

**COMPANIES WITH MIXED PUBLIC-PRIVATE OWNERSHIP IN
ETHIOPIA: ANALYSIS OF THE LEGAL AND PRACTICAL
PROBLEMS**

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MAY 2020

**COMPANIES WITH MIXED PUBLIC-PRIVATE OWNERSHIP IN ETHIOPIA:
ANALYSIS OF THE LEGAL AND PRACTICAL PROBLEMS**

A Thesis

**Submitted to Addis Ababa University, the School of Graduate Studies, College of
Law and Governance Studies,**

**In partial fulfillment of the requirements for the Degree of Master of Laws (LL.M) in
Business Law**

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May 2020

Declaration

I, the undersigned, declare that the thesis comprises my work. In compliance with widely accepted practices, I have duly acknowledged and referenced all materials used in this work. I understand that non-adherence to the principles of academic honesty and integrity, misrepresentation/fabrication of any idea/data/fact/source will constitute sufficient ground for disciplinary action by the University and can also evoke criminal sanction from the State and civil action from the sources which have not been properly cited or acknowledged.

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**Companies with Mixed Public-Private Ownership: Analysis of the Legal and
Practical Problems**

Submitted, to Faculty of Law Addis Ababa University, in partial fulfillment of the requirements
of LLM Degree (Business Law)

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ACKNOWLEDGMENT

This Thesis becomes reality with the kind support and help of many individuals. I would like to extend my sincere thanks to all of them.

I consider myself fortunate indeed to have had the opportunity to pursue research work toward the LLM Degree (Business Law) with the help and guidance of Associate Professor Zekarias Kene'aa. I would like to use this opportunity to express my special gratitude and thanks for his continuous support.

I am also highly indebted to Ato Mulugeta Seid, Ato Wonduante Negash, Ato Andarge Bekele, Ato Addis Alemayehu, Ato Mihretu Mekonnen, Ato Menur Mohammed, W/ro Meteriash Hailegiorgis, and Ato Taye Admasu for their interviews as well as for providing necessary information regarding this research.

Abel Kebede Francis

Table of Contents

ACKNOWLEDGMENT	I
Abstract.....	IV
ACRONYMS.....	V
CHAPTER ONE	1
INTRODUCTION	1
1. Background of the Study	1
2. Statement of the Problem.....	2
3. Research Questions.....	3
4. Litrature Review.....	4
5. The objective of the Study.....	5
6. Significance of the Study.....	6
7. Scope of the Study.....	6
8. Methodology.....	7
CHAPTER TWO.....	9
OVERVIEW AND HISTORICAL BACKGROUND OF COMPANIES WITH MIXED PUBLIC/PRIVATE OWNERSHIP.....	9
2.1. The Merits and the Demerits of Public Enterprises and Private Investments.....	9
2.2. Alternative Mechanisms by which States Employ to Rectify Inefficiency Problems of their Public Sectors.....	10
2.2.1. Public-Private Partnerships	10
2.2.2. Commercialization, Corporatization, and Privatization of Public Enterprises.....	12
2.3. Historical Underpinnings and the Major Factors for the Emergence of MOCs.....	14
2.4. Issues of Corporate Governance	18
2.4.1. Special Regulations on MOCs	19
2.4.2. Covenant (Pre-formation Agreement)	20
2.4.3. Shareholding Structure.....	21
2.4.4. Board of Directors	21
2.4.5. The Office of Core Managers.....	22

2.4.6. Employment Relations	22
2.5. The Dangers of Adopting MOC as a Business Modality.....	23
CHAPTER THREE.....	24
COMPANIES WITH MIXED PUBLIC/PRIVATE OWNERSHIP IN ETHIOPIA: THE LEGAL AND PRACTICAL PROBLEMS	24
3.1. Formation of MOCs in Ethiopia: the Law and the Practice	24
3.1.1. Legal and practical issues of Pre and post Privatization.....	24
3.1.2. Institutional Undertakings.....	31
3.2. Corporate Governance of MOCs in Ethiopia: The Law and the Practice	32
3.2.1. Companies’ Constitution	32
3.2.2. Share Holding Structure and Shareholders’ Meetings	34
3.2.3. Board of Directors	35
3.2.4. The Covenant (pre-formation agreements) and the Special Regulations	37
3.2.5. Employment Relations	39
3.2.6. Institutional setup and Corporate Governance	39
CHAPTER FOUR	41
CONCLUSION AND RECOMMENDATIONS.....	41
4.1. CONCLUSION	41
4.2. RECOMMENDATIONS.....	44
BIBLIOGRAPHY	46

Abstract

The crux of this paper focuses on the formation and corporate governance aspects of Companies with Mixed Public/Private Ownership. In so doing, it has looked at the major driving factors that explain the emergence of Mixed Ownership Companies and explore the corporate governance of the same. It is found that the major factor that gives rise to the Mixed Ownership Company in Ethiopia is the partial privatization of State-Owned Enterprises.

The study has looked at the corporate governance aspects of Mixed Ownership Companies mainly from the standpoints of the companies' shareholding structure, the composition of the Board of Directors, employment relations, and pre-formation agreements. Based on these, the thesis argues that Ethiopia needs to revisit the existing practice and give proper concern to the corporate governance of Mixed Ownership Companies.

By and large, the study finds that the process of forming and running of Mixed Ownership Companies in Ethiopia is problematic in every step. The main contributor to these problems is found to be the Government's lack of clear strategy towards the formation of Mixed Ownership Companies. Legal and practical problems are also carefully discussed. To this effect, different legislations related to the area, the practices of formation and governance, as well as the institutional infrastructure of the Government are explored.

ACRONYMS

Board of Directors BODs

Mixed-Ownership Companies MOCs

Private-Public Partnership PPP

State-Owned Enterprises SOEs

CHAPTER ONE

INTRODUCTION

1. Background of the Study

Companies with Mixed Public/Private Ownership, as the name itself suggests, are those which are established between private actors on the one hand and the State on the other. Those kinds of companies may be formed owing to different factors. The first factor is when a Government decides to partially privatize wholly State-owned Enterprises by considering it as one of the strategies in reforming Public Enterprises. To rectify the efficiency problem which seems to be the curse upon public enterprises, different countries of the world have employed different modes of reform ranging from corporatization to full privatization (the details discussed under Chapter Two). Departing from prompt privatization of State-owned enterprises during the 1980s and 1990s, unlike other transitional economies, Chinese Governments followed their path of gradual reformation of ownership of public enterprises which led to the introduction of a particular form of a company called public/private mixed ownership company.¹

Ethiopia, for the past 25 years, witnessed zigzag economic policies ranging from a big bang privatization approach in which the Government had intensified its effort to privatize State-owned enterprises to a developmental State approach by retaining the big enterprises and allowing the flourishing of new ones was the priority. Meanwhile, after the coming of Prime Minister Dr. Abiy Ahmed into power, the Government [arguably] seems to have made a policy U-turn by announcing its willingness to transfer mammoth enterprises to the private sector in the mixed private-public ownership approach. It is reported that the decision includes partially or fully transferring the shares of companies such as railway, industrial parks, hotels, sugar, and manufacturing industries and also to sell lesser portions

¹ Wenkui Zhang, 'The Emergence of China's Mixed Ownership Enterprises and Their Corporate Governance', (Dphil Thesis, University of Brunel 2011) 1

of shares from companies including the Ethiopian Airlines, Ethio-Telecom, as well as Ethiopian Shipping & Logistics Services Enterprise.²

The other factors of formation of MOCs are through a horizontal alliance that is when public enterprises and private companies decide to form a new company from the scratch or when the Government decides to buy shares from an already existing private company. There are times when privately-owned companies invite public enterprises to hold shares to get benefited from the fruits of a partnership with the Government. Moreover, the Government, by the statutory act, may decide to take free equity from privately held companies.³

2. Statement of the Problem

The first research problem relates to the formation of MOCs. Companies, as one form of the business organizations, come into being only through a partnership agreement which is made in writing and registered before a public notary. In other words, to be recognized by the Commercial Code, the company should be a registered company.⁴ Moreover, the Code only considers two business organizations as companies; Share Company and Private Limited Company.⁵

Some Authors argue otherwise from this narrow consideration of the Code. As per this argument, the understanding of company should go beyond those companies which are incorporated by fulfilling the requirements of the Code that are; incorporated through a partnership agreement, but also statutory companies which are established directly through pieces of legislation, typically Public Commercial Enterprises which are wholly owned by the State and established to carry on trade activities for gain like on manufacturing,

² Dargie Kahsay, 'Privatization: Part and Parcel of Economic Reform', *Ethiopian Press Agency*, (Addis Ababa, Feb 16, 2019) < <https://www.press.et/english/?p=2604#>> accessed Jan 6, 2020

³ Typical example for the last way of forming mixed Public-Private companies is the revised mining operation Proclamation no. 816/2013 which gives a Government free pass to take 5% free equity from large scale mining companies. Accordingly, Council of Minister's regulation no. 413/2017 mandates a public enterprise named Mineral, Petroleum and Biofuel Corporation to take and administer that 5% of share from privately operated large scale mining Companies.

⁴ Commercial Code of the Empire of Ethiopia, Proc. No. 166, *Fed.Neg.Gaz.*, Year 19, No. 3 Arts., 211, 221(2), 222(2), 313, 314, 516, 517 and 518

⁵ Com. Code., Arts., 212 (e) and Articles 304-509, 212 (f) and Articles 510-543

distribution, service rendering or other related economic activities.⁶ They base their arguments upon the very purpose of those State-owned Enterprises being commercial and the cross-reference of public enterprise Proclamation no. 25/1992 to the Commercial Code to apply to such State-owned enterprises, like articles 34 and 36 of the Proclamation. Thus, the mechanisms by which MOCs come into existence is the interest of this paper.

The second problem that this paper envisages to address is the organization and the corporate governance issues of those companies with mixed ownership. Given the peculiarity of those mixed owned companies, their corporate governance issues rang from the selection and structure of their Board of Directors to the shareholding structure, the structure of core management office, the Covenants (the pre-formation agreement) which may be entered between the Government and its private partners, Government's special regulation (if any) are worthy of exploration.

3. Research Questions

The following specific research questions are designed as follow:

- What are the major factors driving the emergence of MOCs in Ethiopia? Which factor is most dominant?
- What are the legal and practical problems exhibited during the pre-establishment stage MOCs?
- What are the legal and practical problems shown during the formation of MOCs?
- Does the Government has an institutional framework that is designed for establishing MOCs?
- What is the shareholding structure of MOCs look like?
- What are the mechanisms by which Board members of MOCs are appointed?
- To what extent that MOCs are free to restructure their workforces?

⁶ To mention one example of Authors who are against the narrow definition of the Code, the Author named Getahun Seifu, 'REVISITING COMPANY LAW WITH THE ADVERT OF ECX', Mizan Law (Vol 4(1)) 109-114

4. Literature Review

China is the Country that pioneered and still pursuing the formation of MOCs. Chinese Government has successfully transformed its SOEs into MOCs for engaging in such kinds of companies for long, as opposed to most other countries that embark on full transfer of their SOEs to private investors. For this reason, the Chinese literature on MOCs is abundant, and has its historical backdrop and time order, while the English literature is scarce, more theoretical and econometrics-styled.

For example, In the 1970s, Jensen and Meckling established the principal-agency theory, they argued that many problems in the firm's operation and management could be explained by principal-agency issue.⁷ Holmstrom and Milgrom did the multi-task principal-agency analysis and noted that the agency cost might become more complicated in the multi-task environment.⁸ According to the principal-agency theory, ownership matters because ownership may change the agency cost.⁹ In the 1980s and 1990s, Hart expanded the theory of the firm by introducing the analysis of the incomplete contract.¹⁰ He noted that the property rights matter due to the incompleteness of contract, and ownership is connected with the residual control of the firm.¹¹ Beyond these however, there are little English works of literature on mixed ownership. The reason might be mixed ownership is not common in Western countries. Although a few papers on mixed ownership were found, these papers focus only on case studies or performance analysis.

The Chinese literature on mixed ownership, on the other hand, has become abundant over time since the late-1980s.¹² In the past years, a few papers with empirical analysis can be found. The above literature has shortcomings, however. The literature before the mid-1990s focused on arguing the compatibility of mixed ownership with the socialist system.¹³ Some latter papers conducted an empirical analysis, though these papers often

⁷ Jensen, M., and W. Meckling, 'The Theory of Firm, Managerial Behaviour, Agency Cost and Ownership Structure'[1976] *Journal of Financial Economics* 305-360

⁸ Holmstrom, B., and P. Milgrom, 'The Firm as an Incentive System'[1994] *American Economic Review*,972-991

⁹ Ibid

¹⁰ Hart, O., 'Corporate Governance: Some Theory and Implications', [1995] *The Economic Journal*, 678-689.

¹¹ Ibid

¹² Zhang (n 1) 18-27

¹³ Ibid

focused on the ever-increasing numbers of MOCs and their contributions to the local economy.¹⁴

There are only a few papers that focus on the major factors of the emergence of MOCs and their corporate governance. The Thesis written by Wenkui Zhang is notable in this regard. This Writer has managed to extensively study the historical background of MOCs in China, the major factors that cause the emergence of MOCs, their corporate governance, the commonness degree of mixed ownership, as well as their performance degree. According to this Author, the emergence of MOC in the realm of corporate World is mainly the result of Chinese gradual ownership reform of SOEs.

In Ethiopia, the main factor for the emergence of MOCs is the partial privatization of SOEs. Many pieces of research are written on public enterprises in general and privatization aspects of those enterprises in particular. To mention a few, the Writer named Tewodros Mehret extensively addressed the concept and characteristics of public enterprises. Endeworke Tsegaw has written an article on the legal status of State-Owned Share Companies in Ethiopia, and Eshete Taddesse has shown policy implications of privatization in Ethiopia. Sadly though, one can't find a single research paper that is written specifically to address aspects of formation and corporate governance of MOCs in Ethiopia.

5. The objective of the Study

The concept of companies with mixed Public/Private Ownership and the legal consequence of operating such companies is not well known to the regulators, judges, and the practicing lawyers as well as to the business community. So it is the objective of this Writer to:

- Investigate the formation, organizational structure and the corporate governance of companies with shared public/private ownership existing in Ethiopia
- Inspect the adequacy of the existing legal and institutional framework (if any) in the regulation of mixed ownership companies as well as suggest ways out.

¹⁴ Ibid

- Analyze the practical problems of those companies and recommend possible solutions.

6. Significance of the Study

This Study hopefully will shade light on the formation and corporate governance aspects of MOCs in Ethiopia. More and more MOCs are expected to rise in Ethiopia because there still are many SOEs expected to take ownership restructuring. Though the Government of Ethiopia policy and strategy are still not clear, mixed ownership will persist in Ethiopia for a long time. Therefore, understanding and improving their peculiar characteristics and paying due attention to their formation and corporate governance is undoubtedly very important. Furthermore, this research reminds people that more attention should be paid to the corporate governance of MOCs.

This research will also open the curtain for further discussions and studies on MOCs in Ethiopia.

7. Scope of the Study

Though Companies with Mixed Public/Private Ownership could come into picture owing to different factors, having in mind its prevalence compares to the other factors, the paper mainly focuses on those shared ownership companies that came into being after partial privatization of formerly wholly SOEs.

Secondly, though the issue at hand could be seen from different perspectives, to limit the scope of the research, study will be made on mixed ownership companies' organizational structure and legal framework principally from the perspective of company law.

Thirdly, this study is by no means a comparative one. Experiences of other countries are discussed not as comparative study but only to understand in what ways that Countries have managed to form and govern their MOCs.

Fourth, the performance of MOCs is not the interest of this Paper. In other words, analysis of out-performance or underperformance of MOCs compared to wholly SOEs or privately held companies will not be the subject of this Study.

Finally, the partnership arrangement of doing business between private investors and the Government can take different forms. However, the research excludes those partnership arrangements which take the form other than the form of companies (Share Company or Private Limited Company form). Furthermore, the Study focuses only on MOCs incorporated under federal laws having their head office in Addis Ababa.

8. Methodology

The research will explore applicable laws as primary resources.

Regarding the review of practices concerning companies with shared Public/Private Ownership in Ethiopia, data about those kinds of business entities will be brought and gathered primarily from the Public Enterprise Holding and Administration Agency (hereinafter called “Agency” or “the Agency”). In so doing, one senior expert in the Privatization of Public Enterprises Directorate will be interviewed. The selection of the expert is based on the experience and the exposure of him to the issue at hand. The interview further conducted with one legal expert based on the case he is handling concerning dispute arises between shareholders of MOCs. The Corporate Governance and Finance Directorate Director will also be interviewed to know how far this Branch of the Agency goes to make sure the implementation of proper corporate governance within MOCs. To get further acquainted with the practice the Directorate Director of Trade and Service will be interviewed. These officials of the Agency interviewed not only on MOCs that are still operational but also on those fully privatized right now.

The pre-formation, the formation and the governance of MOCs of Ambo Mineral Water S.co, AMCE S.co, Africa Juice Tibila S.co, Bebeke Coffee State S.co, Tapi Green Coffee State S.co, Abijata Soda Ashe S.co, Sodere resort hotel S.co, Ethiopian Crown Cork and Can Production S.co, National Tobacco S.co, BM Ethiopia Textile S.co, Sigen Dima Textile S.co, Selen Dawa S.co, and Horizon Addis Tyre S.co are the main interest of the interview.

From the above-mentioned companies, only Africa Juice Tibila S.co and BM Ethiopia Textile S.co are still taking the form of MOCs. The rest is entirely transferred to private investors.

The interview with a Branch Manager of Document Registration and Authentication Agency has been conducted primarily to know which kinds of MOCs are prevailing in number and the ways that this governmental body has been dealing the matters of incorporation and yearly renewal of their licenses.

The former chairman of the Board of Directors for the Mixed Ownership Company named Afar Salt Production S.co also be interviewed to get an inside view of this company formation and corporate governance. The reason for specifically choosing this company is the way of its formation. Unlike most MOCs that are the result of partial privatization, from the start this company came into being as Share Company through the contribution made among Government and other four private actors.

Furthermore, an interview with the former legal advisor of the Minister of Ministry of Mines and Petroleum will be conducted to understand the reason behind the statutory provision which allows the Government to take a 5% share from existing Large Scale Mining Company.

The existing pieces of literature will also be explored as a secondary source to be familiarized with the concept, formation and corporate governance aspects of MOCs.

Finally, Chinese experience regarding the issues of formation and corporate governance of MOCs will get due regard more than others. This is because, China is the country which pioneered MOCs as one business modality as opposed to other Countries of the world that have taken the formation of MOCs as mere scheme of privatization.

CHAPTER TWO

OVERVIEW AND HISTORICAL BACKGROUND OF COMPANIES WITH MIXED PUBLIC/PRIVATE OWNERSHIP

2.1. The Merits and the Demerits of Public Enterprises and Private Investments.

As dealt in Chapter One, Mixed ownership companies are the integration of State-owned capital with private capital.¹⁵ Private capital can be foreign or domestic.

The advantages of SOEs are more Government resources, higher credit rating, and strong financing capacity. Its insufficiency is reflected in the fact that nonseparation between Government and enterprises results from an inability to have independent decision-making, the multiplicity of objectives, lack of clearly defined targets, lack of incentive, and form of ownership.¹⁶ Corruption, management inefficiencies, overstaffing, and rising current account deficits are also indicated as the downsides of public enterprises as key players in economic development. Consequently, large-scale privatization of SOEs was undertaken in the 1980s and 1990s, with the vital support of multilateral financial institutions.¹⁷

The debate on whether public enterprises are vehicles of development or impede development is still underway. The recent global economic crisis has weakened the arguments against public enterprises and the pursuit of reducing the role of governments in the economy.¹⁸

Even if the economic crisis seems to have redeemed public enterprises, recent data indicate that “the performance of public enterprises has been shockingly bad”.¹⁹

The advantages of domestic private investment are flexible mechanism, independent decision-making, high efficiency, sensitivity to the market, cost control, and perfect management; its shortcomings are that strategy and employing aspects are not stable enough, and the strength

¹⁵ Zhujiya Yin, Lijuan Liu, Haidong wang, Fengming Wen, ‘Study on the ownership balance and the efficiency of mixed ownership enterprises from the perspective of heterogeneous shareholders’ (2018) 4 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0194433> accessed 2 February 2020

¹⁶ Ibid

¹⁷ Tewodros Miheret, ‘The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview’ [2014] Mizan Law Review 357 <http://dx.doi.org/10.4314/mlr.v8i2.3> accessed 24 September 2019

¹⁸ Ibid

¹⁹ Ibid 358

of funds is weak.²⁰ Foreign investment has the advantage of relatively high technology, rich management experience, international vision, brand, sales network, business model, a global technology, and market development ability. The deficiency is not being familiar with the domestic market and rules.²¹

Among other reasons, Government and private investors establish MOCs so as to be benefited from the advantages of both sectors by fixing their respective sectorial problems.

2.2. Alternative Mechanisms by which States Employ to Rectify Inefficiency Problems of their Public Sectors.

Under this sub-topic discussed those instruments, other than forming and engaging in MOCs, that Governments around the world have been using to correct inherent inefficiency problems of their Public sectors.

2.2.1. Public-Private Partnerships

The concept of Public-Private partnership is broad. It is now used throughout the world, with a range of different definitions.

Public-Private Partnerships (PPPs) are about establishing an arrangement often a legally-binding contract that will bring benefits to both public and private sectors, the private sector needs to earn a return on its investment.²² The Public sector wants to deliver services to the standard specified and to make the best use of public resources.²³ Public-private partnerships involve collaboration between a Government agency and a private-sector company that can be used to finance, build, and operate projects, such as public transportation networks, parks, and convention centers.²⁴ Financing a project through a public-private partnership can allow a project to be completed on time or even make it a possibility in the first place.²⁵

²⁰ Yin, Liu, Wang, Wen (n15) 4

²¹ Ibid

²² WILL KENTON, 'Public-Private Partnership', *Investopedia*, (2019), 2

²³ <https://www.investopedia.com/terms/p/public-private-partnerships.asp>, accessed Jan 5, 2020

²⁴ Ibid

²⁵ Ibid

According to the categorization used by the European Union and many other countries, the Public-Private Partnership can be contractual and Institutional.²⁶

In a PPP of a purely contractual nature, the partnership between the public and the private sector is based solely on contractual links, whereas in a PPP of an institutional nature there is cooperation between the public and the private sector within a distinct entity.²⁷ Both arrangements involve delegated management of the traditional public sector activities to the private sector.²⁸ In the contractual type of PPP, the rights and obligations are regulated by an administrative contract or series of contracts.²⁹ In the institutional type, they are guaranteed by the company's statutes and by the shareholder agreement between public and private parties.

Institutionalized PPPs (as some call it, mixed companies) imply the establishment of an entity held jointly by the public partner and the private partner.³⁰ The joint entity thus has the responsibility of ensuring the delivery of work or service for the benefit of the public.³¹ The establishment of an institutionalized PPP may be done either through an entity in which public and private sectors jointly participate or through the private sector partially buying and owning shares in an existing public company.³²

Institutional type of partnership arrangement looks similar to Mixed Ownership Companies. When one sees deep into details, however, their differences become apparent. Institutional PPPs are not necessarily profit motivated, at least for the public partner. Instead, the purpose of having the Institution could be to ensure the delivery of work or service for the benefit of the public. This is not true for those companies with mixed Public/private ownership. As one of the commercialization scheme, the purpose of union for such companies is by mobilizing resources and along the way by bringing efficiency to the company, to make a profit and bringing about organizational growth even if the public partner could have purposes which are beyond making profits.

²⁶ Rui Cunha Marques, 'What are different types of PPP arrangements?' *Body of Knowledge on Infrastructure Regulation* (2010), 1 <http://www.regulationbodyofknowledge.org>, accessed Oct, 2019

²⁷ Ibid

²⁸ Ibid 2

²⁹ Ibid

³⁰ Ibid

³¹ Ibid 3

³² Ibid

This seems to be the reason why our Public-Private Partnership Proclamation no. 1076/2018³³ under its article (4) sub-article (2) (b) excludes privatization and sale of Public Enterprises from the scope of the Proclamation.

The shareholding structure of Institutional PPPs and MOCs can also be mentioned as their main difference. Since the very purpose of Institutional PPP is delivering work or service for the benefit of the public, the Public partner usually controls the company either as a majority shareholder or through special rights it may hold in the arrangement.³⁴ But that is not always the case for Companies with mixed ownership. The shareholding structure and the controlling scheme depends on the number of share parties acquire and the extent of control they can exert through different means, one of which could be through the covenant that they enter during the conceiving stage of the company, or by way of holding the office of core management.

However, the above-stated ways of differentiation are by no means to assert that the two approaches are mutually exclusive. The contracts of PPP can also set future ownership arrangements between Governments and private firms, and thus a company under the PPP program may be a MOC or may become a MOC in the future.³⁵

2.2.2. Commercialization, Corporatization, and Privatization of Public Enterprises

The increasing economic globalization over the past two decades has raised considerable concern over the competitive capacity of public enterprises, which has, in turn, imposed pressure on the public sectors of all systems. Thus, starting from the 1980s and prevalent in the 1990s, a new wave of liberalizing or commercializing public enterprises has occurred in many jurisdictions.³⁶

The strategies of commercialization include corporatization, a scheme of approximating the private sector model of incorporation in the context of public ownership, and privatization, a

³³ Public Private Partnership Proclamation, Proc. No.28, Fed. Neg. Gaz., Year 24, no. 2018

³⁴ *Marques* (n 26) 4

³⁵ *Zhang* (n 1) 42

³⁶ Yuwa Wei, 'Corporatization and Privatization: A Chinese Perspective' 2002 *Northwestern Journal & Business* 22 <https://ssrn.com/abstract=1286895>, accessed 18 Nov, 2019

scheme of total adoption of the private sector model by transferring public ownership to private hands.

The spread of the practice of commercializing the public sector is due to the following factors. First, corporatization and privatization have been widely promoted in the former socialist countries and some East-Asian economies as part of their reform packages to counteract the failures of their former highly interventionist systems.³⁷ Second, many developed countries have embraced the idea of increasing the economic efficiency of their public sectors by introducing an incentive environment, similar to the one in the private sector, into the public sectors.³⁸ Third, the World Bank has pushed hard for urging countries to take steps to privatize their public enterprises.³⁹

Accordingly, corporatization has been regarded as a more appropriate reform strategy, which could serve the purposes of limiting excessive autonomy and retaining political controls for promoting the public interest.⁴⁰ The logic behind corporatization is that if public ownership is inevitable, then it is wise to make a public enterprise as much as a private enterprise as possible.⁴¹

However, the difficulty of reforming public enterprises does not lie in the adoption of the corporate form, but in realizing the economic efficiency of the enterprises by embracing the corporate structure on the one hand and retaining public ownership on the other.⁴² A publicly-owned corporation could never become identical with a privately-owned corporation. It is also unlikely to achieve the economic efficiency that a private corporation can achieve, as it cannot replicate all the benefits of a private corporation.⁴³

Therefore, if privatization indicates the full acceptance of the corporate structure at the microeconomic level, corporatization only goes halfway in that direction.⁴⁴ In other words,

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

⁴⁰ *Wei* (n 36) 222

⁴¹ *Wei* (n 36) 224

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

corporatization, at most, means creating a maximum degree of similarity with the corporate form of the private sector in corporatized public enterprises.⁴⁵

2.3. Historical Underpinnings and the Major Factors for the Emergence of MOCs

Though mixed ownership in many other countries usually exists in particular industries and a specific period, it derives mainly from the ownership reform of China's SOEs.⁴⁶ Mixed ownership in some other countries work as an interim tool during the progress of privatization, and the Governments usually have the definite plan of consecutive sales of State shares and finally full privatization.⁴⁷ However, in China, this is not the case. Other countries do not have a definite strategy of restructuring SOEs into MOCs, but China has a clear strategy of the development of mixed ownership and this strategy has been reiterated by the ruling party and the Central Government in the official documents.⁴⁸ Thus, probing briefly into the process of China's SOEs reform and the features of the reform is necessary while studying the driving factors of the emergence of MOCs.⁴⁹

The emergence of MOCs in China is attributed to two main reasons. The First is the cultural and ideological obstacles on privatization that resulted in the gradual ownership reform of SOEs.⁵⁰ Being a communist country, privatization in China was strictly forbidden.⁵¹ It was considered as a way to capitalism and full westernization. Instead of big bang privatization, the Chinese way of gradual ownership reform (gradualism) led to the introduction and formation of MOCs.⁵² The background is that after the Cultural Revolution during the 1966-1976, China was suffering a severe shortage of manufactured goods, and the top priority of China's Government was to increase the supply of industrial goods.⁵³ The very purpose of SOEs reform at that time was to try everything possible to motivate the productivity of SOEs. With more autonomy, SOEs began to enjoy economic gains, to retain more profits, and

⁴⁵ Ibid

⁴⁶ Zhang (n 1) 15

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Zhang (n 1) 72

⁵⁰ Zhang (n 1) 54

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

increase employees' income.⁵⁴ In this way, the initial reform in the control of SOEs brought in positive effects and feedbacks, which spurred the enterprises to ask for more autonomy.⁵⁵

The 14th party congress held in the fall of 1992, spelled out the target of China's economic transition. This was to establish a socialist market economy.⁵⁶ In 1993, the 3rd plenary session of the 14th party congress determined that the direction of China's SOEs reform is to establish the modern enterprise system featuring "clear property rights, well-defined powers, and responsibilities, separation of enterprises from Government scientific management".⁵⁷ In the same year, the first Company Law of the People's Republic of China was promulgated.⁵⁸ The declaration of establishing the modern enterprise system marked the first step of the official ownership reform for SOEs.⁵⁹ Afterward, the financial difficulties of the State sector in the mid-1990s prompted the official ownership reform. In the mid-1990s, more and more local Governments began to carry out audacious ownership reform, the driving factor being a great deal of SOEs falling into financial distress and became a burden to the Governments.⁶⁰

Based on local experiments and pushed by local enthusiasm, the central Government then decided to carry out the nationwide official ownership reform of the SOEs.⁶¹ The 15th party congress held in 1997 was a very important event for the ownership reform of China's SOEs. This conference called for the strategic restructuring of the State sector. The so-called strategic restructuring refers to the ownership restructuring in China. This call enormously expedited the ownership reform of China's SOEs.⁶² Small SOEs were allowed to be sold to both insiders and outsider investors, including private firms, individuals, and foreign investors.⁶³ Medium-sized and large-sized MOCs were allowed to be partially privatized and be restructured into MOCs.⁶⁴

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Zhang (n 1) 57

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Zhang (n 1) 58

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

Gradualism implies that the ownership reform approach for many SOEs is not the outright full sale, instead, the correct approach was to diversify the ownership structure and gradually decrease the proportion of State ownership.⁶⁵ As a result, mixed ownership emerged.⁶⁶ Gradualism also implies that the ownership reform generally started with small SOEs before spreading to large SOEs.⁶⁷

The second main reason is the emergence of MOCs through the horizontal economic alliance between the Government and private sectors. The early mixed-ownership [in China] was related to the advocacy program of the economic and technological co-operation and horizontal alliance.⁶⁸ Mixed ownership tended to emerge spontaneously. There was no Government strategy or plan to develop mixed ownership, but once the economic and technological co-operation and horizontal alliance proceeded forward, it could not be confined to SOEs, the joint investment and joint operation among SOEs and private firms would happen, resulting in the origin of MOCs.⁶⁹

Besides ideological reasons, there is also a reason for the Government to retain shares in the Enterprises. That is, the Government is not willing to entirely give up its controlling powers and its influences on those enterprises even after the ownership reform. These controlling powers are very precious to the Government. The Government also has some influences on the SOEs. The Government can still put some pressure on the enterprise to follow and to accomplish their objectives of the local development, to use the enterprises as a source of financial income.

On the other side of the coin, Private Enterprises in China were also keen to bring State ownership to their already established company.

Private firms cannot enjoy the same treatment as SOEs in terms of acquiring Government funds, project bidding, and borrowing from banks.⁷⁰ During the business expansion, the

⁶⁵ *Zhang* (n 1) 66

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ *Zhang* (n 1) 103

⁶⁹ *Ibid*

⁷⁰ *Zhang* (n 1) 116

difficulties of private firms in raising funds were much more serious than SOEs.⁷¹ SOEs usually have good access to funds from the domestic stock market and banks.⁷² Private firms usually have good flairs for selecting projects, finding opportunities, and making profits. In these circumstances, mixed ownership helps both SOEs and private firms.⁷³

Moreover, since the periodic business cycle and market fluctuations impose risks on enterprises, in comparison with large SOEs, private firms have the poorer capability and fewer resources to tackle these risks.⁷⁴ After the long-term and gradual ownership reform, most of the small and lots of the medium-sized SOEs were sold out. Nowadays, SOEs are usually large-sized and are supported by the Government.⁷⁵ These large SOEs have good access to Government support and have a great capability to resist risks.⁷⁶ In terms of obtaining assistance from the Government to resist the risk, private firms are still struggling to get the same national treatment as large SOEs.⁷⁷

In China, although the economic transition has produced a great number of private enterprises, it is still difficult for them to acquire enough trust from the public, customers, or banks.⁷⁸ Even nowadays, SOEs are still regarded by the public as a more reliable kind of enterprise.⁷⁹ While SOEs face efficiency problems, private firms face a trust problem.⁸⁰

Due to the trust problem they face, private firms choose mixed-ownership when participating in SOEs ownership reform and expanding their businesses.⁸¹ Mixed ownership may help them acquire more trust and facilitate their businesses.⁸²

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ *Zhang* (n 1) 119

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ *Zhang* (n 1) 120

⁸² Ibid

2.4. Issues of Corporate Governance

Issues of Corporate governance are more complex for MOCs than SOEs. This is because the corporate governance of MOCs has its particularities.⁸³ The critical difference between MOCs and SOEs, as well as between MOCs and private enterprises, is that there are both State shares and private shares in MOCs.⁸⁴

Corporate governance refers to all issues related to ownership and control of the corporate property, the rights of shareholders and management, powers and responsibilities of the Board of Directors, disclosure and transparency of corporate information, the protection of interests of stakeholders that are not shareholders, enforcement of rights, etc.⁸⁵ For this specific chapter, however, the focus will be on the institutional arrangement of corporate governance and its major elements by taking into consideration the experience of China.

The organizational arrangement of Chinese MOCs has the following frameworks; Board of Directors, Shareholding Structure, Covenant or pre-formation agreements, Office of Core Managers, Special regulations, and Employment relations.⁸⁶

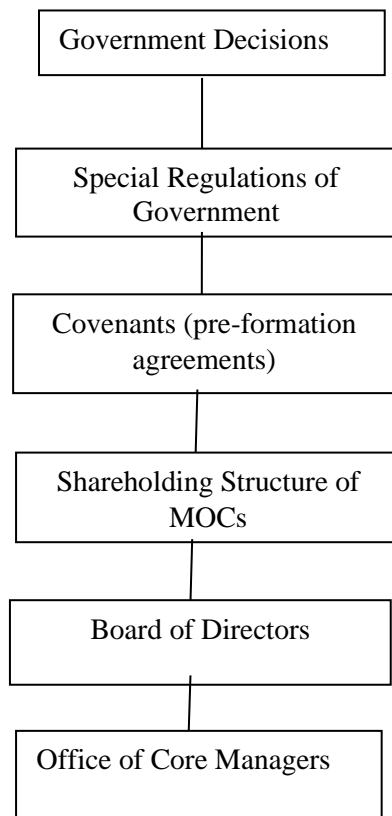
And, the hierarchy of decision-making power of each framework can be summarized by the following organogram:-

⁸³ *Yin, Liu, wen* (n 15) 13

⁸⁴ *Zhang* (n 1) 143

⁸⁵ Fekadu Petros Gebremeskel, 'Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications' (2010) *Mizan Law Rev* (4 (1)) 4

⁸⁶ *Zhang* (n 1) 156



2.4.1. Special Regulations on MOCs

The major cause of these special Governmental regulations is, the Government of China is keen to uphold its responsibilities for the safety and smoothness of the ownership reform and post-reform development.⁸⁷

In restructuring SOEs to MOCs, the Government is usually concerned about the stability of the enterprises and society, as well as the interests of the stakeholders including employees and suppliers.⁸⁸ Furthermore, the Government wants to attract more funds to invest in local areas through ownership restructuring to promote local economic development.⁸⁹ Therefore the Government is in favor of setting up special regulations regarding the above issues.⁹⁰

⁸⁷ Ibid

⁸⁸ Zhang (n 1) 169-171

⁸⁹ Ibid

⁹⁰ Ibid

While the Government is still one of the owners of a MOC, these special regulations help supervise the corporate operation and the activities of private shareholders.⁹¹

It is found from the questionnaire survey⁹² that more than half of the 950 surveyed enterprises made commitments to the Government to ensure that the major business would remain unchanged after the ownership reform. Besides, some enterprises made commitments not to move to other regions. Commitments not to sell the shares to third parties were also made.⁹³

2.4.2. Covenant (Pre-formation Agreement)

The shareholding structure provides the basis for corporate governance, but it is only one of the numerous factors impacting corporate governance.⁹⁴ Judging corporate governance only based on the shareholding structure may be misleading. In many circumstances, a covenant may be made between the shareholders of the MOCs and the Government.⁹⁵ Even in the US, covenants can be found in controlling powers arrangements and interest arrangements.⁹⁶

The clauses of the covenants include the shareholding proportion and the conditions to change the shareholding proportion, the distribution of voting rights, and the exit arrangements.⁹⁷ Shareholders sometimes strike covenants with strategic business partners to share the powers and profits and to acquire critical support.⁹⁸

Most companies in China have covenants between the non-State shareholders and the Government, as well as the management.⁹⁹ The contents of these covenants include the successive engagement program of the previous management, the re-employment program of workers, and others.¹⁰⁰

⁹¹ Ibid

⁹² Ibid

⁹³ Zhang (n 1) 171-175

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Lerner, J., H. Shane, and A. Tsai, 'Do Equity Financing Cycles Matter? Evidence from Biotech Alliances', *Journal of Financial Economics* (2003) 67 (3) 411-446.

⁹⁸ Ibid

⁹⁹ Zhang (n 1) 165

¹⁰⁰ Ibid

2.4.3. Shareholding Structure

Generally speaking, different shareholders have different interests. Their ways and means of realizing their interests could be very different. Shareholders owning a large number of shares often have more advantages to realizing their interests, they may also abuse the controlling powers to loot the interests of shareholders owning a small number of shares.

Many MOCs in China have State majority shareholders and non-State minority shareholders.¹⁰¹

2.4.4. Board of Directors

Since any MOC should be a registered corporation, according to Chinese company law, a corporation must either establish its Board of Directors or set up the post of an executive director if the corporation is a limited liability company.¹⁰²

The Board of Directors in Chinese company law has powered on the following matters: 1) convene the general meeting of shareholders and report to the general meeting; 2) execute the decisions of the general meeting; 3) decide the business plan and investment program; 4) formulate the annual fiscal budgeting and the final account; 5) formulate the dividend payment plan; 6) formulate the recapitalization plan; 7) formulate the restructuring plan; 8) decide the organizational structure; 9) appoint the managers and decide on the payment of their remunerations; 10) formulate the basic management systems; 11) other issues authorized by the general meeting of shareholders.¹⁰³

Except for those MOCs that are small in size or small in shareholding, most MOCs have established Board of Directors.¹⁰⁴ But, this does not mean that the BODs have the power to exercise all the above mentioned statutory mandates freely.¹⁰⁵ To mention one instance, the management in some MOCs is still appointed by the Government. Especially, the person assuming the post of chairman of the board may be decided by the Government or the ruling

¹⁰¹ Zhang (n 1) 163

¹⁰² Zhang (n 1) 157

¹⁰³ Ibid

¹⁰⁴ Zhang (n 1) 158

¹⁰⁵ Ibid

party instead of by the Board of Directors.¹⁰⁶ In China, as a country of strong Government, adherence to Government will is more important than the rule of law can be a reason for such intervention.¹⁰⁷

2.4.5. The Office of Core Managers

The core position of management may vary from company to company or country to country depending on the peculiarities of each company or each country's legal system possesses.

In companies where there is a separation between ownership and control, control over sites of key posts of management plays a pivotal role for shareholders as one way of guiding the corporate governance of the company. It is highly likely if the shareholding proportion is high and that shareholders can easily acquire the office of core managers.¹⁰⁸

However, this is not always true in China. Governmental decisions and Covenants signed between the founders of a company also play their role in this regard.¹⁰⁹

Moreover, according to China's company law, the board chairman is usually the only legal representative of the company and the convener of board meetings. Usually, the board chairman has the ultimate power to decide corporate affairs. Thus, the chairman is, in fact, a core official, the president is another core official. The position of Chief Financial Officer, also a core official, maybe more critical than the position of president.¹¹⁰

2.4.6. Employment Relations

Since the entrance of private shareholders may cause employment status transformation and threaten the positions of the original management, the workers and the management sometimes unite to resist the entrance of private shareholders.¹¹¹ Therefore, to dissolve this alliance or diminish the obstruction, the new shareholders and the Government may negotiate

¹⁰⁶ *Zhang* (n 1) 159

¹⁰⁷ *Ibid*

¹⁰⁸ *Zhang* (n 1) 166-169

¹⁰⁹ *Ibid*

¹¹⁰ *Ibid* 167

¹¹¹ *Ibid*

with the management and the workers, usually resulting in the commitment relating to the future employment and future position retention.¹¹²

2.5. The Dangers of Adopting MOC as a Business Modality

Though China is often praised by many for being a success story of pioneering MOC and adopting it as one business modality, there are also fierce critics of such an approach.

According to these critics, there are three major problems associated with establishing MOCs.

Firstly, it helps the State sector expand as the private sector shrinks.¹¹³ Generally, China's State enterprises enjoy credit support from banks (most banks are State-Owned as well) and the bond market, and their demand for private capital is limited.¹¹⁴ It is easy for SOEs to reject private investment bids for stakes. On the other hand, when the State wants to get a foothold in private firms, it is not easy for those companies to say no.¹¹⁵ They need to think about the consequences of offending SOEs and, more importantly, their powerful owners.¹¹⁶

Secondly, mixed ownership reform increases opportunities for corruption.¹¹⁷

Thirdly, mixed ownership reform leads to unfair competition in the market.¹¹⁸ Political power is a special resource in business. A field survey done by the Unirule Institute of Economics shows that over 90 percent of small and medium-sized private business owners have political aspirations, such as membership of the ceremonial people's congress or political consultative committees.¹¹⁹ On average, they said they are willing to pay one million yuan for this membership.¹²⁰

¹¹² Ibid

¹¹³ Zhang Lin, <The Three Dangers of China's Mixed-Ownership Reform> (2018) South China Morning Post 19 <https://www.scmp.com/news/china/economy/article/2158036/three-dangers-chinas-mixed-ownership-reform> accessed at October 3rd 2019

¹¹⁴ Ibid 20

¹¹⁵ Ibid

¹¹⁶ Ibid 21

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Ibid

¹²⁰ Ibid

CHAPTER THREE

COMPANIES WITH MIXED PUBLIC/PRIVATE OWNERSHIP IN ETHIOPIA: THE LEGAL AND PRACTICAL PROBLEMS

3.1. Formation of MOCs in Ethiopia: the Law and the Practice

In the current status quo of the Country, MOCs have been established mainly as a result of partial privatization of wholly SOEs. Though there is an indication that the Government has an experience of forming MOCs from scratch through a horizontal alliance with the private sector, this kind of alliance is not that prevalent. The other two factors that could be the reasons for MOCs coming into being (namely, through private investor's invitation to the Government to take a share in already established Private Company and when by the statutory act the Government decides to retain free equity from private firms) are not yet practiced. Thus, the main interest of this sub-topic is in MOCs that have been established through partial privatization of SOEs.

3.1.1. Legal and practical issues of Pre and post Privatization

A privatization law serves a valuable purpose in defining the legal authority for a country's privatization program, the key principles on which it will be based, and the institutional arrangements for policymaking and implementation.¹²¹ Other supporting laws provide for the legal steps in preparation for privatization and to consummate the transaction, as well as forming part of the business environment in which the newly-privatized enterprises will operate.¹²²

In addition to the broad legal issues having application across the entire privatization program, individual privatization transactions will give rise to a variety of legal issues needing to be dealt with on a case-by-case basis relying upon legal advice.¹²³ Specific transactional legal

¹²¹ World Bank, LEGAL GUIDELINES FOR PRIVATIZATION, <worldbank.org/INTLAWJUSTICE/Resources/privatization_guide.pdf> 2

¹²² Ibid

¹²³ Ibid 11-12

issues are most readily resolved in the context of a clear and consistent set of publicly announced guidelines for each step of the process, from evaluation through implementation.¹²⁴

Privatization (be it full or partial) in Ethiopia does not have a long historical background. The concept of privatization was acclaimed in the country after the previous Government, Derge fell and its successor the FDRE Government planned to change the economic orientation from socialism to capitalism.¹²⁵ The very two characteristics of capitalism are private ownership of property and the existence of the free market. Therefore, to implement these objectives, it is found necessary to launch a privatization program on State-owned enterprises, which are mostly the result of the nationalization.¹²⁶

Having said that, All MOCs that are established after partial privatization of SOEs have taken the form of Share Companies.¹²⁷ Accordingly, all thirteen (13) companies that are shortlisted for this research are Share Companies. It, therefore, is the interest of this topic to see pre and post-formation aspects of those MOCs that have taken the form of Share Companies.

a) Valuation and the Danger of Poor Bargaining

Before the shares of SOE are sold to private individuals, it should be necessary to determine the price of each share and by implication, the value of the Company concerned.¹²⁸ Proper valuation remains of critical importance because the Government has a public responsibility to ensure that the property of the society is not sold at low prices to private investors. At the same time, the Government has the social responsibility of ensuring that it is not selling a fictitious asset of no value.¹²⁹

The type of valuation that should have been carried out is the going-concern value of a business or its asset.¹³⁰ This means, as opposed to the liquidation value of a business or its asset, the value of a commercial enterprise's asset and business should be the value of an

¹²⁴ Ibid

¹²⁵ Endaweke Tsegaw <The Legal Status of State-Owned Share Companies in Ethiopia> (2016) 18 Beijing Law Review <http://www.scrip.or/journal/blr> accessed at 13 September 2019

¹²⁶ Ibid

¹²⁷ Interview with Addis Alemayehu, Senior Expert of Post-Privatization Affairs, Privatization Directorate, Public Enterprises Holding and Administration Agency (Addis Ababa, Ethiopia , 13 January 2020)

¹²⁸ Eshete Tadesse, <The Impact and Policy Implications of Privatization in Ethiopia> 204 <https://www.eeaecon.org/>

¹²⁹ Ibid

¹³⁰ *Endaweke* (n 125) 20

active business with future earning power. Therefore, there are two valuations; asset valuation and business valuation.¹³¹

Given the market volatility and the company's performance over time, the valuation of the Company's worth should be an ongoing process. Revaluating the asset and the business value (it can be the Company's goodwill, chemical formulas, and other intellectual properties and raw materials, finished goods, by-products, etc.) of a given Enterprise should be done in a timely basis to avail from over or undervaluation up until the privatization. Besides, the fixed assets of companies have depreciated from time to time.

To this effect Article 6 (2) of Privatization and Public Enterprise Proclamation no. 146/98 mandates the Board of Management which is established under the then Ethiopian Privatization Agency to prepare guidelines for the valuation of SOEs. However, when we see the Country's experience in this regard, once the valuation of a given SOE is done, the Government doesn't bother to reevaluate it in due course. In some instances, the value of the SOE done more than eight years ago is used to show the current value of the Enterprise.¹³²

Therefore, the above-stated problems of valuation of the capital or shares of the SOEs are the reasons for the undervaluation of SOE, and the same negatively affects the transferability of the shares from the Government to private ownership.

The interviews made with the officials of the former Privatization and Public Enterprises Supervising Authority and the current Public Enterprise Holding & Administration Agency show that there is also a danger of poor bargaining on the Government side.¹³³ The Gov't often is not in a strong position compared to potential buyers. Therefore, the Government often makes a poor bargain.

¹³¹ Ibid

¹³² Ibid. as per this Writer's observation the problem of valuation doesn't end on such lack of ongoing concern. It goes beyond this. Accordingly the mandated Governmental body (the then Ethiopian Privatization Agency) often neglect to evaluate the business aspect (e.g., the good will) of those privatized SOE and the valuation process focused on only the current asset of the Enterprise as if it is going to be liquidated.

¹³³ Interview with Mihretu Mekonnen, Legal Expert Public Enterprises Holding and Administration Agency (Addis Ababa, Ethiopia, 14 March 2020)

b) Stock Exchange Market

Stock markets are generally one of the efficient ways of capital movements. The most important function stock markets do is raising capital easier and they allow for capital pulling because they facilitate both entries into and exit out of a business.¹³⁴

The transfer of shares from the public to the private sector requires the presence of a developed capital market. The transfer generally takes place through the mechanism of a stock exchange. The process also requires the intervention of investment banks and securities brokerage firms.¹³⁵ This firms' role is to undertake the valuation of a company and eventually act as underwriters to buy the shares from the Government and retail the shares through the stock exchange at market price.¹³⁶ In Ethiopia, however, there is no single stock exchange market just to float shares.¹³⁷ The required legislation and the institutional infrastructures necessary for the partial and full privatization process are also non-existent.¹³⁸

c) The Role of Foreigners and the Distribution Dilemma

Ethiopia Investment Law divides investment areas into three categories, namely those reserved for the public sector, those reserved for domestic investors and areas which are open for foreign investors including in joint venture with the State.¹³⁹ According to article 6(1)(c) of the Investment Proclamation No.769/2012, air transport services using aircraft with a seating capacity of more than fifty passengers is one of the areas of investment exclusively reserved for the Government. On the other hand, the law permits the involvement of the private sector in the telecom business through joint investment with the Government.

¹³⁴ *Endaweke* (n 125) 19

¹³⁵ *Eshete* (n128) 204

¹³⁶ *Ibid*

¹³⁷ *Ibid*

¹³⁸ *Ibid*

¹³⁹ Investment Proclamation, Proc. No. 63, Fed.Neg.Gaz., Year 18, No. 2012 (hereinafter called Investment Proclamation) From Article 6-9

The question to be raised is whether the privatization of those enterprises listed as reserved for the Government and domestic investor calls for the amendment of laws or whether it can be accommodated within the existing legal framework.

The existing law seems to have room for change and mandates the executive branch of the Government to decide upon the issue. Article 29 (7) of the Investment Proclamation grants the power to Investment Board to forward a recommendation for approval by the Council of Ministers concerning investment areas exclusively reserved for domestic investors. Article 6 (3) of the Investment Proclamation also grants power to the Council of Ministers to decide over investment areas exclusively reserved for the Government or for the joint investment with the Government to be open to private investors.

The second question to be raised here is as to the appropriateness of granting the power to the executive branch of the Government to pass decisions on the fate of strategic and mammoth SOEs. Reserving investment areas like Ethiopian Air Lines and Electric Grids to the Government by a Proclamation, in the first place, is to tighten the grip on the executive branch to prohibit misguided political and corrupt decisions that may be taken by the administration. Instead of calling for the amendment of the law by the legislative branch after considering the issue from different policy angles, letting the Council of Ministers decide over the transfer of investment areas specially reserved to the Government to private investors' defeats the very purpose of reserving them through a Proclamation in the first place.

The distribution dilemma relates to whether the best interest of the Country is served by ensuring the widest distribution of shares or one that is restricted.¹⁴⁰ If the widest distribution of shares is allowed, it is generally feared that foreign shareholders who would generally control large blocks will be able to wield large uncontrolled power.¹⁴¹ On the other hand, a much-restricted distribution of shares might result in overconcentration of economic

¹⁴⁰ *Eshete* (n 128) 204

¹⁴¹ *Ibid*

power on the hands of a few individuals, who may use the economic power to pursue objectives that may be at variance with the national objective.¹⁴²

d) Membership of the MOC and public offering of shares

All MOCs, that are short listed for this Study, in Ethiopia take the form of Share Companies. It is, thus, the purpose of this sub-topic to see the companies' membership structure and how the shares are sold.

One of the reasons of forming Share Company is to broaden its ownership base. Companies formed by public subscriptions are limitless members who may not know one another.

A public offering of shares requires complete disclosure of relevant financial and business information concerning the assets and liabilities of the enterprise, its profitability history, business activities, and prospects.¹⁴³ This disclosure should be in the form of an offering document or prospectus containing a description of the new shares and the terms on which they will be allocated.¹⁴⁴

Since investors will take up shares relying on the offering document, the responsibility for any error or omission in the document should rest with the Board of Directors which approved its issue.¹⁴⁵

While the capital of share companies formed per the Commercial Code is paid by the contribution of the shareholders, public enterprises are pre-existing and their capital is the value of their assets. The name "Share Company" is to allocate the assets of the enterprises into shares to ease the transfer of public property to private.¹⁴⁶

That said, all MOCs in Ethiopia that are established after partial privatization didn't come into being after following the above-mentioned requirements of a public offering of shares

¹⁴² Ibid

¹⁴³ *World Bank* (n 121) 10

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Privatization of Public Enterprises Proclamation, Proc. No., 26, *Fed. Neg. Gaz.*, Year 5, no. 1998. Article 5 of Privatization of Public Enterprise Proclamation has made it clear the intent of the law to convert Public Enterprises is preparing them for privatization

and by inviting members to take shares in the newly formed companies. They rather established through a very unorthodox way of forming Share Companies.

The very purpose of converting the asset of SOEs into shares, in the first place, is to ease the privatization process or to invite private investors to buy shares as per their financial capabilities. Usually, the Government entered into pre-formation agreements with those investors who buy shares.¹⁴⁷

After all such procedures are finalized, the private investor who buys shares from wholly SOEs is given a chance to bring the other three persons to fulfill the minimum number of membership requirements of the Commercial Code (which is five) to form Share Company.¹⁴⁸ Those three persons who are invited by the private investor to take a minimal amount of shares are not expected to be investors that have an interest in the venture. They are rather strawmen who are brought to satisfy the compulsory membership requirements.¹⁴⁹

e) The Purchasing Capability of the Public

Given the low saving capability of the public, the question to be addressed is whether there are indigenous investors that possess the financial resources, the purchasing capability, and the willingness to buy the shares offered. Another question to raise here would be, will the commercial banks be willing to extend loans to individuals so that they acquire shares in privatized SOEs?¹⁵⁰ Will the Government be prepared to allow employees to acquire shares in privatized SOE on credit like what the Chinese Government did in the early stages of gradual ownership reform of SOEs? In China, workers' acquisition of shares from wholly SOEs can be considered as one of the steps leading to the Government's launching of the formation of MOCs.¹⁵¹ In Ethiopia, What kind of guarantees and incentives are necessary to attract the purchasing of shares in privatized SOEs?¹⁵² And other related issues have not been addressed.

¹⁴⁷ *Interview with Addis Alemayehu* (n 127)

¹⁴⁸ *Interview with Addis Alemayehu* (n 127)

¹⁴⁹ *Interview with Addis Alemayehu* (n 127)

¹⁵⁰ *Eshete* (n128) 206

¹⁵¹ *Ibid*

¹⁵² *Ibid*

3.1.2. Institutional Undertakings

As mentioned and discussed earlier, so far, the primary reason for the establishment of MOCs is the partial privatization of SOEs. Privatization needs an institution that will be responsible to oversee the successive steps to be taken in transferring the enterprises through pre-privatization activities and the privatization process. The former, in particular, involves activities making the enterprise-ready for privatization such as, carrying out due diligence, valuation, and auditing, preparing information memoranda, and setting in motion the bidding process.¹⁵³

In Proclamation No. 916/2015,¹⁵⁴ concerning public enterprises and their shares to be privatized, the mandate is given to the Ministry of Public Enterprises (in its current name Privatization and Public Enterprise Holding Agency). Accordingly, the latter is given the power to oversee and supervise the implementation of the Privatization Program, ensure the orderly execution, the legality, transparency, and efficiency of the privatization process, approve the modality of privatization and take all other measures necessary to expedite the privatization process.¹⁵⁵ Essentially, it is this organ that is executing privatization which is an ongoing activity and it is mandated to execute the process.

Under Article 31(9) of Proclamation that defines Powers and Duties of Executive Organ, the Ministry of Public Enterprises is mandated to submit proposals to the Government on the dissolution, amalgamation, or division or sale of public enterprises it supervises. This leads to another question regarding the power of the Ministry on those public enterprises it does not supervise. The Ministry is given restricted power concerning those enterprises so that it can but “oversee and assist their corporate management and financial performance.”¹⁵⁶ The logical conclusion is that the Ministry cannot propose privatization, for instance, of Ethiopian Air Lines which is supervised by the Ministry of Transport. A supervising authority has,

¹⁵³ Tewodros Mihiret, <The New Wave of Privatization in Ethiopia: A Legal Perspective> 8 Lawyers for Africa <https://www.lexafrika.com/2018/10/the-new-wave-of-privatization-in-ethiopia-a-legal-perspective/> accessed 14 December 2019

¹⁵⁴ Definition of Power and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proc. No 12, *Fed. Neg. Gaz.*, Year 22 no.2015 (Proclamation that defines Powers and Duties of Executive Organ)

¹⁵⁵ Proclamation that defines Powers and Duties of Executive Organ, Article 31

¹⁵⁶ Powers and Duties of Executive Organ Proclamation, Article 31 (1) (a)

however, the power to propose to the Council of Ministers about enterprises under its control that it or its management be transferred.¹⁵⁷

Now the Government, seems to have opted for another course to implement the decision to privatize the enterprises gauging from what has come to light so far. A 21-member Advisory Council has been established to ensure transparency and accountability in the process.

3.2. Corporate Governance of MOCs in Ethiopia: The Law and the Practice

The rubric “company governance” has an analogy with the modern democratic Government.¹⁵⁸ In a parliamentary democracy such as Ethiopia, legislative sovereignty rests with parliament, while the administration is left to the executive organ of the Government based on the constitution.¹⁵⁹ Likewise, the company's democracy is kept by allocating of company's power to different organs: the shareholders, directors, managers, and auditors based on the two-fold constitution: the memorandum of association and articles of association, and the resolutions of shareholders’ meetings.¹⁶⁰

In Ethiopia, all MOCs are established in the form of Share Companies. Thus, the points to be raised here are whether the administrative organization running MOCs is up to the standard set for share companies or their analogous corporate form in any legal system. Moreover, are there any supportive instruments like pre-formation covenants and sector-specific special regulations that supplement the governance of those MOCs? Those issues and related aspects of corporate governance of MOCs are the interest of this sub-topic.

3.2.1. Companies’ Constitution

The two-fold constitutions adapted by the companies enable them to perform their economic and social functions. The formation of the initial company’s constitution is the mandate of the promoters or founders but is subject to verification by the subscribers in the meeting.

¹⁵⁷ *Tewodros* (n 153) 9

¹⁵⁸ *Endaworke* (n 125) 17

¹⁵⁹ Paul L. Gower, *Principles of Modern Company Law* (5th ed, London: Sweet and Maxwell) 75

¹⁶⁰ *Ibid*

The preparation of a memorandum of association is an important step in the formation of a company. As it is depicted in the Commercial Code Art. 313, it is one of the most important documents required to be filed with the Ministry of Trade and Industry at the time of the formation of the company. No company can be registered without a memorandum of association and hence is sometimes called a life-giving document. It lays down the company's basic constitution: the name of shareholders clause, registered office clause, object clause, liability clause, and Capital clause. It also defines the limitations of the powers of the company, beyond which the company cannot commence its activities; otherwise, it constitutes Ultra Vires.¹⁶¹ Memorandum of association defines the relationship of the company with outsiders.¹⁶²

Everything else is regarded as a matter of administration to be dealt with in the second document, Articles of association.¹⁶³ The articles of the company are the regulations or by-laws which govern the internal management of the company. The articles of association may prescribe such regulations for the company as the subscribers to the memorandum deem expedient. It embodies the powers of directors, officers, and of the shareholders' voting, etc, the model and the form in which the business of the company is to be carried out and how changes in the internal regulations may be made.¹⁶⁴

All MOCs in Ethiopia that have short listed for this Study happen to be formed by satisfying the above mentioned mandatory requirements of the law. They all have to have registered those constituting documents. However, there are two main problems. The first is on the lack of deliberate intent to form and to run MOCs especially on the side of the Government. As deliberated earlier, so far the Government of Ethiopia hasn't considered the formation of MOCs as one business modality. The Government has rather taken the modality as one of the privatization schemes that eases the further transfer of shares to private investors. This absence of policy direction made the Government not to give due care and attention to these establishing documents.

¹⁶¹ Mahindra P. Singh, *Company Law* (9th ed., Delhi: Eastern Book Company) 7

¹⁶² *Ibid* 8

¹⁶³ *Gower* (n 159) 75

¹⁶⁴ *Endaweke* (n 125) 18

On the flip side of the coin, the Government invites and concludes a pre-formation agreement with one or two interested bidders to work together. Establishing MOCs in the form of Share Companies comes next by an unusual way of letting an investor bring other straw men members just to comply with the mandatory magic number of five.

3.2.2. Share Holding Structure and Shareholders' Meetings

The ultimate owners of a Share Company are its shareholders. The shareholding structure of a certain Share Company, thus, can be considered as one of the evidence that shows the apparent decision making power. Diversification of the shareholding structure in MOCs is the interest of many researchers and used to measure Companies' level of efficiency.

For instance, one empirical Study conducted on Chinese Mixed Public-Private Companies revealed that the more diversified the ownership is, the higher the efficiency becomes, and the introduction of private capital or foreign capital by different industries will have different effects.¹⁶⁵ With the increase in the heterogeneous ownership balance degree, the efficiency increases.¹⁶⁶

Cruising through the Commercial Code of Ethiopia, one can easily understand the emphasis given to the shareholding structure of Share Company by the law. Shareholders can exercise their powers acting collectively in meetings. In meetings, generally, a simple majority vote suffices, but in some cases, a large majority or unanimity may be required.¹⁶⁷ Accordingly, the Ethiopian Code of Commerce made provisions under Art. 390 that meeting of Share Company is broadly divided into two; general and special meetings.

When we look into the Ethiopian experience, no attention is given to the shareholding structure and/or the ownership balance in MOCs. In the first place, the Government of Ethiopia so far has no intention to diversify ownership structure since all MOCs came into being after a joint 'work together' agreement. Forming a Share Company came into the picture afterward. Besides, the Government shows no sign of interest to hold the majority share in those MOCs to

¹⁶⁵ *Yin, Liu, wen* (n 15) 2

¹⁶⁶ *Ibid*

¹⁶⁷ *Ibid*

let it control the decision making of the Companies. It rather holds residual shares in the MOCs until the time they are transferred to an interested bidder.¹⁶⁸

Concerning who represents the Government in shareholders' meeting, the usual practice is that in MOCs the Government has represented by its higher officials as fiduciary members of the meeting.¹⁶⁹ On the other hand, the private investor and the other straw members also are represented by themselves or by their agents. Usually, the voting right follows the amount of shares members own.

The Government is represented in Shareholders' meetings by fiduciaries who are not the owners and direct beneficial of the dividend. They are rather high governmental officials and high ranking ruling political members that are often careless to the MOCs' affairs.

The observation made on those MOCs that are the subject of this paper shows that all MOCs called and held a meeting at least once a year. However, this is mainly because it is a mandatory requirement of the law and the Document Registration and Authentication Agency demands and follows the adherence of this procedure strictly.¹⁷⁰

It is also witnessed that in MOCs that private investors happen to own majority shares, there are cases of maneuvering the Shareholders' Meeting to their advantages. For example, The MOC named African Juice Tibila S.co, in the meeting called by the Auditor for the agenda of presentation and approval of audit report, the majority shareholders hired a General Manager to the Company. The Government side aggrieved by the conduct brought a case before a court of law and obtained a court decision that the resolution of the meeting has overruled.¹⁷¹

3.2.3. Board of Directors

The Board of Directors is a body of appointed members who jointly oversee the governance aspects of a company. A Board's activities are determined by the powers, duties, and responsibilities delegated to it or conferred on it by an authority outside itself. "Director" may

¹⁶⁸ *Gower* (n 159) 76

¹⁶⁹ Interview with Taye Admasu, Directorate Director of Trade and Service in Public Enterprises Holding and Administration Agency (Addis Ababa, Ethiopia, 11 March 2019)

¹⁷⁰ Interview with Menur Mohammed, Branch Manager of Document Registration and Authentication Agency (Addis Ababa, Ethiopia, 12 March 2019)

¹⁷¹ *Interview with Mihretu* (n 133)

be defined as “a person having control over the direction, conduct, management or superintendence of the affairs of the company.”¹⁷²

In companies with dispersed ownership, shareholders are usually unable to closely monitor management, its strategies, and its performances for lack of information and resources. Thus, the role of a Board of Directors is to fill this gap between the uninformed shareholders as principals and the fully informed executive managers as agents by monitoring the agents more closely.¹⁷³

According to the Commercial Code, the Board of Directors is the ultimate ‘managing’ body of a company. It enjoys extensive powers as provided in the Code, under the Memorandum and Articles of Association, and provided in Resolution of shareholders in ordinary and extraordinary meetings.¹⁷⁴

All MOCs in Ethiopia that are subjected to this Study have a Board of Directors whose duties are enumerated under their Constitutions. The stated duties of the Board are more or less similar across the Companies and most of them are a direct replica of the Commercial Code.

When we come to see the composition of the Boards, the usual practice of MOCs that comes into being after partial privatization is selecting one or two Board members that represent the Government irrespective of the balance of shareholding, and the rest of members are selected by the private investors.¹⁷⁵

The Commercial Code under Article 347 (1) allows only shareholders of a company to be appointed as directors. Besides, Article 350 of the Commercial Code provides the appointment of Directors has to be either by the Constitution of a Company or by the blessing of Shareholders’ General Meetings. However, some pieces of evidence show the prevalence of practices where Board Members that represent the Government are appointed from other Governmental enterprises or the ruling political party.

¹⁷² Husen Tura, <Overview of Corporate Governance in Ethiopia: the Role, Composition, and Remuneration of Board of Directors in Share Company> (2012) University of Eastern Finland 57 <https://www.researchgate.net/publication/312587074> accessed at 04 September 2019

¹⁷³ Ibid

¹⁷⁴ Ibid

¹⁷⁵ *Interview with Addis Alemayehu* (n 127)

To mention one instance, Afar Salt Production Share Company is peculiar from other MOCs since it was established not after partial privatization, rather than by the new venture of the Government and other ‘private’ investors. And its majority shares are held by the Public Enterprise named Ethiopian Mineral, Petroleum, and Biofuel Corporation. Even in this MOC, there was a practice of appointing Board Members that represent the Government directly by the Privatization and Public Enterprise Supervising Authority (PESSA) outside the Articles of Association of the MOC which dictates members to be appointed by General Meeting of Share Holders.¹⁷⁶

When we see their effectiveness, the model that the Government follows to establish and run MOCs by itself does not allow for the directors to act as they should-as fiduciaries of the organization that they are appointed to direct. Appointing Board Members and letting them do their job in the context of SOEs should mean embracing and applying it within a Government context with all its imperfections.

The standard of skill and care expected from those MOC directors (especially those appointed by the Government) is very low, as such directors are not required to give continuous attention to the affairs of the company. Instead, active attendance by himself or his delegate in periodical board meetings suffices. There is no statutory provision requiring directors to have expertise and experience in the management of companies. Instead, directors are only expected to exhibit a degree of care and skill that can reasonably be expected from persons of their knowledge and experience.

3.2.4. The Covenant (pre-formation agreements) and the Special Regulations

Though our commercial code doesn’t envisage it, a striking of pre-formation agreement among founders before embarking into the formation of a company is a common phenomenon across the globe. This pre-formation agreement helps the founding members to well establish the direction that the ship is going to float. The agreement may address different issues like shareholding proportion, the exit arrangement, the corporate governance matters ranging from

¹⁷⁶ Interview with Mulugeta Seid, Chief Executive Officer of Ethiopian Mineral, Petroleum, and Bio-Fuel Corporation, former Chairman of Board of Directors of Afar Salt Production Share Company (Addis Ababa, Ethiopia, 20 March 2020)

the successive engagement program of the previous management to the future composition and arrangements of directors, core management personnel, and workers.¹⁷⁷

MOCs in Ethiopia that are established after partial privatization happens to have pre-formation covenants between The Government on one side and the private investors on the other. These covenants mainly focus on the manner and term of payment to be made by the private investor/s. As mentioned earlier, the Government partially transfers SOEs after evaluating the assets of the enterprise and converting it into shares. Accordingly, the usual practice during the formation stage is non-State shareholders who buy shares will pay a certain percentage of money for the shares they bought (most of the time 25% of the total value of shares) and the rest will be payable on an installment basis. The main purpose of pre-formation covenants is, thus, to articulate the terms of payment for the remaining unpaid amount of shares and to put pre-conditions that shall be fulfilled if the Government decides to transfer the residual shares of MOCs to the same investor/s.

Moreover, implementation of successive business and strategic plan that is expected from non-State shareholders and periodic assessment of the same, re-employment issue, dispute resolution methods are also the focus area of those pre-formation agreements. However, pre-formation agreements interred between the Government and the private investor/s, so far, didn't seem to be interested in incorporating issues of corporate governance. This is mainly because the Government lacks the interest to engage longer in MOCs and it has no clear policy direction towards forming well organized and properly managed hybrid Companies. Consequent formation of Share Companies after the signing of these covenants is mainly aimed to ease the further transfer of the Government's residual shares to non-State shareholders.

When we come to see the presence of special regulations of the Government that are meant to deal with the safety and smoothness of ownership reform and the post-reform development of SOEs (as the details discussed under Chapter Two), there is none to be found in Ethiopia.

¹⁷⁷ Zhang (n 1) 163

3.2.5. Employment Relations

SOEs in Ethiopia, are generally unprofitable due to, among other things, the fact that their employees enjoy a semi-civil service status which makes it difficult for management to control the labor force. Moreover, SOEs tend to be overstaffed with unproductive labor because of the employment creation objective pursued by the Government. In many instances, many SOEs are subsidized to protect jobs.¹⁷⁸ The newly formed MOCs, thus, must be allowed freely to hire and fire in a way that enables them to be profitable. The practice, however, tells otherwise from the above assertion. Our Government is notorious to be a tough negotiator when it comes to retaining former employees and management of SOEs. And in each covenant that is signed to partially transfer wholly SOEs, there are re-employment clauses. This, often, is a push factor for most non-state investors since nobody would be interested to invest in a Public Enterprise who is crippled by, among other things, unproductive and overstaffed labor force.

On the flip side of the coin, there are also cases where employees are given a chance to buy shares from SOEs which are designated to be partially privatized. In this regard, the Chinese experience is worthy of noting. As part of gradual ownership transfer of wholly SOEs, China gave priority right to employees to buy shares before inviting outside investors.¹⁷⁹ Investment by employees, in turn, motivated workers to strive for better output and profit. After careful observation of the positive result which it brings in firms, China gradually went to invite outsiders to have shares in the Enterprises. Such experience is nowhere to found in Ethiopia. The Government surely overlooks the possible positive outcomes that could be achieved by employing such a strategy before embarking on the full fledged partial and/or full privatization.

3.2.6. Institutional setup and Corporate Governance

The former Privatization and Public Enterprises Supervising Authority (PPSA), by its current name Public Enterprise Holding and Administrative Agency (hereinafter to be referred as “Agency” or “The Agency”), has been the main responsible organ for activities ranging from inviting non-State investors to buy shares from SOE to further follow up of the performance of MOCs that have been established accordingly. The Agency often has a say in appointing

¹⁷⁸ *Eshete* (n 128) 205

¹⁷⁹ *Zhang* (n 1) 50-56

fiduciaries that represent the Government in shareholders' meetings, nominating Members of Boards from the Government side (sometimes there are cases in which the Agency directly appoints those members without bothering to go through the normal procedure of the law) and follows up the performance of MOCs regularly.

However, such follow up mainly focuses on the manner and terms of payment that non-State shareholders have agreed to comply with. As discussed earlier, non-State shareholders often pay 25% of the total value of shares they subscribe to and subsequently pay the rest on an installment basis. Moreover, the Agency also monitors the private investors' commitment and progress over the implementation of the business and strategic plan which they agreed to deliver. Beyond such follow-ups, the Agency, so far, has not been able to give the needed due attention to corporate governance of MOCs. There is a lack of awareness and due care as to the importance of selecting and appointing proper representatives that represent the Government in shareholders' meetings and the nomination of the Board of Directors is not at all merit-based. The rather common experience is nominating heavyweight politicians who have no time to properly shoulder the responsibility and who are also not fully concerned and committed to the MOCs' overall performance. There is no possibility of sanctions to discipline bad performing directors and heavyweight politicians who are nominated and appointed in different types of MOCs irrespective of their qualifications, previous performance, and experience.

To our further dismay, though the Agency has designated one directorate which is responsible to oversee corporate governance of SOEs, this directorate is not mandated to study and recommend better ways of good corporate governance concerning MOCs.¹⁸⁰

This is nonsense in many ways. The Agency is the main responsible organ for the establishment of MOCs in the first place. It has also a very long arm regarding nominating and appointing fiduciary shareholders and nominating members to the Board. In light of all these, denying the directorate which is established for the promotion of good corporate governance upon SOEs, not to oversee MOCs governance is simply wrong.

¹⁸⁰ Interview with Meteriyash HaileGeorgis, Directorate Director of Corporate Governance and Finance, a Department established under Public Enterprises Holding and Administration Agency (Addis Ababa, Ethiopia, 04 January 2020)

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSION

First, the Study by focusing on MOCs that have established by State on one hand and by non-State actors on the other, begins its discussion on the factors that MOCs came into being. It has established that MOCs can be formed owing to different factors. Accordingly, partial privatization of wholly SOEs, a horizontal alliance between the State and non-State investors, private investors invitation to the Government to have a share from their already established Companies, and statutory act by State to retain shares from already established private Companies were the factors that have been deliberated. From the above factors, the prevalent one that gives rise to the formation of MOCs in Ethiopia found to be the partial privatization of wholly SOEs. Moreover, there also discussed MOC that is formed through a horizontal alliance between State and non-State shareholders. The paper has given due emphasis on the major factor driving the emergence of MOCs in Ethiopia (which is partial privatization) and has deepened into its details.

Second, the historical background of forming MOCs has been studied. There found to be the formation of MOCs as a business model is deeply rooted in China. The driving factors of the emergence of China's MOCs have been explored. It is in the 1980s, the mixed-ownership budded in the economic co-operation and horizontal alliance, and it combined SOEs' advantage of obtaining business resources and non-SOEs' advantage of flexible operational mechanisms. The mutual supplement of different advantages achieved good synergy in mixed ownership. Since the mid-1990s, lots of SOEs in China have been restructured to MOCs instead of fully-privatized enterprises. The Government's incomplete trust in private ownership, the Government's incomplete releasing of its controlling powers on SOEs, the granting of some shares to SOEs' insiders, the unfair treatment to private enterprises, and the Chinese traditional culture, promoted the emergence of China's MOCs.

Third, the corporate governance of MOCs in China has been discussed from the vantage points of Shareholding Structure, the existence and power of the Board of Directors, the content of

pre-formation agreements (covenants), the existence of sector-specific Special regulations, and from employment relations. Accordingly, it has found that even though most MOCs in China happen to have Board of Directors, this top management body doesn't fully free to apply its power. It is rather kept under a short leash of the Government and the Government often decides over some matters that supposed to be decided by the Board of Directors. The shareholding structure of MOCs is also exhibited in major State shareholding. The Chinese Corporate Governance of MOCs is also characterized by the presence of Company-specific Special Regulations which are meant for deciding over a wide range of issues, the presence of pre-formation agreements, and strong tendency of keeping the workforce of the former SOEs. Thus, the corporate governance of China's MOCs is said to be unstable and immature and is not commercialized enough.¹⁸¹

In dealing with legal and practical problems of MOCs in Ethiopia, the pre and post-formation stages, as well as issues of corporate governance, has widely addressed. Concerning the legal and practical problems regarding pre and post-formation stages of MOCs:

First, in Ethiopia, as of China, the most common factor of forming MOCs is through partial privatization of SOEs. In this regard, however, the required legislation and the institutional infrastructures necessary for the partial and full privatization process are non-existent. At present, there is no law dealing with sensitive privatization issues. There is no experience of evaluating SOEs' asset and business in an ongoing manner, and there is evidence that shows the Government using the one-time value of SOE to the coming years.

There is no Capital Stock Exchange market, financial intermediaries, and no law to this effect. There is also no law meant to halt unnecessary concentration of ownership in the hand of block-holders. No law promotes the general purchasing power of the public. An institutional infrastructure that could enable the general public to acquire shares from partially privatized SOEs is nowhere to be found.

Second, there is no well-structured and well-equipped single institutional infrastructure that is designed to partially transfer the ownership of SOEs. Different Governmental Bodies assume such responsibility. The laws of the land, hand the responsibility of transferring of ownership

¹⁸¹ Zhang (n 1) 177

based on the question of which government body is supervising the SOE. By and large, Public Enterprise Holding and Administration Agency has assumed this responsibility. The Agency, however, doesn't have a power over those SOEs that it doesn't supervise.¹⁸² The current Government moves to go beyond the existing legal procedures and institutional channel and entrust the issue of partial privatization to 21 membered Advisory Council is also further evidence that shows the absence of a well-coordinated institutional framework that is designed and organized to deal with issues of partial privatization.

Third, it is found that all MOCs that have been short listed for this Study in Ethiopia take the form of Share Company. But none of them are established by a public offering of shares. They rather came into being in strange and unusual ways. The practice is, after evaluating wholly SOEs asset and by converting the assets into shares, the Government invited interested investors by open tender. With the investor that came out to be a winner, the Government interred a preformation agreement and let the non-State shareholder bring other strawmen which serve to fulfill the minimum membership requirement. After all this procedure fall in order, the Share Company will be formed.

The MOCs that take the form of Share Company all have registered Constitution before the Ministry of Trade and Industry just to meet the legal procedure and they all establish the Board of Directors. In so doing, the Government's obvious intent is not to get benefited from the fruits of forming Share Company, it is rather meant to ease the further transfer of ownership to the non-State investors.

Concerning corporate governance aspects of MOCs, the problem begins with the constituting documents of those Companies. There is no experience of well-crafting the Memorandum of Association and Articles of Association. It is rather considered a simple formality of the law to form a company.

Unlike China, the Shareholding Structure of MOCs in Ethiopia doesn't get proper attention as needed. First of all, the Government neither has the intent to retain a majority of shares in the MOCs to influence the decision making nor does it commits to diversify the shareholding structure. It rather impliedly encourages block holding in the Share Company by letting the

¹⁸² Proclamation that defines Powers and Duties of Executive Organ (n 154) Article 31 (1) (a)

non-State shareholders have a share as much as they can and by letting them recruit straw members whose decision at the end of the day may seal the fate of the MOCs. Second, the Government representation in the MOC is also faced with serious agency problems. The Government usually represented by high Government officials that act as fiduciaries who are in turn to be not fully concerned and committed to the overall success of the Company.

Aspects of an appointment, composition, and the required skill of the Board of Directors of MOCs in Ethiopia have been addressed. Even though all MOCs do have a Board of Directors, the practice is troubled in each step. The government often appoints members of the Board from where it pleases, which is against the law that requires the Board member to be appointed only from shareholders. Besides, the Government doesn't give due attention to the number of Board members to be appointed on its side. The appointment of Board members is not also merit-based. Most Board members that are appointed happen to be high ruling party officials who don't have enough time and skill to well manage the MOC.

Moreover, all MOCs that are established after privatization have a pre-formation agreement that mainly focuses on issues like manner and terms of payment, on fulfillment of a strategic and business plan, and on re-employment issues. Speaking of issues of re-employment, the Government of Ethiopia happens to be a tough negotiator to keep and sustain the existing workforce of SOEs which used to enjoy a semi civil servant status. Moreover, unlike other countries' experience, it is found that none of these pre-formation agreements has focused on and interested in the corporate governance aspects of MOCs.

Finally, it has deliberated that there is no established institutional setting that focuses on issues of corporate governance of MOCs in the current structure of the Public Enterprise Holding and Administration Agency.

4.2. RECOMMENDATIONS

- ✓ The asset and business valuation of SOEs that are designated to partial privatization should be an ongoing process and there needs to be clear law that dictates the process.
- ✓ The Government should focus on establishing a capital stock exchange market and formulating the legal setting to this effect.

- ✓ Employees of SOEs and the general public at large should get a chance to buy shares from to be privatized SOEs.
- ✓ There needs to be a law that prohibits block holding in MOCs. The shareholding structure of MOCs shall be diversified.
- ✓ The privatization process should be run by a well-equipped single Governmental institution rather than entrusting the process to different Governmental bodies as well as an advisory council in a dispersed manner.
- ✓ The Government should abandon the practice of establishing a ‘factious Share Company’ only to ease further privatization.
- ✓ The overall corporate governance aspects of MOCs have left open and need to be revisited. To start with, the Government shall duly emphasis on the corporate governance issues while interning into pre-formation Agreements and shall make sure the incorporation of provisions that dictate the MOCs’ governance structure. Second, the constitution of the MOCs (Memorandum of Association and Articles of Association) shall get the proper attention it deserves and be well-crafted.
- ✓ The government should snap out of following the corporate structure of MOCs in the context of SOE, and the corporate governance provisions of Commercial Code shall be adhered strictly.
- ✓ The Government shall be represented in the shareholding meeting by agents with knowledge and experience in the particular field that the MOC engages in. The composition and appointment of the Board of Directors should also get proper attention. Especially Government side should adopt a system of merit-based appointment of its Board Members by focusing on their previous engagement records, their educational background, and experience.
- ✓ Employment structure ranging from core management office to regular employees shall be based on the need of the company. The Government shall not interfere and force the newly established MOCs to keep the former SOEs’ workforce.

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