

RESEARCH ARTICLE

Reforming Ethiopian Bilateral Investment Treaties in Line with Domestic Development Policies: Challenges, Prospects and Simplified Reform Options

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Abstract

This article examines the alignment of bilateral investment treaties (BITs) with domestic development policies. The analysis reveals the presence of considerable disparity between Ethiopian BITs and the country's domestic development policies and the importance of ensuring consistency between the two. The potential options to resolve this disparity can be combined on a case-by-case basis, depending on different challenges, such as bargaining power, political commitment, procedural requirements and resistance from other treaty partners. The changing dynamics of global politics and the growing backlash against BITs have created a conducive environment for such reform.

Keywords: challenges; consistency; domestic development policies; Ethiopian BITs; prospects; reform

Introduction

Countries that have historically benefited from old-model bilateral investment treaties (BITs) show little commitment to undertaking treaty reform, especially one oriented towards sustainable development.¹ Their commitment is often limited to improving the terms of subsequent treaties, rather than modernizing existing ones.² This poses a significant obstacle for the other parties, particularly developing countries, seeking to undertake a comprehensive reform of their BIT regime. Developing countries also encounter numerous other challenges in their effort to align their BITs with their developmental needs and interests. Ofodile, for example, has highlighted a “lack of negotiation capacity, disparities in bargaining power, [and] lack of appreciation of the legal implications of BITs for host countries” as potential factors that hinder African countries from effectively negotiating BITs that reflect their level of development.³ Some legal obstacles also stand in the way of BIT reform; the most important emanates from the termination provisions of the BITs themselves. Old-model BITs incorporate onerous procedures that undermine unilateral termination.⁴

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1 A Newcombe “General exceptions in international investment agreements” in M Cordonier et al (eds) *Sustainable Development in World Investment Law* (2011, Kluwer Law International) 351 at 352–53.

2 S Jinnah “Strategic linkages: The evolving role of trade agreements in global environmental governance” (2011) 20 *Journal of Environment & Development* 191 at 194; T Ginsburg “International substitutes for domestic institutions: Bilateral investment treaties and governance” (2005) 25 *International Review of Law and Economics* 107 at 107.

3 U Ofodile “Africa–China bilateral investment treaties: A critique” (2013) 35/1 *Michigan Journal of International Law* 131 at 179.

4 A Blackett “Whither social clause? Human rights, trade theory and treaty interpretation” (1999) 31/1 *Columbia Human Rights Law Review* 1 at 13–14.

Despite all these challenges, recent international experiences indicate a growing trend towards reforming BITs that were signed based on the old model. Most recent international investment agreements (IIAs) include components for reform related to sustainable development, which allow the right to regulate while upholding investor protection, nurturing responsible investment and advancing matters of dispute settlement.⁵ However, there are still some countries that have yet to embrace this global trend and embark on their own BIT reform journey. This article specifically focuses on one such country, Ethiopia, and examines the imperative of reforming Ethiopian BITs as well as exploring potential reform options and challenges. The article argues that Ethiopian BITs are not aligned with the country's development policies and need comprehensive reform. The Ethiopian Constitution enjoins the government to formulate policies that enable all Ethiopians to benefit from the country's resources.⁶ It also provides that the principles for external relations should be based on mutual interest and equality between countries; it further states that international agreements should promote the interests of Ethiopia and requires the government to observe those agreements that ensure respect for the country's sovereignty and are not contrary to the interests of the people.⁷ Therefore adopting international agreements that undermine the country's capacity to achieve sustainable development runs counter to these core constitutional principles.

Our qualitative evaluation reveals that Ethiopian BITs were not formulated with consideration of the country's development policies. All existing Ethiopian BITs were adopted after the coming into force of the 1995 Constitution, but there is no visible progress towards sustainable development from the earliest BITs to the latest ones. This is despite the explicit stipulation in the Constitution that all international agreements concluded by the country shall respect and ensure Ethiopia's right to sustainable development.⁸ The country has also been reforming its development-related legal and policy frameworks, such as investment laws and the commercial code, considering the principles and goals of sustainable development. Isolating the BIT regime from the ongoing reforms would be erroneous if the country is genuinely committed to achieving rapid, inclusive and sustainable development. Contradictions between these different legal regimes undermine the implementation of the BITs and domestic laws, and hence their potential to realize the developmental objectives of the country. This also undermines the ability to promote a stable and predictable legal environment for investors and states.⁹

It is therefore essential to ensure legal consistency between domestic development policies and BITs;¹⁰ this requires reforming Ethiopian BITs in line with the country's constitutional principles and other domestic policies that call for sustainable development. Recent trends in the international investment regime indicate that the growing global concern for sustainability has created a conducive environment for undertaking a reform of BITs which is oriented towards sustainable development. The diverse challenges to such reform are also lessening, due to changing global geopolitics and the emergence of different advocates for reform.¹¹ Hence, the current moment presents a

5 United Nations Conference on Trade and Development (UNCTAD) *2017 World Investment Report on Investment and the Digital Economy* (2017, United Nations Publications) at 119.

6 Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, extraordinary issue, proc no 1, 1st year, no 1 (1995), art 89(1).

7 *Id.*, art 86(3) and (4).

8 *Id.*, art 43(3).

9 K Olaoye and M Sornarajah "Domestic investment laws and international economic law in the liberal international order" (2023) 22/1 *World Trade Review* 109 at 132.

10 Consistency between domestic law and international investment agreements means that the two sets of rules do not conflict or contradict but rather support and complement each other. Sustainable development-related issues of foreign investments should be regulated by effectively managing the interface between international law and domestic laws, as well as by integrating these two legal regimes.

11 U Kollamparambil "Why developing countries are dumping investment treaties" (24 March 2016) *Reuters*, available at: <<http://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448>> (last accessed 10 April 2019).

favourable opportunity for Ethiopia to initiate a sustainable development-oriented reform of its BITs.

This article contributes to the advancement of international economic law, particularly by clarifying the link between domestic development policy, foreign investment and IIAs. It provides input to the ongoing global debate regarding the implementation of the Sustainable Development Goals (SDGs) and efforts to create sustainable international economic law. The article is organized into five sections; the next part examines the relationship between Ethiopian BITs and the domestic development policy and legal frameworks. This section seeks to assess whether the BITs align with the country's development policies, and to what extent. The subsequent section analyses the different challenges of and prospects for reform of BITs at both international and national levels, before an in-depth analysis of the different options for reforming Ethiopian BITs and the associated challenges.

Ethiopian BITs and domestic development policies

BITs constitute the principal governing law of foreign direct investment (FDI). There are almost 3,000 BITs worldwide, counting those under the old and new models.¹² The old-model BITs mainly comprise provisions such as the definition of investment, national treatment, most favoured nations (MFNs), fair and equitable treatment, expropriation, transfers of funds and dispute-settlement mechanisms.¹³ Since the first BIT, which was concluded between Germany and Pakistan in 1959, the vast majority of BITs have been designed by incorporating these provisions.¹⁴ However, since the mid-2000s, developing countries have been voicing concerns about BITs and the broader international investment law regime.¹⁵ The main concern of developing countries has been that investment treaties were framed by Western countries to protect the interests of their investors in the wake of decolonization; this is particularly the case for old-model BITs.¹⁶ The concerns with such BITs can be summarized as follows: first, while they include extensive and detailed provisions for investor protection, they often remain silent on investor obligations. Second, they tend to grant foreign investors greater rights compared to domestic investors. Lastly, old-model BITs significantly limit the regulatory authority of the host state.¹⁷

Ethiopia has signed 35 BITs, 22 of which have entered into force as of May 2024.¹⁸ Those BITs which have entered into force are designed based on the old model, giving rise to the concerns mentioned above. The BITs limit the application of domestic development policies due to the existence of the absolute standard of treatment accorded to investors. Our qualitative analysis reveals that, except for the Ethiopia–France BIT, Ethiopian BITs (like other old-model BITs) do not contain explicit provisions preserving regulatory space. The Ethiopia–France BIT grants the contracting states a general right to regulate without specifying the matters that fall under this right, such as environmental, labour and human rights.¹⁹

12 UNCTAD “Recent developments in the international investment regime” (May 2018) 1 *IIA Issues Note* at 2, available at: <http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf> (last accessed 6 March 2022).

13 UNCTAD “Recent developments in international investment agreements” (2005) 2 *IIA Monitor* at 4, available at: <http://unctad.org/en/docs/webiteit20051_en.pdf> (last accessed 12 March 2021).

14 D Chudnovsky and A Lopez “Globalization, foreign direct investment, and sustainable human development” in K Gallagher and J Werksman (eds) *The Earthscan Reader on International Trade and Sustainable Development* (2002, Earthscan Publications).

15 Ofodile “Africa–China bilateral investment treaties”, above at note 3.

16 Chudnovsky and Lopez “Globalization”, above at note 14; UNCTAD *Investment Policy Framework for Sustainable Development* (2015, United Nations Publications) at 18.

17 Ofodile “Africa–China bilateral investment treaties”, above at note 3 at 147.

18 UNCTAD “Investment agreements navigator: Ethiopian BITs” (30 October 2023), available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>> (last accessed 30 October 2023).

19 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–France) (7 August 2007), art 1(6), available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1163/download>> (last accessed 9 September 2021).

We have also evaluated the BITs that have entered into force in line with the three pillars of sustainable development: economic development, social development and environmental protection.²⁰ The Ethiopian Constitution implicitly recognizes the need to balance these pillars by incorporating them into different provisions. Therefore, evaluating Ethiopian BITs in line with constitutional principles means investigating whether they adequately incorporate the economic, social and environmental pillars. The BITs show gaps when evaluated in terms of the economic development pillar. Although all BITs state in their preambles that their objectives are to strengthen economic cooperation, increase prosperity and promote economic development, these aims are not reflected in the substantive provisions of each BIT, except in some definitional provisions of “investment”, in cases of expropriation and other limited instances specified in the Ethiopia–Kuwait and Ethiopia–Netherlands BITs. For instance, the Ethiopia–Kuwait BIT’s substantive part provides that each contracting party shall encourage and facilitate the formation of business organizations of investors in different economic sectors, as permitted under domestic laws.²¹ Similarly, the Ethiopia–Netherlands BIT states that each contracting party shall stimulate economic cooperation within the framework of its domestic law.²² Overall, the BIT regime inadequately addresses the economic development pillar of sustainable development, as only a few BITs incorporate aspects of this pillar.

Moreover, Ethiopian BITs were not formulated with consideration for the social development pillar of sustainable development. No BITs except the Ethiopia–Finland one address important elements of social development, such as human rights, labour standards or health and safety measures. While the Ethiopia–Finland BIT mentions the need to protect labour rights and health and safety measures in its preamble, there is no explicit provision incorporated in the substantive part of the BIT that addresses these elements.²³ Similarly, the issue of environmental protection is not addressed in the Ethiopian BITs that have entered into force, except for the Ethiopia–Finland BIT. While the preamble of this BIT acknowledges that its objectives can be achieved without relaxing environmental measures, this manner of incorporation is inadequate, as there is no substantive provision stating the need to observe such measures.²⁴

This evaluation reveals the gaps in Ethiopian BITs in terms of the economic development, social development and environmental protection pillars of sustainable development. The BITs inadequately incorporate these important aspects into their substantive provisions, except for a few limited instances in specific BITs; nor do they make cross-references to domestic or international laws dealing with sustainable development. Some of these BITs make limited reference to certain aspects of sustainable development within their preamble, but they typically lack express substantive provisions. The legal effect of such references is insignificant, since the preamble is not considered part of the treaty text; it is simply used as an interpretative aid or guide.²⁵

20 See UN General Assembly Report of the World Commission on Environment and Development: Our common future, UN Doc A/42/427 (1987) at 2–3; J Harris “Basic principles of sustainable development” (Global Development and Environment Institute working paper 00–04, June 2000) at 5.

21 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–Kuwait) (12 November 1998), art 2(2), available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1169/download>> (last accessed 21 May 2021).

22 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–Netherlands) (1 July 2005), art 2, available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download>> (last accessed 22 June 2022).

23 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–Finland) (3 May 2007), preamble, available at: <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1162/download> (last accessed 25 May 2022).

24 Ibid.

25 Vienna Convention on the Law of Treaties (23 May 1969), art 31; A Bonzon “Balance between investment protection and sustainable development in BITs” (2014) 15 *Journal of World Investment & Trade* 809 at 822.

The gaps in the BITs are in conflict with the constitutional goal of the right to sustainable development and ongoing domestic legal reforms oriented towards sustainable development. Article 43(3) of the Constitution stipulates that all international agreements concluded by the country shall respect and ensure Ethiopia's right to sustainable development; this right is enshrined as a policy goal that imposes a soft obligation on the government. An explanatory note to the Constitution underlines that the government should realize this goal progressively by taking into account the country's demand and resource capacity.²⁶ This obligation encompasses the adoption of international agreements that respect and confirm Ethiopia's right to sustainable development.

Establishing the conformity of international agreements with one's constitution has its own purpose. Juwana has articulated three reasons in this regard: first, it guarantees that the constitution is the highest norm in the hierarchy of laws. Second, it is important to establish a common understanding between the people and the government when deciding to conclude international agreements. Third, ensuring conformity is important to prevent indirect interventions by other states in one's sovereignty, as international agreements are often used as political instruments by one state towards another.²⁷ The Ethiopian Constitution also emphasizes the importance of international agreements respecting and affirming the country's right to sustainable development.

Ethiopia has embarked on a major reform of its domestic policy and legal frameworks to promote sustainable development. The most prominent of these is the amendment of the national investment law in 2020. The latest Investment Proclamation recognizes the importance of private investment "to accelerate the economic development of the country, ensure its sustainability, strengthen domestic production capacity and thereby improve the living standards of its people".²⁸ Article 5 of the Proclamation further states that the overarching objective of the country's investment policy is "to improve the living standard of the peoples of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development". Inherent in the achievement of this objective is the need to "encourage socially and environmentally responsible investments".²⁹ To this end, Article 54(2) of the Proclamation enjoins investors (both domestic and international) to "give due regard to social and environmental sustainability values including protection standards and social inclusion objectives in carrying out their investment projects". It is clear from these provisions that the country considers the attraction of private investment not as an end in itself but a means of achieving sustainable development.

Another major area of the reform agenda has been the 1960 Commercial Code of Ethiopia, which was amended in 2021 to make it fit for purpose. The new Commercial Code underlines that "laying a firm legal foundation for the conduct of commercial activities is a prerequisite for ensuring economic development and public benefit".³⁰ Here again, the reform is explicitly linked to the overall objective of ensuring that commercial or economic activities contribute to the economic development of the country and benefit its people.

The Ethiopian BITs stand at odds with the country's objective to promote sustainable development through different reform measures. What is even more perplexing is the current lack of concrete efforts to reform these BITs, which remain untouched by the country's ongoing efforts to achieve sustainable development. Excluding BITs from the reform processes, despite their evident contradictions with the country's commitments to sustainable development, poses a risk of undermining Ethiopia's endeavours. Legal consistency between the domestic policy and legal frameworks and the bilateral,

26 Explanatory notes of the 1995 Ethiopian Constitution (Amharic version, HOPR-Documentation 1995) at 98, available at: <<https://www.abysinnialaw.com/laws/constitutions/the-1995-ethiopian-constitution-explanatory-note-amharic-version>> (last accessed 13 June 2021).

27 H Juwana "The obligation to ensure the conformity of international treaties with the constitution" (2011) 8 *Indonesian Journal of International Law* 434 at 435–37.

28 Ethiopian Investment Proclamation, *Federal Negarit Gazeta*, proc no 1180/2020, preamble, para 1.

29 *Id.*, art 5(8).

30 Commercial Code of Ethiopia, *Federal Negarit Gazeta*, extraordinary issue, proc no 1243/2021 (2021), preamble.

regional and multilateral agreements adopted by Ethiopia is desirable; this helps avoid potential enforcement challenges stemming from the existence of two or more conflicting obligations emanating from different legal sources. Therefore, this article argues that Ethiopia's BIT regime should be an integral part of the ongoing reform, because the intolerable gap in this regime creates obstacles to ensuring that FDI has a positive impact on the country's sustainable development goals.

The major challenges of and prospects for reforming Ethiopian BITs

The analysis in the preceding sections shows the need for reforming Ethiopian BITs in a manner that complies with domestic development policies. However, undertaking such reform poses a significant challenge for the country. This section identifies some of the key challenges to reforming Ethiopian BITs and potential solutions to those challenges.

The challenges of undertaking reform

Unequal bargaining power

Various scholars have stated that international law is designed to maintain colonial practices or the interests of the West at the expense of the rest of the world, especially as regards the least developed countries.³¹ As Antony Anghie argues, the colonial approach has influenced every aspect of the discipline.³² For example, market principles were established particularly out of the colonial encounter by adopting the European hegemony, in Haskell's words, "at the expense of the ideas and material prosperity of third world populations".³³ Anghie's assertion applies to BITs, as such treaties were framed by Western countries to protect the interests of their investors in the wake of decolonization.³⁴ In BIT practice, there is still a concern over inequality between developed and developing countries due to historical and practical reasons. Huaqun argues that "[i]n theory BIT is a result of a bilateral negotiation between contracting states, aiming at providing equal legal protection for both parties. In practice, they are usually agreements between developed capital-exporting states and developing capital-importing states."³⁵

The principles of investment protection are mostly dependent on the expectation, status and bargaining power of the contracting states. The lack of a model BIT prepared by developing countries (apart from a few exceptions) can to some extent be a reason for the unequal bargaining power between BIT negotiators. Developed countries spend much time and effort in designing model BITs which can be used for negotiation. Due to this, developing countries usually face difficulty in challenging the rules and standards contained in the model BITs presented by developed countries' negotiators, as they do not have their own alternative model.³⁶

When we come to Ethiopia, we find similar challenges in bargaining power. Ethiopian negotiators usually accept the old-model BITs presented by their counterparts in developed countries during negotiation.³⁷ Sometimes they attempt to reflect the Ethiopian interest, but in most cases, they

31 B Chimni "Third world approaches to international law: A manifesto" (2006) 8/1 *International Community Law Review* 1 at 4–7.

32 A Anghie "The evolution of international law: Colonial and postcolonial realities" (2006) 27/5 *Third World Quarterly* 739 at 751–52.

33 J Haskell "TRAIL-ing TWAIL: Arguments and blind spots in third world approaches to international law" (2014) 27 *Canadian Journal of Law & Jurisprudence* 383 at 396.

34 Chudnovsky and Lopez "Globalization", above at note 14 at 3.

35 Z Huaqun "Balance, sustainable development, and integration: Innovative path for BIT practice" (2014) 17 *Journal of International Economic Law* 299 at 302.

36 Id at 302–303.

37 Interview with B Lemma, Ethiopian investment treaties negotiator at the Ethiopian Investment Commission, 8 July 2018.

do not succeed due to the resistance from the other parties, coupled with a lack of negotiation capacity and an attitude to compromise all other interests in order to attract FDI. One Ethiopian negotiator has stated that “developed countries do not accept most of our proposals; as a result, we follow their standards”.³⁸ He further said that some capital-exporting countries (both developed and developing countries) insist that sustainable development is not an issue in BITs, as other laws can govern it. Some Far East Asian countries refuse to accept the inclusion of provisions about sustainable development, saying that it is already presumed; some negotiators from these countries ask their Ethiopian counterparts, “Will you refuse to give protection if our investors do not observe sustainable development standards?” They have also rejected the proposal of Ethiopian negotiators to include anti-corruption provisions, saying that it is unnecessary to impose this duty on investors at the BIT level.³⁹ Some negotiators from European Union (EU) member states have also argued that the EU would not recognize their proposal if it increases the obligations of investors.⁴⁰ Middle Eastern countries have also rejected a proposal by Ethiopia that increases the obligations of investors, and they do not want to separate states’ and investors’ obligations, as most of their companies are state-owned enterprises.⁴¹ All these instances illustrate the impact of unequal bargaining power on developing countries like Ethiopia in their attempt to negotiate or renegotiate BITs that reflect their national interests and developmental objectives. As will be discussed below, Ethiopia needs to take advantage of its emerging role in international and regional affairs, as well as its attractive investment climate, to overcome its lack of bargaining power.

Lack of political commitment

One of the challenges of reforming Ethiopian BITs has been the lack of political commitment and an excessive emphasis on creating or maintaining good diplomatic ties. The Ethiopian government has so far shown little appetite for reforming the existing BITs or negotiating new ones to take the domestic development goals into consideration. Some Ethiopian negotiators from investment-related government bodies have suggested the need to reform the existing BITs. However, the government has not been willing to accept their suggestion, insisting that calling for renegotiation might affect the country’s diplomatic ties with the other contracting states.⁴² The government previously ordered its negotiators to focus on issues that are not connected to sustainable development, such as investor protection, in order to attract more FDI and to enhance diplomatic ties.⁴³ There is also evidence to suggest that certain Ethiopian BITs were concluded solely for diplomatic purposes, without the involvement of expert consultation. The previous Ethiopia–Qatar BIT can serve as an example in this regard: the diplomatic relationship between the two countries had been interrupted for a significant period, and to renew it, a BIT was concluded as a demonstration of commitment to reestablishing ties.⁴⁴ This BIT, which has since been replaced by a new one, was signed (although it did not enter into force) without following the standard negotiation process or consulting relevant experts.⁴⁵

As a matter of practice, before signing BITs or any other international agreements, the Ethiopian Ministry of Justice should examine their conformity with the Ethiopian Constitution and other international obligations.⁴⁶ However, there have been two practical problems related to this: the first is the lack of professionals who can expertly examine the conformity of the BITs with other

38 Ibid.

39 Ibid.

40 Ibid.

41 Interview with H Abebe, international law expert at the Ethiopian Ministry of Foreign Affairs, 10 July 2018.

42 Ibid.

43 Ibid.

44 Lemma, above at note 37.

45 Ibid.

46 Interview with B Yirga, legal drafting director at the Ethiopian Justice Ministry, 7 July 2018.

laws, including the Constitution. The second is that most of the government bodies that negotiate BITs do not send drafts to the Ministry before concluding the negotiations; they simply send the final agreements for a technical check.⁴⁷ This once again illustrates the government's lack of political commitment to ensuring that the BITs it negotiates are fully aligned with the domestic laws and regulations of the country.

There is no visible policy incoherence among the different government bodies, which are pro-investment and pro-sustainable development. The domestic policy and legal frameworks, such as the Investment Proclamation, environmental policies and proclamations, and growth and transformation plans, require the government to ensure rapid and sustainable development that balances economic, social and environmental considerations. More importantly, the Constitution requires all government organs to establish that the design and implementation of developmental programmes and projects in the country should not damage or destroy the environment.⁴⁸ Thus, the primary problem is a discrepancy of commitment in the implementation of those policies among the different government bodies. However, as will be discussed later, the country is currently undertaking a fundamental political reform which may create a conducive environment to initiating and undertaking a reform measure relating to the BIT regime.

Legal obstacles

Some legal obstacles can be mentioned as challenges to BIT reform. The first emanates from the termination provisions of the BITs themselves. Old-model BITs incorporate onerous termination procedures;⁴⁹ they contain a long initial period of termination and impose stringent procedures and liabilities if one of the parties wants to unilaterally discontinue the BIT before or after the termination period.⁵⁰ One reason for imposing such stringent procedures is to avoid adverse effects on investment projects that may be affected by the termination.⁵¹ This is acceptable to some extent, but the problem is that most BITs give excessive protection to investors by according a very long period for the application of the BIT to investments created prior to the date of termination.⁵²

All Ethiopian BITs which have entered into force contain termination provisions that stipulate an initial fixed term of operation of between 10 and 30 years. This is very long, and can be considered an obstacle to terminating some of the BITs in the short term and to renegotiating new BITs friendly to sustainable development. The solution is to suspend the relevant BIT by mutual agreement at any time, but this usually depends on the willingness of the other contracting parties, even if Ethiopia is ready. So, as will be discussed below, thinking of different and simplified reform options, in addition to encouraging the other contracting parties through diplomatic channels, is required.

The prospects for undertaking reform

A conducive international environment

The preceding section has highlighted the different challenges (e.g. bargaining power and legal requirements) that undermine efforts to reform Ethiopian BITs. Those challenges mostly reflect

47 Ibid.

48 Ethiopian Constitution, above at note 6, arts 13 and 92(2).

49 Blackett "Whither social clause?", above at note 4 at 13–14.

50 A Bjorklund "The necessity of sustainable development?" in M Segger et al (eds) *Sustainable Development in World Investment Law* (2011, Kluwer Law International) at 374.

51 M Segger and A Newcombe "An integrated agenda for sustainable development in international investment law" in Segger et al *Sustainable Development*, id at 127.

52 G Foster "Foreign investment and indigenous peoples: Options for promoting economic equilibrium between economic development and indigenous rights" (2012) 33 *Michigan Journal of International Law* 627 at 652; Bjorklund "The necessity of sustainable development?", above at note 50.

the situation of past international law-making processes. As noted in the introduction, there is an increasingly conducive international environment for undertaking treaty reform.⁵³ The growing backlash against international investment arbitration and other factors in the political economy have created more willingness to reform old international investment treaties. This does not mean that there are no longer any challenges. Instead, it is simply to suggest that today, there is a more conducive environment compared to the past, as different stakeholders, like developing countries, international organizations and scholars, are actively working to reshape international investment law in a manner that reflects the interests of all states. The challenges still exist, but are not as difficult as in the past due to the emergence of different voices that, to some extent, lessen those challenges.

Third World Approaches to International Law (TWAIL) scholars focus on rectifying the problems of international law by challenging the liberal trend to build separate classifications of economics, law and politics. They have been advocating “a reform package for international economic law that selects from the legal innovations of the 1960s postcolonial moment and more generally, liberal economic, regulatory ideals”.⁵⁴ It is observable that there is advancement away from the norms of the neo-conservative idea, “to bring about a balance that allows host states to pursue their development objectives”.⁵⁵ Sornarajah argues that

“These [recent] developments will ensure that alternative norms are raised in resistance to the norms based on power. As such resistance is not confined to states but is organised by people around the world through non-governmental groups or other means, the locus of lawmaking within the international community will shift to include such groups within the traditionally recognised group that includes states and international organizations.”⁵⁶

Unlike in the past, today a more convenient situation is created for developing countries to design a balanced investment framework. This is the result of, first, the changing geopolitical reality that enables developing countries to collectively resist investment agreements based on the old model and designed in line with the national interests of developed countries. The emergence of new regional blocks, like the BRICS association of five emerging economies (Brazil, Russia, India, China and South Africa), and the collective bargaining approach of smaller and weaker countries are contributing to the incorporation of provisions that strike a balance of rights and duties in investment agreements.⁵⁷

Different international organizations, such as the United Nations Conference on Trade and Development (UNCTAD) and the International Institute for Sustainable Development, are also advocating the need for remodelling the international investment law regime in a manner that strikes a balance between host states’ sustainable development objectives and investors’ rights and obligations. For example, UNCTAD’s investment policy framework for sustainable development asserts that “[t]he urgency of the problem of increasing the contribution of the private sector to SDG investment and the need for a *concerted push* by the international community requires a holistic strategy framework that guides *mobilizing* funds, *channeling* them to sustainable development, and *maximizing impact*”.⁵⁸ The majority of recent IIAs have incorporated components related to sustainable development reforms that allow the right to regulate while upholding investor protection, nurturing responsible investment and advancing matters of dispute settlement.⁵⁹

53 M Sornarajah “Power and justice: Third world resistance in international law” (2006) 10 *SYBIL* 19 at 56.

54 Haskell “TRAIL-ing TWAIL”, above at note 33 at 402.

55 Sornarajah “Power and justice”, above at note 53 at 35.

56 *Id* at 56.

57 Kollamparambil “Why developing countries”, above at note 11.

58 UNCTAD *Investment Policy Framework*, above at note 16 at 146. Emphasis in the original.

59 UNCTAD *Investment and the Digital Economy*, above at note 5.

Generally, the principles of sustainable development are increasingly securing legal, judicial and institutional recognition. Reforming old-model BITs and integrating such principles is becoming a more common approach. An African Development Bank study asserts that BITs should be designed considering a host state's FDI necessities and domestic investment status, and need to be reformed as a state develops.⁶⁰

Although it seems that the main objective of BITs is to encourage investments and safeguard investors, there is always another element in a balanced negotiation of a BIT, that is, sovereign national interests such as national security, the environment, health and food security. Conceptually, exceptions for national interests have been considered as more important for developing nations; "however, in changing global circumstances expansive national interest standards are increasingly attractive to developed countries, and the reciprocity principle suggests emerging economies could promote their incorporation for local sustainable development purposes".⁶¹ Boulle argues that "[w]hile it is difficult, a priori, to stipulate comprehensively what categories of policy space need to be protected in BITs, the case is more conspicuous in relation to constitutional norms".⁶² In practical terms, constitutional principles could be protected by the renegotiation of pertinent treaty obligations. For example, Ecuador has terminated 12 BITs, claiming that they are not compatible with its Constitution.⁶³

Overall, it is crucial to analyse and understand the recent global trends in IIAs and the changing geopolitical reality. This will enable the Ethiopian government to overcome the old perception of the challenges and consequences of reforming the BIT regime. Currently, invoking defences based on bargaining power and diplomatic ties, as was done in the past, reflects a misunderstanding of the global situation. However, this does not mean that Ethiopia will not face challenges related to bargaining power or diplomatic ties when initiating a reform agenda. The point is that, compared to the past, the current global situation is more conducive to reforms oriented towards sustainable development, as this has become a common agenda worldwide. It is therefore desirable to understand this recent global situation and to utilize it to reform Ethiopia's BITs based on its domestic development policies. Furthermore, some capital-exporting countries have shown a willingness to incorporate provisions friendly to sustainable development in their negotiations with Ethiopia. For instance, certain EU member states, like Poland and the Czech Republic, do not oppose Ethiopian negotiators including sustainable development-related provisions in new BITs. Instead, their resistance pertains to issues such as standards of treatment and protection.

The prospects for reform at the national level

At the national level, two major developments enable Ethiopia to initiate and undertake a sustainable development-oriented reform of its BIT regime. These developments are the recent political reform in the country and the increase in the country's attractiveness for FDI.⁶⁴ Concerning the former, so far, one of the obstacles to undertaking reform of the Ethiopian BITs was a lack of political

60 African Development Bank "Do bilateral investment treaties (BITs) foster FDI?" (2013) 46/2 *Market Brief*, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Market_Brief__Africa_Economic_Financial> (last accessed 10 December 2018).

61 L Boulle "Balancing competing interests in FDI policy: A developing country perspective" (2012) 7 *Asian Journal of WTO & International Health Law & Policy* 315 at 336.

62 Id at 337.

63 K Cervantes-Knox "Ecuador terminates 12 BITs – a growing trend of reconsideration of traditional investment treaties?" (15 May 2017) *International Arbitration Alert*, available at: <<https://www.dlapiper.com/en/chile/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/>> (last accessed 12 January 2018).

64 Africa Investment Conference "Ethiopia attracting labour-intensive companies, says investment commission" (15 February 2019) *Fana Broadcasting Corporate*, available at: <<https://africaninvestmentconference.com/news/ethiopia-attracting-labor-intensive-companies-says-investment-commission/>> (last accessed 22 April 2019); UNCTAD *World Investment Report on Investment and New Industrial Policies 2018* (2018, United Nations Publications) at 41.

commitment. Given the very recent and fundamental legal reform going on in the country, one can expect that there will be a political commitment, unlike in the past, as the government is reconsidering policies and legal frameworks that have been seen as obstacles to exercising human rights and freedoms in the country. To incorporate recent developments and accord more attractive incentives to investors, the domestic investment law has been amended about six times in the last two decades. The latest Investment Proclamation, no 1180/2020, requires investments to comply with economic, social and environmental objectives.⁶⁵ The 1960 Commercial Code of Ethiopia, among others, was revised in 2021 to create a conducive environment for investment that contributes to socio-economic development. Moreover, the Civil Society Proclamation, the Media and Freedom of Information Proclamation and the Anti-Terrorism Proclamation can be mentioned as examples of controversial laws which have recently been amended.⁶⁶ Although it is not clear whether BIT reform is included, the government has also expressed its intention to promote foreign investment projects to contribute to the country's sustainable development.⁶⁷ These positive changes on the government side will create a good opportunity for stakeholders to initiate reform measures relating to the BIT regime. There will be a political commitment to accept sustainable development-oriented reform and address public concerns, including the investors' concern relating to the lack of government support to implement sustainability standards that are beyond the capacity of the investors themselves.

Second, Ethiopia's attractiveness for FDI is increasing; it has become the second-leading FDI destination in Africa. UNCTAD's World Investment Report of 2018 stated that "East Africa, the fastest-growing region in Africa, received \$7.6 billion in FDI in 2017 ... Ethiopia absorbed nearly half of this amount, with \$3.6 billion ... and is now the second-largest recipient of FDI in Africa after Egypt, despite its smaller economy (the eighth largest in Africa)."⁶⁸ Multinational corporations, including Calvin Klein, Tommy Hilfiger, Levi's, Zara and China's Jiangsu Sunshine Group, have invested in Ethiopia.⁶⁹ The government has also expressed its intention to attract and prioritize large, efficient corporations to invest in the country.⁷⁰ This recent progress will reduce the country's necessity to attract FDI at the expense of sustainability, which was one of the challenges of undertaking reform in the past. The main reasons for the increase of FDI flow to Ethiopia are the introduction of different forms of incentives, access to global and regional duty and quota-free agreements, and infrastructure.⁷¹ Generally, foreign investors do not experience big challenges with respect to rules and procedures for taxes, licences, imports or exports.⁷²

Moreover, it will be crucial to show the Ethiopian government the real impact of excessive investor protection, facilitated in old-model BITs, on FDI inflow. Most capital-importing countries conclude BITs with the expectation that they will promote more foreign investment by providing guarantees and protection to investors and investments, thereby enhancing the growth and development of their countries. However, "there is no clear evidence that BITs have a strong impact on

65 Ethiopian Investment Proclamation, above at note 28, arts 5(8) and 54.

66 See UNCTAD *Reform Package for the International Investment Regime* (2018, UN) at 77–92; Human Rights Watch *Ethiopia: Events of 2018* (World Report 2019), available at: <<https://www.hrw.org/world-report/2019/country-chapters/ethiopia>> (last accessed 12 April 2019); C Foarde "Abiy Ahmed Ali's political, economic reforms in first 100 days revive Ethiopia" (9 July 2018) *The Washington Times*, available at: <<https://www.washingtontimes.com/news/2018/jul/9/abiy-ahmed-revives-ethiopia-reforms-eritrea-outrea/>> (last accessed 5 March 2019).

67 Africa Investment Conference "Ethiopia attracting labour-intensive companies", above at note 64.

68 UNCTAD *Report on Investment and New Industrial Policies*, above at note 64.

69 Ibid.

70 Africa Investment Conference "Ethiopia attracting labour-intensive companies", above at note 64.

71 Ethiopian Investment Commission "Company to invest about 2 billion USD in renewable energy in Ethiopia" (2 January 2018) *EIC Info Center*, available at: <<http://www.investethiopia.gov.et/index.php/information-center/news-and-events/585-company-to-invest-about-2-bn-usd-in-renewable-energy-in-ethiopia.html>> (last accessed 29 January 2018).

72 US Department of State *Ethiopia Investment Climate Statement 2015* (May 2015, Addis Ababa), available at: <<https://2009-2017.state.gov/documents/organization/241767.pdf>> (last accessed 29 October 2021).

the direction of FDI inflows”.⁷³ For example, the Indonesian experience shows that their termination or review of BITs does not negatively affect their FDI inflow.⁷⁴ There is also no clear empirical evidence showing that BITs friendly to domestic development policies discourage FDI. Some studies demonstrate that improved human rights treatment is linked to more FDI inflows, as investors demand peace, stability and enhanced human resources, which are the manifestation of better human rights treatment.⁷⁵

In the Ethiopian context, it is difficult to be sure that signing BITs has been contributing to FDI inflows, as no empirical study has been conducted so far. There is also disagreement between researchers who have made doctrinal studies on the role of Ethiopian BITs in attracting FDI.⁷⁶ The Ethiopian Investment Commission reported that the increase in FDI inflows to Ethiopia is more than 12 per cent per annum; it also stated that this growth rate has been achieved because of the government’s effort to create an attractive investment climate through an effective investment strategy, promotion, fiscal incentives and institutional and domestic policy reforms.⁷⁷ However, it is not indicated whether or not signing BITs has also contributed to the increase in FDI inflows. These two prospects show us that there is a conducive environment, at least, to start a reform of some Ethiopian BITs which is friendly to domestic development policies. A fully fledged reform measure will be achieved step by step when those prospects advance and are supplemented by the recent universal trends in IIAs.

The reform options for Ethiopian BITs

This section explores various options for reforming Ethiopian BITs, taking into consideration UNCTAD’s reform package and the rules outlined in the Vienna Convention on the Law of Treaties. The reform options are assessed in light of the specific challenges associated with BIT reform and the unique context of Ethiopia.

The different reform options

Different options can be taken into consideration to reform BITs in ways which are compatible with domestic development policies. It is useful to refer to the UNCTAD Reform Package for the International Investment Regime, which articulates ten reform options: (1) jointly interpreting treaty provisions, (2) amending treaty provisions, (3) replacing “outdated” treaties, (4) consolidating the IIA network, (5) managing relationships between coexisting treaties, (6) referencing global standards, (7) engaging multilaterally, (8) abandoning unratified old treaties, (9) terminating existing old treaties, and (10) withdrawing from multilateral mechanisms.⁷⁸ These options can be used as guidelines for renegotiating BITs to be compatible with domestic development policies.

We selected UNCTAD’s reform options as they are well developed and give different, flexible options to adopt BITs friendly to domestic development policies, considering the different challenges. Several countries have been reforming their BITs using UNCTAD’s options; for example,

73 A Yilmaz “Foreign direct investment, investment agreements and economic development: Myths and realities” (2015, South Centre, Geneva, research paper no 63,) at 26–27.

74 D Price “Indonesia’s bold strategy on bilateral investment treaties: Seeking an equitable climate for investment?” (2017) 7 *Asian Journal of International Law* 124 at 148–50.

75 S Blanton and R Blanton “What attracts foreign investors? An examination of human rights and foreign direct investment” (2007) 69/1 *Journal of Politics* 143 at 149.

76 See, for example, H Selassi “Ethiopian investment: BITs, FDI, and development” (2009, UNCTAD) at 6, available at: <https://unctad.org/sections/wcmu/docs/ciimem3_p03_en.pdf> (last accessed 11 October 2021); Y Ayalew “Role of BITs in attracting FDI to Ethiopia” (2017) 6 *Journal of Ethiopian Law* 66 at 87.

77 Ethiopian Investment Commission “Economic indicators” (5 January 2018), available at: <<http://www.investethiopia.gov.et/index.php/why-ethiopia/economic-indicators.html>> (last accessed 11 January 2018).

78 UNCTAD *Reform Package*, above at note 66.

212 BITs were terminated as of 2017, and 130 BITs were replaced as of 2018.⁷⁹ In 2019, at least 34 IIAs were terminated, of which four were replacements.⁸⁰ This indicates the extent to which the options have been accepted and have been influencing the global reform measures. We could not find other reform options that are as well developed as UNCTAD's. However, we have also referred to the reform options contained in the Vienna Convention on the Law of Treaties, such as amendment and termination, as they are the main standards for treaty-making and reforms across the globe; we have integrated these into the UNCTAD options discussed above.

It is essential to determine which option, as asserted in UNCTAD's reform package, is more relevant to the Ethiopian context:

“Determining whether a reform mechanism is ‘right’ for a country in a particular situation requires a careful and facts-based cost-benefit analysis while addressing several broader challenges. Strategic challenges include producing a holistic and ‘balanced’ result, rather than ‘over-shooting’ on reform and depriving the IIA regime of its purpose of protecting and promoting investment.”⁸¹

When undertaking a comprehensive reform, care must be taken not to adversely affect the country's need for attracting FDI and maintaining diplomatic ties. We make a selection for screening the best potential combination of the ten reform options. As stated in the reform package, the selected options should eventually represent a country's direction in international investment policy in the light of its domestic development strategy. Accordingly, Ethiopia needs to choose among the ten reform options, taking into account their importance in meeting the constitutional goal of the right to sustainable development in general and the practical necessity of adopting sustainable development-oriented reform, universal trends in international investment policy reforms, the country's diplomatic relations, the need for maintaining the country's investment climate, and the reform status of the existing BITs (such as issues of amendment and termination) in particular. Considering such issues as justifications, we selected five options from UNCTAD's ten reform options: (1) amending treaty provisions, (2) replacing “outdated” treaties, (3) referencing global standards, (4) abandoning unratified old treaties, and (5) terminating existing old treaties. Some of these reform options are also contained in the Vienna Convention, and we will explain them in line with the rules of this Convention, in addition to their concept as articulated in the UNCTAD reform package. Therefore, our reform proposal will comprise the above five options, which need to be adopted on a case-by-case basis, considering their respective requirements and the different challenges of and prospects for reform.

Amending treaty provisions

A given country may revise an existing agreement by incorporating new provisions or modifying or repealing existing ones. “By amending treaty provisions, the parties can achieve a higher degree of change and thereby ensure that the amended treaty reflects their evolving policy preferences.”⁸² Unlike renegotiation, which enables the parties to change the entire content of a treaty, an amendment does not enable an extensive revision; instead, it revises some contents of an existing treaty or introduces some new provisions.

As will be discussed later, the best reform options are replacing outdated treaties and terminating existing treaties (by mutual consent), as they enable a state to renegotiate new BITs from scratch.

⁷⁹ Id at 80 and 91.

⁸⁰ UNCTAD *World Investment Report on International Production beyond the Pandemic 2020* (2020, United Nations Publications) at 107.

⁸¹ UNCTAD *Reform Package*, above at note 66 at 77.

⁸² Id at 79.

But undertaking reform based on these options depends on the willingness of the other contracting parties, and the termination period of Ethiopian BITs is very long, between 10 and 30 years. So amending treaty provisions can be taken as a short-term reform option if replacement and termination are impossible due to the resistance of the other parties and when the time for discontinuing a particular BIT has not arrived. The amendment can be considered as a minimum reform action for treaty partners who resist the renegotiation of new BITs friendly to domestic development policies.

Only two Ethiopian BITs incorporate express amendment provisions. The first is the Ethiopia–Turkey BIT, which states that “[t]his Agreement may be amended by written agreement between the Parties”.⁸³ The second, the Ethiopia–Algeria BIT, also states that “[t]he contracting parties may [by] mutual consent, make any modification and / or amendments to the provisions of this Agreement”.⁸⁴ Concerning these two countries, Ethiopia can easily initiate the amendment agenda based on these provisions, but other Ethiopian BITs do not incorporate such provisions. In such cases, the rules of the Vienna Convention on the Law of Treaties must be applied, which states that “[a] treaty may be amended by agreement between the parties”.⁸⁵ So, based on this general rule, Ethiopia may request its treaty partners to make amendments if those partners are not willing to renegotiate new BITs.

Overall, Ethiopia may consider the option of amending its BITs to incorporate provisions that are friendly to domestic development policies. However, this option should be regarded as a minimum reform measure. Achieving a comprehensive reform oriented to sustainable development requires the country to exert maximum effort in negotiating new BITs that effectively balance the economic, social and environmental pillars of sustainable development.

Replacing “outdated” treaties

A state may substitute an old treaty with a new one; this creates room to conduct a comprehensive revision instead of amending selected provisions, and also enables parties to renegotiate BITs from scratch in line with emerging national policy priorities.⁸⁶ But, as replacing “outdated” treaties depends on the outcome of negotiations, it does not mean that this reform option enables a state to incorporate all of its interests in a particular BIT. It requires the consideration of termination clauses in the old treaties and a careful shift to the new one. Even if it has the above advantages, the overall process of replacing outdated treaties may be challenging, especially with respect to unequal bargaining power, which means that it may require a long time to convince some powerful treaty partners. It is crucial for Ethiopia’s negotiators to thoroughly understand the challenges at hand to identify appropriate solutions and successfully replace the relevant treaty in a manner that aligns with the constitutional objective of the right to sustainable development.

It may be a good approach to start with Ethiopia’s treaty partners that have been replacing their own BITs concluded with other countries, for example Germany and Egypt.⁸⁷ It may be easy to initiate reform with such countries, although an outcome oriented towards sustainable development depends on Ethiopia’s effectiveness in the renegotiation process. Moreover, it will be easier to initiate renegotiation with those BIT partners that have adopted, or expressed their intention to adopt, a new model BIT addressing sustainable development concerns. In this regard, the Netherlands can

83 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–Turkey) (10 March 2005), art 9(3), available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1179/download>> (last accessed 24 April 2021).

84 Agreement for the Encouragement, and Reciprocal Protection of Investments (Ethiopia–Algeria) (1 November 2005), art 11, available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/44/download>> (last accessed 21 June 2021).

85 Vienna Convention, above at note 25, art 39.

86 UNCTAD *Reform Package*, above at note 66 at 80.

87 *Ibid.*

be taken as a good example, as the country recently adopted a new-model BIT. This approach can be a signal for other treaty partners as well.

Ethiopia also has some experience concerning replacement. Its BITs with Germany and Qatar were terminated and replaced by new ones; however, the motive of both terminations was not to renegotiate BITs friendly to sustainable development, as the replacement treaties are also old-model BITs. The Ethiopia–India BIT was also terminated, and it is expected that the two countries may renegotiate a BIT friendly towards new domestic development policies, as India adopted a new model addressing some concerns related to regulatory space. However, this does not mean that Ethiopia should sign a BIT with India by accepting the entire content of India’s model, as some of its rules may not align with Ethiopia’s interests. For example, the removal of the MFN clause in the Indian-model BITs may not be beneficial for Ethiopia, as it could discourage Indian investors from investing in Ethiopia due to the absence of MFN-related protection.⁸⁸ It would be advantageous for Ethiopia if its BITs included MFN provisions with certain exceptions for sustainable development; this approach would help maintain the attraction of FDI by providing fair protection for investors.

In general, replacing outdated treaties can be considered the best option for reform, as it allows Ethiopia to undertake a comprehensive revision that not only addresses domestic development policies but also other significant gaps in old-model BITs, such as rules related to the standards of treatment and dispute settlement. By replacing such treaties, Ethiopia can proactively shape its investment agreements to reflect its evolving needs and priorities. This enables the country to incorporate provisions that promote sustainable development and other key considerations. It also provides an opportunity to renegotiate rules related to the standards of treatment, ensuring a fair balance between investor rights and the host country’s regulatory space.

Referencing global standards

Contracting parties can refer to internationally accepted standards and agreements in order to help avoid inconsistency between IIAs and other international instruments that directly or indirectly deal with international investment matters.⁸⁹ Referencing global standards in BITs is a useful reform option for Ethiopia, as it has adopted several regional and multilateral agreements as well as development goals and initiatives that require member states to foster the integration of sustainable development into their development objectives and human rights agendas. In this regard, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples’ Rights, the Rio Declaration on Environment and Development, the International Labor Organization Declaration on Fundamental Principles and Rights at Work, the SDGs and the Addis Ababa Action Agenda can be mentioned as notable examples which explicitly or implicitly require the sustainability of developmental projects, including investments.⁹⁰ Moreover, other international initiatives, such as the United Nations Guiding Principles on Business and Human Rights and the International Organization for Standardization 26000 “Social Responsibility”, may be considered when referencing global standards.⁹¹

Recent investment agreements and trade agreements with investment chapters also refer to global standards. For example, the Burkina Faso–Canada BIT (2015) and the Colombia–Panama free

88 Indian Model BIT “Bilateral Investment Treaty between the Government of the Republic of India and _____” (adopted 2015), available at: <<https://edit.wti.org/document/show/d0eac9a8-2de6-44a8-9e9f-2986b8817aa9>> (last accessed 13 May 2020).

89 UNCTAD *Reform Package*, above at note 66 at 84.

90 The Addis Ababa Action Agenda is the result of the 2015 Third International Conference on Financing for Development, conducted in Addis Ababa. It was adopted on 15 July 2015.

91 The ISO 26000 Guidance on Social Responsibility has been developed by the International Organization for Standardization (2010), available at: <https://en.wikipedia.org/wiki/ISO_26000> (last accessed 12 May 2021).

trade agreement (FTA) (2013) refer to internationally recognized standards, such as in the areas of labour, the environment, human rights and anti-corruption measures. More specifically, the Morocco–Nigeria BIT (2016) refers to SDGs, and the Bosnia and Herzegovina–European Free Trade Association FTA (2013) also refers to the Organisation for Economic Co-operation and Development’s Guidelines of Multinational Enterprises and its Principles of Corporate Governance.⁹²

Referencing the above instruments in BITs helps Ethiopia in two ways. First, it is useful to avoid inconsistency between the country’s BITs and other regional and multilateral agreements. Second, it is also essential to discharge its obligation to promote sustainable development, emanating from different agreements, consistently in all sectors and in a fully fledged manner.

Abandoning unratified old treaties

A country may indicate its decision not to become a party to a signed but unratified treaty, with the intention of claiming renegotiation of a new one.⁹³ This reform option is useful to Ethiopia, as it has about 12 unratified BITs (out of 35), which are designed based on an old model. This means that there is a similar concern about domestic development policies in the unratified treaties. So by drawing lessons from the problem and its effects on ratified old treaties, the reform needs to include unratified BITs as well, in order to undertake a comprehensive reform of the whole BIT regime and to avoid double standards between different treaty partner countries.

Abandoning unratified old treaties is simple compared to ratified ones, as only giving notice to the other party is enough.⁹⁴ However, Ethiopia should be careful not to negatively affect its relationship with other treaty partners, as well as its investment climate, when undertaking reform using this option. It will be easy to start with treaty partners which have unratified BITs with Ethiopia and which are taking similar reform action with other countries. In this regard, South Africa, Morocco and Nigeria can be taken as examples. South Africa has terminated some of its old-model BITs with a view to renegotiating new BITs that enable it to ensure inclusive economic growth and incorporate advanced dispute-settlement provisions.⁹⁵ In 2016 Morocco and Nigeria also signed BITs friendly to domestic development policies which were appreciated by the international community.⁹⁶ Thus, Ethiopia should first initiate the reform issue with the countries mentioned and utilize this opportunity to send a message to other treaty partners. This approach is very useful for adopting BITs friendly to domestic development policies reasonably quickly.

Terminating existing treaties

Terminating existing treaties relieves the contracting states from the obligation to further operate based on the relevant terminated treaty. This option may be used to promote reforms which are friendly to sustainable development if they are part of an organized and mutual replacement plan.⁹⁷ The option of terminating existing treaties “differs from a treaty’s termination due to its replacement by a new one”.⁹⁸ A treaty can be terminated unilaterally (if the relevant treaty so provides) or by mutual agreement (at any time) without it being replaced with a new one. In this

92 UNCTAD *Reform Package*, above at note 66 at 87.

93 *Id* at 89.

94 *Id* at 90.

95 *Id* at 91.

96 T Gazzini “The 2016 Morocco–Nigeria BIT: An important contribution to the reform of investment treaties” (26 September 2017) *IISD Investment Treaty News*, available at: <<https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/>> (last accessed 12 October 2022).

97 UNCTAD *Reform Package*, above at note 66 at 90–91.

98 *Id* at 90.

regard, the Vienna Convention on the Law of Treaties stipulates that a treaty can be terminated based on its provisions or by the consent of the contracting parties.⁹⁹

All Ethiopian BITs contain a period of termination that stipulates an initial fixed term of operation between 10 and 30 years. Of the 22 ratified BITs, 17 can be terminated at any time, as their initial period of operation has expired. The remaining five BITs can be terminated three to seven years from now. All BITs (expired or not) allow unilateral termination after the initial period of termination by giving notice to the other contracting party. For example, the Ethiopia–Germany BIT states that it “shall remain in force for ten years and shall be extended thereafter for an unlimited period unless a notice of termination has been given in writing through diplomatic channels by either contracting party twelve months before its expiration”.¹⁰⁰ Similarly, the Ethiopia–Finland BIT stipulates that “[t]his Agreement shall remain in force for twenty (20) years and shall thereafter remain in force on the same terms until either contracting party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months”.¹⁰¹

Even if unilateral termination is possible, Ethiopia needs to be mindful of its advantages and disadvantages. It is essential to try to terminate the BITs by mutual agreement to make a smooth transition from a terminated treaty to a new one compatible with sustainable development, as the latter requires a very friendly relationship with the other party. That means if a particular BIT is terminated unilaterally by Ethiopia, it may thereafter be difficult to convince the other party to accept an offer of renegotiation of a new BIT compatible with domestic development policy. It is therefore desirable to avoid any hostility in the termination processes of old BITs; as far as possible, Ethiopia should try to make the termination by mutual consent. This may not be a difficult task, as UNCTAD’s reform package shows; it states that “countries are often receptive to termination, but generally when it is part of the process of concluding a new IIA”.¹⁰²

Moreover, sunset (survival) clauses can be mentioned as a challenge to using the option of termination. Such clauses are incorporated to extend the application of a BIT for an additional period after the date of termination. Most BITs impose this stringent procedure if one of the parties wants to unilaterally terminate the BIT before or after the initial period.¹⁰³ One reason for incorporating a sunset clause is to avoid adverse effects on investment projects that may be affected by the termination.¹⁰⁴ This is acceptable to some extent, but most BITs give excessive protection to investors by according a very long period for the application of the terminated BIT on investments created prior to the date of termination.¹⁰⁵

Ethiopian BITs also contain sunset clauses that stipulate a long period, between 10 and 20 years. This long period of termination can be considered an obstacle to terminating some of the BITs in the short term and to renegotiating new BITs friendly to sustainable development. The solution is to try to terminate a particular BIT by mutual agreement. In such cases, the sunset clause may not be activated if it is amended or neutralized in the new BIT that replaces the old one. The UNCTAD reform package asserts that “when jointly terminating an IIA countries are well advised to clarify their intention about the survival clause, either by explicitly amending and / or suppressing it (neutralization)”.¹⁰⁶ For example, the sunset clause has been neutralized by the contracting states’

99 Vienna Convention, above at note 25, art 54(a)(b).

100 Agreement for the Encouragement and Reciprocal Protection of Investments (Ethiopia–Germany) (4 May 2006), art 12(2), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1165/download> (last accessed 11 May 2021).

101 Ethiopia–Finland Agreement, above at note 23, art 17(2).

102 UNCTAD *Reform Package*, above at note 66 at 91.

103 Bjorklund “The necessity of sustainable development?”, above at note 50.

104 Segger and Newcombe “An integrated agenda”, above at note 51 at 127.

105 Foster “Foreign investment”, above at note 52; Bjorklund “The necessity of sustainable development?”, above at note 50.

106 UNCTAD *Reform Package*, above at note 66 at 81.

mutual consent in the joint termination of the Argentina–Indonesia BIT (1995) and that between the Czech Republic and several other EU member states.¹⁰⁷

Overall reform approach

In the preceding section we mentioned some BITs as examples that could be considered under each reform option. Therefore BIT negotiators can utilize these examples as a source of inspiration and guidance for the remaining BITs. Ethiopia needs to carefully consider the advantages and disadvantages of its reform measures. It is important to maintain a favourable investment climate and avoid frustrating foreign investors due to potential reforms. However, this concern should not completely prevent Ethiopia from undertaking a reform oriented towards sustainable development due to a fear of disruption in FDI inflows. Studies indicate that the evidence linking IIAs to FDI inflows is weak, and not all investments contribute to sustainable development. We suggest that Ethiopia make every effort to implement reforms while considering its domestic development policies. It is also advisable to learn from the experience of new-model BITs that address concerns related to the right of states to regulate and promote sustainable development while still maintaining attractiveness for FDI. By striking a balance between these factors, Ethiopia can pursue reform measures that are in line with its development objectives while remaining an appealing destination for foreign investment.

The five reform options above propose simplified approaches for renegotiating BITs that align with Ethiopia's domestic development policies while ensuring the preservation of its investment climate and its positive relationships with treaty partners. Depending on the specific challenges related to factors such as bargaining power, the willingness of the other parties involved or legal requirements, three alternative approaches can be employed to reform Ethiopian BITs:

1. Combined reform: If different challenges arise, Ethiopia can employ a combination of the five reform options for different BITs based on the preferences and willingness of its treaty partners. This approach allows for flexibility and consideration of the interests of all parties involved to avoid adverse effects on the investment climate and diplomatic ties.
2. Uniform reform: Ethiopia can select one reform option as the best approach and uniformly apply it to all BITs. Terminating old BITs with the intention of replacing them with new ones is recommended in order to renegotiate agreements from scratch and to establish fully fledged BITs that are favourable to domestic development policies. This approach ensures consistency and coherence in the reform process.
3. Amending treaty provisions: If the above two approaches are not feasible due to time constraints or the unwillingness of treaty partners, Ethiopia can focus on amending specific provisions of existing BITs. The country can achieve a minimum level of reform aligned with its sustainable development objectives. However, the long-term objective should remain the termination–replacement approach, with the intention of negotiating new BITs that fully support domestic development policies.

These alternative approaches provide Ethiopia with different strategies to navigate the reform process based on the specific challenges and circumstances it faces. The ultimate goal is to establish BITs that promote domestic development while maintaining a favourable investment climate and positive relationships with treaty partners.

If a treaty partner is unwilling to accept any of the above approaches, Ethiopia can take the following steps:

¹⁰⁷ Ibid.

1. Diplomatic efforts: Ethiopia should make every effort to convince the treaty partner through diplomatic channels. This can involve demonstrating the recent trends in IIAs towards practices oriented towards sustainable development and emphasizing the importance of consistency with Ethiopia's sustainable development obligations under other regional and multilateral agreements. By presenting a compelling case, Ethiopia may be able to persuade the partner to consider the proposed reforms.
2. Unilateral termination: If diplomatic means do not yield the desired outcome and the FDI from the treaty partner is causing significant sustainability problems due to gaps in the existing BIT, Ethiopia may consider unilaterally terminating the BIT. This decision should be based on the recognition that upholding and enforcing constitutional provisions, particularly those related to ensuring Ethiopia's right to sustainable development, takes precedence over maintaining flawed diplomatic ties or benefiting from unsustainable foreign investment projects.

The termination of a BIT, or the absence of one, does not necessarily mean that FDI will cease to flow into Ethiopia from a particular country. In such cases, the country has the option to negotiate directly with foreign investors when concluding investment contracts. By engaging in direct negotiations, Ethiopia can tailor the terms and conditions of the investment to align with its specific needs and priorities and can ensure that the investment arrangements are in line with its domestic development policies and objectives. This approach provides flexibility and enables Ethiopia to incorporate provisions that promote sustainable development, technology transfer, or any other policy measures deemed necessary for its environmental protection and economic and social development.

Conclusion

Both the international and national situations demonstrate that, compared to the past, there is now a conducive environment for reorienting BITs towards domestic development policies. The rights of states to regulate and promote sustainable development have become increasingly important, not only for capital-importing countries but also for capital-exporting ones. The various challenges associated with BIT negotiations, including issues related to bargaining power, legality, politics and economics, are being addressed due to the evolving geopolitics of the world and the emergence of diverse governmental and non-governmental interest groups. However, this does not imply that challenges have been eliminated; rather, it signifies that there are now greater opportunities to negotiate BITs that are supportive of domestic development policies compared to the past.

We suggest that Ethiopia should capitalize on the current international and national opportunities to renegotiate existing BITs and negotiate future BITs that are in line with its domestic development policies. This may entail adopting a simplified and case-by-case approach to avoid adverse effects on the investment climate and diplomatic relations. However, Ethiopia should not be discouraged from making concerted efforts to initiate the required reform. It is advisable to consider the five reform options discussed in this article, taking into account different challenges such as potential resistance from other treaty partners. Among these options, the ideal approach is to terminate the existing outdated treaties, with the intention of replacing them with new ones. If this proves challenging, for the various reasons discussed in this article, Ethiopia can prioritize reforming its BITs by amending treaty provisions; this option involves modifying specific parts of a BIT and is relatively simple compared to completely replacing the treaty. However, it is important to note that amending treaty provisions should be considered a short-term solution that only partially aligns BITs with domestic development objectives. If all other options prove unattainable due to resistance from treaty partners, we recommend that Ethiopia consider unilateral termination of

the BITs. If the country is compelled to take this step, it can engage in direct negotiations with foreign investors to ensure adherence to domestic development policies, including environmental sustainability standards, when entering into investment contracts.

In addition to renegotiating existing BITs, it is crucial for Ethiopia to prioritize negotiating future BITs that align with its domestic development policies. The reform agenda should encompass the entire BIT regime, including ratified, unratified and future BITs. One effective approach for initiating BIT negotiations is to focus on countries that have adopted new-model BITs and have investors operating in Ethiopia but which do not currently have BITs in place with Ethiopia. Starting with these countries provides a solid starting point and allows Ethiopia to gain valuable negotiation experience that can then be extended to other countries.

Competing interests. None