INVESTOR-STATE ARBITRATION UNDER ETHIOPIAN LAW

BY: BEAKAL KETEMA WOLDEGIORGIS

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE LLM DEGREE (PUBLIC INTERNATIONAL LAW)

ADDIS ABABA UNIVERSITY

SCHOOL OF LAW AND GOVERNANCE

DEPARTMENT OF LAW

JUNE 2018

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Investor- State Arbitration under Ethiopian Law

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By: Beakal Ketema Woldegiorgis

Approved by board of Examiners

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Declaration

The thesis is my original work, has not been submitted for a degree in any other University and that all materials used have been duly acknowledged.

Signature of confirmation

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Acknowledgement

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I am also indebted to my friends Taye Tinti and Mezgebua Tadesse for their support and encouragement to complete this work.

Beakal Ketema Woldegiorgis

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List of Acronyms

BIT- Bilateral investment treaty

COMESA CCIA - Common Market Area for Eastern and Southern Africa Common Investment Area

FET - Fair and Equitable Treatment

ICC - International Chamber of Commerce

ICSID - International Centre for Settlement of Investment Disputes

IIA - International investment agreement

ISDS - Investor-state dispute settlement

MOFA – Ministry of Foreign Affairs

NYC- New York Convention - Convention on the Recognition and Enforcement of Foreign Arbitral Awards

PCA - Permanent Court of Arbitration

UN- United Nations

UNCITRAL - United Nations Commission on International Trade Law

UNCTAD - United Nations Conference on Trade and Development

CHAPTER ONE

1. Background

Arbitration is one kind of Alternative Dispute Resolution mechanisms. Arbitration allows a dispute to remain private and confidential between parties. The public interest is also served because the parties bear the costs of arbitration themselves. Arbitration is more flexible than court litigation. The parties have control over their own dispute, the procedures followed and the principles applied to resolve it. This increases the satisfaction of the disputants with the process and the outcome. Arbitration is also faster, and consequently less expensive, than court litigation. There is no precedent value in the decision reached, so a concern for future cases will not have impact on the decision. As the procedure can be designed to be far less formal and intimidating than court, the confrontational atmosphere of the dispute is diminished. This is especially important in maintaining ongoing business relationships.

On the contrary, Arbitration may not always be faster, less expensive, and less formal. It may be more expensive and time-consuming than litigation if the arbitration agreement, choice or conduct of arbitrators, procedure, or award is challenged. In addition, there are concerns regarding the ability and qualifications of arbitrators, and whether they should be subject to professional standards.

Generally, arbitral decisions are not reviewable for errors of fact or law, which may lead to unfair results.

Investor-State arbitration settles disputes between an investor and a host state using international arbitral tribunal. Most of the over 3,000 International Investment Treaties in force worldwide allow investors to take disputes to arbitration.[1]The investor typically alleges that the State has violated the treaty, and will seek compensation.

Investor- State arbitration clause is found in treaties signed between Host and Home State. It guarantees investors against an action by the State that could be detrimental

[1]http://pubs.iied.org/17241IIED visited on November 03, 2016 at 11:20hrs

to their investment. Both an investor and a State party may agree to settle possible dispute through arbitration.

Parties to the treaties in most of the agreements choose International Convention on Settlement of Investment Dispute on its acronym (ICSID) or United Nations Commission on International Trade Law rules (UNCITRAL arbitration rules). In most Bilateral Investment Treaties settlement of dispute articles allow investors to take disputes to arbitration based on ICSID convention leads by 197 cases from UNCITRAL. Overall, the numbers available to date indicate that ICSID Rules 448 cases which was used in investment arbitration, followed by United Nations Commission on International Trade Law rules by 251 cases.[2]

In terms of the institutions administering the largest number of investment treaty claims, the available data suggests that ICSID is by far the most active arbitral institution in this field. The reasons of the dispute can be different. Among the disputes between a State and private investors, Investors take greater in number to brought cases to the arbitration tribunals and won most of them[3]. Breach of the contract by either parties, inadvertent or purposeful act by the host State, unfair and inequitable treatment[4] and the umbrella clause within the BITs are the referred issues in the dispute.

Investors prefer a third country to be the seat of the tribunals than the host State. It is due to avoid unfamiliar justice system and fear of involvement from the host State. The seat of the tribunal can also be a source of dispute and that matters significantly.

The dispute has a consequence; Arbitral Award. It can be monetary, specific performance or etc. Until today the biggest monetary compensation is against Ecuador. The amount $1.7 billion[5] was followed by the withdrawal of Ecuador from the ICSID convention. The arbitration rules are final and binding. This amount of compensation could affect the annual budget of a country. The financial and political outcome forces some States to limit the Investor-State arbitration clause in their treaties.

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[2] http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution , visited on November 10 2016 at 14:00hrs.

[3] http://investmentpolicyhub.unctad.org/ISDS?status=2 visited on November 10, 2016 at 14:00hrs

[4] http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches visited on November 10, 2016 at 15:00hrs

[5] http://italaw.com/sites/default/files/case-documents/italaw1094.pdf /Visited on November 12, 2016 at 12:00hrs

Fair and Equitable treatment and Umbrella clauses are the most referred issues for investors to sue a host State. The fact that these terms are the investors guarantee, because of a slight inadvertent act by any government (can be of any part of government institution) part in the relationship, were referred for being unfair treatment by the powerful State. From the record of arbitral awards among Investor-State disputes in 2012, Investors cover 31% and the State 42% out of the 244 cases taken to international arbitration tribunals. [6]However, in real practice, investors win most of the subject matter cases. The biggest number covers the issue of jurisdiction among the cases the State won. The figure for investors won the dispute encourages the others to include the clause. States agree to use it as a strategy to attract Foreign Direct Investment. It actually helped many capital importing countries. Such figures also motivate investors to initiate disputes against the host State using any possible gap.

The decisions given by the arbitrators will be final and binding. States seldom reject such award in domestic courts as a form of injunction. Similarly, ICSID convention commits States to recognize its tribunal awards as binding and calls on States to enforce awards as if they were final judgments. States may not refuse such awards to encourage and avoid hurdling to their Foreign Direct Investment. Due to financial and political outcome, States limit their exposure to investor-State arbitration clause in their treaties. Some countries devise mechanisms that forecast issues before escalation in each sector office. Countries like Bolivia[7], Venezuela[8] and Ecuador[9] withdrew from ICSID while South Africa and Indonesia terminated the Bilateral Investment treaty with the Netherlands for the reason that the Investor State Dispute Settlement articles allow investors to sue sovereign States directly while trying to design a development policy that might affect the investors' profitability. [10]

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[6]http://unctad.org/en/PublicationsLibrary/wir2013_en.pdfPp 111 visited on November 10 2016 at 14:00hrs

[7] http://unctad.org/en/Docs/webdiaeia20106_en.pdf Pp 9 paragraph 2 visited on October 2016 at 12:00hrs

[8]https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/

[9]http://unctad.org/en/PublicationsLibrary/wir2013_en.pdfpp, 111. This is the highest award which leads Ecuador to unilaterally terminate an oil contact with Occidental; http://uk.practicallaw.com/2-422-1266?service=arbitration visited on November 20 2016 at 15:00hrs

[10]http://somo.nl/news-en/after-south-africa-indonesia-takes-a-brave-decision-to-terminate-its-bilateral-investment-treaty-with-the-netherlands visited on November 20 2016 at 15:00hrs

Arbitration is not a new phenomenon to Ethiopia. The 1960 Ethiopian Civil Code Title XX Chapter Two stipulates arbitral submission and arbitration agreement. However, it was not developed as the other laws and dispersed in different legislations. Separate arbitration law is not promulgated yet except in draft form.

Ethiopia is a signatory of the ICSID convention but has not ratified it. Over the past two decades more than thirty BITs have been signed between Ethiopia and foreign States.[11] In almost all of the treaties, international arbitration and Bilateral Investment Treaties ICSID convention is the indicated arbitration rule at the time of dispute.

Ethiopia as a signatory to the ICSID convention and having several Bilateral Investment Treaties (BITs) into force, Investor-State dispute may arise in the future. When such cases arise, having clear laws, arbitration institutions, as well as enforcement mechanisms will be important.

In this thesis, a look will be made at what Ethiopia lacks in the sector and international legislations.

1.2. Statement of the Problem

Ethiopia has signed more than thirty bilateral agreements of which beyond twenty have been enforced.[12] Within these Bilateral International Treaties, ICSID convention and other arbitration rules are indicated as the preferred dispute resolution mechanisms. Ethiopia has signed but has not ratified ICSID[13].Experiences of other countries show that the award from the tribunals could directly affect even the annual budget of a country.

The issue is whether being signatory and not ratifying the convention enables Ethiopia to escape liability. Neither seems to be good choices. But why do investors knowing these tangible facts, enter into a treaty referring the convention? From State practice, the International law refers to Customary International law; that is other States Practice to fill the possible gap. This study will attempt to deal with this issue.

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[11] http://investmentpolicyhub.unctad.org/IIA/CountryBits/67 visited on November 1st, 2016 at 10:00hrs

[12] http://investmentpolicyhub.unctad.org/IIA/CountryBits/67#iiaInnerMenu Visited on February 1st, 2018 at 10:00hrs

[13] *Supra* note 11

The other problem is Fair and Equitable treatment and Umbrella clauses in the enforced Bilateral Investment Treaties. Both are identified as security concern for investors at the same time backed the disputes to refer the Bilateral Investment treaties. States are sued for not being fair and equitable to the investors. It has no definition and will be seen on a case by case basis. Ethiopia should have clear laws and must be cautious in the future consequence while signing treaties.

Countries like Peru learnt from their past and devised a mechanism by instituting a separate body which screens possible disputes to be solved before going to the Arbitration Tribunals.

This paper tries to see the need and the risk of incorporating Investor-State Arbitration and Umbrella clauses and Fair and Equitable treatment in the Bilateral Investment Treaties. Consenting to arbitrate before international tribunal without having Arbitration law and enough arbitral award enforcement mechanism abroad and locally have negative impact both to State and Investor. This research intends to analyze the need, risk and where the gap lies.

1.3. Research Questions

1.3.1. General Questions

The study will try to address the question as to how the current legal regime and inclusion of dispute settlement clauses in Investor-State arbitration is compatible with international standard.

1.3.2. Specific Questions

1.3.2.1. How are typical terms defined in the legal instruments and the conceptual framework?

1.3.2.2. How are Investor-State Arbitrations analyzed and compared to international instruments?

1.3.2.3. What is the reality with respect to Investor-State Arbitration in Ethiopia?

1.4. Objective of the study

1.4.1. General Objective

To analyze the inclusion of dispute settlement clauses in Investor- State arbitration in the context of Ethiopia's law and its compatibility with internationally accepted legislation.

1.4.2. Specific Objective

1.4.2.1. To define the typical terms and conceptual framework

1.4.2.2. To compare and analyze Investor-State Arbitration from international Arbitration norms

1.4.2.3. To find out and examine the reality of Investor-State Arbitration in Ethiopia

1.5. Significance of the Study

1.5.1. This research will assist academicians, policy makers, negotiators and others by highlighting the consequences of signing a treaty without first analyzing it thoroughly.

1.5.2. As Ethiopia is inviting investors by giving several incentives, taking promotional activities and arrangements, investors will step-in considering the cheap and easily trainable labor as well as abundant land. However, the treaty signed does not consider future consequence and possible negative impact both for the Investor and the State. This study helps in filling this gap.

1.5.3. Showing the possible risk and gap will enable the policy makers as well as negotiators to re-evaluate their action and thereby deter future complexity. This study will provide information to lawmakers so as to update the existing law to fill in the existing lacuna. Academicians may also capitalize on the same area and contribute more to the understanding of the issue.

1.6. Scope of the study

The study is primarily aimed at looking into the Bilateral Investment Treaties (BIT) signed and ratified by Ethiopia. Furthermore the issue of Investor- State Arbitration from BITs in relation to the existing Ethiopian laws as well as International Arbitration rules will be analyzed. The study will focus on how the existing law prevents, traces, restrains and ascertains future possible difficulties in Investor-State Arbitration. The legal analysis among the international and signed BITs will take large portion of the study. Nevertheless its scope will be limited to Investor-State Arbitration.

1.7. Limitation of the Study

The major problem the researcher faced is access to information. As the issue of Investor-State is confidential, officials and other informants are not be familiar with it. On top of this accessing a real case was the challenge to the researcher.

The other limitation was in relation to reference literature. As the issue is experienced confidentially, the researcher has mainly relied on web sources, official sites of ICSID and other international organization sites.

The third constraint of the researcher is related to time and finance.

1.8. Methodology

1.8.1. Research design

The research design for the study will be analytical. The research will try to describe the existing situations in the selected area, analyze major issues and put forth sound recommendations.

1.8.2. Method of the study

The research has applied qualitative and quantitative methods to clarify concepts, characteristics, counts, and measures to demonstrate implications of the issue under consideration. Data presented in study has been obtained both from primary and secondary sources. Primary source information was collected from respondents through qualitative methods. International laws and relevant instruments are thoroughly assessed. Secondary data is collected through review of relevant literatures. Research reports and publications are also considered to clarify issues.

1.8.3. Qualitative Method

The researcher analyzed data in tandem with related laws. Information was gathered through interview following interview guide principles. To get information, discussion was also held with relevant bodies engaged in actual implementation of the law using a list of open and close ended questions.

1.9. Organization of the Study

This study has five chapters.

- The first chapter deals with the background, objective, significance, scope and methodology of the study.
- The next chapter defines the typical terms and conceptual framework of the study.
- The third part covers the comparative legal analysis of the Investor-State arbitration and touches upon international legislations.
- The fourth part focused on the law and reality of Investor- State arbitration under Ethiopian law.
- The last chapter consists of conclusion and recommendation.

CHAPTER TWO

2. Definition of Typical Terms and Conceptual Framework

2.1. Defining Investment

Defining the term Investment and Investor, especially foreign investment and foreign investor, is among the key elements determining the scope of application of rights and obligations under international investment agreements.

The term investment is defined differently in different legislations and writings.

The United Nations Commission on Trade and Development on its acronym UNCTAD discussed many issues to cover all aspects of the term. It points out that the term can be defined by both parties or by the host State. The definition may include or exclude specific assets or activities. The report shows that trying to define the term may narrow or broaden the scope as well as the jurisdiction.[14] Therefore its meaning could be contextualized according to the Bilateral Investment Treaties or the host State law.

Investment is defined under the Federal Democratic Republic of Ethiopia Investment Proclamation as follows;

"*Expenditure of capital in cash or in kind or both by an investor to establish a new enterprise or to expand or upgrade one that already exists.*"[15]

As per the UNCTAD, most of the definitions are found in the treaties among States and investors. Thus, as they will be liable to the terms they sign, the specific definitions must be seen upon arbitration.

2.2. Conceptualizing State and International Investment Law

2.2.1. State

State in Investor-State arbitration scope may include home State and host State. The home State represents the investor and host State the place where the investment takes place. Both States do have interest in the treaties signed for the benefit of the outcome

[14]UNCTAD Series on Issues in International Investment Agreements II; UNITED NATIONS New York and Geneva, 2011.Pp 24-27

[15]Proclamation No.769/2012 Investment Proclamation Article 2(1)

out of it. The home State guides the investor to control future dispute in addition to the benefit. The host State on its part scrutinizes the obedience of the investor to the local, international legislations and as per the agreement on the contract. Both States discharge their duties in consideration of these respective interests.

2.2.1.1. Host State

The host States are supposed to treat foreign investors as domestic ones. They are required to respect the contract and must be trustworthy in their policies as well as new development. They are expected to guarantee dispute settlement as per their agreement. The guarantee to the dispute settlement must be meant for more than just attracting Foreign Direct Investment. However upon guaranteeing in their treaties to submit their subsequent dispute to the foreign arbitration tribunal, the Constitution of such State must be thoroughly seen. There may be internal constitutional difficulties. This is because where a separation of power divides the three organs of government the power to adjudicate with in a territory is given to the judiciary. Transferring such power to foreign tribunal must be made by legislature in its absolute terms with respect of future disputes. Such bypass may create political concern for vital cases with concerns for national security. Therefore such legislation that contains the guarantee is a nullity in national law; it would be difficult to argue that it should nevertheless have effect on the international plane.[16]

2.2.1.2. Home State

Home State has a responsibility to deter or prevent its nationals from any illegal acts in the host State contrary to international or local laws. Furthermore they extend assistance to their citizens investing in another State. Subrogation by home State is among the terms included in the Bilateral Investment Treaties.

2.3. International Investment Law

The nature of International Investment Law is different from all other type of international instruments. Unlike other more integrated legal regimes it lacks precise form. It did not emerge from major constitutional movements where States purposefully designed at least the core of the regime like Universal Declaration of

[16] M. Sornarajah; the international law on foreign investment, Grotious publications, Cambridge university press 2004. Pp 115

Human Rights and the like. Rather it evolved from substantive rules of investment protection and promotion as a blend of Customary International Law, rules on diplomatic protection and treatment of aliens, Bilateral Investment Treaties and guidelines fashioned by leading international and intergovernmental organizations like ICSID and UNCITRAL.

According to Sornarajah "International Investment Law is being shaped by the interplay of various economic, political and historical factors. It is generated by eventual resolution of conflicting national interests. The interests of capital exporting and importing States and the resolving law for [a] conflict is the international law on foreign investment… It is a field by which economic theories, political science and related areas have helped to shape the arguments in the field".[17]

Investment can be of business or commercial activity; the transactions of business in general and investment in particular require the application of the law and contract since it involves contractual transactions. Properties are the subject of contracts in investments. Thus an investment involves the application of the law of contract and property.[18]

The main purpose of defining investment and investor under investment laws is to ensure the investment has been registered and licensed properly in accordance with the laws of the host country. Investment law puts requirements and standards to establish enterprises to undertake investment activities and forms of various enterprises. It also states restrictions to sectors and ownership. Investment law must incorporate the guarantee for expropriation rules, and environmental and labor issues.[19]

2.3.1. Investor

The term Investor can be defined broadly or narrowly according to the agreement of the parties, to achieve their purpose. However for the purpose of this chapter, we may only limit how it is defined in some of the international, regional and local laws.

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[17] M. Sornarajah; the international law on foreign investment, Grotious publications, Cambridge university press New York 1990, Pp2-3

[18] George whitecrosspaton A Text book of Jurisprudence (third edition), Oxford, London, 1967,Pp 245-246)

[19] www.Abyssinialaw.com Under the title Definition and Nature of Investment law ByTesfaye Abate 2012 visited on January 30, 2018 at 09:50hrs

There are two broad categories of investors; individual and institutional (legal persons).

Individual Investor is "any person who commits capital with the expectation of financial returns".[20]

Institutional Investors consists of companies like Banks, trust departments, pension funds, mutual funds and insurance companies, State owned public enterprises established by statutes and to name a few.

Common Market Area for Eastern and Southern Africa Common Investment Area (not ratified) rule on its acronym (COMESA CCIA) defines Investor as a natural or a juridical person of a member State making an investment in another member State in accordance with the laws and regulations of the member State in which the investment is made. A natural person means a person having a citizenship of a member State.

A juridical person means any legal entity duly constituted or otherwise organized under the applicable laws and regulations of a member State provided that a juridical person owned or controlled by foreign nationals shall not qualify as a COMESA investor unless it maintains substantial business activity in the member State in which it is duly constituted or organized. The concept of 'substantial business activity' requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia:

(a) the amount of investment brought into the country;

(b) the number of jobs created;

(c) its effect on the local community; and

(d) the length of time the business has been in operation.[21]

The Federal Democratic Republic of Ethiopia Investment Proclamation # 769/2012 defines investor as "a domestic or a foreign investor having invested in Ethiopia''[22]

[20] https://www.investopedia.com/terms/i/investor.asp visited on December 20, 2016 at 18:00hrs

[21] http://investmentpolicyhub.unctad.org/IIA/treaty/3325COMESA CCIA Article 1(4)

[22] Supra note, 14. Article2(4)

2.3.2. Foreign Investor

The ICSID Convention, the main instrument for the settlement of Investor-State disputes, limits the jurisdiction of its Centre to disputes between one contracting State and a national of another contracting State. It provides specific rules on the nationality of claims.

For natural persons, it requires nationality to be established on two important dates:

- the date of consent to arbitration and
- the date of registration.[23]

For juridical persons, the ICSID Convention requires nationality to be established only on the date on which the parties consented to submit such dispute to arbitration[24] and allows a departure from the principle of incorporation or seat when the parties agree to treat a legal entity with the nationality of the contracting State as a national of another contracting State because of foreign control.[25]

Therefore upon declaring their nationality, the definition on the treaty between the parties will be applied. It means it is left to parties to choose their nationality before the arbitration begins.

As defined by the FDRE Investment Proclamation "Foreign investor" means

> *"A foreigner or an enterprise wholly owned by foreign nationals, having invested foreign capital in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor"*[26]

[23] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partA-chap02.htm ICSID Article 25(2)(a)

[24] Ibid. (b)

[25] https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdfINTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS – ISBN 978-92-64-04202-5 – © OECD 2008 Pp 8 Paragraph 3 Visited on October 12, 2016.

[26] Supra note. 14. Article 2(6)

2.4. International Investment Arbitration

2.4.1. Investment Arbitration

International Investment Arbitration is a mechanism to resolve disputes between foreign investor and the State hosting the investment.[27]

In investment arbitration, the arbitral tribunal thus judges the host State's behavior when exercising its sovereign rights as provided for either by law, treaty or contract, in light of customary international law.[28]

Investment arbitration booms following many Bilateral Investment Treaties and regional treaties have been signed most of which provide for the compulsory arbitration of investment disputes involving the State. Following the end of cold war in 1990's, roughly 1500 BITs were concluded and the inclusion of States' consents to the investment arbitration based on broad jurisdictional concepts and liberal investment standards became the norm.[29] Further a number of ground breaking regional investment treaties authorizing compulsory investment arbitration were concluded; like the North American Free trade agreement and the Energy Charter Treaty. The prevalence of BITs followed by wider costs and benefits became a debatable issue which has led to an explosion of investment arbitration. Moreover the wide geographic coverage of investment treaties and the corresponding availability of investment arbitration has taken investment arbitration beyond a mere collection of dispute settlement procedures in different treaties and established it as an international mechanism for adjudicative review in the regulatory sphere.[30]

2.4.2. Types of Investment Arbitration

In Investor-State Arbitration, there are two types of Arbitration. One is through Arbitration institute and the other is ad-hoc in which the contending parties choose their arbitrators.

Through the ad hoc system, the parties themselves or third party (ies) nominated by them would select the arbitrators. The numbers of arbitrators differ from case to case.

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[27] http://www.kwm.com/en/uk/knowledge/insights/role-of-investment-treaties-and-investment-arbitration-in-africa-20150316 Visited on June 12, 2015@12:00hrs

[28] http://www.internationalarbitrationlaw.com/investment-arbitration/ visited on July 10, 2015 at 14:00hrs

[29] http://ejil.org/pdfs/17/1/65.pdf Paragraph 2 Visited on June 15, 2016 at 08:00hrs

[30] Salacuse, 'Toward a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N. Horn(ed.), *Arbitrating Foreign Investment Disputes* (2004), at 68–70.

It depends on the will of the disputing parties. Usually two or four arbitrators will be selected by both parties, and the selected arbitrators will select another individual as chairperson of the arbitrators. Like the courts, here also the number of arbitrators should be an odd number. In the ad-hoc system of arbitration, the place of Arbitration, the payment for arbitrators, etc., would be determined by the agreement of disputing parties and the arbitrators.

2.4.3. Importance of Investment Arbitration

Investment arbitration is based on consent of both parties. Majority of international investment arbitration cases these days are handled via specialized centers behind closed doors. International arbitration industry has shown its thorny edges in the past decades with investors pressing States with huge amount of financial claims reaching up to one billion dollars in recent years. Notwithstanding the lucrative nature of these proceedings for claimant investors, in most cases involving big multinational corporations, the specialized legal practitioners appear to be at the receiving end of the financial transaction. The average cost a State incurs to defend claims lodged against it in international arbitration tribunal is averaged above eight million dollars in recent years. And the bulk of this expense, from both the investor and State sides, would be going to legal firms defending each side and the arbitrators.[31] Industry estimates show that an average of $1000 dollars/hour/lawyer fee is standard for legal professionals in the arbitration game while the arbitrators pocket up to $3000 dollars/day.[32] The same estimates indicate that up to 80% of the legal cost of arbitration, not including the award should the State lose the dispute, goes to the law firms with armies of qualified and expensive lawyers.

There are deeper criticisms against the international investment arbitration regime today than the days where it was proposed as antidote to avoid a State - State oppression to enforce financial obligations and contract debts. [33]

[31] https://www.thereporterethiopia.com/index.php/content/winner-takes-all-international-arbitration-game by Asrat Seyoum Paragraph 12 visited on September 27, 2017 at 18:00hrs
[32] https://icsid.worldbank.org/en/Pages/services/Cost-of-Proceedings.aspx visited on January 30, 2018 at 16:00hrs
[33] Supra note 29, Paragraph 14

2.5. Investor-State Arbitration

2.5.1. Nature of Investor-State Arbitration

Investor-State arbitration has become more frequent in recent years. The nature of arbitration is somehow confidential and there has been much debate about reforming investor-State arbitration. In the 1960's efforts to promote foreign investment stopped investor-State disputes from escalating into disputes between States to minimize the risk of powerful States bullying poorer nations and led States to extend arbitration to State-State disputes. However this dispute differs from business disputes because public policy is at stake. Even if confidentiality is a major element, in this aspect some degree of transparency and public scrutiny is desirable.[34]

2.5.2. Concept of Investor-State Arbitration

Investor- State arbitration settles disputes between an Investor and a host State using an international arbitral tribunal. There are more than 3,000 International Investment treaties that allow investors to take disputes to arbitration.[35] The investor typically alleges that the State has violated the treaty and will usually seek Award. The tribunals issue a binding award to the Award Creditor a document similar to a court judgment.

Investor-State arbitration begins with some sort of governmental or investor conduct that adversely affects a foreign investor's investment. It could be an enactment of a law by a host State or other factors from investor. If the parties are unable to resolve the dispute among themselves, the investor (in most cases) initiates arbitration by picking one of the neutral arbitral institutions listed in the investment treaty and submitting notice and request for arbitration. Thereafter the parties typically select a third arbitrator who serves as a chair. Next parties gather their evidence and present arguments (typically in private) and the tribunal renders an award that is enforceable worldwide.[36]

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[34] http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf United Nations Convention on Transparency in Treaty-based Investor-State Arbitration; United Nations Resolution adopted by the General Assembly on 10 December 2014 visited on January 01, 2018 at 20:00hrs

[35] http://pubs.iied.org/17241IIED visited on November 03, 2016 at 11:20hrs

[36] http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partA-chap04.htm ICSID Article 37(2) (b)

2.6. Evolution of Investor State Arbitration

2.6.1. Overview

International investment treaties dated back to the 1960's. The then Investor-State dispute relates to expropriation issues. It gives access to domestic courts. The claim was the expropriation clause and basically refers to the domestic court for settlement.[37]

Another type of treaty category was giving the settlement of Investment dispute to international arbitration than domestic. This category only allows investment disputes to be settled through international arbitrations.[38]

The third type of treaty category gives the settlement to both the domestic and international arbitration for adjudicating investment disputes. Through time the right to bring a claim to international arbitration is now mainly provided in addition to domestic proceedings.

2.6.2. Regional Level: Due Focus on Ethiopia

The first investor- State arbitration in Africa was recorded in 1864 between Egypt and the Suez Canal Company.[39] It was one of the earliest arbitration in the record. Since then there were many cases registered in ICSID.

During the review in the year 2016 there have been 129 recorded ICSID cases that have involved parties of which 126 had States as respondents while in only three cases African parties are claimant investors.

The claimants' nationalities are

United Kingdom (25 cases),

USA (20 cases),

France (15 cases) and

Italy (10 cases) till 2016.[40]

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[37] http://investmentpolicyhub.unctad.org/IIA/CountryBits/16 Korea- Bangladesh BIT (1986), Art.5 (1) visited on January 10, 2017 at 12:00hrs

[38] http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/1378 Egypt- Netherlands BIT (1996)

[39] http://booksandjournals.brillonline.com/content/journals/10.1163/22119000-01703003

[40] https://www.bryancave.com ; Bryan Cave LLP International Investment Arbitration in Africa: Year in Review 2016 Pp 2-6

The leading States facing the most investment arbitration are

Egypt (30 cases),

Democratic Republic of Congo (8 cases),

Guinea (9 cases),

Algeria and Tanzania (5 cases) each till 2016.[41]

Historically, the majority of ICSID cases were oil, gas and mining industry. Finance and information as well as communication sectors had the fewest cases.

Worldwide, approximately 3,500 investment treaties exist. Out of this 960 involve African signatories. The majority of them are in force in countries over the continent. Again here Egypt leads by nearly 120 treaties followed by Morocco with 80 and Tunisia with 63.

Ethiopia is 12th on the list with nearly 40 treaties.
Claimant investors often rely on multiple bases for jurisdiction which is consistent with the historical trend.[42]

In Ethiopia, it can be said that Investor-State Arbitration is a recent phenomenon. The clause is stipulated in the BITs signed with other States. Even though the knowledge of Arbitration as a written law dates back from the 1960 Civil Code of Ethiopia, the applicability was not as such enumerated. Under Article 3325 and 3328 of the Civil Code, when there is a dispute the court is mandated to rule. However the code allows for parties to negotiate through Arbitration or other means.

Under the signed Bilateral Investment Treaties between Ethiopia and Foreign States, the dispute settlement articles guide the parties to exhaust domestic means as an option to international tribunals by the investor or States choice.

Ethiopia had participated in the drafting of the International Convention for Settlement of Investment Dispute (ICSID) in 1960 and even hosted a round of negotiations in Addis Ababa when the original document was signed.[43] Thus far Ethiopia has not in effect acceded to any of the ICSID convention and The New York conventions preserving its right (its local court's right) not to accept the award (to set aside the awards) handed down by international arbitration tribunal. According to

[41] Ibid
[42] Ibid
[43] *Supra* note 14. Paragraph 16

Ato Yohannes Woldegebriel, the series of uncomfortable experiences with the international legal system is among the reasons why Ethiopia has not taken the leap to sign neither the ICSID nor the New York convention, the two most recognized international arbitration enforcement mechanisms that exist today.[44]

Although the country is not party to the conventions, it certainly has experience with these laws and rules of procedure on ad hoc basis since it signs contracts and treaties submitting to the jurisdiction of these legal frameworks.

Table1. Bilateral Investment Treaties which Ethiopia is a Party[45].

No.	Short title	Parties	Type of agreement	Status	Date of signature	Date of entry into force	Date of terminatio	Type of termination
1	Algeria - Ethiopia BIT (2002)	Algeria; Ethiopia;	BIT	In force	04/06/2002	01/11/2005		
2	Austria - Ethiopia BIT (2004)	Austria; Ethiopia;	BIT	In force	12/11/2004	01/11/2005		
3	BLEU (Belgium-Luxembourg Economic Union) - Ethiopia BIT	BLEU (Belgium-Luxembourg Economic Union); Ethiopia;	BIT	Signed	01/07/2003			
4	BLEU (Belgium-Luxembourg Economic Union) - Ethiopia BIT	BLEU (Belgium-Luxembourg Economic Union); Ethiopia;	BIT	Signed	26/10/2006			
5	China - Ethiopia BIT (1998)	China; Ethiopia;	BIT	In force	11/05/1998	01/05/2000		
6	Denmark - Ethiopia BIT (2001)	Denmark; Ethiopia;	BIT	In force	24/04/2001	21/08/2005		
7	Egypt - Ethiopia BIT (2006)	Egypt; Ethiopia;	BIT	In force	27/07/2006	27/05/2010		
8	Equatorial Guinea - Ethiopia BIT	Equatorial Guinea; Ethiopia;	BIT	Signed	11/06/2009			
9	Ethiopia - Finland BIT (2006)	Ethiopia; Finland;	BIT	In force	23/02/2006	03/05/2007		
10	Ethiopia - France BIT (2003)	Ethiopia; France;	BIT	In force	25/06/2003	07/08/2004		
11	Ethiopia - Germany BIT (1964)	Ethiopia; Germany;	BIT	Terminated	21/04/1964		04/05/2006	Replaced by new treaty
12	Ethiopia - Germany BIT (2004)	Ethiopia; Germany;	BIT	In force	19/01/2004	04/05/2006		
13	Ethiopia - India BIT (2007)	Ethiopia; India;	BIT	Signed	05/07/2007			
14	Ethiopia - Iran, Islamic Republic of	Ethiopia; Iran, Islamic Republic of;	BIT	In force	21/10/2003	15/12/2004		
15	Ethiopia - Israel BIT (2003)	Ethiopia; Israel;	BIT	In force	26/11/2003	15/02/2006		
16	Ethiopia - Italy BIT (1994)	Ethiopia; Italy;	BIT	In force	23/12/1994	08/05/1997		
17	Ethiopia - Kuwait BIT (1996)	Ethiopia; Kuwait;	BIT	In force	14/09/1996	12/11/1998		
18	Ethiopia - Libya BIT (2004)	Ethiopia; Libya;	BIT	In force	27/01/2004	25/06/2004		
19	Ethiopia - Malaysia BIT (1998)	Ethiopia; Malaysia;	BIT	In force	22/10/1998	04/06/1999		
20	Ethiopia - Morocco BIT (2016)	Ethiopia; Morocco;	BIT	Signed	01/11/2016			
21	Ethiopia - Netherlands BIT (2003)	Ethiopia; Netherlands;	BIT	In force	16/05/2003	01/07/2005		
22	Ethiopia - Nigeria BIT (2004)	Ethiopia; Nigeria;	BIT	Signed	19/01/2004			
23	Ethiopia - Russian Federation BIT	Ethiopia; Russian Federation;	BIT	Signed	10/02/2000			
24	Ethiopia - South Africa BIT (2008)	Ethiopia; South Africa;	BIT	Signed	18/03/2008			
25	Ethiopia - Spain BIT (2009)	Ethiopia; Spain;	BIT	Signed	17/03/2009			
26	Ethiopia - Sudan BIT (2000)	Ethiopia; Sudan;	BIT	In force	07/03/2000	15/05/2001		
27	Ethiopia - Sweden BIT (2004)	Ethiopia; Sweden;	BIT	In force	10/12/2004	01/10/2005		
28	Ethiopia - Switzerland BIT (1998)	Ethiopia; Switzerland;	BIT	In force	26/06/1998	07/12/1998		
29	Ethiopia - Tunisia BIT (2000)	Ethiopia; Tunisia;	BIT	In force	14/12/2000	02/10/2004		
30	Ethiopia - Turkey BIT (2000)	Ethiopia; Turkey;	BIT	In force	16/11/2000	10/03/2005		
31	Ethiopia - United Arab Emirates	Ethiopia; United Arab Emirates;	BIT	Signed	03/12/2016			
32	Ethiopia - United Kingdom BIT	Ethiopia; United Kingdom;	BIT	Signed	19/11/2009			
33	Ethiopia - Yemen BIT (1999)	Ethiopia; Yemen;	BIT	In force	15/04/1999	15/04/2000		

The above table shows the Bilateral Investment treaties which Ethiopia is a party. Among the thirty two, eleven of them are only signed and the remaining twenty one are enforced.

[44] Interview to AtoYohannesWoldegebriel; Director of the Arbitration institute at the Addis Ababa Chamber of Commerce and Sectorial Association on April 16, 2016 at 09:30hrs

[45] http://investmentpolicyhub.unctad.org/IIA/CountryBits/67#iialnnerMenu Visited on February 1st, 2018 at 10:00hrs

CHAPTER THREE

3. Analysis of Major International Instruments on Investor-State Arbitration

3.1. ICSID

The International Centre for Settlement of Investment Disputes on its acronym (ICSID) was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) signed in 1965. The ICSID Convention, which was drafted by the World Bank's Executive Directors, gave foreign investors and host states the possibility to submit disputes to international arbitration. ICSID is an autonomous institution within the World Bank Group, partly financed by the World Bank. An amended version of the Arbitration Rules entered into force in 2006.[46]

By the end of 2012, the largest proportions of known Investor-State Dispute Settlement (ISDS) cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (61.9 % of all disputes). Cases initiated under the ICSID Convention are always administered by the ICSID Secretariat, as are cases brought under the ICSID Additional Facility Rules.[47]

Amongst the intergovernmental institutions, ICSID has the highest number of contracting State parties (153).[48]

ICSID has resolved issues with regard to immunity of sovereignty raised by host States to awards against them from private investors and it is serving as a deterrent to possible disputes between many countries of ICSID and foreign private investors. ICSID referred in many BITs as a dispute resolution rule to arbitrate parties. In ICSID, consent must be express. However, once the parties have consented to arbitration under the ICSID Convention, neither party can unilaterally withdraw its consent.[49]According to Article 42 of ICSID, during arbitration, if there is lacuna in the

[46] ICSID Additional Facility Rules

[47] IISD REPORT JANUARY 2014 Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes Pp3

[48] https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx visited on January 10, 2018 at 12:00hrs

[49] International Centre for Settlement of Investment Disputes. *"ICSID Dispute Settlement Facilities"*. World Bank Group. *Retrieved 27 July 2012*

treaty, the tribunals will see contracting State (host State) law including its conflict of laws.

The primary purpose of the convention is for private capital to continue to flow to countries offering a favorable climate for attractive and sound investments even if such countries are not parties to the Convention or having joined did not make use of the facilities of the center. In addition to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories.

Parties may join the convention by giving their consent. Consent can be construed by including a clause in investment agreements. A host State may in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the center and the investor might give his consent by accepting the offer in writing.

3.2. An Overview of Major International Instruments

Table 2. A Survey of ICSID, ICSID Additional Facility and UNCITRAL (1976)

ICSID	**ICSID Additional Facility Rules**	**United Nations Commission on International Trade Law (UNCITRAL)**
Parties can choose the governing arbitration law.	The ICSID 'Additional Facility' Rules extend the application of most ICSID rules to cases where either the host State or the home State is not a party to the convention.	The scope of application only lies if parties agreed in writing to be governed by UNCITRAL rules, except for the non-derogating arbitration laws which may prevail over the latter.
It raises nationality issue to be indicated on the date of consent to arbitration and the date of registration by the investor	Rule 20 of the Additional Facility Rule provides that proceedings may only be held in countries which are party to the New York convention to make it easy for execution of the award rendered by the tribunal.	Notice shall be given by the claimant for the respondent in person
Arbitration in addition to other means prioritizes exhaustion of local remedies.	A case can be processed under the ICSID Additional Facility Rules if one of the parties to the dispute is either not a contracting member State	The following model clause is designed by the Assembly; *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or*

	or a national of a contracting member State	*invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.* *Note - Parties may wish to consider adding:* *(a) The appointing authority shall be ... (name of institution or person);* *(b) The number of arbitrators shall be ... (one or three);* *(c) The place of arbitration shall be ... (town or country);* *(d) The language(s) to be used in the arbitral proceedings shall be...*
The Convention suspends diplomatic protection because of direct access of investors to sue a sovereign state in the agreement entered.	Awards rendered under Additional Facility rules are subject to review by domestic courts. And also enforcement in ICSID convention are not applicable to Additional Facility Awards.	The parties to the arbitration may be assisted or represented by anyone of their choice. It must be communicated to the other party in writing stating whether it is representation or assistance.
Arbitration must be requested in writing. It shall consist of their intention and identity. A copy will be sent by the ICSID Secretary to the other party. However the Secretary can refuse or cancel the request if he finds it is outside the jurisdiction of ICSID.		Parties to the arbitration may agree on the number of arbitrators to be one or three. Upon disagreement about the person(s) and/or the hiring institution, the secretary general of Permanent court of Arbitration (PCA) will be requested to hire an authority to appoint arbitrator(s). Arbitrators can be challenged if they are not impartial or independent and will be substituted by another arbitrator. Failure to perform in de facto or de jure or at time of death and resignation can be replaced by another arbitrator.
The number of arbitrators can be either one or three. Parties can appoint arbitrators or the chairman can do so. Arbitrators can be from the parties or ICSID.		Statement of Claim The statement of claim shall include the following particulars:

		(a) The names and addresses of the parties; *(b) A statement of the facts supporting the claim;* *(c) The points at issue;* *(d) The relief or remedy sought.* Statement of Defense The statement of defense shall reply to the particulars: *(a)*A statement of the facts supporting the claim *(b)* The points at issue and *(c)*The relief or remedy sought of the statement of claim.
Place of Arbitration can be at the seat of the Bank, Permanent Court of Arbitration or any other appropriate institution and any place approved by the commission or the tribunal after the secretary general is consulted.		The respondent may annex to his statement the documents on which he relies for his defense or may add a reference to the documents or other evidence he will submit. The statement of claim or defense could be amended if it is approved by the arbitrators
The convention applies to all territories where a contracting State is responsible except excluded.		The place of arbitration can be agreed by the parties. The tribunal may determine considering the witness hearing and other conditions to do their job. They shall meet where deemed important and the award shall be made at the place of Arbitration. Upon proceeding parties will be treated equally and will present all the documents to each arbitrator.
The rule of law will be as agreed by the parties and in its absence host State law will apply.		Default of the claimant without a good cause could terminate the arbitration and on the contrary the respondent failure will make the hearing without its presence.
To pass the decision, majority vote will apply.		The Award shall be final and binding. Only upon the consent of the parties, the awards will be public

Parties' consent needed to publish the award.		Parties can terminate the proceeding by settling their dispute or where found not necessary during the process by the parties.
In order to review the award, clerical, arithmetical or similar errors are the only grounds		The cost of the arbitration shall be fixed by the tribunal. However they may deposit equal share upon establishment by the request of the tribunal.
Unknown fact to the applicant and to the tribunal and the ignorance that did not exist by the side of application with in specific period of time must be presented to the secretary general		
If the tribunal considers the circumstances so require, it can pend the decision of the award.		
Enforcement can pend or be stayed until they rule on such request		
Appeal is impossible; the award can be viewed as a decision, interpreting or revising or annulling		
Recognizing the award as if it is a final court decision the same may apply to Federal State constitution		
Unlike various types of government system, article 54 requires each contracting States to meet the award. A party seeking a recognition shall present the copy of the award certified by the secretary general to the competent court or designated authority of a state where execution is sought. And the execution of the award shall be sought by the laws concerning the execution of judgments to be enforced in the state where the execution is sought.		

Article 25 of the ICSID Convention stipulates the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State... and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre.

Under this article, the State does not need to consent in the investment agreement giving rise to the dispute, or even that there must have been an investment agreement; this means the agreement on the Bilateral Investment Treaties can suffice for the arbitration under the convention rules.

Article 42 of the same Convention stipulates that in the absence of an agreement by the parties, the tribunal has to apply the law of the host State and such rules of international law as may be applicable.

In the first place it seems no absence of agreement would be found if it is put on Bilateral Investment Treaties. That is, the tribunal can apply the treaty itself as there was no need to consent by a contending country.

As a concluding remark, the special nature of ICSID among the others is, it is equivalent to final judgment of a court. It does not need any other internal enforcement judicial procedure and directly executable in most countries around the world.

In contrast UNCITRAL and ICSID Additional Facility Rule do require internal/domestic enforcement procedures. Though difficult to enforce they will be assisted by the 1958 New York Convention which contains only very limited grounds for refusing recognition and enforcement and enables enforcement in any State party to the convention (more than 146 countries currently) where a contracting state has assets.[50]

3.3. COMESA CCIA

In the Investment Agreement for the COMESA Common Investment Area signed in 2007, both the Investor- State and State-State dispute settlement are included. As our focus is on the former, in the agreement under Article 27 it states

[50] http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Article 1(3) & 10

(1) In the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith…a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation…and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time:
(a) to the competent court of the Member State in whose territory the investment has been made;
(b) to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or
(c) to international arbitration:
(i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention;
(ii) Under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent is a party to the ICSID Convention;
(iii) Under the UNCITRAL Arbitration Rules; or
(iv)Under any other arbitration institution or under any other arbitration rules, if the other parties to the dispute agree

The agreement in addition to good faith effort and domestic court assert international arbitration rules.

Even if the agreement is not yet in force, it includes the most advanced provisions. Like the requirement of transparency and public access to proceedings to disputes between both member States as well as with Investors. Under Article 27(3) and 28(5) of the instrument, all documents relating to the dispute must be available to the public. Upon hearing, procedural and substantive oral hearings are to be open to the public under Article 27(4) and Article 28(6).

The agreement also prevents investors from forum-shopping to take same case to different tribunals.

Article 28(3)

> *If the COMESA investor elects to submit a claim at one of the fora set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora.*

The same provision in sub article (9) allows host States to counter claim or set-off as a defense to mitigate possible damage upon the Investor claim for not fulfilling its duty.

The subsequent article requires member States adopt such domestic rules as are required to make final awards enforceable in domestic legal proceedings in their States.[51]

3.4. Bilateral Investment Treaties (BIT's)

A treaty is an agreement governed by international law. This definition is meant to distinguish between treaties on the one hand and contracts entered into by States on the other. States may enter into contracts, commercial or otherwise, that are governed by the national laws of one of the States involved. Generally, treaties are entered into by States, but international organizations have the capacity to enter into treaties as well.

Treaties may be bilateral or multilateral. Bilateral treaties are treaties between two parties. Bilateral Investment Treaty is a lex specialis, applicable only between the host country and a national of the other State Party to the treaty.

Bilateral investment treaty is a separate rule with a specific State; when a treaty stipulates the governing law- both parties will be liable. There are two ways of contract; general and specific. As a general law Ethiopia will be governed by ICSID as it mentioned on Bilateral Investment treaties though non-party to it. When such document is signed, it is believed that the State is in full knowledge of the referred law with its consequence even though not ratified. However the scope of the execution is limited to that country.

Bilateral Investment Treaties are agreements emanating from an investment office of the two States (i.e. from Executive organs of both States). The other party can represent its government and the ultimate benefit will be for the private investor. The power to negotiate is given by a Proclamation to the Executive organ of a government in the case of Ethiopia[52]. It is the Ethiopian Investment Commission (EIC)[53] who is responsible in drafting, negotiating and preparing it for signing the agreements as per Proclamation number 1024/2017. The signing ceremony will be concluded at the presence of the Prime Minister or by his representation.

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[51] COMESA Common Investment Area (Draft) Article 29,

[52] Proclamation # 916/2015Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Article 10(f)

[53]Proclamation # 1024/2017 International Agreements Making and Ratification Procedure Proclamation

3.5. Fair & Equitable Treatment

Fair and Equitable Treatment is the most frequently invoked standard in investment disputes. According to this concept, States are to maintain stable and predictable environments consistent with reasonable investor expectations. It should however be noted that the concept's broadness and scope may vary with the wording of the clause.[54]

According to ICSID tribunal in order to amount to a violation of a BIT to guarantee the Fair and Equitable Treatment[55] any procedural irregularity can be of outrage, bad faith, will full neglect of duty, an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Some relate this standard to the Customary International Law however it seems more than international law.

Capital importing (the developing countries) hopes the infusion of foreign investment may generate growth and are inclined to accept Bilateral Investment Treaties in the terms proposed by Capital- exporting countries. The unequal bargaining powers have a contribution to such inclusion though the controversies witnessed as hardly any opinio juris have arisen.

Fair and Equitable Treatment does not have definition due to States loose relationship and unwillingness to give a meaning limit since. This standard would be interpreted on case by case issue by the arbitrators. No standard could limit them defining on fair and equitable manner from the unfair and inequitable.

Fair and Equitable Treatment is a complimentary to international law due to further protection ensured to the investor. Investor-State agreement is basically to grant a protection for the Investor. Admitting it could be influenced by specific wordings, parties intention may matter while interpreting it. Therefore during arbitration, giving a plain meaning definition is the better approach than equating it to the Customary International Law or International laws as it lowers the protection assumed by the Investor.

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[54] http://www.internationalarbitrationlaw.com/investment-arbitration/ visited on July 2016 at 18:00hrs

[55] http://pubs.iied.org/17241IIED visited on November 03, 2016 at 11:20hrs

3.6. Umbrella Clause

Umbrella clause[56] is an alteration in the treaties that gives protection for the contracting parties. The term has no clear definition. It can be inferred from the treaties signed. The term consists of obligatory terminologies like 'shall observe', 'shall respect', 'any undertaking', 'any act' and the like.

Umbrella clauses are a common feature of many investment treaties. Often umbrella clauses read: *A Contracting Party shall adhere to any other obligation deriving from a written commitment undertaken by it in favor of an investor of the other Contracting Party with regard to an investment in its territory*.[57]

Umbrella clauses convert a contract claim, i.e. a claim based on a specific contract between two parties under civil law, into a treaty claim, i.e. a claim under public international law.

Practically speaking, umbrella clauses are quite important for an Investor. Umbrella clauses transform contractual obligations (e.g. from a maintenance contract) into international obligations.

Accordingly, an investor can bring related claims directly before an international arbitral body; an umbrella clause removes the requirement for investors to file a claim with national courts. Therefore, investors often rely on an umbrella clause as a catch-all provision to pursue claims when a host state's actions do not otherwise breach the Bilateral Investment Treaties. Lawyers involved in Investor-State Dispute Settlement call umbrella clauses a "powerful tool for foreign investors in the event of contractual dispute with a host state". From an environmental point of view, the main problem with umbrella clauses is that they protect investments that comply with a private contract, but which might not be in line with national laws, such as environmental regulations.[58]In international case law, umbrella clauses have been interpreted in multiple ways, depending on their wording and context.

[56]http://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf visited on July 8 , 2016 at 12:00 hrs

[57]Ethiopia-Germany BIT Article 8(2)

[58]http://somo.nl/news-en/after-south-africa-indonesia-takes-a-brave-decision-to-terminate-its-bilateral-investment-treaty-with-the-netherlandsVisited on June 2015 at 16:00hrs

CHAPTER FOUR

4. The reality of Investor-State Arbitration in Ethiopia

4.1. The Legal Framework

4.1.1. The FDRE Constitution

The basic process for entering into a treaty often is laid out in a particular States Constitution. In Ethiopia treaties are negotiated by the Executive and then ratified by the House of Peoples Representatives.[59] Once Ethiopia ratifies a treaty (and the treaty enters into force), Ethiopia is bound by that treaty.

The Federal Democratic Republic of Ethiopia Constitution provides that Ethiopian government organs (presumably including domestic courts) will "observe international agreements which ensure respect to Ethiopia's sovereignty and are not contrary to the interests of its peoples."[60] Seemingly, if an Ethiopian court determined that an otherwise valid treaty was "contrary to the interests of its peoples," the court possibly could disregard the treaty altogether. It is known that this would be a violation of international law, but such a violation would not affect the decision of the Ethiopian court as applied in the territory of Ethiopia.

4.1.2. Civil Code

The 1960's Ethiopian Civil Code enshrined Arbitration under Title XX. There are two ways of Arbitration stated; Arbitral Submission and Arbitration Clauses.

According to the code Arbitral Submission[61] is a contract where by the parties to a dispute entrust its solution to a third party. The third party here is the Arbitrator who undertakes to settle the dispute in accordance with the referred law. Further the chosen Arbitrator may be ordered by the parties to establish a point of fact without making decision on the legal consequences following there from.

Arbitration clause[62] is the agreement of the parties to arbitrate their difference by arbitration and inserted as a clause in the main contract which is made by the parties.

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[59] FDRE Constitution Article 55(12)
[60] Ibid Article 86 (4)
[61] Ethiopian Civil Code Article 3325
[62] Ibid Article 3328

Although Arbitration Clause and Arbitral submission are considered and referred to settle a dispute by Arbitration, unlike the Arbitration Clause – Arbitral Submission is independent of the main agreement.

That is to mean that while one party enters in to a legally binding transaction or relationship with other party, they may, apart from the main obligations they assume for each other, include in their agreement, a clause to settle dispute arising out of the contract or legal relation, by arbitration. This is known as Arbitration Clause.

Unlike Arbitration Clause, Arbitral Submission is an agreement between conflicting parties to usually settle their current difference through private judge(s).

4.1.3. Investment Proclamation[63] and Regulation[64]

The Investment proclamation defines the term investment, domestic and foreign investor. The Ethiopian Investment Commission established under the Ethiopian Investment Board and the Ethiopian Investment Commission Establishment Council of Ministers Regulation [65]as an autonomous federal government office having its own legal personality. The Ethiopian Investment Commission has jurisdiction over wholly foreign owned investment, joint investment by domestic and foreign investors are among others.

The commission negotiates Bilateral Investment Treaties with other countries where potential investment is likely to flow into the country and prepare it for signing the same upon approval by the Council of Ministers.

The law designates areas or sectors of investment for government, joint performance with the government, for domestic investors and foreign investors. It also put a requirement of a minimum amount of capital to invest and its forms, investment permit and its procedures and cancellation procedures.

It allows investors to lodge complaints related to their investments with appropriate investment organ. Any grievance against the decision, can be appealed to the

[63]Proclamation No.769/2012 Investment Proclamation
[64]Regulation #313/2014 The Ethiopian Investment Board and the Ethiopian Investment Commission Establishment Council of Ministers Regulation
[65]Ibid

investment board or in the regional States to the concerned regional organ. Any investor as per this proclamation shall have the obligation to observe the laws of the country in carrying out investment activities. In particular, due consideration shall be given to environmental protection.

4.1.4. Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation[66]

As per the structure of the Ethiopian government, the three organs i.e. the legislative, executive and judiciary are separated and have their own designated duties and responsibilities.

The Proclamation gives powers and duties of the Executive organ to enter into contracts and international agreements in accordance with the law.[67]The Ministry of Foreign Affairs in consultation with the concerned organs negotiates and signs.[68]

The Ministry of Foreign Affairs ensure the enforcement of rights and obligations arising from treaties signed by the Ethiopian government except in so far as specific power has legally been entrusted to other organs register and keep all authentic copies of treaties concluded between Ethiopia and other States as well as international organization[69]. The Ministry also identifies and attracts foreign investors[70].

4.1.5. International Agreements Making and Ratification Procedure Proclamation[71]

This law will apply to the agreements Ethiopia concludes about negotiation, signature, ratification, accession, amendment, suspension and termination. International Agreement is defined in the proclamation as a bilateral or multilateral agreement governed by international law and signed between Ethiopia and another State or three or more States, or an agreement concluded between Ethiopia and one or more international organization.[72]

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[66] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation # 916/2015
[67]Ibid article 10(f)
[68]Ibid article 15(3)
[69] Ibid Article 15(4 and 5)
[70] Ibid Article 15(2(b))
[71]International Agreements Making and Ratification Procedure Proclamation # 1024/2017
[72]Ibid Article 2(7)

The law authorizes any government organ that initiates negotiation of an international agreement [like Bilateral Investment treaty and other contracts] to consult the Ministry of Foreign Affairs (MOFA) and the concerned organs, to submit with an explanatory note on the obligations and benefits that the agreement would entail on Ethiopia and get approval from the Council of Ministers.[73]

The power to negotiate and to sign international agreements is given to the Prime Minister and Ministry of Foreign Affairs. Other government organ officials shall negotiate and sign international agreements when only they are issued full power[74] by the Prime Minister or in attendance of the Prime Minister without full power[75]upon request of the Minister office.

The negotiating executive organ shall submit a copy of the agreement, the explanation of the provision of the agreement prepared in Amharic with brief explanatory note as well as draft ratification proclamation to ratification. The note shall consist of the comments of the Ministry and stake holders [like the office of the Federal Attorney General]. The Prime Minister shall sign instruments of ratification. The deposited instruments of ratification shall incorporate the reservation and declaration entered on the international agreements. The relative ministry shall take appropriate measures to implement the international agreement.[76]

Amendment is possible for the newly agreed instruments or already previously ratified agreements with limits to errors that does not have substantive change to the agreement. It will take place in consultation with the Ministry according to the procedures stipulated under the agreement or in a manner to be agreed upon with the other party.[77]

Termination and suspension can be decided by the executive body of a government after consultation with the Ministry and other organs to the council of Ministers. Any termination and suspension shall be promulgated on the Federal Negarit Gazette and the contracting party or the depository of the agreement shall be notified by the Ministry.

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[73] Ibid Article 4(1)
[74] Ibid Article 2(3)
[75] Ibid Article 6(3)
[76] Ibid Article 13(1)
[77] Ibid Article 14(1 and 2)

It is the Ethiopian Investment Commission who is responsible in drafting, negotiating and signing the BITs. The signing ceremony will be concluded at the presence of the Prime Minister or by representation. The agreement will be presented to the council of ministers and the House of People's Representative will ratify it as per FDRE constitution Article 55(12).

4.1.6. Federal Attorney General Establishment[78]

The office Federal Democratic Republic of Ethiopia Attorney General is established as an autonomous Federal government ministerial office having its own legal personality. [79]The office is accountable to the prime Minister and council of Ministers. The office will work as principal legal advisor and representative of the federal government [80] and enforces civil interest of the federal government and the public.

The proclamation defines International agreement as an agreement concluded between Ethiopia and other State/s or an international organization in a written form whether embodied in one or more related instruments and whatever its particular designation may be, governed by international law and includes treaties, conventions and protocols.[81]It advises and participates with concerned bodies in contract participation and negotiation of mega government projects; participates or advises concerned bodies in other contract preparation and negotiation when it believes that public and government interest could be affected. [82]

It institutes civil suits on behalf of the Federal government office; represents them in civil litigation where they sue or are sued, represents them in an ongoing civil litigation by its own or together with them; gives direction to government offices on the management of the litigation; cause execution of judgment in accordance with law;[83]

[78]The Federal Democratic Republic of Ethiopia Attorney General Establishment Proclamation # 943/2016
[79]Ibid Article 3(1)
[80] Ibid Article 6(2)
[81] Ibid Article 2(9)
[82]Ibid Article 6(4(b))
[83]Ibid Article 6(4(c))

It decides on settlement of disputes arising between Federal government offices through judicial means or out of court alternative dispute settlement mechanisms, and ensures the execution of the decision; [84]

The office represents the government in litigations and conduct negotiations in consultation with concerned bodies at international judicial or quasi- judicial bodies where the Government of the Federal Democratic Republic of Ethiopia sues or is sued, and enforces the decision thereto. [85]

It performs preparation of draft laws to be promulgated by the federal government; ensures that draft laws prepared by government organs are consistent with the Constitution and federal laws; provide legal opinion to concerned bodies; assist in the preparation of draft law. [86]In addition to the new law, to amend an existing law, the office of the Federal Attorney General shall be consulted.

It ensure that international agreements to be signed or adopted by Ethiopia are in consonant with the constitution and other laws of the country and are accepted in view of the standards of national interest.[87]

The office ensures the implementation of laws enacted by the federal government and the consistency of their implementation and that the offices of the executive branch perform their business in accordance with the law.[88]

4.1.7. The Ethiopian Civil Procedure Code

The Ethiopian civil procedure code declares the conditions by which foreign arbitral awards are enforced. The application of execution shall be made to the Federal High Court[89] accompanied by a certificate of judgment to be executed and by the chairman of the Arbitrators to the effect that such judgment is final and enforceable.[90]

The ground for executing a foreign Arbitral Award in the Ethiopian territory ground is reciprocity.[91] A permission to execute a foreign arbitral award will be granted if the

[84] Ibid Article 6(4(d))
[85] Ibid Article 6(4(g))
[86] Ibid Article 6(5(a))
[87]Ibid Article 6(5(c))
[88]Ibid Article 6(6)
[89]The Ethiopian Civil Procedure Code Article 456(3)
[90]Ibid Article 457
[91]Ibid Article 461(1(a))

Ethiopian judgment is allowed in the country in which the judgment to be executed was given.

To get permission for an execution, the Ethiopian judgment should be allowed in the country in which the judgment execution was given. If the judgment was given by a duly established body, the award debtor should have been given the opportunity to appear and present his defense. The finality and enforceability as well as its non-contrariness to public order or morals will be considered.[92]When the application is allowed the judgment shall be executed in Ethiopia as if it had been given by an Ethiopian court. [93]

4.1.8. New Trends and Future Dynamism: the Draft Arbitration Proclamation[94]

A draft Arbitration code has been made by the Federal Attorney General Office in 2005 Ethiopian calendar. Until this paper is concluded, it was not ratified.

The draft code is enacted to avoid Civil, Economic, Trade, Investment and other disputes from unnecessary delay and cost; taking into account the country's custom to resolve disputing issues by Arbitration; to minimize the case load at the court room and to protect parties interest; to implement international Arbitration conventions and agreements; to enhance free market economy and to compile the dispersed Arbitration legislations. The scope of Application will be both in the Federal and regional State governments.

The draft code identified non-arbitral matters. However Marriage, Adoption, Succession issues and criminal cases up to three years imprisonment can be arbitral if the court allows so.

This draft Arbitration Code stipulates Arbitration Institutes and Tribunals to be constituted.

[92]Ibid Article 458(a-e)
[93]Ibid Article 460(1-3)
[94] Annex, A Draft Arbitration Code Annexed at the end

Parties for Arbitration are deemed agreed to be governed by this law. However if they agreed otherwise, will be bound by it unless it is contrary to the place of Arbitration law or basic principles of this law.

Where there is impossible or invalid contract entered by the parties which does not allow performing in the law of place of Arbitration, parties to the dispute will present the case to the government Arbitration office to be constituted. The office will decide and form an execution committee.

Each Arbitration agreement

1. Must be in writing in addition to oral or any other means of agreement
2. Can be concluded electronically and shall be available at the time of request
3. Must consist of parties' Arbitration agreement
4. When there is a previous agreement that is referred to, make it part on the new document.

Arbitration agreement is independent of the main contract. Unless parties agree to the contrary, any adjustment on the main contract like amendment, termination, change or repeal does not affect the Arbitration agreement.

Constitution of Arbitration Tribunal Institutions and Feature[95]

A governmental Arbitration Institute can be constituted to resolve any dispute among government organs or public enterprises. The arbitration institute will have power to see disputes among federal government bodies or more than one State government or between Federal and State government bodies reporting to Ministry of Justice. Regional States Arbitration institute reporting to the regional justice office can also see regional government disputes or disputes among public enterprise.

A non-governmental Arbitration Institute of national and international profit making companies in both rural and urban areas can be constituted by registering in the government Arbitration institute office. Despite this, parties to the dispute can constitute a temporary tribunal.

In order to constitute an Arbitration Institution

[95] Article 11-16 of the Draft Proclamation

1. The name of the Arbitration Institute
2. All the necessary tools
3. Registered Arbitrators
4. Leaders indicated on Charity Associations laws or Commercial codes are required.

In a non-governmental Arbitration Institutes Arbitrators must be

- Honest
- Fair
- Equitable
- Reputable and well trained on the case in dispute.

Each institute must take necessary steps to ensure best service. The institution must disclose

- The Memorandum of Association, Memorandum of Articles, Services rendered, the working condition and payment
- The parties working with the institution and their neutrality as well as economic, legal, professional and other relationship
- The way of handling confidential issues, resolving mechanisms during conflict of interest and its code of conduct policies
- Requirements for interested neutral parties to join the firm like trainings, qualification
- The ways of selection i. e. who are parties to the institution.

Every Institution shall ensure its just and neutral service quality. It must consider its human resources and efficiency, shall serve with fair price for low income parties including free service**.**

Where there is a conflict of interest between the Institution and the case under issue, the Institution must notify to the parties without delay. If parties refuse the service the tribunal must terminate the Arbitration.

Any complaint by the Arbitration Tribunal can be lodged to an independent party who may verify it in just and equitable manner. The independent party or other Arbitration Code of conduct shall be presented other than its own rule. Also the members of the

tribunal should solve the monetary and other Administrational conflicts among them in an honest and just manner. The tribunal must be confidential according to its own rule, other laws or parties' agreement. It shall notify which procedure of the rule it is following to the parties.

The number of Arbitrators and Assignment[96]

Each party to the dispute will have equal opportunity to choose the Arbitrators.

When parties did not decide the number of Arbitrators, one or three Arbitrators can be assigned by the institution as necessary. Nationality of the Arbitrator shall not be a ground to ban him/her unless the parties agree to the contrary.

If parties did not agree to choose their Arbitrator(s) chair, the selected Arbitrators may assign their chair. Again when there is a disagreement to choose the sole or third Arbitrator, the Ministry of Justice or his representative will assign the Arbitrator. The assignment will consider parties' interest, neutrality of the person, the different nationalities (if any) of either party. The assignment is not appealable.

Each Arbitrator must notify any condition that endangers his neutrality. The defect on neutrality and under performance of the Arbitrator will be a ground to raise objection. The procedure of objection can be agreed between parties. An objection can be lodged before the tribunal in writing. The tribunal may accept or decline. The refusal can be submitted to the Minister of Justice or his/her representative and will be decided. The decision will be final and non-appealable. However if the decision was not received in five days by the tribunal, may decide on the issue together with the Arbitrator in objection.

An Arbitrator can be replaced upon incapacity, resignation and termination by the parties. If there is any objection by one of the parties, it can be submitted to the Ministry of Justice and the decision will be final.

Statement of claim[97]

The claimant shall present agreement of arbitration and request for Arbitration.

[96] Ibid Article 25-30
[97] Ibid Article 36

The statement of claim shall include

- The reason of the dispute
- The cause of action and
- Judgment

The *statement of defense*[98] shall consist of a response for the claimant

The claimant can amend or leave the Arbitration request. The respondent on the other hand can accept or defend and request Arbitration.

A tribunal may put a time frame for the Arbitration.

In spite of the fact that at the presence of an Arbitration Agreement if one party applies to court and the other party objects before hearing starts, the court will reject the request. Failure of the other party to object will be considered waiver of the Arbitration by the court and will proceed.

The tribunal will have a power to decide on

- the legality of the Arbitration Agreement
- the submitted claim compatibility with the agreement and
- the legality of the tribunal institution

Any objection to the power of the tribunal must be submitted before the 1st day of hearing as a preliminary objection. The issue of Ultra Vires must be raised without delay with the objection.

The tribunal may observe the objection other than the 1st date with good cause.

When the tribunal accepts the objection with regards to power, it may decide immediately. If parties agree to apply the objection to the court, the tribunal must stop the Arbitration.

The court has a power to decide on the preliminary objection by the claimant about the jurisdiction of the tribunal. However it can reject when the objection is

- the nationality of the Arbitrator

[98] Ibid

- the choice of Arbitrator
- the neutrality of Arbitrator
- if it was not permitted to apply in a court room
- the court is costly than the Arbitration
- Late application and the case at issue as these issues have no ground to be seen at the court room.

The tribunal may decide while the objection is under process. The decision of the court on the matter will be final.

Hearing and Arbitration Award Process[99]

Parties to the dispute are equal before the tribunal in presenting their case. The tribunal procedure can be decided by the parties or the tribunal itself including admissibility of evidence, compatibility and weight. The place of Arbitration can be decided by the parties or the tribunal considering the parties convenience. However the tribunal may present in each place where necessary for the performance of the Arbitration.

Arbitration Award and Termination Process[100]

In rendering a decision, majority vote applies. The process can be terminated before honoring the award upon parties' negotiation, upon rendering a decision, when Arbitration is unnecessary or impossible by the tribunal, when a claimant drops the case and when the tribunal believes the legal right of the respondent would not be affected. On such conditions the tribunal will also terminate the service.

The decision has to be in writing and signed by the Arbitrators. A dissenting opinion has to be expressed clearly. Parties can have their copies of the award given with the name of the place and date. Meanwhile partial judgment can be given on clear issues during the process.

The decision can be amended by the application of either parties or by the tribunal.

Any decision will have legal effect from the date of registration.

[99] Ibid Article 40
[100] Ibid Article 51

Cancellation of Arbitral Award[101]

Cancellation is possible in the draft code. It will be submitted to the competent court if the case was not seen by Arbitration. The grounds for requesting cancellation by the claimant are

- Incapacity of the parties to the dispute
- No equality was not seen upon choosing the Arbitrator(s) or not duly notified to follow-up the Arbitration process
- Any Ultra Vires or missing of facts in issue
- No mutual agreement about the mixture of Arbitrators or process of Arbitration
- No Arbitration Agreement found between parties
- Misleading and false documents
- Concealment of documents for a just decision by the tribunal
- After the knowledge of the case if any bribery or bending the rule or corruption by the Arbitrators has occurred and
- If the decision has a major error of law

Execution[102]

Without considering the place and country of the Arbitration Award, only by application to the court with a power to adjudicate and under the rule of procedure, a decision will be executed in Ethiopia. Also an Arbitral award rendered by the Arbitration tribunals in Ethiopia will be executed in a foreign country after authentication and approval by the Federal High Court in correspondence with an empowered court with jurisdiction or authority**.**

A foreign Arbitral Award will be executed in Ethiopia as per the following requirements

- If the Award is executable under Ethiopian Law
- If the Award is decided based on parties agreement to the tribunal or the law of place of Arbitration allows so

[101] Ibid Article 58
[102] Ibid Article 62

- If parties to the dispute had equal opportunity to choose the Arbitrator(s) or had equal presentation upon Arbitration process
- If the Arbitration tribunal is instituted according to basic principle of the law and requirement
- If the Award and Execution is not in contrary to peace and morality of the public

The request for the execution submitted to the Federal High Court.

The draft in general introduces new trends for investor-state arbitration. A major transformation is execution of the award without border in Ethiopia and abroad. This law can be referred during making of a contract even for the active bilateral investment treaties.

The draft Arbitration code appeared with two major transitions in Ethiopian law.

1. Constitution of Arbitration Tribunal Institutions

The draft Arbitration code allows constituting government or non-government Arbitration Institutions under Articles from 11-16. These institutions will be the referred rules in the Bilateral Investment Treaties to solve possible disputes in the territory where the investment takes place. Upon ratification of this law, Investor-State Arbitration could be submitted according to the rules of the institution. Moreover the intended institutions considering parties income could extend free service.

2. Execution of an Arbitral Award

The other major transformation will be executing Arbitral Award both in Ethiopia and abroad stipulated under Article 62 and sub articles.

Notwithstanding the place and country of the Arbitration Award, only by application to the Federal High court, a decision will be executed in Ethiopia. Also an Arbitral award rendered by the Arbitration tribunals in Ethiopia will be executed in a foreign country after authentication and approval by the Federal High Court in correspondence with an empowered court with jurisdiction or authority. When this draft code is ratified it will simplify the execution procedure and will enable Ethiopia to chase the Award debtors.

Challenge of the Draft Arbitration Code

Once the arbitral award is rendered, the decision is final. Despite this fact cancellation can be applied to the competent appellate court as per Article 58 of the proclamation. Along from the contemporary arbitration laws, it would be a challenge for both the Investor and State to be certain and rely on the decision passed. Besides it would not be chosen by the investor since it could create doubt for being treated equally in the domestic court.

4.1.9. A Survey of Relevant BIT's to which Ethiopia is a party

Table 3: Bilateral Investment treaties which Ethiopia is a party and currently enforced.

#	Bilateral Investment Treaties	ISDS Article	Arbitration Requested by	Linked by	Respective tribunals referred	Remark
1	Algeria - Ethiopia BIT(2002)	Article 9	Either Party	By or	ICSID & UNCITRAL	
2	Austria - Ethiopia BIT(2004)	Article 12	Investor	By or	Local Courts, Administrative tribunals, previously agreed dispute settlement mechanism, ICSID, Additional Facility Rule to ICSID, UNCITRAL & ICC	Article 13 stipulates that parties unconditional consent to be treated by the tribunals is given upto disregarding exhaustion of local remedies
3	China - Ethiopia BIT(1998)	Article 9	Either Party		Local Court, Adhoc Tribunals and ICSID	
4	Denmark - Ethiopia BIT(2001)	Article 9	Investor	By or	Local Court, ICSID, Additional Facility Rule, UNCITRAL, previously agreed dispute settlement mechanism	Article 9(5) stipulates that parties unconditional consent to be treated by the tribunals is given upto disregarding exhaustion of local remedies
5	Egypt - Ethiopia BIT(2006)	Article 8	Either Party	By or	Local Court, ICSID, Additional Facility Rule, UNCITRAL	
6	Ethiopia - Finland BIT(2006)	Article 9	Investor	By or	Local Court, ICSID, Additional	Article 9(5) stipulates that parties

					Facility Rule, UNCITRAL, previously agreed dispute settlement mechanism	unconditional consent to be treated by the tribunals is given upto disregarding exhaustion of local remedies
7	Ethiopia - France BIT(2003)	Article 9	Either party	By or	Local Court, ICSID, Additional Facility Rule & UNCITRAL	
8	Ethiopia - Germany BIT(2004)	Article 11	Investor		Local Court, UNCITRAL,ICSID & Additional Facility Rule	Article 11(3) stipulates an Investor can take to International Arbitration tribunals only of the local courts delayed to render the final decision over the case
9	Ethiopia - Iran, Islamic Republic of BIT(2003)	Article 12	Investor	By or	Local Court, ICSID & UNCITRAL	
10	Ethiopia - Israel BIT(2003)	Article 8	Investor	By or	Local Court, ICSID, Additional Facility Rule & UNCITRAL	Article 8(3) stipulates that parties unconditional consent to be treated by the tribunals and Newyork Convention (1958) upto recourse to the tribunals of his choice
11	Ethiopia - Italy BIT(1994)	Article 9	Investor	By or	Local Court, UNCITRAL &ICSID	
12	Ethiopia - Kuwait BIT(1996)	Article 9	Investor	By or	Previously agreed dispute settlement mechanism, ICSID, Additional Facility Rule & UNCITRAL	Article 9(5) stipulates that parties unconditional consent to be treated by the tribunals and Newyork Convention (1958)
13	Ethiopia - Libya BIT(2004)	Article 9	Either Party		Previously agreed dispute settlement mechanism & ICSID	
14	Ethiopia - Malaysia BIT(1998)	Article 7	Investor	By or	Local Court, ICSID, Additional Facility Rule & UNCITRAL	Article 7(5) stipulates that parties unconditional consent to be treated by the tribunals is given upto

						disregarding exhaustion of local remedies
15	Ethiopia - Netherlands BIT(2003)	Article 9	Investor	By or	Local Court, ICSID, Additional Facility Rule & UNCITRAL	Article 9(5) stipulates that parties unconditional consent to be treated by the tribunals.
16	Ethiopia - Russian Federation BIT(2000)	Article 8	Investor	By or	Local Court & UNCITRAL	Article 8(4) stipulates that parties unconditional consent to be treated by the tribunals.
17	Ethiopia - Sudan BIT(2000)	Article 9	Investor	By or	Local Court, ICSID, Additional Facility Rule &UNCITRAL	Article 9(4) stipulates that parties unconditional consent to be treated by the tribunals.
18	Ethiopia - Sweden BIT(2004)	Article 8	Investor	By or	Local Court, ICSID, Additional Facility Rule &UNCITRAL	Article 8(5) stipulates that parties unconditional consent to be treated by the tribunals and Newyork Convention (1958) upto recourse to the tribunals of his choice
19	Ethiopia - Switzerland BIT(1998)	Article 8	Investor	By or	Local Court, ICSID, Ad hoc tribunal as per UNCITRAL	
20	Ethiopia - Tunisia BIT(2000)	Article 7	Investor	By or	Local Court, ICSID, UNCITRAL, previously agreed dispute settlement mechanism	
21	Ethiopia - Turkey BIT(2000)	Article 7	Investor	By or	Local Court, Tribunal, ICSID,UNCITRAL	
22	Ethiopia - Yemen BIT(1999)	Article 9	Investor	By or	Local Court, ICSID, Additional Facility Rule &UNCITRAL	Article 9(4) stipulates that parties unconditional consent to be treated by the tribunals.

To have a brief discussion about the table

- The 1st column indicates the numbers
- The 2nd column shows the parties to the treaty with the year signed

- The 3rd column represents the Investor State Dispute Settlement Article in the treaty
- The 4th column tells who has the right to take to the dispute at the expiry date specified to solve amicably
- The 5th column refer how the choices of the places are linked for selection for the parties
- The 6th column states the choices of place of the parties in their respective steps
- The last and 7th column remarks the parties consent for the terms in the treaty entered as well as disregarding exhaustion of local remedies up to be governed by the New York Convention.

As the above table illustrates among the 22 BITs ratified by Ethiopia,

- Only five of the treaties give options for both parties the choice of arbitration or court
- Only seven of them give choice for both parties to follow the step put on the arbitration rules
- Ten of the treaties shown a consent by Ethiopia is entered to be governed by the arbitration rules of the mentioned laws
- Among the ten BITs, three of them specifically put the application of New York convention
- Twenty of the BITs refer ICSID; Nineteen UNCITRAL; Eighteen local courts; twelve Addition Facility rule to the ICSID; six previous experiences; Two Ad hoc tribunal and the other ICC as referred.

The survey indicates the unbalanced treaty agreement. What is the reason?

During the interview with Ato Meaza Haimanot at the office of the Federal Attorney General, 'Ethiopia as a State prioritizes its public interest'. The priority could be illustrated as the expedited service for the public need and getting rid of long lasted

poverty will be measured to enter to the agreement and put on a scale to conclude future conflicts. [103]

Ethiopia as a developing country closing its doors to investment opportunities will drag the State's economic level to a worse condition. Creating job opportunity, leveling up the living standard of people and accessing three meals per day is a priority for the government. Thus having a 'refraining stand referring to the data of losing countries in Investor-State arbitration could be wrong. Because of the level of current economic status as a developing country, lack of expertise in the firms like drafting and negotiating a contract and also a technical factor about the subject matter. Ethiopia is not different from other African States- which makes all vulnerable to the unbalanced contracts presented to the table'. Having these facts, it does not seem there is a choice to include Investor-State Dispute Settlement clauses for Ethiopia rather it is a standard.

While entering to the agreement, International law assumes party equality. When a State believes it benefits from the investment for current prioritized issues like economic matter, it may use it despite a lack of expertise expecting great lawyers will be produced in the near future. This reasoning is strengthened as every State has a loop in every aspect therefore the standing point would be the current economic status of the State.

Currently the Bilateral Investment Treaties are being reviewed by avoiding selected clauses which have been rejected worldwide. Among the articles 'Fair and Equitable treatment', 'Umbrella clause' and the 'or' connected dispute settlement choice of places are some of them. The new Bilateral Investment Treaties with Morocco and United Arab Emirates did not have the Fair and Equitable Treatment and umbrella clauses.[104]According to Ato Mesay Woldesemayat mainly these phrases were not the sources of the conflict rather the contracts backed them by interpretation as per the view of the Ethiopian Investment Commission.

[103]Interview to Ato MeazaHaimanot; Assistant Attorney General : Arbitration and International Civil Affairs Coordination Office Federal Attorney General Ethiopia; Tuesday January 30, 2018 at 10:22hrs

[104] Interview to Ato Mesay Woldesemayat Ethiopian Investment Commission Investment Treaty Team Leader on February 15, 2018 at 14:05hrs

As a new trend Brazil removed Investor State Dispute Settlement articles from its Bilateral Investment Treaties and the outcome will be seen in the future. Ethiopia in addition to removing some clauses focuses on making the exhaustion of local remedies mandatory in the future Bilateral Investment Treaties. The Ethiopian Investment Commission office believes that there are enough laws in Ethiopia. After the re-drafting, courts and administrative tribunals will be competent enough to solve any issues in the future and will interpret the domestic laws at the same time a better court system will be introduced to the country.

The reviews have been done content wise. The main causes of the disputes are the contracts entered by the government offices. Thus from the local, international and developing countries experience in the area are taken in to consideration with regard to the points raised for the review. The review was presented to the Ministry of Foreign Affairs of Ethiopia. As the law does not say to ask for the private law firms who have been handling cases' consultation thus the office did not incorporate practitioners for the re-drafting. The office did re-drafting the Bilateral Investment Treaties to mitigate the risk emanating from it in a way to keep the interest of Ethiopia. However the international rules like ICSID arbitration laws will be incorporated in the reviewed Bilateral Investment Treaties.

As a concluding remark, Ethiopia now is not in a position to bargain capital exporting countries on the terms of agreements due to its priorities. Thus we may open our doors to attract investors with in the standard and acceptable negotiations.

4.2. Practicing Investor-State Arbitration in Ethiopia

4.2.1. Basic causes for Investor-State Dispute in the Ethiopian context

The problems are seen in agreements between government to government, government to foreign private investor and government to domestic investor. These contracts are found difficult to arbitrate because they involve public interest.

An investor is duty bound to observe the law of Ethiopia as stipulated by the Investment proclamation. The current causes for conflicts are contracts drafted and concluded between the government offices and an investor. The problem is for both Ethiopia and the Investor. However due to lack of legal instrument to guide them on

how[105] to conclude a contract (drafting by the expert in the firm) to restrain a domestic contract could be converted to an international obligation, ordinary contracts concluded between an investor and the government office make Ethiopia liable ultimately. The umbrella clauses are the reference for such occurrence. The offices remain with the litigation until the conflict escalated and refer the Bilateral Investment Treaties between the home State and Ethiopia according to an interview with Ato Henok Tesfaye at the office of the Federal Attorney general experience.

The defects during concluding of the contracts are; not considering the property of an investor in Ethiopia and unknown nationality of the investor could be mentioned. Here an investor may mean both natural and juridical person which may appear a subsidiary to one of contracting party to Ethiopia.

For the benefit of Ethiopia, while concluding a contract by the government organ it must be certain that an Investor has property in the territory where the Ethiopian courts have jurisdiction to execute the decision upon dispute. If there is no property found in the territory, no execution is possible even with having a decision for Ethiopia.

From the discussion with Ato Henok, the nationality of an Investor should be considered as it converts the domestic contract to international obligation. Some companies affiliated with a national of a contracting State with Ethiopia. Until the dispute, there would be nothing mentioned but later becomes a source of conflict.

4.2.2. .Responsible government office to respond for Investor-State Arbitration

The only clear law which authorizes a body to respond for the Investor- State Arbitration is the Federal Attorney General Establishment proclamation # 943/2016.

The office has a power to put a direction[106] for the contracts entered by the State. Among them one of the directions is facilitation of Arbitration for parties in dispute. Even if at the time of Arbitral Submission though parties can choose their arbitrators this law will govern.

[105] Ibid
[106] Supra note, 21. Article 6(4(d))

The office expects that in the future no party under the representation of a State will draft and enter into a contract before presenting it to this Federal Attorney General for assessment and advice. The office of Federal Attorney General shall be consulted[107] for any major or mega projects and like Bilateral Investment treaties will review them. Failure to present it on the date of expiry for any amendment or review like in the case of Bilateral Investment treaties by the Ethiopian Investment Commission and Ministry of Foreign Affairs, they will take full responsibility and must act accordingly because ultimately Ethiopia will be liable whoever fails to do so.

4.2.3. Contemporary handling of the Investor-State Arbitration cases

The preferred strategy of Ethiopia seems to be to wait until a case is brought at the table rather than having laws as per Ato Henok Tesfaye. So far the issues brought to the Federal Attorney General's office are very few in number. It has been seen on the news and witnessed by the researchers' attempt to get the information from the individual practitioners who are handling Investor-State Arbitration learnt that there are a number of cases are being entertained. When most of these cases are instituted, they are sent to a specific government office. Sometimes it was not disclosed to the Federal Attorney's office according to the interview with Ato Henok and Ato Meaza Haimanot. This show there could be a lot more issues handled in each government offices. The organs think it is a case for their office when it is actually a State matter. Ethiopia as a nation is lucky that no huge cases are instituted yet. Either the investor waives the case or is cajoled by the respective government offices. On top of these, the Arbitration law has not been enacted. The draft Arbitration law is in place but is not approved yet. The investment arbitration in general and investor-State arbitration in particular is limited to a certain individual's knowledge and some of the cases are outsourced from the government offices due to lack of expertise. The silence of the government could be considered as one of the mechanisms to attract Foreign Direct Investment.[108]

[107] Supra note, 14. Article 4(2)

[108] Interview to Ato Henok Tesfaye Tefera Coordinator; Arbitration and International Civil Affairs Coordination Office Federal Attorney General Ethiopia; on January 30, 2018 at 10:58hrs

4.2.4. Execution of Foreign Arbitral Award: In Ethiopia and another State

The foreign Arbitral award can be of monetary, punitive damages, specific performance etc.

Currently Ethiopia considers the agreements referred to in the Bilateral Investment Treaties as a general contract. Thus the execution will follow the steps in the Civil Procedure Code. To illustrate for the request of specific performance, Article 1776 of the code stipulates that it will be ordered without affecting the personal liberty of the debtor. In the event an Award creditor investor is seeking for an execution for a specific performance, the Ethiopian courts should not enforce the execution Award debtor if it affects its personal liberty : in this case the government of Ethiopia.

Foreign Arbitral Award even if it is a strict procedure, the Civil Procedure code allows execution. On the other hand when Ethiopia is an Award Creditor, so long as there is a property found in its territory it will be possible to execute.

In order to get the execution in the Ethiopian Courts, the Civil Procedure code requires a reciprocal agreement to execute a decision should exist between Ethiopia and a State of a party to the contract.

4.3. Findings

Ethiopia does not have a law of investment Arbitration. It rather considered as a general contract which will be a governing law between the Investor and government organ and their choice of laws in the agreement. Ethiopia also does not have institutions like Permanent court of Arbitration or International Chamber of Commerce or other and has not ratified international laws like the New York Convention.

Among several attempts to find a concluded case, the researcher found one tax case which was decided against Ethiopia by the International Chamber of Commerce (ICC). The disputing issue from the case seen is the bidding contract concluded between a Chinese company and Ethiopian Authority. It was a maintenance contract which Ethiopian Authority withholds the VAT during the seasonal payment for the service received from the Chinese company.

The facts for such a defect leading to the lack of a stable legal stand as a country are:

- There has been a gap in the making of a contract which opens for otherwise interpretation
- Lack of guiding law which can dictate what must be included and omitted

The arbitrators analyzed the Ethiopian Civil Code Articles and VAT proclamation with the construction law of other countries. They finally decided the Chinese company knowing the bidding amount was including paying VAT would not enter. As the Ethiopian Authority was the drafter for the bidding contract and by referring the Civil Code Article 1738 interpreting the in favor of the debtor, award the Chinese Company more than 300,000.00 UK pound sterling.

For awards to be executed in Ethiopia, as their agreement is considered as a general law the Civil code and Civil Procedure codes of Ethiopia will apply. While seeing the laws there are some obligations that are not executable in Ethiopia. Instituting Arbitration tribunals or acceding international executing laws are not considered as option for such problems.

Ethiopia does not have conflict of laws and Arbitration law but handling Investor-State Arbitration. In addition to the private law firms, the contemporary handling by the office of the Federal attorney general is on the case by case basis. Since there is no office that compiles cases and series of decisions exposed to a very poor documentation which extends to seeking Amharic versions of documents from contending parties. According to the discussion with the Ato Henok, in addition to the poor documentation, the individual assigned to the case may not found when needed due to resignation or death. As there is no system designed the newly appointed employee sometimes does not have a clue about the pending case[109]. This does not seem that it was not well thought about administering the Foreign Direct Investment as attracting.

[109]Supra note, 42

Is Investor State Dispute Settlement a choice or a Standard for Ethiopia?

For Ethiopia it is a standard. As a developing country, no investor would be attracted without the Investor –State Dispute Settlement clause. The Ethiopian Investment Commission is working to mitigate the risk of being sued by individual investor.

Investment Associations are the suggested mechanisms to tackle investors' problems. The Ethiopian Investment Commission is preparing to institute as a complaint handling body which will handle grievance from the private investors before it escalates to a dispute. In future Bilateral Investment Treaty with Brazil, there is a plan to form a committee constituted form both parties to identify issues to retain disputes locally.

CHAPTER FIVE

5. Conclusion

The capacity of local experts taking part in the drafting and shaping process of the binding international treaties and contracts that country is signing is a major factor. From the case we have seen the contract signed by the government and private investor in Ethiopia request for strong legal and technical expertise. The problem is expertise which is way beyond academic knowledge; contract requires experience and the abilities to identify loopholes and cover them at the earliest possible time. From the case between Ethiopian Authority and Chinese company, the drafting of the bidding document was found susceptible to interpretation by the arbitrators. The contract was converted to international agreement while importing regional trends of calculating VAT. The interpretation was considered fairly to reach to the award. Thus the case has shown poor contract drafting, fair interpretation arena and conversion of local contract to international customary law.

The office of the Federal Attorney General shall observe agreements concluded between government and investors. It is authorized to assess whether that contract does not keep the interest of the State in general. Nevertheless, nurturing the right legal mind that will defend the interest of the nation at the international arena is something that requires huge investment. Especially with increased flow of Foreign Direct Investment to the country, the future could be quite challenging to Ethiopia in the area of international arbitration unless anticipatory measures are taken. Among several duties delegated to the office of the Federal Attorney General is to give direction like in this case of Arbitration. However it must specify with a platform like who and how an arbitration will perform.

Ethiopia, under reviewing the ratified Bilateral Investment treaties still plans to keep the ICSID convention as an Arbitration rule. The Ethiopian Investment Commission is working to mitigate the risk of being sued by an individual investor together with making exhaustion of local remedies a mandatory condition. The fact here is the ICSID does not require consent of Ethiopia once it is stipulated in the agreement. The parties' disagreement for having consent for the arbitration does not serve anything to revert to the host State law.

Decision of an Arbitral Award and Executing are two different things.

The only enforcement law to foreign arbitral award is the civil procedure code of Ethiopia. It put a strict procedure for the execution. Although it put requirements, the nature of the agreements concluded allows executing without a domestic legislation. International Convention for Settlement of Investment Dispute the most referred law in the treaties does not need domestication for its Award and direct execution is expected from Ethiopia. One can easily identify the ICSID tribunals as international tribunals, because the documents of the ICSID Convention reveal that the Convention was basically designed to establish international arbitral machinery to which private individuals and corporations could have substantially the same access as State claimants have to the International Court of Justice. Therefore, the right of the ICSID tribunal to apply its lex fori, international law, is unquestionable. The law of the land, the FDRE Constitution allows the courts to disregard the decision if it is against the interest of the people which can be of the development policies. The two laws do contradict and time will tell which one will prevail.

The draft Arbitration law has not been enacted, and there is a delay to approve it. It was not commented, nor rejected, nor supported but just kept as a draft in a drawer. Such an act could be an implicit preference to resolving disputes the case by case rather than passing a clear law in-line with the international arbitration principles.

Furthermore is there must be an assessment made of what Ethiopia has lost from not signing the New York convention, ratifying ICSID and other materials and what it will gain from incorporating them, or vice versa. Ethiopia has to be subtle while signing these agreements by foreseeing future conflict tackling mechanisms so as to benefit the State interest.

Recommendation

- Ethiopia should adopt the draft Arbitration code as it will bring a potential change with regard to the Arbitration arena.
- Ethiopia should ratify the New York convention with reservation on the identified articles to the detriment of the interest of Ethiopia

- Government of Ethiopia should compile all arbitration laws in to one rather than approving the draft law and administering it. There should be a designed system. To entertain several rights having own law is preferable.
- Making mandatory exhaustion of local remedies and omitting fair and equitable treatment and umbrella clauses from the under revision Bilateral Investment Treaties will benefit Ethiopia.
- The draft code needs to include provisions like the requirement of transparency, public access to proceedings to disputes between both member States as well as with Investors, open hearing access to all documents relating to the dispute must be available to the public. It shall also incorporate articles which prevents investors from forum-shopping to take same case to different tribunals.

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Annex

Case

In arbitration between Ethiopian X Authority and Chinese Y company presented to International Chamber of Commerce (ICC) an award was given to the Chinese company nearly 300,000 United Kingdom pound sterling to be paid in 28days of the decision.

The dispute has started when the Ethiopian X Authority deduct the VAT from the amount to be paid to the Chinese company. The relationship between the parties was the Chinese company supplies a service to the Ethiopian Authority.

According to their agreement at time of dispute to settle through arbitration, the Ethiopian Authority chose ICC which was agreed by the Chinese company in writing.

The Issue

The Ethiopian authority announces a bidding for the service needed and it states in the bidding procedure

> "*All duties, taxes and other levies payable by the contractor under the contract, or for any other cause, as of the date 28 days prior to the deadline for the submission of bids, shall be included in the rates and prices and the total bid price submitted by the bidder*"

In the bidding forms under the heading of "Bills of Quantities",

"All items [in the contractor's price] shall be fully inclusive of all that is necessary to fully the liabilities and obligation arising out of the contract"

The Ethiopian authority X addendum to the bidding documents stated as,

> "*The rates and prices included by the contractor in the priced bills of quantities shall include all freight costs, customs dues, import duties, taxes, rates bills, pilotage, landing charges, wastages loss and all other associated charges in respect of anything provided by [the contractor] for the purpose of the contract*"

The Chinese Y company tendered and its tender was accepted by the Ethiopian X Authority. The letter of acceptance stated that China Y company bid was accepted "subject to the conditions of contract, specifications, Bid submission form, Bill of quantities and other with currencies…including all taxes…"

For the Ethiopian X Authority request that VAT should be paid by the contractor, the Chinese company responded that VAT should be deducted from the local portion of the payment.

It asserted:"We have not considered such tax in our rate at the time of tender and is not specified in the contract document. Rather, we believe, we are liable only for taxes, like profit and custom and other taxes. In this regard, we would like to inform you that we will submit our detail request in near future for your kind review and fair determination."

And on other written letter by the Chinese Y company as their understanding for the subject matter is that VAT is applied only to local portion of the contract since this is what is to be expanded in the country and certainly is subjected for tax. Also they added the company assumption at the time of bidding was VAT would be paid by the Ethiopian X Authority.

The relief sought by China Y company was

1. dismissing the claim of Ethiopian authority
2. ordering the Ethiopian X Authority to pay cost of the Arbitration, including legal and all costs in connection to Arbitration
3. granting such additional and other relief as may be just and proper under the law
4. an indemnity in respect of any costs, losses, damages and expenses (including legal fees and expenses) suffered by china y company arising from Ethiopian X company wrongful deduction of VAT from certified mounts or such declaration as the tribunal decides.

The rules

The VAT proclamation # 285/2002 and amended proclamation # 609/2008, the council of ministers regulations# 79/2002, the ministry of finance and economic development directive on VAT withholding by the buyer, directive # 27/2010(the 2010 directive) was seen relevant.

The laws stated

- VAT is payable at the rate of 15% on the value of every taxable transaction by a registered person
- A taxable transaction is a supply of goods or services in furtherance of a taxable activity
- The value of a supply, on which VAT is charged, is the amount the registered person receives or entitled to receive in return for the supply of goods or services, excluding VAT
- A registered person is entitled to credit against its output VAT the amount of VAT paid by him on his taxable transactions. The tax payable by him for any accounting period is the difference between the amount charged on taxable transactions and the amount of tax creditable, i. e. the difference between the output and input VAT.

Under their contract: it provides that the contractor shall in performing the contract, comply with applicable laws…pay all taxes….

The "laws" would include the VAT legislation.

The arbitrators consider the experts on Ethiopian law. The Ethiopian civil code articles contract laws were referred and relied upon.

Article 1732: contracts shall be interpreted in accordance with good faith, having regard to the loyalty and confidence which should exist between the parties according to business practice.

Article 1733: where the provisions of a contract are ambiguous, the common intention of the parties will be sought.

Art. 1734. - (1) Where the provisions of a contract are ambiguous, the common intention of the parties shall be sought. (2) The general conduct of the parties before and after the making of the contract shall be taken into consideration to this effect.

Article 1738: (1) in cases of doubt, a contract shall he interpreted against the party who stipulates an obligation and in favour of the party who -u-it. .

(2) Stipulations inserted in general provisions, models or forms of contracts prepared by one party shall he interpreted in favour of the other party.

Analysis

The tribunal analyzes the issue and states, in reality by setting out the terms and conditions and stipulating how china Y company were to put forward its bid, the Ethiopian X Authority were imposing the obligations on Chinese y company and whilst, as we have found above, Chinese company could have expressed their bid as being exclusive of VAT, the obligations as to the payment of taxes were matters imposed or stipulated by Ethiopian X authority.

Article 1738(2) was said not easy to understand or apply but the arbitrators understood it to mean that where one party drafts a contract, whether by bespoke drafting or adopting model or standard forms, stipulations which impose obligations on the other party are to be interpreted in favour of the other party. Once again, that would suggest that the contract is to be read and interpreted in favour of the Chinese company.

The tribunal concluded after considering East African states and similar construction laws;

- the contract is ambiguous or unclear as to whether the Contract price includes Out Put VAT
- having regard to Article 1733 they consider the relevant custom and practice is that applying internationally to contracts of this nature but that , in any event, for these purpose the relevant custom and practices do not differ in Ethiopia and East Africa
- That custom and practice establishes that output VAT is not included in the rates and prices in a contract of this nature and that if the employer wishes the

contract price to include Output VAT, it is specified as a line item for the contractor to price. In the absence of such a line item, or any other clear and unambiguous indication that Chinese company was to include Output VAT in pricing the works, the contract is to be construed on the basis that the contract price does not allow for output VAT and that therefore the Ethiopian X authority undertook to pay such VAT in addition to the contract price. They added the reading of Article 1734 and 1738 would support this intention.

The Award

The Award was given to the Chinese company as follows

- The contract price is exclusive of any sum payable in respect of Vat
- Where the goods and services supplied by Chinese company under the contract are VAT rates, VAT is to be added to the consideration otherwise payable to Chinese Y company at the prevailing rate
- The Ethiopian X Authority shall pay Chinese company the sums of nearly 300, 000 United Kingdom Pound Sterling in respect of legal costs within 28 days of the date of this final award
- The Ethiopian X Authority shall pay Chinese Y Company the sum of nearly $200,000.00 in respect of the ICC costs incurred by it within 28 of the date of this final award.
- The claims of Ethiopian X Company are rejected.