in force with the exclusion of the BIT between the Netherlands and Kenya provide for FPS. Another striking feature of the documents is the significant variations on the wording of the standard. In the case of Ethiopia, while some BITs use full protection and security,[159] others employ full protection,[160] continuous protection and security[161]. Still others use adequate protection and security,[162] protection,[163] full and adequate protection and security,[164] full and constant protection and security.[165]

In the case of Kenya, 'full and constant protection and security',[166] 'sufficient protection and security,'[167] and 'full protection and security'[168] are used. It is also importan to note that in most instances the full protection and security standard of treatment is treated as a separate and stand alone standard. However, exceptionally, in the BIT between Libya and Ethiopia this standard is found together with fair and equitable treatment. Consistent with this view, the Tribunal in Wena Hotels Ltd v Arab Republic of Egypt, for example, held that FPS can be found together with fair and equitable treatment.[169]

[156] Article 2(2) & (3).
[157] Article 2(2).
[158] Article 2(3).
[159] Article 2(2) of BIT between Israel and Ethiopia, Supra note 108.
[160] Article 2(2) of BIT between Denmark and Ethiopia.
[161] Article 3(2) of BIT between Belgium- Luxembouge Economic Union and Ethiopia, Supra note 68 .
[162] Article 2(2) of BIT between Egypt and Ethiopia, Agreement for the Promotion and Protcetion of Investments between The Arab Republic of Egypts and Federal Democraic of Ethiopia 2006.
[163] Article 3(1) of BIT between Libya and Ethiopia Agreement between The Federal Democraic of Ethiopia and the Great Socialist People's Libyan Arab Jamahirya concerning the Encouragemnet and Reciprocal Protection of Investments 2004.
[164] Article 2(2) of BIT between Malaysia and Ethiopia, Supra note 68.
[165] Article 2(2) of BIT between Finland and Ethiopia, Supra note 68.
[166] See for example Article 2(2) of the BIT between Kenya and Finland.
[167] See for example Article 3(3) of the BIT between Kenya and Burundi.
[168] See for example Article 4(1) of the BIT between Swiss Confederation and Kenya; Article 4(1) of the BIT between Germany and Kenya; and Article 2(2) of the BIT between the United Kingdom and Kenya.
[169] *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, para 89 as quoted in Islam R, Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protections and Standards, *Bangladeshi Journal of Law*, Vol. 1: No. 2, (2014), p. 119.

From the analysis provided so far, one can observe a marked consensus among scholars as to the non-contingent nature of full protection and security treatment in Ethiopian and Kenyan BITs. Yet there are limited instances in which some BITs opt exercising of this standard on a contingent basis. The BIT between Ethiopia and Sweden, for example, makes the enjoyment of FPS contingent on its consistency with "recognized principles in international law, the municipal law of the Contracting Party and the provisions of this Agreement as applicable".[170]

In the case of Kenya, the BIT between Kenya and the United Arabs Emirates conditions the enjoyment of FPS on domestic laws and applicable international law.[171] This makes the exercise of this right contingent upon the existence of international law and more importantly its consistency with national laws. Thus, as per these provisions the content of this standard will be determined in reference to international and national laws.

## Conclusions

A broader look into the global practice largely shows that standards of treatment is one of the key features in any BIT. Historically, there was substantial difference between the developed and developing countries as to the very existence of customary international law as a standard of treatment for aliens. The developed countries (usually capital exporting countries) argue that there is customary international law which extend special and differential treatment for foreign investors. This includes prompt, adequate and effective compensation in case of expropriationwhereasthe developing countries (largely capital importing countries) take the position that there is no such standard of treatment of aliens, and foreign investor should be treated on the same level with domestic investors. Back then, the United Nation General Assembly was dominated by developing countries and hence came up with three different but related resolutions which reaffirm the position of developing countries. That is why in every BIT the issue of standards of treatment pops out as the outstanding feature.

Generally speaking, standards of treatment are privileges and rights accorded to investors and duty and obligation to host states. These treatment can be broadly classified into two categories: contingent or conditional and non-contingent or non-conditional types of standard of treatment. Arguably, FET and FSP standard of

[170] Article 2(4) of the BIT between Kenya and Sweden.

[171] Article 3(2) of the BIT between Kenya and the United Arabs Emirates , Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirate on the Promotion and Protection of Investment 2014.

treatments are non-contingent (automatic and absolute) type of entitlement. In contrast, national treatment and most favoured nation treatment are contingent upon how the host state treats its own investors or investors of third parties. Looking into the Ethiopian and Kenyan BITs in this lense, we can see that they recognize all the four major types of standards of treatment despite the lack of consistency and/or a clearly established pattern of using the rules in question.

To appreciate these realities in the documents, it is important to point out the most striking manifestation of each stadard under consideration. To this end, FET is a well recognized type of standard of treatment under Ethiopia's and Kenya's BITs. However, the definition and content of FET cannot be found in the BITs. This is attributed to the illusive and vague nature of this standard. This makes the obligation of the host state very burdensome as it doesn't exactly know the contents and cannot act accordingly. On the other hand, the illusive and vague nature of the standard advances the interest of the host state since the host state is not subjected to a specific or pre-defined commitment. Thus, several scholars have argued in favour of either side of the divide. That is, the standard can favour either the investors or the host state, whichever way one sees it.

The practice of international arbitration exhibited that the illusive and the subjective nature of this standard makes it a blessing in disguise for foreign investors to allege almost every action and potential action of the host state under the violation of FET. This will create the undesirable fear for the host state to come up with the regulatory framework which potentially violate the FET and results in tremendous amount of compensation. By doing so, it will deprive policy space and result in regulatory chill effect.

Furthermore, there is a tendency from international arbitration tribunal to examine the intent behind the legislation if they found it in contradiction to the good faith principle. This in effect may cause the host state to withdraw from the agreement. This will in turn create counter-majoritarian dilemma and adversely affect the sovereignty of the country. In cumulative terms it suggests a pressing need for omitting this standard altogether and replacing it with a more precise and objective rights of the investor that clearly set out the fundamental due process of law and access to justice in any judicial and administrative tribunal.

Turning to the MFN , we can observe that it is a well entrenched type of standard of treatment under Ethiopia's and Kenya's BITs. Yet there are two major problems obstracting its realization in this connection. First, both Ethiopia's and Kenya's BITs

do not indicate the national security and public order/morality exception. These exceptions are the most widely used and prominent grounds to give breathing space and retain the sovereignty of the host state. Moreover, national security exceptions are usually not subject to arbitration review and hence the host state can determine the matter single handedly and avail a policy space. Second, under some Ethiopia's and Kenya's BITs, the standard of MFN is qualified only to like circumstance, although what constitutes like circumstance is not well defined. This will lead investors and international arbitration tribunals to come up with a definition and criteria which fit their own purposes..

This imparatively neccessitates practical acctions to do away this problem. Particularly, it requires to include national security and public order/moral exceptions and to provide a clear yardstick as to what constitutes like- circumstance. The authors would hold that Ethiopia and Kenya will be better off if they adopt combined criteria employed by the USA Model of BIT and Draft Pan African Investment Code. The same can be applied to the problem exhibited in the national standard of treatment.

Apart from these problems, the standard of national treatment under the Ethiopian and Kenyan BITs also substantially lack consistency and uniformity of contents. For instance, in some BITs of the two countries, the benefit of MFN and NT must meet requirements of like- circumstances whereas in some other BITs there is no such requirement. Further, the national standads demonstrate varying irregularities of treatment manifested in several ways.

In some BITs the applicability of national treatment is limited only to post-admission types of investment whereas in some other BITs the applicability of national treatment extends to pre-admission. In other BITs, FPS is not provided at all. Still some BITs tend to consider FPS as contingent entitlement and in others it is not. Further, as discussed ealier, the standards of treatment under Ethiopia's and Kenya's BITs have a substantial adverse effect on the sovereignty of the states, especially their right to regulate all the events related to the investment as a host state.

Such problems and the inconsistency outlined are so wide spread in BITs of Ethiopia and Kenya that they require remedial actions. One way of doing this is through drafting Model BIT. A Model BIT that serves as a basis for any bilateral investment negotiation. This will help Ethiopia and Kenya to have consistent and unified BITs and result in predictability of the system. The fact that many countries develop their own model BIT as a starting point for further negotiation exhibits its significance. This

would also contain the adverse effect of the stadards on the sovereign rights of of the two states.