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THE ADEQUACY OF ETHIOPIA'S BILATERAL INVESTMENT TREATIES IN PROTECTING THE ENVIRONMENT: RACE TO THE BOTTOM

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Abstract

States have the sovereign right to regulate investment activities within their territories to cope up with various policy objectives. One of such areas where regulation is necessitated is the protection of the host State's society and the environment. This article aims at elucidating how to strike a balance between the protection of the foreign investment and the protection of the environment under Ethiopia's Bilateral Investment Treaties (BITs). Though a comparative doctrinal investigation, this piece finds that the BITs of Ethiopia accord various protections to investments of foreign investors but they do not impose adequate obligations on the investors concerning environmental protection. It comes across the need to adopt a holistic approach of reforming the BITs from the preambles to the substantive contents. In order to safeguard Ethiopia's right to regulate, the preambles, the fair and equitable treatment (FET) and indirect expropriation provisions of the BITs should be reconsidered. For this to happen, a resort to amendment, termination and renegotiation of the agreements would be a way-out. Thus, new generation of BITs is needed to introduce a bottom-up approach and ensure sustainable development.

Keywords: Bilateral investment treaties (BIT), environment, Ethiopia, fair and equitable treatment, foreign direct investment (FDI), regulatory space

I. INTRODUCTION

The current international economic relationship among States is characterized by massive cross-border flow of capital paving ways through which foreign nationals could directly invest their finance in other States. This type of capital flow, referred to as Foreign Direct Investment (FDI), often takes place between capital exporting and capital importing countries. The effect of FDI in the state which hosts the investment is multifarious. For instance, it has the potential to contribute to the economic growth and development of the state. A properly regulated FDI can provide developing countries with foreign capital; new jobs; new and improved technology and management practices; increased domestic production, more developed and diversified domestic

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markets, stronger institutional capacity and less dependency on foreign aid and external debt to promote poverty reduction and other development initiatives.¹ Contrary to this, loosely regulated FDI causes pollution, land degradation, climate change and thereby causing harm to the society and the environment. As a matter of fact, the wastes that industrial plants release threatens the human, animal, and plant life and safety. Investors may also bring obsolete technologies which can endanger the environment and life in the host state.²

The inward flow of FDI into Ethiopia is increasing rapidly and the country's economy is in transition.³ Ethiopia has concluded dozens of BITs for the promotion and reciprocal protection of the investments.⁴ These BITs are concluded hoping that they will contribute to the development of the country. Over the past few years, industrial activities in Ethiopia are attracting attention of not only the local communities but also of the government because of their harm to the society and the environment. In light of this, it is important to consider the extent to which the existing BITs of Ethiopia support the imposition of measures to protect the environment when the environment is harmed as a result of FDI. This, however, is not to mean that domestic investments do not harm the environment. Rather, the application of BITs unduly restricts regulatory space and causing a regulatory chill on socially desirable action.⁵

The Ethiopian Constitution⁶ explicitly provides that the people of Ethiopia have the right to improved living standards and to sustainable development.⁷ It goes on saying that all international agreements and relations to which Ethiopia is a party shall ensure the country's right to sustainable development.⁸ Within the ambit of this sub paragraph falls the BITs concluded by Ethiopia. Accordingly, it is a must that Ethiopian BITs be consistent with the notion of sustainable development. The Constitution also declares that "all persons have the right to a clean and healthy environment."⁹ Ethiopia has also adopted various legislations, policies and strategies in this regard.¹⁰ Furthermore, the country has become a party to numerous Multilateral

¹ Genevieve Fox, *A Future for International Investment? Modifying BITs to Drive Economic Development*, 46 GEORGETOWN J INT'L L. 229, 234-235 (2014).

² M SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 109-110 (3rd edn, Cambridge University Press) (2010).

³ National Planning Commission, *The Second Growth and Transformation Plan (GTP II) (2015/16-2019/20)*, The Federal Democratic Republic of Ethiopia, Addis Ababa, 2015, at 14.

⁴ So far, Ethiopia has concluded a total of thirty three BITs for the promotion and reciprocal protection of investments. See UNCTAD page, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>. (Accessed on 28th of October 2017). Out of these, only twenty one BITs are in force. These are those signed with Algeria, Austria, China, Denmark, Egypt, Germany, Finland, France, Iran, Israel, Italy, Kuwait, Libya, Malaysia, the Netherlands, Sudan, Sweden, Switzerland, Tunisia, Turkey and Yemen.

⁵ See e.g. UNCHR, 'Human Rights, Trade and Investment,' UN doc E/CN.4/Sub.2//2003/9 (2003).

⁶ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, FEDERAL NEGARIT GAZETTE, 1st Year No.1, 1995 (hereafter FDRE CONSTITUTION).

⁷ *Id.* Art. 43 (1). According to the World Commission on Environment and Development definition of sustainable development of 1987, "sustainable development is a development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT. OUR COMMON FUTURE. Oxford: Oxford University Press, (1987)

⁸ *Id.* sub para. 3.

⁹ *Id.* Art. 44 (1).

¹⁰ E.g. Environmental Pollution Control Proclamation No. 300/2002, FEDERAL NEGARIT GAZETA, 9th Year No. 12, Addis Ababa, 3rd December, 2002; Federal Democratic Republic of Ethiopia, Ethiopia's Climate-Resilient Green Economy, Green economy strategy, Addis Ababa, 2011.

Environmental Agreements (MEAs) that strive to ensure sustainable development through environmental protection.¹¹

Against this backdrop, this article aims at examining how to strike a balance between the protections of FDI and Ethiopia's right and duty to impose regulatory measures to protect the environment through BITs. By using comparative and doctrinal analysis, this piece assesses the approaches of inculcating environment-friendly provisions into BITs and identifies the best experiences of other jurisprudences and creating a new roadmap for new generation of BITs. The legal analysis part is corroborated with cases rendered at different tribunals. The BITs Ethiopia has signed with other countries are analyzed through an explorative critical review approach. In the comparative part, IISD (International Institute for Sustainable Development) Model Agreement, Indian Model BIT, SADC (South African Development Community) Model BIT, and BITs agreements from different jurisdiction, most importantly signed between developed and developing countries are considered.

The remaining part of the article is organized as follows. Section II presents the general overview of BITs. Based on model agreement and comparative experience, Section III examines how environmental regulatory spaces are opened up within BITs frameworks. Adequacy of policy space under Ethiopian BITs towards the protection of the environment are analyzed under Section IV. Finally, section V comes up with conclusion and the way forward.

II. GENERAL OVERVIEW OF BILATERAL INVESTMENT TREATIES

A. Nature, Structure and Scope

Bilateral investment treaties are International Investment Agreements (IIAs) entered into between two countries that are designed to establish rules and enforcement mechanisms governing foreign investment between the state parties and their nationals.¹² BITs usually constitute a title, preamble, definition of terms, the rights and duties of the Parties, standards of protections and dispute settlement mechanisms. IIAs in general and BITs in particular have used to concentrate on the protection and promotion of foreign investments. But in recent years, the protection of the environment and other public policy objectives are emerging as one of the most serious contemporary issues of the international investment legal regime.¹³ Given the binding nature of their dispute settlement mechanisms, IIAs have a key role in supporting the protection of the environment that is essential for our economies and for sustainable development.¹⁴ In

¹¹ Ethiopia is Party to the United Nations Framework Convention on Climate Change and the Kyoto Protocol, the Convention on Biological Diversity, the United Nations Convention to Combat Desertification, the Stockholm Convention on Persistent Organic Pollutants, to mention few.

¹² Fox, *supra* note 1, at 229.

¹³ Won Kidane and Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM I L J, 4 (1034), 1067 (2014).

¹⁴ United Nations Environment Programme, UNCTAD Conference on International Investment Agreements and Sustainable Development: UNEP Statement on IIAs delivered by Anja von Moltke 16.3.2016, *available at* <http://unctad-worldinvestmentforum.org/wp-content/uploads/2016/03/Statement-UNEP.pdf>. (accessed on 3rd of November 2016).

particular, IIAs can be used to properly define how the treaty partners balance investor protection with other public policy objectives.¹⁵

Nevertheless, investment treaties of our time are more of mechanisms through which a small and typically powerful set of private actors can change the substantive content of the law outside the normal domestic legislative and judicial frameworks.¹⁶ In order to tackle this problem, BITs need to be reconstructed to accommodate both private and public interests. In this regard, one may question whether capital importing countries have the leverage to influence the capital exporting countries in determining the terms and conditions of BITs. This has a lot to do with the bargaining power of the Parties while making the treaties. In addition, capital importing nations need to be selective enough when potential investments tend to override public interests. This way, it is possible to reform and extend the scope of the current BITs.

B. Provisions of BITs with Repercussions on Environmental Protection and the Jurisprudence

This subsection aims at discussing specific provisions of BITs having implications for the protection of the environment. The discussion is further corroborated by the arbitral awards of investment arbitration tribunals.

1. Fair and Equitable Treatment (FET)

The FET standard requires the host State to accord a ‘fair and equitable treatment’ to the investments of foreign investors. This standard of protection of foreign investment remains a controversial standard of treatment under IIAs. The concept of FET is more of uncertainty because the notions of fairness and equity do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment paving ways for foreign investors to bypass domestic laws and other regulatory measures.¹⁷ The Black’s Law Dictionary defines fair as “impartial, just, equitable, and disinterested”.¹⁸ An important element that tribunals have considered in determining whether there was a violation of the FET standard is the notion of the legitimate expectations of the investor. Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any state, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability.¹⁹

¹⁵ Kathryn Gordon and Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers on International Investment, OECD Publishing, (2011), at 7.

¹⁶ Lise Johnson and Oleksandr Volkov, *State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law*, (2014), at 1. Available at <https://www.iisd.org/itm/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/>. (accessed on 2nd of November 2016).

¹⁷ United Nations Conference on Trade and Development (UNCTD), *Investment Policy Framework for Sustainable Development*, 2015. Available at http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf. (Accessed on 10th of January 2017). (UNCTAD 2015 hereafter).

¹⁸ BRYAN A. GARNER, *BLACK’S LAW DICTIONARY*, 8th ed. (2004).

¹⁹ UNCTAD, *supra* note 17.

In *Tecmed v Mexico*, concerning the revocation of a license for the operation of a landfill, the tribunal reasoned that:

The FET standard of treatment, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner... so that it may know beforehand any and all rules and regulations that will govern its investments...²⁰

Some tribunals have explicitly ruled that a breach of legitimate expectations may happen even where the host State is acting in the good faith pursuit of a legitimate regulatory measure. In *Enron v. Argentina*, the tribunal noted that FET is desirable to maintain a stable framework for the investment and concluded that a key element of FET is the requirement of a “*stable framework for the investment*.”²¹ The same tribunal added that legitimate expectations are derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.²² It further established that the principle of good faith is not an essential element of the FET standard and therefore violation of the standard would not require the existence of bad faith on the part of the host State.²³

Other tribunals also ruled that if the legal framework governing the investment changes in a way that was not anticipated by the investor at the time of making the investment, then the investor should be compensated for the cost of complying with those changes.²⁴ This means that if a new law is adopted, or an existing law is changed or applied in a new way,²⁵ those changes can trigger state liability. Moreover, onerous levels of compensation awarded to investors could preclude poorer states from taking effective measures to give effect to their international obligations to protect their environmental patrimony since they will often not be in a position to finance interference.²⁶

Thus, the use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies including those for the public good that may have a negative impact on individual foreign investors.²⁷ FET

²⁰ *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, para. 154.

²¹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007. Paras. 259 & 260.

²² *Id.* para 262.

²³ *Id.* para 263.

²⁴ See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 207; *Total v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010, para. 122.

²⁵ *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004.

²⁶ Luke E. Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development (IISD) (2003), at 31. Available at https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf. (Accessed on 2nd of November 2016).

²⁷ UNCTAD, *supra* note 17.

protections can, under some treaties, extend to subsequent actions of the state, for example changes in laws or regulations, withdrawals of essential licenses, imposition of new duties or export quota or similar.²⁸ This type of FET is evident from those treaties which use broad connotations without qualifying the standard of treatment. This, in turn, results in extensive subjectivity in the course of interpretation of the FET by arbitral tribunals. Those BITs which recognize qualified FET and those which omit the FET standard play a vital role in minimizing this unnecessary subjectivity.

At this juncture, it is important to reiterate that BITs usually contain adequate provisions that protect foreign investors against opportunistic intervention by the host states and that the notion of legitimate expectations is improperly used by investors to acquire unjust benefits. It is not uncommon to see the following six core investor protection provisions in BITs:

*(1) right to national and most-favored-nation treatments; (2) protection against expropriation, and fair, prompt, and adequate compensation when it happens; (3) right to repatriate capital and investment proceeds; (4) limitations on performance requirements; (5) access to international arbitration in the event of a dispute; and (6) authority to select top managerial personnel of their choice.*²⁹

It is also vital to note that the host states are duty bound to protect the legitimate expectation of investors. However, any interest invoked by foreign investors shall not be protected to the extent it impairs the ability of the host state to comply with its obligation to protect the environment under domestic laws and international agreements. This necessitates to draw a boundary between the genuine mistreatment of foreign investments that should be outlawed by the FET standard and measures of host states taken in pursuance of legitimate policies that cannot be held in breach of the standard, even where such measures harm foreign investments.³⁰ BITs can be used to set criteria for ensuring a proper balance between the interests of investors and host states.

Some BITs tie the FET standard to the customary international law minimum standard of treatment. In such type of agreements, FET cannot be invoked as a separate standard. What is more, the violations of other provisions of the agreement or another agreement do not give rise to the breach of FET. Art 6 of both the Canada-Tanzania BIT and Canada-Senegal BIT provides for the “Minimum Standard of Treatment” to be accorded to the investments of foreign investors. The provisions oblige each party to accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment.

According to the United Nations Conference on Trade and Development (UNCTAD), “where an IIA ties the FET obligation to the customary international law minimum standard of treatment of aliens, the threshold of liability as applied by arbitral tribunals has been generally

²⁸ Dunn Gibson and Crutcher LLP, *Bilateral and Multilateral Investment Treaties: What all Dealmakers Need to Know* (2015), at 2. Available at <http://www.gibsondunn.com/publications/documents/Bilateral-and-Multilateral-Investments-Treaties--What-All-Dealmakers-Need-to-Know.pdf>. (Accessed on 11th of November 2016).

²⁹ Fox, *supra* note 1, at 233-234.

³⁰ United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II*, United Nations, New York and Geneva (2012), at 15.

higher, i.e. the host state's conduct needs to be egregious or outrageous."³¹ In a similar fashion, the tribunal in *Pope and Talbot v. Canada* ruled that the FET standard was "additive" to the international minimum standard of treatment.³² As such, the host state is obliged not to deny justice so that the foreign investor acquires adequate protection to her economic rights and interests. At the same time, the host state will also be able not to give up its non-economic interests.

2. Expropriation

In a nutshell, investment rules and regulations do not provide precise definition for the term expropriation.³³ Generally speaking, expropriation can be of two types: direct and indirect.³⁴ The former is made through a formalized expropriation decree or law whereas the latter emanates from measures the host state takes to regulate economic activities within its territory, even where such regulation is not directly targeted at an investment.³⁵ It has to be clear that not all measures of the host State constitute expropriation under international investment law. In other words, there are some measures essential to the efficient functioning of the state for which no compensation shall be paid like non-discriminatory measures taken for environmental protection.³⁶ In the course of imposing any measure for environmental protection, however, the host state must take into account its investment treaty obligations.

Though whether a measure taken by the host State is non-compensable regulatory measure or otherwise is to be determined on a case by case analysis in the course of dispute settlement, it is important to highlight some criteria that may be taken in to consideration. Basically, the purpose of the measure needs to be examined. Accordingly, it is important to make sure that the measures are taken for environmental protection. Second, any such measure shall not cause a substantial deprivation of the economic interests of the investor. When severe economic impact is caused to the foreign investor, the host State may be required to pay compensation. Third, it shall not be used as a disguised taking of the investment and shall be non-discriminatory.³⁷

A broad definition of indirect expropriation, adopted because of lack of precise definition of the term, in IIAs may result in a situation where all state measures that harm an investor can be considered an indirect expropriation, irrespective of the reasons that underlie any such measure.³⁸ Accordingly, the determination of the scope of indirect expropriation is a prominently debated issue particularly whether or not it includes "measures tantamount to expropriation." The practice of tribunals tends to show that such a phrase includes indirect expropriation. For

³¹ UNCTAD, *supra* note 17, at 13.

³² *Pope and Talbot v. Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 110.

³³ OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law*, OECD Working Papers on International Investment, No. 2004/04, 2004, at 5. Available at <http://dx.doi.org/10.1787/780155872321>. accessed on 23rd of September 2017.

³⁴ *Id.*

³⁵ Suzy H. Nikiema, *Indirect Expropriation*, Best Practices Series, IISD, 2012, at 1. Available at http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf. (accessed on 3rd of November 2016).

³⁶ *Id.* at 4.

³⁷ OECD, *supra* note 33.

³⁸ Nikiema, *supra* note 35, at 3.

instance, in *Tecmed v. Mexico*,³⁹ the tribunal held that the failure to renew the operating permit had violated Article 5 of the Mexico-Spain BIT, which safeguards investors from expropriation or equivalent measures. It recognized that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and further noted the following:

Generally, it is understood that the term ‘equivalent to expropriation’ or ‘tantamount to expropriation’ included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called ‘indirect expropriation’ or ‘creeping expropriation’, as well as to the *de facto* expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not express the purpose of depriving one of rights or assets, but have actually that effect.⁴⁰

As most IIAs also prohibit indirect expropriation, which extends to regulatory takings, and as some arbitral tribunals have tended to interpret this broadly so that it includes legitimate regulatory measures in the pursuit of the public interest, the expropriation clause has the potential to pose undue constraints on a State’s regulatory capacity.⁴¹ To avoid this, policymakers could clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.⁴²

Some international investment tribunals have found that environmental regulatory measures constituted expropriation thereby entailing the liability to pay compensation. For instance, in *Santa Elena v. Costa Rica*, the tribunal stated that:

*Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.*⁴³

Some BITs to which developing countries are parties recognize that non-discriminatory measures aimed at protecting the environment do not constitute expropriation. In this regard, the BIT entered into between India and Senegal⁴⁴ is a good example. It constitutes an annex for the interpretation and clarification of expropriation, which forms an integral part of the BIT. It provides that “except in rare circumstances, non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives including health, safety

³⁹ *Tecmed v. Mexico*, *supra* note 20.

⁴⁰ *Id.* para. 114.

⁴¹ UNCTAD, *supra* note 17.

⁴² *Id.*

⁴³ *Santa Elena v. Costa Rica*, ICSID, Case No. ARB/96/1, para 72 (2002).

⁴⁴ Agreement between the Government of the Republic of India and the Government of the Republic of Senegal for the Promotion and Protection of Investments, (signed 03/07/2008 and entered into force 17/10/2009). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1595>. (Accessed on 3rd of December 2016). (India-Senegal BIT hereafter).

and the environment concerns do not constitute expropriation or nationalization.”⁴⁵ Similarly, the BIT concluded between Canada and Tanzania BIT⁴⁶ states that:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.⁴⁷

Accordingly, it is possible for the host State to impose measures to protect the environment without the measure constituting indirect expropriation.

Furthermore, the India-Senegal BIT states that “actions and awards by judicial bodies of a Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization.”⁴⁸ Pursuant to the BIT between Turkey and Senegal,⁴⁹ measures aimed at the protection of the environment do not constitute expropriation provided that they are non-discriminatory.⁵⁰ Thus, tribunals need to be cautious of the regulatory measures that host States may take to protect their environmental interest and measures that CONSTITUTE INDIRECT EXPROPRIATION.

III. ENVIRONMENTAL REGULATORY SPACE IN IIAS

Being an integral parts of modern IIAs, environmental stipulation have featured in different parts of agreements, from preamble through substantive parts and annexes. As looking into IIAs serve as a foundation to evaluate Ethiopian BITs, this section presents how sovereign rights of regulating the national environment are coined in IIAs, and its implication and meaning (enforceability) when they appear in different parts of an agreement.

A. Preambles

The sovereign right to regulate and environmental protection may be expressly recognized in the preamble of IIAs. At this juncture, it is vital to consider the role of preambles. The Vienna Convention on the Law of Treaties stipulates that treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁵¹ It goes on saying that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and

⁴⁵ *Id.* Annexure 5.1 (3).

⁴⁶ Agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (signed on 17th May of 2013). Available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/222>. (Accessed on 23rd of January 2017). (Canada-Tanzania BIT hereafter).

⁴⁷ *Id.* Art. 10 (5) last para.

⁴⁸ India-Senegal BIT, *supra* note 44, Annexure 5.1 (4).

⁴⁹ Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments, Signed on 15th of June 2015. (Turkey-Senegal BIT hereafter).

⁵⁰ *Id.* Art 5 (2).

⁵¹ Vienna Convention on Law of Treaties, concluded at Vienna on 23rd May of 1969, Art. 31 (1).

annexes.⁵² Thus, preambles could be used in interpretation of treaties both at the text and context stage, and at the object and purpose stage. Since the existing BITs primarily focus on the protection of investments, tribunals have often relied on preambles to justify expansive interpretations of investor protections, where the preambles clearly indicated that the overriding objective of the treaty was investment promotion and protection.

For instance, in *SGS v. Philippines*, the tribunal relied on the preamble of the applicable BIT, i.e. Philippines-Switzerland BIT of 1997, which is intended to create and maintain favorable conditions for investments by investors of one contracting party in the territory of the other contracting party thereby favoring the investor. The tribunal stated that:

The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ...to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other.... It is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.⁵³

The BIT entered into between Finland and Nigeria,⁵⁴ employs environmental language in its preamble. After stipulating the desire to promote and protect international investment, the preamble of the agreement recognizes the importance of environmental protection. It provides that “these objectives can be achieved without relaxing health, safety and environmental measures of general application.”⁵⁵ The preamble to the Canada-Senegal BIT also explicitly refers to the promotion of sustainable development.⁵⁶ It reads “recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development...”⁵⁷

The preamble of the Canada-Tanzania BIT can also be considered as a good example in striking the balance between investment protection and sustainable development. It acknowledges the Parties’ desire in the following terms:

Desiring to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries...; recognizing that the promotion and reciprocal protection of such investments favor the economic prosperity and sustainable development

The foregoing preambles declare not only the parties’ interest to achieve economic objectives but also their desire to reach the objectives in a manner consistent with the protection of the environment. This concern for the protection of the environment and other social objectives

⁵² *Id.* Art. 31 (2).

⁵³ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 116.

⁵⁴ Agreement between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments, signed 22nd June 2005. (Finland-Nigeria BIT hereafter).

⁵⁵ *Id.* Preamble; See also the Turkey-Senegal BIT, *supra* note 49.

⁵⁶ Agreement between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, (concluded on 27th November of 2014) (Canada-Senegal BIT hereafter). Available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3240>. (Accessed on 15th of February 2017). Art 16

⁵⁷ *Id.*

could not be underestimated as it informs tribunals to take care of such non-economic interests in the course of interpretation of the BIT.

The IISD Model Agreement⁵⁸ introduces the concepts of sustainable development and sustainable investment. Some of the expressions employed in its preamble⁵⁹ are worth due attention. To mention few:

- a) The concern for sustainable development in terms of sustainable investment has become at the forefront. It has been admitted that the development of the national and global economy is possible only through sustainable investment.
- b) Sustainable investment begs for the cooperation between foreign investors, their home states and host governments of the concerned investment activity.
- c) The need for balance of rights and obligations in international investment between foreign investors, their home states and the host states has become immense.
- d) IIAs are required to reflect the principles of transparency, accountability and legitimacy for all participants (investors, home states and host states) of FDI.

The Indian Model BIT⁶⁰ has also a room for the notion of sustainable development. It declares the Parties' objective in the following terms:

Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties.⁶¹

In addition to its adoption of the principle of sustainable development, the Indian Model acknowledges the parties' right to regulate the investment and to exercise flexibility with respect to the conditions applicable to such investments.

B. Substantive provisions

When BITs do not create express exceptions from the obligations contained therein, they might nonetheless expressly mention the noninvestment obligations of the contracting parties, in balancing clauses.⁶² The new generation of BITs has seen the multiplication of this kind of clauses, which can take different forms and express different levels of commitment to non-investment obligations.⁶³ In this regard, it is vital to consider some BITs to which developing countries are Parties. For instance, the BITs concluded between Canada and Tanzania⁶⁴ as well as that of Canada and Senegal⁶⁵ contains a provision on "Health, Safety and Environmental

⁵⁸ Int'l Inst. for Sustainable Dev., IISD Model International Agreement on Investment (Apr. 2005), available at http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf, (accessed on 23rd of January 2017).

⁵⁹ *Id.* preamble.

⁶⁰ Model Text for the Indian Bilateral Investment Treaty, (Indian Model BIT hereafter), Available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf. (Accessed on 7th of November 2016).

⁶¹ *Id.* preamble.

⁶² Alessandra Asteriti, Greening Investment Law, PhD thesis, University of Glasgow, (2011), at 144. Also available at <http://theses.gla.ac.uk/2813/>. (accessed on 15th December of 2016).

⁶³ *Id.*

⁶⁴ Canada-Tanzania BIT, *supra* note 46.

⁶⁵ Canada-Senegal BIT, *supra* note 56, Art. 15.

Measures” which states that “The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures”.⁶⁶

The SADC Model BIT⁶⁷ enshrines sustainable development concerns both under its preamble and substantive provisions. The Model BIT provides for options the parties can resort to in the course of drafting their investment agreements. In the preamble, the need to promote investment opportunities that enhance sustainable development is acknowledged. It also recognizes the right to regulate investment in explicit terms.⁶⁸ According to Art. 1 of the SADC Model, the objective of an investment agreement shall be to encourage and increase investments that support the sustainable development of each party.⁶⁹ With respect to FET, the SADC Model optionally refers to customary international law. It states that “each State Party shall accord to Investments or Investors of the other State Party FET in accordance with customary international law on the treatment of aliens”.⁷⁰

Pursuant to Art. 6.7 of the SADC Model, a non-discriminatory measure of a state party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement. The Model further requires investors to comply with environmental impact assessment under its Art. 13. Art. 14 (1) of the Model also requires investments to implement a system of environmental management in light of available international environmental management standards. By virtue of Art. 14 (2) of the Model, such environmental management system has to be improved and updated regularly. More importantly, the SADC Model requires “investors and their investments not to establish manage or operate investments in a manner inconsistent with international environmental, labor, and human rights obligations binding on the host State or the home State, whichever obligations are higher.”⁷¹ Art. 22 of the Model provide that each state party is permitted to adopt its own environmental standards and to modify such standards where the need arises.

The IISD’s model multilateral investment agreement attempts to change the prevailing structure of investment treaties to specifically introduce development objectives into them.⁷² The IISD model agreement achieves this by creating both rights and obligations for investors and host countries. The Model was designed in such a way that the protections for investors are

⁶⁶ Canada-Tanzania BIT, *supra* note 46, Art. 15.

⁶⁷ SADC Model Bilateral Investment Treaty Template with Commentary, 2012. (SADC Model hereafter). Available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>. (Accessed on 19th of February 2017).

⁶⁸ Art. 20.1 of the SADC Model reads: ‘In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.’

⁶⁹ *Id.* Art. 1.

⁷⁰ *Id.* Art. 5, Option 1. The second option refers to ‘fair administrative treatment.’

⁷¹ *Id.* Art. 15.3.

⁷² Jennifer Maul and Kate Vyborny, *Globalization, International Law and the Future of International Investment Treaties, An Introductory Workshop on the International Institute for Sustainable Development’s Model International Agreement on Investment for Sustainable Development*, Carnegie Endowment for International Peace, at 1. Available at <http://carnegieendowment.org/files/IISD.pdf>. (Accessed on 3rd of December 2016).

conditioned upon minimum responsibilities, including conducting environmental impact assessments.⁷³ Art. 12 of the Model requires foreign investors or their investments to undergo environmental or social impact assessments prior to the establishment of the investment in accordance with the laws of the host state. Similarly, Art. 14 impose post-establishment obligations on foreign investors to maintain environmental management system and standard. Furthermore, Art. 20 provides that it is inappropriate for the parties to attract foreign investment through the adoption of lax environmental and other standards. More specifically, Art. 21 (1) of the Model calls for high levels of environmental protection. By so doing, the model seeks a balance between rights and obligations for investors, host states, and home states. The agreement affirms the inherent right of governments to regulate foreign investment in the public interest and to articulate their own development policy.⁷⁴

Art. 7 of the IISD Model entitled “Minimum international standards” provides that “each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security and such obligation is to be understood as consistent with the obligation of host states.”⁷⁵ Furthermore, the preceding sub-paragraph is said to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments.⁷⁶ It goes on saying that the concepts of FET and full protection and security are included within this standard, and do not create additional substantive rights.⁷⁷

The provision of the IISD Model on expropriation reiterates that regulatory measures may not be considered as expropriation.⁷⁸ The IISD Model, under its Article 8 (I), stipulates that non-discriminatory regulatory measures taken by a party that are designed and applied to protect or enhance legitimate public welfare objectives, such as health, safety and the environment, do not constitute an indirect expropriation. Such measures, nevertheless, are required to be in consistency with the right of states to regulate and the customary international law principles on police powers.

Under Art. 10.6 (ix) of the Indian Model, foreign investors and investments are duty bound to develop and comply with policies to ensure timely and accurate disclosure of material information relating to environmental impacts and management systems. This obligation persists even in the absence of such obligation under the laws and regulations of the host state. Furthermore, investors and their investment are obliged to comply with the environmental laws of the host State applicable to the concerned investment by virtue of Art. 12.1 (iii) of the same Model.

⁷³ Luke E. Peterson, *Bilateral Investment Treaties- Implications for Sustainable Development and Options for Regulation*, FES Conference Report (2007), at 2. Available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf. (Accessed on 15th of January 2017).

⁷⁴ *Id.*

⁷⁵ IISD Model, *supra* note 58, Art. 7 (A).

⁷⁶ *Id.* Art. 7 (B).

⁷⁷ *Id.*

⁷⁸ *Id.* Art. 8 (I).

C. Exceptions

An environmental exception clause is a general provision that excuses governments from treaty obligations where the challenged measures were taken for environmental purposes.⁷⁹ Exceptions can be inserted in IIAs in two ways- general and specific. General exceptions permit the Parties to the agreement to derogate from all of their obligations provided that certain requirements are satisfied. Specific exceptions, on the other hand, are aimed at preventing the application of specific obligations, such as those arising from expropriation clause.

Many countries have included general exceptions for measures taken to protect environmental interests in treaty texts. These express carve-outs allow the parties to adopt necessary measures to protect human, animal and plant life or health as well as for conserving natural resources and ensure that environmental policies are not watered down to attract more investments.⁸⁰ A good example of the general exceptions is the BIT concluded between Egypt and Canada.⁸¹ Under Art XVII of the BIT, general exceptions to the application of the agreement are recognized. The relevant part of the provision reads “nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”⁸² It goes on saying that:

Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources⁸³

The foregoing provision is almost similar to the general exception recognized under the General Agreement on Tariffs and Trade (GATT).⁸⁴ Despite its exceptional recognition for natural resource conservation and protection of the environment, the dispute settlement organs of the World Trade Organization (WTO) regime constructed this exception narrowly.⁸⁵ The effectiveness of the environmental general exception under the international trade regime is complicated by the range of interpretations concerning Article XX of the GATT that have been

⁷⁹ Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership*, 45 ELR 10684 (2015) at 11.

⁸⁰ Francesca R. Jacur, *Changing Climate in Climate Change Investment; An International Law Perspective*, at 14-15, Available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_071568.pdf. (Accessed on 12th of February 2017).

⁸¹ Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, concluded on 13th of November 1996). (Egypt-Canada BIT hereafter).

⁸² *Id.* Art XVII (2).

⁸³ *Id.* Art XVII (3).

⁸⁴ General Agreement on Tariffs and Trade, Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, in World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: WTO, 1995), Art. XX (b and g).

⁸⁵ Jonathan M. Harris, *Trade and the Environment, Global Development and Environment Institute, Tufts University* (2004) at 12.

issued by several GATT/WTO dispute settlement panels.⁸⁶ However, the possibility of ensuring environmental protection, at least to some extent, cannot be ruled out.

With a slight difference from the preceding paragraph, the BIT signed between India and Senegal⁸⁷ provides for a “General and Security Exceptions” which encompasses measures for public health reasons or to prevent diseases affecting animals and plants.⁸⁸ Furthermore, Art. 16 of the Indian Model BIT provides that nothing in this Treaty precludes the host state from taking actions or measures of general applicability which it considers necessary with respect to the protection and conservation of the environment including all living and non-living natural resources.⁸⁹ Though ‘exceptions’ are more difficult to prove than ‘principles,’ which are positive rules that establish parallel rights and obligations for the concerned parties, they can still serve as one of the approaches used to incorporate environment-friendly provisions in BITs.

D. Separate side agreements

Apart from or in addition to the recognition of environmental-friendly provisions in BITs, it is also possible to adopt a separate side agreement to protect the environment. This approach makes it easy to come-up with all necessary details towards environmental objectives. A good example in this regard is the NAFTA Side Agreement⁹⁰ signed by NAFTA member countries. Even if it is not a BIT, NAFTA regulates investment activities under its Chapter Eleven and the side agreement concluded under its ambit can be taken as a good practice.

IV. STOCKTAKING OF ENVIRONMENTAL REGULATION UNDER ETHIOPIA'S BITs

Evidences show that there are multiples of ways for exercising the sovereignty right of regulating environmental by host states. They have done that without adversely affecting other investment interests within the frameworks of BITs. Against such backgrounds, this section critically evaluates the extent to which Ethiopia's BITs empower the state and oblige investors of their environmental duties. Accordingly, examination of different sections of the signed BITs and new developments are analyzed.

A. Preambles

The Ethiopia-Turkey BIT was concluded on 16th November 2000.⁹¹ Before proceeding with its substantive contents, it is vital to start by examining its preamble which stipulates:

⁸⁶ Douglas J. Caldwell, *Multilateral Environmental Agreements and the GATT/WTO Regime*, Discussion Draft, 1998, at 13.

⁸⁷ India-Senegal BIT, *supra* note 44.

⁸⁸ *Id.* Art. 13.

⁸⁹ Indian Model BIT, *supra* note 60, Art. 16.1 (v).

⁹⁰ North American Agreement on Environmental Cooperation Between the Government Of Canada, The Government of the United Mexican States and the Government of the United States of America, *available at* <http://www.sice.oas.org/trade/nafta/Environ.asp>. (Accessed on 17th of November 2016).

⁹¹ Agreement between the Republic of Turkey and the Federal Democratic Republic of Ethiopia concerning the Reciprocal Promotion and Protection of Investments, (concluded on 16th of November 2000). (The Ethiopia-Turkey BIT).

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party; ...; Agreeing that FET of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.⁹²

The Ethiopia-China BIT⁹³ was meant to create favorable conditions for the investment activities and to bring economic prosperity as envisaged from the following terms:

Intending to create favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States.⁹⁴

From the very outset, the Parties' foremost objective is to create favorable conditions for the investment activity of investors of one contracting Party in the territory of the other contracting Party. This objective, on its face, is sound as it creates a safe business environment for the investors of both Parties. The next paragraph enshrines two things: stimulating business initiative of the investors and an increment of prosperity in both States. This paragraph seems to have been constructed on the belief that investment activities by themselves could ensure prosperity. The preamble also strives to intensify economic cooperation. A close look at the foregoing preamble illustrates the Parties' sole interest to encourage investment activities. No single word is inserted, which recognizes other non-economic interests of the contracting Parties including the need to protect the environment.

The Ethiopia-France BIT⁹⁵ was concluded on 25th June 2003. To start with its preamble, it aims at creating favorable conditions for investments by the investors of one contracting Party in the territory of the other contracting Party. It reads:

Desiring to strengthen the economic cooperation between both States and to create favorable conditions for French investments in Ethiopia and Ethiopian investments in France, Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two countries in the interest of their economic development⁹⁶

This preamble also lacks the regulatory space through which states could impose measures to protect the environment.

⁹² *Id.* preamble.

⁹³ 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, Signed on 11 May 1998 and entered into force on 1 May 2000. (Ethiopia-China BIT hereafter).

⁹⁴ *Id.* preamble.

⁹⁵ Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, (concluded on 25th of June 2003). (Ethiopia-France BIT).

⁹⁶ *Id.* preamble.

The Ethiopia-Sudan BIT⁹⁷ was signed on 7 March 2000 and entered into force on 15 May 2001. Just like other BITs to which Ethiopia is a Party, the preamble of the BIT focuses on the sole aim of protecting foreign investments. It reads:

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relation between them and in particular to create favorable conditions for investments by Investors of one Contracting Party in the territory of the other Contracting Party; Recognizing the need to protect investments by Investors of the Contracting Parties and to stimulate the flow of investments and individual business initiative with the view of promoting the economic prosperity of the Contracting Parties;

The currently effective BIT between Ethiopia and Germany was concluded on 19 January 2004.⁹⁸ This BIT, in its preamble, declares the intention of the Parties to cooperate in promotion and protection of investments in the following terms:

Desiring to intensify economic co-operation between both States; intending to create favorable conditions for investments by investors of either State in the territory of the other State; recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations.

Just like other BITs of Ethiopia, the preamble to this BIT focuses on the protection and promotion of investments and it does not reflect the need to protect the environment. The following subsection also presents that the BITs of Ethiopia are means by which foreign investors maximize their interests.

B. Duty to promote and protect investment

Generally speaking, Ethiopian BITs lack provisions that impose parallel obligations on investors with respect to environmental protection. In the absence of such provisions in BITs, a resort to only domestic environmental rules and regulations may not effectively address environmental concerns. This is attributable to two reasons. First, the protection offered to investors may limit the ability of governments to regulate investment for the protection of the environment, natural resources and other social goods, and to ensure that foreign investment contributes to overall national development goals.⁹⁹ Any attempt by the host state to impose measures for environmental protection could result in the violation of its obligations under BITs. Second, by virtue of the Vienna Convention on the Law of Treaties, states are precluded from invoking their domestic laws as a defense for the breach of their treaty obligations.¹⁰⁰ As such, for the host state's environmental measure to be justifiable without constituting treaty violation, the measure

⁹⁷ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of the Sudan on the Reciprocal Promotion and Protection of Investment, (concluded on 7th March of 2000). (The Ethiopia-Sudan BIT).

⁹⁸ See Treaty between the Federal Democratic Republic of Ethiopia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, (concluded on 19th January of 2004). (The Ethiopia-Germany BIT).

⁹⁹ Livia Costanza, *The Security of International Investments – A Synthesis of Impacts on Public Policies and Domestic Laws of Host States*, LL.M Dissertation, Faculty of Law, Victoria University of Wellington, 2009, at 66.

¹⁰⁰ Vienna Convention, *supra* note 51, Art. 27.

must first get an equal status with the obligation to protect and promote foreign investment under the applicable treaty.

Under the BITs of Ethiopia, the Parties' conviction of promotion and protection of investments is further elaborated under the substantive provisions of the BITs. At this juncture, it is vital to examine the implications of a heavy reliance on attracting, promoting and protecting foreign investment. Basically, it is important for every State to promote and protect investment so as to comply with its investment treaty obligations. The question, however, is what kind of investments deserve protection? Or could States be better-off by protecting all investments whatsoever? These questions are relevant because there are some investments which are irresponsible to the society and the environment in which they operate. Thus, States should protect quality investments that are responsible for each and every of their activities. This takes us to a third question which asks how should the duty to promote and protect investment appear in BITs. The answer is clear: BITs should not promote and protect investments in generic terms but only those responsible to the society and the environment.

According to Art. 2 of the Ethiopia-Turkey BIT, each Party assumed the obligation to encourage and create favorable conditions for investors of the other Party to invest in its territory.¹⁰¹ By the same token, the substantive part of the BIT also focuses only on the protections of the investors and their investments. For instance, the provision on the promotion of investments obliges the Parties to encourage investors to make investments and to grant all sorts of assistance with respect to activities associated with such investments.¹⁰² Contrary to the normal BITs practice, the Ethiopia-Belgian-Luxembourg BIT, which has not entered into force yet, introduces environmental measures under its Art. 5.

The Ethiopia-France BIT enshrines the duty of the parties to promote investment. Article 2 provides that each contracting party shall encourage and admit on its territory and in its maritime area, investments made by nationals or companies of the other contracting party. What is more, under the Ethiopia-Sudan BIT, the Parties are duty bound to encourage and create favorable conditions for investors of the other contracting Party¹⁰³ and to grant the necessary permit needed for the investment.¹⁰⁴ The Ethiopia-Germany BIT also follows the same stance. Article 2 of the BIT is another indication of the Parties commitment to focus solely on economic objectives. It provides that "each Contracting Party shall within the framework of its policies in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its legislation."¹⁰⁵ In this regard, most BITs of Ethiopia talk similar language. They tend to maximize the interests of foreign investors by providing for various obligations on the country.

¹⁰¹ Ethiopia-Turkey BIT, *supra* note 91, Art. 2 (1).

¹⁰² Ethiopia-China BIT, *supra* note 93, Art. 2.

¹⁰³ Ethiopia-Sudan BIT, *supra* note 97, Art. 2 (1).

¹⁰⁴ *Id.* Art. 2 (2).

¹⁰⁵ Ethiopia-Germany BIT, *supra* note 98, Art. 2 (1).

C. Standards of Treatment

Ethiopia's BITs provide for different types of standards of treatment to be afforded to foreign investors and their investments. One of such standards of protection is the FET. With the exception of the Ethiopia-United Arab Emirates BIT, which has not entered into force yet, the remaining BITs of the country recognize the FET principle. Not surprisingly, in some cases, the BITs stipulate the FET as their very objective in their preamble in addition to the substantive provisions.¹⁰⁶

Out of the effective BITs of Ethiopia covered under this article, only the one concluded with France recognizes a qualified FET.¹⁰⁷ Basically, FET can be qualified by reference to international law (this is the stance taken by the Ethiopia-France BIT), by listing FET elements (making exhaustive or illustrative lists) and by incorporation of FET modifiers like, for instance, combining with NT and MFN.

The Ethiopia-Turkey BIT provides that investments of investors of the other contracting party shall at all times be accorded FET and shall enjoy full protection in the territory of the other contracting party.¹⁰⁸ It is nowhere clear as to what amounts to the breach of this obligation. In addition, the provision is not clear whether this protection is self-containing or dependent on the international minimum standard of treatment.

Art. 3 of the Ethiopia-China BIT, on its part, provides for the standards of treatment to be accorded to investments. Accordingly, the Parties are duty bound to extend FET to the investments and associated activities of the investors. It goes on saying that investments and activities associated with investments of investors of either party shall be accorded FET and shall enjoy protection in the territory of the other party.¹⁰⁹

What makes the FET under the Ethiopia-China BIT different is that the Ethiopia-China BIT uses a broad language which extends to activities associated with investments. As it is difficult to ascertain such related activities, it is more likely that foreign investors argue on the basis of this provision to attack all measures of host states.

Article 3 of the Ethiopia-Sudan BIT prescribes the necessary standards of treatment. Hence, parties shall accord to the investments of investors from the other contracting party full protection, non-discriminatory, NT and FET. It stipulates that each contracting party shall ensure FET within its territory to investments and investors of the other contracting party and shall not be less favorable than that accorded to investments made by its own investors or investors of any third states.

Furthermore, with respect to the FET principle, the Ethiopia-Germany BIT acknowledges that each contracting party shall in its territory in any case accord investments by investors of the

¹⁰⁶ See *e.g.* Ethiopia's BIT concluded with Denmark, preamble and Art. 3 (1).

¹⁰⁷ The BITs Ethiopia concluded with Finland, Germany, Iran, Israel, Italy, Kuwait, Libya, Malaysia, Netherlands, Sudan, Sweden, Switzerland, Tunisia, Turkey and Yemen recognize unqualified FET. Consequently, the FET under these BITs is vulnerable to a broad interpretation with the possibility of zeroing policy space.

¹⁰⁸ Ethiopia-Turkey BIT, *supra* note 91, Art. 2 (2).

¹⁰⁹ Ethiopia-China BIT, *supra* note 93, Art. 3(1).

other contracting party FET as well as full protection under the Treaty.¹¹⁰ Rather than providing for the FET, the provision, just like other BITs, is not clear as to what constitutes FET.

D. Expropriation

Concerning expropriation, some BITs of Ethiopia explicitly recognize the direct-indirect expropriation classification.¹¹¹ Others employ equivalent terms or phrases such as “expropriate, nationalize or take similar measures”, “other measures having the same nature or the same effect” and “subjected to any other measure the effects of which would be tantamount to expropriation”.¹¹² These latter terminologies connote indirect expropriation. Not surprisingly, all the BITs require that indirect expropriation, too, must be compensated. Indirect expropriation includes regulatory measures that harm, affect or interfere with the investment to such a degree that they effectively take the investors' property even if the investors still technically retain ownership.¹¹³ Thus, environmental regulation could fall in the ambit of such phrases thereby entailing liability.

The Ethiopia-Turkey BIT connotes that investments shall not be expropriated, nationalized or subject, *directly or indirectly*, to measures of *similar effects* except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in the Article III of this Agreement.¹¹⁴ It lacks a language that excludes regulatory measures taken for environmental protection from constituting indirect expropriation.

The expropriation provision of the Ethiopia-China BIT lacks adequate policy space to regulate in the interests of the society and the environment without paying compensation to the foreign investors. It stipulates that neither party shall expropriate, nationalize or take similar measures against investments of investors of the other party in its territory, unless it is for the public interests; under domestic legal procedure; without discrimination and against compensation.¹¹⁵ It is important to note here that the host state may expropriate foreign investments provided that it is for public interest and against prompt, adequate and effective compensation. In other words, although environmental concerns may constitute public interest in this scenario, environmental measures may not be imposed in the absence of compensation. This needs to be compared to the provisions of some BITs which enable the host state to adopt environmental regulatory measures without effecting compensation to the foreign investors.

Article 5 of the Ethiopia-France BIT entitled “Dispossession and Indemnification” recognizes privilege against expropriation. With respect to expropriation, it states that “Neither Contracting Party shall take any measures of expropriation or nationalization or any other

¹¹⁰ Ethiopia-Germany BIT, *supra* note 98, Art. 2 (2).

¹¹¹ E.g. Ethiopia-Turkey BIT, *supra* note 91; Ethiopia-France BIT, *supra* note 95.

¹¹² E.g. The BITs Ethiopia concluded with China, Sudan and Germany.

¹¹³ Nathalie Bernasconi-Osterwalder and Lise Johnson, Belgium's Model Bilateral Investment Treaty: A review, Draft for Discussion (2010) at 15. Also available at <http://www.iisd.org>. (Accessed on 11th of February 2017).

¹¹⁴ Ethiopia-Turkey BIT, *supra* note 91, Art. 4 (1).

¹¹⁵ Ethiopia-China BIT, *supra* note 93, Art. 4(1).

measures having the effect of dispossession, direct or indirect.”¹¹⁶ What makes the Ethiopia-France BIT different from others in this regard is that it introduces a “More Favorable Provisions” that could prevail over the BIT. Article 7 of the BIT provides that investments made by nationals or companies of one contracting party having formed the subject of a particular commitment from the other contracting party, according to its legislation, to a specific contract, or to any other form of agreement, shall be governed, without prejudice to the provisions of this Agreement, by the terms of this said commitment if the latter includes provisions more favorable than those of this Agreement.

Article 4 of the Ethiopia-Sudan BIT provides that neither contracting party shall take any measures of expropriation, nationalization or *any other measures having the same nature or the same effect* against investments of Investors of the other Contracting Party unless some requirements are satisfied. The Ethiopia-Germany BIT recognizes both direct and indirect expropriation. The relevant part of the provision on expropriation states that investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected to *any other measure the effects of which would be tantamount to expropriation* or nationalization in the territory of the other contracting party.¹¹⁷ The way indirect expropriation is inculcated in this provision may overwhelm measures taken for the protection of the environment.

At this juncture, it is important to note that expropriation is a sovereign right of the host State when the conditions prescribed in the appropriate legal frameworks is satisfied like the existence of *public purpose*, non-discrimination, prompt, adequate and effective compensation. The *public purpose* criterion here is not to mean that regulatory environmental measures should result in the obligation of the host State to pay compensation. This is because not all regulatory measures constitute expropriation and there must be a room for police power. If the host State is required to pay compensation for each and every measure taken to protect its environment, the law itself would defeat its purpose. Thus, expropriation should start to count only where the environmental regulatory measures go beyond their objectives and cause substantial deprivation of the rights of the investor.

E. The Possibility of Reforming Ethiopia's BITs

1. Amendment, Termination and Renegotiation

Amendment is one of the ways via which the BITs can be reformed. The Parties may amend the provisions of BITs to incorporate environment-friendly provisions. Unfortunately, only very few BITs of Ethiopia permit amendment. Under the BITs of the country concluded with Algeria (Art. 11), Denmark (Art. 13), Malaysia (Art. 11), Turkey (Art. 9 (3)), amendment is permitted by the mutual consent of the Parties and in writing. In a somewhat different language, Art. 11 of the Ethiopia-Malaysia BIT provides that amendment by mutual consent is possible without prejudice to the rights and obligations arising from the BIT prior to the date of such alteration or modification until such rights and obligations are fully implemented. On the other hand, the BITs

¹¹⁶ Ethiopia-France BIT, *supra* note 95, Art. 5 (2).

¹¹⁷ Ethiopia-Germany BIT, *supra* note 98, Art. 4 (2).

Ethiopia signed with Austria, China, Finland, France, Germany, Iran, Israel, Kuwait, Libya, Netherlands, Sudan, Sweden, Switzerland, Tunisia and Yemen do not permit amendment to the agreements.

Termination of BITs is the other means by which the Parties reconcile the discrepancy between economic and non-economic objectives. However, a State could be better-off where termination is followed by renegotiation to introduce new generation of BITs. Practice envisages that countries have terminated BITs to minimize the unnecessary effects of such agreements. According to UNCTAD, at least 110 BITs were renegotiated by the end of 2006.¹¹⁸ For instance, in 2005, China renegotiated BITs with Belgium Luxembourg, the Czech Republic, Portugal, Slovakia and Spain, while Germany renegotiated BITs with Egypt and Yemen.¹¹⁹ It has to be noted at this point that the termination of BITs could differ from the termination of other treaties. For instance, it is not easy to terminate BITs before the date of their expiry. By the same token, the Ethiopian BITs stipulate that the agreements will remain effective for certain fixed period of time like ten,¹²⁰ fifteen,¹²¹ twenty¹²² or thirty¹²³ years. Once the initial period is over, either of the contracting parties may cause termination upon giving written notice to the other party. Upon termination, prior investments will receive protection under the terminated BIT for additional period of time.¹²⁴

2. Recent Developments: the Draft Model BIT of Ethiopia and the Ethiopia-United Arab Emirates BIT

Currently, there is an attempt to adopt a model BIT¹²⁵ which incorporates the notion of sustainable development. More specifically, it explicitly refers to environmental protection and also acknowledges the need to promote corporate social responsibility. The preamble of the draft model adopts the need to promote and protect investment on the one hand and the need to protect the environment on the other.

¹¹⁸ UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, United Nations, New York and Geneva, 2007, at 3. Available at http://unctad.org/en/docs/iteia20073_en.pdf. (Accessed on 25th of February 2017).

¹¹⁹ *Id.*

¹²⁰ See BITs of Ethiopia signed with Algeria (Art. 11 para. 2), Austria (Art. 25 (2)), Belgian-Luxembourg (Art. 14 (1)), China (Art. 13 (1)), Denmark (Art. 16 (1)), Germany (Art. 12 (2)), India (Art. 15 (1)), Iran (Art. 14 (1)), Israel (Art. 14), Libya (Art. 12 (1)), Malaysia (Art. 12 (2)), Spain (Art. 13 (2)), Sudan (Art. 11 (1)), Switzerland (Art. 11 (1)), Tunisia (Art. 12), Turkey (Art. IX (1)), United Kingdom (Art. 15 (1)) and Yemen (Art. 11 (1)).

¹²¹ See Art. 14 (1) of the Ethiopia-Netherlands BIT, Art. 12 (2) of the Ethiopia-Russia BIT and Art. 12 (2) of the Ethiopia-South Africa BIT which provide that the agreements shall be effective for the period of fifteen years.

¹²² See BITs of Ethiopia signed with Finland (Art. 17 (2)), France (Art. 12 para. 2), Sweden (Art. 11 (2)).

¹²³ For instance, the relevant part of Art. 15 (1) of the Ethiopia-Kuwait reads: *This Agreement shall remain in force for a period of thirty (30) years and shall continue in force for similar period or periods...*

¹²⁴ For instance, pursuant to Art. IX (2) of the Ethiopia-Turkey BIT, Art. 13 (4) of the Ethiopia-China BIT and Art. 11 (3) of the Ethiopia-Sudan BIT, the treaties shall remain in force for additional period of ten years in respect of investments made or acquired prior to the date of termination. Similarly, under Art. 12 (3) of the Ethiopia-Germany BIT and Art. 12 paragraph 3 of the Ethiopia-France BIT, prior investments will receive protection under the terminated BITs for additional period of fifteen and twenty years, respectively.

¹²⁵ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the for the Promotion and Reciprocal Protection of Investments, draft (unpublished), 2016, accessed from the Ethiopian Investment Commission, Addis Ababa, Ethiopia.

The NT provisions of the draft model also introduce some qualifications. For instance, Art. 4 (4) provides that the extension of financial assistance or measures taken by a Contracting Party in favor of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a breach of NT. In addition, the draft provides for environmental exception to the MFN treatment. Accordingly, any non-discriminatory regulatory measure taken by a Party to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the MFN treatment.¹²⁶ The draft model also omits the FET obligation. This will enable to take regulatory measures for environmental protection whenever necessary. The expropriation provision acknowledges that measures taken to safeguard the environment shall not constitute indirect expropriation.¹²⁷

What is more, a separate provision is adopted concerning environmental protection under the draft model. Pursuant to Art. 14 of the draft, Ethiopia as a host State of a foreign investor has wide regulatory space that permits the regulation of FDI. It recognizes the right to adopt one's own standard of environmental protection policy and to freely modify such standards when desired without the fear violating FET and indirect expropriation provisions. More importantly, any alleged violation of the provision on the environment (Art. 14) shall not be subjected to the dispute settlement provision of the draft model BIT.¹²⁸ This shows the country's need not to take away the adjudicatory power concerning disputes involving environmental measures from domestic judicial organs.

Recently, Ethiopia concluded a BIT with the United Arab Emirates on 3rd of December 2016. The BIT recognizes the interests of the host country in terms of environmental protection and sustainable development. Its preamble attempts to reconcile problems related to investment protection on the one hand and police powers on the other. In addition, it omits FET standard. Furthermore, Art. 11 (2) of the BIT obliges investors and their investments to contribute to the development objectives of the host State and to the benefit of the local community in which the investment is made. The BIT acknowledges the need to protect the environment under its Art. 12. Accordingly, the host State can adopt, modify and implement environment-friendly laws and policies without transgressing its obligations to protect investment. Unfortunately, this BIT has not entered into force yet.

V. CONCLUSION AND THE WAY FORWARD

In sum, Ethiopian BITs have no adequate regulatory space to protect the environment. It is only under the Ethiopia-France BIT that a general right to regulate is recognized with no specific reference to the environment. There are also some other BITs which make a specific reference to

¹²⁶*Id.* Art. 6 (1).

¹²⁷*Id.* Art. 8 (4). This provision is a verbatim copy of Annex B, Art. 13 (1) (c) of the 2004 Canadian Model BIT.

¹²⁸ By virtue of Art. 17 of the Model BIT, disputes between a Contracting Party and an investor of the other Contracting Party shall, first, be submitted to amicable settlement. If the dispute has not been settled amicably within six months from the date of request, the investor shall institute a claim before a competent domestic court or administrative tribunal of the host State. After exhausting all available local remedies, the investor may resort to international arbitration.

environmental regulatory measures. The Ethiopia-Finland BIT enshrines the need to protect the environment only in its preamble. The Ethiopia-Belgian-Luxembourg BIT, which has not entered into force yet, incorporates a separate provision for environmental protection in its substantive part. Furthermore, the Ethiopia-United Arab Emirates BIT adopts environmental protection both in its preamble and substantive parts. Save for these few scenarios, the preambles of Ethiopia's BITs are mute on the right to regulate in general and on environmental issues in particular.

Except the Ethiopia-France BIT which recognizes a FET qualified by reference to international law, the remaining effective BITs of Ethiopia adopted unqualified FET. Accordingly, such unqualified FET is open to broad interpretation with the possibility of nullifying policy space of the host State. In addition, the expropriation provisions of Ethiopia's BITs are not defined and have no carve-outs which preclude environmental measures from constituting indirect expropriation.

There is no a single formula for inserting environmental clauses in investment agreements. Instead, a holistic approach i.e. a reference in the preamble, main text, annex or separate agreement could produce a better result. With that said, Ethiopian BITs should recognize the protection of the environment as its objective and must also reflect the right of the States to regulate environmental matters. The BITs must also be capable of ensuring the continuing duty of States to promote and enforce environmental protection measures. It has to be noted that environmental issues will be fully addressed when all States cooperate avoid the race to the bottom. To introduce a bottom-up approach, it is important that the concerned government office of Ethiopia develop a model BIT that guides the negotiations and renegotiations. So as to introduce new generation of BITs, it is advisable to amend or terminate the existing BITs of Ethiopia that lack room for the regulatory power of the state.

This should be indicated in different parts of BITs. Accordingly, the preambles to the BITs of the country shall be restructured in a way that acknowledges the Parties' interest to ensure sustainable development through environmental protection. This has to be followed by inserting explicit obligations on foreign investors and the host State to protect the environment in BITs. The BITs of Ethiopia must also eliminate FET standard of protection. In addition, the BITs must incorporate provisions that explicitly exclude measures taken for the purpose of environmental protection from constituting indirect expropriation. That way, our BITs can serve as a means of striking the balance between private gain and public loss.

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