

The Room for Imposing Performance Requirements on Foreign Investors under the Ethiopian Legal Regime

Yemegnu Mesele Dejene *

Abstract

There is the need to maximize the benefits from Foreign Direct Investment (FDI). As studies suggest, performance requirements can be used as an important policy instrument for maximizing benefits of FDI and countering potential abuses of foreign investors. This article examines the existence of a room for applying performance requirements on foreign investors in Ethiopia and explores challenges and opportunities that may arise in doing so. To this end, qualitative methodology, involving both doctrinal and non-doctrinal legal research approaches have been employed. Primary and secondary data are utilized; semi-structured interviews were used as data collection tools for gathering data from respondents. The findings indicate that although there is the policy and legal premise to apply performance requirements, Ethiopia is not imposing adequate performance requirements on foreign investors. The absence of adequate requirements does not enable Ethiopia to gain optimal benefits from foreign investment. Therefore, Ethiopia should apply performance requirements such as export performance, local content, and technology transfer requirements to ensure optimal benefits from FDI and boost its contribution towards sustainable development.

Key terms:

Performance requirement · Foreign investment · Policy instrument · Sustainable development

DOI <http://dx.doi.org/10.4314/mlr.v16i2.6>

This article is licensed under a Creative Commons Attribution-NonCommercial-NoDerivs (CC BY-NC-ND)

Received: 30 March 2022

Accepted: 5 October 2022

Suggested citation:

Yemegnu Mesele Dejene (2022). “The Room for Imposing Performance Requirements on Foreign Investors under the Ethiopian Legal Regime”, 16(2) *Mizan Law Review*: 391-422.

* Yemegnu Mesele Dejene (LLB, LLM), Lecture of Law at Arba Minch University, School of Law

E-mail: yemegnumesele22@gmail.com

ORCID: <https://orcid.org/0000-0001-5079-0811>

Contents

Abstract

1. Introduction
2. Overview of Ethiopia's Organ Donation Legislation
2. Performance Requirements: General Overview
3. Performance Requirements under International Investment Legal Regime
4. Comparative Experience in Selected Countries
5. The Room for FDI Performance Requirement under the Ethiopian Legal Regime
6. Conclusion and the Way Forward

1. Introduction

The gains of Foreign Direct Investment (FDI) do not accrue immediately across countries even though it is an integral part of an open and effective international economic system. Neither inflows of FDI nor materialization of the possible benefits from such inflows are automatic because commercial interests of foreign companies do not always go in line with host countries' development goals.¹ Thus, obtaining the potential benefits from FDI is not

Acronyms

BIT	Bilateral Investment Treaty
EIC	Ethiopian Investment Commission
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
PSRC	Policy Study and Research Center
GATT	General Agreements on Trade and Tariffs
ICSID	International Convention on the Settlement of Investment Disputes
IIT	International Investment Treaty
LDCs	Least Developed Countries
MNCs	Multi-National Companies
NAFTA	North American Free Trade Agreement
PRs	Performance Requirements
SDGs	Sustainable Development Goals
TRIMS	Trade-Related Investment Measures
UNCTAD	United Nations Commission on Trade and Development
WTO	World Trade Organization

¹ Suzy H. Nikiema (2014). *Performance Requirements in Investment Treaties: Best Practice Series*, (International Institute for Sustainable Development) 1. ; see also,

simple and fixed as a result of which some host states have benefited more than others.²

Developing and implementing investment policies and regulatory frameworks which are coherent, transparent, and appropriately designed to mobilize FDI can provide the greatest benefits in terms of sustainable development.³ One of the policy instruments which are used by host countries –to maximize the benefits and minimize the disadvantages of FDI– is imposing performance requirements.⁴ Though, there is no universally agreed and comprehensive definition for performance requirements⁵, it can be defined as stipulations imposed by the government of investment hosting country on foreign investors, requiring those investors to meet certain specified goals with respect to their operation in the host country and considered as one kind of host country operational measures.⁶

There is a divergent view and debate among scholars, capital exporting countries, and host countries regarding the role of performance requirements. Capital exporting countries, specifically the US, consider performance requirements (investment measures) as barrier to free trade flow and thus another form of non-tariff trade barriers (trade distorting measures); hence need to be prohibited by WTO Agreement of TRIMs.⁷ This argument is based on the premise that performance requirements affect free trade and such view originates from the classical theory of FDI which requires FDI to be free from any host state regulator's actions. On the other hand, host countries argue

Selma Kurtishi-Kastrati (2013). 'The Effects of Foreign Direct Investments for Host Country's Economy' *European Journal of Interdisciplinary Studies*, Vol. 5/1, 26, p. 31.

² Harnessing Investment for Sustainable Development

<www.oecd.org/investment/business-investment-sdgs.htm> accessed 12 March 2021.

³ Economic and Social Commission for Asia and the Pacific (2019). *Foreign Direct Investment and Sustainable Development in International Investment Governance: Studies in Trade, Investment and Innovation No. 90* (United Nations Publication) 24.

⁴ Economic and Social Commission for Asia and the Pacific (2017). *Handbook on Policies, Promotion, and Facilitation of Foreign Investment for Sustainable Development in Asia and the Pacific*, (United Nations Publication) 131.

⁵ Performance Requirements <<http://jusmundi.com/en/document/wiki/en-performance-requirements>> accessed 12 January 2021.

⁶ United Nations Commission on Trade and Development (2003). *Foreign Direct Investment and Performance Requirement: New Evidence From Selected Countries* (United Nations Publications, New York and Geneva), 2.

⁷ Eric M. Burt (1997). 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' *American University International Law Review* Vol. 12/6, 1015, p. 1034.

against the prohibition of performance requirements on the basis of the role of performance requirements in boosting the potential benefits to be gained from FDI; and if there is a need to prohibit performance requirements for the sake of free trade flow, the WTO Agreement on TRIMs should only prohibit those measures that directly and significantly affect trade and allow other measures.⁸

Despite the arguments of capital exporting countries against the imposition of performance requirements, they have been used by both developing and developed host countries to achieve both economic and non-economic goals.⁹ Host countries require foreign investors to fulfill certain performance requirements as part of their policies so as to promote linkages, local industries, jobs and promote exports.¹⁰

Almost every developing country needs the inflow of FDI to achieve various development needs; however, allowing FDI without any conditions makes the country vulnerable to the potential abuses of foreign investors and an inequitable distribution of benefits.¹¹ Thus, the utilization of performance requirements is designed to control the potential abuses of foreign investors and to harness the potential benefits of the foreign investors' investment to serve the development goal of the host country.¹²

I argue that Ethiopia has not made adequate effort to maximize the benefits that it should obtain from FDI and is not gaining the benefits commensurate with its legitimate expectations. Ethiopia is facing capital shortage caused the level of investment and gaps between export and import.¹³ The country also needs advancement in technology to transform and make its industry competitive.¹⁴ Despite the grand vision of industrial development and an

⁸ Id. 1035.

⁹ H. Nikiema *supra* note 1, p. 1.

¹⁰ Roberto Ehandi, Jana Krajcovicova and Christine Zhenwei Qiang, (2015). 'The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature' *World Bank Group Policy Research Working Paper 7437*, p. 27 <<http://econ.worldbank.org>> Accessed March 2021. See also Shujiro Urata and John Sasusa (2007), *An Analysis of the Restrictions on Foreign Direct Investment in Free Trade Agreements* (RIETI) 19.

¹¹ M. Burt *supra* note 7, 1026.

¹² *Ibid.*

¹³ Mulu G/eyesus, Birhanu Beshah and Girum Abebe (2017). *Foreign Direct Investment in Ethiopia: Challenges, Opportunities and Policy Options for Effective Use to Stimulate Industrialization* (FDRE- PSRC and Ethiopian Development Research Institute) 1.

¹⁴ *Ibid.*

aspiration of becoming a middle income country by the year of 2025, Ethiopia's central focus has been on attracting FDI while little attention has been given to maximize the benefits from FDI.¹⁵

This article examines the room for applying performance requirements on foreign investors under the Ethiopian legal regime and to explore the challenges and opportunities that may arise while trying to apply them. The article also assesses whether there is a legal room under international law for Ethiopia to apply performance requirements. It further highlights the advantages and disadvantages of applying performance requirements.

The next three sections (i.e. Sections 2 , 3 and 4), *inter alia*, provide an overview of performance requirements including the meaning and objectives of performance requirements, arguments against and in favor of performance requirements, the status of performance requirements under international investment legal regime, and the experience of some selected countries. Section 5 examines the room for applying performance requirements under the Ethiopian legal regime. It also explores the challenges and opportunities of applying performance requirements.

2. Performance Requirements: General Overview

2.1 Meaning and categories of performance requirements

Though, there is no universally agreed and comprehensive definition for performance requirements¹⁶, it can be defined as stipulations imposed by the host state on foreign investors, requiring those investors to meet certain specified goals with respect to their operation in the host country, and it is considered as one kind of host country operational measures.¹⁷ Performance requirements are also defined as terms and conditions, imposed on foreign investors, requiring them to meet certain specified goals with respect to their operations in the host country of investment.¹⁸ The UNCTAD publication describes performance requirements as one among the kinds of host country operational measures which are imposed by the host government.¹⁹ They are imposed by FDI hosting states so as to guarantee that the foreign investor

¹⁵ Ibid.

¹⁶ Performance Requirements *supra* note 5.

¹⁷ United Nations Commission on Trade and Development *supra* note 6, p.2.

¹⁸ Ibid.

¹⁹ Z. Boroo (2012). 'Effective Use of Performance Requirement's and Investment Incentives' *The Mongolian Journal of International Affairs* 97, p. 98.

exports a percentage of his production, buys local products and services, and employs local labor in the process of the production.²⁰

Performance requirements have been extensively used by a large number of countries at different stages of development and its incidence varies depending upon the development strategy, endowments of natural and other resources, and market size, etc.²¹ They are set by the host government and made to be in line with its development strategies, the violation of which may result in legal sanctions ranging from withdrawal of operating license, penalties up to loss of rights in case of mandatory requirements, or loss of benefits or incentives in case of voluntary requirements.²²

There are a number of performance requirements that can be imposed by a host state which can be divided into three major categories;²³ the first category includes those performance requirements which are explicitly prohibited by the WTO Agreement on Trade Related Investment Measures due to their contradiction with Article III and XI of GATT/1994; the second category consists of those requirements which are explicitly prohibited, conditioned or discouraged by interregional, regional or bilateral agreements; and the third category consists of those performance requirements which are not prohibited by any international investment agreement.²⁴

Category	Performance requirements
Prohibited by the TRIMs Agreement	<ul style="list-style-type: none"> • Local content requirements • Trade-balancing requirements • Foreign exchange restrictions related to the foreign-exchange inflows attributable to an enterprise • Export controls
Prohibited, conditioned or discouraged by IIAs at bilateral or regional levels	<ul style="list-style-type: none"> • Requirements to establish a joint venture with domestic participation • Requirements for a minimum level of domestic equity participation • Requirements to locate headquarters for a specific region • Employment requirements • Export requirements

²⁰ M. Sornarajah (2010). *The International Law on Foreign Investment*, 3rd edn. (Cambridge University Press) 205.

²¹ Boroo *supra* note 19, p. 101.

²² H. Nikiema *supra* note 1, p. 2.

²³ United Nations Commission on Trade and Development *supra* note 6, table 1.

²⁴ Boroo *supra* note 19, p. 98.

	<ul style="list-style-type: none"> • Restrictions on sales of goods or services in the territory where they are produced or provided • Requirements to supply goods produced or services provided to a specific region exclusively from a given territory • Requirements to act as the sole supplier of goods produced or services provided • Requirements to transfer technology, production processes or other proprietary knowledge Research and development requirements
Not restricted	All other performance requirements

Source: UNCTAD, *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* (UN Publications, New York and Geneva 2003) Table 1.

Performance requirements may also be classified into *mandatory* or *non-mandatory* (voluntary) based on the nature of the requirement.²⁵ Mandatory performance requirements need to be compulsorily complied-with by the investor so as to either commence an investment or expand an already existing investment.²⁶ Such requirements are attached to the conditions for the entry and operation of the investment.²⁷ Non-compliance with the mandatory requirements could result in rejection of the investment by the host state and the investment could never materialize or be expanded.²⁸

Voluntary performance requirement is non-mandatory, and it relates to access to certain advantages, such as tax exemptions or subsidies by the host country.²⁹ Yet, the investor can choose not to fulfill such requirements and still continue with the investment.³⁰ Thus, voluntary requirements are generally attached with certain incentives like tax benefits or subsidies which the host state might offer if the investor complies with the prescribed requirement.³¹

²⁵ Satwik Shekhar (2017). 'Performance Requirements: Prospects for the EDEs' *Center for WTO Studies Working Paper CWS/WP/200/3*, p. 7.

²⁶ Ibid

²⁷ H. Nikiema, *supra* note 1, p.2

²⁸ Shekhar, *supra* note 25.

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

2.2 Objectives of performance requirements

Performance requirements are used to enhance the contribution of FDI to the host state's development.³² They may also be used to address market or policy failure, information asymmetries, or to compensate for possible negative externalities associated with FDI.³³ In facilitating FDI's positive spillovers for their economy, a host state's recourse to performance requirements aims at benefits out of the incoming investments.³⁴ As indicated earlier, performance requirements have been used in both developing and developed countries to achieve both economic and non-economic goals of host states.³⁵ They are imposed by host states so as to guarantee that the foreign investor exports a percentage of his production, buys local products and services, and employs local labor in the process of the production.³⁶

The following is a non-exhaustive list of the main objectives of performance requirements;³⁷

- i. Strengthening the industrial base and increasing domestic value added;
- ii. Creation of domestic employment opportunities;
- iii. Creation and promotion of linkage of foreign companies with domestic enterprises; and technology transfer;
- iv. Export generation and performance;
- v. Trade balancing;
- vi. Promotion of Sub-national regional development;
- vii. Avoidance of restrictive business practices;
- viii. Generation and distribution of rents;
- ix. Various non-economic objectives, such as political independence and distribution of political power.

2.3 Arguments against and in favor of performance requirements

Some consider performance requirements as inconsistent with the principle of liberal markets, while others perceive them as an essential component of a domestic development strategy.³⁸ Initially, performance requirements were

³² Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, 131.

³³ *Ibid.*

³⁴ Shekhar, *supra* note 25, p. 3.

³⁵ H. Nikiema, *supra* note 1, p. 1.

³⁶ Sornarajah, *supra* note 20, p. 205.

³⁷ Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.

³⁸ Sornarajah, *supra* note 20, p. 79.

used by both developed and developing countries until developed countries started opposing their imposition by host states.³⁹

Developed countries argue against the imposition of performance requirements and consider them as host government interference with a liberal trade regime.⁴⁰ As a capital exporting country, during the time of TRIMs negotiation, US presented a comprehensive list of performance requirements that need to be prohibited by WTO agreement which include; local content requirements, export performance requirements, trade balancing requirements, product mandating requirements, domestic sales restrictions, foreign exchange and remittance restrictions, local equity requirements, technology transfer and licensing requirements, and investment incentives.⁴¹

On the other hand, developing countries argue in favor of the imposition of performance requirements on foreign investors since they are necessary measures to counter abusive practices of foreign investors.⁴² Beyond controlling the abusive practices of foreign investors, developing countries highly emphasize on the significance of applying performance requirements in channeling FDI to national development objectives.⁴³ The reasoning of developing countries in relation to applying performance requirements primarily aims at boosting the contribution of FDI to the host state development.⁴⁴

In this regard, developing countries consider the TRIMs Agreement as deficient since it only focuses on the outcome of performance requirements and ignores the underlying causes for their imposition, i.e., the aim of performance requirements to counterbalance the benefit distorting practices of foreign investors.⁴⁵ As Burt notes, “developing countries desire FDI for realizing their development objectives, but allowing FDI without conditions

³⁹ H. Nikiema, *supra* note 1, p. 1.

⁴⁰ M. Burt, *supra* note 7, p. 1034.

⁴¹ Alexandre Genest (2017). ‘Performance Requirement Prohibitions in International Investment Law- PhD Thesis’ (University of Ottawa) p. 32 and ff. *see also* M. Burt *supra* note 7, p. 1034.

⁴² M. Burt, *supra* note 8, p. 1035.

⁴³ *Ibid.* *see also* John Croome (1995). *Re-shaping the World Trading System: A History of the Uruguay Round* (WTO), pp. 15-16.

⁴⁴ Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, 131.

⁴⁵ M. Burt, *supra* note 7, 1038. *See also* United Nations Commission on Trade and Development (2004), *International Investment Agreements: Key Issues* Vol. I (United Nations Publications, New York and Geneva), p. 29.

may expose such countries to the potential abuses of foreign investors and an inequitable distribution of benefits.⁴⁶

3. Performance Requirements under International Investment Legal Regime

At the International level, there are no uniform treaties among a large number of countries that furnish a comprehensive codified international foreign investment law in spite of repeated efforts.⁴⁷ There is a multilateral treaty, ICSID,⁴⁸ which entered into force on October 14, 1966. It provides facilities for conciliation and arbitration of international investment disputes between contracting states and nationals of other contracting states under the convention. Although the ICSID was successful convention in the field of international investment law, it is a procedural convention that deals with the settlement of investment disputes through arbitration.⁴⁹

At the international level, FDI is largely governed by BITs and customary international law. Despite the unsuccessful efforts to bring a multilateral investment agreement in place, the Uruguay Round came up with a patchwork of partial investment rules under the umbrella of WTO.⁵⁰ Thus, currently, at the multilateral level, investment in relation to performance requirements is governed by the Agreement on Trade-Related Investment Measures (TRIMS) that came into existence after the Uruguay round negotiations of WTO and which prohibits trade-related investment measures governments could impose on foreign investors as performance requirements.

⁴⁶ M. Burt, *supra* note 8, p. 1026.

⁴⁷ Economic and Social Commission for Asia and the Pacific, *supra* note 4, 116. See also Global Agenda Council on Global Trade and FDI (2013), 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (World Economic Forum, Geneva) 23 <www.WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.com> Accessed 12 January 2021. See also Sornarajah *supra* note 20, p. 79; Getahun Seifu (2008), 'Regulatory Space in the Treatment of Foreign Investment in Ethiopian Investment Laws' *The Journal of World Investment & Trade* Vol. 14/15, p. 1.

⁴⁸ International Convention on the Settlement of Investment Disputes

⁴⁹ Sornarajah, *supra* note 20, p. 80. See also United Nations Commission on Trade and Development, *supra* note 46, p. 17.

⁵⁰ Global Agenda Council on Global Trade, *supra* note 47, p. 23.

3.1 Performance Requirements under BITs and Customary International Law

The prohibition of performance requirement by international agreements is not widely practiced in the international jurisprudence; however there are some treaties dealing with the prohibition of performance requirements. In 2021, for example, 2219 BITs were effective (at the global level) out of 2844 BITs.⁵¹ This shows that BITs are one of the major international instruments regulating investment. The BITs signed by Ethiopia and model BITs of high capital exporting countries is discussed below in relation to the status of performance requirements.

Performance requirements which are imposed by host countries on foreign investors have only been prohibited in international investment agreements concluded by a few countries.⁵² In the past, international investment law only focused on post-entry regulation, thereby allowing states to have full control over whether or not to admit foreign investments, which can be inferred from the BIT practice of countries such as Germany, Italy, the Netherlands, and the United Kingdom.⁵³ In addition to traditional investment protection standards, a few states have recently concluded agreements that include binding commitments like prohibition of performance requirements at pre and post entry stage; and in particular, this is a notable feature of most US and Canadian treaties.⁵⁴

In addition to the categories of requirements prohibited by TRIMs Agreement, US BITs prohibit the imposition of employment requirement, technology transfer requirement, research and development performance requirements.⁵⁵ The US-model BIT which was first elaborated in the 1980s, revised in 2004 and again most recently revised in 2012; and it contains restrictions on performance requirements.⁵⁶ Article 8 of the model BIT

⁵¹ United Nations Commission on Trade and Development, 'International Investment Agreements Navigator' last updated 7 July 2021 <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>> accessed 25 August 2021 [hereinafter UNCTAD Navigator].

⁵² Sornarajah, *supra* note 20, p. 205.

⁵³ Karl P. Sauvant and Federico Ortino (2013). *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland) 23.

⁵⁴ *Ibid.*

⁵⁵ M. Burt, *supra* note 7, p. 1029.

⁵⁶ Global Agenda Council on Global Trade, *supra* note 47, p. 25.

contains detailed rules on the prohibition of performance requirements. Unlike the US Model BIT, the 2008 Model BIT of Germany did not contain rules on the prohibition of performance requirements.

For instance, Article 2 of the BIT signed between US and Democratic Republic of Congo provides that “within the context of its national economic policies and goals, each Party shall endeavor to avoid imposing on the investments of nationals or companies of the other party conditions which require the export of goods produced or the purchase of goods or services locally”.⁵⁷ The US-Ukraine BIT provides that neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.⁵⁸ These restrictions are, for example, embodied in Article 2 of a BIT entered between Malaysia and the United Arab Emirates.

Unlike the examples of BITs stated in the preceding paragraph, the BITs signed between China and Great Britain, China-Netherlands, China-Germany, and China-South Africa, do not incorporate provisions on the prohibition of performance requirement on investors of the contracting states.⁵⁹ Until 2021, Ethiopia has signed a total of 35 BITs, out of which 21 BITs are in force and the remaining ones are either terminated or not adopted.⁶⁰ None of the BITs signed by Ethiopia deal with the prohibition of performance requirements.

⁵⁷ United Nations Commission on Trade and Development (2004), *supra* note 45, p. 96.

⁵⁸ Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment art. II, 6 [hereinafter US-Ukraine BIT].

⁵⁹ Agreement between the Government of the United Kingdom of Great Britain and North Ireland and the Government of the People’s Republic of China concerning the Promotion and Reciprocal Protection of Investments; Agreement between the People’s Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments; Agreement on encouragement and reciprocal protection of investments between the Government of the People’s Republic of China and the Government of the Kingdom of the Netherlands; Agreement Between the Government of the People’s Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments. Available at: UNCTAD Navigator, *supra* note 51.

⁶⁰ UNCTAD Navigator, *supra* note 51.

3.2 The Agreement on TRIMs

One of the WTO agreements, the Uruguay Round Agreement on TRIMs⁶¹ bans certain categories of performance requirements.⁶² Trade Related Investment Measures were among the so called new issues under the Uruguay Round of negotiation.⁶³ Prior to the negotiation of the Uruguay Round, the jurisdiction of GATT did not incorporate investment measures since they were not considered tariffs or subsidies and thus they were outside of the scope of GATT.⁶⁴ Thus, according to the Uruguay Round Agreement of TRIMs, TRIM is generally any host country investment related restriction or measure that directly affects free flow of trade.

The prohibition of certain category of performance requirements by the TRIMs Agreement seems to be made following the influence of the classical theory that requires avoidance of any regulatory actions by host states on foreign investors. On the other hand, the position of the agreement in relation to its prohibition of limited number of performance requirements seems to be made because of the influence of the middle path theory which hardly asserts the need for giving regulatory space for host states that enables them to maximize the benefits and minimize its costs.

According to Article 1 of the TRIMs, the scope of application of the agreement is limited to investment measures affecting trade in goods.⁶⁵ Accordingly, the member states are not allowed to apply trade related investment measures in contradiction with the following GATT two articles; i.e., Article III (in relation to national treatment), and Article XI (with regard to the prohibition of quantitative restrictions). The Annex to the agreement provides the list of investment measures that violate these two principles of GATT.

Investment measures in violation of WTO member's national treatment obligation include local content requirements and trade balancing requirements. Investment measures in violation of GATT's prohibition on quantitative restrictions include general import restrictions and trade balancing restrictions, foreign exchange balancing restrictions on imports, and

⁶¹ Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments Results of The Uruguay Round (1994) [hereinafter TRIMs Agreement].

⁶² United Nations Commission on Trade and Development (2004), *supra* note 45, p. 29.

⁶³ M. Burt *supra* note 8, p. 1033.

⁶⁴ *Ibid.*

⁶⁵ TRIMs Agreement, *supra* note 61.

domestic sales requirements or export restrictions. Investment measures not covered by the TRIMs Agreement include: local equity requirements, technology transfer and licensing requirements, local manufacturing requirements, personnel entry restrictions, local employment requirements, remittance restrictions, and export performance requirements, among others.⁶⁶

4. Comparative Experience in Selected Countries

This section examines the experience of some selected countries in utilizing local content requirement, technology transfer requirement and export performance requirement. The selected countries are chosen because they are more or less successful in maximizing the gains from FDI by imposing performance requirements, and they were at nearly similar stage of socio-economic development with Ethiopia at the time when they applied performance requirements on foreign investors.

Historically, numerous countries, both developing and developed, required foreign investors to fulfill certain performance requirements as part of their policies so as to promote linkages, local industries, jobs and promote exports.⁶⁷ During the early stages of their development, today's developed countries, who argue against the imposition of performance requirement, have used performance requirements on foreign investors as a policy instrument to build up their national economy.⁶⁸ Performance requirements in regulating FDI have continued even after the prohibition of certain category of performance requirements by the WTO TRIMs Agreement.⁶⁹

4.1 Export performance requirement

Theoretically, performance requirements are imposed for the purpose of boosting the contribution of FDI for host states; accordingly, one of the primary objectives of imposing such requirements is increasing the level of export performance.⁷⁰ And practically, in a number of host countries, imposing export performance requirement on foreign investors was found

⁶⁶ United Nations Commission on Trade and Development (2001). *Host Country Operational Measures* (United Nations Publications, Geneva and New York) 3.

⁶⁷ Echandi et al, *supra* note 2, 27. See also Urata and Sasusa *supra* note 10, p. 19.

⁶⁸ Ha-Joon Chang (2004). 'Regulation of Foreign Investment in Historical Perspective' *European Journal of Development Research* Vol. 16/3, p. 687.

⁶⁹ Echandi et al, *supra* note 2, p. 27.

⁷⁰ Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.

effective in, *inter alia*, increasing the export-orientation of foreign investors to third countries.⁷¹

Malaysia is one of the states which have succeeded in expanding its manufacturing exports through imposing export performance requirements which required investors to export certain percent of their products; and this has enabled the country to generate the desired foreign currency for the purpose of financing its national development objectives.⁷² The other country that succeeded in utilizing export performance requirement was China through imposing mandatory performance requirement at the time of entry which pushed foreign investors to export large portion of their products to foreign markets.⁷³

Likewise, Chile has also succeeded in diversifying the country's export base through the devise of export performance requirements on foreign investors that enabled the country to increase its exports.⁷⁴ South Africa is successful in promoting an internationalization of the South African automotive industry by making export performance requirement an integral part of the Motor Industry Development Program.⁷⁵

Export performance requirement is also successfully employed for triggering the growth of export-focused investments in the automotive industry of Brazil, Mexico and Thailand.⁷⁶ The government of Thailand, which started imposing export performance requirements on foreign investors in the middle of 1980s achieved the desired objective and became the third largest exporter of automotive products in the continent of Asia.⁷⁷

With regard to the experience of Korea and Taiwan, they provided extensive financial incentives to foreign investors while at the same time imposing extensive performance requirements.⁷⁸ These two Asian states provided different incentives that require investors to export certain amount

⁷¹ Kumar Nagesh (1998). *Globalization, Foreign Direct Investment and Technology Transfers: Impacts on and Prospects for Developing Countries* (Routledge, London and New York) cited on United Nations Commission on Trade and Development (2003) *supra* note 6, p. 22.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ United Nations Commission on Trade and Development (2003), *supra* note 6, p. 22.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Chang *supra* note 68, p. 706.

of their products so as to get the available incentives and they became successful in maximizing the gains from FDI.⁷⁹

Thus, comparative experience shows that export performance requirement has been practically successful in helping different countries to gain the maximum benefit out of FDI. According to Moran, positive evidence has been found with regard to the benefits of export performance requirements.⁸⁰ In particular, export performance requirement has helped developing countries and countries with their economies in transition.⁸¹

4.2 Technology Transfer Requirement

For the purpose of facilitating the process of industrialization that FDI can bring to their economies, investment receiving countries resort to applying performance requirements on incoming investments.⁸² Ensuring technology transfer and creating linkages are among the major objectives of imposing performance requirements on foreign investors.⁸³ Accordingly, numerous countries require certain performance requirements to promote linkages and upgrade local industries through the opportunity of new technologies brought by foreign investors.⁸⁴

Chang indicates that some developed countries which recently argue against the imposition of performance requirements, have (during their early stages of development) applied performance requirements on foreign investors including technology transfer requirements as a national policy instrument of building up their national economy through the means of FDI.⁸⁵ During the Uruguay Round negotiation of WTO, the European Union had opposed the prohibition of technology transfer requirement under the Agreement of TRIMs in light of its practical advantages.⁸⁶

The practical experience of countries regarding the success of technology transfer requirements shows its benefits. China's extensive use of technology transfer performance requirement has, for example, become successful in developing its solar and wind power sectors thereby upgrading the level of

⁷⁹ Ibid.

⁸⁰ Theodore H. Moran (1998). *Foreign Direct Investment and Development: The new Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics, Washington D.C).

⁸¹ Ibid.

⁸² Shekhar, *supra* note 26, p. 3.

⁸³ Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.

⁸⁴ Echandi et al, *supra* note 2, 27; Urata and Sasusa, *supra* note 10, p. 19.

⁸⁵ Chang, *supra* note 68, p. 687.

⁸⁶ M. Burt, *supra* note 7, p. 1034.

local industries.⁸⁷ South Africa also utilized technology transfer performance requirement and became successful in its Motor Industry Development Program.⁸⁸

4.3 Local Content Requirement

Local content requirement is imposed for the purpose of creating economic linkages in the upstream and downstream chain of the investment activities in order to ensure the creation and diversification of related economic activities in the FDI host state.⁸⁹ Such requirement is widely used by FDI host states to ensure that foreign investors utilize local raw materials, products, and services in the process of production.⁹⁰

Local content performance requirements attached with various investment incentives have been imposed by many countries; and foreign investors have willingly complied with such requirements through sourcing part of their production inputs from local raw material supplies.⁹¹ For example, lessons can be drawn from the demand of China on foreign investors which required them to introduce high technology, and the performance requirements included the foreign currency balance, import substitution of and encouraging exports; and these requirements were not relaxed until the country achieved its targeted objectives.⁹² China's wind and solar power sectors have benefited from the extensive use of local content performance requirements.⁹³ The government of Indonesia also applied extensive local content performance requirements on the investors of United States, Japan, and Europe.⁹⁴

⁸⁷ See Mazzucato Mariana (2015), *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press, London).

⁸⁸ United Nations Commission on Trade and Development (2003), *supra* note 6, p. 213.

⁸⁹ H. Nikiema, *supra* note 1, p. 2.

⁹⁰ Sornarajah, *supra* note 20, p. 205.

⁹¹ Gary Clyde Hufbauer *et al* (2013). *Local Content Requirements: Report on a Global Problem* (Peterson Institute for International Economics) 22.

⁹² Lu Yuan and Terence Tsai (2000). 'Foreign Direct Investment Policy in China since 1973' *China Review* 223, p. 234 <www.jstor.org/stable/23453369> Accessed 12 March 2021.

⁹³ Mariana, *supra* note 87.

⁹⁴ Hufbauer *et al*, *supra* note 91, p. 22.

5. The Room for FDI Performance Requirement under the Ethiopian Legal Regime

This section examines the availability of both legal and policy rooms for Ethiopia to apply performance requirements on foreign investors. In doing so, it tries to assess the status of performance requirements under the Ethiopian investment legal regime; and it examines whether there exists a legal room under international investment law for Ethiopia to apply performance requirement without violating any commitment. Moreover, the opportunities, potential gains and the challenges in applying performance requirements as a national policy instrument are highlighted.

5.1 Ethiopia's investment laws

The Investment Proclamation and its regulation regulate the entry, establishment and operation of foreign investment and the protection accorded to investors and their investments. The new investment Proclamation No. 1180/2020 enacted on 2nd April, Regulation No. 474/2020, and Investment Incentive Regulation No 517/2022 are the laws that specifically focus on investment including the laws concerning the regulation of FDI in Ethiopia.

Under its preamble, the Proclamation states the primary goal of the law as improving the living standard of the people of Ethiopia, through creating an economic framework that fast-tracks the global competitiveness of the National economy, increases export performance, generates more and better employment opportunities and to further increase and diversify FDI inflow, to accelerate inward transfer and diffusion of knowledge, skill, and technology.⁹⁵ In spite of these elements in the preamble, the provisions of the Proclamation do not embody performance requirements such as technology transfer, export performance and local content requirements.

Moreover, the law does not specifically require most of the major fulfillment of performance requirements (such as local content, technology transfer, backward and inward linkage with local economy and technology transfer) upon the issuance of investment permit. Instead of mandatory technology transfer requirement, the law has rather opted to promote technology transfer agreement between foreign investors and domestic investors.⁹⁶

⁹⁵ Federal Democratic Republic of Ethiopia Investment Proclamation No. 1180/2020

⁹⁶ *Id.*, Art. 15. *See also* Federal Democratic Republic of Ethiopia Council of Ministers Investment Regulation No. 474/2020, Art. 15. [hereinafter Investment Regulation]

However, in relation to employment requirements the Proclamation as well as the Regulation require the Ethiopian Investment Commission (EIC) in collaboration with the Ministry of Trade and Industry (MOTRI), to prepare and implement a guideline regulating the duty of foreign investors to design and provide training programs for Ethiopian workers so as to employ them.⁹⁷

Moreover, the Proclamation requires foreign investors to employ all workers from Ethiopia as an employment performance requirement.⁹⁸ In this regard Article 22(1) provides:

Any investor may employ duly qualified foreigners necessary for the operation of his investment in positions of higher management, supervision, trainers and other technical professions. However, foreigners may be employed only when it can be ascertained that Ethiopians possessing similar qualification or experience required by the sector are not available.

Article 15 of Regulation No. 474/2020⁹⁹ provides rules for technology transfer agreements; Article 19 deals with the procedures for the training and the transfer of knowledge and skills to Ethiopian employees by foreign investors. Yet, this regulation does not incorporate minimum local content requirement and technology transfer requirement as policy instrument on foreign investors.

Although both the former investment regulation and the current regulation require foreign investors to give training for Ethiopian employees so as to transfer knowledge and skills thereby enabling local employees to substitute expatriate staff, there is a large presence of domestic employees in the areas that require low technical knowledge,¹⁰⁰ and Tihitina observes that foreign investors engaged in mobile assembly, textile and garment sub-sectors have employed foreign experts in many areas for a long period of time without substituting them with Ethiopians.¹⁰¹

With regard to investment incentives, a new investment incentive regulation is enacted and became operative as investment incentive regulation

⁹⁷ Investment Regulation Art. 19. See also Investment Proclamation, *supra* note 95, Art. 22.

⁹⁸ Investment Proclamation, *supra* note 95, Art. 22 (1).

⁹⁹ Investment Regulation, *supra* note 96.

¹⁰⁰ Tihitina Ayalew Getaneh (2020). 'The Role of the Investment Legal Framework in Ethiopia's FDI-development Nexus: PhD Thesis (Tilburg University) 160.

¹⁰¹ *Id.*, p. 161.

No 517/2022.¹⁰² Similar to the former repealed Regulation No 270/2012, the new investment incentive regulation provides investment incentives for foreign investors who are capable and willing to export certain portion of their products to a foreign market, which shows the existence of voluntary performance requirements attached with incentives under the Ethiopian legal framework.¹⁰³ Although these incentives seem to aim at encouraging export performance of foreign investors, minimum local content and technology transfer requirements are not embodied as a precondition for the benefits provided under the incentive scheme.

The regulation gives two years of income tax exemption for investors who export or supply to exporter at least 60% of their products or services. Yet, this author argues that such requirement alone cannot guarantee sustainable export of products to a foreign market, since investors may cease to export after benefiting from the two years income tax exemption which substantially decreases tax revenue of the country thereby aggravating the loss if investors cease to export at the end of the incentive. Thus, I argue that there should be additional requirement attached to such incentive which requires export for additional years once they benefit from the incentive.

Foreign investors who want to operate in industrial parks are required to export their products to a foreign market as per the terms of the contract.¹⁰⁴ However, there is no such requirement on using minimum local input and transfer of technology as per the responses of experts from the EIC. Thus, other than employment requirement and training of domestic workers to transfer knowledge and skill, Ethiopia's investment laws have failed to legally impose mandatory performance requirements on foreign investors who are investing or want to invest in the country.

5.2 International agreements ratified by Ethiopia

According to the FDRE Constitution,¹⁰⁵ all international agreements signed and ratified by the Government of Ethiopia are part and parcel of the law of the land; thus BITs to which Ethiopia is a party are applicable. As indicated in Section 3.1, Ethiopia has signed a total of 35 BITs, out of which 21 BITs

¹⁰² Council of Ministers Investment Incentive Regulation No. 517/2022, enacted on July 22, 2022

¹⁰³ *Id.*, Art. 6.

¹⁰⁴ Interview with Mr. Aschalew Tadesse, Investment Promotion Directorate, EIC (Addis Ababa, Ethiopia, 11 August 2021); Mr. Ermias Jano, Legal Expert, EIC (Addis Ababa, Ethiopia, 10 August 2021).

¹⁰⁵ The Federal Democratic of Ethiopia Constitution Proclamation No.1/1995, Art. 9(4).

are in force and the remaining ones are either terminated or not ratified by Ethiopia.¹⁰⁶

Ethiopia has concluded bilateral investment promotion and protection agreements with different states which are still in force.¹⁰⁷ However, the overall assessment of the BITs covered under this article reveals that there is no single BIT that prohibits Ethiopia from imposing performance requirements on foreign investors of the other contracting party. The absence of any BIT, to which Ethiopia is a party, which prohibits the imposition of performance requirement is a great opportunity for Ethiopia to apply any of the performance requirements without violating its bilateral commitment.

For instance the WTO Agreement on TRIMs prohibits certain category of performance requirements that it deems contrary to liberal trade regime.¹⁰⁸ Accordingly, the performance requirements prohibited by the WTO Agreement of TRIMs are; local content requirements, trade balancing requirements, general import restrictions and trade balancing restrictions, foreign exchange balancing restrictions on imports, and domestic sales requirements or export restrictions.¹⁰⁹ Performance requirements not prohibited by the WTO agreement include local equity requirements, technology transfer requirements, local manufacturing requirements, local employment requirements, and export performance requirement.

Since Ethiopia is not member of WTO, it will not be bound by the WTO Agreement of TRIMs that prohibits certain category of performance requirements; and there is no BIT that prohibits Ethiopia from imposing such requirements on foreign investors. As Ethiopia is in the process of accession to the WTO, it will be prohibited from imposing the performance requirements (listed in the preceding paragraph) as per the rules of TRIMs Agreement so as to be compliant with the WTO regime. Ethiopia is in the process of WTO accession for the past two decades, and imposing the performance requirements prohibited under TRIMs Agreement can cause hurdles in the process. Yet, the country is free to impose other performance

¹⁰⁶ UCTAD Navigator, *supra* note 51.

¹⁰⁷ Ethiopia's agreements with Egypt, Finland, Sweden, Austria, Libya, Germany, Israel, Iran, France, Netherlands, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Kuwait and Italy available at UNCTAD Navigator, *supra* note 51.

¹⁰⁸ TRIMs Agreement, *supra* note 61.

¹⁰⁹ UNCTAD Navigator, *supra* note 51, p. 3.

requirements which are not prohibited by the TRIMs Agreement even after joining WTO.

The investment protection provided under Ethiopia's law is in conformity with the international standard.¹¹⁰ In this regard, Ethiopia's central focus has been on attracting FDI while little attention has been given to maximize the benefits from FDI.¹¹¹ Thus, there is the need to strike a balance between attraction, protection, and maximizing the benefits from FDI thereby enhancing its contribution towards sustainable development. Thus, the existence of a legal room under international law to apply performance requirements for Ethiopia could be an important opportunity to apply such requirements on foreign investors.

5.3 Unattained opportunities due to failure to impose performance requirements

The rationale behind the employment of each of performance requirements is to control the potential abuses of foreign investors, and to secure the potential benefits of foreign investment in host countries. The absence of regulatory schemes such as performance requirements exposes host countries to the abuses of foreign investors and inequitable distribution of benefits.¹¹² Even though Ethiopia offers tax incentives to foreign investors, such benefits are often abused by foreign investors since the conditions attached to the incentives are not adequate and have not been mandatorily imposed.¹¹³

As it can be inferred from an interview conducted by Capital News with the Commissioner of EIC in August 2021, shortage of foreign currency is a major challenge in investments, and the major cause for such shortage is low export level of the country and increased imports.¹¹⁴ This can imply that the tax incentives provided for investors with the aim of increasing their export level are not adequately effective in contributing towards narrowing down the shortage of foreign currency in the country. Although the rationale behind

¹¹⁰ Martha Belete Hailu and Zeray Yihdego (2017). 'The Law and Policy of Foreign Investment Promotion and Protection in Ethiopia: An Appraisal of Theories, Practices and Challenges' in Zeray Yihdego and others (eds), *Ethiopian Yearbook of International Law* (Springer International Publishing AG) 27.

¹¹¹ *G/eyesus et al, supra* note 13, p. 2.

¹¹² Interview with Professor Zeray Yihdego (PhD), Chair in Public International Law, School of Law, University of Aberdeen (Aberdeen, Scotland, 30 September 2021 interviewed via Email)

¹¹³ *Ibid.*

¹¹⁴ Staff Reporter, 'Promoting Investment' Capital News (Addis Ababa, 16 August 2021) <www.capitalethiopia.com/interview/promoting-investment/amp/> Accessed 25 August 2021.

giving incentives for exporters is to enhance the export level of the country – thereby decreasing the huge gap between export and import levels– the realities on the ground show that the objectives of the incentives have not been achieved.

Technology transfer from MNCs to the host country can materialize through two major means; first through adaptation, imitation or direct introduction of technologies that domestic firms come in contact with, and second, through labor productivity that emanates from employment opportunities in foreign companies.¹¹⁵ However, there is significant gap in knowledge transfer due to the failure to implement legal provisions that require foreign companies to replace their expatriate staff members with local staff by upgrading local employees.¹¹⁶ Thus, adequate training is not provided for domestic employees by foreign investors as a result of which the desired technology transfer has encountered severe gaps.

Although Ethiopia promotes a direct technology transfer agreement which is registered by the Ethiopian Investment Commission, the number of technology agreements registered by the EIC is very low.¹¹⁷ The investment incentives also seem to concentrate on export sectors. Thus, regarding technology transfer, there is gap in the legal framework in capturing foreign technologies that can contribute towards facilitating sustainable development.¹¹⁸ The degree of technology transfer in Ethiopia is not to the expected level as compared to the duration of FDI operations.¹¹⁹ Some studies show the deficiency of technological knowledge and skill in Ethiopia which is needed to transform and make the country's industry internationally competitive.¹²⁰ However, technology transfer agreements that are promoted by the law are not effectively functioning as a channel for the transmission of the desired technology from foreign investors.¹²¹

Theoretically transfer of the latest and updated technology is seen as one of the major spillovers that host states could get from foreign investors. In the absence of adequate monitoring mechanisms, foreign investors may bring obsolete and outdated technologies which are unwanted in their home country.

¹¹⁵ Tihitina, *supra* note 100, p. 160.

¹¹⁶ *Id.*, p. 171.

¹¹⁷ Interview with Mr. Ahmed Nur Yusuf Hassen, Director License and Registration Directorate, EIC (Addis Ababa, Ethiopia, 10 August 2021).

¹¹⁸ Tihitina, *supra* note 100, p. 106.

¹¹⁹ Interview with Mr. Aschalew and Mr. Ermias, *supra* note 118.

¹²⁰ Mulu G/eyesus et al, *supra* note 13, p. 1.

¹²¹ Tihitina, *supra* note 100, p. 160.

Such obsolete and outdated technologies adversely affect health and the environment. Furthermore, such technologies will not enable Ethiopia to gain the potential benefits from FDI that can help to achieve sustainable development.

As stated by the Commissioner of EIC, one among the options to overcome the existing shortage of foreign currency in Ethiopia is minimizing the country's import items through adequately working on import substitution.¹²² One possibility in this regard could be encouraging local raw material suppliers to increase both the quantity and quality of such materials and legally requiring foreign investors to use certain minimum thresholds of local inputs from domestic suppliers.

However, since there is no mandatory minimum local content requirement which is imposed on foreign investors, most of the foreign investors import raw materials either from their home country or other foreign suppliers.¹²³ For instance a Chinese manufacturing company that is engaged in the manufacturing of clean materials and child health supplies in Ethiopia imports all of its raw material inputs from China.¹²⁴ But, such manufacturer complains that quality input raw materials for their production are not locally available, and that is why they are importing from abroad.

As one study shows, foreign investors engaged in the manufacturing sector, like in textile and garment, are importing almost all of their raw materials from abroad, while domestic cotton producers, on the other hand, are complaining on lack of market for their products.¹²⁵ The complaints from some manufacturers regarding one of the causes for importing all of their raw materials from abroad is the non-availability of quality raw material in the domestic market.¹²⁶ Thus, to satisfy the interest of investors with regard to the availability of quality raw materials from the domestic market, a great effort is required from the Ethiopian government in enhancing the quality of domestic raw material supplies.

¹²² Staff Reporter, *supra* note 114.

¹²³ Interview with Mr. Ermiyas Melesse, Legal Expert, EIC, (Addis Ababa, Ethiopia, 15 August 2021).

¹²⁴ Interview with Mr. Wing, Manager, Clean Material and Child Health Supplies Manufacturing PLC (Addis Ababa, Ethiopia, 14 August 2021).

¹²⁵ Yechalework Aynalem (2019). 'Opportunities and Challenges of Industrial Park Development in Ethiopia: Lessons from Bole Lemi and Hawassa Industrial Parks: MA Thesis (Addis Ababa University) 78.

¹²⁶ *Ibid.*

It can be argued that one of the causes may be the lack of desire from the manufacturers to use local materials and, in effect, procure benefits to their sister companies (in their home states) that supply such materials. This problem has been exacerbated by the absence of adequate performance requirements in Ethiopia's laws and gaps in the availability of quality raw materials in the domestic market. There is thus the need to strike a balance between attracting and designing adequate policy and legal instruments that can help in ensuring the contribution of FDI to sustainable development.

5.4 The need to apply performance requirements: Advantages and opportunities

As discussed above, imposing mandatory export performance requirements can enhance export levels, and minimum local content requirement decreases the level of raw material imported from abroad. With regard to technology transfer, training to be given by foreign companies for local enterprises that supply raw materials in the textile and garment sectors (to ensure the quality of such products) can be regarded as one of the elements of technology transfer.¹²⁷ Such skill transfers (in the value chain) should accompany the technical skills mentoring and training provided to the local technical staff in the process of production at the investment site.

Imposing such technology transfer requirements on foreign companies on the production process for local suppliers of raw materials can help to improve the quality of raw material supply to foreign investors. Moreover, technology transfer could also be made through merger or joint venture of foreign companies with domestic ones.¹²⁸ Thus, applying joint venture requirements can pave the way for domestic companies to benefit from the technology and skills that can be obtained from foreign companies.

As highlighted earlier, various countries such as Malaysia, Thailand, China, Brazil, Mexico, South Africa, and Chile, have succeeded by applying different performance requirements as their national policy objective. In relation to local content requirement and technology transfer requirements China has succeeded in developing domestic wind and solar power sectors through extensive use of local content and technology transfer performance requirements.¹²⁹ Malaysia is one of the states which have succeeded in expanding its manufacturing exports through imposing export performance

¹²⁷ Tihitina, *supra* note 100, p. 160.

¹²⁸ *Id.*, p. 31.

¹²⁹ Mariana *supra* note 87.

requirements that enabled the country to generate the desired foreign currency for the purpose of financing its national development objectives.¹³⁰ The other country that succeeded in utilizing export performance requirement was China through imposing mandatory performance requirement at the time of entry which pushed foreign investors to export large portion of their products to foreign markets.¹³¹

The 2030 Agenda for Sustainable Development, which was adopted by the UN General Assembly in 2015, incorporates 17 Sustainable Development Goals (SDGs) including goals on poverty eradication, food security, health, education, basic infrastructure, economic growth and decent work, among others.¹³² FDI is among the principal means of financing the 2030 Agenda for Sustainable Development and realizing the corresponding 17 Sustainable Development Goals.¹³³

FDI has a great potential towards contributing to sustainable development in numerous important ways; among others, through bringing in foreign exchange, expanding access to market, contributing in skills and human capital growth, and technology transfer.¹³⁴ However, the development and implementation of investment policies and regulatory frameworks that provide the greatest benefits in terms of sustainable development are critical.¹³⁵

Based on the discussion in the preceding sections, the author argues that applying performance requirements can help Ethiopia to maximize benefits from FDI thereby accelerate the country's objective of realizing sustainable development. Export performance and local content requirements can increase the existing low export level and decrease the level of raw material imports, which can help the country to minimize the existing shortage of foreign currency. Furthermore, I argue that by requiring foreign companies to give training on the production process for local suppliers of raw material as a technology transfer requirement, it is possible to ensure the quality of local raw material supplies.

¹³⁰ Nagesh *supra* note 71.

¹³¹ *Ibid.*

¹³² United Nations Commission on Trade and Development (2021), *Investing in the Sustainable Development Goals: The Role of Diplomats; Investment Advisory Series A, number 9* (United Nations Publications, Geneva) 5.

¹³³ Economic and Social Commission for Asia and the Pacific *supra* note 3 (2019), p. 1.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

5.5 Challenges that might arise in applying performance requirements

The implementation of performance requirements may not be free from challenges and such challenges may vary depending on the nature and type of performance requirements to be imposed. The challenges may relate to fear related to decline in the attraction of FDI, lack of the necessary human capacity that can monitor the implementation of such requirements and the availability of the required local raw materials. As one study shows, in Bole Lemi and Hawassa Industrial Parks, some foreign investors engaged in garment and textile sub-sectors raise lack of quality local raw material supply as a defense for importing all of their raw materials from abroad.¹³⁶ The possible way out for such challenge could be increasing the quality of local raw materials through providing the necessary training on the production process for suppliers of raw materials in such sectors.

Devising and implementing investment policies and regulatory frameworks that are coherent, transparent, and appropriately designed to mobilize FDI that provide the greatest benefits in terms of sustainable development are very crucial.¹³⁷ Yet, there is a need to strike a balance between attracting and incentivizing foreign investors and realizing host country sustainable development objectives.

In imposing mandatory performance requirements there can be the fear of losing the attraction of FDI,¹³⁸ and Ethiopia has failed to apply certain performance requirements such as mandatory local content, export and technology transfer requirements, due to fear of losing the attraction of FDI.¹³⁹ However, I argue that this fear of foreign investment decline is unjustified because absence of performance requirements might harm the country's economy more than the potential decline in foreign investment. Moreover, a country should not enact and apply its laws to merely appease foreign investors at the expense of its own socio-economic interest and environmental sustainability.

Thus, the fear of discouraging foreign investors cannot be raised as a justification for not imposing performance requirements; rather it is better to work on other favorable conditions that are intended for ensuring mutual win-win benefits to the foreign investor, its home state and the host state. This calls

¹³⁶ Aynalem, *supra* note 125. p. 78.

¹³⁷ Economic and Social Commission for Asia and the Pacific (2019), *supra* note 3, p. 24.

¹³⁸ Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 136.

¹³⁹ Interview with Mr. Aschalew, *supra* note 104.

for transcending beyond mere focus on quantity of investments and giving due attention to the quality of investments. This requires aligning investment attraction legal frameworks with the development needs of the country so as to get the desired gains from FDI.¹⁴⁰ Accordingly, I argue that instead of totally avoiding performance requirements under the fear of decline in FDI attraction at the expense of national interest, the policy and legal frameworks can accommodate performance requirements side by side with the FDI attraction schemes.

Therefore, the performance requirements need to be in tandem with the business policy of foreign investors and should not undermine its overall goal.¹⁴¹ Foreign investments may not be attracted if foreign investors are mandatorily required to utilize a minimum of their inputs from local sources when such sources are perceived to produce substandard inputs that will affect the investors' reputation.¹⁴² Similarly, if there are no local producers that produce quality inputs, forcing foreign investors to obtain their inputs from local producers becomes a disincentive against FDI.

On the other hand, if other favorable domestic conditions—that are available for foreign investors—outweigh the performance requirements to be fulfilled by such investors, performance requirements may not affect the attraction of FDI. In this regard, the experience of South Korea and Taiwan, which provided extensive financial incentives to foreign investors while at the same time imposing extensive performance requirements reveals that the maximum benefits can be derived from FDI when carrots are combined with sticks, rather than when either carrots or sticks alone are used.¹⁴³ With regard to local content requirements, for example, the Ethiopian government should thus work on increasing the quality and quantity of local raw material supplies before mandatorily imposing minimum local content requirements on foreign investors.

¹⁴⁰ Tihitina, *supra* note 100, p. 139.

¹⁴¹ Economic and Social Commission for Asia and the Pacific, *supra* note 4 (2017), p. 136.

¹⁴² *Ibid.*

¹⁴³ Chang *supra* note 68, p. 706.

6. Conclusion and the Way Forward

Although Ethiopia has given due attention to various incentives to attract FDI, there is lack of effort in maximizing the benefits thereof. Thus, the country is not gaining the expected benefit from FDI, since attracting foreign investment and maximizing its benefit are different and require different policy devices. Performance requirements are one of the policy instruments that help countries to get the maximum benefits from FDI. Mere focus on FDI attraction without sufficient regulatory schemes such as performance requirements exposes host countries to the abuses of foreign investors and inequitable distribution of benefit. In this regard, lessons can be drawn from the comparative experience of numerous developing countries that have gained the maximum benefits from FDI through applying performance requirements.¹⁴⁴

Thus based on the analysis made on the preceding sections, the author argues that there is both policy and legal room for applying performance requirements on foreign investors under international law and the Ethiopian legal regime that can boost the contribution of FDI to the country's sustainable development. Specifically, there is no BIT or international investment agreement, to which Ethiopia is a party that prohibits Ethiopia from imposing any performance requirement which can be the best opportunity for the country to apply such requirement without violating any international commitment. It can be imposed on both already established investments and those to be established in the future. However, it is better to not impose new performance requirements on investments already established, because doing so may contravene the legitimate expectation of investors.

It is to be noted that only limited category of performance requirements are prohibited under TRIMs Agreement. Thus, as long as Ethiopia imposes those categories of performance requirements which are not prohibited under TRIMs Agreement, investment performance requirements will not affect its WTO accession process. Moreover, if there is a possibility of violating the national treatment standard in the BITs and IITs to which Ethiopia is a party, the performance requirements can be uniformly applied on both domestic and foreign investors based on national priority areas and other sector specific considerations.

¹⁴⁴ For instance, *see* United Nations Commission on Trade and Development (2003), *supra* note 6, p. 22; Chang *supra* note 68, p. 706 and Mariana, *supra* note 87; Hufbauer *et al*, *supra* note 91, p. 22.

Thus, I argue that Ethiopia should impose permissive and mandatory performance requirements on the basis of national development priority objectives like export performance, local content, and technology transfer requirements on foreign investors. Such requirements should not be arbitrarily imposed since their effectiveness depends on their economic importance, the country's capacity to implement and monitor their impact, among others. For this purpose, the Ethiopian Investment Commission should build the capacity of its experts who can efficiently and diligently execute and monitor the compliance of investors with such requirements. Moreover, the EIC while negotiating BITs, should give due caution in relation to those countries that intend to prohibit performance requirements under their BITs. _____■

Cited References

- Boroo, Z. (2012). 'Effective Use of Performance Requirement's and Investment Incentives' *The Mongolian Journal of International Affairs*.
- Burt, Eric M. (1997). 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' *American University International Law Review* Vol. 12/6.
- Croome, John (1995). *Re-shaping the World Trading System: A History of the Uruguay Round* (WTO).
- Echandi, Roberto *et al* (2015). 'The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature' *World Bank Group Policy Research Working Paper*.
- Economic and Social Commission for Asia and the Pacific (2017). *Handbook on Policies, Promotion, and Facilitation of Foreign Investment for Sustainable Development in Asia and the Pacific*, (United Nations Publication).
- Economic and Social Commission for Asia and the Pacific (2019). *Foreign Direct Investment and Sustainable Development in International Investment Governance: Studies in Trade, Investment and Innovation No. 90* (United Nations Publication).
- Genest, Alexandre (2017). 'Performance Requirement Prohibitions in International Investment Law- PhD Thesis' (University of Ottawa).
- Getahun Seifu (2008). 'Regulatory Space in the Treatment of Foreign Investment in Ethiopian Investment Laws' *The Journal of World Investment & Trade* Vol. 14/15.
- Tihituba Ayalew Getaneh (2020). 'The Role of the Investment Legal Framework in Ethiopia's FDI-development Nexus: PhD Thesis (Tilburg University).
- Global Agenda Council on Global Trade and FDI (2013). 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (World Economic Forum, Geneva) 23
- Ha-Joon Chang (2004). 'Regulation of Foreign Investment in Historical Perspective' *European Journal of Development Research* Vol. 16/3.
- Hufbauer, G. C. *et al* (2013). *Local Content Requirements: Report on a Global Problem* (Peterson Institute for International Economics).
- Kurtishi-Kastrati, Selma (2013). 'The Effects of Foreign Direct Investments for Host Country's Economy' *European Journal of Interdisciplinary Studies, Vol. 5/1*, 26
- Martha Belete Hailu & Zeray Yihdego (2017). 'The Law and Policy of Foreign Investment Promotion and Protection in Ethiopia: An Appraisal of Theories, Practices and Challenges' in Zeray Yihdego and others (eds), *Ethiopian Yearbook of International Law* (Springer International Publishing AG).
- Moran, Theodore H. (1998). *Foreign Direct Investment and Development: The new Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics, Washington D.C).
- Mulu G/eyesus *et al* (2017). *Foreign Direct Investment in Ethiopia: Challenges, Opportunities and Policy Options for Effective Use to Stimulate Industrialization* (FDRE- PSRC and Ethiopian Development Research Institute).
-

- Nagesh, Kumar (1998). *Globalization, Foreign Direct Investment and Technology Transfers: Impacts on and Prospects for Developing Countries* (Routledge, London and New York).
- Nikiema. Suzy H. (2014). *Performance Requirements in Investment Treaties: Best Practice Series*, (International Institute for Sustainable Development).
- Sauvant, Karl P. & Ortino, Federico (2013). *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland).
- Shekhar, Satwik (2017). 'Performance Requirements: Prospects for the EDEs' *Center for WTO Studies Working Paper CWS/WP/200/3*.
- Sornarajah, M. (2010). *The International Law on Foreign Investment*, 3rd edn (Cambridge University Press).
- United Nations Commission on Trade and Development (2001). *Host Country Operational Measures* (United Nations Publications, Geneva and New York).
- United Nations Commission on Trade and Development (2003). *Foreign Direct Investment and Performance Requirement: New Evidence From Selected Countries* (United Nations Publications, New York and Geneva).
- United Nations Commission on Trade and Development (2004). *International Investment Agreements: Key Issues* Vol. I (United Nations Publications, New York and Geneva).
- United Nations Commission on Trade and Development (2021). *Investing in the Sustainable Development Goals: The Role of Diplomats; Investment Advisory Series A, number 9* (United Nations Publications, Geneva).
- Urata, Shujiro & Sasusa, John (2007). *An Analysis of the Restrictions on Foreign Direct Investment in Free Trade Agreements* (RIETI)
- Yechalework Aynalem (2019). 'Opportunities and Challenges of Industrial Park Development in Ethiopia: Lessons from Bole Lemi and Hawassa Industrial Parks: MA Thesis (Addis Ababa University).
- Yuan, Lu & Tsai, Terence (2000). 'Foreign Direct Investment Policy in China since 1973' *China Review* 223.
-