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"Regulatory Space" in the Treatment of Foreign Investment in Ethiopian Investment Laws

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1. INTRODUCTION

Investment is, without doubt, one of the primary engines of growth in all economies.[1] Though foreign investment could contribute its share in the process of extricating developing countries (including least-developed countries) from their vicious circle of abject poverty, the international community has thus far failed, in spite of several attempts, to strike a deal at the multilateral level to give effective legal protection to foreign investment. To reduce the implications of this legal gap at the international level, however, countries started concluding bilateral investment promotion and protection treaties (commonly called "BITs").[2] This resulted in the proliferation of BITs as the main instruments of promotion and comprehensive legal protection of foreign investment. By the end of 2004 the total number of BITs concluded was about 2,392 among which about 35% were concluded between developing countries.[3] This indisputably makes BITs the main sources of international law on foreign investment.

BITs cover several substantive aspects of the regulation of foreign investment including the meaning of foreign investment; the admission process of foreign investment; guarantees and compensation for foreign investment in the event of expropriation or nationalization; guarantees of free transfers of funds and repatriation of capital and profits; and dispute settlement mechanisms. Further, BITs include nondiscriminatory treatments, in the forms of national treatment, most-favoured nation (MFN) treatment and fair and equitable treatment, as one of their cardinal principles. Nevertheless, in the light mainly of the prevalence of weak/infant industries and the

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[1] United Nations Conference on Trade and Development (UNCTAD), Investment and Innovation Policy Review: Ethiopia (2002), UNCTAD, Geneva, 1.

[2] The first of such BITs was the one concluded between Germany and Pakistan in 1959. BITs were "initially concluded mainly between developed countries and developing countries" although this trend has clearly changed at present. See Sacerdoti, Giorgio, *The Sources and Evolution of International Legal Protection for Infrastructure Investment Confronting Political and Regulatory Risks*, World Bank Conference on Political and Regulatory Risks in Private Infrastructure Investment, Rome (Italy), (on file with the author), 14. However, developing countries also began concluding BITs amongst themselves with the view to exhausting all possible sources of investment and showing economic and political solidarity over their development endeavors.

[3] UNCTAD, World Investment Report, 2005: Transnational Corporations and the Internationalization of R&D (2005), UNCTAD, Geneva, 24.

presence of some sensitive areas such as those with considerable military, environmental or cultural significance, discrimination becomes inevitable making it impossible to grant such treatment for all foreign investments. Thus, host States leave "regulatory space", which allows them some degree of flexibility, when they conclude BITs. Then, the issue is how broad regulatory freedoms should be and how they should be framed so that they balance national interest and the level of protection required for foreign investment. Another issue that arises in this relation is how the principle of nondiscrimination should be viewed vis-à-vis national investment laws.

Accordingly, the first part of this research sets forth a general background on the importance of foreign investment, the development of its legal protection and the dynamics of BITs. The second part describes the principle of nondiscriminatory treatment in terms of BITs concluded by Ethiopia and examines the limitations to nondiscriminatory treatment as determinants of the regulatory flexibility. Then, an analysis of Ethiopia's domestic investment laws vis-à-vis the obligations in the BITs will follow with the view to identifying the major gaps and shortcomings. Finally, the last part contains conclusions and recommendations on remedial measures for the future

2. Conceptual Overview and Background to Foreign Investment

2.1 *Meaning of Foreign Investment*

Though the term investment could be defined in various ways, it could generally be understood to mean the expenditure of capital for the production of goods and services with the purpose of making a profit. The Ethiopian investment code defines the tern investment to mean the expenditure of capital by an investor to establish a new enterprise or to expand or upgrade one that already exists[4].

The term foreign investment, on the other hand, refers to the transfer of funds or materials from one country (called capital exporting country) to another country (called host country) in return for direct or indirect participation in the earnings of an enterprise[5]. Thus it can be seen that foreign investment involves the transfer of capital, which could be in the form of tangible or intangible assets, from one country to another for the purpose of use in that country to generate wealth under the total or partial control of the owner of those assets[6]. It includes physical assets such as land; and intangible assets such as contractual arrangements and intellectual property rights. A typical definition of foreign investment in a BIT will include[7]:

a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, and similar rights;

[4] See, for instance, Article 2(1) of Investment Proclamation No. 280/2002, Federal Negarit Gazeta – No. 27, 2nd July, 2002 ("Investment Proclamation" hereinafter).

[5] Encyclopaedia of Public International Law, Vol. 8, p. 246, cited in M. Sornarajah, The International Law on Foreign Investment, (Cambridge University Press, Cambridge), 2004, 7.

[6] See *Id.*

[7] See article 1(1) of the Agreement between the Czech Republic and the Republic of Tunisia for the Promotion and Reciprocal Protection of Investments, signed at Tunis, on 6 January 1997.

b) shares, stocks and debentures of companies or any other form of participation in a company; c) claims to money or to any performance having an economic value associated with an investment;
d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill;
e) any right conferred by laws or under contract and any licenses and permits pursuant to law, including the concession to search for, extract, cultivate or exploit natural resources.

Therefore, it is not difficult to observe the broadness of this definition. Nowadays, the concept of foreign investment is expanding to include even pre-establishment rights, i.e. expenditures of an investor prior to acquiring admission to invest in a particular jurisdiction and being established. Further, it should be noted that foreign investment could be classified as foreign direct investment (FDI) and portfolio (indirect) investment[8].

2.2 *Economic Theories in Foreign Investment*

Investment would be a critical component of the development tools of a country as it is a source of capital for the production and supply of goods and services. It complements the development endeavours of a country in addition to providing hard currency for countries that need it most. Nonetheless, there are some three conflicting theories advanced by economists as to whether foreign investment is good or bad for the development of economies. These are:

1. *The classical economic theory:* this theory takes the position that foreign investment is wholly beneficial to the host economy[9]. According to this theory, foreign investment enables countries, such as developing countries, to divert their meagre resources to other more important public sectors. It also enables the receiving countries attract new technologies and employ more workers. It should be noted that these arguments mostly favour developed countries and are advanced by developed countries and their institutions such as the World Bank. No one would dare to argue that these are not true benefits of foreign investment but critiques say that foreign investors would unduly exploit host economies without regard to the development concerns of the society, thereby violating human rights, and issues relating to environmental protection. Thus what the critiques say is that although foreign investment is beneficial for the host economy, it would not be wholly beneficial and has to be watched warily.

[8] FDI refers to an investment carried out by a foreign investor by being physically present in the country where the investment takes place and she is in control of the management aspects of the investment; whereas portfolio investment refers to an indirect investment which participates the foreign investor only indirectly such as through buying shares, debentures and bonds.
[9] See M. Sornarajah, 51.

2. *The dependency economic theory:* This class of economists take the view that foreign investment will not bring about meaningful economic development[10]. Certainly, they agree that foreign investment is good for an economy but one should not expect that the presence of foreign investment is a panacea for the lack of economic development that developing countries are suffering from. They essentially raise two-pronged arguments in support of their theory. One, as investments are normally carried out by privately owned multinational companies that headquarter at their home countries, they would remit their profits to headquarters and by doing so keep on further strengthening the economies of developed countries[11]. This would end up maintaining the economic domination of developed counties and makes them the "central economies" of the world. Two, foreign investors are run by individuals who are driven by profit motive. Upon coming to the host country, they click with the ruling class or politicians and lull them with unlawful benefits such as corruption. Hence, instead of developing the economy of the country that is hosting them, they just keep on enriching individuals in power and bring about "uneven distribution" of the meagre resources available. Thus they argue that foreign investment would maintain the supremacy of developed counties and result in economic dependency of host countries on foreign investment.

3. *The Middle path:* This category of economists does not appear to have their own independent view but do not agree wholly with both the above theories. They take the middle-ground because they believe that foreign investment brings about economic development but that does not mean that the problems raised by the dependency theorists do not have a shred of truth. They base their arguments on factual analyses of the effect of foreign investment on development of foreign economies and conclude that "foreign investment should be harnessed to the objective of economic development and must be carefully regulated to achieve this end."[12]

2.3 *Conflicting Views Emanating from the Level of Economic Development*

Even if investment and economic development are intertwined and cannot be seen separately, the idea of its legal protection or regulation has been riddled with enduring arguments between the countries that generate it (usually developed countries) and those that receive it (usually developing countries). Those countries that export it seek to establish international law and constrain the liberty of the receiving countries.

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[10] Ibid, 57.

[11] Note that the economies of developed countries have developed, arguably, at the expense of those of the developing countries for historical reasons such as the slave trade and colonialist exploitation of the resources of the now developing countries.

[12] M. Sornarajah, 63.

On the other hand, developing countries seek more national control through their own national laws and minimum regulation of the area by international law. The Charter of Economic Rights and Duties of States of 1974[13] would adequately represent views of developing countries on international economic relations including foreign investment. Chapter 1 of the Charter, which lays down the fundamentals of international economic relations, states that economic as well as political and other relations among States shall be governed, *inter alia*, by the principles of (a) sovereignty, territorial integrity and political independence of States; (b) sovereign equality of all States; (c) non-aggression; (d) non-intervention; (e) mutual and equitable benefit; (f) peaceful coexistence;(g) equal rights and self-determination of peoples; (h) peaceful settlement of disputes; (i) remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; (j) fulfilment in good faith of international obligations; (k) respect for human rights and international obligations; (1) no attempt to seek hegemony and spheres of influence; (m) promotion of international social justice; (n) international cooperation for development; and (o) free access to and from the sea by land-locked countries within the framework of the above principles. Accordingly, Article 2 (2) (a) of the Charter authorizes every State to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.

Such difference in the positions of investment sending and receiving countries has been in place since the time foreigners (usually referred to as "aliens") started moving to foreign lands and doing investment activities. Though writers during those times were all from the developed countries, they argued for different standards. While Vitoria was of the view that aliens should be given equal treatment with the nationals of the host state[14], others such as Vattel were of the view that aliens should be treated in accordance with some external standard, which was higher than the national standard[15]. This latter view was based on the assumption that national standard is relative in its nature and that might subject aliens to unacceptable lower standards such as abusive treatments in dictatorial regimes. This difference continued all along intensified during the cold war era and even after its demise. It should be noted, however, that the difference in position was rigorously diluted and, even abolished at some places, during the colonial times as the colonialists subjugated their colonies and either forced their own laws or changed the laws of the colonies in a manner that favours the aliens.

[13] GA Res. 3281 (xxix), UN GAOR, 29th Sess, Supp. No. 31 (1974) 50, available at http://www.vilp.de/Enpdf/e162.pdf, accessed on 31 July 2008. Note that this Charter remained only as a General Assembly Resolution and is not binding yet. As the practice of states is very varied since then, one cannot think of it crystallizing into customary international law as well.

[14] This gave rise to what became to be known as the "Calvo doctrine", which is mainly championed by Latin American countries. According to this doctrine, aliens and their property in a foreign land shall be entitled only to the same treatment that is available to nationals of that country in accordance with its domestic laws.

[15] *See* M. Sornarajah, 18.

Be that as it may, the differences between the two blocs still persist and their arguments could be summarised as follows. Developed countries argue, *inter alia*, for:

a) Total liberty of the private investor regarding his choice as private investment is motivated by profit expectations;
b) Free admission of investors to countries where they want to invest;
c) Provision of international minimum standards of treatment;
d) Lawful expropriation, which requires expropriation to be only for public interest, on a non-discriminatory basis, with prompt, adequate and effective compensation to be followed by due process of law and the right of diplomatic protection.

Developing countries, on their part, contrarily raise the following arguments, among others, in defence of their interests:

a) The total liberty of the host states to exercise economic sovereignty over their natural resources;
b) Subjecting choice of investment to their own needs and policies;
c) The freedom to accept or reject investment offers based on their own assessment;
d) Freedom to expropriate or nationalize foreign investment based on their internal needs and policies and payment of compensation equivalent to their available resources;
e) Non-requirement of diplomatic protection as it could tamper with domestic issues and even the exclusivity of the jurisdiction of national courts.

2.4 *Lack of Comprehensive International Law on Foreign Investment*

The history of international regulation of foreign investment has also been fraught with series of problems. As noted above, there had not been any significant progress on the area before the end of the cold war era. After the demise of the cold war era, however, several attempts were made at the multilateral level to regulate the conduct of foreign investment but none of them succeeded as a result of the flatly contradicting interests of countries based on their level of economic development. Dominant attempts worth mentioning at this juncture include the attempt of the Organization for Economic Cooperation and Development (OECD) to adopt a Multilateral Investment Agreement (MAI) in 1998; and that of the World Trade Organization (WTO) to adopt the same MAI between 1996 and 2003 (international investment being one of the infamous "Singapore issues"). Both of these multilateral attempts failed due to the prevailing conflicts of interests.

Instead, agreement could only be reached on specific agreements, in different forums, covering only specific aspects of foreign investment. The prominent ones, among these,' include;

1) The World Bank conventions that established the International Center for

Settlement of Investment Disputes (ICSID), which provide only framework for arbitration in the event of investment disputes; and the Multilateral Investment Guarantee Agency (MIGA), which guarantees foreign investment against non-commercial risks;

2) The WTO agreements, which could be further divided into three different areas including:
   i) The Trade-Related Investment Measures (TRIMS) Agreement, which operates to regulate local content, trade balancing purchases, trade balancing exports and limitations on foreign exchange on trade in goods;
   ii) General Agreement on Trade in Services (GATS) which provides for 'commercial presence' of foreign service providers in the country where they operate to be able to effectively provide services; and
   iii) The Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement which regulates distortion of trade in goods and services resulting from intellectual property rights.
3) At the regional level, it has become commonplace to see investment protection provisions included in various regional trade agreements. Excellent examples for such regional trade arrangement dealing with investment issues include Chapter 11 of the North American Free Trade Area (NAFTA) concluded between the USA, Canada and Mexico in 1994 and the Association of South East Asian Nations (ASEAN) Treaty on the Protection and Promotion of Foreign Investment concluded in 1987.
4) Regional trade arrangements of particular interest to Ethiopia include the Cotonou Agreement and the Common Market for Eastern and Southern Africa (COMESA).
   i. The COMESA Agreement requires its members to accord fair and equitable treatment to private investors and maintain predictable, transparent and secure investment climate[16]. The Treaty simply lays down the general skeleton for the promotion and protection of investment between its members and leaves it to be fleshed out by domestic laws of the member states.
   ii. The Cotonou Agreement[17] requires the African, Caribbean and Pacific Group of States and the European Communities to promote and protect each other's investments and provides "The ACP States and the Community and its Member States, within the scope of their respective competencies, affirm the need to promote and protect either Party's investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment

[16] See Article 159 (1), The Treaty Establishing the Common Market for Eastern and Southern Africa, signed on 5 November 1993.

[17] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one Part, and the European Community and its Member States, of the Other Part, Signed in Cotonou, Benin, on 23 June 2000.

promotion and protection agreements which could also provide the basis for insurance and guarantee schemes."[18] It also intends to include the general principles on the promotion and protection of foreign investments within the framework of Economic Partnership Agreements[19]. The negotiation for such a framework investment agreement under the Cotonou Agreement appears realizable within the framework of Economic Partnership Agreements being concluded between the African, Caribbean and Pacific Group of States and the European Union.

In addition to being very specific, the aforementioned agreements do not deal with detailed substantive rules on foreign investment. Needless to state, the WTO agreements, i.e. TRIMS, GATS and TRIPS, govern investment only as far as it relates to trade distortion. The ICSID and MIGA agreements also deal only with fragmented aspects of foreign investment, which do not cover substantive issues of investment protection. Even worse, the regional agreements, besides focusing on trade liberalization, deal only tangentially with issues of investment.

2.5 *THE EMERGENCE OF BILATERAL INVESTMENT TREATIES (BITS)*

The underlying reason for the failure to reach a comprehensive multilateral agreement is that developed countries seek progressive liberalization of foreign investment while developing countries, which host the investment, oppose to the establishment of a multilateral ly binding international agreement and want to maintain broad rights of regulatory freedom. As a result, "foreign investment regulation is scattered over [...] BITs, a few regional investment treaties and national investment laws."[20]

This strategy of shifting towards bilateral arrangements has several reasons for both developed and developing countries[21]. BITs tend to serve a middle ground for both the interests of developing countries and developed countries[22]. In that they enable developed countries get back what they have lost at the multilateral level and enable

[18] Id., Article 78 (1).

[19] Id., Article 78 (3).

[20] Committee on Legal Aspects of Sustainable Development, International Law Association, London Conference Report (2000), 4. As expressed above, currently there are more than 2,392 BITs in the world.

[21] There are evidences that show that some developed countries are not willing to enter into a multilateral obligation for fear of loss of sovereignty in making their own policies on certain issues. For example, the French had to withdraw from the OECD negotiation on MAI in autumn of 1998 due to lack of willingness to open investment areas such as the cultural industry. They feared that the sector will be overwhelmed by US multinational companies. *See* Committee on Legal Aspects of Sustainable Development, 4; *See* also M. Sornarajah, 292-293 and 297.

[22] This term 'bilateral treaties' is usually named in different ways. To give a few examples, names such as Agreement (e.g., Agreement between Ethiopia and Kuwait on the Encouragement and Reciprocal Protection of Investment ("Ethic-Kuwait BIT" hereinafter), signed on September 14, 1996); Protocol (e.g., Protocol between Ethiopia and Denmark on the Promotion and Reciprocal Protection of Investment, signed on April 24, 2001); and Memorandum of Understanding (e.g., Memorandum of Understanding between Ethiopia and Libya on Investment, signed on August 12, 1999) are commonly used. Please, note also that the BITs used in this research are accessible at UNCTAD's website: http://www.unctadxi.org/templates/Startpage_718-aspx.

developing countries conclude the agreement, at least to some extent, balancing the interests better than multilateral arrangements. As such, the advantages of BITs include, *inter alia*, that they:

a) are concluded on *ad hoc* basis usually with review provisions every five or ten years;
b) give the parties greater freedom, as opposed to multilateral treaties, to negotiate on the content of each and every obligation in accordance with the particular needs involved as they entail mutual obligation;
c) would enable the parties to limit the specific areas of foreign investment they would like to protect and to control the extent of the protection;
d) protect host countries from an instantaneous development of an all-encompassing international norm/standard on foreign investment, to which they were objecting since the inception of the idea of international legal protection of foreign investment; and
e) It is further argued that "[trilateral solutions become necessary simply because of an absence of a consensus to create multilaterally acceptable norms"[23].

Another recent development is that developing countries are taking foreign investment as a strategy for their fight against poverty as well as their development endeavors on the premise that international investors, particularly multinational companies bring in a large amount of foreign capital or assets. Such benefits include, among others, transfer of technology, management skills, international marketing channels for marketing products, product design, quality characteristics, and brand names, which are intangible in nature.[24] These intangible assets will then be capitalized or converted in capital by applying them on the products and services of the developing countries.

In exchange for such benefits, countries started giving nondiscriminatory protection through BITs to the foreign investors on par with their national investors and other foreign investors. This is premised on the fact that protection of foreign investment on bilateral basis guarantees and encourages investors of the other party to invest in the partner country and stimulates the flow of capital and technology and in the end brings economic development to the parties. This can be witnessed from the objectives of the BITs themselves. Note that Ethiopia has concluded dozens of such BITs with countries in Africa, Europe, the Middle East and Asia with the view to promoting foreign investment and giving it legal protection.[25]

As regards the purpose of concluding such BITs, see the Table below which shows sample BITs concluded by Ethiopia and the relevant part of the purpose of the BIT as an illustration.

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[23] See M. Sornarajah., 212.

[24] *See* Agosin, Manuel R. and Mayer, Ricardo, *Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment?* UNCTAD Discussion Paper No. 146 (February 2000), 1.

[25] Ethiopia is also a party to the World Bank conventions mentioned above but not to the WTO agreements yet.

It should be underscored, however, that "despite expectations about the impact of BITs on FDI, there is no evidence indicating that the adoption of BITs has actually encouraged FDI flows to signing developing countries."[26] The Ethiopian Investment Agency reports that between July 2004 and July 2005, the share of foreign investment out of the total number of projects and capital is 52% and 62% respectively.[27] But the report does not indicate whether this foreign investment is a result of encouragement by BITs concluded by the country. It also does not show whether or not the investments originate from countries that have concluded BITs with the country. This makes it difficult to determine whether foreign investment is achieving the target for which it is required in the country.

Notwithstanding such shortcomings, the scope and content of BITs have been very standardized over the years. Nonetheless, the exact wordings of individual provisions still vary from BIT to BIT, "while differences are most significant between BITs signed some decades ago and those signed more recently."[28] Today, the main provisions of BITs deal with the scope and definition of foreign investment; admission and establishment; national treatment in the post-establishment phase; most-favoured nation (MFN) treatment; fair and equitable treatment; guarantees and compensation in the event of expropriation; guarantees of free transfers of funds and repatriation of capital and profits; and dispute settlement provisions, both State-State and investor-State[29]. As this research focuses on the type and extent of nondiscriminatory treatments, the following Section will analyze this subject in greater detail.

3. Treatment of Foreign Investment in BITs Concluded by Ethiopia

3.1 *Meaning and Types of "Nondiscriminatory Treatment"*

Three different types of nondiscriminatory treatment standards have developed to afford protection to foreign investment. These are the most-favoured nation (MFN) treatment, national treatment and fair and equitable treatment standards. They all deal with different aspects of nondiscriminatory treatment and will be discussed as follows.

The MFN treatment takes as its reference point the best benefit, advantage or privilege a country gives to its friendliest country. It takes this best treatment offered to the friendliest country and extends it to investors originating from other countries. In other words, the MFN treatment multilateralizes the arrangement concluded between the friendly countries with the purpose of "providing] a level playing field for all

[26] Corea, Carlos M., Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses, *Michigan Journal of International Law* (2004), Vol. 26, No. 1, 332. *See* also, generally, UNCTAD, Economic Development in Africa: Rethinking the Role of Foreign Direct Investment, UNCTAD, Geneva (2005), 64-81.

[27] Ethiopian Investment Commission, *Investment Review*, Quarterly Newsletter, Vol. 8, No. 16 (September 2005), 3.

[28] C.M Corea, 332.

[29] See UNCTAD, World Investment Report, 2003, FDI Policies for Development: National and International Perspectives, UNCTAD, Geneva (2003), 89.

investment players."[30] In any event, the foreign investors from third countries shall be given no less favourable treatment when compared with the investors of the other country that made the best deal. Though it is observable that the standard is expansive in its nature, it is not without limitation, however. The main limitation on MFN treatment is that the treatment should apply to investors operating under 'like circumstances' or 'like situations'. Consequently, there would seem to be an element of flexibility for a host country that wishes to treat different investors or categories of investment differently as long as fairly objective and defensible criteria are used in making such a distinction[31].

The standard of national treatment could be defined as a principle whereby a host country extends to investors treatment that is at least as favorable as the treatment that it accords to its national investors in like circumstances.[32] Thus the national treatment standard lays down the principle for non-discrimination between national investors and foreign investors concerning investment. But it is a contingent standard, as its level of protection is to be inferred from the laws and regulations of the host state on its own nationals. It is very important, however, as it treats foreign investors on equal footing with the host state's own investors. Nonetheless, it is important to note that in some circumstances such as dispute settlement, for instance, foreign investors could even obtain better treatment than the nationals of the host state as the former could sue the host state before international tribunals, which is not the case for nationals.

It has to be noted that these MFN and national treatment standards bring about the equal treatment of not only a foreign investor and a third country foreign investor but also a foreign investor and a domestic investor. To put it differently, these standards of treatment create equality of treatment literally among all investors. Needless to state, this will have far reaching implications on the capacity of competition of the investors. However, as referred to above, in the event of national treatment in particular countries appear to have broader flexibility as the points of reference of the standard are treatments provided to one's own nationals, i.e., countries can issue bad standards of treatment to their own nationals as that would be by and large a prerogative of their sovereign jurisdiction.

To circumvent the extension of such discriminatory loopholes, BITs include a third type of standard of treatment, which is called the international minimum standard. The international minimum standard of treatment is understood to encompass fair and equitable treatment and full protection and security.[33] Though generally speaking, these standards refer to a requirement of impartiality, they still remain nebulous as the terms

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[30] Victor Musoti, Non-discrimination and its Dimensions in a Possible WTO Framework Agreement on Investment: Reflections on the Scope and Policy Space for the Development of Poor Economies, *The Journal of World Investment* (Werner Publishing, Geneva), Volume 4, December 2003, 1025.

[31] Id.

[32] UNCTAD, International Investment Agreements: Key Issues, UNCTAD, Geneva (2004), 185.

[33] The tribunal in *S.D. Myers, Inc. v The Government of Canada* (2000), ICSID stated, under para. 259, that "the 'minimum standard' is a floor below which treatment of foreign investment must not fall, even if a government were not acting in a discriminatory manner". Note that the international minimum standard refers to protections available in customary international law.

they use are 'fairness' and 'equitability'. This standard is practically tested in the NAFTA investment framework. In NAFTA, Article 1105 accords to investors of the other party minimum standard of treatment in accordance with international law, including fair and equitable treatment and full protection and security. What constitutes "international law" to become minimum standard of treatment in accordance with this Article has become highly debatable.[34] Obviously, the national treatment standard itself could be taken as an international law. It is obvious that such debate is prompted by how the treatments are drafted in the NAFTA Agreement. Subsequently, countries have taken lessons from NAFTA and some BITs concluded recently have been influenced by this experience.[35] The US 2004 Model BIT provides a good example in this regard. Sub-article 2 of Article 5 of this Model BIT provides, in part, the following:

> The concept of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by [international minimum standard], and do not create additional substantive rights. The obligations in paragraph 1 to provide:
>
> a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

The point of entry of these standards into operation depends on the process of admission as provided in the particular BIT and the local law of the particular country. While some BITs dictate that the treatment standards commence application upon admission (post-entry), others dictate that the standards apply even before the foreign investor is admitted to invest (pre-entry). This will be discussed in greater detail below.

3.2 *Variations in the Formulation of Nondiscriminatory Treatments*

The formulation of nondiscriminatory treatment varies from BIT to BIT. Some BITs are quite detailed as to the content of nondiscriminatory treatment while others are not precise enough. In general, the contents of nondiscriminatory treatment can be grouped as follows:

(1) while some BITs express nondiscriminatory treatment in terms of according

[34] Article 1105 has caused many challenges to the parties though it was meant to serve as an example of higher treatment for foreign investment. One of the challenges is the extent to which the term "international law" should be interpreted (conventional or customary international law) and whether "fair and equitable treatment and full protection and security" could be taken as part of "international law" or whether they should be seen independently of it. Some tribunals have argued that "fair and equitable treatment and full protection and security" are additive while others have argued that they are illustrative (Barutciski, Milos, *In the Eye of the Beholder: A Commentary on the Investor Protection under NAFTA* (on file with the author), footnote 14)). Such divergent interpretations raised fear that such broad protection might trigger unintended MFN obligations in favor of third country agreements and the parties issued, in 2001, an interpretation that limits minimum standards of treatment to customary international law only and for "fair and equitable treatment and full protection and security" to be considered part of customary international law and not as additives to it.

[35] *See* UNCTAD, International Investment Agreements; Key Issues, 26.

treatment by a State which shall not be less favorable than that accorded to its own or third country investors and their investments, others condition it to apply only to investors and investments "in like circumstances" or sometimes "in like situations";

(2) while some nondiscriminatory treatment provisions provide for pre-establishment rights and post-establishment rights expressly, others do not provide for pre-establishment rights; and

(3) while some BITs provide for some exceptions or what could be referred to as "regulatory space", others do not mention any limitations. In what follows, the implications of these variations will be examined in turn,

3.2.1 "NO LESS FAVOURABLE" TREATMENT

Nearly all BITs provide for nondiscriminatory treatment and oblige the parties to accord investors and investments of nationals of the other party treatment no less favorable than that accorded to their own nationals or nationals of third countries. But the exact wordings of the treatment have variations. In most BITs, the provisions on treatment of investment run more or less as follows:

> Each Contracting Party shall accord to [foreign] investments treatment which in any case shall not be less favorable than that accorded ... to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned...[36]

This is the case with almost all BITs to which Ethiopia is party with few exceptions such as the Ethio-China BIT and the Ethio-Malaysia BIT.[37] Such a blanket provision makes the implementation of the provision difficult as an investor could claim such treatment in sectors where he is not investing, i.e. an investor investing in the leather industry could claim a nondiscriminatory treatment given to an investor engaged in the mining sector despite the fact that they are not operating under like circumstances.

To curb such potential problems, some BITs limit the application of nondiscriminatory treatment to investments in "like circumstances". BITs do not define what constitutes investments "in like circumstances" and clear jurisprudence on the issue is yet to develop. To give an example, the tribunal in *S.D. Myers, Inc. v Canada*, examining the issue in the context of NAFTA, stated as follows:

> The phrase 'like circumstances' [in Article 1102 of NAFTA] is open to interpretations in the abstract and in the context of a particular dispute...The tribunal considers that the interpretation ...must take into account the general principles that emerge from the legal

36 *See* e.g., Ethic-Netherlands BIT, Article 3 (2).

37 *See* for e.g. 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 3 May 1998 (Ethio-China BIT); and the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of Malaysia for the Promotion and Protection of Investments, signed on 2 October 1998 (Ethio-Malaysia BIT). These BITs simply require equitable treatment and full security and protection for investments made under them.

> context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns... The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favorable treatment is in the same "sector" as the national investor.[38]

Thus the term in "like circumstances" itself lacks clarity as it depends on several situations surrounding a particular agreement. Assuming that foreign investment is made by and large by transnational companies, some commentators argue that "[a] large multinational corporation as an investor is never 'in like circumstances' [as a national investor] because of its size and vertically integrated global organization."[39] Despite this inherent shortcoming, it is strongly advisable to include the condition of "in like circumstances" to national treatment provisions as it at least indicates possible comparison within similar sectors thereby tightening the scope of the treatment. It appears that the conditioning of nondiscriminatory treatment to such a requirement seems to be inspired by the "like product" requirement of the General Agreement on Tariffs and Trade (GATT Article III, national treatment). In any case, as the adage goes: "something is better than nothing" and such a condition is worth including in BITs, as its inclusion clarifies, at least to some degree, the extent of the treatment.

3.2.2 Distinction of pre- and post-establishment rights

Most BITs provide expressly that they apply only for post-establishment or post-entry stages of investment. "[T]he majority of bilateral investment agreements do not include binding provisions concerning the admission of foreign investments."[40] Rather, the rights of foreign investment normally begin to apply after the foreign investor is given an investment permit and is legally recognized to invest in the host country. Article 3 (5) of the Ethio-Netherlands BIT, for example, confirms that national treatment "applies to investments once legally admitted, through specific authorization, if applicable." Article 2 further subjects the admission of investment to be in accordance with the laws and regulations of the parties, which give them complete freedom to issue a law that could circumvent the agreement. Such restrictions or listing the stages when investment is protected (operation, management, maintenance, use, enjoyment or disposal), signaling that the treaty applies to post-establishment, are common in BITs. The reason behind such restrictions is clear: it is to identify foreign investments that add value to the economic objectives of the concerned states.

As post-entry requirement entitles the receiving country to accept or deny admission based on justifiable and legal grounds, the issue that arises is what protection would be available for an investor until it is admitted by the host country. Apparently, in such an event, the investor will be subject to either general international law or the domestic legislations of the host country or to both regimes, as the case may be.

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38 *S.D. Myers, Inc. v The Government of Canada*, paras. 243 and 250.
39 M. Sornarajah, 235.
40 Victor Musoti, 1025-1026.

Some BITs, primarily US and Canadian BITs, however, extend investment protection to pre-establishment preventing acts such as screening on the basis of nationality[41]. A provision on pre-establishment right is essentially a market access provision as it makes parties to such BITs open their investment markets for any potential investor. It grants foreign investors the right to be admitted to invest in the territory of the other party. Apparently, this equates foreign investors with nationals regarding investment but parties to such agreements expressly state exceptions where they would not allow foreign investment to certain areas. Pre-establishment rights are pretty advanced for capital-importing countries as they tie their hands well in advance before they see the worth of a foreign investment to which they are going to give the protection. For the countries that export capital, it is the best protection available.

However, some BITs do not provide expressly as to at what stage a foreign investor will be protected. The BIT between Ethiopia and China is a good example. In such circumstances, resort to interpretation of some provisions of the specific BIT becomes necessary. Most BITs define investment to include investments made "in accordance with the laws and regulations of the other party"[42]. They might also subject admission of foreign investment to be "in accordance with the laws and regulations of the parties"[43] making it read in conjunction with an investment law. Such provisions might help to determine whether a particular BIT provides only for post-establishment rights or whether it includes pre-establishment rights as well. But it depends on the provisions of domestic investment laws. Such options are not advisable as they could be taken to the dispute settlement mechanism agreed up on in that same BIT. Therefore, making the obligation clear from the outset would be of paramount importance.

3.2.3 The requirement of "regulatory space"

Regulating foreign investment from its beginning to the end of the investment, with all the activities in between, constitutes the heart of the conflict in a BIT. States have sovereign prerogative, under customary international law, to control entry of foreign investors and regulate how their investment is conducted after admission. To this end, regulatory space is of profound importance as it enables the parties to effectively control foreign investment. What agreements such as BITs do is progressively liberalizing this limitation.

However, complete liberalization of foreign investment is not possible and national laws and BITs regulate the entry as well as activities afterwards. To this effect, host states can introduce performance requirements, requirement to hire local personnel, requirement to transfer technology, local content in the form of joint venture, limitations on minimum capital requirement, exchange controls and so forth to protect

[41] See e.g. US-Azerbaijan BIT, Article II (1); See also Vandevelde, Kenneth J, The Economics of Bilateral Investment Treaties, *Harvard International Law Journal*, Vol. 41, No. 2 (2000), 493 (footnote 203).

[42] See e.g. Ethio-China BIT, Article 1 (1).

[43] See *Ibid*, Article 2 (1).

local industry including important sectors, and control unemployment and capital flight. The extent of regulatory space provided in BITs is well-summarized as follows:

> "It has been seen that some treaties confine protection to investments specifically 'approved in writing' for purposes of protection of the treaty. Others contain formulations such as investments 'made in accordance with the laws and regulations' of the host state or the wider formula, 'made in accordance with the laws and regulations from time to time in existence'. These treaties conserve sovereign rights."[44]

Such BITs leave very broad flexibility to host States as the foreign investments have to a large extent depend on the domestic laws of the host State.

In addition, some BITs also enunciate specific sectors that are excluded from the scope of national treatment through what is commonly referred to as "negative listing". None of the Ethiopian BITs examined for the purpose of this research provide such specific sectoral exceptions to the obligation of nondiscrimination particularly on national treatment. They just provide catchall exception provisions that subject the admission and treatment of investment to be in accordance with the legislations of the parties. Even if their exact formulations vary, the provisions of typical BITs run as follows: "Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to invest in its territory and *admit such investments in accordance with its laws and regulations*."[45] Here as well, the host country might use its own domestic law to negatively list areas that are not subject to national treatment.

Moreover, it is a common phenomenon in international trade treaties to carve out regional integration exceptions to the principles of nondiscrimination. Such exceptions allow the parties to the regional integration to treat each other in a more favourable manner than countries that are not within the regional integration. In other words, the parties in the regional integration can make a discriminatory treatment without violating their nondiscrimination obligation simply because it is provided for in the major treaties of international trade law. Unlike international trade, there is no comprehensive international investment law to allow or disallow exceptional treatments in the event of treaties dealing with international investment. Apparently following a similar pattern, BITs also provide for an exceptional treatment in the event of regional integration. For instance, Article 4 (3) of the Ethio-Belgian BIT[46] and Article 3 (3) of the Ethio-Netherlands BIT, which deal with MFN and national treatment, provide that such treatment shall not include the privileges granted by one of them to investors of a third state by virtue of its participation in a free trade area, customs union, common market

[44] M. Sornarajah, 257.

[45] Article 2 of the 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 Investments, signed on 7 March 2000 (Emphasis added). See also Art. 2 and 3 (6) of the Ethio-Kuwait BIT; Art. 2 and 3 (5) of the Ethio-Netherlands BIT; Art. 2 (1) of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments signed on 26 November 2003.

[46] Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal Promotion and Protection of Investments.

or any other form of regional economic organisation or on the basis of interim agreements leading to such organization. This certainly leaves some degree of flexibility for the parties.

Furthermore, some BITs leave more lax rights of regulatory flexibility to the parties. In this regard, Article 3(3) of the Ethio-Israel BIT seems to establish such broader freedom as, save in the case of compensation and repatriation of investments and returns, the parties are free to use *differential treatment to grant rights and privileges* for their own investors. Although there are such variations in the formulation of nondiscriminatory treatment, it remains a right with paramount importance as it protects foreign investors and their investments from discrimination. It also enables host States impose prohibitions on foreign investment in sectors of significant importance such as military, environment and indigenous culture and sectors that threaten local industry; and limitations on exchange control, performance requirements, technology transfer and hiring local personnel.[47] If a BIT includes a nondiscriminatory treatment provision and no exception or regulatory space is provided, then whatever sound economic reasons a state could come up with would not enable it to discriminate between investors.

4. THE INTERACTION OF BITS WITH DOMESTIC LAWS

In addition to BITs, Ethiopia has domestic laws on the regulation of investment. The primary legislations include the Investment Proclamation that deals with foreign as well as domestic investment and the Foreigners of Ethiopian Origin Proclamation[48] that enables foreigners of Ethiopian origin effectively involve in the overall socio-economic development of the country, including investing in their country of origin. The following sections will analyze the relevant parts of these legislations in turn.

4.1 *INTERACTION WITH INVESTMENT PROCLAMATION(S)*

The main objective of the Ethiopian Investment Proclamation is encouraging, promoting and improving the conditions of investment with the view to accelerating the country's economic development. In relation with foreign investment, it aims at enabling foreign investment increase the country's foreign exchange earnings and foster transfer of technical know-how, managerial skills and technology.[49] As a poor country in dire need of attracting as much foreign investment as possible, Ethiopia has repeatedly

[47] *See* K. Vandevelde, 483-84. *See* also OECD's compilation on the List of Measures Reported as Exceptions to National Treatment, available at http://www.oecd.org/dataoecd/32/21/1954854.pdf, accessed on 29 April 2006. Note that countries that are Members to the WTO cannot impose requirements such as local content, trade balancing purchases, trade balancing exports and limitations on foreign exchange. That is so because such impositions might distort trade in the parlance of the TRIMS Agreement. It should be underlined, however, that TRIMS does not cover limitations on foreign investment in areas such as the participation of local equity, R&D, transfer of technology, participation of local personnel and so on. Article 3 of the TRIMS also allows exceptions under GATT Article XX, which introduces a host of grounds of limitation fulfilling the specific requirements.

[48] Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in their Country of Origin Proclamation No. 270/2002 ("Foreigners of Ethiopian Origin Proclamation" hereinafter).

[49] Investment Proclamation, Art. 4.

amended its investment laws. Between 1991 and 2008 alone, the investment laws have been amended for about five times to accommodate new progresses and provide competitive incentives for investors. The Proclamation along with the Regulation issued to enforce it provide comprehensive rules such as on utilization of foreign currency, remittance, compensation in case of nationalization or expropriation[50], investment administration, investment permits, and investment incentives[51].

The Investment Proclamation reserves dozens of areas of investment for the government, joint venture with the government and for domestic investors[52]. The term "domestic investor" is defined to include Ethiopian nationals or foreign nationals permanently residing in Ethiopia and foreign nationals, Ethiopian by birth and desiring to be considered as a domestic investor (Article 2(5)).

Article 11 of the Investment Proclamation introduces capital requirements on foreign investors. While in principle a minimum of USD 100,000 is mandatory for a single project, for some specific areas such as engineering, architectural, accounting and audit services, project studies, business and management consultancy services and publishing, the minimum amount is USD 50,000. If the investment is a joint venture with domestic investors, the minimum capital requirement is USD 60,000 while for the above specifically mentioned areas the minimum is USD 25,000. Aside from these limitations, Article 8 of the Investment Proclamation guarantees that all other areas of investment shall be open for foreign investors. The Proclamation does not impose limitations or requirements such as performance requirements and limitations on local personnel. Rather, it exempts foreign investors that export at least 75% of their outputs from being required to allocate minimum capital for their investment.

It should be noted that in relation to regulatory freedom in BITs discussed above, the proclamation follows negative listing of areas reserved for Ethiopian nationals and foreigners of Ethiopian origin and foreigners permanently residing in the country. However, as pointed out above, the BITs discussed do not follow such negative listing.

[50] It is important to note that compensation in case of expropriation or nationalization is a constitutional right of investors according to Article 40 (8) of the Ethiopian Constitution (Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property). In line with this, the Investment Proclamation guarantees adequate compensation corresponding to the prevailing market value of property and such payment to be effected promptly.

[51] See Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 84/2003 ("Regulation" hereinafter).

[52] The Proclamation reserves investments in transmission and supply of electrical energy through the integrated national grid system, air transport services using aircraft with a seating capacity of more than 20 passengers and postal services, with the exception of courier services, exclusively for government. It also reserves manufacturing of weapons and ammunition and telecommunication services for joint venture with the government (See Art. 5 and Article 3 (3) of the Investment Proclamation and the Investment (Amendment) Proclamation No 375/2003. Please, note that this amendment Proclamation number is wrongly written as "373/2003" in the English text.) It should be underlined that the exclusion of private investment or the requirement of joint venture with the government in these sectors applies both to domestic as well as foreign investors. To this extent, notwithstanding the argument that these limitations discourage foreign investment in these sectors, the provisions do not contradict with the nondiscriminatory treatment commitment. Further, Article 6 of the Investment Proclamation and Article 3 of the Regulation reserve about two dozens of specific areas of investment for domestic investors only.

4.2 *Interaction with the Foreigners of Ethiopian Origin Proclamation*

As alluded to in the definition of domestic investors above, Ethiopia's laws relating to investment classify investors into three categories: Ethiopian nationals, foreign nationals of Ethiopian origin (and desiring to be considered as a domestic investor), and foreign nationals (those with Ethiopian origin and not preferring to be treated as a domestic investor as well as those who do not have Ethiopian origin).

The Foreigners of Ethiopian Origin Proclamation also has several social and economic reasons for its promulgation such as strengthening the ties of former Ethiopians that have changed their nationality (for various reasons) and entitle them to certain rights and privileges they lost when they acquired another nationality.[53] This is believed to enable foreign nationals of Ethiopian origin to contribute to the development endeavors and prosperity of their country of origin. Once a person acquires an identification card of foreign national of Ethiopian origin, he is exempt from entry visa and residence permit to enter and live in the country; exempt from work permit to work in the country; entitled to economic, social and administrative services equally with nationals; and eligible to be considered as a domestic investor to invest in the country[54]. Needless to state, this Proclamation bestows foreign nationals of Ethiopian origin with a broad range of rights of social and economic implications save political involvement.[55]

Thus, the Foreigners of Ethiopian Origin Proclamation expressly grants foreign nationals of Ethiopian origin with the right to be considered as domestic investors in accordance with the investment laws proper. As discussed above, the Investment Proclamation(s) reiterate(s) the same and entitles foreign nationals of Ethiopian origin to be considered as domestic investors, if they wish so[56]. A point worth noting at this juncture is that Article 6 of the Investment Proclamation differentiates areas exclusively reserved for "Ethiopian nationals and other domestic investors" and Article 3 of the Regulation further clarifies this by identifying the areas of investment that are exclusively reserved for domestic investors and those that are reserved *only* for Ethiopian nationals. Accordingly, areas such as banking, insurance, micro-credit and saving services, forwarding and shipping agency services, and air transport services (for aircrafts that have seating capacity of up to 20 passengers) are exclusively reserved for nationals only.

[53] Ethiopian laws on nationality do not allow dual citizenship and nationals automatically lose their nationality when they acquire another nationality. To be considered as a domestic investor, the person who has lost his Ethiopian nationality has to acquire the status of foreigner of Ethiopian origin. To get the status of foreign national of Ethiopian origin, again, *inter alia*, she must be an Ethiopian national before acquiring a foreign nationality or at least one other parents or grand parents or great grand parents was an Ethiopian national; and she must obtain an identification card that certifies that she is a foreign national of Ethiopian origin.

[55] Compare Foreigners of Ethiopian Origin Proclamation, Art. 5.

[55] *Ibid*., Art 6 (1). Note also that rights and privileges as well as restrictions on foreign investors would not apply to foreign nationals considered as domestic investors (Article 37 (1) of the Investment Proclamation).

[56] Note that some developing countries such as India and Pakistan also use similar schemes to promote ties and investments by persons of their national origin.

This begs for two questions: (i) whether it is possible to give nationals special treatment complying with obligations in BITs and (ii) whether it is possible to draw distinction between foreign nationals, i.e. those that are treated as domestic investors and those that are not. As regards the first issue, there is no doubt that the rationale for such protection is, in addition to encouraging indigenous entrepreneurship, shielding the fragile and fledgling domestic industry in those protected areas from being overwhelmed by foreign investors and driven out of business. Though, as indicated above, Ethiopian BITs do not negatively list areas that are reserved, they leave broad rooms for regulatory flexibility by making foreign investments subject to domestic laws and regulations. This should be interpreted as authorizing the country to take appropriate discriminatory measures in the interest of promoting domestic investment.

The second issue relating to differentiation between foreign nationals in particular seems to contradict with BITs obligations and hence a discriminatory treatment. But closer analysis shows, arguably, that that would not be the case. The following arguments could be raised in this regard.

1) There is no international law that prohibits states from conferring the benefits applicable to citizenship especially to foreigners of their own origin as they have a natural relationship with their country of origin. As noted above, the Foreigners of Ethiopian Origin Proclamation aims at calling upon nationals that have changed their nationality to participate in the socio-economic development of the country and it is supposed to boost their ties to their country of origin. Thus this preference is not driven solely based on economic reasons and "it is inappropriate to regard economic factors alone as the driving forces behind policy on foreign investment. The[re] are equitable, historical and other considerations which a state has to accommodate in fashioning policy on foreign investment."[57] This preference enables the foreigners of Ethiopian origin to open businesses, including family businesses, in their country of origin and that entails lesser suspicion that these category of foreigners would fly out with their capital anytime they do not feel safe or they find better business opportunities elsewhere. They could be taken as a more reliable source of capital than the other foreign investors.

2) The Proclamation grants the foreigners of Ethiopian origin with several other rights that are not related to investment. The foreigners with Ethiopian origin would be treated more or less like a national. They carry an identification card issued by the country showing that they are entitled to rights and privileges the country offers to its citizens short of voting and being elected. That makes it difficult to treat them as foreign investors *per se*, who normally get significantly lesser treatment than nationals.

3) The Ethiopian and non-Ethiopian origin foreigners get the same treatment when it comes to investment incentives. Some argue that a "host state can exclude any investment that does not appear to have the desired macro-economic impact."[58] If a

[57] M. Sornarajah, 295.
[58] KJ Vandevelde, 493.

state can exclude investments based on their macro-economic impact, then it should, for stronger reason, be allowed to favor, with clear criteria across-the-board, types of investment that would add value and have better impact on its economic progress.

4) Most importantly, BITs, as seen above, tend to introduce broad limitations based on the domestic laws of the parties. This could encompass several possible interventions by the laws of the country. That gives the country a chance to make such maneuvers in line with her development objectives.

5. Conclusion

It is possible to conclude that the fundamental rights to nondiscriminatory treatments, i.e., national treatment and the most-favoured nation treatment, of foreign investment are relative rights. They are granted, limited or denied depending on treatments that a country gives to either its own nationals or investors of a third country. Thus, it is for the concerned country to appropriately regulate how much treatment it should give to its own nationals and to third country nationals. It needs to be underlined, however, that it remains a right with paramount importance as it protects foreign investors and their investments from discrimination in addition to encouraging investment in developing countries.

If a BIT provides for nondiscriminatory treatment and does not leave "regulatory space" for the parties, it becomes very difficult, if not impossible, to advocate important, and at times inevitable, national policies, deviating from the BIT, through domestic legislations. Thus there is a need to include the negative listing of investment areas not open for foreign investors to be expressly and consistently indicated in the BITs. This should be done by mentioning the areas by name. If not, BITs should expressly leave discretionary power that would depend on the need of the country from time to time.

As the legal provisions of BITs are highly influenced and informed by the provisions in international trade law, it could also be strategic to think in terms of the broad exceptions used in international trade in goods and services. These exceptions are the general exceptions[59] used, for instance, for the protection of public morals, public order, human and plant life and health, the environment; and the security exceptions, used to protect essential security interests of Members of the WTO[60]. It is not unimaginable to think that a particular area where a foreign investor wishes to invest could conflict with the host country's essential interests such as these. To ones surprise, such protections to the interest of the country are not inscribed in most of the BITs which are the subject of this research. Some BITs such as the Ethio-Israel BIT, however, expressly cater for

[59] See Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS).

[60] See Article XXI of the GATT, Article XIV bis of the GATS and Article 73 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

exceptions, on a nondiscriminatory basis, necessitated for the protection of essential security interests of the parties[61].

Finally, given the fact that the number of bilateral investment treaties being concluded by the country is increasing over time, even with a room for "regulatory space", there is a need to standardize, to the extent possible, the contents of the treaties. In particular, regulating the contents of nondiscrimination provisions becomes of prime importance. That is so because notwithstanding possible contradiction with domestic laws, varying treatments in BITs provisions could attract unintended MFN obligations forcing the country to open its investment sectors to an undesired extent.

[61] See Article 7(1) of the Ethio-Israel BIT.