

# THE NEW ETHIOPIAN INVESTMENT LEGAL REGIME: CHANGES AND CONTEXT

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## ***Abstract***

*Ethiopia has been undergoing tremendous policy and legislative reforms since 2018. The reform generally pursued an ‘open-door’ economic policy replacing previous laws and government decisions that were considered restrictive. Among the key areas that were the subject of the reform was the investment regulatory regime. This article examines the changes introduced in the investment legal regime in the context of historical investment regulation in Ethiopia. It shows that, while the public announcements of the reforms, including those relating to privatization of state-owned enterprises indicated a significant shift in economic policy, the new investment laws adopted a more cautious approach. The new investment laws saw the re-introduction of previously tested rules on investment admission, and re-adjustments of administrative rules in investment administration. While some progressive steps were taken to liberalize previously protected sectors, fundamental and comprehensive changes to investment regulation were not made. More revisions are needed to relax sectoral restrictions, waive minimum capital requirements, ease bureaucratic processes and improve regulatory coordination.*

**Key-terms:** Investment admission, investment administration, investment regulation, liberalization

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## Introduction

Ethiopia introduced a new investment regulatory framework through the enactment of the Investment Proclamation No. 1180/2021 (hereinafter “Investment Proclamation”), Investment Regulation No. 474/2021 (hereinafter “Investment Regulation”), and the Investment Incentives Regulation No. 517/2022 (hereinafter “Incentive Regulation”) (together “new laws”). The new laws repealed Investment Proclamation No. 769/2012 and Investment Regulation No. 270/2012 (hereinafter “previous laws”)<sup>1</sup> which were in effect for eight years. The changes in legislation came as part of a broader economic reform program of a new government that came to power in 2018. One of the key pillars of the overall reform was to enhance the role of the private sector in the national economy primarily through easing and liberalizing the business and investment regulator regime.<sup>2</sup> To that end, an investment reform project was launched in 2019 aiming to align the investment regulatory framework with the changes in the economic policy of the new administration.<sup>3</sup> This article provides a comparative examination of the changes introduced in the new investment regime. It investigates the

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<sup>1</sup> Investment Proclamation No. 769/2012 and Investment Regulation No. 280/2012.

<sup>2</sup> Ethiopia Office of the Prime Minister: *Homegrown Economic Reform Agenda: A Pathway to Prosperity*, (2019). <https://www.pmo.gov.et/initiatives/>

<sup>3</sup> In a speech at the 2019 World Economic Forum in Davos, Prime Minister Abiy Ahmed outlined his government's key economic and political reform direction. He noted that it is in the country's economic interest to increasingly open its borders to international capital and called upon investors and entrepreneurs to invest in the economy. Outlining the key economic reform plans of the government, he stated “unleashing the potential of the private sector” as a key goal to be achieved through four priority areas of reform:

- i. Supporting small and medium enterprises to grow and flourish as the engine of the economy.
- ii. Ease and mainstream regulations to start a business and provide a better policy environment, noting the revision of the investment, commercial and other regulations as examples.
- iii. Making the private sector an integral part of the economy, through reforming the State-Owned Enterprises and opening up the economy to international investors in telecom, logistics, aviation, energy, railways, and industrial parks.
- iv. Fostering Public-Private Partnerships as a way to build balanced long-term partnerships aimed at triggering fast economic growth and profit. Full speech available at <https://www.youtube.com/watch?v=x2l7KscqRro>

policy rationale underpinning the changes drawing on available official government pronouncements and the author's involvement in the reform process. Bearing in mind parallel reform initiatives and legislative changes across several sectors, the article examines the key features of the new investment regime in the context of broader policy changes. Section one starts with the contextual background of investment regulation in Ethiopia. Section two outlines the key changes introduced by the new laws.

## **1. Investment Regulation in Context**

A country's legal and regulatory framework is one of the critical factors that affect investors' decisions to invest.<sup>4</sup> Countries adopt various domestic policies and laws to create an enabling environment that is best suited for attracting investment. Ordinarily, an investment regulatory regime is informed by the normative contents of the investment and economic policy of the government. Legal and judicial frameworks implement the policies and offer the predictability, consistency, and certainty needed to boost private investment and protect the rights and properties of investors.<sup>5</sup> In addition, such frameworks establish the parameters under which foreign investment is permitted and domestic investment is protected. Beyond the adoption of robust national legislation, international investment laws embodied in regional and bilateral investment treaties are also used to offer regulatory safeguards to investors.

Ethiopia's experiment with investment regulation dates to the early 1950s.<sup>6</sup> For the seven decades that followed, the investment laws reflected the

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<sup>4</sup> The World Bank Group, Global Competitiveness Report 2017/2018, *Foreign Perspectives and Policy Implications* (2018) p.23. The Report identified that 86% of the foreign investors included in the data stated that legal and regulatory frameworks were critical in their decisions to invest.

<sup>5</sup> The World Bank Group, *Investment Law Reform: A Handbook for Development Practitioners* (2010).

<sup>6</sup> Official Notice No. 10 (1950) of the Imperial Government, *Statement of Policy for the Encouragement of Foreign Capital Investment in Ethiopia*.

economic and ideological orientation of the government of the day; From near total openness in 1950/60s to total closure in the 1970s /1980s and a cautious liberalization since 1991.<sup>7</sup> A series of federal laws have been adopted between 1995-2018, generally aiming to spur domestic and foreign investment.<sup>8</sup> In 2012, there was a slight pivot in policy brought by the adoption of a “developmental state” economic model that prioritized industrialization and greater state intervention in the economy.<sup>9</sup> Consequently, a special regulatory regime for the development and expansion of industrial parks was instituted targeting the manufacturing industry and the existing investment laws were reformed.<sup>10</sup> Complementing national efforts, regional and multilateral investment agreements were increasingly adopted, aiming to boost foreign investments in the manufacturing sector.<sup>11</sup>

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<sup>7</sup> During the Transitional Period (1991-1995), the Investment Proclamation No. 15/1992 was one of the earliest laws promulgated. Following the introduction of a new constitution in 1995, Investment Proclamation No. 37/1996 and Investment Regulation No. 07/1996 were enacted. These were succeeded by two waves of investment legislations, before the enactment of the current investment laws: Investment Proclamation No. 280/2002 and Investment Regulation No. 84/2003 and later by Investment Proclamation 769/2012 and Investment Regulation No. 270/2012.

<sup>8</sup> Won Kidane, *The Legal Framework for the Protection of Foreign Direct Investment in Ethiopia*, Chapter 26, in THE OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru, et al, ed. OUP, 2019). At 742-762.

<sup>9</sup> J. Hauge and A. Chang, *The Concept of a ‘Developmental State’ in Ethiopia*, in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019). at 824-839.

<sup>10</sup> For more on Industrial Parks, see Industrial Parks Proclamation No. 886/2015; Industrial Parks Regulation No.417/2017; and, Industrial Parks Development Corporation Establishment Regulation No. 326/2014.

<sup>11</sup> This was primarily demonstrated through the execution and ratification of Bilateral Investment Treaties. Currently, there are 35 Bilateral Investment Treaties and 5 other treaties with Investment provisions signed by Ethiopia. The country is also a party to 10 multilateral investment-related instruments. See the full list on United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub - Ethiopia. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>

## **2. New Investment Laws: Reform and Rationale**

Ethiopia does not have a separate investment policy. Instead, investment is integrated into the different national economic and sectoral policies.<sup>12</sup> At the outset, the 2019 investment reform process had the dual objectives of achieving policy and practical reforms. At the policy level, there was a need to align the investment regime with the local economic reform process. Key among the reform programs was the decision to liberalize the telecom sector, partially privatize key state-owned enterprises in the rail, energy, and aviation sectors and improve the investment climate.<sup>13</sup> Additionally, the investment reform was driven by the need to align the investment laws with the government's renewed efforts to push for regional and global economic integration through membership in the African Continental Free Trade Area (ACFTA)<sup>14</sup>, the World Trade Organization (WTO)<sup>15</sup>, and improve Ethiopia's ranking on the global Ease of Doing Business platform.<sup>16</sup> As part of the Ease of Doing Business Initiative, legislative and administrative reforms across priority sectors were undertaken, ushering in several new pieces of legislation, including the new Investment Laws.<sup>17</sup> Whilst piecemeal amendments have

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<sup>12</sup> As part of the investment reform program, the reform team prepared an investment "White Paper" as the guiding policy document for the reform proposals. Currently, the key national policy instrument is the 10-Years Development Plan (2021-2030) available at <http://www.pdc.gov.et/#/tenyearplansection>. Other sector-specific policies include the 2017 Public-Private Partnership Policy (available at <https://www.mofed.gov.et/programmes-projects/ppp/>)

<sup>13</sup> Ethiopian Office of the Prime Minister, *Improving Ease of Doing Business - Medium Term Reform Road*, July 23, 2019. Available at [https://pmo.gov.et/media/documents/Improving\\_Ease\\_of\\_Doing\\_Business\\_jul23.pdf](https://pmo.gov.et/media/documents/Improving_Ease_of_Doing_Business_jul23.pdf)

<sup>14</sup> Agreement Establishing the African Continental Free Trade Area Ratification Proclamation No. 1124/2019

<sup>15</sup> Ethiopia Resumes WTO Accession Negotiations After Eight-Year Pause [https://www.wto.org/english/news\\_e/news20\\_e/acc\\_eth\\_31jan20\\_e.htm](https://www.wto.org/english/news_e/news20_e/acc_eth_31jan20_e.htm)

<sup>16</sup> Ethiopian Office of the Prime Minister, *Improving Ease of Doing Business - Medium Term Reform Road* (2019). The vision of this initiative was to make Ethiopia in the Top 100 ranking for Ease of Doing Business. Available at [https://pmo.gov.et/media/documents/Improving\\_Ease\\_of\\_Doing\\_Business\\_jul23.pdf](https://pmo.gov.et/media/documents/Improving_Ease_of_Doing_Business_jul23.pdf)

<sup>17</sup> *Id.* The Doing Business Initiative identified priority areas for reform, which included starting a Business, Getting Credit, Paying Taxes, Trading Across Borders, Dealing with Construction Permits,

been made to the previous investment laws over the years,<sup>18</sup> a comprehensive review of the investment regulatory regime was required to address grey areas in the law, incorporate new policy objectives, and modernize the regulatory regime in line with international best practices. This section will examine the various sections of the investment laws and the changes introduced.

## **2.1. Investment Objectives**

Since the investment legislation of 1992 there have not been major changes in Ethiopia's investment goals as stated in the enabling laws. Articulated both in the preamble and other clauses, the laws generally provided as the main policy objectives the promotion, facilitation and protection of investments.<sup>19</sup> Through effective implementation of such broad objectives, the laws further aimed to attain economic growth, job creation, technology transfer, and development of the domestic market. Beginning in 2012 and consistent with the “developmental state” economic policy of the government at the time, the policy moved towards favoring investments in strategic sectors of agriculture and industrialization.<sup>20</sup> Special attention was given to export-oriented

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Registering Property, Getting Electricity, Protecting Minority Investors, Resolving Insolvency, Enforcing Contracts, and other Cross Cutting Reforms.

<sup>18</sup> Investment Proclamation No. 769/2012 was replaced by Investment Proclamation No. 849/2014, while Investment Regulation No. 270/2012 was replaced by Investment Regulation No.312/2014.

<sup>19</sup> The Encouragement, Expansion, and Coordination of Investment Proclamation No. 15/1992, Investment Proclamation No. 37/1996, art. 4; Investment Proclamation No. 280/2002, art. 4; Investment Proclamation No. 769/2012, art. 5.

<sup>20</sup> Mulu Gebreyesus, *The Private Sector in Ethiopia's Transformation*, in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019). at 688-703. In 2002, Ethiopia's government launched a comprehensive industrial development strategy that recognized the role of the private sector in the economy. It designed the role of the government as supporting those private players in selected manufacturing sectors such as textile and apparel, meat, leather, agro-processing, and Small and Medium Enterprises (SMEs). The policies were articulated in the Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005-2010); Ethiopia National Industry Policy (2002); the Growth and Transformation Plan (GTP-I) (2010/11- 2014/15); and, the Second Growth and Transformation Plan (GTP II) (2015/16- 2019/20).

manufacturing sectors and private investments in commercial agriculture.<sup>21</sup> Such policy dispensation was also manifested under the previous laws, which principally emphasized the objective to attract investments in agriculture and manufacturing sectors.<sup>22</sup>

Investment Proclamation No. 769/2012, Article 5 provided the investment objectives as follows:

1. Accelerate the country's economic development;
2. Exploit and develop immense natural resources of the country;
3. Develop the domestic market through the growth of production, productivity, and services;
4. Increase foreign exchange earnings by encouraging expansion in volume, variety, and quality of the country's export products and services as well as save foreign exchange through the production of import-substituting products locally;
5. Encourage balanced development and integrated economic activity among the regions and strengthen the inter-sectoral linkages of the economy;
6. Enhance the role of the private sector in the acceleration of the country's economic development;
7. Enable foreign investment to play its role in the country's economic development;
8. Create ample employment opportunities for Ethiopians and advance the transfer of technology required for the development of the country.

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<sup>21</sup> *Id.*, at 690.

<sup>22</sup> J. Hauge and A. Chang, *supra* note 9, at 832. Alongside the investment laws, other policy measures were taken to spur industrialization including: the massive expansion and investment in industrial parks, sectoral targeting of industrial and investment plans, state-led credit allocation to prioritized industries, export promotions measures, import substitution in certain industries, and infrastructure investments.

Similarly, the new Investment Proclamation retained much of the objectives in Proclamation No. 769/2012, signaling policy consistency with the previous investment laws. However, minor amendments were made to accommodate changes in national economic policy. The new additions and amendments include:

1. enhance the *competitiveness of the national economy* by promoting investments *in productive and enabling sectors*;
2. create *more and better* employment opportunities for Ethiopians and advance the transfer of knowledge, skills, and technology required for the development of the country;
3. create an integrated economy by strengthening inter-sectoral and foreign-domestic investment linkages;
4. Encourage socially and environmentally responsible investments.<sup>23</sup> (*Emphasis added*).

The emphasis to develop the domestic market through the growth of production, productivity and services was redrafted to “enhance the competitiveness of the national economy by promoting investment in productive and enabling sectors.”<sup>24</sup> The two added components focus on “competitiveness of the economy” and “promoting investments in productive and enabling sectors.” The Proclamation does not define “competitiveness” and “productive and enabling sectors”. However, other policy documents reveal an underlying policy recognizing the service sector as a key growth driver and enabler of the economy, besides the manufacturing sector.<sup>25</sup> This in turn is intended to develop competitive local enterprises able to supply

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<sup>23</sup> Investment Proclamation No. 1180/2020, art. 5.

<sup>24</sup> *Id.*, art. 5(1).

<sup>25</sup> *Ethiopia 2030: The Pathway to Prosperity – 10-Year Perspective Development Plan (2021-2030)*. This document elaborates on the policy focus areas for the government. Productive sectors include agriculture, manufacturing, and mining; service sectors (referring to tourism), and Enabling Sectors to include energy, transport, sustainable finance, innovation and technology, urban development and irrigation, and human capital development include agriculture.



goods in international markets and ensure quality service delivery in critical social services such as education and health. Additionally, the inclusion of “foreign-domestic investment linkages” recognizes the need to promote backward-forward investment linkages between foreign manufacturers and domestic industries, which was identified as one of the key reform areas.<sup>26</sup> Further, social and environmental standards were added as separate objectives to emphasize that investments must conform to these standards for sustainable development.<sup>27</sup> In sum, the substance of the adjustment made in the New Investment Laws does not signify a fundamental shift in policy. While the overall spirit of the policy and law is geared toward liberalization and increased participation of the private sector, it did not result in a significant amendment of the investment objectives.

## **2.2. Investment Admission: Background**

Under international investment law, it is a generally accepted norm that regulating the admission, establishment, and administration of investments is within the sovereign mandate of host countries.<sup>28</sup> A key aspect of such regulatory function is determining the entry and establishment rights of foreign investors through national legislation. Controls on the entry of foreign investors are often rationalized on account of preserving national economic goals, nationality security, public health and safety, public morals, and other motivations such as protecting local businesses.<sup>29</sup>

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<sup>26</sup> Office of the Prime Minister, *supra* note 2, at 13.

<sup>27</sup> United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Framework for Sustainable Development* (2015). This is in line with the “New Generation” investment policies that have emerged globally, emphasizing sustainable development issues, such as environmental, social, governance, and poverty alleviation, in investment policymaking. These trends place social and environmental goals on the same footing as economic growth.

<sup>28</sup> M. SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3<sup>rd</sup> Ed., 2010), at 94.

<sup>29</sup> *Id.*

For the past thirty years, the trend has been to gradually remove entry restrictions and adopt an open admission policy for investment.<sup>30</sup> Save for those sectors exclusively reserved for nationals or the government, the overall policy direction in developing countries has been to increasingly admit foreign investors.<sup>31</sup> To this end, countries generally follow either one of the two investment admission approaches to regulating foreign participation, i.e., a positive-list approach or a negative-list approach. A negative-list approach contains a limited number of investment areas that are either fully prohibited for foreigners or conditionally restricted allowing only minority foreign ownership. Foreign investors will be admitted to sectors that are not included in the “negative-list”. This approach is generally viewed as more open and practiced in more countries around the world. In contrast, a positive list approach provides an exhaustive list of investment areas that are permitted for foreign investment, prohibiting all other areas that are not in the “positive-list”. This is considered a more restrictive investment regime and a minority number of countries adopt this approach.<sup>32</sup>

Ethiopia’s investment legislation to date has experimented with both approaches. For the two decades between 1991 and 2012, the regulatory framework followed a negative list approach,<sup>33</sup> with varying degrees of openness for foreign investment. The negative-list provided sub-categories of investment areas that are generally reserved for the government, joint

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<sup>30</sup> World Bank Group, *Investment Law Reform: A Handbook for Development Practitioners* (2010) at 26.

<sup>31</sup> UNCATD, *supra* note 27 at 16. Further, the “New Generation” of investment policies seeks to maintain a balance between a favorable investment climate through regulation and openness: a dichotomy of measures that further liberalize investment regimes and promote foreign investment on the one hand, and regulate investment in pursuit of public policy objectives on the other. This approach recognizes that liberalization, if it is to generate sustainable development outcomes, should be accompanied by the establishment of proper regulatory frameworks.

<sup>32</sup> *Id.*, at 28.

<sup>33</sup> The Encouragement, Expansion, and Coordination of Investment Proclamation No. 15/1992; Investment Proclamation No. 37/1996; Investment Regulation No. 7/1996; Investment Proclamation No. 280/2002; and Investment Regulation No. 84/2003.

investment with the government, Ethiopian nationals, domestic investors, and joint investment with domestic investors. All investment areas that are not included in any of the negative-lists were open for foreign investors.<sup>34</sup>

The negative-list approach was changed in 2012 with the enactment of the previous laws. For the first time, these laws introduced a positive-list approach, combined with a separate list having a negative list of investment areas reserved for domestic investors.<sup>35</sup> Accordingly, the areas that are restricted to foreign investment and the areas that are permitted for foreign investors were exhaustively enumerated in the law. All other sectors that were not on either the positive or negative list were considered closed for foreign investors.

### **2.3. Shifting Gears: Reversal of Investor Admission Rules**

The new Investment Proclamation No.1180/2020 reversed the positive-list approach to a negative-list approach. Consistent with the revised investment objectives, the change in approach was justified by the need to implement a more open economic policy. More specifically, the open policy preference aims to encourage the growth of domestic industries and services, attract quality foreign investment, enhance forward and backward linkages between local and foreign investments, maximize learning, skills, and technology transfer as well as ensure high job creation. The shift to a negative-list approach was accompanied by additional new features of the investment laws, particularly the definition of “domestic investors” and liberalization in the list of sectors that were previously reserved for the government and domestic investors.<sup>36</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> Investment Proclamation No. 769/2012, arts. 6-9.

<sup>36</sup> See sub-section 2.3.2 of this article.

### **2.3.1. “Investor” Definition**

The new Investment Proclamation classifies investors as “domestic” and “foreign”.<sup>37</sup> The law collectively governs both domestic and foreign investments ensuring that similar legal protections and incentives are offered.<sup>38</sup> Beyond the meaning of the terms, the definitional scope of an “investor” also determines the scope and application of other sections of the legislation, particularly eligibility to invest in reserved sectors and incentives. Investor categorization is therefore an important element that reflects the investment objectives and policy priorities for the country.

Under the previous laws, domestic investors constituted the following categories: (a) the government, public enterprises, and cooperatives (b) Ethiopian nationals, and (c) foreign nationals of Ethiopian origin treated as domestic investors under separate laws (“Ethiopian Diaspora”). Investors falling under these categories were entitled to invest in areas reserved for domestic investors.<sup>39</sup>

The new Investment Proclamation retained the above list but expanded the category of domestic investors to include:

- i. An enterprise incorporated in Ethiopia and wholly owned by Ethiopian nationals
- ii. Foreign nationals or foreign enterprises treated as domestic investors by international treaties ratified by Ethiopia;
- iii. Foreign nationals or foreign enterprises treated as domestic investors in prior laws and having existing investments in the country;
- iv. Descendants of foreign nationals that have invested in the country.<sup>40</sup>

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<sup>37</sup> Investment Proclamation No. 1180/2020, art. 2(5) and art. 2(6).

<sup>38</sup> This however does not mean that requirements and protections are identical for foreigners and domestic investors in all cases. For instance, the right to repatriate profits and dividends, and the mandatory requirement of a minimum capital apply only to foreign investors.

<sup>39</sup> See Section 2.3.2 of this article on sectoral regulation.

<sup>40</sup> Investment Proclamation No. 1180/2020, art. 5.

This has a number of implications. First, it eliminated the category of “Ethiopian nationals” which were previously considered a separate category of domestic investors with corresponding sectors reserved only for them. Secondly, it expanded the definition of ‘domestic investors’ to include enterprises incorporated and wholly owned by Ethiopians.<sup>41</sup> Third, it recognized the special treatment granted to foreign nationals through preferential bilateral treaties.<sup>42</sup> Fourth, it extended legal recognition to specific groups of foreign nationals with a long history of investments in Ethiopia.<sup>43</sup> Previously, these groups were the subject of legal uncertainty as they lacked formal recognition as neither domestic nor foreign investors while operating businesses in Ethiopia.<sup>44</sup> The new laws clarified their status through express recognition and classified them as domestic investors.

Concerning the definition of “foreign” investors, the new Proclamation maintained the previous approach of determining foreign status through the test of nationality and place of incorporation. It recognizes investors as foreign if they have any one of the following legal statuses: a) foreign nationals; b) an enterprise incorporated in Ethiopia with a foreign shareholding (regardless of shareholding size); and c) an enterprise incorporated abroad.<sup>45</sup> The

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<sup>41</sup> This was not clearly articulated under Investment Proclamation No. 769/2012. Rather it was indirectly mentioned in art. 3(2) of Investment Regulation No. 270/2012, a provision regulating sector participation.

<sup>42</sup> Such a treaty, for example, exists between Ethiopia and Djibouti. Ethio-Djibouti Preferential Investment Facilitation and Property Acquisition Agreement Ratification Proclamation No. 516/2007. Under this treaty, Djiboutian nationals and enterprises are recognized as domestic investors and permitted to invest in areas reserved for domestic investors (excluding those reserved for Ethiopian nationals only). *See also* Proclamation Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in their Country-of-Origin No. 270/2002, art. 5 (5).

<sup>43</sup> These included foreign nationals that have lived and invested in Ethiopia for generations, such as Italians, Indians, and Armenians.

<sup>44</sup> Under the Investment Proclamation No. 280/2002, ‘foreign nationals permanently residing in Ethiopia having made an investment’ were recognized as domestic investors. However, Investment Proclamation No. 769/2012 changed the definition of “domestic investors” eliminating this category. This had left several foreign nationals with long investment history in legal limbo.

<sup>45</sup> Investment Proclamation No. 1180/2020, art. 2 (6) (c).

Proclamation explicitly labelled enterprises incorporated abroad as “foreign investors” to clearly indicate that the location of incorporation matters as regards the determination of status as “foreign” or “domestic” investor. Consequently, any enterprise in which a foreigner is involved becomes a foreign investment irrespective of the place of incorporation; and any business incorporated abroad becomes a foreign investment irrespective of the nationality of the shareholders (even if all shareholders are Ethiopians).<sup>46</sup> As an exception, Ethiopian nationals who reside, permanently abroad, may elect to be treated as foreign investors and the law accommodates such choice.<sup>47</sup>

### **2.3.2. Sectoral Regulations**

National investment regulations often impose restrictions on foreign investor participation to protect national interests in the following ways: a) sectoral regulations through investment entry requirements; b) requiring local equity participation; and, c) imposing export quotas on investors.<sup>48</sup> A critical characteristic of the new Investment Proclamation is the reversal of the sectoral regulation approach which has been in place since 2012. Under the previous laws, a hybrid of “positive” and “negative” lists existed, providing an exhaustive list of permissible investment sectors<sup>49</sup> and a separate list of areas reserved for government and domestic investors. Article 6 of the new Investment Proclamation reversed the above approach and reintroduced a full negative listing system that existed before 2012.<sup>50</sup> Here, except for the few areas that are reserved for the government and domestic investors, all areas

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<sup>46</sup> Exception is granted to Djiboutians and Djibouti incorporated entities under the Preferential Trade Agreement, *supra* note 42.

<sup>47</sup> Investment Proclamation No. 1180/2020, art. 2 (6) (e).

<sup>48</sup> Sornarajah, *supra* note 28, at 136.

<sup>49</sup> Investment Regulation No. 280/2012, Schedule of Permissible Investment Sectors.

<sup>50</sup> The rationale for such reversal was predicated on the policy dispensation that sought more openness to foreign investment.

are permitted for foreign investment.<sup>51</sup> The approach introduced a new list with different sub-categories and requirements as detailed below.

### **2.3.2.1. Restrictions on the Participation Foreign Investors**

Article 4 of the new Investment Regulation lists 32 sectors that are exclusively reserved for domestic investors. This provision essentially liberalizes all sectors not included in its list, except those business areas reserved for government or joint ventures with the government. The new definition of “domestic investors” in the Investment Proclamation encompasses Ethiopian nationals, foreign nationals of Ethiopian origin and other specific categories of persons expressly recognized by the law as domestic investors. This broader definition of “domestic investors” partially liberalizes sectors that were previously reserved only for Ethiopian Nationals<sup>52</sup> This follows the government’s decision to allow the Ethiopian diaspora to invest in areas that were previously reserved only for Ethiopian nationals.<sup>53</sup> The 32 investment

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<sup>51</sup> Investment Proclamation No. 1180/2020, art. 6(3).

<sup>52</sup> Investment Regulation No. 270/2012, art. 3(1). These are banking, insurance, micro-credit and saving services, packaging, forwarding and shipping agency services, broadcasting services, mass media services, attorney and legal services, preparation of indigenous traditional medicines, advertisement, promotion and translation work, air transport services using aircraft with a seating capacity of up to 50 passengers.

<sup>53</sup> However, some sector-specific legislation that were enacted subsequent to the investment laws have eroded the equal protection granted to the Ethiopian diaspora. For instance, Media Proclamation No. 1238/2021 derogated from the Investment Regulation provisions by restricting the rights of the Ethiopian diaspora to participate in the media and broadcasting business. Art. 23 of the Media Proclamation treats Ethiopian diaspora as foreign citizens (and not as domestic investors) and limits their ability to invest in media and broadcasting services providing a maximum share ownership cap of 25%. The Federal Advocacy Service Licensing and Administration Proclamation No. 1249/2021, on the other hand, has remained consistent with the spirit of the new investment laws, providing equal treatment to Ethiopian nationals and Ethiopian diaspora for the provision of legal services in Ethiopia. *See also* Banking Business Amendment Proclamation No. 1159/2019, art. 9, allowing investment by the Ethiopian diaspora in financial services. In regulating financial services, art. 4(1) of the Investment Regulation has deferred to sector legislations to determine the manner and extent of such relaxation. Thus, whilst allowing Ethiopian diaspora to invest, the Banking Proclamation has introduced sector-specific restrictions that such investment may only be made in foreign currency, which is a requirement not provided under the new investment laws.

sectors reserved for domestic investors under the new Investment Regulation mirror the 2002 Investment Regulation that excluded key economic sectors from foreign participation, including financial services, domestic trade, retail, wholesale, and import trade.<sup>54</sup> Additionally, it reserves for domestic investors small and medium-scale businesses and those sectors traditionally protected for domestic industries.<sup>55</sup>

### **2.3.2.2. Mandatory Participation of Local Investors**

Mandatory equity participation of local investors is embedded in the new investment laws in two ways: a) joint investment with the government; and b) joint investment with foreign investors.

#### **i. Joint Investment with the Government**

Previously, under Art. 6(1) of the Investment Proclamation No. 769/2012, the following areas were exclusively reserved for the Government:

- a) Transmission and distribution of electrical energy through the integrated national grid system;
- b) Postal services, except for courier services;
- c) Air transport services using aircraft with a seating capacity of more than fifty passengers.

Similarly, Art. 6(2) of the same proclamation reserved the following areas exclusively for joint investment with the government:

- a) Manufacturing of weapons and ammunitions;
- b) Telecom services.

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<sup>54</sup> Investment Regulation No. 280/2002.

<sup>55</sup> Investment Regulation No. 474/2021, art. 4.



Under the new investment legal regime, the category of “areas reserved for the government” has been removed, while retaining the category of “joint investment with the government”. This category is expanded to include:<sup>56</sup>

1. Manufacturing of weapons, ammunition, and explosives used as weapons or to make weapons;
2. Import and export electrical energy;
3. International air transport services;
4. Bus rapid transit; and
5. Postal Services, excluding courier services.

First, the category of investment fields reserved for the government under the previous investment proclamation was entirely removed ending the exclusive monopoly of the government in three areas of investment. Previously, air transport services, transmission and distribution of electricity through the national grid, and postal services (except courier) were exclusively reserved for the government. These sectors are now moved to the category of “Investment Areas Reserved for Joint Investment with the Government”, expanding the previous list which only included the manufacturing of weapons and ammunition and telecom services.<sup>57</sup> The legal consideration here was to align the decision of the government to partially privatize public enterprises such as Ethiopian Airlines, Ethiopian Electric Power, and Ethiopian Shipping and Logistics Enterprise.<sup>58</sup> Secondly, the listing resulted in the opening up of sectors previously under government monopoly. Although telecom liberalization preceded the introduction of the new

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<sup>56</sup> Investment Regulation No. 474/2020, art. 3.

<sup>57</sup> Note that telecom services had already been liberalized prior to the enactment of the Investment Proclamation by virtue of the Communications Service Proclamation No.1148/2019.

<sup>58</sup> Although the government in its decision to partially privatize the state-owned enterprises stated that only a maximum of 49% of the shares in Ethio telecom will be open for foreign ownership, the law does not provide for such cap. See Reuters “Ethiopia opens up telecoms, airline to private, foreign investors. <https://www.reuters.com/article/us-ethiopia-privatisation-idUSKCN1J12JJ>

investment laws, it was removed from the list, and “air transport services using aircraft with a seating capacity of more than fifty passengers” has been replaced by “[I]nternational air transport services”. By carving out “international air transport services”, the law liberalized domestic air transport services to both domestic and foreign investment.

## **ii. Joint Investment with Domestic Investors**

Article 5 of the Investment Regulation No. 474/2020 introduced a new category that was not provided in the previous laws.<sup>59</sup> This category permits the participation of foreigners through a joint venture with domestic investors. The approach to include this category follows a precedent set by the Investment Board’s decisions which partially liberalized the logistics sector to foreigners in 2018.<sup>60</sup> The stated aim of the joint investment scheme is to encourage skills and technology transfer and allow technological learning and the diffusion of innovative capabilities through partnership of foreign and local firms.<sup>61</sup> In addition, a joint venture structure aims to serve as a countervailing force to ensure better benefits accruing to the country in both job creation, learning, and maximization of taxes and hard currency earnings.

Article 5 of the Investment Regulation No. 474/2020, therefore, opens the following sectors to foreign investors only in joint ventures with domestic investors and with a maximum shareholding of 49% of the share capital of the enterprise.<sup>62</sup>

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<sup>59</sup> Joint venture with domestic investors was included at last in Proclamation No. 37/1996. Art. 7(1) reserved three sectors under this category, which included ‘Engineering and metallurgical industries, pharmaceutical industries, basic chemical and petrochemical industries, fertilizers industries’

<sup>60</sup> See Ethiopian Investment Board Decision (2018) (*Available at* <http://www.investethiopia.gov.et/images/pdf/EIB-decision-on-Logistics.pdf>)

<sup>61</sup> *Id.*

<sup>62</sup> The process for selecting areas eligible for joint investment with domestic investors was preceded by a series of consultations with sector regulatory institutions and ministries.

1. Freight forwarding and shipping agency services;
2. Domestic air transport services;
3. Cross-country public transport services using buses with a seating capacity of more than 45 passengers;
4. Urban mass transport service with a large carrying capacity;
5. Advertisement and promotional services;
6. Audiovisual services, motion picture and video recording, production and distribution; and
7. Accounting and auditing services.

Alongside the sector liberalization provided under the new investment laws, the law anticipates further policy reforms and relaxation of investment sectors for foreigners. Sector listing, which was previously regulated by the investment proclamation and investment regulation, is now fully relegated to the realm of the new Investment Regulation. Additionally, the new Investment Proclamation authorizes the Investment Board to open or close areas of investment, and for such decisions to take immediate effect, further allowing sector listing to be regulated at the Investment Board level, without the need for a legislative amendment.<sup>63</sup> Signaling the overall goal of maintaining an open policy to investment, the Board's authority to restrict sectors that have already been liberalized may only be exercised if such restriction is justified by "public interest considerations."<sup>64</sup>

## **2.4. Investor Obligations**

In the context of the investment objectives set out under the new Investment Proclamation, various obligations are embedded in the laws aimed at achieving the stated objectives. These range from minimum capital

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<sup>63</sup> Investment Proclamation No. 1180/2020, art. 6(4) and art. 31 (2).

<sup>64</sup> Investment Proclamation No. 1180/2020, art. 31 (1) (h).

requirements for foreign investors to fostering social and environmental compliance, local employment, training, and skills transfer, and reporting duties.<sup>65</sup>

### **2.4.1. Minimum Capital Requirement**

Minimum capital requirement for foreign investors has been a mainstay of consecutive investment legislation in Ethiopia. The objective behind minimum capital requirements is to attract capital flows in large and priority sectors while reserving small and medium businesses to domestic industries. Countries with high forex needs also use mandatory forex commitments to help increase forex inflow. Under the new Investment Proclamation, minimum capital thresholds are required for both wholly foreign-owned operations and joint ventures, although the amounts slightly vary. Domestic investors are not subject to minimum capital requirements. Depending on the sector of investment and nature of the partnership with domestic investors, previous minimum capital requirements are retained ranging from USD 50,000-USD to 200,000.<sup>66</sup> Wholly foreign-owned investments need to allocate USD 200,000, whereas joint ventures with domestic investors are subject to a lesser amount of USD 150,000 for a single investment project.<sup>67</sup> Investors seeking to invest in more than one investment project, would be required to commit the minimum capital separately. While the definition of “capital” includes local or foreign currency, negotiable instrument, machinery or equipment, building, working capital, property right, intellectual property right, or other tangible or intangible business assets<sup>68</sup>, in practice, a direct cash

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<sup>65</sup> *Id.*, art. 14. At the investment stage, investors must submit a quarterly report to the Ethiopian Investment Commission.

<sup>66</sup> “Capital” is defined in the Investment Proclamation No. 1180/2020, art. 2 (3) as “local or foreign currency, negotiable instrument, machinery or equipment, building, working capital, property right, intellectual property right or other tangible or intangible business assets.”

<sup>67</sup> Investment Proclamation No. 1180/2020, art. 9.

<sup>68</sup> *Id.*, art. 2(3).

deposit is required to fulfill the minimum capital requirement at the time of investment.<sup>69</sup>

In a new move, the new Investment Proclamation expands the exceptional circumstances where a waiver of minimum capital may be permitted. Under the previous laws, minimum capital waivers were offered to existing investors re-investing their profits and dividends in the country. The waiver was broadened to benefit other business activities such as the election of persons as the board of directors following the conversion of a private limited company (PLC) to a share company.<sup>70</sup> This exempts shareholder/s seeking board directorship in a share company with nominal shareholding.<sup>71</sup> Additionally, waivers are extended to foreign investors buying the entirety of an existing enterprise owned by foreign investors or the shares of the enterprise. Here, the underlying rationale for exemption is that the foreign investors engaged in the business have already fulfilled the minimum capital requirement at the time of the initial investment.

#### **2.4.2. Social and Environmental Protection**

There is a global consensus that investments, in general, should comply with social, environmental, and governance standards.<sup>72</sup> Strict regulatory

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<sup>69</sup> Information obtained from EIC shows that while the law recognizes minimum capital may be contributed in cash or in kind, “in-kind” contributions created administrative setbacks related to valuation of the properties. EIC maintained a position that the cash requirement allows easy administrative verification and also demonstrates the ‘seriousness’ of the investor to do business in Ethiopia.

<sup>70</sup> Investment Proclamation No. 1180/2020, art. 9 (4) (b).

<sup>71</sup> This addresses a longstanding challenge within the investor community due to a restriction imposed by the Commercial Code and the Investment Proclamation. On the one hand, the 1960 Commercial Code, art. 347 states that “only members of a company may manage the company” requiring all board members of a share company to be shareholders in order to qualify for a board membership. On the other hand, the investment law perceived all investors as separate and therefore required those seeking shareholding in a company to first commit the minimum capital requirement applicable to foreign investors, regardless of whether the membership sought is nominal or not.

<sup>72</sup> UNCATD, *supra* note 27, at 33.

standards have emerged at international and regional levels obligating investors to comply with those standards. While the overall objective of the investment laws is to provide favorable conditions to attract and retain investments, it also seeks to ensure that investments do not have negative social and environmental consequences. To this end, the Investment Proclamation added a new clause that requires investors to promote social and environmentally sustainable values, requiring the inclusion of environmental protection standards and social objectives in investment projects.<sup>73</sup>

#### **2.4.3. Local Employment, Skills and Knowledge Transfer**

One of the key objectives of policies and regulatory frameworks promoting investments in developing countries is creating job opportunities and attaining skills, knowledge, and technology transfer. In Ethiopia, successive investment laws have sought to use investments as a vehicle to create jobs and facilitate learning and technological advancement. Emphasis on agriculture and manufacturing under the previous laws was aimed at addressing chronic issues of unemployment and underemployment. Similar goals of generating employment opportunities and increasing investment inflow to accelerate inward transfer and diffusion of knowledge, skill, and technology are articulated in the new laws. Accordingly, the investment laws complement the national job agenda of the government which recognizes private investment as a pillar for creating jobs.<sup>74</sup>

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<sup>73</sup> Investment Proclamation No. 1180/2020, art. 54.

<sup>74</sup> In 2018, Ethiopia established a special Jobs Creation Commission through Regulation No. 435/2018, with a key mandate to facilitate and scale job opportunities. Recently, the Commission's mandate was transferred to the Ministry of Labor and Skills through Proclamation No. 1263/2021. [www.jobscommission.gov.et](http://www.jobscommission.gov.et). See also, Ethiopia Plan Of Action for Job Creation (2020-2025) (available at <https://jobscommission.gov.et/wp-content/uploads/2019/11/National-Plan-for-Job-Creation-Brief.pdf>)

One of the ways the new Investment Proclamation seeks to encourage local employment is by limiting the employment of expatriates and imposing obligations for training and technological transfer to locals.<sup>75</sup> Except for those in positions of top management<sup>76</sup>, the new Proclamation qualifies the right to employ foreign employees subject to the unavailability of Ethiopians possessing similar qualifications or experiences in the market.<sup>77</sup> The rules on expatriate employment set a maximum threshold of foreigners that can be employed<sup>78</sup>, a limit on the duration of the employment,<sup>79</sup> and obligations of skill and technology transfer. A Directive issued by the Ethiopian Investment Commission (hereinafter “Directive”) further levies strict compliance requirements on investors to train and transfer skills and knowledge to Ethiopians within a prescribed timeline. These include requirements such as the provision of on-the-job training, preparation, and submission of training programs to the Investment Commission, including a proposed timeline within which the investor intends to replace the foreigners with local employees.<sup>80</sup>

In parallel, the new investment laws have further introduced a benefit to the spouses of foreign employees. For the first time, the investment laws

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<sup>75</sup> Investment Proclamation No. 1180/2021, art. 22.

<sup>76</sup> “Top Management” is defined to constitute chief executive officer, chief financial officer, and chief operations, officer.”

<sup>77</sup> Investment Proclamation No. 1180/2020, art. 22.

<sup>78</sup> Ethiopia Investment Commission Directive No. 772/2021 on Regulating the Issuance of Work Permit to Expats Employed in Investments and the Implementation of Knowledge and Skill Transfer from Expats to Ethiopia (2021), art. 6. The Directive sets a maximum of 10% -15% of the enterprises’ employees that can be foreigners. However, this restriction is sector-specific and exceptions are made for some industries that do not require high employment rates. (For instance, consultancies).

<sup>79</sup> Investment Proclamation No. 1180/2020, art. 22(5), and EIC Directive, art. 11(2). Foreign employees may only be hired for a maximum period of three years following which they must be replaced by Ethiopians.

<sup>80</sup> EIC Directive No.772/2021, art. 9(2) and 10.

grant spouses of investors and foreign employees the right to obtain work permits.<sup>81</sup>

### 3. Investment Guarantees, Protections, and Incentives

Investment decisions are often impacted by several business and investment climate considerations. Variables such as political stability, ease of entry and exit, incentives, promotions, local regulations, and administrative processes all compound to influence investor decisions.<sup>82</sup> Regulatory guarantees and legal protections seek to inspire confidence in investors and create favorable conditions to attract investment. These include incentive schemes, protection against expropriation and nationalization, right to compensation, and assurance of profit and dividend repatriation.

#### 3.1. Protection Against Expropriation

One of the most recognized principles of international investment law is the protection of foreign investments against expropriation and nationalization.<sup>83</sup> While states generally have full sovereignty over natural resources and properties located in their territories, it is also a recognized principle that states may not seize private property unless certain conditions are met. Previous Ethiopian investment laws have recognized this right.

Investment Proclamation No. 769/2012, Article 25 provides:

1. No investment may be expropriated or nationalized except for public interest and then only in conformity with the requirements of the law.

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<sup>81</sup> Investment Proclamation No. 1180/2020, art. 22 (3). This follows the permission to allow foreigners residence in industrial parks.

<sup>82</sup> The World Bank Group, *Global Competitiveness Report 2017/2018, Foreign Perspectives and Policy Implications* 2018, at 13.

<sup>83</sup> *Id.*



2. Adequate compensation corresponding to the prevailing market value, shall be paid in advance in case of expropriation or nationalization of investment for the public interest.
3. For this article, the word “nationalization” shall be used interchangeably with the word “expropriation” and results in the payment of adequate or appropriate compensation.

Similarly, the new Investment Proclamation No. 1180/2020, adopts the same approach with a slight variation under Article 19:

1. The Government may expropriate any investment undertaken under this Proclamation for a public interest, in conformity with requirements of the law, and on a non-discriminatory basis.
2. In the case of expropriation of an investment effected under sub-article (1), adequate compensation corresponding to the prevailing market value shall be paid in advance.

The new proclamation does not define “expropriation” and the reference to “nationalization” in the previous law was removed. The wording of the “expropriation” provision was changed not as a *prima facie* prohibition against expropriation but rather as a permissive ground on which the government may expropriate private investment. The express recognition to the principle of “non-discrimination” is consistent with recognized principles of international investment law.

### **3.2. Right to Repatriation of Funds**

A key aspect of foreign investment attraction is the guarantee that funds invested, and profits earned will be repatriated. Similar to previous approaches, the new investment laws explicitly recognize and protect the investor’s right to the repatriation of earnings and payments in convertible foreign currency. Eligible payments include profits and dividends – principal and interest payment on external loans; payments related to technology

transfer agreements and collaboration agreements; proceeds from the transfer of shares or conferral of partial or total ownership of the enterprise to another investor; proceeds from the sale, capital reduction, or liquidation of an enterprise; and compensation paid to an investor.<sup>84</sup> A slight change introduced in the new law is the change in stipulation from “proceeds from the transfer of shares to *domestic investors*” to “*any investors*”. This relaxes a previous restriction on the investor’s ability to repatriate proceeds of shares sold to non-domestic (foreign) investors.<sup>85</sup>

### 3.3. Investor-State Disputes

One of the components of the protection and guarantee that countries extend to foreign investors and their investments relates to mechanisms of settling investment disputes. The dispute can be between the host state and the home state of the foreign investor (state-to-state dispute) or between the foreign investor and the host state (investor-state dispute). The new Proclamation introduced a new provision addressing investment disputes that was not available since 2002.<sup>86</sup> The two preceding investment legislation had no references to investor-state disputes. The working assumption had been that provisions governing investor-state disputes are situated in bilateral or multilateral investment treaties. To the extent that an investor belonged to a country where there is a bilateral investment treaty with Ethiopia, then the dispute resolution mechanism available in the treaty would apply to the investor. All other disputes would have been referred to local courts. The new Investment Proclamation reversed this approach and added the following provision:

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<sup>84</sup> Investment Proclamation No. 1180/2020, art. 29.

<sup>85</sup> Investment Proclamation No. 1180/2020, art. 20 (1)(e).

<sup>86</sup> *Id.*, art. 28. Previously, Investment Proclamation No. 15/1992 (art. 39) and Investment Proclamation No. 37/1996 (art. 22) contained dispute settlement mechanisms that gave the choice to the state and a foreign investor to provide in their agreement the manner of settlement of a dispute, including the option for international dispute settlement.

#### Article 28: Settlement of Investment Disputes

1. Without prejudice to the right of access to justice through a competent body with judicial power, any dispute between an investor and the Government involving investments effected under this Proclamation will be resolved through consultation and arbitration.
2. The Federal Government may agree to resolve investment disputes involving foreign investments through arbitration.
3. Where a foreign investor chooses to submit an investment dispute to a competent body with judicial power or arbitration, the choice shall be deemed final to the exclusion of the other.

The stipulation of consultation and arbitration as the preferred method of dispute settlement is consistent with international regulatory best practices aiming to attract foreign investment. Domestic courts are often considered inadequate for the settlement of investment disputes, due in particular to their perceived inefficiency, delays, actual or apparent bias toward foreign investors, and lack of independence from the host State.<sup>87</sup> Such inclusion in the investment law, coupled with the enactment of supplementary laws establishing a system of international arbitration and enforcement of arbitral awards<sup>88</sup> signals the policy drive to create favorable regulatory condition likely to attract foreign investment.

### 3.4. Investment Incentives

Investment incentives conferring privileges on selected investments is a common practice in both high-income and developing countries.<sup>89</sup> An incentive regime primarily aims to attract and retain investment in priority

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<sup>87</sup> G. KAUFMAN –KOHLE, M. POTESTA, *INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS: CURRENT FRAMEWORK AND REFORM OPTIONS* (2020) at 20.

<sup>88</sup> Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 and the New York Convention on the Recognition and Enforcement Foreign Arbitral Awards Ratification Proclamation No. 1184/2020.

<sup>89</sup> The World Bank Group, *supra* note 82, at 28.

sectors. Different types of incentives, ranging from tax holidays to duty exemptions, might be granted to selected investments. In offering incentives, an attempt is made to balance the financial losses resulting from the non-collection of revenues with the wider benefits which will accrue from the investments.

The Ethiopian incentive regime is no different and has been a common feature of earlier investment laws.<sup>90</sup> Previously, investment incentives were interlinked with sector regulation. Priority and encouraged sectors that were eligible for foreign investment were simultaneously afforded tax and duty waivers. A Schedule attached to the Investment Regulation incorporated both the list of sectors eligible for foreign investment and the corresponding incentives. In contrast, the new proclamation split the regulation of sectors from the eligibility for investment incentives.<sup>91</sup> Consequently, a separate Investment Incentives Regulation was adopted setting out the eligibility, type, and extent of entitlement to incentives.<sup>92</sup>

Similar to previous incentive schemes, the type of incentives offered are income tax holidays and duty exemptions on goods<sup>93</sup> imported into the country. Depending on the sector, type, location, and exporting status of the investment, a time-bound income tax holiday or preferential tax rates on corporate income tax are granted. The incentive scheme continues the policy

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<sup>90</sup> Investment Regulation No. 7/1996 (Schedule), Investment Regulations No. 84/2003 (Schedule), Investment Regulation No. 270/2012 (Schedule).

<sup>91</sup> Investment Proclamation No. 1180/2020 art. 17 states “investment areas eligible for investment incentives as well as the type and amount of investment incentives will be determined by a separate regulation”.

<sup>92</sup> Investment Incentive Regulation No. 517/2022.

<sup>93</sup> *Id.*, art. 12. The eligible goods are “Capital goods” which include equipment and other similar tangible goods to produce goods or services for consideration and “Construction Materials” which means a material or supply that is to be made part of a building or any other construction. Motor vehicles are also eligible for duty-free imports as per a Directive to be issued by the Ministry of Finance.

emphasis on agriculture and manufacturing as priority sectors, while other sectors such as tourism, health, transport, logistics, and ICT were added to the eligible list.<sup>94</sup> Additionally, by offering extra incentives, the policy seeks to encourage the expansion of existing investments,<sup>95</sup> investments in exports,<sup>96</sup> remote locations,<sup>97</sup> and selected tourist destinations.<sup>98</sup> Moreover, the new regulation has introduced an incentive regime for investors that facilitate overseas employment opportunities for qualified Ethiopians. Investors that have placed Ethiopians in a foreign country numbering 100-500 persons will be eligible for an income tax exemption of 1-3 years.<sup>99</sup>

Overall, with few exceptions, the new incentive regime is a mirror image of the scheme under previous law. The policy goal remains consistent, focusing on agriculture and manufacturing as priority sectors where investments are encouraged and incentivized. However, changes were introduced to the procedures and regulatory functions of the agencies that administer incentives.<sup>100</sup>

#### **4. Investment Administration**

The institutional framework for investment admission and administration is a key component of an investment regulatory regime. A well-functioning and effective investment facilitation system characterized by an efficient

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<sup>94</sup> Investment Incentive Regulation No. 517/2022, Schedule No. 3, 8, 10.

<sup>95</sup> *Id.*, art. 5.

<sup>96</sup> *Id.*, art. 6. An additional, one-time income tax exemption of 2 years is granted to investors outside industrial parks that have exported 60% of their products or services.

<sup>97</sup> *Id.* Art. 4(2) offers an additional income tax deduction of 30% for three consecutive years after the expiry of the income tax holiday period for investors who invest “in areas far from the center and with very low infrastructure development”.

<sup>98</sup> *Id.* Art. 4(2) provides that an investor eligible for incentives and who invests in areas far from the center and with very low infrastructure development and invests in new, atypical, and selected tourist destination areas, in hotels, lodges and resorts will be entitled to a five-year income tax exemption.

<sup>99</sup> *Id.*, art. 4(4).

<sup>100</sup> See Section 4.1.4 of this article.

institutional setup plays a key role in attracting and retaining investors.<sup>101</sup> Beyond easing entry and establishment procedures, good ‘aftercare’ services are proven means of encouraging investment expansions.<sup>102</sup> As part of overhauling the investment regulatory regime, the new Investment Laws aimed to introduce institutional reforms that will further ease the entry, establishment, and operation of investments in the country. This involved revising the regulatory functions of existing investment administration organs, restructuring mandates, establishing platforms of engagement between government bodies and the private sector, and instituting an improved grievance and complaint handling system.

#### **4.1. Investment Administration Organs**

Ordinarily, the key investment administration organs are the Ethiopian Investment Commission, the Ethiopian Investment Board, and regional investment bureaus.<sup>103</sup> The new Investment Proclamation retained these organs and expanded their mandates. Additionally, the Proclamation established a high-level investment organ, i.e. the Federal Government and Regional State Administrations Investment Council (“Investment Council”) with a new mandate to coordinate investment activities.

##### **4.1.1. The Ethiopian Investment Board**

The Ethiopian Investment Board (“Board”) is the highest decision-making body of the Ethiopian Investment Commission.<sup>104</sup> Initially, the Board’s powers and duties included, issuing directives, adjudicating disputes,

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<sup>101</sup> John Sutton, *Institution Building for Industrialization: The Case of the Ethiopian Investment Commission*, in OXFORD HANDBOOK OF THE ETHIOPIAN ECONOMY (Cheru et al, eds. (2019), at 858.

<sup>102</sup> *Id.*, at 858.

<sup>103</sup> Although with differing names and structures, these three organs were part of the investment legislation since Investment Proclamation No. 32/1996.

<sup>104</sup> Investment Proclamation No. 37/1996 through Investment Proclamation No. 769/2012 have all incorporated a Board structure within the investment administration organs.

initiating policies, and forwarding recommendations to the Council of Ministers. Through amendment of the Investment Proclamation and adoption of new regulation in 2014, the Board was reconstituted as a high-level government body with a robust policy mandate.<sup>105</sup> The amendment of the previous laws authorized the Investment Board to assume a more proactive role in policy formulation, investment admission and administration.

The new laws retained the Board's role as a key investment administration body, adding clarity on its members and granting additional powers and duties. Chaired by the Prime Minister, the membership of the Board was expanded to include eight government agencies relevant to trade and investment and two representatives from the private sector.<sup>106</sup> Additionally, the Board's mandate was enhanced to include full powers of sector regulation including the authority to revise the list of investment sectors.<sup>107</sup> Adjudicative powers of the Board were also expanded to receive complaints from investors against the decisions of the EIC and *other federal agencies*.<sup>108</sup>

#### **4.1.2. The Ethiopian Investment Commission**

The Ethiopian Investment Commission (hereinafter "EIC") is the key regulatory agency responsible for investment attraction, admission, and administration.<sup>109</sup> It is an autonomous organ of the government that is

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<sup>105</sup> Investment Proclamation No. 769/2012, art. 29 (5) (6) (7) and Investment Regulation No. 312/2014, art. 4. Members of the Investment Board were the Prime Minister (Chair) and government officials to be designated by the Prime Minister.

<sup>106</sup> Investment Proclamation No. 1180/2020, art. 32.

<sup>107</sup> *Id.*, art. 6 (4). Although sector regulation was partially delegated to the Board pursuant to the amendment of the investment proclamation in 2014, the Council of Ministers retained some of the powers to regulate sectors reserved for Ethiopian nationals and to the government and joint investment with the government.

<sup>108</sup> See Section 3.3.4 of this article (Grievance and Complaints Handling).

<sup>109</sup> Investment Proclamation No. 1180/2020, art. 37.

accountable to the Prime Minister. Except for investments in the prospecting, exploration, and development of minerals and petroleum, the EIC has the mandate to regulate: a) Wholly foreign-owned investments; b) joint investments made by foreign and domestic investors; c) investments made by foreign nationals but treated as domestic investors as per relevant law; and, d) investments by domestic investors engaged in areas eligible for incentives.<sup>110</sup> Among others, EIC is empowered to create an overall conducive investment climate. It initiates and leads investment promotion activities, provides investor after-care services, and coordinates government agencies to create a favorable investment climate. Regional investment bureaus, established by regional laws at the regional level, may play a similar role in investment promotion and facilitation, particularly for domestic investors. However, the registration and licensing of foreign investors are processed through the EIC.

While EIC is the focal agency for investment admission, the law has delegated some of EIC's powers to a few sector-specific regulatory bodies. Previously, the Ethiopian Energy Authority and the Ethiopian Aviation Authority were granted investment facilitation mandates including the issuance of investment permits. The new laws expanded the list of delegated agencies to include the Ethiopian Communications Authority, established following the liberalization of the telecommunication sector.<sup>111</sup> These regulatory authorities are empowered to carry out EIC's regulatory functions, including the granting, approval, and revocation of investment permits, in their respective areas of energy, aviation, and communication. Furthermore, the new Investment Proclamation enhanced the mandate of these agencies to issue

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<sup>110</sup> *Id.*, arts 3 and 4.

<sup>111</sup> Communication Services Proclamation No. 1148/2019, art. 3.



directives, specific to their sectors, that would enable them to implement their mandate.<sup>112</sup>

#### **4.1.3. Federal Government and Regional State Administrations Investment Council**

The Investment Proclamation No. 1180/2020 expanded the administrative entities responsible for investment facilitation. A new and high-level investment administration organ, the Federal Government and Regional State Administrations Investment Council (the Council) is newly established.<sup>113</sup> The Council is both a policy and regulatory entity with a specific mandate to “oversee and direct all aspects of the horizontal relationship between the Federal Government and Regional Administrations.”<sup>114</sup> This platform aims to establish a formal inter-governmental relations platform to resolve issues related to investments.<sup>115</sup>

Given the federal system of governance in the country, investors are met with varying regional and local rules that are not consistent with the federal services obtained at the EIC. Additionally, the federal system of government and devolved power structure means that rules and regulations are subject to the region’s specific context. The lack of harmonized rules and procedures has been shown to challenge investment implementation at local levels.

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<sup>112</sup> Investment Proclamation No. 1180/2020, art. 55 (1).

<sup>113</sup> *Id.*, art. 44-46. Members of the Investment Council are the Prime Minister (in his absence the Deputy Prime Minister), All Regional States Presidents, Mayors of Addis Ababa and Dire Dawa and the investment commissioners of both the federal and regional investment agencies.

<sup>114</sup> *Id.*, art. 45 (1).

<sup>115</sup> While the Investment Proclamation preceded it, a new law was introduced in 2021 with similar objectives of addressing inter-governmental relations between the federal and regional states. The System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia’s Determination Proclamation No. 1231/2021.

Considering these challenges, the Council was established to principally act as a platform of horizontal cooperation and coordination between the federal and regional administrations on investment matters.<sup>116</sup> It provides a high-level structure for the deliberation of issues and decision-making that will be implemented by regional administrations. In addition, it assumes an adjudicative role with the mandate to resolve ‘fundamental grievances’ and ‘significant misunderstandings’ submitted by investors regarding their investments.<sup>117</sup> Consequently, all decisions and recommendations made by the Council must be implemented by the federal government or regional administration that is the subject of the decision of the Council.<sup>118</sup>

#### **4.1.4. Incentives Administration**

Previously, the regulation and administration of investment incentives were the mandates of the EIC and the Investment Board. EIC was responsible for permitting exemptions from customs duty<sup>119</sup> and ensuring that incentives granted to investors are used for the designated purposes.<sup>120</sup> Additionally, the Board was authorized to grant new or additional incentives other than those that were provided by law.<sup>121</sup>

The adoption of the new Investment Incentive Regulation introduced a new incentive administration system, with a focus on centralization, supervision, and data collection. First, the power to administer and approve investment incentives is transferred from the EIC to the Ministry of Finance (hereinafter ‘the Ministry’). The Ministry is authorized to approve requests for investment

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<sup>116</sup> Investment Proclamation No. 1180/2020, art. 44.

<sup>117</sup> Per art. 49 of the Investment Proclamation No. 1180/2020, the Board is required to adopt a directive that will determine the working procedures of the Council including submission of matters for consideration and rendering of decisions and recommendations.

<sup>118</sup> *Id.*, art. 47.

<sup>119</sup> Investment Proclamation No. 769/2012, art. 30 (2) (a).

<sup>120</sup> *Id.*, art. 28 (11).

<sup>121</sup> Investment (Amendment) Proclamation No. 849/2014, art. 4 (6).

incentives upon recommendation by the EIC. Similarly, the power to grant incentives is transferred from the Board to the Ministry.<sup>122</sup> Second, the Investment Incentive Regulation provides detailed rights and obligations of regulatory institutions responsible for the implementation of the incentives.<sup>123</sup> These include the obligation to examine and regularly report to the Ministry on incentives granted and taxes forgone by the government.<sup>124</sup> Third, it emphasizes the need to closely monitor and evaluate whether the incentives granted are being used for the intended purposes. All the regulatory institutions with a mandate to implement incentives are required to supervise the use of the incentives and report to the Ministry. Failure to report to the Ministry carries serious consequences to the government agency or the employee responsible for reporting a penalty of up to 3 months' salary.<sup>125</sup> Concurrently, the Ministry is responsible for maintaining a database of monitoring and analysis of tax incentives granted to investors and reporting to the federal government on the incentives awarded and revenue foregone by the government.<sup>126</sup>

#### **4.1.5. Investment Facilitation and Regulatory Coordination**

Investment promotion, attraction, and retention is not an isolated activity. Its success largely depends on strong collaboration between different government agencies at the federal and regional tiers. Recognizing the need to improve and streamline investment services, previous investment laws vested powers on the EIC to liaise and coordinate between investors, public

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<sup>122</sup> Investment Incentive Regulation No. 517/2022, art. 4 (7).

<sup>123</sup> *Id.*, art. 2(6). For the purpose of the Incentive Regulations, the applicable regulatory institutions with the mandate to implement tax incentives include, the Ethiopian Investment Commission, the Ministry of Trade and Regional Integration, the Ministry of Mines, the Ministry of Revenues, regional states administrations, Addis Ababa and Dire Dawa city administrations and others as appropriate.

<sup>124</sup> *Id.*, art. 18 (4).

<sup>125</sup> *Id.*, art. 25.

<sup>126</sup> *Id.*, art. 23.

offices, regional governments, and other relevant organs.<sup>127</sup> Additionally, a system known as a “one-stop-shop” was instituted in 1996 that centralized various administrative services in one window at the EIC.<sup>128</sup> The one-window services aimed to ease regulatory controls at the entry-level, smoothen procedures and reduce the time to execute investment projects. This is a critical factor to ensure that any investment promotion activities are converted into real projects.

Under the new laws, the previous list of administrative functions that were delegated to the EIC under the one-stop-shop services scheme was significantly expanded to allow EIC to provide more services to investors. Examples include the expansion of EIC’s mandate to facilitate Brownfield Investments<sup>129</sup> and the provision of visa services.<sup>130</sup> In addition, one-stop services at the EIC that previously stopped after an investor obtained its business license are now extended for the full cycle of the investment.<sup>131</sup> For those services that fall outside of the one-stop-shop scheme, such as obtaining land, loans, or utility services, the law obliges the EIC and the regional investment bureaus to establish help desks that will handle these requests expeditiously.<sup>132</sup> Furthermore, the new laws imposed a legal obligation on regional investment bureaus to provide one-stop-shop and help desk

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<sup>127</sup> Investment Proclamation No. 769/2012, art. 28 (5).

<sup>128</sup> *Id.*, art. 30. Although the wording of this provision appears to limit the one-stop shop services to the “manufacturing” sector, in practice, the services were availed to all investments handled by the EIC. One-stop shop services include services such as document notarizations, registration and licensing of companies, granting construction permits, work permits, and investment permits.

<sup>129</sup> *Id.*, art. 12(3); Investment Proclamation No. 1180/2020, art. 2(1); Investment Regulation No. 474/2021, art. 11. Previously, the registration and permitting procedures for the acquisition of existing business by foreign investors was the mandate of the Ministry of Trade and Industry. EIC’s mandate only extended to new and greenfield investments. Investment Proclamation No. 1180/2020, art. 2(1).

<sup>130</sup> Investment Proclamation No. 1180/2020, art. 23.

<sup>131</sup> Investment Proclamation No. 769/2012, art. 30 (2).

<sup>132</sup> Investment Regulation No. 474/2020, art. 18 (5).

services.<sup>133</sup> Previously, the decision to provide one-stop-shop services at regional levels was left to the discretion of the regional administration.<sup>134</sup>

Besides the establishment of the Council, EIC's role as the investment coordination unit of the Federal government is legally enhanced through various mandates. EIC is now required to jointly develop with regional administrations guidelines, and investment promotion activities, and facilitate pre- and post-investment services to resolve investment bottlenecks.<sup>135</sup> For this purpose, standing desks at the EIC representing the regions are required to be formed to jointly work on investment co-promotion, administrative coordination, and augment regions' participation in investment administration. Similarly, the law obligates the EIC to design joint investment promotion activities and strategies for the specialized sectors in collaboration with the federal agencies with delegated powers.<sup>136</sup> Other coordination responsibilities of the EIC include developing strategies jointly with the Ministry of Labour and Social Affairs, the Ministry of Trade and Industry, and the Immigration, Nationality and Vital Events Agency, to jointly address matters such as visas, employment of foreigners, skills, and technology transfer.<sup>137</sup>

Additionally, the new laws attempt to address one of the most intricate issues of investment implementation in Ethiopia, i.e., land allocation. Land-related issues are frequently cited as highly difficult to resolve.<sup>138</sup> Constitutionally,

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<sup>133</sup> Investment Proclamation No. 1180/2020, art. 24 (2).

<sup>134</sup> Investment Proclamation No. 769/2012, art. 30 (10).

<sup>135</sup> Investment Proclamation No. 1180/2020, art. 50.

<sup>136</sup> *Id.*, art. 4(3).

<sup>137</sup> *Id.*, art. 22 (7), (8) and 23 (6).

<sup>138</sup> A survey carried out by the Investment Reform Taskforce, targeting 35 investors with investment in regional states of Ethiopia, identified the following common responses:

- the service in relation to the land provision is poor, not helpful or not good enough - especially in the face of resistant, unresponsive, or little motivated regional agencies.

land ownership is vested on the State and peoples of Ethiopia.<sup>139</sup> The Federal government retains legislative power over the conservation and utilization of land, whereas regional states are granted the powers to administer the land based on federal laws.<sup>140</sup> Consequently, land required for any investment project must pass through the land acquisition procedures of regional administrations, which often vary from region to region. EIC's role has been limited to assisting investors in acquiring land required for their investments, which has not always been successful.<sup>141</sup>

To address this issue, the new laws have introduced rules that obligate both EIC and regional administration organs. The new Investment Proclamation requires regional investment administration bodies to: a) identify and classify lands to be used for investment projects; b) organize the lands centrally under one regional state administration body; c) transfer information to the relevant investment organ; and, d) establish a transparent and predictable system for handling such land requests.<sup>142</sup> The EIC's role is elevated to ensuring that land allocation requests are facilitated and the regional organs are efficiently handling the requests. Furthermore, the law provides timelines within which such requests shall be handled prioritizing land requests for agricultural and manufacturing sectors (maximum of 60 days) and other sectors. (maximum of 90 days).<sup>143</sup> Such enhancement is expected to complement the Council's mandate which specifically includes resolving issues of land allocation. The

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- EIC is involved in most procedures, writes support letters, follows up, but is often unable to translate the efforts into concrete results.
  - EIC lacks political influence over other agencies.
  - level of cooperation between the EIC and regional states is very low.
  - Significant disconnect between EIC's investment promises and what actually exists on the ground.

<sup>139</sup> Constitution of the Federal Democratic Republic of Ethiopia, art. 40(3).

<sup>140</sup> *Id.*

<sup>141</sup> Investment Proclamation No. 769/2020, art. 30 (4) (a).

<sup>142</sup> Investment Proclamation No. 1180/2020, art. 51.

<sup>143</sup> *Id.*

various legal and institutional arrangements introduced under the new law aim to establish a nationally integrated mechanism for investment and introduce an improved level of regulatory symmetry.

#### **4.1.6. Administrative Measures and Grievance Handling**

##### **4.1.6.1. Administrative Measures**

The EIC is mandated to carry out various administrative functions to assist investors. Key among these are the registration and licensing of companies and the issuance, renewal, suspension, and revocation of investment permits. Previous laws provided for a general provision that authorized the EIC to issue and revoke investment permits. Clarity on the nature of violations, grounds for suspension or revocation, and timelines for adjudication and appeal mechanisms were not provided in the law, granting wide discretionary powers to the EIC. Under the new Investment Regulation, detailed rules are provided offering substantive rights and procedural safeguards that reduce administrative discretion. Previously non-existent rules on investment permit suspension and revocation are added to the new law.<sup>144</sup> These include clear provisions on what constitutes a violation and the extent necessary to justify a suspension, the term of any suspension, requirements to notify the investor of the reasons for the suspension, and an opportunity to remedy the violations.<sup>145</sup>

##### **4.1.6.2. Grievance Hearing**

Investor complaints or disputes of an administrative nature are natural consequences of investment projects. Modern investment laws typically incorporate clear rules on investor complaint handling and dispute resolution

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<sup>144</sup> Investment Regulation No. 474/2020, art. 13.

<sup>145</sup> Investment Proclamation No. 1180/2020, art. 13 and Investment Regulation No. 474/2020, arts. 13 and 14.

mechanisms to manage investor expectations. Previously, the investment proclamation granted a broad right of complaints for investors to lodge to the EIC with a right of appeal to the Investment Board.<sup>146</sup> The law did not provide procedural details on the standards, scope, and types of complaints that could be submitted as well as timelines for a decision on the complaints.

The new investment laws have established robust mechanisms to address complaints filed with the EIC at three levels. First, complaints related to the decisions of the EIC may be escalated to the Investment Board. Through such a process, the new Proclamation entitles the investor to a “speedy, equitable and efficient” procedure.<sup>147</sup> Secondly, the new investment proclamation expands the scope of investor complaints that may be entertained by the EIC (with the right of appeal to the Board) to also include complaints against other executive bodies. This is a new entitlement that allows investors to file complaints to the EIC against the decisions of other federal government agencies having a “significant” impact on the investor’s business. Here, the Investment Proclamation establishes a substantive right of complaint to the investor and clear procedural steps to follow. Thirdly, the new laws have introduced a new platform to handle grievances against regional investment administration bodies. Complaints involving “fundamental grievances” or ‘significant misunderstandings” regarding the provision of pre-investment or post-investment services may be submitted to Council. Definitions of these terms and guidelines for interpretation are not provided in the law. However, the Board is obliged to enact a Directive that will determine the details of matters that are to be submitted to it and the Council, and the rendering of decisions and recommended solutions. Furthermore, the law obliges all

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<sup>146</sup> Investment Proclamation No. 1180/2020, art. 32.

<sup>147</sup> *Id.*, art. 25 (2).



federal and regional bodies to comply with the decisions and recommended solutions of the Investment Council.<sup>148</sup>

In sum, the new and different layers of grievance handling procedures established under the new investment proclamation aim to harmonize investment administration across government bodies. While the EIC is the central regulatory agency for investment admission and administration, the decisions of sectoral agencies and regulatory bodies have an impact. As part of its ‘after-care’ service provision, such a centralized system will afford the EIC the mandate and forum to address investment complaints, regardless of their origin. To this end, the Proclamation imposes a duty on all executive organs to comply with the final decision of the Board and the Council.

## **Conclusion**

This article attempted to examine the newly introduced investment regulatory regime in light of investment regulations of the recent past. It highlighted the key substantive, procedural and institutional rules introduced by the new investment laws and the policy rationale behind them. Relative to the previous investment laws, the reform of the investment regulatory regime may generally be considered progressive. However, the changes fall short of a comprehensive reform signaling a fundamental shift in policy or approach to investment regulation in Ethiopia. At best, the new laws may be characterized as a cautious exercise at liberalization, retaining many of the previous restrictions. In some instances, regressive legislations have since been passed derogating from the “open” policy to investment admission and the stated objectives of the new investment laws. There is a need for policy and legal consistency, and additional reforms for Ethiopia to remain a competitive and attractive investment destination. The Board will need to exercise its authority

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<sup>148</sup> *Id.*, art. 47 (4).

to continuously review the investment regulations with a view to liberalizing more sectors and lift existing restrictions on investment entry (such as mandatory joint-investment and minimum capital requirements).

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