



**BALANCING RIGHTS AND OBLIGATIONS IN
ETHIO-CHINA BIT**

LL.M THESIS

By

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JUNE,2019

HAWASSA, ETHIOPHIA

**BALANCING RIGHTS AND OBLIGATIONS IN
ETHIO-CHINA BIT**

**A THESIS SUBMITTED TO HAWASSA UNIVERSITY, SCHOOL OF LAW,
COLLEGE OF LAW AND GOVERNANCE IN PARTIAL FULFILLMENT OF THE
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IN COMMERCIAL LAW

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This is to certify that the Thesis entitled “Balancing Rights And Obligations in Ethio-China BIT” submitted in partial fulfillment of the requirements for the Master's Degree with specialization in Commercial Law, the Graduate Program of the College of Law & Governance, and has been carried out by Mr. Hashim Tuna ID. No CLW/0010/10, under my supervision. Therefore, I recommend that the student has fulfilled the requirements and hence hereby can submit the thesis to the department.

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Dedication

This thesis is dedicated to my wife and my son ,Singtan, who were always the most supportive persons to all my accomplishments and dreams. My beloveds, I love you every single day.

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Thank you Lord ,you are Unmoved mover of globe, for making this possible and for all the blessings. May your name always be praised because it is only through you Lord that your creation can live a more fulfilled and purposeful life.

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Acronyms and Abbreviations

ADR	Alternative Dispute Resolution
BITs	Bilateral Investment Treaties
CFIA	Cooperation Facilitation Investment Agreement
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
ICSID	International Centre for the Settlement of Investment Disputes
OUP	Oxford University Press
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
BEE	Black Economic Empowerment
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
IAs	International Investment Agreements
ISDS	Investor-state Dispute Settlement
MFN	Most-Favored Nation Treatment
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
SDGs	Sustainable Development Goal

Table of ICSID Cases

- Biwater Gauff Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, July 18, 2008
- CMS Gas Transmission Company v Argentina Republic, ICSID Case No. ARB/01/8 May 15 2005
- Emilio Augustin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7 January 25 2000
- Metalclad Corp v United Mexican States, ICSID Case No. ARB (AF)/97/1 August 30 2000
- Occidental Exploration and Production Company v Republic of Ecuador, 12 ICSID Rep Award of 1 July 2004
- Piero Foresti v Republic of South Africa, ICSID Case No. ARB (AF)/07/1, 4 August 2010
- Pope & Talbot Inc v The Government of Canada (2001) 7 ICSID Reports
- Salini Costruttori S.P.A and Italstrade S.P.A v Morocco, ICSID Case No. ARB/00/4, Jurisdiction, July 23, 2001
- Siemens A.G v Argentina Republic, ICSID Case No. ARB/02/8 February 2007
- Tecnicas Medioambientales Tecmed S.A v United Mexican States, ICSID Case No. ARB/AF/00/2 May 19 2003

Ethiopia Cases

- The Ethiopian Holland Car Plc Vs Chinese Lifan Car Assembly Case
- Shandong Group, a Chinese donkey abattoir Vs Bishoftu City Admiration

Table of Contents

Acknowledgements.....v

List of Abbreviationsvi

List of Cases	vii
Abstract.....	xii
Chapter 1: Balancing Rights and Obligations in the BITs.....	1
1.1. Background	1
1.2. Problem Statement.....	7
1.3. Objective of the Research.....	9
1.4 Research Question.....	9
1.5. Significance of the Study.....	9
1.6. Scope of the Study.....	10
1.7. Methodology.....	11
1.8. Chapter Outline	12
Chapter 2: Review of Related Literature: Towards Understanding Ethio-China BIT.....	13
2.1 Emergence and Development Of Bilateral Investment Treaties	10
2.2 Brief Overview Of Ethiopia's Signed BITs	15
2.3 Analyses Of Ethio -China BIT	17
2.3.1 Definition Of Terms.....	14
2.3. Fair And Equitable and Its Elements.....	21
2.3.4 Protection and Security.....	25
2.3.4. Most Favored Nation Treatment.....	26
2.3.5. Expropriation.....	28
2.3.6. Investor State Dispute Provision.....	30
2.5. Previous Studies of the Relationship Between BITs and FDI.....	32

Chapter Three- Best practices of BITS: Lesson for Ethiopia from South Africa and Brazil Experience with BITS	36
3.1. The Chinese Investments in Ethiopia.....	36
3.3 South Africa and Factors for It's BITS Review.....	43
3.4 Lessons That Ethiopia Can Learn From South Africa's Experience.....	46
3.5 Brazil and the BIT regime.....	48
3.5.1 Justifications By Brazil Not To Ratify BIT.....	49
3.6 Brazilian CFIA for Ethio -China BIT.....	50
3.6.1 From BIT Content View.....	50
3.6.2 CFIA for Thematic agenda for cooperation and facilitation.....	57
3.6.2 CFIA to Increase Local Spillover	58
3.6.4 CFIA for Ease Doing of Business and Competitiveness Tool For Ethiopi..	59
Chapter Four- Findings and Recommendations.....	65
5.1 Findings.....	66
5.2 Recommendations.....	72
Bibliography	
Annex	

List of Figures

Figure 1: Top Five FDI Sources of Ethiopia

Figure 2: Ethiopia's Rank of Ease Doing of Bussiness Out of 190 Countreies

Figure 3: Rank Of Countries Competitiveness From 140 Countries

Figure 4:-The Global Competitiveness Level of Ethiopia and Brazil

Annex

Ethio-China CFIA developed as alternative to Ethio-China BIT

Abstract

This thesis is conducted with general objective : it is necessary to rethink Ethio-China BIT with the intention of balancing rights and obligations of investors and state party. This

because Ethio-China BIT would have significant challenges. One of these challenges pertains to Ethio-China's in-force BIT is , all clauses are shy of clear, precise meaning, leaving room for wide interpretation for tribunals. Investor are given inviolable, justiciable and inalienable rights. The second challenge was, eventhough stated as a priority in the Investment laws ,previous studies on Chinese FDI in Ethiopia indicate that there is policy gaps and the natural unwillingness to diffuse technology, skill and knowledge by Chinese firms to the economy. The third challenge was the existence of strong BITs signed by Ethiopia cannot be substitute for sound domestic regulatory and institutional frameworks because today , among others, factors that deter FDI to Ethiopia are excessive bureaucracy, inefficient and ineffective legal system are the prominent. As a result, the country failed to have high quality FDI as the cost of doing business is very high and the productivity & the profitability of investments significantly very low. The last but not the least , it is found that no direct linkage between Ethio-China BIT and FDI flows from China to Ethiopia .As various studies shows the objectives for Chinese firms to establish a FDI in Ethiopia are market seeking and strategic asset seeking.

The thesis argues that there has been a paradigm shift in the investment treaty practice of World from protectionism approach of BITs to facilitation of investements. Facilitating investment is critical for achieving the Sustainable Development Goals. Ethio- China BIT have paid relatively no attention to it ,which need to reconsidered as Brazil did. Brazil's response to the criticisms of the current regime of BIT was to move away from the adversarial approach and to adopt a cooperative approach, focusing on the elements of mutual benefit to investors and states called CFIA.

Generally, it is safe to say that Chinese FDI certainly is a potential for development in Ethiopia and not a development trap,but the thesis understand that there is need for optimal investment policy that will bring win-win situation for both Ethiopia and China. Given the fact that South Africa, among other countries, has already reviewed its BITs and Brazil developed alternative international friendly investment agreement, Ethiopia have to learn from South Africa's and Brazil experience in coming up with a solution for its problems regarding its Ethio-China BIT.

There is therefore a need for a sound regulatory approach to the treatment, protection ,cooperation and facilitation systems for foreign investors in Ethiopia through the use of BITs as country is characterized by weak legal system and weak institutions internally. This aids

in creation of legal certainty and faith which are an important ingredient for the inflow of investment in short time. In long run, Ethiopia must work to create hospitable business environment in order to attract diversified high quality and beneficial FDI by competing with other countries.

Chapter One

Balancing of Rights and Obligations Under BITs

1.1. Background to the Problem

A Bilateral Investment Treaty is an agreement between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.¹ The purpose of the BITs are to attract FDI to the host country that is linked to economic growth while for the investor; the primary benefit is the protection that the BITs provide from the risks associated with investing in a foreign country.² Attracting FDI is a core, permanent, objective of Ethiopia's International Political Economy. The government of Ethiopia has been trying to boost FDI inflows into the country by providing various investment incentives through its laws. To this effect, Ethiopia is a party to more than 30 BITs. One of them is Ethio-China BIT that focus primarily on investment protection of investors and generally pay little attention to the wider policy objectives of the Ethiopian government.³

International investment law is dynamic, treaty practice and jurisprudence in area is constantly growing. UNCTAD heralds new generation investment policy, with an aim to broaden the regulatory space of host states. This is because BITs limit regulatory space for host states by constraining measures pertaining to host state's regulatory prerogative which may take the form of protectionism. There has been refinement by India, Brazil, USA, Canada, Norway and South Africa of BITs as well as renegotiation of existing treaties.⁴ This reaction shows discontentment with existing IIAs and the lack of balance they strike between the host country's right to regulate and the expectations of investors regarding transparent, predictable and consistent investment framework.

1 Loungani P and Razin A. 'How Beneficial is FDI for Developing Countries' (2000) International Monetary Fund Finance and Development Quarterly Magazine available at <<http://www.imf.org/external/pubs/ft/fandd/loungani.htm>> accessed on 17 January 2019

2 UNCTAD 'Investment Instruments Online' available at <<http://www.unctadxi.org/templates/Page1006.aspx>> accessed 17 January 2019

3 ibid

4 UNCTAD (n 2)

Similarly, Ethio-China BIT is much unbalanced by imposing high obligation on Ethiopia. The objective of Ethiopian investments law as provided in preamble and article 5 of proclamation no.769/2002 are to speed up capital inflow and technology transfer ,improving living standard of people, encourage production capacity of domestic investors and ultimately to provide sustainable development of the Ethiopia.Against these objectives , noticeably absent from China-Ethiopia BIT⁵: provisions pertaining to the right to regulate, human rights, labor rights, Corporate social responsibility, environmental protection and sustainable development.

In 2017, at least 65 new treaty-based ISDS cases were initiated, bringing the total number of known cases to 855. So far, 113 countries have been respondents to one or more known ISDS claims.⁶ Of the total number of known cases decided on the merits, investors have won about 60 percent.⁷ Some of the cases that were brought before the court included challenges to a broad range of government measures, including changes related to investment incentive schemes, alleged breaches of contracts, alleged direct or de facto expropriation, revocation of licenses or permits, and many more. These countries include the Argentina, USA, Norway, Canada, South Africa and other states to mention a few.⁸Argentina, suffered several arbitration procedures from investors based on BITs signed by Argentina during the nineties.⁹

5Ethio-China 'Agreement Concerning the Encouragement and Reciprocal Protection of Investments' (May 11, 1998) available at <http://www.unctad.org/sections/dite/ia/docs/bits/china_ethiopia.pdf> accessed on January 20 ,2019

6UNCTAD 'Recent developments in investor-state disputes ISDS' (2014) Issue Note number1 availableat<http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> accessed 5 January 2019

7UNCTAD'World Investment Report 2018'Retrieved from <http://unctad.org/en/Publications_Library/wir2018_en.pdf> accessed on 15 January, 2018

8Green AR 'Bilateral Investment Treaties Coming Back to Bite' available at <<http://www.thisisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-tobite>>accessed 10 February 2019

Other countries such as Bolivia, Ecuador and Venezuela, have been embarked on reviewing their BITs, challenging investment protection regimes and have either terminated their BITs or have even gone as far as withdrawing from ICSID.¹⁰ In March of 2014, Indonesia decided to terminate its BIT with the Netherlands and has also reviewed all of its BITs.

In the view of this thesis, substantive clauses that are problematic in Ethio-China BIT¹¹, include among all the most-favored nation treatment, fair and equitable treatment, full protection and security and indirect expropriation. In Ethio-China's in-force BIT, all clauses are shy of clear, precise meaning, leaving room for wide interpretation which may be to the detriment of Ethiopia as a host state. Among central challenge to Ethio-China BIT which my thesis will explore is that claims could have been brought forward for indirect expropriations using BIT provisions.

Indirect expropriation¹², has been defined as measures by government that gradually encroaches upon foreign investment, so as to confiscate or destroy. Although the Ethio-China BIT has a provision for direct expropriation¹³, no indirect expropriation provision. The provisions did not address the distinction between compensable and non-compensable regulatory actions. Thus, a host government (Ethiopia) can regulate only to the extent that it

9 To this date, Argentina has figured as a respondent state in a total of 60 cases – this represents 7% of the total cases worldwide. Out of the 60 cases, 54 were initiated between 1997 and 2009. Argentina is the country with more cases as a respondent state – followed by Venezuela with 44 and Spain with 43 cases. This is based on the number of public cases, available at the UNCTAD 'Investment Instruments Online' available at <http://www.unctadxi.org/templates/Page1006.aspx> accessed 17 January 2019

10 UNCTAD(n 6)

11 Ethio -China BIT(n 5)

12Isa koff PD 'Defining the Scope of Indirect Expropriation for International Investments' (2013) Global Business Law Review

13 Ethio-China BIT (n 5) art 4

does not interfere with investments. In the event that it does regulate and interfere with an investment, it has to compensate.

It is also noteworthy to point out that Ethio-China BIT fail in offering clarity for standards of treatment, namely fair and equitable treatment.¹⁴ The FET is not clear as to what it means, and inconsistent arbitral awards add more confusion and uncertainty. The standard has been termed by some scholars as vague. As such, case law points to different interpretations. For example, *Pope & Talbot Inc. vs Canada*¹⁵, states that an investor is entitled to international law minimum standard of treatment, plus fairness elements; while in the *TecMed* case¹⁶, the tribunal held that FET requires the state parties to provide treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. These decisions are different and inconsistent, and may delegitimize the investor-state dispute settlement mechanism in Ethiopia, if disputes arise since Ethio-China BIT contain absolute standard of treatment.

Ethio-China BIT didn't contain labor, human right and environmental issue. A baseline study by the International Labor Organization found that Chinese investments are characterized by low labor standards, with long working hours, low pay, low standard of occupational safety and health. Generally, recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws.¹⁷ China has become a major player in the development of hydropower in Ethiopia and these developments raise serious questions about the environmental consequences of Ethio-China cooperation which the BIT omitted. This is against constitutional right of people to live in healthy environment which needs quick solution. This shows the BIT is not co-existent with Ethiopian domestic legislations.

14 Ibid art.3(1)

15 *Pope & Talbot Inc. v Government of Canada*[2001] UNCITRAL final merits award

16 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*[2003] ICSID Case No. ARB (AF)/00/2. May 19, 2003

17 UNCTAD(n 2)

Another strong criticism against Ethio-China BIT is that there is a significant lack of reciprocity and the BIT did not create responsibilities or duties for China foreign investors or home states such as corporate social responsibility which resulted in bad stigma on foreign investments around the country. China-Ethiopia BIT also limited Ethiopian policy space. This distinctive issue finds itself absent in Ethio-China BIT. This has severe implications for the government especially with regard to enforcement of social economic transformation and its related policy. The increase of investor-state disputes precipitated by the exercise of state police powers when regulating domestic affairs raises the need to balance investor's rights and host country's policy space and regulatory flexibility.

Investment treaty making has reached a turning point. The number of new IIAs concluded in 2017 are 18, was the lowest since 1983. The number of new ISDS claims remains high. IIA reform is well under way across all regions. Since 2012, over 150 countries have taken steps to formulate a new generation of sustainable development-oriented IIAs.¹⁸ For example, Indonesia, Ecuador, Venezuela, India, Norway, Malaysia, have reviewed their treaty networks.¹⁹ FDI regulations of South Africa, Egypt, Algeria, Kenya, Lesotho and Swaziland was reviewed. In contrast to reforms under way globally, Ethiopia continued to enforce the outdated BIT with China.

Brazil had signed 14 traditional type BITs in the 1990s, but these were not ratified by its National Congress.²⁰ Authors understand that Brazil's refusal to adhere to the traditional BITs is because these treaties were seen as compromising Brazil's sovereignty given, for example, that they do not provide home countries' investors with obligations, only rights. This consisted in an opportunity to develop an innovative model that did not focus only on

18 UNCTAD(n 2)

19 UNCTAD (n 6) , For instance. In striking contrast to the treaties concluded at the turn of the millennium, all treaties concluded in 2017 contain a sustainable development orientation, preservation of regulatory space and improvement or omission of ISDS clause.

20 Kaushal, A, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009)(Vol. 50, 512) Harvard International Law Journal

protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality.²¹

BITs rarely contain an obligation for the home country to promote investment flows. Most BITs only focus on the protection of existing investments, rather than the promotion and facilitation of new FDI. Facilitating investment is critical for achieving the Sustainable Development Goals. According to UNCTAD's calculations, developing countries face an annual SDG investment gap of \$2.5 trillion.²² Despite the fundamental importance of investment facilitation for growth and development, Ethio- China BIT have paid relatively no attention to it, which need to be reconsidered as Brazil did.

Generally, studies show China uses Ethiopia for two strategic goals: to enter new markets and to enhance her own international influence over Africa.²³ Additionally, studies indicated that the effects of Chinese investments on Ethiopia's economy were found to be twofold. Chinese investment in Ethiopia could facilitate investment in Ethiopia through the provision of infrastructure in relatively short time, modern management systems as can be gleaned from the study. The negative side relates to Chinese competitive threat to the infant but growing local firms, technology, skill and knowledge transfers, quality of projects, foreign exchange problem, CSR, SDGs. The study concludes that this is mainly due to poor regulation.²⁴

21 Bernasconi-Osterwalder, N., & Brauch, M. D. 'Comparative commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi' Retrieved from <<http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas>> accessed on 20, September 2019

22 UNCTAD(n 6)

23 Alemayehu Geda and Atnafu G. Meskel 'Impact of China-Africa Investment Relations: Case Study of Ethiopia'(2011)(no. A04) Institute of African Economic Studies, IAES Working Paper Series [http://www.mofed.gov.et/English/Resources/Documents/GTP%20Policy%20Matrix%20\(Eng%20lish\)2.pdf](http://www.mofed.gov.et/English/Resources/Documents/GTP%20Policy%20Matrix%20(Eng%20lish)2.pdf) Last visited 25 December 2018

24 *ibid*

The existence of strong BIT protection is not primary driving force for China to invest in Ethiopia. Ethio -China BIT cannot facilitate the positive spillover and local capacity building which aimed by domestic investment legislations.

The assumption that BITs promote investment has recently been called into question by numerous studies. Two early U.N. studies found no "direct linkage" between BITs and FDI flows and concluded that BITs play a minor and secondary role in influencing FDI flows. A more recent World Bank report found that BITs do not seem to have increased flows of investment to signatory developing countries.²⁵ This is the case of Brazil , who does not have a BIT with China, USA does not have BIT with China the prime destination of its FDI outflows.

The government of Ethiopia has been trying to boost FDI inflows into the country providing various investment incentives. Nevertheless, the amount of FDI coming to Ethiopia is quite small. China is the major source country, accounting for more than one-half of the total FDI flows to the country.²⁶ The factors that deter FDI flows into Ethiopia are: low level of infrastructure development, excessive bureaucracy, inefficient and ineffective legal system, lack of skilled force, lack of liberalization and slow process of the privatization program.²⁷ But it requires a serious commitment and long time for Ethiopia to address these factors as they increase the transaction costs of doing business in the country and affect the image of the country in the eyes of potential investors.

IAs are only one of many determinants of FDI decision-making, and their importance is contingent on other variables. IAs cannot substitute for sound domestic policies and regulatory and institutional frameworks.²⁸ Ethiopia's signing of strong protective BIT with

25 UNCTAD (n 7)

26EIC' Ethiopia Investment .Commission .Report of 2017' Retrieved from <http://www.investethiopia.gov.et/images/pdf/EIC%202017%20Report%20.pdf> on5 January 2019

27 Solomon Mamo 'Determinants of Foreign Direct Investment in Ethiopia'(2008)Maastricht University

28 UNCTAD(n 6)

China alone cannot turn a weak domestic investment climate into a strong one, and cannot guarantee inflows and positive spillover from foreign investment. As a satisfied investor is an important promoter for potential investors, the government should also support the existing investors by introducing a pre-care and after-care program, aimed at identifying and resolving the problems encountered by the existing investors in short time bypassing over weak institutions of the country.

Unlike traditional BITs, which are geared toward investor protection, Brazil's CIFAs focus primarily on cooperation and investment facilitation. Moreover, they encourage close cooperation with the private sector, and allow for participation of NGOs and civil society representatives in the Joint Committees. All CIFAs concluded include innovative preambular language, a best-efforts obligation on corporate social responsibility and safeguards right to regulate, right to restrict transfers and contribution to SDGs.²⁹ Generally CIFA is developed in a manner similar to 2016 UNCTAD Global Action Menu for Investment Facilitation, which is based on the organization's rich experiences with investment promotion and facilitation efforts worldwide over the past decades.

If Ethiopia enacted different regulations before rethinking of its BIT with China, to overcome regulation gap to benefit from Chinese FDI in the line of the objectives of Investment proclamation no.769/2012, it may result in violation of BIT and will cost Ethiopia much as in South Africa. So, Ethiopia must learn from South Africa, Argentina and others in terms of the costs incurred for failure to review BITs and the factors that forced to rethink their BITs.

Generally, to avoid the aforementioned and other cases that may emerge from interpretation of the Ethio-China BIT, to enhance the competitiveness level of Ethiopia, and to direct and increase spillover from Chinese investments in Ethiopia in line of objectives provided in Investment proclamation, my thesis recommends that Ethio-China BIT must be replaced by balanced IIA.

1.2.Statement of Problem

Even though Investment treaty is dynamic, since the inception, Ethio-China BIT never undergone development. It is therefore not shocking that this BIT would have significant

²⁹Report of the 4th Annual Forum of Developing Country Investment Negotiators, retrieved from <https://www.iisd.org/pdf/2011/dci_2010_report.pdf> on December 10, 2018

Problems. First, Ethio-China BIT have potential to ‘bite’ i.e. the language used in the BIT has potential to generate unanticipated and inconsistent interpretations by arbitral tribunals, and resulted in a lack of predictability as to what the BIT actually require from Ethiopia. For instance the definition of investment under article 1 of Ethio-China BIT, is characterized by broad assets-based definition of investments. This approach of definition is an open-ended asset-based test that allows most assets to be claimed as covered investments which didn’t have any contribution to economy of Ethiopia. This is the most favorable to Chinese investors, and least predictable for Ethiopia as Host State. It allows tribunals to read it just in that way, with no limitations.

Ethio-China treaty under article 6 allow for the repatriation of capital and returns but the BIT didn’t provide terms of their scope, content, and specificity. The BIT didn’t provide and detailed examples of the types of investments and returns on investment that can be repatriated. Additionally it didn’t state whether in case of a serious balance of payments difficulties and external financial difficulties or the threat thereof, each contracting party may temporarily restrict transfers.

The BIT expressly provides for standards of treatment like FET, MFN in article 3 , however, these are articulated in one paragraph without explanation which allow tribunals to read without any limitation. The protection provisions can have potential to be enforced by arbitral tribunals at sometimes huge costs to Ethiopia. In addition ,development needs of the country and public issues like the right to regulate, human rights, labor rights, environmental protection, CSR and sustainable development absent from Ethio-China BIT.

Secondly, it found little evidence that the treaty has delivered on their limited part of promised benefits and it is running counter of domestic legislations. Empirical research show that even though China is the leading source of FDI in Ethiopia but the contribution to sustainable development of the country is low and diffusion of technology, skill and knowledge by workers into the local economy, have been weak due to poor regulations and implementation regarding these transfers. This is against ultimate objectives of investment laws of the country. Thirdly, Ethiopia have signed BIT with China in the expectation that they would promote foreign investment. The existence of strong BIT protection is not primary driving force for China to invest in Ethiopia. So there is no reason for Ethiopia to enforce the outdated BIT running against its objectives.

Fourthly, Investment treaty making has reached a turning point. There is global move from investment protection to investment facilitation to improve the benefit from FDI and competitiveness level for FDI destination. The BIT impact will depend on the actual drafting of the BIT and the capacity of national and subnational entities to effectively implement the treaty. BITs require complex and standard institutional reforms. Ethiopia is swimming at the bottom of the world in every pillars of competition. So the country have no capacity to implement the standard BIT with China. Despite its importance, Ethio-China omitted the issue of facilitation. Fifthly, IIA reform is well under way across all regions toward formulation of a new generation of sustainable development-oriented IIAs. BITs in order to be effective must depends on individual countries circumstances. Ethio-China BIT failed to bring the intended benefit from FDI because they adhered to theorothical model rather than the circumstances and needs of the country. So, Ethiopia should review its BIT with China in line that will bring win-win situation for both Ethiopia and China.

1.3.General Objective

This thesis will be conducted with general objective to answer the question: whether or not it is necessary to rethink Ethio-China BIT with the intention of balancing rights and obligations of investors and state party.

1.3.1 .Specific Research Objectives

- i. To examine and analyses the gaps of Ethio-China BIT especially in light of the problems of the clauses.
- ii. To examine whether the current Ethio -China BIT is in the line of investement policies and development needs of Ethiopia
- iii. To assess whether Ethio-China BIT is in the line of new international investement law trends
- iv. To examine whether the current Ethio-China BIT facilitated to Ethiopia the intended benefits of SDGs from Chinese FDI
- v. To assess alternative international investment friendly model for Ethio-China BIT, which can help the country to rebalance the Ethio-China BIT

1.4 Research Question

This thesis will answer the following questions:

- i. What are the legal problems with the current Ethio-China BIT and how may it affect Ethiopia?
- ii. Is the current Ethio -China BIT in the line of investment policies and development needs of Ethiopia?
- iii. Is the current Ethio-China BIT facilitated to Ethiopia the intended benefits of SDGs from Chinese FDI?
- iv. Is the current Ethio-China BIT in the line of new mantra in international investment law of balancing the rights and obligations of investors and host-states?
- v. What lessons could Ethiopia learn from the Brazil and South Africa experience?

1.5 Significance of the Study

The central problem that this thesis grapples with is that of the inherent challenges that Ethio-China's BIT are fraught with. There is now a trend which developing countries have especially adopted to ensure FDI policies are geared and otherwise consistent with their national development goals. Ethiopia's interests underlying in sustainable development and responsible business conduct have not been recognized in recent Ethio-China BIT as the government is enjoined to provide for by the new transformative Economic policies. Developing countries that signed BITs with developed nations seem to be disproportionately disadvantaged in the agreements. Against this, countries like India, Indonesia, Ecuador, South Africa, Brazil and others developed of new model in order to increase benefits from FDI and in order to become among the leading destination of world's FDI.³⁰ It is against this background that it becomes important to resolve the challenges in Ethio-China BIT because:

- i. it accords with the transformative agenda of Ethiopia's economy
- ii. it moves in line with the new mantra in international investment law of balancing the rights and obligations of investors and host-states,
- iii. it eliminates potential exposure to insensitive arbitral claims, and
- iv. it clarifies poor drafting in existing treaty.
- v. it helps countries that enter into such agreements to make informed decisions.
- vi. Suggests alternative IIA model which can help the host state to become best for destination of FDI and enable to fully reap intended benefit from FDI.

For academics, the study contributes to the ongoing debate on the role of BITs in encouraging FDI thereby adding on the existing literature on the topic. It will also help policy makers on how they can improve on BITs, so that they can encourage foreign direct investment.

30UNCTAD, 'UNCTAD's Global Action Menu for Investment Facilitation' (2016) Retrieved from <http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_Investment%20Facilitation%20Action%20Menu_3_1.pdf> accessed on 20 February 2019

1.6.Scope of the Study

This study is limited to only Ethio-China BIT and to lessons that Ethiopia can learn from Brazil and South Africa in relation to its old BIT clauses. In the Ethio-China BIT to be discussed in this study, focus will be on the potential consequences and benefits emanating from clauses in the BIT that will be discussed in detail. Regarding lessons to be drawn from Brazil and South Africa the thesis will examine the factors that necessitated South Africa to engage in extensive review of its BITs and reasons for Brazil not to ratify signed BITs, the manner in which Brazil developed CIFA and the measures that were taken to develop the model. Finally, full Ethio-China CIFA model will be prepared as presented in an annexure at the end of this thesis.

1.7 Methodology

Legal research is systematic finding of law on the identified topic or in on a given area as well as inquiry into law with a view of making advancement in the law. This research is doctrinal legal research. Doctrinal legal research is a research into legal rules, principles and doctrines. This thesis will use comparative legal research³¹, which involves comparing of law from different jurisdictions. It exhibits the failures and achievements in a given law in comparison to laws of other countries. The purpose of comparative legal research is to test the logical coherence, consistency and technical soundness of legal proposition with other jurisdiction and draw lessons from them if needed.³²

This study therefore follows a similar pattern by analyzing investment BIT between Ethiopia and China to discover its failures and achievements, then to draw lessons especially from South Africa and Brazil. These jurisdictions are chosen because while interestingly, Brazil has managed to turn around its investment climate and, it has also constructed some progressive Model IIA. South Africa makes a good jurisdiction to draw lessons from, as in

31 Du Plessis W 'A Self Help Guide Research Methodology and Dissertation Writing' (2007) available at <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/Du_Plessis_Research_Methodology_FINAL.pdf> accessed 17 January 2019

32 ibid

the past, just like Ethiopia, it grappled with the issue of empowerment and many problems emerged from its BITs.

Brazil developed an innovative model that solved problems with traditional BITs, aimed at promoting and facilitating productive investment of high quality, recognize the importance of a transparent and friendly investment environment. Ultimately, different regimes recognized CFIA as balanced, predictable and conducive to sustainable development and as it fulfilled the core principles developed by UNCTAD.³³

This thesis determined to take lessons from Brazil because Facilitation of investments model developed by Brazil is a cornerstone for attracting and increasing spillover from FDI in LDCs like Ethiopia as they lacks developed pillars of competition. CFIA helped Brazil to create hospitable investment environment by adoption of facilitation and cooperation approach to bypass the factors that increase cost of doing business.

South Africa entered into its BITs there was a common belief among many countries that BITs would attract FDI and the BIT did not conflict with any South African law. But South Africa have experienced practical effect that BITs have on domestic policy space. Moreover, South Africa also learnt that the growing number of cases was challenging government measures such as changes to the domestic regulatory framework, the tax regime, public tenders, public health, the environment and measures that were aimed to address the financial crisis bailouts and withdrawal of subsidies.³⁴ In these cases, 75 percent of the awards were in favor of foreign investors and significantly high arbitration costs were involved with such disputes.³⁵ Such observations on BITs together with other factors forced South Africa to review its BITs. Ethiopia could learn from the practical cases emanating from BITs experienced by South Africa and factors that prompted its review process.

33 UNCTAD(n 2)

34 Lang J ‘Bilateral Investment Treaties- a Shield Or A Sword?’ available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-BilateralInvestment-Treaties.pdf> accessed 10 January 2019

35 *ibid*

1.7.1 Data Source and Type

This research is a desktop study which is based on various primary and secondary sources. The primary sources used in the research are mostly the Ethio-China BIT, few BITs signed by South Africa and the Brazil's CIFA. As regards secondary sources, a review of journal articles, internet sources, position papers, books on international investment law, internet sources, journal articles, publications and other scholarly material will be conducted.

1.8 The Organization of the Study

This thesis comprises of four chapters. Chapter one introduces the thesis with a background, the problem statement, the significance and objectives of the study, the research questions, scope, the methodology and the chapter outline of the study. Chapter two focuses on the history of BITs of Ethiopia with typical emphasis on Ethio-China BIT clauses. The clauses in Ethio-China BIT will be discussed in detail. Chapter three will briefly introduce South Africa's BIT history and the factors that prompted South Africa to review its BITs. Additionally it will briefly introduce Brazil's BIT regime, the manner in which Brazil developed CIFA and the measures that taken within the model developed. It will analyze the situation that exists in Ethiopia now in relation to Chinese investments. With this in mind, Ethiopia has numerous lessons to learn from South Africa and Brazil. Finally Chapter Four will provide recommendations and the course of action for Ethiopia. It will also be the concluding chapter of the thesis.

Chapter Two

Review of Related Literature: Towards Understanding Ethio - China BIT

2.1 Emergence and Development of Bilateral Investment Treaties

Bilateral agreements were a more manageable platform to negotiate for protection of investments. From the historical perspective above, it is clear that there was dire need for an international investment protection legal framework. Perhaps at a multilateral level, it was impossible owing to clashes of ideologies such as those between capitalism and communism.³⁶

Most analysts believe that the purpose of the BITs is to attract Foreign Direct Investment to the host country that is linked to economic growth while for the investor; the primary benefit is the protection that the BITs provide from the risks associated with investing in a foreign

³⁶ There are fundamental differences in the two ideologies with regard to property ownership and rights. Thus, it was inevitable that states had different views on protection standards.

country.³⁷ BITs catalyze investment by reducing political risk which compel states to trade part of their sovereignty for credibility over hosting foreign capital.³⁸ BITs create internationally binding obligations on treatment of investors by setting out rules on how investors from state parties are to be treated. Such binding obligations are important to guard against dynamic inconsistency. Thus, the fundamental purposes of BITs is to reduce political risks that would otherwise work to the detriment of investors. Granting protection, stabilizing and otherwise limiting a host state government's regulatory freedom is a focal point of BITs.

With the multilateral regulation process having been fraught by numerous challenges, the first ever BIT was signed between Germany and Pakistan in 1959 and entered into force in 1962.³⁹ Other states quickly followed the German-Pakistan example and many BITs were signed during the 1960s using a similar pattern.

The BITs were entered into mostly between developing and developed countries, but the trend changed in recent decades as more BITs are being entered into between developing countries.⁴⁰ Most BITs in existence in Africa were signed after the countries attained their independence. For example, after 1994 the South African government entered into a flurry of BITs with developed countries. These BITs were signed principally with European countries

37 Ginsburg T 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) *International Review of Law and Economics* 108

38 Aaken V 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) *Journal of International Economic Law* 507

39 Ghouri A 'The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment law' (2011) (no.14 (6)) *Int. A.L.R* 196

40 Masamba M 'Africa and Bilateral Investment Treaties: to "BIT" or not?' available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1697:africa-and-bilateral-investment-treaties-to-bit-or-not&catid=82:african-industry-a-business&Itemid=266 accessed 20 February 2019

that were equally keen to support South Africa's transition from apartheid, back into the community of nations, with a view of encouraging foreign investment in the new South Africa. Many countries followed a similar approach resulting in 1472 BITs being signed within the 1990s.⁴¹

In recent years, there has been criticism regarding the BITs that were signed in the 1990's that are still in force to date. As highlighted, by South Africa, for example, in the desire to attract foreign investment, insufficient heed was paid to the less obvious, and less attractive, consequences of those treaties. It is also argued that BITs restrict the policy space of a host state in favor of foreign investors. Host states have given up their sovereign right to pursue policy objectives due to the BITs that they signed. In addition, BITs have also been regarded as affording investors preference with corporate rights over public interest.⁴² Some lawyers believe that the first wave of BITs was signed too fast with text penned by a closely-knit group of western lawyers. Based on this belief, it is concluded that the majority of BITs reflect the texts developed to promote the 1960s anti-communist, post decolonization protection agenda for European investors.⁴³

In addition to the criticism of BITs that has been highlighted, it is also important to include the fact that the number of cases brought to the ICSID has also increased in the last decades. The issues raised in these cases do not only indicate that BITs create risks that may result in dispute settlement proceedings but also indicate the potential for huge financial costs being incurred when disputes arise. The dispute mechanism could also be viewed as an infringement of the host countries sovereignty as disputes are settled in international tribunals and not the domestic courts.⁴⁴ In order to address concerns raised in some of these disputes,

41 Lang J 'Bilateral Investment Treaties- a Shield or a Sword?' available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-BilateralInvestment-Treaties.pdf> accessed 10 January 2019

42 M Masamba (n 23)

43Green AR 'Bilateral Investment Treaties Coming Back to Bite' available at <http://www.thisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-tobite> >accessed 10 February 2019

44 AR Green(n 43)

some countries have embarked on reviewing their BITs. These countries include the USA, Norway, Canada, South Africa and other states to mention a few. Other countries such as Bolivia, Ecuador and Venezuela, have been very vocal in challenging investment protection regimes and have terminated their BITs or have even gone as far as withdrawing from ICSID.

The majority of countries that signed the 1472 BITs that came into force in the 1990s have taken action toward reviewing their BITs. Ethio –China BIT⁴⁵, has been signed in 1998 and currently in force BIT under its survival clause. South Africa had set an example by going full-blown in throwing out decade-old agreements that favored foreign investors thereby enabling it to rethink the agreements in a way that favors local industries.

2.2 Brief Overview of Ethiopia’s Signed BITs

Foreign investments have many benefits; most of which are dependent on the kind of investment.⁴⁶ For host countries, the expected benefits which would arise from their perspectives include, but are not limited to; technology, knowledge and skills transfer. Apart from these non-monetary benefits; more directly, a country benefits from increase in job opportunities, increased competition, and in some cases, increased economic stimulus.

To mitigate the current downward economic spiral, Ethiopia needs to do more to attract foreign investments. This would entail revisiting how investors are protected. There is therefore a need for a sound regulatory approach to the treatment and protection of foreign investors in Ethiopia through the use of IIAs. This aids in creation of legal certainty which is an important ingredient for the inflow of investment.

45 Ethio-China 'Agreement Concerning the Encouragement and Reciprocal Protection of Investments' (May 11, 1998)available at <http://www.unctad.org/sections/dite/ii/docs/bits/china_ethiopia.pdf> accessed on January 20 ,2019

46 There are two types of investments, namely foreign direct investment and portfolio investments. FDI involves cross-border movements of capital into another country, establishing a lasting interest in an enterprise that is resident in another economy. Portfolio investments covers equity and debt securities, and does not involve any control or management of the business. See Maffry A ‘Direct versus Portfolio Investment in Balance of Payments’ (1954) (no.44) The American Economic Review 614

Investment in Ethiopia is regulated by domestic laws, treaty laws, customary international law and international instruments Ethiopia has ratified.⁴⁷ In terms of treaty law, Ethiopia is a party to more than 30 BITs, majority of which are in force.⁴⁸ The problem with these treaties is that they have been highly debated owing to their lopsided nature, to which there has been suggestion of balancing rights and obligations of investors and host states. All of its investment treaties are which provide more rights than obligations and grappled with unexplained clauses, similar in structure and language.

Most of Ethiopian signed BITs⁴⁹, make provisions for generally the same terms and does not deviate significantly from the typical modern BIT. Allee and Peinhardt point out that there is a fallacy promoted that BITs are uniform when, in fact, each treaty has an internal balance that has been negotiated by the parties.⁵⁰ Based on this fact, the four BITs⁵¹(Ethic-China, Ethic-Turkey, Ethic-Israel and Ethic-Egypt BITs) signed by Ethiopia which are enforce have minor differences indicating the varying interests or concerns of the parties that negotiated with Ethiopia. The differences mainly emanate from the manner in which the same provisions are phrased in the different BITs.⁵² There is also evidence of certain provisions found in certain Ethiopian BITs that are not found in the others. From the wording of Ethiopian signed BITs preambles it is evident that more broadly Ethiopian BITs are negotiated between two asymmetrical parties.

47Investment Policy Hub, 'Ethiopia Bilateral Investment Treaties' available at <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/233>> accessed on 25 March 2019

48 ibid

49 Investment Policy Hub (n 47) art 1 ,2,3 of Ethiopian BIT with China, Egypt and Turkey

50 Allee T & Peinhardt C 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provision' (2010) (no.54) International Studies Quarterly 2.

51 Investment Policy Hub (n 47)

52 For example the FET standard stated in preamble part in Ethic-Egypt treaty while Ethic-China, Ethic-Turkey, Ethic-Israel included it in substantive part.

Despite often having the name “Agreements for the Promotion and Protection of Investments,” these traditional texts do not have an actual promotion concern⁵³, but almost exclusively the protection one, and their effectiveness in promoting investments has not been confirmed, after all these years, by any available data. Given the array of inconsistent decisions and the vagueness of BITs standards, it is imperative that Ethiopian government should reconsider changing from the present attitude of passive observers to more relevant and active player. Ethiopian government need to reassert BITs and join the group of countries pushing for a more balanced investment regime. On the basis of the existing investment regime, Ethiopian government can pursue a number of policy options which include, withdrawing from BITs, renegotiate existing BITs, not simply consent to foreign model drafts, prepare more favorable model drafts and finally reinvigorate support for a multilateral investment treaty framework.

2.3 Analyses Ethio-China BIT

2.3.1 Definition of Terms

The definition of the terms ,’investment’ and, ’investor’ are important because, from the perspective of a capital exporting country, the definition identifies the group of investors whose foreign investment the country is seeking to protect through the agreement, including, in particular, its system for neutral and depoliticized dispute settlement. From the capital importing country’s perspective, it identifies the investors and the investments the country wishes to attract and from the investor’s perspective, it identifies the way in which the investment might be structured in order to benefit from the agreements protection.

The recent UNCTAD study points out that broad asset based definitions have significant implications for the range of possible disputes that could come before arbitral tribunals.⁵⁴ According to UNCTAD, generalized definitions have led to a widening of the types of transactions that tribunals have felt able to include as ‘investments’ which has in turn given arbitral tribunals’ subject matter jurisdiction over a wider range of claims.

53 UNCTAD(n 6), Only 19 percent of 500 BITs analyzed by UNCTAD included investment promotion provisions.

54 UNCTAD, ’Scope and Definition Clause: UNCTAD Series on Issues in International Investment Agreements II’(2011) (No. 11.II.D.9)48-49.

Ethio-China BIT⁵⁵, defines investor with reference to the term ‘natural person’, and ‘economic entities’. The definition of the term ‘natural person’ in the treaty merely requires that nationality be determined in terms of the laws of the country that the national claims to be from. This proves problematic in that it results in situations in which foreign investors who are not privy to the original BIT may seek to exploit the shortcomings of this definition by altering their nationality so that they benefit from the rights and protection offered under Ethio-China BIT. Examples of such situations have been evident in cases such as that of *Waguih Siag v The Arab Republic of Egypt*.⁵⁶ This case involved a situation in which an Egyptian national, who had investments in Egypt, lost his Egyptian nationality at a time when he had acquired Lebanese and Italian nationality in a manner that appeared to have been devised. The said claimant went on to claim under the BIT that existed between Italy and Egypt as an Italian investor despite the fact that he had been an Egyptian national at the time the investment was made. This indicates that the manner in which the nationality requirement is phrased in Ethio-China BIT has loopholes that may allow foreign investors from other countries that do not have BIT with Ethiopia to nonetheless benefit from Ethio –China BIT.

Article 1 Ethio –China BIT define the term ‘investment’ broadly by indicating that the term refers to any kind of asset and further lists the assets that are considered as investments. Such definitions conform to Peterson’s view regarding some investment treaties that he claims to have been crafted in deliberately vague language, so as to cover the broadest range of investment situations.⁵⁷ The definitions of the term investment in Ethio-China BIT further states that the highlighted list is not exclusive. Malik states that, such a non-exclusive definition was developed by capital exporting states to ensure that a wide variety of their investors’ assets were protected in the territories of their capital importing treaty partners.⁵⁸

55 Ethio-China BIT(n 45)

56 *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt* [2015]
ICSID Case No. ARB/05/15

57 Peterson L ‘Bilateral Investment Treaties and Development Policy-Making’ (2004) IISD
27

58 Malik M ‘Recent Developments in the Definitions of Investment in International
Investment Agreements’ (2008)IISD 7

This presents problems in that the nonexclusive list could be interpreted to include anything from foreigners' money in a bank account, a holiday home, a company's goodwill, even contracts for the sale of goods manufactured by the investor in its home country, or services performed by the investor in its home country and then sold to consumers in the host country, to mention a few examples.⁵⁹ Such assets would have little to no contribution to the host state's economy or sustainable development and yet would still benefit from the heightened rights and protections offered by the investment agreement.

The Ethio-China BIT sought to place a limitation on the interpretation of the definition of investment by highlighting that the investment must be made in conformity with the laws and regulations of a contracting party. Yackee refers to such provisions as 'in accordance to' provisions and he is of the opinion that, relying on such provisions in BITs to provide tribunals with authority to take account of the issues in dispute would pose a number of interpretative and applicative uncertainties. He goes on to point out that such provisions typically do not mention which laws and regulations must be complied with.⁶⁰ Ethiopia's Investment proclamation⁶¹, is an example of Ethiopian legislation that may be used in interpreting the BIT provisions relating to what constitutes an investment in Ethiopia. This proclamation provides that, for an investment to be approved it has to promote the economic development of the country or would need to be of benefit to Ethiopia.⁶² The application of this law in the event of a dispute is not automatic not only because of the fact that it is not specifically mentioned in the treaty but also because of the manner in which tribunals have interpreted the 'in accordance to' provisions in BIT arbitrations'.

In the case of *Saipem S.p.A v Bangladesh*, the tribunal indicated that Article 1 (1) of the BIT in issue that stated that investment had to be made in conformity with the laws and

59Bernasconi-Osterwalder N & Johnson L 'Commentary to the Austrian Model Investment Treaty'(2011) IISD 7

60 Yackee J W 'Investment Treaties and Investor Corruption: An Emerging Defence for Host States?' (2012) *Virginia Journal of International Law*. 723-740.

61House of Peoples' Representatives "Investment Proclamation"(2012)(no.769)

62 Ibid preamble

regulations of the host state does not limit the definition of investment under the treaty to investment within the laws and regulations of Bangladesh.⁶³ This case indicate that the tribunal at ICSID may have jurisdiction regarding issues that may not even be considered as an investment in Ethiopia. There is no rule of binding precedent in international investment law, and as such, tribunals may reach their own conclusions regarding the facts of a case. With such uncertainties, it is a risk for Ethiopia to maintain the provision in its current phrasing since it may result in interpretations that may not be in its favor.

To add to the complexity of such broad definitions or a failure to define the term investment, it is important to highlight that foreign investors often make their investments through subsidiary companies incorporated under the laws of the host state. Without a specific agreement to the contrary, a locally incorporated subsidiary will not be able to bring a treaty claim against the host state. However, the foreign investor shareholder can bring a claim under an applicable treaty for damages with respect to its shareholdings. This has been evident in a number of cases against Argentina including the case of CMS Gas Transmission Co. v Argentina. In this case, the ICSID Annulment Committee noted that ,the definition in the Argentina-US BIT which provided for

“every kind of investment...owned or controlled directly or indirectly...such as equity, debt...” was very broad, and confirmed that investments made by minority shareholders are covered by the actual language of the definition as is also recognized by ICSID arbitral tribunals in comparable cases.”⁶⁴

The wording in this Argentina-US BIT is almost similar to that found in Ethio-China BIT. Argentina argued, in relevant part, that if the tribunals allowed minority or indirect shareholders to bring claims for relief based on damage to the company, host countries would be faced with a multitude of claims from different shareholders, as well as claims by the company itself. The tribunals, however, rejected those arguments in favor of a broad definition of investments and in doing so; they hung their decisions on the observation that there was nothing in the actual text of the governing treaties that imposed such a limitation. This indicates that Argentina had no intention of including minority shareholders as

63 Yannaca-Small C ‘Definition of Investor and Investment in International Investment Agreements’ (2008) OECD 77

64 Malik M (n 58) 18.

investments in its BITs and yet due to the phrasing of the definition of investment, the tribunal allowed such minority shareholders to bring a claim against Argentina. Ethiopia could also be subject to similar situations since Ethio-China BIT that define the term investment, provide the same broad definition of the term as that found in the Argentine-US BIT that was at issue in the aforementioned case.

Similarly in *Salini v Morocco*, the respondent alleged that the road construction contract did not constitute an investment protected both under the ICSID Convention and the Italy-Morocco BIT. The tribunal acknowledged that various objective criteria must be met before a transaction can qualify as a protected investment under the Italy-Morocco BIT and the ICSID Convention.⁶⁵ According to the tribunal Doctrine generally considers that investment infers: contribution, certain duration of performance of the contract and a participation in the risks of the transaction...in reading the Convention's preamble. One may add the contribution of the economic development of the host State of the investment as additional condition. The tribunal further emphasized that the constitutive elements may be interdependent, for example the risks of the transaction could depend on the contributions and the duration of performance of the contract.⁶⁶ Based on the Italy-Morocco BIT as well as the ICSID Convention, the tribunal was of the view that:

“The Italian company made a contribution in money, in kind and in industry through inter alia providing the necessary equipment's, qualified personnel and issuing of bank guarantees, the transaction was for 36 months complying with the minimum length of time upheld by doctrine, there were risks involved such as risks associated with prerogatives of owner permitting him to prematurely bring an end to the contract, unforeseen incidents that could be considered as force majeure, the contract contributed to economic development of Morocco because the highway in question serves a public interest and it is within the duty of states to construct infrastructure.”⁶⁷ Taken as a whole the tribunal found the contract constituted an investment as articulated both under the Italy-Morocco BIT and article 25 of the ICSID

65 *Salini Costruttori S.P.A and Italstrade S.P.A v Morocco*[2001](No. ARB/00/4) ICSID Case Jurisdiction,

66 *ibid*

67 *Salini Costruttori S.P.A and Italstrade S.P.A v Morocco*

Convention. The criteria used to determine whether disputed transactions constitute investments are now commonly known as the ‘Salini test’⁶⁸ and have been followed with measurable degree in subsequent cases.

From the foregoing discussion, it is plausible to argue that the ICSID Convention requires an objective interpretation to the term investment independent of the intention of state parties under the relevant BIT. Put differently, if the claimant fails to demonstrate that the transaction at hand meets the characteristics of ‘investments’ irrespective of whether the transaction complies with the BIT definition, arbitral tribunals should decline jurisdiction. Even more, when the definition of investment explicitly states that assets should be in the host state’s national interests, arbitral tribunal should evaluate whether such assets indeed contribute to the host state’s development. It should be noted that Ethio-China BIT concluded contain an asset based definition with a non-exhaustive list of assets that qualify for treaty protection. According to the tribunal, even though economic development of the host state is one of the proclaimed objectives of the ICSID Convention, contribution to the economic development of the host state is an expected consequence and cannot be perceived as an independent criterion.

2.3.2 Fair and Equitable Treatment

The most important provision from the perspective of the investor is the fair and equitable treatment clause. It is a rule of international law and not determined by laws of the host state. Although this provision is a common clause in BITs, there is no standalone definition of the FET standard in BITs. There is a school of thought that attributes diverging interpretations of the FET clause to the drafting itself.⁶⁹ There are different approaches in drafting the FET clause. One has been to link FET to international law. Another drafting style is to link the standard to minimum standard under customary international law. In Ethio-China BIT, the FET clause is articulated without clarity. It reads:

68 Christoph H ,Schreuer and others, ‘The ICSID Convention: A Commentary’(2009) (2nd edn) Cambridge University Press 116-129.

69UNCTAD 'Fair And Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' (2012) available at<<http://unctad.org/en/Doc s/unc tad di aeia 2011 d5en. pdf>> accessed 3 February 2019

‘Investments and returns of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of another Contracting Party.’⁷⁰

When examining the FET provision provided in the Ethio-China BIT, it is unclear whether the preceding sentence is meant to give interpretation the FET clause. The language lacks specific meaning and is particularly prone to expansive interpretation simply because an arbitral tribunal does not have sufficient interpretative guidance from the text. The law on FET is primarily for the purposes of promoting investment protection and not to bring about a law that balances investor interests and host state interests. This is attributed to the expansionist approach taken by arbitral tribunals when interpreting the FET standard.⁷¹ It is necessary however to consider the needs of the host state to regulate the behavior of aliens in its territory for public interest. Therefore, leaving the FET standard without an attempt to describe what it is, leaves the host state vulnerable. The following are Elements of FET in Arbitral Practice

i.The Protection of Investor Confidence and Legitimate Expectation

The respect of investor’s legitimate expectations is the foundation to ensuring that foreign investors receive fair and equitable treatment. The failure to honor such expectations will inevitably come at the forefront for any alleged violation of FET. Particularly, it should be stressed that when states provide assurances of FET, presumably such states wish to indicate to the international community that foreign investors will receive treatment comparable with some of the main expectations of foreign investors.⁷² This was emphasized in *CMS v Argentina* where the tribunal noted that FET is inseparable from stability and predictability.⁷³

70 Ethio-China(n 45)art.3(1)

71 UNCTAD(n 69)

72 Stephen Vasciannie, ‘Fair and Equitable Treatment in International Investment Law and Practice’ (1999) (no.70) *British Year Book of International Law* 99

73 *CMS Gas Transmission Company v Argentina Republic*(2005) (No. ARB/01/8) ICSID Case.

According to the tribunal FET is desirable to maintain a stable framework for investment and maximum effective use of economic resources.

The stability of the business environment constitutes the core of investor's expectations because investors envisage the legal framework to remain stable after the investment has been undertaken. This was precisely the issue in *Occidental Expropriation v Ecuador*⁷⁴, where the tribunal found that Ecuador had mischievously changed the legal framework under which the investment was made. According to the tribunal, Ecuador deliberately changed the tax law without providing clarity about its meaning and also the regulations were inconsistent with Ecuador's own practice.

ii. The Protection Against Discrimination and Arbitrary Conduct

According to proponents of the plain meaning approach, FET is violated if there is unfair discrimination or if investments are subjected to arbitrary or capricious treatment.⁷⁵ Accordingly therefore, FET aims at inherently precluding arbitrary and capricious actions against foreign investors. Conduct that is arbitrary and discriminates against foreign investors is considered prima facie breach of the standard of FET. It therefore follows that when a host state imposes measures considered as arbitrary and discriminatory such measures will inevitably violate the standard of fair and equitable treatment.

iii. Transparency

Transparency is considered an important component of fair and equitable treatment because it guarantees legal certainty. In essence, transparency in government decisions ensures that investors are left without doubt about the law applicable at a given time, in a given area thus making it possible for investors to know whether certain acts or conduct are lawful or unlawful.⁷⁶ In *Tecmed v Mexico*, the tribunal noted that the manner in which non-renewal of

74 *Occidental Exploration and Production Company v The Republic of Ecuador*(2004) (no.12) ICSID Rep 59

75 Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) (no.70) *British Year Book of International Law* 133

76 Abba Kolo and Thomas Walde, 'Capital Transfer Restrictions under Modern Investment Treaties' (2008) Oxford University Press 235

the license occurred was totally lacking in transparency. According to the tribunal, the lack of transparency in the behavior leading up to the nonrenewal did not reflect the reasons that led to the non-renewal of the permit.⁷⁷ More so, the ambiguity of government actions was even greater when it resorted to non-renewal of the permit to overcome obstacles not related to the preservation of health and environment. The tribunal further noted that the lack of transparency within government operations did not permit the investor to adopt behavior to prevent the non-renewal of the permit. According to the tribunal

“the conduct of Mexico amounted to a breach of fair and equitable treatment because the standard requires host states to act in a consistent manner, free from ambiguity and; ...totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”⁷⁸

IV. Denial of Procedural Due Process and Denial of Justice

The right to both substantive and procedural fairness are elementary principles of the rule of law and vital elements of fair and equitable treatment.⁷⁹ Procedural due process and denial of justice are grounded in arbitral practice as cardinal requirements for an inquiry whether investors have been treated fairly and equitably.⁸⁰ Specifically, the inquiry examines whether the investor was given a fair hearing before an independent tribunal, whether the investor was given specific information in advance of the hearing of the claim and whether there was a reasonable disposition of the investor’s case.⁸¹ A number of arbitral cases are illustrative, for instance in *Metalclad*, the tribunal found a lack of procedural fairness in the process leading

77 *Tecnicas Medioambientales Tecmed SA v United Mexican States*(2003)(No. ARB/AF/00/2) ICSID Case

78 *Metalclad v Mexico*(n 77)

79 Rudolf Dolzer and Christoph Schreuer, 'Principles of International Investment Law' (2008)OUP 131-32.

80 *ibid*

up to denial of the construction permit. Particularly, the tribunal upheld a violation of fair and equitable treatment because

“Metalclad was not notified of the Town Council meeting where the permit application was discussed and rejected, nor was Metalclad given any opportunity to participate in that process”⁸²

Furthermore, the tribunal found that Metalclad’s request for reconsideration of the denial of the permit was rejected without cause and the denial was without any reference to Metalclad’s flaws in conduct or failure to comply with rules and regulations.

V. The Failure to Act in Good Faith

Under normal circumstances, the relationship between host states and foreign investors is supposed to be based on good faith. Foreign investors expect the host state to abide by well-established fundamental standards such as good faith, due process and non-discrimination. On this premise, host states bound by the obligation of FET are expected to act in good faith throughout the investment process.

Furthermore, deciding whether government authorities acted in bad faith is subjective and tantamount to interfering with sovereignty. Indeed, this is why arbitral tribunals and commentators support the view that bad faith or malicious intention is not an essential element of unfair and inequitable treatment. As underscored by the tribunal in *Tecmed v Mexico*⁸³, bad faith is not required for the violation of fair and equitable treatment what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a state may treat a foreign investor unfairly and inequitably without necessarily acting in bad faith. The principle of good faith only requires governments to provide foreign investors treatment that does not affect the basic expectations that were taken into account by the foreign investor while making the investment decision.⁸⁴ Indeed, when the government sufficiently shows that it acted in good faith to achieve the objectives of its laws and

81 Louis B Sohn and R. R Baxter, ‘Responsibility of States for Injuries to the Economic Interests of Aliens’ (1961) (no.55) *Am. J. Int’l L* 545.

82 *Metalclad v Mexico*(n 77)

83 *Metalclad v Mexico*(n 77)

regulations, this acts as a counterbalance to instances of disregard of legal or regulatory requirements.

From the foregoing discussion, it should be noted that Ethio-China BIT practice supports the view that FET is an autonomous treaty standard and is not tied to customary international law. Accordingly, investment arbitration can be plagued by a troubling lack of consistency in the interpretation of the substantive provisions in BITs from one case to the next. As such, it is evident that without a clear explanation of what the FET entails, the Ethiopian government risks legal action from Chinese investors whose expectations of the provision may differ from what the Ethiopian government envisaged when entering into this BIT.

2.3.3 Protection and Security Clause

Another important provision in the perspective of the investor is the full protection and security clause. This is largely due to the fact that it is a provision that an investor depends on for physical safety especially in instances where there may be armed conflict or any other civil unrest which could affect the investment.⁸⁵ A foreign investor expects to have security and protection in a secure and safe environment, especially after investing large sums of capital in the host state. Moreover, investors contribute immensely to the economy of a country and thus governments should be incentivized to provide security and protection. However, the extent of this protection is questionable, whether it extends beyond physical protection or not.

Although tribunals have refused to hold governments to an absolute standard of strict liability, the degree of diligence expected of states is high, and it is not necessarily proportionate to the resources available⁸⁶, particularly to developing countries like Ethiopia. The Ethio-China BIT in Article 3 (1) provide that investments by nationals or companies of either contracting party shall enjoy protection and security in the territory of the other. Additionally Article 5 of the same BIT provides :

84 ibid

85Schreuer C ‘Full Protection and Security’(2010) Journal of International Dispute Settlement 2

86 Malik(n 45)

“Investors of one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded by the latter Contracting Party, if it takes relevant measures, treatment no less favorable than that accorded to investors of a third State.”⁸⁷

Green is of the view that this provision puts a hefty responsibility on the state to ensure that foreign investors’ investments are protected.⁸⁸ There has been evidence of this huge responsibility on host states from a number of cases including the Swiss case against South Africa in which the South African government was mandated to compensate a Swiss investor who had acquired a game reserve in South Africa that was later subject to poaching, vandalism and theft.⁸⁹ It brings to question how the tribunal could interpret this provision whether it applies to only physical protection or could extend beyond that.

This presents a problem for Ethiopia in that; Ethiopia has security concerns that emanate from internal political crisis. For Ethiopia, BIT refer to protection and security without subjecting such to available resources. This creates problems for a developing poor country like Ethiopia that is already swimming in international debt, to open itself to an onerous standard of protection it can little afford. Therefore, it is imperative to revisit its BITs and balance these provisions.

2.3.4 Most-Favored Nation Treatment

Most Favored Nation standard provides that investors from state parties shall not receive treatment less favorable than that awarded to investors from third states. The provision is a non-discriminatory measure that seeks to guard against economic distortions that could occur through country by country liberalization.⁹⁰ Therefore, the MFN clause has become a significant instrument of economic liberalization. This provision has been described as a core

87 Ethio-China(n 28) art.5

88 Green AR (n 43)

89Lang J ‘Bilateral Investment Treaties- a Shield or a Sword?’ available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-BilateralInvestment-Treaties.pdf>> accessed 10 January 2019

provision of international investment agreements that provides a basic minimum for the establishment of equality of competitive opportunities for investors from different countries.

Moreover, investors can latch on to more favorable treatment provided in past or present treaties. It is therefore, against this background that one will see the problems with the MFN treatment today. In BITs, clause importing has been enabled by the MFN standard. This has been with the assistance of arbitral tribunals, who have created a norm for investors to benefit from treaty provisions they are not even a party to. Ethio-China BIT contains the provision of MFN treatment and could experience the same problems the standard brings about. The standard Ethio-China BIT⁹¹, indicates that treatment that is awarded to nationals of third countries should also be awarded to investors from the other respective BIT signatories. This approach problem, however, lies in the limitation of the scope of application of the MFN clause. It remains questionable as to how far the clause extends and/or how far it ought to extend to for it to take a balanced position in the regulation of an investment.

One may analyze the case of *Maffezini v Spain* concerned a dispute arising from the treatment of an Argentinean investor by Spanish entities in relation to the investor's production and distribution of chemicals.⁹² The claimant sought to avoid submitting the dispute to the Spanish courts for 18 months as mandated by the Argentina-Spain BIT before resorting to international arbitration. The claimant argued that the Argentina-Spain BITs MFN clause should allow him to import a dispute settlement provision from the Chile-Spain BIT, which merely required that the investors observe a six-month negotiating period before filing for arbitration. Spain argued that the MFN clause was confined to the investor's substantive economic treatment and did not extend to procedural matters. The tribunal in this case held that dispute settlement procedures were inextricably related to the protection of foreign investors envisaged under the BIT and therefore, the MFN clause should be applied to give

90 Salomon C & Friedrich S 'How Most Favored Nation Clauses in BITs Affect Arbitration' *Practical Law Arbitration* (2013) available at < <https://m.lw.com/thoughtLeadership/favoured-nationclauses-arbitration> > accessed 28 January 2019

91 Ethio-China BIT(n 45) art.3

92 C Salomon and S Friedrich (n 90).

the Argentina claimant the benefit of the Chile-Spain BITs easier access to international arbitration.

This further indicates that any tribunal may interpret the MFN provision broadly if the phrasing of the parties to the treaty does not clearly indicate how the provision is to be interpreted. The MFN clause is problematic, however notwithstanding this, it remains a cornerstone in the protection against discrimination of investors. Sometimes, allocation of rights or preferential treatment may be due to a ‘facilitation fee’ or ‘greasing of the wheel’,⁹³ as such create an unfair playing field for investors, especially those from countries that are unable to do so. Therefore, the MFN treatment serves as a disincentive against such practices. The application of the provision MFN in Ethio-China BIT is silent on the question of applicability to dispute settlement mechanisms. This is an indication that Ethio-China BIT is not clear on whether the MFN provision applies to dispute settlement provisions or not.

2.3.5 Expropriation

The expropriation of foreign investors is one of the most controversial issues in the relationship between foreign investors and sovereign states because it directly attacks duly acquired property rights.⁹⁴ When left unconstrained, expropriation has the propensity to reshape and disproportionately balance the relationship between foreign investors and sovereign states. However, international law recognizes that when foreign investors are permitted entry, there is an equally compelling responsibility to offer compensation for damages resulting from expropriation measures.⁹⁵ While the duty to compensate foreign investors is straightforward, international law falls short on delimiting or deconstructing measures that constitute indirect expropriation. The delicate balance between government interests vis-à-vis the interests of foreign investors appears to have revived the bitter rivalry between developed and developing countries.

Contextually, it is important to draw a distinction between, confiscation, nationalization and expropriation. Sornarajah defines confiscation as the capricious taking of property for

93 C Salomon and S Friedrich (n 90).

94 Dolzer and Schreuer (n 79) 89-118

95 *ibid*

personal enrichment and notes that usually such measures are implemented by dictators.⁹⁶ Traditionally, international law prohibits confiscatory taking and pronounces such takings as unlawful and unjustifiable. On the other hand, nationalization is defined as the systemic taking of foreign property to curtail economic dominance. Nationalization usually leads to the creation of state monopolies, termination of all foreign investments and the total takeover of means of production by state machinery. International law holds that states have the sovereign right to expropriate foreign property provided this is followed with the payment of prompt, adequate and effective compensation.⁹⁷ In other words, the payment of compensation is a sine qua non for the exercise of legitimate expropriation.

Conceptually, indirect expropriation is a concept of deep controversy because it leaves investor's legal title untouched but deprives the investor meaningful enjoyment of the investment.⁹⁸ Governments are forced to respect rules and commitments through architects of the media, big corporation and institutional design that serve as watch dogs for government compliance. This oversight function ensures that countries are reluctant to design policies pursuing outright takings for fear of negative publicity which can result in decreased investment flows. Because of severe consequences associated with direct expropriation, this has resulted in countries devising other creative means to interfere with property rights without a formal taking.

There are a number of creative ways governments can deploy to deprive investors effective control without actually taking the investor's property. Such measures include but are not limited to the use of legislation, withdraw of a license, refusal to renew permits, higher taxes, and sometimes simply omitting to act. Obviously, countries that pursue measures tantamount to expropriation will deny the existence of such measures and will not contemplate paying compensation.⁹⁹ Cases of indirect expropriation are complicated because compensation is not

96M Sornarajah 'The International Law on Foreign Investment' (2004) (2nd edn) Cambridge University Press 346

97 Sornarajah M(n 96)

98 Dolzer and Schreuer,(n 79) 92

99 *ibid*

guaranteed and the investor has to sustain a claim that the state's conduct has the effect of depriving meaningful use and enjoyment of the property. The Ethio -China BIT expressly provides for direct expropriation. The BIT reads:

Neither Contracting Party shall expropriate, nationalize or take similar measures against investments of investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation.¹⁰⁰

Although Ethio-China BIT contain expropriation clause, it didn't specifically defines what constitutes an expropriation. It contains a generalized expropriation clause that does not explain the scope of expropriation and the extent of government interference required for compensable regulatory expropriation. Additionally, the BIT is silent to whether or not state police powers exercised through regulation could amount to expropriation. Essentially Ethio-China BIT contain vaguely worded expropriation clauses with the hope that arbitral tribunals will interpret the expropriation clause in accordance with Article 31 of the Vienna Convention.

Delimiting the contours of expropriation has proved difficult with one commentator concluding that in identifying expropriation 'I know it when I see it' while Dolzer acknowledges that the reality is indirect expropriation is difficult to define with precision in the abstract.¹⁰¹ Although the Tanzania-UK BIT does not explicitly refer to indirect expropriation the tribunal in *Biwater v Tanzania* viewed the BIT as broadly framed to cover cases of indirect expropriation. According to the tribunal, the Tanzania-UK BIT includes not only direct expropriation ,i.e. a formal government taking, but also de facto or indirect expropriation which does not involve actual takings of title but nonetheless result in the effective loss of property.¹⁰²

100 Ethio-China(n 45) art.4

101 Rudolf Dolzer, 'Indirect Expropriation of Alien Property' (1986) (no.41) ICSID Review FILJ, 59.

102 *Biwater Gauff Ltd v United Republic of Tanzania*(2008)(No. ARB/05/22) ICSID Case, Award, July 18,2008

Moreover, states have different economies and aspirations. As such, regulations and the extent of regulations differ. It would be to the detriment of host state parties to be negated from regulating towards national interest, unless such regulation is accompanied by necessary funds to compensate any investor that would be affected. It is safe to say, the poorer the host state, the more its regulatory power is depleted. It is therefore necessary to ensure there is an acceptable line drawn between compensable and non-compensable forms of regulation.

Generally, Ethiopia could face numerous challenges which require continued regulation; to implement measures for public interest which include the environment, labor, human rights and public safety. Inadvertently this means that interests of foreign investors will be affected. Furthermore, Ethio-China BIT did not demarcate what constitutes non-compensable regulatory measure and regulatory expropriation requiring compensation. As a result, arbitral tribunals have the discretion to use any of the elaborated approaches mentioned above.

2.3.6 Investor State Dispute Provision

Another issue potentially faced by Ethiopia regarding its BIT with China relates to the investor state dispute clause. The provision allows investors to leapfrog domestic courts and sue governments in international arbitration tribunals if there has been an alleged breach of treaty protections.¹⁰³ In other words, even though Ethiopia is not ratified ICSID Convention, the provision relocates decision-making power outside the country and into international panels whose determinations can have major implications on domestic policies. Ratification of the ICSID Convention alone without any further action does not automatically imply consent to jurisdiction under the ICSID framework.

According to ICSID arbitral rules, ICSID jurisdiction is only enforceable through written consent by both parties.¹⁰⁴ Specifically, for contracting states consent to arbitration under the

¹⁰³ Ethio-China(n 45) art.9

¹⁰⁴Article 25(1) of the ICSID Convention provides as follows ‘The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Convention can either be expressed through treaties such as BITs or any other instrument while foreign investors can duly express consent through instituting proceedings. Substantively therefore, consent to arbitration clauses articulated in Ethio-China BIT form an integral part when determining jurisdiction of arbitral tribunals over disputes between Chinese investors and Ethiopian government. Ethio-China BIT article 9, expansively consent to arbitration covering virtually all disputes. As expressed in article 25(1) of the ICSID Convention, the Convention does not impose conditions on the form that consent should take except that when consent to arbitration is given, it must be expressed in writing.

In essence therefore, contracting states have the discretion to limit the scope of consent through for instance imposing conditions on the types of disputes that can be arbitrated under the Convention as well as the duration such disputes should take before proceeding to arbitration. In practice, the approaches of different tribunals dealing with consent clauses similar to those stipulated in Ethio-China BIT remains divided. For instance, in *Salini v Morocco*, the tribunal in interpreting article 8 of the Morocco-Italy BIT consenting to “all disputes or differences” reasoned that the scope of the consent clause was generally construed to include both BIT claims as well as contractual claims.¹⁰⁵ According to the tribunal the wording of article 8 “compels the state to respect the jurisdiction offer in relation to violations of the bilateral investment treaty and any breach of contract that binds the state directly.”¹⁰⁶

In sum, the tribunal accepted jurisdiction over contractual claims provided such claims directly correspond to violations of the BIT. Ethiopia may find itself in a similar position since Ethio-China BIT make provision for the same clause. However, Ethio-China BIT stipulate that at first instance the investor should seek to resolve the dispute through domestic courts.¹⁰⁷

For instance the tribunal in *Ronald Lauder v Czech Republic* concluded that the “requirement of a six-month waiting period in Article VI (3) (a) of the United States-Czech Republic Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the

¹⁰⁵ *Salini Construttori SpA v Morocco(2001)*(No. ARB/00/4) ICSID Case Decision on Jurisdiction

¹⁰⁶ Ibid

Claimant”.¹⁰⁸ According to the tribunal even though only 17 days had passed between the time when the letter had been delivered to the Media Committee of the Czech Parliament and the filing of the Notice to Arbitration, evidence presented suggested that the respondent would not have accepted entering into negotiations.¹⁰⁹ In the tribunal’s view insisting that the claimant cannot commence proceedings until after 6 months would amount to an unnecessary and overly formalistic approach that does not protect any legitimate interests of the parties.¹¹⁰

In addition, consent to arbitration provisions in Ethio-China BIT, Most Favored Nation clause can further upset the delicate balance in the relationship between Chinese investors and Ethiopian government through negatively interfering with previously agreed consent restrictions.

3. Previous Studies of the Relationship Between BITs and Investment

While economists and legal scholars generally agree that countries conclude BITs primarily to increase FDI, they disagree about their effectiveness. Many variables influence investors’ investment decisions, including various economic and political factors.¹¹¹ This complexity makes it difficult to distinguish the effect of a BIT from other factors affecting investment. Several social scientists have employed econometric tools to disaggregate the many determinants of FDI flows, but they have come to conflicting conclusions concerning whether BITs affect investment.

107 Ethio-China BIT(n 45) art 9, simply provides that “if such disputes cannot be settled... within a period of six months from the date either party to the dispute requested amicable settlement, the dispute shall, by mutual consent, be submitted to international arbitration or conciliation.”

108 *Ronald Lauder v Czech Republic*(2001) UNICTRAL Tribunal Final Award

109 *ibid*

110 *Ronald Lauder v Czech Republic*(n 108)

111 Tim Buthe & Helen V. Milner, ‘The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI Through International Trade Agreements?’, (2008) (no.52)A M.JPOL.S CI. 742-43

In 2005, Jennifer Tobin and Susan Rose-Ackerman, of the Yale Political Science Department and the Law School respectively, performed an econometric study using data from 1984 to 2000 on inbound FDI to 176 low- and middle-income countries, with similar results.¹¹² The authors analyzed the effect on investment of the total number of BITs a country had signed and introduced political risk as an independent variable in order to assess whether BITs strengthen domestic institutions. The study found that BITs had a negative effect on aggregate FDI inflows at high levels of political risk and began to have a small positive effect at high levels of stability.

With regard to China, BITs are an integral part of China's "Going Global" strategy. BITs have assumed increasing importance to Beijing as China's status has changed from that of a capital-importer to that of capital-exporter. China has become a leading player in the international investment treaty landscape, it has concluded 139 BITs and at least 29 sub-Saharan African countries including Ethiopia, and BITs have become one of the policy tools that underpin China-Africa economic diplomacy.

Asiedu conducted a study on 32 sub-Saharan African countries and 39 non-sub-Saharan African countries over a period of 10 years (1988-1997).¹¹³ She argues that FDI inflows into Sub-Saharan African countries are market seeking. Asiedu argues that natural resources and market size are the chief determinants of FDI in Africa. She also said that FDI inflow to Africa can be promoted by political and macroeconomic stability, by educated labor force, less corruption and an efficient legal system.¹¹⁴ It is not surprising that a BIT with China would have no significant effect on total inbound FDI flows. Thus, even at the height of Beijing's hostility to BITs, China saw sizeable flow of investments from countries with which

112 Jennifer Tobin & Susan Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties'(2005) (No.293) Yale Law School Ctr. for Law Working Paper

113 Asiedu, Elizabeth 'Policy Reform and Foreign Direct Investment in Africa: Absolute Progress but Relative Decline. Development Policy Review,' (2004). (no. 22(1): Retrieved from <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=51344341-48> on January 25, 2019

114 *ibid*

it had not concluded BITs. In Africa, Angola has not concluded a BIT with China and yet is the highest recipient of Chinese FDI in the region.¹¹⁵

To make more precise, China-Africa BITs have not created any known liabilities until now. China is active negotiators of BITs, but Chinese investors have only brought five known treaty based arbitrations worldwide none of each involves African states.¹¹⁶ Lack of any known arbitration raises questions about the extent to which investment treaties matter to Chinese companies investing in Africa. The possibility that Chinese investors might bring arbitration claims Cannot be ruled out. Thus there is strong case for Ethiopia government to review the performance of its BIT.

Specifically, there is report that focuses for sub-Saharan Africa and China-Africa investment treaties' as a shorthand for the treaties concluded between China and sub-Saharan African state.¹¹⁷ The company interviews point to very low awareness of investment treaties among company staff, including legal personnel, suggesting that Chinese businesses pay little attention to BITs in their investment decisions. Many Chinese large State Owned Enterprises would have the resources and expertise to consider and activate investment treaties, other considerations that drive their operations such as market access and politics may trump their concerns about political risk.

115UNCTAD, 'Global Investment Trend Monitor' (2012)Retrieved from <http://unctad.org/en/Publications_Library/webdiaeia2012d20_en.pdf> on January 25, 2019

116 UNCTAD 'Recent Developments in Investor State Disputes ISDS' (2014) Issue note number 1 available at <http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> accessed 5 January 2019

117 Lorenzo Cotula and others 'China-Africa Investment Treaties: Do They Work?'(2016) First published by the International Institute for Environment and Development (UK) available at< www.ied.org/pubs >accessed on 18 January 2018 , The research draws on 22 interviews with representatives from Chinese companies that are active in Africa's natural resource and infrastructure sectors and 11 interviews with Chinese experts. It also draws on 22 Chinese company interviews conducted during earlier studies on Chinese outward investment decision making.

Company interviewees raised concerns about access to business opportunities, corruption and unfair competition. They have developed strategies to deal with investment disputes, with a strong emphasis on ADR.¹¹⁸ China recognizes the geostrategic importance of Ethiopia and wishes to use it as the gateway into the rest of Africa. There are studies that found no correlation between China's BIT coverage and outward Chinese FDI to Ethiopia. Chinese considerations that drive their operations to Ethiopia are Geostrategic importance, market access and politics may trump their concerns about BIT.¹¹⁹

This can better exemplified by the controversial Shandong Dong Group, a Chinese donkey abattoir, based in Bishoftu of Oromia regional State, in which the case can show that they deal with investment disputes, with a strong emphasis on ADR.¹²⁰ The administration of Bishoftu banned the Chinese company from carrying on with its operations, saying that it was offensive to the people who are living around the plant. To the complaint it lodged with the Office of the Prime Minister, the company claimed, it lost five million Birr because of the public protests and they claimed to be unfair closure of their donkey slaughterhouse and asserted that when we opened the abattoir, nobody told us not to do it.¹²¹ But the Chinese investors did not initiate case based on Ethio-China BIT violation, in which the action may amount to indirect expropriation and violation of FET, because once the business is licensed, the city administration cannot shut down the abattoir without a court warrant and due process of law.

Although the Ethio-China BIT didn't explicitly refer to indirect expropriation the tribunal in *Biwater v Tanzania* viewed the BIT as broadly framed to cover cases of indirect expropriation. According to the tribunal, the Tanzania-UK BIT includes not only direct expropriation, i.e. a formal government taking, but also de facto or indirect expropriation

118 *ibid*

119 Geda, A. and A. Meskel (n 23)

120 Retrieved from < <https://www.tesfanews.net/author/admin/>> on 10 March 2019

121 *ibid*

which does not involve actual takings of title but nonetheless result in the effective loss of property.¹²²

Additionally, since there is Procedural due process failure by Bishoftu city admiration, which are grounded in arbitral practice as cardinal requirements for an inquiry whether investors have been treated fairly and equitably¹²³, Chinese investors can bring case based on violation of art.3 of Ethio-China BIT. Nevertheless, complaint is lodged to political organ and solved through negotiation. This shows China's lack of affinity for international arbitration and its preference for settling disputes informally through diplomatic consultations possible reasons for the absence of cases initiated by China investors against Ethiopia. But the possibility that Chinese investors might bring arbitration claims cannot be ruled out. Thus there is strong case for Ethiopia government to review the performance of its BIT. From this finding it is obvious that Existing China- Ethiopia BIT have little to say about ADR strategies, which seems to create a misalignment between law and practice. It is possible to address these issues by reconfiguring the investment treaty policies

Chapter Three

Best Practices of BITs: Lesson For Ethiopia From Brazil and South Africa

3.1 Introduction

This chapter will analyze the current situation as it exists in Ethiopia in relation to Chinese investments, which has a bearing on its outdated BIT and draw lesson from the situation that existed in South Africa prior to review of its BITs. The aim would be to identify the factors that could also prompt Ethiopia to initiate a review process of its BIT and the lessons that Ethiopia could learn from South Africa's experience. In addition this chapter will also propose Brazilian CFIA model as alternative model to Ethio-China BIT.

3.2 The Chinese Investment in Ethiopia

The objective of the FDI has the potential to increase investment capita, create employment, boost completion and increase exports and gain tax revenues. Yet, it depends on several aspects, amongst others, the objectives of the investments. There are various motives and

¹²² *Biwater v Tanzania*.(n 102)

¹²³ Dolzer and Schreuer(n 79)

objectives for firms to establish a foreign subsidiary, generally these are: resource-seeking, market seeking, efficiency seeking or strategic asset seeking.¹²⁴ Resource-seeking FDI is also associated with the lowest form of job creation, but if created, they are usually dangerous or hard labour with poor wages, lowest technology transfer and local supply chain linkages. Conversely, it usually entails high capital inflows, and if well managed, good export earnings. Market seeking-FDI used to be focused on developed markets. This form of FDI is regarded as highly beneficial as it usually brings with it not only capital and advanced production capabilities but also sector specific knowledge and technology, marketing skills and organizational capabilities.¹²⁵

As the Chinese economy booms, Chinese presence in Africa is becoming an obvious sight. The scene is similar in Ethiopia. Generally, China uses Africa for three strategic goals: to acquire natural resources, to enter new markets and to enhance her own international influence.¹²⁶ The expansion of markets for Chinese products is essential for Chinese economic growth. The consumer market of Africa has significant potential and by entering the African market, China secures new possibilities for China's domestic production market, but also reduces the risk of dependency on the European and US markets, which have endured financial crises.¹²⁷ The Sino-African relationship is used to counterbalance the traditional world order and this is used by both parties. By building strategic bonds with the African countries, China received significant support and was able to improve its position in the world order. Africa also uses China's political power through the strengthened relations, to become more independent and proactive.

124 Farole and others, 'Making Foreign Direct Investment Work for Sub-Saharan Africa: Local Spillovers and Competitiveness in Global Value Chains. Directions in Development'(2014)Washington DC: World Bank

125 *ibid*

126 Cohen D.S, 'Multinational Corporations and Foreign Direct Investment, Avoiding Simplicity, Embracing Complexity' (2009) Oxford University Press. New York

127 D.S.Cohen (n 126)

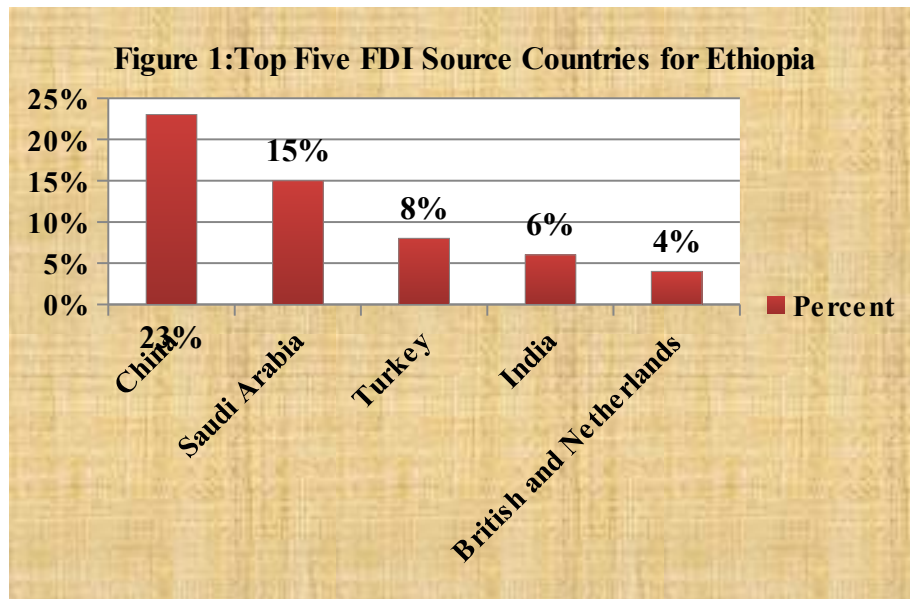
The effects of Chinese direct investment in Ethiopia on the bilateral trade hinge upon the motivations of Chinese direct investment. This effects could be looked at through series of scenarios such as strengthening the production chains and specialization, technology spillover, substituting Chinese exports to Ethiopia by local production. Although Ethiopia lacks natural resources, it is still of strategic interest for the Chinese. China recognizes the geostrategic importance of Ethiopia and wishes to use it as the gateway into the rest of Africa. China treats Ethiopia with different principles and perceptions compared with other traditional donors.¹²⁸ China's choice for making a stronghold in Ethiopia will help and allow them to extend their influence in the rest of Africa. As former president, Hu Jintao stated:“ Ethiopia could play a pivotal role in enabling China to consolidate its cooperation with other African countries”¹²⁹

One of the most striking examples of this build-up is to be found in Addis Ababa. The economic linkages between China and Ethiopia have been strengthened through both trade and Chinese direct investment in Ethiopia for past decades. The Chinese investment in Ethiopia has been growing since the year 2000 and takes two modalities of investment: joint venture and wholly Chinese owned investment.¹³⁰ The Chinese FDI in Ethiopia is growing very fast. In the last year Chinese FDI in Ethiopia constitutes about 23% of the total foreign owned projects under implementation and in operation in Ethiopia.

128 Asayehgn Desta ‘Chinese Investment in Ethiopia: Developmental Opportunity or Deepening China’s New Mercantilism?’(2009) Dominican University of California

129 ibid

130 EIC ‘Ethiopia Investment .Commission .Report of 2017’ (2017) <<http://www.investethiopia.gov.et/images/pdf/EIC%202017%20Report%20.pdf>> accessed on 5 January 2019



Source: Ethiopian Investment Commission Report March 2017

This thesis conducted on Chinese strategies and outcomes in Ethiopia and Zambia, concludes that the intentions and outcomes of Chinese presence, strategic choices and involvement offer important variations and results for each targeted country.¹³¹ With the help of Ethiopia's location and having the headquarters of the African Union within its borders, China tries to transform Ethiopia into a strategic spearhead for the rest of the continent. With investments in infrastructure, telecom, agriculture and manufacturing the Chinese utilize the country as a show case for the rest of Africa, with a primary focus on expanding export markets. Whereas China's main interest in Zambia is focused on its copper reserves. The offered aid package here is primarily targeted at resource extraction. By investing in infrastructure, i.e. railways and Special Economic Zones and using its diplomatic and political ties, China is constantly looking to improve and optimize this process.¹³²

Among limited studies, in Ethiopia Asayehgne's study noted that the Chinese wholly owned companies don't seem to act as a platform for exports and their goal is to seek for themselves efficiency and market in their production process.¹³³ However Asayehgn, noted that the skill transfer is very limited in his case study. In terms of efficiency, since more than 50 percent of

¹³¹ Maxelle Runge 'Two African countries, Two Strategic Chinese Aid Packages, Two Different Outcomes' (2016) Leiden University, Faculty of Humanities MA Chinese studies,

¹³² ibid

input materials executed by the Sino-Ethiopian firms come from China, it is very difficult to ascertain the contribution of efficiency to the new products made by the Sino-Ethiopian investments.’¹³⁴

The other study is that of Tegegne, based on survey of micro, small and medium size firms in the footwear industry he conducted, he noted that small scale shoe producers have downsized their activity, lost assets and property and have resorted to informal operation, with detrimental consequences on their activity and growth. Firms have followed both high and low road of competition in reaction to the Chinese imports.¹³⁵ Based on his finding Tegegne, emphasized a package of interventions have to be designed to strengthen the shoe producers and minimize the negative effects of Chinese shoe imports, he noted.¹³⁶ In short the long term effects of the footwear imports including textile is that it will crowd out the local effort to use these sectors as the basis of industrialization as the study of Tegegne of shows.

The African Economic Research Consortium presented a publication on Chinese FDI in several African economies, where Geda and Meskel conduct a case study to examine its impacts in Ethiopia.¹³⁷ In their qualitative assessment mainly constituted of in-depth interviews it is found that the Chinese government has either fully funded or partially subsidized the building of for instance, Bole Airport in Addis Ababa, the main ring road across central Addis Ababa and the new African Union headquarter, which the researchers concluded to be in the interest of other African nations as Addis Ababa is considered the “unofficial capital” of Africa with high representation of foreign officials in the capital. Although these investments produced vast gains for the domestic market, many of the

133 D. Asayehgn (n 128)

134D. Asayehgn (n 128)

135 Tegegne GebreEgziabher ‘The Developmental Impact of China and India on Ethiopia with Emphasis on Small Scale Footwear Producers’(2006)Development Policy Research Unit, Johannesburg, South Africa

136 *ibid*

137 Geda, A and A. Meskel (n 23)

contractors that were hired for the construction were however Chinese.¹³⁸ The research found that Chinese firms involved in the manufacturing sector, where both market and resource seeking FDI. As a result, the effects on the economy were found to be twofold. On the one hand, it crowded out local producers and suppliers in for instance apparel and footwear. On the other hand, it provided the economy with employment creations, capital inflows and to an extent technology transfers that were previously lacking.

Concluding, the paper finds that the transmission channels for which further benefits and spillover effects can occur are hampered by poor regulatory policies for Chinese investments in the country, along with the lack of skilled labour and availability of foreign exchange.¹³⁹

The World Bank completed a study on Chinese FDI in Ethiopia ,upon the formal request of the Ethiopian Government that wanted to further the trade relations between Ethiopia and China.¹⁴⁰ The report stated some contrasting findings in its survey research of Chinese investors in the country. It found that Chinese FDI in Ethiopia was, almost exclusively, positive to the economy. The study also noted that the level of skill and expert difference between Ethiopia and Chinese counterparts in negotiation and investment engagement might be working against the interest of Ethiopia in the short run and both countries in the long run.

To tackle this, Ethiopia needs to upgrade the skill of its work force, bureaucrats/experts/ in the long run. In the short run, however, it may need to use qualified consultants with adequate knowledge to deal with Chinese negotiators in all areas of investment and new projects.

The study concludes Chinese investment in Ethiopia seems to be constrained by lack of skilled labour, foreign exchange as well as policy credibility of the Ethiopian government.¹⁴¹ Thus, these are areas that require government immediate action to redress them.

138 *ibid*

139 Geda, A and A. Meskel (n 23)

140 The World Bank ‘Chinese FDI in Ethiopia A World Bank Survey: Africa Region.’ (November 2012) The World Bank

141 *ibid*

Additionally, survey study conducted by Essabella on number of experts in different Ministries indicated that, in regards to Chinese firms, there were too generous incentives.¹⁴² The primary fact was that if anything, the Chinese FDI did in fact create employment in the country. The questionable notion might be the quality of the jobs and the possibility of advancement. On her conclusion, there needs to be explicit policy regulations on technology, skill and knowledge transfers that reflect the ambitions of the investment proclamations to fully benefit from the FDI.¹⁴³ It therefore needs to be coherence in the investment proclamation in regards to this matter to avoid both confusion amongst the Ministries as well as the foreign investors and the local employees.

Generally, from aforementioned studies we can conclude that Ethio-China BIT is not primary motive for China to invest in Ethiopia. Rather, China uses Ethiopia for two strategic goals: to enter new markets and to enhance her own international influence over Africa. Ethiopia has large market in Africa as it is the third most populous country in Africa after Nigeria and Egypt. The consumer market of Ethiopia has significant potential and China secures new possibilities for China's domestic production market. With regards to regional market, Ethiopia is a member of Common Market for Eastern and Southern African countries. This creates an opportunity to investors to sell their product in 23 member countries (about 400 million people) with preferential tariffs.¹⁴⁴ With the help of Ethiopia's location and having the headquarters of the African Union within its borders, China tries to transform Ethiopia into a strategic spearhead for the rest of the continent.

The studies also showed as Chinese investments in Ethiopia are potential for development not development trap but due to weak legal system, measurable policies and guidelines to

142 Isabelle Gebretensaye, 'Chinese Foreign Direct Investments In Ethiopia –The Potential For Development Or A Development Trap?' (2015) Nationalekonomiska Institutionen Vid Lunds Universitet

143 ibid

144 World Bank, 'Global competitiveness report of 2018' (2018) retrieved from <
<https://internet-start.net/?q=Global%20competitiveness%20report%20of%202018#gsc.tab=0&gsc.q=Global%20competitiveness%20report%20of%202018&gsc.page=1>> on 15 January 2019

sustain all spillover effects of Chinese FDI is not attained. The Chinese are building the much needed roads, electric power stations, engaged in oil exploration and similar productive ventures in Ethiopia from which Ethiopia would benefit. On the positive side, Chinese investment in Ethiopia could facilitate investment in Ethiopia through the provision of infrastructure in relatively short time and affordable and appropriate technology to local firms, as can be gleaned from our survey.¹⁴⁵ The negative side relates to Chinese competitive threat to the infant but growing local firms. It is curious to note that most of the Chinese firms (nearly 90%) do not prefer to work in a joint venture with Ethiopian firms, while the majority of the Ethiopian firms would like to engage with Chinese in joint venture which is main stream for transfer of technology and other benefits of FDI.¹⁴⁶

The FDRE Constitution also recognizes the right to live in a clean and healthy environment which is part of the chapter dealing with ‘Fundamental Rights and Freedoms.’¹⁴⁷ Additionally, the FDRE Constitution guarantees the peoples of Ethiopia ‘the right to sustainable development’ and envisages development through rational and prudent use of environmental resources.¹⁴⁸ The Constitution further requires that international agreements and relations, concluded or established by the country, should uphold the right to sustainable development. The ultimate goal of investment, as can be gathered from the preamble of the Proclamation, is accelerating the economic development of the country and improving the living standards of its people.¹⁴⁹ Within the ambit of this overarching goal, the preamble also makes reference to specific goals, such as encouraging and expanding investment, strengthening domestic production capacity, increasing inflow of capital, and speeding up of transfer of technology. On its side, Ethio-China BIT didn’t contain these objective article in substantive text and

145 G. Isabelle (n 142) and Geda, A and A. Meskel(n 23)

146 *ibid*

147 House of Peoples Representatives ‘ Constitution of Federal Democratic Republic of Ethiopia’(1995) (no.1)Neg. Gaz, .under Art 44(1)

148 *Ibid* art. 43

149 House of Peoples Representatives “Investment Proclamation”(2012)(No.769) ,article 5

didn't set out in preambles development as a direct objective and none explicitly acknowledged that the host country has any right to development.

Johnson elaborates that countries need specific BIT provisions depending on their progressive stages of development. These provisions would help the countries keep up with their economic development agenda.¹⁵⁰ The extent to which FDI is beneficial in an economy is principally due to both the judicial structure of a country and its regulatory structure governing FDI.¹⁵¹ Given the strong relation between the Ethiopian and Chinese government, it is not difficult to bear fruits by making their BIT for better spillover from Chinese firms. Notably, Ethiopia's interests underlying in sustainable development and responsible business conduct have been recognized in recent IIAs. Further emphasized, Investment policies should be grounded in a country's overall development strategy and all policies that impact on investment should be coherent and synergetic at both the national and international level.¹⁵²

So based on aforementioned studies and analysis in Ethiopia, it is very obvious that Ethio-China BIT governing investment environment needs further strengthening to attract more FDI from China that is secure and beneficial to the economy. The country on its part needs to prepare a scheme for how to ensure that firms know what is required of them and workers what they have the right to learn. This must however be done delicately to insure that there is a mutual pay-off for both parts so as to not discourage 'high quality' FDI to the country. Only by addressing these issues would the Ethiopian economy reap the full benefits associated to Chinese FDI, and use FDI as a vehicle for achieving sustainable economic growth in the country.

3.3 South Africa and Factors for BITs Review

150 Johnson A R 'Rethinking Bilateral Investment Treaties for Sub-Saharan Africa'(2009-2010) (no.59) Emory L. J. 922.

151 Retrieved from <<http://data.worldjusticeproject.org/pdf/rule-of-law-index-ETH.pdf>> accessed on 5 January 2019

152 UNCTAD 'Investment Policy Hub'(2018) available at <[http:// investment policy hub. unctad. org/IIA/CountryBits/108](http://investmentpolicyhub.unctad.org/IIA/CountryBits/108) > accessed 25 February 2019

The first BIT that South Africa signed was with the UK in 1994. Based on the beliefs that the South African government officials had at that time, the UK model BIT was adopted by South Africa as the basis for concluding 46 additional BITs (a figure inclusive of the BITs that did not come into force).¹⁵³ Most of these BITs were signed with a group of European countries that had traditionally been the largest source of FDI in South Africa. The UK draft model BIT was based on a standard OECD model.¹⁵⁴

The main features of this model were that, it stipulated that foreign investors and their investments had to be treated fairly and equitably, there should be no discrimination or expropriation, contracts should be upheld, there should be no capital restrictions, and disputes could be adjudicated through international investor state arbitration.”¹⁵⁵ At the time that this BIT was signed, South Africa was emerging from colonial rule and was yet to fully develop its strategy for negotiating BITs. South Africa had been undergoing a combination of international sanctions and tight capital controls and, as a result, the country received almost no FDI inflows during apartheid. After independence, South Africa had to reverse the disastrous economic management under apartheid and attracting foreign investment was an important component of the economic strategy.¹⁵⁶ At that time, the best way to make a firm signal of such intent was through entering into BITs.

In addition to reversing the disastrous economic management that was under apartheid, South Africa also had to begin rectifying deeply entrenched racial inequalities that existed prior to South Africa’s independence.¹⁵⁷ The new South African government had inherited a society

153 UNCTAD(n 152)

154 Mossallam M ‘Process matters: South Africa’s Experience Exiting its BITs’(2015) University of Oxford GEG working paper, 7.

155 *ibid*

156 M Mossallam(n 154)

157 Poulsen L N S ‘Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality’(2011) (unpublished Ph.D thesis, London School of Economics and Political Science)260.

that was among the most unequal in the world, where the vast majority of black South Africans had been excluded from meaningful economic activity under apartheid. As part of a set of initiatives to redress this inheritance and to meet the government's constitutional obligation to create a more open and equitable society based on human rights, black economic empowerment programs were initiated.¹⁵⁸

These programs were not in line with South Africa's BIT commitments and upon being faced with legal action under the auspices of the ICSID Additional Facility, South Africa initiated a review process of its BITs. As a result of this incident, South Africa realized how much BITs were encroaching on its domestic policy space and given the importance of South Africa's social up-liftment objectives to the country, the South African government had to rethink its position regarding its BITs.

The first known instance of investors using BITs to promote their interests, vis-à-vis the South African government, was in 2001.¹⁵⁹ During this period South Africa's policy makers suggested a ban on foreign ownership and forced disinvestment among the approximately 5000 private security firms in the country, one of the largest security industries in the world when seen relative to the size of the South African economy. Foreign investors objected fiercely to these suggestions and the British government informed South Africa that any such measure result in legal recourse for the British citizens. Eventually, the foreign-owned security companies won the argument.¹⁶⁰ Kicking out firms who brought in close to two billion Rands a year turned out to be too costly an endeavor for the South African government even without a BIT claim.¹⁶¹ From this experience, South Africa began to realize the limitation that was placed on the government's policy space by its commitment to BITs.

158 Green AR 'Bilateral Investment Treaties coming back to Bite' available at <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Bilateral-investment-treaties-coming-back-tobite> accessed 10 January 2019

159 L N S Poulsen (n 157) 263.

160 Ibid 264

161 L N S Poulsen (n 157) 264

In 2004, South Africa was called upon to respond to investor claims based on BIT provisions. A Swiss investor who had acquired a game reserve that was later subject to poaching, vandalism and theft initiated the claims.¹⁶² The investor alleged, among many other allegations, that the government had failed in its treaty obligations to provide protection and security. The tribunal found South Africa in breach of its obligations to provide full protection and security and it awarded the investor almost seven million Rands in compensation, which the South African government paid a year later.¹⁶³

The international trend regarding BITs also had a bearing on South Africa's decision to review its BITs. The UNCTAD Issue Notes indicate that since the year 2000, there has been a marked increase in arbitrations under BITs worldwide. The awards in these cases have shown evidence of inconsistencies.¹⁶⁴ The growing number of cases and the inconsistencies mentioned, which are not subject to appeal, have led to uncertainty about the meaning of treaty obligations leading to the unpredictability of how the treaties are interpreted. All this became apparent to South Africa after it had entered into its BITs. Being a signatory to such treaty provisions became a cause of concern for the South African government contributing to the decision by South Africa to review its BIT policy framework.

Moreover, South Africa also learnt that the growing number of cases was challenging government measures such as changes to the domestic regulatory framework, the tax regime, public tenders, public health, the environment and measures that were aimed to address the financial crisis bailouts and withdrawal of subsidies.¹⁶⁵ In these cases, 75 percent of the awards were in favor of foreign investors and significantly high arbitration costs were

162 Lang J 'Bilateral Investment Treaties- a Shield Or A Sword?' available at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-BilateralInvestment-Treaties.pdf> accessed 10 January 2019

163 J Lang(n 162)

164 UNCTAD 'Recent developments in investor-state disputes ISDS' (May 2013) Issue note number 1 available at http://unctad.org/en/publicationslibrary/webdiaepcb2013d3_en.pdf accessed 5 January 2019

165 UNCTAD(n 152)

involved with such disputes (more than US\$ 8 million on average per case).¹⁶⁶Such observations on international trends regarding BITs also contributed to South Africa's decision to review its BITs.

Gordon and Pohl indicate that in a sample of countries that had brought their IIAs in force since 1959, at least 170 treaties or at least nine percent of the sub-sample had been amended, complemented after signature by protocols, replaced, denounced or ended by mutual agreement.¹⁶⁷ New approaches to investment treaties are emerging to mitigate risks of earlier agreements through more precise drafting of provisions. As such, South Africa had to keep up with global trends regarding BITs.

There are also other factors that contributed to South Africa reviewing its BITs that shall be briefly indicated. Mossallam points out that at the time the decision to review was made, most of South Africa's BITs were about to reach their renewal phases.¹⁶⁸ This required South Africa to take immediate action in revising their BITs. South Africa was also realizing that it was getting FDI from countries that did not have BITs with South Africa, which also prompted South Africa to rethink its position regarding BITs. All these factors indicated above contributed to the decision to review South Africa's BITs. The review resulted in five recommendations which were the development of a new investment Act, the termination of South Africa's first generation BITs while offering partners the possibility to renegotiate, refraining from entering into BITs in the future unless there were compelling economic and political reasons, to develop a new model BIT as a basis for renegotiation and to establish an Inter-Ministerial Committee to oversee processes.¹⁶⁹

166 *ibid*

167 Gordon K & Pohl J 'Investment Treaties Over Time- Treaty Practice and Interpretation in a Changing World' (2015)(no.02) OECD 17., For instance Bolivia, Ecuador, and Venezuela denouncing the ICSID while Brazil, India and Mexico have both refused to be party to the ICSID. Brazil has not ratified any of its BITs.

168 M Mossallam (n 154) 10

169 *Ibid*, for instance South Africa legally terminated its expiring BITs with Belgium, Luxembourg, Spain, Germany and Switzerland

3.4 Lessons That Ethiopia Can Learn From South Africa's Experience

There are many lessons that Ethiopia could learn from South Africa's BIT experience. From the brief history of South Africa's BITs, Ethiopia could learn of the need to perform a thorough analysis of the risks and benefits of BITs before entering into them. This would ensure that the agreements are entered into on well thought out decisions. Ethiopia could use this same principle in weighing the options available to them before renewing or terminating any of its BITs. This ensures that the country does not bind itself to agreements that may later have adverse effects on its development. Learning from South Africa's experience, it would be necessary for Ethiopia to include the expertise of lawyers and all relevant government stakeholders in the drafting and the negotiation process of BITs.

From South Africa's experience, Ethiopia could also learn that it needs to develop a BIT negotiating strategy particularly when negotiating with traditional capital exporting countries. As was indicated, South Africa signed BITs that placed all the obligations on the host state and awarded all the rights to the foreign investors.

Devising a negotiating strategy would ensure that the BITs are balanced and that both parties get to benefit from the agreements. Ethiopia could also learn from the factors that prompted South Africa's review process. It was indicated earlier that at the time when South Africa entered into its BITs there was a common belief among many countries that BITs would attract FDI. It was on this basis that many countries like South Africa entered into BITs. This, however, was not true as was evident from the results of South Africa's review process, and yet South Africa had acted on the common notion that BITs attracted FDI. It was important for South Africa to conduct an assessment of the claims of BITs attracting FDI based on its own situation. The fact that other countries saw BITs as attracting FDI in their countries did not mean the same would apply to South Africa, as such, a more cautious approach needed to have been taken.

Ethiopia could also use this lesson in making an independent, unbiased decision regarding its BITs bearing in mind all the criticisms that have been highlighted about them. Ethiopia will need to assess BITs and their effect in its country to examine whether any of the allegations about BITs are indeed true in Ethiopia's context. From this, Ethiopia needs to understand that the perspective and rationale that countries have when they sign BITs changes over time. Thus, BITs will need to be reevaluated continuously to make sure that the motivating factors for concluding them are still relevant.

Another lesson that Ethiopia could learn from South Africa's experience is the fact that Ethiopia should not wait for a dispute to be brought against the country over its BIT obligations by foreign investors. Poulsen points out that, decision makers in many developing countries often ignore experiences in other countries which in turn leads to considerable risk-neglect until hit by their first claim.¹⁷⁰ As was noted, South Africa did not initiate the review process of its BITs until the state was a respondent to the Foresti case. The Swiss case against South Africa was an indication that a failure to observe BIT obligations will result in costly awards against the host state. Such situations would be worsened by the fact that legal action under BITs is extremely costly. Moreover, having a decision in one or more ICSID disputes being made against a host state could cause broader damage if outside investors begin to question the environment within the host state.¹⁷¹ All this goes to highlight how important it is for the Ethiopian government to take the necessary action regarding its BITs before any legal dispute emanates from the treaties.

Another lesson that could be learnt from South Africa is, its judiciary system is regarded as being equivalent to international standards. As such, South Africa can resort to domesticating its BITs with the expectation that foreign investors would be confident in their judicial system. Strengthening the role of national courts could mean that foreign investors may be required to submit disputes that arise during the course of foreign investment to the investment host state's national courts in the first instance rather than being able to go straight to international tribunals.¹⁷²

Encouraging such states to develop their legal regimes in order to cope with the demands of settling international investment disputes will also enable them to free themselves from the

170 Poulsen LN S 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) (no.58) *International Studies Quarterly* 2

171 Allee T & Peinhardt C 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provision' (2010)(no. 54) *International Studies Quarterly* 3.

172 Butler N 'The State of International Investment Arbitration: The Possibility of Establishing An Appeal Mechanism'(2015) (unpublished Ph.D thesis, The University of Leeds) 153.

sometimes arbitrary rulings in international investment tribunals that often award huge amounts of compensation to foreign investors, which the state has to pay.¹⁷³ This requires Ethiopia to learn the importance of upgrading its system so that it meets international standards and can settle investment disputes in-country rather than having them settled outside their jurisdiction.

Ethiopia could also learn from the manner in which South Africa terminated its BITs. South Africa has been criticized for the lack of adequate communication and reassurance to the state parties when it terminated its BITs.¹⁷⁴ This may be because the decision was made unilaterally by South Africa not appearing to have considered the possibility of at least attempting to renegotiate the terms of the terminated BITs. Ethiopia could learn from the criticism South Africa faced so as to avoid the same situation for Ethiopia. Ethiopia could also learn from the fact that South Africa did not withdraw from any active treaty in an effort to protect diplomatic relations.

3.5 Brazil and the BIT Regime

Although Brazil signed 14 traditional BITs between 1994 and 1999¹⁷⁵, they were never approved by the country's National Congress, which saw the investor-state arbitration regime as limiting states' right to regulate and as granting extraordinary benefits to foreign investors, hence discriminating against domestic investors. Even so, it continued to receive significant amounts of FDI, consolidating its position as one of the world's top recipients of FDI¹⁷⁶ and reinforcing the understanding that having BITs in force is not decisive for attracting

173 *ibid* 154

174 Reuters 'South Africa Investment Law Overhaul Sparks Concerns' available at <<http://www.safpi.org/news/article/2013/south-africa-investment-law-overhaul-sparks-concerns>> accessed 20 February 2019

175 Retrieved from <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iaInnerMenu>> on January 5, 2018

176 UNCTAD 'World investment report 2016: Investor nationality: Policy challenges'. (2016) Retrieved from <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed on January 5, 2018

investments. This consisted in an opportunity to develop an innovative model that did not focus only on protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality. The Brazilian government thus adopted a new approach: the Cooperation and Facilitation Investment Agreement .¹⁷⁷

CFIA model was built based on the revision of previous agreements mainly the BITs signed in the 1990s by Brazilian policymakers, and from the inputs from the Brazilian private sector. The model was created by the CAMEX, governmental team and led by the Ministries of Finance , Foreign Relations and Industry and Foreign Trade , in consultations with other institutions and private sector coalitions.¹⁷⁸ This approach might explain the higher legitimacy and acceptance of this model, in comparison with the nineties' treaties. According to the Brazilian government, the CFIA model is based on three main pillars: which are risk mitigation, institutional governance and thematic agenda for the investment cooperation and facilitation.¹⁷⁹

3.5.1 Justifications By Brazil Not To Ratify BITs

The increasing internationalization of Brazilian enterprises,¹⁸⁰ the interest of partner countries in negotiating investment agreements, the several problems perceived in traditional BITs and the growing number of investor–state arbitration cases raised the debate of investment agreements in Brazil.¹⁸¹

In a general perspective, the two main problems encountered by the nineties' agreements were the direct divergence that some provisions had with the Brazilian Federal Constitution

177Bernasconi-Osterwalder and others 'Comparative commentary to Brazil's cooperation and investment facilitation agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi' Retrieved from <http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas> accessed on 20, September 2019

178 ibid

179 Bernasconi-Osterwalder and others(n 177)

180ibid

181Bernasconi-Osterwalder, and others. (n 177)

and the risk that the original BITs posed to Brazil's national sovereignty.¹⁸² Besides a direct discrepancy with the Brazilian Federal Constitution, the expropriation provision from the nineties' agreement could also mean an impairment to the sovereign regulatory power of the Brazilian state. As a rule, any state by exercising its regulatory power can freely adopt rules and regulations to protect the public interest, which may affect or restrict the rights of investors. In some circumstances, these rules and regulations can constitute the indirect expropriation.

The same concern in terms of sovereignty loss is also discussed in the investor-state dispute settlement provision seen in the nineties' agreements. This concern is complemented by other issues. The international jurisdiction right granted to the foreign investors was understood as a direct conflict to the constitutional rules and as a provision that would discriminate against Brazilian investors.¹⁸³ In addition, the investor-state dispute settlement mechanism provoked an additional criticism, this time a financial one, not political. This type of dispute resolution system increased the perception of potential new judicial procedures in Brazil. During the same period that the nineties' BITs were refused by the National Congress, Brazil's close neighbor, Argentina, suffered several arbitration procedures from investors based on BITs signed by Argentina during the nineties.¹⁸⁴ As the result, the CFIA's were negotiated and drafted to ensure ratification. The purpose, therefore, was not to repeat the experience of the nineties' treaties, but to guarantee that the new framework of investment treaties would finally be ratified and become a formal law in Brazil.

3.6 Brazilian CFIA for Ethio -China BIT **3.6.1 From BIT Content View**

182 *ibid*

183 Bernasconi-Osterwalder and others(n 177)

184 To this date, Argentina has figured as a respondent state in a total of 60 cases – this represents 7% of the total cases worldwide. Out of the 60 cases, 54 were initiated between 1997 and 2009. Argentina is the country with more cases as a respondent state – followed by Venezuela with 44 and Spain with 43 cases. This is based on the number of public cases, available at the UNCTAD Investment Policy Hub website

Ethiopia must replace Ethio-China BIT with Brazilian model ,CIFA , that can contribute to more informed investment treaty policy in line with its own development strategies and can avoid the potential bite effect of Ethic-China BIT.

Ethio-China BIT didn't contain objective article in substantive text and didn't set out in preambles development as a direct objective and none explicitly acknowledged that the host country has any right to development. The unstated assumption in BIT is that the Contracting Parties are at the same level of development and will reap equal benefit from the agreements. Additionally ,Ethio-China BIT did not account for and was not adapted to Ethiopia's individual and changing circumstances , did not affirm the Ethiopia's right to development(its right to regulate in the public interest, or its right to pursue other social policy goals). The consequence of this is, if Ethiopia exercised its legislative power, investors trigger the ISDS clause, and lead matters of important public policy to be solved before an insensitive international arbitral tribunal who are geared to determine breach of investment treaty measures.

But all CIFAs have similar preambular text. The parties express their wish to deepen the bonds of friendship and the spirit of cooperation as well as to stimulate investment, while broadly reaffirming their legislative autonomy and public policy space..¹⁸⁵ The parties also acknowledge the:

“essential role of investment in the promotion of sustainable development and other public policy objectives, and express their understanding that a strategic partnership on investment will bring broad benefits to both parties investments due to their essential role in the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development.”¹⁸⁶

185 Monebhurrin, N. ‘Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model ‘(2016) *Journal of International Dispute Settlement*, pp. 79–100.

186 *ibid*

The definition of investment under Ethio-China BIT¹⁸⁷, is characterized by broad assets-based definition of investments. This approach of definition is an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favorable to Chinese investors, and least predictable for Ethiopia as Host State. It allows tribunals to read it just in that way, with no limitations.

But CFIA's cover only FDI, which is the kind of investment seen as able to play a more decisive role in the development of the states. Portfolio investments are explicitly excluded from the scope of the CFIA's, since they encompass essentially short-term and speculative investment.¹⁸⁸ The CIFA differs, however, in that it qualifies investment as having 'the purpose of establishing long-lasting economic relations' and being 'aimed at the production of goods and services', therefore, for an asset to qualify as an investment, it must be linked to economic activities.¹⁸⁹

Ethio-China BIT under article 2 provides Contracting States undertake to encourage investors of the other Contracting Party to make investments in their territory but the BIT did not require Contracting States to exchange information regarding investment opportunities in their territories. But in all CIFA the parties commit to exchange relevant information on business opportunities and procedures and conditions for investment, particularly by means of the Joint Committee and the Focal Points.¹⁹⁰ To this end, the parties commit to sharing information that may create favorable investment conditions, such as treaties, laws and policies on various matters (investment, foreign exchange, labour, immigration), specific incentives, customs and tax regimes, statistical information on markets, available infrastructure and public services, and regional investment projects. They also agree to discuss how to strengthen investment in public-private partnerships through greater

187 Ethio-China BIT(n 45)art.1

188UNCTAD 'UNCTAD's Global Action Menu for Investment Facilitation'(2016) Retrieved from <http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_Investment%20Facilitation%20Action%20Menu31.pdf> accessed on 20 February 2019

189 UNCTAD(n 188)

190 *ibid*

transparency and swifter access to regulations. All information sharing is subject to the level of protection requested by the supplying state.¹⁹¹

Ethio-China BIT didn't contain labor, human right and environmental issue. A baseline study by the International Labor Organization found that Chinese investments to have exceptionally low labor standards, with long working hours, low pay, low standard of occupational safety and health. Generally, recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. China has become a major player in the development of hydropower in Ethiopia and its investments are generally concentrated in environmentally sensitive sectors.¹⁹² This is against constitutional right of people of the country which needs quick solution and can be solved by adopting CFIA. But CFIA has Corporate social responsibility and investor obligations provisions. According to this provision:

“foreign investors and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community. It indicates that this can be done by means of adopting a high degree of socially responsible practices and indicates voluntary principles and standards as a reference. Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognize the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.”¹⁹³

This is in line with Brazil's wish that investments be socially responsible and contribute to sustainable development. The desire of Ethiopian government to make investments beneficial to society around investments areas and to country as a whole can better achieved by CFIA model since it removes all gaps in Ethio-China BIT in this regard.

191 UNCTAD(n 188)

192International Institute for Sustainable Development (IISD). (2016). Retrieved from <<https://www.iisd.org/sites/default/files/meterial/South-South-Principles-on-International-Investment-Nairobi-July-2016.pdf>> on 15 January 2019

193 UNCTAD (n 188)

Ethio-China treaty under article 6 provides repatriation of capital and returns but the BIT didn't provide terms of their scope, content, and specificity. The BIT didn't provide and detailed exhaustively examples of the types of investments and returns on investment that can be repatriated. Additionally, it did not state whether in case of a serious balance of payments difficulties and external financial difficulties or the threat thereof, each contracting party may temporarily restrict transfers.

But CFIA safeguards the right to adopt nondiscriminatory regulatory measures restricting transfers during balance-of-payment crises, the right to use exchange measures and other rights under the Articles of Agreement of the International Monetary Fund.¹⁹⁴

Another important characteristic of Ethio -China BIT is the guarantee of protection of investors and their investments through clauses such as absolute fair and equitable treatment ,MFN as well as compensation where expropriation has taken place.¹⁹⁵ But treaty did not identified between direct and indirect expropriation. Under CFIA, national treatment and most-favored-nation treatment clauses establish that foreign investors must be treated no less favorably than domestic investors or investors from third parties The model does not limit new public policy measures, if they are not discriminatory. To avoid unintended consequences and interpretations that allow the import of guarantees granted under other investment treaties, the parties to the CIFAs could set out explicit clarifications. The treaty with Mexico¹⁹⁶ ,already clarifies that MFN does not extend to dispute settlement provisions contained in other investment-related agreements.

The FET clause is excluded in the new CFIA's. This is because the analysis of arbitral jurisprudence showed that when interpreting the ordinary meaning of FET, arbitral tribunals have developed components such as protection of legitimate expectations, good faith, transparency, consistency and discrimination, which are difficulty for developing countries to observe and FET is center for many disputes at ICSID. The expropriation provision in

194 UNCTAD (n 188)

195 Ethio-China BIT(n 45) art.4&5

196 Brazil-Mexico CFIA Retrieved from <<http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas>>accessed on 7 January 2019

Brazil's CIFAs generally requires compensation without delay and be equivalent to the fair market value and fully realizable and freely transferable. The CIFA is therefore similar to other expropriation provisions in BITs, to the exception of a qualification added to CIFA: 'in accordance with the law of the host Party. The expropriation article does not cover indirect expropriation.'¹⁹⁷

Another issue potentially faced by Ethiopia regarding its BIT with China relates to the investor state dispute clause. The provision allows investors to leapfrog domestic courts and sue governments in international arbitration tribunals if there has been an alleged breach of treaty protections.¹⁹⁸ There is no dispute prevention component works through a mechanism in which representatives of the investors and governments involved can share their views on the issue raised by the investors and look for a solution on a common ground. But role of investment facilitation and ADR would make more relevant comparator than conventional approaches to investment treaty making for sub-Saharan African countries with China.

The CFIAAs have an innovative dispute resolution mechanism, which is more favorable to a dialogue between the investor and the state. With this specific approach in mind, the new model created what is called the Ombudsman or the Focal Point and the Joint Committee.¹⁹⁹ The Ombudsman is an organized unit that must be created by the two signatory states and will become the main support structure to the foreign investor. The main purpose of Ombudsman is to clarify any questions that the investor might have. The Ombudsman will also interact directly with the involved authorities in both states to make feasible that a prompt response is provided to any complaint or initial dispute presented by any investor.²⁰⁰ The Ombudsman acts as a mediator to amicably settle disputes between investors and the host countries. Since the Brazilian Ombudsman will centralize in one single

197UNCTAD(n 171)

198 Ethio-China(n 45) art.9

199 Morosini, and others 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (2015) Retrieved from International Institute for Sustainable Development <<https://www.iisd.org/itn/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>> accessed on January 19, 2019

200 Morosini(n 199)

institution the receipt of all consultations and questions regarding any matter related to investment, it is expected that these concerns and questions will be addressed in a timely manner, besides reducing the number of future disputes, since many of the initial discontents might be solved by the Ombudsman amicably.²⁰¹

The Joint Committee, the second institution created by the CFIA's, is a group formed by representatives of both the home and host countries as a second instance for the initial processes presented to the Ombudsman, in case the initial amicable settlement fails. The parties to the dispute request a meeting in which their concerns will be presented and they may engage in negotiations. After 60 days of the request to establish the meeting, the Joint Committee will issue a report with its recommendation. If the parties are not satisfied with the report, they can move onto the dispute settlement phase state to state arbitration.²⁰² The Joint Committee's main objective is to prevent a dispute from being taken to arbitration, which will be the last resource available.²⁰³

The arbitration process in the CFIA's will be held between the host and home states only, not involving the specific investor. This is a discretionary analysis of the home state by convenience, which may be influenced by the political judgment of the state, and there is no guarantee that the investor's rights will be demanded or protected. This means that the system is based on diplomacy.

In Ethio-China BIT there is no responsibility couched as corporate responsibility, mandating investors to abide by the laws, regulations, administrative guidelines and policies of the host state. In Brazilian CIFA, indicated

“Foreign investors and investments have a best-efforts obligation to carry out the highest level possible of contributions to the sustainable development of the host State and the local community, by means of adopting a high degree of socially responsible practices.”²⁰⁴

201 *ibid*

202 Hawes and S. G, 'Trends in investment treaty arbitration: a perspective on Brazil' (2017) Practical Law Arbitration Blog

203 *ibid*

CFIA require investors to disclose information about their entities. This requires investors to show appropriate documentary evidence establishing the legitimacy of their funds. For the purposes of proving an alleged breach of treaty provisions, investors are mandated to maintain true and complete copies of the records, books of account and current financial statements. Furthermore, investors are expected to maintain accounting records and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.²⁰⁵

This clause would come as a huge benefit for Ethiopia if it is made part of its BIT with China. The investments by Chinese in the country can assist more in the revitalizing of the economy if exploited well. However, investors privileged enough to no disclosure of operations needs to be done. Disclosure also assists members of parliament to act on complete and correct information in exercising parliamentary oversight. The benefit of this provision to Ethiopia is that it assists in the guard against fraudulent activities investors may be engaged in.

Poulsen points out that, decision makers in many developing countries often ignore experiences in other countries which in turn leads to considerable risk-neglect until hit by their first claim.²⁰⁶ While the success of the CFIA model in terms of generating more investments and fewer disputes cannot yet be tested, the new institutional framework established due to the CFIA, has already improved and organized the investment policy decision-making process and provided Brazil with a better system for diagnosis and analysis of the domestic regulatory scenario. So, If CFIA adopted by Ethiopia can reshape investment climate of Ethiopia.

3.6.2 CFIA for Thematic Agenda for Cooperation and Facilitation

204 Hawes and S. G(n 202)

205 *ibid*

206 Poulsen LN S 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) (no.58) *International Studies Quarterly* 2

According to UNCTAD's calculations, developing countries face an annual SDG investment gap of \$2.5 trillion.²⁰⁷ Despite the fundamental importance of investment facilitation for growth and development, Ethio- China BIT have paid relatively no attention to it, which need to be reconsidered as Brazil did.

The CFIA's utilize an additional tool for the cooperation and facilitation of bilateral investment: the thematic agendas.²⁰⁸ The agendas will cover a vast array of specific topics of interest to the signatory parties and their investors regarding cooperation and facilitation of investment and might include: business visas, corporate social responsibility, technical and environmental regulations, cooperation on currency remittance, and any other areas deemed pertinent by the parties. This is an even more important concern for developing countries, like Ethiopia. While those may be problems for an investor from any part of the world, such barriers are more costly for investors from developing countries, to the extent that they limit capital exports in the absence of alternatives. But CFIA having a new and innovative approach, it is plausible that CFIA's will solve them in short time

The CFIA's introduce an initial list of themes to be developed by the parties of the agreement starting with the agreement's signature. However, it is clear that this is only an initial objective to be addressed by the parties. The agenda should have an evolutionary content to be constantly revisited by the parties. The CFIA's delegate to the Joint Committee the responsibility of developing the agenda and coordinating the discussions related to such agenda between the competent governmental authorities. This is a very dynamic mechanism since the agenda will be constantly updated based on the current demands of the parties. The existence of such thematic agendas turn the CFIA's into dynamic agreements that may evolve along with the bilateral investment relations.²⁰⁹

Considering that the agreements will only be in force a few years after their signature, as the current process is indicating, this update will be a very resourceful tool to guarantee that the agreements are still addressing the most important themes for the facilitation of investment.

207 UNCTAD 'World Investment Report 2018:'. Retrieved from

<http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed on 15 January, 2018

208 N Monebhurrin (n 185)

209 *ibid*

So, this will rectify Ethio-China BIT that did not cater for empowerment agendas, akin to the exercise of the right to regulate, which are an important mantle in need for sustainable development. It accords with the transformative agenda of Ethiopia's economy.

3.6.3 CFIA to Increase Local Spillover

In view of this thesis Chinese FDI in Ethiopia has a positive effect for the economic growth but the overall effect on the needs of the country is weak. As established by empirical research even though China is the leading source of FDI in Ethiopia but the contribution to sustainable development of the country is low and diffusion of technology, skill and knowledge by workers into the local economy, have been weak due to poor regulations and implementation regarding these transfers.²¹⁰ It is at the mercy and willingness of Chinese companies to transfer technology and other know-how as they are not provided by Ethio-China BIT. This can be best reflected by the following case:

❖ The Ethiopian Holland Car Plc vs Chinese Lifan Car Case

Holland Car Plc was established in 2005 by Tadesse Tessema Engineering and Trento BV Engineering, a Dutch company, with a capital of about 1 million US\$. Before the year 2009 this company could have been taken as a success story of Ethio - Chinese joint venture as the company is assembling the widely known LIFAN brand Chinese car by a creative marketing of giving a local name for the cars known as: ABAY, TEKEZE, AWASH – apparently names of famous Ethiopian rivers.²¹¹ The company flourished selling each car at about \$15,000 and later to about \$20,000. This is a good price in Ethiopia given the prohibitive tax rate of close to 270% on imported cars either new or second-hand in Ethiopia.

Seeing this huge and potential market the Chinese partner (Lifan) asked the Ethiopian partner to sell the company for them. This has led to the disagreement between the two and LIFAN decided unilaterally to stop supplying the parts to the Ethiopian partner. The Joint-venture then collapsed.²¹² The Ethiopian partner is then forced to find another Chinese partner. Now the parts of the new models will be imported from Anhui Jianghuai Automobile Co., Ltd

²¹⁰ Geda, A and A. Meskel (n 23) and G. Isabelle (n 142)

²¹¹ Geda, A and A. Meskel (n 23)

(JAC) based in Shanghai, China. It has been mentioned in some quarters that the Ethiopian company is selling this new brands at a loss as they are relatively expensive owing to their superior quality to the original Lifan model.

One would expect that the government of Ethiopia would protect the interest of this Ethiopian company because as managerial skill transfer as well as technology transfer is very important for Ethiopian firms. Sadly that is not the case. Most of the legal action taken by the Ethiopian partner is not well taken by the Ethiopian government because the latter doesn't want to spoil its cordial relation with the government of China.²¹³The moral of the story is to take the issue of technology transfer seriously by Ethiopian government as that is the sure way for technological and benefit transfer to Ethiopia.

Thus, there is a need to stand for Ethiopian firms by their government in such situation. This case is the typical example that Chinese investment in Ethiopia seems to be constrained by policy credibility on cooperation and transfer of technology ,knowhow and other positive spillover from investment by Ethiopian government. But the premise of the CFIA is the long-term perspective that states need to cooperate and maintain fluent and organized dialogue with investors to foster sustainable development of the country, which involve many concept among which technology transfer is vital. CFIA encourage local capacity building through close cooperation based on the principles and standards set out in the OECD Guidelines for Multinational Enterprises. So CFIA can serve as Legal framework governing investment environment to attract FDI that is secure and beneficial to and to absorb the benefit intended to the Ethiopian economy.

3.6.4 CFIA for Ease Doing of Business and Competitiveness Tool For Ethiopia

According to global competitiveness center ,competitiveness is not a zero-sum game between countries. All countries can become more productive at the same time and it is achievable for all countries by working on pillars of competitiveness.²¹⁴So Ethiopian can improve its competitiveness level, by working on pillars of competitiveness which are considered as a potential priority.

212 ibid

213 Geda A and A. Meskel (n 23)

Natural resource is the most important determinant of FDI for the least developed African countries like Angola, Chad, Equatorial Guinea and Sudan. On the contrary, the middle income frontrunners like Egypt, Morocco and Tunisia have attracted diversified FDI.²¹⁵ The host countries should attain a certain minimum level of economic development to attract non resource-seeking FDI and diversified FDI. This is because the host countries' levels of development are highly determined the costs of doing business and the profit possibilities of investments mainly market and efficiency-seek FDI. In least developed countries like Ethiopia , the costs of doing business are very high, and the profit possibilities of investments are quite limited because the purchasing power of the people is very low, and there is no adequate stock infrastructure & skilled labor. In addition to the levels development of the host countries, political stability , privatization and macro economic stability can promote FDI flows to Africa.

Nevertheless, the natural resource base of Ethiopia is not attractive for foreign investors, as Ethiopia does not have sufficient stock of minerals and petroleum. Although natural resource endowments of the host countries the most common explanation of FDI flows to Africa, Egypt, Morocco and Tunisia have managed to attract a non-resource seeking FDI or diversified FDI.²¹⁶ Ethiopia is far behind these countries in terms of the purchasing power of the people, infrastructure development, existence of skilled manpower, availability of stable political and hospitable business environment.²¹⁷ As a result, the cost of doing business is very high and the productivity & the profitability of investments significantly very low.

214 World Bank, 'Global competitiveness report of 2018'(2018) retrieved from <

<https://internet-start.net/?q=Global%20competitiveness%20report%20of%202018#gsc.tab=0&gsc.q=Global%20competitiveness%20report%20of%202018&gsc.page=1>> on 15 January 2019, For instance , All countries can become more

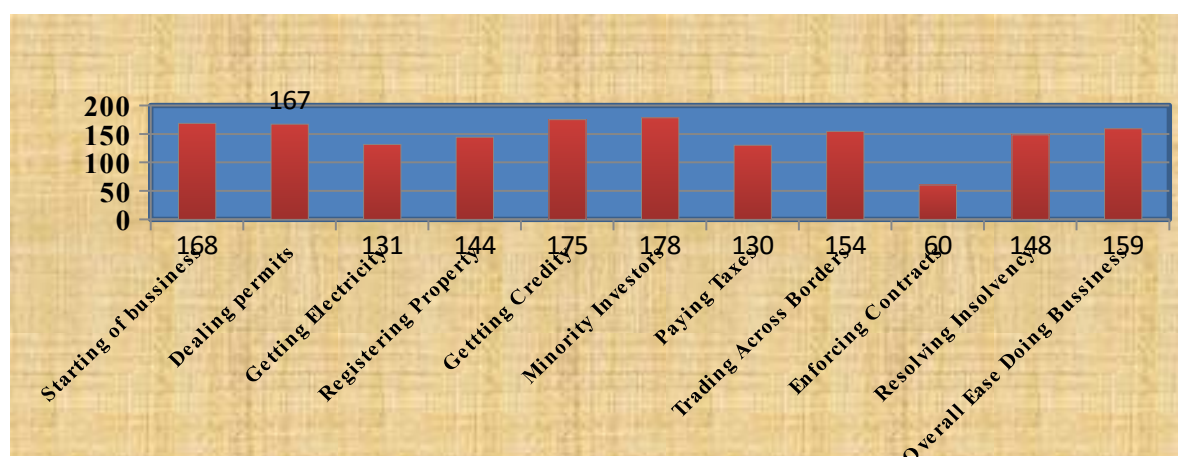
productive at the same time. Improving education standards in Country A does not lower standards in Country B; tackling corruption in Country A does not make Country B more corrupt. Hence, the pursuit of national competitiveness does not undermine global cooperation—indeed, openness contributes to competitiveness

215 UNCTAD (n 207)

216 UNCTAD (n 207)

217 World Bank(n 214)

Figure 2: Ethiopia Rank of Ease Doing Bussiness Out of 190 Countries



Source:- World Bank 'Economy Profile of Ethiopia'(2019)

The factors that deter FDI flows into Ethiopia are: absence of some important natural resources like petroleum, low level of infrastructure development, excessive bureaucracy, inefficient and ineffective legal system, unstable political environment, lack of skilled force, lack of liberalization and slow process of the privatization program.²¹⁸ A country to draw a sizable non-resource seeking FDI or diversified FDI should attain a certain minimum level of development like Egypt and Morocco. Therefore, those factors that are related to the country's level of development are highly responsible for the dismal record of Ethiopia in attracting FDI as it determines its Competitiveness.

The EIC has established a one-stop shop service to cut the time and cost of acquiring investment and business licenses. If all requirements are met, it is now possible to obtain a business license in a single day, although this remains the exception rather than the rule. The EIC readily admits that many bureaucratic barriers to investment remain, but hopes to eliminate many of these in the future.²¹⁹ Starting a business in Ethiopia requires 14 procedures and takes 35 days but lowered to 11 procedures and 32 days, but does not reflect new legislation and administrative changes that have significantly improved the situation in

218World Bank 'Economy Profile of Ethiopia'(2019) available at <[doing%20bussiness%20in%20ethiopia.pdf](#)> accessed on 25 January 2019

219 USA Department of State 'Ethiopia Profile' (2018) Retrieved from <<https://www.state.gov/e/eb/rls/othr/ics/2018/af/281416.htm>> on February 15,2019

the past year. Getting Electricity requires 95 days and percentage of credit bureau coverage is null in Ethiopia, whereas in Brazil requires 65 days and 80.5% respectively.²²⁰ Online business registration is not yet available, it is a long-term plan of the Ministry of Trade to migrate the paper-based registration process to a digital system.

According to above 2019 World Bank's Ethiopia's Ease of Doing Business report, indicated that lack of co-ordination between ministries is one of the complaints of the existing foreign investors in Ethiopia. It points out that among most problematic factors for doing business in Ethiopia, inefficient government bureaucracy and under developed infrastructures take the first position. This excessive bureaucracy raises the costs of doing business and offer opportunities for corruption thereby deterring inflows of FDI.²²¹ Corruption can be regarded as the culture of the public sector in Ethiopia. Transparency international 2018 report indicated that Ethiopia is one of the most corrupted places in the world. According to the report Ethiopia ranked 114th out of 180 countries while Tunisia, Egypt and Morocco ranked 73th, 105th and 73th, respectively.²²² Businesses note corruption in areas such as government procurement, tax collection, customs clearance and land administration.

The government is the sole owner of land in Ethiopia.²²³ In Ethiopia the land market including the lease system, presents serious problems in terms of availability of land and corruption. Effective rule of reduces corruption, combats poverty and diseases, protects people from injustices large and small. It is foundation for communities justice, opportunity and peace underpinning development, accountable government and respect for fundamental

220 World Bank 'Doing Business in 2019' Retrieved from

<<http://www.doingbusiness.org/Documents/DB2004-full-report.pdf>> on February 10, 2019

221 World Bank(n 220)

222 Transparency International 'Corruption Perception Index for 2018'(2018) Retrieved from

<http://www.transparency.org/policy_research/surveys_indices/cpi> on January 10, 2019

223 Daniel B. and Gemmeda A. 'The Enigma of Informal Rural Land Deals In Ethiopia: Evidence from Peri-urban Areas of Hawassa City' (2017)(no.6) Haramaya Law Review 43-

66

rights. But according to global rule of law index Ethiopia ranked 118th out of 180 countries while Brazil and S. Africa ranked 58th and 47th, respectively.²²⁴

A strong legal and regulatory framework is a prerequisite for dynamic private sector economic activity and efficient market relationships. The inefficient legal system of the country is also deterring the inflows of FDI. According to the 2019 World Bank's Ease of Doing Business report, it takes on average 530 days to enforce contracts through the courts in Ethiopia.²²⁵ This inefficient judicial process is definitely an impediment to enforce a contract effectively.

Pillars Competition		Figure 3: Rank Of Countries Competitiveness From 140 Countries						
		Ethiopia	Morocco	Tunisia	Egypty	S.Africa	Kenya	Brazil
1	Institutions	116	54	75	102	69	64	93
2	Infrastructure	120	53	84	56	64	105	81
3	ICT adoption	138	93	90	100	85	113	66
4	Macroeconomic stability	113	47	118	135	57	104	122
5	Health	113	88	58	99	125	110	73
6	Skills	136	114	71	99	84	95	94
7	Product market	135	75	103	121	74	79	117
8	Labour market	126	119	129	130	55	60	114
9	Financial system	118	44	78	99	18	73	57
10	Market size	63	53	70	24	35	71	10
11	Business dynamism	126	99	73	97	56	63	106
12	Innovation capability	127	78	84	64	40	69	40
Oveall Rank		122	75	87	94	67	93	72

Source: World Bank, Global competitiveness report of 2018

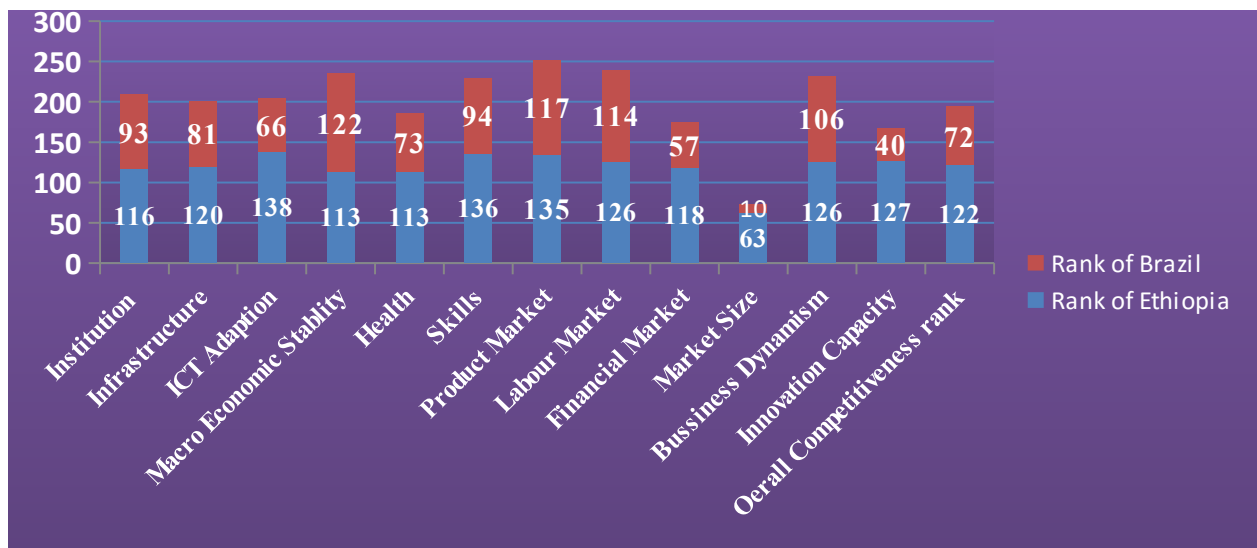
But it requires a serious commitment and long time for Ethiopia to address these factors which increase the transaction costs of doing business in the country and affect the image of the country's competitiveness in the eyes of potential investors. As a satisfied investor is an important promoter for potential investors, the government should also support the existing

224 World Justice Project 'Global rule of Law Index of 2018'(2018) retrieved from <https://internetstart.net/?q=Global%20competitiveness%20report%20of%202018#gsc.tab=0&gsc.q=Global%20rule%20of%20law%20index%20report%20of%202018> accessed on 22 January 2019

investors by introducing an pre care and after-care program adopted by Brazilian CFIA, aimed to identifying and resolving the problems encountered by the existing investors in short time. CFIA helped Brazil to create hospitable investment environment by adoption of facilitation and cooperation approach to bypass the factors that increase cost of doing business.

As South America’s largest economy , Brazil ranks 72nd in overall competitiveness index. Its score is driven by its relatively large market size (10th in the world) and the reforms passed by CFIAs aiming to overcome the poor integration of policies and the lack of coordination between the public and private sectors which are inhibiting its competitiveness.²²⁶ The presence of large market size and reforms introduced through CFIA coupled together with other factors in presence many problems made Brazil one of the top recipients of global FDI in short time.

Figure 4:-The Global Competitiveness Level of Ethiopia and Brazil



Source: World Bank, Global competitiveness report of 2018

Ethiopia also have large market in Africa , as it is the third most populous country in Africa after Nigeria and Egypt. With regards to regional market, Ethiopia is a member of Common Market for Eastern and Southern African countries . This creates an opportunity to investors to sell their product in 23 member countries (about 400 million people) with preferential tariffs. But Ethiopia’s level of competitiveness to be priority place of FDI destination is ranked 122th out of 140 counties which behind African countries competing for the same

²²⁶World Bank (n 218)

place like S. Africa, Algeria, Egypt ,Morocco and Rwanda, ranked as 67th,92th,94th,75th and 108th respectively.²²⁷So Ethiopia should try to work on this market, which is the primary motive for Chinese investing in Ethiopia and the giant factor in its competitiveness as ranked 63th within a short time in order to attract more FDI. UNCTAD laid down investment treaties have reached a turning point and reorienting international investment policy making towards facilitation rather than protection which become core principle of new policy objectives.²²⁸ For instance,

“Egypt established the Supreme Council for Investment, which will overlook the State’s investment policies with a view of further improving the investment climate and facilitating investment, Tunisia enacted a new investment law, which, inter alia, removes profit taxes on major investment projects for 10 years and gives foreign investors more flexibility to transfer funds out of the country and even more ,in 2017, Italy tripled the tax credit for businesses engaged in Research and Development. It also adopted new rules to provide for a “golden visa” for foreign investors, subject to certain conditions.”²²⁹

A country is in urgent need of quality FDI and to draw a sizable FDI .So in short time , to survive on globe of competitiveness and to achieve the needs of the country, facilitation of investments under CFIA is ideal solution for Ethiopia. This is because Facilitation which is called hand holding, can help investors to bypass factors that increase cost of doing business in short time, as it includes mechanisms and services through which governments, in a very practical manner, assist investors in making their investments a success from establishment onward.

227 World Bank, (n 220)

228UNCTAD ‘World Investment Report 2017’(2017) Retrieved from
<http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> on February 10, 2019

229 ibid

Chapter Four-

Findings and Recommendation

4.1 Findings

Attracting Foreign Direct Investment is a core, permanent, objective of Ethiopia's International Political Economy. To this effect more than 30 BITs signed by Ethiopia. To attract greater FDI, granting protection, stabilizing and otherwise limiting a host state government's regulatory freedom is a focal point of BITs. This study presented in analysis of BIT between Ethiopia and China. In particular, the study found that even though investment treaty making has reached a turning point, since inception, Ethio-China BIT never undergone development. It is therefore not shocking that this BIT would have significant challenges.

One of these challenges pertains to the structure of BIT. Ethio-China BIT clauses have contributed immensely to the position that the IIA regulatory regime is unbalanced. In general, the key features of China-Ethiopia BIT are: a broad asset based definition of investments; absolute standards of treatment and noticeably absent from China-Ethiopia BIT are provisions pertaining to human rights, labor rights, environmental protection, CSR and sustainable development issues.

In the desire to attract foreign investment, insufficient heed was paid to the less obvious, less attractive, and consequences of the treaty. In Ethio-China's in-force BIT, all clauses are shy of clear, precise meaning, leaving room for wide interpretation, which may be to the detriment of Ethiopia as a host state. Ethio-China BIT didn't contain objective article in substantive text and didn't set out in preambles development as a direct objective and none explicitly acknowledged that the host country has any right to development. The definition of investment under Ethio-China BIT²³⁰, is characterized by broad assets-based definition of investments. This approach of definition is an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favorable to Chinese investors, and least predictable for Ethiopia as Host State. It allows tribunals to read it just in that way, with no limitations.

230 Ethio-China BIT(n 45)art.1

The BIT expressly provides for standards of treatment like FET,MFN in article 4, however, these are articulated in one paragraph without explanation. The language lacks specific meaning and is particularly prone to expansive interpretation simply because an arbitral tribunal does not have sufficient interpretative guidance from the text. Therefore, leaving the standard treatments without an attempt to describe what it is, leaves the host state vulnerable. Generally, the structure of BIT focused on protecting investors and thus give rights generously and on a wider array as compared to customary international law. Investor rights are given through different standards of treatment and are inviolable, justiciable and inalienable.

FDI has positive and negative effects which are not automatic but depends on policy in place. Care needs to be taken to ensure coherence between IIA obligations and domestic policies, and to achieve consistency between IIAs and other international obligations of the IIA contracting parties.As such, against the objectives of Ethiopian investment laws, issues of public interests like corporate social responsibilities, environmental , labor and sustainable development rights are side-lined. Ethio-China BIT ignored host state legitimate interests in which the host state would be ordinarily interested in the right to regulate , a critical feature of sovereignty.

This show the BIT is not co-existed with Ethiopian domestic legislations like FDRE constitution and investment proclamation no.769/2002.Thus, a strict interpretation of treaty provisions may give an inappropriate outcome and cases that trumps on human rights and interest of the country. This creates problems for a poor country like Ethiopia that is already swimming in international debt, to open itself to an onerous standard of protection it can little afford.

The BIT impact will depend on the actual drafting and design of the IIA and the capacity of national and subnational entities to effectively implement the treaty. BITs require complex and standard institutional reforms. But Ethiopia have lowest institutional capacity(116 out of 140 countries). Therefore, it is imperative to revisit its standard BITs as it cannot enforced properly and may expose to different cases. Ensuring this degree of coordination can be a daunting challenge.

Furthermore, the study also revealed that South Africa entered into its BITs without a proper appreciation of what the South African government was signing up for. The desire of South Africa's government to attract FDI and eliminate all forms of racial inequalities resulted in

South Africa being sued at international tribunals, prompting the initiation of the review of South Africa's BITs. The review revealed that the BIT provisions were not what South Africa desired to be bound to, as some of the provisions were a direct violation of South Africa's constitution and South African legislation. With this in mind, South Africa made numerous recommendations regarding its outdated BITs.

Ethiopia has numerous lessons to learn from South Africa. Ethiopia could learn of the need to perform a thorough analysis of the risks and benefits of BITs before entering into them. Ethiopia could also use this lesson in making an independent, unbiased decision regarding its BITs bearing in mind all the criticisms that have been highlighted about them. Ethiopia will need to assess BITs and their effect in its country to examine whether any of the allegations about BITs are indeed true in Ethiopia's context. Another lesson that Ethiopia could learn from South Africa's experience is the fact that Ethiopia should not wait for a dispute to be brought against the country over its BIT obligations by foreign investors.

The study understands that there is need for optimal investment policy relation that will bring win-win situation for both Ethiopia and China. It is safe to say that Chinese FDI certainly is a potential for development in Ethiopia and not a development trap. Nevertheless, studies show Ethio-China BIT is not primary driving motive for Chinese FDI and can't facilitate fully the benefits from Chinese investments in line of needs and objectives of the country. The incentives and the level of protection that were given by the BIT to investments were unbalanced with contribution to development of the country.

Generally, studies show China uses Ethiopia for two strategic goals: to enter new markets and to enhance her own international influence over Africa. The investments by Chinese in the country can assist more in the revitalizing of the economy if exploited well. However, Chinese investors privileged enough not to contribute to capacity building needs of the country.

Previous studies on Chinese FDI in Ethiopia indicate that there is policy gaps and the natural unwillingness to diffuse technology, skill and knowledge by firms in to the economy. Yet, in the case of the Ethiopian incentive structure for FDI, a central concern is the fact that it is not promoting effective technology, skill and knowledge transfers, although it is stated as a priority in the Investment Proclamations. Without specific policy directives, automatic diffusions cannot be guaranteed.

The extent to which FDI is beneficial to economy depends on regulatory system governing. According to UNCTAD policy packages of 2018 , Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level. Notably, Ethiopia's interests underlying in local capacity building, local linkages which lead to sustainable development and responsible business conduct have been not recognized in recent Ethio-China BIT. Local capability upgrading helps to attract FDI and increase spillover from FDI. So Ethio-China BIT must be rebalanced in a manner that bring above benefits which the country have no access to before entering into these relations.

If BITs are to promote outward foreign investment, they would need to meet businesses where they are, rather than where abstract theories about investment protection and promotion would expect them to be. Rather than conclude questionable BITs, Ethiopia could consider adopting targeted policies to attract investors to specific sectors needing foreign capital and associated know how. The Chinese businesses have developed their own solutions to the challenges based on ADR, so any rethinking of policy should also build on these.

According to world bank Ease doing business report of 2019 , the factors that deter FDI flows into Ethiopia are: absence of some important, low level of infrastructure development, excessive bureaucracy, inefficient and ineffective legal system, lack of skilled force, lack of liberalization and slow process of the privatization program.²³¹ The existence of strong BIT cannot substitute for sound domestic policies and regulatory and institutional frameworks. Despite minimum impact of other factors ,it's Macro-economic policies that shape the locational decisions and the underlying fundamentals of cost of competitiveness

A country to draw a sizable non-resource seeking FDI or diversified FDI should attain a certain minimum level of development like Egypt and Morocco. Therefore, those factors that are related to the country's' level of development are highly responsible for the dismal record of Ethiopia in attracting quality FDI ,as it determines its Competitiveness level.

Ethiopia is far behind many African countries in terms of the purchasing power of the people, infrastructure development, existence of skilled manpower, availability of stable political and

²³¹World Bank 'Economy Profile of Ethiopia'(2019) available at <[doing%20business%20in%20ethiopia.pdf](#)> accessed on 25 January 2019

hospitable business environment.²³² As a result, the country failed to have high quality FDIs as the cost of doing business is very high and the productivity & the profitability of investments significantly very low. But it requires a serious commitment and long time for Ethiopia to address the excessive bureaucracy, the weak legal & regulatory framework and corruption, as these factors increase the transaction costs of doing business in the country and affect the image of the country in the eyes of potential investors.

Therefore there is a need of urgent solution that can overcome these problems in short time. As a satisfied investor is an important promoter for potential investors, the government should also support the existing investors by introducing an pre care and after-care program, aimed to identifying and resolving the problems encountered by the existing investors in short time.

The thesis argues that there has been a paradigm shift in the investment treaty practice of World. Specifically from protection to facilitation approach to achieve their national development goals. This would be a trend Ethiopia would find beneficial to catch onto, as the government is enjoined to provide for by the new transformative economic policies. BITs only focus on the protection of existing investments, rather than the promotion and facilitation of new FDI.

Eventhough, EIC adopted One-Stop Shop service but still no on-line registration, services takes long time and high cost ,bureaucracy remains, visa delays, onerous paper works is there. Ethio- China BIT have paid relatively no attention to facilitation which can solve these problems in short time. So, Ethiopia need to rethink as competition for FDI has been intensified globally.

Investment Facilitation which is reffered as hand holding, is vital particularly in LDCs like Ethiopia. Image building, investment generation and investors servicing are the three main elements of successful investment facilitation. Facilitation of investments is a cornerstone for attracting FDI in LDCs as they lack developed pillars of competition. Facilitation bypass these gaps as it provides mechanisms and services through which governments, in a very

232 World Bank, 'Global competitiveness report of 2018'(2018) retrieved from <
<https://internet-start.net/?q=Global%20competitiveness%20report%20of%202018#gsc.tab=0&gsc.q=Global%20competitiveness%20report%20of%202018&gsc.page=1>> on 15 January 2019

practical manner, assist investors in making their investments a success from establishment onwards.

Among the several ways in which facilitation is supposed to help investors, two are of particular importance are: provision of information, especially on legislation, requirements, procedures and authorities related to investment, and assistance to investors in resolving difficulties they may face in their dealings with government agencies on which they may depend to make their investments work (such as granting of permits or licenses). Ethiopia is in urgent need of greater quality and quantity of FDI. So to achieve it in short term must adopt a model based on facilitation and solving disputes through ADR.

Brazil's response to the criticisms of the current regime was to move away from the adversarial approach and to adopt a cooperative approach, focusing on the elements of mutual benefit to investors and states. It sought to avoid the problems of the investor-state arbitration regime as limiting states' right to regulate and as granting extraordinary benefits to foreign investors, hence discriminating against domestic investors. Even though never ratified single BIT and have weak pillars of competition, Brazil continued to receive significant amounts of foreign direct investment, consolidating its position as one of the world's top recipients of FDI and reinforcing the understanding that having BITs in force is not decisive for attracting investments by adopting of CFIA.

The CFIA is also an incentive to socially and environmentally responsible investors, as it fully incorporates social corporate responsibility commitments. These help investors ensure that they will generate the sustainable development benefits that States and societies legitimately expect to obtain from investment. The CFIA has an important, extensive section on the relation between investments and environment, labour affairs and health.

In addition to helping investments work for both investors and society, these features of the agreement can have a branding effect, as investors and their investments become associated with best practices of social and environmental management. CFIA lies on helping ensure the success of the investment by building a long-term investment relationship between countries and investors and host States, as a manner to prevent disputes further on. With this specific

approach in mind, the new model created what is called the Ombudsman or the Focal Point and the Joint Committee.²³³

The Ombudsman is an organized unit that must be created by the two signatory states and will become the main support structure to the foreign investor. The main purpose of Ombudsman is to clarify any questions that the investor might have. The Ombudsman will also interact directly with the involved authorities in both states to make feasible that a prompt response is provided to any complaint or initial dispute presented by any investor in timely manner. Joint Committee's main objective is to prevent a dispute from being taken to arbitration and to follow the enforcement of agreement.

So, the findings of this thesis offer Ethiopia food for rethinking its investment treaty policy with China to ensure it meets the challenges that Ethiopia faces from BIT with China. In long run, Ethiopia must work to create hospitable business environment in order to attract diversified high quality and beneficial FDI by competing with other countries. Hospitable business environment includes efficient judicial system, liberalized regulatory framework, efficient and transparent bureaucracy and an environment with less corruption.

4.2 Recommendation

4.2.1 Review BITs

The first recommendation for Ethiopia is that it should carry out an extensive BITs review process that is targeted at uncovering specific aspects. Ethiopia's BITs review that could be aimed at ascertaining if BIT still fall in line with Ethiopia's domestic legislative agenda and the country's goals of attracting FDI. Ethiopia could also assess the vulnerabilities in the language of its current BIT that would open up Ethiopia to litigation. In addition, Ethiopia could also determine if BITs will attract enough FDI to balance the risks of claims that could be brought upon Ethiopia. With this in mind, Ethiopia carrying out their own BIT review will help them understand whether BITs work for their specific situation that is the combination of their characteristics which make Ethiopia a unique country.

233 Morosini, and others 'The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (2015)

Retrieved from International Institute for Sustainable Development

<https://www.iisd.org/itn/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/> accessed on

January 19, 2019

Given the array of inconsistent decisions and the vagueness of BITs standards, it is imperative that Ethiopian government should reconsider changing from the present attitude of passive observers to more relevant and active player. Ethiopian government need to reassert BITs and join the group of countries pushing for a more balanced investment regime.

To my focus of , based on the results of the review I have made on aforementioned parts about Ethio –China BIT, Ethiopia should terminate the outdated Ethio-China BIT and resorts to a measure that is beneficial for the Ethiopian government.

4.2.2 Alternative Model

Since the current Ethio-China BIT is determined ineffective and in event other Ethiopian signed BITs ascertained to be ineffective, Ethiopia could come up with creative solutions that are not BIT-model dependent, i.e, Brazilian CIFA. CIFA helped Brazil to create hospitable investment environment and become one of the leading global destination of FDI.

CIFA is innovative model developed based on current trend of international investement law of balancing rights and obligations. The CIFA differs from Ethio-China BIT, in that it qualifies investment as having ‘the purpose of establishing long-lasting economic relations’ and being ‘aimed at the production of goods and services’, therefore, for an asset to qualify as an investment, it must be linked to economic activities. CIFA has Corporate social responsibility and investor obligations provisions that provide, foreign investors and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community. CIFA safeguards the right to adopt non-discriminatory regulatory measures restricting transfers during balance-of-payment crises, the right to use exchange measures and other rights under the Articles of agreement of the International Monetary Fund.

CIFA require investors to disclose information about their entities. This requires investors to show appropriate documentary evidence establishing the legitimacy of their funds. Furthermore, investors are expected to maintain accounting records and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State. This clause would come as a huge benefit for Ethiopia if it is made part of its BIT with China. The investments by Chinese in the country can assist more

in the revitalizing of the economy if exploited well. However, investors privileged enough to no disclosure of operations needs to be done.

CFIA encourage local capacity building through close cooperation based on the principles and standards set out in the OECD Guidelines for Multinational Enterprises. So CFIA can serve as Legal framework governing investment environment to attract FDI that is secure and beneficial to and to absorb the benefit intended to the Ethiopian economy. CFIA recognize the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development by clearly providing legal and institutional framework for its enforcement.

Facilitation of investments is a cornerstone of the CFIA, as it includes mechanisms and services through which governments, in a very practical manner, assist investors in making their investments a success from establishment onwards. The CFIA offer investors legally-binding international protection for their investments; facilitation of their investments during their entire life-cycle; and structured and dynamic cooperation between the signatory governments.

Generally, Brazilian CIFA model can rebalance Ethic-China BITs as it avoided investor-State dispute settlements, affirmed the lost regulatory power for protection of health and safety, labor rights, environment or sustainable development in BITs, provide only minimum standard of treatment of aliens under Customary International Law or clarified with a list of State obligations, not constitute an indirect expropriation, contain detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws, Promotion of corporate social responsibility standards by incorporating a separate provision, excluding policy areas from ISDS, specific proactive provisions on investment promotion and facilitation.

The CFIA utilize an additional tool for the cooperation and facilitation of bilateral investment: the thematic agendas. The agendas might include: business visas, corporate social responsibility, technical and environmental regulations, cooperation on currency remittance, and any other areas deemed pertinent by the parties. This is a very dynamic mechanism since the agenda will be constantly updated based on the current demands of the parties. This helps to keep the dynamic nature of international investment law consistently in Ethiopia.

Eventhough, EIC adopted One-Stop Shop service but still no on-line registration, services takes long time and high cost ,bureaucracy remains, visa delays, onerous paper works is there. These problems require long time to solve. But CFIA can solve the problem of providing quick service to investors that increased the cost and time required for starting business in Ethiopia, through the new organs created called the Ombudsman or the Focal Point and the Joint Committee. These bodies will interact directly with the involved authorities in both states to make feasible that a prompt response is provided to any complaint or initial dispute presented by any investor in timely manner.They will assist investors in very practical manner from establishment of project onwards.

Ethiopian government in urgent needs of greater quality and quality of FDI to meet its sustainable development goals. But the government is swimming at the bottom of world in terms of ease doing of business and pillars of competition as it stands 159th and 122th respectively which is the lowest of African countries competing for the same matter.But it requires long time to solve those factors that hindered FDI flow to country by increasing cost and time required for investements.This is because the primary driving force for investors is the prospectus of returns from investements not existence of strong BITs.

Facilitation of investments is a cornerstone for attracting FDI in LDCs as they lack developed pillars of competition. Facilitation bypass these gaps as it provides mechanisms and services through which governments, in a very practical manner, assist investors in making their investments a success from establishment onwards. Despite the fundamental importance of investment facilitation for growth and development, Ethio- China BIT have paid relatively no attention to it ,which need to reconsidered as Brazil did.

Conclusively, the presence of large market size and reforms introduced through CFIA coupled together with other factors in presence many problems made Brazil one of the top recipients of global FDI in short time. So,If Ethiopia adopted CFIA , it can reshape Ethiopian investement environment.

4.2.3 Capacity-building

The recommendation for Ethiopia to adopt an effective new model BIT ,i.e CFIA, necessarily requires that Ethiopia , consider capacity-building for all the officials that would be involved in handling BITs. Ethiopia, it is particularly important to ensure that knowledge of IIA issues is preserved in institutional memory and does not disappear due to turnover of officials, as

well as to ensure some continuity in the staff engaged in IIA reform in order to maintain a coherent ,cohesive IIA reform approach over time and increase the bargaining power.

4.2.4 Ethiopia's Draft Model BIT

Ethiopian Draft model BIT provides legal certainty and strong protection to investors and investments. Draft model is based on the UK draft model BIT that was based on a standard Organization for Economic Co-operation and Development model. The main features of this model were that, it stipulated that foreign investors and their investments had to be treated fairly and equitably, there should be no discrimination or expropriation, contracts should be upheld, there should be no capital restrictions, and disputes could be adjudicated through international investor state arbitration.

However, IIAs are only one of many determinants of FDI decision-making, and their importance is contingent on other variables. IIAs cannot substitute for sound domestic policies and regulatory and institutional frameworks. IIAs alone cannot turn a weak domestic investment climate into a strong one, and, like other treaties, they cannot guarantee market outcomes in the form of inflows of foreign investment. Today, globally Facilitating investment is critical for achieving the Sustainable Development Goals. But draft model is based on protection rather than facilitation approach. So there should be move to more balanced IIA based on facilitation rather than protectionism approach provided in Ethiopian draft model..

Survival clauses included in draft model BIT is designed to extend treaty application for a further period after termination for some for 5 years. But new draft model BIT did not contain the transition clause , if included in the new treaty, such clauses help ensure a smooth transition from the old to the new by limiting situations in which both treaties apply concurrently or by clarifying that upon the new treaty's entry into force, the old treaty is phased out.

Although foreign investment can create positive conditions for improving peoples' lives, it can also carry the risk of negatively impacting on the environment, peoples' health and the enjoyment of their human rights. These effects can be aggravated due to domestic regulatory and institutional lacunae in Ethiopia. Currently , in Ethiopia there is weak institutional capacity as Ethiopia stands 116th from 140 countries. Ensuring high degree of coordination

for enforcement of Ethiopian draft model can be a daunting challenge and have possibility of creating many arbitral cases.

Ethiopia should also take lesson from South Africa that perceived BITs to be instruments that attract FDI and hastily entered into 46 BITs based on UK model in the hope of attracting such FDI that finally generated unanticipated many cases and huge awards. Therefore, it is better not to adopt the draft model BIT and rather to provide balanced investment protection that address more directly investor responsibilities and can go with countries institutional capacity. That is CFIA ,which have wider implications for policy and systemic coherence and capacity-building

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ANNEX

Agreement Between The Federal Democratic Republic Of Ethiopia And The Republic Of China On Investment Cooperation And Facilitation

Preamble

The Federal Democratic Republic of Ethiopia and the Republic of China (Herein after jointly referred to as the "Contracting Parties" and separately as "Contracting Party"),

Wishing to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Contracting Parties;

Seeking to create and maintain favourable conditions for the investments of investors of a Contracting Party in the territory of the other Contracting Party;

Seeking to stimulate, streamline and support bilateral investments, thus opening new integration opportunities between the Contracting Parties;

Recognizing the essential role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expansion of productive capacity and human development;

Considering that the establishment of a strategic partnership between the Contracting Parties in the area of investment will bring wide-ranging and mutual benefits;

Recognizing the importance of fostering a transparent and friendly environment for investments by investors of the Contracting Parties;

Reassuring their regulatory autonomy and policy space;

Wishing to encourage and strengthen contacts between the private sectors and the Governments of the two countries; and

Seeking to create a mechanism for technical dialogue and fosters government initiatives that may contribute to a significant increase in mutual investment;

Agree, in good faith, to conclude the following Agreement on Investment Cooperation and Facilitation, hereinafter referred to as "the Agreement" :

PART I
Scope of the Agreement and Definitions

Article I
Definitions

1.For the purpose of this Agreement

1.1 "**Enterprise**" means: any entity constituted or organized under applicable law, for profit, whether privately owned or State-owned, including any corporation, trust, partnership, sole proprietorship, joint venture;

1.2 "**Host State**" means the Contracting Party where the investment is made

1.3. "**Investment**" means a direct investment of an investor of one Contracting Party, established or acquired in accordance with the laws and regulations of the other Contracting Party, that, directly or indirectly, allows the investor to exert control or significant degree of influence over the management of the production of goods or provision of services in the territory of the other Contracting Party, including but not limited to:

- a) an enterprise;
- b) shares, stocks, participations and other equity types in an enterprise;
- c) Movable or immovable property and other property rights such as mortgages, liens, pledges, encumbrances or similar rights and obligations;
- d) Concessions, licenses or authorizations granted by the Host State to the investor of the other Contracting Party;
- e) Loans and debt instruments to a company
- f) Intellectual property rights such as trademarks, trade names, trade secret, copyrights, know-how, goodwill associated with an investment, industrial design

and technical processes the extent they are recognized under the law of the Host State and international agreements to which the Contracting Parties are parties.

1.3.1 For the purposes of this Agreement and for greater certainty, "**Investment**" does not include

- a) An order or judgment issued as a result of a law suit or an administrative process;
- b) Debt securities issued by a Contracting Party or loans granted from a Contracting Party to the other Contracting Party, bonds, debentures, loans or other debt instruments of State-owned enterprise of Contracting Party that constitutes public debt under the legislation of that Contracting Party;
- c) Portfolio investments, i.e., those that do not allow the investor to exert a significant degree of influence in the management of the company; and
- d) Claims to money that arise solely from commercial contract for the sale of goods or services by an investor in the territory of a Contracting Party to a national or an enterprise in the territory of another Contracting Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in sub-article (a)-(i) of Article 1.3.

1.4 "**Investor**" means

- a) any natural person who is a national or a permanent resident of a Contracting Party, according to its laws, that makes an investment in the territory of the other Contracting Party;
- b) any legal person established and organized in accordance with the laws of a Contracting Party, that has its domicile and substantial business activities in the territory of that Contracting Party and that invests in the territory of the other Party; and

c) any legal person established in accordance with the laws of a third party and whose property or effective control belongs, directly or indirectly, to investors of one of the Contracting Parties, according to sub-articles (a)-(b) above.

1.5. **"Returns"** means the values obtained by an capital gains, dividends or "royalties" investment, including profits, interests,

1 .6. **"Measure"** means any measure adopted by a Contracting Party, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form.

1 .7 **"Territory"** means

a) In respect of the Federal Democratic Republic of Ethiopia: the territory of the Federal Democratic Republic of Ethiopia over which it exercises sovereignty, sovereign rights and jurisdiction in accordance with international law.

b) in respect of the Republic of China the territory, including its land and aerial spaces, the exclusive economic zone, territorial sea, sea bed and subsoil within which China exercises its sovereign rights or jurisdiction, in accordance with international law and its internal legislation.

Article 2 Objective

The objective of this Agreement is to promote cooperation between the Contracting Parties in order to facilitate and encourage mutual investment, through the establishment of an institutional framework for the management of an agenda for further; investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instrument of mutually agreed on by the Contracting Parties.

Article 3

Scope and coverage

1 This Agreement- shall apply to all investments made before or after :its entry into force

2. This Agreement shall not limit the rights and benefits, which an investor of a Contracting Party enjoys under national or international law in the territory of the other Contracting Party.
3. This Agreement shall not prevent the adoption and implementation of new legal requirements or restrictions to investors and their investments, as long as they are consistent with this Agreement.
4. This Agreement applies only to investments once admitted in accordance with domestic laws, regulations and policies.
5. The provisions of this Agreement shall apply to future investments made by investors of one Contracting Party in the territory of the other Contracting Party, and also to the investments existing in accordance with the laws of the Contracting Parties on the date this Agreement came into force; but shall not apply to claims arising out of events which occurred or to any claims which had been settled, or to any government measures which were taken, prior to its entry into force.
6. This Agreement does not apply to government measures relating to taxation in accordance with Article 11 -- (Tax Measures)

PART II
Regulatory Measures and Risk Mitigation
Article 4
Admission and treatment

1. Each Contracting Party shall admit and encourage investments of investors of the other Contracting Party, according to their respective laws and regulations.
2. Each Contracting Party shall grant to investments and investors of the other Contracting Party treatment according to the due process of law.
3. In line with the principles of this Agreement, each Contracting Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with their respective laws and regulations.

Article 5
National treatment

1 . Without prejudice to the measures in force under its legislation on the date of entry into Force of this Agreement, each Contracting Party shall accord to investors of another Contracting Party and their investments treatment no less favourable than that it accords, **in like circumstances**, to its own investors with respect to the expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. For greater certainty, whether treatment is accorded in '**like circumstances**' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the bases of legitimate public welfare objectives.

3. Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

a) a bilateral investment treaty or free trade Agreement that entered into force prior to this Agreement; or

b) any multilateral or regional Agreement relating to investment or economic integration in which a Contracting Party is participating or may participate.

4. For greater certainty, this Article shall not be construed to require any Contracting Party to compensate for any inherent competitive disadvantages, which result from the foreign character of the investor or investments.

Article 6 **Most-favoured-nation treatment**

1 . Each Contracting Party shall accord to investors of another Contracting Party and their investments treatment no less favourable than that it accords, **in like circumstances**, to investors of any third State with respect to the expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. This Article shall not be construed to require a Contracting Party to grant to an investor of another Contracting Party or their investments the benefit of any treatment, preference or privilege arising from:

a) Provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement; or

b) any existing or future customs, economic or monetary union, a common market or a free trade area or similar economic integration agreement to which either of the Contracting Parties is or may become a party;

c) a bilateral investment treaty or free trade agreement that entered into force prior to this agreement; or

3. For greater certainty, whether treatment is accorded in ' **like circumstances**' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 7 Expropriation

1. Each Contracting Party shall not directly nationalize or expropriate investments of investors of the other Contracting Party, except:

a) for a public purpose or necessity or when justified by a social interest;

b) in a non-discriminatory manner;

c) on payment of effective compensation, according to sub-article 2 to 3; and

d) in accordance with due process of law

2. The compensation shall

a) be paid without undue delay;

b) be equivalent to the fair market value of the expropriated investment, immediately before the expropriating measure has taken place ("expropriation date");

c) not reflect any change in the market value due to the knowledge of the intention to expropriate, before the expropriation date; and

d) be completely payable and transferable, according to Article 10

3. The compensation to be paid shall not be less than fair market value on the expropriation date, plus interests at commercial rate from the date of expropriation until the date of payment, according to the legislation of the Host State.

4. The Contracting Parties shall cooperate to improve the mutual knowledge of their respective national legislations regarding investment expropriation.

5. For greater certainty, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights.

Article 8 Compensation For losses

1. The investors of a Contracting Party whose investments in the territory of the other Contracting Party suffer losses due to war or other armed conflict, revolution, state of emergency, insurrection, riot or any other similar events, shall enjoy, with regard to restitution, indemnity, compensation, or other form of settlement, the same treatment as the latter Contracting Party accords to its own investors or the treatment accorded to investors of a third party, whichever is more favourable to the affected investor.

2. Each Contracting Party shall provide the investor restitution, compensation, or both, as appropriate, in accordance with Article 6 of this Agreement, in the event that investments suffer losses in its territory in any situation referred to in sub-article 1 resulting from:

- a) Requisitioning of its investment or part thereof by the forces or authorities of the latter Contracting Party; or
- b) Destruction of its investment or any part thereof by the forces or authorities of the latter Contracting Party.

Article 9 Transparency

1. Each Contracting Party shall ensure that its laws, regulations, procedures and general administrative resolutions related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without undue delay and, when possible, in electronic format, as to allow interested persons of the other Contracting Party to be aware of such information.

2. Each Contracting Party shall endeavor to allow reasonable opportunity to those stakeholders interested in expressing their opinions on investment-related measures that the Contracting Party intends to adopt.

3. Whenever possible, each Contracting Party shall make available this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other Contracting Party.

Article 10 Transfers

1 . Each Contracting Party shall allow that the transfer of funds related to an investment be made freely and without undue delay, to and from their territory. Such transfers include:

- a) the initial capital contribution or any addition thereof in relation to the maintenance or expansion of such investment;
- b) returns directly related to the investment;
- c) the proceeds of sale or total or partial liquidation of the investment;
- d) the repayments of any loan, including interests thereon, relating directly to the investment;
- e) the amount of compensation

2. Without prejudice to paragraph 1, a Contracting Party may, in an equitable and non discriminatory manner and in good faith, prevent a transfer if such transfer is prevented under its laws relating to:

- a) bankruptcy, insolvency or the protection of the rights of creditors;
- b) criminal or penal offences and the recovery of the proceeds of crime;
- c) financial reports or maintenance of transfers registers when necessary to cooperate with law enforcement or with financial regulators;
- d) the guarantee for the enforcement of decisions in judicial or administrative proceedings;
- e) the formalities required to register and satisfy the Central Bank and other relevant authorities of a Contracting Party.

3. Nothing in this Agreement shall affect the right of a Contracting Party to adopt regulatory measures concerning the balance of payments in a balance of payments crises, nor will it affect the rights and obligations of the Contracting Parties as members of the International Monetary Fund contained in the Agreement of the International Monetary Fund, in particular exchange measures which are in conformity with the Agreement of the International Monetary Fund.

4. The adoption of temporary restrictive measures for transfers in case of the existence of serious balance of payments difficulties must be non-discriminatory and in accordance with the articles of the agreement of the International Monetary Fund.

Article 11 **Tax measures**

1. No provision of this Agreement shall be interpreted as an obligation of one Contracting Party to give to an investor from the other Contracting Party, concerning his or her investments, the benefit of any treatment, preference or privilege arising out of any agreement to avoid double taxation, current or future, of which a Contracting Party to this Agreement is a party or becomes a party.

2. No provision of this agreement shall be interpreted in a manner that prevents the adoption or implementation of any measure aimed at ensuring the equitable or effective imposition or collection of taxes, according to the Contracting Parties respective laws and regulations, so long as such a measure is not applied as to constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.

Article 12 **Prudential measures**

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining prudential measures, such as:

a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

b)the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and ensuring the integrity and stability of a Contracting Party's financial system.

2. Where such measures do not conform to the provisions of this agreement, they shall not be used as a means of circumventing the commitments or obligations of the Contracting Party under this Agreement.

Article 13 Security measures

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures aimed at preserving its national security or public order, or to apply the provisions of their criminal laws or comply with its obligations regarding the maintenance of international peace and security in accordance with the provisions of the United Nations Charter.

2. Measures adopted by a Contracting Party under sub-article 1 of this Article or the decision based on national security laws or public order that at any time prohibit or restrict the realization of an investment in its territory by an investor of another Contracting Party shall not be subject to the dispute settlement mechanism under this agreement.

Article 14 Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the principles and standards set out in this Article and the OECD Guidelines for Multinational Enterprises (MNEs) as may be applicable on the State Parties.

2. Investors and their investment shall endeavour to comply with the following principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State

- a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
- b) Respect the internationally recognized human rights of those involved in the investors' activities;
- c) Encourage local capacity building through close cooperation with the local community;
- d) Encourage the creation of human capital, especially by creating employment opportunities and of offering professional training to workers;
- e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
- f) Support and- advocate for good corporate governance principles, and develop and apply good practices of corporate governance;
- g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the investment and the societies in which its operations are conducted;
- h) Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programs for professional training;
- i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;
- j) Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and
- k) Refrain from any undue interference in local political activities

Article 15
Investment Measures And Combating Corruption And Illegality

1. Each Contracting Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.
2. Nothing in this Agreement shall require any Contracting Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

Article 16
Provisions On Investment and Environment, Labor Affairs and Health

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health legislations of that Contracting Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.
2. The Contracting Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and environmental legislation or measures of health. Therefore, each Contracting Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards. If a Contracting Party considers that another Contracting Party has offered such an encouragement, the Contracting Parties will address the issue through consultations.

PART III
Institutional Governante and Dispute Prevention
Article 17
Joint Committee for the Administration of the Agreement

- 1 . For the purpose of this Agreement, the Contracting Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as "Joint Committee").

2. This Joint Committee shall be composed of government representatives of both Contracting Parties designated by their respective Governments.
3. The Joint Committee shall meet at such times, in such places and through such means as the Contracting Parties may agree. Meetings shall be held at least once a year, with alternating chairmanships between the Contracting Parties.
4. The Joint Committee shall have the following functions and responsibilities
 - a) Supervise the implementation and execution of this Agreement;
 - b) Discuss and divulge opportunities for the expansion of mutual investment;
 - c) Coordinate the implementation of the mutually agreed cooperation and facilitation agendas;
 - d) Consult with the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee;
 - e) Seek to resolve any issues or disputes concerning investments of investors of a Contracting Party in an amicable manner; and
 - f) Supplement the rules for arbitral dispute settlement between the Contracting Parties
5. The Contracting Parties may establish adhoc working groups, which shall meet jointly or separately from the Joint Committee.
6. The private sector may be invited to participate in the adhoc working groups, whenever authorized by the Joint Committee.
7. The Joint Committee shall establish its own rules of procedure

Article 18
National Focal Points or "Ombudsmen"

1. Each Contracting Party shall designate a National Focal Point, or "Ombudsman", which shall have as its main responsibility providing support for investors from the other Contracting Party in its territory.

2. Each Contracting Party shall designate a single agency or authority as its National Focal point

a) in China, the "Ombudsman;" /National Focal Point shall be designated by the "Chinese Foreign Investment Ministry".

b) in the Federal Democratic Republic of Ethiopia, the "Ombudsman ' National Focal Point shall be designated by the Ethiopian Investment Commission .

3 The National Focal Point, among other responsibilities, shall

a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point of the other Contracting Party, in accordance with this Agreement;

b) Follow up in a timely manner on requests and enquiries of the other Contracting Party or of investors of the other Contracting Party with the competent authorities and inform the stakeholders on the results of its actions;

c) Assess, in consultation with relevant government authorities, suggestions and complaints received from the other Contracting Party or investors of the other Contracting Party and recommend, as appropriate, actions to improve the investment environment;

d) Seek to prevent differences in investment matters, in collaboration with government authorities and relevant private entities;

e) Provide timely and useful information on regulatory issues on general investment or on specific projects; and

f) Report its activities and actions to the Joint Committee, when appropriate.

4. Each Contracting Party shall determine time limits for the implementation of each of its functions and responsibilities, which will be communicated to the other Contracting Party.

5. The National Focal Points, or "Ombudsmen", shall cooperate with each other and with the Joint Committee with a view to helping in the prevention of disputes between the Contracting Parties.

Article 19
Exchange Of Information Between The Contracting Parties

1. The Contracting Parties shall exchange information, whenever possible and relevant to reciprocal investments, concerning business opportunities, procedures, and requirements for investment, particularly through the Joint Committee and its National Focal Points.

2. For this purpose, the Contracting Party shall provide, when requested, in a timely fashion and with respect for the level of protection granted, information related, in particular, to the following items:

- a) Regulatory conditions for investment;
- b) Governmental programs and possible related incentives;
- c) Public policies and legal frameworks that may affect investment;
- d) Legal framework for investment, including legislation on the establishment of companies and joint ventures;
- e) Related international treaties;
- f) Customs procedures and tax regimes;
- g) Statistical information on the market for goods and services;
- h) Available infrastructure and public services;
- i) Governmental procurement and public concessions;
- j) Social and labor requirements;
- k) Immigration legislation;
- l) Currency exchange legislation;
- m) Information on legislation of specific economic sectors or segments previously identified by the Contracting Parties; and

n) Regional projects and Agreements related to an investment

3. The Contracting Parties shall also exchange information on Public-Private Partnerships (PPPs), especially through greater transparency and quick access to the information on the legislation.

Article 20 Treatment of Protected Information

1 . The Contracting Parties shall respect the level of protection of information provided by the submitting Contracting Party, according to the respective national legislations on the matter.

2. None of the provisions of the Agreement shall be construed to require any Contracting Party to disclose protected information, the disclosure of which would jeopardize law enforcement or otherwise be contrary to the public interest or would violate the privacy or harm legitimate business interests. For the purposes of this article, protected information includes confidential business information or information considered privileged or protected from disclosure under the applicable laws of a Contracting Party.

Article 21 Interaction with the Private Sector

Recognizing the key role played by the private sector, the Contracting Parties shall publicize, among the relevant business sectors, general information on investment, regulatory frameworks and business opportunities in the territory of the other Contracting Party

Article 22 Cooperation Between Agencies Responsible For Investment Promotion

The Contracting Parties shall promote cooperation between their investment promotion agencies in order to facilitate investment in the territory of the other Contracting Party.

Article 23 Dispute Prevention Procedure

1 . If a Contracting Party considers that a specific measure adopted by the other Contracting Party constitutes a breach of this Agreement, it may invoke this Article to initiate a dispute prevention procedure within the Joint Committee.

2 The following rules apply to the aforementioned proceduré

a) To initiate the procedure, the interested Contracting Party shall submit a written request to the other Contracting Party, identifying the specific measure in question, and presenting the relevant allegations of fact and law. The Joint Committee shall meet within sixty (60) days from the date of the request;

b) The Joint Committee shall have sixty (60) days from the date of the first meeting, extendable by mutual agreement, to evaluate the submission presented and to prepare a report;

c) The report of the Joint Committee shall include

i) Identification of the submitting Contracting Party;

ii) Description of the measure in question and the alleged breach of the Agreement; and

iii) Findings of the Joint Committee

d) In the event that the dispute is not resolved upon the completion of the time frames set forth in this Article, or there is non-participation of a Contracting Party in the meetings of the Joint Committee convened according to this Article, the dispute may be submitted to arbitration by a Contracting Party in accordance with Article 24 of the Agreement.

3 If the measure in question pertains to a specific investor, the following additional rules shall apply

a) the initial submission shall identify the affected investor;

b) representatives of the affected investor may be invited to appear before the Joint Committee; and

c) a Contracting Party may refuse to discuss in the Dispute Prevention Procedure a question concerning an investment of a national of that Contracting Party in the territory of that Contracting Party.

4. Whenever relevant to the consideration of the measure in question, the Joint Committee may invite other interested stakeholders to appear before the Joint Committee and present their views on such measure.

5. The records of the meetings held under the Dispute Prevention Procedure and all other related documentation shall remain confidential, except for the report submitted by the Joint Committee under sub-article 2, subject to the law of each of the Contracting Parties regarding the disclosure of information.

Article 24
Settlement Of Disputes Between The Contracting Parties

1. Once the procedure under sub-article 2 of Article 23 has been exhausted and the dispute has not been resolved, either Contracting Party may submit the dispute to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Contracting Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Contracting Parties decide otherwise, such institution shall apply the provisions of this Article.

2. The purpose of the arbitration is to determine the conformity with this Agreement of a measure that a Contracting Party claims to be not in conformity with the Agreement.

3. The following may not be subject to arbitration: Article 13 - Security Exception, Article 14 Corporate Social Responsibility; sub-article 1 of Article 15 Investment Measures and Combating Corruption and Illegality; and sub-article 2 of Article 16 - Provisions on Investment and Environment, Labor Affairs and Health.

4. This Article shall not apply to any dispute if more than three (3) years have elapsed since the date on which the Contracting Party knew or should have known of the facts giving rise to the dispute.

5. The Arbitral Tribunal shall consist of three arbitrators. Each Contracting Party shall appoint, within three (3) months after receiving the "notice of arbitration", a member of the Arbitral Tribunal. Within three (3) months of the appointment of the second arbitrator, the two members shall appoint a national of a third State with which both Contracting Parties maintain diplomatic relations, who, upon approval by both Contracting Parties, shall be appointed chairperson of the Arbitral Tribunal. The appointment of the Chairperson must be approved by both Contracting Parties within one (1) month from the date of his/her nomination.

6. If within the periods specified in sub-article 5 of this Article, the necessary appointments are not made; either Contracting Party may invite the President of the International Court of

Justice to make the necessary appointments. If the President of the International Court of Justice is a national of one Contracting Party or is prevented from fulfilling the said function, the member of the International Court of Justice who has the most seniority who is not a national of a Contracting Party will be invited to make the necessary appointments.

7 Arbitrators must

a) have the necessary experience or expertise in Public International Law, international investment rules or international trade, or the resolution of disputes arising in relation to international investment agreements;

b) be independent of and not be affiliated, directly or indirectly, with any of the Contracting Parties or with the other arbitrators or potential witnesses nor take instructions from the Contracting Parties; and comply with standard of conduct established by the Joint Committee;

8. The "Notice of Arbitration" and other documents relating to the resolution of the dispute shall be presented at the location to be designated by each Contracting Party. The Arbitral Tribunal shall determine its own procedure in accordance with this Article or, alternatively, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Arbitral Tribunal will render its decision by majority vote and decide on the basis of the provisions of this Agreement and the applicable principles and rules of international law as recognized by both Contracting Parties. Unless otherwise agreed, the decision of the Arbitral Tribunal shall be rendered within six (6) months following the appointment of the Chairperson in accordance with sub-article 5 and 6 of this Article.

9. The decision of the Arbitral Tribunal shall be final and binding upon both Contracting Parties, who shall comply with it without delay

10. Each Contracting Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings; the host of the Chairperson and the remaining costs shall be borne in equal parts by both Contracting Parties, unless otherwise agreed. The arbitral tribunal shall have the power to determine its own procedures.

11. Notwithstanding sub-article 2 of this Article, the Contracting Parties may, through a specific arbitration agreement, request the arbitrators to examine the existence of damages caused by the measure in question under the obligations of this Agreement and to establish

compensation for such damages through an arbitration award. In this case, in addition to the provisions of the preceding sub-articles of this Article, the following shall be observed:

a) The arbitration agreement to examine the existence of damages shall be taken as "notice of arbitration" within the meaning of sub-article 8;

b) This sub-article shall not be applied to a dispute concerning a particular investor which has been previously resolved and where protection of res judicata applies. If an investor had submitted claims regarding the measure at issue in the Joint Committee to local courts or an arbitration tribunal of the Host State, the arbitration to examine damages can only be initiated after the withdrawal of such claims by the investor in local courts or an arbitration tribunal of the Host State. If after the establishment of the arbitration, the existence of claims in local courts or arbitral tribunals over the contested measure is made known to the arbitrators or the Contracting Parties, the arbitration will be suspended.

c) if the arbitration award provides monetary compensation, the Contracting Party receiving such compensation shall transfer to the holders of the rights of the investment in question, after deducting the costs of the dispute in accordance with the internal procedures of each Contracting Party. The Contracting Party to whom restitution was granted may request the Arbitral Tribunal to order the transfer of the compensation directly to the holders of rights of the affected investment and the payment of costs to whoever has assumed them.

PART IV
Agenda for Further Investment Cooperation and Facilitation
Article 25
Agenda For Further Investment Cooperation And Facilitation

1 . The Joint Committee shall develop and discuss an Agenda for Further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment. The issues to be initially discussed by the Contracting Parties will be agreed upon in the first meeting of the Joint Committee.

2. The agendas shall be discussed between the competent government authorities of both Contracting Parties. The Joint Committee shall invite, when applicable, additional competent government officials for both parties in the discussions of the agenda.

3. The results of such negotiations shall constitute additional protocols to this Agreement or specific legal instruments.
4. Joint Committee shall establish schedules for discussions of the Agenda for further Investment Cooperation and Facilitation, and if applicable, the negotiation of specific commitments.
5. The Contracting Parties shall submit to the Joint Committee the names of government bodies and its official representatives involved in these discussions.

PART V
General and Final Provisions
Article 26
Preservation Of Diplomatic Channels

Neither the Joint Committee nor the Focal Points or Omóudsmen shall replace or impair, in any way, any other agreement or the diplomatic channels existing between the Contracting Parties.

Article 27
Entry In To Force, Duration And Termination

1. Each Contracting Party shall notify the other Contracting Party in writing of the completion of the constitutional procedure required for entry into force of this Agreement. This Agreement shall enter into force ninety (90) days after the date of the receipt of the second diplomatic note indicating that all necessary intenal procedures with regard to the entry into force of intenational agreements have been completed by both Contracting Parties.
2. This Agreement shall remam in force for a period of ten (10) years and shall lapse thereafter unless the Contracting Parties expressly agree in writing that it shall be renewed for additional ten (10)-year period. On the last Joint Committee meeting immediately prior to the completion of such period and of any additional ten (10)-year period, the Contracting Parties shall discuss the matter.
3. Any Contracting Party may terminate this Agreement, at any time, by giving at least twelve (12) months prior written notice to the other Contracting Party.

4. In respect of investment made prior to the termination of this Agreement, the provisions of this Agreement shall continue in effect for a period of five (5) years from the date of termination.

Article 28 Amendment

1. This Agreement may be amended by mutual consent of the Contracting Parties: provide that one of the Contracting Parties presents to the other Contracting Party a written proposal

2. Amendments shall be made by written agreement and shall enter into force ninety(90) days after the date of the receipt of the second diplomatic note indicating that all necessary internal procedures with regard to the conclusion and the entering into force of international agreements have been completed by both Contracting Parties.

In witness where of the undersigned duly authorized by their respective governments have signed this Agreement.

FOR THE FEDERAL

DEMOCRATIC REPUBLIC OF ETHIOPIA

REPUBLIC OF CHINA

ANNEX I
Agenda For Further Investment Cooperation And Facilitation

The agenda listed below represents an initial effort to improve investment cooperation and facilitation between the Contracting Parties and may be expanded and modified at any time by the Joint Committee.

a. Payments and Transfere

The cooperation between the financial authorities shall aim at facilitating capital and currency remittances between the Contracting Parties.

b. Visas

i Each Contracting Party shall seek, whenever possible and convenient, to facilitate the free movement of managers, executives and skilled employees of economic agents, entities, businesses and investors of the other Contracting Party

ii. While Respecting national legislation, immigration and labor authorities of each Contracting Party shall seek a common understanding in order to reduce time, requirements and costs to grant appropriate visas to investors of the other Contracting Party.

iii. The Contracting Parties will negotiate a mutually acceptable agreement to facilitate visas for investors with a view to extend its duration and stay.

C. Technical and Environmental Regulations

i. Subject to their national legislation, the Contracting Parties shall establish expeditious, transparent and agile procedures for issuing documents, licenses and

certificates related to the prompt establishment and maintenance of the investment of the other Contracting Party.

ii. Any query from the Contracting Parties, or from their economic agents and investors concerning commercial registration, technical requirements and environmental standards shall receive diligent and timely treatment from the other Contracting Party

D. Cooperation on Regulation and Institutional Exchange

i. The Contracting Parties shall promote institutional cooperation for the exchange of experiences on the development and management of regulatory frameworks.

ii. Contracting Parties hereby undertake to seek to promote technological, scientific and cultural cooperation through the implementation of actions, programs and projects for the exchange of knowledge and experience, in accordance with their mutual interests and development strategies.

iii. The Contracting Parties agree that access to technology should be promoted, whenever possible, and be aimed at contributing to mutual investment.

iv. The Contracting Parties shall seek to promote, foster, coordinate and implement cooperation in professional qualification through greater interaction between relevant national institutions.

vi. The Contracting Parties shall seek ways to promote greater integration of logistics and transports in order to open new air routes and increase, whenever possible and appropriate, their connections and maritime merchant fleets.

vii. The Joint Committee may identify other areas of mutual interest for cooperation in sectorial legislation and institutional exchange.

