Major features of Ethiopia's new investment law: an appraisal of their policy implications*

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Abstract

This paper analyses the major features of the 2020 Ethiopian investment law and their policy implications. The law has liberalized many areas of the Ethiopian economy to pave the way for increasing the private sector's share and diminishing the Government's role. It adopted the negative list approach to liberalization to simplify the process of determining investment fields that are open for foreign investors. It laid out procedures for handling investors' grievances and for resolving investor–State disputes, principally through domestic institutions. It also obliges investors to discharge their corporate social responsibilities. The paper argues that these features of the law demand transparent, efficient and competent government institutions to properly regulate and protect investments and to attain sustainable development as the ultimate goal of the law. For this purpose, it also argues that two factors are essential: ensuring effective institutional coordination and supplementing the mandatory corporate social responsibility requirements with voluntary engagement. In addition, it contends that the Government needs to strengthen linkages between foreign and domestic investment, promote decent jobs and sustainability, enhance human resources and infrastructure, and build a stable political system to reap the significant development benefits of investment,

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The term "the investment law" or "the law" is used in this paper to collectively refer to Ethiopia's Investment Proclamation No. 1180/2020 and Investment Regulation No. 474/2020. These two pieces of legislation, albeit issued separately, are part of a unified legal framework on investment. The Proclamation is the primary law on investment adopted by the Ethiopian Parliament (the House of Peoples' Representatives), and the Regulation, adopted by the federal executive body (the Council of Ministers), details and helps implement the provisions of the Proclamation. But, where it is necessary to specifically mention the Proclamation or the Regulation, the word "Proclamation" or "Regulation" is used in the paper.

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as envisaged in the investment law. The paper also suggests that other countries, in Africa and beyond, can benefit from applying these lessons in designing or reforming their investment policies to maximize the sustainable development gains from foreign investment.

Keywords: investment, national investment laws, Ethiopian investment laws, sustainable development, investment promotion, investment protection, investment regulation

JEL classification codes: F2, K2, K3, K4, Q01

1. Introduction

After 1991, which marked the end of the socialist economic system that existed in Ethiopia since 1974, the Government introduced policies that favour foreign and domestic investment (Oqubay, 2015). It also continued to participate significantly in the economy. Consequently, foreign and domestic investment have increased, many State-owned enterprises (SOEs) have been privatized and the Government has consolidated its participation in different areas of investment, including infrastructure and utilities (Hailu and Yihdego, 2017). As a result, Ethiopia has achieved successive double-digit economic growth for many years (Oqubay, 2015).

Foreign and domestic investment have been promoted, protected and regulated in Ethiopia through its national investment law, bilateral investment treaties (BITs) and other relevant commitments. Ethiopia has signed 35 BITs so far with other countries, of which 21 are currently in force.[1] It is also a member of the Multilateral Investment Guarantee Agency, which provides political risk insurance and credit enhancement guarantees to investors. Moreover, it has acceded to the African Continental Free Trade Area (AfCFTA), for which the Investment Protocol is currently under negotiation by its State Parties. Although Ethiopia is a member of the Common Market for Eastern and Southern Africa (COMESA), it has not joined its free trade area despite its previous expression of interest in doing so. Likewise, even though it has not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, it has agreed to use the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID). In addition to its multilateral and regional commitments to promote and protect investments, Ethiopia has repeatedly reformed its national investment law over the years.

In keeping with this trend, following the 2018 change in administration, the Government undertook some reform measures in the economic arena. Primarily, it adopted a framework for the economic reform, "A Homegrown Economic Reform Agenda: A Pathway to Prosperity", in 2019. The Reform Agenda outlines the major pillars of the reform to be implemented in the subsequent years (OPM, 2019). It also underscores the need to augment the role of the private sector by improving the efficiency, competitiveness and predictability of the investment environment (OPM, 2019). This policy stance also formed the basis of the reform of the investment regime.

[1] UNCTAD, "International Investment Agreements Navigator – Ethiopia", Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia (accessed 19 March 2022).

One of the major components of the economic reform recently undertaken in Ethiopia is, thus, the revision of the investment law (Lawrence, 2020). Accordingly, the Investment Proclamation[2] was adopted, which repealed the previous Investment Proclamation,[3] and the Investment Regulation[4] for implementation of the Proclamation followed, repealing in part the Investment Incentives and Investment Areas Reserved for Domestic Investors Regulation.[5]

The Proclamation and the Regulation have many provisions with broad policy implications, mainly for the roles of the private sector and the Government in the economy and for sustainable development as well as for investment promotion, protection and regulation. They introduced some major new features and modified parts of the previous investment law. This paper appraises the main features of the Proclamation and the Regulation, thereby contributing to the comprehension of their policy implications and supporting their effective implementation. The paper does not provide an article-by-article commentary; rather, it focuses on the aspects of the Proclamation and the Regulation that have significant policy implications.

Accordingly, the paper dwells on five major features of the Proclamation and the Regulation. It examines the liberalization of fields of investment for foreign investment, which previously were reserved for the Government or domestic investors. It also looks at the negative list approach to liberalization that was adopted. In addition, it examines the procedures for handling investors' grievances and the mechanisms for settling investor–State disputes. Finally, it explains the imposition of mandatory corporate social responsibility on investors.

The rest of the paper contains six sections. The first section discusses, as a background, the nature and objectives of national investment laws in general. The next section briefly explains the rationales for the introduction of the Proclamation and the Regulation, which provides the context in which they were passed. This is followed by a section that explicates the objectives and provides an overview of the Proclamation and the Regulation. The fourth section explains the major features of the Proclamation and the Regulation that have huge policy implications. The fifth section offers some further reflections on investment law and its broader policy implications for sustainable development, which can be useful to other countries in Africa and beyond in designing or reforming their investment policies. The final section provides concluding remarks.

[2] Ethiopia, Investment Proclamation No. 1180/2020, *Federal Negarit Gazette*, 2 April 2020.
[3] Ethiopia, Investment Proclamation No. 769/2012 (as amended), *Federal Negarit Gazette*, 17 September 2012.
[4] Ethiopia, Investment Regulation No. 474/2020, *Federal Negarit Gazette*, 2 September 2020.
[5] Ethiopia, Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012 (as amended), *Federal Negarit Gazette*, 29 November 2012.

2. National investment laws and their objectives

It is common for States to have laws that govern foreign and domestic investment, albeit with differences in their scopes, structures and approaches. Without losing sight of the possibility of definitional variations among jurisdictions, a domestic investment refers to "an investment made in a country by a resident or a national of that country", while a foreign investment is "an investment made by a person in a project or enterprise in a country other than their country of residence or nationality" (World Bank Group, 2010, p. 13). The power to regulate investment forms a part of a State's sovereignty (Titi, 2014). The regulation of investment is done mainly through investment laws (World Bank Group, 2010).

National investment laws, which have diverse nomenclatures in different legal systems (Scharaw, 2018), generally "seek to present in one piece of legislation the basic provisions on investment in the country concerned" (Parra, 1992, p. 428). However, it must be noted that there are States that do not have unified national investment laws (including the United States), which instead regulate investment through piecemeal legislation (such as company and tax laws) (World Bank Group, 2010). Even in States with single domestic investment laws, the laws do not cover all issues relating to investment, which necessitates reference to other pertinent laws (Parra, 1992). These other laws mostly govern specific issues that relate to investment, such as labour, tax and the environment (UNCTAD, 2016).

Although there are differences in their specific objectives and priorities, national investment laws share many purposes, which can have various specific prongs. One of their shared purposes is promotion of investment (Sornarajah, 2010). This targets particularly attracting and retaining foreign investment, especially in capital-importing countries. It is worth noting that national investment laws that have this purpose proliferated in the 1990s (Sauvant, 2016). Promotion of foreign investment is premised in particular on the belief that foreign investment can bring capital, technology, revenue and know-how to a host State and can help it achieve its economic and political objectives, including sustainable development. Investment laws that have the purpose of promoting investment also often contain rules that provide incentives and other support to investors (Hepburn, 2018; UNCTAD, 2016).

Protection of investment, through rights, guarantees and other safeguards, is another purpose of national investment laws. Domestic investment laws provide legal protections to investment against risks (such as expropriation), which can be similar to the protections afforded by investment agreements (Scharaw, 2018). They also often provide frameworks for the settlement of disputes between an investor and a host State (Parra, 1992). The provision of legal protections to investment through national laws is important, in particular in the absence of applicable investment treaties (Scharaw, 2018).

Another objective of domestic investment laws is regulation of investment (Sornarajah, 2010). Regulation is needed in order to ensure that investment is carried out in a manner that benefits States by helping them achieve economic development (Sornarajah, 2010). It is also important because investment policies should be integrated with a State's overall development strategies (UNCTAD, 2015). For domestic investors, national laws are the only regulatory framework that govern them, as they are nationals or residents of the host State. Nonetheless, in the case of foreign investors, in addition to national laws, international investment law is applicable. Yet, as Subedi (2008, p. 55) puts it, "[m]uch of the regulation of foreign investment is done through the domestic laws of the host countries concerned." National investment laws generally provide the procedures and requirements to establish, operate and exit investments, obligations of investors and institutional frameworks on investments. Particularly, regarding foreign investors, they typically specify the requirements and procedures for investors to enter the host country, the standards of treatment that apply to them and other rules.

There are also other specific drivers for enacting domestic investment laws, particularly those that govern foreign investment. In this regard, Hepburn (2018) holds that States can legislate such laws because they involve lower transaction costs than does negotiating investment treaties. He also states that the process of approving national laws is regarded as more transparent and accountable, unlike the process of negotiating and concluding investment agreements. Besides, he argues that some States may enact national investment laws because they want to use them as bargaining chips to negotiate for investment treaties with other states. It could also be that a State may be less interested in reciprocity (Hepburn, 2018), therefore placing less emphasis on investment agreements and, instead focusing on regulating and protecting foreign investment through its domestic laws. This is particularly the case for predominantly capital-importing countries, which are more on the receiving end of capital than on the supplying side (Hepburn, 2018).

At this juncture, it is important to understand the nexus between national investment law and international investment law with respect to foreign investors. The international law on foreign investment is mainly contained in BITs, investment rules of trade agreements and customary international law. As alluded to earlier, international law recognizes the right of a State to exercise control over foreign investors, which is implemented mainly through national investment laws. As such, national laws are the principal mechanisms to regulate the activities of foreign investors. International investment law, on its part, contains rules that "outline international standards of protection, provide supplementary and complimentary protection, and assure foreign investors of access to an independent international tribunal in the event of a dispute arising between the host State and a foreign investor" (Subedi, 2008, pp. 55–56). However, there is often no clear distinction between domestic and international investment laws in their application because of their intricate interconnection (Ratner, 2020).

3. Rationales for the reform of the investment law

Ethiopia has experienced wide-ranging economic reforms over the last four years. In June 2018, the Government decided to privatize many of the SOEs engaged in utilities and other sectors,[6] although it later reversed its plan to sell some of the enterprises.[7] The Reform Agenda, which followed this decision, recognizes the positive aspects of Ethiopia's economic performance over the previous decade, particularly the expansion of infrastructure, rapid economic growth and development of human capital. It also emphasizes that sustaining the successes of the past decade demands resolving the economy's challenges, including macroeconomic imbalances and structural bottlenecks (OPM, 2019). Moreover, it stresses the need to create new opportunities and sources of growth (OPM, 2019). Accordingly, as part of the solutions to the challenges facing the economy, it states that private sector investment must be enhanced, including by privatizing SOEs. However, some have criticized the Reform Agenda on various grounds, including the element of privatizing SOEs.[8]

The emphasis placed by the Reform Agenda on strongly promoting the private sector represents, to some extent, a departure from the country's decades-old developmental model of economy (World Bank Group, 2019), in which the Government has had a significant share in the economy. The move towards a private sector–led economy is believed to help attain mainly inclusive growth, poverty reduction and job creation (OPM, 2019). The Proclamation and the Regulation were introduced in this context.

The revision of the previous investment law was necessitated because of some specific reasons (HPR, 2019). It is partly intended to align the previous investment law with the reforms undertaken in the country, particularly the economic reform (HPR, 2019). Other major justifications for the adoption of the Proclamation and the Regulation are the needs to augment the role of the private sector in the economy, to modernize the investment administration system through consolidating the relevant laws, to increase inward investment by solving investment-related challenges and to put in place effective and transparent investors' grievance handling procedures (HPR, 2019).

It is worth noting that the adoption of the Proclamation and the Regulation is a part of the bundle of legal reforms undertaken on the Ethiopian economy. The telecommunication industry, which has been monopolized by the Government

6 Aaron Maasho, "Ethiopia opens up telecoms, airline to private, foreign investors", *Reuters*, 5 June 2018.
7 *Borkena Ethiopian News*, "Ethiopia cancels privatization of Ethiopian Shipping & Logistics Services Enterprise", 11 October 2020.
8 Alemayehu Geda,"Ethiopia's 'homegrown' reform: wrong diagnosis may make it a wish list", *Addis Fortune*, 21 September 2019; Ayele Gelan, "Ethiopia needs evidence-based economic reform", *Addis Fortune*, 5 October 2019.

for years, has been liberalized through the 2019 Communications Service Proclamation. The Government has also ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2020 and adopted a revised Commercial Code in 2021. In addition, in 2020, it passed a new Public Enterprises Privatization Proclamation to establish the institutional framework for and regulate the process of privatization of SOEs. Hence, the Proclamation and the Regulation are not the only recent acts of the Government in the economic arena, but they are particularly essential because they lay out the national investment objectives and the legal and institutional frameworks.

4. Overview of the new investment law

This section provides an overview of the Proclamation and the Regulation. It explains their objectives and offers brief summaries of them. It is intended to help facilitate the comprehension of the next section on the major features of the law and their policy implications.

4.1 Objectives of the law

The Proclamation enumerates the country's investment objectives. The ultimate objective is to "improve the living standard of the peoples of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development" (Art. 5(1), the Proclamation). This is generally in line with the right of the Ethiopian people to improved living standards and sustainable development and the right to a clean and healthy environment, as well as the economic objectives stipulated in the Ethiopian Constitution,[9] mainly promoting equitable wealth distribution (Art. 43, 44 and 89). The notion of sustainable development refers to "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (United Nations, 1987). It thus mainly demands "the integration of environmental, social, and economic concerns into all aspects of decision making" (Emas, 2015, p. 3), including those relating to promotion, protection and regulation of investment.

At this juncture, it is worth noting that the need for integrating sustainable development and investment policies has increasingly garnered acceptance. In this regard, UNCTAD has proposed some principles (UNCTAD, 2015). Accordingly, it recommends that States have coherent investment policies (investment policies and development objectives that are aligned), maintain their regulatory power

[9] Ethiopia, Constitution, Proclamation No. 1/1995, *Federal Negarit Gazette*, 21 August 1995.

to protect their non-investment public interests and promote (including through openness to investment) and protect investments. It also recommends that investment policies be dynamic, incorporate balanced rights and obligations of investors, and encourage investors to adopt good corporate social responsibility and governance practices and be supported by appropriate legal and institutional frameworks and systems. Similarly, the 2015 Sustainable Development Goals also clearly recognize the vital role that the private sector can play in meeting the 17 development goals (United Nations, General Assembly, 2015).

The Proclamation is also generally aligned with these international instruments in having sustainable development as its ultimate goal. The broad objective is detailed through specific objectives. One of the main objectives is to increase the role of the private sector in the economy (Preamble and Art. 5, the Proclamation). It states that "increasing the role of private sector investment in all sectors of the economy including in productive and enabling sectors has become necessary to accelerate the economic development of the country, ensure its sustainability, strengthen domestic production capacity and thereby improve the living standards of its people" (Preamble, the Proclamation). As such, the Proclamation aims at enabling the private sector, which includes foreign and domestic investors, to take the dominant position in the economy by progressively reducing the Government's participation.

There are also other specific investment objectives in the Proclamation. These are increasing the competitiveness of the economy and the country's export performance as well as creating better job opportunities and sustainable linkages among different sectors of the economy (Preamble and Art. 5, the Proclamation). The Proclamation also has the purposes of building a transparent, predictable and efficient investment administration; attracting and retaining foreign investment; promoting fair distribution of investment among the regions;[10] maximizing the links between foreign and domestic investors; leveraging foreign investment to promote domestic investors' competitiveness and encouraging transfer of technology, knowledge and skills, and socially and environmentally friendly investments (Preamble and Art. 5, the Proclamation). Thus, the Proclamation focuses not only on increasing the quantity of investment but also on ensuring the quality of investment, such as through creating decent jobs and preventing or minimizing environmental damage.

It is important to note that the objectives of the Proclamation are common in many other national investment laws. In this regard, it has been remarked that "[m]any (investment) laws … refer to general economic development objectives,

[10] Ethiopia follows a federal system of government. Hence, powers are divided between the Federal Government and the 11 regions and two semi-autonomous city administrations (the capital, Addis Ababa, and Dire Dawa).

such as economic growth, diversification, integration, industrial development, competitiveness, or to social development objectives, such as employment, poverty reduction, skill transfer, education, or health" (UNCTAD, 2016, p. 4). Such diverse, but interrelated, specific objectives of investment laws require the active participation and coordination of various government bodies that work on matters of investment promotion, protection and regulation.

4.2 Synopsis of the law

The Proclamation provides the main framework for promoting, supporting and regulating investments in Ethiopia. To understand the Proclamation, it is essential to start from the definitions of some of the key terms in it. It defines an "investment" as the "expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise". An "enterprise" is "an undertaking established for profit-making" (Art. 2(2), the Proclamation). An "investor" refers to a domestic or foreign national that has invested capital (Art. 2(4), the Proclamation). A domestic investor includes an Ethiopian national, the Ethiopian Government, an Ethiopian SOE, an enterprise established in Ethiopia and wholly owned by Ethiopian nationals, a foreign national treated as a domestic investor by law or international treaty and a cooperative society as well as a joint investment between any of these investors (Art. 2(5), the Proclamation). In addition, a foreign national or enterprise issued a domestic investment permit based on prior laws, the heir of the foreign national or enterprise is regarded as a domestic investor (Art. 2(5), the Proclamation). In contrast, a foreign investor is a foreign national, an enterprise incorporated abroad or with a foreign national's share, a joint investment between any of such investors, or an Ethiopian permanently residing abroad who prefers to be treated as a foreign investor (Art. 2(6), the Proclamation).

The Proclamation governs all investment in Ethiopia, except investment in prospecting, exploring and developing minerals and petroleum (Art. 3). Investment in mining and petroleum operations is excluded from the ambit of the Proclamation because it is appropriate for special laws to regulate them (HPR, 2019).[11] The Proclamation mandates the Ethiopian Investment Commission (EIC) as the main investment promotion agency in Ethiopia, with the power to administer foreign investment, joint investment between foreign and domestic investors, investment of foreign nationals treated as domestic investors and investment by domestic investors in areas eligible for incentives (Art. 4(1), the Proclamation).

[11] The Mining Operations Proclamation No. 678/2010 (as amended) and the Petroleum Operations Proclamation No. 295/1986 govern investment in minerals and petroleum respectively.

Aside from the EIC, the regulation and promotion of investment in the aviation, energy and telecommunication industries are delegated to the Ethiopian Civil Aviation Authority, the Ethiopian Energy Authority and the Ethiopian Communications Authority respectively (Art. 4(2), the Proclamation). Though the Proclamation governs investments in these sectors, their respective sectoral bodies are assigned to administer them because they have special expertise and preparations to regulate them (HPR, 2019). Investment organs of the regions have the power to regulate and promote investments in their respective regions, other than those assigned to the EIC and the other three Authorities (Art. 4(4), the Proclamation).

The Proclamation also contains rules on categories of areas of investment. Under the Proclamation, areas of investment are classified into four groups. These are investment areas open for (1) only joint investment between private investors and the Government, (2) only domestic investors, (3) only joint investment between domestic and foreign investors, and (4) foreign investors (Art. 6). Without prejudice to these classifications, the Proclamation stipulates the principle that "any investor may engage in any area of investment except where it is contrary to law, moral, public health or security" (Art. 6(1)). As such, an investment is subject to additional restrictions on the basis of public policy, health and security, which are intended to prevent activities that are not expressly prohibited but could be contrary to public morality, security or health (HPR, 2019). Interestingly, security is also expressly included in the Proclamation as a potential ground for restricting investment. This is in line with the experiences of other countries, which increasingly subject foreign investment to the requirement of not jeopardizing national security (UNCTAD, 2020).

The Proclamation also prescribes the requirements for establishing and operating an investment. These mainly consist of allocating minimum capital for a foreign investor (with the exceptions thereto) and securing and renewing an investment permit (Art. 9 and 10). In addition, the procedures for renewal, suspension and revocation of an investment permit are stipulated (Art. 11 and 13). The Proclamation also provides other rules for promoting and facilitating investment in Ethiopia, such as one-stop services for investors by investment administration organs and the EIC's mandate to facilitate the visa applications of foreign investors (Art. 24 and 23).

Under the Proclamation, the Ethiopian Investment Board, the EIC, the Federal Government and Regional State Administrations Investment Council and regional investment bodies are the investment administration organs (Art. 29). The Board is composed of 13 members drawn from relevant government bodies (including the EIC's Commissioner) and the private sector; it is chaired by the Prime Minister. It is primarily responsible for setting out investment policies and overseeing their implementation, as well as following up on the activities of the EIC (Art. 31, the Proclamation). The EIC is mandated to make the investment climate conducive; to promote, attract and retain investments; to issue, renew and cancel investment permits; and to monitor investments within its jurisdiction (Art. 37 and 38, the Proclamation). The Council is composed of the Prime Minister or the Deputy Prime Minister ; presidents of the regions; mayors of Addis Ababa and Dire Dawa cities; the EIC's Commissioner; heads of investment organs of the regions and the city administrations as well as other members, as deemed necessary (Art. 46, the Proclamation). The Council, which did not exist in the previous investment law, is in charge of coordinating the horizontal relations between investment organs of the federal government and the regions (Art. 45, the Proclamation). Investment organs of the regions are mandated to regulate investments in their jurisdictions, as stated above.

Moreover, the Proclamation has some guarantees, protections and obligations for investors. It allows a foreign investor to own an immovable property (except land)[12] for investment purposes and permits a large-scale foreign investor or a foreign national treated as a domestic investor to own one dwelling house (Art. 18). It also protects investment against unlawful expropriation (devoid of public interest, uncompensated, discriminatory or not according to law) (Art. 19). In the case of a lawful expropriation, it requires that the affected investor be awarded "adequate compensation corresponding to the prevailing market value" in advance (Art. 19). In addition, the Proclamation permits investors to obtain foreign loans and have foreign currency accounts and allows foreign investors to repatriate investment-related funds in foreign currency, such as profits and external loan repayments (Art. 21 and 20). Investors also have different obligations under the Proclamation, which mainly include providing information on their investment to pertinent government bodies and complying with laws and social and environmental sustainability requirements (Art. 14 and 54).

The Regulation has also introduced some changes. It mainly contains the list of areas of investment, as further expounded in the next section. It also provides rules that detail provisions of the Proclamation. It should be noted that the Regulation repealed only the section of Investment Regulation No. 270/2012 that deals with investment areas. Hence, the section of Investment Regulation No. 270/2012 on incentives granted to investors is still effective (Art. 20 and 21, the Regulation).

[12] According to Article 40 of the Ethiopian Constitution, all land is publicly owned and, hence, cannot be privately owned. As a result, individuals and businesses can have only long-term lease or rental rights on land.

5. Main aspects of the investment law and their policy implications

This section examines the major features of the Proclamation and the Regulation and their policy implications. For this purpose, five areas of the law are selected and expounded.

5.1 Liberalization of many areas of investment

The economic dimension of territorial sovereignty continues to confer on each government the right to decide whether to close the national economy to foreign investors or to open it up, fully or with respect to certain sectors (Dolzer and Schreuer, 2008, pp. 79–80). Accordingly, the Proclamation and the Regulation contain rules that determine fields of investment that are fully or partially open or closed for foreign investors. These rules are essential in that they delineate the extent of participation of foreign investors in the Ethiopian economy.

Among the major features of the Proclamation and the Regulation is the full or partial liberalization of various areas of investment for foreign investors that were previously either monopolized by the Government or reserved exclusively for domestic investors in Ethiopia. As stated earlier, they classify investment areas into four categories. In the first category are those exclusively reserved for joint investment between private investors and the Government, such as postal (except courier) services and international air transport services (Art. 6(2), the Proclamation; Art. 3, the Regulation). Such joint venture arrangements make it possible for a State to be actively involved in the implementation of its policies (Sornarajah, 2010), such as economic and national security interests.

The second category of investment areas are those open only for domestic investors (Art. 6(2), the Proclamation and Art. 4, the Regulation). These include financial services and legal services, as well as wholesale and retail businesses (with some exceptions). So, foreign investors cannot engage in these investment areas. As noted earlier, customary international law generally honours the sovereign right of a State to determine the entry of investors. Accordingly, it is well recognized that "a state may institute measures to keep out foreign investment that is considered harmful to its interests" (Sornarajah, 2010, p. 104). The interests can be varying but generally include protection of infant domestic industries and national security. This is, however, without losing sight of the countless bilateral or regional investment agreements that promote investment liberalization across jurisdictions (Sornarajah, 2010; Subedi, 2008).

The third category of investment areas are those reserved only for joint investment between domestic investors and foreign investors (Art. 6(2), the Proclamation and Art. 5(1), the Regulation). These include logistics, domestic air transport, audiovisual services, and accounting and auditing services. The Regulation limits the share of a foreign investor to 49 per cent of the share capital of an enterprise (Art. 5(2)). The mandatory requirement for joint ventures between domestic and foreign investors is intended to facilitate the transfer of expertise and technology, to ensure that some portion of profits from joint ventures stays in the host State and to exercise effective control over investments (when the local partner is a State entity) (Sornarajah, 2010). Indeed, this requirement can also help serve the Ethiopian investment law's objectives of promoting knowledge, skills and technology transfer and maximizing linkages between foreign and domestic investments. From the perspective of a foreign investor, a joint venture with a local investor can also be beneficial because it "diversifies the risk, gives the foreign investor a lower visibility and provides them with a local partner who will often be an effective mediator with the local government" (Sornarajah, 2010, p. 107). Nonetheless, a mandatory joint venture requirement can also be problematic for foreign investors, as it may result in a lack of trust and understanding with local partners (UNCTAD, 2003), given that it is imposed by law and is not a result of the free consent of parties to the venture.

The last category of investment areas are those fully open for foreign investors. Any investment area that does not fall in the three other categories is regarded as open for foreign investors (Art. 6(3), the Proclamation and Art. 6, the Regulation). Hence, subject to the applicable entry requirements, foreign investors have the right to establish investments in this category with full ownership.

Unlike the previous investment law, the Proclamation and the Regulation do not have a category of investment areas reserved exclusively for the Government, which may effectively reduce the creation of government monopolies. Most investment areas that were previously off limits for private investors are now open for either joint investment with the Government or domestic investors or for all private investors. Most importantly, the telecommunication industry, which was reserved exclusively for the Government under the prior laws, is currently open to foreign and domestic investors. These liberalization measures are complemented by the Government's plan to privatize many SOEs. The liberalization and privatization decisions have been taken to align the Proclamation with Ethiopia's membership in the AfCFTA and its preparation to accede to the World Trade Organization (HPR, 2019).

With the full implementation of the Proclamation and the Regulation, the share of the private sector in the Ethiopian economy will steadily grow. As a result, the role of the Government will progressively diminish to focus on engaging in only specific areas of investment that may necessitate its participation and in regulating the private sector. As stated in the Proclamation, these liberalization measures are mainly intended to bring more benefits to the economy, including through strengthening domestic production capacity and global competitiveness, creating decent jobs, enhancing export performance and improving peoples' living standards.

It is essential to note that the liberalization of many fields of investment by the Proclamation and the Regulation generally follows the global trend. According to the *World Investment Report*, 107 new investment policy measures were recorded in 2019, of which "three-quarters were in the direction of liberalization, promotion and facilitation" (UNCTAD, 2020, p. 97). Liberalization measures were adopted for different sectors, including the mining, energy and financial industries (UNCTAD, 2020). This is in consonance with policies that encourage the opening of national borders to foreign investment, which have been globally dominant in particular since the late 1980s.

5.2 The negative list approach to liberalization

The other major introduction of the Proclamation and the Regulation is their adoption of the "negative list approach" to determine areas of investment that are open for foreign investors. Under this approach, "authorities list the sectors or subsectors that are closed (prohibited) or restricted (allowing only minority foreign ownership, requiring special authorization from foreign investors, and so forth)" (World Bank Group, 2010, p. 28.). If a certain field of investment is not included in the list, it is regarded as open to foreign investors. Many countries use this approach (World Bank Group, 2010). As stated above, the Proclamation and the Regulation also provide that foreign investors are allowed to engage in any area of investment, except those reserved only for (1) joint investment between private investors and the Government, (2) exclusively domestic investors and (3) joint investment between domestic investors and foreign investors, as exhaustively listed in the Regulation. This approach has the merit of simplicity in determining prohibited or restricted areas of investment (World Bank Group, 2010). In other words, in order to determine whether a foreign investor is allowed to engage in a certain field of investment, it suffices to check whether the field is in the negative list (sometimes referred to as the prohibited or restricted list).

In contrast, under the "positive list approach", an investment law "attempts to enumerate all the sectors or subsectors in which foreign investors may invest" (World Bank Group, 2010, p. 28.). This method, which only some countries use, is difficult to apply because the positive list cannot cover all sectors of an economy (World Bank Group, 2010). A positive list can also be open to interpretation and make it impossible to introduce new investment areas that arise out of industry changes (World Bank Group, 2010). The previous investment law used this approach (Art. 8, the Investment Proclamation No. 769/2012), which was difficult to implement because many of the listed investment areas were ambiguous, which often led to varying interpretations.

The negative list approach of the Proclamation and the Regulation is expected to minimize such practical administrative problems. If this approach is properly followed in practice, it would contribute to make the Ethiopian investment administration system transparent, predictable and efficient, which is among the rationales for the adoption of the Proclamation and the Regulation. This can, in turn, help increase investment attraction, retention and expansion in Ethiopia.

5.3 Comprehensive investors' grievance handling procedures

Another major feature of the Proclamation is its procedures for handling investors' grievances. The Proclamation envisions investors' grievances that occur prior to and after establishment in Ethiopia, as grievances can arise at any stage of the investment process (HPR, 2019). Accordingly, the Proclamation states that "[a]ny investor who has grievance in respect of his investment shall have the right to submit a complaint to the appropriate investment organ" (Art. 25(1)). Such grievance must be "against a final decision given by the appropriate investment organ on application to engage in investment" (Art. 25(3)). This is intended mainly to provide the framework for a potential investor, including an investor who has an investment in Ethiopia but wishes to engage in another area of investment, to contest any decision of an investment organ that fully or partially rejects its application to make an investment. Hence, it covers grievances that investors may have about decisions that affect their entry into or expansion in Ethiopia.

Regarding complaints on final administrative decisions of the EIC specifically, the Proclamation stipulates that they can be submitted to the Board for review (Art. 26(1)). Such complaints must be submitted to the Board within 30 working days from the day the aggrieved investor becomes aware of the final decision (Art. 26(3)). The Board is obliged to render a decision on the application within 90 working days from the date of submission of the complaint (Art. 26(4)). Then, the Secretariat of the Board should provide a written copy of the Board's decision to the aggrieved investor (Art. 26(5)).

The Proclamation also allows an investor to request the EIC to review a final decision of any federal government executive body that significantly affects its investment (Art. 27(1)). An example of a federal government body whose final decision can hugely affect an investment is the Environment Protection Authority, which addresses matters of failure of an investment to comply with environmental laws. It is apt to empower the EIC to review the decisions of other bodies affecting investments because the EIC, as the principal body responsible for promoting and regulating investment, has better expertise to understand the rights, obligations and concerns of investors and provide recommendations to their complaints as per the relevant laws. This can be regarded as an important part of the EIC's aftercare services to investors. When the EIC receives such application, it must consult with the government body against which the complaint is lodged and offer a recommended solution in writing within 30 days from the date of submission of the complaint (Art. 27, the Proclamation). The aggrieved investor can submit a complaint to the Board against the EIC's recommended solution if it does not accept it or if the government body concerned rejects the solution (Art. 27(6)). The Board must make a decision within 90 working days from the date of submission of the complaint, which must be executed by the government body concerned (Art. 27(8) and (9)). It should be noted that the Proclamation requires decisions on investors' complaints to be made through speedy, equitable and efficient procedures (Art. 25(2)).

The investors' grievance handling procedures provided in the Proclamation are important. It has been held that the "best way forward for the host [S]tate to avoid and prevent disputes and/or achieve early settlement is by putting in place several policies of information provision, prevention and institutional cooperation" (UNCTAD, 2010, p. 65). Therefore, grievance handling procedures, if properly utilized, can help the Government forestall the escalation of complaints into costly investor–State disputes by enabling its institutions to reassess their own decisions or review the decisions of others, thereby preventing waste of public resources. They can also help the relevant government bodies to cooperate on issues of investment, including through sharing information and experiences, in order to balance their regulatory powers with investment promotion and protection efforts. From investors' perspective, the grievance handling mechanism can be essential, as it can help them obtain resolutions for their complaints in the early stages, without incurring the huge expenses required for bringing and vindicating formal investment claims against the Government.

5.4 A system for investor–State dispute settlement, but a cautious approach to investor–State arbitration

The Proclamation also contains a provision that deals with investor–State dispute settlement (ISDS), which did not exist in the previous investment law. It provides that "[w]ithout prejudice to the right of access to justice through a competent body with judicial power, any dispute between an investor and the Government involving investments effected pursuant to this Proclamation will be resolved through consultation or negotiation" (Art. 28(1)). This procedure applies once all the above procedures for handling investors' grievances have been followed and the matter has escalated into a dispute. So, when an investor has a claim against the Government, it has to submit it first for consultation or negotiation with the Government. Such mechanisms, which aim at facilitating amicable and early resolution of investment disputes, including alternative dispute resolution methods, are encouraged (Sauvant, 2015). Hence, under the Proclamation, making consultation or negotiation the primary recourse for resolving investor-State disputes, can be important. This is because negotiation, as a form of alternative dispute resolution, can "help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties", even though its success cannot be guaranteed (UNCTAD, 2013, p. 5).

If a dispute between an investor and the Government cannot be resolved through negotiation or consultation, in principle, it must be submitted to the competent Ethiopian court (Art. 28(1), the Proclamation), which is the default dispute resolution forum. This is the only option for settling investor-State disputes with respect to domestic investors. In other words, an investment dispute between a domestic investor and the Government would be entertained by an Ethiopian court of jurisdiction, although there is a possibility to use other alternative dispute resolution methods under another applicable law.

Under the Proclamation, arbitration can be used as an alternative to resolve a dispute between a foreign investor and the Government if there is a specific agreement to this effect. It allows the federal government to "agree to resolve investment disputes involving [f]oreign investments through arbitration" (Art. 28(2), the Proclamation). If there is such an agreement that is relevant to a foreign investor, the investor can institute a legal action against the Government in an arbitration forum. If there is no such agreement, the dispute can only be submitted to a court in Ethiopia.

In general, there are three ways for States to give their consent to arbitration for investment disputes (Bonnitcha et al., 2017). First is through a BIT or another investment agreement signed between States (Bonnitcha et al., 2017). These agreements mostly focus on protecting foreign investments by prescribing some standards of treatment of investors and providing ISDS mechanisms (Schill, 2009). The common mechanism for settling investor-State disputes is arbitration. Second, a State can agree to arbitration in specific investment contracts it signs with investors (UNCTAD, 2014). Third, it is also possible for a State to grant its consent to arbitration in national investment laws (Bonnitcha et al., 2017). States grant their consent to investment arbitration "in the hope that there would be greater flows of foreign investment if impartial methods of seeking remedies in the event of government intervention are made available to the foreign investor" (Sornarajah, 2010, p. 102).

Pursuant to the Proclamation, foreign investors can bring legal actions against the Ethiopian Government through arbitration only if there are agreements to this effect that apply to them. Consent to arbitration of investment disputes mainly exists in many of the country's BITs. All of its currently effective BITs allow foreign investors to bring actions against the Ethiopian Government in arbitral tribunals, both institutional (such as ICSID's Additional Facility) and ad hoc tribunals. Thus, a foreign investor whose home State has an operative BIT with Ethiopia (for instance, a French investor) is entitled to bring its claims against the Ethiopian Government through arbitration under the applicable BIT. This means such a foreign investor cannot be compelled to resort to Ethiopian courts to sue the Government. Foreign investors can also use arbitration if they have specific investment contracts with the Ethiopian Government that contain arbitration clauses. An example of an investment contract is a power purchase agreement, which is signed between a power producing company and the Ethiopian Electric Power, the state-owned energy utility, for the production and sale of energy.

The Proclamation's position – that of not containing consent to arbitration but deferring to other agreements – is cautious. It can most likely be attributed to the numerous challenges that international investment arbitration currently faces. The system has been seriously criticized, mainly for its questionable legitimacy in entrusting a few private individuals with significant power to decide on matters of public interest (UNCTAD, 2013). Other problems associated with the ISDS system include the lack of transparency, inconsistency of arbitral awards, lack of independence of arbitrators, absence of an effective system of review of awards and expensiveness of the process (UNCTAD, 2013). As a result, there are efforts to look for ways to minimize the use of international arbitration for investor-State disputes, particularly in capital-importing countries. An example of this approach is found in the 2016 Draft Pan-African Investment Code, which was prepared under the patronage of the African Union Commission and may have influenced the drafting of the Proclamation. The Draft Code requires investor-State disputes to be resolved through negotiation and consultation, with arbitration considered as an option subject to the host State's applicable law and/or the agreement of the State and the investor as well as exhaustion of local remedies.

If an agreement allows investment arbitration, under the Proclamation, a foreign investor who can benefit from the agreement will have the options to resort to litigation or arbitration. In this regard, the Proclamation stipulates that "[w]here a [f]oreign investor chooses to submit an investment dispute to a competent body with [j]udicial [p]ower or arbitration, the choice shall be deemed final to the exclusion of the other" (Art. 28(3)). In international investment law, this type of provision is commonly known as a "fork in the road" clause, which is intended to "prohibit an investor from submitting an investment dispute to a particular court or tribunal if he has previously seized another court or tribunal of the same dispute" (Petsche, 2019, p. 395). This type of provision is intended to avoid multiple proceedings in different forums over the same investment dispute (Douglas, 2009), which can help save resources.

The fact that the Proclamation allows the arbitration of a dispute with a "foreign investor", instead of an "investor" (which refers to both a foreign and a domestic investor), seems to have been motivated by the typical nature of BITs (including their ISDS rules), which provide unique protections and privileges only to foreign investors. Nevertheless, it is possible for the Ethiopian Government or its specific bodies to agree to arbitration with domestic investors under the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021.

It could be argued that, by refraining from promising the settlement of disputes with all foreign investors through arbitration, the Proclamation intends to limit the number of disputes to be submitted for arbitration. This can help ensure that investment disputes are handled either amicably or by Ethiopian courts, which can be efficient and cost-effective. Yet, this approach equally demands the existence of transparent, efficient and competent domestic institutions, including courts, to prevent or resolve investment disputes and protect investments effectively.

Many studies have particularly showed that, although courts in Ethiopia have their independence declared in the Ethiopian Constitution, the judicial system is politicized, as it is generally under the undue influence of the executive wing of the Government (Brien et al., 2021). Corruption and incompetence have also been reported as problems in the judicial system (Brien et al., 2021). These challenges must be addressed in order to have a judicial system that is trusted by investors and that robustly protects their property rights, which is important for them to have confidence in the investment climate.

5.5 Mandatory investors' corporate social responsibility

The other major feature of the Proclamation is the mandatory corporate social responsibility (CSR) it imposes on investors. CSR denotes "the way firms integrate social, environmental and economic concerns into their values, culture, decision making, strategy and operations in a transparent and accountable manner, and thereby establish better practices within the firm, create wealth and improve society" (Hohnen, 2007, p. 5). A rule on CSR in the Proclamation was needed because in addition to legal obligations, investors have social responsibilities towards local communities around their investment projects and the country in general (HPR, 2019).

Accordingly, the Proclamation provides that "[a]ll investors shall carry out their investment activities in compliance with the [l]aws of the country" (Art. 54(1)). The wide range of laws that are pertinent to investments include environmental, labour and anti-corruption laws. More specifically, the Proclamation prescribes that "[a]ll investors shall give due regard to social and environmental sustainability values including environmental protection standards and social inclusion objectives in carrying out their investment projects" (Art. 54(2)). Albeit this broadly crafted duty covers many things, it requires that investors comply with environmental laws, respect Ethiopian cultures and values and integrate local communities in their investments.

The rule on investors' CSR can be essential, even though it can also be regarded as ambitious. If strictly enforced, it can help investors play effective roles in "tackl[ing] the broader systemic challenges of better meeting societal expectations and contributing to sustainable development across the value chain" (Schönherr et al., 2017, pp. 33 and 39). In this way, it can be instrumental in achieving the investment law's principal objective of inclusive and sustainable development, such as through creating decent jobs and facilitating environmental sustainability. Investors can also benefit from discharging their CSR commitments, principally by building their reputation in the market and increasing their competitiveness (Hohnen, 2007).

A CSR rule, as incorporated in the Proclamation, may not be effectively enforced without any form of supervision of the activities of investors. The EIC's power to regulate investments can help in this regard. This could also be supplemented by investors' obligation, under the Proclamation, to provide periodic reports on the implementation of their projects and investment-related information upon request by the government bodies concerned (Art. 14).

Yet mandatory CSR is not the only option. In fact, voluntary CSR engagements can be particularly important in giving companies the flexibility to undertake CSR measures in line with their specific conditions (Picciotto, 2003), albeit they could also be abused. Hence, a blend of mandatory and voluntary CSR frameworks is needed. Effective supervision of the conduct of investors and their impact on the society is also important to ensure that they carry out their CSR, thereby contributing to sustainable development. At the same time, it is equally vital to encourage investors to engage in CSR activities voluntarily without breaching legal requirements, preferably by exceeding their legal CSR commitments.

6. Investment law and its broader policy implications for sustainable development

Given that investment policy must form a key part of a host State's development strategy (UNCTAD, 2015), the fact that the investment law in Ethiopia ultimately aims at attaining sustainable development is commendable. It may serve as a useful reference point for designing or reforming investment laws in other countries, in Africa and beyond. As stated earlier, such an approach of linking investment policies with (sustainable) development-related objectives has also been adopted in many recent national investment policies. But, there is a need for investment policies to integrate and cohere with other national policies, including those related to agriculture, industrial development and education.

Yet, adopting investment policies with sustainable development objectives does not, ipso facto, lead to sustainable development. This is why it has been stated that "[r]eaping the development benefits from investment requires not only an enabling policy framework that combines elements of investment promotion and regulation and that provides clear, unequivocal and transparent rules for the entry and operation of foreign investors…, it also requires adequate regulation to minimize any risks associated with investment" (UNCTAD, 2015, p. 47). Hence, in the Ethiopian case, the rules of the investment law that promote and protect investment need to be effectively balanced against the rules that regulate investment so as to maximize the benefits from investment and protect other public interests. Thus, in line with UNCTAD's recommendation, the investment law needs to be complemented by regulations on a wide range of areas relevant to investments (including labour, the environment and other social issues) (UNCTAD, 2015), which must be effectively enforced.

It is also worth noting that, aside from adopting an investment law that is geared towards sustainable development (such as the Ethiopian investment law), many other factors determine the materialization of the development gains from foreign investment. According to Bonnitcha (2019, p. 5), the "literature suggests that foreign direct investment can be beneficial from a host state perspective, but that the benefits depend on the characteristics of the investment, the nature of its linkages to the host state's economy and the 'absorptive capacity' of the host state". These include policies and measures that support efforts by foreign investment to create strong linkages with domestic investors (thereby facilitating the transfer of technology and know-how) and to promote decent jobs and environmental sustainability. Enhancing human resources and skills and improving the infrastructure necessary for the successful operation of investment (energy, telecommunications etc.) are also essential in order to effectively reap the advantages of foreign investment (UNCTAD, 2015). Finally but equally important is host-country political stability, as it is among the vital factors in investors' decisions. In Ethiopia stability has been disrupted, mainly because of the ongoing war in the northern part of the country.

7. Conclusion

This paper expounds the major features of the new investment law of Ethiopia and their policy implications. Aside from explaining the law and its policy background in general, it explicates the implications of its main features for the role of the private sector and the Government in the economy, for sustainable development and for investment promotion, protection and regulation in Ethiopia.

The investment law has liberalized many sectors of the Ethiopian economy, thereby paving the way for progressive increase in the share of the private sector in the economy. In addition, the negative list approach to liberalization adopted in the law is expected to simplify the process of determining whether specific fields of investment are open to foreign investors. Full implementation of the investment law would gradually limit the Government's role in the economy to regulating the private sector and engaging in only specific investments that may be necessary. As stated in the Proclamation, the ultimate purpose of this enhanced liberalization is to help attain inclusive and sustainable economic development in Ethiopia, including by creating decent jobs, improving the country's export performance and effectively using its resources. This requires efficient, transparent and competent investment administration bodies, which can create an environment conducive to attracting and retaining investments.

The Proclamation also laid out the procedures for handling investors' complaints against decisions of governmental bodies and for resolving disputes between investors and the Government. Grievance handling procedures, which can enable government bodies to reassess their decisions or review the decisions of others, can help prevent the escalation of complaints into investor-State disputes. Moreover, they can facilitate cooperation among the relevant government bodies, including through sharing information and experiences, in order to balance their exercise of regulatory powers with the promotion and protection of investment. In addition, the use of consultation or negotiation for investor-State disputes under the Proclamation can help de-escalate investment disputes and reduce the number of cases to be submitted for litigation or arbitration. The facts that Ethiopian courts are made the next default investor-State dispute resolution forum and arbitration can be resorted to only when an agreement of the federal government to arbitrate investment disputes exists show the Government's preference for domestic institutions. This is most likely intended to reduce the number of investment disputes that can be submitted to international investment arbitration, a system that has been controversial over the past decades. Grievance handling procedures and resort to negotiation prior to litigation or arbitration can also be valuable for investors, as they can help investors get solutions for their complaints in the early stages, with reduced costs.

Yet, in order to adequately protect investments, the judicial system should be independent, efficient and competent in handling investment disputes. Ethiopian courts, which have problems of lack of independence, incompetence and corruption, should be reformed to address these challenges. Continued judicial reform geared towards this goal is important in order to have a judicial system that investors trust (in particular, foreign investors) and that supports investment promotion and protection.

Furthermore, the Proclamation demands that investors discharge their CSR, mainly requiring them to comply with laws and ensure social and environmental sustainability. Doing so will enable investors to engage in activities that benefit society, aside from generating profits. Discharging their CSR can help investors play important roles in improving living standards and in broadly achieving sustainable development in Ethiopia, which is the fundamental objective of the investment law.

It can also enable investors to build their reputations in society, thereby enhancing their competitiveness in the market. Nevertheless, there is a need to conduct proper supervision of the activities of investors and their CSR-related performances if the CSR rules are to be meaningful. Investors should be encouraged to engage in voluntary CSR engagements to supplement the mandatory CSR requirements, to the extent they are compatible with the Proclamation, since doing so can provide investors with flexibility to come up with tailor-made ways of discharging their CSR.

Finally, it should be noted that the investment law with its sustainable development objectives, albeit important, is not sufficient to achieve sustainable development in Ethiopia. The law must be supplemented by regulations and institutions that can protect various public interests besides investment promotion. Also essential are policies and measures that support foreign investment to create strong linkages with domestic investors and to promote decent jobs and environmental sustainability. Moreover, it is important to enhance human resources and infrastructure and to have political stability so as to attract and retain investment and effectively benefit from it and ultimately achieve sustainable development. These suggestions can also be useful for other countries in designing or reforming their investment policies to maximize the sustainable development gains from foreign investment.

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