

ETHIOPIA'S BILATERAL INVESTMENT TREATIES AND PROTECTION OF THE ENVIRONMENT

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ABSTRACT

Ethiopia's continued economic growth for the past ten years has attracted a considerable amount of FDI (Foreign Direct Investment). FDI has been remarkable in the manufacturing sector. One of the ways of promoting FDI in Ethiopia has been signing BITs (Bilateral Investment Treaties) with other states. The global BIT regime has been criticized on various grounds like the absence of environmental protection, respect for human rights and labor standards, etc. The absence of reciprocal duty on part of the investors has also been another point of concern in BITs.

By signing BITs, Ethiopia gives protection to foreign investments. This research shows that virtually all of Ethiopia's BITs do not accord any kind of protection to the environment. The research has further tried to show that, under its current BIT regime, Ethiopia faces risk of expensive litigation before international investment tribunals for its unilateral measures, legislations which may be taken to protect the environment and/or mitigate pollution.

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List of Abbreviations

BITs	Bilateral Investment Treaties
FDI	Foreign Direct Investment
ISDS	Investor-State Dispute Settlement
UNCTAD	United Nations Conference on Trade and Development

Introduction

With an impressive economic growth over the last decade, Ethiopia is making itself one of the major destinations of FDI (Foreign Direct Investment) in Africa. It has signed more than 30 BITs (Bilateral Investment Treaties). The thesis investigates issues of FDI and environmental protection considering BITs against laws and policies of Ethiopia.

The first chapter looks into current FDI and related issues. More specifically, the writer concentrates on the issue of foreign direct investment and the environment. It addresses the intricate relationship between FDI and the environment. The writer also reviews the literature to show the link between FDI and economic growth.

The second chapter is a thorough consideration of BITs signed and/ or ratified by Ethiopia. For this purpose, the writer reviews the BITs signed after 1991. In doing so the, the evolution of BITs is considered to originate the protection of the environment in the BIT regime. The right to regulate is also examined and its role assessed in light of protection of the environment.

The third chapter analyzes Ethiopian BITs in terms of their content to see if they reflect the evolution of BITs globally by emphasizing that the environment should be protected. Furthermore, it investigates whether the right to regulate has been expressly provide for to enable the country to come up with laws and pass measures on the environment without fear of litigation before investment tribunals.

Finally, in the last part, the writer concludes on the issue of Ethiopia's BITs and protection of the environment drawing mainly on the second and third chapters of the thesis.

Chapter 1 - Ethiopia and Foreign Direct Investment

1.1. Introduction

The whole effort of attracting FDI to Ethiopia is premised on the assumption that it will lead to economic growth, employment opportunity, transfer of technology and knowledge, etc. This can be gathered from the national investment laws and policy, and from the bilateral investment treaties of the country. Since Ethiopia is one of the fastest growing economies in the world, endowed with rich natural resources and a population of 100 million potential consumers, it has been eyed by foreign investors. As a result, FDI has been growing in the country. It has attracted the attention of big economies like China, the US, and India, to name a few.

As indicated by Ethiopian Investment Commission and some researches, most of the FDI in Ethiopia seems to go the manufacturing sector which has the potential of causing serious environmental pollution.¹ The country has been strengthening its environmental laws since 1997. Despite the evolution of institutional and legal framework, critiques underscore the weak implementation of the policies and laws on the environment.

The relationship between international investment and the environment has been a preoccupation of various scholars and institutions for decades. There have been conflicting researches on the impact of foreign direct investment on the environment of the host state. A dominant view in this regard has been the ‘pollution haven’ hypothesis postulating that FDI seeks developing countries with lax environmental laws and enforcement. As we will see in this chapter, there is also the ‘Environmental Kuznets Curve’ (EKC) hypothesis postulating that more FDI will lead to economic growth which will finally result in better environmental

¹ Manufacturing accounted for 42.5% of the total FDI for the period of 1992-2015 see Asmelash Berhane. *An Analysis of Foreign Direct Investment: The Case of Ethiopia: Co-Integrated VAR Approach*. Master’s thesis, AAU, 2015:37 Accessed January 5, 2017.
<http://etd.aau.edu.et/bitstream/123456789/8201/1/Asmelash%20Berhane%20.pdf.pdf>

protection as income of citizens increases. The first part of this chapter, will be an introduction about FDI in Ethiopia. The relationship between the environment and foreign direct investment will also be another issue addressed in this chapter. The last section will briefly deal with the literature about the relationship between FDI and economic growth.

1.2. FDI in Ethiopia

Ethiopia has been hailed as one of the fastest growing economies in the world. Its GDP (Gross Domestic Product) has been growing between the range of 8 % and 12 % for the past several years². The economic growth is expected to continue at a rate of 7.4 % from 2017 to 2020.³ The country has been trying hard to attract FDI since 1992. As a result, various policies, laws and regulations have been issued that promote and encourage foreign direct investment. There seems to be a general satisfaction of investors with the endeavors and measures taken by the government to improve the regulatory environment of FDI. The US state department notes that

Tax incentives for investment in the high priority sectors of heavy and light manufacturing, agribusiness, textiles, sugar, chemicals and pharmaceutical and mineral and metal processing underscore the government's focus on and openness to FDI, while Ethiopia's success in winning a higher credit rating from international rating agencies has given it access to commercial foreign loans.⁴

As part of its effort to attract FDI, Ethiopia has signed bilateral investment and protection agreements with countries like Egypt, Equatorial Guinea, Finland, France, Turkey, China, Austria, Sweden, Denmark, Germany, Finland, Algeria, Switzerland, Tunisia, Kuwait, Qatar, the Netherlands, Republic of Djibouti, Russia, Republic of South Africa, Spain, France, Italy,

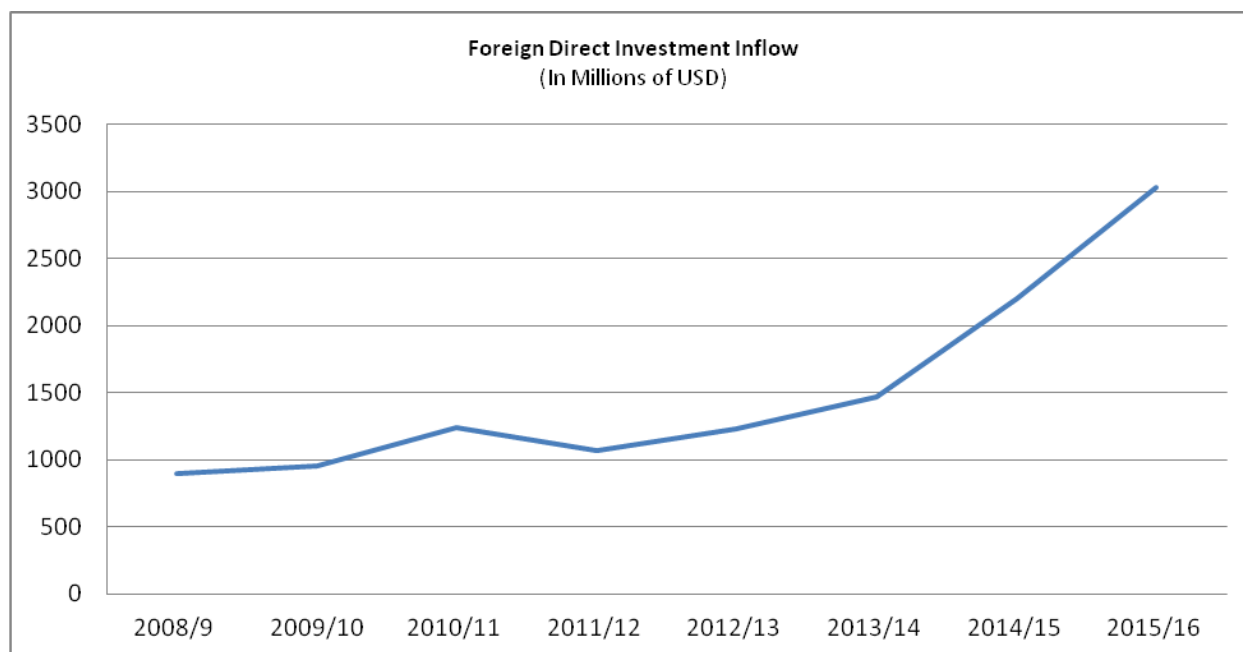
² US Department of State. *Ethiopia: Investment Climate 2015*. (2015). Accessed January 5, 2017. <https://www.state.gov/documents/organization/241767.pdf>

³ US Department of State. *Ethiopia: Investment Climate 2016*. (2016). Accessed January 5, 2017. <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dliid=254197&year=2016#>

⁴ *Ibid.*

Iran, Israel, Libya, Malaysia, Sudan and Yemen.⁵ Among these countries, China, India, Sudan, Germany, Italy, Turkey, Saudi Arabia, Yemen, the United Kingdom, Israel, Canada and the United States are the major sources of FDI flowing to Ethiopia.⁶

In the six months from July through December 2017, Ethiopia has succeeded in attracting 1.2 billion USD (US dollars) of FDI.⁷ The plan for the 206/17 fiscal year is a total of 3.5 billion U⁸



FDI Inflows (in millions of USD) 2008-2016

Source: National Bank of Ethiopia

⁵ Ethiopian Investment Commission. *Ethiopia; A preferred location for Foreign Direct Investment in Africa. An Investment Guide*. 2014: 7. Accessed January 5, 2017.
http://www.investethiopia.gov.et/images/pdf/Investment_Guide_2014.pdf

⁶ *Ibid.*

⁷ Bloomberg. *Foreign Investment in Ethiopia Slumps After Business Attacks*. Accessed January 5, 2017.
<https://www.bloomberg.com/news/articles/2017-02-15/foreign-investment-in-ethiopia-slumps-after-businesses-attacked>

⁸ *Ibid.*

Agriculture, agro-processing, textiles and garment, leather and leather products, tourism, mining and hydropower are among the top areas on which Ethiopia expects to attract FDI.⁹ The impressive economic growth of the country has resulted in a continued growth of inflow of FDI as shown above. With forecasts that the economy will continue to grow, there will be more investment by foreign investors who want to tap into cheap labor and big market of the country.

One of the areas of FDI involvement in Ethiopia is horticulture and floriculture business. For example, in 2006 Oromia Regional state accounted for 94% of all floriculture investments in Ethiopia with 134 companies of which 54 were foreign while 18 were joint-ventures.¹⁰ The floriculture business has been estimated to have employed 30,000-60,000 workers.¹¹ This clearly shows that FDI has created employment opportunities for Ethiopian citizens.

Ethiopia has a legal obligation of protecting foreign investment. This obligation usually emanates from BITs that the country has signed with other states. Investment has been defined differently in different BITs. Just to give an idea as to what is considered investment, it may be useful to consider the following examples. According to the 2010 Ethiopia-Egypt Bilateral Investment Treaty, investment is any kind of asset invested by investors of one contracting party in the territory of the other contracting party in accordance with the laws and regulations of the later contracting party and shall include in particular, though not exclusively¹²:

- a. Movable and immovable property as well as any other property rights in rem such as mortgage, guarantees, pledges, usufruct and similar rights;

⁹ FAO. *Foreign Agricultural Investment country profile Ethiopia*.2011:5. Accessed December 6, 2016. http://www.fao.org/fileadmin/user_upload/tcsp/docs/ETHIOPIA_COUNTRY_PROFILE.pdf

¹⁰ As cited in Getu Mulugeta. *Ethiopian floriculture and its impact on the environment: regulation, supervision and compliance*. *Mizan L. Rev.* 3 (2009): 241. Accessed March 2, 2017. http://heinonline.org/HOL/Page?handle=hein.journals/mizanlr3&div=16&g_sent=1&collection=journals

¹¹ *Ibid.*

¹² Agreement for the Promotion and Protection of Investments between the Arab republic of Egypt and the Federal Democratic Republic of Ethiopia. Cairo, Egypt. 2006. Accessed March 02, 2017. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5345>

- b. Shares, stock and debentures of companies, or other rights, or interests in such companies;
- c. Claims to money, or to any performance having economic values associated with in investment;
- d. Intellectual property right including copyrights, trademarks, patents, industrial design, technical process, know how, trade names and good will.

The 2012 Model Bilateral Investment Treaty of the United States lists the type of investments that qualify as investment in a non-exhaustive manner:

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.¹³

¹³ US 2012 Model Bilateral Investment Treaty. Accessed December 10, 2016.
<http://www.state.gov/documents/organization/188371.pdf>

These definitions show that there is virtually no exhaustive list of investment in BITs. Host states are required to give protection to all kinds of investments listed in these BITs and other investments which may fall under these definitions since the lists are illustrative, not exhaustive. Therefore, it can be said that these are kinds of investments that Ethiopia is trying to attract from foreign investors.

1.3. FDI and the Environment in Ethiopia

BTI Country Report of Ethiopia (2016) states that in Ethiopia “environmental regulation is weak and not strongly enforced.”¹⁴ The report goes on to say that environmental issues are not given proper attention and that they are overridden by development / growth efforts.¹⁵ The report, in other words, is stating that the economic development in Ethiopia is not sustainable. This seems to imply currently the state is interested in economic growth/ development and does not want to scare away FDI on grounds of pollution and protection of the environment. However, the country has well-developed environmental law and policy. The problem primarily lies in implementing the law.

Given the weak environmental law implementation in Ethiopia, the argument in the ‘pollution haven’ hypothesis seems to have a point. It can be argued that the weak regulation and implementation of laws is among many factors that make Ethiopia a favorable destination for FDI in floriculture and horticulture. However, rich natural resources like the availability of arable land, water and labor are also factors that might have been considered by the investors. FDI has been said is seeking refuge in places, called “pollution havens”, destinations with

¹⁴ Bertelsmann Stiftung. *BTI 2016 — Ethiopia Country Report*. Gütersloh: Bertelsmann Stiftung, 2016:21. Accessed January 5, 2017. https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Ethiopia.pdf

¹⁵ *Ibid.*

lower standards of environmental regulation.¹⁶ Such places are developing countries and emerging markets. These developing countries and emerging markets have moved away from command and closed economies to become investment friendly by adopting pro-investment policies and allowing inflow and outflow of finances.¹⁷ Therefore, we can say that foreign direct investment has two aspects for the host countries. On the one hand, the investment will bring the advantages of foreign technology, capital, know-how while on the other it may also pose a threat to the environment of host states through risky and harmful production processes and methods.¹⁸

Environmentalists have been violent opponents of the floriculture companies operating in the Ethiopia. They contend that these companies are causing serious environmental damages, to soil and water bodies. Getu summarized the negative impacts as unregulated and high chemical consumption, depletion of water resources, unsafe waste disposal mechanisms and risks on safety of farm workers.¹⁹ In addition, the industry is water intensive and hence has been competing with local farmers for water sources. It has been stated that floriculture production might use more than 300 types of chemicals as pesticide (insecticides, fungicides and nematocides) and growth regulators.²⁰ This may have the negative impact of killing useful organisms in the soil and shaking biodiversity.

¹⁶ Mabey Nick, and Richard McNally. *Foreign direct investment and the environment*. Godalming, Surrey: WWF-UK (1999): 3. Accessed January 6, 2017.

¹⁷ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.456.7872&rep=rep1&type=pdf>

¹⁸ *Ibid.*

¹⁹ Vinuales Jorge. *Foreign investment and the environment in international law: an ambiguous relationship*. Research Paper, Geneva 2 (2010): 6. Accessed November 15, 2016.

https://disciplinas.stoa.usp.br/pluginfile.php/79798/mod_resource/content/1/LER%20Vinuales%20-%20Foreign%20Investment%20and%20the%20Environment%20-%20BYIL%20-%20CIES-1.research.paper.02.pdf

¹⁹ Getu Mulugeta. *Defiance of environmental governance: environmental impact assessment in Ethiopian floriculture industry*. Journal of Environmental Research and Management 4, no. 4 (2013): 219-229. Accessed January 12, 2017. http://e3journals.org/cms/articles/1376567319_Getu.pdf

²⁰ Sisay Misganaw. *Assessment of the ecological impacts of floriculture industries using physico-chemical parameters and benthic macroinvertebrates metric index along Wedecha river, Debrezeit, Ethiopia*. PhD diss., AAU, 2007: 5. Accessed January 12, 2017: 5. <http://etd.aau.edu.et/handle/123456789/240>

However, there are also arguments denying and criticizing the ‘pollution haven’ hypothesis. There are researches that underline that they were unable to find evidence that “FDI inflow into developing countries is responsible for the level of environmental pollution and energy use”²¹. In addition, Kurtishi-Kastrati states that “further than economic benefits FDI can help the improvement of environment and social condition in the host country by relocating ‘cleaner’ technology and guiding to more socially responsible corporate policies.”²² This argument seems to be related with the ‘Environmental Kuznets Curve’ (EKC) hypothesis postulating that more FDI will lead to economic growth which will finally result in better environmental protection as income of citizens increases.²³

The issue of floriculture investment in Ethiopia is a typical example of pollution by foreign investment. The activities of the companies are said to have adversely affected the soil because of use of fertilizers and chemicals. This pollution has even been argued to be negatively affecting food security.²⁴ There is information gap as to other kinds of investments and their negative impact on the environment.

A development of the natural resources of a country should be a sustainable at least in the contemporary discourse of development and the environment. A sustainable development should take into account the needs of future generation and the protection of the environment.

²¹ Aliyu Mohammed Aminu. *Foreign direct investment and the environment: Pollution haven hypothesis revisited*. In *Eight Annual Conference on Global Economic Analysis, Lübeck, Germany*. 2005:19. Accessed January 8, 2017. <https://www.gtap.agecon.purdue.edu/resources/download/2131.pdf?q=pollution-haven-hypothesis>

²² Kurtishi-Kastrati Selma. *The effects of foreign direct investments for host country's economy*. *European Journal of Interdisciplinary Studies* 5, no. 1 (2013): 26. Accessed January 12, 2017. www.ejst.ro/files/pdf/369.pdf

²³ Dinda Soumyananda. *Environmental Kuznets curve hypothesis: a survey*. *Ecological economics* 49, no. 4 (2004). Accessed March 5, 2017. <http://www.sciencedirect.com/science/article/pii/S0921800904001570>

²⁴ Kirigia Evans, Gemma Betsema, A. C. M. van Westen, and E. B. Zoomers. *Flowers for food? Scoping study on Dutch flower farms, land governance and local food security in Eastern Africa*. (2016): 21. Accessed March 5, 2017. <https://dspace.library.uu.nl/handle/1874/328201>

However, there has been a criticism against foreign investment. For example, Graham underlines the negative impact of international investment and trade on the environment:

that international trade and investment, to the extent that these are associated with greater economic growth, are almost sure to lead to some degree of environmental deterioration in much of the developing world and perhaps the developed world as well.²⁵

The author further states that such a trend is predictable during the early phase of rapid economic development as has happened in countries like China and India.²⁶ The theory that this author is pointing to ('Environmental Kuznets Curve' hypothesis) claims that such a trend would come to an end when, in the long run, the growth in income level will make such a state to take measures that will mitigate or avoid environmental distress.²⁷ The whole theory seems to be based on the assumption that FDI results in economic growth and alleviation of poverty. However, there is no consensus whether FDI results in economic growth/development as discussed later in this chapter.

According to Xing and Kolstad (1996), who examined US FDI between 1985 and 19990, reached the conclusion that more lax environmental regulation in a host country was a significant consideration by US investors in areas of chemical industries.²⁸ However, Repetto in 1995 concluded that twenty five percent of the FDI from the US went into pollution intensive sectors of which only five percent was invested in less developed countries.²⁹ The significant part of the investment was made in the advanced countries: "the advanced countries export

²⁵ Graham Edward M. *Globalization, Foreign Direct Investment and the Environment: In Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises*. Institute for International Economics. Washington DC.2000: 134. Accessed November 15, 2016. https://piie.com/publications/chapters_preview/91/5iie2725.pdf

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ UNCTAD. *Making FDI work for Sustainable Development*. 2004: 57. Accessed December 25, 2016. http://unctad.org/en/Docs/ditcted9_en.pdf

²⁹ *Ibid.*

their ‘dirty’ industries, they seem to be sending them to each other, not to the less developed countries”³⁰. On the other hand, there is a view of considering environmental quality as a normal good.³¹ It then follows that developing countries have “laxer environmental regulation stringencies or weaker environmental monitoring systems and institutions than developed countries”³².

A report from the World Bank has once indicated that the quality of labor, rather than cost, was the most important consideration for Japanese FDI in selecting sites for the investment.³³ Similarly, German FDI in other countries was motivated by search for new markets and to maintain existing ones, and environmental or ecological aspects were not decisive or relevant.³⁴ Another Important survey, by Zamarutti Klavens (1993), indicated that low environmental standards in central and east Europe were important concern for companies from the OECD countries having a negative impact of ‘blocking or impeding’ FDI.³⁵ Olewiler in 1994, after assessing data on investment and trade with respect to pollution-intensive companies of the USA, concluded that there was no pattern of treating the least developed countries as pollution havens.³⁶ Manni and Wheller (1997) stated that pollution-intensive output was falling in the developed countries while it is on the rise in the developing countries but not because of the effect of pollution havens of international investment.³⁷

³⁰ *Ibid.*

³¹ Neequaye Nii Amon, and Reza Oladi. *Environment, growth, and FDI revisited. International Review of Economics & Finance* 39 (2015): 47. Accessed December 27, 2016.
<http://www.sciencedirect.com/science/article/pii/S1059056015001021>

³² *Ibid.*

³³ UNCTAD, *supra* note 28 at 56

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, 57

³⁷ *Ibid.*, 59

There are also several researches concluding that FDI is very important in protection of the environment and seeks sites with better environmental protection laws and regulations. As Gentry et al, 1996 allege foreign investors have been mounting pressure on the government of Costa Rica to work on environmental care considering that their European customers want “an environmentally sound product”.³⁸ It is even said that developing countries, as host countries of FDI, are improving their environmental legal regime and policies.³⁹ One of the benefits that accrue from FDI is that multinational corporations bring to the developing host states advanced technologies. This is because multinational corporations are among the top users of the most sophisticated technologies.⁴⁰ In addition, the technical capability of these companies is essential for the host states since it has spillover effect to areas of technology, management practices, etc. as postulated by Findlay 1978.⁴¹

To conclude, it should be noted that environmental laws of a country are among the considerations made by any multinational corporation or investors in a line of various assessments made to measure suitability to invest capital in the host state. Therefore, less stringent environmental law and regulation of a developing state (together with other considerations of taxes, peace and political stability, cost of labor, etc.) will facilitate the investment of foreign capital in the developing world.

³⁸ *Ibid.*, 56

³⁹ *Ibid.*, 60

⁴⁰ Borensztein Eduardo, Jose De Gregorio, and Jong-Wha Lee. *How does foreign direct investment affect economic growth?*. Journal of international Economics 45, no. 1 (1998): 116. Accessed January 5, 2017. http://ac.els-cdn.com/S0022199697000330/1-s2.0-S0022199697000330-main.pdf?_tid=6a5f5e3e-b96b-11e6-8a2f-00000aacb35f&acdnat=1480778347_8cf490146b20abee1ec09febf50b543a

⁴¹ *Ibid.*

1.4. FDI and Economic Growth

All the purpose of investment laws of Ethiopia, including its BITs, is economic growth and development. For example, Proclamation 769/2012 in the preamble states that raison d'être of investment proclamation is to strengthen the domestic production capacity and thereby accelerate the economic development of the country and improve the living standards of its peoples.⁴² Speeding up the inflow of capital and accelerating technology transfer are also major objectives of the investment laws of the country. Therefore, the whole assumption behind Ethiopian investment policy and laws is that FDI will lead to economic growth and development. However, the nexus between FDI and economic growth has been a bone of contention.

A relatively recent research (Carcovic and Levine, 2002), using data obtained from 72 countries for the period of 1960-1995, was unable to establish a positive relation between FDI and economic growth.⁴³ Durham (2004) reaches a similar conclusion based on data of countries from 1979 to 1998.⁴⁴ On the other hand, based on US FDI data for 40 countries (20 developing countries and 20 developed countries), Xu (1999), reached the conclusion that FDI positively impacts productivity growth in developed countries only.⁴⁵ The author reasoned that the low effect of FDI on growth in developing countries is attributed to the absence of adequate capital.⁴⁶ Dierek *et al* argue that “in the vast majority of countries, there exists neither a long-term nor a short-term effect of FDI on growth; in fact, there is not a single country where a

⁴² Federal Democratic Republic of Ethiopia. *A Proclamation on Investment*. Proclamation NO.769/2012

⁴³ Aurangzeb Zeb, and Thanasis Stengos. *The role of Foreign Direct Investment (FDI) in a dualistic growth framework: A smooth coefficient semi-parametric approach*. Borsa Istanbul Review 14, no. 3 (2014): 135. Accessed January 5, 2017. <http://www.sciencedirect.com/science/article/pii/S2214845014000295>

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

positive unidirectional long term effect from FDI to GDP is found”.⁴⁷ Therefore, the researchers have not reached at similar outcomes and hence the nexus between FDI and economic growth seems obscure at the moment.

Researches reflect the same divergent analysis of the relationship of FDI and economic growth/development in Ethiopia. For example, one research claims to have found “positive and significant effect of FDI on economic growth”.⁴⁸ However, the research also claims that it may take time before the country effectively realizes the outcome of FDI since it needs to work on its poor infrastructure and human capital.⁴⁹ Another research states that FDI has contributed positively to Ethiopia’s economic development seen in light of real GDP growth.⁵⁰ On the other hand an author has underlined that the effect of FDI is insignificant in explaining real per capita GDP.⁵¹ Therefore, the assumption in Ethiopian BITs, laws and policies that FDI will lead to economic growth is not based on solid grounds.

⁴⁷ Herzer Dierk, and Stephan Klasen. *In search of FDI-led growth in developing countries: The way forward*. Economic Modelling 25, no. 5 (2008): 793. Accessed January 12, 2017. <http://www.sciencedirect.com/science/article/pii/S0264999307001356>

⁴⁸ Menamo Meskerem Daniel. *Impact of Foreign Direct Investment on Economic growth of Ethiopia*. (2014): 44. Accessed January 22, 2017. <https://www.duo.uio.no/bitstream/handle/10852/39250/Menamo-Meskerem-Master-Thesis.pdf?sequence=1>

⁴⁹ *Ibid*.

⁵⁰ Selamawit Woldekidan. *Foreign Direct Investment and Economic Development in Ethiopia*. Master’s thesis, Copenhagen Business school, (2015):80. Accessed January 25, 2017. http://studenttheses.cbs.dk/bitstream/handle/10417/5863/selamawit_berhe_woldekidan.pdf?sequence=1

⁵¹ Remla Kedir. *The Impact of Foreign Direct Investment on Poverty Reduction in Ethiopia: Cointegrated VAR Approach*. Master’s thesis., AAU, 2012: 73. Accessed January 27,2017. <http://etd.aau.edu.et/handle/123456789/2621>

Chapter 2 – Evolution of BITs and Protection of the Environment

2.1. Introduction

It has been almost sixty years since the first BIT was signed between Germany and Pakistan. During this period, there has been an extensive use of BITs in the absence of international investment law. They were pure instruments for protecting transnational movement of capital. Nowadays, these instruments are incorporating some important provisions like protection of the environment and human rights. The first section of this chapter will consider the origin and development of environmental protection in BITs in general. The next section will trace this development in the Ethiopian BIT regime. Finally, the third section will deal with the need for protection of the environment through BITs and the right to regulate on matters of the environment.

2.2. Origin and Development of Environmental Protection in BITs

BITs have been the one of the most important legal instruments in the field of international investment protection and promotion.⁵² They have become so famous that there were over 700 of such agreements in 1994.⁵³ The number of such agreements was over 2200 in 2002.⁵⁴ At the time of writing of this paper, there are about 2955 BITs of which 2334 are in force.⁵⁵ It was in 1959 that the first BIT was signed between Pakistan and Germany.⁵⁶

⁵² Dolzer Rudolf, and Margrete Stevens. *Bilateral investment treaties*. Martinus Nijhoff Publishers, 1995:1.

⁵³ *Ibid.*

⁵⁴ Salacuse Jeswald W., and Nicholas P. Sullivan. *Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain*. Harv. Int'l LJ 46 (2005): 67. Accessed February 2, 2017. http://heinonline.org/HOL/Page?handle=hein.journals/hilj46&div=7&g_sent=1&collection=journals

⁵⁵ This is the current number of BITs as stated in <http://investmentpolicyhub.unctad.org/IIA>

⁵⁶ Vandevelde Kenneth J. *Bilateral investment treaties: history, policy, and interpretation*. Oxford University Press, 2010. (.....). Accessed February 2, 2017. https://books.google.hu/books?id=9YpnAgAAQBAJ&printsec=frontcover&redir_esc=y#v=onepage&q&f=false

The first BIT of Germany and Pakistan was made after Germany lost its investments abroad due to its defeat in the Second World War. Taking such kind of risks into account, Germany sought protection of its investments abroad through BITs. This intention of Germany can easily be seen from the very title of the agreement (Treaty Between the Federal Republic of Germany and Pakistan for the Protection and Promotion of Investments) and from the preamble of the BIT which states the contracting parties' intention to "create favorable conditions for investments by nationals and companies of either state in the territory of the other state."⁵⁷

During the first three decades after 1959, BITs were concluded between developed capital exporting states and developing capital importing states.⁵⁸ These agreements were initiated by the developed countries with the ultimate objective of securing higher protection of their investors and companies than was provided by domestic investment legislations of the host states.⁵⁹ However, currently BITs are also signed between two developing countries, and between two developed countries.

While all BITs limit the regulatory flexibility within which contracting parties can pursue their economic development policies, more recent BITs include a wider variety of duties and obligations affecting more areas of host country activity in a more complex and detailed manner. At the same time, some of these treaties put more emphasis on public policy concerns through the inclusion of safeguards and exceptions relating to public health, environmental protection and national security.⁶⁰ However, BITs emerged in the second half of the 20th

⁵⁷ Treaty between The Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment. Bonn, Germany. 1959. Accessed February 2, 2017.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387>

⁵⁸ Elkins Zachary, Andrew T. Guzman, and Beth A. Simmons. *Competing for capital: The diffusion of bilateral investment treaties, 1960–2000*. International organization 60, no. 04 (2006): 819. Accessed February 5, 2017. <https://www.cambridge.org/core/journals/international-organization/article/div-class-title-competing-for-capital-the-diffusion-of-bilateral-investment-treaties-19602000div/474DA5396C266F75C5C26752D22620C7>

⁵⁹ UNCTAD. *Bilateral Investment Treaties 1959-1999*. (2000):1. Accessed February 11, 2017. <http://unctad.org/en/docs/poiteiia2.en.pdf>

⁶⁰ UNCTAD. *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*. (2007). xi. Accessed February 2, 2017 http://unctad.org/en/docs/iteiia20065_en.pdf

century as instruments which exclusively focused on protection of investments and investors.⁶¹ This shows that BITs emerged as tools of investment protection, not as tools of environmental protection.

One of the most important part of BITs is the preamble. This is because it is the place where contracting states emphasize the main objective of the treaty they are signing. But the preamble does not create any rights or duties for the contracting parties. However, it does not have to be considered irrelevant since it usually clearly shows the intentions of the contracting parties and the objectives of the instrument. In this respect, the preamble may be used by investment arbitral tribunals in case of the need of interpretation of any provision of the BIT. The 1969 Vienna Convention on the Law of Treaties in Article 31(1) and (2) provides that treaties “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 light of its object and purpose.”⁶² It also states that the context can also be found in the preamble.⁶³ Therefore, preambles may be used by arbitral tribunals to find the intent of the parties in reaching a particular BIT. The preamble of BITs may include interest of the contracting states to protect the environment.

Based on the wordings and the content of the preambles, UNCTAD (United Nations Conference on Trade and Development) divided preambles of BITs into two types. The first one is the traditional preamble wherein the contracting states underline their intention of reciprocal investment/investor protection and the assumption that investment leads to prosperity.⁶⁴ Such kind of preamble, might also state the importance of investment in technology transfer, human resource development, and mutual respect for state sovereignty.⁶⁵

⁶¹ *Ibid.*, 1

⁶² United Nations. *Vienna Convention on the Law of Treaties*. 23 May 1969. Accessed February 2, 2017. <http://www.wipo.int/export/sites/www/wipolex/en/glossary/vienna-convention-en.pdf>

⁶³ *Ibid.*

⁶⁴ UNCTAD, *supra* note 60 at 4

⁶⁵ *Ibid.*

A typical traditional type preamble is the one in Ethiopia-Germany BIT of 1964 which reads as follows:

Desiring to intensify economic cooperation between both states,

Intending to create favorable conditions for investments by nationals and companies of either State in the territory of the other State, and

Recognizing that contractual protection of all assets of nationals or companies of either Contracting Party in the territory of the other Contracting Party is apt to promote private investments and private business initiatives and to increase the prosperity of both nations

Surprisingly enough, the relatively recent BIT of Ethiopia and the UK of 2009 (signed fifty years after the first Germany-Pakistan BIT of 1959) reads as follows:

Desiring to create favorable conditions for greater investment by nationals and companies of one Contracting Party in the territory of the other Contracting Party;

Recognizing that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiatives and will increase prosperity in both Contracting States;⁶⁶

This Ethiopia UK BIT of 2009 is as traditional as the 1964 Ethiopia-Germany BIT in relation to the preambular part. Most of the BITs that Ethiopia signed belong to this category of BITs with traditional type preambles.

⁶⁶Agreement 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). Addis Ababa, Ethiopia. Accessed from <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1180>

The second category of preambles is called non-traditional. Protection of public health, safety, protection of the environment and consumers, and respect for international labor standards are examples of public policy objectives that can be found in non-traditional preambles of BITs.⁶⁷ The following paragraph from the United States -Uruguay BIT of 2005 makes the preamble a non-traditional one:

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights⁶⁸

And from the Republic of Korea-Trinidad & Tobago BIT of 2002, the following paragraph of the preamble makes the preamble a non-traditional one:

Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application⁶⁹

Similarly, the BIT between the Government of the Republic of Finland and the Government of the Federal Republic of Ethiopia on the Promotion and protection of Investments has paragraphs in the preamble which states the following:

Recognizing that the development of economic and business ties can promote respect for internationally recognized labor rights, and

Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application,⁷⁰

⁶⁷ UNCTAD, *supra* note 60

⁶⁸ *Ibid.*, 5

⁶⁹ *Ibid.*

⁷⁰ 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. Addis Ababa, Ethiopia. 2006. Accessed February 22, 2017. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1180>

There is also classification of BITs as generations of investment agreements. According to Mary Footer, most of the existing BITs are of the first generation, concluded between 1959 and the early 1990s.⁷¹ Others refer to those BITs between 1959 and the mid-1980s as the first generation of BITs.⁷² This generation of BITs has entirely and exclusively focused on the protection and promotion of the investment.⁷³ Footer argues that the BITs of this generation reflected the interest of the “major capital exporting states in the developed- industrialized world”.⁷⁴

After the early 1990s (as some authors claim, from the mid-1980s to the mid- 1990s ⁷⁵) came the newer, i.e. second generation of BITs and other international investment agreements. These agreements were predominantly similar with the first generation of BITs. What makes them different is the place and emphasis they accord to investment liberalization by removing or reducing market access barriers in the developing, host, or recipient states.⁷⁶ Therefore, the second generation of BITs does two things: protect/promote investment and liberalize investment in host states.

The recent development, which can be referred to as the third generation of BITs, were the ones which were concluded since 1995.⁷⁷ They have the peculiar attribute of/or clause of the non-lowering of environmental standards by the host states in order to attract FDI.⁷⁸ Such a

⁷¹ Footer Mary E. Bits and pieces: social and environmental protection in the regulation of foreign investment." *Mich. St. U. Coll. LJ Int'l L.* 18 (2009):37. Accessed February 15,

2017. http://heinonline.org/HOL/Page?handle=hein.journals/mistjintl18&div=6&g_sent=1&collection=journals

⁷² Van Os Roos, and Roeline Knottnerus. *Dutch bilateral investment treaties: a gateway to 'treaty shopping' for investment protection by multinational companies.* (2011): 8. Accessed February 15, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961585

⁷³ Footer, *supra* note 71

⁷⁴ *Ibid.*

⁷⁵ Van Os, *supra* note 72

⁷⁶ Footer, *supra* note 71

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 43

clause or standard in BITs seems to be a response to the threat of pollution in ‘pollution heaven’ hypothesis which states that FDI seeks host states with relaxed environmental and labor standards.⁷⁹

The US Model BIT of 2012 is a typical manifestation of the development of the third generation of rights. The Model BIT has a whole provision on Investment and Environment that can be a lesson for other countries. Article 12(2) of the US Model BIT provides that it is “inappropriate to encourage investment by weakening or reducing the protection afforded in domestic environmental laws.”⁸⁰ Sub-article 3 of the same provision provides that “each party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.”⁸¹

Belgium’s Model BIT is also a prominent one with an environment article. Article 5 of the Model BIT provides that it is “inappropriate to encourage investment by relaxing domestic environmental legislation”.⁸² Article 5(10) provides that each party should in its legislation provide for internationally agreed levels of protection and that they should work for improvement of their domestic legislations.⁸³

Another important development in the protection of the Environment is the 2012 Model BIT of SADC (the South African Development Community). The Model BIT of SADC has three provisions dealing with investment and the protection of the environment. Article 13 stipulates

⁷⁹ *Ibid.*

⁸⁰ *US 2012 Model Bilateral Investment Treaty*. Accessed January 18, 2017.
<https://www.state.gov/documents/organization/188371.pdf>

⁸¹ *Ibid.*

⁸² Bernasconi-Osterwalde Nathalie, and Lise Johnson. *Belgium's Model Bilateral Investment Treaty: A Review*. International Institute for Sustainable Development, 2010:21. Accessed January 25, 2017.
http://www.iisd.org/pdf/2011/belgiums_model_bit.pdf

⁸³ *Ibid.*

that “investments shall comply with environmental and social assessment criteria and assessment processes applicable to their proposed investments prior to their establishment as required by the host state for such an investment.”⁸⁴ Article 15(3) stipulates that “investors shall not establish, manage or operate investments in a manner inconsistent with international environmental, labor and human rights obligations binding on the host state or home state, whichever obligations are higher.”⁸⁵ Article 14 imposes on the investor the obligation of maintaining an environmental management system consistent with internationally recognized management standards and good business practice standards.⁸⁶

While Belgium’s and US Models are notable for their detailed provisions on investment and the environment, the Indian Model BIT of 2016 in Article 16 simply mentions India’s sovereign power to take actions or measures to protect and conserve the environment including all living and non-living natural resources.⁸⁷ Similarly, the Canadian Model BIT in Article 11 stipulates that contracting states should not lower their standard on the protection of the environment to attract foreign investment.⁸⁸

In general, all the purposes of the recent generation of BITs, with respect to the environment, can be categorized into three. One purpose is to recognize protection of the environment as treaty objective.⁸⁹ The second goal is to preserve policy making powers to the host state on matters of environmental protection.⁹⁰ The third and a very important purpose is to “ensure the

⁸⁴ *SADC 2012 Model Bilateral Investment Treaty*. Accessed January 21, 2017. <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Indian 2016 Model Bilateral Investment Treaty*. Accessed January 24, 2017. https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

⁸⁸ *Canadian 2004 Model Bilateral Investment Agreement*. Accessed January 16, 2017. <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>

⁸⁹ Beharry Christina L., and Melinda E. Kuritzky. *Going green: managing the environment through international investment arbitration*. *Am. U. Int'l L. Rev.* 30 (2015): 389. Accessed January 26, 2017.

http://heinonline.org/HOL/Page?handle=hein.journals/amuilr30&div=23&g_sent=1&collection=journals

⁹⁰ *Ibid.*

continuing duty of states to enforce and promote environmental protection measures.”⁹¹ These purposes seem to be incidental as the primary objective of BITs of any generation is the protection and promotion of foreign investment.

2.3. Originating protection of the Environment in Ethiopia's BITs

The first BIT signed by Ethiopia seems to be the 1964 BIT with the Federal Republic of Germany. This BIT's sole purpose was to “intensify economic cooperation between the two states.”⁹² This was to be accomplished by creating favorable conditions and according protection to the investment by the nationals and companies of the contracting states.⁹³ The BIT nowhere mentions protection of the environment.

The Switzerland- Ethiopia BIT of 1998 is basically the same and in the preambular part mentions the sole purpose of the BIT to be “to intensify economic cooperation to the mutual benefit of both states”.⁹⁴ Economic reasons of investment were of particular concern for the contracting parties. Nowhere in the BIT is mentioned about protection of the environment. The 1996 Ethiopia-Kuwait BIT⁹⁵ and the Ethiopia-Malaysia of 1998⁹⁶ are also the same in light of absence of protection to the environment. This trend seems to have continued into the 21st

⁹¹ *Ibid.*

⁹² Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investment. Addis Ababa. 1964. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

⁹³ *Ibid.*

⁹⁴ Agreement between the Swiss Confederation and the Federal Democratic Republic of Ethiopia on the Promotion and Reciprocal Protection of Investments. Crans-Montana, Switzerland. 1998. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

⁹⁵ Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments. Kuwait. 1996. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

⁹⁶ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments. Kuala Lumpur, Malaysia. 1998. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

century since the Ethiopia-China BIT of 1998⁹⁷, the Ethiopia-Yemen BIT of 1999⁹⁸ (both BITs entered into force in the year 2000), and Ethiopia-Sudan BIT of 2001⁹⁹ do not say anything in relation to the protection of the environment.

Nothing is different in the Ethiopia- France BIT of 2004, the Ethiopia-Israel BIT of 2004, Ethiopia-Libya BIT 2004, Ethiopia-Iran BIT of 2003, Ethiopia-Tunisia of 2000 in relation to protection of the environment.¹⁰⁰ Ethiopia-Denmark BIT of 2001, Ethiopia-Algeria BIT of 2002, Ethiopian-Austrian BIT of 2004, Sweden-Ethiopia BIT of 2004, Ethiopia-Netherlands BIT of 2003, Ethiopia-Turkey BIT of 2000, Germany-Ethiopia BIT of 2004, all belong to the first and second generation of BITs.

However, Belgium & Luxembourg-Ethiopia BIT of 2006 can be considered as a notable development in Ethiopia's BITs. This BIT does not say anything about protection of the environment in its preamble. Though this BIT has not entered into force, Article 5 was important and reads as follows:

Article 5¹⁰¹

Environment

⁹⁷Agreement 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. (Not available where it was done). 1998. Accessed January 27, 2017.

<http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

⁹⁸Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investment. Sana'a, Yemen.1999. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

⁹⁹Agreement 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. Khartoum, Sudan.2000. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

¹⁰⁰Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments. Paris, France. 2003 Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

¹⁰¹Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investments. Brussels, Belgium.2006. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/360>

1. Recognizing the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation.
2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.
3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their domestic legislation.
4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.

The Ethiopia-Finland BIT of 2006 has also been very important in Ethiopia's BIT regime. In its preamble, the BIT has the following paragraph:

AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application¹⁰²

¹⁰²Agreement between Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments. Addis Ababa, Ethiopia.2006. Accessed January 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

This Ethiopia-Finland BIT seems to be the first Ethiopia's BIT that expressly stated the importance of environmental standards. This would make this BIT the first third-generation of BIT in Ethiopia's history of international investment agreements. However, it does not impose any legal duty on Ethiopia and Finland.

From the review of Ethiopia's BITs, it is easy to conclude that they are all in pursuit of free movement of capital and prosperity through investment. This feature of the BITs show that they are "quintessentially liberal documents".¹⁰³ Their sole purpose was the promotion and protection of investment. In addition, they all assume that this free movement of capital will lead to prosperity in the contracting states. This assumption has been attacked as stated in Chapter One.

2.4. The Rationale for Protection of the Environment through BITs

Why is it necessary to include protection of the environment in BITs?

It has been argued that the regime of BITs is in crisis mode or at cross roads despite BIT proliferation in the 21st century.¹⁰⁴ This is mainly because of the investor-state dispute settlement (ISDS) under the BITs which may result in the host state being sued for various reasons and the possible payment of millions or billions of dollars in damages. Such actions by investors challenge sovereign states on their public policy decisions, measures and regulations. This has caused adverse opposition to BITs in different countries.

¹⁰³ This liberal doctrine believes that free movement of capital leads to greater productivity. Vandevelde, Kenneth J. *The political economy of a bilateral investment treaty*. American Journal of International Law (1998): 627. Accessed January 28, 2017. <http://www.jstor.org/stable/pdf/2998126.pdf> . ***The writer could not get access to the 2016 Ethiopia-United Arab Emirates BIT and to the English version of Ethiopia-Italy BIT of 1994***

¹⁰⁴ Ofodile Uche Ewelukwa. *Africa-China Bilateral Investment Treaties: A Critique*. Mich. J. Int'l L. 35 (2013): 144. Accessed January 23, 2017. <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1027&context=mjil>

A state's legislative power may be restricted as a result of its being a party to an international investment agreement. In addition, administrative measures may as well be restricted since their interpretation by investment arbitral tribunals may constitute expropriation for which the state would be required to pay compensation. One such investment agreement is BIT. The main reason why we find protection of the environment in BITs is because of states interest to reestablish sovereignty which can be manifested through introducing policies and regulations that aim at protecting the environment. Furthermore, the fear of being brought to arbitral tribunals which allegedly favor investors in such matters is another factor in having BITs that give recognition and protection to the environment.

BITs give an extensive protection and rights to investors and investment without reciprocal duty from the investors. As rightly pointed out

The increasing use of ISDS mechanisms also highlights the lack of balance between public rights and private interests under the framework of a BIT. The current BITs regime has failed to address the balance of rights and responsibilities of foreign investors without requiring corresponding responsibilities for them.¹⁰⁵

As a result of such factors, Bolivia has become the first country to denounce the ICSID (International Center for Settlement of Investment Disputes) Convention in 2007.¹⁰⁶ Similarly, Venezuela and Ecuador submitted their written denunciation of ICSID Convention.¹⁰⁷ This convention has been ratified by more than 150 states so far. Interestingly, Republic of South Africa has terminated its BITs with Belgium and Luxemburg, Switzerland, the Netherlands,

¹⁰⁵ Singh Kavaljit, and Burghard Ilge.(Eds).*Rethinking Bilateral Investment Treaties Critical Issues and Policy Choices*.(2016): 3. Accessed January 23, 2017. <https://www.somo.nl/rethinking-bilateral-investment-treaties-critical-issues-and-policy-choices/>

¹⁰⁶ Wick, Diana Marie. *The Counter-Productivity of ICSID Denunciation and Proposals for Change*. J. Int'l Bus. & L. 11 (2012): 239. Accessed January 23, 2017. http://heinonline.org/HOL/Page?handle=hein.journals/jibla11&div=18&g_sent=1&collection=journals

¹⁰⁷ *Ibid.*

Spain, Austria and Germany.¹⁰⁸ It has in its place introduced a domestic legislation with the aim of protecting investors rights while respecting domestic policy space.¹⁰⁹ Indonesia, has been terminating and refusing to renew BITs with several countries.¹¹⁰ It is also trying to review its BITs since it considers the current international investment agreements highly limit its regulatory and policy space.¹¹¹ This shows that there is significant dissatisfaction, especially on part of the developing countries, with the current regime of BITs.

Though based on Energy Charter Treaty (ECT), the *Vattenfall case* seems an important case from the perspective of environmental protection and international investment treaties. This case has its origin in 2009 when *Vattenfall*, the Swedish energy company brought an investment claim (USD 1.9 billion) against Germany. It was a case against Germany's environmental measures which restricted the use and discharge of cooling water for a coal-fired power plant on the banks of the Elbe river in Hamburg.¹¹² The case was settled after Germany agreed to 'dilute' its environmental standards which as a result adversely affected the river and its wildlife.¹¹³ In 2012, *Vattenfall* brought another claim (USD 4.4 billion) against Germany's decision to phase out nuclear energy by 2022 after the Fukushima disaster and to close down *Vattenfall's* nuclear power plants.¹¹⁴ The case has not been decided so far. Similarly, in *Ethyl v Canada*, Ethyl challenged the ban of import of gasoline addictive which the government

¹⁰⁸ Singh, *supra* note 105 at 6

¹⁰⁹ Adeleke F. *Benchmarking South Africa's Foreign Direct Investment Policy*. SAIIA Policy Insights 13 (2015): 2. Accessed January 23, 2017.

http://dspace.africaportal.org/jspui/bitstream/123456789/35079/1/saia_spi_13_adeleke_20150511.pdf?1

¹¹⁰ Trakman, Leon, and Kunal Sharma. *Indonesia's Termination of the Netherlands-Indonesia BIT: Broader Implications in the Asia-Pacific?* (2015). Accessed January 23, 2017.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661199

¹¹¹ *Ibid.*

¹¹² Eberhardt Pia, and Cecilia Olivet. *Profiting from injustice, how law firms, arbitrators and financiers are fueling an investment arbitration boom*. (2012): 27. Accessed January 27, 2017.

<https://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>

¹¹³ *Ibid.*

¹¹⁴ Bernasconi-Osterwalder Nathalie, and Martin Dietrich Brauch. *The State of Play in Vattenfall v. Germany II*. (2014). Accessed March 23, 2017. <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>

believed was extremely toxic.¹¹⁵ Ethyl asked for USD 251 million as compensation.¹¹⁶ The government of Canada later on settled the dispute with the company by paying compensation and lifting the ban on the chemical.¹¹⁷ These cases show the uncertainty and risk BITs brought to the host states. They also pose a challenge to the inherent right of states to regulate for public purposes.

One of the basic reasons for the actions of these states is their desire to have a complete control on their policy space which includes regulating investment against protection of the environment. Such cases and fear on part of host states has led to the inclusion and the reaffirmation of the right to regulate in relation to the environment, health, etc., in some BITs. The inclusion of such right to regulate and protection of the environment can give investment arbitral tribunals guidance in interpreting BITs and giving deference to sovereign states measures of regulating environmental and other matter for purely public purposes without being compelled to pay compensation. In this regard, Turkey's Model BIT of 2009 is exemplary since it seeks to preserve states' regulatory power by expressly mentioning that legal measures which have the objective of protecting the environment do not amount to indirect expropriation and hence are non-compensable.¹¹⁸

¹¹⁵ Moloo Rahim, and Justin M. Jacinto. *Environmental and Health Regulation: Assessing Liabilities Under Investment Treaties*. (2010). Accessed March 23, 2017.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663025

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Article 5(2) of Turkish 2009 Model Bilateral Investment Treaty. Accessed March 23, 2017.
investmentpolicyhub.unctad.org/Download/TreatyFile/285

Chapter 3 – Ethiopia’s BITs and Protection of the Environment

3.1. Introduction

There has been a movement in the regime of BITs to reform them in light of protection of the environment and the right of host states to regulate. The absence of safeguards in the BITs has resulted in interpretation of administrative measures and legislative actions as indirect expropriation. Ethiopia has already signed more than 30 BITs. The Federal Constitution imposes on the government the duty to ensure that the international agreements Ethiopia signs are in line with sustainable development. The country has also an ambitious plan to build a green economy. Such a plan might require new regulations that may negatively impact investors and investment. This may result in initiation of investment arbitral proceedings by investors. ISDS is expensive for developing countries like Ethiopia. Moreover, the country’s environmental measures or legislations may be considered an indirect expropriation and compensable by investment tribunals. The first section of this Chapter will analyze Ethiopian BIT regime from environmental protection perspective and see if they afford some kind of protection to the environment. The right to regulate, with respect to the environment, will be investigated in Ethiopia’s BITs in the second and last section.

3.2. Ethiopia’s BITs and the Environment

Ethiopia has signed more than 30 BITs. Most of the BITs are either first generation or second generation of BITs as discussed in Chapter Two. Furthermore, with regard to preambular part of BITs, investment agreements can be divided into traditional or non-traditional BITs. One of the prominent non-traditional BITs in the case of Ethiopia is the Finland-Ethiopia BIT of 2007. This BIT in the preamble states that the contracting states have agreed that the objectives of the BIT, *i.e.* greater economic cooperation and investment protection, “can be achieved without

relaxing health, safety and environmental measures of general application”.¹¹⁹ This may be seen as a positive development in the BITs signed by Ethiopia. However, such a statement does not create any legal obligation. Despite being a third generation and a non –traditional BIT, this treaty does not have a separate provision on the protection of the environment in the substantive part of the BIT.

Another important BIT is the Belgian and Luxembourg-Ethiopia BIT of 2006. This BIT does not say anything about environmental protection or environmental standards in its preamble, which makes it a traditional type of preamble. The BIT in the substantive part contains an article which provides for protection of the environment. In Article 5, the BIT affirms the regulatory right of the contracting states. Article 5(1) stipulates the right of each contracting state “to establish its own levels of domestic environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each contracting party shall strive to ensure its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation.”¹²⁰ As can be seen from the wording of this provision, it can be concluded that such a provision is similar with the preambular paragraph of Finland-Ethiopia BIT. This is because the two BITs have simply stated their intentions or aspirations in relation to environmental protection. Even the word “*strive*” in this substantive provision clearly shows the aspirational character of Article 5(1).

¹¹⁹ Agreement between Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments. Addis Ababa, Ethiopia. 2006. Accessed March 26, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>

¹²⁰ *Belgium Luxembourg BIT signed but has not entered into force*. Environmental legislation was defined in the BIT as any legislation with the primary purpose of protecting the environment, or prevention of a danger to human, animal, or plant life. Agreement between the Belgian-Luxembourg Economic Union and the Federal Democratic Republic of Ethiopia on the Reciprocal Promotion and Protection of Investments. Brussels, Belgium. 2006. Accessed March 26, 2017. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/360>

Similarly, Article 5(2) provides that the contracting parties “shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.” This provision is virtually identical in its substance with the Finland-Ethiopia BIT. The wording in this sub-provision again reflects the aspiration, not the legal obligation, of the contracting parties as can be inferred from the word *strive*. This Article 5 has its origin in the 2002 Belgian Model BIT.¹²¹ It is still part of the 2010 Belgian Model BIT.¹²² This shows that Model BITs are relevant that they can be tabled for negotiation with potential contracting states. In contrast, Ethiopia does not have its own Model BIT so far.

BITs may not be direct in relation to recognizing the protection of the environment or regulating investment against environmental objectives and standards of domestic policy or laws. A typical example in this regard is the Ethiopia-South Africa BIT of 2008. In the preamble, the BIT states that the contracting parties acknowledge “the right of the parties to regulate, on a non-discriminatory basis, the manner and flow of investment within their territories in order to meet national policy objectives.”¹²³ In addition, the BIT also mentions that investment can play an important role to bring about sustainable development when it has an appropriate domestic policy environment. This BIT seems to be the only BIT Ethiopia signed that talks about sustainable development. Moreover, the preamble talks about securing ‘an overall balance’ of rights and obligation between the investors and the host states.¹²⁴ This makes the BIT a non-traditional one in the preambular part since this regulatory power includes policy and legislation regarding protection of the environment. This statement does not oblige

¹²¹ Bernasconi-Osterwalder, *supra* note 82 at 3

¹²² *Ibid.*, 21

¹²³ 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. Pretoria, RSA. 2008. Accessed March 27, 2017. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67> (which was signed but never entered into force.)

¹²⁴ *Ibid.*

the contracting states to have a stringent policy or law protecting the environment. It simply declares the right of the parties to regulate investment. The BIT does not deal with the issue of the environment in its substantive part. This BIT was signed but never entered into force. This is because Republic of South Africa was terminating its BITs with different states and revising its BIT regime as discussed in Chapter Two.

The Egypt -Ethiopia BIT of 2006 (which entered into force in 2010) and the UK-Ethiopia BIT of 2009 are relatively recent BITs signed by Ethiopia. The first BIT has nothing to say about environmental protection despite being a recent BIT. The UK-Ethiopia BIT is traditional in the sense that it does not even have anything in relation to the environment even in the preamble. The substantive part is also devoid of any such objective, aspiration or obligation on the contracting parties to protect the environment. It has been held that “despite being one of the UK’s more recently agreed deals, the BIT contains no language to protect the environment and human rights.”¹²⁵ Therefore, the UK-Ethiopia BIT is one of the most old-fashioned BITs seen in light of its preamble and generation of BITs. There has been even strong pressure on the parliament to reform UK BIT regime.¹²⁶ This BIT has been signed but has not entered into force and there is opposition against its ratification in the UK.¹²⁷ These two BITs, although are from the 21st century, they do not afford any kind of deference to environmental protection. It is clear that the BITs belong to the traditional category and the first generation of BITs despite the fact that they are signed after 1995.

¹²⁵ Bergan Ruth. *Worried about UK BITs? The case for reviewing UK investment protection provisions*. Trade and Justice Movement. 2015: 15. Accessed March 28, 2017. http://tjm.org.uk/documents/reports/Worried_about_your_BITS_report_FINAL.pdf

¹²⁶*The case for reform of UK BITs-short briefing for MPs.*(.).Trade and Justice Movement. Accessed March 29, 2017. <http://tjm.org.uk/resources/briefings/the-case-for-reform-of-uk-bits-short-briefing-for-mps>

¹²⁷ Cotula Lorenzo. *Why parliament should scrutinize the UK-Ethiopia BIT*. Blog. IIED. 2015. Accessed March 29, 2017. <https://www.iied.org/why-parliament-should-scrutinise-uk-ethiopia-bit>

Turkey is one of the biggest sources of FDI for Ethiopia. The 2000 Ethiopia-Turkey BIT does not mention the right of the contracting parties to regulate, and hence a reference to regulatory autonomy on matters of the environment is lacking. However, the 2009 Model BIT of Turkey has made a positive step and mentions in the preamble that the objectives of the BIT “can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights.” In its substantive part of article 4, the Model BIT seems to be different from other BITs since it dedicates a whole provision about the contracting states right to regulate (such a provision does not exist in the 2000 Ethiopia-Turkey BIT). In Article 4(1) (b), the contracting states right to adopt, maintain and enforce non – discriminatory measures for the protection of “human, animal or plant life or health, or the environment” has been recognized. Article 4(1) b stipulates this measure also applies to the conservation of living or non-living exhaustible natural resources. This Model BIT seems to be a good example for the future BITs Ethiopia is going to sign.

From the consideration of all the BITs Ethiopia signed, it is clear that virtually all of them have the sole purpose of attracting foreign direct investment and affording protection to investors/investment/ companies of the other contracting states. Of all the BITs that Ethiopia ratified, only the Ethiopia-Finland BIT provides for protection of the environment in the preamble.

Whether this is a result of the asymmetric relationship of the country with the other contracting states is not clear. This may also be the absence of a clear policy of handling investment and environmental matters. The absence of a Model BIT, of Ethiopia, may be a manifestation of the lack of unambiguous policy on the intricate matter of investment and protection of the environment.

3.3. Ethiopia's BITs and the Right to Regulate vis-à-vis the Environment

The right to regulate is an important attribute of sovereignty. Ethiopia can adopt regulations or pass administrative decisions to govern particular activity, behavior, business, or industry within its territory. One such area that may be regulated is environment and investment. In Chapter One, it has been shown that there are problems of pollution from foreign investments. Pollution to the environment can be one area that Ethiopia needs to regulate by adopting stringent laws and regulations, and taking administrative measures against polluter investors.

The Environmental Policy of Ethiopia is underpinned by sustainable development. Sustainable development is “development that meets the present without compromising the ability of the future generation to meet their own needs.”¹²⁸ The concept is about integrating environmental, social and economic concerns into every decision making.¹²⁹ The following is the objective of Ethiopian Environmental Policy:

The overall policy goal is to improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic development through the sound management and use of natural, human-made and cultural resources and the environment as a whole so as to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.¹³⁰

¹²⁸ UN. *Report of the World Commission on Environment and Development: Our Common Future*. (1987). Accessed March 28, 2017. <http://www.un-documents.net/our-common-future.pdf>

¹²⁹ Emas, Rachel. *The Concept of Sustainable Development: Definition and Defining Principles*. Florida

International University (2015). Accessed March 29, 2017.

https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf

¹³⁰ Federal Democratic Republic of Ethiopia. *Environmental Policy*.1997. Accessed March 26, 2017. http://thereddddesk.org/sites/default/files/environment_policy_of_ethiopia_1.pdf

The Federal Constitution, in Article 44(1), provides for the right of all persons to a clean and healthy environment. Article 43(3) of the Constitution also imposes the duty on the government to make sure that all international agreements that are signed by the country to be in line with the right of the country to sustainable development. As per Article 9(4) of the Constitution, all BITs which are ratified by Ethiopia are part and parcel of the law of the land. Hence, it can be concluded that the government has the duty to make sure that the BITs that it signs and ratifies should have sustainable development as a goal. This also means that the BITs should contain a safeguard mechanism which affirms the right to regulate in important policy areas like protection of the environment.

There has been a growing number of investment claims by investors on grounds of environmental legislations and measures of the host states.¹³¹ As a result, it has been stated that international investment treaties which are supposed to create certainty for investors are becoming the source of uncertainty for host states environmental regulations and measures.¹³² The clear expression of the regulatory autonomy of the country seems important in light of unpredictability and extensive discretion of arbitral tribunals.¹³³ For example in *Metalclad v Mexico*, the tribunal stated in its award that

The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However,

¹³¹ Spears Suzanne A. *The quest for policy space in a new generation of international investment agreements*. Journal of International Economic Law 13, no. 4 (2010): 1037. Accessed March 25, 2017. <https://academic.oup.com/jiel/article/13/4/1037/799841/The-Quest-for-Policy-Space-in-a-New-Generation-of>

¹³² Mann Howard & Konrad von Moltke. *NAFTA's Chapter 11 and the Environment: Addressing the impacts of the Investor-State Process on the Environment*. International Institute for Sustainable Development Working Paper 1999:5 Accessed March 25, 2017. <http://www.iisd.org/pdf/nafta.pdf>

¹³³ Shotaro Hamamoto. Review of *The Right to regulate in International Investment Law* by Titi Aikaterini In European Yearbook of International Economic Law 2016. (2016): 836. Accessed March 15, 2017. <https://link.springer.com/book/10.1007/978-3-319-29215-1>

the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.¹³⁴

In addition, another tribunal has stated the following

We find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole- such as environmental protection -, particularly if the negative economic or commercial use of its investment without receiving any compensation whatsoever.¹³⁵

According to Aikaterini, “ in the absence of an express right to regulate, the wide cast of existing interpretations does not permit the deduction that tribunals accommodate host state policy space and tribunals *bon plaisir* may not be safely relied upon by states.”¹³⁶ The author further states that “it seems preferable that, insofar as a state wishes to reserve its right to regulate, it does so explicitly by means of concrete provisions in its [treaties]”.¹³⁷ In this regard, five years after the entry into force of Ethiopia-Turkey BIT, Turkey adopted a Model BIT that seeks to preserve its regulatory power by expressly mentioning that legal measures which have the objective of protecting the environment do not amount to indirect expropriation and hence non-compensable.¹³⁸

¹³⁴ Paragraph 111 of Arbitral Award *Metalclad Corporation v The United Mexican States*. ICSID case No. ARB(AF)/97/1. Accessed March 26, 2017. <http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf>

¹³⁵ Paragraph 122 of Arbitral Award. *Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States*. ICSID case No. ARB(AF)/00/2. Accessed March 26, 2017. <http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>

¹³⁶ European Yearbook of International Economic Law, *supra* note 133

¹³⁷ *Ibid.*

¹³⁸ Article 5(2) of the Turkey 2009 Model Bilateral Investment Treaty. Accessed March 28, 2017. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2852>

Ethiopia has an ambitious plan to build a green economy. According to United Nation's Environmental Program (UNEP), green economy is key for growth "that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities."¹³⁹ According to Ethiopia's climate-resilient Green Economy Strategy,

Ethiopia aims to achieve middle-income status by 2025 while developing a green economy. Following the conventional development path would, among other adverse effects, result in a sharp increase in GHGs [Greenhouse Gases] emissions and unsustainable use of natural resources. To avoid such negative effects, the government has developed a strategy to build a green economy.¹⁴⁰

Investment may be considered as an impediment towards the building of a green economy. This is because green economy may require a state to exercise its regulatory autonomy that may have adverse effects to investment and investors. Implementation of such a green economy strategy requires a strong regulatory framework.¹⁴¹ This is because current economies and regulatory frameworks are driven by unsustainable production practices which show the dominance of financial and economic policies over environmental policies.¹⁴² Therefore, investors/investments may be required to cut their emissions or install new technology in an effort to build green economy.¹⁴³ Such measures might prove to be costly for foreign

¹³⁹ Bina Olivia. *The green economy and sustainable development: an uneasy balance?*. Environment and Planning C: Government and Policy 31, no. 6 (2013): 1024. Accessed March 29, 2017. <http://journals.sagepub.com/doi/pdf/10.1068/c1310j>

¹⁴⁰ Federal Democratic Republic of Ethiopia. *Ethiopia's Climate Resilient Green Economy Strategy*. (2011). Accessed March 27, 2017. <http://www.undp.org/content/dam/ethiopia/docs/Ethiopia%20CRGE.pdf>

¹⁴¹ Brand Ulrich. *Green economy—the next oxymoron? No lessons learned from failures of implementing sustainable development*. GAIA-Ecological Perspectives for Science and Society 21, no. 1 (2012): 30. Accessed March 22, 2017. <http://www.ingentaconnect.com/content/oekom/gaia/2012/00000021/00000001/art00009>

¹⁴² *Ibid.*

¹⁴³ Wilensky Meredith. *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures under the Trans-Pacific Partnership*. 2015. Environmental Law Institute. Accessed March 30, 2017. <http://columbiaclimatelaw.com/files/2016/06/Wilensky-2015-07-International-Investment-Law-and-Climate-Change-Policy.pdf>

investment/ investors. This may also lead to closure of factories.¹⁴⁴ Vinuales states in this regard that “the ‘transitional challenges’ mentioned in the Green Economy Report prepared by the United Nations Environment Programme would have to include the considerable litigation risks resulting from the application of investment disciplines.”¹⁴⁵ This should be a very serious concern for Ethiopia in light of BITs and the potential risk of being brought to costly investment arbitrations. This should be one of the reasons why the country should look into its BIT regime and assess the place of such regulatory powers in the agreements.

The issue of environmental matters in investment disputes has been very controversial. Investment Arbitral tribunals allegedly favor investors than host states even on environmental matters.¹⁴⁶ Others contend that the current Investor-State Dispute Settlement (ISDS) is an impartial non-political dispute resolution mechanism.¹⁴⁷ Others indicate that absence of reference to environmental and other public policy concerns in BITs is also a problem for the arbitral tribunals.¹⁴⁸ This is because such absence of reference will have the effect that “tribunals will have no guidance on how to weigh ecological aims of governmental measures.”¹⁴⁹ Therefore, it is advised that states include exceptions in their BITs not to risk initiation of arbitral proceedings on their regulatory actions relating to the environment and the subsequent value judgment of their actions and measures.¹⁵⁰ In addition, such inclusion is

¹⁴⁴ *Ibid.*

¹⁴⁵ Viñuales Jorge E. *The environmental regulation of foreign investment schemes under international law*. 2012:1. Accessed March 24, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125170

¹⁴⁶ Schill Stephan W. *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*. International Centre for Trade and Sustainable Development (ICTSD). E15 Initiative Geneva. 2015. Accessed from https://pure.uva.nl/ws/files/2512304/163092_E15_Investment_Schill_FINAL.pdf

¹⁴⁷ Brower Charles N., and Sadie Blanchard. *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against Re-Statification of Investment Dispute Settlement*. Transnational Dispute Management (TDM) 10, no. 4 (2013). Accessed March 31, 2017. http://www.harvardilj.org/wpcontent/uploads/2014/01/Brower_Blanchard_to_Publish.pdf

¹⁴⁸ Beharry Christina L., and Melinda E. Kuritzky. *Going green: managing the environment through international investment arbitration*. Am. U. Int'l L. Rev. 30 (2015): 403. Accessed March 31, 2017. http://heinonline.org/HOL/Page?handle=hein.journals/amuilr30&div=23&g_sent=1&collection=journals

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

supported on the ground that the present regime of BITs imposes burdensome obligations without imposing any reciprocal duty on part of the investors.¹⁵¹

Seen in light of express right to regulate, the Ethiopian BIT regime seems not to reflect the current development in international investment treaties. Out of the BITs, only the Ethiopia-Republic of South Africa BIT expressly reaffirms the right of the contracting states to regulate on any matters including the environment. The problem is that this BIT never entered into force. Similarly, the Belgium &Luxembourg-Ethiopia BIT does the same in reaffirming the right of the contracting states to design and implement environmental policies. However, this treaty never entered into force. Therefore, Ethiopian BITs do not contain an environmental protection provision. They do not, furthermore, have general exception which underline the right of the country to regulate matters of the environment without any fear of being held liable through indirect expropriation. Such gaps may lead to an expensive litigation processes before arbitral tribunals and subsequent payment of huge compensation to foreign investors/investments.

The Belgium and Luxembourg –Ethiopia BIT of 2006 provided for the right to regulate and an independent environment protection provision. It was strange experience for the country to conclude a few years later BITs with the UK and Egypt which reversed the positive developments in the protection of the environment and the right to regulate. It is difficult to explain the reversal in these two BITs. One may argue that this reversal may be due to the difference in bargaining power between Ethiopia and the respective contracting states. This argument may make sense in case of Ethiopia-UK BIT since the UK has by far a higher bargaining power than Ethiopia. However, there is no such difference in bargaining power between Ethiopia and Egypt. Furthermore, most of the BITs do not fulfill the sustainable

¹⁵¹ *Ibid.*, 404

development requirement which has been stipulated in the Federal Constitution of Ethiopia. This is because most of the reviewed BITs of Ethiopia do not incorporate the principle of sustainable development which also demands a strong regulatory power by the state. Therefore, the absence of a clear policy in Ethiopian BITs has to be underlined.

Conclusion

The assumption or the belief that foreign direct investment leads to economic prosperity can be gathered from every preamble of the BITs that Ethiopia signed. However, there does not seem to be a consensus whether they lead to more investment and economic growth.

Recently, international investment agreements have been showing some positive developments. Protection of the environment has been an important one. This development has taken various forms. The most prominent and frequent one has been that the contracting parties give recognition to the need for affording protection to the environment in the preambles of the treaties. It has also been observed that the right to regulate has been considered in preambles of some countries. The Ethiopia-Finland BIT was positive in that it underlined that objectives of the BIT would be achieved without lowering environmental standards.

Another key development has been making a separate environment protection provision in the BITs. The American Model BIT, the Canadian Model BIT, the Belgium Model BIT, and the SADC Model BIT are typical examples. The Ethiopian experience in this respect seems to be a weak one. The country signed a BIT with Belgium and Luxembourg in 2006. This BIT was a positive development (which has not been followed in its other BITs) in that it had separate substantive provisions on the right to regulate and protection of the environment. The BIT making practice has shown that the country does not have a clear policy as to the content of the BIT it signs. The lack of consistency in the content of BITs is manifestation of this problem.

This absence of clear direction and policy is an encroachment on the very supreme law of the land which is the Federal Constitution. The Constitution imposes on the government the duty of making sure that the international treaties that Ethiopia signs guarantee sustainable development. Since the majority of the BITs do not have the principle of sustainable

development incorporated in them, it can be concluded that Ethiopia's BIT regime is a very old one that does not afford protection to the environment and that does not affirm the regulatory autonomy of the country on environmental matters.

Such outdated and old BITs may lead the country to expensive international investment arbitrations. This risk can be minimized by express inclusion of the protection of the environment and the right of contracting states to regulate matters of the environment. The country should at least have clarity on the matters by coming up with a Model BIT that can be used for negotiation of future BITs. Otherwise, the country's effort of building green economy and sustainable development may be constrained heavily if the country continues to sign first and second generation type of BITs.

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