THE STATE OF ETHIOPIA'S TRANSNATIONAL ECONOMIC LAW: TRADE, INVESTMENT, AND ARBITRATION

Zewdineh Beyene Haile & Won L. Kidane[*]

Abstract

This article offers a critical appraisal of the evolution and the current state of Ethiopia's transnational economic laws focusing on trade, investment and commercial dispute settlement. It finds with curiosity a considerable degree of departure from established texts for reasons that are not readily evident and recommends limiting such departures to the promotion of legitimate, rational, ascertainable, and defensible economic, social or other types of local objectives.

Key-terms: Investment, arbitration, international trade, BITs, Ethiopia

Introduction

A misnomer though it might sound, a nation's laws that impact its overall cross-border economic interactions of all types could usefully be termed transnational economic law for academic and policy appraisal.[1] In that sense,

[*] Zewdineh Beyene Haile (PhD, SJD) and Prof. Won L. Kidane (JD, SJD) are founders and co-principals of Addis Law Group LLP (ALG), a Washington D.C. based law firm specializing mainly in international commercial and investment arbitration. For details, please see the firm's website at www.addislawgroup.com

[1] The term "transnational law" is used in the sense that Philp Jessup used it in the 1950s to include "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." Peer Zumbansen, *Transnational Law*, OSGOODE HALL LAW SCHOOL OF YORK UNIVERSITY (2008),

this article canvases the sources of Ethiopia's transnational economic laws, and where meaningful content exists, offers a critical appraisal thereof. The areas of law include trade, investment, commerce, and dispute settlement, particularly, arbitration.

In terms of method the article follows a descriptive analysis of the sources of Ethiopia's transnational economic laws. Municipal laws as well as bilateral and multilateral treaties governing trade, investment and dispute settlement aspects of Ethiopia's transnational economic engagement have been analyzed. Where appropriate laws and jurisprudence of other countries have been referred to for comparative insight.

The article is organized as follows. Following this introduction, Section 1 highlights international legal instruments relevant to Ethiopia's international trade. Section 2 appraises the transnational aspect of Ethiopia's investment law regime. Section 3 examines in detail the Ethiopian regime for the settlement of transnational disputes. Finally, the article provides brief conclusion and recommendation.

1. Ethiopia's Trade Agreements and Regulations

Ethiopia remains by and large outside of the world's complex trading legal regime. Still an aspiring member of the World Trade Organization (WTO), Ethiopia has to date a few formal binding bilateral trade treaties.[2] The known

https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1181&context=clpe [https://perma.cc/D3Q3-ZZ7G].

[2] Ethiopia's WTO accession process that laid dormant for more than a decade was reinitiated in 2019. Its prospects remain unclear as of this writing. *See* International Trade Administration (ITA), *Ethiopia: Country Commercial Guide* [hereinafter *Ethiopia: Country Commercial Guide*], https://www.trade.gov/knowledge-product/ethiopia-trade-agreements [https://perma.cc/4VS3-74QZ]. To be sure, Ethiopia has numerous bilateral trade arrangements with a number of countries operationalized by bilateral trade commissions under the Ministry of Foreign Affairs. The legal instruments are not publicly available.

international legal instruments of trade significance that Ethiopia is a party to are the following:

(1) Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (Kampala, 5 November 1993)

(2) Agreement Establishing Intergovernmental Authority on Development (IGAD) (Nairobi, March 1996)

(3) African, Caribbean, and Pacific Group States (ACP)-European Union (EU) Economic Partnership Agreement (Cotonou, 23 June 2000)

(4) The African Continental Free Trade Agreement (AfCFTA)

(5) The Abuja Treaty that aims to establish an Africa Economic Community among the continents 54 countries.[3]

Beyond this, as one of the least developed countries, Ethiopia benefits from unilateral concessions from some of its major trading partners including the United States,[4] the European Union,[5] and China.[6]

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[3] These are listed as the only ones by ITA. *Id.* The official website of the Ethiopian Ministry of Trade and Industry does not offer more details. *See* the Ethiopian Ministry of Trade and Industry website at: http://www.motin.gov.et/home [https://perma.cc/CF6C-VWX9].

[4] *See* Office of the United States Trade Representative, *The African Growth and Opportunity Act (AGOA)*, USTR.GOV, https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa [https://perma.cc/Y8JY-C8AH]. ("Since its enactment in 2000, the African Growth and Opportunity Act (AGOA) has been at the core of U.S. economic policy and commercial engagement with Africa. AGOA provides eligible sub-Saharan African countries with duty-free access to the U.S. market for over 1,800 products, in addition to the more than 5,000 products that are eligible for duty-free access under the Generalized System of Preferences program. In 2015, Congress passed legislation modernizing and extending the program to 2025.").

[5] *See* European Commission, *EU Trade Policy and Africa's Exports*, TRADE.EC.EUROPE.EU, https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156399.pdf [https://perma.cc/QE4T-6WQX]). ("The EU is the most open market for African exports. Most African countries have fully free access to the EU market. Other partners offer less favourable conditions for African exports. Europe is by far Africa's largest export market and its main customer. Thanks to EU trade openness, exports of food and manufactured products from Africa to the EU keep increasing.").

[6] *See* Africa Unconstrained, *From China-Africa to Africa-China: A Blueprint for a Green and Inclusive Continent-Wide African Strategy towards China*, available at:

Ethiopia has detailed import tariff schedules[7] but as the International Trade Administration of the United States indicates, the purpose of these regulations seems to be for the purpose of "revenue generation, not protection of local industry."[8] As such, outside commentary on Ethiopia's tariffs regimes paints a picture of unmitigated revenue generation idiosyncrasy with the exception of the few tariffs regimes governed by the regional trade agreements that Ethiopia is a party to.[9]

https://developmentreimagined.com/wp-content/uploads/2021/06/blueprint-final-14.06.pdf [https://perma.cc/ZD7B-CBNY]. In 2010, China agreed to allow imports from Least Developed Countries (LDCs) under a Duty-Free Quota Free Scheme (DFQF). This scheme was renewed in 2015 and is estimated to cover 97% of tariff lines. However, it has had a limited impact so far. For example, while 99% of all LDC imports into China in 2011 were under the DFQF scheme, China has imported little beyond such commodities from African LDCs. The WTO largely attributes under-utilization of these preference schemes to complex Rules Of Origin (ROOs), market access challenges and direct transportation requirements. *Id.* at 21.

[7] *See e.g.*, Ethiopian Customs Commission, *Customs Tariff*, CUSTOMS.ERCA.GOV.ET, https://customs.erca.gov.et/trade/customs-division/tariff?lang=en.

[8] *Ethiopia: Country Commercial Guide*, *supra* note 2.

[9] *See id.* ("Revenue generation, not protection of local industry, appears to be the primary purpose of Ethiopia's tariffs. Goods imported from the Common Market for Eastern and Southern Africa (COMESA) members are granted a 0 to 10% tariff preference, (depending on the type of goods) under the Free Trade Agreement (FTA). Tripartite FTA membership among COMESA, the South African Development Community (SADC), and the East African Community (EAC) members will allow zero tariffs and duties, which will impact Ethiopian trade when it completes the COMESA accession process (timeline for completion is unclear). Customs duties are payable on imports by all persons and entities that have no duty-free privileges. In 2019 Ethiopian customs ceased its policy of reducing, or eliminating, customs duties on imports of knocked-down and semi knocked-down industrial inputs. This new revision has reclassified these products to be treated with basic tariff rates.").

2. Ethiopia's Investment Law Regime

Previous writings have outlined the sources, evolution, and contents of Ethiopian investment law up to the most current proclamation and regulation enacted in 2020.[10] This section focuses on the current state of the law.

2.1. International Treaties

Ethiopia has signed 34 Bilateral Investment Treaties (BITs) of which 21 have come into effect.[11] As a preliminary matter, it is interesting to note that although Ethiopia has signed at least 4 BITs in the last ten years, none has come into effect.[12] It is not clear whether this is an indication of BIT hesitancy along the lines of India[13] and South Africa[14] or a matter of legislative priority, administrative lag time or a function of simple bureaucratic neglect.

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[10] *See* 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).

[11] *See* the Bilateral Investment Treaties (BITs) that Ethiopia signed at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia [hereinafter Ethiopia BITs] [https://perma.cc/BB72-C4LL]. The database shows 35 BITs but the Ethiopia-German BIT signed in 1964 was terminated and renegotiated in 2004. Besides, the BITs signed with India and South Africa are terminated unilaterally by these respective countries. *Id.*

[12] *See id.* These four BITs have been signed since 2016. Between 2009 and 2016, no BIT has been signed. *Id.*

[13] Disappointed by a series losses of investment arbitral cases, India sought to renounce its existing BITs and came up with new model BITs. For a detailed discussion of the Indian ISDS cases and its effort in renegotiating its BITs with a new model, *see generally* Won Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa* [hereinafter *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*], 49 LOY. U. CHI. L.J. 406, 445-461 (2017).

[14] Although South Africa did not have arbitral setbacks like to India, arbitral threats of a similar nature caused serious rethinking of the overall BITs program. For details *see* Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 GEO. WASH. INT'L L. REV. 523, 557-561 (2018).

The history of Ethiopia's BITs[15] program is long. It began in earnest in 1964, a year after Ethiopia adopted its first Investment Code in 1963.[16] The 1964 BIT with Germany[17] was indeed one of the very first BITs in the world.[18] A comparison of the texts of the 1959 Germany-Pakistan BIT, which is considered the very first BIT in the world, and the 1964 Germany-Ethiopia BIT shows that it is in fact identical.

This German model contained some of the most fundamental investor protection principles in their rudimentary form.[19] Unsurprisingly, although it anticipates a state-to-state dispute settlement, it does not contain any form of investor-state dispute settlement (ISDS).[20]

It took exactly three decades for Ethiopia to sign its second BIT in 1994 with Italy.[21] Indeed, the BIT with Italy was the very first ever that came into effect. It did so in May of 1998.[22] Mildly put, legal developments during those

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[15] In addition to BITs UNCTAD lists the following instruments with significant foreign investment implication: MIGA Convention1985, UN Code of Conduct on Transnational Corporations (1983), World Bank Investment Guidelines (1992), ILO Tripartite Declaration on Multinational Enterprises (2006), UN Guiding Principles on Business and Human Rights (2011), Permanent Sovereignty UN Resolution (1962), New International Economic Order UN Resolution (1974), Charter of Economic Rights and Duties of States (1974). *See* Ethiopia BITs, *supra* note 11.

[16] AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LEGAL MATERIALS [hereinafter International Legal Materials] (1963).

[17] Treaty between the Federal Republic of Germany and the Empire of Ethiopia concerning the Promotion of Investments, Ger.-Eth., 1964 [hereinafter Germany-Ethiopia 1964 BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1165/download [https://perma.cc/R49R-SJA2].

[18] The first known BIT is between Germany and Pakistan signed in 1959 and came into effect in April 1962.
Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak. 1959,
https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download [https://perma.cc/NMT4-AERH].

[19] *See* Germany-Ethiopia 1964 BIT, *supra* note 17, at arts. 2, 3. Article 2: non-discrimination and Article 3: security and protection and non-expropriation.

[20] *See* Germany-Ethiopia 1964 BIT, *supra* note 17, at art 11. Article 11: dispute settlement.

[21] *See* Ethiopia BITs, *supra* note 11.

[22] *See id.*

decades did not prioritize transnational economic matters. The decade of the 1990s and 2000s saw rapid treaty activity as well as corresponding domestic legislative efforts.[23] It was between 1997 and 2010 that all of Ethiopian 21 BITs came into effect.[24]

Substantively, almost all of these treaties contain some of the most basic investment and investor protection rules such as non-discrimination, fair and equitable treatment, non-expropriation, and ISDS.[25]

Investors from these 21 countries[26] enjoy legal protection from these external sources of law. The nature and exact scope of their added benefits are, of course, specific text dependent. It cannot be assumed that just because the texts read similar, the protections are identical. To the contrary, minor variations in taxonomy could have significant implications especially in dispute resolution.

Most notably, Ethiopia's history of BITs defies any discernable patter such as North-South or South-South as almost half are with developing economies such as Yemen, Libya and Sudan and half are with advanced economies such as the Netherlands, Sweden, and Germany.[27] It does not support the notion that Andreas Lowenfeld famously describes as the core of international investment law i.e., replacements for colonial rule, which he describes in the following terms:

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[23] For a discussion of the domestic legislations of most current importance, *see infra* section 2.2.

[24] *See* Ethiopia BITs, *supra* note 11.

[25] A good sampling for comparative review is the earliest English text of Ethiopia-Kuwait (1998) and the last to come into effect the text of Ethiopia-Egypt (2010). Although there is variation in taxonomy, the basic rules appear similar. Ethiopia BITs, *supra* note 11.

[26] Egypt (2010), Finland (2007), Sweden (2005), Austria (2005), Libya (2004), Germany (2006), Israel (2006), Iran (2004), France (2004), Netherlands (2005), Algeria (2005), Denmark (2005), Tunisia (2004), Turkey (2005), Sudan (2001), Yemen (2000), Malaysia (1999), Switzerland (1998), China (2000), Kuwait (1998), and Italy (1997). Ethiopia BITs, *supra* note 11.

[27] *See id.*

> By the early 1960s, following the wave of decolonization in Africa and parts of Asia, and a wave of take- overs of foreign investments throughout the Third World, it had become apparent that it would be very difficult to achieve consensus on the obligations of host countries toward alien investment (read multinational corporations). The leading international aid institution, the World Bank, began to consider how, on the one hand, it could avoid being embroiled in controversies between home and host states concerning expropriations, and on the other hand, how it could assist the resolution of such controversies …[28]

It does not make Lowenfeld's proposition more or less probable inasmuch as it is merely a function perhaps of the paucity of intentionality on the part of Ethiopia in terms of the objectives that these treaties are supposed to accomplish. The abrupt cessation of ratification activity of all signed BITs at around 2010, lacking articulable exogenous explanation, appears to reinforce the conclusion on intentionality. This is not unique to Ethiopia, however. As indicated above, for example, India seems to have been less systematic than China in its ratification and management of its BITs program bearing some serious adverse consequences.[29]

2.2. The Current Investment Proclamation

Ethiopia's most current domestic investment law is Investment Proclamation No. 1180 enacted in 2020 and the Investment Regulation No. 474/2020.[30] It

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[28] *See* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 536 [hereinafter Lowenfeld] (2nd ed. 2008).

[29] *See China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, *supra* note 13.

[30] Investment Policy Hub, Ethiopia's Investment Proclamation No. 1180/2020 [hereinafter Investment Proclamation No. 1180/2020], https://investmentpolicy.unctad.org/investment-laws/laws/318/ethiopia-investment-proclamation-no1180-2020 [https://perma.cc/NMT4-AERH]. It replead the most immediately preceding Investment Proclamation No.769/2012 (as amended) and the Ethiopian Investment Board and Ethiopian Investment Commission Establishment Council of Ministers Regulation No. 313/2014. *See id.* at art. 56. See also, Ethiopia's Investment Regulation No. 474/2020, https://bit.ly/investmentregulation. This regulation partly repealed the previous Investment

is a continuation of the gradual modernization of Ethiopia's legislative effort in the area of investment that began with the adoption of the first Investment Code of 1963[31] under the revised Imperial Constitution of 1955.[32] Proclamation 1180/2020 replaced the most immediately preceding Investment Proclamation No.769/2012 (as amended) and the Ethiopian

Incentives and Investment Areas Reserved for Domestic Investors Regulation No. 270/2012. See art. 21.

[31] International Legal Materials, *supra* note 16, at p. 41-44. Chronologically, modern notions of investment protection had already been contained in the Treaty of Amity and Commerce between Ethiopia and the United States of 1951. Treaty of Amity and Economic Relations between the United States of America and Empire of Ethiopia, U.S.-Eth. 1951, https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002815.asp [https://perma.cc/SH29-KEK5]. The Treaty provides in Article VIII:

> 1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.
> 2. Property of nationals and companies of either High Contracting' Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just and effective compensation.

A related notable feature is MFN in the area of admission of each other's citizens: Article VI

> 1. Nationals of either High Contracting Party shall be permitted, subject to immigration laws and regulations, to enter the territories of the other High Contracting Party and to reside therein for the purpose of engaging in industry, carrying on international trade, or pursuing studies, upon terms no less favorable than those accorded to nationals of any third country." This Treaty was updated in 1994. *See* International Trade Administration, *Ethiopia - Country Commercial Guide*, TRADE.GOV., https://www.trade.gov/knowledge-product/ethiopia-trade-agreements [https://perma.cc/X2N3-S77N].

[32] The Ethiopian Constitution of 1955 (Revised) is available at: https://archive.org/stream/TheEthiopianConstitution/EC_djvu.txt [https://perma.cc/9G3M-D4G5].

Investment Board and Ethiopian Investment Commission Establishment Council of Ministers Regulation No. 313/2014.[33]

Two of the eight preambular paragraphs touch and concern Foreign Direct Investment (FDI) and hence by definition set the stage for the transnational investment rules that the Proclamation makes.[34] The law applies to both domestic and foreign investors. In fact, an investor is defined as "[a] Domestic or Foreign investor who has invested capital in Ethiopia".[35]

Foreign investor is further defined as:

a) A Foreign National;

b) An Enterprise in which a Foreign National has an ownership stake;

c) An Enterprise incorporated outside of Ethiopia by any investor;

d) An Enterprise established jointly by any of the investors specified under Sub-article (6) paragraphs (a), (b) or (c) of this Article; or

e) An Ethiopian permanently residing abroad and preferring treatment as a Foreign investor."[36]

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[33] *See* Investment Proclamation No. 1180/2020, *supra* note 30, at art. 56. Legislations that predated the 2012 Proclamation included: Investment Proclamation No. 37/1996; Investment Proclamation No. 280/2002; Proclamation No. 116/1998; Proclamation No. 168/1999; Proclamation No. 375/2003; Proclamation No. 103/1998 (Capital Goods Leasing Business Proclamation) and, Proclamation No. 543/2007 (The Revised Export Trade Duty Incentive Scheme Establishing Proclamation); Investment Proclamation No. 769/2012; Investment Regulation No. 270/2012, and Mining Proclamation No. 678/2010, and Petroleum Operations Proclamation No. 295/1986. Texts of all these are also available at www.hopr.gov.et. A major subsequent legislation is the Industrial Parks Proclamation No. 886/2015. *Id.* For a discussion of legislative activities during the military rule between 1974 and 1991, *see* LIBRARY OF CONGRESS, ETHIOPIA: A COUNTRY STUDY (1991), at 187-190.

[34] *See* Investment Proclamation No. 1180/2020, *supra* note 30. At Preamble: ("WHEREAS it has become necessary to further increase and diversify foreign investment inflow to accelerate inward transfer and diffusion of knowledge, skill, and technology; RECOGNIZING that it has become necessary to maximize linkages between foreign and domestic investments, promote equitable distribution of investments among regions, and leverage foreign capital to promote the competitiveness of domestic investors.").

[35] Investment Proclamation No. 1180/2020, *supra* note 30, art. 2(4).

[36] *Id.* art. 2(6).

The Investment Proclamation provides for the general negative-list rule on the areas of investment reserved for nationals or joint investment and leaves the details for further regulation.[37] The Regulations enacted shortly thereafter supply the actual list.[38]

More relevant to transnational matters are the rules on investment protection and dispute settlement. There is only one provision on investment protection analogous to protections offered by investment treaties and that is the rule against expropriation. Although most investment treaties formulate the rule in the negative such as "neither party shall expropriate unless,…" the Investment Proclamation makes a similar rule albeit in the positive formulation i.e., "The Government may expropriate any investment undertaken under this Proclamation for public interest, in conformity with requirements of the law, and on a non-discriminatory basis."[39] It further provides that "In case of expropriation of an investment effected pursuant to Sub-article (1) of this Article, adequate compensation corresponding to the prevailing value shall be paid in advance."[40]

Few rules of international law are more fraught with controversy than the rule on expropriation. The above provision approximates, but does not exactly duplicate, the most recognized expropriation standard known as the Hull Rule, named after its architect – Secretary of State Cordell Hull.[41] Having

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[37] *Id.* art. 6.

[38] Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Investment Regulation No. 474/2020 arts. 3-6 [hereinafter Investment Regulation No. 474/2020], http://unidoseoul.org/en/files/2020/10/Federal-Negarit-Gazette-New-Investment-Regulation-No.-474-2020.pdf

[39] Investment Proclamation No. 1180/2020, *supra* note 30, art. 19(1).

[40] *Id.* art. 19(2).

[41] Cordell Hull's most famous statement is the following:
"The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their

overcome the most acrimonious dissent from the famous Calvo doctrine,[42] the Hull formula is now fully entrenched in its cogent articulation as "prompt, adequate and effective" compensation.[43]

To the extent the Investment Proclamation's formulation defers in any significant way from protection standards provided in applicable BITs, arbitral tribunals or other adjudicators depending on the dispute settlement mechanism that may apply, would have to reckon with priorities of applicable rules. Ordinarily, disputes often pertain to whether an act of expropriation has

ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equality and justice." U.S. Secretary of State communications to Mexican Ambassador to the United States, Jul. 21, 1938. Lowenfeld, *supra* note 28, at 474-475.

[42] The essence of the Calvo doctrine is that "[a]liens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity. The rule that in more than one case it has been attempted to impose on American states is that foreigners meri regard and privilege more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations." Donald R. Shea, "The Calvo Clause" (1955), 17–19. *Id.* 473.

[43] For a fuller exposition of the principle, *see generally*, Frank G. Dawson & Burns H. Weston, *Prompt, Adequate and Effective': A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727 (1962). The most frequently invoked principle of international law in respect of compensation is the PCIJ's statement in the Chorzow Factory case: "The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decision of international arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." Permanent Court of International Justice, *Case Concerning German Interests in Upper Silesia*, P.C.I.J. Series A, Nos. 7, 9, 17, 19 (1926–1929) at 47.

taken place in the first place. Where such is admitted, however, disputes pertain to the adequacy and timeliness of the compensation. The determination of market value at the time of expropriation or at least when the intent to expropriate was made known is often an exceedingly difficult exercise that adjudicators undertake with the help of quantum experts. In this regard, the Investment Proclamation's rule of "prevailing market value" seems to offer a relatively sufficient guidance although it is not inconceivable that disputing parties could disagree on the timing and related matters that could affect value. A more serious problem could arise if an applicable BIT contains a different quantum or valuation rule. Where such treaty exists, it serves as an external standard that often supplants the domestic standard unless the treaty itself contains a rule of priority or preemption. In any case, this is a matter that would be determined on a case-by-case basis.

That leads to the final and perhaps more important topic of dispute settlement.

3. Ethiopia's Transnational Dispute Settlement Regime

The legal regimes for two broad categories of transnational disputes warrant appraisal: investment disputes and commercial disputes.

3.1. Investment Disputes

Ethiopia's most current legal regime for the resolution of investment disputes comprises dispute settlement provisions in Investment Proclamation No. 1180/2020 and the 21 BITs that have come into effect.

The Investment Proclamation contains a separate provision on dispute settlement. It follows elaborate "grievance procedures."[44] The grievance procedures anticipate such mundane matters as the non-issuance or

[44] *See* Investment Proclamation No. 1180/2020, *supra* note 30, arts. 25-27.

revocation of investment license, denial of incentives etc.[45] These "grievances" could potentially have investors' rights implications whether they be granted in the domestic laws or investment treaties.

The basic principle is stated in Article 25(1) as: "1/ Any investor who has grievance in respect of his investment shall have the right to submit a complaint to the appropriate investment organ." The operative term is defined as "[A]ppropriate Investment Organ" means the Commission, a federal government body carrying out functions delegated by the Commission, or the relevant regional state administration body authorized to issue investment permits or administer investments."[46] The Commission is given strict timeline during which it must resolve the "grievance".[47] The relevant provisions anticipate a mechanism of non-adversarial dispute settlement between the investor and any government agency by empowering the Investment Commission to recommend what seems like a settlement. The most pertinent provision reads:

> 1/ Any investor undertaking investments pursuant to this Proclamation shall have the right to submit a complaint to the Commission against final decisions of any federal government executive body where such decisions significantly affect the investments.
>
> 2/ A written copy of the final decision of any federal Government Executive Body shall be given to the investor within Seven (7) working days from the date of decision.
>
> 3/ Any complaint submitted to the Commission against a final administrative decision of a Federal Government Executive Body shall be lodged within Thirty (30) working days from the date the investor becomes aware of the decision.
>
> 4/ The Commission shall engage with the government body against whom a complaint is lodged under Sub-article (1) of this Article and

[45] *See id.*

[46] *Id.* art 2(16).

[47] *Id.* arts. 26-27.

> propose a recommended solution in writing within Thirty (30) days from the date of submission of the complaint.[48]

The Commission's decisions are appealable to the Investment Board, chaired by the Prime Minister or his designee.[49]

Unsurprisingly, the Board's decision is the final administrative disposition: "Any Federal Government Body whom a decision of the Board concerns shall have the duty to comply with and Execute in accordance with the decision of the Board."[50] Presumably, the decision of the Board could be judicially reviewed under the new Administrative Procedure Proclamation.[51]

Beyond the domestic administrative processes, the Proclamation anticipates ISDS. The relevant provision states as follows:

> 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 pursuant to this Proclamation will be resolved through consultation or negotiation.
>
> 2/ The Federal Government may agree to resolve investment disputes involving Foreign investments through arbitration.

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48 *Id.* art. 27(1-4).

49 *Id.* art. 27(6). "6/ The investor may file a complaint to the Board against the Commission's recommended solution proposed under Sub-article (4) of this Article, or where the Commission's recommended solution is not accepted by the government body against whom the complaint was submitted." For the composition of the Board, *see id.* art. 30.

50 *Id.* art. 27(9).

51 Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Federal Administrative Procedure Proclamation No. 1183/2020, https://www.lawethiopia.com/images/federal_proclamation/proclamations_by_number/Administrative%20procedure%20proclamation.pdf. Article 48 states: Without prejudice to the Provisions under Article 46 of this Proclamation: 1/ Any interested person may file a petition requesting a judicial review of a directive; 2/ Anyone whose interest is affected by an administrative decision may file a petition requesting judicial review. *Id.* art. 48.

> 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.[52]

Subsection (3) introduces the classic fork-in-the-road principle in investment law where the investor cannot pursue the same claim on multiple fora. A rather intriguing question could, however, arise within the possible meaning of this provision: whether the decision to seek judicial review of the Board's decision could be interpreted as a selection of forum for purposes of the fork-in-the road provision. That in turn would raise the question of whether or not there was a denial of justice[53] for purposes of determining FET (Fair and Equitable Treatment) violation under certain investment treaties.[54] This kind

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[52] Investment Proclamation No. 1180/2020, *supra* note 30, art. 28.

[53] As Jan Paulsson puts it: "(i) the denial of justice is essentially procedural in nature; (ii) it does not require the State to create a perfect system of justice but rather a system of justice that could correct serious errors; and, more importantly, (iii) the denial of justice requires the exhaustion of local remedies and the showing of a system failure." JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7-8 (2005).

[54] The connection between FET and Denial of Justice is fairly well established. For example, Article 8.10 of the Canada-EU Comprehensive Economic and Trade Agreement, provides in relevant parts:

> "1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
> (a) *denial of justice in criminal, civil or administrative proceedings*;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) manifest arbitrariness;
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) abusive treatment of investors, such as coercion, duress and harassment; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article." (emphasis added.).
>
> Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Canada– European Union, Oct. 2016, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/, [https://perma.cc/G89K-5R59]. The investment provisions are in Chapter 8.

of exhaustion question is not purely theoretical; it is contested with considerable frequency.

Finally, all 21 ratified BITs provide for ISDS albeit in differing formulations. A sample from each decade could help identify any pattern or the lack thereof of generational evolution of the dispute settlement provisions of the BITs.

The earliest was the terminated Ethiopia-Germany BIT of 1963. The dispute settlement provision reads: "Article 10 (1) Disputes concerning the interpretation or application of the present Treaty should, if possible, be settled by the Governments of the two Contracting Parties. (2) If a dispute cannot thus be settled it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal."[55] The subsections that follow describe the composition of the arbitral tribunal and the manners of its constitution. This being the only dispute settlement provision in the treaty, it is fair to conclude that at the time this treaty was signed in 1964, the Contracting Parties did not anticipate ISDS.[56]

As indicated above, in the 1970s and 1980s, Ethiopia concluded no BITs. The 1990s saw some activity, most notably, the Ethiopia-China BIT in 1998. It contains what is considered one of China's early generation BITs that only permitted international arbitration for the quantum of damages. It reads in relevant part:

> 9 (2). If the. dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment. . . . 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to

[55] Germany-Ethiopia 1964 BIT, *supra* note 17, art. 10.

[56] Coincidentally, this BIT was concluded just about a year after the famous World Bank African legal consultative meeting that took place in Addis Ababa between December 16 and 20 in 1963 to discuss the draft ICSID Convention. *See* International Centre for Settlement of Investment Disputes (ICSID), *The History of the ICSID Convention*, ICSIDD.WORLDBANK.ORG, https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention [https://perma.cc/Q2E5-797P]. Indeed, before the ICSID Convention of 1964, ISDS was unknown to international law and might even be considered an aberration as it allows a private person *locus standi* in a lawsuit against a sovereign state.

> negotiations as specified in Paragraph I of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal or arbitration under the auspices of the International Center for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investments Disputes between States and Nationals of Other States opened for signature in Washington on March 18, 1965 once both Contracting Parties become member States thereof. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in the Paragraph 2 of this Article.[57]

This is obviously, a Chinese model that Ethiopia supported. Although China employed this model primarily as a recipient of capital from the Global North in an effort to maintain decisional autonomy in the adjudication of liability by domestic processes, it is remarkable to see that it used the same model even when it is the sender of capital in this particular case. Whether it is a function merely of consistency for its own sake, a matter of principle, path-dependency or administrative rigidity, it is difficult to say. In any case, it offers a good example of Ethiopia's BITs relative to ISDS in the 1990s.

The third sample concluded in the mid-2000s is the Ethiopia-Netherlands BIT. It contains what could be considered modern and rather elaborate ISDS provision.

> (2) If the dispute has not been settled within a period of six months from the date either Party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to: a) the competent court of the Contracting Party in the territory of which the investment has been made; or b) the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under

[57] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments art. 9(2-3), Ethiopia-China, 1998 [hereinafter Ethiopia-China BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/732/download [https://perma.cc/PB9M-VHT7]. For a detailed discussion of the various generations of Chinese BITs, *see generally*, NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES (2009).

> the Convention on the Settlement of Investment Disputes between States and Nationals of other States entered into force on October 14th, 1966 after accession by the Contracting Parties; or c) the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility of Rules), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph 2 b) of this Article; or d) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). 13 3) A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States for the purpose of the Convention be treated as a national of the other Contracting Party. 4) The arbitral awards shall be final and binding on both parties to the dispute and shall be executed according to national law. 5) Each Contracting Party hereby consents to submit investment disputes for resolution to the alternative disputes settlement fora mentioned in the preceding paragraphs.[58]

It offers enough details on all aspects of the international arbitral process. Indeed, it is under this provision that Israel Chemical Limited LLC (ICL) initiated an ISDS against Ethiopia in 2017. Although the details of this case remain confidential, its existence is reported by the Permanent Court of Arbitration (PCA).[59]

[58] Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, art. 9, Ethiopia-Netherlands, 2003 [hereinafter Ethiopia-Netherlands BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download [https://perma.cc/9GYC-ZQBF].

[59] Limited information about the case is available on the PCA website at https://pca-cpa.org/en/cases/153/ [https://perma.cc/455R-BWS2].

The progression from no ISDS to ISDS for quantum purposes only to full-fledged ISDS over a period of more than four decades appears to have stopped in 2010 with no BIT ratification since then.[60]

3.2. International Commercial Dispute Settlement

On 13 February 2020, the Ethiopian parliament took the final domestic step for the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention).[61] On 24 August 2020, Ethiopia officially became a party to the New York Convention. [62] On 2 April 2021, Ethiopia enacted a comprehensive Arbitration Act: Proclamation No. 1237/202: Arbitration and Conciliation Working Procedure Proclamation [Ethiopian Arbitration Proclamation or the Arbitration Proclamation.][63]

The Proclamation itself is essentially a long overdue consolidation and development of rules scattered around Ethiopia's Civil Code of 1960 and Code of Civil Procedure of 1965.[64] The legislator did not exactly have a *tabula rasa*

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[60] *See* Ethiopia BITs, *supra* note 11 (ratification status). The record shows that at least four BITs were signed between 2010 and 2018 but none were ratified as of this writing. These BITs are with Brazil, Qatar, United Arab Emirates and Morocco. *See id.*

[61] *See* New York Arbitration Convention, *Ethiopia Ratifies the New York Convention*, NEWYORKCONVENTION.ORG, https://www.newyorkconvention.org/news/ethiopia+ratifies+the+new+york+convention [https://perma.cc/YFZ6-BGTY].

[62] *See* New York Convention's membership status at https://www.newyorkconvention.org/countries [https://perma.cc/4V2Y-88UJ].

[63] Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, Arbitration and Conciliation, Working Procedure Proclamation No. 1237/2020 [hereinafter Ethiopian Arbitration Proclamation], https://chilot.me/wp-content/uploads/2021/06/Arbitration-and-Conciliation-Working-Procedure-Proclamation.pdf.

[64] Although the Proclmation mostly rewrites the existing rules, it also expressly repeals many preexisting rules. *See id.* at art. 78. "Inapplicable Laws 1/ The provisions of Articles 3318 to 3324 of the Civil Code which deals about conciliation and the provisions Articles 3325 to 3346 of the Civil Code which deals about arbitrator shall be repealed by this Proclamation. 2/ The provisions of the civil procedure code from Articles 315 to 319,350,352,355-357 and 461 which deals about arbitrator repealed by this Proclamation. 3/ Other law or customary practices that are inconsistent with this Proclamation shall not

in this case, but a comparative look at what changed, though historically significant, is less useful in the appraisal of the new law on their own.[65] This section focuses on the salient features of the new rules.

It appears that, although it remains unmissably wedded to its Civil Code and Civil Procedure Code roots, the Proclamation, in essence, drew inspiration from multiple sources including primarily the UNCITRAL Model Law [66] inasmuch as it purports to implement the newly ratified New York Convention.[67]

One of the stated objectives of the enactment is the amendment of the existing rules "by taking into account the international practices and principles related to arbitration and conciliation."[68]

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be applicable with respect to matters provided for in this Proclamation. Article 79 states: "Applicable Laws. The Provisions of the Civil Procedure Code that may help the implementation of the conciliation or arbitration proceedings or related to the proceedings and not contravene this Proclamation shall be applicable." *Id.* art. 79.

65 The Proclmation does not apply retroactively. *See id.* art. 77. Article 77 states: "Transitional Provisions 1/ Any arbitration agreement signed before the coming into force of this Proclamation shall be governed by the law that had been in force before the effective date of this Proclamation. 2/ Arbitral proceedings initiated before the coming into force of this Proclamation or cases of arbitration pending before courts, ongoing proceedings and execution of decisions shall be governed by the law in force before the coming into force of this Proclamation, 3/ Contracting parties who have concluded arbitration agreement or in the process concluding an agreement before the coming into force of this Proclamation may agree to be governed by this Proclamation."

66 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985)* [hereinafter UNCITRAL Model Law], UNCITRAL.UN.ORG, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [https://perma.cc/4V2Y-88UJ].

67 Ethiopian Arbitration Proclamation, *supra* note 63, Preamble. "[h]elps in implementing international treaties acceded and ratified by Ethiopia;".

68 *Id.*

i. Scope of Application

The Proclamation applies to both domestic and international arbitration. International arbitration is defined through a combination of the place of business of the contracting parties and/ or the place of performance of the contract.[69]

ii. Formal Requirement, Enforcement of the Arbitral Agreement and Competence-Competence

Consistent with the New York Convention's formal requirement that the arbitration agreement be in writing to be enforceable, the Arbitration Proclamation contains a slightly modified version to account for modern media of preservation of content such as electronic communication.[70] Most notably, it defines electronic communication as: "any exchange of information between the contracting parties through email or the act sending, receiving and storing of information through electronic, magnetic, optical or similar means."[71]

Arbitration agreements are enforceable by the court seized of the matter unless it finds that the agreement is "void or becomes ineffective."[72] Although

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[69] *See* Ethiopian Arbitration Proclamation, *supra* note 63, art. 4. ("1/ An arbitration shall be deemed to be International arbitration if it falls under one of the following: a) Where the principal business place of the contracting parties are in two different countries at the time of the conclusion of the agreement; b) Where the legal place of the arbitration chosen in accordance with the arbitration agreement or the place of the principal business where the substantial part of the obligations of the commercial or contractual relationship is to be performed or the place of business with which the subject-matter of the dispute is [] most closely connected is located in a foreign country; c) Where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. 2/ If a party has more than one place of business for the purpose implementing this Article, the place of business shall be that which has the closest to the arbitration agreement and, where there is no place of business, it will be the principal residence of the contracting parties.") Errors in original.

[70] *Id.* art. 6(1-4).

[71] *Id.* art. 6(5).

[72] *See id.* art 8(2).

the objective appears to be the direct implementation of Article II of the New York Convention on the enforceability of the arbitral agreement, the Proclamation makes changes to the text although it is not clear whether it sets a different standard on the enforceability of the agreement or on the competence of the decision maker. Consider the variation in the taxonomy.

> Where a suit falling under an arbitration agreement is brought before a court and the defendant raises preliminary objection that the parties agreed to resolve their disputes through arbitration agreement, the court shall dismiss the suit and the parties to resolve their dispute in accordance with the arbitration agreement.[73]

Notwithstanding this provision, the said court "shall hear the case where the arbitration agreement is void and becomes ineffective."[74] The exact language of the New York Convention states: "[T]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[75] The meaning of each word of the Convention's "null and void, inoperative or incapable of being performed" has been extensively litigated.[76] There is now some settled jurisprudence on each. Although it is not clear why the Ethiopian legislature made those changes, presumably the same meaning as "null and void, inoperative or incapable of being performed" is intended.

The more serious point of departure from the widely adopted UNCITRAL Model Law that implements the New York Convention pertains to who decides the validity – the court or the arbitral tribunal.

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[73] *Id.* art. 8(1).

[74] *Id.* art. 8(2).

[75] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II (3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

[76] Cases under each topic could be found at New York Arbitration Convention Court Decisions. New York Arbitration Convention, Court Decisions, newyorkconvention.org, https://www.newyorkconvention.org/court+decisions [https://perma.cc/A9QB-42UW].

The Model Law states in relevant part:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[77]

This provision enshrines both the principles of competence-competence and separability; two doctrines that are considered the cornerstones of the legal regime of arbitration domestic or transnational.

The Ethiopian Proclamation also contains the principle of competence-competence and separability formulated in slightly different language:

> The tribunal shall have the power to determine the existence or non existence of a valid arbitration agreement between the contracting parties including as to whether it has jurisdiction to hear the case or not. For this purpose, arbitration clause which is included in an agreement shall be deemed to be a separate and independent agreement. The fact that the principal agreement becomes null and void shall not make the arbitration clause null and void.[78]

While it remains unclear why the Ethiopian legislature departed from established legal text, the Proclamation under Article 8(1) clearly anticipates the court to make the initial decision on the validity of the arbitration agreement and, hence, its own competence. It would also seem per Article 19(1) that if the party desirous to go to arbitration wins the race to the arbitral panel, the tribunal would decide its own competence. Indeed, this is so whether the question of validity, which is often the same question as the competence of the tribunal (as an invalid agreement cannot give the tribunal jurisdiction) is first presented to the court or not. Indeed, it is also not

[77] UNCITRAL Model Law, *supra* note 66, art. 16(1).

[78] Ethiopian Arbitration Proclamation, *supra* note 63, art. 19(1).

inconceivable that the tribunal could come to a contrary result creating a profound anomaly.[79] The Ethiopian Proclamation's formulation of these principles did not aid the resolution of these perennial dilemmas in the law and jurisprudence of arbitration.[80]

iii. Arbitrability

Since the United States Supreme Court decided the famous *Mitsubishi v. Soler* case in 1984[81] on the arbitrability of public law matters, the worldwide trend on arbitrability of subject matters previously deemed not arbitrable has been on the decline.

In *Mitsubishi,* the Supreme Court permitted the arbitrability of a cause of action based on the US antitrust law called the Sherman Act[82] consolidating a

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[79] This is a situation that the 2nd Cir. Court of Appeals dealt with in the famous case *of Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 986 (2d Cir. 1942). "(b) If the issue of the existence of the charter party were left to the arbitrators and they found that it was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made. Such a conclusion would (1) negate the court's prior contrary decision on a subject which, admittedly, the Act commits to the court, and (2) would destroy the arbitrators' authority to decide anything and thus make their decision a nullity." Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1270-1272 (1933); Philip G. Phillips, *A Lawyer's Approach to Commercial Arbitration*, 41 YALE L.J. 31 (1934); GEORGE J. WILLISTON, WILLISTON ON CONTRACTS 5369-5379 (Rev.ed.1938). Although this case's significance is on separability and is now outdated, it's description of the competence-competence anomaly is still instructive.

[80] Profound jurisprudence deals with the allocation of competence between the court and the arbitral tribunal in association with the enforcement of the arbitral agreement. Two most instructive cases for reference are: *Fiona Trust Holding Corp and Ors v. Privalov and Ors* [2006] EWHC 2583 (Comm); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

[81] *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

[82] *See id. at* 473-73. ("There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed

trend towards the encouragement of international arbitration[83] that began with *Bremen v. Zapata*.[84]

The Ethiopian Arbitration Proclamation has adopted the following list as an initial matter:

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that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b), "citations omitted.").

[83] This essentially overrules a long line of cases that found strong expression in *Wilko v. Swan* disallowing the arbitrability of securities laws matters. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953). ("Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors, and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act." Citations omitted.).

[84] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1,9-10 (1972). ("We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades, we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that, once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." Citations omitted.).

> The following shall not be submitted for arbitration:
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> 1/ Divorce, adoption, guardianship, tutorship and succession cases;
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> 2/ Criminal cases;
>
> 3/ Tax cases;
>
> 4/ Judgment on bankruptcy;
>
> 5/ Decisions on dissolution of business organizations;
>
> 6/ All land cases including lease;
>
> 7/ Administrative contract, except where it is not permitted by law;
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> 8/ Trade competition and consumers protection;
>
> 9/ Administrative disputes falling under the powers given to relevant administrative organs by law;
>
> 10/ other cases that is not arbitrable under the law.[85]

This list resembles what was common in many jurisdictions in the 1980s and perhaps earlier. As indicated above, subject matters listed under Article 7(8), "trade competition and consumer protection" are the exact same matters that cases with broad worldwide acceptance such as *Mitsubishi v. Soler* and *Rodriguez de Quijas v. Shearson/American Express Inc.*, overruling *Wilko v. Swan*,[86] have deemed arbitrable in the interest of modern transnational commerce. An Act in 2021 that contains principles that were convincingly renounced in the 1980s in most jurisdictions appears to run counter to modern developments[87] and the Ethiopian Proclamation's objective of modernizing the law in this area.

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[85] Ethiopian Arbitration Proclamation, *supra* note 63, art. 7.

[86] *Wilko v. Sawn* was overruled by *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 486 (1989). ("Our conclusion is reinforced by our assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.").

[87] For a discussion of these modern trend in the European jurisdictions, *see generally*, Komninos, Assimakis, *Arbitration and EU Competition Law* (April 12, 2009). Available at SSRN: https://ssrn.com/abstract=1520105 ("All these elements of competition law had led in the past to the exclusion of the arbitrability of antitrust-related disputes, because of their public policy (ordre public) nature. This attitude, however, was reversed in the 1980s and early 1990s and it can now be said with certainty that arbitrability of competition law

A similar concern may be expressed about the law's exclusion from arbitration of administrative contracts "except where it is permitted by law" under sub-article 7, and those "disputes falling under the powers given to relevant administrative organs by law" under sub-article 9.

Although further legislative activity or case law may clarify the contours of these restrictions, the arbitrability of administrative contracts had remained a subject of uncertainty in preexisting Ethiopian law.[88] The inarbitrability of administrative contracts is not a uniquely Ethiopian phenomenon. It has its roots in 19th Century French law that inspired many Civil Law jurisdictions. However, modern trends are conclusively in the direction of allowing arbitrability of administrative contracts. As Gary Born aptly summarizes:

> The result of the past four decades' judicial developments in France has been a substantial retrenchment of nonarbitrability limits in the international context. Notwithstanding potentially expansive (and archaic) nonarbitrability provisions of the Civil Code, and almost equally expansive historic judicial interpretations of those provisions, French courts have progressively narrowed the scope of nonarbitrable matters. The end result is that they have apparently categorized matters as nonarbitrable only where mandatory statutory text expressly requires this result. Nothing in the recent revisions of the French arbitration legislation have altered this result.[89]

disputes is generally accepted in all jurisdictions with developed antitrust regimes." Citing numerous useful authorities beyond the US cases cited above. Some more useful authorities cited include: in France CA Paris, 19.5.1993, *Labinal SA v. Mors and Westland Aerospace Ltd.*, (1993) Rev.Arb. 645. In Italy, Corte di Cassazione, 21.8.1996, no. 7733, *Telecolor SpA v. Technocolor SpA*, 47 Giust.Civ. I-1373 (1997). In *England & Wales, ET Plus SA et al. v. Welter et al.* (Comm.), [2006] Lloyd's Rep. 251; [2005] EWHC 2115.

[88] For a detailed discussion of Ethiopian law on under pre-existing law, *see generally*, Zekarias Kenea, Arbitrability in Ethiopia: Posing the Problem, J. OF ETHI. LAW VOL. XVII (1994).

[89] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 964 (2nd ed.). For a more comprehensive treatment of the nonarbitrability doctrine in various legal traditions, *see id.* at 957-1045.

Although not entirely unique,[90] the Ethiopian Arbitration Proclamation took the exact opposite approach of permitting arbitrability of administrative contracts only when specific legislation allows it. The enforceability of arbitration provisions in administrative contracts of a transnational nature, therefore, depends on whether there is a specific legislation that overrides the overall prohibition under the Arbitration Proclamation.

The broadest override comes from the Investment Proclamation which reads in relevant part: "2/ The Federal Government may agree to resolve investment disputes involving Foreign investments through arbitration."[91] This provision read in tandem with the Arbitration Proclamation's Article 7(7) which prohibits the arbitrability of administrative contract "except where it is not permitted by law" clearly shows that all administrative contracts entered into

[90] Compare for example with the approach taken by Egypt in its Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters [hereinafter Egyptian Arbitration Law] available at:
http://www.crcica.org.eg/LawNo271994.pdf [https://perma.cc/3ETQ-64XG].
It renders administrative contracts inarbitrable unless permitted by the relevant Minister at the time of contracting. The pertinent provision reads: "[]With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect." art. 1. For a brief commentary on recent developments in Egypt, *see* Fatma Salah, *New Approval Required for Government Contracts and Arbitration Agreements in Egypt*, Kluwer Arbitration Blog, Feb. 21, 2021,
http://arbitrationblog.kluwerarbitration.com/2021/02/21/new-approval-required-for-government-contracts-and-arbitration-agreements-in-egypt/ [https://perma.cc/7UD4-FUHV]. ("The Egyptian Arbitration Law No. 27 for 1994 (the 'Arbitration Law') generally allows governmental entities and state companies to agree to arbitration of future disputes; only in the case of administrative contracts, the approval of the competent minister is required. Nevertheless, by virtue of the Decree, all governmental entities and state companies are now prevented from signing any arbitration agreement without referring the matter first to the Commission to get its 'no objection' clearance. The Decree therefore comes with an additional layer of approval beside the one required under the Arbitration Law. Such additional approval however is broader in its scope as it applies to all government contracts not only the administrative ones.").

[91] Investment Proclamation No. 1180/2020, *supra* note 30, art. 28(2).

by Federal agencies relating to investment remain arbitrable even after the coming into effect of the Arbitration Proclamation.

Other examples of exceptions are sector specific. Consider Mining Proclamation No. 678/2010.[92] The relevant provision reads: "In the event that agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the agreement. An arbitral award shall be final and binding upon the parties."[93]

Petroleum Operations Proclamation No. 295/1986 likewise provides: "2. In the event that agreement cannot be reached through negotiations, the case shall be settled by arbitration in accordance with the procedures specified in the petroleum Agreement."[94]

With investment related administrative contracts and these types of major natural resources sectors excepted, the rule under the new Arbitration Proclamation that disallows the arbitrability of administrative contracts may in reality be the exception at least in high stakes transnational matters.

iv. Arbitrators and Arbitral Institutions

The Proclamation permits the contracting parties to appoint their preferred arbitrators without regard to citizenship, and grants the default appointment

[92] Mining Proclamation No. 678/2010, A Proclamation to Promote Sustainable Development of Mineral Resources, Aug. 4, 2010, http://extwprlegs1.fao.org/docs/pdf/eth183181.pdf [https://perma.cc/4SKP-MG2A].

[93] *Id.* at art. 76(2). The remaining subsections of the same provision read: "76. Settlement of Dispute 1/ Any dispute, controversy or claim between the Licensing Authority and a licensee arising out of, or relating to an agreement for reconnaissance, exploration, retention or mining, or the interpretation breach or termination thereof shall, to the extent possible, be resolved through negotiation…3/ Any party aggrieved by the decision of the arbitration may lodge an appeal to the concerned court.").

[94] Proclamation No. 296/1986, A Proclamation to Regulate Petroleum Operation, art. 25(2), Mar. 26, 1986, available at: http://extwprlegs1.fao.org/docs/pdf/eth85045.pdf [https://perma.cc/VYJ6-Q2NA].

authority to the Federal First Instance Court.[95] The Court's decision on appointment of arbitrators is not appealable.[96] Challenge on grounds of lack of impartiality or independence may first be submitted to the tribunal itself, and where that leads to no resolution, the same challenge could subsequently be brought before the First Instance Court without the possibility of further appeal.[97] The standard of review is the most commonly recognized standard of "justifiable doubt as to impartiality or independence."[98]

One of the most significant additions of the Proclamation is on domestic arbitral institutions. It anticipates the co-existence of publicly and privately established and run centers. To this effect, the relevant provision states:

> 18. Arbitration Centers 1/ An arbitration center may be established by government or private person. 2/ Federal Attorney General shall supervise arbitration centers, issue and renew license and provided for criteria for the establishment of the same. The details shall be determined by Regulation to be issued by the Council of Ministers. 3/ This Proclamation shall not prohibit existing arbitration centers from being operational.[99]

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[95] Ethiopian Arbitration Proclamation, *supra* note 63, art.12(3)"(b) Notwithstanding paragraph (a) of Sub Article 3 of this Article, where one of the contracting parties fail to appoint the coarbitrator within 30 days from the date of receipt of the notice by the other party, or where the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days from the date of their appointment or where the contracting parties fail to agree, in the case of a sole arbitrator, the First Instance Court shall appoint such arbitrator upon the request of one of the parties."

[96] *Id.* art. 12(7).

[97] *Id.* art. 15(4) "A person whose objection is rejected may submit his grievance to the First Instance Court within 30 days from the date such decision is communicated to him. No appeal shall lie from the decision of the court."

[98] *Id.* art. 14. "Objection to Arbitrators 1/ An objection against the appointment of an arbitrator may be made only if there are circumstances which create justifiable doubts as to his impartiality and independence, or fulfillment of the criteria stated in the arbitration agreement."

[99] *Id.* art. 18.

Although the said regulation is not issued as of this writing, it embodies licensure and government supervision requirements that could potentially be taken in any direction in terms of intrusiveness.

v. Interim Measures

The interim measures section possesses all the indicia of the 2006 Revised UNCITRAL Rules with significant details than usual in many domestic *lex arbitri*. Perhaps the most important detail pertains to the enforceability of an interim award treated as analogous to an arbitral award enforceable under the New York Convention including the grounds of refusal.

In the sense, it provides:

> 1/ Without prejudice to recognition and enforcement of foreign awards, an order of interim measure issued by a tribunal shall be binding, irrespective of the country in which it was issued. 2/ Where an order for interim measure cannot be enforced, one of the contracting parties may apply to a court for the enforcement of such order.[100]

Enforcement of the interim measure may, however, be refused on the basis that resemble grounds of refusal of an arbitral award.[101] The Proclamation makes no distinction between domestic and international interim measures. The parties are given the option of seeking interim measures from the arbitral tribunal, which the court is required to enforce baring the grounds of refusal, or go directly to court for the issuance of an interim award in the first place.[102]

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[100] *Id.* art. 25(1-2).

[101] For grounds, *see id.* art. 26.

[102] *Id.* art. 27. "Contracting parties may request a court for an order of interim measure irrespective of the place of the arbitration of the arbitral tribunal." Probably the first international application for an interim measure filed since the enactment of the new arbitration proclamation is the one recently lodged at the Ethiopian Federal Hight Court under File No. 275955 by BGP Inc., China National Petroleum Corporation (BGP) against POLY-GCL Petroleum Investments Limited Ethiopian Branch and POLY-GCL Petroleum Investments Limited (POLY-GCL). The Court granted BGP's request and issued an injunction order suspending POLY-GCL's rights to transfer, sale or attach the exploration

Unlike some other jurisdictions such as China, it appears that the parties are given the option of going to the tribunal, where it is constituted, or go directly to court as a matter of choice. Under the Chinese Arbitration Proclamation, for example, a party has to first petition the relevant arbitral commission, which would pass it onto the court.[103]

Finally, and unsurprisingly, as it is common in most systems, a security deposit may be required for the issuance of such measures.[104] It is discretionary.

vi. Annulment and Enforceability of Arbitral Awards

In ordinary circumstances, matters progress in either one of two directions: a claim for annulment or enforcement – although they could occur simultaneously in multiple fora.

1. Annulment

Two sets of provisions in the Ethiopian Arbitration Proclamation pertain to actions that could fall under annulment of the arbitral award. The first one is

and mining licenses (the concession rights) over Ethiopian petroleum fields in the Ogaden region of Ethiopia, and freezing the bank accounts the respondents have in Commercial Bank of Ethiopia. The Court order clearly says it shall remain in force until such a time the international arbitration tribunal instituted under the Hong Kong International Arbitration Rules gives its final award.

[103] *See* Arbitration Law of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995), arts. 25, 68, 1994 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 8 (China). Available at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html [https://perma.cc/KFC8-8435]. (If the parties to a foreign-related arbitration apply for evidence preservation, the foreign arbitration commission shall submit their applications to the intermediate people's court in the place where the evidence is located.").

[104] Ethiopian Arbitration Proclamation, *supra* note 63, art. 21(3).

titled "Objection Raised Against Arbitral Awards."[105] The other one is the most commonly known setting aside procedure.[106] The Proclamation permits a signatory or non-signatory who "should have been" made a party to the arbitral proceeding but was not, to object to the award within 60 days of becoming aware of the award.[107]

This is designed to protect the interests of parties who may be affected by the execution of the award without getting their own due process. In the same vein, the Proclamation disallows a third-party who previously requested to join the proceedings and was permitted to do so by the tribunal.[108] *A contrario* reading would suggest that one who had been denied the opportunity to intervene could still raise the objection against the award assuming that the other requirements for objecting to a judgment under the Civil Procedure Code that the Proclamation refers to in Article 48(5) are met.[109]

Signatories and non-signatories are treated differently for purposes of remedies. Where a signatory, who should have been made a party, objects to the execution of the award, the Proclamation requires the court seized of the matter to remand the case back to the tribunal that issued the award, which would otherwise be technically considered *functus officio* after it had rendered the award.[110]

If the objecting party is a non-signatory, the Proclamation requires the court to essentially exercise adjudicative jurisdiction over the merits of the matter. This would effectively mean the invalidation of the arbitration agreement for failure to join an indispensable party.[111] To the extent this remedy also applies

[105] *See id.* art. 48.

[106] *See id.* art. 50.

[107] *See id.* art. 48(1).

[108] *Id.* art. 48(2): "Where the third party who submits his objection had previously submitted the same to the tribunal that heard the case and had intervened in the arbitration proceedings; he may not submit his objection in accordance with Sub-Article (1) of this Article."

[109] *Id.* art. 48(5).

[110] *Id.* art. 48(3).

[111] *Id.* art. 48(4).

to situations whereby the third party requested to join but was refused by the tribunal, it offers a disproportionate remedy.

In any case, this provision seems to collaterally answer the question of the allocation of power between the tribunal and the court on the issue of third-party joinder. The court gets the last word at the backend of the process.

The second set of provisions relate to the traditional setting aside procedure. Like most jurisdictions, the Ethiopian Proclamation's set aside grounds mimic the grounds of refusal of enforcement under Article V of the New York Convention in considerable ways.[112] That is understandable as the New York Convention leaves grounds of annulment to the domestic laws of the State Parties.

A material ambiguity does, however, exist in art 50(2)(b) of the Proclamation in relation to the applicable law for the determination of the invalidity. It reads: "[T]he arbitration agreement becomes null and void under the applicable law chosen by the contracting parties or by Ethiopian law or such agreement has expired"[113] The supposedly analogous New York Convention provision reads: "[t]he said agreement is not valid under the law to which the

[112] *Id.* art. 50. There appears to be a difference in the actual English language text. It does not appear that different meanings are intended. It seems like it is a function of re-translation from the official Amharic text. "a) The applicant does not have the capacity to conclude an arbitration agreement as provided for in the law in force; b) The arbitration agreement becomes null and void under the applicable law chosen by the contracting parties or by Ethiopian law or such agreement has expired; c) The applicant shows that he has not been given proper notice about the appointment of arbitrators, arbitration proceedings or has not been able to present his case during the proceedings; d) The arbitrators did not make the award by maintaining their impartiality or independence or have delivered the award by receiving bribe; e) The subject matter of the arbitral award is beyond the scope of the arbitration agreement or the award rendered is beyond jurisdiction the tribunal; f) The process of establishment of the tribunal and the procedure applicable in the course of the proceedings contradicts with agreement of the contracting parties and has influenced outcome of the award.")

[113] Ethiopian Arbitration Proclamation, *supra* note 63, art. 50(2)(b).

parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[114]

Although this is for purposes of refusal of enforcement, many states use such grounds as grounds of annulment or set aside. Ethiopia also seems to have done so but the chosen default law is Ethiopian law not the law of the place where the award is made presumably because this is a set aside proceeding and the proceedings must have taken place in Ethiopia. The critical ambiguity does not, however, come from an attempt to adopt grounds of refusal to set aside proceedings but instead from the use of "or" to suggest that the court could in its discretion alternate between the party chosen law and Ethiopian law. It appears that there are two possible laws here, and unfortunately, the official Amharic version does not resolve the problem. The sequence does, however, suggest that the legislature probably meant that the court looks at Ethiopian law where there is no party selected applicable substantive law.

Relatedly, however, it is important to mention that although the New York Convention limits all challenges to a set aside proceeding and otherwise presumes finality, the Ethiopian Proclamation allows appeals against an arbitral award under limited circumstances. It anticipates two possibilities: (1) where the parties agree to have an appeal,[115] or (2) where the parties fail to exclude appeals to the cassation bench for "fundamental or basic error of law."[116] In other words, generally, the default rule is that an arbitral award is considered final and binding unless the parties agree to the possibility of appeal except for the appeal on modes of payment of arbitration costs. The law presumes that all arbitral awards are reviewable for fundamental or basic errors of law as a matter of default, but the parties have the liberty to exclude such appeals by agreement except in three instances: (1) where the decision is made *ex aquae et bono*,[117] (2) the award is made by agreement,[118] and (3)

[114] New York Convention, *supra* note 75, art. V(1)(a).

[115] Ethiopian Arbitration Proclamation, *supra* note 63, art. 40(1).

[116] *Id.* art. 49(2). In addition, under Article 46 (1 &2) the Ethiopian Arbitration Proclmation allows appeal on awards made in relation to the modes of payment of costs necessary for the arbitration and service fees of arbitrators.

[117] *See Id.* art 49(3) cum art. 41(5).

[118] *See Id.* art. 49(3) cum art. 43.

where the parties have agreed for the rendition of an award without opinion.[119]

Overall, although the Proclamation permits the parties great latitude in shaping the post-award landscape; it takes a decisively pro-finality stance. It is, however, unclear whether "fundamental or basic error of law" in Article 49(2)[120] refers to Ethiopian law or foreign law or both. Because the Proclamation permits the applicability of foreign law,[121] it is fair to assume that the reference to law in this provision would also include foreign law.

To the extent foreign law applies, cassation review for error could also be assumed as a matter of default rule i.e., in the absence of exclusion by party agreement. Such assumption is fair as the Proclamation makes no exception to foreign law. If the losing party in an arbitration where foreign law applied challenges the Tribunal's interpretation of foreign law, it is not inconceivable that the Cassation bench would take on the task of ascertaining the correct foreign law interpretation in the manner it ordinarily goes about ascertaining foreign law in civil litigation. If the challenged applicable law is Ethiopian law, it is constitutionally doubtful whether the parties could exclude review by agreement because, under the existing Constitution, the Court of Cassation has the jurisdiction to review basic errors of law. It reads in relevant part: "(a) The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law. Particulars shall be determined by law."[122] Whether the Proclamation's provision that permits parties to exclude

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[119] *See Id.* art. 49(3) cum art. 44(2).

[120] *Id.* art. 49(2). ("2/ Unless there is agreement to the contrary, an application for cassation can be submitted where there is a fundamental or basic error of law.")

[121] *See Id.* art. 41(2&4) ("3/ Where no substantive law has been chosen by agreement in accordance with Sub-Article (1) of this Article, the tribunal may choose a substantive law close and relevant to the subject matter of the dispute. 4/ Where the subject matter of the dispute does not have an element of international arbitration, Ethiopian law shall apply.")

[122] Constitution of the Federal Democratic Republic of Ethiopia, art. 80(3)(a).

Cassation review for error of Ethiopian law is constitutional is a question that needs to be asked.[123]

2. *Recognition and Enforcement of Awards*

As it was originally conceived by the community of nations, the New York Convention was all about the recognition and enforcement of arbitral awards. The enforcement of the arbitral agreement under Article II(3) of the New York Convention, which later came to occupy at least half of arbitral jurisprudence, was indeed a last minute addition. A dramatic story is told about its last-minute inclusion by its drafter, Pieter Sanders:

> My review of the Convention's history will deal in particular with what, during the Conference, was called the "Dutch proposal". It was conceived during the first weekend of the Conference. I spent that weekend at the house of my father- in- law in a suburb of New York. I can still see myself sitting in the garden with my small portable typewriter on my knees. It was there, sitting in the sun, that the "Dutch proposal" was conceived … _at a very late stage of the Conference, a provision on the arbitration agreement was inserted in the Convention, the present article II.[124]

Otherwise, the principal conception and initial design of the Convention was the recognition and enforcement of foreign arbitral awards under Articles III and V. The Proclamation, which follows Ethiopia's belated ratification of the

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[123] The Supreme Court has given an elaborate opinion on the reviewability of errors of law in *Consta Joint Venture v. Ethiopia-Djibouti Railway Company* case under Ethiopian law prior to the passage of the Arbitration Proclamation. *Consta Joint Venture v. Ethiopia-Djibouti Railway Company* [2016] 2013-32. The Petition for Review is available at https://jusmundi.com/en/document/pdf/other/en-consta-joint-venture-v-chemin-de-fer-djibouto-ethiopien-the-ethiopian-djibouti-railway-representing-the-federal-democratic-republic-of-ethiopia-and-the-republic-of-djibouti-petition-for-cassation-review-thursday-26th-may-2016 [https://perma.cc/YP86-DYAW].

[124] Pieter Sanders, *The Making of the Convention*, *in* U.N., ENFORCING ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, U.N. Sales No. E. 99. V. 2, 3-4 (1999), available at: http://www.newyorkconvention.org/travaux+preparatoires [https://perma.cc/P8EB-CTKM].

Convention, implements its core provision with some textual modifications, the purpose of which is unclear. The key provision reads: "Without prejudice to the provisions Articles 50 or 52 of this Proclamation, an arbitral award rendered in Ethiopia or in a foreign country shall be deemed to be binding and shall be executed pursuant to Civil Procedure Code by applying to a court that is empowered to execute the award had the case been heard by a court."[125]

Article 52 (1) of the Proclamation also provides that: "[A]n objection to the enforcement of arbitral award may only be made, where an application made to the court previously to have the award set aside has not been dismissed." Note first that the official Amharic text is accurately translated. It seems to say that one would only have the chance to seek refusal of enforcement only if a set aside attempt has failed. It conceives set aside and refusal of enforcement in a temporally linear sequence. It does not seem to account for the possibility that both proceedings could be commenced concurrently by different parties. In fact, the most common sequence of event would be the losing party goes to court seeking annulment, the wining party goes to court seeking enforcement. The proposition that one may only seek refusal if he failed to succeed in his set aside action suggests that if an award is set aside, there is no point in allowing objections against it as it cannot be enforced anyway.

Another modification is the change of the choice of law for the determination of the validity of the agreement. Under article V(1)(a) of the Convention, enforcement may be refused if "[t]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[126] The default applicable law is "the law of the country where the award was made." The Proclamation changes that default law to Ethiopian law, presumably, regardless of where the award might have been made: "if the arbitration agreement is null and void under applicable law chosen by the parties or, in the absence of such agreement, under

[125] Ethiopian Arbitration Proclamation, *supra* note 63, art. 51(1).

[126] New York Convention, *supra* note 75, art. V(1)(a)

Ethiopian law."[127] It is unclear what important values that this is designed to preserve.

Another notable textual change is contained in article 52(2)(f). It reads: "f) The arbitral award has not reached its final stage or is reversed or suspended." This appears to be giving effect to the analogous provision of the New York Convention's article V(1)(2): "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." The Proclamation splits suspension and set aside in different provisions and adds another ground of refusal called "reversed". It seems to anticipate an appellate reversal that the Convention does not anticipate because of its pro-finality stance. It is also possible that the drafters were using "reversal" to mean set aside. While the terminology could be exchangeable, the existence of another provision on set aside and refusal discussed above suggests that reversal is probably an appellate reversal for error of law or some other consideration under the appeals provisions. Even in that case, it would be stating the obvious.

Although the above discussed provisions are not specifically designated to be applicable only to domestic arbitration, a separate provision titled the "recognition and enforcement of foreign arbitral award" follows under Article 53. This provision also makes certain non-negligible changes to the text of the parallel provision of the New York Convention. To highlight just a couple such changes: the key recognition and enforcement provision is changed from mandatory "shall" to permissive "may" and the refusal of enforcement provision is changed from arguably permissive "may" to "shall". Comparing the actual texts is here the simplest way of exposition.

Text of the Proclamation:

> Where a foreign arbitral award falls under International Treaties ratified by Ethiopia, it ***may be recognized*** or enforced in accordance with such treaties.[128]

[127] Ethiopian Arbitration Proclamation, *supra* note 63, art. 51(2)(b).

[128] *Id.* art. 53(1).

Text of the New York Convention:

> Each Contracting State ***shall recognize*** arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.[129]

The change in refusal of recognition and enforcement provision could also be similarly demonstrated.

Text of the Proclamation:

> Without prejudice to Sub-Article (1) of this Article, a foreign arbitral award ***shall not be recognized or enforced*** only on the following grounds:

Text of the New York Convention:

> Recognition and enforcement of the award ***may be refused***, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

The textual formulation in the Proclamation is not as simple as just changing "may" to "shall" and as such it is likely to give rise to creative arguments down the road, but it is again unclear what policy considerations prompted such changes. While future writings could explore this further, it is fair to say that the textual departures in the grounds of refusal provisions do not improve matters in this regard.

The relevant provision of the New York Convention begins by the following formulation that goes to the heart of what is called the international arbitral order: "1. Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought,

[129] New York Convention, *supra* note 75, art. III.

proof that:"[130] The use of *may* rather than *shall* in this provision has caused profound controversy around the world. If a new law departs from an established text that it seeks to implement, it would be expected to remediate an existing ambiguity. Regrettably, the Proclamation did not only fail to address this issue but might have unwittingly added a new set of ambiguities.

Consider first the controversy surrounding the use of "may be refused" in the operative text of the Convention. It often arises in connection with the question of the enforceability of a foreign arbitral award set aside in the place where it was made.[131] Two opposing schools of thought have emerged. The first considers "may" permissive and enforces an arbitral award regardless of its status in the place where it is made.[132] The second ignores the semantics and refused to enforce any arbitral awards that are set aside in the place where it is made.[133] The matter is so contentious that there is even a disagreement as to which one is more dominant.

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130 *Id.* art. V (1). Emphasis added.

131 The interaction between the general provision under art V (1) with V(1)(e) "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." *Id.*

132 *See* example *Chromalloy Aeroservices Inc. v. Ministry of Def. of Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996) (enforcing an arbitral award set aside in Egypt.). The same court later revisited its position. *See Termorio S.A.E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

133 For a description of this school of thought, *see* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010). Having discussed the various theories, he presents his own preferred one partially as follows: "In the current context of differing laws and diverging ways in which domestic courts apply those laws, the only valid question is whether a single law, irrespective of its degree of conservatism and the manner in which domestic courts decide to apply it, is entitled to govern an arbitration for the sole reason that it happens to be that of the country where the arbitration is taking or has taken place. In terms of order, the benefit is tangible. In terms of justice, hardly so. One simply has to consider the numerous situations in which the courts of the seat have developed idiosyncratic theories with a view to helping one of the parties to the arbitration, often a national of that country. Anti- suit injunctions will be addressed below. At this juncture, it suffices to observe that the centralizing conception of the source of the arbitrator's power

The Ethiopian Proclamation's modifications of the text are clearly not designed to resolve these types of perennial controversies and may have introduced idiosyncrasies of the type that advocates of the supranational arbitral seem to be concerned with.[134]

The Proclamation also makes other changes to the refusal provision. First, it adds an independent reciprocity provision although Ethiopia has already submitted its reciprocity reservations to the New York Convention.[135] It is possible that the legislature had other bilateral and other forms of present or future treaties in mind. In that sense, it may not suffer from redundancy that may appear at first.

Secondly, it changes the provision of the New York Convention under V(1)(d), which reads: "d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"[136] to "Where the arbitral award is based on invalid arbitration agreement or rendered by a tribunal which is not established in accordance with the law of the country in which such award is rendered"[137]

It not only merges the invalidity of the arbitration agreement provision and the legality of the composition of the arbitral tribunal into one but also changes the choice of governing rules for the determination of the validity of the constitution of the tribunal from the parties' choice to the applicable law. It might appear innocuous but is likely to give rise to unnecessary controversy especially in circumstances where the parties choice and the applicable law would lead to different results.

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to adjudicate belongs to a philosophical tradition that readily favors injustice over chaos." *Id.* at 24.

134 *See id.*

135 Ethiopian Arbitration Proclamation, *supra* note 63, art. 53(2)(a).

136 New York Convention, *supra* note 75, art. V(1)(d).

137 Ethiopian Arbitration Proclamation, *supra* note 63, art. 53(2)(b).

Third, it adds an entirely new provision that has no corresponding rule in the New York Convention. It reads: "The arbitral award rendered cannot be enforced in accordance with Ethiopian law"[138] It might at first appear that it is meant to incorporate the public policy exception under Article V(2)(b), but the Proclamation makes for an independent provision for that under 53(2)(f) even adding national security as an aspect of public policy.[139]

These are non-trivial changes to the text of the New York Convention. If there is a policy reason for each change, it is not readily discernable from the appraisal of the text of the Proclamation itself.

Conclusion

Ethiopia has in recent years made some strides in modernizing its transnational economic laws. In the area of trade, it has recommenced its WTO accession negotiations, and enthusiastically joined the grand AfCFTA project. In investment, although it slowed down its BITs ratification program since 2010, it enacted a new Investment Law that took the law in this area one step forward. In the area of transnational commence, it ratified the New York Convention and enacted a comprehensive implementing legislation. This article has offered a brief critical appraisal of these new developments.

What appears to be the most common defining characteristic of developments in each area is the not so infrequent departures from fairly established norms and texts without readily and reasonably appreciable reasons. This is manifested in each area of law appraised hereinabove: the significant lag in meeting the WTO accession requirements, the silent cessation of BITs ratification activity, and the non-trivial modifications of the legal texts of certain important provisions of the New York Convention in the taxonomy of the new Arbitration Proclamation.

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[138] *Id.* art. 53(2)(c).

[139] *Id.* art. 53(2)(f). ("Where the arbitral award contravenes public policy, moral and security.").

Perhaps more than any area of law, the modernization of transnational economic laws requires synchronous development inasmuch as the whole objective is the harmonious coexistence of transnational laws of various states. These laws bring forth order and offer predictability that transnational economic activities appreciate. Needless local ostensibly idiosyncratic variations of established norms and legal texts have the potential of undermining the whole modernization and harmonization enterprise and must be avoided whenever they do not promote legitimate, rational, ascertainable, and defensible economic, social or other types of local objectives.

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