Making Foreign Investment Contributory to Sustainable Development in Ethiopia: A Normative Analysis.

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Abstract

To ensure positive impacts of Foreign Direct Investment (hereinafter FDI) to domestic human good, it has become imperative for host states to identify responsibility of foreign investors to sustainable development and devise mechanisms to effectuate the same. However, this task poses challenges for least developed countries like Ethiopia, which must balance the competing interests of attracting foreign capital and pursuing sustainability objectives. The governance of FDI is a highly debated subject within the international investment regime. It is currently threatened by legitimate crisis, requiring a concerted, well-crafted and comprehensive response from varying actors in the FDI landscape. This paper suggests that if FDI is appropriately managed, guided, and regulated, it is possible not only to minimize its impairment on sustainability but can also contribute to sustainable development. The paper qualitatively explores potential approaches within the existing framework of norms in the Ethiopian legal system to establish the sustainable development responsibilities of foreign investors. While treaty terms and contents are often influenced by global power dynamics, leaving little room for least developed countries like Ethiopia, the current global backlash against the regime could be taken as opportunity for reform. Drawing insights from the treaty practices of other states and by aligning itself with reform forces in the international investment regime, Ethiopia can strategically move to capitalize on the advantageous conditions. Findings of this paper suggests that, together with reform in the investment treaty regime, exhausting alternative measures could

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help the country install sustainable development friendliness in the existing frameworks.

Key Words: Sustainable Development; Social license to operate; Corporate Social responsibility; Counter claims; Contributory fault

1. Introduction

Ethiopia, a landlocked country in the Horn of Africa, has gained good records of FDI in the years between 2017 and 2021.[1] The World Bank report of 2022 indicated that the country is one of the most preferred FDI destinations in the region.[2] Further, the report showed that the country has made many policy adjustments by reforming its economic framework laws and substantially amending its age-old Commercial Code. All this has been made with the ambition to attract foreign capital.[3] However, the contents and underlying visions of the FDI legal frameworks still require close scrutiny. Embracing widely acclaimed standards of measures, this paper holds the view that while the availability of FDI is one of the major inputs of national economies, its impact should be development-friendly and sustainable.

The continued survival of the international investment frameworks especially that of the Bilateral Investment Treaties (hereinafter BITs) regime relies on

[1]Macrotrends, Ethiopia Foreign Direct Investment 1977-2023, https://www.macrotrends.net/countries/ETH/ethiopia/foreign-direct-investment (accessed, Dec. 25,2023).

[2] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2022: International Tax Reforms and Sustainable Investment, United Nations, 2022, p12, [hereinafter UNCTAD], see also Magdalene Teiko Larnyoh, Business Insider Africa, https://africa.businessinsider.com/local/markets/here-are-the-top-10-african-countries-with-highest-fdi/7264vlz (accessed Dec. 20, 2022).

[3]U.S DepArtment of State, 2023 Investment Climate Statements: Ethiopia, https://www.state.gov/reports/2023-investment-climate-statements/ethiopia/(accessed Dec. 15, 2023).

the fairness of its procedural and substantive elements and their sensitivity to wider public policy objectives.[4] This could be evident from reform attempts by some countries introducing new model BITs with the view to embrace sustainable development agenda.[5] Attracting foreign direct investment and attaining sustainable development are, of course, two competing phenomena in contemporary policymaking and require proactive policy moves from governments. Thus, Ethiopia must move to navigate ways that maintain the balance between attracting FDI and safeguarding its national interests including sustainable development.

In Ethiopia, the principle of sustainable development is not only a universally recognized value but it is also a value protected by its current constitution.[6] By designing Sustainable development-friendly FDI regulatory framework, governments could make economic activities through FDI a viable contributor to this cherished value. Further, this paper advances the argument that where governments show an utmost will and made concerted effort to so, there are global and national opportunities to reframe and gear FDI legal frameworks to more sustainability.

[4] David Ma, BIT Unfair: An Illustration of the Backlash against International Arbitration in Latin America, Journal of Dispute Resolution,Vol.2012:No,2.(2012),p571, https://scholarship.law.missouri.edu/jdr/vol2012/iss2/6. (accessed Jun. 20, 2023).

[5] United Nations Conference on Trade and Development (UNCTAD), United Nations, "Taking Stock of IIA Reform" (1 IIA Issues Note 2016) https://unctad.org/system/files/official-document/webdiaepcb2016d3_en.pdf. (accessed Oct. 20, 2023), see also Indian Model Bilateral Investment Treaty of 2015, https://edit.wti.org/document/show/d0eac9a8-2de6-44a8-9e9f-2986b8817aa9, (accessed on Jan. 12, 2024); 2012 U.S. Model Bilateral Investment Treaty, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf, (accessed Dec. 12, 2024); Canada Model Foreign Investment Promotion and Protection Agreement (FIPA) of 2021 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download, (accessed Dec. 12, 2024).

[6] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, Federal *Negarit* Gazetta, (1995), Article 43, [hereinafter FDRE Const.].

2. Legitimacy Crisis in The International Investment Regime and Its Implication to Sustainable Development

Currently, it is widely held that the international investment law regime is grappling with legitimacy crisis, prompting persistent calls for reform.[7] The legitimacy crisis signals the need for the ongoing pursuit of reform within the international investment regime, which is widely criticized for over protecting private investment interests at the expense of other legitimate public policy concerns.[8]

Many attribute the legitimacy crisis to multiple contributory causes in the current framework.[9] In some situations, the uncertainty surrounding the effectiveness of BITs in promoting and attracting FDI while limiting policy space of host states poses concerns. In others, it is largely caused by the overly protective nature of BITs towards private property rights at the expense of limiting the regulatory autonomy of host countries. The other contributory causes include the existing asymmetric relationship between countries and investors along with the absence of responsibilities imposed on foreign investors, the controversial benefits of Investor-State Dispute Settlement (hereinafter ISDS), the concerns regarding arbitrator bias and lack of

[7]Fabio Morosini and Michelle Ratton Sanchez Badin, Re-conceptualizing International Investment Law from the Global South, 1st Edition, Cambridge University Press, (2018) p.3.; see also Susan D. Franck, The legitimacy crisis in investment arbitration: privatizing public international law through inconsistent decision, Fordham Law Review, Vol.73: No 4, (2005). P1523; see also David Schneiderman, The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics, in C.L. LIM,(ed.) Alternative Visions of The International Law on Foreign Investment, 1st edition, Cambridge University Press, (2016), p.135.

[8] Peter Muchlinski et al, The Oxford Handbook Of International Investment Law, 1st edition, Oxford University Press, (2008), p.9.; David Schneiderman, International Investment Law's Unending Legitimation Project, Loyola University Chicago Law Journal, Vol. 49: No 2., (2017). p.229.

[9] Lim, *Supra* note 7; Susan D. Franck , *Supra* note 7, p.1593.

accountability, the insufficient transparency in the ISDS process, the absence of amicus curiae and third-party participation, the inconsistencies in arbitral awards, the lack of appeal mechanism, and the constraints on policy space.[10]

Many countries are now making foreign investment policy reform as a way to overcome the effects of such multiple challenges.[11] The United Nations Conference on Trade and Development (hereinafter UNCTAD) indicated that in 2012 - 2015, at least 110 countries have reviewed their national and/or international investment policies and a considerable number of countries have developed new model IIAs.[12] Yet it is important to note that the response given to such legitimacy crisis varies from country to country.

One of the targets of policy reforms of many countries is the responsibility of foreign investors. Debates concerning foreign investors' responsibilities in host states are hot and lingering. It is, in fact, taken to be the next frontier of international investment law. Evidencing such facts, it prompted, at international level, varying voices over the effects of the legitimacy crisis on public interests such as sustainable development in a host states.[13] Thus, it has become imperative for many countries to incorporate foreign investors' sustainable development responsibilities in FDI regulations as one of the essential reform moves in this regime.

3. Conceptualizing Sustainable Development and Sustainability

The notion of sustainable development is rooted in eighteenth-century German forestry science and Hans Carl von Carlowitz who is widely taken as

[10] Id.
[11] Morosini and Badin, *Supra* note 7. Pp.16-25.
[12] UNCTAD, Reforming the IIA Regime - a Stocktaking (01 March 2016), https://unctad.org/news/reforming-iia-regime-stocktaking, (accessed Apr. 22, 2023)
[13] Jola Gjuzi, Stabilization Clauses in International Investment Law: A Sustainable Development Approach, 1st ed., Springer International Publishing, (2018), p.5.

the founding father of modern idea of sustainable development.[14] According to Hans Carl, 'we have to find the right balance between resource use and the regeneration of natural capital'.[15]

At institutional level, this concept attained implicit recognition in the Universal Declaration of Human Rights (hereinafter UDHR) in 1948 while its explicit recognition begins in the Stockholm Declaration in 1972.[16] Since then it has become recurring notion in international conferences focusing on environmental protection and human development.

Despite this recognition, sustainable development is still an evolving concept, with no universally agreeable understanding and definition for it as such.[17] It is indicated by some that sustainable development is one of the main aspirations of human societies in the 21st century.[18]It aims to achieve a balance between natural, economic, and social dynamics. While traditionally encompassing environmental, economic, and social dimensions, the concept recently includes new elements such as governance, technology (knowledge),

[14] Judith C. Enders and Moritz Remig, Theories of Sustainable Development: introduction, in Judith C. Enders and Moritz Remig, (ed.),Theories of Sustainable Development, 1st edition, Routledge, (2015), p.2.

[15]Id; see also Virginie Barral, Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law Vol. 23: no. 2, (2012), p.377.

[16]Mekonnen Seid Demeke, Renegotiating Ethiopian Bilateral Investment Treaties in line with the Constitutional Goal of the Right to Sustainable Development, City University of Hong Kong, DPhil thesis,(2021), p.58.

[17] Lorenzo Cotula, Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries, Natural Resource Issues No. 31. (2016), p.4.

[18] Bert J.M. de Vries and Arthur C. Petersen, Conceptualizing sustainable development An assessment methodology connecting values, knowledge, worldviews and scenarios, Ecological Economics, vol.68, (2009), p.1006.

and culture as critical dimensions for successful implementation of sustainable development policies and laws.[19]

Assessing sustainability from the point of view of investment is one of the major engagements of policy practice and academic inquiry, through which different models have been suggested as tools of analysis. Among others, it can be viewed through two paradigms: strong sustainability and weak sustainability. The weak sustainability paradigm allows for substituting one form of capital with another, while the strong sustainability paradigm considers certain forms of capital such as natural capital as irreplaceable.[20] It is advisable for a state to employ a combination of these approaches on a case-by-case basis, adopting a stronger definition when irreversible loss of resources is at stake, and a weaker definition when substitutability is possible.

Of course, there are critics surrounding the concept of sustainable development, arguing that over obsession with this concept leads to more destruction rather than actual sustainability. They particularly contend that sustainable development is merely a superficial label used to appease environmentalists by promoting a neoliberal development model.[21] Further,

[19] Ethan D. Schoolman et als, How interdisciplinary is sustainability research? Analyzing the structure of an emerging scientific field, Sustainability Science, (2011), p.67. https://graham.umich.edu/media/pubs/published-research_sustainabilityscience.pdf, (accessed Nov. 20, 2023).

[20] Simon Dietz and Eric Neumayer, Weak and Strong Sustainability in the SEEA: Concepts and Measurement, Ecological Economics, Vol.61:No.4, (2007), p.621., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957994#. (accessed Feb. 10, 2023), See also JérômePelenc and Tom Dedeurwaerdere , Weak Sustainability versus Strong Sustainability (Brief for GSDR 2015), p.3. https://sustainabledevelopment.un.org/content/documents/6569122-Pelenc Weak%20Sustainability%20versus%20Strong%20Sustainability.pdf. (accessed Mar.20, 2023).

[21] Manjiao Chi, Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications, Routledge, (2018), p.163.

the critics hold that sustainable development has inherent flaws as it is not feasible to achieve unlimited growth with limited resources. While these polarized views are available in the literature, the author in this paper holds that attaining sustainable development is possible, yet governments need to effectively adhere to an all-inclusive model, which enables to achieve a balance between environmental, economic, and social aspects in the context of FDI governance and operations. The all-inclusive model, which the author employs, takes sustainable development as an overarching concept which embraces the three dimensions.

4. Sustainable Development in Legal Spaces

Whether sustainable development is a policy, soft law, or law has not been settled yet.[22] The developing discourse in this area could be divided into those who are skeptical of its legal nature and those who try to establish its legal nature.[23]The uncertainty attending the concept sparks perplexity, requiring the attention of many international legal scholars and policy practitioners.[24]

The legal status of a given proposition could be determined based on the extent to which it attains accepted sources of legal norms with clear legal consequences. To this end, sustainable development is, at least gradually, surging into both non-binding and binding international legal instruments. In

[22]Leslie-Anne Duvic-Paoli, From Aspirational Politics to Soft Law? Exploring The International Legal Effects of Sustainable Development Goal 7 On Affordable and Clean Energy from Aspirational Politics to Soft Law? Melbourne Journal of International Law, Vol.22: No.1,(2021), p.5.

[23] Michael Mc Closkey, The Emperor has no Clothes: The Conundrum of Sustainable Development, Duke Environmental Law and Policy Forum, Vol.9: Spring issue, (1999), p.153.; see also Marie-Claire Cordonier Segger and Ashfaq Khalfan, Sustainable Development Law, Principles, Practices & Prospects, Oxford University Press, (2004).

[24] Barral, *Supra* note 15. p.1.

this connection, Virginie Barral, one of the influential authorities in human rights law observed:

> *Sustainable development has, over the last 30 years, received wide support in a vast array of non- binding international legal documents. It finds expression in countless Declarations of states, resolutions of international organizations, programmes of action, and codes of conduct. (…) But sustainable development also finds expression in a far from negligible number of international treaties. It is included in over 300 conventions, and a brief survey of these is revealing from the point of view of the categories of conventions at stake, the location of the proposition relating to sustainable development, and the function attributed to it. References to sustainable development can indeed be found in 112 multilateral treaties, roughly 30 of which are aimed at universal participation*.[25]

We can notice from the observation of this writer that sustainable development is gradually penetrating important sources of international law. Accordingly, one may argue that even if it is mentioned in binding conventions, the concept is found in the non-operative part of a convention such as preambles and hence less significant for its implementation. But some surveys indicate that about 69% (207 of 300) of those conventions inculcating sustainable development include it in the operative part of a convention.[26]

Taking perspective of the customary international practice, commentators claim that there is only obligation of means with respect to sustainable development.[27]In an obligation of means, the focus is on the efforts or means employed to accomplish a task or objective. The party undertaking the

[25]Barral, *Supra* note 15. P.384 (citation omitted).
[26]Id.
[27]Id., p.385.

obligation is required to use reasonable or best efforts, skills, or resources to achieve the desired outcome. As such the emphasis is on the actions and resources applied rather than solely on achieving a specific result.[28] However, we need also notice that a closer examination of obligations related to sustainable development does include negative obligations like obligation not to violate certain environmental or labor standards.

Nonetheless, some argue that impregnation of legal mentality and hence opinio-juris with sustainable development will be created from a wide range of 'wealth of resolutions, declarations, gentlemen's agreements, programs of action, international and national judicial decisions, national legislation, and conventional provisions referring to it'.[29] Thus, there is considerable potential for sustainable development to crystallize into customary international law. There is little disagreement in taking sustainable development as an objective to aspire.

Apart from such conditions, sustainable development can also be taken as an interpretative tool available at the hands of judges and could give them liberty, authorizing value, or circumstantial choices to be made. Emphasizing this role, Virginie Barral states that '[s]sustainable development may… have a hermeneutical function … as a customary principle or as a conventional rule and its characteristics make it a particularly useful interpretative tool'.[30]

To make the best out of this interpretive role of sustainable development, governments need to include it both in preambles and operative part of treaties. Parties to a treaty may also agree that sustainable development is an

[28] Id., p.386.
[29] Id., p.388.
[30] Id., p393.

'evolutive interpretative tool'[31]. That is, they may incorporate terms of a treaty that allows a space for 'an interpretation in the light of the law enforce at the time of the dispute and in the light of current norms of international law, not just of the law enforce at the time of the conclusion of the treaty.'[32]

Encouraging such moves, the 70th Conference of the International Law Association, held in New Delhi, India in 2002, adopted a declaration of Principles of International Law relating to Sustainable Development which could potentially inform policy and law making in host states.[33] The legal nature of sustainable development can slowly emerge if sustainable development law makes its base on such principles. These principles include: (1) the duty of States to ensure sustainable use of natural resources; (2) the principle of equity and the eradication of poverty; (3) the principle of common but differentiated responsibilities; (4) the principle of the precautionary approach to human health, natural resources and ecosystems; (5) the principle of public participation and access to information and justice; (6) the principle of good governance; and (7) the principle of integration and interrelationship, in particular relating to human rights and social, economic and environmental objectives.[34]

These principles are carefully crafted by high profile professionals including all latest dimensions of sustainable development. Therefore, the notion of sustainable development is making gradual evolution to crystalize into normative standards. Even if the incorporation of sustainable development

[31]United States v. India et al., United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of WTO Appellate Body, WT/DS58/AV/R, 1998, at para 129.
[32] Barral, *Supra* note 15. P. 394.
[33]International Law Association (ILA), New Delhi Declaration of Principles of International Law Relating to Sustainable Development, (2002).
[34]Id.

clauses in international investment agreements is increasing, their level of enforcement and effectiveness requires further research.

5. Approaches to Establishing Foreign Investors' Sustainable Development Responsibilities in Ethiopia

The normative imperatives of foreign investors in Ethiopia's sustainable development journey should embrace responsibilities of foreign investors to sustainability and go beyond recognizing their right to profit-making. As per the development norms and visions of the country, they should adhere to and observe ethical responsibility, sustainable business models, environmental stewardship, respect for human rights, social and economic inclusion, and technology transfer. By embracing these imperatives, foreign investors can create a positive impact on Ethiopia's development trajectory. Ultimately, their commitment to these normative obligations will contribute to Ethiopia's long-term prosperity, environmental integrity, and the well-being of its people. Multiple approaches to embrace sustainability into Ethiopian FDI normative frameworks are available and commendable.

5.1 Limiting the BITs' Regulatory Chill Potential on Host States

Regulatory chill refers to a situation where governments refrain from implementing or enforcing regulations due to fear of potential investment claims.[35] Moving a step in the right direction, currently, the epistemic community is recommending the importance of reserving regulatory space to

[35] SATWIK SHEKHAR, 'REGULATORY CHILL': TAKING RIGHT TO REGULATE FOR A SPIN, (Working paper, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi.), SEPTEMBER, 2016, p.2 https://wtocentre.iift.ac.in/workingpaper/%27REGULATORY%20CHILL%E2%80%99%20TAKING%20RIGHT%20TO%20REGULATE%20FOR%20A%20SPIN%20(September%202016).pdf.(Accessed Apr. 29/2024).

a host state.[36] This will enable the host state to regulate the behavior of foreign investors in the public interest including in the interest of sustainable development. Regulatory chill effect could be evident from high-profile international investment arbitration cases such as *Vattenfall et al. v. Germany*[37] and *Philip Morris v. Australia*.[38] In such cases, foreign investors usually challenge host states regulatory measures through international investment arbitration and this could impede countries' efforts to pursue sustainable development.

Looking into Ethiopian BITs, especially those signed before 2015, one could see that most of them are not designed in a manner that protects regulatory power. Many of these BITs incorporated Fair and Equitable Treatment (herein after FET) and indirect expropriation provisions without indicating their precise scope and meaning.[39] Claims based on indirect expropriation and violation of FET standards are potentially and practically emerging as it is

[36] Id.

[37] Vattenfall AB et al. v. Federal Republic of Germany (ICSID Case No. ARB/12/12), as elaborated in UNCTAD, 2012a. 7 For a case example please refer to Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12), as elaborated in UNCTAD, 2011.

[38] Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12), as elaborated in UNCTAD, 2011.

[39] Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia concerning the Encouragement and Reciprocal Protection of Investments, (2005), Art.2(2)& 2(4); Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, (2006), Art. 3; Agreement Between The Government Of The Republic Of South Africa and The Government Of the Federal Democratic Republic Of Ethiopia For The Promotion And Reciprocal Protection Of Investments, (2008), Art.3(1); Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the encouragement and Reciprocal Protection of Investments, (1998), Art.3; Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, (2000), Art 2.

evidenced in the *ICL Europe v. Ethiopia*.[40] The claimant in this case, revealing the caveats of Ethiopia's investment and economic framework, raised a claim challenging tax assessment by Ethiopian tax authorities.

While FET and indirect expropriation provisions are important tools to protect the interests of foreign investors, they pose a danger to host states in pursuing sustainable development goals. These clauses are known as sustainable development impeding provisions.[41]This is worsened with ISDS provisions which permit investors access to international investment arbitration tribunals. Concerning ISDS, almost about 19 Ethiopian BITs permit dispute settlement through court or arbitral tribunal after an attempt is made through amicable mechanisms.[42]

The majority of Ethiopian investment treaties use the definition of expropriation which seems to limit regulatory space. Vague indirect expropriation seems to be part of expropriation provisions in many of Ethiopian BITs. This is evident from terms included in clauses defining expropriation. The provisions use phrasings such as 'measures having a

[40]UNCTAD Investment Dispute Settlement Navigator, ICL Europe v. Ethiopia, ICL Europe Coöperatief U.A. v. Ethiopia (PCA Case No. 2017-26)

[41] Chi, *Supra* note 23, p. 60

[42]Treaty between the Federal Republic of Germany and the Federal Democratic Republic of Ethiopia concerning the Encouragement and Reciprocal Protection of Investments, (2005), Art.10&11; Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia Concerning the Reciprocal Promotion and Protection of Investments, (2000), Arts 7&8; Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, (1998), Arts. 8&9.

similar effect as expropriation or nationalization' indicating inclusion of indirect expropriation from expropriations scope.[43]

Currently, with the view to minimize such restraining effect on host state regulatory power, treaty practice is innovating different balancing provisions. These may include listing elements for a standard, specifying carved-in exception, indicating mitigating factors etc.[44] In elements listing, a treaty lists out measures that can be taken as indirect expropriation. It also lists out elements that can be taken as violation of FET standards. This can reduce chilling effect on host states.[45] In indicating mitigating factors, a certain measure by the host state may be considered as indirect expropriation. However, in considering compensation to the investor, compensation may be reduced in favor of the host state if the host state takes the measure to achieve public interest ends.[46]

There are various mechanisms to help the host state preserve its regulatory power in international investment treaties. Even if Ethiopia, as least developed host state, lacks strong bargaining power to influence terms of its BITs, attending legitimacy crisis of the international investment regime, the related backlash and calls for change may feed important input for possible reform. As such, the BITs to which this country is a party always require close

[43] 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, (2009), Art.5; Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, (1998), Art.4; Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, Art.6.

[44] Chi, *Supra* note 21, pp. 56-59.

[45] Id.

[46] Id., p.59.

examination so that they can embrace emerging changes in the international investment regime.

While such post-treaty formulation effort is important, it is further more important to make, from the outset, FET provisions outline rights and obligations clearly, to limit or avoid ISDS clauses, to use public interest carve-outs, and to make clarification on indirect expropriation provisions as a way to preserve regulatory rooms for sustainable development.[47] Reserving regulatory rooms in BITs will particularly help the country to prescribe standards of behavior expected of foreign investors towards sustainable development without fear of risk towards arbitration.

Moreover, the relationship between signing and ratifying BITs and investment inflow is illusive. The same is true concerning investment inflow and giving better terms at the expense of host state. For instance, currently, there is no active BIT between Ethiopia and India. However significant numbers of Indian Foreign investors are investing in Ethiopia, arguably, implying that designing regulatory frameworks at the expense of sustainable development agenda may not serve foreign investment promotion ends.[48]

5.2. Orienting BITs with Sustainable Development Provisions

While many agree on the need to align BITs with the sustainable development agenda, there is a heated scholarly debate over the mechanisms for creating criteria for IIAs' orientation towards sustainable development.

[47]United Nations Conference on Trade and Development (UNCTAD), Preserving Flexibility in IIAs: The Use of Reservations, (UNCTAD Series on International Investment Policies for Development) (New York and Geneva, 2006), pp. 7-9.

[48]Next to China, Saudi Arabia, and the United States, India is the 4th in investing in Ethiopia. See Standard Bank, Foreign direct investment (FDI) in Ethiopia https://www.googleadservices.com/pagead/, (accessed June 10, 2023).

The inclusion of provisions for sustainable development in various formulations is recommended by some group of policy practitioners and scholars.[49] These clauses could be of various types, ranging from broad sustainability clauses to clauses that cover a particular matter. A treaty preamble that adopts the broader form contains general sustainability clauses identifying sustainable development as one of the goals of the pact. These clauses are declarative and obligate contracting states to implement policies or advance sustainable development. Another approach to structure these clauses for sustainable development is to include particular clauses addressing difficulties with the environment, society, human rights, or security concerns.

Such elements for sustainable development are rarities in Ethiopian BITs. The general sustainable development provision (hereinafter SDP) is found only in few BITs of the country.[50] Some BITs have specific SDP such as *no lowering standards in the preamble*.[51] For example, the Ethio-Brazil BIT and Ethio-United Arab Emirates BIT incorporate such Sustainable development Provisions.[52] Yet in other BITs, in specific operational provisions, a preambular broad reference to sustainable development is missing.

[49] Chi, *supra* not 21.

[50] Agreement between The Government of the Republic of South Africa and the Government of the Federal Democratic Republic of Ethiopia for the Protection and Reciprocal Promotion of Investment, (2008), preamble; Agreement between the Government of The Federal Democratic Republic of Ethiopia and The Government of The United Arab Emirates Concerning the Promotion And Reciprocal Protection Of Investment, (2016), preamble; Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation,(2018), preamble and Art 14.

[51] Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments, (2006), preamble.

[52] Agreement between the Government of The Federal Democratic Republic of Ethiopia and The Government of The United Arab Emirates Concerning the Promotion And Reciprocal Protection Of Investment, (2016), preamble; Agreement between the

Currently, the increase in ISDS cautiously suggests that if investment treaty making continue as it is, it would contradict with public policy especially those related to sustainable development.[53] Scholars such Wolfgang Alschner&Elisabeth Tuerk have suggested host states' response to these difficulties in treaty procedures.[54] These responses include adding balancing clauses to treaties, limiting arbitral discretion through language clarification in treaties, expanding the purview of investment treaties beyond just investment protection to cover other issues like upholding environmental standards, combating corruption, and corporate social responsibility, etc., and enhancing the defensive nature of investment treaties by adding deadlines for filing notices of arbitration.[55]

Currently, capital exporting countries with better bargaining position are also recognizing the concerns of least developed host states. In recognition of such challenge, they are taking positive steps towards enhancing their BITs regime by providing new BIT models and renegotiating their existing BITs.[56] This would, debatably, encourage least developed countries like Ethiopia to push modification of its BITs in a manner that enable it create domestic legal frameworks which are sustainable friendly.

Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, (2018), preamble and Art 14.

[53] Wolfgang Alschner& Elisabeth Tuerk, The role of international investment agreements in fostering sustainable development. pp3-4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295440. Accessed on 13/5/2023

[54] Id.

[55] Id., see also Markus A. Petsche, The Fork in the Road Revisited: An A visited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, Washington University Global Studies Law Review, VOL. 18: No.2, (2019), p. 395.

[56] UNCTAD, *Supra* note 5.

5.3. Soft Law Norm Approaches and Sustainable Development

Soft law refers to standards of behavior that are neither binding hard law nor mere political or moral statements. They lie between the two and play an important role in the interpretation and development of international investment law.[57] There are diverging views on the role of soft law.[58] Though it may not be compared with hard law norms, soft law norms also provide important form of regulation, especially in areas where there is scarcity of binding multilateral norm. To this effect, foreign investors are expected to observe such standards of soft laws in varying moves of their investment operations. As such, such laws are taken to be one of the major tools to gear FDI to sustainable development ends. The next paragraphs explore the nature and possible utilization of soft laws in regulating investment moves of individual foreign investors and transnational companies.

5.3.1 Corporate Social Responsibility

Corporate Social Responsibility (hereinafter CSR) is a standard of corporate behavior that demands corporations to pursue policies which are desirable in terms of the objectives and values of societies.[59] As such, it is a normative model of corporate governance and operations that seeks to contribute to the attainment of sustainable development by regulating and balancing the

[57] M. G. Desta, Soft Law in International Law: An Overview, in A. Bjorklund and A. Reinisch (eds.), Soft Law and International Investment Law (Cheltenham, Edward Elgar Publishing Ltd., 2013), p. 40.

[58] Melaku Geboye Desta, Soft law in international law: an overview in Andrea K. Bjorklund and August Reinisch, International Investment Law and Soft Law, (2012), pp. 42-49.

[59] H. R. Bowen, Social Responsibility and Accountability (New York: Harper & Row, 1953), as cited in Archie B. Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct', Business and Society38(3) (1999), p. 270.

interests of corporations, investors and other private actors with the concerns and interests of the public.[60]

In contemporary development discourse and policy debate, there is a widely shared expectation among academics, policy practitioners and other public stakeholders for sustainable development to be integrated into corporate strategies and programs.[61] Currently, through the soft law approach, there are international instruments trying to prescribe responsibilities of foreign investors in host states. Instruments such as the United Nations (UN) Global Compact[62], the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises about Human Rights,[63] the UN Guiding Principles on Business and Human Rights[64] are important examples with CSR standards. The instruments lay down standards of behavior expected from foreign investors. Such moves are, in fact, one of the potential mechanisms to instill socially responsible behavior on foreign investors.

Therefore, it is important to note that the CSR movement is geared toward corporate self-regulation than creating binding instruments which help in punishing noncompliance by corporations.[65] Yet compliance based on UN

[60] Jarrod Hepburn and VuyelwaKuuya, Corporate Social Responsibility and Investment Treaties, in CordonierSegger et al. (eds), Sustainable Development in World Investment Law, Cambridge University Press, (2013), p. 585.

[61] Norma Schönherr et al., 'Exploring the Interface of CSR and the Sustainable Development Goals' TRANSNATIONAL CORPORATIONS, Vol. 24: No.3, (2017) 33, p.39.

[62] UN Global Compact, www.unglobalcompact.org. accessed on 6/5/2023.

[63] Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (13 August 2003) UN Doc.E/CN.4/Sub.2/2003/12/Rev.2 http://undocs.org/E/CN.4/Sub.2/2003/12/Rev.2.

[64] UN Office of the High Commissioner for Human Rights (OHCHR), Guiding Principles on Business and Human Rights (2011).

[65] Id.

Global Compact and the UN Guiding Principles on Business and Human Rights are important sources of norms governing corporate behavior towards sustainability.[66]

Jean Ho summed up the substantial departure made in this respect as:

> *When corporate investors, whether motivated by profit or civic duty, voluntarily adopt sustainable and lawful business practices, the pursuit of investor responsibility in international fora becomes redundant. To be fair to its proponents, the CSR movement has made some headway in Europe. Starting from 2018, large public interest corporations are required by law to report their policies on various aspects of social responsibility, such as environmental protection and human rights preservation. However, until the European model of imposing mandatory CSR reporting only on the largest corporations converts all corporations into socially responsible actors (…).*[67]

As a way to make such norms, countries employ different treaty practices of incorporating CSR element into a treaty. Some include a call for encouragement of CSR in a preamble to promote CSR-friendly reading of the whole treaty.[68] This purpose could also be achieved through making direct reference to international standards to CSR like the UN Global Compact or OECD Guidelines for Multinational Enterprise. Secondly, it is also possible to directly include CSR clause and make best endeavor commitments. Currently, there is also an attempt to impose direct obligations on foreign investors. For instance, the Brazil-Malawi Investment Cooperation and

[66] Jean Ho, The Creation of Elusive Investor Responsibility, (Symposium on Investor Responsibility: The Next Frontier in International Investment Law, (2019), p. 12.
[67] Id. P.13.
[68] Norway Draft Model BIT (2007) Preamble and Article 32.

Facilitation Agreement contained detailed provisions aligned with sustainable development objectives.[69] Article 9(1) of the agreement provides for direct obligations of investors to the local community.[70] Similarly, the Argentina – Quatar BIT lays down corporate social responsibility duties under Articles 11 and 12.[71]

Following a more normative approach, the Pan-African Investment Code (PAIC) urges investors to comply with internationally recognized human rights laws and combating corruption laws.[72]Such CSR inclusion is getting its way into model BITs. For instance, the Ghana Model BIT normatively obligates investors to engage in human capital formation, local capacity building through close cooperation with the local community, to create employment opportunities and facilitate training opportunities for employees, and to pave ways the transfer of technology.[73]

In sum, the global experience shows that there is a substantial move to harmonize CSR norms with relevant laws and globally acknowledged benchmarks of human rights, international labor and environmental standards, anti-corruption norms, and endeavors that foster sustainable development. Further, it is widely held that CSR encompasses both active contributions to and prevention of detrimental effects on sustainable development.

Turning to the Ethiopian policy practice, we could see that the majority of the BITs are almost devoid of CSR clauses in contrast to a changing landscape in

[69] Article 9 of the Brazil–Malawi Investment Cooperation and Facilitation Agreement (an investment treaty that is different from traditional BITs)
[70] Id.
[71] The Reciprocal Promotion and Protection of Investments Between The Argentine Republic and The State Of Qatar, (2016), Art 11 and 12.; See also Art 21 and 24 of the Pan Africa Investment Code.
[72]The Pan Africa Investment Code, Arts 21 and 24.
[73] Ghana Model BIT, 2008. Art 12.

FDI governance in the other world. However, we can find CSR clauses in some recently signed Ethiopian BITs. The Ethio- Brazil BIT[74] and Ethio-UAE BIT[75] are the rare instance that included some direct and indirect CSR provisions. The Ethio-Brazil BIT (not yet ratified) provides that '[i]nvestors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices."[76]

Similarly, the Ethio-UAE BIT states that '[i]nvestors and investments shall strive, to the extent possible, through their management policies and practices, to contribute to the development objectives of the Host State and to the benefit of the local community where the investment is made.'[77] Based on such provisions, the host state could take administrative or regulatory measures with the view to enhance sustainable development agenda.

Thus, soft law can play important roles in the regulation of international investment law in line with the sustainable development needs of a host state.[78] In this instance, for example, the existence of CSR provision in a BIT helps Ethiopia to limit scopes of investors legitimate expectation and scope of

[74] The Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, (2018), The preamble and Art 14.

[75] Agreement between the Government of The Federal Democratic Republic of Ethiopia and The Government of The United Arab Emirates Concerning the Promotion and Reciprocal Protection of Investment, (2016), Arts 11,12,13.

[76] The Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, (2018), Art 14(1).

[77] Agreement between the Government of The Federal Democratic Republic of Ethiopia and The Government of The United Arab Emirates Concerning the Promotion And Reciprocal Protection Of Investment, (2016), Art 11.

[78] Giovanna Adinolf, Soft Law in International Investment Law and Arbitration; the Italian review of international and comparative law 1 (2021), p. 89.

FET clauses in a treaty. Further, soft law instruments can serve as alternative outlays of a regulatory tool when negotiation and deliberation processes of adopting hard law regulatory instrument fail. Often, this process generates by-products that can be regarded as soft laws and become subjects of exploration and discourse within the academic community. It can also serve as an experimenting laboratory of regulation, giving a chance to do and learning through time. Emphasizing such opportunities, Stephan W Schill and Kerem Gülay state: 'Soft law can also react to the dynamics of FDI regulation in allowing for the incremental and, at times, experimental infusion of legal change by trial and error, without the need to settle on durable hard law rules.'[79]

5.3.2. Social License to Operate

Social License to Operate (hereinafter SLO) in the context of FDI regulation refers to the level of acceptance and support that a company or investor receives from the local communities, stakeholders, and society at large in a host country.[80] It goes beyond legal and regulatory requirements and encompasses the broader social and environmental expectations of local communities.[81] Obtaining a social license to operate implies that a company

[79]Schill, Stephan W. and Gulay, Kerem, Approaches to Foreign Direct Investment in Legal Research (December 19, 2019). published in Markus Krajewski and Rhea T Hofmann (eds), Research Handbook on Foreign Direct Investment (Edward Elgar 2019) Ch. 2, Amsterdam Law School Research Paper No. 2019-19, Amsterdam Center for International Law No. 2019-08, Available at SSRN: https://ssrn.com/abstract=3506743. (accessed May, 20, 2023).

[80] Emma Wilson, What is the social license to operate? Local perceptions of oil and gas projects in Russia's Komi Republic and Sakhalin Island, The Extractive Industries and Society, (2016), vol. 3, p. 74.

[81] Robert Boutilier and Ian Thomson, Modelling and Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice (2011), p.2 https://socialicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf. Accessed on 10/5/2023.

has effectively engaged with and gained the trust and approval of the community, demonstrating responsible and sustainable business practices that align with the community's values and interests. In terms of impact, investment processes based on SLO principles involve active management of relationships, addressing community concerns, respecting human rights, preserving the environment, and contributing to the overall well-being and development of the host community.

Historically, one can trace the genesis of SLO to 2007 UN Declaration on the Rights of Indigenous Peoples.[82] This international human rights instrument states that indigenous people shall not be forcibly removed from their lands or territories and no relocation shall take place without the Free, Prior and Informed Consent (FPIC) of the indigenous people.[83]

However, this SLO is distinctively different from FPIC, as it represents a continuous undertaking throughout the entire investment venture. Whereas FPIC is much about governments' duty, SLO falls under the purview of companies. SLO as a normative behavior had initially gained prominence only in the extractive industry. Yet later, it progressively is attaining traction in other sectors such as energy production and agriculture.[84]

A common understanding and uniform definition are lacking about the concept of social license to operate. Some relate it to moral legitimacy of enterprises which refers to the ethical acceptability of an institution or its

[82] UN Declaration on the rights of indigenous people, see also DomènecMele and JaumeArumengou, Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate, Journal of Business Ethics, Vol. 136, No. 4, Special Issue on The 26th EBEN Annual Conference in Lille (July 2016), p.731.

[83] Art 10 of UN Declaration on the rights of indigenous people.

[84] Marieke Evelien Meestersa and Jelle Hendrik Behagel, The Social Licence to Operate: Ambiguities and the neutralization of harm in Mongolia,Resources Policy, Vol. 53, (2017), p. 274.

activities.[85] Others take it as unwritten contract between an industry and the community it operates.[86]This license goes beyond strict compliance with regulation, and requires companies to demonstrate a commitment to sustainable development throughout their operations.[87] Implying the contractual essence underlying the concept, the Minerals Council of Australia explained:

> *Foundation[al] to the industry's commitment is the concept of a 'social license to operate'. Simply defined the 'social licenses to operate' is an unwritten social contract. Unless a company earns that license, and maintains it on the basis of good performance on the ground, and community trust, there will undoubtedly be negative implications.*[88]

Placing societal stake at the center, others take SLO as perceptions of local stakeholders in terms of the extent to which a project, a company, or an industry operating in a given area or region is socially acceptable or legitimate.[89] The community in which the investment is destined would grant the license where it fulfills requirements beyond what is required legally. Thus, it imposes implied obligation on foreign investors to discharge sustainable development responsibilities - which is usually not yet fully prescribed in normative frameworks.

[85]Domènec Mele and Jaume Arumengou, *supra* note 82. p. 729.
[86] Id. P.732.
[87] Id.
[88]Minerals Council of Australia, 2005, p. 2.
[89]Raufflet, E., Baba, S., Perras, C., Delannon, N. (2013). Social License. In: Idowu, S.O., Capaldi, N., Zu, L., Gupta, A.D. (eds) Encyclopedia of Corporate Social Responsibility. Springer, Berlin, Heidelberg. https://doi.org/10.1007/978-3-642-28036-8_7. (Accessed Jul. 18, 2023).

In other circumstances, the significance of SLO extends beyond the local community and encompasses the investment itself. The extent of SLO granted to a company is inversely correlated with the level of sociopolitical risks that the company encounters. This is especially important in least developed countries like Ethiopia where there is less legitimacy to public authorities. In host states where indigenous people or local communities question government authority, the license from governments may not be sufficient for the investment to operate safely in the locality. This implies that a foreign investor possessing such licenses could mitigate sociopolitical risks on the investment. However, there are critique leveled against such SLO related to lack of clarity as to who is in the position to grant this license and on what conditions that community shall grant that license.[90]

Apart from such theoretical analysis, the normative nature or judicialization/legalization[91] of SLO comes to the scene in relation to defense of contributory fault for investors claims (see section 5.6). Host states intervention in the form of taking corrective measures against investors usually entails social conflict between investment/investors and local community. In this connection, SLO will usually ease the difficulty to make a link between investors conduct, resultant social protests, and resulting host state measures. However, an insightful understanding of the relationship between defense of contributory fault and SLO will defy this problem. It could be taken as contributory fault of the investor that provoked state measures and thus reduces states liability. It therefore helps in establishing sustainable development responsibilities indirectly.

[90] Marieke Evelien Meestersa and Jelle Hendrik Behagel, *supra* note 84. P.275.

[91] Raúl F. Zúñiga Peralta, The Judicialization of the Social License to Operate: Criteria for International Investment Law, https://ssrn.com/abstract=3855028. (Accessed Jun. 20, 2023).

In this connection, when we come to Ethiopia, we can find some normative prescriptions in domestic legislative documents with underlying elements of SLO. To this effect, the Mining Operation Proclamation No 878/2010 provides that mining operators should participate and contribute to the development of the community.[92] It particularly obliges mining operation licensees to reserve funds for such purposes. Such legislative moves are potential opportunity for the investment projects to build positive relationship with the local community and to obtain the SLO in addition to the legal license from government authorities.

Of course SLO is not explicitly enshrined in legal statutes of Ethiopia mentioned earlier and legal status of the underlying SLO elements is disputed. Yet its significance and bearing on businesses cannot be underestimated.[93] Several legal elements intersect with the concept of SLO, influencing corporate actions and outcomes. These include Regulatory Compliance, Social and human rights impact assessment, Environmental Impact Assessments, Indigenous Rights and Consultation, respecting land use rights and property ownership and engaging in community development projects.[94] Judicialization and legalization of such concepts could gradually be established if clarity and understanding is made through continuous works on notion of SLO.

Foreign investors, on their part, must recognize the importance of fostering sustainable partnerships and collaboration with the local communities, civil society organizations, and other stakeholders. By actively engaging in

[92] Mining Operation Proclamation, Proclamation no 878/2010, Federal Negaret *Gazeta*, (2010), Art 60(3).

[93] Geert Demuijnck and Björn Fasterling, Social License to Operate, Journal of Business Ethics, Vol. 136, No. 4, Special Issue on The 26th EBEN Annual Conference in Lille (July 2016), https://www.jstor.org/stable/24755721. Accessed on 6/19/2023, p.683.

[94] Id.

dialogue and incorporating diverse perspectives, investors can align with national development plans and priorities as well as community interests. Transparency, accountability, and responsible business practices should be at the core of these partnerships, ensuring mutual trust and long-term sustainability.

5.4 Role of Counterclaims in Establishing Sustainable Development Responsibilities

Counterclaims refer to legal actions initiated by host states against foreign investors in response to alleged breaches of investor obligations. In the realm of international investor-state disputes, there exists a noticeable pattern where claims predominantly originate solely from investors, displaying a unidirectional flow.[95] This trend did not reflect the whole dimension of international investment dispute as the interests of individuals and the local community may not be represented by other bodies than host states at international forums.[96] While institutions or individuals representing states at arbitral forums articulate government interests, they may not sufficiently cover damages sustained by communities or individual citizens.

Alternative mechanisms for the representation of the interests of individuals and local communities in international forums have been almost missing, except through counter claims by host states.[97] However in recent years, counterclaims against foreign investors have emerged as a mechanism to address potential conflicts between investment protection and sustainable

[95] Tomoko Ishikawa, Counterclaims and the Rule of Law in Investment Arbitration. (Symposium On Investor Responsibility: The Next Frontier In International Investment Law) (AJIL UNBOUND Vol. 113, (Published online by Cambridge University Press), p. 33, available at https://doi.org/10.1017/aju.2018.96 (accessed Nov. 5, 2023).
[96] Id.
[97] Id. P. 35

development objectives.[98]Consequently, the act of filing counterclaims provides host states with an opportunity to hold international investors responsible for their non-compliance of environmental and social responsibilities and the resulting harm inflicted upon local communities.

Emphasizing the role of counter claims and the need for expanding the space for such moves, James Gathii and Sergio Puig have this to say:

> *The emergence of a debate about investor responsibility as a prominent dimension of international investment law is attributable to at least three recent developments. The first is the appearance of provisions in newer investment treaties demanding that investors respect human rights, protect the environment, and act in a socially responsible manner when operating in the host state. The second is the growth of counterclaims by respondent host states in ISDS, seeking rulings from tribunals on the claimant investors' responsibility under domestic or international law. The third stimulus has been the adoption of Resolution 26/9 by the United Nations Human Rights Council to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.*[99]

[98]SaArthak Jain, Bridging the Gap Between Investment Arbitrations and Environmental Concerns: Can Inclusion of Counterclaims Help?, available at https://aria.law.columbia.edu/bridging-the-gap-between-investment-arbitrations-and-environmental-concerns-can-inclusion-of-counterclaims-help/. (accessed Nov. 5, 2023).

[99]James Gathii and Sergio Puig, Introduction to The Symposium on Investor Responsibility: The Next Frontier in International Investment Law, AJIL UNBOUND, Vol. 113, (2019), p. 2; available at https://doi.org/10.1017/aju.2018.97. (accessed Aug. 6, 2023).

Given these grounds to regulate conducts of foreign inverstors, host state has the responsibility to take due diligence in authorizing and monitoring foreign investors' projects as part of their obligations to safeguard the rights of local communities. The recognition of such obligations in international practice has been demonstrated by the stance taken by the African Commission on Human and Peoples' Rights. In a position statement, the Commission presents arguments highlighting the Nigerian government's failure to provide protection to the 'Ongonis'[100] people.[101]As such it took as a breach of obligation by a state actor to protect persons against interference with the enjoyment of their rights.[102]

If effectively utilized, raising counterclaims in international investment dispute settlement forums would also provide one additional dimension of gearing foreign investors' responsibility to achievement of sustainable development. Tribunals may face difficulty to determine investors' responsibilities for the mere fact that such is not provided in the treaty terms.[103] However, it should be noted that it is the persistent state practice which could create binding norms in the long run. Thus, counterclaims serve to enhance the effectiveness of investor-state arbitration for several compelling reasons. It contributes to efficient time utilization, facilitates equality and narrows the asymmetrical investor-state relations, and minimizes the attending legitimacy problem of investor-state arbitration.[104]

[100] One of the Indigenous people living in South-East Nigeria.
[101]Mavluda Sattorova, Investor Responsibilities From A Host State Perspective: Qualitative Data And Proposals For Treaty Reform, Symposium On Investor Responsibility: The Next Frontier In International Investment Law,(2019), P.36.
[102] Id.
[103]Yaraslau Kryvoi, Counterclaims in Investor-State Arbitration, MINNESOTA JOURNAL OF INT'L LAW, Vol 21: No. 2, (2012), p. 216.
[104] Id. P. 220.

To this end, host states should actively participate in the process of establishing the international responsibility of investors by raising claims in international forums or use other mechanisms. They should try to invoke investors' misconduct based on international law in counter claims or in original claims so that investors' rules for responsibility could be developed in arbitration tribunals or elsewhere.[105] As noted by Jean Ho, 'in accordance with this principle, the Copper Mesa tribunal recognized that the investor's own actions contributed to a damage claimed to have suffered by communities. Through this recognition, the court justified a reduction in the compensation owed by Ecuador for expropriating the investor's mining concessions.'[106]

If investors are aware of the risk that host countries can successfully bring counterclaims based on their failure to exercise due diligence, they could tend to be responsible. Equally, they would be discouraged from initiating arbitration proceedings where they would need to justify their own actions.[107]

These instances clearly show that counterclaims are promising tools to push foreign investors to engage in meaningful dialogue with stakeholders, including local communities, civil society organizations, and governmental bodies. By actively participating in discussions and addressing concerns, investors can foster collaboration, gain insights, and incorporate diverse perspectives into their decision-making processes.[108] This collaborative approach would help them build trust, ensures transparency, and creates a sense of shared responsibility towards sustainable development goals.

[105] Ho, *Supra* note 66. P. 12.
[106] Id.
[107] Giovanna Adinolf, Soft Law in International Investment Law and Arbitration; the Italian review of international and comparative law 1 (2021), p.89.
[108] Gleason, T. Examining Host-State counterclaims for environmental damage in Investor-State dispute settlement from human rights and transnational public policy perspectives. Int Environ Agreements, Vol.21, (2021), p.35, available at https://doi.org/10.1007/s10784-020-09519-y (accessed on 5/5/2023).

Ethiopia has been involved in a limited number of ISDS cases to date. In this connection, Ethiopia is advised to make the ISDS process accountable and transparent. It is also commendable for Ethiopia to institute counter claims so that it could open a door to make irresponsible foreign investors aligned with sustainable development ends.

5.5 Host State's Legitimate Expectation

The concept of a host state's legitimate expectation refers to the reasonable expectations and requirements that a host state may have regarding the conduct and behavior of foreign investors. This concept serves as an important legal and policy consideration, and there are arguments supporting the recognition and protection of a host state's legitimate expectation.[109] Proponents of this notion justify its recognition on grounds of public interest, host states inherent right of sovereignty, and the right to regulate social and economic development.

On the other hand, the doctrine of investors' legitimate expectation is one of the major subjects of scholarly dialogue host state and foreign investor relationships. It refers to the obligation of the host state to act in line with certain expectations of foreign investors. Accordingly, the host state could not act contrary to certain expectations of foreign investors. Usually, these expectations are based on BITs provisions which are concerned with FET standards and provisions which are meant to address indirect expropriation issues. It is believed that the arbitral jurisprudence has created the doctrine of legitimate expectation. Currently, there are some attempts to use such doctrine

[109] Karl P. Sauvan and Daniel Allman, Colombian Center on Sustainable development: Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues No. 183 September 26, (2016).

of legitimate expectation by extension to the host states' legitimate expectation, too.[110]

In *Sempra v. Argentina*, Argentina argued that "the government[…] had many expectations in respect of the investment that was not met or was otherwise frustrated."[111]In this case, Argentina expected that foreign investors would work diligently and in good faith and dutifully observe contractual commitments, and respect the regulatory frameworks. It would be logical to argue that if private investors with their commercial purpose are granted such protection of the doctrine, for stronger reason, host states holding and promoting public purpose should be given the protection of such doctrine. It is natural for the host state to expect the foreign investor to respect its regulatory frameworks and measures as it is the state's inherent right and obligation to do so.

Some authors justify the need for enabling host states to claim such legitimate expectations by analogizing foreign investors' legitimate expectations. For instance, Karl P. Sauvan and Daniel Allman stated:

> *By analogy, the question arises whether host countries, too, can have legitimate expectations concerning the behavior of foreign investors within their economies, absent in any specific investor obligations in IIAs. Such expectations could be inferred from treaty preambles recognizing the objectives of IIA parties' economic or "sustainable development", as well as articles providing that investors shall strive to carry out the highest …possible contributions to the sustainable development of the host State and the local community or corporate*

[110]Id.

[111]Id.; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007, para 289.

> *social responsibility (CSR) articles reaffirming the importance of each Party encouraging enterprises … to voluntarily incorporate into their internal policies those ,internationally recognized standards, guidelines and principles of CSR.*[112]

In addition to logical and analogical argumentation, host state legitimate expectation could be based on soft law principles advocated by some regional organizations that are calling for more responsibility by multinational enterprises.[113]More specifically, Southern African Development Community (SADC) model BIT calls for foreign investor responsibilities.[114] Such persistent desire and practice for host state legitimate expectation could gradually contribute to sustainable development norm-making. Moreover, host state legitimate expectation demands investors to act in accordance with reasonable standards and obligations, which may include compliance with domestic laws and regulations, adherence to environmental and labor standards, or respect for social and cultural norms. This is in line with principles of equity and fairness as well.

Arguably, some of the BITs to which Ethiopia is a party do have some space to invoke host state legitimate expectation. Implying such room, it employs sustainable development related terms like *improve living standards, without relaxing labor* and *environmental standards, economic growth or prosperity*.[115] Yet more specifically, some recently signed BITs include the

[112] Sauvan and Allman, *Supra* note 109, citation omitted.
[113] Id.
[114] SADC Model Bilateral Investment Treaty Template with Commentary, (2012), Arts 10-17.
[115] Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments, (2006), preamble; Agreement between the Government of The Federal Democratic Republic of Ethiopia and The Government of The State of Israel for The Reciprocal Promotion And. Protection of Investments; Agreement between the

term sustainable development and CSR provisions.[116] Giving recognition to host states legitimate expectation would be a step towards the right direction to make balanced international investment regime. This author would suggest that foreign investment arbitral tribunals be part of a solution in the process of creating equitable and balanced FDI regulatory framework by recognizing such host states' legitimate expectation.

5.6 Contributory Fault and Host State Measures

Contributory fault in relation to international dispute arbitration comes to the scene to serve as a defense to the host state. The host state invokes contribution of the investor to the problem or to the disputes and alleged damage.[117] And the investor is required to be responsible together with the host state for damages caused to communities, individuals, or the society at large.[118] As such this principle acknowledges that investors are obligated to bear costs of compensation for damages equitably traceable to the negative consequences arising from their own actions.[119]

Thus, contributory fault is typically considered in cases where the investor's conduct, such as non-compliance with contractual obligations, violation of

Government of the Federal Democratic Republic of Ethiopia and the Government of the People's Republic of China Concerning the encouragement and Reciprocal Protection of Investments, (1998), preamble.

[116] The Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, (2018), The preamble and Article 14.

[117] Martin Jarrett, Contributory Fault and Investor Misconduct in Investment Arbitration, Cambridge University Press, (2020), p. 79.

[118] UNCITRAL Secretariat , Possible reform of investor-State dispute settlement (ISDS) Assessment of damages and compensation, 2021, p12, https://uncitral.un.org/sites/uncitral.un.org/files/note_by_the_secretariat_-_assessment_of_damages_and_compensation_.pdf. (Accessed on 5/25/2023.)

[119] Id.

local laws, or failure to take reasonable precautions, has contributed to the dispute or the harm suffered. Its purposes are to balance the interests of both the investor and the host state by taking into account the investor's contribution to the dispute when assessing liability and determining the appropriate remedies.

Contributory fault is punitive on foreign investors for their misconducts, and not directly imposing obligations. It indirectly requires investors to act responsibly by reducing the possible compensations for damage in final settlement of disputes. Such effects of contributory fault are typically illustrated in Copper *Mesa vs. Ecuador*.[120] In this case, the tribunal made the investor (Copper Mesa) liable together with Ecuador (host state) for inflicting violent attack on the local community.[121] Material facts of the case show that the investor has materially contributed to the occurrence of its own damages by provoking state measures. Based on the evidence and assessment of damage made, the tribunal allocated 30% of the compensation to the investor.[122]

This is an important experience worth drawing on for other states and foreign investors alike. Particularly, it encourages government authorities host states to take measures with the purpose to regulate behavior of foreign investors to the effect of supporting or, at least, restraint themselves from hampering sustainable development ends. As these moves are becoming common practices in FDI operations in many parts of the world, foreign investors are coming under global pressure to observe laws of the host state. Such growing

[120] Copper Mesa Mining Corporation v. Republic of Ecuador (PCA Case No. 2012-2), March 2016.

[121] _____when arbitrators reward mining corporations' human rights abuses Copper Mesa Vs Ecuador available at https://10isdsstories.org/wp-content/uploads/2019/06/Copper-Mesa-vs-Ecuador.pdf. (accessed on 10/05/2023).

[122] Id.

norms could give the host state legitimate grounds to take regulatory measures even in situations where such obligation is not expressly stated in bilateral treaties regarding a specific investment in question.[123]This by implication means that foreign investors are expected, as a matter of norm, to refrain from misconduct that prejudices host state interests which includes sustainable development ends. As evidence of recognizing it as a norm, usually host states use it as a defense when they are alleged for violation of Full Equitable Treatment standards and Indirect Expropriations.

The notion of contributory fault is also based on Article 39 of Responsibility of States for Internationally Wrongful Acts, which states that '[i]n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity concerning whom reparation is sought.'[124] The host state's persistence in taking proper measures with the end to further sustainable development and its continuous invoking of contributory fault as a defense is, therefore, imperative to further establish it as a norm. Of course, contributory fault is not directly related to upholding sustainable development. Yet it can indirectly help in aligning behaviors of foreign investors to sustainability.

As governments in many parts of the world stick to such norms, investors may become more cautious and diligent in assessing risks associated with their investment decisions. They may consider the potential for contributory fault and evaluate their own actions or decisions that could contribute to

[123]Judith Gill and Rishab Gupta, The Principle of Contributory Fault after Yukos, Dispute Resolution International, Vol. 9: No.2, (2015), p.93.; Jean-Michel Marcoux and Andrea K. Bjorklund, Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration, International and Comparative Law QuArterly, Vol.69, (2020), p. 879.

[124] General Assembly resolution 56/83, Responsibility of States for Internationally Wrongful Acts 2001, A/56/49(Vol. I)/Corr.4. Art 39 https://www.ilsa.org/Jessup/Jessup11/basicmats/StateResponsibility.pdf (accessed 10/12/2023).

negative outcomes. Investors may adopt a more conservative approach in their decision-making process where they understand that the host state may invoke contributory fault as a defense. Availability of such defense can also encourage host state to take corrective measures on sustainable development non-compliance by foreign investors.

Concluding Remarks

Ethiopia as least developed state has a strong desire for FDI and to make the most out it. The country should prepare well designed regulatory frameworks not only to obtain optimal benefits but also to minimize negative effects on sustainability. This paper, while illustrated the imperative need for tailoring FDI activities and operations to ends of sustainable development, it explored the available mechanisms to attain such goals in this country. Among others, it suggested that the responsibility for sustainable development be shared between host states and foreign investors. The governance of international foreign investment is currently undergoing a gradual evolution towards embracing varying legitimate public interests together with investment protection. Such changes could give opportunities to Ethiopia so that it can adjust its regulatory frameworks with sustainable development ends.

By comprehending and drawing on the current FDI governance practices, we can identify platforms that allow least developed countries, like Ethiopia, to align their FDI regulations with sustainability objectives. The global consensus on the promotion and endorsement of sustainable development agenda presents a favorable opportunity in this regard. Aligning FDI regulatory frameworks with this globally valued objective can serve as a

means to address and legitimize the ongoing legitimacy crisis within the international investment regime.

Though Ethiopia has little opportunity to influence nature and contents of BITs as a result of its weak bargaining power and its strong desire to foreign capital, the global backlash against the international FDI regime and the resulting reform desire would supply some enabling opportunity if it is taped properly. Taping this opportunity, among other things, includes initiating renegotiation of investment treaties with treaty partners that may wish to make changes resulting from changing global investment landscape. In this process Ethiopia should demand to inculcate provisions that promote sustainable development friendliness.

Alternatively, Ethiopia could focus on acting in the existing playing field together with the push to reforming the international investment treaty regime. While treaty reform holds its own merits, it is equally important to make silent adjustments without impairing its economic diplomacy. This paper has outlined opportunities or avenues for making subtle adjustments in the FDI regulation process without necessarily employing transformative actions that may be beyond the capabilities of Ethiopia. These strategies, which involve varying moves, can be exercised within the existing international legal frameworks as way to (1) protect national interest and (2) to further create state practice which is essential constituent element for international custom.