# REGULATORY EXCEPTION UNDER ETHIOPIAN BILATERAL INVESTMENT TREATIES

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## ABSTRACT

*The Investors-State Arbitration (ISA) under traditional model Bilateral Investment Treaties (BITs) has shown the interference of the system with the regulatory right of host States. Lately, this necessitates the introduction of express regulatory exceptions in the form of general exceptions, exclusions, reservations and general right to regulate under new generation of BITs. The textual evaluation of all Ethiopian BITs entered into force so far shows that they did not incorporated express regulatory exceptions. I believe that the separate incorporation of these express regulatory exceptions may provide wider regulatory space than old model BITs which is devoid of the same, but not balance States right to regulate with investors protection. The 2021 Canada model BIT, the 2006 IISD Model International Agreement on Investment for Sustainable Development and the 2012 SADC model BIT are enacted combining these express regulatory exceptions with the same objective. Ethiopia should learn from this experience.*

**Keywords:** Investment regulation, Ethiopian BITs, regulatory exception under BITs, balance between investors' protection and regulatory exception, regulatory exception and Ethiopian BITs.

## INTRODUCTION

The day to day of ISA under traditional model BITs has shown several disadvantages of the system. From the practice of ISA, several disadvantages of the systems are perceived. One of the most very important of such disadvantages is the interference of the system with the regulatory right of host State for the public interest. The right to regulate became the overall problem of ISA. The critics are that BITs seen as empowering foreign investors to interfere with a States right to regulate for the public interest. It is believed that foreign investors are thus encroaching on the States sovereignty, since the right to regulate is seen as the core feature of the sovereignty.

In the arbitration system, parties are the one choosing the arbitrators, who tend to be expert in commercial law field but have less or no expertise in the field of public international law. Mostly, tribunals focus their main attention in interpreting BITs provisions literally -using the plain word meaning. This means, they evaluate the measure taken by the States mainly from the perspective of whether the act violate States obligation under the BITs – a major element which disregard the public interest in the States policy. However, the ability to regulate within its own borders is a core feature of sovereignty as per Customary International Law (CIL). This means, through its legislative, administrative and judicial bodies, the States are at liberty to adopt, maintain and enforce any measure necessary for the advancement of its public policy goals. In



**Citation Information:** Ahmed, M.I, (2024). Regulatory Exception under Ethiopian Bilateral Investment Treaties. *Journal of Legal, Ethical and Regulatory Issues, 27*(S1), 1-12.

short, the critics was that ISA did not take in to account a wide States policies to regulate which



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recognized under CIL – a matter such as labour, health, environmental, national security etc. In other way, it is to mean that, ISA under the platform of BITs limits the host States right to regulate, which is recognized under CIL.

This interference with regulatory right of States makes the regime to suffer from the legitimacy crises. This is the feature of the first traditional model BITs that give emphasis to investor protection while disregarding States right to regulate for public interest. In line to this, there are a lot of practical cases which were decided by tribunals disregarding States right to regulate for the public interest. In this regard the followings can be taken as example: Philips Morris v Uruguay, Aguas del Tunari, SA v Republic of Bolivia, Sociedad Anónima Eduardo Vieira v Republic of Chile, Murphy exploration v. Ecuador, Occidental Petroleum v Ecuador , Chevron Corporation and Texaco Petroleum Company v (ICSID, 2005, 2006, 2010 & 2012). The Republic of Ecuador , Gold Reserve Inc. v. Bolivarian Republic of Venezuela, Azurix Corp. vs. Argentine Republic , Continental Casualty Co. v. Argentine Republic , Sempra Energy Int'l v. Argentine Republic , Enron Corp. v. Argentine Republic , LG&E Energy Corp. v. Argentine Republic, CMS Gas Transmission Co. v. Argentine Republic , Philip Morris Asia Ltd. v. Australia etc (UNCITRAL, 2011 & 2012). In all these cases, the States have taken domestic regulatory measure for the public interest, but convicted for violating their obligation under the BITs. In the award, the tribunals disregarded States right to regulate for public interest (Bischoff, 2015). This in short shows the extent to which ISA under the traditional BITs disregarded States right to regulate for the public interest – the rule which is recognized under CIL (de Zalduendo, 2007).

The backlash against ISA obliges the States to maintain their regulatory autonomy. In this regard, the States have followed two approaches. In the first approach, certain States have voiced their displeasure by withdrawing from BITs or withdrawing their consent to arbitrate. For example, countries such as Bolivia, Ecuador, Argentina, and Venezuela have denounced the ICSID convention and also terminated their respective BITs. Similarly, countries like South Africa and Australia declared the outright banning access to ISA and exclusive local jurisdiction for investor-State dispute settlement (Escobar, 2017).. However, this declaration no longer fits the world as it is now, if it ever fit the world before. Currently, arbitration is the preferred dispute resolution method, especially in the realm of international transactions. In the context of international quarrels, parties seek to ensure that their disputes are handled by a dispute resolution method that best serves their interests. Thus, litigation is not a preferable method for many due to concerns related to local bias, language barriers, inconvenience to parties, and incompetence by adjudicators, procedural arbitrariness, issues of enforceability and recognition of the judgment, and corruption (Korzun, 2017).

In contrast to the first approach, many States tried to maintain their regulatory autonomy through BITs reform. This is the second approach. This approach followed incorporating a provision in BITs that authorize the States the right to regulate. This is made through precise drafting of the substantive provisions of the BITs, or by reasserting their right to regulate within the BITs. This second approach followed two methods (Aguas del Tunari, 2006).

The first method under this approach mostly followed weakening States' substantive obligations. This means, it is emphasized on to limit the scope and the types of substantive investor protection provision and, consequently, the scope of claims a foreign investor can



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submit to arbitration. The problem with this method is they are no explicit enough to provide the right to regulate for the States (Kim, 2017). This means they do not mention States' right to regulate explicitly. In this regard, the right to regulate could only be implied indirectly from provisions limiting the scope and the types of substantive investor protection provision. Another problem with this method is the scope of application for such rights is too narrow as it is confined to particular subject matter with specific objective under investor protection provision. This means, since this right is incorporated into an article on an individual investor protection provision, it is limited in scope and potency (Szewczyk, 2011).

The second method under this approach is emphasized on incorporating separate provision with regulatory exception on particular subject matter. The scope of application for this provision may cover the whole treaty, but its potency is much more limited and do not provide wide regulatory space since it is confined to particular subject matter such as environmental protection only (Alschner, et al., 2018). Sometimes, the scope of application for this provision might be limited to a particular chapter. In such circumstance, the clause does not exempt States from liability in case of a breach of another substantive obligation of the treaty. These limitations make the second approach, a method that does not leave wide regulatory space (Seifu G, 2008).

Taking in to consideration the short coming of the two approaches, the new generation of BITs began to incorporate express/direct reference to states regulatory exception -in the form of general exceptions, exclusions, reservations and general right to regulate. The incorporation of these express regulatory exceptions are believed as a tool that leave wide regulatory spaces for the host States. They are also supposed for introducing a better clarity and securing States right to regulate for legitimate objective, even where this may inhibit investment protection. This means, they are introduced to ensure that States are not unduly constrained by BITs obligations during regulation for the public interest. Even they are romanticized by some as tool that serve to balance States right to regulate with investors protection (Frutos-Peterson, 2008).

The central objective of this Article is to investigate whether Ethiopian BITs are incorporated express regulatory exceptions that leave wide regulatory space for the State to regulate. In view of this, it aimed at indicating how further action will be taken by the government in order to incorporate express regulatory exceptions under Ethiopian BITs. This Article is, therefore, useful for the pursuit of knowledge and the indication to the reform that should be taken by Ethiopia government (Martini, 2018).. Accordingly, the Article is structured as follow: Part II examines the detail about general exceptions such as its nature, feature, meaning etc. including its pros and cons. Part III discusses the facet of exclusions such as its nature, feature, meaning etc. in detail alongside the pros and cons of the same. Similarly, part IV analyze the aspect of reservations such as its nature, feature, meaning etc. together with its pros and cons. Likewise, part V explore about general right to regulate explicitly combined with its advantages and disadvantages. Part VI discusses express regulatory exceptions under Ethiopian BITs and the international experience in this regard. Finally, part VII gives a summary of overall conclusion.



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## GENERAL EXCEPTIONS

General exception are distinct from other safeguard provisions in that they serve as an affirmative defense for regulatory measures falling within the scope of the exception. Consequently, if successfully invoked, general exception eliminate the State's liability and damages for such measures, which are otherwise in breach of the treaty obligations. General exceptions are mutually agreed upon by the treaty parties. As a result, general exception provides the investor protection regime for all parties to the treaty. It is safeguard provision that reserve for the State the right to adopt and enforce measures necessary for the protection of legitimate public welfare objectives, such as human life, health, the environment, public morals etc. Let see in the following the advantage and disadvantage of general exception (Frutos-Peterson, (2006). International law practitioners have increasingly acknowledged the benefit of general exception in BITs. General exception became very important to BITs and believed to improve the traditional BITs system. The incorporation of general exception in BITs increases regulatory autonomy for the States. General exception may have such an impact, for example when compared to traditional BITs that includes no exception. General exception has a long history in international trade law, and already appears in several BITs. Therefore when combined with more precise drafting of the obligations, general exception can go a long way towards addressing the criticisms of traditional BITs. By inclusion of general exception, governments will better know what actions they can take, and investors will be informed and able to calculate potential risks before making the investment (Kluding, 2018). As opposed to targeting a single/few industry, general exception clause may apply to all public policy measures. This means it allow a State to keep its regulatory options open, adopting any public policy measure it sees fit in order to achieve a particular regulatory objective. However, in contrast to this, general exception is sometimes listed up front by the State party to an investor protection treaty. In such circumstance, although they are more limiting on the State's regulatory power, but they provide more certainty to the investor protection regime by putting a foreign investor on notice with regard to any general exception. Another benefit of general exception is, it reflects the principle of fairness and justice (Shan, 2006). It could help the BITs to reach a better balance between the protection of investors' rights and the paradigm of host State right to regulate. This can be illustrated as follow: on the one hand, investment in the territory of a host country may have considerable influence over environment, public health, public order, and other aspects of domestic life. As exceptional provision to protect these public interests, general exception clause helps the host State right to regulate on this regard. On the other hand, the application of general exception is not arbitrary. In this regard, to avoid the potential abuse of general exception clause, the general exception clauses explicitly provide certain restrictions. Also another benefit of general exception is that, it can act as a bridge between international investment law and other legal regimes. From this perspective, general exception clauses can be viewed as the point of intersection of international investment law, other areas of international law and domestic laws (Brew, 2019)..

Nevertheless, this does not mean that general exception is without limitation. Doubts regarding the actual added value of general exception in practice remain. A recent increase in the occurrence of general exception poses many interpretive and theoretical challenges. These



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critiques include: (i) The risk that general exception fall short of providing additional regulatory flexibility to implement public policy measures. (ii) The risk that extensive phrasing in general exception could enable host States to implement protectionist measures. Sometimes general exception drafted through illustrative manner. In such circumstance, it requires a case-by-case assessment with regard to whether a measure falls within the scope of a legitimate regulatory objective. Treaty provisions do not provide much guidance in this respect, and so arbitral tribunals often have to decide what standard to apply and how much deference to give to the State's own determination. (iii) In contrast to what is provided under ii, sometimes general exception is drafted in exhaustive manner. The provision of an exhaustive list of permissible objectives under general exception binds the arbitrators hands, potentially closing off avenues of public policy exception to which they could otherwise reach for under traditional model BITs (Wang, 2017). This is to mean what might have been considered a measure taken in pursuit of a legitimate public policy before the proliferation of general exception clauses, may not do so today. (iv) General exception provision need both parties consensus on the matter incorporated under the same, and since they are symmetrical serve both parties equally. However, negotiating over these types of exception requires strong negotiation skills since it requires particular knowledge and expertise to convince the home State. This is happen for the fact that home State has adequate information as to the respective measures under the same. Therefore, in such circumstance host State may unable to negotiate and convince the home State in a way that leaves wide regulatory space under the provision. In addition, host State may encounter the difficulty of securing their wide policy interest through exception provision because of the unequal bargaining power between the host countries and the home countries.

## EXCLUSIONS

Safeguarding public welfare measures by excluding certain industries from the scope of investment obligations is the most recent development involving investment agreements. Thus far, such attempts are limited to investment like tobacco, now a day it is extended to other products deemed harmful or otherwise undesirable. Some BITs provisions exclude certain policy areas, sectors or activities from the application of the agreement, where both parties agree that these areas should not be covered, perhaps because of their sensitivity or their connection to State policy or security (Lester, et al., 2017). With respect to covered measures, exclusions deny jurisdiction for dispute settlement and hence preclude liability for compensation to investors. It is fair to say that a purpose of this exclusion is not merely to defend measures in litigation, it is to limit litigation. Similar to general exception, exclusion is negotiated as part of treaty text to exclude certain measures for all parties (Ranjan, et al., 2017).

Exclusion has both advantage and disadvantage. The disadvantage with exclusion is that it may allow the government to use such controlling measures to favour domestic industry through discriminatory regulations. Another problem is, there will be no legal recourse when, under the guise of such controlling measure, a corrupt official expropriates property or a business, leaving the market open for him/herself or a friendly local contact. Exclusion provision need both parties consensus on the matter incorporated under the same, and since they are symmetrical serve both parties equally. However, negotiating over these types of exclusion requires strong negotiation skills since it requires particular knowledge and expertise to convince the home State. This is



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happen for the fact that home State has adequate information as to the respective measures under the same. Therefore, in such circumstance host State may unable to negotiate and convince the home State in a way that leaves wide regulatory space under the provision. In addition, host State may encounter the difficulty of securing their wide policy interest through exclusion provision because of the unequal bargaining power between the host countries and the home countries.

The advantage of the exclusion is that it is listed up front by the treaty. In such circumstance, although they are more limiting on the States regulatory power, however they provide more certainty to the investor protection regime by putting a foreign investor on notice with regard to any excluded matters.

## RESERVATIONS

A reservation has two types: the positive and the negative list. A number of treaties contemplate that each party State will list reservations that exclude specific sectors or measures from the application of some or all obligations in the BITs. This is a form of negative listing (sometimes referred to as non-conforming measures). Such type of reservation allow parties to customize their obligations by carving out specific measures, policy areas or sectors where they want to preserve their freedom to regulate without reference to the requirements of the agreement. Most of the time negative reservations can only be listed in relation to the obligations regarding National Treatment, Most Favored Nation, the prohibition on performance requirements and the prohibitions on nationality requirements for senior management and entry restrictions in those models. Likewise, treaty requirements related to Fair and Equitable Treatment, expropriation and the free transfer of funds are obligations against which reservations may not be taken. In contrast, there may some investment agreement which provides reservations from all treaty obligations. In opposite to negative list, positive list is positive listing of sectors, sub-sectors or measures which entails that an agreement's core obligations apply only to the activities listed in a country's schedule (Park, 2017)..

Unlike general exceptions, exclusions and general right to regulate, reservations are separately listed for each party and typically are not symmetrical. Both types of reservations have their own advantage and disadvantage. A positive type of listing has some comparative advantages over negative listing approach. Positive listing is simple for administration since it limits the obligations undertaken in a treaty to specific sectors/measures listed in an annex to the BITs. It is typically less onerous for host States because it does not require an exhaustive inventory of non-conforming measures to be undertaken to ensure that they are excluded from a BITs by listing them. Such an inventory is required if a negative list approach is followed. Another thing is, the agreement's obligations do not apply to sectors or measures that simply do not appear in the country's schedules. This has the advantage of providing wide regulatory space for the states.The disadvantage is sometimes the States do not list some sectors or measure in their schedule. For example the State may put in their BITs clause in general term which stipulates: "the reservations include all existing conforming measure maintained by a: States party at the national level and listed in its schedule; Sub-national government". This indicate that it is not necessary to conduct a survey of sub-national measures or sectors to prepare a list of measures or sectors that agreement's core obligations applies too. From an investors' point of view, this approach is less transparent than the specific listing required at national level because



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it does not disclose the restrictions that are in place. This means the remaining restrictions in sectors that a State has not listed are not disclosed to them.

A negative type of listing has some comparative advantages over general exception and exclusion. First, negotiating over such type of reservation list requires less onerous negotiations skills because it does not require particular knowledge and expertise of the main text of the BITs. Unlike obligation provisions in the main treaty text, negotiators can simply argue that certain domestic measures are critical rules and regulations for their economic growth. They do not require the expertise that is usually required in other provisions within the main treaty text. Because negotiators from home countries have a little or no information as to the respective domestic measures, which is therefore difficult for them to counter argue the importance and necessity of the measures in question. Another advantage of such reservation list is that it avoids textual ambiguity, which may arise in the main text. There is no uncertainty as long as they list the domestic measures in the reservation list, which in turn leaves no room for interpretation by investors and tribunal. Unlike putting some policy space rationale into the preamble of the investment treaty or general exception and exclusion clause, investors or the tribunal do not need to interpret or second-guess as to whether certain measures by host countries are within the boundary of exceptions. The tribunals and investors could simply look up the existing measure to find carved out measures, and examine the description in the reservation list to get a sense of the contents of the measures at issue.

The disadvantage of negative listing is, first, the host countries should recognize that the negative list could limit their policy options since all other unlisted measures should automatically conform to the main text of the BITs. There may be some other undiscovered domestic measures that should have been carved out but were not listed. Once the host countries decide to take the negative list, they should prepare the list with a complete version of the domestic measures which is burdensome. Second, the host countries may opportunistically include as many domestic measures as possible to have a broader policy space. This opportunism weakens the fundamental purpose of signing the BITs, which is to attract foreign investments.

## GENERAL RIGHT TO REGULATE

It is a general right to regulate which is intended to recognize that States have a broad general power and responsibility to regulate in the public interest that is not confined to any specific policy area. In this regard, some BITs seek to address concerns regarding whether States are free to regulate to achieve their development goals by including a provision setting out a positive right to regulate. The inclusion of a general right to regulate in a BITs is an attractive way to protect State regulatory flexibility. Because it is not tied to any particular policy area and provides comprehensive cover for State regulatory actions in all areas¬ - unlike general exception, exclusion and reservation which are limited to specific policy areas. Meaning, reservation, general exception and exclusion are limited to the discrete areas of State activity to which they refer (Uluc, 2016). In short, general right to regulate enables the State to take regulatory measures to achieve other development goal consistence with the principle of sustainable development on the matters that not expressly addressed in general exceptions, exclusions and reservations, in accordance with CIL and other general principles of international



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law, without violating investors protection obligation along with procedural fairness (Korzun, 2017).

In addition, general right to regulate avoid the problem of narrow interpretation of general exception and reservation by some tribunals on the basis that they undermine the main investment protection and promotion goals of BITs.

Nevertheless, the scope of the general right to regulate is unclear. While States are entitled to regulate, it is difficult to know what kind of State activity falls within this right. In addition, it is not clear how a right to regulate should be applied in relation to the investor protection provisions in BITs (Pathirana, et al., 2021).

In the above we have seen the pros and cons of the four types of express regulatory exceptions in general. In the following we will see the express regulatory exceptions under Ethiopian BITs and the international experience in this regard.

## Express Regulatory Exception under Ethiopian Bits and the International Experience

Ethiopia has 35 BITs with different countries. Among these 35 BITs, only 22 are in force. The remaining BITs are either terminated or signed but not entered in to force. When we see the incorporation of the express regulatory exceptions from Ethiopian BITs perspective, there is a considerable gap relating to the whole type of express regulatory exceptions. The 35 BITs signed by Ethiopia are not familiar with the aforementioned types of express regulatory exceptions. As noted above, express regulatory exceptions are introduced as a solution to ISA regime that interferes with regulatory right of host State. They are introduced because they are believed to leave wide regulatory space for the host States. Even, it is believed by some that they are a tool that serve to balance State right to regulate with investors protection. However, 35 Ethiopian BITs are devoid of these express regulatory exceptions. Nevertheless, this does not mean that they are devoid of regulatory exception at all. Some of these BITs are maintained the regulatory approach under traditional model BITs which are not express regulatory. For example, the Ethiopia-United Arab Emirates BIT (2016), Ethiopia-Brazil BIT (2018), Ethiopia-Qatar BIT (2017) and Ethiopia-Belgium Luxembourg Economic Union BIT (2006) incorporated separate provision with regulatory exceptions on particular subject matter such as environmental standard, labor standard and health protection. This is a traditional model BITs approach that emphasized on incorporating separate provision with regulatory exception on particular subject matter. This approach does not provide wide regulatory space since it is confined to particular subject matter. As discussed above, it is against this backlash that express regulatory exceptions are introduced under new generation of BITs.

In contrast to the Ethiopian BITs, the 2021 Canada model BIT, the 2006 International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development (here in after - IISD Model Agreement) and the 2012 Southern African Development Community (SADC) model BIT (here in after - SADC Model BIT) are enacted incorporating express regulatory exceptions. The reason for selecting them as best international experience is for they have contained the combination of express regulatory exceptions that serve as a tool to balance between States right to regulate with investors protection (Stumberg, 2013). To illustrate, I believe that the separate incorporation of express regulatory exception may provide wider regulatory space than old model BITs which is devoid of the same, but not balance



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States right to regulate with investors protection. I believe that it is the combination of these regulatory exceptions that balances States right to regulate with investors protection by providing wide regulatory space to regulate. It is in line to this approach that the selected model BIT and investment agreement is enacted by combining the aforementioned express regulatory exceptions. Therefore, I believe that if Ethiopia derive a lesson from these model BIT and investment agreement alongside making some modification, the country can introduce BITs that balance State right to regulate with investors protection.

For example, the 2021 Canada model BIT under Art.3 confirmed the general right to regulate for the State within their territory for the public interest in line to State right to regulate under CIL. In Art. 21 it enshrined the rule for reservations (non-confirming measures), and provided annexes for the same at the end of the BIT. In Art.22 it also provided the general exceptions for both contracting parties. Likewise, the same BIT provides under Art.23 rule on what excluded from the application of some treaty provisions, and provides annexes for the same at the end of the BIT. The IISD model agreement recognized the general right regulate under Art.25 as inherent rights of States. In this Art., it recognized the general right of State to regulate for the public interest in accordance with CIL and other general principles of international law. In part 10 of the agreement under Art.49, 50 and 51 it recognized the general exception to both parties. The same model agreement recognized the annexes as integral part of the agreement under Art.54, and provided annexes for exclusion and reservation (non-confirming measures) at the end of the agreement. The SADC model BIT under Art.20 recognized the host State general right to regulate in accordance with CIL and other general principles of international law. In Art. 25 the model BIT recognized the general exceptions. The same model BIT recognized the schedule as integral part of the agreement under Art.36, and provided schedule for exclusion and reservation (non-confirming measures) at the end of the agreement. From the above, it is clear that the model BIT and investment agreement combined the express regulatory exceptions as method to balance State right to regulate with investors protection by giving/leaving wide regulatory space for the State.

## CONCLUSION

The traditional models BITs that do not contain regulatory exceptions, increases claims against host States. However, the absence of regulatory exceptions does not mean that States cannot take public policy measures at all. In such circumstances, States regulatory measure either may not be in conflict with BITs obligations in the first place, or may be justified based on the other principles of international law that inform the interpretation of BITs obligation. Otherwise, the States are responsible for the consequence of regulatory measure they have taken. Nevertheless, under CIL, States have inherent right to regulate their domestic affairs including foreign investment. This means, through its legislative, administrative and judicial bodies, the States are at liberty to adopt, maintain, and enforce the measures necessary for the advancement of their public policy goals. However, under ISA, tribunals interpretation to the traditional model BITs did not take in to account this States' right to regulate under CIL. This is based on the assumption that BITs are specific laws that can derogate State right to regulate under CIL, and accordingly they focus their main attention in interpreting BITs provisions literally-using the plain word meaning. This means they evaluate the measure taken by the States from the



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perspective of whether the act violate States obligation under the BITs - a major element which disregard States right to regulate under CIL. This makes impossible for the States to regulate foreign investment through domestic laws based on inherent right to regulate under CIL. The backlash against ISA in this regard, obliges the States to maintain their regulatory autonomy. Accordingly, the States have followed different approaches as far as their BITs are concerned. However, due to different reasons, these approaches become ineffective. Lately, this fact necessitates the introduction of express regulatory exceptions in the form of general exception, exclusion, reservations and general right to regulate under new generation of BITs. The main purpose of their introduction is to ensure that States are not unduly constrained by BITs obligations. They are designed to ensure that State measures intended to achieve important public policy objectives are not at risk of being challenged on the basis of their inconsistency with the investor protection obligations in the treaty. In other way, they are introduced to provide wide regulatory space to achieve very important public policy objectives even if the measure taken by the States are contrary to investors' protection obligation under BITs. For these reasons, they are assumed by some as tool that serve to balance State right regulate with investors protection. However, all Ethiopian BITs are not familiar with these types of express regulatory exceptions. The absence of these regulatory exceptions indicate that Ethiopia BITs are traditional model BITs with no express regulatory exceptions - a BITs that is criticized for proliferation of investor State dispute by limiting States right to regulate for the public interest (Mitchell, et al., 2016).

In fact, the introduction of these express regulatory expressions (under new generation of BITs) can provide wider regulatory right than what under traditional model BITs. However, the separate incorporation of these regulatory exceptions can't balance State right to regulate with investors protection. It is the combination of these regulatory exceptions which balance States right to regulate with investors protection by leaving wider regulatory space for host State. The 2021 Canada model BIT, IISD Model Agreement and SADC Model BIT are enacted in this manner with the same objective.

Therefore, Ethiopia has to enact Model BIT that similar with the 2021 Canada model BIT, IISD Model Agreement and SADC Model BIT, and need to negotiate accordingly. This may: one enables the country to overcome/minimize the intrinsic disadvantages associated with each express regulatory exception. Two, enables the State to obtain wider regulatory exceptions in different areas of State activities that may balance State right to regulate with investors protection.



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**Citation Information:** Ahmed, M.I, (2024). Regulatory Exception under Ethiopian Bilateral Investment Treaties. *Journal of Legal, Ethical and Regulatory Issues, 27*(S1), 1-12.

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**Received:** 26-Sept-2023, Manuscript No. JLERI-24-14018; **Editor assigned:** 27-Sept-2023, Pre QC No. JLERI-24-14018(PQ); **Reviewed:** 21-Oct-203, QC No. JLERI-23-14018; **Revised:** 24-Oct-2023, Manuscript No. JLERI-23-14018(R); **Published:** 28-Oct-2023



**Citation Information:** Ahmed, M.I, (2024). Regulatory Exception under Ethiopian Bilateral Investment Treaties. *Journal of Legal, Ethical and Regulatory Issues, 27*(S1), 1-12.