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The Legal Framework Governing Investment Areas and Incentives in Ethiopia: A Critical Appraisal

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Abstract

This research sought to explore the legal framework governing investment areas and incentives under the investment law of Ethiopia. In particular, the main emphasis of the research is to investigate whether the legal framework governing investment areas and incentives could be used for the promotion of investment and overall economic growth. The research employed doctrinal legal research approach and the investment law of the country were discussed in detail. The study found that the government publicized desire to facilitate the expansion of investment and stimulate the growth of the economy by opening up the investment areas for the private sector and providing incentives for potential investors, particularly to attract foreign investment. The researchers suggested that, if open admission is not allowed, residual reservation should be allowed and the government should not be included under the definition of domestic investors. So, the discrepancy against investment areas reserved for domestic investors should be avoided.

Keywords

Investment, Investor, Investment Areas, Investment Incentive

1. Introduction

There is no single and universally agreed definition for the term investment due to the evolving nature of economic relations, which in turn affects the connotation of the term[1]. It is expressed in broad definition in most multilateral and bilateral investment treaties and trade agreements. They usually refer to every kind

[1]Panitchpakdi Supachai, 2011, Scope and Definition, UNCTAD Series on Issues in International Investment Agreement II, p. 7.

of asset followed by an illustrative but usually non-exhaustive list of covered assets[2]. Due to the side effect of broad asset based definition of the term investment, various restrictions can be introduced to determine protected investments from unprotected ones. Despite its vague and open ended nature, investment can simply be defined as expenditure of some input to get some output. Expenditure can be expressed as capital which is a broad term itself while output can be expressed as profit.

Investment in general and private investment in particular is considered essential for different reasons. Private investment, particularly Foreign Direct Investment (FDI) benefits the host country by re-allocating public resources to other needs; creating employment through new or expanded projects; introducing new skills and training to domestic labor force; improving local management skill; transferring new technology and know-how and accelerating the rate of infrastructure development[3]. However, private investment and FDI have side effects which the host country is required to regulate. The act of private investors and multinational corporations in defeating the tax laws by engaging in transfer pricing (fixing) an artificial high price for an item permitted to be imported at concessionary rates brought from the parent company, harm to the environment and health, human rights violation, and mal-practices and corruption are among negative consequences[4].

Thus, benefits of investment which are expression of classical economic theory on foreign investment and negative consequences which are an expression of the dependency economic theory are negotiated by middle path which desires a mix of regulation and openness of investment[5]. Despite arguments for and against openness to investment, many countries changed their policy framework toward facilitation and openness. It is expressed as objective of the legislation in different countries and international agreements with the view that it fosters economic growth and poverty alleviation[6].

If an investment legislation provide openness to private investment, allow open admission approach to investment areas, use fiscal and non-fiscal incentives to promote and facilitate investment, it is highly attract more investments. Investment policy and legislation openness which provides for investors greater legal security, predictability and transparency, and fewer restrictions are considered as important factors that have a positive impact on economic development of the country[7].

Despite its liberalization of investment areas to private sector, post 1991 gov-

[2]Yannaca-Small, Catherine, and Lahira Liberti, 2008, Definition of Investor and Investment in International Investment Agreement, p. 49.

[3]World Bank, 2010, Investment Law Reform: A Handbook for Development Practitioners, Washington DC, p. 6.

[4]M. Sornarajah, (2010), The International Law on Foreign Investment, 3rd ed., Cambridge University Press, United Kingdom, pp. 56-60.

[5]Ibid, pp. 48-60.

[6]Supra note 3.

[7]Ibid p. 6.

ernment of Ethiopia have exclusively reserved and jointly allow certain investment areas for government. The government has classified itself as domestic investor despite its regulatory and promotion functions. This enables the government to compete with private investors at least theoretically which in turn results at least potential distortion of the market and thereby discourages private investment.

The current investment proclamation of Ethiopia only allows certain areas of investment for foreign investors and areas not allowed expressly are prohibited which is positive list approach. Foreign nationals treated as domestic investors under current investment law are not allowed to invest in areas reserved for domestic investors since it only reserves the area to Ethiopian nationals. Approval of foreign investment which is considered as screening mechanism to non-strategic sector is adopted under investment law of Ethiopia. Minimum capital is required against foreign investors and its amount is increased under current investment law on all areas requiring minimum capital.

Investment incentives, though debating as to its usefulness and efficiency, are generally investment promotion tool and common with investment promotion authorities. Investment incentives are defined narrowly by investment regulations. It only includes exemption from income tax and exemption from customs duty.

2. Review of Related Literature: The Concept of Investment, Investor, Investment Areas, and Investment Incentives

2.1. The Concept of Investment

The concept of investment varies from country to country and changed over time as the nature of international economic relations has changed. The significant development of the types of assets to be protected under international investment agreements since the mid 19thc has created potential for investment to become open-ended and vague term in international investment agreement[8]. Some writers argue that the term investment was evolved with the protection of aliens and their physical properties. The concept of investment in earlier times was evolved with the protection of aliens and their physical properties in accordance with minimum standards of treatment and the meaning of the term investment was confined to foreign direct investment in international investment law[9].

The term was later extended to include "intangible assets" including intellectual property rights and further extension of the term is considered to include the "administrative rights" that the "foreign investor" acquires in the host state[10]. It is expressed in broad definition in most multilateral and bilateral investment treaties and trade agreements. They usually refer to "every kind of asset" followed by an illustrative but usually non-exhaustive lists of covered

[8]Supra note 1 pp. 7-10.
[9]Supra note 4 p. 11.
[10]Ibid p. 15.

assets[11].

The draft Multilateral Agreement on Investment (MAI) is defined investment broadly in terms of assets where assets have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk[12]. Article 1(6) of The Energy Charter Treaty (ECT) also defines investment as "every kind of asset" and refers to any investment associated with an economic activity in energy sector[13]. Both foreign direct investment and portfolio investment are also included in broad definition of investment under article 1139 of North American Free Trade Agreement (NAFTA)[14]. The Organization for Economic Co-operation and Development (OECD), "definition of investor and investment in international investment agreement" lists the categories which are typically included under broad definitions of investment as[15]:

1) Movable and immovable property which covers tangible property;

2) Interest in companies which usually covers debt and equity investment;

3) Claims to money and claims under a contract having a financial value which suggests that investment includes not only property but also certain contractual rights;

4) Intellectual property rights, which may include trademarks, patents and copyrights. Some investment agreements include "goodwill", "technical process", and "know how" under intellectual property rights, for example 2005 the United Kingdom (UK) Model Bilateral Investment Treaty (BIT).

It is also defined as the commitment of funds to one or more assets that will be held over some future time period by some writers and is considered as it involves the study of the investment process[16].

The process of investment under the above definition involves analyzing the basic nature of investment decisions, dividing the activities in the decision process, and examining the major factors in the investor's operating environment that affect their investment decisions[17]. It may also be defined as "expenditure to acquire property or asset to produce revenue"[18]. It is dictionary meaning of the word investment. From above definitions it can simply defined as expenditure of some output to get some input. Expenditure can be capital which itself is wider term and not defined in single manner and input can be considered as profit.

However, it is considered important to identify the protected investment under international investment agreements and clear benchmarks as to what is an

[11]Supra note 2 p. 49.

[12]Ibid.

[13]Ibid.

[14]Supra note 2 p. 49.

[15]Ibid.

[16]Charles P. Jones, 1991, Investment Analysis and Management, 3rd ed., North Carolina State University, Canada, p. 6.

[17]Ibid.

[18]Tesfaye Abate, 2009, Investment Law Teaching Material: Prepared under the Sponsorship of the Justice and Legal System Research Institute, Unpublished, p. 8.

investment which helps to assess whether a given asset or transaction is protected. Various restrictions can be introduced to minimize the risk of wide asset based definition of investment which results in gradual extension of contractual claims not covered under international investment agreement. Exclusion of certain specific assets such as portfolio shares from the definition, restricting protection only to direct investments, protecting investments made in accordance with host country law only are some ways of restricting the wide definition[19].

There are different types of investment. Public versus private, direct versus portfolio, and foreign versus domestic investments are among different types of investment. Though whether the source of investment is government or private sector can be used to differentiate public and private investment, the activities of the commercial public entities are often regarded and treated as private investment[20]. Direct investment refers to a long term in a new business or a preexisting one that is accompanied by a measure of effective management control by the investor while portfolio investment refers to a short term objective, the use of financial flows that have a higher flow of liquidity, and an investment that does not involve management control by the investor[21]. A domestic investment is an investment made in a country by a resident or national of that country while foreign investment refers to an investment made by a person in a project or enterprise in a country other than their country of residence or nationality[22]. FDI as one type of investment is considered as stimulating growth when it generates external economies through technology transfer[23]. Therefore, there is no uniformly agreed definition for the term investment and hence it varies with time and from state to state.

2.2. Investor

It is critical issue in international investment law like that of defining the term investment as it helps in determining the scope of investment agreement and impact on attracting foreign direct investment. There is no single uniformly agreed definition for the term investor under international investment law. Two types of person may be included within the definition of "investor" which includes natural person or individuals and legal persons or judicial entities[24]. Sometimes agreements use terms "nationals" and "companies" instead of the term "investor"[25]. Natural persons are determined typically by the nationality link to be covered under investment agreement and other links such as permanent residence, domicile, residence or combination of them[26].

For natural persons, the criteria for determining nationality in the IIA usually

[19]Supra note 1 pp. 10-11.

[20]Supra note 3 p. 10.

[21]Ibid p. 12.

[22]Ibid p. 13.

[23]Stephen Hill and Brian Morgan, 1998, Inward Investment, Business Finance and Regional Development, MacMillan Press Ltd., p. 14.

[24]Supra note 2 pp. 10-15.

[25]Ibid.

[26]Supra note 2.

refer to the relevant national laws of the contracting parties for the determination of nationality[27]. Legal entities may be excluded on the basis of their legal form, their purpose or their ownership[28]. It can be defined to include or exclude a number of different types of entities. According to dictionary definition, it may also mean "a person who spends money with an expectation of earning a profit"[29]. Thus, investor can be natural or legal person who spends money (capital) with an expectation of earning a profit.

2.3. Investment Areas

Different documents and sources express the term investment areas according to the purpose the term is used. It is expressed in relation with admission of private investors' to proposed investment activities and sectors by state and the term is expressed as investment activities and sectors. The following investment sectors are considered as investment areas[30].

1) Defense, internal public order and state security:

2) Banking activities involving central bank and issuing bank function;

3) Other areas which are considered by law to be absolutely reserved for the state.

The expression of the term investment area above shows us investment areas are sectors that are either allowed or prohibited for investment by investors. It also shows that sectors like agriculture, manufacturing, and service are considered as investment areas.

The OECD FDI Regulatory Restrictiveness Index of 2008 (OECD 2008) found that[31]:

- Among OECD countries, the European Union (EU) countries are generally more open than others;
- Among non-OECD countries, those of Eastern Europe, Chile, and Argentina are among the most open whereas India, China, and Russia are the most restrictive;
- The most restricted sectors are electricity, transport, telecommunications, and finance;
- The least restricted sectors are manufacturing, tourism, construction, and distribution.

It also shows that sectors listed are areas of investment which are included under agriculture, manufacturing, or service sectors. Besides expression of the term investment area, liberal policy of investment where more open approach of investment sectors for private investors in general and foreign investors in particular are recommended by different sources. Advanced industrial nations, including United States (US), favor few restrictions on the activities of transitional corporations and individual international investors while in contrast, many de-

[27]Ibid.

[28]Ibid.

[29]Supra note 18.

[30]Supra note 3 p. 29.

[31]Supra note 3 p. 27.

veloping nations favor major governmental limitations on direct investment activities[32]. Members of OECD countries and increasing number of developing and transition countries today are following open-admission approach in a prevailing manner[33]. Open admission approach is mostly related with the entry of foreign investment to the host country and it implies entry without formal screening and approval process[34].

Restriction on foreign investment can be justified for host countries national security concerns or economic development objectives even with an open admission approach and it is also recognized by World Bank guidelines on foreign investment[35]. Accordingly, restrictions can take place by host countries through different forms either in general manner or sector based. Either "positive list" or "negative list" approach can be followed by host governments to implement sectorial restrictions[36]. Positive list approach refers to governments attempt to enumerate all the sectors or sub-sectors in which foreign investors may invest while negative list approach refers to list of the sectors or sub-sectors that are closed (prohibited) or restricted (allowing only minority foreign ownership, requiring special authorization from foreign investors, and so forth)[37]. Positive list is not recommended since the treatment of the sectors or subsectors that are not in the list is ambiguous while negative list is preferable since sector or subsector if not listed, that sector is automatically deemed allowable without restriction[38]. However, negative list is recommended to be as short as possible, revised from time to time, be static, strictly interpreted, and limited in scope and sectors not to defeat the benefits of negative list[39].

Screening mechanism to non-strategic sectors which includes foreign investment approval is considered as the most problematic barrier to foreign investment and it in general involves an assessment of the investment's potential economic benefits for the host country by the government with rational to decide whether a specific foreign investment is desirable[40]. The followings are arguments against screening requirement[41]:

- Which project is profitable should not be decided by the government but it should be the role of private sector and the role of government is to provide a conducive environment;
- Screening is not an effective way to assess the benefits and costs of prospective investment due to lack of objective economic criteria for deciding whether a particular investment is desirable;
- Screening provisions tend to be vague that they are useless;

[32]Earl H. Fry, 1983, The Politics of International Investment, MacGraw-Hill, USA, p. 129.
[33]Supra note 3 p. 26.
[34]Ibid.
[35]Ibid.
[36]Ibid p. 28.
[37]Supra note 3.
[38]Ibid.
[39]Ibid pp. 28-29.
[40]Ibid pp. 31-32.
[41]Ibid pp. 32-33.

- It restrict FDI and reduce FDI inflows due to lack of objectivity;
- It costs agencies staff time and can lead to corruption, where the process permits discretion;
- Adds investment costs in the form of time delays, onerous compliance requirements, generally results with "hassle costs" and when an investment agency is screener/decision-maker, the hassle cost can include the costs of rent-seeking behavior by corrupt agency officials.

Due to reasons listed above and others, presence of screening mechanism is not recommended. Private investors in general and foreign investors in particular prefers open and unrestricted policy, transparent and minimum or no barriers policy and practices which allows them to invest in investment areas. Thus, screening process has been criticized for establishing cumbersome or complicated procedural regulations and for leading, in most cases, to inefficient results[42].

2.4. Investment Incentives

Investment incentives are generally investment promotion tool and common with investment promotion authorities. They are defined narrowly by investment regulations. It only includes exemption from income tax and exemption from customs duty. The term is defined in different ways under different international documents. The followings, among others, are some of definitions concerning investment incentive.

It may be defined as "Measures designed to influence the size, location or industry of a FDI project by affecting its relative cost or by altering the risks attached to it through inducements that are not available to comparable domestic investors"[43]. This definition is concerned with FDI investment incentive. It is considered to meet two categories of measures which are rule based approach that rely on discrimination/according to nationality/of investors to be stipulated by law, and specific approach that tailor incentives to individual foreign investors or investment contexts. It is also referred as "Measurable economic advantages that governments provide to specific enterprises, with the goal of steering investment in to favored sectors or regions of influencing the character of such investments"[44]. Benefits under this definition can be fiscal/as with tax concessions/or none fiscal/as with grants, loans, or rebates to support business development or enhance competitiveness. It can simply mean encouragement, special right, enhancing, or it may also mean waiver of an obligation.

There is debate as regards the usefulness and efficiency of investment incentives. They are considered as very useful marketing tool on one side and the concern about fiscal costs on the other hand are still debating[45]. Despite the debate, investment incentives are considered as investment promotion tool and

[42]Supra note 3.
[43]Christiansen H, 2003, Checklist for Foreign Direct Investment Incentive Policies, OECD Publishing, pp. 11-12.
[44]Supra note 3 p. 56.
[45]Supra note 43.

common with investment promotion authorities[46]. Offering investment incentives, which includes tax reductions and other fiscal concessions, cash grants and loans, start-up assistance to investors, etc., by governments is used as one of centerpiece mechanisms to improve the enabling environment in attracting investment in general and private investment in particular[47]. Investment Incentives are instrumental in attracting investment when they are non-discriminatory/offer similar incentives to like classes of investors, whether domestic or foreign, correct proven weakness in the domestic environment that cannot otherwise be easily addressed, and where local authorities aim to jump-start economic activity in a given sector[48].

Investment incentives have both positive and negative welfare effects. When investment incentive competition causes governments to increase the quality and volume of their FDI inflow through more effective and cost efficient incentives, it has positive domestic effect while when competition exacerbate poor incentive policies, potentially leading officials to use inefficient incentive instrument or to offer incentives that are greater than the net benefits of the net investment benefits of the investment project to the host country, it has negative effect[49]. It will be the case where government has over subsidized the investment project. There are different types of investment incentives recognized under different sources, Investment Climate Advisory Services of the World Bank Group (2010), classify investment incentives in the following manner[50]:

- Regulatory investment incentives (exemption from specific rules and regulation) which includes easing of environmental requirements and exemption from certain labor requirements;
- Financial investment incentives which includes infrastructure subsidies, job training subsidies, relocation and expatriation support, administrative assistance, and temporary wage subsidies;
- Fiscal investment incentives which includes reduced corporate taxation, incentives for capital formation, and reduced impediments to cross-border operation; and
- Non-tax incentives-investor after care.

Despite the existence of varies debates on this issue, investment incentives helps to promote investment.

3. Investment Areas and Incentives under the Ethiopian Law

Historical Background

Until the 1960 commercial code of Ethiopia was enacted and all economic activ-

[46]Ibid.

[47]Christiansen, H., C. Oman and A. Charlton, 2003, Incentive Based Competition for Foreign Direct Investment, The Case of Brazil: OECD Working Papers on International Investment, 2003/1, OECD Publishing, p. 3.

[48]Ibid.

[49]Ibid p. 8.

[50]Supra note 43 pp. 56-57.

ity were guided by it, the economic policy of the country was a free economy where the private sector was active participant of the economy and it was continued up to 1973[51]. It was the period where the private sector plays a leading role on economic activity of the country. However, even during the period before 1974/75, the participation of private sector was considered very few in large scale investment activities, particularly in manufacturing sector[52]. It was considered as Emperial period where the import substitution was targeted as policy framework from early 1950's to 1974/75.

The period after 1974 was marked as the coming in to force of socialist government in Ethiopia. It was the period characterized by the direct control the country's economic activities by the government. The centrally planned government expressly discouraged private sector from economic activity from 1974/75 to 1991/92[53]. It implies that investment as part of economic activity was also discouraged by the government due to discouraged private participation of the period. During this period privately owned manufacturing establishments, privately owned land, and extra residential houses and commercial establishments were nationalized and the government took away almost full control of the production and distribution activities in the economy. The government assumed its trading activities and leadership in economic activities to the extent down to the retail level[54]. The year 1991 was the period which marked the fall of socialist government called Dergue and coming in to force of the current ruling government of the country called Ethiopian People Revolutionary Democratic Front (EPRDF) which marked the beginning of relative liberalization of the economy, expansion of private investment, and overall economic growth. The current government has moved to liberalization and deregulation of the economy by transforming it from a centrally planned command structure to a market based economy and to create an environment conducive to private sector growth[55].

The Transitional Government of Ethiopia/EPRDF/enacted EPRDF Government Investment Proclamation No. 15/1992 to open the door for private investment[56]. Despite the opening of investment sectors to private investors, the proclamation reserved sectors such as large scale electric power and postal services to the government[57]. It also introduced joint investment with government and provided for incentives to attract and promote private investment[58]. The investment office was established by the proclamation to regulate and supervise

[51]Tsegaye Teklu, 1984, Investment Promotion and Incentives in Ethiopia, http://www.eeaecon.org/, p. 355
[52]Supra note 7 p. 15.
[53]Ibid.
[54]Supra note 51 p. 356.
[55]World Bank Team, 2004, Determinants of Private Sector Growth in Ethiopia's Urban Industry: The Role of Investment Climate, Investment Climate Assessment Report, Washington DC p. 3, pp. 15-16.
[56]Supra note 18 p. 45.
[57]Ibid.
[58]Ibid.

investment activities[59].

The Federal Democratic Republic of Ethiopia (FDRE) Investment Proclamation No. 37/1996 was enacted after above mentioned proclamation number15/1992 with some advancement. Besides reduction of minimum capital requirement and others, the proclamation allowed foreign investors to invest in building construction equipment, and hotels whose standard was below the four star and five grades[60]. It extended investment incentives to additional sectors such as education, hotels, tourism, and health and the period of incentive was further extended from three to five years[61]. Sectors such as banking and insurance, electricity generation up to 25 Megawatt, air transport with the capacity of up to 20 passengers or 2700 kilo gram were reserved for Ethiopia nationals[62].

The FDRE Investment Proclamation No. 116/1998 and FDRE Investment Council of Ministers Regulation No. 36/1998 were amendments to the 1996 Investment Proclamation mentioned above enacted with aim to encourage and facilitate investment by opening more investment areas to the private sector and providing additional investment incentives[63]. The followings are among the main amendments included under above amendment proclamation and regulation[64]:

- It modified definition of investor by allowing liberty to foreign nationals of Ethiopian origin to choose to be treated as domestic investors or foreign investors.
- Hydro-electric power generation for private sectors was fully opened but for exclusive monopoly of the distribution of the electricity by the government.
- Telecommunication sector was also allowed to private investors to invest jointly with the government. Defense industries were also allowed jointly with the government.
- Accounting and auditing consultancy services in addition to engineering, architectural or other technical services was expanded.
- Oil companies such as Shell, Mobil, Agip and Total as areas of investment for foreigners was recognized by regulation number 35/1998.
- Additional power to decide additional investment incentives other than those provided under the investment regulation was conferred to the Ethiopian investment board/EIB. However, the power to approve was given to the council of ministers.

The FDRE Investment Proclamation with its amendment is repealed by FDRE Investment Proclamation No. 280/2002[65]. It aims to encourage and promote investment in general and enhance the role of private sector in particular so as to accelerate the economic development of the country. As part of the private sec-

[59]Ibid p. 46.
[60]Ibid.
[61]Ibid.
[62]Ibid.
[63]Ibid p. 48.
[64]Ibid p. 48-50.
[65]Investment Proclamation No. 280/2002 of FDRE, Article 40/1.

tor participation and promotion of investment foreign investors are allowed on all areas of investment, other than those exclusively reserved for the government or joint venture with the government, or for Ethiopian nationals or other domestic investors[66]. It shows that residual reservation is allowed for foreign investors where all other areas than the areas expressly prohibited are considered areas of investment where foreign investors can invest. There are also areas exclusively reserved for domestic investors. "Domestic investor" is defined under the proclamation to include Ethiopian nationals, foreign national permanently residing in Ethiopia having made an investment, and government itself[67]. Accordingly areas of investment reserved for domestic investors are classified as areas exclusively reserved for domestic investors and areas exclusively reserved for Ethiopian nationals. Besides areas exclusively reserved for domestic investors, areas exclusively reserved for Ethiopian nationals include[68]:

- Banking, insurance and microcredit and saving services;
- Forwarding and shipping agency services;
- Broadcasting services; and
- Air transport services using aircraft with a seating capacity of up to 20 passengers.

Besides allowing private sectors to investment areas, government also exclusively reserved and jointly allowed certain investment areas for the government. Transmission and supply of electrical energy through the integrated national grid system and postal services with the exception of courier services are exclusively reserved for government while manufacturing of weapons and ammunition, and telecommunication services are jointly allowed with the government[69]. By allowing joint venture with the government, the government follows pragmatic approach by trying to transfer "technology, technical know-how, and managerial skill"[70] on one hand and to maintain control over the sectors. Besides investment areas exclusively reserved for the government and jointly allowed with the government, investments in the prospecting, exploration and development of minerals and petroleum resources are not included under the scope of investment proclamation[71]. Though open admission approach for private investors is recommended as discussed earlier, investment areas exclusively reserved for the government, jointly allowed with the government, and investment areas not covered under the scope of investment proclamation are generally restricted for private investment. In addition to areas restricted for private investors, investment areas reserved for domestic investors and investment areas exclusively reserved for Ethiopian nationals are restricted for foreign investors. However, the proclamation mentioned allows residual reservation through negative list

[66]Ibid, Article 8.
[67]Ibid, Article 2/5.
[68]Council of Ministers Regulation No. 84/2003 of FDRE on Investment Incentives and Investment Areas Reserved for Domestic Investors, Schedule Article 2.
[69]Supra note 65, Article 5.
[70]Ibid, Article 4/8.
[71]Ibid, Article 3.

approach as it is recommended as discussed earlier.

The proclamation mentioned above aims to widen the scope of participation of foreign investors and facilitate conditions thereof in addition to that of domestic investors with a view to enhancing the country's investment activities[72]. It also proposes the encouragement and promotion of investment accelerate the country's economic development[73]. As part of investment promotion and facilitation tool investment incentive is adopted to be the part of the investment proclamation to be regulated by regulation. Council of ministers are mandated to issue regulation which specifies areas of investment eligible for investment incentive considering investment objective stated under the proclamation and to determine the type and extent of entitlement to incentives[74]. Remittance of funds and guarantees against expropriation are also stated as part of incentives for foreign investors. Foreign investors have the right to make the remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance in respect of approved investment and it includes[75]:

- Profits and dividends accruing from investment;
- Principal and interest payments on external loans;
- Payments related to a technology transfer agreement registered in accordance with the proclamation;
- Proceeds from the sale or liquidation of an enterprise;
- Proceeds from the transfer of shares or of partial ownership of an enterprise to a domestic enterprise.

Expropriation or nationalization is not allowed in principle and if expropriated when required by the public interest, it requires compliance with the requirement of law, adequate compensation, corresponding to market value, paid in advance, and remittance of compensation out of Ethiopia in convertible foreign currency for foreign investors[76]. Even though the terms like adequate compensation are debating as to their meaning, it shows that expropriation or nationalization is provided as incentive in the form of guarantee. A foreign national taken for domestic investor and a foreign investor have the right to own a dwelling house and other immovable property[77]. However, the ownership of land is not allowed as part of immovable property[78].

Minimum capital of 100,000 US dollars for a single investment project is required from any foreign investor to be allowed to invest in Ethiopia[79]. It is reduced to 60,000 US dollars if foreign investor invests jointly with domestic investor[80]. However, minimum capital requirement for foreign investors investing

[72]Ibid, Preamble.
[73]Ibid.
[74]Supra note 69, Article 9.
[75]Ibid, Article 68.
[76]Ibid, Article 21.
[77]Ibid, Article 38.
[78]FDRE Constitution Proclamation No. 1/1995, Article 40/3.
[79]Supra note 69, Article 11.
[80]Ibid.

in areas of engineering, architectural, accounting and audit services, project studies or business and management consultancy services or publishing is reduced to 50,000 US dollars if the investment is wholly made on his/her own or 25,000 US dollars if the investment is jointly made with domestic investors[81]. A foreign investor is not required to allocate minimum capital if he/she is re-investing his/her profit or dividends or exporting at least 75% of his out puts[82]. Thus except the last case mentioned above in all other cases foreign investor is required to allocate minimum capital even though minimum capital requirement is considered as one of the entry barrier for foreign direct investment and thereby negatively affects promotion of investment.

Unlike the proclamation mentioned above, FDRE Investment Incentives and Investment Areas Reserved for Domestic Investors Regulation No. 84/2003 defines investment incentive by only providing for exemption from income tax and exemption from the payment of customs duty. Incentive under the regulation is narrowly defined though there are different types of incentives discussed earlier which promotes and facilitates investment. Investment incentive granted for income tax ranges from two to seven years. However, council of ministers can decide granting of period for income tax exemption more than seven year[83]. An investor can import capital goods necessary for his/her enterprise and spare parts whose value is not greater than 15% of the total value of the capital goods to be imported duty free where he/she is granted with a customs duty exemption privilege[84]. However, duty free capital goods and construction materials are required to be superior to locally produce in terms of price, quality, and quantity[85]. However, interviews conducted against individuals from Ethiopian Investment Agency shows that there is lots of complain as regards the scope of capital goods and spare parts from private investors which by itself negatively affects investment promotion. Any investor can also import duty free ambulances for employees that are needed for emergency cases and buses for tour operation services[86].

The FDRE Investment Proclamation No. 769/2012 is a proclamation governing investment activities by repealing FDRE Investment Proclamation No. 280/2002. Investment under current proclamation is defined as expenditure of capital in cash or in kind or in both by an investor to establish a new enterprise or to expand or upgrade one that already exists[87]. it is defined in a similar way with the repealed investment proclamation except for more clarification of the term capital be either in cash, in kind or in both. The terms "capital" and "enterprise" are also defined in both repealed and current investment proclamations. "Enterprise" refers to an undertaking established for the purpose of profit

[81]Ibid.
[82]Ibid.
[83]Ibid, Article 4/2.
[84]Ibid, Article 8.
[85]Ibid.
[86]Ibid, Article 9.
[87]Investment Proclamation No. 769/2012 of FDRE, Article 2/5.

making[88] while "capital" refers to local or foreign currency, negotiable instruments, machinery or equipment, buildings, working capital, property rights, patent rights, or other business assets[89]. From the definition above investment can simply refer as the expenditure of some input to get some output and input in above definition is capital while output is profit.

Investor is not defined under the proclamation but it recognizes domestic and foreign investor having invested in Ethiopia[90]. The proclamation recognizes only two types of investors, foreign and domestic, and government is included under domestic investor[91]. Besides government and Ethiopian nationals, foreign nationals treated as domestic investors are also included under the definition of domestic investors.

Enhancing the role of the private sector in general and enabling foreign investment to play its role in particular to accelerate country's economic development are among the objectives of current proclamation[92]. However, unlike the repealed investment proclamation number 280/2002, the current investment proclamation only allows certain areas of investment for foreign investors. Residual reservation is not allowed for foreign investors than expressly allowed investment areas[93]. Foreign investors are allowed to invest in areas of investment specified in the schedule attached to FDRE Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation number 270/2012[94]. However, Investment Board is entrusted with power to allow foreign investors to invest in areas other than those specified in the schedule, except investment areas exclusively reserved and jointly allowed with government and investment areas exclusively reserved for Ethiopian nationals[95]. The current mentioned investment regulation provides for investment areas reserved for domestic investors. However, there is discrepancy between the title and content of the provision providing for investment areas reserved for domestic investors under the regulation[96]. While the title provides for investment areas reserved for domestic investors, the content provides for areas of investment exclusively reserved for Ethiopian nationals. Domestic investors are defined to include Ethiopian nationals and foreign nationals treated as domestic investors/foreign nationals who are Ethiopian domiciliary. However, foreign nationals treated as domestic investors are excluded from investment areas reserved for domestic investors. Accordingly, only Ethiopian nationals are allowed to invest in investment areas reserved for domestic investors and the fate of foreign nationals treated as domestic investors is not clearly indicated under current In-

[88]Ibid, Article 2/2.
[89]Ibid, Article 2/3.
[90]Ibid, Article 2/4.
[91]Ibid, Article 2/5.
[92]Ibid, Article 5.
[93]Ibid, Article 8.
[94]Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012 of FDRE, Article 4.
[95]Ibid, Article 4/2.
[96]Ibid, Article 3.

vestment Proclamation mentioned above.

In addition to transmission and distribution of electrical energy through the integrated national grid system and postal services with the exception of courier services which were also exclusively reserved for the government under the repealed FDRE Investment Proclamation No. 280/2002, air transport services using air craft with a seating capacity of more than 50 passengers is also clearly included under investment areas exclusively reserved for the government[97]. There is no change of the content as regards investment areas jointly allowed with the government with the repealed proclamation mentioned. However, the council of ministers is entrusted with the power to allow or open investment areas exclusively reserved for the government or jointly allowed with the government to private sectors by issuing regulation whenever it needs necessary[98].

Like the repealed investment proclamation mentioned, the current investment proclamation entrusts council of ministers to issue regulation considering the investment objectives provided under the proclamation which specifies investment areas eligible for investment incentive which determines the type and extent of entitlement to incentive[99]. Under investment objective enhancement of the role of private sector and enabling foreign investment play its role in the country's economic development are included[100]. Investment incentive as special right granted for investors promotes and facilitates private investors to play their role in investing investment areas there by accelerate country's economic development.

Payments related to a collaboration agreement registered in accordance with the proclamation and compensation paid to an investor due to expropriation or nationalization are additional rights granted for foreign investor to remit funds out of Ethiopia to repealed proclamation mentioned[101]. However, remittance of funds out of Ethiopia is not allowed to a local partner in a joint investment[102]. Provision governing expropriation or nationalization is similar with the repealed proclamation mentioned above.

Minimum capital requirement for foreign investors is increased in all aspects except the area where foreign investors are not required to allocate minimum capital than the repealed proclamation mentioned. Part two of the FDRE Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012 also define investment incentive narrowly like the repealed FDRE Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 84/2003. It only includes exemption from income tax and exemption from customs duty[103].

[97]Supra note 87, Article 6/1.
[98]Ibid, Article 6/3.
[99]Ibid, Article 23.
[100]Ibid, Article 5.
[101]Ibid, Article 26/1.
[102]Ibid, Article 26/2.
[103]Supra note 94, part 2.

4. Summary of the Research

According to the current Ethiopian investment law, the government of Ethiopia is categorized as a domestic investor and at the same time it is a regulator. There are areas of investment allowed for foreign investors and investment areas not expressly allowed are prohibited. The legal framework that reserves major investment areas for exclusive or joint investment by the government, defines government under domestic investors, follows positive list approach against foreign investors, is discrepant as regards investment areas reserved for domestic investors which are not allowed for foreign nationals treated as domestic investors. It also allows entry barrier by providing minimum capital requirement and screening mechanism and narrowly defines investment incentives under investment regulations. The scope of investment incentive is not wide under the Ethiopian investment laws. Hence, the investment incentives are only defined from the point of exemption from income tax and custom duty.

5. Conclusion

The current investment laws of Ethiopia exclusively reserved and jointly allow certain investment areas. If not open admission is allowed, residual reservation needs to be allowed as far as promotion of private investment is one of the objectives under investment law of Ethiopia. The Ethiopian government classified itself as one type of domestic investor despite its regulatory and promotion functions which can potential distortion of market. By doing so the government becomes the player and regulator at the same time. It is recommended not to include government under the definition of domestic investors and also to classify investors at least as domestic, foreign, and government.

The proclamation only allows certain areas of investment for foreign investors and investment areas not expressly allowed are prohibited, which is positive list approach. So, it needs that investment law has to address the discrepancy as regards investment areas reserved for domestic investors but not allowed for foreign nationals treated for domestic investors. Foreign nationals treated as domestic investors under current investment law are not allowed to invest in areas reserved for domestic investors since it reserves the areas only for Ethiopian nationals.

Regarding minimum capital, it is a requirement against foreign investors and its amount is increased under current investment law regarding all areas of investment requiring minimum capital. In spite of the fact that the approval mechanisms and minimum capital requirements are barrier to investment and investment promotions, the current Ethiopian investment law is increased the amount of minimum capital requirement. Thus, it is recommended if not decreased, the minimum capital requirement should not be increased as far as it is barrier against foreign investment and hence negatively affects investment promotion.

The investment laws only narrowly define investment incentives under investment regulations by only including exemption from income tax and exemption from customs duty. As far as investment incentive is one of the investment promotion and facilitation tool, it is recommended to define it widely by including other types of incentives though it needs further research as to its effectiveness and use.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Abate, T. (2009). *Investment Law Teaching Material: Prepared under the Sponsorship of the Justice and Legal System Research Institute*.

Christiansen, H. (2003). *Checklist for Foreign Direct Investment Incentive Policies*. Paris: OECD Publishing.

Christiansen, H., Oman, C., & Charlton, A. (2003). *Incentive Based Competition for Foreign Direct Investment, the Case of Brazil*. OECD Working Papers on International Investment, 2003/1, Paris: OECD Publishing.

FDRE Constitution Proclamation No. 1/1995, Federal Negarit Gazeta, 1st Year No. 1, Addis Ababa, Ethiopia, 21st August 1995.

Fry, E. H. (1983). *The Politics of International Investment*. New York: McGraw-Hill Publishing Co. Ltd.

Hill, S., & Morgan, B. (1998). *Inward Investment, Business Finance and Regional Development*. New York: MacMillan Press Ltd. https://doi.org/10.1007/978-1-349-14181-4

Investment Incentives and Investment Areas Reserved for Domestic Investors FDRE Council of Ministers Regulation No. 84/2003, Federal Negarit Gazeta, 9th Year No. 34, Addis Ababa, Ethiopia, 7th February, 2003.

Investment Incentives and Investment Areas Reserved for Domestic Investors FDRE Council of Ministers Regulation No. 270/2012, Federal Negarit Gazeta, 19th Year No. 4, Addis Ababa, 29th November, 2012.

Investment Proclamation No. 280/2002 of FDRE, Federal Negarit Gazeta, 8th Year No. 27, Addis Ababa, 2nd July 2002.

Investment Proclamation No. 769/2012 of FDRE, Federal Negarit Gazeta, 18th Year No. 63, Addis Ababa, Ethiopia, 17th September 2012.

Jones, C. P. (1991). *Investments Analysis and Management* (3rd ed.). Raleigh, NC: North Carolina State University.

Panitchpakdi, S. (2011). *Scope and Definition: UNCTAD Series on Issues in International Investment Agreement II*.

Sornarajah, M. (2010). *The International Law on Foreign Investment* (3rd ed.). Cambridge: Cambridge University Press. https://doi.org/10.1017/CBO9780511841439

Teklu, T. (1984). Investment Promotion and Incentives in Ethiopia. 349-366. http://www.eeaecon.org/

World Bank (2010). *Investment Law Reform: A Handbook for Development Practitioners*. Washington DC: World Bank.

World Bank Team (2004). *Determinants of Private Sector Growth in Ethiopia's Urban Industry: The Role of Investment Climate*. Investment Climate Assessment Report, Washington DC.

Yannaca-Small, C., & Liberti, L. (2008). *Definition of Investor and Investment in International Investment Agreement: Understanding Concepts and Tracking Innovations* (pp. 7-100). Paris: OECD Publishing.