Addis Ababa University
College of Law and Governance Studies
School of Law
LL.M in Business Law

Financial Sector Liberalization for Foreign Nationals of Ethiopian Origin in Ethiopia and Its Extra-territorial Implications and Challenges

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Declaration

I, ***Tafese Kussa Shamana,*** with Identification Number **GSE/6009/12** hereby declare that this thesis is my original work and it has not been submitted partially or fully to any higher academic institution in Ethiopia or abroad as a partial fulfillment to any degree award and all sources of the material used in the study have been acknowledged properly.

Declared by: Tafese Kussa Shamana

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Confirmed by: Solomon Abay (PhD, Associate Professor of Law)

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Letter of Certification

This is to certify that this study, **"Financial Sector Liberalization for Foreign Nationals of Ethiopian Origin in Ethiopia and Its Extra-territorial Implications and Challenges''** undertaken by Tafese Kussa in partial fulfillment of the requirement for the Award of the Degree of Masters in Law (LL.M) in Business Law from College of Law and Governance Studies, School of Law, of the Addis Ababa University, is an original work and not submitted prior for any degree either at this university or any other university.

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By: Tafese Kussa

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Key terms definition

For this study:-

Foreign Nationals of Ethiopian Origins (FNEOs): means Foreign Nationals of Ethiopian Origin and Organizations fully owned by Foreign Nationals of Ethiopian Origin or jointly owned by Ethiopian Nationals and Foreign Nationals of Ethiopian Origin, and registered under the laws of and having head office in Ethiopia.

Financial Sector: means Banking business, Insurance business, and Microfinance business.

Liberalization: means uplifting the restriction placed upon Foreign Nationals of Ethiopian Origins to invest in the financial sector.

Repatriation: means transferring the asset from the country where the investment is undertaken to another country.

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Abbreviations and Acronyms

BITs	Bilateral Investment Treaties
CREFAA	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
ECT	European Community Treaty
EIC	Ethiopian Investment Commission
FDI	Foreign Direct Investment
FNEOs	Foreign Nationals of Ethiopian Origins
HPR	House of Peoples Representatives
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IDS	Investment Dispute System/Settlement
IGE	Imperial Government of Ethiopia
IIAs	International Investment Agreements
IIF	Illicit Financial Flows
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
NBE	National Bank of Ethiopia
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SBB	Supervision of Banking Business
TGE	Transitional Government of Ethiopia
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties of 1969
WBG	World Bank Group

Abstract

Until late 2019, only Ethiopian Nationals and Organizations entirely owned by Ethiopian Nationals and registered under Ethiopian law were allowed to invest in the financial sector in Ethiopia. The Ethiopian government has implemented a policy amendment that lifts the legal bar on FNEO investing in the financial industry. In this regard, FNEOs are permitted to buy shares in existing financial institutions or to form new financial institutions in Ethiopia. However, the liberalization came with a stipulation that prevents FNEO investors from exercising their economic rights over their investments, i.e. they are not allowed to repatriate any asset or economic advantage derived from their investment and also every payment due to FNEO in relation to their investment shall be paid in local currency (ETB). Transfer of funds in respect of investments is a major concern in investment treaties, both multilateral and bilateral, and one of the standards of protection for foreign investment. Ethiopia has signed BITs that establish a standard of protection for foreign investment recognized by IIAs and multilateral investment treaties, including funds transfer. The objective of the study is to assess the financial sector liberalization for FNEOs in Ethiopia and its extra-territorial implications and challenges. The researcher gathered evidence from primary and secondary sources to substantiate the conclusion. Relevant experts of the institutions bestowed with the power and responsibility of regulating the financial sector as well as foreign investment, and also a principal advisor and representative of the government regarding law namely the NBE, EIC, and Ministry of Justice respectively have been interviewed. Relevant investment agreements, investment tribunals' decisions, and laws dealing with foreign investment have been discussed. Preparatory documents of the financial sector amendment laws have been reviewed. This study argues that given the BITs signed by Ethiopia, the stance of the financial sector, as well as investment laws, appear to conflict with the BITs signed by Ethiopia in terms of FNEO investment protection in Ethiopia is concerned. It is recognized that the host state's action against FNEO deprives the investor of the use and advantages of their investment, even while the investor retains normal ownership of the investment's corresponding rights, the actions are comparable to creeping or indirect compensable expropriation. On the one hand, this thesis accepts that financial sector deregulation for FNEOs will promote FDI and hence boost the country's economy, as well as strengthen FNEOs' ties to their place of origin, and placing restriction on FNEO investment on the other hand. However, because FNEOs are foreign nationals, the restriction must be consistent with the country's international obligations emanating from BITs signed by Ethiopia. Finally, this thesis advises that financial sector laws be amended in a fashion that complies with treaty obligations as well as the jurisprudence of international investment tribunals, while liberalizing the industry and limiting FNEOs' investment rights.

Key words: Financial sector, Foreign nationals of Ethiopian origin, Liberalization, Repatriation

CHAPTER ONE
Introduction

1.1 Background of the Study

Prior to 1930, the Ethiopian government's economic responsibilities were not well defined.[1] Only during Emperor Haile Selassie I's rule, which lasted from 1930 to 1974, did the nation begin to specify the economic functions of its government.[2] Ethiopia experienced a free market along with a governmental development strategy throughout this time.[3]

A Provisional Military Government Establishment Proclamation was passed on September 12, 1974, by the country's military government, which took control in 1974, repealing the Imperial Revised Constitution of 1955 and consolidating state power under the Provisional Military Administrative Council.[4] State ownership and planning were seen as the government's economic roles during this time, and the government announced its Ethiopian Socialism Policy, which viewed private economic activity centered on individual gain as being against the interests of the community or marginalizing the private sector.[5]

By adopting a Transitional Period Charter in May 1991, the country's transitional government voided the military government's 1987 Constitution.[6] This was the time when the shift to a free-market economy had been seen. The transitional government specified its economic responsibilities in a transitional economic strategy that was adopted in 1991, promising to scale back its economic endeavors in favor of the free market, encourage domestic and foreign private investment, among other things.[7] It then enacted laws that were designed to provide for the development and regulation of private investment and trade in

[1] See Solomon Abay, Designing the Regulatory Roles of Government in Business: The Lesson from Theory, International Practice and Ethiopia's Policy Path, *Journal of Ethiopian Law*, Vol. XXIII No. 2, December 2009, at p. 108.
[2] See Ibid, at p. 109.
[3] See Ibid, at pp. 109-111.
[4] See Ibid, at pp. 111-112; Provisional Military Government Establishment, Provisional Military Government Establishment Proclamation No. 1/1974, Negarit Gazeta, Year 34, No.1 Addis Ababa, 12 September 1974.
[5] See Ibid, *supra note 1*, at pp. 112-114; Government Ownership and Control of the Means of Production Proclamation No 26/1975, Negarit Gazeta, Year 34, No. 22, Addis Ababa, 11 March 1975; Proclamation Relating to Commercial Activities Undertaken by the Private Sector Proclamation No. 76/1975, Negarit Gazeta, Year 35, No. 18, Addis Ababa, 29 December 1975.
[6] See Transitional Period Charter of Ethiopia No. 1/1991, Negarit Gazeta, Year 50, No. 1, Addis Ababa, 22 July 1991.
[7] See Ibid, *supra note 1*.

different sectors.[8] During this period, financial sectors[9] were privatized under the regulation of the National Bank of Ethiopia (NBE) except for government-backed financial sectors.[10] To this end, investments in these sectors were exclusively reserved for domestic investors except Capital Goods Financing business in which there is no restriction concerning investors owing to their nationality.[11] But, recently, the legal restriction on these areas is lifted to Foreign Nationals of Ethiopian Origins (herein after, FNEOs).[12] It is in late 2019 and early 2020 Ethiopia's financial sector liberalization was undertaken in banking, insurance, and micro-financing business. Hence, they are allowed to acquire shares from existing financial institutions or establish financial institutions in Ethiopia.[13] However, the liberalization had undertaken with the reservation that limits the investors to exercise their economic rights over the investment.[14] These restrictions imposed on FNEOs as an investor in the financial sectors are that all types of payments due to FNEOs resulting from dividends earned, share transfer, sales or liquidation of financial institutions, or any other matters related to shareholding in financial institutions are required to be paid in local currency, i.e. Birr. Even worst, they are not allowed to repatriate any asset or interest obtained in these

[8] See Ibid.
[9] See Ibid, *supra note 1*, at pp. 114-125; Provisional Military Government Establishment, Government Ownership and Control of Means of Production Proclamation No. 26/1975, Negarit Gazeta, Year 34, No. 22, Addis Ababa, 11 March 1975.
[10] See Solomon Abay, *supra note 1*, at pp. 114-125.
[11] See Investment Proclamation No. 1180/2020, Federal Negarit Gazeta, Year 18, No. 63, Addis Ababa, 17 September 2012, Art. 6 (2); Investment Council of Ministers Regulation No. 474/2020, Federal Negarit Gazeta, Year 26, No. 78, Addis Ababa, 2 September 2020, Art.4 (1); The National Bank of Ethiopia Establishment (Amendment) Proclamation No. 591/2008, Federal Negarit Gazeta, Year 14, No. 50, Addis Ababa, 11 August 2008, Art.2 (15); Banking Business Proclamation No. 592/2008, Federal Negarit Gazeta, Year 14, No. 57, Addis Ababa, 25 August 2008, Art.2 (5) and 9; Insurance Business Proclamation No. 746/2012, Federal Negarit Gazeta, Year 18, No. 57, Addis Ababa, 22 August 2012, Art. 2(8) and 10; and Microfinance Business Proclamation No. 626/2009, Federal Negarit Gazeta, Year 15, No. 33, Addis Ababa, 12 May 2009, Art.2(3) and 25; Capital Goods Leasing Business Proclamation No. 103/1998, Negarit Gazeta, Year 4, No. 27, Addis Ababa, 5 March 1998 as amended by Capital Goods Leasing Business Proclamation No. 807/2013, Negarit Gazeta, Year 19, No. 60, Addis Ababa, 26 July 2013.
[12] See Banking Business Proclamation No. 592/2008, Negarit Gazeta, Year 14, No. 57 Addis Ababa, 25 August 2008, Art.2 (5) and 9 as amended by Banking Business Pro. No. 1159/2019, Negarit Gazeta, Year 25, No. 88, Addis Ababa, 9 September 2019; Insurance Business Proclamation No. 746/2012, Negarit Gazeta, Year 18, No. 57, Addis Ababa, 22 August 2012, Art.2 (8) and 10 as amended by Insurance Business Proclamation No. 1163/2020, Negarit Gazeta, Year 26, No. 6, Addis Ababa, 9 January 2020; Micro-finance Business Proclamation No. 626/2009, Negarit Gazeta, Year 15, No. 33, Addis Ababa, 12 May 2009, Art.2(3) and 25 as amended by Micro-finance Business Proclamation No. 1164/2019, Negarit Gazeta, Year 26, No. 7, Addis Ababa, 9 January 2020.
[13] Ibid.
[14] Ibid.

manners.[15] As the result, since FNEOs are foreign nationals for any legal and practical purpose, legally speaking, any disagreement with them related to the realization of economic rights as an investor may appeal to international remedies by claiming fundamental principles of investment treaties unless the issue is resolved domestically in an amicable way. Besides that, they may opt to use illegal remedies to exercise their right.

1.2 Statement of Problem

In Ethiopia, financial sector investment was limited to Ethiopian nationals and organizations fully owned by Ethiopian nationals[16] and registered under Ethiopian law.[17] Currently, the Ethiopian government is lifting the legal prohibition for FNEO investment in the financial sector.[18] But, the liberalization is still subject to the condition that FNEOs must invest in the foreign currencies chosen by the regulator (NBE), namely the USD, the British pound, and the Euro.[19] Additionally, it is prohibited from remitting investment gains and is only payable in Ethiopian Birr rather than the currency used to make the investment.[20] Moreover, they are not allowed to donate the capital that they invested in the sector.[21] It appears to be permissible to repatriate investment proceeds from FNEO-run businesses outside the financial sector, or there are no apparent legal restrictions preventing investors from donating the funds they had invested in the industry.[22] Legally speaking, FNEOs are foreigners for all intents and purposes, and if there is a dispute between an investor and Ethiopia, particularly one involving a bilateral investment treaty that Ethiopia has signed, the investor may seek redress under international law for Ethiopia's breach of the treaty obligation. Ethiopia cannot use its domestic law as a defense.[23] Additionally, they may use criminal means to exert their economic rights. Further, Ethiopia recently ratified the 1958

[15] Ibid.
[16] Ibid.
[17] See Civil Code of the Empire of Ethiopia Proclamation No. 165/1960, Year 19, No. 2, Addis Ababa, 5 May 1969, Arts.545-549, Arts. 555-560.
[18] See Ibid, *supra* note 12.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] See Ethiopian Investment Proclamation No. 1180/2020, Federal Negarit Gazeta, Year 26, No. 28, Addis Ababa, 2 April 2020, Art. 20; Investment Incentive and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012, Federal Negarit Gazeta, Year 19, No. 4, Addis Ababa, 29 November 2012.
[23] See United Nations, VCLT, 23 May 1969, Treaty Series, Vol. 1155, p. 331 (Entered into Force on 27 January 1980).

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (herein after, the "Convention")[24] in which if there is an investment dispute referred to the International Center for Settlement of Investment Disputes (herein after ICSID or the "Center")[25] and the award therefrom, Ethiopia is obliged to recognize and enforce the arbitral awards as well as judgments as if it is rendered by Ethiopian arbitration tribunal and Ethiopian courts. Allowing the investor or their asset to be out from Ethiopia in this case is inevitable. Therefore, the researcher mainly examined the financial sector liberalization for FNEOs in Ethiopia and its extra-territorial impacts, as well as the issues a country may encounter beyond the prospects of the liberalization, and provided a potential solution to handle the challenges.

1.3 Research Questions

The researcher tried to answer the following research questions.

a. What are the extra territorial implications to Ethiopia's financial sector liberalizations for FNEOs?
b. What are the potential challenges of Ethiopia's financial sector liberalization for FNEOs?

1.4 Objectives of the Study

A) General objective

The general objective of the study was to assess the financial sector liberalization for FNEOs in Ethiopia and its extra-territorial implications as well as challenges related to Ethiopia's financial sector liberalization for FNEOs.

B) Specific objectives

i. Examining the legal framework which provides financial sector liberalization to FNEOs and the reservation imposed thereon.
ii. Analyzing investment treaties signed by Ethiopia in light of the liberalization as well as the limitation.
iii. Exploring the possible challenges the country might face as a result of reservation.

[24] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184/2020, Federal Negatit Gazette, Year 26, No. 21, Addis Ababa 13 March 2020.
[25] Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1818 H Street, N.W. Washington, D.C. 20433, U.S.A., entered into force on 14 October 1966.

iv. Proposing possible ways to resolve the challenges that may happen as a result of the reservation.

1.5 Significance of the Study

This research is expected to determine the financial sector liberalization, justification(s), its credibility, and its extra-territorial implications as well as challenges a country might face as the result of restrictions made on the liberalization. In so doing, this work strived to ensure whether the justification(s) that may be provided for restriction based on research or not, identify potential obstacles that might happen as the result of reservation, and finally recommended the possible solutions to manage the challenges. Hence, it will inform policy makers on the possible advantages and disadvantages of the liberalization with fundamental limitations and may serve as a base for the academia and also initiate future research.

1.6 Scope of the Study

This investigation limited its work in assessing the financial sector liberalization for FNEOs in Ethiopia. To this end, the researcher consulted Ethiopian banking, insurance, and micro-financing amendment laws, Ethiopian investment laws, and bilateral investment treaties that Ethiopia signed and ratified. Further, basic principles of international investment agreements related to investors' rights will be discussed to reveal the interaction between domestic investment laws especially financial sector laws. Finally, the writer wound up the investigation by identifying the possible challenges a country might face as a result of reservation and recommending possible ways to manage the challenges.

1.7 Literature Review

In recent decades, several emerging markets have loosened limitations on international financial transactions. According to the traditional theory, doing so would enable these nations to: (i) receive capital inflows from advanced nations that would finance increased investment and growth; (ii) protect against aggregate shocks and reduce consumption volatility; and (iii) hasten the development of domestic financial markets and achieve a more effective domestic allocation of capital and better sharing of individual risks.[26] The

[26] Fernando A. Broner and Jaume Ventura, CREI and Universitat Pompeu Fabra (www.crei.cat). Rethinking the Effect of Financial Liberalization, International Growth Center, F -4005- NOC-1.

conventional viewpoint, which was a component of the so-called Washington Consensus[27], was quite positive about the outcomes of financial liberalization. [28] A well-known statement by Stanley Fischer, Deputy Director of the International Monetary Fund and a renowned macro-economist, provides an authoritative expression of such a viewpoint, who argued that:

> *"Free capital movements facilitate a more efficient global allocation of savings and help channel resources into their most productive uses, thus increasing economic growth and welfare. [...] International capital flows have expanded the opportunities for portfolio diversification and thereby provided investors with the potential to achieve higher risk-adjusted rates of returns. And just as current account liberalization promotes growth by increasing access to sophisticated technology, and export competition has improved domestic technology, capital account liberalization can increase the efficiency of the domestic financial system. [...] These are not abstract concepts, but benefits that every country represented in this room have enjoyed as a result of its access to the international capital markets".*
>
> Stanley Fischer, "Capital Account Liberalization and the Role of the IMF", speech at the IMF Annual Meetings, September 19, 1997.

However, the evidence suggests that this conventional view was wrong.[29] Financial liberalization might lead to different outcomes: (i) domestic capital flight and ambiguous effects on net capital flows, investment, and growth; (ii) large capital inflows and higher investment and growth; or (iii) volatile capital flows and unstable domestic financial markets.[30] This shows how these outcomes depend on the level of development, the depth of domestic financial markets, and the quality of institutions.[31] The impacts of financial

[27] See International Economics, Washington Consensus, The Washington Consensus refers to a set of free-market economic policies supported prominent financial institutions such as the International Monetary Fund, the World Bank, and the U.S. Treasury. A British economist named John Williamson coined the term Washington Consensus in 1989. The ideas were intended to help developing countries that faced economic crises. In summary, The Washington Consensus recommended structural reforms that increased the role of market forces in exchange for immediate financial help.
[28] See Ibid, *supra* note 26.
[29] See Ibid.
[30] See Ibid.
[31] See Ibid.

liberalizations specifically depend on how wealthy, how developed, and how well-resourced the liberalizing nation's institutions are.[32] The conventional view was certainly aware of problems associated with the enforcement of foreign debts.[33] After all, most financial liberalization occurred in emerging markets were after the international debt crisis of the 1980s.[34] But, this view ignored key interactions between foreign and domestic debts by implicitly assuming that the latter would be enforced even if the former were not.[35]

Currently, the Ethiopian government has made a policy shift that uplifts the legal restriction in the financial sector investment partially to FNEOs.[36] That is, previously, the financial sector investment especially banking, insurance, and micro-financing businesses were the areas exclusively reserved for Ethiopian nationals and organizations fully owned by Ethiopian nationals.[37] However, the liberalization is made with reservation which limits the investors to exercise their economic rights over their investment.[38] In business activities undertaken in Ethiopia by FNEOs other than the financial sector, it seems possible to repatriate proceeds of the investment by the currency in which the investor invested or there is no clear legal restriction that precludes the investor to donate part of or fully of the capital that they had.[39]

The principal focus of the researcher was to analyze financial sector liberalization undertaken by Ethiopia and its extra-territorial implication, determine the justification(s) for the restriction imposed on the liberalization, and assess the possible challenges Ethiopia might face as a result of the reservation imposed on the liberalization to, and finally, recommended the way out to avoid or at least manage the challenges.

[32] See Ibid.
[33] See Ibid.
[34] See Ibid.
[35] See Ibid.
[36] See Ibid, *supra* note 15.
[37] See Ibid, *supra* note 12; Investment Regulation No. 474/2020, Federal Negarit Gazette, Year 26, No. 78, Addis Ababa, 2 September 2020, Art.4 (1).
[38] See Ibid, *supra* note 17.
[39] See Ibid, *supra* note 21.

1.8 Research Methodology

A) Method of data collection

The study strived to determine the justification(s) and possible challenges a country might face as the result of restrictions made on financial sector liberalization. In this regard, the investigation undertaken employed multiple sources of data such as textbooks, laws, conventions, and interviewing people. Due to this, the researcher followed the socio-legal research method which encompasses both doctrinal legal research, and social research method. Accordingly, to address the research questions, both primary and secondary sources of data were used. Before addressing primary sources of data collection analysis, the available existing literature, legislations, cases, and theories were reviewed as much as possible. The review of existing literature helped to delimit the scope of the research problem and thereby supported the researcher to decide on the kinds of interviews employed, relevant data sources approached, appropriate offices and personnel communicated, and the cases and documents to be reviewed, etc. Besides that, the review of secondary sources of data indicated works already done and data published thereby disclosing possible gaps to be filled either by data collection or by analyzing the existing data. Then, the researcher resorted to primary sources of data collection based on the gaps observed from the review of secondary sources data.

B) Data analysis

Before making the data analysis, the interviews were transcribed and translated into English; since the interview was conducted using the local language. Having the research questions and purpose of the study in mind, the data gained through an in-depth interview was coded into different major categories; to make the data analysis easier and comprehensive; while relating to the theory and existing literature in the area. Primary sources of data collected through face-to-face interviews were analyzed while reviewing the provisions of the relevant domestic laws and international investment agreements, bilateral investment treaties to which Ethiopia is a member, and other accepted international principles and practices and/or literature that are relevant to the issue. Empirical data collected through face-to-face interviews were summarized in a way suitable to determine the justification(s) and challenges as the result of restrictions made on financial sector liberalization and tried to pinpoint the possible ways to manage the challenges a country might face. Empirical data

was used to assess the validity and reliability of available literature, legislations, conventions, investment treaties, and other accepted international principles and practices.

C) Sampling methods

To undertake the investigation, the researcher planned to collect information from offices that have authority and hence, may have relevant information concerning law-making, i.e. financial sector laws such as the Ministry of Justice, NBE, and EIC. Principally, these offices were approached to obtain the justification for the restriction made on financial sector liberalization. In this regard, the method of sampling employed in this investigation was that of purposive sampling that the offices, and the respective personnel therefrom were selected based on the relationship they have with the issue at hand and the availability of relevant information required for this research with these offices as well as the respective personnel. To do so, one /1/ official was contacted from Legal Study, Drafting and Compilation Directorate General of the Ministry of Justice; Investment Treaties and Legal Affairs Directorate of EIC, and three /3/ officials were contacted from each: Financial Supervision Cluster, Chief Economist, and V/Governor Monetary Stability Cluster and Legal Service Directorate of NBE.

After the interview questions to be employed for the respective officials were prepared, the respondents were selected by using non-probability sampling techniques based on the purpose of selection. To this end, a researcher planned to use the purposive sampling technique to select actual respondents based on education, experience, and official capacity bestowed as the case may be. The study used a semi-structured interview guide to conduct an interview; which was prepared in English and translated into the local language for the convenience of the interviewees. The interview was undertaken for 45 to 60 minutes. The interviewer was assured that the questions were clear enough in such a way that they can be understood easily by the participants of the study. The interview with the officials and personnel from the major government offices was conducted in their respective offices.

1.9 Limitation of the Study

This study required the gathering of empirical data as well as reviewing the doctrinal sources of data. The data have been collected through interviews with officials and professionals as well. Some of these personnel were not available when required as per the

researcher's schedule and some of them were busy with their program. Moreover, the researcher faced a problem while trying to review the preparatory document of the financial sector amendment laws as if the document is confidential. On top of this, a topic under investigation is a recent event that there were no relevant literature, books, and research paper sources available in advance. However, the researcher tried to overcome the limitation in such a way that the interview schedule was re-arranged, and also by discussing the objective of the study with the concerned officials, the said document has been reviewed.

1.10 Ethical Considerations

While approaching the concerned officials for an interview, the researcher ensured the wishes of the respondents. Respondents were informed that the confidential information that may be obtained through data collection will not be used unless expressly authorized to do so. It was disclosed that if the respondents authorize to use it, to keep anonymity, the researcher used predetermined codes instead of the name of the respondents. In this regard, there was no confidential information as such, and hence, the names of the respondents were stated as it is. Further, respondents were informed of the purpose of data collection and/or the research. The researcher informed the respondents that the information obtained in this way will be used only for academic purposes. While gathering empirical data, norms and cultural considerations were maintained. The 19th edition of the blue book citation rule was employed for the data used in the study.

1.11 Organization of the Study

The thesis was organized into five chapters. Chapter one deals mainly with the background and statement of the problem of the study in which a general overview of the Ethiopian financial market economy is addressed. With this, the chapter encompasses a statement of the problem, methodology, objective, research questions, significance and scope of the study, etc. Chapter two explains the liberalization and the respective reservation taken by Ethiopia over FNEOs' investment. Chapter three deal with books, investment agreements, and conventions relevant to the study. Chapter four specifically analyzes the extra-territorial implications of liberalization as well as the fundamental limitations imposed on the investor in light of BITs signed by Ethiopia and also the challenges there might be as well. The last chapter deals with the conclusion and recommendations.

CHAPTER TWO

Financial Sector Liberalization for Foreign Nationals of Ethiopian Origins in Ethiopia

2.1 Overview of Financial Sector Investment in Ethiopia

Before 1930, Ethiopia's government had not yet established its economic functions.[40] Only under the rule of Emperor Haile Selassie I, who was in power from 1930 until 1974, did the nation begin to specify the economic functions of its government.[41] During this period, Ethiopia experienced a free market plus state plan for development as economic roles of the government.[42]

By adopting a Provisional Military Government Establishment Proclamation on September 12, 1974, the military government that took control of the nation in 1974 repealed the Imperial Revised Constitution of 1955 and consolidated state power in the Provisional Military Administrative Council.[43] During this period, the government declared Ethiopian Socialism Policy and considered the private economic activities based on private gain as something contrary to community interest or marginalizing the private sector; state ownership and planning as the economic role of the government.[44]

In May 1991, the country's Transitional Government adopted a Transitional Period Charter, repealing the military government's 1987 Constitution.[45] This is the period in which the transition to a free-market economy was witnessed. The Transitional Government defined its economic roles under a transitional economic policy adopted in 1991 and promised to reduce the scope of its economic activities in the interest of the free market; promote domestic and foreign private investment, etc.[46] It then enacted laws that were designed to provide for the development and regulation of private investment and trade in different sectors.[47] During this period, financial sectors[48] are privatized under the regulation of the

[40] See Ibid, *supra* note 1.
[41] See Ibid, at pp. 99-108.
[42] See Ibid, *supra* note 3.
[43] See Ibid, *supra* note 4.
[44] See Ibid, *supra* note 5.
[45] See Ibid, *supra* note 6.
[46] See Ibid, *supra* note 1.
[47] See Ibid.
[48] See Ibid, *supra* note 9.

National Bank of Ethiopia (NBE) except for government-backed financial sectors.[49] To this end, investments in these sectors were exclusively reserved for domestic investors except Capital Goods Financing business in which there is no restriction concerning investors owing to their nationality.[50] In this regard, the investment regulation[51] provides that except for capital goods financing business banking, insurance, and micro-financing businesses are the areas exclusively reserved for domestic investors.[52] Moreover, the financial sector laws passionately state that FNEOs are prohibited to own financial institutions or carry on financial services or operate branch offices or subsidiaries of foreign financial institutions in Ethiopia, or acquire shares of Ethiopian financial institutions.[53] This is especially revealed under these laws while defining the company besides the definition ascribed to the company under the Commercial Code of 1960 and considered a criminal act if FNEO participate as an investor in the financial institution in Ethiopia. In financial sector laws `Company` is defined as an organization the capital of which is wholly owned by Ethiopian nationals or organizations wholly owned by Ethiopian nationals and registered under the laws of, and having its head office in, Ethiopia.[54] Besides that, the participation of FNEO as an investor in the financial sector constitutes a criminal act and subjects a person to a criminal proceeding. It is provided under these laws with similar wordings that any person who contravenes or obstructs the implementation of other provisions of this Proclamation or regulations or directives issued hereunder shall be punished with imprisonment up to three years and with a fine up to Birr 10, 000.[55]

However, it has been reported that many foreign nationals of Ethiopian origin were found to be involved in financial institutions in Ethiopia in some way or another from the time financial sector laws prohibiting FNEOs' investment were enacted.[56] Nevertheless, the National Bank of Ethiopia issued an interim order titled "Manner of Relinquishing

[49] See Ibid, *supra* note 10.
[50] See Ibid, *supra* note 11.
[51] See Ibid, Investment Regulation.
[52] See Ibid, Art.4 (1).
[53] See Ibid, *supra* note 11, Banking Business Proclamation Art.9; Insurance Business Proclamation Art.10 and Micro Financing Business Proclamation Art.25.
[54] See Ibid, Banking Business Proclamation Art.2 (5); Insurance Business Proclamation Art.2 (8) and Micro Financing Business Proclamation Art.2 (3).
[55] See Ibid, Banking Business Proclamation Art.58 (7); Insurance Business Proclamation Art.57 (7) and Micro Financing Business Proclamation Art.26 (2).
[56] See Ibid, *infra* note 58, preamble.

Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or Insurer Guideline No.FIS/01/2016[57]" that addressed this particular issue. In this guideline, it is recognized that some FNEO were found holding shares in financial institutions of Ethiopia against the laws of the land and although the acts against the laws carry criminal responsibility, the government waived such charges against them who invested in the financial sector in Ethiopia.[58] Finally, it is indicated in the guideline that FNEOs shall disinvest from financial institutions of Ethiopia once again and the financial institutions shall refund such shareholders at the par value of the shares and pay dividends thereof until June 30, 2016.[59]

The current administration is dedicated to reducing poverty through the expansion of the private sector and by integrating Ethiopia into the global economy.[60] To this end, the Ethiopian government has made a policy reform that uplifts the legal restriction on the financial sector investment by FNEOs.[61] It is recognized that financial sector liberalization to FNEOs contributes to the development and the prosperity of the peoples and country of their origin on one hand, and realizes the rights and privileges provided to the FNEOs to enjoy as well as strengthen their tie with their country of origin according to the objective of a proclamation to provide FNEOs with certain rights and privileges to be exercised in their country of origin on the other hand.[62]

2.2 Financial Sector Liberalization for Foreign Nationals of Ethiopian Origin in Ethiopia

A) Potential benefits and qualifications to the liberalization of the financial sector for FNEO

Although Ethiopian authorities are aware of the potential value of financial liberalization, it is widely believed that liberalization may lead to a loss of economic control and may not be economically advantageous. While the Ethiopian government's concerns about financial

[57] See National Bank of Ethiopia, Manner of Relinquishing Shareholdings of Foreign Nationals of Ethiopian Origin in a Bank or Insurer Guideline No. FIS/01/2016.
[58] See Ibid, preamble.
[59] See Ibid.
[60] See Abiy Ahmed Ali, *Medemer*, Addis Ababa, September 2019, pp. 191-196.
[61] See Ibid, *supra* note 11.
[62] See Providing Foreign Nationals of Ethiopian Origin with certain Rights to be Exercised in their Country of Origin Proclamation No. 270/2002, Federal Negarit Gazeta, Year 8, No. 17, Addis Ababa, 5 February 2002, preamble and Art.3.

liberalization are understandable, there is, nonetheless, a compelling case that can be made to pursue liberalization. The following are some of the important potential benefits that may be realized from the liberalization of the financial sector for FNEO and some qualifications to be taken into account:[63]

- Financial liberalization may have positive effects on the efficiency of the financial sector in the host market. This is because financial institutions are forced to compete with each other and there by become a sound financial institution and hence, provides efficient financial services. After all, skills and technology levels improve.[64]
- The entry of foreign nationals of Ethiopian origin through financial liberalization may improve bank supervision through regulatory spillover. According to Goldberg (2007, p. 10): being healthier than domestic banks, foreign banks' participation in emerging markets implicitly enables a nation to import more stringent prudential regulation and improve the stability of its financial sector.[65] Crystal, Dages, and Goldberg (2001) found that the admission of foreigners of Ethiopian descent into the financial sector had favorable effects on the general soundness of financial systems, in part because financial institutions owned by foreigners of Ethiopian descent aggressively screened and handled problem finances.[66]
- As a part of financial sector liberalization, the privatization of state-owned banks may be an important option to further enhance the efficiency of the banking sector.
- The entry of foreign banks may have positive effects on employment and wages. While studies of manufacturing industries have confirmed that FDI generally had positive effects on employment and wages in host countries, since banks play an important role in financial intermediation, the effects of FDI for financial services on employment may be greater and broader than those of FDI for manufacturing sectors.[67]
- The participation of FNEO in the financial sector increases the accumulation of foreign exchange in the host market that may in return contributes to the country's trade balance.

[63] See Kozo Kiyota, Barbara Peitsch and Robert M Stern, *The Case for Financial Sector Liberalization in Ethiopia,* Research Seminar in International Economics Gerald R. Ford School of Public Policy, The University of Michigan Ann Arbor, Michigan 48109-3091, p. 15.
[64] See Ibid.
[65] See Ibid.
[66] See Ibid.
[67] See Ibid.

- The whole economy in the host country may be encouraged that the FNEO can re-invest in the country the proceeds obtained from previous financial sector investment.

Likewise, the liberalization of financial services for FNEO entails various economic risks and uncertainties, some of which are compatible with the worries of the aforementioned stakeholders:

- Financial liberalization may cause financial fragility rather than financial stability. That is there may be enormous capital outflows and which in effect lead to a financial crisis since foreign nationals of Ethiopian origin are foreign citizens.
- The financial sector liberalization for FNEO may not address directly issues of poverty alleviation and the access of low-income and rural-based savers and borrowers to financial services. Although financial liberalization itself may have positive effects on economic growth, only wealthy people may gain from financial development.
- It is argued that if financial liberalization is not managed properly, it can lead to potentially highly disruptive financial crises.

It seems response to this general assumption, a series of financial sector reforms has been introduced in Ethiopia in late 2019 and early 2020, when financial sector investment was allowed to FNEOs. It is evident from the preceding discussion that there may be significant economic benefits to be derived from financial sector liberalization in particular and the entry of FNEOs and the privatization of state-owned banks in general. However, attention needs to be made to the possible detrimental effects that may occur in the case of developing countries like Ethiopia while liberalizing the financial sector for FNEO since FNEO are foreign nationals legally speaking, and any disagreement between FNEO and Ethiopia may appeal to bilateral investment treaties ratified by Ethiopia.

B) Financial sector liberalization for FNEO in Ethiopia

Since Ethiopian Prime Minister Dr. Abiy Ahmed took power in April 2018, his government has sent an unambiguous message that it needs more private sector investment to drive growth and create jobs. The government's growth strategy calls for structural reforms designed to strengthen the private sector, boost competition, and increase investment—an approach that is accelerating the end of Ethiopia’s long reliance on state-led economic

development. With this, financial sector laws dealing with the prohibition of financial sector investment for FNEO were amended by new respective amendment laws.[68]

FNEO is allowed to acquire shares from existing or establish new financial institutions in Ethiopia.[69] This can be taken as the realization of the rights and privileges provided to the FNEOs to enjoy as well as strengthen their tie with their country of origin according to the objective of Proclamation No. 270/2002.[70] Art.5 of the Proclamation No. 270/2002 states the rights and privileges shall be exercised and enjoyed by foreign nationals who are covered by Art.2 (1) of the proclamation and who hold valid Identification Card.[71] The rights stated under the proclamation seem holistic and all-inclusive, and of which, the right to be considered as a domestic investor to invest in Ethiopia according to Investment Laws is the primary issue. On the other hand, Investment Proclamation No. 1180/2020 under Art.2(5)(f) provides that a Foreign National or Foreign Enterprise treated as a domestic investor as per the relevant law or international treaty ratified by Ethiopia is recognized as a domestic investor and hence, is allowed to invest in investment areas reserved for a domestic investor in Ethiopia. Accordingly, Investment Regulation No. 474/2020 under Art.4 (1) indicates that the investment areas are exclusively reserved for domestic investors, i.e. banking, insurance, and microfinance business.

Thus, FNEO has the right to be treated as a domestic investor and thereby invest in investment areas exclusively reserved for domestic investors including the financial sector. In this regard, it can be construed that only FNEOs who opted to be treated as domestic investors are entitled to invest in the financial sector in Ethiopia. This is the subject of this research and an in-depth investigation will be going on to assess whether the rights and privileges provided for FNEO by Proclamation No. 270/2002 were realized by other laws, i.e. financial sector laws on one hand, and its extra-territorial implications in Ethiopia in line with bilateral investment treaties signed and ratified by Ethiopia with great attention on the other hand.

[68] See Ibid, *supra* note 12.
[69] See Ibid.
[70] See Ibid, *supra* note 62.
[71] See Ibid, Art.5.

C) Overview of FNEOs' participation in the financial sector since liberalization

A series of economic as well as financial sector reforms introduced in Ethiopia in late 2019 and early 2020 was welcomed by foreign investors in general and FNEO in particular in a sense that it may boost the country's economy on one hand and realizes the rights and privileges' of FNEO to be exercised in their country of origin. Having this ambition in mind, FNEOs are participating in existing as well as by forming new financial institutions. Based on the financial sector liberalization for FNEOs in Ethiopia, let us see the participation of FNEOs in the financial sector as of March 2022.

According to the data obtained from the NBE as of March 2022, generally, there are 22 banks in Ethiopia. Of these, three (3) are government-owned banks, i.e. National Bank of Ethiopia, Development Bank of Ethiopia, and Commercial Bank of Ethiopia whereas the rest 19 are private banks undertaking banking business in Ethiopia. Moreover, there are 10 banks are applied for and undergoing the formation of a company to undertake banking business in Ethiopia. As of March 2022, three of the under formation banks, i.e. Zad Bank S.C. (under formation), Afro Bank S.C. (under formation), and Jano Bank S.C. (under formation) terminated the process of establishing a company for various reasons. Further, recently, NBE issued a directive dealing with the transformation of a microfinance company to a bank in which licensed microfinance institutions undertaking micro-financing business may be relicensed as a bank.[72] Based on this directive, six (6) financial institutions licensed and undertaking micro-financing business in Ethiopia are applied for NBE to be relicensed as a bank and undergoing the transformation process as the NBE report state. These are Amhara Credit and Saving Institution S.C., Addis Credit and Saving Institution S.C., Omo Microfinance Institution S.C., Oromia Credit, and Saving Institution S.C., Sidama Microfinance Institution S.C., and Somali Credit and Saving Institution S.C. As of March 2021, only one (1) microfinance institution, i.e. Oromia Credit and Saving Institution S.C. is relicensed and commenced operation as a bank by changing its name to Siinqee Bank S.C. Thus, for this research, microfinance institutions undergoing a transformation process are included in the banking industry, but their name is used as it was in the microfinance institution.

[72] See NBE, Licensing and Supervision of Banking Business, Requirements for Relicensing a Microfinance Institution as a Bank Directive No. 297/2020.

As far as FNEOs' participation in the banking industry is concerned, as of December 2021, FNEOs are participating in existing, under-formation banks as well as in microfinance institutions under transformation. Regarding the FNEOs' participation in the banking industry, detailed information was provided in the table below.

No.	Name of banks	No. of FNEO shareholders	Nationality	No. of shares owned by FNEO	Manner of acquisition
1	Awash Bank S.C.	62	American (39) British (13) Norwegian (1) French (2) Dutch (2) Italian (3) Canadian (2)	63,153	Purchase and other means, but the majority of the shareholding was by purchase
2	Zemen Bank S.C.	17	American (12) British (3) Germania (1) Canadian (1)	7,255	Purchase and other means, but the majority by purchase
3	Bank of Abyssinia S.C.	8	American (5) British (1) Swiss (1) NA	98,721	Purchase and other means, but the majority by purchase
4	Nib International Bank S.C.	23	Canadian (1) American (19) Norwegian (1) Israel (1) British (1)	13,002	Purchase and other means, but the majority by purchase
5	Lion International Bank S.C.	4	American (4)	9,010	Purchase
6	Wegagen Bank S.C.	3	American (3)	323	Purchase
7	Addis International Bank S.C.	1	American (1)	350	Purchase
8	Debub Global Bank S.C.	2	American (1) Italian (1)	43	Purchase
9	Hibret Bank S.C.	6	American (5) Swiss (1)	18,689	Purchase (2) Court order (4)
10	Enat Bank S.C.	20	American (14) Italian (2) Norwegian (2) Canadian (1) Australian (1)	4,106	Purchase
11	Abay Bank S.C.	1	American	536	Purchase
12	Oromia Bank S.C.	1	American	100	Purchase
13	Somali Microfinance S.C.	1	Canadian	100	Purchase

	(under transformation to be relicensed as Shebele Bank S.C.)				
14	Amhara Credit and Saving Institution S.C. (under transformation to be relicensed as Tseday Bank S.C.)	1	American	10	Purchase
15	Amhara Bank S.C. (Under formation, licensed)	233	American (132) Canadian (38) UK (30) Swedish (13) Others	61,854	Purchase
16	Diaspora Bank S.C. (under formation)	1	Canadian	500	Purchase
17	Goh Betoch Bank S.C. (Under formation, licensed)	35	Saudi Arabian (30) South African (2) American (1) Australian (2)	518	Purchase
18	Ahadu Bank S.C. (under formation, licensed yet commenced operation)	148	American (105) Norwegian (13) Swedish (12) Canadian (10) Italian (8)	22,667	purchase
19	Ramis Bank S.C. (under formation)	2	Swedish (1) American (1)	250	purchase
20	Tsehay Bank S.C. (under formation)	1	American	202	purchase
21	Geda Bank S.C. (under formation)	1	American	50	purchase
	Total	**571**		**301,439**	

Table 1: FNEOs who are shareholders in existing, transforming as well as under formation banks

Based on this data, generally, 571 FNEOs have participated and owned 301,439 shares from existing, transforming as well as under formation banks through purchase, succession, and court order since financial sector liberalization for FNEOs in Ethiopia.

According to the data obtained from the NBE as of March 2022, generally, 18 licensed insurance and one re-insurance company are operating insurance business in Ethiopia. Moreover, two insurance companies are under formation to run the insurance business. As far as FNEOs participation in insurance is concerned, no FNEO has participated in the insurance companies applied for and undertaking the process of formation of a company to

obtain a license to run an insurance business. Regarding the FNEOs' participation in the existing insurance companies, detailed information was provided in the table below.

No.	Name of Insurance/Reinsurance company	No. of FNEO shareholders	Nationality	No. of shares owned by FNEO	Manner of acquisition
1	Awash Insurance Share Company	4	American	689	Succession
		2	British	106	
		1	American	500	Purchase
2	Berhan Insurance Share Company	1	British	13	Succession
		3	American	39	
3	Ethio-life and General Insurance Share Company	1	American	169	Succession
4	Global Insurance Share Company	1	Swiss	3,885	Purchase
5	National Insurance Corporation of Ethiopia	1	American	514	Succession
6	Nib Insurance Share Company	5	American	377	Succession
7	Nile Insurance Share Company	1	American	25	Succession
8	Nyala Insurance Share Company	2	Yemeni	2,288	Succession
		1	American	1,810	
9	United Insurance Share Company	1	American	380	Succession
10	Ethiopian Re-insurance Share Company	1	American	10	Purchase
	Total	**25**		**10,805**	

Table 2: FNEOs who are shareholders in Insurance/Re-insurance Companies

According to this data, 25 FNEOs owned a total of 10,805 shares from existing insurance and re-insurance companies by a way of succession and purchase in Ethiopia since financial sector liberalization for FNEOs as of March 2022. It can be revealed that the majority of shareholding by FNEOs in insurance companies was acquired through succession from Ethiopian parents. In this regard, during the interview undertaken with W/ro Serkaddis Adugna, Principal Insurance Examiner, from NBE on March 25, 202 confirmed that FNEOs

are welcomed the financial sector liberalization, but they are not participating as expected from while liberalizing the sector as such yet. The possible reason for the insignificant participation, as stated by w/ro Serkaddis Adugna, is the restriction imposed on the exercising of investment capital, i.e. transfer of funds as an investor. W/ro Serkaddis Adugna stressed that since the liberalization was aimed at increasing foreign exchange reserve, actually it is not realized that FNEOs are not willing to participate in the investment due to the limitation imposed on the investment.

According to the data reported by the National Bank of Ethiopia as of March 2022 disclosed during the interview with Ato Kurundi Tesgera, A/director of Micro finance Institutions Supervision Directorate, Financial Institutions Supervision Cluster, NBE on March 23, 2022, generally 42 licensed microfinance institutions are operating micro-financing business in Ethiopia. Moreover, 39 microfinance institutions are applied for and are under formation to run micro-financing businesses. As far as FNEOs participation in micro-financing institutions is concerned, only 5 FNEOs are participated in existing as well as under formation micro-financing institutions yet, and the detailed information was provided in the table below.

No.	Name of the company	No. of FNEO shareholders	Nationality	No. of shares owned by FNEO	Manner of acquisition
1	One Micro financing S.C. (existing)	3	France	79	Succession
			Norwegian	208	
			America	40	
2	Elsabi Micro financing S.C. (under formation)	2	America	2000	Purchase
			Germany	2000	
	Total	**5**		**4,327**	

Table 3: FNEOs who are shareholders in Micro finance Companies

According to this data, 5 FNEOs have owned a total of 1,327 shares from existing as well as under-formation micro finance companies by a way of succession and purchase in Ethiopia since financial sector liberalization for FNEOs as of March 2022. It can be revealed that the majority of shareholding by FNEOs in microfinance companies was still acquired through succession from Ethiopian parents. During the interview with Ato Gayim Addisalem, A/principal examiner of micro finance institutions, from NBE on March 20, 2022, he disclosed that though financial sector liberalization for FNEOs was aimed at increasing

foreign direct investment and, thereby increase foreign exchange reserve in the country, the aim was not realized yet as expected from the liberalization. In this regard, he shares the response reflected by W/ro Serkaddis Adugna during the interview with the researcher. Ato Gayim Addisalem pointed out two reasons, hence important, for the low or under the realization of the aim of the financial sector liberalization for FNEOs. First, the limitation imposed on the liberalization discouraged the potential investor that they require investors the security of the investment including the transfer of funds resulting from the investment. Second, though the procedural problem, the place of share subscription of the financial sector that the share subscription shall be taken in the geographical territory of Ethiopia while a financial sector may conduct the promotion and other related preliminary activities needed for share subscription outside Ethiopia[73]. That is foreign investors do not want to come to Ethiopia just for a share subscription owing to related costs and other inconveniences, rather they require to complete the subscription in the place where promotion and other related activities are undertaken. Besides that, he raised the reason for the limitation that it was intended to encourage the foreign investors to re-investment in Ethiopia rather than transferring funds from outside Ethiopia and also most importantly, due to the risk of capital flight that if the transfer of funds is allowed, there would be capital flight and a country might be in a verge of foreign exchange shortage.

From the data obtained from NBE about the participation of FNEO in the financial sector in Ethiopia, the researcher observed that Ethiopia does not have signed BIT with some of the countries whose nationals are investing in Ethiopia in the general and financial sector in particular. For example, the majority of the FNEO investing in the financial sectors were nationals of United States of America in relation to other countries' nationals. On the other hand, Ethiopia does not have a bilateral investment treaty with the United States of America yet.[74] It could not be construed that the claims of foreign investors are only based on BITs, but it is accepted that BITs ensure the security of foreign investment and also most importantly impose obligations on the contracting parties concerning foreign investment more than other investment-related instruments. Hence, this research is confined to

[73] See Ibid, *infra* note 76, Manner of equity investment by FNEO in a bank directive, Art.4 (1); Manner of equity investment by FNEO in an insurance directive, Art.4 (1); Manner of equity investment by FNEO in a micro finance directive, Art.4 (2).
[74] See Ibid, *infra* note 261.

investigating the provisions of BITs signed by Ethiopia in light of the limitation imposed on foreign investor in the financial sector, and a detailed discussion on this issue will be going on in chapter four.

2.3 Restrictions on Foreign Nationals of Ethiopian Origins' investment

While providing FNEOs with certain rights and privileges to be exercised and enjoyed in their country of origin, the law provided certain restrictions that FNEOs are not entitled to exercise in their country of origin even if they fulfill the requirements provided under the law. In this regard, let us examine the restrictions imposed on the FNEO in the financial sector.

Restrictions on the financial sector investment

An FNEO intends to hold a share in financial institutions or indirectly by holding a share in another organization that holds a share in financial institutions shall pay the values of the share in the financial institutions only in the acceptable currencies.[75] In this regard, the NBE issued the directives dealing with the manner of equity investment by foreign nationals of Ethiopian origin or organizations fully owned by foreign nationals of Ethiopian origin or jointly by Ethiopian nationals and foreign nationals of Ethiopian origin in the financial sector.[76] Acceptable currency is defined in these directives as foreign currency which is declared to be acceptable for payment in Ethiopia by the NBE and shall include US Dollar,

[75] See Ibid.

[76] See Licensing and Supervision of Banking Business Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in Banks Directive No. 101/2020, National Bank of Ethiopia, Addis Ababa, 28 February 2020; Licensing and Supervision of Insurance Business Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in an Insurance Company Directive No. 113/2020, National Bank of Ethiopia, Addis Ababa, 5 March 2020; Licensing and Supervision of Microfinance Business Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in Microfinance Directive No. 302/2020, National Bank of Ethiopia, Addis Ababa, 9 March 2020. With respect to the numbers of these directives in particular and any other directive issued by the NBE, the reader of this research may encounter a different number for the same directive while referring to these directives. This is due to the fact that the NBE while issuing the directive assigns a number by ascending order to each directive based on the sector of business by indicating the sector which a directive deals with, like SBB/73/2020; SIB/49/2020; MFI/30/2020 respectively as referred herein above and that may help a reader to differentiate the directives sector by sector basis. But, currently any administrative institutions are required to send the existing and newly adopted directives to the Ministry of Justice based on Federal Administrative Procedure Proclamation No. 1183/2020, and the Ministry of Justice while registering the directive provide identification number which is national code like that of proclamation or regulation pursuant to Art. 16 of the proclamation and publicized accordingly to have the legal effect. Thus, the numbers of NBE directives stated in this thesis are based on the numbering provided by Ministry of Justice.

Great Britain Pound Sterling, Euro, and other currencies that the NBE may specify to be acceptable for this purpose from time to time.[77]

However, the liberalization had undertaken with the restriction that limits the FNEO to exercise their economic rights over the investment. The restrictions imposed on FNEOs as an investor in the financial sectors are that all types of payments due to FNEOs resulting from dividends earned, share transfer, sales or liquidation of financial institutions, or any other matters related to shareholding in financial institutions are required to be paid in local currency, i.e. Birr.[78] Even worst, they are not allowed to repatriate any asset or interest obtained in these manners.[79] Art.9 (3) of the Banking Business Proclamation No. 592/2008 as amended by Proclamation No. 1159/2019 clearly illustrates these restrictions against FNEOs.[80] Art.10 (3) of the Insurance Business Proclamation No. 746/2012 as amended by Proclamation No. 1163/2019[81] and Art.32 (3) of the Microfinance Business Proclamation No. 626/2009 as amended by Proclamation No. 1164/2019[82] contain similar stipulations.

As indicated in the the financial sector laws discussed herein above, FNEO opted to be treated as a domestic investor are not allowed to repatriate the proceeds of the investment from the financial sector in Ethiopia though they are foreign nationals. Moreover, the directives issued by NBE to regulate the manner of equity investment by FNEO in financial institutions also maintained the position held by the financial sector laws. It is affirmed in these directives that dividends earned as a result of investment in a financial institution by FNEO shall be paid in Ethiopian Birr, and shall not be repatriated.[83] Further, FNEOs are not

[77] See Ibid, Art.2 (1).
[78] See Ibid, *supra* note 12.
[79] See Ibid.
[80] See Ibid, Banking Business Proclamation No. 592/2008 as amended by Proclamation No. 1159/2019, Art.9 (3).
[81] See Ibid, Insurance Business Proclamation No. 746/2012 as amended by Proclamation No. 1163/2019, Art.10 (3).
[82] See Ibid, Microfinance Business Proclamation No. 626/2009 as amended by Proclamation No. 1164/2019, Art.32 (3).
[83] See Ibid, *supra* note 76, Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in Banks Directive, Art.6 (1); Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in an Insurance Company Directive, Art.6 (1); Manner of Equity Investment by Foreign Nationals of Ethiopian Origin or Organization in Microfinance Directive, Art.6 (1).

entitled to obtain shares in financial institutions in Ethiopia through donation[84]. But, they can get it through succession from Ethiopian parents.[85]

Moreover, FNEO may own shares of financial institutions undergoing the formation process. On one hand, the formation of the company may not be successful for various reasons and as the result, the organizers or sometimes founders of the company under formation may terminate the process of formation. According to Art.254 (3) of the Commercial Code, i.e. Proclamation No. 1243/2021, where the company has not been completed the formation process within the time limit set in the prospectus from the date of deposit in a bank of the paid-up sums, subscribers who do not wish to continue as members of the company may request the refund with bank interest of the paid-up sums on the other hand. In these cases, the organizers or founders are duty-bound to refund or notify the organ mandated to register business organizations to effect a refund of the contributed sum to the subscribers.[86] Thus, it is an inevitable scenario that foreign nationals who subscribed to the shares of financial institutions under formation may require a refund of the contributed sum and thereby transfer the seed capital out from Ethiopia. Strictly speaking, this is the process of the investment and the investor is unable to implement the investment project for various reasons, and hence, it is a pre-investment phase. Ethiopian Investment Proclamation No.1180/2020 under Art.2 (1) defines the investment in a holistic manner including the pre-investment phase that an expenditure of capital in cash or in-kind or both by an investor to establish a new enterprise, or to acquire, in whole or in part, or to expand or upgrade an existing enterprise amounts to an investment. But, financial sector laws seem only to refer to the scenario after the implementation of a proposed investment, i.e. FNEO established an organization or acquired the shares of a company.[87] Moreover, BITs signed by Ethiopia protect an investment when an investor established an enterprise or acquired a share or other economic rights in an enterprise which seems to refer to post-investment situations rather than the pre-investment phase.[88] Thus, cumulative reading of investment proclamation with that of the financial sector laws reveal that the protection of investment begins from the pre-

[84] See Ibid, Art.5 (2).
[85] See Ibid, Art.5 (3).
[86] See Commercial Code of Ethiopia Proclamation No. 1243/2021, Federal Negarit Gazette, Year 27, No. 23, Addis Ababa, 12 April 2021, Arts.250 (1) (g) and 254 (3).
[87] See Ibid, *supra* note 11, Investment Proclamation, Art.2 (1).
[88] See Ibid, *infra* note 157.

investment phase and hence, FNEO who tried to invest in the financial sector in Ethiopia but failed to do so, are not allowed to transfer the seed capital to the home state or other third state. But, BITs signed by Ethiopia only recognize the activities as an investment when an investor established an enterprise or acquired a share or other economic rights in an enterprise. In this case, the pre-investment phase may not be considered as an investment and may not be covered by the scheme of investment. This is again another challenging situation in which transfer of funds requests come in to picture when foreign investors tried to invest in the financial sector in Ethiopia, but failed to do so, and require repatriating the capital from Ethiopia.

Concerning the rationale behind the limitation imposed on the investment of FNEO treated as a domestic investor as well as the fate of these investors at the end of the day, the interview made on April 30, 2022, with Ato Bogale Tumdedo Wanniso, Investment Treaties and Legal Affairs Directorate Director of Ethiopian Investment Commission (herein after, EIC), stated that financial sector liberalization for FNEO was aimed at to obtain the contribution from FNEO by allowing them to participate in country's economy and thereby increase foreign direct investment in general, and to increase foreign exchange reserve in particular. He pointed out that, due to this reason, they are not allowed to transfer funds resulting from an investment out from Ethiopia. Rather, they are required, perhaps encouraged, to re-investment in Ethiopia. Moreover, Ato Bogale stressed that in practice FNEO may be allowed to transfer funds only for basic needs via a Letter of Credit (LC) with the authorization of a letter of EIC though there is no law supporting this practice. However, as discussed herein above the financial sector laws clearly state that FNEO is not allowed to transfer funds resulting from the investment.

In this regard, it is a corollary to raise the fate of foreign nationals of Ethiopian origin who opted to be treated as domestic investors in Ethiopia for the transfer of funds out of Ethiopia in respect of their investment. Since FNEO are foreign nationals for all practical and legal purposes, it is inevitable to require the remittance of funds resulting from an investment out of Ethiopia. Investment laws discussed herein above seem silent concerning the remittance of funds owing to FNEO opting to be treated as a domestic investor. Financial sector laws, on the other hand, clearly state that FNEO are not allowed to repatriate the proceeds with

respect to their investment out of Ethiopia. Thus, the limitation imposed on FNEO opting to be treated as a domestic investor in the general and financial sector, in particular, might have a negative impact on FDI and also become a source of illicit financial flows unless the legal remedies provided for FNEO is not responsive to the practical inevitable scenarios.

But, Ethiopia might have an obligation emanating from BITs ratified by Ethiopia in this respect. Hence, it is wise to consult the BITs ratified by Ethiopia in terms of the rights and duties of contracting parties to the treaty in general and the issue of transfer of funds in particular. Moreover, many FNEOs are investing in the financial sector in Ethiopia even though there is no BIT signed between Ethiopia and their home state. In this case, the issue might call the attention of IIAs as well as the jurisprudence of the international arbitration tribunal. Further, there may be another situation in which Ethiopia would be duty-bound to allow the remittance of funds out of the country if the equity is subjected to enforcement of foreign judgment and/or arbitral award as Ethiopia is a party[89] to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.[90] The next chapter will discuss these issues in light of IIAs and international arbitration tribunal decisions.

[89] See The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No. 1184/2020, Federal Negarit Gazeta, Year 26, No. 21, Addis Ababa, 13 March 2020.
[90] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Commission on International Trade Law, New York, 1958, (entered into force on 7 June 1959).

CHAPTER THREE

Extra-Territorial Implications of Financial Sector Liberalization for Foreign Nationals Ethiopian Origins

As indicated in the preceding chapter, currently, financial sector investment is open to the FNEOs. However, it is clearly stated in the financial sector laws that FNEOs are not allowed to be paid in foreign currency, rather, all payments due to, in respect of the investment, them shall be paid in local currency. Moreover, they are not allowed to repatriate all types of payments resulting from the investment though they are foreign nationals by law. As far as investment proclamation and regulations concerning the transfer of funds of FNEOs are concerned, it remained silent while clearly stating the fund transfer of foreign investors. The next section will deal with the conceptual frameworks related with the issue.

3.1 Theoretical and Conceptual Frameworks

A) Investors and Investments

i. Investors: Individuals, Companies, Nationality, and Shareholders

Private Foreign Investors: Investors might be either natural people (individuals) or businesses (juridical persons). In majority of the cases, the investor is an organization but at times individuals also act as an investor, and hence, the reference is made simply to the investor in general which includes individuals as well as the organization. The investor's nationality determines the foreignness of the investment.[91] The origin of the investment, in particular of the capital, is not decisive for the question of the existence of foreign investment.[92]

The investor's nationality determines the treaty from which it may benefit as far as a bilateral investment treaty is concerned.[93] However, in extraordinary circumstances, the position of foreign investors may be extended to permanent residents. Additionally, several

[91] See A Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, (2005) 20 ICSID Review FILJ 357; R Wisner and R Gallus, *The Nationality Requirement in Investment-State Arbitration*, (2004) 5 JWIT 927.

[92] See Tradex vs. Albania, Award, 29 April 1999, 5 ICSID Reports 70, Para 108-111; Olguin vs. Paraguay, Award, 26 July 2001, 6 ICSID Reports 164 (2004), at Para 66; Wena Hotels vs. Egypt, Award, 8 December 2000, 6 ICSID Reports 89, Para 126; Wena Hotels vs. Egypt, Decision on Annulment, 5 February 2002, 6 ICSID Reports 129, at paras 54-55; Tokios Tokeles vs. Ukraine, Decision on Jurisdiction, 29 April 2004, 20 ICSID Review-FILJ 205(2005), at paras 74-82.

[93] See North American Free Trade Agreement (NAFTA), 1 January 1994, Art. 201.

treaties demand the investor's domicile in addition to their nationality.[94] That is if the investor wishes to rely on a BIT, it must show that it has the nationality of one of the state parties, or if the investor wishes to rely on a regional treaty, such as the North American Free Trade Agreement (herein after, NAFTA) or European Community Treaty (herein after, ECT), it must show that it has the nationality of one of the states parties to the treaty. If the investor wishes to rely on the International Center for Settlement of Investment Disputes Convention (herein after, ICSID), it must show that it has the nationality of one of the states parties to the ICSID Convention.

Nationality of Individuals: an individual's nationality is determined primarily by the law of the country whose nationality is claimed. Most of the time, a certificate of nationality, issued by the competent authority of a state, is strong evidence for the existence of the nationality of that state but is not necessarily conclusive. In its Draft Articles on Diplomatic Protection (2006), the International Law Commission (herein after, ILC) considered that the rule on continuous nationality was not appropriate in the case of an individual claim and that preference should be given only to the date of the presentation of the claim.[95]

In this regard, when we see for example, BIT between Ethiopia vs. Brazil under Art. 1.4 (a) defines 'investor' as 'any natural person who is a national or a permanent resident of a Contracting Party, according to its laws, that invests in the territory of the other Contracting Party'.[96]

Nationality of Corporations: generally, nationality presupposes legal personality. Therefore, unincorporated entities and groupings will not, in general, enjoy legal protection,[97] although a treaty may provide otherwise.[98] Compared to individual nationality, corporate nationality is far more complicated. Legal systems and treaties employ a range of criteria to ascertain whether a juridical person is a national of specific state. Each party's

[94] See Ibid.
[95] See ILC, Draft Articles on Diplomatic Protection with Commentaries (2006) 138.
[96] See Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, 11 April 2018, Art.1.4 (a).
[97] See Consorzio Groupement L.E.S.I. Dipenta cl Republique Algerienne, Award, 10 January 2005, paras. 37-41; Impergilo vs. Pakistan, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, paras 131-139.
[98] For example, the Argentina vs., Germany BIT in its definition of 'national' refers to 'any legal person and any commercial or other company or association with or without legal personality'.

corporate nationality may occasionally be defined differently in the same treaty. Incorporation and primary business location are the two most often cited factors for corporate nationality.[99]

Concerning nationality of the corporation, BITs signed and ratified by Ethiopia most of the time use incorporation, under the laws and regulations of that Contracting Party, conducting substantial business activity in the territory of one of the Contacting Parties and domiciled in its territory to determine the nationality of the corporations. For example, a BIT between Ethiopia and Brazil requires incorporation, domicile, and the existence of substantial business activities in the territory of contracting parties to determine the nationality of the corporation.[100]

Shareholders as investors: Investments are typically made by purchasing shares in a firm whose nationality is different from the investor's. May a shareholder pursue claims for the damage done to the company? In particular, is it possible for the shareholder to proceed based on its nationality even if the company does not meet the nationality requirements under the relevant treaty?[101]

In the Barcelona Traction Case[102], the International Court of Justice (herein after, ICJ) held that Belgium, the state of nationality of the majority shareholder of a company incorporated in Canada, was unable to pursue claims against Spain for the damage done to the company.[103] But, the ICJ acknowledged that it was decided under customary international law and that treaties may provide otherwise.[104] In addition, the ICJ acknowledged that the

[99] See Autopista vs. Venezuela, Decision on Jurisdiction, 27 September 2001, 6 ICSID Reports 419, para. 107; See also Soabi vs. Senegal, Decision on Jurisdiction, 1 August 1984, 2 ICSID Reports 175, para 29.
[100] See Ibid, *supra* note 96.
[101] See S A Alexandrov, *The Baby Boom of Treaty Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as investor and Jurisdiction Ratione Temporis* (2005) 4, Law and Practice of International Court and Tribunals 19; C Schreuer, *Shareholder Protection in International Investment Law* in Festschrift Fur Christian Tomuschat (2006) 601.
[102] See Barcelona Traction, Light and Power Co., Ltd. (Belgium vs. Spain), Judgments, 5 February 1970, ICJ Reports 1970, p.4.
[103] See I A Laird, *A* Community of Destiny, The Barcelona Traction Case and the Development of Shareholder Right to Bring Investment Claims in *T* Weiler (ed.), *International Investment Law and Arbitration Leading Cases from ICSID, NAFTA and Bilateral Treaties and Customary International Law* (2005) 77-96.
[104] See Ibid, para 89-90.

exclusion of shareholders' rights against a host state inflicting damage on a company would not necessarily apply if the company in question is incorporated in the host state.[105]

In the Diallo case (Guinea vs. DR Cong),[106] the ICJ held that the state of nationality of the shareholder (Guinea) was unable to exercise diplomatic protection against the state in which the company is incorporated (DR Congo). The ICJ noted that in contemporary international law the protection of shareholders is governed by bilateral and multilateral treaties and by contracts between state and foreign investors.[107] However, protection by substitution in favor of the shareholder rather than the company is not discernible under customary international law.[108] When investments are made through entities formed in the host state, as is frequently the case, and the local company is the immediate investor, the issue of shareholder protection is particularly acute.

Under the conditions of Art.25(2)(b) of the ICSID Convention and provisions in some BITs, the local company might qualify as a foreign investor because of its foreign control. A slightly different method is employed in NAFTA in that an investor that owns or controls a company registered in another state party may submit a claim to arbitration on behalf of that company.[109] Generally, what these provisions have in common is that they require control over the company in question. In other words, they do not offer comfort to minority shareholders. However, most investment treaties offer a solution that gives independent standing to a shareholder that the treaties include shareholding or participation in a company as their definition of investment.[110] In this regard, it is not the locally incorporated company that is treated as a foreign investor, rather the participation in the locally incorporated company becomes an investment. Even though the locally incorporated company may be unable to pursue the claim internationally, the foreign shareholder in the company may pursue the claim internationally in its name. In other words, even if the local company is not endowed with investor status, the participation therein is seen as an investment. The

[105] See Ibid, para 92; See also Pan American vs. Argentina, Decision on Preliminary Objection, 27 July 2006, paras 215-216.
[106] See Diallo case (Guinea vs. DR Congo), Judgment, 24 May 2007.
[107] See Ibid.
[108] See Ibid, at paras 88-90.
[109] See Ibid, NAFTA, *supra* note 93, Art.1117.
[110] See R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995) 27-28; See Ibid, Art.1139 of the NAFTA; Art.1 (6) (b) of the ECT.

shareholders may then pursue the claims for adverse action by the host state against the company that affects its value and profitability. This practice has also been extended to indirect shareholding through an intermediate company as well.[111] The same technique has been employed where the affected company was not incorporated in the host state but in a third state.[112]

When we consult the BITs signed by Ethiopia, a similar position was held to that of other bilateral investment treaties regarding the definition of investment, and the shareholders' protection is concerned as can be inferred from Art.1(c) of the 2007 BIT between Ethiopia and Finland[113], and Art.1 (3) (b) of the recent BIT between Ethiopia and Brazil which was signed on April 11, 2018.[114]

It follows that it is now generally accepted, based on treaty provisions, that shareholding in a company is a form of an investment that enjoys protection.[115] Thus, even if the affected company does not meet the nationality requirement under the relevant treaty to pursue an international remedy, there will be a remedy if a shareholder does.

ii. Investment

Large-scale investments typically last for decades. Due to its nature, it involve both the interests of investors and the general public of the host state. As a result, there are two competing interests that require careful consideration and reconciliation. The laws of the host state may not be adequate to handle the project's nature and the interests involved therein. Thus, each investment's legal environment must be tailored to the particulars and complexity of that venture.

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[111] See Siemens vs. Argentina case, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005); Enron vs. Argentina case, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273; Cummazzi vs. Argentina case, Decision on Jurisdiction, 11 May 2005, para 9; Gas Natural vs. Argentina case, Decision on Jurisdiction, 17 June 2005, paras 9, 10, 32, 39.

[112] See Lauder vs. The Czech Republic case, Award, 3 September 2001, 9 ICSID Reports 66; See also Waste Management vs. Mexico, Award, 30 April 2004, 43 ILM 967 (2004).

[113] See Agreement between the Government of the Republic of Finland and the Government of the Federal Democratic Republic of Ethiopia on the Promotion and Protection of Investments, entered in force on May 3, 2007 (still in force), Art.1 (c).

[114] See United Nations Convention on Trade and Development (UNCTAD), Investment Policy Hub, International Investment Treaties Navigator, BIT between Ethiopia and Brazil; available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia.

[115] See O Spiermann, *Individual Rights, States Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties* (2004) 20 Arbitration International 179, 183, p.59.

Beyond the allocation of the rights, tasks, risks, and responsibilities related to the investment project, investment contracts had laid down the ground rules on which the parties agreed. These rules include, in particular, the law applicable to the project and the choice of a forum for dispute resolution. Specific provisions often were included concerning force majeure, good faith, and changed circumstances. From a legal perspective, the most complex and difficult questions often concerned the inclusion of clauses regulating the conduct of the parties in case of political changes in the host state and case of change of economic equilibrium between the host state and the investor.[116]

B) Expropriation

For a very long time, foreigners in general and foreign investors in particular have been deeply concerned with the international legal principles governing the expropriation of alien property. According to customary international law, the host state's territorial sovereignty is constrained in order to preserve alien property and uphold the minimal norm for the protection of aliens.[117] On the level of treaty law, all modern agreements on foreign investment contain specific provisions covering preconditions for and consequences of expropriation. There are many issues related to preconditions for and consequences of expropriation like the right to expropriation, the three branches of the law, the legality of expropriation, direct and indirect expropriation as well as expropriation of contractual rights may have paramount importance as far as expropriation of aliens property is concerned. But, for this research in general and in light of the title under study, the discussion was confined to some of the issues as discussed herein below.

i. The right to expropriate

The host state's right to expropriate alein property has been recognized as a general norm of international law, which is congruent with the idea of territorial sovereignty. [118] In fact, state practice has viewed this right as being so essential that even contemporary investment treaties take this perspective into consideration.

[116] See Ibid, *supra* note 115, p. 73.
[117] See Ibid, p. 89.
[118] See Ibid, p. 89.

The treaty law typically addresses only the conditions and consequences of expropriation, leaving the right to expropriate as such unaffected.[119] Even clauses in agreements between the host state and the investor that freeze the applicable law for the period of the agreement (the so-called, stabilization clause) will not necessarily stand in the way of a lawful expropriation.[120] An international tribunal will likely take such a clause literally, barring unusual circumstances. However, in actuality, such extensive measures haven't really made a difference.[121]

ii. Direct and indirect expropriation

Depending on where the legal title of the owner is impacted by the legislation in question, direct or formal expropriation differs from indirect expropriation. Direct expropriations are practically non-existent today. This is due to states' reluctance to openly seize foreign property without justification, which would damage their business climate. An official action that transfers ownership of a foreign investor's property will get bad press and probably harm the state's standing as a location for international investments in the long run.[122] Indirect expropriation thus received a great attention from investors nowadays as well as the industry as a whole. Even though the investor's title is unaffected, an indirect expropriation prevents the investor from using the investment in a meaningful way.

In the 1920s and 1930s, the PCIJ and arbitral tribunal's early case law recognized the notion of indirect expropriation.[123] Even if the owner retains the official title, it is now generally accepted that some actions that harm foreign property are considered expropriations and call for compensation. The line between governmental actions amounting to indirect compensable expropriation and non-compensable regulatory and other measures was and is still up for debate. The host country, which may want to expand the list of non-compensable actions, and the foreign investor, who will urge for a broad interpretation of the notion of indirect takings, both place equal weight on the issue.

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[119] See Ibid.
[120] See Ibid.
[121] See Ibid, p. 90.
[122] See Ibid, *supra* note 115, p. 92.
[123] See Norwegian Ship owners' Claim, 1 RIAA (1922) 307; Cases Concerning Certain German Interests in Polish Upper Silesia, PCIJ Series A, No. 7 (1926) 3.

In this regard, the cases decided by arbitral tribunals demonstrate the variety of scenarios in which the question of indirect expropriation comes into place. The ICSID award in *Middle East Cement Shipping vs. Egypt case*[124] concerned revocation of a free zone license through the prohibition of import of cement into Egyptian territory. The prohibition resulted in a paralysis of investors' business, which essentially consisted of importing, sorting, and dispatching cement within Egypt. The arbitral tribunal found that the import prohibition resulted in an indirect taking of the claimant's investment.[125]

The main consideration for determining whether an indirect expropriation has occurred is how the measure will affect the investment's value and economic advantage as well as its control. This effect will be *prima facie* evidences that taking of the property has occurred whenever it is significant and lasts for a long time.[126] International tribunals accordingly based their decision on economic considerations. Indirect expropriation was deemed to exist if the measure constituted a deprivation of the economic use and enjoyment as if the rights related thereto, such as the income and benefit, had ceased to exist, whether the use and enjoyment of benefits related thereto is exacted or interfered with to a similar extent.[127]

In numerous instances, the tribunals have stressed that any intention to expropriate was superfluous and that only the measure's effect qualified as an indirect expropriation.[128] In *Tecmed vs. Mexico case*,[129] the tribunal after explaining the concept of indirect or de facto expropriation said that: the government's intention is less important than the effects of the measures on the owners' assets or the benefits arising from such assets affected by the measures, and the form of deprivation measure is less important than its actual effect.[130]

[124] See Middle East Cement Shipping vs. Egypt case, Award, 12 April 2002, 7 ICSID Reports (2005) 178.
[125] See Ibid, at para 107.
[126] See Norwegian Ship owners' Claim, 1 RIAA (1922) 307; Goetz vs. Burundi, Award, 10 February 1999, 15 ICSID Review-FILJ (2000) 457; Middle East Cement Shipping vs. Egypt case, Award, 12 April 2002, 18 ICSID Review (2003) 602; Metal clad Corporation vs. Mexico, Award, 30 August 2000, 5 ICSID Reports 209; CME vs. Czech Republic, partial Award, 13 September 2001, 9 ICSID Reports 121.
[127] See TECMED vs. Mexico, Award, 29 May 2003, 43 ILM (2004) para 115.
[128] See Azurix vs. Argentina, Award, 14 July 2006, at para 309.
[129] See Tecnicas Medioambientales Tecmed vs. The United Mexico States case, Award, 29 May 2003, 43 ILM 133 (2004).
[130] See Ibid, at para 116.

On the other hand, other decisions have to take into account the context of the measure, including the purpose pursued by the host state.[131] Up on a review of the case law, Fortier has concluded that an approach balancing different factors seems to be dominant.[132] Also, the 2004 US Model BIT, in its description of indirect expropriation, refers not only to the economic impact of the government action but also to the design to protect legitimate public welfare objectives.[133] Hence, it has been long accepted that the mere post-facto explanation by the host state of its intention will in itself carry no decisive weight.[134] Indeed, several tribunals have pointed out that a proper analysis of expropriation claims must go beyond the technical consideration of formalities and look at the real interests involved and the purpose and intention of the government measure.[135]

In this regard, when we scrutinize the BITs signed by Ethiopia, it refers to the government measures that have the effect of expropriation, it does not refer to the intent of the state to expropriate. Moreover, the treaties stress that the contracting parties should not take measures against the investments in the territory of the contracting parties the effect of which deprive the investor of the use and benefit of the investment as indicated, for example, under Art.4 (2) of the 2006 BIT between Ethiopia-Germany.

C) Standard of protection for foreign investment

Generally, the legislation of the host state may not be sufficient to address the nature of the project and the kinds of interests concerned. Thus, in the investment contract, the contracting parties negotiate over the issues regarding the investment project to be established in each other's territory. The investment treaties provide for the rules of the standard of protection that guarantee the protection of the investment in the other contracting party. These principles of the standard of protection of foreign investment were adopted by most international investment tribunals and also achieved the level of customary international law even though debatable yet. These rules of the standard of protection of

[131] See PCIJ, Oscar Chinn case (UK VS. Belgium), 12 December 1934, Series A/B, No. 63 (1934) 4; Sea Land Service Inc. vs. Iran, 6 Iran-US Claims Tribunal Report 149, 166 (1984).
[132] See Y Fortier and SL Drymer, *Indirect Expropriation in the Law of International Investment Law: I Know It When I See It, or Caveat Investor* (2004) 19 ICSID Review-FILJ 293.
[133] See US Model BIT 2004, Annex B, para 4.
[134] See Norwegian Ship owners' Claims, 1 RIAA (1922) 307; R Dolzer, Indirect Expropriation: New Developments? (2003) 11 NYU, *Environmental Law Journal,* 64, 91.
[135] See S D Myers vs. Canada, First Partial Award, 13 November 2000, 40 ILM (2001) 1408, para 285.

foreign investment are namely[136]: (1) Fair and Equitable Treatment; (2) Full Protection and Security; (3) The Umbrella Clause, i.e. is a provision in investment protection treaties that guarantee the observation of obligation assumed by the host state vis-à-vis investors; (4) Access Justice, Fair Procedure and Denial of Justice; (5) Emergency, Necessity, Armed Conflicts, and Force Majeure; (6) Preservation of Rights; (7) Arbitrary or Discriminatory Measures; (8) National Treatment; (9) Most Favored Nation Treatment; (10) Transfer of Funds. Of these standards of protection of foreign investment, the transfer of funds in respect of foreign investment will be discussed in the next section for the reason that it has direct relevance and the subject matter of this study.

Transfer of funds

Both the host state and the investor have major concerns about the investor's transfers of funds into and out of the host state. Often, the main business goal of the investment is the repatriation of cash, including profits and other payments related to the venture. The host nation will naturally wish to manage its currency and foreign reserves.

Thus, the interest of the foreign investor and those of the host state in the admissibility of foreign transfers will often diverge. Therefore, investment treaties invariably cover this subject matter. The modalities of regulation in the treaties vary considerably, and also no single pattern is dominant yet. This divergence is greatly influenced by monetary and financial policies, the volume of the domestic capital market, historical experience, and the simple bargaining power of the parties and this will again influence the outcome of the treaty negotiations. The monetary sovereignty of the host governments serves as the backdrop for all treaty negotiations. The host state, thus, has the sole authority to choose its monetary unit, give it legal significance, fix the exchange rate, and control, impede, or forbid the conversion or transfer of foreign exchange.[137] The IMF's regulations, which 184 states have agreed to in principle, forbid member states from restricting the so-called "current transaction".[138] This leaves the host state the power to regulate the inflow and outflow of ‘capital transactions’ as opposed to ‘current transactions’.[139]

[136] See Ibid, *supra* note 115, pp. 119-194.
[137] See R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995) 85.
[138] See Articles of agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944 … amended effective January 26, 2016

Rules on the transfer of funds are found in virtually all investment treaties. They deal with the investor's right to make transfers, the types of payment covered by this right, convertibility and exchange rates, and with the limitation of free transfer. Practically, no treaty grants an absolute right to make transfers to the investor. Some treaties state that the rights guaranteed to the investor exist only `subject to the laws' of the host state`. For the investor, such a restriction substantially reduces the value of the right, especially since the national laws of the state may be revised in the future as the host state deems appropriate. The majority of treaties today stipulate that the investor has the right to transfer funds in a freely convertible currency at the official exchange rate in effect on the date of the transfer, that the transfer will be "authorized without delay," "without undue delay," or that the procedures will be completed "expeditiously".[140]

Generally, three approaches can be found in recent treaty practice to allow such restrictions.[141] First, some treaties are based on the view that the short-term withdrawal of funds by the investor is undesirable in all circumstances and therefore allows transfer out of the host country only a year after the capital has entered the territory. A second approach is to place restrictions on the right to fund transfer during periods of the severe balance of payments crisis, external financial difficulties, or other exceptional circumstances affecting the host country's monetary policies and the exchange rate. A third approach, more recently favored by Canada, the United States of America, and Japan, concerns specifically the right to restrict the freedom to provide financial service during the extraordinary periods, preserving the right of the host state and home state to maintain the safety, soundness, integrity or financial responsibility of the financial institutions.[142]

When we review the position of the BITs signed by Ethiopia in light of this standard of protection for foreign investment, i.e. transfer of funds in respect of investment, it provide for the transfer of funds.

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by the modifications approved by the Board of Governors in Resolution No. 66–2, adopted December 15, 2010, Art. VIII.

[139] See Ibid, Art. XXX (d).

[140] See Ibid.

[141] See Ibid, *supra* note 139, 62 ff.

[142] See Art.20 (1) (Financial Services) of the 2004 US Model Treaty.

As far as the approach to the right to restrict freedom of fund transfer is concerned, since there is no restriction in the treaties signed by Ethiopia, it is not clear to determine which one of the approaches to restrict the fund transfer is adopted by BITs signed by Ethiopia. However, Art. 12 (prudential measures) of the 2018 BIT between Ethiopia and Brazil[143], which is a more recent investment treaty signed by Ethiopia, seems as adopted the third approach for restriction of freedom of fund transfer.

[143] See Ibid, Art. 12.

CHAPTER FOUR

Overview of Investment Treaties Signed by Ethiopia

Foreign Direct Investment (hereinafter, FDI) and foreign trade are pillars in the overall investment and trade picture, even more so in today's globalized and interconnected value chains. This is because an open international investment environment increases the competitiveness of emerging economies by enabling them to serve foreign investors and markets so that these investors and markets contribute to the well-being of a country's economy and its citizens.[144] It is therefore widely accepted that effective and prompt investment promotion and protection are more crucial than ever, not just for the least developed countries but also for the developed and emerging world. This is due to the fact that FDI is attracted to countries with greater and higher-quality rule of law systems, pro-investment policies, and investor protections.[145]

Economic and political risks, such as expropriation, restrictions on money transfers to and from the host state, withdrawal of the investment or failure to renew licenses, arbitrary and discriminatory processes, regulatory procedures by the host state, or interference by national courts that are frequently prejudiced against foreign investors, are factors that influence decisions about FDI most of the time.[146] As a result, before making a large investment or incurring expenses in the host nation, the investor needs guarantees and assurances that they will be treated equally and fairly as all other investors in the same host state. IIAs, which include bilateral and multilateral treaties, were created to confirm fundamental protection standards, try to create safeguards that reduce risks, and give investors confidence in facilitating the resolution of investment disputes through well-established, neutral, and non-political international arbitration proceedings in order to address these uncertainties.[147]

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[144] See Bungenberg, M., Griebel, J., & Hindelang, S. (2011). *International Investment Law and EU Law*, Berlin Heidelberg: Springer-Verlag. https://doi.org/10.1007/978-3-642-14855-2.

[145] See Tekalegn E. (2019), *Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap*, Beijing Law Review, 10, p. 116; https://doi.org/10.4236/blr.2019.101007.

[146] See UNCTAD (2015), World Investment Report (WIR15), Reforming International Investment Governance; http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

[147] See Ibid, *supra* note 144.

As a party to today's contemporary world, Ethiopia has also signed investment protection treaties with various countries. According to the data provided on the UNCTAD website, Ethiopia has signed 35 BITs from which 21 treaties are in force, and also signed 5 multilateral treaties with investment provisions and 10 other multilateral investment-related instruments.[148]

4.1 Standard of Protection for Foreign Investment in BITs Signed by Ethiopia

A standard of protection for foreign investment as acknowledged under IIAs is consistently recognized by almost all BITs signed by Ethiopia. Conditions for the transfer of funds by the investor into the host state and out of the host state are of key concern for both the host state and the investor. Almost all investment treaties have rules regarding the transfer of funds. They encompass the investor's right to transfer funds, the sorts of payments that fall within this right, convertibility, exchange rates, and the restriction on unrestricted transfers.

Bilateral investment treaties signed by Ethiopia provide, unanimously, for the transfer of funds. Moreover, it is recognized in the BITs signed by Ethiopia that the manner of funds transfer shall be freely and promptly by using the phrases like, 'without undue delay',[149] 'without restriction or delay',[150] 'without unreasonable delay and restriction',[151] 'without any restriction',[152] etc.

Based on the treaties' provision signed by Ethiopia regarding the transfer of funds, it can be concluded that the BITs signed by Ethiopia provide for the free transfer of funds in a freely convertible currency without restriction. But, the 2018 BIT between Ethiopia and Brazil provides some restrictions on the free transfer of funds to maintain the safety, soundness, integrity, or financial responsibility of financial institutions as well as ensuring the integrity and stability of a Contracting Party's financial system as stated under Art.12. Moreover, the treaties stress that the contracting parties should not take measures against the investments in the territory of the contracting parties the effect of which deprive the investor of the use and

[148] See UNCTAD (2013), World Investment Report 2013, Global Value Chains: Investment and Trade for Development, Geneva: United Nations Publication; https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia?type=bits, last accessed on 26 April 2022.
[149] See Art.10 of the 2018 BIT between Ethiopia and Brazil.
[150] See Art.5 of the 2005 BIT between Ethiopia and Netherlands.
[151] See Art.7 (2) of the 2016 BIT between Ethiopia and United Arab Emirates.
[152] See Art.7 (2) of the 2006 BIT between Ethiopia and Finland.

benefit of the investment except for a purpose that is in the public interest, on a non-discriminatory basis, under due process of law, and against prompt, adequate and effective compensation. In this case, the reference is to the government measures that have the effect of which deprive the investor of the economic use and benefit of the investment and hence, tantamount to expropriation, it does not refer to the intention of the state to expropriate.[153]

4.2 Analyzing Domestic Laws in light of BITs Signed by Ethiopia

when we see the domestic laws of Ethiopia, i.e. investment laws and other laws dealing with the investment issues, they hold a divergent position than that recognized by BITs signed by Ethiopia as far as standard of protection for foreign investment especially the transfer of funds is considered. Investment Proclamation No. 1180/2020 under Art. 20(1) provides the right to transfer funds from Ethiopia as stated in the aforementioned BITs signed by Ethiopia. However, this provision only provides the right to transfer funds with respect to investment from Ethiopia for foreign investors. But, as far as the foreign investors treated as domestic investors funds transfer is concerned, there is no provision dealing with the issue of transfer of funds in the investment proclamation even though they are foreigners and undertaking investment in Ethiopia by foreign seed capital. On the other hand, financial sector laws clearly provide that the foreign investor treated as the domestic investor is not allowed or has no right to transfer funds from Ethiopia in any manner.[154]

Thus, the position of financial sector laws, as well as investment laws though silent, become in contradiction with the BITs signed by Ethiopia as far as the foreign investors treated as domestic investors regarding fund transfer is concerned. Moreover, in Ethiopia capital account is closed and not liberalized yet.

Based on the power bestowed upon it, the NBE has issued the directive dealing with terms and conditions in which transfer of foreign exchange from Ethiopia is allowed.[155] Even

[153] Many BITs signed by Ethiopia in relation to the government measures refer to the effect of measures up on the economic value, use and benefit of the investment concerned. See for example: Art.5 (1) of the 2006 BIT between Ethiopia and Finland; Art.6 (1) of the 2016 BIT between Ethiopia and United Arab Emirates; Art.6 of the 2005 BIT between Ethiopia and Netherlands; etc….

[154] See Ibid, *supra* note 12, Insurance Business Proclamation, Art.10 (3); Micro Financing Business Proclamation, Art.32 (3).

[155] See NBE Directive, Transparency in Foreign Currency Allocation and Foreign Exchange Management (as Amended) Directive No. 53/2020 (FXD/77/2021), 1 December 2021, Art.6 (1).

though the directive issued by the NBE provides for the transfer of profit and dividends as well as sales of shares and the liquidation of companies, it seems only for foreign investors.[156] Moreover, the cumulative reading of provisions NBE directive No. 53/2020 (FXD/77/2021) with that of financial sector laws' provisions dealing with funds transfer discussed above, it can be concluded that NBE directive dealing with fund transfer does not refer to foreign investors opted to be treated as a domestic investor in Ethiopia. In this regard, during the interview on March 20, 2022 with W/ro Yenehasab Tadesse, Director of Foreign Exchange Monitoring and Reserve Management Directorate of NBE affirmed that the capital account in Ethiopia is closed and is not liberalized yet. Besides that for the question that what is the fate of the foreign investor treated as domestic investors regarding their investment capital at the end of the day if they are not allowed to transfer it? W/ro Yenehasab replied that even though they are foreigners and their seed capital may have a foreign origin, they opted to be treated as domestic investors, and hence, they waived the right to be a foreign investor. Thus, they are not entitled to the right to transfer funds from Ethiopia anymore.

However, the BITs signed by Ethiopia stress that the contracting parties should not take measures against the investments in the territory of the contracting parties the effect of which deprive the investor of the use and benefit of the investment except for a purpose of the public interest, on a non-discriminatory basis, by due process of law, and against prompt, adequate and effective compensation. In this case, the focus is on the government measures that have the effect of which deprive the investor of the economic use and benefit of the investment.

When we analyze the prohibition imposed on the FNEOs' investment, the measures deprive the investors to realize the economic use and benefit of the investment. Since investors are precluded from transferring funds resulting from the investment, they are expected to re-invest in Ethiopia or donating to Ethiopians. This is a clear departure from the provisions of the BITs signed by Ethiopia in the sense that the effect of the measure taken against the investment deprives the investor of the economic use and benefit of the investment and

[156] See Ibid, Art.6 (1) (c) (VIII) and (X).

hence, tantamount to compensable indirect expropriation regardless of the intention of the state to expropriate.

Based on this issue, the researcher approached to Ministry of Justice, since it works as the principal advisor and representative of the federal government regarding the law,[157] to discuss the rationale behind the restrictions imposed on the foreign investors participating in the financial sector in Ethiopia. But, the interview with Ato Addisu Getinet, V/Director of Legal Study, Drafting and Consolidation Directorate General, Ministry of Justice on March 29, 2022, responded that they reviewed these financial sector laws just to ensure the legislative drafting rule. In addition, he stressed that they did not have meritorious information on whether these laws are in conformity with other laws and treaties ratified by Ethiopia including the BITs. Moreover, the researcher approached the financial sector regulator, banker, fiscal agent, and financial advisor to the Government of Ethiopia, i.e. NBE[158] to discuss the justification for the restrictions on FNEOs' investment. In this regard, during the review of preparatory document of the financial sector amendment laws, it is stated that the aim of financial sector liberalization for FNEO was to increase FDI in general and foreign exchange reserve in the country in particular.[159] The primary justification reflected in the preparatory document for the restriction is the risk of capital flight.[160] Most importantly, the impact of restrictions on FNEOs' investment was raised during the discussion of the preparatory document that FNEOs are foreign nationals, and any issue related to the protection of their investment and the corresponding economic right may appeal to international investment tribunals based on BITs signed by Ethiopia to protect their right.[161] But, this part of the discussion was overruled and finally, it was decided to impose the restrictions on FNEOs' investment that they should not be allowed to transfer funds from Ethiopia.

However, the FNOEs as the investor for strong reasons may claim the treaty provisions providing for the transfer of funds if the investor is not allowed completely to transfer funds

[157] See Federal Attorney General Establishment Proclamation No. 943/2016, Federal Negarit Gazette, Year 22, No. 62, Addis Ababa, 2 May 2016, Art.6 (2).
[158] See Ibid, The National Bank of Ethiopia Establishment (as Amended) Proclamation, *supra note 11*, Art.5 (7) and (14).
[159] See NBE, Preparatory document of the financial sector amendment laws, 2019, p. 1.
[160] See Ibid.
[161] See Ibid.

in respect of investment in any manner. In this case, it is challenging to claim domestic laws as a defense for the violation of treaty obligation or to question the validity of the treaty concerned in the international arena.

There might be a scenario in which the capital or even asset of the foreigner would be subjected to attachment of the third party proceeding in which the foreigner is a party (defendant), and the capital in Ethiopia in the name of the defendant (foreign investor) may be required for the enforcement of the foreign judgment or arbitral award which is somehow out of the control of parties to the BIT. In such kind of scenarios, Ethiopia may be required to recognize and enforce the foreign judgments or arbitral awards as the case may be. In this case, the recognition and enforcement of foreign judgments and foreign arbitral awards can be enforced in accordance with Articles 456-461 of the 1965 Civil Procedure Code of Ethiopia.[162]

Moreover, the Ethiopian parliament has recently ratified, through Proclamation No 1184/2020[163], the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is commonly known as the "New York Convention".[164] As stipulated in the New York Convention, state parties are obliged to recognize and give effect to arbitral agreements including an arbitral clause; and ordinary courts are precluded from exercising their jurisdiction on the merits of the case.[165] In addition, unless in exceptional circumstances recognized under the convention, foreign arbitral awards shall be enforced just like domestic arbitral awards.[166] Moreover, it is stated that each Contracting State shall recognize arbitral awards as binding and enforce them under the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention.[167] This is one of the inevitable scenarios in which Ethiopia is obliged to

[162] See Civil Procedure Code of the Empire of Ethiopia of 1965, Negarit Gazeta, Year 25, No. 3, Addis Ababa, 8 October 1965, Arts.456-461.
[163] See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184/2020, Federal Negarit Gazette, Year 26, No. 21, Addis Ababa, 13 March 2020.
[164] See UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, UNCITRAL secretariat, Vienna International Centre, 1400 Vienna, Austria.
[165] See Ibid, Art.2.
[166] See Ibid, Arts.I and V.
[167] See Ibid, Art.III.

undertake the transfer of funds related to investment by FNEOs out of the country to fulfill the international obligation.

Notwithstanding the right to claim the treaty provision to protect their interest, the writer of this paper suspects that if the investor is precluded from the transfer of funds in respect of investment and there exists a non-relinquishing demand to transfer funds out from Ethiopia, the investor may think of or ignited to see other illegal means of satisfying its demand, i.e. transfer of funds. In this regard, it could be one source of Illicit Financial Flows (hereinafter, IFF).[168]

Furthermore, financial sector liberalization for FNEOs in Ethiopia was welcomed by Ethiopian Diasporas as well as Ethiopian nationals that the policy shift adopted by the Ethiopian government as the realization of rights and privileges to be exercised and enjoyed by FNEOs in their country of origin as indicated under Proclamation No. 270/2002. However, the prohibition imposed upon the investment in Ethiopia against FNEO may erode the expectation of financial sector liberalization and thereby discourages foreign direct investment by FNEO. In this regard, during the interview on March 26, 2022 with the Ethiopian Diaspora Agency to discuss the expectation of financial sector liberalization for FNEO as well as the restriction imposed on the investment by the Ethiopian diaspora community, Ato Melaku Zeleke Robelie, Information, Research and Communication Directorate Director of Ethiopian Diaspora Agency indicated that financial sector liberalization for FNEO was welcomed by diaspora community as it strengthens their relationship with their country of origin. But, Ato Melaku Zeleke stressed that even though the liberalization was welcomed by the Ethiopian diaspora community, this expectation has been declined in effect due to the restriction imposed on FNEO investment.

Moreover, while the researcher reviewed the documents related to the shareholding of FNEOs in the financial sector observed the letter written by organizers of a bank under formation named, Diaspora Bank S.C. (under formation), dealing with or addressing the complaint they have against the restriction on FNEOs' investment. The organizers of the

[168] See Global Financial Integrity (GFI), *Illicit Financial Flows from Developing Countries over the Decade Ending 2009*', Ethiopia: The illicit financials outflow in perspective, Reports, 2009.

Diaspora Bank S.C. (under formation) stated in their letter to NBE that the restrction imposed on the FNEOs' investment in effect deprives the exercise of economic use and benefit of the investment and thereby discouraged FNOE's investment in Ethiopia. The letter states that:

> *"...በብሔራዊ ባንክ መመሪያ ቁጥር ኤስቢቢ/73/2020 አንቀጽ 6.1 ላይ የአክሲዮን ትርፍ ድርሻ ለትውልደ ኢትዮጵያዊያን የሚከፈለው በብር ብቻ ሲሆን ትውልደ ኢትዮጵያዊያን የትርፍ ድርሻቸውን ወደ ዉጭ ሊወስዱት አይችሉም ይላል። ይህ ድንጋጌ በከፍተኛ ደረጃ አክሲዮን ለመግዛት የተዘጋጁትን ትውልደ ኢትዮጵያዊያንን በሀብታቸው እንዲያዙ መብት የሚነፍግ ሰለሚሆን ኢንቨስትመንት ያቀጭጫል ብለን እናምናለን። በመሆኑም ይህ ድንጋጌ እንደገና ሊፈተሽ ይገባል የሚል ጥቆማ እናቀርባለን።..."*

On top of this, financial sector liberalization for FNEOs aimed at increasing foreign investment inflow and thereby improving the living standard of the people of Ethiopia by realizing a rapid, inclusive and sustainable economic and social development and realizing the availability of foreign exchange. On the other hand, providing enabling legal environment and having a predictable and consistent administrative procedure are essential conditions of FDI, and also may have a positive impact on the figure of the country in general and foreign investment in particular. But, the writer of this research suspects that the prohibition discussed under chapter two imposed on foreign investment may endanger the very objective foreign investment in general and financial sector liberalization for foreign nationals of Ethiopia in particular. Thus, great attention needs to be made to alleviate and manage the discrepancies between BITs signed by Ethiopia and domestic laws to make the two legal instruments congruent to each other in general and compromise the competing interests in foreign investment in particular.

CHAPTER FIVE
Conclusion and Recommendations

5.1 Conclusion

Until late 2019, in Ethiopia, financial sector investment was limited to Ethiopian nationals and organizations fully owned by Ethiopian nationals and registered under Ethiopian law. Since late 2019 and early 2020, when FNEOs were authorized to invest in the financial sector, Ethiopia has implemented a series of financial sector reforms. To this end, FNEOs are allowed to acquire shares from existing financial institutions or establish financial institutions in Ethiopia.

However, the deregulation came with restrictions: it restricted FNEO investors' ability to exercise their economic rights over their investments. Even though FNEOs are foreigners who are required to invest in Ethiopia with acceptable foreign currencies, all payments due to FNEOs resulting from the investment in financial institutions must be made in Ethiopian Birr. Worse, they are unable to repatriate any assets or interests acquired in this manner.

But, the transfer of funds in connection with investments is a major topic in international investment treaties. Furthermore, it has long been understood that one of the principles of protection for foreign investment is the freedom to move funds. To this aim, Ethiopia's bilateral investment treaties guarantee a level of protection for foreign investment including the transfer of funds. Given Ethiopia's BITs, the stance of financial sector legislation, as well as investment laws, appear to be in contradiction with Ethiopia's BITs in terms of foreign investors being considered as domestic investors' funds' transfer. Furthermore, the host state's measures against foreign investors treated as domestic investors deprive the investor of the use and benefits of their investment, even though the investor retains normal ownership of the respective rights constituting the investment, and hence, the measures are tantamount to indirect compensable expropriation.

If the investor is not allowed to transfer funds in respect of investment in any way, the foreign national, i.e. FNOEs, as the investor, may claim the treaty provisions providing for the transfer of funds, which may result in an investor vs. state conflict. In this instance, claiming domestic laws as a justification for violating treaty obligations or questioning the

legality of the treaty in question in the international arena is difficult and untenable. In this context, the host state, Ethiopia, may be obligated to compensate the investor for damages claimed as a result of anti-investor policies that in effect deprived the investor of the economic use and profit of the investment. Furthermore, the limitation on the transfer of funds for investment hurts foreign investment inflow and places a negative figure on the state's foreign investment environment.

Even though the domestic laws prohibit the transfer of funds in contradiction with BITs signed by Ethiopia, there might be inevitable scenarios in which a country is obliged to transfer the investment asset of the foreign investor out from Ethiopia, for instance, the case of enforcement of foreign judgments or arbitral awards. It is also pointed out that since FNEOs are foreign nationals, the absolute prohibition of funds transfer out from Ethiopia resulting from investment in the country may necessitate the investors to seek other illegal means like illicit financial flows or may become one source of illicit financial flows. Most importantly, it is revealed that the liberalization qualified by fundamental prohibition may not realize the aspiration FNEOs as such.

5.2 Recommendations

- Revise the domestic laws dealing with fund transfers for foreign investors treated as domestic investors to make it congruent with the BITs signed by Ethiopia.
- The funds' transfer clause of the bilateral investment treaties signed by Ethiopia ought to be qualified with restriction by using approaches to restrictions on the transfer of funds.
- The definition ascribed to an investment in various legal instruments ought to be responsive to each other.
- The measures going to be taken by a state against foreign investment ought to be evaluated in terms of its effect on economic use and benefit of the foreign investment besides the intention of the state.
- Liberalizing the financial sector for foreign nationals of Ethiopian origin with fundamental restrictions has to be in compliance with the treaty obligation a country is expected from as well as general international investment tribunals' jurisprudence.

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Annex I

Addis Ababa University

College of Law and Governance Studies

School of Law

LL.M in Business Law

Interview questions

1. What is the expectation from liberalizing the financial sector for Foreign Nationals of Ethiopian Origin?
2. The liberalization is qualified by restriction, i.e. prohibition of fund transfer resulting from the investment.
   a) What is the aim of restriction?
   b) What is the fate of these investors at the end of the day?
3. A cumulative reading of Art. 5(5) of the Proclamation No. 270/2002, i.e. Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in their Country of Origin and Art. 5(f) of the Investment Proclamation No. 1180/2020, Foreign Nationals of Ethiopian Origin may be treated as foreign investors or domestic investors. In this case:
   a) If they are treated as a foreign investor, Art. 20 of Proclamation No. 1180/2020 provides for the fund transfer, but the financial sector laws (Banking, Insurance, and Microfinance proclamations) did not. How do you see this difference?
   b) If they are treated as a domestic investor, the investment proclamation neither permits nor prohibits the fund transfer in respect of investment. Not surprisingly, financial sector laws prohibit fund transfer in respect of investment. What is there in practice regarding fund transfer of foreign nationals treated as a domestic investors? Directive(s) and/or case(s) if any?
4. Financial sector laws prohibit fund transfer for foreign investors treated as domestic investors whereas BITs signed by Ethiopia provide for fund transfer of foreign investment as a primary concern. How do you see this variation?

5. Do you think the restriction imposed on the liberalization for Foreign Nationals of Ethiopian Origin realizes the objective of investment, i.e. increasing foreign investment inflow in general and the aim of Proclamation No. 270/2002 in particular?
6. Investment definition difference between investment laws and BITs signed by Ethiopia. How do you reconcile it?
7. Foreign Nationals of Ethiopian Origin or others treated as domestic investors may be forced to see or think of the illegal remedies e.g. illicit financial flows if there is no legitimate way to transfer funds arising from the investment. What do you think in this regard?

Thank you for your cooperation