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UNRAVELING THE LEGAL AND REGULATORY FRAMEWORK FOR INVESTMENT IN ETHIOPIA: AN IN-DEPTH GAP EXPLORATION AND ANALYSIS

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Declaration

I, **Elshaday Getachew Alemayehu**, declare that this mini dissertation is wholly my own work except for references specifically indicated in the text. This mini dissertation is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at the International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria. It has not been previously submitted for the award of a degree at this or any other tertiary institution.

Elshaday Getachew Alemayehu

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LIST OF ABBREVIATIONS

AfCFTA - African Continental Free Trade Area

AU – African Union

BITs - Bilateral Investment Treaties

CSR- Corporate Social Responsibility

EIC - Ethiopian Investment Commission

EPRDF - Ethiopian People's Revolutionary Democratic Front

FDI - Foreign Direct Investment

GDP – Gross Domestic Product

ICSID - International Centre for Settlement of Investment Disputes

JAC - Judicial Administration Council

LDCs - Least Developed Countries

NBE - National Bank of Ethiopia

OAU - Organisation of the African Union

PAIC - Pan-African Investment Code

RECs – Regional Economic Communities

SDGs - Sustainable Development Goals

SMEs - Small and Medium Enterprises

SOEs - State Owned Enterprises

UN – United Nations

UNCTAD - United Nations Conference on Trade and Development

UNDP - United Nations Development Programme

ABSTRACT

Investment is perceived as an important source for enhanced economic growth, despite contrasting views, in many countries, especially developing countries. It can pave the way for knowledge transfer, provide employment opportunities, and stimulate capital with appropriate regulations and effective implementation. To harness the benefits of investment, putting in place a good legal and regulatory framework for investment is essential. Ethiopia is one of the countries in the world that aspires to increase both foreign and domestic investment. This research assesses the legal and regulatory framework for investment in Ethiopia. It commences with an overview of the private sector liberalisation reforms and policies that took place in Ethiopia. Subsequently, it provides an overview of the relevant legislation governing investment and the regulatory framework. An analysis of the existing gaps and challenges in the legal and regulatory framework for investment is provided in the research, and finally, it evaluates whether the African Continental Free Trade Area (AfCFTA) Protocol on Investment addresses some of these challenges and gaps. Even though the investment legal framework was recently revised, challenges and gaps are still apparent in the legal and regulatory framework. With the current willingness and attempt to liberalise most closed sectors in the country for investors, it is relevant to analyse the gaps and challenges. The gaps are a roadblock to the effective realisation of creating an enabling investment environment. Lack of commitment to address such challenges undermines efforts to attain a good investment climate. Finally, this research concludes by providing recommendations on the apparent challenges and gaps.

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CHAPTER ONE:
INTRODUCTION

1.1 Background to the Research

Investment, both foreign and domestic, is an essential catalyst for economic growth.[1] It is no argument that there are also other important factors for attaining economic growth, but investment has a significant contribution. It primarily paves the way for generating employment opportunities and promoting specialisation.[2] Developing countries can tap into the benefits of investments, which can aid in enhanced economic growth and the accomplishment of the Sustainable Development Goals (SDGs).[3] Foreign Direct Investment (FDI) can also benefit capital-importing countries, particularly developing countries, by providing revenue and job opportunities in addition to economic development.[4] The relevance of FDI for Least Developed Countries (LDCs) is pronounced by the need for economic growth. Despite investment reforms implemented in LDCs, the level of FDI inflows has not developed substantially between 2011 and 2021, according to a report published by the United Nations Conference on Trade and Development (UNCTAD).[5] The share LDCs have in the global FDI space is less than two percent.[6] For LDCs, like Ethiopia, the benefit of FDI is crucial as it makes a substantial contribution to raising capital.[7]

In Ethiopia, prior to the 1990s, private sector engagement was minimal due to the socialist 'Derg' Regime, in which the state had complete authority and nationalised all economic activities in the country.[8] Economic activities that are of a private nature were not promoted by the government.[9] Due to the policy of the socialist government, the investment rate in the

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[1] Amanu Daba Waktola 'Analysis of Determinants of Private Investment in Ethiopia' (2020) 9 *International Journal of Economics and Management Science* at 1.
[2] As above.
[3] Solomon Tilahun 'The determinants of public investment in Ethiopia: An ARDL approach' (2021) 9 *Cogent Economics & Finance* at 2.
[4] Hang Bich Phung 'Determinants of FDI into Developing Countries' (2016) *Mark A. Israel '91 Endowed Summer Research Fund In Economics* 1.
[5] United Nations Conference on Trade and Development 'Foreign Direct Investment in LDCs' 2022 at 7 https://unctad.org/system/files/official-document/diaeia2022d1_en.pdf (accessed 05 June 2023).
[6] As above.
[7] Habtamu Legese 'Determinants of foreign direct investment in Ethiopia: Systemic review' (2018) 6 *International Journal of Business and Economic Development* at 38.
[8] Bogale Anja Abba & Yared Kefyalew Demarso 'The Legal Framework Governing Investment Areas and Incentives in Ethiopia: A Critical Appraisal' (2020) 11 *Beijing Law Review* at 749.
[9] As above.

country was not satisfactory.[10] This is due to the fact that economic activities, especially private ones, were not promoted and facilitated by the government.[11]

Various economic reforms were introduced after the end of the socialist system and the change from a command economy to a market economy in the early 1990s.[12] The economic reforms that were implemented by the new government encompass, *inter alia*, the devolution of economic power and the partial opening of foreign trade.[13] Since the economy has shifted from a command economy to a market economy, it can be inferred that foreign trade and liberalisation have been focal points of attention during this reform. Hence, due to this increased attention on liberalisation, State Owned Enterprises (SOEs) are planned to be privatised and liberalised by the current government.[14] These enterprises that are planned to be privatised include Ethio Telecom and Ethiopian Airlines.[15] To this end, the current government recently announced that forty percent of Ethio Telecom will undergo privatisation.[16] Since the late 1990s, the investment rate in Ethiopia started to gradually increase.[17] Moreover, as an integral part of the reform, there was a promotion of the private sector in order to increase its participation in the economy.[18] All these efforts have resulted in the gradual increase of foreign investments in the country, which has contributed to economic growth.[19] Yet, even if the private sector was promoted as compared to the socialist regime, there were still some sectors that were not open to the private sector and only the government could operate in.[20]

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[10] As above.
[11] As above.
[12] United Nations Conference on Trade and Development 'Ethiopia's Macroeconomic and Finance Policy Framework for Structural Transformation' 2021 at 5 https://unctad.org/system/files/official-document/BRI-Project_RP19_en.pdf (accessed 05 June 2023).
[13] Dejene Mamo Bekana 'Determinants of Foreign Direct Investment in Ethiopia; Time Series Evidence from 1991-2013' (2016) 50 *The Journal of Developing Areas* at 142.
[14] Christina Tekie Collins 'The meaning and uses of privatisation: the case of the Ethiopian developmental state' (2022) 92 *Africa* at 602.
[15] As above.
[16] United Nations Conference on Trade and Development 'Investment Policy Hub- Ethiopia issues expression of interest to partially privatise Ethio-Telecom' 16 November 2022 https://investmentpolicy.unctad.org/investment-policy-monitor/measures/4124/issues-expression-of-interest-to-partially-privatize-ethio-telecom (accessed 05 June 2023).
[17] Admasu Shiferaw 'Productive Capacity and Economic Growth in Ethiopia' 2017 at 3 https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/CDP_BP34_April_2017.pdf (accessed 05 June 2023).
[18] Mulu Gebreeyesus 'Industrial Policy and Development in Ethiopia' in Carol Newman (eds) et al. *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (2016) at 30.
[19] Arkebe Oqubay *Made in Africa Industrial Policy in Ethiopia* (2015) 63.
[20] Abba (n 8).

Ethiopia, which plans to achieve middle-income status by 2025, has issued different investment policies currently to intensify the rate of direct and foreign investment.[21] Moreover, it has set a clear goal in regard to poverty reduction, to reach 7% of the population in the ten-year plan set to be achieved from 2021-2030.[22] The ten-year plan comprises a goal to enhance and create an enabling investment landscape.[23] With the intent of attracting FDI, Ethiopia passed various laws and signed several Bilateral Investment Treaties (BITs). To date, Ethiopia has signed 34 BITs, of which 22 are currently in effect.[24] The current government, which came into place in 2018, has implemented a reform known as "A Homegrown Economic Reform Agenda: A Pathway to Prosperity" in 2019 to attain a macroeconomic environment that is stable, privatisation of public enterprises, a vibrant private sector, and a cutting-edge regulatory and institutional framework, which in the long run can result in significant economic growth.[25]

During this economic reform, in 2020, a new Investment Proclamation, which repealed the previous Investment Proclamation 769/2012 was enacted.[26] Moreover, in the same year, a new Investment Regulation, which repealed the Investment Incentives and Investment Areas Reserved for Domestic Investors Regulation No. 270/2012 was enacted.[27] The purpose of this enactment is to attain sustainable development which has afforded better protection for foreign investors and enhanced attention to the private sectors.[28] In addition to that, the Ethiopian Council of Ministers enacted the Investment Incentive Regulation.[29] Hence, both foreign and

[21] World Bank 'Ethiopia Economic Update: Laying the Foundation for Achieving Middle Income Status' https://www.worldbank.org/en/country/ethiopia/publication/ethiopia-economic-update-laying-the-foundation-for-achieving-middle-income-status (accessed 05 June 2023).
[22] Alemayehu Geda & Guta Legesse 'Ethiopia and investment provisions in the AfCFTA: issues and challenges' 2022 at 13 https://cdn.odi.org/media/documents/Ethiopia_AfCFTA_Investment_Report.pdf (accessed 05 June 2023).
[23] Planning and Development Commission of the Federal Democratic Republic of Ethiopia 'Ethiopia 2030: The Pathway to Prosperity Ten Years Perspective Development Plan (2021 – 2030)' https://www.ircwash.org/sites/default/files/ten_year_development_plan_a_pathway_to_prosperity.2021-2030_version.pdf (accessed 15 June 2023).
[24] United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub 'International Investment Agreements Navigator-Ethiopia' https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia (accessed 05 June 2023).
[25] Federal Democratic Republic of Ethiopia 'A Homegrown Economic reform Agenda: A Pathway to Prosperity' https://www.mofed.gov.et/media/filer_public/38/78/3878265a-1565-4be4-8ac9-dee9ea1f4f1a/a_homegrown_economic_reform_agenda-_a_pathway_to_prosperity_-_public_version_-_march_2020-.pdf (accessed 06 June 2023).
[26] Investment Proclamation No. 1180/2020, Fed. Neg. Gaz. 26th Year No. 28.
[27] Investment Regulation No. 474/2020, Fed. Neg. Gaz. 26th Year No. 78.
[28] Bereket Alemayehu Hagos 'Major features of Ethiopia's new investment law: an appraisal of their policy implications' (2022) 29 *Transnational Corporations Journal* at 138.
[29] Council of Ministers Investment Incentive Regulation No. 517/2022, Fed. Neg. Gaz. 28th Year No. 39.

domestic investment were intended to be enhanced through the national investment laws and the BITs that were entered into force.[30]

When we look at the institutional framework generally, the Ethiopian Investment Commission (EIC) is tasked with leading responsibility for investment in Ethiopia. The main governmental organ that is responsible for the promotion of investment, granting investment permits, serving as a one-stop shop for the registration of investment, and setting policies that will create an enabling investment environment is the EIC.[31]

Therefore, this research provides an in-depth understanding of the current legal and regulatory framework for investment in Ethiopia. After laying the groundwork for the legal and regulatory framework, it assesses the gaps and challenges that are apparent within the framework. The assessment of the gaps aims to elucidate the need for reform, as they are roadblocks to enforcement and implementation. Based on the gaps and challenges, this research provides recommendations, practical solutions, and the way forward to have a long-lasting and enabling investment environment in Ethiopia.

1.2 Statement of the Problem

The Government of Ethiopia has revised the Investment Proclamation and Regulation in 2020 as stated above. The revision was necessitated by the need to set up transparent mechanisms for entertaining grievances of investors, boost FDI by tackling challenges associated with it, and ensure a higher level of the private sector's involvement in the economy.[32] Several sectors, for instance, the transport service, are now open to foreign investors, as indicated in the Investment Regulation.[33] Even though this legal reform has materialised, Ethiopia has not been able to attain enhanced investment attraction.[34]

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[30] Waktola (n 1) 1.
[31]Ethiopian Investment Commission 'An Investment Guide to Ethiopia' https://www.unido.org/sites/default/files/files/2018-05/1.%20AN%20INVESTMENT%20GUIDE%20TO%20ETHIOPIA.pdf (accessed 06 June 2023).
[32] Business Info Ethiopia '5 features of the new Investment Proclamation ad Regulation Laws of Ethiopia' https://businessinfoeth.com/5-features-of-the-new-investment-proclamation-and-regulation-laws-of-ethiopia/ (accessed 06 June 2023)
[33] United Nations Conference on Trade and Development Investment Policy Hub 'Adoption of new investment liberalisation measures'https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3559/adoption-of-new-investment-liberalisation-measures- (accessed 07 June 2023)
[34] Geda (n 22) 9.

The growing rate of public investment did not continue as there is recurring challenge in the macroeconomic environment.[35] Furthermore, the rate of FDI has not increased in a satisfactory manner.[36] Ethiopia has been challenged to attain a satisfactory investment attraction throughout the course of many years.[37] This is mainly due to the prevalence of higher costs in starting a business and a lack of protection for investors.[38] There are various issues that hinder the proper enforcement of the investment regulations. It is stated that the absence of effective and efficient integration and synchronisation among the regional and federal state investment organs when it comes to investment-related issues, the lack of a transparent system, the lack of foreign currency, and the unpredictable adjustment of the surrender rate by the National Bank of Ethiopia (NBE) are some of the challenges.[39] Even though there is a new investment framework put in place after the reform, these challenges are readily apparent and burdensome for investors.

Due to various challenges and gaps, the legal and regulatory framework for investment in Ethiopia requires significant reform in this respect. Addressing such issues in the framework is quite important since reluctance to reform will negatively affect the country's investment objective of attaining a good investment climate and enhanced foreign and domestic investment. Therefore, the purpose of this research is to identify the challenges and gaps that exist in the legal and regulatory framework of investment in Ethiopia and recommend practical solutions.

1.3 Aims and Objectives of the Research

The primary aim of this research is to analyse the extant legal and regulatory framework of investment in Ethiopia with the view of identifying its main challenges and gaps and recommending reforms. Therefore, to ascertain the central aim of this research, the research objectives endeavour to:

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[35] United Nations Development Programme (UNDP) 'Quarterly Economic Profile' November 2021 https://www.undp.org/sites/g/files/zskgke326/files/2023-03/Quarterly%20Economic%20Brief%20November%202021.pdf (accessed 30 July 2023).
[36] United Nations Conference on Trade and Development (UNCTAD) 'World Investment Report 2023 Factsheet Ethiopia' 2023 https://unctad.org/system/files/non-official-document/wir_fs_et_en.pdf (accessed 30 July 2023).
[37] Henok Assefa and others 'Ethiopia's Investment Prospects: A Sectoral Overview' (2013) 4 *African Review of Economics and Finance* at 216.
[38] As above.
[39] Geda (n 22) 7.

(i) assess and provide an understanding of the legal and regulatory framework for investment in Ethiopia.

(ii) identify and analyse the gaps and challenges existing in the current legal and regulatory framework for investment in Ethiopia.

(iii) recommend practical solutions and reform for existing challenges and gaps to help the Ethiopian government tackle the gaps, gain better investor attraction, and reform the investment environment.

1.4 Research Questions

The overarching question this research aims to answer is to what extent the current legal and regulatory framework for investment in Ethiopia promotes and protects investments. In accordance with the above background of the study and statement of the problem, this study endeavours to address the subsequent queries:

1) What are the legal and regulatory framework put in place for investment in Ethiopia?
2) What are the existing challenges and gaps in the legal and regulatory framework for investment in Ethiopia?
3) Does the African Continental Free Trade Area (AfCFTA) Protocol on Investment address (some of) these challenges and gaps?

1.5 Significance of Research

This research is significant in improving comprehension of the current challenges and gaps that are apparent in the legal and regulatory framework of investment in Ethiopia. With Ethiopia's reform agenda to liberalise few sectors, it is essential and timely to assess the gaps and challenges, as there is an impact on the whole investment protection regime of Ethiopia. The current reform program in the country envisions creating an enabling investment environment. Hence, this research serves as a good guide by showing how Ethiopia can gain from addressing such challenges and gaps to improve the investment climate and harness the benefits of an enabling investment environment. Specifically, it is useful for policymakers, regulators, and investment organs to devise an effective strategy for improving the investment regime in Ethiopia. Moreover, this research serves as a gap-filling role as there is no adequate, integrated, and in-depth study on the challenges and gaps in the legal and regulatory framework for investment in Ethiopia.

1.6 Thesis Statement

This research is based on the hypothesis that the challenges and gaps that exist in the legal and regulatory framework of investment in Ethiopia have resulted in a lack of an enabling investment environment. Therefore, this research suggests a legal and regulatory framework that addresses the gaps will significantly improve and facilitate the investment regime. Moreover, it will be in line with Ethiopia's aspiration to enhance the investment climate in the country.

1.7 Research Methodology

A qualitative desktop-based research methodology is employed for this research. It deals with assessing the legal and regulatory framework for investment in Ethiopia. Primary and secondary sources are employed to answer the research questions and meet the objectives of this research. Primary sources include the Ethiopian Investment Proclamation 1180/2020, Ethiopian Investment Regulation 474/2020, Ethiopian Council of Ministers Investment Incentive Regulation No. 517/2022, and the African Continental Free Trade Area (AfCFTA) Protocol on Investment. Secondary sources such as books, journal articles, guidelines, reports, papers, policy briefs, and internet sources are employed. A thorough desktop assessment is undertaken to meet the objectives of this research, drawing upon the relevant legal and regulatory literature.

1.8 Scope and Limitations of Research

To assess the legal and regulatory framework for investment in Ethiopia, this research focused on the challenges and gaps that exist within the framework. Although the legal and regulatory framework for investment in Ethiopia is wide, this research, from the legal framework aspect, specifically focuses on the recently enacted Ethiopian Investment Proclamation 1180/2020, Ethiopian Investment Regulation 474/2020, and Ethiopian Council of Ministers Investment Incentive Regulation No. 517/2022. From the regulatory framework aspect, it focuses on the Ethiopian Investment Commission, Ethiopian Civil Aviation Authority, Petroleum and Energy

Authority, Ethiopian Communications Authority, Ethiopian Investment Board, Federal Government and Regional State Administrations Investment Council, and the Ministry of Finance.

There is no sufficient literature that has conducted an in-depth study on the gaps and challenges that exist in the current investment regime. Lack of sufficient data on such issues and how it affect the entire legal and regulatory framework of Ethiopia's investment climate is the major limitation. Furthermore, time constraint is another limitation of the research.

1.9 Structure of the Research

This research is divided into an introduction chapter and four additional main chapters. Chapter one of this research outlines the background of the study, the statement of the problem, sets the research questions, states the type of methodology used for the research, provides the scope and limitations of the study, provides a review of available literature, and states the significance of the study as well.

Chapter two fundamentally sheds light on the legal and regulatory framework for investment in Ethiopia. Initially, it gives an overview of the private sector's progress in Ethiopia by mainly focusing on the liberalisation reforms and policies that took place. It provides a comprehensive understanding of the historical overview of how the private sector has been gradually liberalised throughout the years. Subsequently, it focuses on the assessment of the legal and regulatory framework of Ethiopia's investment regime. As per the scope of this research, it assesses the available Ethiopian Investment Proclamation, Regulation, and Incentive Regulation. Moreover, it provides an understanding of the different institutions mandated with the responsibility of regulating and supervising investments in Ethiopia.

Chapter three identifies and analyses the gaps and challenges ingrained in the current legal and regulatory framework for investment in Ethiopia. It mainly focuses on the bottlenecks and roadblocks available in Ethiopia's legal and regulatory framework for investment, which make it difficult to create a good investment environment.

Chapter four assesses whether the African Continental Free Trade Area (AfCFTA) Protocol on Investment addresses some of the existing challenges and gaps apparent in the legal and regulatory framework of investment in Ethiopia.

Chapter five brings the research to a conclusion and recommendation. The chapter commences by concluding the major findings and analysis stated in the research. It further provides a recommendation on the way forward and practical solutions for the challenges and gaps stated in this research while assessing the legal and regulatory framework for investment in Ethiopia.

1.10 Literature Review

In the current scholarly discourse, there is insufficient comprehensive study on the specific challenges and gaps that exist in the legal and regulatory framework of investment in Ethiopia, mainly after the 2018 reform.

Ethiopia has been amending and revising the different legal frameworks for investment with the aim of, *inter alia*, improving living standards, attaining economic development, and enhancing foreign investment.[40] Getaneh argues that the legal framework for investment in Ethiopia focuses more on economic objectives and is not attentive to other development objectives, such as social and environmental goals.[41]

According to Abebe, the lack of good governance and corruption has been identified as one of the impediments to attaining a good investment climate and hindering the successful implementation of the laws.[42] He asserts that Ethiopia has been undergoing several legal revisions with respect to investment to make the investment climate conducive and attractive to operate in effectively, yet investors are not able to fully utilise the market.[43] However, the author has not comprehensively looked into the challenges in the legal and regulatory framework. Rather, it was highly focused on the distribution challenges of investment in Ethiopia.

As discussed above in the background section of this research, Ethiopia has undergone economic and legal reforms since 2018 with the coming of the current government. The investment regulatory framework was planned to be advanced through the introduction of market liberalisation and some other positive measures that are aligned with the enhancement

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[40] Tihitina Ayalew Getaneh 'The role of the investment legal framework in Ethiopia's FDI-development nexus' Doctoral Thesis, Tilburg University, 2020 at 84. https://pure.uvt.nl/ws/portalfiles/portal/47219437/Getaneh_The_Role_17_12_2020_zonder_juiste_titelpagina.pdf (accessed 12 June 2023).
[41] As above.
[42] Tsega Adego Abebe 'Investigating Investment Practices in Ethiopia: Success Stories and Challenges Ahead' (2014) 4 *Developing Country Studies* at 126.
[43] As above.

of the private sector's role in the economy.[44] The reform has resulted in a new investment legal framework being enacted in 2020.

Nigussu asserts that the challenges of retaining an investment organ, both in the federal and regional states, that is in good capacity and has good coordination skills are apparent in the investment framework of Ethiopia.[45] Despite the fact that the cost of doing business in the country is improving, Ethiopia is still considered a country where the cost of doing business is high and difficult to operate in.[46] This study has assessed the gap based on the previous or repealed version of the investment law. Hence, it has not employed the currently operating legal framework for investment in order to assess the gaps and challenges.

Geda and Legesse note that there are various challenges in the Ethiopian investment regime that need to be improved to yield the benefits of an enabling investment environment. The authors recognise that despite the investment incentives that have been offered, there is a low level of investment attraction in the country, for which an in-depth study is needed.[47] They noted the major challenges as a lack of foreign currency, a lack of effective collaboration amongst investment organs, and a lack of adequate execution of the investment laws.[48] The authors did not identify and deliberate more on the challenges, as they focused on the major challenges only with respect to the AfCFTA Protocol on Investment.

Ayele, Belete, and Velde, in another policy brief, noted that the new investment law that has been issued in 2020 has aimed to rectify some of the obstacles investors face in Ethiopia, especially the opening of sectors that were previously government monopolies.[49] The authors have recognised that the new investment law has mandated investors to prioritise social and environmental standards. The authors, though, have not delved deep into the complexities and challenges of investment law in pursuit of their analysis.

Thus, a comprehensive assessment and analysis of the legal and regulatory framework for investment in Ethiopia is needed to explore the challenges and provide recommendations that

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[44] Waktola (n 1) 1.
[45] Abebe Nigussu 'The Legal and Institutional Frameworks of FDI in Ethiopia: The Shortcomings' unpublished MA thesis, Ethiopian Civil Service University, 2014 at 1 https://www.academia.edu/23191705/The_Legal_and_Institutional_Frameworks_of_FDI_in_Ethiopia_The_Shortcomings (accessed 10 June 2023).
[46] As above.
[47] Geda (n 22) 5.
[48] Geda (n 22) 6.
[49] Yohannes Ayele and others 'The AfCFTA Protocol on Investment: issues and potential impacts' 2023 at 17 https://cdn.odi.org/media/documents/ODI-PA-SITA_AfCFTA_Investment-PB-17Apr23-FINAL.pdf (accessed 10 June 2023).

enable the creation of a good investment environment. Moreover, it is equally important to assess the potential of the AfCFTA Protocol on Investment in addressing some of the existing challenges and gaps.

CHAPTER TWO:
LEGAL AND REGULATORY FRAMEWORK FOR INVESTMENT IN ETHIOPIA

2.1 Introduction

The previous chapter briefly introduced this study and recalled that investment can contribute to economic growth, especially in developing countries like Ethiopia. One of the main drivers for growth is investment.[50] It has also been stated that the fruits of investment can be attained if appropriate policies and laws are put in place. This necessitates the establishment of a good legal and regulatory framework for investment, which is one of the main drivers of growth. Moreover, it has shed light on the fact that Ethiopia is currently undergoing a reform program with the primary objective of increasing the private sector's role in the economy and stimulating foreign and domestic investment.

It is against this backdrop that this chapter explores the legal and regulatory framework for investment in Ethiopia. It will first depict an understanding of the definition of investment. It will also discuss how the private sector liberalisation process in Ethiopia has gone through several forms throughout the years, since the general historical background is important to understand the investment regime in the country. It will also provide a brief understanding of the role of national investment laws in regulating investment, as it is important to highlight their significance as this research is primarily focused on national investment laws. It will subsequently dwell on the legal framework for investment in Ethiopia, particularly the recently revised Investment Proclamation, Regulation, and the newly enacted Investment Incentive Regulation. Furthermore, it will also explore the regulatory framework for investment in Ethiopia. It is set to primarily deal with providing an overview of the different institutions that the law has mandated to regulate and supervise the investment laws in Ethiopia. Finally, the chapter will end with concluding remarks.

2.2 Definition of investment

[50] Ambachew Mekonnen Sisay 'Determinants of Private Investment in Ethiopia: A Time Series Study' (2010) 19 *Ethiopian Journal of Economics* at 75.

Investment, in its mere common description, relates to the process of investing.[51] The definition of investment has been expounded by several scholars and arbitration tribunals. It is not defined in Article 25 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, although the definition is a relevant issue for such arbitrations.[52] This is the case because it is assumed that parties would have the fate of obtaining a wider scope of the definition.[53] There have been several contentions over the lack of a proper definition of investment in the ICSID Convention and a lack of consensus among scholars on how to define the term.[54] As noted in *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka* in the ICSID arbitration case, the lack of definition in the ICSID Convention is perceived as an opportunity for gradual development in defining the term 'investment' in international investment law.[55]

The definition of investment in the *Salini v Morocco* tribunal, in which four distinct features have been stated collectively, is referred to as the *Salini* test.[56] These are contribution, duration of performance of the contract, participation in the risks of the transaction, and contribution to the economic development of the host state.[57]Although there are contentions over these specific features, the *Salini* test is widely accepted.[58] An additional requirement, ''regularity of profit and return'', has been highlighted in *Fedax N.V. v Republic of Venezuela*[59] in which we can observe that arbitration tribunals have, thus, embarked on defining 'investment' in different arbitration cases.[60]

While that has been the reality in ICSID arbitration cases in international law, there is a tendency to interpret investment by limiting it to FDI.[61] Yet, investment also encompasses domestic investment, by which a national of a certain country undertakes the investment within

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[51] Michael Hwang & Jennifer Fong Lee Cheng 'Definition of ''Investment''—A Voice from the Eye of the Storm' (2011) 1 *Asian Journal of International Law* 99-100.
[52] As above.
[53] Zachary Douglas *The International Law of Investment Claims* (2009) 164.
[54] Felix O. Okpe 'The Definition of Investment and the ICSID Convention: Matters arising under the Nigerian Investment Promotion Act and International Investment Law' (2017) 8 *Journal of Sustainable Development Law and Policy* at 134.
[55] ICSID case number ARB/00/2.
[56] Hwang (n 51) 103.
[57] Hwang (n 51) 103.
[58] Muthucumaraswamy Sornarajah *The International Law on Foreign Investment* (2010) 310.
[59] ICSID case number ARB/96/3.
[60] Hwang (n 51) 103.
[61] Sornarajah (n 58) 11.

the nation's borders.[62] Foreign investment, on the other hand, is undertaken by an individual or enterprise in a jurisdiction outside their country. [63]

There are various approaches to defining investment: enterprise-based, open-list asset-based, and closed-list asset-based definition.[64] A restrictive approach is followed by an enterprise-based definition, which necessitates the procurement of an enterprise by enumerating the list of assets acquired by the enterprise.[65] A closed list asset-based definition is considered to have an intermediate strategy as opposed to enterprise-based, which has a restrictive approach, and enumerates a specific set of assets.[66] Finally, an open-list asset-based definition has a comprehensive scope and an illustrative list of assets considered investments which gives discretion to arbitral tribunals to interpret expansively.[67] In foreign investment, the broad asset-based definition is preferred by developed countries, and it is argued that the broad nature has the tendency to result in a loss of bargaining power.[68]

2.3 Legal and Regulatory Framework for Investment in Ethiopia

Under this section, there will be an exploration of the current legal and regulatory framework for investment in Ethiopia. Prior to that, in the next subsection, the role of investment regulation through the mechanism of national investment laws and a brief historical overview of how the private sector has evolved in Ethiopia will be revealed.

2.3.1 The role of regulating investment through national investment laws

Generally, states possess the inherent sovereign right to govern through national laws.[69] Although this concept has created perplexity in international investment agreements, it extends to the rights of states to regulate within their jurisdiction while also complying with

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62 World Bank Group 'Investment Law Reform: A Handbook for Development Practitioners' 2010 https://openknowledge.worldbank.org/server/api/core/bitstreams/a0973975-595f-52f6-badc-3b60b602e1a5/content (accessed 05 August 2023).
63 As above.
64 Tinashe Kondo 'A Comparison with Analysis of the SADC FIP before and after Its Amendment' (2017) 20 *Potchefstroom Electronic Law Journal* at 6.
65 As above.
66 As above.
67 As above.
68 Sornarajah (n 58) 268.
69 Catharine Titi 'The Right to Regulate in International Investment Law (Revisited)' (2022) 18 *International and Comparative Law Research Center* at 18.

international obligations they have entered.[70] The investment of foreign investors would be under the ambit and supervision of the host state's laws and regulations when it entered the country.[71]

Countries have different approaches regarding the regulation of investment within their borders. Some countries regulate investment through specific investment laws, while others regulate it through scattered pieces of legislation under the ambit of their national laws, such as foreign exchange law, insurance law, commercial law, constitution, and the like.[72]

The prevalence of certainty, predictability, and a lack of ambiguity in an investment policy would ascertain confidence for both domestic and foreign investors.[73] Broadly, the rationale for issuing investment laws is to protect and promote investment, ensure sustainable and social development, and the like.[74] National investment laws, *inter alia*, would serve the purpose of ascertaining transparency, ensuring good governance, and safeguarding the interest of the investment.[75] They can serve as instruments to enhance foreign investment by providing substantive safeguards and protection provisions.[76] They provide protections akin to those stated under investment treaties.[77] Favourable provisions regarding expropriation and compensation can be incorporated into national investment laws so as to attract foreign investors.[78] The purpose of overseeing and governing the economic endeavours within the state's jurisdiction, which is an inherent sovereign right of states, would be ascertained with national investment laws.[79]

2.3.2 Synopsis of the progress rate of investment and private sector development in Ethiopia

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[70] As above.
[71] Sornarajah (n 58) 88.
[72] World Bank Group (n 62).
[73] World Bank Group (n 62).
[74] United Nations Conference on Trade and Development (UNCTAD) 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment' 2016 at 4 https://unctad.org/system/files/official-document/webdiaepcb2016d5_en.pdf (accessed 06 August 2023).
[75] World Bank Group (n 62).
[76] Jarrod Hepburn 'The Past, Present, and Future of Domestic Investment Laws and International Economic Law' (2023) 22 *World Trade Review* 18-34.
[77] Jarrod Hepburn 'Domestic investment statutes in international law' (2018) 112 *The American Journal of International Law* at 658.
[78] Sornarajah (n 58) 424.
[79] Sornarajah (n 58) 115.

During the Imperial Regime (from 1955-1973), the extent of infrastructure development and an active private sector was minimal, specifically in the early years of this regime.[80] There were subsequent amendments to several economic policies with the aim to enhance foreign and direct investment through different stages of five-year plans by rendering incentives.[81] Extending this plan to attract investors, the regime issued numerous proclamations, of which Proclamation No. 242/1966 is the predominant one.[82] Subsequently, after the downfall of the imperial regime, in which the private sector was supposed to flourish due to the changes stated above, the Derg Regime (1974-1990) came to power and altered the policy in the country.[83]

The Derg regime introduced a socialist system in which private ownership of means of production was prohibited and nationalisation transpired.[84] Hence, it can be deduced that the private sector did not flourish during this time due to the absence of private ownership. Low levels of private investment and a lack of conducive environment for the private sector were apparent during the Derg regime due to the establishment of a command economy and capitalisation that was deposed.[85] The industries that had been dominated by foreign investors were excluded and domestic private investment ceased.[86] Later on in the 1980s, a joint venture was allowed for foreign and domestic investors, with the majority of shares owned by the government, which resulted in a slight increase in private investment.[87] Furthermore, a mixed economy was introduced during the final years of this regime to stimulate the private sector's participation in the economy.[88]

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[80] Alemnesh Tadesse 'The Nexuses between Public Investment, Private Investment, Trade Openness and Economic Growth in Ethiopia: Co-Integrated Var Approach' MSc. Thesis, Addis Ababa University, 2012 at 70 http://etd.aau.edu.et/bitstream/handle/123456789/3931/Alemnesh%20Tadesse.pdf?sequence=1&isAllowed=y (accessed 05 August 2023).

[81] Mulu Gebreeyesus 'Industrial policy and development in Ethiopia: Evolution and present experimentation' (2013) *World Institute for Development Economics Research (WIDER) Working Paper* https://www.econstor.eu/bitstream/10419/93684/1/771374577.pdf (accessed 05 August 2023).

[82] Mamo Esayas 'An Investigation of the Macroeconomic Determinants of Private Investment in Ethiopia: Co-Integrated Var Approach' MSc. Thesis, Addis Ababa University, 2016 at 73 http://etd.aau.edu.et/bitstream/handle/123456789/14001/Mamo%20Esayas.PDF?sequence=1&isAllowed=y (accessed 06 August 2023).

[83] As above.

[84] Mesfin Belayneh Bekele 'Evaluation of the Degree of Liberalisation of the Rules for the Admission of Foreign Direct Investment in the New Investment Legal Frame work' LLM Thesis, Hawassa University, 2022 at 23 http://etd.hu.edu.et/bitstream/handle/123456789/3151/MESFIN%20BELAYNEH%20BEKELE.pdf?sequence=1&isAllowed=y (accessed 06 August 2023).

[85] Alemi Desta 'Reconsidering Ethiopia's Tax Incentive Policy on Hospitality Sector' LLM Thesis, Addis Ababa University, 2020 at 20 http://etd.aau.edu.et/bitstream/handle/123456789/25945/Alemi%20Desta.pdf?sequence=1&isAllowed=y (accessed 06 August 2023).

[86] Waktola (n 1) 1.

[87] Esayas (n 82) 76.

[88] Waktola (n 1) 1.

In the early years of the 1990s, following the Derg regime, a Transitional Government was established that had a more polarised and different economic strategy than the Derg Regime.[89] The socialist economic policy was replaced by a free-market policy, which paved the way for intensified investment and an enhanced flow of FDI from different countries.[90] This change in policy has thus impacted the level of investment in the country. Various investment laws were enacted to create a conducive business environment and increase private investment.[91] This change was conducted by the newly formed government, the Ethiopian People's Revolutionary Democratic Front (EPRDF), in which private sector engagement increased, but at the same time, the dire effects of private investment were incurred due to the unsuccessful implementation of the investments.[92]

The rate of FDI post 1991 has been increasing gradually but has experienced a slight decrease in some years.[93] Mainly in manufacturing and infrastructure, as compared to low-income sub-Saharan African countries, the highest FDI inflow was recorded by Ethiopia since 2013.[94] More specifically, starting from 2003, studies indicate that there has been a growing rate of foreign and domestic investment operations in the country.[95] Yet, despite this strong progress regarding investment and private sector engagement in the economy, it is indicated that a decreasing rate has been recorded since 2015 and a variety of projects that are in the operational stage are at a minimal level.[96]

The necessity for the growth of the private sector became even more pronounced when the current government, led by Prime Minister Abiy Ahmed, came to power in 2018.[97] The strive to create a conducive environment for investors by enhancing private sector engagement and revising investment laws in 2020 by opening different sectors to FDI is the major policy

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[89] Bekele (n 84) 23.
[90] Martha Belete Hailu & Zeray Yihdego 'The Law and Policy of Foreign Investment Promotion and Protection in Ethiopia: An Appraisal of Theories, Practices and Challenges' in Zeray Yihdego, Melaku Geboye Desta, Martha Belete Hailu & Fikremarkos Merso (eds) *Ethiopian Yearbook of International Law* (2017) 13-14.
[91] Bekele (n 84) 24.
[92] Waktola (n 1) 1.
[93] UNCTAD STAT 'Foreign direct investment: Inward and outward flows and stock, annual' https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx (accessed 06 August 2023).
[94] Nombulelo Braiton & Nicholas M. Odhiambo 'Capital flows to low-income sub-Saharan Africa: an exploratory review' (2022) 7 *International Trade, Politics and Development* at 39.
[95] Sisay Debebe & Semeneh Bessie 'Private Sector Development in Ethiopia: Trends, Challenges and Policy Issues' (2022) *Ethiopian Economics Association (EEA) Policy Working Paper 04/2022* https://eea-et.org/wp-content/uploads/2022/08/Working-paper-04-2022.pdf (accessed 07 August 2023).
[96] As above.
[97] International Finance Corporation (IFC) 'Ethiopian Reforms Attract Investor Interest' 09 February 2020 https://www.ifc.org/en/stories/2020/ethiopia-reforms (accessed 07 August 2023).

trajectory of the new government.[98] The notable reform approach to materialising this aspiration is the "A Homegrown Economic Reform Agenda: A Pathway to Prosperity" that has been implemented in 2019.[99] Due to this reform, a multitude of private sectors that are playing a fundamental role in advancing the country have developed and thrived.[100] Despite the fact that there has been increased private sector engagement, there is a low level of participation in the manufacturing and export sectors.[101]

The foregoing brief historical overview elucidates the progress of private sector engagement and investment throughout the years in Ethiopia. Since Ethiopia has gone through various policy trajectories under different regimes, the above lays the groundwork for understanding the investment regime in Ethiopia.

2.3.3 Legal Framework for Investment in Ethiopia

As stated in the above subsection, the investment laws in Ethiopia were recently revised by the new administration. The legal framework for investment in Ethiopia is vast and comprises the Constitution, the Commercial Code, the Civil Code of Ethiopia, the Commercial Registration and Business Licensing Proclamation No. 980/2016, the Investment Proclamation No. 1180/2020, the Investment Regulation No. 474/2020, the Investment Incentive Regulation 517/2022, and many others.[102]

Globally, there are several BITs, and this has persisted for many years.[103] Regarding such treaties, Ethiopia has signed 34 of them, of which 22 are in force at present.[104] The signing of these treaties was executed to entice foreign capital flow into the country.[105] Ethiopia has also ratified the African Continental Free Trade Area (AfCFTA), to which the recently adopted

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[98] As above.
[99] Hagos (n 28) 137.
[100] Mulu Gebreyesus 'The Private Sector in Ethiopia's Transformation' in Fantu Cheru, Christopher Cramer, & Arkebe Oqubay (eds) *The Oxford Handbook of the Ethiopian Economy* (2019) at 687.
[101] As above.
[102] Bekele (n 84) 24.
[103] David Collins *An Introduction to International Investment Law* (2023) 35.
[104] United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub 'International Investment Agreements Navigator-Ethiopia' https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia (accessed 07 August 2023).
[105] Martha Belete Hailu & Tilahun Esmael Kassahun 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration' (2014) 8 *Mizan Law Review* at 121.

Protocol on Investment would also be applicable.[106] Moreover, Ethiopia has signed but not ratified the ICSID Convention and submitted consent to be bound by the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID) in some of its BITs.[107]

As stated in the previous chapter of this research, there will be a particular focus on the recently revised investment laws: Investment Proclamation No. 1180/2020, Investment Regulation No. 474/2020, and Investment Incentive Regulation 517/2022. Hence, the subsequent part will dwell on shedding light on the substance of these laws and the specific reforms made to them.

Investment Proclamation 1180/2020

Commencing in 1992, the Investment Proclamation of Ethiopia has been revised five times to increase domestic investment and foreign capital flow and create a conducive investment environment.[108] These laws have gradually eased the limitations on the private sector.[109] The current Investment Proclamation 1180/2020, which has repealed Investment Proclamation No. 769/2012, has brought about significant changes, rendering avenues for the private sector.[110]

In the Investment Proclamation, investment is delineated to extend to an outlay of capital, in cash or in kind, by either forming an enterprise or enlarging an already established enterprise.[111] In contrast to the previous proclamation, this new law has introduced an extensive range of elements under the concept of capital, which incorporates business assets, either tangible or intangible, and also intellectual property rights.[112] In accordance with Article 2(1) of the Proclamation, the provision of the Proclamation extends to every investment carried out in the country, apart from investments in relation to minerals and petroleum, either by a domestic or foreign investor.[113] A negative list is provided for the sectors restricted to foreign investors,

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[106] African Union 'Ethiopia deposits instruments of ratification of AfCFTA' 10 April 2019 https://au.int/en/pressreleases/20190410/ethiopia-deposits-instruments-ratification-afcfta (accessed 08 August 2023).
[107] Hagos (n 28) 137.
[108] Ethiopian Business Review 'Zooming in on Ethiopia's New Investment Law' 15 December 2020 https://ethiopianbusinessreview.net/zooming-in-on-ethiopias-new-investment-law/ (accessed 08 August 2023).
[109] Policy Studies Institute (PSI): National Graduate Institute for Policy Studies (GRIPS) 'Ethiopia FDI Policy Report' 2022 at 9 https://www.grips.ac.jp/forum-e/pdf_e22/Ethiopia_FDI_Policy_Report_printed.pdf (accessed 08 August 2023).
[110] AbyssiniaLaw 'The New Investment Proclamation No. 1180/2020: A Brief Overview' 27 May 2020 https://abyssinialaw.com/blog/the-new-investment-proclamation-no-1180-2020-a-brief-overview (accessed 08 August 2023) ; Ethiopian Business Review (n 108).
[111] Investment Proclamation 2020, art 2(1).
[112] Bekele (n 84) 22.
[113] Investment Proclamation 2020, arts 2(4) & 3.

which is a reversal of the previous investment proclamation that was characterised as having a positive list with an unclear list of sectors, resulting in it being challenging to implement.[114]

The law has enabled foreign investors to participate in any sector apart from those conducted jointly with the government, domestic investors, and for joint investment with domestic investors.[115] The investment administration in Ethiopia can be transparent, efficient, and result in a better investment attraction due to the incorporation of a negative list approach.[116]

The proclamation has stipulated, under Article 9(1) and (2), a minimum capital requirement for foreign investors, which is USD 200,000, while the capital requirement for an investment made jointly with a domestic investor is USD 150,000. This minimum capital requirement would not be applicable whenever foreign investors reinvest their profits from an already formed enterprise.[117]

Regarding dispute resolution for disputes between an investor and the government, the proclamation has stated that such disputes are to be resolved amicably through negotiation or discussion, as well as giving the right to settle such disputes through court mechanisms.[118] Arbitration is also another option whenever there is a dispute with a foreign investor, as stated under Article 28(2) of the proclamation. The number of investor-state disputes that will be entertained in litigation or arbitration will decrease due to the inclusion of negotiation in the proclamation.[119]

The aim of investment, as highlighted under Article 5 of the proclamation, is to enhance sustainable economic and social development. Translating this objective, it has been stated that improving living standards and investments responding positively to social and environmental needs are highlighted in this article. Rather than focusing primarily on profit generation, investors are obliged to adhere to their Corporate Social Responsibility (CSR) and consider social and environmental sustainability.[120]

Remittance of funds beyond the borders of Ethiopia in convertible foreign currency, such as profits, earnings, payments and the like, are allowed for foreign investors under Article 20 of

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[114] Hagos (n 28) 149.
[115] Investment Proclamation 2020, arts 2(4), 6(2) & 6(3).
[116] Hagos (n 28) 150.
[117] Geda (n 22) 15.
[118] Investment Proclamation 2020, art 28(1).
[119] Hagos (n 28) 157.
[120] Hagos (n 28) 157.

the proclamation. Yet, this right is not applicable to domestic investors who invest jointly with a foreign investor.[121]

Investment Regulation 474/2020

As stated above, the new investment law has a negative list approach, and the Investment Regulation 474/2020, which repealed Regulation 470/2012, provides details of the areas. A list of areas is thus stipulated under the regulation. Foreign investors are now allowed to venture their investments jointly with the government in areas such as transport services, postal services, bus rapid transit, weapon manufacturing, and the importation and exportation of electricity.[122] This is a noteworthy amendment from the previous investment regulation due to the fact that the monopoly of the government in these areas has now been reformed by allowing foreign investors to invest jointly with the government.[123] As indicated in the synopsis of the historical overview of this research, the new administration in Ethiopia has embarked on enhancing the private sector's role in the economy. Hence, this is one way of depicting the aim of permitting the private sector to invest in some sectors that used to be under the sole control of the government.[124]

There are several sectors listed in the regulation that are only allowed for domestic investors, which depicts the policy trajectory Ethiopian investment laws have been on, which is limiting the participation of foreigners in the sectors.[125] The sectors listed under this category include small and medium enterprises (SMEs), with the aim of safeguarding domestic investors.[126] These sectors are 32 in number, comprising media, legal services, financial services, retail trade, and the like.[127] Yet, over the next course of five years, the government has recently permitted foreign investors to invest in the banking sector by planning to render five licences.[128] Thus, we can see that the financial sector, which did not permit foreign investors to invest, is now allowed. Most importantly, we can see the policy shift and reform the current government is undertaking, which is liberalising and opening up government-owned enterprises to foreign investors. In addition, the new regulation has a provision on investments

121 Geda (n 22) 29.
122 Investment Regulation 2020, art 3.
123 Bekele (n 84) 29.
124 Bekele (n 84) 29.
125 Bekele (n 84) 29.
126 Bekele (n 84) 29.
127 Investment Regulation 2020, art 4.
128 Reuters 'Ethiopia to offer up to five banking licences to foreign investors' 04 May 2023 https://www.reuters.com/business/finance/ethiopia-offer-up-five-banking-licenses-foreign-investors-2023-05-03/ (accessed 09 August 2023).

jointly made between domestic and foreign investors under Article 5. Seven areas have been stipulated under this category, under which the law has made a constraint for foreign investor ownership not to surpass 49%.[129]

Incentive Regulation 517/2022

Pursuant to Article 17 of the Investment Proclamation, investment incentives in certain areas and sectors would be specified under a regulation issued by the Council of Ministers. As such, the Council of Ministers has issued Investment Incentive Regulation No. 517/2022. The scope of this regulation extends to the exemption of income tax and customs duty and lists several investment areas with their specific exemption rates.[130]

The regulation is not only applicable to new enterprises but also to enterprises that are upgraded from an already existing form, as stated under Article 5 of the regulation. Hence, expansionary incentives are provided under the regulation. Moreover, there is a 30% deduction on income tax for investors who engage in investing in areas with low infrastructure.[131] This encourages more investment to be conducted in such areas and helps develop the infrastructure of the area.

The preceding subsections of this chapter have revealed the current legal framework for investment in Ethiopia, with a specific focus on the Investment Proclamation, Regulation, and the Incentive Regulation. It can be observed that the government has made reforms to liberalise a few sectors for the private sector and increase foreign investors participation in some sectors. As such, all these attempts, as highlighted above, is to establish an enabling and conducive investment environment for both domestic and foreign investors in Ethiopia. It is intended that such an effort would entail a good investment climate. Moreover, it is a clear indication of the current reform agenda the country has started to undertake since the coming of the new government. The following subsection will then demonstrate the current regulatory framework for investment in Ethiopia.

2.3.4 Regulatory Framework for Investment in Ethiopia

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[129] Investment Regulation 2020, art 5(2).
[130] Investment Incentive Regulation 2022, art 3.
[131] Ernest & Young 'Ethiopia issues new investment incentives regulation' 22 August 2022 https://www.ey.com/en_gl/tax-alerts/ethiopia-issues-new-investment-incentives-regulation (accessed 09 August 2023).

There are different organs that are mandated to regulate and supervise the investment laws of the country. These organs and institutions are empowered with this responsibility firmly entrenched within the framework of investment laws in Ethiopia. Hence, in this section, a comprehensive exploration will be undertaken to delve into the mandates and responsibilities entrusted to each of these institutions to shed light on the overall regulatory framework for investment in Ethiopia.

Ethiopian Investment Commission (EIC)

The commission is an independent agency under the Federal Government empowered with the mandate of regulating and supervising investment, as stated under the Investment Proclamation. The EIC provides a one-stop service that incorporates registration of relevant documents, issuance of permits and renewals, administration of investment incentive applications, and the like.[132] The main responsibility of this organ is to create an enabling and attractive investment environment and execute effective administration of investment.[133] It is empowered with the responsibility to implement policies and procedures to attract and retain an enabling investment environment, supervise the investment ventures it has granted permits, provide assistance to regional investment organs, engage in the creation of awareness about investment laws for investors, and the like.[134] Moreover, the commission is granted the power to receive a complaint submitted by an investor who is aggrieved by a decision passed by the federal government's executive body.[135] The granting of investment permits in some sectors that were under the responsibility of the commission has now been assigned to other organs. These sectors include electric power transmission, telecommunications, financial services, and transport services.[136] Even though this power has been transferred to other institutions, quarterly reports must be presented to the commission by the institutions.[137] The institutions in charge of these sectors will be discussed below.

Ethiopian Civil Aviation Authority

As stated above, the grant of permits for air transport services has been assigned to another organ. This organ is the Civil Aviation Authority. In general, this authority is bestowed with the

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[132] Investment Regulation 2020, art 18.
[133] Investment Proclamation 2020, art 37.
[134] Investment Proclamation 2020, art 38.
[135] Investment Proclamation 2020, art 27(1).
[136] Investment Proclamation 2020, art 4(2).
[137] Investment Proclamation 2020, art 4(3)(a).

responsibility to issue regulations in relation to the technical aspects of aviation on top of delivering aviation services.[138] Specifically, it is mandated with the power of licensing aircraft, revoking licences with reasonable grounds, executing regulations related to the aviation sector, establishing norms related to air traffic, and overseeing aviation services, among other mandates.[139]

Petroleum and Energy Authority

Another institution notable enough to be mentioned in relation to the regulation and supervision of investment in Ethiopia is the Ethiopian Energy Authority. As per the Investment Proclamation, it is granted the power to provide permits for investments conducted for electricity generation and transmission.[140] This institution has now been reestablished as the Petroleum and Energy Authority, accountable to the Ministry of Trade and Regional Integration.[141] Hence, as per the establishment regulation of the Petroleum and Energy Authority, it is mandated with a variety of responsibilities regarding the supervision and regulation of the petroleum and energy sectors, including issuing laws on the sector, granting and revoking professional certificates and licences, preparing capacity-building programs, devising strategies related to the sector, and the like.[142]

Ethiopian Communications Authority

The other organ designated in the Investment Proclamation to issue investment permits for the provision of communications services is the Ethiopian Communications Authority. It is bestowed with the crucial responsibility of enhancing and advancing an efficient and quality communication sector through regulation[143] The specific responsibilities of this authority encompass granting licences in the communication sector, setting standards, cultivating and safeguarding data and information security, and governing the regulation of tariffs.[144]

Ethiopian Investment Board

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[138] Ethiopian Civil Aviation Authority 'Responsibilities' http://www.ecaa.gov.et/home/about-us/responsibilities/ (accessed 10 August 2023).
[139] Ethiopian Civil Aviation Authority 'Powers and Duties' http://www.ecaa.gov.et/home/about-us/powers-and-duties/ (accessed 10 August 2023).
[140] Investment Proclamation 2020, art 4(2).
[141] Proclamation to Provide for the Definition of the Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia No. 1263/2021, Fed. Neg. Gaz. 28th Year No. 4.
[142] Federal Democratic Republic of Ethiopia No. 521/2022, Fed. Neg. Gaz. 28th Year No. 51.
[143] Ethiopian Communications Authority 'About ECA' https://eca.et/ (accessed 10 August 2023).
[144] Ethiopian Communications Authority ''About' https://eca.et/about/ (accessed 10 August 2023).

The Ethiopian Investment Board constitutes yet another vital organisational entity entrusted with the responsibility for regulating, supervising, and oversight of investment activities within the country. This Board carries the weight of responsibility to oversee the proper implementation of the Investment Proclamation, supervise the functions of the EIC, enact directives that would aid in the proper implementation of the Investment Proclamation and Regulation, pass decisions regarding grievances invoked by investors, and the like.[145] This Board is composed of different officials, such as the Prime Minister, representatives from the private sector, and government officials.[146]

Federal Government and Regional State Administrations Investment Council

The Investment Proclamation has introduced a new council tasked with creating a synchronised management system of investment among the federal and regional states.[147] This council is set up to facilitate the administration of investment, supervise the activities between the federal and regional states, and give decisions and resolutions on grievances, especially regarding land issues.[148] The Prime Minister, Presidents of all Regions, the Commissioner, and additional members designated by the Prime Minister form this Council.[149]

Ministry of Finance

The Ministry of Finance is charged with the paramount responsibility of ensuring a stable macroeconomic environment.[150] Specifically, in relation to investment, it possesses the authority and power to exempt income tax on certain sectors, grant incentives, enact on matters related to incentives, and follow-up on whether tax incentives are properly utilised.[151]

2.4 Conclusion

In conclusion, investment in Ethiopia is regulated within the legal and regulatory framework. This chapter has shown a thorough comprehension of the investment regime in Ethiopia by providing an extensive account of the specific legislation and institutions tasked with the pivotal role of regulating and supervising investment in the country. National investment laws have a positive role in protecting and safeguarding both domestic and foreign investors. For

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[145] Investment Proclamation 2020, art 31.
[146] Investment Proclamation 2020, art 32.
[147] Investment Proclamation 2020, art 44.
[148] Investment Proclamation 2020, art 45.
[149] Investment Proclamation 2020, art 46.
[150] Ministry of Finance 'About us' https://www.mofed.gov.et/ministry-en/about-ministry/ (accessed 10 August 2023).
[151] Investment Incentive Regulation 2022, art 23.

this reason, the roles assumed by the national investment entities play an indispensable and central role. Such an approach will, in the long run, increase the rate of investment in a country and contribute to economic development. Over time, in Ethiopia, the rate of investment and private sector participation have increased gradually through the different policies instituted. After the coming of the new administration in Ethiopia, there were revisions to the investment laws of the country in 2020, which led to several reforms. The current legal framework this chapter has focused is the Investment Proclamation No. 1180/2020, Investment Regulation No. 474/2020, and Investment Incentive Regulation 517/2022.

Due to the reform, these laws have liberalised a few sectors for foreign investors and enabled enhanced participation in the private sector. This goes in line with the economic reform program the new administration has undertaken to implement. Furthermore, different regulators of the investment laws have been discussed in this chapter. The regulators discussed under this chapter are the Ethiopian Investment Commission (EIC), Petroleum and Energy Authority, Ethiopian Civil Aviation Authority, Ethiopian Communications Authority, Ethiopian Investment Board, Federal Government and Regional State Administrations Investment Council, and Ministry of Finance. These institutions play a role in implementing the laws and overseeing their proper application. To further enrich this comprehension, the next chapter will center its attention on examining the gaps and challenges in the current legal and regulatory framework for investment in Ethiopia.

CHAPTER THREE:

EXAMINING THE GAPS AND CHALLENGES IN THE LEGAL AND REGULATORY FRAMEWORK FOR INVESTMENT IN ETHIOPIA

3.1 Introduction

The previous chapter has extensively elaborated on the Ethiopian investment regime, specifically the recently revised investment laws and institutions mandated with the administration of investment. It laid significant groundwork for attaining the goals of this research, which is exploring the gaps and challenges in the legal and regulatory framework for investment in Ethiopia.

With the groundwork set in the preceding chapter, this chapter will focus on exploring and examining the specific challenges and gaps in the Investment Proclamation, Investment Regulation, and Incentive Regulation, as well as the institutions tasked with regulating and supervising investment. It will point out and analyse the specific gaps and challenges while showing the importance of addressing them. At last, the chapter will end with concluding remarks highlighting the main points of discussion in this chapter.

3.2 Gaps and challenges

The investment environment in Ethiopia, despite reforms, encounters several challenges.[152] It has become challenging due to the lack of implementation of rules and regulations, *inter alia*, which is hindering the effort to create a conducive and enabling business environment.[153] A business environment that is enabling would yield economic growth and benefit both domestic and foreign investment.[154] Regulations and policies play a significant role in materialising this positive result and making the investment climate attractive to operate in.[155] Considering the weight and importance of regulations, it is important to assess the gaps and challenges in

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[152] Geda (n 22) 6.
[153] Geda (n 22) 6.
[154] Angelica E. Njuguna & Emmanuel Nnadozie 'Investment Climate and Foreign Direct Investment in Africa: The Role of Ease of Doing Business' (2022) 9 *Journal of African Trade* 23-46.
[155] As above.

regulations to yield positive benefits. Hence, the following subsections will analyse the gaps and challenges apparent in the legal and regulatory framework for investment in Ethiopia.

3.2.1 Political violence risk

International business is highly influenced by a country's political climate.[156] The presence of instability in a political climate represents an adverse factor of significant concern, restricting economic development and the rate of FDI.[157] Normally, at times of political violence and unrest, investments would face the diminishing and impairment of their assets and face the negative consequences stemming from an economic shock.[158] The instabilities in a political environment result in the interruption of economic operations due to harm to infrastructure and the loss of lives.[159]

The two years of conflict in Ethiopia, which had adverse social and economic effects, resulted in a decrease in both public and private investment, which led to a decrease in Gross Domestic Product (GDP) from 35% to 25%.[160] The conflict broke out in 2021 in the northern part of Ethiopia, which led to adverse impacts and regrettably limited the successful implementation of the economic reform the country has embarked upon.[161] The adverse impact on economic loss and property destruction due to the recurring political conflict and tension made the investment environment challenging.[162] As a direct consequence of this unfortunate occurrence, restoring the lost investments is one of the fundamental plans for Ethiopia as of now.[163] Hence, it can be clearly understood how much a country's political stability highly influences investment, and investors would not feel confident enough to invest in an unstable environment.

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[156] Naina Qadri and others 'Impact of Political Instability on International Investment and Trade in Pakistan' (2020) 9 *European Online Journal of Natural and Social Sciences* at 283.

[157] Abdul Malik Nazeer & Mansur Masih 'Impact of political instability on foreign direct investment and Economic Growth: Evidence from Malaysia' 12 May 2017 at 1 https://mpra.ub.uni-muenchen.de/79418/1/MPRA_paper_79418.pdf (accessed 15 August 2023).

[158] Diana Restrepo and others 'Political Risk and Corporate Investment Decisions' January 2012 at 10 https://e-archivo.uc3m.es/bitstream/handle/10016/13114/wb120403.pdf (accessed 15 August 2023).

[159] Assi Okara 'Does foreign direct investment promote political stability? Evidence from developing economies' (2023) 123 *Economic Modelling* at 1.

[160] CEPHUS Research and Analytics 'Ethiopia Macroeconomic Handbook 2023' 2023 at 2 https://cepheuscapital.com/wp-content/uploads/2019/01/Ethiopia-Macroeconomic-Handbook-2023.pdf (accessed 15 August 2023).

[161] Geda (n 22) 9.

[162] Geda (n 22) 7.

[163] CEPHUS Research and Analytics (n 160) 4.

In Ethiopia, there is a lack of legal and regulatory framework for a guarantee of political violence risk to be granted to investors.[164] The laws in Ethiopia, including the Investment Proclamation, only state guarantees for expropriation risks; more specifically, there is no guarantee scheme for domestic investors against political risk.[165] There is no sufficient consideration and focus on this issue by the EIC.[166] As highlighted in the previous chapter of this research, the EIC is the main organ for investment in the country, mandated with important responsibilities in relation to investment. Hence, the lack of sufficient consideration on this issue on the part of this commission would greatly hamper the investment environment. Foreign investors would not face the negative aspect of this challenge as much as domestic investors since guarantee schemes would be provided in BITs for political risks.[167] There has been a recent mechanism that has been conducted once in which insurance companies provided compensation informally, but the lack of proper inclusion of such issues in the legal and regulatory framework results in the government refraining from rendering compensation.[168]Therefore, the Investment Proclamation, which applies to both domestic and foreign investors, should have incorporated this to resolve the issue by providing guarantees and compensation to domestic investors.

3.2.2 Dispute settlement and corruption

As stipulated in chapter 2 of this research, the new Investment Proclamation has provided an option to resort to court mechanisms for investors whenever there is a dispute. Although this is a good effort and an inclusion, it is challenging because of the current reality of the judicial system in Ethiopia. The judicial system in Ethiopia is characterised as lacking independence and serving the interests of the executive organ of the government.[169] Courts need to possess independence and transparent mechanisms to entertain disputes, as a lack of such would not enhance investors' confidence.[170] A study indicates that business laws lack enforcement in

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[164] Desalegn Beyene 'The need of rule for domestic investors compensation/guarantee against political risks: the case of political violence' LLM Thesis, Addis Ababa University, 2020 at 48 http://etd.aau.edu.et/bitstream/handle/123456789/25950/Desalegn%20Beyene.pdf?sequence=1&isAllowed=y (accessed 15 August 2023).
[165] As above.
[166] As above.
[167] As above.
[168] As above.
[169] Simeneh Kiros Assefa 'Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia' (2021) 15 *Mizan Law Review* at 379.
[170] Hagos (n 28) 154.

Ethiopia due to the lack of competent judges in the area and the prevalence of corruption in the system.[171] Moreover, we can observe from other international indicators that shows the corruption level in Ethiopia is high. One of such indicators, the Rule of Law Index, underscores that Ethiopia's result is not satisfactory, as it ranked 123 out of 140 in 2022.[172] Additionally, the Corruption Perception Index of Transparency International shows that Ethiopia has scored 38 out of 100 in 2022.[173] This would be a challenge for the system because, as stated above, such a corrupted environment would not be preferable for investors to invest in the country.

A domestic investment law would have the feature of weak enforcement whenever the legal system of the country is not strong enough to deter and combat corruption while upholding the rule of law.[174] Specifically, the legal system must be able to combat corruption, render redress mechanisms for investors, and deter unlawful activities of investors.[175] This is a clear indication that a domestic investment law should be backed by a strong legal system to provide a good legal framework for investment in the country.

Hence, the Ethiopian investment regime needs a properly functioning legal system and good governance to attain an attractive investment climate.[176] Without strengthening the legal system, it will be very challenging to obtain a good investment environment for both foreign and domestic investors. In a more specific manner, there needs to be a competent and independent judicial system to realise the option of entertaining disputes in court, which was stated in the Investment Proclamation. It can be deduced from this finding that the presence of competent and independent judges would entail proper enforcement of business law, which would greatly contribute to heightening public trust and boosting the confidence of foreign and domestic investors, as stated above.

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[171] Mesenbet Assefa and Samuel Teshale 'Governance in public sector: implications on private sector development in Ethiopia' 2018 at 50 https://deliverypdf.ssrn.com/delivery.php?ID=260116123082074087077114077125071089014010017032055005018069007097030067101008094124103017054013044015041124094064017070106082011074041011058080001127070126003015067034060071110127126016065084011087123117000127122091068071078004004000002107011121127127&EXT=pdf&INDEX=TRUE (accessed 15 August 2023).

[172] World Justice Project Rule of Law Index 'Ethiopia' https://worldjusticeproject.org/sites/default/files/documents/Ethiopia.pdf (accessed 15 August 2023).

[173] Transparency International 'Country data' https://www.transparency.org/en/countries/ethiopia (accessed 15 August 2023).

[174] Ilias Bantekas 'The Human Rights and Developmental Dimension of Investment Laws: From Investment Laws with Human Rights to Development Oriented Investment Laws' (2021) 31 *Florida Journal of International Law* at 353.

[175] As above.

[176] Abebe (n 42) 131.

3.2.3 Institutional challenges

There is a lack of sound execution of the legal framework, especially investment laws, in Ethiopia.[177] The institutional challenge plays a fundamental role in the lack of enforcement of the investment laws. Especially in making decisions, such as on land disputes, there is a prevalence of an absence of cooperation among the federal government and the regional state governments, mainly due to capacity constraints regional governments have.[178] As stated in chapter 2 of this research, an investment council was set up in the Investment Proclamation with the responsibility to ease investment administration among the federal and regional states. This council has not been set up in practice to date, which is creating a gap in resolving this challenge.[179] The rapid establishment of this council would serve the objectives of setting up an institution that can enable efficient cooperation among the federal and regional states. Moreover, this new council did not consider the current challenge in the country regarding the ever-existing failure of cooperation between the regional states and the federal state.[180] The resistance to cooperate is basically due to the lack of a fair distribution of power between the regional states on the one hand and the federal state on the other, which has created political tensions.[181]

Foreign investors are mandated to obtain their licence from the EIC, for which tax is also collected by the federal government, and acquire land from regional governments.[182] This stipulation does not satisfy regional governments, as there is an imbalance of benefit and power between the regional government and the federal government.[183] Unfortunate encounters are faced by foreign investors to acquire land due to the dissatisfaction felt by regional governments as they lack control over major investments and experience the power imbalance.[184] The fact that this issue has not been addressed by the new Investment Proclamation is not a good indication of how the country is responding to the prevailing fiscal centralisation problem.

177 Geda (n 22) 6.
178 Geda (n 22) 6.
179 Geda (n 22) 6.
180 Ethiopian Business Review (n 108).
181 Ethiopian Business Review (n 108).
182 Ethiopian Business Review (n 108).
183 Ethiopian Business Review (n 108).
184 Ethiopian Business Review (n 108).

In addition, even though a negative list approach can help bring about a system that is transparent and an enhanced investment attraction, as indicated in chapter 2 of this study, it still has a challenge. This is due to the prevalence of an absence of knowledge on such an approach and an institutional framework that possesses the ability to implement it properly since it paves the way for authorities with wide discretion to decide.[185] Related to this, the challenge of an institutional framework manifested in the EIC, which is tasked with a variety of responsibilities in the Investment Proclamation, has constraints in capacity.[186] Thus, there is a need to resolve the constraint in the capacity of this commission for it to be able to successfully manage the responsibilities enshrined in the Investment Proclamation.

Another institutional challenge that can be raised is regarding the bureaucratic process and lack of transparency, which is creating uncertainty and unpredictability in the investment regime in Ethiopia.[187] This is manifested particularly whenever a certain FDI passes through an authorisation procedure, of which the EIC is the main organ responsible for the issuance of permits, which involves bureaucracy.[188] The low performance in a simplified business environment in Ethiopia is a sign of the presence of bureaucratic procedures for authorisation of permits.[189] Addressing this challenge of bureaucratic procedure in the framework is important as it influences simplifying the overall business and investment environment.

3.2.4 Sustainable development and corporate social responsibility

The Investment Proclamation has stated the concept of sustainable development as one of its goals to achieve by briefly mentioning social, economic, and environmental sustainability under Article 5 and 54. This stipulation is quite significant, as it has the potential to weigh the rights and responsibilities of the investors and state.[190] The new Investment Proclamation has stipulated sustainable economic and social development but has failed to specifically define what this term is in the definition section of the proclamation.[191] Moreover, the sustainable development provision is only stated in two articles in the Investment Proclamation, as stated

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[185] Geda (n 22) 24.
[186] Geda (n 22) 6.
[187] Bekele (n 84) 40.
[188] Bekele (n 84) 40.
[189] Bekele (n 84) 40.
[190] Ayele (n 49) 18.
[191] Bereket Alemayehu Hagos 'Legal Aspects of Corporate Social Responsibility in Ethiopia: A Sustainable Development Perspective' (2022) 13 *The Journal of Sustainable Development Law and Policy* at 13.

above, merely mentioning the responsibility of investors to abide by social and environmental values, engage in an investment that conforms with those standards, enhance foreign exchange, boost the national economy, enhance the creation of employment opportunities, strengthen the engagement of the private sector, utilise the natural resources, and enhance FDI.[192] Implementing detailed rules to encourage and incorporate, for instance, low-carbon investments into tax incentives is one way of achieving sustainable development.[193] The Incentive Regulation of Ethiopia does not include any of these areas, such as low-carbon investment, as eligible for tax incentives. Incorporation of such issues would be beneficial, as it would create a good regulatory framework.[194]

Notwithstanding that it is a commendable effort to incorporate sustainable development in the Investment Proclamation as opposed to the previous investment law, it cannot be concluded that it will sufficiently address the goals of sustainable development.[195] Several regulations and policies, with the role of safeguarding diverse interests of the public, regarding social and environmental sustainability are required to support the stipulation of sustainable development in the Investment Proclamation.[196] The realisation of sustainable development would be completely fulfilled if it was underpinned by comprehensive and detailed regulatory frameworks that dealt with social and environmental sustainability.[197]

Another notable incorporation in the Investment Proclamation is CSR, which mandates investors to conform to social and environmental values while conducting the investment for which they have obtained a permit. Although this obligatory requirement is beneficial for attaining sustainable development, it is also important to include voluntary CSR.[198] Voluntary CSR is a growing concept impacting investment conduct that the government can utilise to incorporate it with the formal regulatory structure to result in sustainable development.[199]

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[192] Investment Proclamation 2020, arts 5 & 54.
[193] United Nations Conference on Trade and Development 'Investment Policy Framework for Sustainable Development' 2012 at 20 https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/diaepcb2012d5_en.pdf (accessed 16 August 2023).
[194] As above.
[195] Hagos (n 28) 136.
[196] Hagos (n 28) 136.
[197] Hagos (n 28) 136.
[198] Hagos (n 28) 155.
[199] United Nations Conference on Trade and Development (n 193) 22.

3.2.5 Small and medium-sized enterprises (SMEs)

Within both developed and developing countries, Small and Medium-Sized Enterprises (SMEs) play a significant role in resolving social and economic challenges towards the creation of sustainable development.[200] They are known for contributing positively to the economic development of a country.[201] Especially in the last two decades, there has been a significant role for SMEs in the economic development of a country.[202]

In the same way, in Ethiopia, SMEs contribute a majority share of employment as part of being in the agricultural sector, which is the fundamental underpinning of the economy.[203] In general, limitations regarding access to finance for private sector investment are apparent in Ethiopia.[204] Particularly, this problem is exacerbated by the low level of access to loans. Firms that are large by their nature would be preferential borrowers for commercial banks, and SMEs have a lower chance of accessing loans.[205] In recent years, due to the prevalence of political instability, COVID-19, and corruption, SMEs performance has not been satisfactory.[206] Financial limitations for SMEs have been among the fundamental barriers to the development of the sector in Ethiopia.[207]

The new investment law has failed to give due consideration to the obstacles SMEs face regarding access to finance.[208] The mechanism for readily accessing finance for SMEs is not stipulated in the investment law, which shows that such an approach does not cater to the needs of SMEs.[209] Hence, the current investment law does not pave the way for significant growth in

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[200] Getachew Ayalu and others 'The role of micro- and small-scale enterprises in enhancing sustainable community livelihood: Tigray, Ethiopia' (2023) 25 *Environment, Development and Sustainability* at 7561.
[201] K.O. Osotimehin and others 'An Evaluation of the Challenges and Prospects of Micro and Small Scale Enterprises Development in Nigeria' (2012) 2 *American International Journal of Contemporary Research* at 174.
[202] Abrehet Mehari Gebreselassie 'Challenges of Economic Integration of Small and Medium Enterprises in Manufacturing Sector Tigray Regional State Mekelle City' (2020) 11 *Journal of Economics and Sustainable Development* at 122.
[203] Ayalu (n 200) 7562.
[204] Debebe (n 95) 28.
[205] Debebe (n 95) 29.
[206] Gemechu Abdissa and others 'Determinants of Sustainable Growth of SMEs in Developing Countries: The Case of Ethiopia' (2022) 10 *Economies* at 1.
[207] Ebrahim Endris & Andualem Kassegn 'Analysis of growth and constraints of agricultural micro- and small-scale enterprises in North Wollo Zone, Amhara Regional State, Ethiopia' (2023) 9 *Cogent Social Sciences* at 1.
[208] Ethiopian Business Review (n 108).
[209] Ethiopian Business Review (n 108).

SMEs as it does not address the main challenge, which is access to finance, that such enterprises face and is thus not enabling.[210]

3.2.6 Private equity

The concept of private equity, widely recognised in the banking and finance industries, refers to the action of an investor directly investing in private enterprises.[211] Their role extends to evolving companies that are not performing well by boosting their productivity.[212] The private equity firm generally dedicates itself to enhancing the company it buys, by rendering financial and expert assistance in an efficient and effective manner.[213] This conduct is not only confined to the development of the company that it is invested in but also has a ripple effect on the economy in general.[214]

In Ethiopia, the concept of private equity started in 2012, when the first international private equity firm, Schulze Global Investments (SGI), started investing. There has been an increase in private equity funds, and there have been investments in the telecommunications, consumer goods, and agribusiness sectors.[215] Zoscales Partners, East African Novastar Ventures, KKR, and DEG Investment are among the ones that were involved in investing in these sectors.[216] The gap in the new investment law is that there is no express indication of private equity funds or venture capital.[217] Specifically, the procedures for registering and licensing a private equity company are not stipulated in the law.[218] There is a lack of a legal framework for private equity funds that are established in Ethiopia, which is why the incorporation of all the private equity

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[210] Ethiopian Business Review (n 108).
[211] Rajibul Hasan 'Private Equity Investment Practices: A Comprehensive Study' (2014) 18 *The Journal of Private Equity* at 73.
[212] Adrian Blundell-Wignall 'The Private Equity Boom: Causes and Policy Issues' 2007 at 2 https://www.oecd.org/finance/financial-markets/40973739.pdf (accessed 16 August 2023).
[213] Ernest & Young 'Why is private equity the driving force behind innovation and job creation in Europe, and Luxembourg?' https://www.ey.com/en_lu/private-equity/why-is-private-equity-the-driving-force-behind-innovation-and-jo#:~:text=Private%20equity%20(PE)%20is%20a,of%20four%20to%20six%20years. (accessed 16 August 2023).
[214] As above.
[215]AsokoInsight 'Ethiopia's Private Equity Landscape' 08 June 2019 https://www.asokoinsight.com/content/quick-insights/ethiopia-private-equity-landspace (accessed 16 August 2023).
[216] As above.
[217] Ethiopian Business Review (n 108).
[218] Ethiopian Business Review (n 108).

funds is not in Ethiopia.[219] Given this challenge, the investment law should have incorporated a mechanism for registering and licensing private equity funds in the country.

3.2.7 Macroeconomic instability

Stability in a macroeconomic environment is critical to a country's sustainable development and influences decisions regarding investments.[220] For every country, achieving a stable macroeconomic environment is a policy focus.[221] In general, a stable macroeconomic environment is very important since it alleviates business unpredictability and boosts the confidence of investors.[222]

The macroeconomic environment in Ethiopia has undergone serious challenges, mainly due to the unavailability of foreign exchange and rising inflation.[223] The increasing level of inflation and the imbalance of the balance of payments are among the significant obstacles in the macroeconomic environment.[224] The NBE modifies the surrender rate on a regular and recurrent basis.[225] Formerly, the surrender rate was 70%, but recently it has been reduced to 50%.[226] The regular modification of this surrender rate has a negative impact as it would instil a lack of predictability and confidence among investors in the country.[227] Since such factors have an influence on investment and the attraction of FDI specifically, the government should consider a better availability of foreign exchange by putting into place a good policy framework and refrain from modifying the surrender rate on a regular basis to enhance a better macroeconomic environment in Ethiopia.[228]

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[219] Atkilit Bekele Diribsa 'Private Equity in Ethiopia: Exit Challenges' LLM Thesis, Central European University, 2020 at 12.
[220] United Nations 'Macroeconomic stability, inclusive growth and employment: Thematic Think Piece ILO, UNCTAD, UNDESA, WTO' 2012 at 4 https://www.un.org/millenniumgoals/pdf/Think%20Pieces/12_macroeconomics.pdf (accessed 16 August 2023).
[221] Md. Nur Alam Siddik 'Does macroeconomic stability promote economic growth? Some econometric evidence from SAARC countries' (2023) 5 *Asian Journal of Economics and Banking* at 1.
[222] Aleksandra Pieloch-Babiarz and others 'An impact of macroeconomic stabilization on the sustainable development of manufacturing enterprises: the case of Central and Eastern European Countries' (2021) 23 *Environment, Development and Sustainability* at 8693.
[223] Geda (n 22) 33.
[224] Geda (n 22) 33.
[225] Geda (n 22) 33.
[226] Ethiopian Monitor 'NBE Imposes Credit Growth Ceilings, Reduces Forex Surrender Demand' 11 August 2023 https://ethiopianmonitor.com/2023/08/11/nbe-imposes-credit-growth-ceilings-reduces-forex-surrender-demand/ (accessed 16 August 2023) ; Geda (n 22) 33.
[227] Geda (n 22) 33.
[228] Geda (n 22) 33.

3.2.8 Minimum capital requirement

In accordance with the Investment Proclamation, as stated under chapter 2 of this research, the minimum capital requirement for foreign investors in one project is USD 200,000. This requirement will be reduced to USD 150,000 whenever there is a joint investment between a foreign and domestic investor.[229] Moreover, the other main requirement that the Investment Proclamation states is in regards to sectors related to architectural or engineering works, technical consultancy services, technical testing and analysis or in publishing works in which the minimum capital is set to be USD 100,000.00 for a foreign investor only and USD 50,000.00 for a foreign investor investing jointly with a domestic investor.[230]

The challenge with the above minimum capital requirement is that the Investment Proclamation does not stipulate conditions for investors who make an investment with a capital amount less than the minimum capital requirement set in the law. Thus, investors in this category would be affected.[231] Moreover, the Investment Proclamation has made the minimum capital requirement of USD 200,000 applicable for all types of investments except for a separate minimum capital requirement for architectural or engineering works or related technical consultancy services, as stated in the above paragraph. Specific sectors must have been listed with specific capital requirements rather than having a general minimum capital requirement for all sectors.[232] Doing so will pave the way for flexibility and a wider magnitude of liberalisation of the legal framework of investment with minimum capital requirements.[233]

3.2.9 Performance requirements

Utilising performance requirements is an effective instrument for gaining the positive aspects of FDI and alleviating issues related to such investments.[234] According to several studies, the economic objectives of a host country with the aid of foreign investment have been guided by

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[229] Investment Proclamation 2020, art 9(2).
[230] Investment Proclamation 2020, art 9(3).
[231] Bekele (n 84) 38.
[232] Bekele (n 84) 38.
[233] Bekele (n 84) 39.
[234] United Nations Conference on Trade and Development 'Foreign direct investment and performance requirements: new evidence from selected countries' 2003 at 3 https://unctad.org/system/files/official-document/iteiia20037_en.pdf (accessed 18 August 2023).

performance requirements.[235] To enable foreign investors to utilise local labour, goods, and services, host countries implement performance requirements.[236] For developing countries, the incorporation of performance requirements contributes to the increasing level of foreign investment.[237]

In some cases, through the implementation of investment treaties, there might be limitations on the host country's ability to enforce performance requirements like utilisation of local goods, services, labour, and technology transfer. This limitation would entail the host country not being able to gain the positive aspects of performance requirements.[238] Enhancing and utilising domestic labour and materials by working in synergy with domestic enterprises would be positive results of the enforcement of performance requirements.[239]

The rationale of the Ethiopian Investment Proclamation, among others, as stated in the Preamble section, is to create job opportunities by raising living standards and amplifying foreign investments. Technology transfer has been stipulated in both the proclamation and regulation to regulate the registration process and other procedural requirements of an agreement to be conducted between a foreign and domestic investor.[240] Despite this fact, these laws have failed to make technology transfer a compulsory stipulation, and it has not incorporated performance requirements such as utilising domestic content, technology transfer, and export performance.[241]

Under Article 19 of the Investment Regulation, procedural requirements have been mandated for foreign investors training and knowledge transfer to Ethiopian employees. What becomes challenging from the requirement of training and knowledge transfer to Ethiopian employees, which is aimed at replacing foreign employees, is the lack of availability of expert domestic

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[235] United Nations Conference on Trade and Development 'World Investment Report: FDI Policies for Development: National and International Perspectives' 2003 at 199-23 https://unctad.org/system/files/official-document/wir2003_en.pdf (accessed 18 August 2023).
[236] Sornarajah (n 58) 205.
[237] Sornarajah (n 58) 205.
[238] Martin Khor 'A Summary of Public Concerns on Investment Treaties and Investor-State Dispute Settlement' in Kinda Mohamadieh, Anna Bernardo & Lean Ka-Min (eds) *Investment Treaties Views and Experiences from Developing Countries* (2015) at 4.
[239] Martin Khor 'A Summary of Public Concerns on Investment Treaties and Investor-State Dispute Settlement' in Mohamadieh, Bernardo & Ka-Min (n 238) 21.
[240] Investment Proclamation 2020, art 15.
[241] Yemegnu Mesele Dejene 'The Room for Imposing Performance Requirements on Foreign Investors under the Ethiopian Legal Regime' (2022) 16 *Mizan Law Review* at 408.

employees in some sectors in Ethiopia.[242] Lack of local expertise in sectors such as textiles, mobile assembly, and others has led to the hiring of foreign experts.[243]

Moreover, pursuant to Article 6 of the Incentive Regulation, export performance of foreign investors is regulated, and such investors that export at least 60% would be eligible for an incentive scheme. Despite this being a good indication of the incorporation of a discretionary performance requirement and motivating the level of export performance, important mandatory requirements such as technology transfer and minimum domestic input are not included as a requirement to access the incentives.[244] This shows that the Investment Proclamation, Regulation, and Incentive Regulation has not incorporated compulsory performance requirements, specifically like minimum domestic input and technology transfer. The laws have only focused on knowledge transfer and training for Ethiopian employees.[245] As stated above, a host country would benefit from requiring performance requirements by mandating several areas, such as local labour and content. Ethiopia, as a host country for foreign investors, should use this as a policy tool and incorporate it into the investment laws to benefit from the positive results of performance requirements.

3.2.10 Incentives

Enforcing and rendering incentives can be beneficial for various reasons, one of which reason can be to stimulate investment rate with the aim of fostering job opportunities, technological advancement, and the creation of goods and services that are of value to a country.[246] Yet, it poses a risk for the government to spend more and lose revenue due to tax exemptions, as the main source of revenue for a government in a country emanates from the collection of tax.[247]

The Investment Proclamation, under Article 17, has stated that an investment incentives regulation will be issued by the Council of Ministers, which gave rise to the enactment of

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242 Getaneh (n 40) 160.
243 Getaneh (n 40) 161.
244 Dejene (n 241) 410.
245 Dejene (n 241) 411.
246 Rossana Galli 'The role of investment incentives for structural transformation: A comparative analysis of investment incentives legislation in developing countries in sub-Saharan Africa, South Asia and South-East Asia' (2017) *Employment Working Paper No. 211* at 39 http://ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_554302.pdf (accessed 21 August 2023).
247 Cedidlová Miroslava 'The Effectiveness of Investment Incentives in Certain Foreign Companies Operating in the Czech Republic' (2013) 5 *Journal of Competitiveness* at 108.

Incentive Regulation 517/2022. The Incentive Regulation, as stated in the previous chapter of this study, is applicable to tax and customs duty exemptions. The fact that the scope is limited is not advisable, as it must also extend to other types of investment incentives rather than focusing solely on income tax and customs duty exemptions.[248] The scope of the investment incentive in this regulation must have been wide enough, as incentives are supposed to be utilised for the enhancement and ease of investment.[249]

Relating to the performance requirements stated in the above subsection, the Incentive Regulation, under Article 6(1), has provided a mechanism for a two-year exemption when at least 60% of goods and services are exported. The challenge here is that there will be a compromise on the continuity of such an export and export performance subsequent to the two year period because there might be a discontinuation of exports after benefiting from the tax exemption.[250] The continuance of exporting to an international marketplace will not be ensured for the long-term when investors stop exporting after the two years term, which creates an adverse impact on the government as it loses revenue and does not gain from the benefits of export.[251] The inclusion of local content and technology transfer requiring exporting for a period longer than the two years term would be beneficial in the Incentive Regulation.[252] Due to such inclusion, the country would be able to gain the positive results of performance requirements as stated in the above subsection and ensure a benefit from exports that can be able to last for a longer period.

3.3. Conclusion

In this chapter, various gaps and challenges that are evident in the Investment Proclamation, Regulation, and Incentive Regulation have been discussed and analysed. Moreover, challenges apparent in the institutions responsible for regulating and supervising investment have been examined. Although the new investment laws have brought about several reforms, there are still gaps and challenges that need to be addressed. These challenges and gaps appear to be hinderances to the attainment of a good investment environment in the country. The challenges

[248] Abba (n 8) 753.
[249] Abba (n 8) 753.
[250] Dejene (n 241) 410.
[251] Dejene (n 241) 410.
[252] Dejene (n 241) 410.

and gaps, such as lack of guarantee for political violence risk, prevalence of corruption in the judicial system, the lack of responding to the access to finance needs of SMEs, capacity and procedural constraints in the institutions responsible for regulating and supervising investment were examined. Moreover, bureaucratic procedures in the institutions, lack of sufficient and detailed rules on aspects of sustainable development, absence of important performance requirements, non-inclusion of private equity funds and its procedures for registering and licensing in the law, macroeconomic instability, the specific amount of the minimum capital requirement not being classified into different sectors, and finally gaps in relation to incentives were analytically examined under this chapter.

With this examination of the gaps and challenges, the subsequent chapter will specifically deal with the AfCFTA Protocol on Investment. It will assess how the Protocol would be of benefit in addressing some of the existing challenges and gaps stipulated under this chapter.

CHAPTER FOUR:
ASSESSING THE AFRICAN CONTINENTAL FREE TRADE AREA PROTOCOL ON INVESTMENT IN ADDRESSING THE CHALLENGES IN THE LEGAL AND REGULATORY FRAMEWORK FOR INVESTMENT IN ETHIOPIA

4.1 Introduction

The previous chapter has examined the gaps and challenges apparent in the current investment legal and regulatory framework in Ethiopia. Although the investment laws have been reformed, it appears that there are challenges and gaps that have the possibility of hindering the successful implementation of the vision of the laws and Ethiopia's current reform agenda. These challenges and gaps have to be addressed so that a good investment climate can be ensured in Ethiopia.

In light of the gaps and challenges examined in chapter 3, it is significantly important to see how the recently adopted African Continental Free Trade Area (AfCFTA) Protocol on Investment would help in addressing some of the existing challenges and gaps in the Ethiopian investment regime. It is essential to explore how the Protocol can assist in resolving the challenges and gaps and serve as an instrument for reforming the investment regime in Ethiopia. A possible justification on why this Protocol is a good comparative tool is that Article 52(2) of the Protocol requires African states to bring their national laws, regulations, and policies into alignment with this Protocol. As Ethiopia is on the road to improving the private sector's role in the economy, as highlighted in the preceding chapters, exploring such kinds of international obligations in light of their role in addressing the challenges and gaps is key.

Although recently adopted, the Protocol on Investment is not publicly available. The analysis in this chapter will be based on the text submitted to the Head of States at the Summit of February 2023.[253] Considering this importance, this chapter will first shed light on the general understanding of the AfCFTA. Subsequently, it will explore the relevance of the Protocol on

[253] Bilaterals.org 'AfCFTA Protocol on Investment' https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf (accessed 10 September 2023).

Investment and how it can address some of the gaps and challenges identified under chapter 3 of this research.

4.2 Brief exposition on the African Continental Free Trade Area (AfCFTA)

The foundation for the formation of the Organisation of the African Union (OAU), the preceding organisation of the African Union (AU), in 1963 was the heightened strive to integrate economically and politically.[254] For African leaders, the establishment of a unified African Economic Community has been the steadfast attention since the early days of independence.[255] The political landscape of Kwame Nkrumah, former President of Ghana, Emperor Haileselassie I, and other eminent leaders showed their strive and commitment to integrating Africa.[256] Numerous actions were undertaken and implemented to promote regional integration following the establishment of the OAU.[257] The concept of independence was elevated during 1979 and 1980 in the Monrovia Summit and the Lagos Plan of Action, respectively, but they were not successful as they were hindered by the downturn in the economy.[258] One objective of the Lagos Plan of Action was to serve as a blueprint for the development of the African Economic Community.[259]

In 1991, the Abuja Treaty was formulated with the purpose of creating the African Regional Economic Communities.[260] The significant move towards the revitalisation of Africa's integration agenda was made possible by the formation of the Abuja Treaty.[261] Fostering integration among African countries was the aim of this treaty, which advocated for the utilisation of the Regional Economic Communities (RECs) to serve as an instrument for

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[254] Hippolyte Fofack & Andrew Mold 'The AfCFTA and African Trade—An Introduction to the Special Issue' (2021) 8 *Journal of African Trade* at 4.
[255] Rodrigo Tavaresa & Vanessa Tang 'Regional economic integration in Africa: impediments to progress?' (2011) 18 *South African Journal of International Affairs* at 217.
[256] W. Shumba 'Towards the African Economic Community: Legal and Historical Perspectives' (2023) 26 *Potchefstroom Electronic Law Journal* at 4.
[257] Guillaume Gérout and others 'The AfCFTA as yet another experiment towards continental integration' in David Luke & Jamie Macleod (eds) *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (2019) at 18.
[258] Bernhard Tröster & Eva Janechová 'The long journey towards Pan-African integration: The African Continental Free Trade Area and its challenges' 2021 at 5 https://www.econstor.eu/bitstream/10419/232581/1/1752670329.pdf (accessed 26 August 2023).
[259] Bereket Alemayehu Hagos 'The African Continental Free Trade Area: The road ahead for the continent's bold integration project' (2023) 22 *Journal of International Trade Law and Policy* at 3.
[260] Shumba (n 256) 7.
[261] Andy McKay and others 'Rethinking regional integration in Africa for inclusive and sustainable development: Introduction to the special issue' (2023) 46 *The World Economy* at 305.

reaching the integration goal.[262] The AU emerged as a successor of the OAU in 2001, having various objectives like the strengthening of economic and political integration in Africa as enshrined in its Constitutive Act.[263] The process of unifying the RECs and creating a customs union at a continental level by forming large free trade agreements like the Tripartite Agreement of Eastern and Southern African Countries emerged in 2012.[264]

With its size and the desire to create integration at a continental level, Africa has the potential to utilise trade for the alleviation of poverty.[265] The richness of natural resources such as forests, oil, minerals, and many others, are readily available in Africa.[266] Even though there are rich natural resources, Africa has not been able to maximise its import and export share in the global space, as it only has a 3% share.[267] Additionally, the level of intra-African trade is at a minimal stage due to several factors, such as infrastructural challenges like easy movement of goods, people, and cross-border payments, a weak institutional framework, weak implementation of laws, and the like.[268] Processing, transforming, and adding value to raw materials are absent in intra-African trade, as there is an emphasis only on trading semi-processed raw materials with minimal value addition.[269] It is the need to transform the continent structurally that is envisaged under Article 3(e) of the Agreement Establishing the AfCFTA.[270]

On 21 March 2018, the AfCFTA, a flagship project of Agenda 2063, was signed in Kigali, Rwanda, and became effective as of 30 May 2019.[271] It is one of the largest free trade areas,

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[262] Shumba (n 256) 7.
[263] Hagos (n 259) 3.
[264] Tröster (n 258) 5.
[265] Lisandro Abrego and others 'The African Continental Free Trade Area: Potential Economic Impact and Challenges' 2020 at 10 https://books.google.co.za/books?hl=en&lr=&id=CrAYEAAAQBAJ&oi=fnd&pg=PA5&dq=African+Continental+Free+Trade+Area&ots=8yIedFNJmb&sig=OJANlTA71eO_1Kk6jHKBuAzffzs&redir_esc=y#v=onepage&q=African%20Continental%20Free%20Trade%20Area&f=false (accessed 26 August 2023).
[266] United Nations Environment Programme 'Our Work in Africa' https://www.unep.org/regions/africa/our-work-africa (accessed 26 August 2023).
[267] International Institute for Sustainable Development 'WTO Report Highlights Programmes to Strengthen Africa's Trade Capacity' 29 March 2021 https://sdg.iisd.org/news/wto-report-highlights-programmes-to-strengthen-africas-trade-capacity/ (accessed on 26 August 2023).
[268] Abrego (n 265) 14.
[269] United Nations Conference on Trade and Development 'Rethinking the Foundations of Export Diversifications in Africa' 2022 at 50 https://unctad.org/system/files/official-document/aldcafrica2022_en.pdf (accessed 26 August 2023).
[270] Françoise Okah Efogo 'AfCFTA and Structural Transformation in Africa' (2020) 50 *Africa Insight* at 90.
[271] TRALAC 'The African Continental Free Trade Area' 2019 at 2 http://www.thedtic.gov.za/wp-content/uploads/Booklet_5th_edition.pdf (accessed on 26 August 2023).

composing a 1.3 billion market.[272] Thus far, 54 countries have signed and 47 countries have ratified this agreement, and only one African country, Eritrea, has not yet signed it.[273] This agreement, with the aim of decreasing tariffs on 97% of goods, would yield favourable outcomes such as expansion of markets, enhancement of export values, and diversification of products.[274] It would also lead to advantageous consequences such as encouraging and facilitating industrial development, competition, economies of scale, and innovation.[275]

There are different protocols under the AfCFTA with different phases of negotiation. Phase I incorporated the Protocol on Trade in Goods, Trade in Services, and Dispute Settlement, while Phase II included the Protocol on Intellectual Property Rights, Competition Policy, and Investment.[276] Phase III negotiations, which include the Protocol on Digital Trade and Women and Youth, have started.[277] For the purpose of this research, there will be particular emphasis on the Protocol on Investment since it is focused on the assessment of this Protocol in addressing the challenges and gaps in the Ethiopian legal and regulatory framework for investment in Ethiopia.

4.3 Assessment of the AfCFTA Protocol on Investment in addressing some of the existing challenges and gaps in the legal and regulatory framework for investment in Ethiopia

In this section, there will be an examination of how the Protocol on Investment would address some of the existing challenges and gaps stated under chapter 3 of this research. Prior to that, the general relevance of the Protocol on Investment will be discussed to shed light on the

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272 Roberto Echandi and others 'Making the most of the African Continental Free Trade Area: Leveraging Trade and Foreign Direct Investment to Boost Growth and Reduce Poverty' 2022 at 8 https://documents1.worldbank.org/curated/en/099305006222230294/pdf/P1722320bf22cd02c09f2b0b3b320afc4a7.pdf (accessed 27 August 2023).

273 African Policy Research Institute 'The Road to Africa's Single Market: Progress so far and Challenges for the future' 2023 at 13 https://afripoli.org/uploads/publications/APRI_PB_on_Trade.pdf (accessed 26 August 2023).

274 Vera Songwe 'Boosting Trade and Investment: A new agenda for regional and international Engagement' 2019 at 99 https://www.brookings.edu/wp-content/uploads/2019/01/BLS18234_BRO_book_006.1_CH6.pdf (accessed 26 August 2023).

275 World Bank Group 'The African Continental Free Trade Area: Economic and Distributional Effects' 2020 at 15 https://openknowledge.worldbank.org/server/api/core/bitstreams/ef1aa41f-60de-5bd2-a63e-75f2c3ff0f43/content (accessed 26 August 2023).

276 TRALAC (271) 3.

277 TRALAC (271) 3.

possible benefits and prospects of the Protocol, which will be an overview for analysing how it addresses the gaps and challenges in the current Ethiopian Investment regime.

4.3.1 Overview on the relevance of the AfCFTA Protocol on Investment

The African Union (AU) Assembly of Heads of State and Government adopted the AfCFTA Protocol on Investment in February 2023 alongside the other two protocols, which are the Protocol on Intellectual Property Rights and Competition Policy.[278] Prior to that, the Pan-African Investment Code (PAIC) was the inaugural treaty on investment encompassing the whole of Africa.[279] It was enacted in 2016, carrying provisions that do not impose legally binding requirements.[280] It played a central role in shaping the negotiations for the Protocol on Investment.[281]

The Protocol is adopted with the aim of facilitating the enrichment of intra-African investment while also rendering prospective gains to investors.[282] It would also pave the way for the prevalence of policies and practices to encourage their effectiveness and create a harmonised strategy across Africa towards investment.[283] In general terms, the Protocol has a good prospect of creating market possibilities and serves as a vehicle to enhance and fortify institutions by moulding a better investment policy.[284]

Sound policies would be implemented as the Protocol would mandate member states to comply with obligations entered into the agreement.[285] It also assists in drawing FDI to a country,

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[278] United Nations Economic Commission for Africa 'Deepening the AfCFTA: celebrating the adoption of new protocols on investment, intellectual property rights and competition policy' 16 March 2023 https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C (accessed 27 August 2023).
[279] Makane Moïse Mbengue & Stefanie Schacherer 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *The Journal of World Investment & Trade* at 414.
[280] Makane Moise Mbengue & Stefanie Schacherer 'Africa as an investment rule-maker: Decrypting the Pan-African Investment Code' 2018 at 4 https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5906&context=sol_research (accessed 27 August 2023).
[281] Mbengue (n 279).
[282] Sherillyn Raga and others 'AfCFTA Investment Protocol: issues and opportunities for Kenya' 2022 at 9 https://www.kenyachamber.or.ke/wp-content/uploads/2019/08/SITA_Kenya-KNCCI-investment-brief-AfCFTA-Investment-Protocol-issues-and-opportunities-for-Kenya.pdf (accessed 27 August 2023).
[283] As above.
[284] Geda (n 22) 5.
[285] Geda (n 22) 5.

which, in the long run, could foster employment opportunities and alleviate poverty.[286] Utilising the prospects of the private sector's activities, rendering long term benefits to local communities, and enhancing Africa's transformation structurally are the fundamental goals of the Protocol on Investment.[287] It will create a stimulating and enabling environment for the private sector through the implementation of a transparent and equitable space for all private sectors in Africa.[288]

It is worth mentioning that, as much as the Protocol can go hand-in-hand with other legislation concerning investments, it is important to note that it should not be cumbersome by expanding responsibilities on states.[289] The governing law for domestic and foreign investors in a country is the domestic law, while the Protocol on Investment, in addition to domestic laws, would govern the foreign investment aspect.[290] The Protocol on Investment has also mandated that investors adhere to national laws while investing.[291] Good domestic investment laws and strong regulatory organs are quite important for creating a good investment climate, together with the Protocol.[292] If either the Protocol or the domestic laws do not function well, it will not result in the successful implementation of the other.[293] It is important to also note that domestic investment laws would now have to be aligned with the Protocol for the purpose of ensuring a proper manner of implementing the Protocol.[294] Moreover, the BITs in which state parties have entered into would have to be terminated during the first five years from when the Protocol comes into effect.[295]

With this pertinence of the Protocol on Investment into consideration, the subsequent subsection will deal with exploring if the Protocol addresses some of the existing challenges and gaps in the Ethiopian Legal and Regulatory framework for Investment in Ethiopia, which

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[286] Geda (n 22) 5.
[287] United Nations Economic Commission for Africa 'Towards a Common Investment Area in the African Continental Free Trade Area: Levelling the Playing Field for Intra-African Investment' 2021 at 92 https://repository.uneca.org/bitstream/handle/10855/46741/b11999081.pdf?sequence=5andisAllowed=y (accessed 27 August 2023).
[288] As above.
[289] Ndanga Kamau 'Investment Law and Treaty Reform In Africa: Fragments and Fragmentation' (2020) 1 *African Journal of International Economic Law* at 202.
[290] United Nations Economic Commission for Africa (n 287) 15.
[291] AfCFTA Protocol on Investment 2023, art 32.
[292] United Nations Economic Commission for Africa (n 287) 142.
[293] United Nations Economic Commission for Africa (n 287) 142.
[294] Ayele (n 49) 1.
[295] Ayele (n 49) 11.

are stated under chapter 3 of this research. It will assess the prospects of the Protocol on Investment in addressing the gaps and challenges under five points: a) sustainable development and corporate social responsibility; b) performance requirements; c) small and medium-sized enterprises; d) corruption; and e) investment facilitation measures.

4.3.2 Addressing gaps and challenges

The AfCFTA Agreement was signed by Ethiopia in 2018 and ratified in 2019.[296] Hence, the Protocol on Investment would be applicable to Ethiopia as it is part and parcel of the AfCFTA Agreement. Ethiopia would certainly benefit from this Protocol, as it would assist in enhancing the level of FDI which in turn results in employment opportunities and the transfer of technology.[297] As stated in chapter 3 of this research, the FDI level in Ethiopia has declined due to the instability. Hence, given the importance of attracting more FDI flow to the country, Ethiopia can leverage the Protocol on Investment to gain higher levels of FDI. Consistent investment rules in such a regional integration approach would lead to an appeal to FDI.[298] More than ever, due to the negative impact that the lower level of FDI has resulted in the GDP in Ethiopia, as highlighted in the previous chapter of this research, it is quite necessary to utilise the Protocol. Moreover, studies indicate, in the context of developing countries, that stability in the political environment can be enhanced through FDI as it can be one economic mechanism to stabilise the country.[299] This can be done by creating jobs for the youth mostly participating in the conflicts, helping generate revenues for rehabilitating damaged infrastructure, and the like. Therefore, it can be deduced that the Protocol, by promoting intra-African investment, can result in increased FDI. Moreover, as stated above, it can offer a valuable avenue for the enhancement of political stability in Ethiopia as well.

In addition, it is also widely recognised that Ethiopia's membership in the AfCFTA would entail certainty and stability since frequent and repeated alterations of laws by the government would be deterred.[300] Frequent alteration of laws and regulations can be seen regarding the

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[296] Geda (n 22) 21.
[297] Geda (n 22) 5.
[298] ODI 'Promoting investment for Africa's industrialisation through economic integration' 18 November 2022 https://odi.org/en/insights/promoting-investment-for-africas-industrialisation-through-economic-integration/ (accessed 27 August 2023).
[299] Okara (n 159).
[300] Geda (n 22) 21.

surrender rate that the NBE conducts as stated in the previous chapter of this research. Thus, such alterations would be limited due to joining the AfCFTA.

Building on the above relevance of the Protocol on Investment to the Ethiopian investment environment, the following will focus on the assessment of the Protocol on Investment in addressing some of the specific existing challenges and gaps in the legal and regulatory framework for investment in Ethiopia.

Sustainable development and corporate social responsibility

The SDGs were stipulated in the United Nations 2030 Agenda for Sustainable Development with the aim of responding to challenges such as poverty, climate change, access to education, and other relevant concerns.[301] The advancement of sustainable development would result in good socio-economic progress and the enhancement of sustainable investment.[302] Despite this importance, the element of sustainable development is not visible in some investments.[303]

Sustainable development concepts are enshrined in international agreements on investment to essentially encourage the influx of investments.[304] SDGs, such as poverty reduction, decent work, promoting innovation, infrastructure, and others, can be incorporated into the provisions of investment.[305] Recent international investment agreements consider the importance of sustainability goals as much as economic development in encouraging investment.[306] In developing countries, especially in Africa, the significance of investing in a sustainable manner

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[301] Ivan Montiel and others 'Implementing the United Nations' Sustainable Development Goals in international business' (2021) 51 *Journal of International Business Studies* at 1000.
[302] International Institute for Sustainable Development 'Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers' 2012 at 1 https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf (accessed 28 August 2023).
[303] As above.
[304] Lise Johnson and others 'Aligning Investment Treaties with Sustainable Development Goals' (2019) 58 *Columbia Journal of Transnational Law* at 58.
[305] Katrin Kuhlmann & Akinyi Lisa Agutu 'The African Continental Free Trade Area: Toward A New Legal Model For Trade and Development' (2020) 51 *Georgetown Journal of International Law* at 37.
[306] Ayele (n 49) 8.

is more pronounced.[307] In Africa, investments that have sustainability as an element would result in socio-economic development.[308]

Hence, the incorporation of such concepts is very important for Africa to yield socio-economic development. The AfCFTA can serve as a cornerstone for the advancement of sustainable development.[309] It has incorporated the concept in the objectives section of the Agreement Establishing the AfCFTA mentioning important SDG goals such as gender equality and the like.[310]

Specifically, the Protocol on Investment is geared toward attaining sustainable development.[311] Several sustainable development concepts are included in the Protocol, striking a balance between the host state and the investor's rights and giving the discretion to the state to put in place measures to encourage sustainable investment.[312] The Preamble part of the Protocol highlights the relevance and inclusion of the United Nations SDGs, the importance and enhancement of investment for member countries sustainable development, and fostering sustainable development in Africa in the pursuit of attaining intra-African investment. Moreover, it has defined the term 'sustainable development' to relate it to social and economic development as well as environmental protection, in alignment with United Nations papers.[313] Since the Ethiopian Investment Proclamation and Regulation have not defined the term 'sustainable development' clearly, as stated in the previous chapter of this research, a clear definition of this term in the Protocol on Investment would guide Ethiopia's investment regime.

As stated in the previous chapter of this research, there are no detailed sustainability rules in the Ethiopian Investment Proclamation. Moreover, the BITs that Ethiopia has signed have limited consideration for sustainable development aspects such as the environment, labour, and

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[307] AfronomicsLaw 'Investment for Sustainable Development: Opportunities and Challenges for the African Continental Free Trade Area Investment Protocol' 31 October 2022 https://www.afronomicslaw.org/index.php/category/analysis/investment-sustainable-development-opportunities-and-challenges-african (accessed 27 August 2023).
[308] OECD Library 'Africa's Development Dynamics 2023: Investing in Sustainable Development' https://www.oecd-ilibrary.org/sites/3269532b-en/1/3/1/index.html?itemId=/content/publication/3269532b-en&_csp_=c10a3c5b7a3890c371391b0adddf1c1c&itemIGO=oecd&itemContentType=book (accessed 28 August 2023).
[309] Echandi (n 272) 98.
[310] Kuhlmann (n 305) 762.
[311] United Nations Economic Commission for Africa (n 287) 14.
[312] Ayele (n 49) 2.
[313] AfCFTA Protocol on Investment 2023, art 1.

human rights.[314] Some of the BITs have a minimum consideration, including very few provisions on sustainability aspects, while others give no consideration to such issues.[315] Unlike the Ethiopian Investment Proclamation and Regulation, which state the mere importance of sustainable development and social and environmental values in just two provisions with no sufficiently detailed rules, the Protocol on Investment has a specific chapter and provisions dedicated to such values. Such rules are stipulated in chapter 4 of the Protocol. Clear and detailed sustainable development provisions are provided in the Protocol by acknowledging states' rights to regulate policies and measures.[316]

Mandatory provisions such as the observance of labour and environmental standards, reducing greenhouse gas emissions, encouraging investments in climate change mitigation programs and low carbon technologies, encouraging public health investments, respecting local communities, and the like are stipulated precisely under chapter 4 of the Protocol. Furthermore, chapter 5 of the Protocol stipulates, among others, the adherence to national and international law, respecting human rights, and conducting business ethically, refraining from harming the environment, and respecting communities and indigenous peoples in the form of investors obligations. Thus, investors are mandated to properly observe such rules while conducting their investment operations.

In the same vein, different kinds of incentives are stated for state parties to utilise to increase the level of investment.[317] The Ethiopian Incentive Regulation, which focuses solely on income tax and customs duty exemptions regarding incentives as stated in the previous chapter. Unlike this regulation, the Protocol on Investment has introduced incentives for low-carbon investment, investment guarantees, subsidised infrastructure, facilitating favourable market schemes, and others in the form of incentives specifically for sustainable investments.[318] It paves the way for states to introduce such measures when granting incentives that can assist in attaining sustainable development in their states. When regulating incentives, it is highly important to regulate from a sustainability angle, as it has long-term benefits for the

[314] Yehualashet Tamiru 'A Critical Examination of the Symmetry of Ethiopia's Bilateral Investment Treaties' LLM Thesis, University of Pretoria, 2019, at 75 https://repository.up.ac.za/bitstream/handle/2263/73343/Tamiru_Critical_2019.pdf?sequence=1&isAllowed=y (accessed 28 August 2023).
[315] As above.
[316] Ayele (n 49) 7.
[317] AfCFTA Protocol on Investment 2023, art 8.
[318] AfCFTA Protocol on Investment 2023, art 8(1).

environment and other key aspects.[319] Therefore, it is important and useful that the Protocol on Investment has introduced the concept of incentives for sustainable investment and thus will fill the gap that exists in the investment laws of Ethiopia.

There are also mandatory stipulations on investment in CSR that investors should adhere to, such as encouraging gender equality, promoting domestic potential, promoting social, environmental, and economic advancement for the realisation of sustainable development, and the like.[320] Furthermore, there must be adherence to human rights, business ethics, and environmental protection.[321] It is stated that investors are expected to endeavour to partake in practices that are socially conscious.[322] This offers an opportunity for investors to adopt and implement customised CSR practices, which translates to the importance of voluntary CSR initiatives to realise sustainable development, as highlighted in the previous chapter. There are potential benefits of voluntary CSR to Ethiopia's investment landscape, in addition to the already existing mandatory CSR, as stipulated in chapter 3 of this research. Hence, it is quite imperative that the Protocol could assist in this regard.

The Protocol is underpinned by a strong foundation for sustainable investment principles.[323] Rather than simply acknowledging and reaffirming the importance of the SDGs under the Preamble, the Protocol has made specific rules that would help guide states in enforcing them with providing certainty. Ethiopian investment laws can benefit from such provisions of the Protocol on Investment. It is imperative for the prevalence of robust regulations that can ensure and support the sustainable development agenda regarding investment in Ethiopia.[324] Thus, as stated under chapter 3 of this research, it is necessary to have specific and detailed provisions dealing with sustainability to support the Ethiopian Investment Proclamation and meet the goal of sustainable development in Ethiopia. Hence, it is deducible that the Protocol on Investment would serve a gap filling role and shape the national investment landscape in this regard while assisting in the successful realisation of sustainable development. Although there is potential for investments to result in sustainable development, it is very important to highlight that a lack

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[319] United Nations Conference on Trade and Development (n 191) 21.
[320] AfCFTA Protocol on Investment 2023, art 38.
[321] AfCFTA Protocol on Investment 2023, art 33 & 34.
[322] AfCFTA Protocol on Investment 2023, art 38.
[323] Hagos (n 259) 7.
[324] Hagos (n 28) 136.

of appropriate implementation can have detrimental effects.[325] Thus, a proper way of implementing the rules is imperative.

Performance requirements

One mechanism for attaining sustainable development is the facilitation of investment through, for instance, the promotion of local content.[326] The Protocol on Investment has paved the way for states to implement measures, factoring in the most-favoured nation treatment[327] and national treatment[328], with the view of encouraging local content and technology transfer, among other elements.[329] Additionally, it has mandated states to encourage technology transfer by creating centres for this purpose, rendering training and assistance, facilitating the inclusion of technology transfer in the endeavours of investors, and the like.[330]

As highlighted under chapter 3 of this research, there is no incorporation of the requirements of local content and technology transfer in the Ethiopian Investment Proclamation, Regulation, and Incentive Regulation. Only procedural requirements, like the registration process for a technology transfer agreement, are stated.[331] Local content and technology transfer requirements are not also visible to foreign investors aspiring to engage in the sector of industrial parks.[332] Despite all the FDIs in the country, there is a minimal level of technology transfer.[333] This has a negative impact as it hinders Ethiopia's ability to compete on the global stage.[334] In contrast to this, the Protocol on Investment, as stated above, has stipulated detailed mandatory provisions instead of a procedural registration process, with an illustrative list, on how states can utilise technology transfer requirements by introducing certain measures.[335]

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[325] Hagos (n 259) 10.
[326] United Nations Conference on Trade and Development 'Promoting Investment in the Sustainable Development Goals' 2018 at 11 https://unctad.org/system/files/official-document/diaepcb2018d4_en.pdf (accessed 28 August 2023).
[327] AfCFTA Protocol on Investment 2023, art 14.
[328] AfCFTA Protocol on Investment 2023, art 12.
[329] AfCFTA Protocol on Investment 2023, art 28.
[330] AfCFTA Protocol on Investment 2023, art 30.
[331] Investment Proclamation and Regulation 2020, art 15.
[332] Dejene (n 241) 410.
[333] Dejene (n 241) 413.
[334] Dejene (n 241) 413.
[335] AfCFTA Protocol on Investment 2023, art 30.

Most importantly, the legal framework on incentives for investment in Ethiopia focuses attention on only sectors related to export, in contrast to obtaining foreign technologies that can realise sustainable development.[336] Conversely, the Protocol on Investment paves the way for state parties to utilise investment incentives for technology transfer.[337] As such performance requirements have significant policy objectives in enhancing a country's local economy and industries while creating employment opportunities, it can serve as a good instrument in achieving it.[338] As one of the major constraints in Ethiopia is the prevailing unemployment, it is quite important to utilise opportunities that can rectify this problem.[339] Hence, it can be inferred that the Protocol on Investment would open a room for the encouragement and promotion of local content and technology transfer with the aim of national development.

Small and medium-sized enterprises (SMEs)

Approximately 90% of businesses in Africa are classified as Small and Medium-Sized Enterprises (SMEs) recognised as the engine for the economic growth of the continent.[340] Nevertheless, SMEs face a lot of challenges, with lack of access to finance being the most prominent one, often leading to the cessation of their businesses.[341] In countries that are developing, this barrier is considered an important issue.[342] In the same manner, SMEs in Ethiopia hold a prominent role in the economy and are challenged with access to finance, as stated in the previous chapter.

The Protocol on Investment, in the Preamble section, has highlighted the importance of SMEs by stating the need to develop the investment activities of such enterprises. It will afford

[336] Dejene (n 241) 413.
[337] AfCFTA Protocol on Investment 2023, art 8(d).
[338] International Institute for Sustainable Development (n 302) 28.
[339] Alemayehu Geda 'The Challenge of Unemployment and Youth Unemployment amidst Fast Economic Growth in Ethiopia' (2022) *AERC Working Paper GSYE*-008 https://includeplatform.net/wp-content/uploads/2022/04/The-Challenge-of-Unemployment-and-Youth-Unemployment-amidst-Fast-Economic-Growth-in-Ethiopia-1.pdf (accessed 29 August 2023).
[340] London Stock Exchange Group 'The Challenges and Opportunities of SME Financing in Africa' 2018 at 5 https://www.lseg.com/content/dam/lseg/en_us/documents/media-centre/africa-sme-financing.pdf (accessed 29 August 2023).
[341] As above.
[342] Donald O. E. Amadasun & Ashley T. Mutezo 'Influence of access to finance on the competitive growth of SMEs in Lesotho' (2022) 11 *Journal of Innovation and Entrepreneurship* at 1.

prospects for entrepreneurship, which SMEs can take advantage of.[343] The access to finance challenge that SMEs are facing will be addressed by the Protocol, which in the long run will result in economic development.[344] This is specifically because SMEs can make use of the AfCFTA SME Financing Facility, which will serve as a facilitating and fostering role for the businesses of SMEs while enhancing their access to financial resources.[345] Hence, the AfCFTA SME Financing Facility can play a good role in assisting SMEs in accessing finance. It can be a good opportunity that can be utilised to tackle the challenge SMEs face regarding lack of finance.

In Ethiopia, as stated in the previous chapter, the law does not cater to the needs of SMEs as it does not pave the way for access to finance. SMEs contribute a major portion of Ethiopia's economy and are thus very important, as highlighted above. Yet, the fact that the investment law does not address their challenge is a huge gap. Hence, SMEs in Ethiopia can take this opportunity that the AfCFTA affords to address their access to finance challenge.

Corruption

Anti-corruption provisions can be incorporated into investment treaties as one way of imposing mandatory obligations on investors in their investment activities.[346] The Protocol on Investment states the obligation of states to enforce anti-corruption and anti-bribery to uphold the rule of law.[347] A specific provision is dedicated to regulating aspects of anti-corruption.[348] This article is a proposition for investors to abstain from giving improper financial gains or favourable advantages to a public official, in official duty, for the purpose of gaining favourable treatment or benefit.[349] It can be inferred that the main purpose of this provision is to counteract corrupt practices and create good governance within the sphere of public governance. In the

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343 Business Day 'Investment protocol holds the key to AfCFTA's success' 15 March 2023 https://www.businesslive.co.za/bd/opinion/2023-03-15-investment-protocol-holds-the-key-to-afcftas-success/ (accessed 29 August 2023).

344 As above.

345 African Union 'Powering trade through AfCFTA: a People-driven wholesome Development Agenda' 15 February 2023 https://au.int/en/pressreleases/20230215/powering-trade-through-afcfta-people-driven-wholesome-development-agenda (accessed 29 August 2023).

346 United Nations Economic Commission for Africa (n 287) 130.

347 AfCFTA Protocol on Investment 2023, art 31.

348 AfCFTA Protocol on Investment 2023, art 37.

349 AfCFTA Protocol on Investment 2023, art 37.

realm of encouraging investments, it has taken precedence to create a space for investors and investments to operate without the prevalence of corrupted practices and processes.

In the previous chapter, it was stated that corrupt practices are prevalent in Ethiopia. Specifically, it is very difficult to enforce business laws due to a lack of good governance and the prevalence of corruption, which have a negative effect on the regulatory framework for investment in Ethiopia.[350] This specific challenge is hindering the regulatory framework's ability to create a facilitated investment environment, as stated in chapter 3 of this research.

Given this critical challenge in Ethiopia, the fact that anti-corruption provisions are stipulated clearly in the Protocol on Investment would ensure good governance and investments devoid of corrupt practices. Stipulating an anti-corruption provision in an international investment agreement is a significant factor in facilitating FDI since it would appeal to foreign investors and show the State's commitment to creating transparency and good governance for the investment landscape in the country.[351] Therefore, since attracting FDI is a critical need at this moment for Ethiopia, as pointed out in the preceding chapter, the anti-corruption provision can assist the country in fulfilling this objective. This measure helps governments tackle corruption.[352]

Investment facilitation measures

State parties are mandated to facilitate investment in accordance with domestic regulatory frameworks that aid in promoting sustainable development.[353] Investment facilitation measures, even though they are apparent in domestic measures, are insufficient to address the bureaucracy, lack of transparent mechanisms, and lack of institutional cooperation.[354] Such measures are important in improving the investment landscape by ensuring a simplified administrative process, accountable public governance, transparent procedures, and laws

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[350] Assefa (n 169) 50.
[351] Yueming Yan 'The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications' (2022) 17 *Asian Journal of WTO & International Health Law and Policy* at 164.
[352] Yueming Yan 'Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance' (2020) 23 *Journal of International Economic Law* at 989.
[353] AfCFTA Protocol on Investment 2023, art 7.
[354] TRALAC 'How can the AfCFTA Investment Protocol advance the realisation of the AfCFTA objectives?' 17 May 2019 https://www.tralac.org/blog/article/14065-how-can-the-afcfta-investment-protocol-advance-the-realisation-of-the-afcfta-objectives.html (accessed 29 August 2023).

related to investment.[355] The inclusion of such a facilitation measure in the Protocol on Investment is critical to attaining a well-governed facilitation measure in the investment landscape of the continent.[356]

The Protocol has specifically stipulated and encouraged investment facilitation measures such as simplifying procedures, setting up systems to foster alignment among the institutions and regulatory bodies in the domestic space, and facilitating business entry processes.[357] As stated in the previous chapter, the current Ethiopian regulatory framework for investment is characterised as being bureaucratic whenever there is an issuance of a permit at the entry stage. Moreover, there is a lack of coordination among the federal and regional state organs responsible for regulating and supervising investment. This has created unpredictability in the investment regime in the country, not to mention the increasing loss of confidence among investors due to this problem. The incorporation of investment facilitation measures, therefore, would be beneficial to address the challenges stated above. More specifically, the inclusion of investment facilitation measures would guarantee a facilitated and simplified administrative procedure and business environment.

National Focal Points are required to be established as per the Protocol. As can be deduced from the elements of the provision, the main purpose of such focal points is to render assistance to investors.[358] Due to the mandatory requirement for states to offer pertinent information related to their policies, legal structures, and institutional structures that regulate investment, it can pave the way for transparent mechanisms to transpire.[359] Hence, it can be inferred that this focal point has a role in facilitating the investment environment by supporting investors and ensuring transparency. Thus, this could help in addressing the absent transparent procedures and facilitated environment challenges the regulatory framework for investment in Ethiopia currently faces.

Furthermore, the fact that the Protocol has stipulated that a Pan-African Trade and Investment Agency would be instituted is a good opportunity for tackling the challenge in the regulatory

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355 United Nations Economic Commission for Africa (n 287) 107.
356 TRALAC (n 354).
357 AfCFTA Protocol on Investment 2023, art 7.
358 AfCFTA Protocol on Investment 2023, art 9(1).
359 AfCFTA Protocol on Investment 2023, art 9(2).

framework for investment in Ethiopia.[360] This Agency is mandated with rendering technical support and assist in the facilitation and promotion of investment to state parties.[361] Hence, it can be a good avenue to improve the capacity constraints the investment regulatory institutions in Ethiopia face currently. These regulatory institutions can benefit from the technical support to be rendered.

4.4 Conclusion

In conclusion, this chapter has shown that some of the gaps and challenges that are apparent in the legal and regulatory framework for investment in Ethiopia can somehow be addressed by the Protocol on Investment. The Protocol on Investment grants the opportunity to address the gaps and challenges by keeping sustainable development into consideration. The issues of sustainable development, corruption, investment facilitation measures, SMEs, and performance requirements are the specific gaps and challenges found and examined that the Protocol on Investment would address. This chapter found that such aspects would be resolved by the Protocol. The Protocol on Investment can aid in shaping the national investment legal and regulatory framework by introducing facilitative measures.

With this examination into consideration, Ethiopia can benefit from the Protocol on Investment. Yet, for the benefit to materialise, national institutions and regulatory frameworks need to work hand-in-hand with the AfCFTA for a successful and smooth implementation of the goals and objectives of both the Ethiopian investment laws and the Protocol on Investment. As both the Protocol on Investment and the national investment laws of Ethiopia are critical to attaining sustainable development, creating employment opportunities, and enhancing FDI, the strength of both would aid in long-term benefits. Even if the Protocol on Investment addresses some of the existing challenges and gaps that exist in the investment regime in Ethiopia, there are still a few of them that need to be reformed. There are other gaps and challenges that are not addressed by the Protocol and hence need to be addressed by the current administration in Ethiopia. These are those stipulated under chapter 3, which are political violence risk, especially for domestic investors, minimum capital requirements, private equity, and macroeconomic instability.

[360] AfCFTA Protocol on Investment 2023, art 42(1).
[361] AfCFTA Protocol on Investment 2023, arts 42(3) & (4).

If such challenges and gaps keep prevailing, the investment environment in the country will be greatly affected. Building on this, the next chapter will conclude the main findings of this research and provide recommendations for the gaps and challenges apparent in the legal and regulatory framework for investment in Ethiopia.

CHAPTER FIVE:
CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

One of the drivers that countries, especially developing countries, utilise for economic development is investment. Hence, for a developing country like Ethiopia, investment is a useful tool for economic development. The rate of investment and private sector engagement in Ethiopia was very low before the 1990s. This was mainly due to the socialist regime, and as such, private economic activities were not promoted. Since the 1990s, due to the shift from the command economy to the market economy, there has been a gradual increase in investment and private sector engagement. Yet, there were various sectors, such as the telecommunications and banking sectors, that were not liberalised.

In 2018, the current government came to power and introduced a reform program known as the 'Homegrown Economic Reform Agenda: A Pathway to Prosperity' which aims at increasing private sector activities for economic reform. The implementation of this reform agenda began in 2019. Currently, some sectors that were state-owned are being liberalised. Additionally, various laws, including the Investment Proclamation and Regulation, were revised, and a new Incentive Regulation was introduced. Despite the reform, Ethiopia has not been able to achieve an increasing appeal to investment due to various challenges and gaps. There are challenges and gaps in the legal and regulatory framework for investment in Ethiopia that need to be reformed to result in a good investment regime and climate. There is a prevalence of obstacles impeding the effective enforcement of investment regulations and a higher cost of starting a business.

To assess the gaps and challenges, this research primarily focused on the newly revised Ethiopian Investment Proclamation 1180/2020, Ethiopian Investment Regulation 474/2020, and Investment Incentive Regulation No. 517/2022 from the legal framework for investment in Ethiopia. From the regulatory bodies, it mainly focused on the Ethiopian Investment Commission, Ethiopian Civil Aviation Authority, Ethiopian Petroleum and Energy Authority, Ethiopian Communications Authority, Ethiopian Investment Board, Federal Government and Regional State Administrations Investment Council, and the Ministry of Finance.

This research set out to achieve its overarching objective, which is to explore and examine the gaps and challenges in the legal and regulatory framework of investment. It aimed to answer to what extent the current legal and regulatory framework for investment in Ethiopia promotes and protects investments. In order to attain this, this research therefore sought to: a) assess the legal and regulatory framework put in place for investment in Ethiopia; b) examine the existing challenges and gaps in the legal and regulatory framework for investment in Ethiopia; and c) assess if the African Continental Free Trade Area (AfCFTA) Protocol on Investment addresses some of the existing challenges and gaps.

5.2 Findings

Considering the brief overview of this research made in the above subsection, the following findings were made in this research.

Chapter two, the first substantive chapter of this research, focused on exploring the current legal and regulatory framework put in place for investment in Ethiopia. It found that national investment laws, in general, have relevance in regulating investment since they are good instruments for protecting and promoting investment. Moreover, they guarantee good governance and transparency. This chapter also gave a brief historical overview of how the economy has been opened to the private sector and the gradual increase in investment in Ethiopia throughout the years. Most importantly, the chapter mainly focused on the recently revised Ethiopian Investment Proclamation, Regulation, and Incentive Regulation. It found that these laws have incorporated important elements such as a negative list approach for sectors opened for foreign investors, resolving disputes through court mechanisms, allowing foreign investors to jointly invest with the government in some sectors, and making income tax and custom duty exemptions to attract investors. Finally, it found that the laws have empowered different institutions to regulate and supervise investment for the proper enforcement and supervision of the investment laws.

Chapter three found that despite the revision of the legal and regulatory framework for investment in Ethiopia, there are extant gaps and challenges in the current investment regime. There is an absence of a guarantee for political violence risk for investors, a prevalence of corruption ingrained in courts, poor cooperation between the federal government and the regional state governments, an absence of an institutional framework to implement the negative listing approach, a prevalence of bureaucratic processes, a lack of transparency, and insufficient provisions to attain sustainable development. Additionally, it revealed that there is an absence of due consideration in the law on the lack of access to finance challenge SMEs face, a lack of framework for registering and licensing private equity funds in the country, repeated modification of the surrender rate by the NBE, which creates uncertainty and unpredictability, a lack of a mechanism for investors who want to make an investment with a capital less than the USD 200,000 minimum capital requirement, a lack of detailed mandatory stipulations regarding domestic content and technology transfer, and a lack of a wider scope in incentives as it solely focuses on income tax and custom duty exemptions. This chapter concluded that even though several reforms have been put in place in the country, there are various challenges and gaps in the legal and regulatory framework for investment in Ethiopia that need to be tackled. Without addressing such challenges and gaps, the goals of the reform program that the country has embarked upon would not be met.

Subsequent to the analysis of the gaps and challenges apparent in the legal and regulatory framework for investment, chapter four of this research found that the AfCFTA Protocol on Investment addresses some of the existing gaps and challenges. Generally, the chapter stated that the Protocol on Investment would aid in increased levels of intra-African investment and FDI. Since the political instability in Ethiopia has decreased the level of FDI in the country, the Protocol can serve as a good instrument in meeting the current goal the country has set to enhance the level of FDI. The presence of detailed sustainable development provisions in the Protocol, incentives for sustainable initiatives and technology transfer rather than focusing only on income tax and custom duty exemptions, and mandatory requirements on states to encourage performance requirements like technology transfer serve as a good vehicle for addressing the gaps and challenges. Moreover, it found that the fact that there is an anti-corruption provision and an investment facilitation measures provision would aid in combating corrupt practices that are apparent in the Ethiopian system and simplify the bureaucratic process. Nonetheless, there are still some challenges and gaps that must be addressed to create a better investment regime in Ethiopia. Practical solutions in the form of recommendations for such challenges and gaps are proposed subsequently.

5.3 Recommendations

In light of the above findings, this section will recommend practical solutions for the gaps and challenges in the legal and regulatory framework for investment in Ethiopia, which will help the Ethiopian government tackle the gaps to gain better investor attraction and reform the investment environment.

5.3.1 Recommendation One: Reform the institutions responsible for regulating and supervising the investment laws

As found in this research, there is a challenge in the institutions responsible for regulating and supervising the investment laws. Therefore, there needs to be a reform in the institutions, ranging from capacity development to removing bureaucratic processes, enhancing knowledge on the negative list approach, and ensuring transparency. Specifically, since this study found that the EIC has capacity challenges, it is important to devise a strategy that can address this. The EIC is granted a variety of responsibilities under the Investment Proclamation. To successfully manage and oversee all these responsibilities, it is important to focus on building the capacity of the Commission.

Hence, to address the above persistent challenges that are bottlenecks to the attainment of a good investment climate, the EIC needs to take action. Firstly, it is recommended to strengthen the digital platforms that can increase the efficiency of the procedures and remove the bureaucratic processes. Leveraging modern technologies by making registration and permits go through easily accessible resources can reduce the bureaucratic barriers in the investment ecosystem. Moreover, it is helpful to use this digital platform to implement policy and legal updates related to investment to ensure a transparent process. This will bring about certainty and predictability in the investment regime. Secondly, there needs to be consistent public engagement and consultation, mainly with the private sector. This will enable to address the challenges they face, reform the process in a timely manner, and gain suggestions and insights. Thirdly, it is important to invest more in skill development to cultivate a professional and accountable workforce. In order to enhance the knowledge of the negative list approach and other areas of investment administration, there needs to be more investment in skills and knowledge for professionals. Legal professionals and other experts can play a pivotal role in elevating awareness and enhancing technical comprehension of the negative list approach. This will ensure more effective enforcement of investment laws. It can also tackle the challenge that exists regarding the implementation of the negative list approach to sectors for FDI enshrined in the investment laws. It will certainly help in properly implementing and executing the laws regarding investment.

Another recommendation for institutional reform is for the Investment Council to be operational in a timely manner to address the lack of effective coordination between the federal and regional states, mainly on land disputes. Any grievances regarding the administration of investment between the federal and regional states would be able to be resolved or reduced if the Investment Council become operational as soon as possible. Given the current lack of efficient coordination, the rapid establishment of the Investment Council is critical to resolving such challenges. It will cultivate a smooth administration and regulation of investment that can create a good investment climate. It is also important to note that since this study found that one cause of the absence of cooperation is capacity constraints faced by regional governments, it will be useful if the federal government allocates resources and a skilled workforce to the regional governments to enhance their capacity. Regional states need to be assisted in this regard in order to properly execute their responsibilities with full capacity.

5.3.2 Recommendation Two: Proposed amendments to the investment laws

Despite the fact that the recently enacted Investment Proclamation, Regulation, and Incentive Regulation have brought about significant reform to increase private sector participation, this research revealed that there are still gaps and challenges. Therefore, the following is recommended for the challenges and gaps.

a) The USD 200,000 minimum capital requirement should be amended in such a way that it enables investors who aspire to make an investment with an amount that is less than such an amount. As found in this research, investors who aspire to undertake an investment with less than the stipulated minimum capital requirement are affected. The minimum capital requirement must have been framed in a way that stipulates specific sectors with specific capital requirements rather than having a general capital requirement for all sectors.

b) As private equity is a growing investment in Ethiopia, as this research revealed, there needs to be a mechanism set in the Investment Proclamation or Regulation that provides for the licensing and registration of such an investment. Due to the lack of such an incorporation, various private equity investments are incorporated elsewhere. The law should have made an express recognition and put in place a mechanism for private equity funds or venture capital. As such, investment is vital for a country's economy and not only for the companies invested, as stated in this research. there should have been a proper inclusion in the legal framework for investment in Ethiopia.

C) The political situation in Ethiopia has been challenging in recent times, as there has been recurring unrest and political violence. The stability of the political climate was compromised due to such unrest and violence. Hence, as found in this research, several investors have been affected by this. The level of FDI has decreased, which has resulted in subsequent decrease in the GDP of the country. The Investment Proclamation does not provide a political risk guarantee scheme for domestic investors. Domestic investors, as highlighted in this research, would be greatly affected by this, as they have no other mechanism to get a guarantee for political risk due to the absence of such a mechanism in the investment laws and since there are no BITs. Hence, the Investment Proclamation should consider the country's political climate and incorporate such provisions to provide a proper guarantee for political risk. This research found that the informal mechanism to provide guarantee schemes by insurance companies is resulting in the government not providing the compensation. The incorporation of a political risk guarantee scheme into the legal and regulatory framework for investment is thus very important. Political violence is a risk for investors, especially domestic investors in this case. Insurance companies must also be able to provide guarantees for the long-term in order to mitigate this problem.

d) The Incentive Regulation should incorporate other forms of incentives instead of focusing only on income tax and customs duty exemptions. It is important to make the scope of the Incentive Regulation sufficiently broad. Since incentives are vital instruments that can facilitate and encourage investment in a country by granting long-lasting benefits to investors, as stated in this research, the broad scope would entail making this a reality. Additionally, this research revealed that the Incentive Regulation, which grants two years of income tax exemption for investors exporting at least 60% of their goods and services, does not make the export sector sustainable, as investors might stop exporting after this time. Having this challenge in mind, the Incentive Regulation must incorporate other ways to ensure the sustainability of exports by including other forms of incentives, such as minimum domestic inputs.

5.3.3 Recommendation Three: To reform the macroeconomic environment

This research observed that the severe inflation, lack of foreign currency, and instability in the macroeconomic environment have entailed a lack of confidence among investors. It is important for the Government of Ethiopia to enable exports to be conducted by investors in Ethiopia to increase foreign currency earnings. As stated in the recommendation above, the Incentive Regulation must have incorporated a way to sustain the export of goods and services by investors. Hence, if this is incorporated into the law, there will be good export performance, which would also enable the country to gain foreign currency earnings. This can be a valuable approach to mitigating the issue of foreign currency scarcity in the country.

Moreover, the NBE should reform its approach regarding the surrender rate. The repeated modifications it makes to the surrender rate should be avoided. As found in this research, the modification is creating unpredictability, uncertainty, and a lack of confidence on the part of investors in Ethiopia. Thus, it is recommended to avert this negative impact by considering not modifying it frequently.

5.3.4 Recommendation Four: To reform the judicial system

The Investment Proclamation has provided the option of entertaining a dispute through judicial mechanisms. Yet, this research observed that there is a prevalence of a lack of competent and independent judges in the courts in Ethiopia. It has been found that the business laws in the country lack proper enforcement due to this problem. Lack of proper enforcement of business laws would make it challenging to create a good investment climate in the country. Hence, this challenge calls for significant reform, and the following are recommendations for the reform of the court system.

There must be a prevalence of strengthening the ethical oversight of judicial conduct in the court system. In order to ensure accountability, there must be a robust mechanism to oversee and manage whether judges are properly conducting their ethical duties. The Judicial Administration Council (JAC) must ensure and strengthen its measures to combat corruption and preserve judicial integrity in the system. This Council must play a prominent role in upholding and safeguarding judicial integrity. The presence of judicial integrity would result in enhancing the confidence of investors, which would improve the investment climate of the country. Moreover, to enhance the confidence of investors, it is important to strengthen a robust, clear, and transparent code of ethics that can be implemented properly. There must be regular judicial integrity checks to enhance public trust in the rule of law. Since the lack of such judicial integrity is affecting the proper enforcement of business laws, it is highly important to consider strengthening the system.

In order to restore trust and confidence in the rule of law, there needs to be a mechanism to create transparency and accountability. Efficient case handling systems must be prevalent so that bureaucratic delays are minimised and are not susceptible to corrupt practices. A digital case recoding mechanism to modernise the court system can serve as a good instrument for reducing the prevailing bureaucracy that impedes reform efforts.

Finally, strengthening the competence of the judges is another important recommendation. Since this research revealed that there is a lack of proper enforcement of business laws, there needs to be capacity building to enhance the skills of judges in this area. Regular comprehensive trainings and workshops must be put in place in order to attain competence. These trainings can range from technical legal-related trainings to ethical conduct. Implementing this kind of regular training would enhance the level of competence of judges.

5.4 Conclusion

Ethiopia is undergoing significant reforms, primarily to enhance private sector participation and create an enabling investment climate. Due to the country’s rich potential in natural resources and others, investment can be used to tap into the benefits of such resources in order to grow economically. Specifically, it will help the country’s goal of striving to attain middle-income status by 2025. The huge prospect the country offers for investors and the private sector is an important element that needs to be considered for the revision of the laws. An appropriate legal and regulatory framework is critical to attaining such a goal. Without the presence of an enabling and appropriate legal and regulatory framework for investment, it is difficult to bear the fruits of investment. This is why there needs to be a proper way to tackle the challenges and gaps. Despite the reforms the investment laws have made as compared to the previous laws, there appear to be different bottlenecks in the legal and regulatory framework. Without a good legal and regulatory framework and proper implementation, it will be very difficult to attain a good rate of investment and private sector engagement. Hence, if the practical solutions this research has proposed are properly implemented, the goals of the reform and reaping the fruits of investment will be attained.

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