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AfCFTA's Dispute Settlement Mechanism and WTO's DSU: Relationship and Multilateralization

Consumer Protection from Unfair Contract Terms in Ethiopia: A Plea for Reform

Impeachment Is Not Disqualification: An Appraisal of the Western Cape High Court's Ruling

Landlocked and Left Out? Effective Access to the Sea as an Imperative Claim with Special Reference to Ethiopia

Law and Communication: Insights from the Plurality of Norms in Ethiopia

Legal Status of the Legitimate Expectation Doctrine in International Investment Law: An Inquiry into its Legitimacy and Clarity

Peri-Urban Land Governance in Ethiopia: Legal Fragmentation and Institutional Practice in the Rural-Urban Transition

Revisiting Self-Determination and Land Rights in Ethiopia's Post-1991 Federal Context

SDG 8 on Decent Work through the Lenses of the National Industrial Court of Nigeria Decisions: Quo Vadis?

Taxation of Private Equity Sector in Ethiopia: Challenges and Reform Options

Comments:

Ethiopia's Entry into BRICS and the Politics of Multipolarity

Unstamped Arbitration Agreement and the Role of Courts in Arbitration: Lessons from India



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AfCFTA's Dispute Settlement Mechanism and WTO's DSU: Relationship and Multilateralization

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Abstract

The African Continental Free Trade Area (AfCFTA) is the largest regional trade agreement to date in Africa, surpassing the African Regional Economic Communities (RECs). Historically, the fragmentation caused by these RECs stood in contrast to a central element of the world trading system: the principle of non-discrimination. The adoption of the AfCFTA is unique in its timing; it emerged during an era when the World Trade Organization (WTO) is facing unprecedented challenges, including negotiating deadlocks, problems in its dispute settlement function, and criticisms regarding its inclusivity and developmental impact. Conversely, the AfCFTA represents a bold new model of regional economic integration that prioritizes inclusive development, regulatory harmonization, and a distinctive 'developmental regionalism' approach, i.e., the multilateralization of regionalism. This article analyzes the relationship between the AfCFTA's Dispute Settlement Mechanism (DSM) and the WTO's Dispute Settlement Understanding (DSU) in the context of this multilateralization. It is argued that the AfCFTA's approach to dispute settlement and enforcement offers a viable model for restoring a functional, trusted, and efficient global dispute settlement system.

Keywords: Dispute settlement Mechanisms, Multilateralization of Regionalism, AfCFTA, WTO-DSU

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I thank Professor JI Wenhua (PhD) for his support as the supervisor of my PhD dissertation (*infra* note 3) submitted to the School of Law, University of International Business and Economics (UIBE), Beijing, China. This article is based on themes in some parts of the dissertation.

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1. Introduction

The African Continental Free Trade Area (AfCFTA) is one of the flagship projects of the African Union's (AU) Agenda 2063. It aims to accelerate intra-African trade and boost Africa's trading position in the global market by strengthening Africa's policy space in global trade negotiations. The agreement establishing the AfCFTA was adopted on March 21, 2018, and officially entered into force on May 30, 2019, following the requisite number of ratifications. The AfCFTA represents a bold new model of regional economic integration that prioritizes inclusive development, regulatory harmonization, and a distinctive "multilateralization of regionalism" that pursues the "developmental regionalism" approach. This stands in contrast to the global multilateral trading system, administered by the World Trade Organization (WTO), which currently faces unprecedented challenges, including negotiating deadlocks, difficulties in its dispute settlement function, and criticisms regarding its inclusivity and developmental impact.

The issues addressed in this article include AfCFTA's approach to dispute settlement and enforcement mechanisms –and how this informs the restoration of a functional, trusted, and efficient regional dispute settlement system. In other words, examining the relationship between the AfCFTA's Dispute Settlement Mechanism (DSM) and the WTO's Dispute Settlement Understanding (DSU), along with its multilateralization, is a critical area of

study that warrants exploration of potential solutions to the WTO DSU's current paralysis.

There are recent academic works that examine the legal and institutional relationship between AfCFTA and WTO, focusing on how their rules of dispute mechanisms interact. For instance, the study by Calistus Abanag investigates whether the AfCFTA's regional objectives align with or contradict the WTO's multilateral trade framework, thereby testing their complementarity, conflict areas, and implementation challenges.¹ On the other hand, Annabel Nanjira explores the legal complexities that arise when a trade dispute could be heard by both the WTO and the AfCFTA, focusing on the legal issue of *choice of forum* and its related legal elements.²

The central theme of this article is beyond examining the relationship between the dispute settlement mechanisms of AfCFTA and WTO. It seeks to examine the new paradigm of AfCFTA's multilateralization approach as a mechanism of surpassing the pains of RECs' fragmented dispute settlement forums and its structural capability of lending legal way outs for the WTO's

Acronyms

AB	Appellate Body
AfCFTA	African Continental Free Trade Area
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
FTA	Free Trade Agreement
MPIA	Multi-party Interim Appeal Arbitration Arrangement
MERCOSUR	Mercado Común del Sur, or Southern Common Market
NAFTA	North American Free Trade Agreement
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
RTA-DSMs	RTA Dispute Settlement Mechanisms
SADC	Southern African Development Community
VCLT	The Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO-DSU	WTO Dispute Settlement Understanding

¹ Calistus Abang. (2024). African Continental Free Trade Area (AfCFTA) and World Trade Organization (WTO): Complementary or Conflicting Agendas? *Journal for Business, Development, and Leadership* (JBDEL), Vol. 3 No. 1, p. 1.

² Annabel Nanjira. (2019). Concurrent Jurisdiction between the World Trade Organization and the AfCFTA Dispute Settlement Systems. *AfronomicsLaw*, Vol. 1 No. 4, pp. 1-4.

paralyzed dispute settlement mechanism. This article is based on the relevant sections of this author's PhD dissertation³ in an updated form, and it analyzes the design and architecture of the AfCFTA's Dispute Settlement Mechanism and the quest for the multilateralization of Regional Trade Agreements (RTAs) in alignment with the WTO Dispute Settlement Understanding.

This article analyzes the legal issues regarding the adherence of the AfCFTA to the WTO dispute settlement system, addressing questions such as how AfCFTA's 'WTO-Plus' and 'WTO-Extra' commitments could be implemented within the WTO's multilateral dispute settlement system. Furthermore, it examines the desirability of the concept of 'multilateralization of regionalism' in the dispute settlement mechanism of the world trading system through the theoretical lens of 'the principle of legal balance and mutual supportiveness,' assessing whether initiatives for the multilateralization of dispute settlement rules at the WTO level are feasible. The themes of discussion include the design and models of DSMs in RTAs, pre-AfCFTA RTA judiciaries and their dispute settlement mechanisms, the legal nexus between the WTO's DSU and the AfCFTA's DSMs, and the multilateralization of dispute settlement mechanisms.

2. Design and Models of DSMs in RTAs

The proliferation of Regional Trade Agreements (RTAs) in the world trading system has not only expanded regulatory coverage but has also shifted enforcement mechanisms from politically oriented procedures to sophisticated and legalistic forms of dispute settlement.⁴ However, the design and models of these RTA DSMs are heterogeneous and lack uniformity. In other words, although most RTAs contain provisions establishing procedures for resolving disputes, the design of RTA Dispute Settlement Mechanisms (RTA-DSMs) does not always align with the WTO Dispute Settlement Understanding (DSU). For instance, Claude Chase *et al.*, in a study mapping the design and models of dispute settlement mechanisms across 226 RTAs (notified to the WTO by the end of 2012), found that RTA-DSMs fall into

³ Dessie Tilahun Ayalew. (2022). The African Continental Free Trade Area (AfCFTA) as a New Multilateralization of Regionalism: Its WTO Compatibility and Implications on China-Africa Trade and Investment Cooperation. (PhD thesis, University of International Business and Economics (UIBE), China).

⁴ Claude Chase, Alan Yanovich, Jo-Ann Crawford & Pamela Ugaz. (2016). Mapping of dispute settlement mechanisms in regional trade agreements- innovative or variations on a theme? In Rohini Acharya (editor), *Regional Trade Agreements and the Multilateral Trading System*, Cambridge University Press, p. 608.

three broad categories: the political/diplomatic model, the quasi-judicial (WTO-DSU) model, and the regional courts/judicial model.⁵

The *political/diplomatic model* encompasses RTAs that either lack dispute settlement provisions entirely, provide exclusively for negotiated settlements among disputing members, refer disputes to a political body for resolution, or allow members a right to veto a referral to a third-party adjudicator.⁶ In contrast, the *quasi-judicial model* comprises RTA-DSMs that provide an automatic right of access to third-party adjudication at some stage in the dispute settlement process. This model is heavily based on the WTO's dispute settlement system.⁷ Finally, the *judicial model* shares defining characteristics with the quasi-judicial model, such as granting an automatic right of referral to third-party adjudication and resolving disputes through the application of law. However, the judicial model is distinguished by a more explicit emphasis on private rights, particularly regarding standing, which entitles private claimants to bring actions directly before an adjudicating body.⁸

Based on the study by Claude Chase *et al.*, among other findings, the vast majority of RTA-DSMs are classified under the *quasi-judicial model*, which provides for a single instance of binding, third-party adjudication. Furthermore, RTA-DSMs falling under the judicial model category possess unique features absent in other RTA systems, such as provisions relating to the standing of private parties.⁹ Consequently, most regional trade agreements contain specific provisions for quasi-judicial and judicial methods of dispute settlement. Pre-AfCFTA Regional Economic Communities (RECs) are no exception; they provide dispute settlement mechanisms and have established judicial bodies or tribunals for their respective regions.¹⁰

The newly established African Continental Free Trade Area (AfCFTA) adopts a dispute settlement mechanism modeled on the WTO-DSU approach, comprising the Protocol on Rules and Procedures on the Settlement of Disputes as part of the single undertaking establishing the AfCFTA. The adoption of this Protocol was one of the first accomplishments of the AfCFTA negotiations, agreed upon during Phase I alongside the Protocols on Trade in Goods and Trade in Services. The AfCFTA Dispute Settlement Mechanism is

⁵ Id., pp. 610-620.

⁶ Id., p. 618.

⁷ Ibid.

⁸ Id., p. 620.

⁹ Id., pp. 619-621.

¹⁰ Obert Bore. (2020). Dispute Settlement Mechanisms in African Regional Economic Communities: Lessons and New Developments. *African Journal of Legal Studies*, Vol. 12, p. 242.

established under Article 20 of the Agreement establishing the AfCFTA, which also establishes a Dispute Settlement Body (DSB) for resolving disputes between State Parties. Thus, the multilateralism-regionalism dichotomy is apparent in the dispute settlement mechanism, given that the WTO's DSU has been primarily replicated in most quasi-judicial and judicial methods of settling disputes under RTAs.¹¹

The issue of whether the proliferation of RTAs threatens the existence of the WTO dispute settlement system lies at the heart of the multilateralism-regionalism dichotomy in the global trading system. Furthermore, the enforcement mechanism of RTAs featuring a new paradigm of 'WTO-plus' or 'WTO-extra' provisions before the WTO-DSU presents another significant challenge in analyzing the nexus between international trade dispute settlement at the WTO and under RTAs. Therefore, analyzing the relationship between the AfCFTA's dispute settlement mechanism and the WTO-DSU, along with the novel concept of multilateralization in trade dispute settlement, is the core focus of this article. Additionally, the issue of further liberalization through RTAs (WTO-Extra) in dispute settlement mechanisms represents a new trajectory for modern RTAs.

The potential benefit of the AfCFTA in encouraging the participation of African countries in trade-related disputes –and thereby changing the paradigm of limited participation in the WTO-DSU– is another pressing concern. African countries have historically faced challenges in utilizing the WTO dispute settlement system; as of January 2026, no African country has participated as a principal complainant in any WTO case. Major hurdles include a complex and prohibitively expensive system, inadequate representation of developing countries, a perceived lack of a development agenda, and compensatory and enforcement dimensions seen as biased against African nations.¹² Thus, the AfCFTA represents a new paradigm with the potential to invigorate African countries' participation and capacity in trade dispute settlement.

¹¹ Yenkong Ngangjoh-Hodu. (2020). Regional Trade Courts in the Shadow of the WTO Dispute Settlement System: The Paradox of Two Courts. *African Journal of International and Comparative Law*, Vol. 28, p. 32.

¹² Richard E. Mshomba. (2009). *Africa and the World Trade Organization*, Cambridge University Press, pp. 39-47.

3. Pre-AfCFTA's RECs Judiciaries and their Dispute Settlement: An Updated Assessment

The evolution of African Regional Economic Communities (RECs) courts reflects a complex judicial history that must not be overgeneralized. While these judicial bodies act as the legal guardians of sub-regional integration, their precise jurisdictional reach varies significantly by treaty text. For instance, the ECOWAS Court of Justice and the East African Court of Justice (EACJ) became widely known for a 'judicialization process'¹³ expanding into human rights litigation while their treaty boundaries remain highly contested. The EACJ's jurisdictional expansion in the *Nyong'o* case led to restrictive treaty amendments by member state governments.¹⁴ Similarly, the COMESA Court of Justice has maintained strict textual barriers under Article 26 of its Treaty, requiring the total exhaustion of local remedies and limiting claims exclusively to treaty infringements rather than municipal law violations, as affirmed in *Malawi Mobile Ltd v. Government of Malawi*.¹⁵

A critical factual correction is required regarding the SADC Tribunal. While historically celebrated for its human rights protections in *Mike Campbell (Pvt) Ltd v. Zimbabwe*, the Tribunal was effectively rendered dysfunctional following Southern African Development Community (SADC) member states' decisions to dismantle it after the ruling it passed on Zimbabwe's government.¹⁶ As highlighted in recent scholarship by August Reinisch and Maria José Escobar Gil, the newly proposed Draft Protocol for the SADC Tribunal removes individual access and is not yet adopted.¹⁷

¹³ Elisa Tino. (2013). The Role of Regional Judiciaries in Eastern and Southern Africa. In André du Pisani and Gerhard Erasmus (editors), *Monitoring Regional Integration in Southern Africa Yearbook 2012*, Tralac, p. 141.

¹⁴ *Peter Anyang' Nyong'o & 10 Others v the Attorney-General of the Republic of Kenya & 5 Others*, EACJ Reference 1 of 2006 and EACJ Appeal 1 of 2009.

For the EACJ's decision and its impacts; see Victor Lando. (2018). The domestic impact of the decisions of the East African Court of Justice. *African Human Rights Law Journal*, Vol. 18, pp. 463-485.

¹⁵ Treaty Establishing the Common Market for Eastern and Southern Africa, November 5, 1993, 33 I.L.M. 1067, art. 26; see also *Malawi Mobile Ltd. v. Government of Malawi*, Case No. 1 of 2013, [2015] COMESACJ 1, 32 (March 13, 2015).

¹⁶ See *Mike Campbell (Pvt) Ltd. v. Republic of Zimbabwe*, Case No. SADC (T) 2/2007, SADC (T) (November 28, 2008); see also SADC Common Market Summit, Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, August 16-17, 2010, 31.

¹⁷ August Reinisch & Maria José Escobar Gil. (2026). The Wealth of Regional Courts in Africa: An Outsider's Perspective. *African Review of International Law (ARIL)*, Vol. 1 No. 1, p. 101.

Consequently, there is no operational SADC Tribunal that is currently available to hear private trade or human rights claims.

Furthermore, the legal landscape has progressed regarding sub-regional treaties; the COMESA-EAC-SADC Tripartite Free Trade Area (T-FTA) is no longer a mere draft agreement. The T-FTA officially entered into force on July 25, 2024, signifying an operational shift toward harmonized dispute options across the three RECs. The inception of a continental trade dispute settlement mechanism under the AfCFTA aims to fundamentally resolve this fragmented sub-regional ‘spaghetti bowl’ by consolidating trade-specific dispute adjudication at the continental level, intentionally omitting individual *locus standi* to avoid the political friction that disrupted its pre-AfCFTA sub-regional predecessors.

4. The DSM of AfCFTA: Security and Predictability of the African Regional Trading System

The AfCFTA is a rules-based trade agreement that enables the filing of disputes against State Parties violating their obligations, thereby upholding a regime characterized by an active, independent, efficient, and reliable dispute settlement system. This system plays a key role in international economic integration. The AfCFTA DSM is designed based on the historical and political context of dispute settlement, modeling itself heavily on the WTO's DSU. The landscape of pre-AfCFTA RECs and their dispute settlement regimes remains complex.

Since the 1960s, the quest for effective economic integration in Africa has been coupled with a pledge to utilize a continent-wide dispute settlement system.¹⁸ There were unsuccessful attempts by OAU (Organization of African Unity) member states to settle all disputes among themselves by peaceful means through such a system, and similar efforts continued in the AU era; however, the African Economic Community (AEC) court has not yet been established.¹⁹ The majority of pre-AfCFTA RECs courts operate under an adversarial, European Union-styled regime and most disputes adjudicated before these regional courts have been non-trade related.²⁰ Thus, the AfCFTA's transplantation of the dispute settlement system is modeled on the WTO-DSM. Moreover, the previously adopted COMESA-EAC-SADC T-FTA also influenced the design, structure, and function of the AfCFTA-DSM.

¹⁸ Olabisi D. Akinkugbe. (2021). Dispute Settlement: African Continental Free Trade Area (AfCFTA). *Max Planck Encyclopedia of International Procedural Law*, pp. 2-3.

¹⁹ Ibid.

²⁰ Ibid.

James Thuo Gathii characterizes this adoption as “a wholesale adoption and a carbon copy of the DSU of the WTO.”²¹

The AfCFTA Establishment Agreement, under its objective clause, proclaims “the establishment of a mechanism for the settlement of disputes concerning rights and obligations.”²² When the AfCFTA was launched, the Protocol on Dispute Settlement (AfCFTA DS Protocol) was adopted as part of the single undertaking of the AfCFTA Agreement. The Protocol proclaims that the AfCFTA-DSM is a “central element in providing security and predictability to the regional trading system.” The advantage of a dispute settlement system forming part of a single undertaking trade regime is that legal certainty and predictability become systematically enshrined, benefiting all parties involved in cross-border trade, investment, and consumption.²³ The institutional arrangement for settling AfCFTA-related disputes is modeled on the WTO-DSM, comprising the AfCFTA Dispute Settlement Body (DSB) and the AfCFTA Appellate Body (AB). The implementation of the AfCFTA is governed by this dedicated protocol, which provides for the establishment of the DSB, Panels, and the AB.²⁴ The AfCFTA Secretariat also plays a key role as one of the main institutions, providing logistical and practical support services to State Parties when required.²⁵

The AfCFTA-DSB was established under Article 20 of the AfCFTA Agreement and has the power to administer the Dispute Settlement Protocol, as proclaimed under Article 5. The DSB is composed of representatives of the State Parties and has the authority to establish dispute settlement panels and an Appellate Body, adopt Panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations.²⁶ According to Article 5(4), the DSB shall have a Chairperson elected by the State Parties and shall establish such rules of procedure as required. The DSB decides by

²¹ James Thuo Gathii. (2019). Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement. *AfronomicsLaw*.

²² Agreement Establishing the African Continental Free Trade Area, March 21, 2018, 58 I.L.M. 1028, art. 4(f).

²³ Gerhard Erasmus. (2021). The AfCFTA Dispute Settlement Mechanism as part of a Continental Trade Regime. *Tralac/trade law centre*.

²⁴ Gerhard Erasmus. (2021). The Institutions of the Dispute Settlement Mechanism of the AfCFTA. *Tralac/trade law centre*.

²⁵ Agreement Establishing the African Continental Free Trade Area, March 21, 2018, 58 I.L.M. 1028, art. 13.

²⁶ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, art. 5.

consensus unless otherwise provided; however, the ‘reverse consensus’ rule applies to the adoption of essential matters, such as panel reports and AB rulings.²⁷

The procedural steps under the AfCFTA DSM are analyzed alongside the dispute resolution options offered: adjudication, mediation, and arbitration.²⁸ The AfCFTA-DSM mandates the prioritization of amicable settlement of disputes before formal adjudication. This distinguishes the AfCFTA from the WTO-DSM, where consultation mechanisms are permissible but not a mandatory pre-condition. Therefore, according to Articles 6(1) and 7, when a dispute is submitted for adjudication, State Parties undertake to participate in consultations in good faith. If the dispute is not settled through consultations, formal adjudication can be referred to the AfCFTA Panel within 60 days of the receipt of the request for consultations.²⁹

A unique feature of the AfCFTA's adjudication process –reflecting its WTO-type transplantation unlike the flexible approach of pre-AfCFTA RECs courts– is the lack of standing for individuals (private entities), regardless of their justiciable grievances. Article 20(1) of the Establishment Agreement and Paragraph 1(h) of the DSM Protocol indicate that *locus standi* is reserved only for disputes between State Parties. This represents a paradigm shift from the pre-AfCFTA RECs courts. Furthermore, the AfCFTA dispute settlement mechanism will not entertain human rights violations, unlike its predecessors.³⁰

James Thuo Gathii links this approach to the weaknesses of pre-AfCFTA courts, arguing that the wholesale adoption of the WTO DSM is premised on “the desire to make the AfCFTA's dispute settlement system as successful as that of the global trading system” and “informed by a desire to judicialize trade disputes in a context in which the African States have been reluctant to litigate trade disputes between themselves.”³¹ Similarly, Regis Yann Simo justifies the restriction of standing to States, noting that “AU Member States are fully mindful of the fact that the negotiated rules are not worth much without a system in place responsible for enforcing them ... in the same

²⁷ Erasmus, *supra* note 23.

²⁸ Akinkugbe, *supra* note 18, p. 5.

²⁹ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, arts. 7(4)-(6).

³⁰ Gerhard Erasmus. (2020). What disputes could be heard by the AfCFTA Dispute Settlement Mechanism? *Tralac/trade law centre*.

³¹ Gathii, *supra* note 21.

manner as in the WTO.”³² Thus, while the AfCFTA DSM has lost the peculiarities of pre-AfCFTA courts, such as private party standing, the transplantation of the WTO-DSM model is deliberate. This disinclination towards adversarial resolution involving private entities is also reflected in recent national legislations insulating states from international investment disputes, such as South Africa's Promotion of Investment Act of 2015³³, Namibia's Investment Promotion Act of 2016³⁴, and Tanzania's Natural Wealth and Resources (Permanent Sovereignty) Act of 2017.³⁵ This trend may frustrate the AfCFTA's efforts to forge a new investment dispute settlement model.³⁶

Regarding the Appellate Body, the AfCFTA Protocol constitutes panels designed to prevent a multiplicity of actions through joinder. However, the adoption of the WTO modality for appointing Appellate Body Members by consensus –a standing body of seven persons appointed for four-year terms– seems not to have learned from the WTO Appellate Body crisis; appointment by a specified majority might be more suitable to avoid deadlock.³⁷

³² Regis Yann Simo. (2019). A Future court without cases? On the question of standing in the AfCFTA dispute settlement mechanism. *AfronomicsLaw*.

³³ Republic of South Africa, Protection of Investment Act, Act No. 22 of 2015, sec. 15(5). Section 15(5) of South Africa's Promotion of Investment Act, 2015 provides that:

The government *may* consent to international arbitration in respect of investments covered by the Act, subject to exhaustion of domestic remedies. Such arbitration will be conducted between the Republic and the home state of the applicable investor.

³⁴ Republic of Namibia, Namibia Investment Promotion Act, Act No. 9 of 2016, sec. 28(4). Section 28 (4) of the Namibia Investment Act provides:

[The] jurisdiction over disputes relating to this Act lies exclusively with the courts of Namibia, but the Minister and investor or investments, as required by the circumstances of the alleged breach of rights or obligations, may, by written agreement, agree to arbitration in accordance with the Arbitration Act.

³⁵ The United Republic of Tanzania, The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, sec. 11(2). Section 11 (2) of the Tanzania Natural Wealth and Resources Act of 2017 provides:

[Dispute] arising from extraction, exploitation, or acquisition and use of natural earth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic in accordance with laws of Tanzania.

³⁶ For the new investment dispute settlement model of Africa, see Faisal Gbadegbe (2021), “African Continental Free Trade Area: Forging a New Investment Dispute Settlement Model”, *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 87, pp. 191-203.

³⁷ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, arts. 1(c), 5(2)-(3), 6, 20(4).

Critical issues regarding security and predictability include the interaction between AfCFTA and REC mechanisms, and compliance enforcement. Common objectives may provide avenues for forum shopping.³⁸ The relationship is governed by the preservation of the *acquis* under Article 5(f) and the supremacy clause in Article 19(1), which dictates that the AfCFTA Agreement prevails over RECs in case of inconsistency. However, Article 20(2) provides an exception: State Parties that are members of RECs which have attained a “higher level of integration” shall maintain such levels among themselves. This raises questions for dispute settlement, particularly regarding the legal standing of private parties permissible in RECs but prohibited in AfCFTA.

In such cases, private parties from member states of RECs with higher integration levels (e.g., customs unions) retain the right to legal standing before their REC's DSM. However, ensuring uniformity of enforcement and discouraging forum shopping to facilitate compliance remains an onerous responsibility for the AfCFTA. Compliance is essential to the DSM's purpose.³⁹ Article 23 empowers the Panel or AB to recommend that the concerned State Party bring its measures into conformity. State Parties are obliged to comply voluntarily within the stipulated timeframe. If the defending party fails to comply, compensation or retaliation (suspension of concessions) may be authorized as a temporary measure to induce compliance, rather than to restore the balance of concessions. While retaliatory measures are common in the WTO, African States historically lacked retaliatory capacity against bigger partners.⁴⁰ Within the AfCFTA context, however, retaliatory capacity will exist among members owing to their relatively comparable economic standing.

Therefore, the AfCFTA DSM is a central element in providing security and predictability to the regional trading system, interpreting legal instruments through the customary rules of public international law, including the Vienna Convention on the Law of Treaties (VCLT). Modeled on the WTO DSU, it provides a framework to develop a unique dispute settlement regime and jurisprudence for the African continent.

³⁸ Akinkugbe, *supra* note 18, p. 11.

³⁹ A. O. Sykes. (2012). The Dispute Settlement Mechanism: Encouraging Compliance? *ResearchGate*.

⁴⁰ Amin Alavi. (2007). African Countries and the WTO's Dispute Settlement Mechanism. *Development Policy Review*, Vol. 25, p. 34.

5. Procedural Mechanisms and Paths to Settlement under the AfCFTA Protocol

This section synchronizes the specific procedural tools designed by continental negotiators to bypass sub-regional jurisdictional friction and maximize compliance within the unified market architecture.

5.1 'Fork-in-the-road' clause approach of AfCFTA

The fork-in-the-road clause is an essential legal concept in trade and investment-related dispute settlement mechanisms. It is meant to prevent and resolve conflicting jurisdictions within the WTO world trading system and RTAs. Consider a situation where a trade dispute arises among African countries that are members of the WTO, the AfCFTA, and a REC that has achieved at least a Customs Union (CU) status, such as the EAC. For instance, Kenya faces at least three potential venues to submit a trade dispute, resulting in overlapping jurisdictions and potential conflicts. Conflicts of jurisdiction appear when both RECs and the WTO cover similar trade aspects –such as trade in goods and services– such that the same measure could be regulated by more than one framework. Consequently, the same measure involving REC partners could be adjudicated in multiple fora: the multilateral WTO level and the regional REC level, thereby raising the risk of conflicting rulings. Thus, a conflict of jurisdiction arises if a trade dispute can be brought entirely or partly before two or more different courts or tribunals.⁴¹

Moreover, there is practical evidence of trade disputes before the WTO involving conflicting jurisdictions with regional RTAs, posing concerns regarding inconsistent rulings. For instance, in the *Argentina – Poultry Anti-Dumping Duties case*⁴², Brazil initiated a WTO case after an unsuccessful claim brought before the MERCOSUR DSM.⁴³ Conversely, in *Mexico – Taxes on Soft Drinks*⁴⁴, the US brought a dispute against Mexico's retaliatory measures to the WTO after Mexico triggered the NAFTA (the North American Free Trade Agreement) DSM, which resulted in a blocked process

⁴¹ Tim Graewert. (2008). Conflicting Laws and Jurisdictions in the Dispute Settlement Process of the Regional Trade Agreements and the WTO. *Contemporary Asia Arbitration Journal*, Vol. 1, p. 290.

⁴² WTO Appellate Body Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/AB/R, adopted 22 May 2003 [hereinafter *Argentina – Poultry Anti-Dumping Duties*].

⁴³ Id., para. 7.17.

⁴⁴ WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R, adopted 12 January 2007 [hereinafter *Mexico – Taxes on Soft Drinks*].

and subsequent retaliation.⁴⁵ Therefore, jurisdictional clauses in RTAs serve as tools to avoid and resolve such conflicts. These clauses can generally be characterized as: choice of forum clauses –which grant exclusive jurisdiction to a forum chosen by law or condition; exclusive jurisdiction clauses allowing parties to choose a forum on a case-by-case basis; and the “fork-in-the-road” clause dictates that once a forum is selected, it is exclusive and recourse to another forum is prohibited.⁴⁶

The ‘fork-in-the-road’ clause is expressed by the Latin maxim *una via electa non datur recursus ad alteram* (“once one road is chosen, there is no recourse to the other”).⁴⁷ The jurisprudence surrounding this clause is well-established in Bilateral Investment Treaties (BITs) to overcome jurisdictional overlap between international arbitration and domestic courts, and it has been adapted for trade-related disputes. Essentially, fork-in-the-road provisions prohibit a claimant from submitting a dispute to a particular court or tribunal if they have previously seized another court or tribunal of the same matter.⁴⁸ Such provisions are available in RTAs entertaining trade disputes. For instance, NAFTA Chapter 20 contains a choice of forum clause; where a complaint can be issued under both NAFTA and the WTO, NAFTA Article 2005:6 provides that “[once] dispute settlement procedures have been initiated ... the forum selected shall be used to the exclusion of the other.”⁴⁹

Similarly, in the proliferation of new EU FTAs, fork-in-the-road provisions assist in protecting against jurisdictional clashes with the WTO DSM. The texts of these agreements contain provisions titled ‘choice of forum’ clauses. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides:

[If] an obligation is equivalent in substance under this agreement and the WTO Agreement, or under any other agreement to which the parties are a party, a party may not seek redress for the breach of such an obligation in the two fora. In such a case, once a dispute settlement

⁴⁵ Id., para. 4.72.

⁴⁶ Jennifer Hillman. (2009). Conflicts between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What should WTO Do? *Cornell International Law Journal*, Vol. 42, p. 195.

⁴⁷ Christoph Schreuer. (2004). Travelling the BIT Route: Of waiting periods, Umbrella Clauses and Forks in the Road. *The Journal of World Investment & Trade*, Vol. 5, p. 239.

⁴⁸ Markus A. Petsche. (2019). The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches. *Washington University Global Studies Law Review*, Vol. 18, p. 395.

⁴⁹ Graewert, *supra* note 41, p. 306.

proceeding has been initiated under one agreement, the party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other agreement unless the forum selection fails, for procedural or jurisdictional reasons...⁵⁰

Therefore, the incorporation of fork-in-the-road clauses demonstrates the parties' intention –openly expressed in new EU-FTAs– to relinquish their right to initiate WTO proceedings when they have already brought a dispute before an FTA Arbitration Panel concerning “substantially equivalent obligations.” This raises the question: what constitutes a ‘substantially equivalent obligation’? When are two obligations equivalent? The insertion of this legal term modifies standard forum-choice clauses by specifying the degree of similarity required to bar parallel or subsequent litigation in a second forum.⁵¹

Ana Cristina Molina and Vira Khoroshavina distinguish three approaches to defining ‘substantially equivalent obligation’ to prohibit parallel proceedings: disputes involving the same matter or issues; disputes submitted elsewhere unless they refer to substantially separate and distinct rights or obligations under other international agreements; and disputes identified based on the similarity of the measure and/or the obligation at hand.⁵² Trade agreement provisions referencing equivalent obligations can imply equality in value, amount, function, or meaning. Pamela Apaza Lanyi and Armin Steinbach remark that the phrase ‘substantially equivalent obligations’ refers to obligations “equivalent in substance to the WTO provisions incorporated by reference or reproduced in the FTA ‘while not identical, are equivalent in substance’ to WTO rules.”⁵³

However, the term ‘equivalence in substance’ lacks precision. Tomer Broude and Yuval Shany offer a legal analysis focusing on norms that are ‘similar or identical in normative content,’ suggesting that FTAs reproducing

⁵⁰ The EU-Canada Comprehensive Economic and Trade Agreement (CETA), Chapter by Chapter, Article 29.3(2),

Available at: <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>

⁵¹ Ana Cristina Molina & Vira Khoroshavina (2018). How Regional Trade Agreements deal with Disputes Concerning their TBT Provisions. *WTO Staff Working Paper*, No. ERSD-2018-09, WTO, p. 8, available at:

https://www.wto.org/english/res_e/reser_e/ersd201809_e.pdf.

⁵² Ibid.

⁵³ Pamela Apaza Lanyi & Armin Steinbach. (2014). Limiting Jurisdictional Fragmentation in International Trade Disputes. *Journal of International Dispute Settlement*, Vol. 5, p. 372.

or incorporating WTO norms can be considered equivalent in substance.⁵⁴ In other words, for fork-in-the-road clauses, the equivalence of norms is established when a dispute materializes by comparing the normative contents of the WTO and the FTA. Does the AfCFTA incorporate such a modification regarding the ‘substantially equivalent obligations’ test in its fork-in-the-road clause?

In the event of a dispute among African countries that are members of the WTO, AfCFTA, and RECs, the matter can be referred to any of these three forums, potentially creating jurisdictional conflicts. Thus, the AfCFTA Protocol on DSM introduced a fork-in-the-road clause to address these options. This provision is stipulated in Article 3(4), which provides: "[A State] Party which has invoked the rules and procedures of this Protocol with regards to a specific matter, shall not invoke another forum for dispute settlement on the same matter." The design and architecture of the AfCFTA's fork-in-the-road clause differ from other parallel RTAs, such as NAFTA and EU FTAs like CETA, which provide independent and transparent chapters for their forum-selection clauses. In contrast, the AfCFTA's fork-in-the-road clause is stated under the scope of the application section of the Protocol, which lacks similar precision.

Moreover, two additional insights can be drawn from the design of this provision. First, it remains ambiguous whether “invoking the rules and procedures of the AfCFTA Protocol” includes invoking the substantive agreements of the AfCFTA. In dispute resolution, parties may choose procedural law distinct from substantive law, thereby raising questions about whether the clause applies if only procedural rules are invoked. Specifying the substantive law in question alongside the procedural law might clarify the jurisdictional claim. Second, unlike EU-FTAs that modify forum-choice clauses with terms like ‘substantially equivalent obligations’ to filter the exclusion of other options, the AfCFTA lacks such ‘filtration tests.’ Consequently, under the current AfCFTA design, selecting one forum among others has an immediate effect of excluding others without a nuanced test for equivalence.

⁵⁴ Tomer Broude & Yuval Shany. (2011). The International Law and Policy of Multi-sourced Equivalent Norms. In Tomer Broude & Yuval Shany (editors), *Multi-sourced Equivalent Norms in International Law*, Bloomsbury Publishing, p. 5.

5.2 AfCFTA's Paths to Settlement of Disputes

The AfCFTA-DSM represents a continental approach to dispute settlement, building upon the legacy of the OAU and AU and embodying the rationale of the African regional system: “African solutions to African problems.”⁵⁵ Under this regional system, the Commission of Mediation, Conciliation, and Arbitration was historically created under the guidance of Article 52 of the UN Charter to achieve the settlement of local disputes through regional arrangements.⁵⁶ Furthermore, traditional dispute settlement mechanisms were historically carried out within African societies. A pertinent question is whether these traditional mechanisms, practices, and values are applied in modern dispute settlement mechanisms under the African regional system.⁵⁷ The AfCFTA addresses this by adopting three major processes in commercial dispute resolution as paths to the settlement of disputes: litigation (adjudication), mediation, and arbitration.⁵⁸

The dispute settlement path of the AfCFTA ranges from informal resolution options, such as consultations, to formal adjudication. Although consultations are a feature of the WTO DSM – allowing state parties to harness the benefits of informal deliberations– the AfCFTA-DSM includes consultations as a preliminary and mandatory step. This emphasizes the prioritization of amicable settlement over litigation.⁵⁹ Intending to find an amicable resolution, the AfCFTA-DSM establishes consultations as the primary recourse for disputes arising between or among State Parties.⁶⁰ A request for consultations must be notified to the DSB through the AfCFTA Secretariat in writing, providing the reasons for the request, identifying the issues, and indicating the legal basis for the complaint.⁶¹ During consultations,

⁵⁵ Aranzazu Pagoaga Ruiz de la Illa. (2004). International Dispute Settlement in Africa: Dispute Settlement and Conflict Resolution under the Organization of African Unity, the African Union, and the African Traditional Practices: A critical Assessment. *Yearbook on Humanitarian Action and Human Rights*, pp. 57-92.

⁵⁶ *Id.*, p. 66.

⁵⁷ *Id.*, p. 82.

⁵⁸ Emilia Onyema. (2019). Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement. *World Trade Review*, pp. 1-23.

⁵⁹ Olabisi D. Akinkugbe, *supra* note 18, p. 5.

⁶⁰ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, art. 6(1).

⁶¹ *Id.*, arts. 7(1) & (3).

State Parties are required to participate in good faith and attempt to obtain a satisfactory settlement before resorting to further action.⁶²

What happens if the parties contravene this principle of good faith? In the WTO context, for instance, members have been found to violate the principle of good faith by initiating proceedings in a forum while seeking redress for the same claims in another, particularly after signing an agreement containing a fork-in-the-road clause.⁶³ In the *Argentina – Poultry Anti-Dumping Duties* case, the WTO Panel addressed a claim by Argentina regarding Brazil's violation of good faith, which allegedly warranted the invocation of the principle of estoppel, as the case had previously been brought unsuccessfully to MERCOSUR (Mercado Común del Sur, or Southern Common Market).⁶⁴ Similarly, Article 4(5) of the AfCFTA Protocol on DSM obliges parties to engage in good faith; it stipulates that if requests for conciliation, good offices, mediation, or dispute settlement procedures are intended for contentious acts rather than resolution, they will not be treated as valid claims.

The *second path* within the AfCFTA's dispute settlement mechanism is mediation. The term 'mediation' is used here in a broad sense to refer to all non-adjudicative Alternative Dispute Resolution (ADR) processes, including good offices and conciliation.⁶⁵ The AfCFTA Protocol provides mediation as an avenue for State Parties to foster amicable resolutions.⁶⁶ Mediation is an ADR process that empowers disputants to manage their dispute and its resolution, either by themselves or with the intervention of a neutral third party. This aligns with dispute resolution methods applied in pre-colonial and post-colonial African communities to resolve all types of disputes, including commercial ones.⁶⁷

The mediation process under the AfCFTA has two key differences from the consultation process. Unlike consultations –which must take place whenever a dispute is submitted to the DSB– mediation is entirely voluntary; second, while consultations must precede adjudication, mediation can run

⁶² Id., art. 7(6).

⁶³ Cornelia Furculita. (2019). *Fork-in-the-road clauses in the new EU FTAs: Addressing conflicts of jurisdictions with the WTO dispute settlement mechanism*, Center for the Law of EU External Relations (CLEER), p. 26, available at: <https://www.cleer.eu>.

⁶⁴ *Argentina – Poultry Anti-Dumping Duties*, *supra* note 42, para. 7.18.

⁶⁵ Onyema, *supra* note 58, p. 7.

⁶⁶ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, art. 8.

⁶⁷ Onyema, *supra* note 58, pp. 7-8.

concurrently with AfCFTA panel proceedings if the State Parties agree.⁶⁸ Therefore, a party to a dispute in mediation may opt in or out at any time, as provided under Article 8(4) of the AfCFTA-DSM Protocol. Additionally, the Protocol does not specify a time limit for mediation, unlike consultations, which are subject to a 60-day limit.

The *third path* is arbitration, an adjudicative dispute resolution process in which parties cede control or power to determine their dispute to a neutral third party: the arbitral tribunal. The AfCFTA recognizes the principle of party autonomy in arbitration, granting parties to a dispute the liberty to resort to arbitration.⁶⁹ Under this principle, parties can choose their forum and procedural rules. However, parties are obligated to notify the AfCFTA DSB of their decision to proceed to arbitration.⁷⁰ Parties who have agreed to arbitration cannot simultaneously refer the dispute to the AfCFTA DSB. The notification to the DSB is crucial not only for forum selection records but also for notifying the award to the DSB for enforcement in cases of non-compliance or refusal to cooperate.⁷¹

One point of contention requiring clarification is whether Article 27(6) of the AfCFTA-DSM Protocol refers to non-cooperation with the arbitral process or non-cooperation with the award. Olabisi D. Akinkugbe argues that Article 27(6) caters to situations where a party acts in a manner likely to frustrate the pre-award arbitration process.⁷² This author concurs with Akinkugbe's analysis; issues connected with the enforcement of arbitration awards are governed separately under Article 27(7) of the Protocol.

6. The Legal Nexus between WTO's DSU, and AfCFTA's Protocol on Dispute Settlement

The WTO and RTAs together constitute the world trading system, serving as complementary components in the pursuit of trade liberalization.⁷³ Conversely, RTAs represent derogations from the WTO's core Most-Favoured-Nation (MFN) principle. These derogations operate as permitted

⁶⁸ Akinkugbe, *supra* note 18, p. 9.

⁶⁹ Protocol on Rules and Procedures on the Settlement of Disputes, March 21, 2018, Agreement Establishing the African Continental Free Trade Area, Annex 9, 58 I.L.M. 1028, art. 27.

⁷⁰ *Id.*, art. 27(2).

⁷¹ *Id.*, arts. 27(5) & (6).

⁷² Akinkugbe, *supra* note 18, p. 10.

⁷³ Malebakeng Agnes Forere. (2015). *The Relationship of WTO Law and Regional Trade Agreements in Dispute Settlement*, Kluwer Law International, p. 95.

exceptions under the legal regimes and disciplines of Article XXIV of GATT, Article V of GATS, and the Enabling Clause. However, the status of RTAs as exceptions to the world trading system is contingent upon their compatibility with WTO disciplines. For instance, regarding DSMs at both the WTO and RTA levels, the consistency of RTA dispute settlement provisions with the WTO Dispute Settlement Understanding (DSU) is crucial.⁷⁴ However, achieving this consistency is legally complex because Article 23 of the WTO-DSU serves as a strict jurisdictional boundary. It states: “When Members seek to redress a violation of obligations ... they shall have recourse to, and abide by, the rules and procedures of this understanding.” Consequently, Article 23 creates an ongoing legal tension by limiting the scope of RTA tribunals whenever an issue overlaps with WTO law.

One line of scholarly interpretation argues that Article 23 of the WTO-DSU establishes compulsory and exclusive jurisdiction over matters arising under the covered agreements.⁷⁵ In other words, this view posits that Article 23 requires WTO Members to seek redress for violations of obligations under the covered agreements exclusively through DSU procedures. The rulings of the Panel (established on the basis of request) or the Appellate Body are legally binding on the parties.⁷⁶

However, questions arise in cases where RTAs possess substantive provisions similar to the WTO but require the resolution of disputes through the RTA's own process, for instance, via a ‘first choice’ forum selection clause. What is the relevance of Article XXIV of GATT and other legal regimes that permit the formation of RTAs as exceptions complete with their own dispute settlement mechanisms, when considering alternatives to the argument that Article 23 imposes compulsory and exclusive jurisdiction? Can a WTO Panel decline jurisdiction because an RTA is a more convenient forum? Furthermore, can a WTO Panel or Appellate Body affirm or overturn the decisions of an RTA dispute settlement body?

On the one hand, WTO members can utilize RTA dispute settlement mechanisms to settle disputes under WTO-compatible RTAs.⁷⁷ On the other hand, the potential for conflict is evident; for instance, the WTO Appellate

⁷⁴ James Thuo Gathii. (2011), *African Regional Trade Agreements as Legal Regimes*, Cambridge University Press, p. 45.

⁷⁵ Debra P. Steger (2004). Jurisdiction of the WTO. *Proceedings of the 98th Annual Meeting of the American Society of International Law*, p. 142.

⁷⁶ Ibid.

⁷⁷ Hillman, *supra* note 46, p. 197.

Body issued a ruling in the *Brazil – Retreaded Tyres* case⁷⁸ that contradicted the outcome of the MERCOSUR proceedings regarding the same measure. Therefore, the legal relationship between RTA dispute settlement systems and the WTO-DSU requires analysis from the perspectives of vertical and horizontal relationships, as well as the nature of RTA claims and applicable law before the WTO-DSU.

6.1 The Vertical and Horizontal Relationship Between WTO's DSU and AfCFTA's Dispute Settlement

The status of Regional Trade Agreements (RTAs) like the AfCFTA within the global multilateral trading system requires an even-handed theoretical evaluation under GATT Article XXIV. Scholarly discourse is deeply divided regarding whether an RTA's failure to meet the strict requirements of GATT Article XXIV –such as the elimination of duties on “substantially all the trade” under paragraphs 5 and 8– renders the regional agreement inherently illegal under international law.

Thinkers (under the *Regulatory Illegality School*) such as Thomas Cottier and Marina Foltea argue that Article XXIV operates as a strict regulatory tool. Under this approach, compliance with the substantive criteria is a condition precedent for the legal existence of the RTA; failure to meet these standards renders the agreement unlawful and procedurally bars its entry into force under paragraph 7(b).⁷⁹

Conversely, a highly persuasive counter-argument (under the *Permissive Exception School*) does not consider GATT Article XXIV as a constitutive or restrictive mechanism, but purely as an affirmative defense or permissive exception to the Article I Most-Favoured-Nation (MFN) obligation. Under this view, supported by the landmark WTO appellate ruling in *Turkey – Textiles*, Article XXIV does not govern the intrinsic validity or illegality of the RTA under general international law. Instead, it merely functions as a safe harbor within the WTO framework. If an RTA fails to fulfill the benchmarks of Article XXIV, the agreement itself remains perfectly valid and operational between its sovereign signatories; it simply loses its immunity from legal

⁷⁸ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007 [hereinafter *Brazil – Retreaded Tyres*].

⁷⁹ General Agreement on Tariffs and Trade, October 30, 1947, 55 U.N.T.S. 194, art. XXIV, paras. 5, 7(b), 8 [hereinafter GATT]; see also Thomas Cottier and Marina Foltea (2006), “Constitutional Functions of GATT Article XXIV”, in Lorand Bartels and Federico Ortino (editors), *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, pp. 43-48.

challenges before the WTO Dispute Settlement Understanding (DSU) for violations of the MFN principle.⁸⁰

This distinction is highly relevant for the AfCFTA. Because the AfCFTA unites 44 WTO members under a single undertaking, it does not derive its legal validity from the WTO, but operates horizontally as a sovereign treaty of equal status under the Vienna Convention on the Law of Treaties (VCLT).⁸¹ However, to preserve its vertical immunity within the multilateral framework, the AfCFTA's phased liberalization schedules must continuously conform to the regulatory parameters of GATT Article XXIV and GATS Article V.⁸²

6.2 RTA claims and applicable law before WTO – DSU: Overview of the law and practice

In the regulatory relationship between the WTO and RTAs, the previous section examined the applicability of WTO law within RTAs. The inverse of this legal issue concerns the competence of WTO Panels to hear RTA claims and whether they can apply RTA law. The legal concepts of jurisdiction and applicable law are distinct: jurisdiction refers to the competence of WTO tribunals over claims and the legal standing of the parties, whereas applicable law refers to the law relied upon by the tribunal to determine the merits of the claims. Thus, are WTO Panels competent to hear RTA claims, and can they apply RTA law?

The competence of WTO Panels is limited to the 'WTO covered agreements', as proclaimed under Article 1.1 of the DSU⁸³ (establishing

⁸⁰ WTO Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, paras. 45–48; see also Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 30 [hereinafter VCLT].

⁸¹ VCLT, *supra* note 80, art. 31.

⁸² General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, art. V; cf. Agreement Establishing the African Continental Free Trade Area, March 21, 2018, 58 I.L.M. 1028, art. 22.

⁸³ Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, art. 1(1) [hereinafter DSU]. DSU under Article 1:1 provides: [The] rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement provisions of the agreements listed in Appendix 1 to this understanding (referred to in this Understanding as the 'covered agreements'). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as

jurisdiction) and Article 11 (defining Panel functions).⁸⁴ The key question is what constitutes claims based on 'provisions of the covered agreements.' Malebakeng Agnes Forere argues that this includes WTO laws incorporated or transformed into RTA laws that regulate trade on substantially the same terms.⁸⁵ Thus, there is a possibility of bringing RTA claims before the WTO, albeit through a 'backdoor approach.' Joost Pauwelyn⁸⁶ and Isabelle van Damme⁸⁷ argue that non-WTO international claims (including RTA laws) can be brought before WTO Panels.

The first instance of WTO Panels assuming jurisdiction over RTA claims is 'consensual jurisdiction,' where parties mutually agree on special terms of reference under Article 7.3 of the DSU.⁸⁸ Scholarly opinion diverges on whether this enables RTA claims. Joost Pauwelyn argues that WTO Panels have no jurisdiction over general international law or non-WTO laws unless parties grant such jurisdiction through mutual agreement under Article 7.3. Similarly, Alan Boyle submits that consensual jurisdiction allows bringing claims beyond the treaty, drawing analogies from the Law of the Sea Convention (UNCLOS).⁸⁹

the 'WTO Agreement') and of this Understanding taken in isolation or in combination with any other covered agreement.

⁸⁴ *Id.*, art. 11. Article 11 of the DSU that deals with the functions of the Panels tasked solely with assisting the DSB to discharge its mandate provides:

[The] function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

⁸⁵ Forere, *supra* note 73, p. 129.

⁸⁶ Joost Pauwelyn. (2003). How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdictions and Merits. *Journal of World Trade*, Vol. 37, pp. 998-999.

⁸⁷ Isabelle van Damme. (2006). What Role Is There for Regional International Law in the Interpretation of the WTO Agreements. In Lorand Bartels and Federico Ortino (editors), *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, p. 553.

⁸⁸ Joost Pauwelyn. (2001). The Role of Public International Law in the WTO: How Far Can We Go? *American Journal of International Law*, Vol. 95, p. 554.

⁸⁹ Alan E. Boyle. (1997). Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction. *International and Comparative Law Quarterly*, Vol. 46, p. 37.

Conversely, Malebakeng Agnes Forere is skeptical, arguing that special terms of reference under Article 7.3 are narrow and cannot grant jurisdiction for non-WTO claims.⁹⁰ However, this argument may not fully consider Article 7.2 of the DSU, which mentions ‘agreements cited by the parties to the dispute’ in addition to covered agreements. This suggests that parties could present the contents of RTA laws to the Panel. Furthermore, the rare practice of modifying terms of reference, as seen in *Brazil – Desiccated Coconut*⁹¹, does not preclude the argument that special terms could address non-covered agreements. Therefore, the argument that WTO Panels can assume jurisdiction over RTA claims through Article 7.3 remains valid.

The second ‘backdoor approach’ is arbitration under Article 25 of the DSU, which serves as an alternative to Panel proceedings. Joost Pauwelyn considers this as a viable route for RTA claims. Article 25 focuses on finding solutions to “certain disputes that concern issues that both parties clearly define.”⁹² As arbitration is an alternative mechanism free from multilateral control, there is no explicit restriction limiting arbitration solely to WTO-covered agreements.⁹³ Forere, however, argues that arbitrators must determine their jurisdiction within the DSU framework and comply with WTO principles.⁹⁴ It appears that arguments against jurisdiction in this context overlook party autonomy and the possibility for parties to define “certain disputes” to include RTA claims.⁹⁵

The third ‘backdoor approach’ involves non-violation complaints under paragraph 1(b) of Article XXIII of GATT, as detailed in Articles 26 and 27 of the DSU. In such complaints, it does not matter whether a covered agreement has been violated; the nullification or impairment of benefits can warrant a complaint. Forere argues that non-violation complaints cannot serve as a basis for RTA claims because the benefits must accrue from GATT. However, counter-arguments suggest that RTAs provide ‘MFN-plus benefits’ which accrue indirectly from GATT Article XXIV. Consequently, a non-violation complaint could serve as a WTO avenue for RTA claims. Nevertheless, relying on ‘backdoor approaches’ is tenuous; and ideally, the ‘front door’ of

⁹⁰ Forere, *supra* note 73, p. 131.

⁹¹ WTO Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997 [hereinafter *Brazil – Desiccated Coconut*].

⁹² Pauwelyn, *supra* note 88, p. 554.

⁹³ DSU, *supra* note 83, art. 25(1).

⁹⁴ Forere, *supra* note 73, p. 135.

⁹⁵ *Ibid.*

the WTO-DSU should be amended to provide an uncontested possibility for RTA members to resolve their disputes within the multilateral system.⁹⁶

The equally contested legal issue regarding applicable law is whether WTO Panels can apply non-WTO international law, such as RTA law. This debate is often characterized as the “academic tale of two Professors”: Joost Pauwelyn⁹⁷ and Joel Trachtman.⁹⁸

Professor Joost Pauwelyn concludes that “WTO is born out of international law, and to the extent that WTO does not contract out of international law, it is bound to apply international law.”⁹⁹ He premises this on the idea that treaty law is born from the international law system.¹⁰⁰ He cites Article 3.2 of the DSU, which mandates Panels to clarify disputes in light of customary rules of interpretation of public international law. Pauwelyn supports his view with the *Chorzów Factory* case¹⁰¹, where the PCIJ held that reparation is a core component of failure to apply a convention and need not be stated explicitly. Similarly, the Panel in *Korea – Procurement*¹⁰² ruled that “WTO rules must be interpreted in line with other WTO members' obligations under international law as long as the WTO treaty does not explicitly contract out of such rules.” Furthermore, Article 31(1)(c) of the VCLT supports the systematic integration of treaties within the broader corpus of international law. Pauwelyn also suggests that a Panel might find no violation of WTO law if the alleged violation is justified under another treaty to which both disputing

⁹⁶ Id., p. 141.

⁹⁷ For the submission of the arguments by Professor Joost Pauwelyn, see:

Joost Pauwelyn. (2009). *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge Univ. Press, pp. 114-122;

Joost Pauwelyn. (2003). How to Win a WTO Dispute Based on Non-WTO law? Questions of Jurisdiction and Merits. *Journal of World Trade*, Vol. 37, pp. 998-999;

Joost Pauwelyn. (2001). The Role of Public International Law in the WTO: How Far Can We Go? *American Journal of International Law*, Vol. 95, pp. 535, 554.

⁹⁸ Joel Trachtman. (2009). Jurisdiction in WTO Dispute Settlement. In Rufus Yerxa and Bruce Wilson (editors), *Key Issues in Dispute Settlement – The First Ten Years*, Cambridge University Press;

Joel Trachtman. (1999). The Domain of WTO Dispute Resolution. *Harvard International Law Journal*, Vol. 40, p. 333.

⁹⁹ Malebakeng Agnes Forere, *supra* note 73, pp. 142-143.

¹⁰⁰ Pauwelyn (2001), *supra* note 97, p. 554.

¹⁰¹ Permanent Court of International Justice, *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, (Germany v. Poland), 1927 P.C.I.J. (Ser. A) No. 9 [hereinafter *Chorzów Factory*].

¹⁰² WTO Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000 [hereinafter *Korea – Procurement*].

states are parties, though this specific argument lacks support in WTO practice.¹⁰³

In contrast, Professor Joel Trachtman suggests that only customary rules of interpretation apply.¹⁰⁴ He argues that WTO Panels are courts of limited jurisdiction; extending applicable law beyond covered agreements would improperly extend their jurisdiction. For Trachtman, Article 3.2 of the DSU implies the exclusion of other international rules, limiting non-WTO law to an interpretative tool. He identifies two instances where non-WTO law may be applied: first, when incorporated into WTO law by treaty language or waiver; and second, to complete procedural gaps, as in *US – Gasoline*, where international law guided the Panel on the burden of proof.¹⁰⁵

While Pauwelyn and Trachtman represent opposite ends of the spectrum regarding RTA law as applicable law, both concur that RTA law can be used as a defense to justify a WTO law violation, particularly when inconsistent RTA measures were adopted during the formation of an RTA.¹⁰⁶ Ultimately, regarding applicable law, the substantive law of RTAs has limited application in the practice of WTO Panels and Appellate Body decisions, a reality that contrasts with the established regulatory relationship between the WTO and RTA dispute settlement mechanisms.

7. Multilateralizing Dispute Settlement Mechanisms: The AfCFTA Context

The genesis and development of the relationship between the WTO and RTAs have traditionally been grounded in Article XXIV, emphasizing the WTO's hierarchy and supremacy over regional agreements. However, RTAs have proliferated alongside WTO multilateral rules, often incorporating 'WTO-plus' liberalization and establishing their own regional dispute settlement mechanisms. The focus of Article XXIV has historically been on the formation of RTAs, but it has failed to effectively monitor their continued existence. Consequently, WTO members have consistently refrained from challenging RTAs in dispute settlement. As a result, Article XXIV is typically

¹⁰³ *Chorzów Factory*, *supra* note 101.

¹⁰⁴ Joel Trachtman. (2009). Jurisdiction in the WTO Dispute Settlement. In Rufus Yerxa and Bruce Wilson (editors), *Key Issues in WTO Dispute Settlement – The First Ten Years*, Cambridge University Press, p. 136.

¹⁰⁵ *Ibid.*

¹⁰⁶ Forere, *supra* note 73, p. 147.

invoked only as a defense before WTO Panels and the Appellate Body to avoid findings of inconsistency regarding the formation of RTAs.¹⁰⁷

Joost Pauwelyn proposes the legal avenue of ‘multilateralizing regionalism’ in dispute settlement as a mechanism for mutual recognition and accommodation. This approach contrasts with the hierarchy and supremacy focus of Article XXIV. Pauwelyn advocates for a shift in focus in the relationship between WTO and RTA dispute settlement, proposing two perspectives to enhance mutual recognition and untangle the complex interaction between the two systems:

- *Multilateralizing regionalism at the WTO*: WTO law should stop treating regional agreements –which it attempts to control as a nemesis (e.g., according to Article XXIV) –as an antagonist. Instead, it should integrate regional developments into WTO activities, for example, by allowing WTO dispute settlement panels to interpret and apply WTO rules in the context of regional arrangements agreed to by both parties.
- *Multilateralizing regionalism in RTAs*: Instead of relying solely on Article XXIV as an interface, negotiators of regional agreements should carefully regulate interactions with WTO agreements to preserve the integrity of both systems.¹⁰⁸

Therefore, guided by the principle of mutual supportiveness and recognition in the relationship between WTO and RTA dispute settlement, the following analysis will examine the multilateralization of dispute settlement mechanisms. Specifically, it will address the enforcement of WTO-plus/extra commitments before the WTO-DSU and the quest for policy considerations regarding the multilateralization of the WTO's DSU.

¹⁰⁷ Joost Pauwelyn. (2008). Legal Avenues to ‘multilateralizing regionalism’: beyond Article XXIV. In Richard Baldwin and Patrick Low (editors), *Multilateralizing Regionalism: Challenges for the Global Trading System*, Cambridge University Press, pp. 368-369. Professor Dr. Manjiao Chi also noticed that the WTO Dispute Settlement played a limited role in furthering trade-plus effects. In this regard, see: Manjiao Chi. (2013). Trade Plus Effects of Dispute Settlement On China: An Ideal or Illusion? *Journal of World Trade*, Vol. 47, pp. 1349-1384.

¹⁰⁸ Ibid.

7.1 The Quest for WTO-Plus/Extra Commitments before the WTO-DSU: Anchoring the AfCFTA

The theoretical framework of ‘multilateralizing regionalism’ proposed by Joost Pauwelyn offers immediate, actionable solutions for the structural architecture of the AfCFTA.¹⁰⁹ The AfCFTA is designed as a modern RTA that encompasses vast ‘WTO-Plus’ and ‘WTO-Extra’ commitments, specifically through its ongoing negotiations and protocols on cross-border investment, intellectual property rights, and competition policy. Because these areas liberalize trade beyond the traditional scope of the WTO covered agreements, they risk creating institutional fragmentation.

Applying the principle of “mutual supportiveness and recognition” directly to the AfCFTA means that global WTO reform must allow multilateral dispute panels to interpret and apply AfCFTA’s regional commitments when addressing disputes between African state parties. Without expanding the scope of “applicable law” before the WTO-DSU to recognize these modern regional disciplines, African nations pursuing continental integration under the AfCFTA will face persistent jurisdictional clashes where advanced regional rules are legally ignored by multilateral panels.

7.2 Policy Considerations on ‘WTO-DSU for Multilateralization’ and the AfCFTA’s Position

As the debate shifts from a rigid paradigm of WTO supremacy to one of mutual accommodation, specific policy options must be integrated to manage the interaction between the WTO-DSU and the AfCFTA. To resolve the complex ‘spaghetti bowl’ arising from overlapping trade obligations, the AfCFTA has proactively implemented a *fork-in-the-road clause* under Article 3(4) of its Dispute Settlement Protocol. This provision dictates that once a state party invokes the AfCFTA forum, recourse to alternative venues like the WTO is prohibited.

However, as highlighted by Jennifer Hillman, global policy coordination is required from the WTO side.¹¹⁰ The WTO should amend Article 23 of the DSU to explicitly permit *res judicata* defenses and require the exhaustion of regional remedies before an RTA dispute can be escalated to Geneva. For the AfCFTA to function smoothly as the largest regional trade block, these WTO structural reforms are essential to validate the AfCFTA’s forum-selection clauses and prevent disruptive parallel litigation by states seeking to bypass continental rulings.

¹⁰⁹ Pauwelyn, *supra* note 107, pp. 398-399.

¹¹⁰ Jennifer Hillman, *supra* note 46, p. 205.

7.3 AfCFTA's Dispute Settlement Commitments beyond WTO-DSU: Modeling the Future

The AfCFTA's dispute arrangement represents a fundamental leap beyond the paralyzed multilateral framework of the WTO-DSU.¹¹¹ While the WTO Appellate Body remains completely frozen due to systemic appointment blockades, the AfCFTA has established an active, operational dispute apparatus featuring a Dispute Settlement Body (DSB) and a permanent seven-member Appellate Body. Crucially, the AfCFTA breaks new ground by legally empowering its Secretariat to provide direct technical advice and legal assistance to developing and least-developed state parties. This institutional support directly eliminates the capacity gaps and prohibitive costs that historically forced African states into a position of passivity within the WTO-DSU system.

Furthermore, the AfCFTA is forging a revolutionary continent-wide model for investment dispute settlement. While individual member states like South Africa, Namibia, and Tanzania have legally retreated from traditional Investor-State Dispute Settlement (ISDS) in favor of domestic municipal remedies, the upcoming AfCFTA Investment Protocol has the opportunity to pioneer a balanced, transparent regional mechanism. By systematically addressing the structural flaws of global arbitration –such as lack of transparency and institutional illegitimacy– the AfCFTA is positioning its dispute mechanism not merely as a passive copy of the WTO, but as an advanced template for global trade governance.

8. Post-AfCFTA WTO-DSU Crisis: Status and Possible Multilateral Way-Outs

The dispute settlement system of the WTO, with its Appellate Body (AB) as a centerpiece, has long been considered the ‘Jewel in the Crown’ by those involved in the governance of the post-1995 multilateral trading system.¹¹² This is because the system was well-crafted, governed by the clear, detailed, and straightforward rules of the Understanding on Rules and Procedures for

¹¹¹ Obert Bore, *supra* note 10, p. 252.

¹¹² Geraldo Vidigal. (2019). Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis. *Journal of World Investment & Trade*, Vol. 20, p. 863.

The expression the ‘jewel in the crown’ is attributed to the first Director-General of the WTO, Renato Ruggiero. See: Peter Van den Bossche & Werner Zdouc. (2013). *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, p. 302.

the Settlement of Disputes (DSU), combining rule-based and diplomatic features. During the first decade of the WTO, the DSU and the Appellate Body met the high expectations of the membership. The Appellate Body was the shining focal point of this jewel, renowned for its high-quality work, professional and authoritative interpretation of WTO Agreements, and trustworthy decisions.

However, the Appellate Body enjoyed this glory for less than two decades. Currently, it is in crisis; the deadlock over appointments has been described as the WTO's "Crown of Thorns" following the United States' blocking of the re-appointment of an Appellate Body Member in 2016. Since mid-2017, the United States has blocked the initiation of selection processes to appoint new Members. As of 30 November 2020, the terms of the last sitting Appellate Body Members expired, leaving the Body without any members. Thus, the WTO dispute settlement system faces unprecedented challenges; the "Jewel in the Crown" is encountering a survival crisis.¹¹³ Cosette D. Creamer characterized this challenge as a US government 'stealth war' on the Appellate Body, describing the Trump Administration's strategy to shut down the AB's ability to hear disputes as "killing the WTO from inside."¹¹⁴

The causes for the United States' blocking of appointments are no secret; its dissatisfaction with the dispute settlement system has been public. In February 2018, Donald Trump labeled the WTO a 'disaster' for the United States, and US Trade Representative (USTR) Robert Lighthizer stated that same year that "to have the WTO work, its binding dispute settlement system would have to change."¹¹⁵ The saga began in 2011 when the US blocked the re-appointment of Professor Jennifer Hillman.¹¹⁶ In 2013–2014, it blocked the potential appointment of James Gathii.¹¹⁷ In 2016, the US blocked the second term of Korean law Professor Seung Wha Chang, accusing him of "deviating

¹¹³ Chang-fa Lo *et al.* (2020). Introduction: Let the Jewel in the Crown Shine Again. In Chang-fa Lo *et al.* (editors), *The Appellate Body of the WTO and Its Reform*, Springer, p. 4.

¹¹⁴ Cosette D. Creamer. (2019). Can International Trade Law Recover? From the WTO's Crown Jewel to its Crown of Thorns. *American Journal of International Law Unbound*, Vol. 113, pp. 51-55.

¹¹⁵ Vidigal, *supra* note 112, p. 865.

¹¹⁶ Henry Gao. (2021). A rule-based solution to the Appellate body crisis and why the MPIA would not work. *School of Law Institutional Knowledge at Singapore Management University*, Vol. 2, p. 1.

¹¹⁷ *Id.*, p. 2.

from [his] appropriate role,” only joining the consensus after Korea nominated Trade Minister Hyun-chong Kim as his successor.¹¹⁸

Following the election of Donald Trump and the appointment of Robert Lighthizer as USTR, the situation worsened. Three Appellate Body Members left their positions: Ricardo Ramirez-Hernandez and Professor Peter Van den Bossche upon the expiration of their terms on 30 June 2017 and 11 December 2017, respectively, and the sudden resignation of Hyun-chong Kim on 1 August 2017 following his nomination as South Korea's Trade Minister. The US refused to join the consensus to launch the appointment process until ‘systemic issues’ –specifically, the US view that the AB exceeded its mandate by issuing “obiter dicta” or “advisory opinions” unnecessary to resolve disputes– were addressed by the Dispute Settlement Body (DSB).

Unless a solution is found, most disputes at the panel stage are now subject to an “appeal into the void,” where a party can appeal a panel report into a non-existent Appellate Body. The AfCFTA, as the largest African RTA comprising 44 WTO members, should be part of the multilateral way-outs for the re-establishment of a compulsory WTO dispute settlement system.

To re-establish compulsory dispute settlement, two multilateral solutions have been proposed to circumvent the US block: first, a voting procedure for appointments; and second, the Multi-party Interim Appeal Arbitration Arrangement (MPIA). The WTO-DSU crisis is an emergency scenario demanding “thinking out of the box” solutions. Pieter Jan Kuijper described the emergency as follows:

[The WTO – DSU Crisis] is no small matter. It is a true emergency. Times of emergency justify emergency measures in international organizations' law. They allow states to invoke the *clausula rebus sic stantibus* in treaty law. They allow states and organizations to make arguably legal decisions that they would not take under normal circumstances. The ambush killing of the AB by the US falls outside normal circumstances.¹¹⁹

Kuijper argues that the WTO Agreement, which permits voting by the General Council and Ministerial Conference “where a decision cannot be arrived at by consensus,” justifies an exceptional direct appointment of Appellate Body Members by majority vote during such emergencies. This multilateral voting approach is supported by Ernst-Ulrich Petersmann, who argues that voting is not just an exceptional measure but an entitlement and a

¹¹⁸ Ibid.

¹¹⁹ Pieter Jan Kuijper. (2018). From the Board: The US Attack on the WTO Appellate Body. *Legal Issues of Economic Integration*, Vol. 45, p. 9.

duty of the membership to overcome “illegal blocking.” WTO members of the AfCFTA Group can play a significant role in advancing these multilateral solutions within the WTO.

The second solution, the MPIA, operates outside the standard AB framework. The concept draws on proposals by Professor Pieter Jan Kuijper and was refined by lawyers from Sidley Austin, outlining an arbitration mechanism based on Article 25 of the DSU. A bilateral initiative between the EU and Canada grew into a multi-party mechanism. On 27 March 2020, the EU and 15 WTO members reached an agreement on the MPIA, notifying it to the WTO on 30 April 2020. On 31 July 2020, the parties notified the agreed pool of arbitrators, setting the arrangement in motion. While Professor Kuijper has criticized the MPIA as a “popular but false option,” this author finds no convincing argument against proposing a multi-party interim appeal arbitration arrangement as an emergency multilateral way-out. Therefore, WTO members of the AfCFTA group should consider joining the MPIA as part of the effort to heal the illness of the world trading system.

9. Conclusion

The AfCFTA dispute settlement mechanism is designed as a WTO-styled system tailored for the African context. The adoption of this mechanism is expected to change the history of African dispute settlement in two significant ways: it will reverse the inoperative trend of pre-AfCFTA RECs judiciaries, and it will improve the historically low participation rate of African countries in the WTO DSU. The design of the AfCFTA dispute settlement incorporates a distinct departure from pre-AfCFTA RECs judiciaries regarding legal standing; under AfCFTA, only State Parties have *locus standi* before the DSB. Furthermore, unlike the WTO DSU where consultations are an optional path, the AfCFTA mandates consultations, prioritizing amicable dispute resolution.

As the largest RTA in Africa, the AfCFTA is not an exception to the general rules of the trading system; it is the result of the regulatory rule of Article XXIV, establishing a vertical relationship with the WTO-DSU. Consequently, the issue of RTA claims before the WTO-DSU remains controversial, as evidenced by the academic debate on the issue. This academic debate, alongside WTO Panel and Appellate Body practices, warrants a reform of the WTO-DSU to establish a clear legal relationship based on mutual recognition and accommodation. This is a primary quest of multilateralization in dispute settlement at both the WTO-DSU and AfCFTA levels.

However, the reform agenda is not limited to the legal relationship between the WTO and RTAs. The current WTO Appellate Body crisis presents an emergency that demands multilateral intervention, such as voting on the appointment and re-appointment of Appellate Body Members currently blockaded by the US. The adoption of the AfCFTA has resulted in overlapping jurisdictions for African WTO members –spanning RECs, AfCFTA, and the WTO. To manage this, the AfCFTA DSM Protocol has adopted a *fork-in-the-road* clause that aims at ensuring forum exclusivity. Furthermore, AfCFTA's new investment dispute settlement mechanism represents further liberalization of dispute settlement beyond the scope of the WTO-DSU. ■

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Consumer Protection from Unfair Contract Terms in Ethiopia: A Plea for Reform

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Abstract

Factors such as asymmetry of information, imbalanced bargaining power, imprudence, and economic inequalities can cause unfair contract terms that give unfair advantage to a supplier at the expense of consumers. To overcome this challenge, a number of countries have enacted laws on unfair contract terms beyond the protection of consumers through classical private and public laws. This article examines pertinent Ethiopian laws to identify the extent of protection of consumers from unfair contract terms. It uses qualitative legal research approach that involves analysis of pertinent laws, legal principles, textual analysis, key informant interviews, literature review and comparative experience in selected jurisdictions. Despite the existence of some scattered provisions in the Civil Code, the Trade Competition and Consumer Protection Proclamation No. 813/2013, the Financial Consumer Protection Directive No.292/2021 and other laws, the Ethiopian law on the protection of consumers against unfair contract terms is deficient. Thus, there is the need for re-visiting the Ethiopian consumer protection law in light of modern trends on the protection of consumers from unfair contract terms.

Keywords:

Consumer, unfair contract terms, standard-form contracts, vulnerability, freedom of contract, bargaining power

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1. Introduction

Classical contract law takes party autonomy (autonomy of will) as a touchstone of contractual relations.¹ On the other hand, the adherents of free market argue that while the presence of other sellers could save the consumer from coercion, the seller, in turn, is “protected from coercion by the consumer

Acronyms

B2B	Business-to-Business
B2C	Business-to-Consumer
B2G	Business-to-Government
CJEU	Court of Justice of the European Union
EU	European Union
FCPD	Financial Consumer Protection Directive
FCPED	Financial Consumer Protection and Education Directorate
FDRE	Federal Democratic Republic of Ethiopia
FSCCD	Federal Supreme Court Cassation Division
MoTRI	Ministry of Trade and Regional Integration
NBE	National Bank of Ethiopia
SMEs	Small and Medium Sized Enterprises
TCCP	Trade Competition Consumer Protection Proclamation
UCTD	Unfair contract terms Directive
UCTs	Unfair contract terms

¹ Richard Stone. (2009). *The Modern Law of Contract*, 8th edition, Rutledge-Cavendish 2 Park Square, Milton Park, Abingdon, pp. 8-10.

because of other consumers to whom he can sell”.² Thus, classical contract law assumes the ‘equality of bargaining power’ among contracting parties. Conversely, in practice, most contracts are negotiated between (among) parties of unequal bargaining power, such as: consumers and professionals, large suppliers and small retailers, powerful principals and small agents. These contracts are often imbalanced to the detriment of the weaker party.³ Suppliers offer a contract with unfair contract terms (UCTs) such as a standard term that gives an unfair advantage to the supplier at the expense of the consumers’ interest.

The modern commercial world proliferate giant suppliers that, at times, triumph the financial muscle of some developing countries.⁴ So, suppliers or traders are in a better position to influence an uninformed consumer to bargain with the trader in a way that safeguards the latter’s best interest.⁵ Hence, letting the consumers to bargain with those entities without regulatory intervention would expose them to various manipulations such as financial loss, health and security risks owing to unfair contract terms. The current prevailing view among legal scholars is that consumers should not be the captives of unfair contract terms.

Against this backdrop, over the last few decades, scholars have proposed alternative theories of contract⁶ that subject a party’s freedom to (of) contract to certain conditions such as ‘common good’, ‘contractual solidarity’ and ‘contractual morality’⁷ thereby requiring parties to adhere to the principle of

² Milton Friedman. (1962). *Capitalism and Freedom*, The University of Chicago Press, Ltd., London, p. 20. See also, Unfair Terms in Contracts Concluded with Consumers, (1984), Commission Communication presented to the Council, Bulletin of the European Communities Supplement 1/1984, p. 6.

³ ASEAN Guidelines on Unfair Contract Terms (UCT). (2024), the ASEAN Secretariat, Jakarta, p. 2.

⁴ Awolalu Akumendi. (2017). *Understanding and Evaluating the Enforcement of Corporate Law in Nigeria: The Case for Enhanced Public Civil Enforcement* (PhD Thesis, E-Durham Theses, Durham University) p. 3. Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/12287/1/O>.

⁵ See European Communities-Commission, Unfair Terms in Contracts Concluded with Consumers, Supplement1/84-Bull-EC, pp. 5 - 6. Further examine Oren Bar-Gill *et al*, (2020), “The American Law Institute’s Restatement of Consumer Contracts: Reporters’ Introduction”, *Loyola Consumer Law Review*, Volume 32, No. 3, 2020, at pp. 92-93. Available at DOI:10.1515/ercl-2019-0008. (Accessed on 10 April, 2025).

⁶ See Sebastiaian Gramood. (2010). Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective. *Canadian Business Law Journal*, Vol. 49, p. 345.

⁷ Id., pp. 345-346.

good faith in their contractual relations.⁸ It is acknowledged that contracts (especially consumer contracts) are increasingly being used as a weapon by which consumer rights are transgressed. To ward-off problems associated with harsh, imbalanced and one-sided contracts in the modern business world, laws on unfair contract terms have become prominently useful in different jurisdictions, cutting ‘a deep furrow right across the doctrine of freedom of contract.’⁹ In our context, the Ethiopian Civil Code¹⁰ embodies provisions aimed at protecting consumers. Furthermore, Ethiopia also adopted laws on competition and consumer protection following contemporary market developments. The financial sector has also a directive that protects financial consumers against the abusive acts of financial institutions.¹¹

This article examines whether Ethiopian laws adequately protect the consumer from unfair contract terms in consumer contracts in general and in adhesive business-to-consumer (B2C) contracts in particular. The next section highlights the conceptual underpinnings of unfair contract terms in consumer contracts. Section 3 deals with the possible rationales for the protection of consumers from UCTs deviating from the classic contract law virtues such as freedom of contract. The fourth section discusses the experience of selected jurisdictions to highlight good practices that protect consumers from unfair contract terms. The fifth section and the conclusion deal with the need for revisiting the protection of consumers from unfair contract terms in Ethiopia.

2. The Notion of Unfair Terms in Consumer Contracts

2.1. Consumers Defined

As John F. Kennedy duly noted, the word consumer ‘includes us all.’¹² In most jurisdictions, a consumer is defined as a private individual who is the

⁸ Martin A. Frey. (1974). A Consumer's Guide to Unconscionable Sales Contracts. *Consumer Journal*, Vol. II, No. 5, p. 5.

⁹ Mary Charman (2007). *Contract Law*, William Publishing, 4th ed., United Kingdom, 2007, p.128. In connection to this, Lord Denning in the case between *George Mitchell v Finney Lock Seeds* (1983), wrote describing the advent of unfair contract terms *vis a vis* the classical principle of freedom of contract as ‘the idol of freedom of contract was shattered’. (Ibid. Mary Charman)

¹⁰ Civil Code of Ethiopia (1960). *Negarit Gazzeta, Gazetta Extra-ordinary*, Proclamation No. 165, 19th Year No. 2.

¹¹ National Bank of Ethiopia (2021). Financial Consumer Protection Directive No. FCP 292/2021, Addis Ababa, Ethiopia.

¹² Érico Rodrigues de Melo. (2020). Consumer Rights as Human Rights: Legal and Philosophical Considerations. *Revista RyD República y Derecho*, Volumen V, p. 4. In his address to the US Congress on the 15th of March 1962 President John F. Kennedy of US stated “Consumers by definition includes us all ... They are the largest economic

purchaser of goods and the receiver of services for personal or family consumption.¹³ Thus, a consumer is not simply the buyer of goods in the shopping malls; it is likewise the recipient of services as a ‘client, or patient or whatever.’¹⁴ A consumer, therefore, is an individual who purchases or uses goods and services for personal, household or non-commercial purposes.

Unfair contract terms are terms in a contract which give an unfair advantage to one contracting party at the expense of the other.¹⁵ In most cases, unfair contract terms are supposedly prevalent in circumstances in which one contracting party (usually the supplier) is strong and the other party (the consumer) is weak, vulnerable to exploitation and abuse. Unfair contract terms are contractual clauses that no person would accept in the ordinary course of dealings.¹⁶ Such kinds of terms are frequently found under standard-form or adhesive contracts.¹⁷

Contrary to the requirement of good faith, these contracts could cause a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer’.¹⁸ Standard form contracts, also named boilerplate contracts, are contracts drafted in advance by the trader (supplier) for repeated use depriving the consumer “an effective opportunity to

group, affecting and affected by almost every public and private economic decision. Yet they are the only important group whose views are often not heard.” See also, Geraint Howells and Rhoda James. (2002). *Litigation in the Consumer Interest. ELSA Journal of International and Comparative Law*, Volume 9 No.1, p. 2.

¹³ Some jurisdictions exceptionally include unincorporated small business entities to the category of a consumer. See, F. O. Ukwueze. (2015). Elevating Consumer Rights to Human Rights. *The Nigerian Juridical Review*, Vol.13, pp.134-135. See also, Charman, *supra* note 9, p. 129.

¹⁴ Peter Cartwright. (2009). *Consumer protection and the criminal law: Law, Theory and Policy in the UK*, Excerpt, Cambridge University Press, p. 3. See also de Melo, *supra* note 12, p. 5.

¹⁵ Adnan Trakic (2015). Statutory Protection of Malaysian Consumers against Unfair Contract Terms: Has Enough Been Done? *Common Law World Review*, Volume 44, Issue 3, p. 203. Available at DOI:10.1177/1473779515600142.

¹⁶ R. Srivastava and A. Ahuja (2015). Notes and Comments Unconscionable Contracts: A Critical Analysis of Indian Legal System. p. 231.

¹⁷ Trakic, *supra* note 15, p. 203.

¹⁸ Susan Amelia Tumade. (2023). *Unfair Terms in EU Consumer Contract Law: A Criteria of Good Faith and Significant Imbalance in the Context of Agreements between Consumers and Providers of Financial Services* (Master's Thesis in European and International Trade Law, Lund University School of Economics and Management) p.16.

negotiate”¹⁹ the terms and conditions of the contract. Usually, the weaker party has no choice but to adhere to the terms or remain docile to the offers of the trader to get hold of basic goods and services.²⁰ Unfair contract terms are currently considered repugnant to the public policy and the dominant purpose of contract law such as fairness, justice, good faith, and the social role of contract.²¹

2.2 Elements of unfairness: substantive and procedural

Some jurisdictions classify unfairness into two: substantive and procedural unfairness,²² and this dichotomy aims at ensuring clarity and certainty so that consumers and the business society (suppliers) can easily identify their rights and duties for compliance and adjudication.²³ Procedural unfairness concerned with how the contract was made, while substantive unfairness deals with the ‘effect’ of contract or “disparity in rights and obligations as between the parties”.²⁴ Laws that prohibit *procedural unfairness* guard against unfair practices in the process of making a contract so that the parties can make a contract in their free will. They relate to specific conditions surrounding the formation of the contract.²⁵ This may include any kind of vulnerability of the weaker party, for instance, age, mental condition and experience; and any factors that influence the weaker party to conclude a contract.²⁶ *Substantive unfairness* focuses on the words (terms) of the contract and “asks whether the

¹⁹ The Australian Government Treasury (2020). *Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision*, p.7. See also de Melo, *supra* note 12, p. 6.

²⁰ Srivastava and Ahuja, *supra* note 16, p. 232.

²¹ Frey, *supra* note 8, p. 5.

²² Consumer Protection Act 68 of 2008, Government Gazette Republic of South Africa, Volume 526, Cape Town, 29 April 2009, Articles 40-47 that dwells on procedural unconscionability and Articles 48-51 on substantive unconscionability. https://www.gov.za/sites/default/files/32186_467.pdf

In addition, see, for instance, the Indian Unfair (Procedural and Substantive) Terms of Contracts Act, Bill No. LVIII of 2018, the last part of the bill under the caption ‘Statement of objects and reasons’ provide such classification. See generally, Thomas Wilhelmsson. (2008). Various Approaches to Unfair Terms and Their Background Philosophies. *Juridica International*, Volume XIV.

²³ See, Gordon Renouf. (2006). Inquiry into Unfair Terms In *Consumer Contracts*, Australian Consumers’ Association, submission No. 19.

²⁴ Sze-Beng Tang. (2006). A Neoclassical Analysis of the Equitable Doctrine of Unconscionable Dealing. *Adelaide Law Review*, Vol. 27, p. 230.

²⁵ Yehuda Adar & Shmuel I. Becher. (2021). Ending the License to Exploit: Administrative Oversight of Consumer Contracts. *Boston College Law Review*, Vol. 62:2405.

²⁶ *Ibid.*

terms of the agreement are so unfavorable to one of the parties that we should refuse enforcement?”²⁷

Laws on procedural unfairness pose the question: “Was there something about that process that prevented one party from understanding the agreement?”²⁸ Thus, procedural unconscionability pertains to the bargaining process itself and requires specific and objective evidence that the consumer was unable to comprehend the terms of the agreement taking factors such as the consumer’s age, literacy, ‘business acumen’, level of education and socio-economic status into account.

Equally relevant is any sort of unethical conduct displayed by the merchant to obtain a swift signature of the consumer concealing crucial information in small print.²⁹ Contract law provisions on defect in consent such as duress, misrepresentation, false statement and undue influence are all examples of procedural unfairness. However, substantive unfairness focuses on the restraints of trade which are not regulated well under traditional contract law.³⁰ It includes “[a]n excessive interest rate, [exaggerated] contractual penalty, an onerous provision about the repossession of goods supplied under a hire purchase agreement, hidden fees and charges, unilateral modification rights, and unreasonable exemption clause etc. are typical examples of oppressive elements of a contract”.³¹

3. The Rationale of Protection against Unfair Contract Terms

Most contracts were supposedly made between parties of a relatively equivalent bargaining power until the advent of giant multinational and national corporations in the mid-twentieth century which made the “equality

²⁷ Eric E. Johnson. (2012). *Contract Doctrine, Theory & Practice Volume Two*, rewritten by J.H. Verkerke, CALI eLangdell Press, p.225 - 226.

²⁸ *Id.*, p. 226.

²⁹ Melissa T. Lonegrass. (2012). Finding Room for Fairness in Formalism-The Sliding Scale Approach to Unconscionability. *Loyola University Chicago Law Journal*, Volume 44, No.19, p. 9. See also, Roderiguez de Melo, *supra* note 12, p.226.

³⁰ Naemah Amin. (2010). Protecting Consumers against Unfair Contract Terms in Malaysia: The Consumer Protection (Amendment) Act 2010”, *Malaysian Law Journal Articles*, Volume1, Issue lxxxix, p. 3.

³¹ A.H. Angelo & E.P. Ellinger. (1992). Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States. *Loyola of Los Angeles International and Comparative Law Review*, Volume 14, Article 3, p. 458. The list of unfair contract terms varies across different jurisdictions. See also, Office of Fair Trading, (2008), Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, OFT 311, pp.13-68.

of bargaining power between such giants and the average citizen “[...] illusory.”³² In the era of globalization, ‘the big business organization should be considered less like an individual who bargains on equal terms, and more like governments, who control the private consumer.’³³ The need for legal intervention to safeguard the interest of the weaker party, the consumer, against oppressive contractual terms became, therefore, imperative.

Most consumer contracts are increasingly becoming “unilaterally drafted boilerplates.”³⁴ Adhesive business contracts, developed for routine use, give an unfair advantage to the trader (business entity) for it is the trader who drafts contractual terms unilaterally determining the rights and obligations of both parties. Consequently, consumers possibly will face unfair contractual terms such as unfair exclusion clauses, unreasonable exemption or other unfair terms that unfairly benefit the trader at the expense of the consumer.³⁵ In fact, true consent exists only between (among) parties of equivalent bargaining power, information, knowledge or prudence. It is palpable that the terms, conditions and notices included in a plethora of consumer contracts do not incorporate “dickered terms” that in turn demand the intervention of courts or law to limit their harshness.³⁶

Hence, the intervention of courts or other regulatory bodies is justified because “as a matter of common fairness it is not right that the strong should be allowed to push the weak against the wall.”³⁷ Laws on unfair contract terms are thus needed to ensure fairness and equity in contractual relations.³⁸

³² Id., p. 457.

³³ Ukwueze, *supra* note 13, p. 140.

³⁴ For some consumers, even if literate, it might be hardly possible to comprehend the meaning of technical terms inserted in the contract.

See Anne-Lise Sibony. (2019). European Unfairness and American Unconscionability: A Letter from A European Lawyer to American Friends. *European Review of Contract Law*, Volume 15, Special Issue on the ALI Restatement on Consumer Contract Law from a European Perspective, p. 198.

³⁵ Jeffrey C. Fort. (1978). Understanding Unconscionability: Defining the Principle. Loyola University, *Chicago Law Journal*, Volume 9, Art. 2, Issue 4, p. 780.

³⁶ J.W. Looney & Anita K. Poole. (1999). “Adhesion Contracts, Bad Faith, and Economically Faulty Contracts. *Drake Journal of Agricultural Law*, Volume 24, p. 178.

³⁷ Siti Aliza Alias & Zuhairah Ariff Abdul. (2012). Inequality of Bargaining Power and the Doctrine of Unconscionability: Towards Substantive Fairness in Commercial Contracts. *Australian Journal of Basic and Applied Sciences*, 6(11), p. 332.

³⁸ Ibtisam Ilyana Ilias *et al* (2023). Navigating Unfair Contract Terms: Drawing Insights from Australia in Addressing the Legal Conundrum in Malaysia. *International Journal on Consumer Law and Practice*, Volume 11, p. 150.
<https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1167&context=ijclp>

Contractual relations need to be made based on not only mutual consent of the parties but should also reasonably balance rights and obligations among (between) parties. Contractual terms that are leaned towards the interest of one party (at the expense of the other) go against the public policy of contractual fairness. In effect, laws on unfair contract terms would increase commercial transparency and reduce business disputes.³⁹ Therefore, it has gradually become indispensable to craft policy, legal and institutional mechanisms to protect consumers from UCTs.

4. Lessons from Other Jurisdictions: EU and South Africa⁴⁰

4.1 The European Union experience

The regulation of UCTs in Europe is rooted in the consumer rights movement of the 1960s and 1970s.⁴¹ Adopted in 1993, the Unfair Contract Terms Directive (UCTD)⁴² was designed to protect consumers' against the seller's abuse especially through one-sided contracts.⁴³ The Directive addressed the power imbalance between the seller and the consumer.⁴⁴ Parallel to this, the EU regulators have expanded their oversight of the consumer market thereby mounting the role of public regulatory and enforcement agencies.⁴⁵ Premised on the idea of consumer vulnerability, the Directive aims to safeguard the interest of consumers as it sets out the minimum level of protection consumers' are entitled to enjoy.⁴⁶ The UCTD allows member states to provide more stringent rules to protect consumers (defined under Article 2 (b) and (c)) from unfair contract terms.⁴⁷

³⁹ Ibid.

⁴⁰ The South African experience is appreciated in various literature. See, Virimail Victor Mugobo & Portia Malunga. (2015). Consumer Protection in South Africa: Challenges and Opportunities for Furniture Retailers in Cape Town, South Africa. *Mediterranean Journal of Social Sciences*, Volume 16, No. 1, pp. 224-225.

⁴¹ Paul Latimer. (2016). Protecting Consumers from Unfair Terms: Australian Comparisons. *Australian Business Law Review*, Volume 44, p. 11.

⁴² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>

⁴³ Tumade, *supra* note 18, p. 9.

⁴⁴ Ibid.

⁴⁵ Jane K. Winn & Mark Webber. (2006). The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants. University of Washington Law Digital Commons, 62 *Business law*, Vol. 20, p. 211.

⁴⁶ Dan Jerker B. Svantesson & Loren Holly. (2010). An overview and analysis of the National Unfair Contract Terms Provisions. *Commerce law Quarterly*, Vol. 24 (3), p. 4.

⁴⁷ Unfair Contract Terms Directive, Council Directive 93/13/EEC of 5 April 1993, Article 8.

The Directive applies to B2C standard form contracts that are not negotiated individually excluding B2B or B2G transactions.⁴⁸ However, the Directive has equal application on consumer contracts concluded either orally or in writing regardless of the form.⁴⁹ Further, stipulating crucial principles and requirements –viz. the unfairness test (Arts. 3 and 4), transparency (Art. 5), the non-binding effect of unfair contract terms on consumers (Art. 6), and injunction in the common interest of consumers (Art.7)– the Directive provides a general direction when a contract term is considered unfair. Article 3 sets out the basic criteria of assessing whether the contract term is unfair–the unfairness test. A term is said to be unfair if it is not individually negotiated and creates a significant imbalance in the rights and duties of the parties against the consumer.⁵⁰

The ‘adequacy of price’ and ‘the main subject matters of the contract’ are exempted from applicability of the unfair contract law provided the transparency requirement is upheld.⁵¹ If the seller or supplier claims that the terms have been individually negotiated, the onus of proof rests upon him. Furthermore, the Annex to Article 3(3) of the directive provides an indicative or non-exhaustive list of seventeen terms that may be regarded as unfair terms in consumer contracts. Article 1 (e) of the Annex includes a term requiring any consumer who fails to fulfill his obligations to pay a disproportionately high compensation or penalty clause as an UCT.⁵² However, the overall circumstances surrounding the conclusion of the contract (procedural unfairness) and other terms of the contract (substantive unfairness), are considered in case law.⁵³

Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0013>.

⁴⁸ Id. Art. 3(2); Read also, Candida Leone (2020), The missing stone in the Cathedral of unfair terms in employment contracts and coexisting rationalities in European contract law, PhD Dissertation, The Amsterdam University, School of Law, pp. 34-36. See also, Tumade, *supra* note 18, pp. 16-17. Some scholars suggest it should be amended to include individually negotiated contract terms and terms that relate to the main subject matter of the contract, the adequacy of the price, and changed circumstances.

⁴⁹ Unfair Contract Terms Directive, *supra* note 47, see paragraph 10 of the preambular part.

⁵⁰ Id., Art. 3 (1) and (2).

⁵¹ Id., Article 4; See also Tumade, *supra* note 18, pp. 16-17.

⁵² See Lucinda Miller. (2004). Penalty Clauses in England and France: A Comparative Study. *International and Comparative Law Quarterly*, Vol. 53, pp. 103-105.

⁵³ Jacobien W. Rutgers. (2014). *Unfair Terms in Consumer Contracts*, (2nd ed.), English and European Perspectives on Contract and Commercial Law, Essays in Honour of Hugh Beale, p. 285.

The *transparency* requirement under Article 5 demands the terms offered to the consumer in written contract to be drafted in plain and intelligible language. If the parties fail to comply with this requirement and the need for interpreting the vague, unclear or contradictory terms emerge, it is declared that the term most favorable to the consumer shall prevail based on the *contra proferentum* rule.⁵⁴ Hence, the seller has a duty to ensure that the consumer is given an opportunity to review the terms of the contract availing all necessary information in advance thereby enabling consumers to make well-informed choice.⁵⁵

In terms of effect, the Directive renders UCTs non-binding (*void ab initio*) upon the consumer.⁵⁶ In such a case, only the term that is found unfair would be null, and the rest of the contract shall remain intact, provided it is capable of continuing without the unfair term. Given the existence of sufficient factual and legal information, courts are empowered to raise contractual unfairness by their own motion⁵⁷ inviting parties to express their views. In one case, the CJEU held that courts must challenge unfair terms by their own motion to safeguard consumers' interest in an effective manner.⁵⁸ However, the court cannot do so if the consumer objects the motion immediately.⁵⁹ By demanding

⁵⁴ Emily Finch & Stefan Fafinski. (2017). *Contract Law* (5th ed.), Pearson education limited, p.103. See also, Charman, *supra* note 9, p.121.

⁵⁵ *Id.*, p. 286; See also Ola Svensson. (2020). The Unfair Contract Terms Directive: Meaning and Future Development. *Nordic Journal of European Law*, Volume 29 (2), p. 25.

⁵⁶ Unfair Contract Terms Directive, *supra* note 47, Art. 6.

⁵⁷ Rutgers, *supra* note 53, p. 287.

⁵⁸ In the *Oceano Case* (*Oceano Group Editorial SA vs. Roci Marciano Quintero, Joined Cases C-240/98 to C-244/98*), the plaintiffs (Spanish companies Oceano Group SA and others (whose principal place of business is in Barcelona) sued several Spanish buyers who reside outside Barcelona claiming unpaid installments under consumer contracts for encyclopedias purchased for individual use. The consumer contract included a jurisdictional clause that empowers Barcelonan courts adjudicatory power to resolve their disputes. The Barcelona court referred the case to the European Court of Justice seeking a preliminary ruling on whether it can assess the fairness of the clause by its own motion under the Unfair Terms Directive. The ECJ ruled that national courts are allowed, under the Unfair Terms Directive, to raise unfair terms on their own motion to protect vulnerable consumers effectively. See Charles R. Calleros. (2017). .U.S. Unconscionability and Article 1171 of the New French Civil Code: Achieving Balance in Statutory Regulation and Judicial Intervention. *45 Georgia Journal of International and Comparative Law*, Volume 259, p. 293.

Available at SSRN: <https://ssrn.com/abstract=3029105>.

⁵⁹ Joseph Chitty. (1838). *On Contracts*, Volume I, General Principles, 31st ed., London: Sweet & Maxwell, in H.G. Beale, general editor, p. 131.

courts to invoke the rule in their own motion, even setting the national laws aside, the directive goes not only to the heart of contract law but also civil procedure law.⁶⁰

With regard to the institutional setups, Article 7 provides *locus standi* to the authorities (or a person) to intervene and challenge unfair terms at an early stage.⁶¹ So, countries have established authorities that negotiate the best contract terms with suppliers to espouse the interest of consumers in standard-form contracts.⁶² Generally, the EU Directive has become a model for various jurisdictions.

4.2 The South African experience

In South Africa, the right to fair, just and reasonable terms and conditions of consumer contracts has a constitutional basis.⁶³ Recognizing the views of judges reflected in precedents and the Law Commission's Report on *Unreasonable Stipulations of Contracts and the Rectification of Contracts* in 1998, South Africa promulgated the Consumer Protection Act (hereinafter, CPA or the Act) 68 in 2008.⁶⁴ Power imbalance between businesses and consumers and the need for ensuring the fairness of contract terms are the basic justifications for the enactment of the Act. The Act⁶⁵ distinguishes "unfairness" into two interdependent elements, i.e., procedural and substantive unfairness.

The scope of application of the law extends beyond standard-form and individually negotiated contracts to include large business to small business contracts.⁶⁶ It is discernable that the inclusion of negotiated contracts to the

⁶⁰ Rutgers, *supra* note 53, p. 288.

⁶¹ Unfair Contract Terms Directive, *supra* note 47, Art. 7(2). See also Svensson, *supra* note 55, p. 34.

⁶² Ibid, Svensson.

⁶³ L Hawthorne. (2012). Public governance: Unpacking the Consumer Protection Act 68 of 2008. *Journal of Contemporary Roman-Dutch Law*, Volume 75, pp. 346-347; see also Philip N Stoop. (2015). The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts. *Potchefstroom Electronic Law Journal*, Volume 18, No. 4, p. 1092.

⁶⁴ Tjakie Naude. (2006). Unfair Contract Terms Legislation: The Implications of Why We need it for its Formulation and Application. *STELL Law Review*, Volume 3, p. 361-362.

⁶⁵ Consumer Protection Act, *supra* note 22, Arts. 40-47 that dwells on procedural unconsonability and Arts. 48-51 on substantive unconsonability. See also, Stoop, *supra* note 63, pp. 1092-1093.

⁶⁶ Id., Consumer Protection Act, Part B, 3.2 /b/ (ii).

See Tjakie Naude. (2017). Towards Augmenting the Lists of Prohibited Contract Terms in the South African Consumer Protection Act 68 of 2008. *Tydskrif vir die Suid-*

scope of UCTs law broadens the rights of consumers. The Act also applies to all transactions for the supply of goods and services carried out within the territory of South Africa unless the transaction is exempted from the application of the Act. Moreover, it protects juristic persons as a consumer whose annual turnover or asset is below a threshold set by the Minister of Trade and Industry.⁶⁷

Under section 22 of the CPA, a contract is required to be made in plain and understandable language. The *transparency* requirement further imposes a duty on businesses to eliminate unclear and incomprehensible terms of the contract and to explain and summarize the implication of certain substantive contractual terms. This enables consumers to exercise a reasonable degree of informed consent thereby enhancing choice and substantive fairness. Similar to the German law, the South African law under Section 50 introduced an “*incorporation control*” and “*content control*” to ward-off unfair contract terms,⁶⁸ in addition to which it uses a third method of control, i.e. ‘interpretation control’.

Incorporation control requires businesses or suppliers to refrain from inserting terms, clauses and conditions that have the effect of excluding, varying or exempting the rights of consumers. In other words, it provides a list of prohibited terms that suppliers must not use in drafting standard-form contracts. According to section 49, these types of terms must be written in plain and understandable language. The South African law further demands that such terms must be written on the reverse side of the document, in contrasting color or font.⁶⁹ The CPA is criticized by the writers as printing exemption clauses in reverse side of the contractual document is not sufficient as most consumers do not read it given the time and effort it would take to

Afrikaanse Reg, Volume 138, Issue 1, p. 138. See also Tjakie Naude. (2007). The Use of Black and Grey Lists in Unfair Contract Terms Legislation in Comparative Perspective. *The South African Law Journal*, Volume 124, No. 1, p. 138.

⁶⁷ The Act currently makes the law applicable on businesses whose turnover is below R 2 Million to be regarded as consumers. This is done with the view to protect small businesses from big ones and create a room for fair competition. See also *id.*, p. 138.

⁶⁸ Tjakie Naude. (2010). The Consumer’s ‘Right to Fair, Reasonable and Just Terms’ Under The New Consumer Protection Act in Comparative Perspective. *The South African Journal of Law*, Volume 127, No. 2, pp. 506-509.

⁶⁹ Consumer Protection Act, *supra* note 22, Article 49. See also, K. Reddy. (2012). Consumer Protection Act for higher education institutions in South Africa. *South Africa Journal of Higher Education*, Volume 26, No. 3, 2012, pp. 600-601.

read the terms and try to understand their effect or searching another person to negotiate for them or to buy from other supplier with better terms.⁷⁰

On the other hand, *content control* allows the judiciary to strike out unfair terms that violate the incorporation test.⁷¹ With the view to simplify the task of the court in identifying unfair terms, Article 51 provides a short list of black-listed unfair contract terms (that are in effect void *per se*) while Article 48 (2) contains factors which render the contract unfair, unreasonable and unjust.⁷²

Moreover, South African law has introduced the third method of control, the *contra proferentum*, also named ‘*interpretation control*’.⁷³ Accordingly, UCTs are “interpreted against the party on whose behalf they were drafted, that is, typically in favour of the consumer and against the business in a B2C contract.”⁷⁴ Hence, any contract or document that creates ambiguity must be interpreted in favor of the consumer.⁷⁵ While interpreting the Act, courts must give meaning to the terms in a manner that gives effect to its purpose taking the applicable foreign law, international law, conventions, declarations or protocols that advance the interests of consumers into account.⁷⁶

Organizations in South Africa, with *locus standi* (such as consumer institutions) are entitled to seek relief against a mere offer of unfair terms to consumers generally even though they lack a role of representing individual consumers in litigation to challenge unfair terms inserted in an already concluded contracts.⁷⁷ The Minister, according to Section 50 of the Act, has the power to prescribe categories of consumer agreements that are required to be in writing.⁷⁸ Such written agreements must comply with certain requirements such as plain and understandable language,⁷⁹ the right of consumers to have a free copy of the agreement before the conclusion of the contract and the obligation of suppliers to keep the record if the contract is

⁷⁰ Ibid.

⁷¹ Id., p. 507.

⁷² Consumer Protection Act, *supra* note 22, Art. 48 (2). A term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if the conditions stated in 48(2)(a) to (d) are met. The Act is available at: https://www.gov.za/sites/default/files/32186_467.pdf

⁷³ Id., Section 4(4).

⁷⁴ Naude, *supra* note 68, p. 506.

⁷⁵ For further information, refer section 4 of the Consumer Protection Act, *supra* note 22.

⁷⁶ Id., Section 2(1). See Stoop, *supra* note 63, pp. 1118-1119.

⁷⁷ See section 4 of the Act. Examine also, Naude, *supra* note 68, p. 515.

⁷⁸ Consumer Protection Act, *supra* note 22, Section 50 (1).

⁷⁹ Id., Section 22.

made electronically.⁸⁰ The act renders the agreement invalid if there is non-compliance with these requirements.⁸¹

5. Consumers' Protection against Unfair Contract Terms in Ethiopia: An Overview of the Legal Framework

The Ethiopian consumer protection legal regime encompasses generalized private and public laws, special legislation on consumer protection law, and industry-specific regulations or directives.⁸² Regardless of the efforts made to enhance the rights of consumers, consumer welfare in Ethiopia is steadily declining.⁸³ Despite the absence of special laws that specifically regulate UCTs in standard-form or consumer contracts in Ethiopia, there are scattered provisions under the Ethiopian Law of Contract, the Law of Sales, the TCCPP, and other bylaws such as the FCPD, which are all explicated below.

5.1 The Ethiopian law of contract on unfair contract terms

5.1.1 General terms of business (standard terms)

Standard form contracting is a socio-legal tradition indispensable to modern commercial transaction.⁸⁴ However, as standard contracts are prepared by the professional party, they could risk the rights and interests of the receiving party, the consumer.⁸⁵ Art. 1686 of the Ethiopian Civil Code which contains concepts that deal with standard terms of business provides that “[g]eneral terms of business applied by a party shall not bind the other party unless he knew and accepted them or they were prescribed or approved by the authorities.”

Both private entities and governmental (administrative) authorities may draft general terms of business to be applicable for anyone with whom they may conclude a contract. Governmental regulatory authorities are also

⁸⁰ *Id.*, Section 50(2). See also Naude, *supra* note 68, p. 512.

⁸¹ It must be noted that non-compliance with the requirement of plain and understandable language does not render the agreement void *per se*; rather the court will decide whether a contract term is unfair, unreasonable or unjust as per Art. 48 of the Consumer Protection Act. See Naude, *supra* note 68, p. 512.

⁸² The special legislation on consumer protection is the TCCPP and the NBE's Directive on Financial Consumer Protection are typical examples of industry specific legislations.

⁸³ See Central Statics Authority (CSA) Annual Report, 2020, 2021, 2022, 2023 and 2024. See also World Bank Report on Ethiopia's economy. See the report available at https://unctad.org/system/files/information-document/wcpm_et.pdf

⁸⁴ Marcus Moore. (2024). The Future of Unfair Terms Regulation in Commercial Contracts. In Mads Andenas & Maren Heidemann, (eds), *Commercial Contract Law and Arbitration: From Assignments to Unfair Terms* (London: Routledge, p. 212.

⁸⁵ *Ibid.*

allowed, in the Civil Code, to issue or approve the general terms of some enterprises such as banks, insurance companies, electricity, telecom, or the transport sector⁸⁶ etc. presumably taking the interest of both parties (the consumer and the supplier) in to consideration. Under this provision, the power granted to governmental authorities to prepare model standard-form contracts or approve such contracts based on the request of businesses is one of the mechanisms through which consumer interests can be protected against exploitation. In both cases, the other party cannot exclude liability invoking his non-acceptance of the terms.

In today's corporate world, most traders frequently employ standard terms in their dealings with the consumer. In Ethiopian law, once the consumer knowingly assumes an obligation included under standard terms or if the terms are approved or prescribed by the governmental bodies, the consumer will be obliged by the terms. This law is applicable to consumer and non-consumer contracts alike. Nonetheless, in consumer contracts, because of their vulnerability, the mere fact that the consumer knew and accepted the terms is not sufficient to protect his interest. However, The Ethiopian contract law failed to take into account neither the "fairness" nor "reasonableness" of the terms included in the contract.

Furthermore, courts are not empowered by law to exclude the unfair term or refuse to enforce the contract or limit the application of the unfair clause or make any further order that is just or reasonable in the circumstances as other jurisdictions do⁸⁷ unless such issue falls under Article 1710 of the Civil Code or other narrower grounds the court may invoke such as those stated under Articles 1732 and Article 1713 of the Civil Code.⁸⁸ Even worse, the approval of standard contracts by governmental bodies as it stands now is impracticable. Experts at the NBE and the MoTRI, for instance, revealed that

⁸⁶ Rene David. (1973). *Commentary on Contracts in Ethiopia*, Translated by Micheal Kindred, published by Haile Selassie I University, p.13.

⁸⁷ See Naude, *supra* note 68, p. 509. See also, Martin, *supra* note 8, p. 5-6. Chitty, *supra* note 59, p. 131. Look also, Rutgers, *supra* note 53, p. 288.

In some jurisdictions such as France the effects of unfair terms in consumer contracts goes beyond prohibition and thus are void or non-existent. Conversely, the Ethiopian contract law precludes courts from interpreting a clear contract or a term thereof if it is clear as per Article 1733 and 1764. Thus, as a matter of principle, the unfairness of the term cannot be a ground of intervention in our contract law.

⁸⁸ The cumulative reading of Articles 1732 and 1713 indicates that custom, equity and good faith are implied terms of every contract and courts should interpret a contract (in case of ambiguity, vagueness or contradiction) in accordance with good faith. Accordingly, invoking these provisions, a court may deliver decisions that balance the interest of the supplier and the consumer.

they were neither requested by any industry to obtain the approval of standard contracts nor there exist any attempt on their part to approve form contracts.⁸⁹ Thus, as it stands now, standard terms in Ethiopia are prepared by suppliers. The question worthy of further scrutiny is what would be the effect, if the contract (be it standard term or not) includes unfair contract terms?

5.1.2 Unconscionable contract terms

As a rule, Ethiopian courts are not allowed to assess the fairness of contractual terms so long as they have fulfilled fundamental requirements of general contract. In relation to this, Article 1710 (1) of the CC stipulates: “A contract may not be invalidated on the sole ground that its terms are substantially more favorable to one party than the other party.” So, as a matter of principle, a contract cannot be invalidated on the sole ground of unconscionability or for containing terms which is more favorable to one contracting party.

An important issue that shall be raised here is the distinction between unconscionable contracts and unfair contract terms. Unconscionability is an oldest principle of law of contract that empowers courts of law to prevent ‘oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power’.⁹⁰ In terms of the scope, while the doctrine of unconscionability apply to any contract including consumer, commercial or employment although it is usually invoked by vulnerable parties in the transaction, unfair terms legislation is usually limited to B2C contracts which excludes commercial, or B2B contracts for it is presumed that they can protect themselves through negotiation or bargain.⁹¹ Laws on unfair contract terms, however, are latest developments that intend to safeguard the consumer from businesses (suppliers) whose knowledge of the product

⁸⁹ Interview with Financial Consumer Protection and Education Directorate of NBE, on *the approval of standard form contracts by the regulatory authorities*, October 28, 2025. Interview with Consumer Rights Protection and Awareness Head of MoTRI, on *the approval of standard form contracts by the regulatory authorities*, October 27, 2025.

⁹⁰ Michael Louis Aaronson. (2013). *Unconscionability in Contracts: A New Test* (Master of Arts Thesis State University, pp. 5-6). <https://doi.org/10.25675/3.020391>

⁹¹ See, Frederick Rieländer. (2025). Policing Consumer Contract Terms under US and EU Law: A Comparative Analysis of the Directive 93/13/EEC on Unfair Terms in Consumer Contracts and the Restatement of Consumer Contracts. *German Law Journal*, Volume 16, p. 770. <https://doi.org/10.1017/glj.2025.10138>.

feature, quality and general bargaining power is unmatched compared with the consumer thereby resulting in imbalanced contractual bargain.⁹²

The practical applicability of unconscionability is harder to satisfy and mainly depends on the subjective and case by case analysis of the court.⁹³ But, the enforcement of unfair contract terms is outright unless the consumer opts otherwise.⁹⁴ Thus, the two regimes have different scope of application; to some extent they overlap and they have different effects.⁹⁵ In terms of effect and remedy, when the contract is unconscionable, the court may refuse the whole contract or refuse to enforce the unfair clause at its discretion. In unfair contract terms, however, the effect is automatic, i.e., an unfair term is not binding on the consumer, and there is little or no judicial discretion on the fate of consumer contracts containing unfair terms.

Under Ethiopian contract law, the fact that the terms of the contract are more favorable to one party (unfavorable to the other) are not sufficient grounds to invoke invalidation.⁹⁶ The exceptions are when one of the parties obtain the consent of the injured party “*taking advantage of his want, simplicity of mind, senility or manifest business inexperience*”⁹⁷ to gain excessive advantage in the contract.

⁹² Aleksa Radonjić. (2018). *Behavioral Approach to Unfair Terms and Conditions I EU Consumer Law*, Institute of Comparative Law, Belgrade, *Strani pravni život*, Volume 18 (4), pp. 14-20.

⁹³ Sibony, *supra* note 34, pp. 204-212.

⁹⁴ Chitty, *supra* note 59, p. 131.

⁹⁵ Sibony, *supra* note 34, pp. 197-203.

⁹⁶ In some jurisdictions, the protection depends on the status of the parties – one of them being a consumer and the other a business and thus whether the term in question is in a consumer contract or not. A similar approach needs to be introduced in Ethiopia.

⁹⁷ See Ethiopian Civil Code, *supra* note 10, Art. 1710(2). The Amharic version of the same provision reads: ቢሆንም የተገኘው ፈቃድ የተገኘው ችግሩን፤ የመንፈስ ቀላልነቱን፤ በዕድሜ መግፋቱን፤ ወይም በንግድ ግልፅ የሆነ የልማድ ዕውቀት የሌለው መሆኑን በመደገፍ አንደሆነና በአሰራሩም ግፍ መስለው ሲታይ ውሉን ለማፋረስ ይቻላል። [Emphasis added]. The Federal Supreme Court Cassation Division, in the case between *W/ro. Desta Kidane* vs. *W/ro Ametie Ertabo*, decided in favour of the applicant (aged 90) contending that she lacked the required mental capacity, business experience and bargaining power to engage in fair transaction. See *W/ro. Desta Kidane* vs. *W/ro Ametie Ertabo*, (2010 E.C/Ethiopian Calendar), Volume 21, File No. 114398, Federal Supreme Court Cassation Decision, pp. 234-239. See also decisions based on similar reasoning in *Sheki Adem Faris* vs. *Sheki Mustefa Feli*, (2011 E.C), Volume 22, FN. 138591, Federal Supreme Court Cassation Division, Vol. 22, FN. 138591, pp. 44-47; and in *Ato Regassa Gurumu & Ato Tsegaye Gebremenfese* vs. *Ato Teshome Afework & W/ro Zenebech Geberemenfese*, (2011 E.C), FN. 138386, Federal Supreme Court Cassation Bench, pp. 48-53.

Under the Ethiopian Civil Code unconscionability can be a ground of invalidation only when the other party exploited the contracting party's want, simplicity of mind, senility or manifest business inexperience that in effect leads to unconscionable bargain. As Rene David noted, in other jurisdictions like Italy, "apart from lesion, where a contract has been obtained by exploiting the state of necessity of one of the parties, it permits the person who entered into the contract because of necessity to get out of it, even if the contract is not unfair."⁹⁸ In the Ethiopian Civil Code, the unconscionability of the contract and the identity of the injured party (his being senile, his want, simplicity of mind or manifest business inexperience) are not sufficient grounds warranting invalidation. The Ethiopian contract law demands further the satisfaction of the requirement of 'the interest of justice' or 'ሰላሳ ግዴታ መስሎ ሊታይ' (when it appears an affront to conscience) as the Amharic version of the Code puts it.

The Ethiopian contract law seems to assume the equivalent bargaining power of the contracting parties. However, the contemporary view among many jurisdictions is that courts or other organs that are entrusted to protect consumers' welfare should be empowered to evaluate the (un)fairness of contract terms and sometimes to interfere with the substantive bargain of the parties to the contract to safeguard the interest of consumers.⁹⁹ It is assumed that the consumer has always persistent want, little knowledge of the product feature and quality, inferior bargaining power and an overt business inexperience¹⁰⁰ that all militate against fair dealing with the trader that in effect demands protection through laws of unfair contract terms. Thus, although Ethiopian contract law may provide some avenues to prevent certain aspects of unconscionable contracts, the need for further unfair contract terms legislation (that takes consumers special interest into account) seems apparent.

5.1.3 The *contra proferentem* rule

The *contra proferentem* rule is a rule of construction or interpretation common in contract law. The main tenet of the rule is that "any doubt or ambiguity in

⁹⁸ Rene David, *supra* note 86, p.28.

⁹⁹ Sandra Booyesen. (2016). Twenty Years (And More) of Controlling Unfair Contract Terms in Singapore. *Singapore Journal of Legal Studies*, p. 221.

¹⁰⁰ Mc Levis Lynne Junior. (2025). Standard Agreements and the Protection of Consumers: A Critical Analysis. *Scholars International, Journal of Law, Crime and Justice*, Volume 8, No. 3, pp. 60-61. <https://dio.org/10.36348/sijlcj.2025.v08i03.002>. See generally, Stefan Haupt. (2003). An Economic Analysis of Consumer Protection in Contract Law. *German Law Journal*, Volume 4, No. 11. <https://doi.org/10.1017/S2071832200012013>.

an exemption clause will be interpreted against the person seeking to rely on it (proffering it”).¹⁰¹ In situations in which one of the contracting parties remains mere docile to the unfair trade terms proffered such as in adhesive or boiler plate contracts, the ambiguities will be interpreted against the party who made the terms or conversely, in favour of the adhering party. The Ethiopian Civil Code recognizes this principle under Art. 1738 (titled: Interpretation in favor of the debtor) which reads:

- (1) In cases of doubt, a contract shall be interpreted against the party who stipulates an obligation and in favour of the party who assumes it.
- (2) Stipulations inserted in general provisions, models or forms of contracts prepared by one party shall be interpreted in favor of the other party.

After applying other rules and principles of interpretation of contracts¹⁰², if there are doubtful cases, such ambiguities and contradictions are interpreted against the party who stipulates the term. As stipulated under the second sub-article, terms that need interpretation (such as ambiguous terms, contradictory terms, and silent terms) are interpreted against the drafting party. This provision protects the interest of the consumer if there are ambiguities in standard term contracts. In the case between *Ethiopian Airlines Group vs. Ato Habtamu Temesgen*, the FSCCD decided in favor of the applicant based on *contra proferentum* rule.¹⁰³ The Bench stated that as the contract made between the parties lacked clarity, it should be interpreted in favour of the person obliged by the contract or against the party that drafted the contract based on Art. 1738(1) of the Civil Code.

If the trader concludes a contract whose terms are clear and unambiguous, and yet embodies unfair contract terms, there would be no room for

¹⁰¹ If there is ambiguity, contradictions, or vagueness in the terms of the contract, the benefit of doubt will go to the non-drafting party in boiler-plate contracts or against the party that put forward the term in negotiated contracts. See, Charman, *supra* note 9, p. 121.

¹⁰² Ethiopian Civil Code, *supra* note 10, Arts. 1732-1738. In searching the common intention of parties (when the terms or words are silent, ambiguous, illogical, and contradictory), good faith (Art. 1732) should be presumed and the conduct of parties before, during and after the making of the contract has to be considered (Art. 1734). If the problem cannot be settled, context of the contract (Art. 1736), business practice (Arts. 1713 and 1732), good faith, equity, positive interpretation and lastly interpretation in favor of the debtor should be resorted.

¹⁰³ *Ethiopian Airlines Group vs. Ato Habtamu Temesgen*, (2008 E.C.), Volume 19, FN. 103910, Federal Supreme Court Cassation Bench, pp. 165-168.

interpretation by the judge as they are precluded from interpreting plain terms under the guise of interpretation.¹⁰⁴ Furthermore, interpretation, at times, involves a subjective evaluation and construction of the issue by the judge which in turn cannot be a guarantee for the weaker party, the consumer.

As one can understand from Article 1764 of the Code, the fact that the obligations assumed by a contracting party have become more onerous than he foresaw is not enough for courts' intervention saving limited exceptions stated under sub-article 2 of the same provision. Furthermore, as per Art. 1766 of the Code, the law permits the intervention of the court in contractual relations involving family members or other relations whose nature demands a special confidence between the contracting parties. This demonstrates that the Ethiopian contract law allows the courts' intervention only in restricted circumstances.

Thus, Ethiopian Courts cannot intervene in a contract to safeguard consumers because the law leaves little room for their intervention. Unlike the experiences of other legal systems (discussed in Section 4) that allow courts to intervene and preserve the balance of the contract in consumer contracts, Ethiopia's contract law provides no avenue for a consumer whose interest is affected by the trader through clearly drafted contract that includes unfair terms saving the exceptions stated above.

5.2.4 Exemption and limitation clauses

Exemption clause is a clause in a contract that aims to limit or exclude the liability of one contracting party towards the other. It incorporates both limitation and exclusion clauses. Limitation clause restricts a party's liability in a contract while exclusion clauses are intended to exclude or avoid liability in the contract.¹⁰⁵ Limitation clauses do not avoid liability rather it restricts the party's liability for a breach, misrepresentation or negligence. Normally, exemption clauses are the manifestations of parties' freedom of contract. It "indicate[s] '... [the parties] decision as to where certain risks involved in the transaction should fall."¹⁰⁶

Nevertheless, exemption clauses must not be unfair by excluding or limiting the liability one party would otherwise incur under the contract.¹⁰⁷

¹⁰⁴ Ethiopian Civil Code, *supra* note 10, see Arts. 1732 and 1714 (2) that prohibit courts from interpreting clear terms of the contract.

¹⁰⁵ Charman, *supra* note 9, p. 119.

¹⁰⁶ See, Richard Stone (2002), *The Modern Law of Contract*, 5th edn, Cavendish publishing, USA, pp.119-120.

¹⁰⁷ Stefan Vogenauer. (2020). Interpretation of Contracts and Control of Unfair Terms in Asia: A Comparison, *Studies in the Contract Laws of Asia III*. Edited by: Mindy Chen-

Such clauses tend to be problematic especially when they appear in standard form and consumer contracts as they usually have the aim of excluding or limiting the legal duty of the seller (supplier). Examples in this regard can be the event of the death or bodily injury of the consumer resulting from an act or omission of the seller (supplier) or excluding or limiting the legal rights of the consumer in cases of the seller's (supplier's) total or partial non-performance (of any of the contractual obligations) or inadequate performance.¹⁰⁸

The 'rules of incorporation' and 'rules of construction (interpretation)' are often used to mitigate the risks associated with exemption clauses.¹⁰⁹ The rules of incorporation exclude a clause that was not part of the contract from excluding the parties' liability. If the clause that limits the parties' liability is clearly incorporated in the contract, the party seeking remedy who was well aware of its incorporation cannot later demand remedy for the term.¹¹⁰ The other rule that mitigates the effect of exclusion clauses is the rule of construction- the *contra proferentem* rule, discussed above. Laws of unfair contract terms are also used to regulate the effect exclusion clauses.

In the Ethiopian context, the Code's drafter was cautious on provisions limiting or excluding liability as stated in his commentary that reads:

Clauses limiting or excluding liability are matters of great concern. One can fear that the beneficiary of such a clause has imposed them on the other party. In addition, in extreme cases, they destroy the very essence of the obligation and contract; a person who incurs liability is not legally obliged.¹¹¹

Accordingly, provisions limiting and excluding liability are regulated under Arts. 1679 and 1879 of the Civil Code. If the obligation assumed by the parties is "*subject to a condition the fulfillment of which depends solely on the party who assumes the obligation*", it will not be binding as per Art. 1879 of the Code. Such kinds of conditional obligations are called potestive conditions whose fulfillments depend on the wish of the debtor. Consequently,

Wishart and Stefan Vogenauer, Oxford University Press, p. 535. Available at SSRN: <https://ssrn.com/abstract=3790700>. (Accessed on 20 June, 2025).

¹⁰⁸ Tumade, *supra* note 18, pp. 23-24.

¹⁰⁹ Naude, *supra* note 68, pp. 506-509.

¹¹⁰ The rule takes the time (whether the term is timely communicated to the other party), and reasonable notice into account in determining the applicability of the rule. See Stone, *supra* note 1, pp. 222-224.

¹¹¹ David, *supra* note 86, p. 97.

contractual terms that totally exonerate the debtor from any liability of non-performance have no effect under Art. 1879(2).¹¹²

Yet, there are some provisions that empower parties to exclude, limit, or extend liabilities in their contract.¹¹³ Article 1887 of the Civil Code stipulates that “the parties may limit their liability under the contract and provide that they will not be liable unless they commit a fault.”¹¹⁴ Apparently, to claim the remedies of non-performance, proof of fault is not a requirement.¹¹⁵ However, the Ethiopian law of contract entitles contracting parties to come to an agreement to limit their liability to the extent that restricts their duty to fault based liability. It is to be noted that the laws of the selected jurisdictions highlighted above (in Section 4), regard terms of contract that exempt one of the parties from liability (especially the supplier in business to consumer contracts) a typical black-listed unfair contract term.¹¹⁶

Article 1888 empowers parties to exclude liability for the fault of their employees.¹¹⁷ It reads: “[t]he parties may provide that they will not be liable where non-performance is caused by a fault of their employees or auxiliaries.”¹¹⁸ In the case of consumer contracts, such provisions pave a way in which traders could abuse the interest of vulnerable consumers. For example, a consumer would not get remedies for a product that failed to fit its purpose if the failure is attributed to the fault of the employee of the trader provided they agreed to this effect. It is commonplace that most traders conduct their business operation through representatives, employees, or agents.¹¹⁹ The Ethiopian Commercial Code also permits traders to conduct their business operation through agents, employees or representatives. If the

¹¹² This provision is congruent with the ASEAN Guidelines on Unfair Contract Terms (UCT) and many other jurisdictions that have special unfair contract terms legislation. See, ASEAN Guidelines on Unfair Contract Terms, *supra* note 3, p. 8.

¹¹³ David, *supra* note 86, p.98.

¹¹⁴ See The Ethiopian Civil Code, *supra* note 10, Art. 1887.

¹¹⁵ Id., Art. 1791. See David, *supra* note 86, p. 98. See also Ayalew, *infra* note 122, p.100.

¹¹⁶ Vogenauer, *supra* note 107, p. 534.

¹¹⁷ See Ethiopian Civil Code, *supra* note 10, Art. 1887.

¹¹⁸ Id., Art. 1888. See Ayalew, *infra* note 122, p.101. Sub-article 2 of the same provision provides that “Any such provision shall be of no effect where it is made to the prejudice of a party who is the employee of the other party”. However, this sub-provision intends to protect contracting parties who are employees of the other contracting party. Saving this exception, the law empowers suppliers (traders) to exclude liability for the fault of employees, agents or auxiliaries, a provision that adversely affects the interest of consumers when it is applied to the context of B2C contracts.

¹¹⁹ The Commercial Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 1243/2021, Federal *Negarit Gazetta*, 2021, Art. 27-31, 36-53.

law allows them to exclude liability for the fault of their employees, agents and representatives, it could be unduly abused by suppliers (traders) to encroach upon the interest of consumers. Cognizant of this problem, various states consider the exclusion of liability of employees or agents as a typical case of unfair contract term condemned by law.¹²⁰

The other provision worthy of scrutiny is Art. 1886 of the Civil Code that allows contracting parties to extend their liability under the contract notwithstanding the fact that performance is precluded by *force majeure*.¹²¹ Here again, in consumer contracts, the trader may abuse such terms to extend the liability of the consumer who can perhaps be unaware of the nature of the bargain or the product or who may lack the necessary prudence to ward-off clauses that affect his interest via extension of liability.

Exclusion clauses are not envisaged under the Ethiopian contract law.¹²² Accordingly, it would create a room for using harsh and unrealistic clauses in consumer contracts by sellers of goods and suppliers of services. The absence of a clear law affects the interest of the consumer;¹²³ because if the law is silent, it seems unlikely for a judge to guarantee the interest of the consumer through interpretation or judicial activism. Under Art. 1733, judges are precluded from interpreting the contract when the terms of the contract are clear.

5.2.5 Cancellation and termination clauses

Cancellation is one of the remedies available for creditors who have performed their obligations. Termination, in turn is the cessation of obligation created by the contract.¹²⁴ In business-to-consumer (B2C) relationships,

¹²⁰ See for instance, the Australian Competition and Consumer Act of 2010, Article 25(1) /i/. available at <https://www.legislation.gov.au/C2004A00109/latest/text>. Refer also the European Communities (in consumer contracts) Regulations, S.I.No.1995, Schedule 3 1(n) which reads “limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality” as unfair contract term.

¹²¹ See the Ethiopian Civil Code, *supra* note 10, Art. 1886.

¹²² Mulugeta Mengist Ayalew. (2010). Ethiopia. In *International Encyclopedia of Laws: Contracts*, edited by J. Herbots. Alphen aan den Rijn, NL: Kluwer Law International, p.101.

¹²³ In civil law legal system where the judge is passive with limited judicial activism, it seems unlikely that they will safeguard the interest of the consumer through interpretation even in blatant cases of unconscionability. The law also precluded the judge from interpreting a clear contract term despite its unconscionability as per Art. 1733.

¹²⁴ Ethiopian Civil Code, *supra* note 10, Arts. 1819-1925.

however, clauses that grant the supplier a unilateral right to cancel or terminate a contract can become unfair where they are not reasonably necessary to protect the supplier's legitimate interests or are triggered by trivial or inconsequential consumer breaches.¹²⁵ Under the EU's Directive 93/13/EEC, for instance, termination without reasonable notice, unilateral alteration of terms, allowing the supplier a purely discretionary right to terminate, termination clause that empowers the supplier to terminate for inconsequential (minor or technical breaches on the part of the consumer), retention of payment for consumers cancellation, etc. are deemed to constitute unfair contractual clauses in business to consumer contracts.¹²⁶

In Ethiopia's contract law, Art.1820 (1) of the Civil Code provides that "[p]rovisions may be made in the contract to the effect that the parties or one of them may terminate the contract on notice". Accordingly, as long as the parties' consent to the contract is ascertained, the law and, in effect, courts, may not give a consumer a remedy in similar instances. Thus, both cancellation and termination clauses, which are permitted for contracting parties under the Civil Code, appear to undermine the protection of consumers' rights in the contemporary market environment.

5.2.6 Penalty (indemnity) clauses

A contractual clause that contains penalty is also another type of clause that has typically been viewed with suspicion and subjected to judicial control.¹²⁷ Contract law provides default rules that supplement the agreement between contracting parties, and it also gives them discretion to determine the remedy in cases of non-performance. However, the amount of penalty stipulated in the contract may be disproportionately higher than the loss the other party could sustain or a reasonable estimate of the probable damage a party may suffer as a result of non-performance.¹²⁸ On the other hand, liquidated damages can be easily enforced by courts because they reasonably estimate the actual damage the defaulting party may cause to the other party.

¹²⁵ See Consumer Protection Act 68 of 2008, *supra* note 22, Art. 52(2) /f/. Look at also the Australian Competition and Consumer Act of 2010, *supra* note 120, Arts. 24 and 25. Available at <https://www.legislation.gov.au/C2004A00109/latest/text>. See also Unfair Contract Terms: A Guide for Businesses and Legal Practitioners, Commonwealth of Australia, 2016, p. 14.

¹²⁶ See Directive 93/13/EEC, *supra* note 47, Article 3(3) 1(1(d), 1(f), 1(g), 1(j) (and by extension 1(k) and 1(b)).

¹²⁷ Vogenauer, *supra* note 107, p. 536.

¹²⁸ While the parties' reasonable estimate is named a liquidated damage, clauses that stipulate excessive and punitive amount of damages are known as penalty clauses.

There is variation in the approach adopted by different jurisdictions with regard to penalty clause.¹²⁹ In common law legal systems, there can be cases in which courts are empowered to intervene in the contract to mitigate the effect of penalty clause. The assumption is that “the basic principle of awarding damages, is purely to compensate”¹³⁰ the prudent party’s damage. As a rule, civil law jurisdictions allow the enforceability of pre-determined penalty clauses in case of non-performance.¹³¹ However, if such payment is manifestly ‘excessive’ or ‘disproportionate’, they will not be enforced and thus would be made ineffective.¹³² Stated otherwise, judges are endowed with a significant power to reduce a manifestly excessive penalty clause or to increase manifestly inadequate liquidated damages.¹³³

The distinction between penalty clause and liquidation clause does not exist under Ethiopian contract law.¹³⁴ Contracting parties are permitted to agree any sum the defaulting party ought to pay in cases of non-performance and as a matter of principle a court should honor the parties’ agreement. The only exception the court may intervene in the contract is stated under Art. 1893 of the Code when a penalty was intended for total non-performance and the debtor’s obligation has been partially performed. Besides, the court may award greater penalty than the parties have fixed provided that non-performance is caused by the defaulting party’s gross negligence, intention to cause damage or grave fault.¹³⁵ Save these exceptions, contracting parties are at liberty to determine the amount of penalty the defaulting party would pay.

In consumer contracts, however, the consumer could be harmed by excessive and unreasonable penalty clauses embodied in standard form contracts or other ordinary contracts. The current legal pattern discourages the use of excessive and unreasonable penalty clauses in consumer contracts and it considers such agreements black listed terms.¹³⁶ Thus, they will either be unenforceable or subject to modification by court intervention, especially in

¹²⁹ David, *supra* note 86, pp. 96-100. See Ayalew, *supra* note 122, p. 101-103. See again, Charman, *supra* note 9, p. 226. See also, Vogenauer, *supra* note 107, p. 536.

¹³⁰ See Charman, *supra* note 9, p.226.

¹³¹ Ayalew, *supra* note 122, pp.102-103.

¹³² Vogenauer, *supra* note 107, p. 536-537.

¹³³ See Ordinance No. 2016-131 of 10th February 2016, French Civil Code, Art. 1152. See also Charles, *supra* note 58, p. 285.

¹³⁴ Civil Code of Ethiopia, *supra* note 10, Article 1889- Penalty Clause:

“The parties may fix the amount of damages which will be due, should a party fail to discharge his obligations or to discharge them completely and in due time.”

¹³⁵ Id., Arts. 1893 &1892.

¹³⁶ Excessive penalty clause is a black-listed unfair contract term. *Examine*, for instance, Vogenauer, *supra* note 107, p. 532. See also Charles, *supra* note 58, p. 285.

consumer contracts. This is meant to maintain the interest of consumers, and it is a lesson worthy of introduction into Ethiopia's legal system.

5.2.7 Other provisions of potential unfairness

The Ethiopian contract law expects the consumer to confront some sort of duress that targets at the persons stated under Article 1706 which does not include distant relatives and threats and pressures of non-serious and non-imminent nature. In the same fashion, a treat to exercise right may not be a ground for invalidating the contract if it is not used to gain excessive advantage to the party who exerted the treat by virtue of Article 1708 of the Code. Article 1708 intends to protect only those contracting parties that have a special loyalty between them.

5.3. The Ethiopian sales law vis-à-vis unfair contract terms

The closer scrutiny of the existing Ethiopian sales law reveals some provisions that incline towards the interest of the seller (supplier) than the consumer (buyer). Article 2275 of the Code provides that "When the seller undertakes to deliver 'about a certain quantity' of specified goods, it shall be for him to determine the exact quantity to be delivered, unless it appears from the circumstances that such stipulation has been included in the contract in the sole interest of the buyer." This provision gives primacy for the seller to determine the exact quantity to be delivered.

Of course, the second sub-article of the same provision, in an attempt to minimize the loss of the buyer, states that the difference between the approximate quantity fixed in the contract and the quantity actually delivered shall not be more than ten percent of the whole cargo of a ship or five percent in other cases.¹³⁷ Yet, giving such power to the supplier in business to consumer (B2C) contracts negates the interest of vulnerable consumers. Allowing the supplier to determine the exact quantity would jeopardize the interest of consumers in consumer contracts.¹³⁸

¹³⁷ An individual consumer may not order or purchase such a large quantity of products or a cargo of a ship. However, it could affect Small and Medium Sized enterprises and consumer associations. In the comparative studies made in this research, South Africa allows Small and Medium Seize Enterprises (SMSE) and bodies corporate below a threshold determined by the Ministry to enjoy similar protections like an ordinary consumer. This provision could affect such entities that are not expressly included in Ethiopian laws.

¹³⁸ Art. 2277 states that when the parties agree on the date of delivery to be during a given period, it is for the seller to fix the exact date of delivery saving limited exceptions. This provision is again inclined towards the interest of the supplier as the law gives the

The other provision worthy of inquiry is Art. 2297 of the Code which states that “Any provision excluding or restricting the warranty shall be of no effect where the seller has fraudulently concealed from the buyer the defects in the thing.” The contrary reading of this provision is that saving the sellers’ fraudulent acts, the seller seems to be permitted to restrict or exclude warranty, an act which incontestably negates consumers’ right. The cumulative reading of Arts. 2294 and 2295 of the Civil Code also indicates that if the parties agree on an express period of warranty, the buyer is duty bound to adhere, and a proof by the seller about the buyer’s knowledge of the defect will have the effect of voiding the warranty given to the buyer.¹³⁹ Likewise, as it is vividly indicated under Article 2085(2) of the Ethiopian law of extra-contractual liability, the failure of the consumer to examine the good has an effect of depriving the consumers’ right to claim damage for the losses because of the mere fact that the consumer failed to make a customary examination of the good.¹⁴⁰

These provisions, seen from the perspective of B2C contracts, could result in depriving the consumers’ right of warranty and compensation for damages. Because of differences in knowledge, prudence and information about the product, the possibility of misleading the consumer (by the seller/supplier) is too high and these provisions can be used as a shield by deceitful suppliers for so doing. As understood from the aforementioned provisions, the Ethiopian sales law has upheld the age old principle of *caveat emptor* (‘let the buyer beware’). The application of the principle of *caveat emptor* is very problematic for it exposes consumers to the prey of unscrupulous sellers. *Caveat emptor* shifts the liability for unsafe products, or unsatisfactory services from the seller to the buyer, the consumer.

decision to determine the exact time of delivery to the seller. Seen from the vantage point of B2C contracts, this provision might expose the consumer to further abuse.

¹³⁹ Ethiopian Civil Code, *supra* note 10, Article 2295 (1) reads “where the seller can prove that the buyer knew the defects at the time of the contract, he shall not be liable on his warranty against defect”. (2) In such a case, an express warranty given by the seller shall itself be void. Moreover, Article 2296 (1) declared that “The seller shall not be liable on a warranty against defects which are so obvious that the buyer could overlook them only as a result of gross negligence.

¹⁴⁰ *Id.*, Article 2085 (1) of the Civil Code provides that “A person who manufactures goods and sells them to public for profit shall be liable for any damage to another person resulting from the normal use of the goods. (2) *No liability shall be incurred where the defect which has caused the damage could have been discovered by a customary examination of the goods.*” [Emphasis added]. This shows that our law still follows the *caveat emptor* principle while the contemporary view supports *caveat venditor*.

Meanwhile, the contemporary view in many legal systems is that “it is not the buyer but the seller who must watch his step, lest he run afoul of the State....”.¹⁴¹ Thus, in various modern legal systems, there is a shift from *caveat emptor* (let the buyer beware) to ‘*caveat venditor*’ (let the seller beware)¹⁴² to protect vulnerable consumers whose knowledge of the product quality and bargaining power is apparently below the seller (manufacturer). This is a major development that should be a lesson for Ethiopian sales law legal regime to keep pace with the modern legal order.

Other jurisdictions have enacted laws that protect consumers from different unfair practices of suppliers through separate consumer sales laws. For instance, the European Union’s Sales of Goods Directive imposes liability on sellers for non-conformities arising within one or (if states opted) two years of the date the goods are delivered. Thus, being aware of the difficulties the consumer would face to prove the non-conformity of goods at the time of delivery, Europe came up with new legal principles called ‘the presumption of non-conformity’ and ‘reverse burden of proof’ in which any lack of conformity in the goods which is apparent within one year (or if states opted two years) of delivery to be deemed to exist at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.’¹⁴³

If the good is found defective or non-conforming to the purpose it was bought, the law automatically assumes that the defect was there when the consumer purchased it notwithstanding any negligence on the part of the

¹⁴¹ As LeViness noted “*caveat emptor* is today a pretty sick horse. It is not so much the buyer as it is the manufacturer and the merchant who must beware, on penalty of fine or imprisonment.” See Charles T., *Caveat Emptor versus Caveat Venditor*, Maryland Law Review, 1943, Vol.7, Issue 3, p.177. Available at "Caveat Emptor Versus Caveat Venditor" by Charles T. LeViness.

¹⁴² Ibid. See also, Shalu Nigam Advcate (2020), *From Caveat Emptor to Caveat Venditor: The Consumer Protection Act 2019 And the Consumer Rights*, *Legal News and Views*, Vol. 34, No.3, pp.1-7.

¹⁴³ See Article 11 of the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. It reads: (1) Any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. This paragraph shall also apply to goods with digital elements. (2). Instead of the one-year period laid down in paragraph 1, Member States may maintain or introduce a period of two years from the time when the goods were delivered.

consumer.¹⁴⁴ The onus of proving otherwise rests on the seller (supplier) hence, reverse burden of proof. The seller is required to disprove the non-existence of the defect or the conformity of the goods sold. The law also precludes the seller from excluding liability through contractual warranty.¹⁴⁵ Thus, the Ethiopian sales law has clear gaps in protecting consumer rights especially when seen from the perspective of B2C contracts.

5.4 The Trade Competition and Consumer Protection Proclamation No. 813/2013

Ethiopia has successively amended its laws on consumer protection.¹⁴⁶ Among the myriad of issues the Trade Competition and Consumer Protection Proclamation (hereinafter, TCCPP) laid down, the part that deals with the protection of consumers is relevant for the theme of this paper. The Proclamation promises to create a leveled field of competition for businesses through the prohibition of anti-competitive and misleading market conducts to create conducive environment in which consumers get goods and services equivalent to the price they pay.¹⁴⁷ A consumer is defined, in the Proclamation, as “a natural person who buys goods and services for his personal or family consumption, whether the price is being paid by him or another person and not for manufacturing activity or resale.”¹⁴⁸ The Ethiopian consumer law protects only natural persons who use services or purchase goods for personal or family consumption. Thus, unlike the other jurisdictions such as South Africa, Australia and the US, it does not extend the definition of a consumer to small and medium-sized enterprises (SMEs), an opportunity that could be relevant (in the Ethiopian context) to safeguard small businesses.

Furthermore, in dealings with the supplier, a consumer has a right to obtain sufficient and accurate information or explanation of the goods or services, the right to buy goods or services on the basis of choice, the right not to be compelled to purchase the good or service, the right to be received humbly

¹⁴⁴ See Rodger Van den Bergh & Louis Visscher. (2009). *Consumer Sales Law from an Economic Perspective*, Rotterdam Institute of Law and Economics, Erasmus University Rotterdam, pp. 9-10. <https://repub.eur.nl/pub/31473>

¹⁴⁵ Ibid.

¹⁴⁶ There were a number of laws related with consumer protections in Ethiopia. These were: The Unfair Trade Practices Decree No 50/1963; Unfair Trade Practices Proclamation No. 228/1965; Trade Practice and Consumers' Protection Proclamation, (2013), Federal *Negarit Gazzeta*, Proclamation No. 685, 16th Year No. 49 Addis Ababa; Trade Competition and Consumers Protection Proclamation, (2013), Federal *Negarit Gazzeta*, Proclamation No. 813, 20th year, No. 28.

¹⁴⁷ Id., Preambular part paragraph 1-3.

¹⁴⁸ Id., Arts. 15-19 and 14.

and respectfully, and the right to claim compensation for the damages sustained as a result of the goods or services.¹⁴⁹ Moreover, Art. 20(2) of the TCCPP provides:

A consumer may, without prejudice to warranties or legal or contractual provisions more advantageous to him, demand the seller within 15 days from the date of purchase: (a) in the case of defective goods, to replace the goods or refund the price paid; or (b) in the case of defective service, to deliver the service free of charge or to refund the fee paid.

Thus, the consumer's right to replace the good or obtain the service free of charge which are found defective than the consumer agreed with the supplier is respected in the Proclamation. Furthermore, a consumer's right to claim compensation for damage as a result of the defect in goods or services is also acknowledged under sub-article 3 of the same provision. Nonetheless, consumers will not have a redress for defects discovered after the lapse of the 15 days.

Considering the vulnerability of the consumer, other jurisdictions extend this timeframe so that consumers' right will remain intact despite the lapse of some time. For instance, the cumulative reading of Article 10 and Article 11 of the European Union Consumer Sales Directive¹⁵⁰ provides that 'the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time'. Even in the case of second-hand goods, where the law allows the seller and buyer to negotiate, the agreed period cannot be less than one year.¹⁵¹ Thus, the TCCPP's protection to consumers' interest in this regard is too narrow as the period of limitation is too short even for prudent consumers to exercise their right. Furthermore, as it is already elaborated under the discussion on law of sales (in Section 5.3 above), the burden of proving the non-conformity of the goods purchased is upon the consumer for there is neither a legal recognition of the reverse burden of proof nor the presumption of non-conformity in the TCCPP.

Art. 14(5) in tandem with Art. 20 (3) of the Proclamation imposes liability on vendors of a defective product that causes damage or injury on the consumer. To safeguard the consumer from being abused by the supplier or

¹⁴⁹ Id., Article 14.

¹⁵⁰ See Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing directive 1999/44/EC, Article 10 (1).

¹⁵¹ See Directive (EU) 2019/771, Article 10(6).

trader in their contract, Art. 21 of the TCCPP¹⁵² prohibits contractual waiver of the consumer's right vested under the Proclamation. Hence, a trader or a consumer cannot exclude the rights of a consumer stipulated under the Proclamation.¹⁵³ However, the Proclamation does not directly address unfair contract terms. Nor does it allow courts to safeguard consumers' rights against unfair contractual terms.

Interviews conducted with pertinent experts from the Ministry of Trade and Regional Integration (MoTRI), a ministry that oversees and handles issues relating to consumer rights¹⁵⁴, revealed that, although a holistic study on the prevalence of unfair terms in consumer contracts has not yet been undertaken by the Ministry, they believe that unfair contract terms are prevalent in the market.¹⁵⁵ Experts noted that in their daily work routines, they encountered some businesses using standard contract terms with misleading terms, contracts written only in English, densely packed writings that often include legal jargons and references owing to, among other things, the absence of clear legal regime that prohibits such drafting practices.¹⁵⁶ Furthermore, they revealed that the Ministry attempts to resolve disputes of such nature by interpreting existing laws through analogy and at times it endeavors to negotiate the consumer and suppliers.¹⁵⁷ This illustrates that consumers are facing unfair contractual terms in the marketplace, and the current legal framework is inadequate in providing effective protection against unfair contract terms.

¹⁵² TCCPP No. 813/2013, *supra* note 145, Article 21 provides “*The provisions of a contract made between a consumer and a business person that provide for the waiver of rights vested in the consumer under this Proclamation shall be of no effect.*”

¹⁵³ Typical rights recognized include: the right to be respected, the right to receive information, the right to choose, the right to be protected from coercion and the right to claim compensation for damages and defects in the good/service) recognized under the Proclamation. See, *id.*, Art.14 of the TCCPP.

¹⁵⁴ Interview with Anti-Competitive and Law Violation Prevention Desk Head at Ministry of Trade and Regional Integration, *on the prevalence of unfair terms in consumer contracts in the Ethiopian market*, October 27, 2025.

¹⁵⁵ *Ibid.* Interview with a legal expert works at Consumer Rights Protection and Awareness Desk of MoTRI, *on the prevalence of unfair terms in consumer contracts in the Ethiopian market*, October 27, 2025.

¹⁵⁶ Interview with Anti-Competitive and Law Violation Prevention Desk Head at MoTRI, *on the prevalence of unfair terms in consumer contracts in the Ethiopian market*, October 27, 2025.

¹⁵⁷ *Ibid.*

5.5 The Financial Consumer Protection Directive No. 292/2021: The new wine in the old bottle

One of the special regulatory directives designed to protect consumers in the financial services sector is the Financial Consumer Protection Directive No. 292/2021. The FCPD contains rules and principles which aim to regulate financial service providers to ensure the protection of financial consumers, *inter alia*, against unfair contract terms. It regulates the contractual relations between the financial consumer and financial institutions i.e., banks, microfinance institutions, insurers, capital goods finance companies, postal savings, money transfer institutions and other institutions designated by the NBE.

The overall objective of the directive is to protect financial consumers through establishing clear and objective financial consumer protection regulation, supervision, complaint handling and dispute resolution mechanism so as to promote fair, responsible and transparent financial transactions and shape the professional conduct of financial service providers towards financial consumers.¹⁵⁸ It demands fair and transparent financial service and requires the treatment of consumers honestly and without discrimination giving special attention and priority to the vulnerable and marginalized groups.¹⁵⁹

The Directive defines financial consumer contract as “a contract between the financial consumer and the financial service provider on financial products or services”. It also defines ‘standard form contract’ as “a financial product or service contract or a security contract that has been prepared by a financial service provider without negotiation and consent with the financial consumer or security provider.”¹⁶⁰ Accordingly, the unfairness of the terms or conditions of a financial consumer contract in and of itself does not create unfair contract terms if it is negotiated between the financial service provider and the financial consumer; i.e. substantive unfairness in negotiated (dickered) financial contracts remain unregulated in the directive with regard to how abusive or unfair the term might be for the financial consumer.

Under the Directive, every financial service provider is precluded from including unfair contract terms in standard-form contracts against the financial consumer, and this marks a positive development. In illustrating what constitutes unfair contract term in standard-form contract, the Directive under 5.1.1.2 stipulates that “A term in standard form contract shall be unfair if it”:

¹⁵⁸ See FCPD No. 292/2021, *supra* note 11, Preambular Part Paragraph 2 & 3.

¹⁵⁹ *Id.*, Arts. 4.1 & 4.2.

¹⁶⁰ *Id.*, Arts. 2.31.

- a) imposes terms inconsistent with Article 1710(2) of the Civil Code, that is, having the consent of the injured party by taking advantage of his want, simplicity of mind, senility or manifest business inexperience;
- b) causes a significant imbalance in the rights and obligations between a financial consumer or security provider and a financial service provider;
- c) causes detriment to the financial consumer or security provider; and
- d) is different from the one that is stipulated to protect the financial service provider's legitimate interests.

Despite the Directive's recent promulgation at the time when protection of consumers against unfair terms is rampant, it cross-refers Civil Code- Article 1710(2). This restricts its scope only to financial consumers affected by 'want, simplicity of mind, senility or manifest business inexperience' and when the ultimate bargain leads to unconscionable result repugnant to justice as elaborated earlier under section 5.1.2 of this article.

As discussed earlier, the cross-referred provision of the Civil Code fails to consider all financial consumers as vulnerable parties worthy of protection against unfairness. It must be noted that other jurisdictions examined in this article provide protection to consumers irrespective of the conditions stated in Article 1710 of the Civil Code, i.e. want, simplicity of mind, senility, or manifest business inexperience. This coupled with the fact that the scope of unfair contracts term regulation is constrained to standard form contracts that are not negotiated between the financial service provider and the consumer makes the regulation of unfair contract terms in the Ethiopian legal system lenient. Thus, the FCP Directive only brings little protection beyond the already existing narrower protection recognized under the Civil Code.

Article 5.1.1.3 of the FCP Directive illustrates what amounts to unfair terms in standard form contract. Although the lists are not exhaustive, terms "that allow the financial service provider to make changes to the contract without describing the circumstances in which such changes may be made; terms that allow charging of fees or charges not previously disclosed; or which are prohibited and restricting early payment of a credit contract"¹⁶¹ are stated as illustrations of unfair terms.¹⁶²

¹⁶¹ FCPD No. 292/2021, *supra* note 11, Art., 5.1.1.3.

¹⁶² In jurisdictions where laws on unfair contract terms are in operation, "binding consumers to hidden terms" or "terms that empower the supplier to alter contractual terms" are clear instances of prohibited unfair contractual terms. In practice, however, some banks are imposing fees and charges without having those terms contained in

Accordingly, it would have been better had the directive exhaustively listed unfair contract terms both for the financial service institutions and the consumer alike. Erstwhile notification of unfair contract terms in the directive would save the financial service provider from unnecessary litigations with financial consumers, while consumers can easily exercise their right at the time of making a contract or thereafter if terms are exhaustively listed for their cognizance.¹⁶³ As the directive is a special legislation dedicated to the issue of consumer protection, it ought to list all possible unfair contract terms in exhaustive manner.

The directive presumes all financial consumer contracts or security contracts as standard-form contracts unless the financial service provider proves otherwise.¹⁶⁴ This provision is compatible with modern consumer protection laws as it recognizes a rebuttable presumption that financial contracts are standard-form contracts unless proved otherwise by the financial service provider. It is a crucial provision in safeguarding consumers' right especially when seen in tandem with the *contra proferentum* rule recognized in the Civil Code.

A question worthy of inquiry here is the existence of approval of standard form financial consumer contracts by the regulatory authority, the NBE. In relation to this, Art. 1686 of the Civil Code (cited in Section 5.1.1) above states that “the general terms of business applied by a party shall not bind the other party” unless they are known and accepted by the latter or unless “they were prescribed or approved by the authorities”. However, in practice and as stated by FCPED of the NBE, the bank neither approves nor yet examines content of standard form financial contracts prepared by financial service providers.¹⁶⁵ The experience of jurisdictions with strong consumer protection

their contract by merely notifying their customer, via texts, thereby depriving the customer a chance to withdraw or decide on the payment of fees (charges). See Office of Fair Trading, Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, OFT 311, September 2008, pp.13-68.

¹⁶³ Many countries provide a black list, grey list or blue list of unfair contract terms in their unfair contract terms legislations. For instance, see, Unfair Contract Terms Directive, *supra* note 47, Article 3(3). See also Consumer Protection Act, *supra* note 22, Sections 48(2) and 51. See the 2008 Indian Unfair Procedural and Substantive) Terms in Contract Bill, Bill No. LVIII of 2018, Section 17(1) (b). See also Giorgio de Nova ‘Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts’, in Naude, *supra* note 67, p. 131.

¹⁶⁴ FCPD No. 292/2021, *supra* note 11, Art. 5.1.1.4

¹⁶⁵ Interview with Financial Consumer Protection and Education Directorate of NBE, on the practical implementation of the Financial Consumer Protection Directive, October 28, 2025.

law (including laws on unfair contract terms) reveals that regulators approve or inspect the content of standard-form contracts to ascertain the existence or otherwise of UCTs in the market.¹⁶⁶ Various jurisdictions allow authorities to register and review standard-form consumer contracts prior to their use in the market.¹⁶⁷

Another important concept introduced in the Directive is the duty of the financial service provider to provide ‘key fact statements (KFS)’ to the financial consumer.¹⁶⁸ Thus, requiring the financial service provider to state key facts to the consumer is congruent with modern laws on unfair contract terms which demand consumer contracts to be provided in clear and conspicuous manner. Furthermore, as stated under 4.1 and 4.2 of the Directive, the principle of fair treatment and transparency principles are compatible with the legal requirements in modern unfair contract terms.¹⁶⁹

The Directive (Art. 5.2.2) stipulates the required form of standard financial contracts and the manner of disclosure. To enhance transparency, it requires financial service providers to ensure that any information, contract, or notice provided to a financial consumer or security provider is (i) easily legible, (ii) simple and clearly expressed, (ii) printed and displayed in a minimum font size of 12, and (iv) available in Amharic, English and regional working language where the financial customer is located.¹⁷⁰

This is intended to make the terms of the standard contracts’ clear, conspicuous and understandable. However, such rule alone “will not improve consumers’ understanding if the disclosed or noticeable terms remain lengthy

¹⁶⁶ For discussion of the issue of regulation of unfair terms in consumer contracts, see, section 4 of this paper. See generally, Adar and Becher, *supra* note, 25; See, Malawi Consumer Protection Act, Consumer Protection Act Chapter 48:10, Arts. 26 & 27, available at <<https://faolex.fao.org/docs/pdf/mlw121036.pdf>> (Accessed on 10 December, 2025). See also, Catherine Pédamon. (2018). “The New French Contract Law and Its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship, European and Comparative Perspective. In Catherine, (edn.) *The Future of the Commercial Contract in Scholarship and Law Reform*, p. 109-118.

¹⁶⁷ For instance, see Tanzanian Fair Competition Act of 8 of 2001, Art. 92. See also its 2003 Amendment, Art. 36. See also Vietnam Law on Protection of Consumer Rights and Decree 55/2024, Art 6 and 25 and other Decisions of the Prime minister requires businesses that provide electricity, water, telecom, air/rail transport, and apartment sales. This Decree mandates Ministry of Industry and Trade (and its provincial Departments) to manage the registration and control *before* implementation and supervision. See also, Renouf, *supra* note 23, pp. 4-5.

¹⁶⁸ FCPD No. 292/2021, *supra* note 11, Art. 5.2.4.1.

¹⁶⁹ Id., Arts. 4.1 and 4.2

¹⁷⁰ Id., Art. 5.2.2.

and complex, –as is often the case”.¹⁷¹ Examining the practice of many banks and insurance companies reveals that they fail to comply with these minimum requirements of standard contract form and manner of disclosure. The terms and conditions are often written densely, with narrow spacing, in a small font, contrary to the Directive, and are prepared in English version that include legal and technical jargons- with cross-references in a manner that an average financial consumer cannot understand.¹⁷² Even the Directive itself, issued by the NBE, has not yet been prepared or translated into Amharic. Under such circumstances, it seems unrealistic to expect financial service providers to prepare their standard-form contracts in Amharic or other regional working languages as required under the Directive.¹⁷³

In jurisdictions examined in this article, a consumer contract particularly standard form contract would be void if it imposes unfair terms that are detrimental to the consumer and at times entails both civil and criminal sanctions. However, Art. 10 of the Directive imposes a penalty of 10,000 Birr for each violation in cases of non-compliance with the provisions of the Directive in addition to taking any other measures the NBE deems necessary.¹⁷⁴ It is commendable that there are penalties other than administrative measures. Yet, the penalty is lenient as it does not in any way deter financial institutions as they may find their acts profitable because it only entails the payment of the fine rather than deterrence toward abstention from engaging in unfair contractual dealings with a customer.¹⁷⁵

¹⁷¹ Adar and Becher, *supra* note 25, p. 2435.

¹⁷² For instance, there is an insurance corporation’s policy (in Ethiopia) that reads ‘in case of contradiction the English version of the policy is final and binding’ while it is known that most customers are not well aware of various technical terms in insurance policy written in English.

¹⁷³ Our interview with the expert of NBE revealed that such gaps are visible because of the dearth of experts. According to the respondent of the interview, the Financial Consumer Protection and Education Directorate of NBE is currently comprised of just five staff members, who are supposed to supervise and monitor 60 Microfinance Institutions, 32 Banks, and 20 Insurance Companies with their numerous branches. Thus, it seems practically unattainable for them to supervise each branch of the financial sector to verify the applicability or otherwise of the Financial Consumer Protection Directive.

¹⁷⁴ FCPD No. 292/2021, *supra* note 11, Art. 10.

¹⁷⁵ In South Africa, the National Consumer Tribunal can impose up to R1 million or 10% of the suppliers annual turnover. See Consumer Protection Act, *supra* note 22, Arts. 48, 51 and 52 and Regulation No. 44. The experience in Australia is that courts can impose civil penalty for relying or proposing unfair terms in consumer contracts. For companies/corporations is up to 50 million AUD, or threefold of the benefit obtained from the contravention if measurable, or 30% of the adjusted turnover during the period

The other important issue slightly indicated in the Directive is the effect of unfair financial consumer contracts. Under 5.2.12.3, the Directive declares the inclusion of ‘terms that allow unilateral changes without describing the triggering circumstances or without adequate notice’ as null and void. However, it remains unclear whether the effect of other unfair terms is also void. This coupled with the failure of the Directive to exhaustively mention instances of unfair contract terms could create inconvenience for both regulatory authorities and courts.

The engagement of NBE (in terms of both manpower and resource) is limited to supervising and thereby ascertaining the practical applicability of the Directive. The NBE has recently created a directorate for consumer protection. The interview with the experts in the Financial Consumer Protection and Education Directorate (FCPDE)¹⁷⁶ shows that they have not yet supervised all branches of banks operating in Addis Ababa. It is thus possible to argue that limited consumer voice and access to redress, weak enforcement and monitoring, absence of strong consumer associations, financial literacy gaps and the Directive’s internal gaps in adequately introducing a full-fledged financial consumer protection regulatory landscape (which safeguards consumers from unfair financial contracts) are some of the problems that challenge the implementation of the FCPD.¹⁷⁷ Thus, while the financial sector’s consumer protection legal regime may appear as “a new wine”, it remains to be served in the “old bottle” of outdated definition of unfairness, weak supervision and lenient sanction among others.

of breach. For individuals, a fine of up to AUD 2.5 million can be imposed. See, Treasury Laws Amendment Act 2022 Measure No. 3, available at <https://www.ato.gov.au/law/view/pdf/acts/20220075.pdf>. (Accessed on 12 December, 2025).

¹⁷⁶ According to the Financial Consumer Protection and Education Directorate (FCPDE), the reason for weak enforcement of the Directive is due in part to manpower constraints: it currently employs only five staff members, who are expected to supervise and monitor approximately 112 financial institutions, including 60 microfinance institutions (MFIs), 32 Banks, and 20 insurance companies. Interview with Financial Consumer Protection and Education Directorate of NBE, *on the challenges NBE is facing in implementing financial consumer rights*, October 28, 2025.

¹⁷⁶ FCPD No. 292/2021, *supra* note 11, Article 5, 5.

¹⁷⁷ Interview with Financial Consumer Protection and Education Directorate of NBE, *on the challenges NBE is facing in implementing financial consumer rights*, October 28, 2025.

6. Concluding Remarks

Contract law respects the freedom of choice and autonomy of contracting parties. Yet, “there are sometimes conflicting values, and freedom of contract may sometimes give way.”¹⁷⁸ A contracting party (such as a consumer) may not have equal knowledge, prudence, information or resource to bargain with the supplier in ways that safeguard their best interest in every contract, especially in adhesive contracts. In standard form B2C (business to consumer) contracts, the consumer is habitually mere docile to the offers of the supplier to get goods and services regardless of abusive or unfair terms of contracts. Thus, intervention through UCTs legislation which forbids certain terms in consumer contract and that entrusts courts (or an administrative authority or tribunal) with the power of vigilance over the fairness of contract terms is necessary.

The assessment of pertinent Ethiopian laws and the practice in some sectors reveal the inadequacy of the existing unfair contract terms regulation. In particular, rules regulating contractual agreements embodied in the Civil Code, such as standard terms of business, cancellation and termination clauses, provisions related to penalty and exemption, and limitation and exclusion clauses allow contracting parties to include unfair contract terms by exercising their contractual freedom. As discussed above, the Trade Competition and Consumer Protection Proclamation does not contain rules that protect consumers against unfair contract terms, and the FCPD (Financial Consumer Protection Directive) does not also address contractual unfairness in full-fledged manner. Thus, Ethiopia should introduce a comprehensive unfair contract terms law to safeguard consumers in consumer contracts in general, and in standard-form contracts in particular, in line with the demands of the modern and complex market. _____■

¹⁷⁸ See Brian H. Bix, (2012), *Contract Law, Rules, Theory and Context*, Cambridge University Press, USA, pp. 87-89.

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Impeachment Is Not Disqualification: An Appraisal of the Western Cape High Court's Ruling

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Abstract

The *Western Cape High Court in Democratic Alliance v Hlophe and Others* (16170/24) [2025] ZAWCHC 120 held that the nomination of former Judge President to the Judicial Service Commission (JSC) was unconstitutional based on his prior impeachment. The issue before the Court was whether an impeached judge may be nominated to the JSC in a non-judicial capacity. This article disagrees with the judgment and argues that the court might have misinterpreted section 177 of the Constitution by equating impeachment from judicial office with a blanket disqualification from future public service. Former Judge President would not serve on the JSC as a judge, but as a nominee under a separate constitutional provision. The article, therefore, examines the following key questions: (i) Does impeachment bar an individual from serving in non-judicial constitutional roles like an appointed member in JSC? (ii) Did the Court exceed its mandate by intruding into a space reserved for parliamentary discretion, and what about the separation of powers? (iii) Can ethical issues like *fit and proper* concerns alone justify disqualification for someone who was appointed as a member of JSC? The article also examines how impeached judges are treated in South African constitutional law in comparison to practices in the United Kingdom, Canada, and Ethiopia. It contends that the Court's reasoning might lack constitutional grounding and improperly converts political disapproval into legal prohibition. The article concludes that the judgment may pose a threat to the separation of powers by allowing judicial activism to override constitutionally valid parliamentary processes.

Keywords: Judicial Service Commission, Constitutional law, Impeachment, Fit and Proper, Separation of powers.

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1. Introduction

In a landmark constitutional ruling, the Western Cape High Court in *Democratic Alliance v Hlophe and Others* invalidated the nomination of former Judge John Hlophe to the Judicial Service Commission (JSC), holding that his prior impeachment rendered him unfit to serve on the body tasked with judicial oversight.¹ This was the first case in post-apartheid South Africa where the court imposed a blanket disqualification on a former judge from future constitutional service, despite the absence of any express limitation in the Constitution.²

The ruling implicates Sections 177 and 178 of the Constitution, the scope of impeachment, and the boundaries of judicial authority in policing political appointments.³ This article disagrees with the court's reasoning. Once removed from judicial office, a former judge no longer serves in a judicial capacity. His nomination to the JSC was not as a judge but as a parliamentary representative under Section 178(1)(h) of the Constitution.⁴ The judgment, however, expands the effect of impeachment beyond its intended purpose,

¹ *Democratic Alliance v Hlophe and Others* (16170/24) [2025] ZAWCHC 120.

² Constitution of the Republic of South Africa, 1996, s 177 and s 178.

³ Judges Matter (2024). “Explained: How a Judge Gets Impeached,”

JudgesMatter.co.za/<https://www.judgesmatter.co.za>.

⁴ See also Constitution s 178(1)(h).

removal from office, and turns it into an ungrounded constitutional prohibition.⁵ More concerning is the court's intrusion into Parliament's discretion, setting a dangerous precedent for judicial overreach into matters reserved for democratic processes.⁶

Generally, the United Kingdom views judicial removal as a corrective measure confined to the judicial role, rather than a wide-ranging constitutional inability.⁷ Similarly, Canada limits the consequences of judicial removal to the particular office in question, thereby allowing future eligibility for public roles to be decided by executive and parliamentary actions through new vetting processes.⁸ In other jurisdictions, the Ethiopian model illustrates that impeachment ought to be viewed as a specific, tenure-related measure to safeguard judicial independence, rather than as a universal prohibition on future public office.⁹

Following this introduction as section 1, section 2 traces the historical development of judicial impeachment in South Africa and identifies the key constitutional and institutional challenges that have emerged over time. Section 3 examines whether a judge removed through impeachment may lawfully serve as a member of the Judicial Service Commission. The fourth section analyses the constitutional scope of impeachment by interpreting Sections 177 and 178 of the Constitution in relation to judicial accountability and institutional integrity. Section 5 considers the ethical standards expected of members of the Judicial Service Commission, with particular emphasis on the constitutional requirement of being "fit and proper" to participate in judicial governance. The sixth section draws comparative lessons from the United Kingdom, Canada, and Ethiopia to identify approaches that may strengthen South Africa's framework. The final section presents the study's way forward and ending remarks.

⁵ F W de Klerk Foundation (2025). "Case Note: *DA v Hlophe and Others*." <https://fwdeklerk.org>.

⁶ Ibid. F W de Klerk Foundation.

⁷ Alex Schwartz. (2025). Court Curbing in the United Kingdom. *The American Journal of Comparative Law*, avaf033.

⁸ Eszter Bodnár. (2017). The Selection of Supreme Court Judges: What Can the World Learn from Canada, What Can Canada Learn from the World. *ELTE LJ*, 103.

⁹ Nega Ewunetie Mekonnen. (2025). The Role of Judicial Independence in the Protection of Human Rights in Ethiopia: Analysis of the Legal and Institutional Frameworks and Federal Court Practices. *Hawassa University Journal of Law*, 9.

2. When did it start, and where do the “challenges” lie: Historical Perspective

To this day, the JSC has successfully impeached former JP Hlophe and former Judge Motata after sixteen and seventeen years, respectively. Yet, it is crucial to examine the core challenges, specifically the litigation and the nascent processes of the JSC, that have hindered a swift impeachment process and explore ways to address these issues. The origins of the Hlophe saga can be traced to his attempt to challenge the legality of the complaints lodged by then-CJ Langa, DCJ Moseneke, and other Justices, on the grounds that they denied him the opportunity to present his case.¹⁰ This challenge was initially granted by a majority of the lower court. However, the majority ruling was overturned on appeal to the Supreme Court of Appeal.¹¹

“On 21 February 2024, a former judge (Hlophe) became the first judge in democratic South Africa to be removed from judicial office by the National Assembly after being found guilty of gross misconduct. The misconduct arose from his attempt to improperly influence two Constitutional Court judges, Justice Bess Nkabinde and Acting Justice Chris Jafta, to decide a pending case in favour of former President Jacob Zuma. His actions were held to constitute an interference with the administration of justice and a breach of the judicial oath of office. This marked the first occasion in South Africa's constitutional democracy that the National Assembly exercised its authority under section 177(1)(b) of the Constitution to remove a judge from office. The events leading to the former judge's removal from judicial office are well documented.”

The matter originated when all the judges of the Constitutional Court, led by Chief Justice Pius Langa and Deputy Chief Justice Dikgang Moseneke, lodged a complaint with the Judicial Service Commission (JSC), alleging that a former judge had attempted to influence two Constitutional Court judges in a pending case.¹² The complaint was referred to the Judicial Conduct Tribunal (JCT), which found that Dr Hlophe had committed gross misconduct by improperly attempting to persuade Justices Bess Nkabinde and Chris Jafta to breach their judicial oaths. The Tribunal concluded that his conduct undermined the independence, impartiality, and integrity of the Constitutional Court and diminished public confidence in the judiciary. After considering the Tribunal's findings, the JSC endorsed its conclusions by majority vote and

¹⁰ *Hlophe v Constitutional Court of South Africa and Others* [2009] 2 All SA 72 (GSJ).

¹¹ *Democratic Alliance v Hlophe and Others* [2025] ZAWCHC 234, paras 1-2.

¹² *Democratic Alliance v Hlophe and Others*, para 3.

determined that Dr Hlophe's actions constituted gross misconduct under Section 177(1)(a) of the Constitution. It further held that:

“His conduct amounted to an attempt to obstruct the administration of justice and seriously threatened the constitutionally protected independence of the judiciary. Acting on the JSC's recommendation, the National Assembly voted on 21 February 2024 to remove the former judge from office. The President formally implemented the decision on 1 March 2024 under section 177 of the Constitution, bringing to an end a legal process that had lasted approximately sixteen years. Following his removal, the former judge joined the Umkhonto weSizwe (MK) Party and was subsequently elected to Parliament. On 9 July 2024, the National Assembly designated him as one of its representatives on the Judicial Service Commission in terms of section 178(1)(h) of the Constitution. This appointment became the subject of further constitutional litigation, with the Democratic Alliance challenging the legality and constitutionality of his designation to the JSC.”¹³

In this case, the appellate court determined that the former judge had no right to be heard by the complainants prior to the filing of a complaint, as they were not functioning as a court.¹⁴ Subsequently, the former judge successfully obtained an interdict (and order) that nullified the JSC proceedings on April 7 and 8, 2009.¹⁵ Subsequent events involved complex cases concerning the successful challenge to the JSC's composition.¹⁶ The JSC decided to dismiss the complaint against the former judge due to conflicting evidence,¹⁷ and requests to appeal both of these decisions were denied.¹⁸ Additionally, there was an unsuccessful effort to prevent the retrospective application of the JSC impeachment mechanisms, as outlined in the Act (amended in 2008 and effective from 2010).¹⁹ Further attempts were made to halt the voting in the National Assembly regarding the impeachment process,²⁰ and one issue

¹³ *Democratic Alliance v Hlophe and Others* [2025] ZAWCHC 234, para 9.

¹⁴ *Langa CJ and Others v Hlophe* 2009 (4) SA 382 (SCA) at para 40.

¹⁵ *Hlophe v Judicial Service Commission and Others* (19006/09) [2009] ZAGPJHC 19; [2009] 4 All SA 67 (GSJ).

¹⁶ *Acting Chairperson, Judicial Service Commission and Others v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA).

¹⁷ *Freedom Under Law v Acting Chairperson, Judicial Service Commission and Others* 2011 (3) SA 549 (SCA).

¹⁸ *Judge President Hlophe v Premier of the Western Cape; Judge President Hlophe v Freedom under Law and Others* 2012 (6) SA 13 (CC).

¹⁹ *Nkabinde and Another v Judicial Service Commission and Others* 2016 (4) SA 1 (SCA).

²⁰ *Ibid.*

remains unresolved in the Constitutional Court following the impeachment of a former judge.

3. Does impeachment bar an individual from serving as a member of JSC?

The answer is no, because former Judge's appointment as a member of the Judicial Service Commission (JSC) by the National Assembly is constitutionally valid and should not have been invalidated on the basis of his prior impeachment.²¹ Section 178(1)(h) of the Constitution of the Republic of South Africa, 1996, expressly provides that the National Assembly designates six of its members to serve on the JSC, with no further qualifications or limitations regarding prior impeachment or misconduct.²² The former judge, having been elected as a Member of Parliament (MP), satisfies the only constitutional requirement for nomination to the JSC in this capacity.²³ It is critical to distinguish between impeachment, which results in removal from judicial office under Section 177, and disqualification from holding any other constitutional or public office.²⁴ The Constitution is explicit that impeachment

²¹ *Democratic Alliance v Hlophe and Others* (16170/24) [2025] ZAWCHC 120; see para 37; The Speaker explains that the designation of nominees to serve on the JSC is conducted in accordance with the Rules of the National Assembly. The General Rules govern motions placed before the NA for a decision. A motion passes by way of majority support by the political party, as is standard practice in a democratic Parliament. She explains that nominations of MPs by their respective political parties are usually an uncontested and uneventful process, and, until these court proceedings, a motion of designation in terms of section 178(1)(h) of the Constitution has never been challenged. See also Rules of the National Assembly, 9th Edition, 26 May 2016 ("NA Rules").

²² Constitution of the Republic of South Africa, 1996, s 178(1)(h); see official text: <https://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (Accessed 17 June 2025).

²³ See the Speaker of the National Assembly emphasises her neutral stance in the matter, abiding by the Court's decision and not getting involved in arguments that political parties are best placed to put forward if they so wish. The review applications do not challenge a decision taken by the Speaker. The Speaker's role is limited to ensuring that the procedures followed in Parliament are in line with the Constitution and parliamentary rules. The designation of members to the JSC is primarily a political decision made by Parliament and reflects the majority view expressed during the vote. See also Bulelani Thukuse. (2026). The Constitutional Boundaries of Judicial Accountability: A Commentary on *Democratic Alliance v Hlophe and Others* (2025). 6 *Turf Law Journal* 1, 12.

²⁴ Constitution, s 177.

removes a person from judicial office but does not impose any continuing disability or bar from serving in non-judicial roles within government.²⁵

The Western Cape High Court²⁶ erred in extending the effect of impeachment to create a blanket disqualification from the JSC membership, a conclusion unsupported by the constitutional text and inconsistent with established principles of separation of powers. Parliamentary discretion in designating JSC members is constitutionally entrenched and broad.²⁷ As a democratic institution, the National Assembly has the authority to determine the suitability of its members for nomination.²⁸ The Constitution does not impose a 'fit and proper' qualification test for these designations, nor does it require Parliament to exclude individuals on the basis of prior judicial misconduct if they remain elected MPs.²⁹

The term 'fit and proper person' remains undefined in South African legislation, leaving its interpretation largely to the discretion of senior legal practitioners and, ultimately, the courts.³⁰ This position was reinforced by submissions from political parties such as the MK and EFF, which emphasised

²⁵ In South Africa, the Constitution explicitly states that impeachment removes a person from judicial office, but it does not automatically prevent them from holding other non-judicial positions within the government. See also Tendai Mikioni "With Great Power Comes Great Responsibility: Decontaminating the Courtroom Through Impeachment- A Challenge or an Achievement?" In his article, he argued that judicial impeachment in South Africa is governed by Section 177 of the Constitution, which sets out the conditions under which a judge may be removed from office, specifically? incapacity, gross incompetence, or gross misconduct.

²⁶ *Democratic Alliance v Hlophe* case.

²⁷ Section 178(1)(h) of the South African Constitution outlines the composition of the Judicial Service Commission (JSC), specifically stating that six members must be designated by the National Assembly (NA) from among its members, with at least three being from opposition parties. The Speaker's interpretation, found in the Parliamentary Hansard, would offer insight into how this provision is understood and applied within the parliamentary context.

²⁸ Parliament's nomination powers explained at:
<https://www.parliament.gov.za/jsc-members-appointment>
(Accessed 18 June 2025).

²⁹ While the terms "fit and proper" are indeed not explicitly defined in the South African Constitution or the Judicial Service Commission (JSC) Act 9 of 1994, they are essential criteria for judicial appointments. The Constitution mandates that judges be "appropriately qualified" and "fit and proper". The concept of "fit and proper" is interpreted by the JSC and the courts based on factors like commitment to constitutional values, independence, impartiality, and professional and personal integrity.

³⁰ Magda Slabbert (2011). The Requirement of Being a 'Fit and Proper' Person for the Legal Profession. *Potchefstroom Electronic Law Journal (PELJ)*, vol. 14, no. 4. Online ISSN 1727-3781.

former judge's qualifications, including his legal expertise and status as an elected MP, as sufficient grounds for his nomination. The Constitution, through Section 178(1)(h),³¹ contemplates that MPs, who are already bound by their oaths of office and parliamentary codes of conduct, may serve on the JSC. Judicial decisions should respect this political discretion and avoid overstepping into the political domain unless explicitly mandated by law.³² The High Court's judgment imposing a permanent disqualification based on impeachment risks undermining the rule of law and democratic principles by effectively legislating through judicial interpretation.³³

Generally, disqualifications must be clearly and expressly provided for by the Constitution or statute, consistent with the principle of legality and legal certainty.³⁴ Judicial activism that invents disqualifications not found in the constitutional text threatens parliamentary sovereignty and the constitutional balance of powers.³⁵ Furthermore, the Constitution allows for political rehabilitation and participation.³⁶ If the electorate and Parliament choose to entrust an impeached judge with a non-judicial constitutional role, this democratic choice should be respected unless there is a clear constitutional

³¹ Constitution Section 178(1)(h).

³² Constitutional Court precedent stressing separation of powers, *Judicial Service Commission v President of RSA* (2016) ZACC 45. See also the Constitutional Court case, *Judicial Service Commission v President of the RSA* (2016) ZACC 45, is a significant precedent for the principle of separation of powers in South Africa. The case revolved around the appointment of an independent panel to investigate allegations against a Chapter 9 institution office-bearer, with the High Court ruling against including a judge on the panel, citing separation of powers concerns. The Constitutional Court upheld the High Court's decision, emphasizing the importance of maintaining distinct roles for the different branches of government.

³³ Principle of legality and judicial overreach, see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 59.

³⁴ Principle of legality and judicial overreach, see *Fedsure Life Assurance Ltd* case in terms of the principle of legality.

³⁵ The separation of powers is a fundamental principle of democratic governance, dividing state authority among three independent branches: the legislative (Parliament), executive (Cabinet), and judicial (Courts). This division aims to prevent the concentration of power in one body and safeguard against potential abuses of authority.

³⁶ The South African Constitution allows for both political rehabilitation and participation. The Constitution enshrines political rights, including the right to form political parties, participate in their activities, and campaign for them. It also guarantees the right to free, fair, and regular elections and the right to vote and stand for public office. Furthermore, the Constitution emphasizes public participation in the legislative process, allowing citizens to engage with Parliament and its committees.

prohibition.³⁷ It is also important to note that the role of a JSC member designated by Parliament is fundamentally different from that of a sitting judge. The former judge (Hlophe) no longer serves as a judge, and therefore, his prior impeachment relates only to his judicial office and does not carry over to other public offices.³⁸

Furthermore, comparative constitutional jurisprudence affirms that removal from one public office does not automatically disqualify a person from other public roles unless expressly provided for.³⁹ The judgment by the Western Cape High Court,⁴⁰ by conflating impeachment with a permanent constitutional bar to JSC membership, misinterprets the Constitution, and sets a dangerous precedent for unwarranted judicial interference in parliamentary affairs. Until Parliament or the Constitution expressly prohibits such appointments, former judge Hlophe's membership on the JSC remains constitutionally valid, and the Western Cape High Court's ruling should be reconsidered in light of constitutional fidelity, separation of powers, and democratic principles.⁴¹

4. The Constitutional Limits of Impeachment and the Interpretation of Sections 177 and 178

Section 177 of the South African Constitution establishes the exclusive and narrowly tailored procedure for the removal of judges on grounds of incapacity, gross incompetence, or gross misconduct. The mechanism

³⁷ See democratic principles in South African constitutional jurisprudence, e.g., *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC). See also *The Doctors for Life case (Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC)) is a landmark case in South African constitutional jurisprudence, establishing a strong precedent for public participation in the law-making process. The case highlights the principle that the South African Constitution mandates legislatures to facilitate public involvement in law-making, and failure to do so can render legislation invalid.

³⁸ Impeachment only applies to judicial office.

³⁹ Comparative constitutional law: Mark Tushnet, *Comparative Judicial Review*. Harvard Law Review 2011; see also South African comparative law texts.

⁴⁰ *DA v Hlophe* case.

⁴¹ The constitutional principle of separation of powers and the related principle of legal certainty are fundamental to South Africa's constitutional democracy. They aim to prevent the abuse of power and ensure a stable legal order. See also Currie & De Waal, Editors. (2002) *The New Constitutional and Administrative Law*, Chapter 4, likely delves into how these principles are applied within the South African context, including the roles of the legislature, executive, and judiciary, and the importance of legal rules that are clear, predictable, and consistently applied.

mandates a finding by the Judicial Service Commission (JSC), a two-thirds majority vote in the National Assembly, and the President's formal removal. Judge John Hlophe became the first post-apartheid judge removed under this process following a Judicial Conduct Tribunal finding in 2022 and a parliamentary vote on 21 February 2024; his removal was effected on 1 March 2024.⁴² The text of Section 177 does not extend beyond removal; it does not prescribe any continuing disqualification from holding public or constitutional office thereafter.

In this instance, courts must interpret constitutional provisions by their text and structure, giving effect to both the specific language and the broader constitutional scheme. Section 178, in turn, stipulates that the National Assembly must designate six members to the JSC, including members of Parliament as representatives.⁴³

The Constitution lacks any express disqualification clause excluding impeached judges from nomination or designation under Section 178. In *Democratic Alliance v Hlophe and Others*, the High Court treated impeachment as effectively a constitutional ban on any future role in judicial oversight, reasoning that appointing an impeached judge to the JSC would undermine public confidence in the judiciary.⁴⁴ But this conflates the purpose of impeachment, which is withdrawing the right to serve as a judge, with perpetual disqualification from all public or constitutional service. A purposive reading of Sections 177 and 178 shows that impeachment applies only to judicial office, not to membership in oversight institutions established under Chapter 8 of the Constitution.⁴⁵

The Constitution places explicit limits on judges, not on former office-holders seeking to serve in other capacities. Former judge, as a Member of Parliament nominated under Section 178(1)(h), would not be exercising

⁴² Constitution s 177(1)(a)–(b). Judges Matter commentary on impeachment process; Judges-Matter.co.za, “Impeachment-of-Judges-Tendai-Mikioni.pdf” § 2; Constitution s 177(1)-(2); Hlophe impeachment by National Assembly, 21 February 2024; removal effected 1 March 2024, confirmed by presidency website and media. See also John Hlophe impeachment, updated July 2025; Constitutional Tribunal and JSC findings. (Accessed 26 June 2025).

⁴³ *Govender v Minister of Safety and Security*, SCA; legal interpretation principles in South Africa: statutory interpretation conforming to Bill of Rights. En. wiki, “Legal interpretation in South Africa.” See also Constitution s 178(1)(h).

⁴⁴ “This matter does not concern whether an impeached judge could never serve on the JSC.” Read *DA v Hlophe and Others* ZAWCHC 120 paras 28–30.

⁴⁵ Judges Matter: Explained: How a Judge Gets Impeached.

judicial authority but fulfilling a representative function.⁴⁶ There is no textual basis to treat impeachment as rendering a former judge *ipso facto* unfit for all forms of public service. Moreover, the principle of legality demands that public power, especially in constitutional roles, must be derived from and constrained by the constitutional text.⁴⁷ To infer a lifetime bar from Section 177 is contrary to constitutional grammar and inconsistent with the principle of avoided construction, which requires that constitutional provisions be read in conformity with the Bill of Rights where possible. There is no reason to read Section 177 as extending to disqualification from Parliament's discretionary designation under Section 178, which is autonomous and unconfined by judicial removal mechanisms.

Broyde and Schapiro emphasise the accountability function of impeachment, not perpetual exclusion.⁴⁸ An analysis in *Judges Matter* notes that impeachment constitutes a remedy to protect judicial integrity while leaving open broader democratic participation subject to political accountability tools such as elections, public scrutiny, and parliamentary oversight.⁴⁹ Freedom Under Law's commentary argues that moral or ethical objections to a nominee's suitability must be resolved in political arenas, not through courts reading in new disqualifications absent from the text. In the landmark Canadian case of *Therrien v Canada (Ministry of Justice)*,⁵⁰ the Supreme Court of Canada, through Gonthier J, articulated the high ethical bar expected of judges.

⁴⁶ Constitution s 178 (1)(h).

⁴⁷ The principle of legality under the rule of law dictates that government actions must be authorized by law and must be rational. The *Govender* case established that the principle of legality, an aspect of the rule of law, requires the government to act within its powers and to act rationally. Overbreadth, in the context of legislation, refers to laws that restrict more conduct than necessary to achieve their legitimate purpose. See also the case of *Govender v Minister of Safety and Security*, which is often cited in discussions about the principle of legality. In that case, the Constitutional Court emphasized that the principle of legality, rooted in the rule of law, requires that government actions be authorized by law and rational. The court held that the executive and the legislature are bound by the principle that they can exercise only powers conferred on them by law.

⁴⁸ Michael J. Broyde & Robert A. Schapiro. (1998). *Impeachment and Accountability: The Case of the First Lady*.

⁴⁹ Jandré van der Schyff. (2024). *Impeaching Judges: Challenge or Achievement?* <https://www.judgesmatter.co.za/wp-content/uploads/2024/09/Impeaching-Judges-Challenge-or-Achievement-Jandre-van-der-Schyff.pdf>

⁵⁰ *Canadian case of Therrien v Canada (Ministry of Justice)* [2001] 2 SCR 3.

The judgment stressed that those entrusted with judicial responsibilities must uphold not only actual impartiality and integrity but must also be seen to do so. Public confidence in the judiciary, Gonthier J explained, hinges on judges embodying unimpeachable conduct that reflects their independence and ethical standing.⁵¹ Importantly, however, the judgment clarified that a lapse in these ideals does not automatically justify the removal of a judge. Judicial independence is a foundational principle that can only be overridden in exceptional cases, specifically where a judge's conduct is so egregiously at odds with the standards of impartiality and integrity that it erodes public trust in the judiciary.⁵²

Furthermore, the decisive test is whether the misconduct is so fundamentally in conflict with judicial values that it renders the judge unfit to perform their duties, thereby justifying their removal from office.⁵³ This explanation above does not apply to members serving on Commissions but to those on the bench. In addition, the High Court's interpretation disrupts the separation of powers by allowing judicial decisions about one branch's internal nomination procedures.⁵⁴ Constitutional jurisprudence prefers deferential respect to Parliament's constitutional powers unless explicit invalidation is necessary.⁵⁵ No decision to date has held that impeachment carries with it a lasting incapacity to sit in elected or representative office,

⁵¹ *Therrien v Canada* (Minister of Justice) [2001] 2 SCR 3 para 147. Also see *Freedom Under Law v Judicial Service Commission and Another* (550/2022) [2023] ZASCA 103; [2023] 3 All SA 631 (SCA) (22 June 2023) para 1.

⁵² *Therrien v Canada* para 147.

⁵³ See *Re Chief Justice of Gibraltar* [2009] UKPC 43 paras 30 and 31. In the case of *Re Chief Justice of Gibraltar* (2009) UKPC 43, the Privy Council advised the Governor of Gibraltar to remove the Chief Justice, Mr. Justice Schofield, from office due to his inability to discharge the functions of his office. The tribunal appointed to investigate concluded that his conduct created an "inability to discharge the functions of office," which included public statements that undermined judicial independence and public confidence. The Committee emphasized that removal should only occur for serious shortcomings that would destroy confidence in the judge's ability to perform judicial functions.

⁵⁴ Magabe T Thabo & Kola O Odeku. (2021). Separation of powers, checks and balances and judicial exercise of self-restraint: an analysis of case law. *Obiter* 42(3) <https://doi.org/10.17159/obiter.v42i3.12901>.

⁵⁵ Constitutional jurisprudence in South Africa, and generally, leans towards deference to Parliament's legislative powers. Courts generally avoid invalidating legislation unless it is demonstrably unconstitutional, prioritizing respect for the democratic will expressed through the legislature. This approach reflects the principle of the separation of powers, where each branch of government (executive, legislature, and judiciary) has its distinct role and responsibilities.

certainly not in the constitutional texts or jurisprudence that govern Sections 177 and 178.⁵⁶

Treating ethical findings as automatically rendering a person “unfit” ignores the democratic legitimacy of elected bodies empowered to decide suitability. The remedy for controversial nominations remains a political, rather than judicial mechanism, including parliamentary debate, recusal rules, and public contestation. Section 177's architecture shows a limited purpose: to remove individuals from judicial office, not to bar all future constitutional roles. Section 178 similarly imposes no continuing disqualifications based on prior removal. The Western Cape High Court's ruling improperly reads across these separate constitutional domains, conflating impeachment with disqualification and shifting political judgment into legal determinism.⁵⁷ Such an interpretation lacks textual authority, misapplies purposive interpretation, undermines legal certainty, and impairs democratic decision-making.⁵⁸

Section 178 of the Constitution sets out how the Judicial Service Commission (JSC) is composed, but it does not state that someone who has been impeached is permanently barred from holding other public roles outside of the judiciary.⁵⁹ Impeachment results in removal from a particular judicial office, but that consequence does not extend either explicitly or by implication to all future appointments, especially to roles that are not judicial in nature. Both the MK Party and the EFF argued that the former judge was well-suited to serve on the Judicial Service Commission (JSC), highlighting his academic credentials, a doctorate in law, and his past experience as a judge.⁶⁰ They pointed out that the Constitution does not prescribe any specific qualifications for a person to be designated to the JSC, apart from the requirement that they be a Member of the National Assembly. According to MK's submissions, the Constitution intentionally leaves the selection criteria broad, trusting that parliamentarians, by virtue of their oath of office and the democratic process that placed them in Parliament, are fit to make such designations.⁶¹ They

⁵⁶ Sections 177 and 178 deal with the removal of judges and the composition of the Judicial Service Commission, respectively, and don't address the issue of post-impeachment limitations on holding office.

⁵⁷ Vukile Nhlumayo. (2024). *The Impeachment of Judges: A Snail Adventure and a Protracted Exercise*.

⁵⁸ Cyril Simphiwe Mlotshwa. (2020). *Inconsistencies in the adjudication of rights: An examination of three South African Constitutional Court decisions*. (PhD dissertation, University of KwaZulu-Natal, Pietermaritzburg).

⁵⁹ Gerald L. Neuman. (2023). *Impeachment, Disqualification, and Human Rights*. 54 *Columbia Hum. Rts. L. Rev* 627.

⁶⁰ *DA v Hlophe and Others* para 40.

⁶¹ See *DA v Hlophe and Others* (n53).

further emphasised that constitutional scholarship supports the inclusion of political figures in the JSC, recognising that the Commission is a hybrid body meant to reflect a balance between legal expertise and democratic accountability.⁶²

The MK Party relied on Parliament's long-standing rules and practices, arguing that the National Assembly (NA) is bound by them.⁶³ They maintained that any departure from this precedent, particularly in relation to the nomination of members to the JSC, would require either a formal amendment to the Constitution or a revision of the NA's internal rules. Without such changes, the NA cannot unilaterally alter the criteria or process for designating representatives to the JSC. The Constitution reserves impeachment for judicial office, not for public office more broadly, and courts must refuse to import untextual restrictions that curtail parliamentary discretion and initiative in constitutional representation.⁶⁴

5. Ethical Fitness and the Constitutional Meaning of “Fit and Proper” in Judicial Governance

The ruling in *Democratic Alliance v Hlophe and Others* reignited significant constitutional debate, not because it addressed ethical governance in judicial appointments, but because it misapplied the standard of what it means to be “fit and proper” in the context of parliamentary discretion and constitutional design. The decision erroneously concluded that Hon. Hlophe's nomination to the Judicial Service Commission (JSC) was unconstitutional on ethical grounds, despite the absence of any textual disqualification in the Constitution following impeachment. Section 178(1)(h) of the Constitution expressly permits the National Assembly (NA) to designate six members to the JSC, and it does not impose additional criteria beyond membership in the NA.⁶⁵

The High Court's reasoning is problematic in its assertion that ethical fitness is an inflexible constitutional prerequisite. It transforms what should be a political and discretionary determination by the legislature into a judicially enforceable threshold. This effectively judicialises political judgment and undermines the separation of powers.⁶⁶ The ruling also fails to

⁶² *DA v Hlophe and Others* case para 40.

⁶³ *DA v Hlophe and Others* para 41.

⁶⁴ Berger, Raoul. (1974). *Impeachment: the constitutional problems*. Harvard University Press, 400.

⁶⁵ Constitution of the Republic of South Africa, 1996, s 178(1)(h).

⁶⁶ Stu Woolman. (2007). The Amazing, Vanishing Bill of Rights. *SALJ*, 124, 762.

respect the principle of legality in its own right by reading into the Constitution a disqualification that the text does not support.

The Constitution contains explicit disqualifications for certain roles, for instance, in Sections 47(1)(e) and 106(1)(e) regarding membership in Parliament and provincial legislatures. The absence of any similar disqualification in Section 178 should be seen as a deliberate choice by the drafters, not an oversight to be corrected by the courts.⁶⁷ The Court's reliance on Section 1(c) of the Constitution and the rule of law was used to elevate ethical fitness to an objective constitutional requirement. However, this stretches the concept beyond its intended meaning. The rule of law ensures that public power is exercised lawfully and rationally, but it does not authorise courts to impose ethical judgments in matters that are explicitly left to political bodies such as Parliament.⁶⁸

In doing so, the Court oversteps its judicial mandate and assumes a supervisory role over the National Assembly's internal processes, in violation of the principle of institutional comity.⁶⁹ Cameron has called for high ethical standards in judicial appointments; their commentary supports moral aspiration rather than binding legal criteria.⁷⁰ The assertion that ethical transgressions should have permanent consequences in all domains of public life disregards the possibility of political rehabilitation and democratic redemption. Hlophe was removed from judicial office, not from all constitutional participation. The Constitution does not suggest that

⁶⁷ Thand'Olwethu Dlanga. (2024). The Separation of Powers and Judicial Independence in South Africa: A Theoretical Critique. *Journal of Law Society and Development* 11.

⁶⁸ The rule of law dictates that public power must be exercised lawfully and rationally, but it does not empower courts to impose ethical judgments on matters that are specifically entrusted to the legislature, like Parliament. This principle ensures that governmental actions adhere to legal standards and are not arbitrary, but it also respects the boundaries between the judiciary and the legislature.

⁶⁹ The assertion that a court oversteps its judicial mandate by supervising the internal processes of the National Assembly (NA) and violating institutional comity raises a complex issue of separation of powers. While courts generally cannot dictate how other branches of government operate, they do have a duty to ensure the constitutionality of actions. If a court intervenes in the internal affairs of the NA, it would be scrutinized for overreach, especially if it appears to be dictating policy or procedure rather than addressing a clear constitutional violation. See also *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008) para 35-36.

⁷⁰ Edwin Cameron. (2018). Judges, justice, and public power: the constitution and the rule of law in South Africa. *Oxford University Commonwealth Law Journal*, 18(1), 73–97. <https://doi.org/10.1080/14729342.2018.1455478>.

impeachment bars future service in non-judicial roles, including legislative representation or JSC membership through National Assembly designation.⁷¹

The High Court's invocation of *Justice Alliance of South Africa v President of the Republic of South Africa* was also misplaced. That case concerned the President's appointment of judges, not legislative nominations to oversight bodies.⁷² Extending its rationale to a former judge's case amounts to conflating different constitutional mechanisms and undermines the NA's freedom to determine who best represents its interests on the JSC. Similarly, the reference to Section 165(2), which requires judges to act without fear, favor, or prejudice, is inapposite.⁷³ That provision governs the judicial function, not the eligibility of legislators or nominees to the JSC.⁷⁴ Interpreting it to bar Hlophe from nomination distorts its plain meaning and risks establishing a dangerous precedent where past misconduct leads to permanent exclusion from constitutional service, regardless of the office in question.

Furthermore, the Court's conclusion that a former judge's nomination would send the wrong message rests on moral conjecture rather than legal analysis. The judiciary's legitimacy depends not just on ethical impressions, but on strict fidelity to constitutional text and structure.⁷⁵ Courts should not enforce symbolic interpretations of fitness at the expense of democratic processes. If the Constitution intended for an impeached judge to be ineligible for JSC nomination, it would have said so either through express provision or by reference to Section 194(3)(b), which governs judicial removal. In the matter above, Judge Hlophe may be nominated as a member of a Commission, not as a Judge in the JSC, as no law prohibits an impeached judge from serving on the JSC Committee.

⁷¹ Constitution, s 178 read with s 194(3).

⁷² *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23.

⁷³ The phrase "without fear, favour or prejudice" found in Section 165(2) of the South African Constitution, while relevant to the judiciary, is not the primary or most pertinent section to discuss regarding a specific issue related to the Constitutional Court's process or inherent powers. While it emphasizes impartiality, Section 173 of the Constitution is more directly relevant to the Constitutional Court's ability to protect and regulate its own process.

⁷⁴ Constitution, s 165(2).

⁷⁵ Tholaine Mafuku Matadi. (2025). The Challenges of Democratic Governance in South Africa: A Closer Look at Parliamentary Oversight, Public Protector, and the Independence of the Judiciary. In *Challenges of Public Administration Management for Higher Education* (pp. 25-46). IGI Global.
<https://doi.org/10.4018/979-8-3693-4346-3.ch002>

6. Comparative Analysis: Lessons from the United Kingdom, Canada, and Ethiopia

The United Kingdom, Canada, and Ethiopia regard the removal of judges as a restricted, position-specific penalty rather than a comprehensive constitutional disqualification from future public positions, a principle South Africa should embrace to maintain proportionality, separation of powers, and parliamentary discretion. The following section provides a detailed comparative perspective on other jurisdictions.

6.1 United Kingdom

The United Kingdom provides judges with strong security of tenure, ensuring that they can perform their duties independently and without political interference. Senior judges may only be removed through a strict constitutional process that requires approval by both Houses of Parliament and formal removal by the Monarch. While this high threshold effectively safeguards judicial independence, it also makes the removal of judges extremely rare.⁷⁶ As a result, concerns have been raised that the process may limit accountability, as no High Court or Court of Appeal judge has ever been removed under these provisions in England and Wales.

Judges serving below the High Court, including Circuit and District Judges, may be removed from office by the Lord Chancellor, provided that the Lord Chief Justice agrees with the decision. Removal is permitted where a judge is unable to perform judicial duties because of incapacity, misconduct, or failure to fulfil the responsibilities of the office.⁷⁷ The Constitutional Reform Act⁷⁸ also authorizes the suspension of judges during disciplinary investigations, subject to the Lord Chancellor's agreement, to preserve public confidence in the independence and integrity of the judiciary. Specifically, the United Kingdom regards judicial removal as a remedial measure limited to

⁷⁶ Judges and Parliament. <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/judges-and-parliament/> (Accessed 26 July 2026).

⁷⁷ Constitutional Reform Act 2005 Explanatory Notes. <https://www.legislation.gov.uk/ukpga/2005/4/notes/division/7?view=plain> (Accessed 25 July 2026).

⁷⁸ The Constitutional Reform Act 2005 is a landmark piece of legislation in the United Kingdom that aimed to modernize the structure of the judiciary and ensure a clearer separation of powers among the legislative, executive, and judicial branches. The Act was introduced in response to concerns about the historical overlap of these powers, particularly the Lord Chancellor's dual role as both a government minister and head of the judiciary, which raised questions about impartiality and fairness in the legal system.

the judicial office, rather than as a broad constitutional incapacity.⁷⁹ A judge who is dismissed for wrongdoing can still serve in other public-facing roles, provided they are subject to political scrutiny, face reputational consequences, and undergo appropriate vetting.

The UK model, therefore, maintains the separation of powers: while Parliament and the judiciary can discipline or remove a judge, they do not claim a constitutional-style veto over appointments to non-judicial bodies.⁸⁰ In South Africa, impeachment must be understood as a constitutional mechanism for removing judges who are no longer fit to hold judicial office, rather than as a permanent barrier to serving in non-judicial governance roles, provided all constitutional requirements are met.

⁷⁹ The United Kingdom regards judicial removal as a remedial measure limited to the judicial office, rather than as a broad constitutional incapacity. This perspective is supported by the European Court of Human Rights' judgment in *SW v United Kingdom* (2016/92), which highlighted the limitations of compensatory damages for procedural breaches in judicial acts under the Human Rights Act 1998. The case concerned a social worker who acted as a professional witness in childcare proceedings under the Care Act. During the hearing, a family court judge made adverse findings against her, accusing her of lying, emotionally abusing a child, and being the principal instigator in a joint enterprise to obtain evidence of sexual abuse. These allegations were outside the scope of the case and had not been raised during cross-examination. The social worker first became aware of these criticisms when the judge delivered an oral judgment and directed it to be sent to her employer and professional regulator, which led to her immediate dismissal and a professional investigation. The court found that these limitations breached the right to an effective remedy under Article 13 of the European Convention on Human Rights. United Kingdom Parliament. Additionally, the Judicial Review and Courts Bill 2021 aims to reform judicial powers, indicating ongoing discussions about judicial independence and the scope of judicial review in the UK. The proposed remedial order under the Human Rights Act 1998 seeks to address these limitations by allowing damages for breaches of procedural rights under Article 8 of the ECHR. The UK's approach to judicial removal and the implications of judicial review reflect a cautious stance on the extent of judicial accountability and the rights of individuals in the judicial process.

⁸⁰ The UK model maintains the separation of powers, but it operates differently from many other democracies. While Parliament and the judiciary can discipline or remove a judge, they do not have a constitutional-style veto over appointments to non-judicial bodies. Instead, the UK's system is characterized by a fusion of powers, in which the executive is drawn from the legislature and is directly accountable to it, leading to a more interconnected system of branches than a rigid separation. This means that while there are checks and balances, the lines between the branches are blurred, making it less rigid than in some other countries.

6.2 Canada

Judicial independence forms one of the fundamental principles of Canada's legal system. The Constitution establishes the judiciary as a distinct and autonomous branch of government, separate from both the executive and the legislature.⁸¹ This institutional independence enables judges to decide cases impartially, relying exclusively on the evidence presented and the applicable law, without interference or improper influence from external actors. In Canada, judges are appointed rather than elected, a process designed to promote judicial impartiality and professionalism. Appointments to the Provincial Courts are made by provincial governments, while the federal government is responsible for appointing judges to the Courts of Appeal and the Supreme Court of Canada.⁸² Although the executive branch plays a role in judicial appointments, once appointed, judges perform their duties independently and are constitutionally protected from government interference in their decision-making.

In Canada, a judge may be removed from office only where one or more of the following circumstances exist, and the judge's continued tenure would erode public confidence in the impartiality, integrity, or independence of the judiciary to such an extent that the judge can no longer effectively perform the functions of judicial office:

- a) infirmity;
- b) misconduct or improper conduct;
- c) inability or failure to carry out the duties and responsibilities of judicial office; or
- d) the judge occupies a position or is involved in circumstances that a reasonable, fair-minded, and well-informed person would regard as inconsistent with the proper performance of judicial office.⁸³

Furthermore, Canada restricts the effects of judicial removal to the specific office involved, allowing future eligibility for public positions to be determined by executive and parliamentary decisions through new vetting procedures.⁸⁴ Judges who are removed do not face automatic disqualification

⁸¹ The Judiciary (Government of Canada):

<https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/05.html> (Accessed 25 July 2026).

⁸² How are judges removed in Canada? <https://legalknowledgebase.com/how-are-judges-removed-in-canada>.(Accessed 25 July 2026).

⁸³ <https://laws-lois.justice.gc.ca/eng/acts/J-1/page-10.html>.(Accessed 25 July 2026).

⁸⁴ The Canadian Judicial Council has introduced a new process for reviewing allegations of misconduct against judges, which replaces the previous review by the Canadian Judicial Council. This new process applies to allegations that are not serious enough to warrant a judge's removal from office and changes the way recommendations regarding

from future positions; rather, their qualifications are re-evaluated based on merit, integrity, and current standards.⁸⁵ This method guarantees that grave misbehavior is recognized without entrenching it as a permanent constitutional blemish.

In this regard, South Africa ought to take this example into account by asserting that impeachment under section 177 does not automatically denote an unacceptable degree of “unfitness” for JSC membership; the key consideration is whether the person, after several years, can still execute the specific, non-judicial roles of that body in a way that aligns with the Constitution and the rule of law. It must be understood that impeachment is a significant penalty, yet it does not constitutionally annul all future public service.

6.3 Ethiopia

The Federal Judicial Administration Council, re-established under Proclamation and recognised by Article 79 of the Ethiopian Constitution, is an independent body responsible for judicial administration.⁸⁶ It plays a central role in promoting judicial independence while ensuring transparency and accountability within the judiciary. In Ethiopia, judges are appointed based on recommendations from the relevant judicial bodies and approved by the appropriate legislative authorities. Judicial discipline, professional conduct, and transfers are managed by the relevant Judicial Administration Council.⁸⁷ Article 31 provides that:⁸⁸

removal can be made to the Minister of Justice. The new process also applies to other persons appointed under an Act of Parliament to hold office during good behaviour. The changes aim to streamline the process and ensure that the removal of a judge is justified only if it would undermine public confidence in the impartiality, integrity, or independence of the judge or their office.

⁸⁵ Philip L Bryden. (2003). Legal principles governing the disqualification of judges. *Canadian Bar Review* 82(3).

⁸⁶ Federal Judicial Administration Council. <https://www.fsc.gov.et/About-Us/Judicial-Administration-Council> (Accessed 25 July 2026). See also the Federal Judicial Administration Council is re-established under the revised Proclamation No. 1233/2021.

⁸⁷ 1995 Constitution of the Federal Democratic Republic of Ethiopia, Art 81(4)-(6).

⁸⁸ Termination of Tenure (Article 31). See also Federal Judicial Administration Proclamation No. 1233-2021: Judicial Appointment, Training, Tenure, and Termination. <https://ethiolex.com/federal-judicial-administration-proclamation-no-1233-2021-judicial-appointment-training-tenure-and-termination/> (Accessed 26 July 2026).

“The tenure of a Federal Court judge may be terminated only on clearly defined legal grounds. These include reaching the compulsory retirement age, taking early retirement at the age of 60, resigning with three months' written notice, or becoming medically unfit to perform judicial duties due to serious illness. A judge's tenure may also be terminated for gross incompetence or serious disciplinary misconduct, as determined by the Judicial Administration Council.”

However, any decision to remove a judge on these latter grounds becomes effective only after it has been approved by the House of Peoples' Representatives. Judges are required to perform their judicial duties independently, free from external influence, and must base their decisions exclusively on the applicable law.⁸⁹ Judges cannot be removed from office before they reach retirement age unless they break the law, are grossly incompetent, or are unable to perform their duties. Any removal must be started by the Federal Judicial Administration Council and approved by the House of Peoples' Representatives or the relevant State Council.⁹⁰ A judge may not be removed from office before reaching the statutory retirement age, except in the following circumstances:⁹¹

- a) where the Judicial Administration Council determines that the judge has committed a serious breach of disciplinary standards or has demonstrated gross incompetence or persistent inefficiency;
- b) where the Judicial Administration Council concludes that the judge is no longer able to perform judicial duties because of ill health or incapacity; and
- c) where the decision of the Judicial Administration Council is confirmed by a majority vote of the House of Peoples' Representatives or the relevant State Council.

Furthermore, the period of judicial service may not be prolonged beyond the retirement age prescribed by law.⁹² Ethiopian law views removal as a disciplinary measure and a means to protect judicial independence, not as a broad constitutional disability that bars removed judges from all future public roles. The system is meant to address misconduct or incapacity while still allowing for rehabilitation and, where appropriate, continuing public-sector careers.

⁸⁹ 1995 Constitution of the Federal Democratic Republic of Ethiopia, Art 79(4).

⁹⁰ Girmachew Alemu Aneme. (2010). *Introduction to the Ethiopian Legal System and Legal Research*. GlobaLex, Hauser Global Law School Program
<https://www.nyulawglobal.org/globalex/ethiopia.html>

⁹¹ 1995 Constitution of the Federal Democratic Republic of Ethiopia, Art 79(4).

⁹² 1995 Constitution of the Federal Democratic Republic of Ethiopia, Art 79(5).

The Western Cape High Court impeachment turns a targeted removal mechanism into a general disqualification.⁹³ This goes beyond the Ethiopian model, which ties removal closely to judicial independence and tenure without automatically applying it to other constitutional or public office positions. South Africa must use impeachment⁹⁴ only as a punishment for a specific term to protect the integrity of the courts, not to prevent people from working in public service in the future. Hence, it is argued that section 178(1) of the South African Constitution⁹⁵ should allow Parliament to decide whether an impeached judge can still serve on bodies such as the JSC, provided that strict ‘fit-and-proper’ testing, transparency, and political accountability are applied.

7. The Way Forward and Ending Remarks

The exclusion of Judge Hlophe from serving as a member on the Judicial Service Commission misrepresents the intended scope of Section 177 of the Constitution. Impeachment results in removal from judicial office, not a lifelong disqualification from all constitutional roles. Section 178(1)(h) empowers Parliament to nominate individuals to the JSC, including those who are no longer judges. By blocking Hlophe’s appointment, the Court has overridden parliamentary discretion and blurred the separation of powers. This sets a troubling precedent where moral judgments are substituted for legal standards.

Courts must interpret the Constitution narrowly and avoid implying disqualifications not expressly stated. Ethical concerns must be addressed through democratic channels, not judicial activism. The Western Cape judgment weakens constitutional democracy by turning accountability into exclusion. It is recommended that future eligibility to constitutional bodies be determined strictly within the confines of the text, preserving the balance between institutional integrity and democratic legitimacy. This approach safeguards against the judiciary assuming powers not granted to it by the Constitution. Judicial enforcement of implied standards risks politicising the bench and weakening public confidence in impartial governance.

⁹³ Impeachment of the Chief Justice. <https://accountabilitynow.org.za/impeachment-chief-justice/> (Accessed 29 March 2026). See also section 177.

⁹⁴ Adolph Landman. (2000). Impeaching the judges, South Africa's copybook, *Judges Forum* (Advocate, First term, 2000), pp. 43-44. https://journals.co.za/doi/pdf/10.10520/AJA10128743_28 Accessed 30 April 2026).

⁹⁵ Section 178(1) of the South African Constitution.

Parliament, as the people's representative, must retain its authority to determine suitability for constitutional appointments. Upholding the rule of law means adhering to what the Constitution says and not what courts believe it should say. Section 2 of the Constitution states that this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The United Kingdom considers impeachment or the removal of a judge as a penalty confined to the judicial position, with no inherent prohibition on future public positions; eligibility afterwards relies on political assessment and scrutiny. Canada also restricts removal to the specific judgeship and does not enforce a lifetime constitutional disqualification, allowing future positions to be evaluated based on merit and integrity.

Impeachment under Section 177 of South Africa's Constitution that terminates judicial positions should not thus necessarily disqualify individuals from non-judicial positions such as the Judicial Service Commission, with Parliament enforcing stringent "fit-and-proper" criteria rather than an outright prohibition. South Africa can follow Ethiopia's lead and treat impeachment as a means of protecting judges' jobs rather than disqualifying them from all jobs. This would allow Parliament to appoint impeached judges to non-judicial roles, such as the JSC, by ensuring that strict standards of fitness and propriety and democratic accountability are always in place. ■

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Landlocked and Left Out? Effective Access to the Sea as an Imperative Claim with Special Reference to Ethiopia

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Abstract

International law recognizes the right of landlocked states to access the sea, yet treats the conditions of access as matters of transit, trade and interstate agreement. That framing is incomplete because authority over an indispensable maritime corridor can determine whether a population obtains food, medicines, the means of subsistence and conditions of development. Effective maritime access constitutes an international human-rights imperative wherever its obstruction foreseeably and materially impairs those protected interests. Scholarship on landlocked access concentrates on maritime transit and trade, while work on extraterritorial economic and social rights has rarely examined transit authority. This separation obscures how a state's control of a route engages obligations to persons and peoples beyond its territory. Read together with Part X of UNCLOS and applicable transit regimes, common Article 1(2) of the Covenants, Articles 2(1), 11 and 12 of the ICESCR and Articles 16, 21 and 22 of the African Charter support a six-factor test based on control, indispensability, directness, foreseeability, severity and causal contribution. The duty to respect prohibits arbitrary or discriminatory obstruction of essential transit, while duties of cooperation require established access relationships to protect the rights dependent upon them. In Ethiopia, concentrated corridor dependence places subsistence, food, health and development within another state's regulatory power. Effective maritime access is therefore a legally reviewable condition of human dignity and equitable regional development, rather than a matter confined to commercial accommodation or diplomatic discretion.

Keywords: Human rights, maritime access, extraterritorial obligations, right to development, Ethiopia

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1. Introduction

International law recognises a landlocked state's right to access the sea while leaving the practical conditions of that access dependent upon another state's exercise of territorial authority. For the thirty-two states classified by the United Nations as landlocked developing countries, that dependence reaches beyond commercial convenience because their populations gain access to maritime trade, food supplies, medicines, productive inputs and external markets through infrastructure and regulatory systems situated partly beyond the territorial state's control.¹ The legal paradox is embedded in the modern access regime itself. Article 125(1) of the United Nations Convention on the Law of the Sea recognizes the right of access to and from the sea and, for that purpose, freedom of transit through transit states. Article 125(2) leaves the terms and modalities of transit to agreement; and Article 125(3) preserves the

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
COMESA	Common Market for Eastern and Southern Africa
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

¹ United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) (2026), 'List of LLDCs', accessed 15 August 2026.

transit state's full sovereignty over its territory.² The entitlement and the dependence therefore coexist. Geography creates the condition, but law determines the terms on which it is managed. Where those terms materially affect food, health, subsistence or development, the relationship cannot remain exclusively within the interstate law of transit.

The law of landlocked access and human-rights law have developed along separate lines. The Barcelona Convention and Statute of 1921, the 1965 Convention on Transit Trade of Land-locked States and Part X of UNCLOS progressively placed freedom of transit within a multilateral legal order.³ Glassner, Caflisch, Vasciannie and Uprety explain the continuing dependence of formal access on territorial authority, while Criddle and Fox-Decent show that cooperation, rather than unqualified consent, increasingly structures that relationship.⁴ Human-rights law provides the missing account of what transit authority does to persons and peoples. Articles 11 and 12 of the ICESCR protect food and health through requirements of availability and physical and economic accessibility; common Article 1(2) of the Covenants protects a people against deprivation of its means of subsistence; and Articles 16, 21 and 22 of the African Charter protect health, resources and development.⁵ The African Commission's decisions in *SERAC, Endorois* and *Democratic Republic of Congo v Burundi, Rwanda and Uganda* connect those rights to

² Convention and Statute on Freedom of Transit (adopted 20 April 1921, entered into force 31 October 1922) 7 LNTS 11; Convention on Transit Trade of Land-locked States (adopted 8 July 1965, entered into force 9 June 1967) 597 UNTS 42; United Nations Convention on the Law of the Sea (1982), 1833 UNTS 397, Part X, arts 124–132.

³ Martin Ira Glassner. (1970). *Access to the Sea for Developing Land-Locked States* (Martinus Nijhoff); Lucius Caflisch. (1978). Land-locked States and their Access to and from the Sea. *British Yearbook of International Law*, Vol. 49, pp. 71–100; Stephen C Vasciannie. (1990). *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* (Oxford University Press); Kishor Uprety. (2006), *The Transit Regime for Landlocked States* (World Bank).

⁴ Evan J Criddle & Evan Fox-Decent. (2026). Landlocked States. In Evan J Criddle and Evan Fox-Decent. *Mandatory Cooperation under International Law* (Cambridge University Press), pp. 95–110, DOI 10.1017/9781009304993.005.

⁵ Committee on Economic, Social and Cultural Rights (CESCR) (1999), General Comment No 12, 'The Right to Adequate Food (Art 11)', UN Doc E/C.12/1999/5, paras 8, 13; CESCR (2000), General Comment No 14, 'The Right to the Highest Attainable Standard of Health', UN Doc E/C.12/2000/4, para 12(b); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1(2); International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3, art 1(2); Human Rights Committee (1984), General Comment No 12, 'Article 1 (Right to Self-Determination)', UN Doc HRI/GEN/1/Rev.9, para 5.

the material conditions of collective life and to state conduct beyond the respondent's territory.⁶ In combination, these sources establish the foundation for treating effective maritime access as a protected condition of subsistence, food, health and development.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires action individually and through international assistance and cooperation, while scholarship on extraterritorial obligations insists upon a legally defined connection between the acting state, the challenged conduct, the protected right and the affected population.⁷ Maritime access creates that connection through a specific transboundary relationship. Innocent passage governs ships moving through the territorial sea; Part X of the United Nations Convention on the Law of the Sea (UNCLOS) and transit law govern the route by which a landlocked state accesses the sea.⁸

The International Court's decision in *Bolivia v Chile* makes the legal source of any access obligation decisive, and Ethiopian scholarship similarly divides between historical entitlement and legally organised access.⁹

⁶ *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, Communication No 155/96, African Commission, decision of 27 October 2001, paras 44–69; *Centre for Minority Rights Development (Kenya) v Kenya (Endorois)*, Communication No 276/2003, African Commission, paras 277–298; *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication No 227/99, African Commission on Human and Peoples' Rights, decision adopted at the 33rd Ordinary Session, 15–29 May 2003, paras 63–98.

⁷ Fons Coomans. (2011). The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights. *Human Rights Law Review*, Vol. 11, No. 1, pp. 1–35; Lorand Bartels. (2014). The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects. *European Journal of International Law*, Vol. 25, pp. 1071–1091; Tilmann Altwicker. (2018). Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts. *European Journal of International Law*, Vol. 29, pp. 581–606; Marko Milanović. (2011). *Extraterritorial Application of Human Rights Treaties* (Oxford University Press), pp. 209–222; Lea Raible. (2020). *Human Rights Unbound* (Oxford University Press).

⁸ UNCLOS, arts 17–26 and 124–132. Innocent passage concerns passage through the territorial sea; Part X governs landlocked access and freedom of transit.

⁹ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Case No 153, Judgment, 1 October 2018, International Court of Justice, ICJ Reports 2018, p. 507, paras 175–176; Biruk Paulos & Temesgen Thomas Halabo. (2025). Ethiopia's Quest for Access to the Sea, *Mizan Law Review*, Vol. 19, No. 2, pp. 347–388, DOI 10.4314/mlr.v19i2.6; Mahemud Eshtu Tekuya, (2024). Swimming Against the Current. *Fordham International Law Journal*, Vol. 47, pp. 301–350; Angelina Shchukina. (2024). Ethiopia's Negotiations on Access to the Sea. *EJIL:Talk!* 27 February 2024.

Ethiopia's context gives the human-rights inquiry unusual precision: more than ninety-five per cent of its import-export trade by volume moves through one corridor, while its operative access is organised principally by the Common Market for Eastern and Southern Africa (COMESA) and bilateral arrangements rather than completed participation in UNCLOS, the 1965 Transit Convention or the WTO.¹⁰ The Ankara Declaration confirms the regional importance of reliable, secure and sustainable access.¹¹ The resulting legal problem is whether control of such an indispensable route may be exercised in a manner that impairs the basic means of livelihood in Ethiopia for a population of over one hundred and thirty million that is dependent upon it.

An established or legally recognised maritime route becomes a human-rights imperative when it is indispensable to subsistence, food, health or development. At that point the state controlling the route exercises public authority over a condition of protected rights, and its transit decisions fall within the obligations attached to those rights. Common Article 1(2) prohibits deprivation of a people's means of subsistence; Articles 11 and 12 of the ICESCR require respect for the availability and accessibility of food and health goods; and Article 22 of the African Charter places development within an individual and collective duty of states. These provisions prohibit arbitrary or discriminatory obstruction of essential transit and require cooperation where the states' access relationship gives that duty determinate legal content. Control over the measure, indispensability of the route, directness, foreseeability, severity and causal contribution identify the duty-bearer and connect the exercise of transit authority to the persons and peoples whose rights are at stake.

¹⁰ World Bank (2023), 'Addis-Djibouti Corridor to Get Major Upgrade That Is Key to Unlocking Connectivity and Trade for Ethiopia and the Horn of Africa', 20 July 2023, reporting that over 95 per cent of Ethiopia's import-export trade by volume uses the corridor; United Nations Treaty Collection (2026), 'United Nations Convention on the Law of the Sea: Status of Treaties', status checked 16 August 2026; United Nations Treaty Collection (2026), 'Convention on Transit Trade of Land-locked States: Status of Treaties', status checked 16 August 2026; World Trade Organization (2026), 'Accession Status: Ethiopia', status checked 16 August 2026; Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty), arts 84, 88 and Annex I, art 2; Federal Democratic Republic of Ethiopia, *Ethio-Djibouti Utilization of the Port of Djibouti and Services to Cargo in Transit Agreement Ratification Proclamation No 284/2002*, 4 July 2002.

¹¹ Ministry of Foreign Affairs of the Republic of Türkiye (2024), 'Ankara Declaration by the Federal Democratic Republic of Ethiopia and the Federal Republic of Somalia Facilitated by the Republic of Türkiye', 11 December 2024.

The claim rests on treaty text interpreted under the ordinary rules of interpretation, judicial decisions and the jurisprudence of the African Commission. CESCER General Comments clarify the content of Covenant rights, while the Declaration on the Right to Development, the Awaza Programme and the Maastricht Principles carry interpretive or progressive weight according to their legal status. Scholarship is relevant where extraterritorial scope, causation and cooperative duties remain contested. Ethiopia provides the setting in which those rules are applied to a concentrated corridor, identifiable transit regimes and traceable effects on protected rights.

Section 2 examines the human-rights foundations of maritime access. Section 3 applies that framework to Ethiopia. Section 4 considers objections based on sovereignty, consent, extraterritoriality and causation, and addresses legal consequences and enforcement.

2. The Human Rights Foundations of Maritime Access

2.1 The legal form and normative interface

International human-rights law protects maritime access through the rights whose enjoyment depends upon it. Food and health require physical and economic access to essential goods; common Article 1(2) protects the material basis of collective subsistence; and the African Charter recognises health, control of resources and development as rights of persons and peoples. For a landlocked population, those guarantees operate through the route by which food, medicines and productive inputs essential to development enter the country. When that route is indispensable and another state controls the transit measure that interrupts it, maritime access is no longer only an interstate facility. It is the legally protected condition through which recognised human rights are exercised.

Understanding maritime access as a condition of existing rights clarifies the relationship among rights-holders, protected interests and duty-bearers. Individuals hold the rights to food and health, peoples hold the rights to subsistence and development, and the state exercising authority over the challenged transit measure bears the corresponding obligation. The protected object is effective access to the goods and opportunities secured by those rights: availability, affordability, continuity of essential supply and participation in development. Where the required cross-border connection is established, the transit state must exercise its authority consistently with its obligations concerning food, health, subsistence and development. Its transit measures can therefore be assessed against those obligations by examining their effects on the persons and peoples who depend on the route.

The resulting allocation of rights and duties operates within the interstate framework created by Part X of UNCLOS and applicable regional or bilateral instruments. Article 125 recognises access to and from the sea and freedom of transit, organises their modalities through agreement and places implementation within the territorial authority of the transit state. Human-rights law sets the substantive standard governing that authority when transit controls the availability of food, medicines, and the means of subsistence or the conditions of development. A single measure may accordingly engage transit law and human-rights law at once: the former identifies the access relationship and regulatory power; the latter judges the exercise of that power by its effect on protected persons and peoples.

Because the same access relationship may be governed by transit and human-rights law, Article 31(3)(c) of the Vienna Convention requires an integrated reading where both bodies of law bind the states concerned.¹² The rules relevant to interpretation include the source-based discipline reflected in Article 38(1) of the ICJ Statute and the distinct interpretive weight of expert principles.¹³ Within that framework, terms such as cooperation, facilitation, special treatment and non-discrimination take their legal meaning from the whole relationship between the parties. Part X and regional transit law identify who controls the route and what cooperation already governs it; the ICESCR and African Charter require those powers to be exercised and those commitments to be fulfilled consistently with subsistence, food, health and development.

A third regime becomes relevant wherever the route on which a landlocked population depends crosses waters used for international navigation. Part III of UNCLOS applies to straits used for international navigation between one part of the high seas or an exclusive economic zone and another, and Article 38 confers on all ships a right of transit passage through them.¹⁴ The states bordering such a strait must not hamper transit passage and must give appropriate publicity to any danger to navigation of which they have knowledge, and the right may not be suspended.¹⁵ This duty is owed to the community of user states rather than created for the benefit of any single landlocked state, and it does not by itself generate a right of access or a human-rights obligation. It offers corroboration only where the corridor to which the

¹² Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, art 31(3)(c).

¹³ Statute of the International Court of Justice, art 38(1); Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011).

¹⁴ UNCLOS, *supra* note 2, Part III, arts 37–38.

¹⁵ UNCLOS, *supra* note 2, art 44.

six factors apply itself crosses such a strait: an obstruction then becomes harder to characterise as an ordinary exercise of territorial discretion, because it would simultaneously implicate a duty owed to international navigation at large, and the strait's narrow, non-substitutable character reinforces the indispensability and foreseeability already required. Where the relevant corridor does not cross such a strait, this regime has no bearing on the analysis.

2.2 Subsistence, food and health

The most categorical collective foundation lies in common Article 1(2) of the Covenants. After recognising that peoples may freely dispose of their natural wealth and resources, it declares that '[i]n no case may a people be deprived of its own means of subsistence'.¹⁶ The final sentence protects the material capacity by which a people sustains collective life. Where a population depends upon maritime transit for indispensable food or productive inputs and state action severs that supply, the route forms part of the means through which subsistence is secured. Article 1(2) therefore applies to deprivation caused by control over access, not merely interference with a particular asset.

The subsistence guarantee applies to maritime access when three conditions converge: the route is indispensable to the population's material survival; the challenged interference is sufficiently severe to deprive rather than merely inconvenience; and no practicable alternative prevents the loss. A closure that makes basic food unavailable, or that cuts off the productive inputs on which subsistence depends, places transit within the prohibition because the exercise of authority over the corridor becomes the mechanism of deprivation. Indispensability, severity and the availability of alternatives are therefore elements that establish the Article 1(2) claim and distinguish it from an ordinary dispute over commercial advantage.

The collective guarantee in Article 1(2) is reinforced at the individual level by Articles 11 and 12 of the ICESCR. Article 11 protects an adequate standard of living, adequate food and freedom from hunger; Article 12 protects the highest attainable standard of health. General Comments Nos 12 and 14 make availability and accessibility integral to both rights, and treat accessibility as having both physical and economic dimensions.¹⁷ For a population dependent on imported food, pharmaceuticals, medical equipment or agricultural inputs, the maritime corridor is part of the infrastructure of those guarantees. A transit

¹⁶ Ben Saul, David Kinley & Jacqueline Mowbray. (2014). *The International Covenant on Economic, Social and Cultural Rights* (Oxford University Press), ch 2; Human Rights Committee, General Comment No 12, para 5.

¹⁷ CESCR, General Comment No 12, paras 6, 8, 13; CESCR, General Comment No 14, para 12.

measure engages the Covenant when it materially reduces the physical supply of the protected good or raises its cost to a level that denies economic access to identifiable rights-holders.

Beyond defining food and health, the CESCR has applied the duty to respect to state measures affecting protected goods abroad. General Comment No 12 requires states to respect the enjoyment of food in other countries and to refrain from embargoes or comparable measures endangering food production or access; General Comment No 14 directs the same restraint toward restrictions on medicines and medical equipment.¹⁸ These interpretations extend the duty to respect to transit measures that endanger food supplies or restrict medicines across a border. A state that controls an indispensable route must respect the food and health rights served by that route because its own measure determines whether the goods remain available and accessible across the border. The obligation attaches to the state's exercise of transit authority and to the impairment it causes.

A legally reviewable cross-border claim therefore depends on precise proof of causation. National estimates of the economic burden of landlockedness establish structural vulnerability, while responsibility for food or health requires proof of the incremental effect of the challenged transit measure.¹⁹ Where the measure reduces supply, raises the landed price or delays delivery enough to impair physical or economic accessibility, the causal chain converts transit interference into a violation of Articles 11 or 12. If the evidence proves exposure alone, it establishes the structural risk against which the duties of prevention and cooperation operate.

Where transit obstruction impairs access to essential food or primary health care, the Covenant's minimum-core doctrine confirms the gravity of the human-rights claim. The territorial state bears the immediate duty to secure minimum essential food and primary health care, while an external state remains responsible for its own conduct that directly obstructs those essentials. The two responsibilities are concurrent rather than substitutive: domestic failures do not erase an independently attributable foreign interference, and foreign control of transit does not displace the territorial state's duty to use its resources for rights protection. Affirmative cooperation draws its additional legal content from Article 2(1), Article 22 of the African

¹⁸ CESCR, General Comment No 12, paras 36–37; CESCR, General Comment No 14, para 41.

¹⁹ Ilias Plakokefalos. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination. *European Journal of International Law*, Vol. 26, pp. 471–492; Philip Alston & Gerard Quinn. (1987). The Nature and Scope of States Parties' Obligations under the ICESCR. *Human Rights Quarterly*, Vol. 9, pp. 156–229.

Charter and the transit relationship through which the relevant states organize access.

2.3 Development and peoples' rights in the African system

Article 22 of the African Charter on Human and Peoples' Rights (ACHPR) recognizes the economic, social and cultural development of all peoples and requires states, individually or collectively, to ensure its exercise.²⁰ Accordingly, development is an entitlement rather than an aggregate policy objective and this places regional cooperation within the content of the right itself. The 1986 Declaration on the Right to Development elaborates the same relationship at universal level by linking development to participation, contribution, benefit and international cooperation.²¹ For Ethiopia and its African transit partners, ACHPR furnishes the binding rule and the Declaration assists in interpreting the quality of development that the rule protects.

Endorois gives Article 22 an operative conception of development. The African Commission treated the community as a rights-holding people and assessed whether it could participate in, contribute to and benefit from the development affecting its material life.²² Applied to maritime access, the same approach directs attention beyond national income to the distribution of opportunity and deprivation. Transit costs, interruption and corridor concentration engage Article 22 when they exclude a people from the material capacities through which development is pursued: food security, health systems, productive activity, trade and meaningful participation in economic life. Effective access is therefore protected as an institutional condition of people-centred development.

The people-centred conception of development also gives practical force to Article 22(2), which requires states to ensure development 'individually or collectively'.²³ Article 22(2) places development within a regional order of shared legal responsibility when it is considered together with Article 20 (on self-determination), Article 21 (on wealth, resources and equitable international economic cooperation), and Article 23 (on solidarity between states). The duty becomes specific when one state controls a condition on which another people's development materially depends and an existing legal relationship governs that control. An established maritime corridor provides

²⁰ African Charter on Human and Peoples' Rights (1981), 1520 UNTS 217, art 22.

²¹ UNGA Res 41/128 (4 December 1986), Declaration on the Right to Development, arts 1, 3–4.

²² *Endorois v Kenya*, *supra* note 6.

²³ African Charter, arts 20–23.

each element. The affected people are identifiable, the access function is indispensable, the transit authority is located in a particular state, and the applicable agreements specify cooperation. Article 22 thus requires that authority over the route be exercised to secure, rather than impair, the neighbouring people's development.

The African Commission's interstate decision in *Democratic Republic of Congo v Burundi, Rwanda and Uganda* supports the narrower proposition that Charter responsibility may follow a state's extraterritorial exercise of public power, even though the decision itself concerned military intervention and territorial control rather than a commercial transit measure.²⁴ In the transit context, the required nexus does not rest on physical presence or force; it arises only where control, indispensability, directness, foreseeability, severity and causal contribution are independently established. Transit responsibility therefore rests on authority over the impugned route and measure, not on the claimant population's physical presence within the respondent's territory.

Beyond the Charter's jurisprudence, the Awaza Programme of Action confirms the contemporary institutional understanding of landlocked development as a human-rights concern. It connects resilient transit, productive capacity, structural transformation and international support to the right to development and the special vulnerability of landlocked populations.²⁵ Its legal significance is interpretive: it records how states now understand the developmental stakes of access, while Article 22 remains the binding regional source. Considered as a whole, the instruments place reliable maritime access within the conditions that states must secure through individual and collective action for the realisation of development.

2.4 Extraterritorial obligation, duty-bearers and the threshold of responsibility

The cooperative dimension of the African Charter is reinforced by Article 2(1) of the ICESCR, which makes international cooperation part of the treaty obligation to realise economic and social rights. Each state party undertakes to take steps individually and through international assistance and cooperation, using the maximum of its available resources; General Comment No 3 treats that cooperative dimension as essential to Covenant

²⁴ *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, *supra* note 6.

²⁵ UNGA Res 79/233 (24 December 2024), UN Doc A/RES/79/233, *Awaza Programme of Action*, paras 9–11; Office of the United Nations High Commissioner for Human Rights (2025), 'The Right to Development and Landlocked Developing Countries (LLDCs)'.

implementation.²⁶ Where another state controls an established maritime route within a treaty, regional regime or sustained operational arrangement, Article 2(1) requires cooperation directed to the rights whose enjoyment depends on that route.

Cooperation is only one dimension of the obligation; the duty to respect applies directly to transit measures that obstruct essential goods abroad. General Comments Nos 12 and 14 require states to respect food and health in other countries and to refrain from measures that endanger food supplies or restrict medicines; General Comment No 24 extends the same principle to direct or indirect interference with Covenant rights outside the state's territory.²⁷ A state that blocks, discriminates against or politically conditions indispensable transit therefore interferes through conduct of its own with the availability and accessibility protected by Articles 11 and 12. Article 2(1) and Article 22(2) add a duty of cooperation, and the corridor's bilateral or regional regime translates that duty into consultation, continuity, non-discrimination and good-faith administration. The negative and positive obligations together protect effective access against obstruction and institutional neglect. The obligation is extraterritorial in reach and immediate in its regulation of the state authority from which the impairment arises.

Six interlocking factors establish the necessary connection: control, indispensability, directness, foreseeability, severity and causal contribution.²⁸ *Control* identifies the state capable of opening, closing or conditioning the route; *indispensability* explains why the route is rights-bearing; and *directness* traces the measure to the availability or cost of the protected good. *Foreseeability* connects the decision to consequences the authority could anticipate; *severity* distinguishes impairment from ordinary commercial friction; and *causal contribution* allocates only the injury produced by the measure. General Comment No 24 grounds the duty to respect, while Article 2(1), Article 22(2) and an established transit relationship specify the cooperative duty.²⁹

²⁶ CESCR (1990), General Comment No 3, UN Doc E/1991/23, para 14; Sigrun I Skogly (2006), *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia).

²⁷ CESCR (2017), General Comment No 24, 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', UN Doc E/C.12/GC/24, para 29.

²⁸ Altwickler, *supra* note 7; Coomans, *supra* note 7, pp. 27–30.

²⁹ CESCR, General Comment No 24, *supra* note 27, paras 29–33; Olivier De Schutter and others (2012), 'Commentary to the Maastricht Principles', *Human Rights Quarterly*, Vol. 34, pp. 1084–1169; Bartels, *supra* note 7, pp. 1077–1085.

The six factors rest on treaty text and interpretive practice, not on the Maastricht Principles as an independent source of law.³⁰ The legal basis for this approach, however, lies in the treaties and interpretive practice already examined: authority over a specific measure, a direct transboundary pathway and a protected interest impaired with sufficient seriousness. This conduct-and-control approach avoids an effects-only theory while ensuring that a border does not sever responsibility for the state action that causes the rights impairment. It also distinguishes the obligation to refrain from interference, which attaches to the measure itself, from positive cooperation, whose precise content is fixed by the legal relationship governing access.

Effective maritime access engages three distinct bodies of rights. Common Article 1(2) governs deprivation of collective subsistence; Articles 11 and 12 govern the physical and economic accessibility of food and health goods; and Article 22 governs a people's capacity to participate in and benefit from development. Each route requires an identifiable transit measure, authority in the respondent state, an indispensable or materially significant corridor, a direct and foreseeable pathway to the protected interest and a causal contribution of sufficient gravity. Where those elements are established, the duty to respect prohibits obstruction and the duty to cooperate requires the existing access relationship to be administered in a manner capable of securing the rights that depend upon it.

3. Ethiopia and the Human Rights Claim to Maritime Access

3.1 From historical access to contemporary legal dependence

Ethiopia's historical access to the Red Sea brings the principles discussed in the preceding section into a concrete legal setting. In 1950 the United Nations General Assembly expressly recognised Ethiopia's "legitimate need for adequate access to the sea" when determining Eritrea's constitutional future.³¹ The phrase identified access to the sea as one of the factors in political, economic and social settlement. Its contemporary human-rights significance lies in the same material reality: access determines whether a landlocked population can obtain essential goods, sustain productive life and participate in development. The historical recognition therefore provides context for

³⁰ Maastricht Principles, *supra* note 13, principles 8, 13, 20, 29 and 31; De Schutter *et al*, *supra* note 29.

³¹ UNGA Res 390(V) (2 December 1950), 'Eritrea', preamble; United Nations Commission for Eritrea (1950), *Report of the United Nations Commission for Eritrea*, UN Doc A/1285.

these obligations; their legal basis lies in the Covenants, the African Charter and the legal regimes governing transit.

The events that followed made the distinction between coastline and functional access explicit. Ethiopia became landlocked in 1993, but Ethiopian cargo continued to move through Assab under a Transit and Port Services Agreement concluded with Eritrea. Loss of coastline therefore did not produce loss of maritime access. Secure access can therefore exist without sovereignty over the port, although it remains subject to the wider international legal order. However, when war began in 1998, the arrangement collapsed. In the Ports Claim, the Eritrea-Ethiopia Claims Commission held that the onset of international armed conflict entitled Eritrea to terminate Ethiopia's access to Assab notwithstanding the prior peacetime arrangements.³²

Article 88 of the COMESA Treaty requires coastal member states to cooperate with landlocked members in maritime transport so as to facilitate their trade and addresses non-discriminatory maritime tariffs, while Annex I requires freedom of transit subject to specified public-interest restrictions and disciplines fiscal burdens and discrimination. Ethiopia and Djibouti have, in addition, an agreement governing use of the Port of Djibouti and services to cargo in transit, ratified by Ethiopia through Proclamation No 284/2002.³³

COMESA and bilateral port law organize the movement of Ethiopian goods and allocate authority along the corridor, while the ICESCR and African Charter govern the consequences for subsistence, food, health and development. Read together, the regimes transform the corridor from a commercial route into a legally organized site of responsibility: transit law specifies the relationship, and human-rights law governs its effect.

The legal relationship assumes exceptional practical importance because more than 95 per cent of Ethiopia's import-export trade (by volume) moves through the Addis-Djibouti corridor.³⁴ The relationship is better understood as concentrated interdependence than as unilateral dependence. Ethiopia controls the domestic side of the logistics chain and represents the dominant source of commercial demand for Djibouti's port system, while Djibouti exercises territorial and regulatory authority over the port and the external segment on which Ethiopian trade overwhelmingly relies. Human-rights

³² Eritrea-Ethiopia Claims Commission, *Final Award, Ports – Ethiopia's Claim 6*, Claim No 6, 19 December 2005, 26 RIAA 489, paras 1, 9–12, 19–22.

³³ COMESA Treaty, *supra* note 10, arts 84(d), 88(d), 110(1)(b), 110(2)(e) and Annex I, art 2; Proclamation No 284/2002, *supra* note 10.

³⁴ World Bank, *supra* note 10; UNCTAD (2018), *The Djibouti City-Addis Ababa Transit and Transport Corridor: Turning Diagnostics into Action*.

responsibility follows those forms of authority rather than the political vocabulary of dependence alone.

3.2 When corridor dependence enters human-rights law

Ethiopia's reliance on the Addis-Djibouti corridor establishes the first element of the human-rights claim: a route whose operation is materially connected to essential supply.³⁵ A claim must then trace a specific closure, delay, charge or operating condition through purchase price, ocean freight, port handling, storage, customs, inland transport, currency conversion, taxation and distribution. Articles 11 and 12 apply when the measure attributable to the transit state materially alters physical availability or economic accessibility for identifiable persons. The relevant comparison is between the effects of the challenged transit measure and the position that would have existed without that interference. This identifies the harm attributable to the transit state, separately from the ordinary costs of geography and costs generated within Ethiopia.

Approximately 2.5 million tonnes of food and 60,000 tonnes of pharmaceutical products passed through the corridor in 2019, while fuel represented about 23.1 per cent of merchandise imports by value in 2022/23.³⁶ Research on rail connectivity, fertiliser distribution and pharmaceutical supply shows how imported inputs shape agricultural production, food availability and health services.³⁷ A measure that interrupts or materially burdens the corridor can reduce the supply of medicines, raise the cost of food, constrain agricultural output and weaken the public systems through which health and subsistence are secured. Responsibility depends on identifying which harmful effects were caused by the transit measure attributable to the state and which persons or groups suffered those effects.

At household level, corridor costs translate into human-rights injury when the evidence identifies who bears them. Using the 2018/19 and 2021/22

³⁵ World Bank, *supra* note 10; UNCTAD, *supra* note 34.

³⁶ World Bank (2023), *Horn of Africa Initiative: Regional Economic Corridor Project*, Project Appraisal Document No PAD4425, 27 June 2023, para 17; National Bank of Ethiopia (2023), *Annual Report 2022/23*, Table 5.6.

³⁷ Atsushi Iimi, Haileyesus Adamtei, James Markland & Eyasu Tsehay. (2019). Port Rail Connectivity and Agricultural Production. *Journal of Applied Economics*, Vol. 22, pp. 152–173; Shahidur Rashid, Nigussie Tefera, Nicholas Minot & Gezahegn Ayele. (2013). *Fertilizer in Ethiopia: An Assessment of Policies, Value Chain, and Profitability*, IFPRI Discussion Paper No 1304; Tesfa Marew, Frances J Richmond, Anteneh Belete & Tsige Gebre-Mariam. (2022). Trends and Challenges in Access to Essential Medicines in Ethiopia. *Ethiopian Journal of Health Sciences*, Vol. 32, pp. 1027–1042.

Ethiopian Socioeconomic Panel Survey, Wieser, Tesfaye and Yitbarek associate above-median local food inflation with a 9.6 per cent reduction in real annual consumption per adult equivalent nationally and 15.5 per cent in urban areas.³⁸ General Comment No 12 treats economic accessibility as part of the right to adequate food and requires that food costs leave other basic needs attainable. The study does not claim that transit caused inflation, but it demonstrates the distributional mechanism by which a proved corridor cost reaches rights-holders: higher food prices reduce real consumption, with a sharper effect among urban households. Conflict, drought, exchange-rate movements, taxation, storage, domestic distribution and global commodity prices may also contribute, so attribution requires isolating the transit measure. Once that causal step is established, the injury is no longer an abstract loss of national income; it is reduced economic access to food among identifiable households.

Tracing the causal chain also allocates responsibility among the authorities governing its successive stages. Ethiopia controls customs and clearance practices, inland transport, dry-port performance, currency policy, domestic taxation and distribution, and Article 2(1) requires those powers and resources to be directed to the realization of Covenant rights.³⁹ The transit state controls the external measure governing passage through its territory. Where both domestic and external decisions contribute to the impairment, each state remains responsible for the injury attributable to its own conduct; Ethiopia's primary obligations cannot excuse an independently wrongful obstruction by the transit state.

Food prices can concurrently reflect global markets, Ethiopian currency policy, domestic distribution and a foreign obstruction. The decisive question is whether lawful administration of the route would have meaningfully reduced the impairment.⁴⁰ Responsibility extends only to the injury caused by the external measure, but concurrent domestic causes do not extinguish that responsibility.

³⁸ Christina Wieser, Wondimagegn Tesfaye & Eleni Yitbarek. (2026). Impact of Food Inflation on Household Welfare in Ethiopia. *Structural Change and Economic Dynamics*, Vol. 79, pp. 510–524, DOI 10.1016/j.strueco.2026.06.006.

³⁹ ICESCR, art 2(1); CESCR, General Comment No 3, paras 9–14.

⁴⁰ International Law Commission. (2001). Articles on Responsibility of States for Internationally Wrongful Acts, arts 2 and 31 and commentary to art 31; Plakokefalos, *supra* note 19, pp. 474–489; André Nollkaemper & Dov Jacobs. (2013). Shared Responsibility in International Law. *Michigan Journal of International Law*, Vol. 34, pp. 359–438.

COMESA specifies that allocation of authority. Article 84(d) requires special treatment for landlocked and island member states; Article 88(d) requires coastal members to cooperate with landlocked members in maritime transport so as to facilitate their trade; Article 88(i) requires non-discriminatory tariffs, rules and regulations; Article 110(1)(b) addresses movement of pharmaceuticals; and Article 110(2)(e) guards against registration procedures that obstruct such movement.⁴¹ These are regional integration obligations rather than human-rights provisions. Their importance is to identify Djibouti and Ethiopia as parties to a legal relationship in which cooperation, non-discrimination and the movement of health goods already have textual content.

A non-discriminatory charge tied to genuine transport, administration or services remains ordinary regulation. The CESCR has expressly stated that food and medicines should not be used as instruments of political or economic pressure.⁴² When the state controlling the route uses that authority in a manner that foreseeably impairs access to those goods, the measure falls within the duty to respect, provided the causal and severity thresholds are met. Human-rights law therefore scrutinizes the purpose and effects of transit authority without turning Article 11 into a general tariff code.

Ethiopia receives essential goods through an operating corridor governed by Djiboutian authority, COMESA and bilateral law.⁴³ A closure, discriminatory restriction, avoidable delay or political condition imposed on that route can therefore be tested against common Article 1(2), Articles 11 and 12 of the ICESCR and Article 22 of the African Charter. The evidence required in a dispute would identify the measure, quantify its effect on supply or landed cost, trace that effect to the affected population and distinguish it from domestic or global causes. The corridor's existing legal structure therefore makes such interference reviewable under human-rights law.

3.3 Rights-consistent access through regional legal relationships

Bolivia v Chile clarifies the legal character of this human-rights claim. The Court required Bolivia to establish a source for the obligation to negotiate sovereign access that it pleaded and found none.⁴⁴ The human-rights obligation has a different source and object. It arises from binding rights to

⁴¹ COMESA Treaty, *supra* note 10, arts 84(d), 88(d), 88(i), 110(1)(b) and 110(2)(e) and Annex I, arts 2, 4 and 5.

⁴² CESCR, General Comment No 12 and General Comment No 14, *supra* note 18.

⁴³ World Bank, *supra* note 10; COMESA Treaty, *supra* note 10, arts 84 and 88; Proclamation No 284/2002, *supra* note 10.

⁴⁴ *Bolivia v Chile*, *supra* note 9.

subsistence, food, health and development and from the established transit relationship through which another state exercises authority over their enjoyment. The remedy is effective, rights-consistent performance of that relationship: continuity of essential transit, non-discrimination, protection against political obstruction and cooperation responsive to foreseeable harm. The judgment therefore reinforces the need to identify the legal relationship while leaving the human-rights regulation of that relationship fully available.

The distinction between an existing access relationship and a claim to sovereign access also frames the Ethiopia-Somaliland Memorandum of Understanding of 1 January 2024 and the Ankara Declaration. Public accounts described the unpublished Memorandum as contemplating long-term naval and commercial access linked to possible Ethiopian recognition of Somaliland.⁴⁵ The Ankara Declaration instead committed Ethiopia and Somalia to pursue reliable, secure and sustainable access under Somalia's sovereign authority.⁴⁶ For human-rights purposes, that development is significant because it identifies the states capable of creating the relationship through consent and the authority that would administer it. Once the commercial arrangements are established, Articles 2(1), 11 and 12 of the ICESCR and Article 22 of the African Charter govern their implementation: access must be organized with continuity, non-discrimination and protection of the essential goods and developmental interests dependent upon it.

Ethiopia's own authority carries corresponding affirmative obligations. Concentration of more than ninety-five per cent of maritime trade in one corridor magnifies the consequences of disruption, and Article 2(1) requires Ethiopia to use available resources to reduce that exposure.⁴⁷ Domestic logistics, customs administration, strategic storage, contingency planning and lawful diversification are therefore elements of the state's duty to protect food, health and development. Those duties operate concurrently with the transit state's duty to respect and cooperate. Diversification may reduce the injury attributable to an external measure, but it leaves responsibility for an independently wrongful obstruction with the state that imposed it.

These provisions give rights-consistent access institutional content when read together with the instrument governing a particular corridor: continuity

⁴⁵ International Crisis Group. (2024). *The Stakes in the Ethiopia-Somaliland Deal*, 6 March 2024; African Union Commission. (2024), *The Chairperson of the African Union Commission Calls for Mutual Respect between Ethiopia and Somalia*, 3 January 2024. The MoU text was not published; the description in the text reflects public accounts.

⁴⁶ Ankara Declaration, *supra* note 11.

⁴⁷ ICESCR, art 2(1); African Charter, art 22(2).

of essential supply and access in emergency, non-discriminatory tariffs and procedures rationally connected to genuine services, and consultation where a material change threatens that supply. Their precise content in a given case depends on the transit agreement or regional regime that identifies the parties, facilities and procedures through which cooperation is performed. Common Article 1(2), Articles 11 and 12 and Article 22 supply the human-rights standard against which that performance is measured. Effective access is thus secured through a legal regime that governs an ongoing relationship rather than an episodic diplomatic discretion.

Extreme corridor concentration places food, medicines, productive inputs and the conditions of development within regulatory decisions taken beyond Ethiopia's territory. COMESA and bilateral law identify the state authority and cooperative structure through which those decisions are made. The Covenants and the African Charter then require that structure to secure the rights dependent upon it. Essential maritime transit must remain available, accessible and non-discriminatory, and must be governed through cooperation proportionate to the human consequences of interruption.

3.4 Historical continuity of Ethiopia's maritime dependence

Ethiopia's dependence on a Red Sea corridor is not a recent development. When Italy renounced its African possessions under the 1947 Peace Treaty and their final disposition fell to the United Nations, the General Assembly resolved that Eritrea would constitute an autonomous unit federated with Ethiopia under the Ethiopian Crown, with express regard for Ethiopia's legitimate need for adequate access to the sea.⁴⁸ For four decades thereafter, first under the federation and then under unitary administration, Ethiopian trade moved through Massawa and Assab, the Federation's two ports on the Eritrean coast of the Red Sea.⁴⁹ Eritrean independence in 1993 ended Ethiopia's territorial connection to Assab. The Claims Commission separately held that the outbreak of war in 1998 entitled Eritrea to terminate the prior peacetime access arrangement.⁵⁰ Federation and later transit regimes show that Ethiopia's reliance on maritime access is neither novel nor transient, a fact relevant to foreseeability and severity although this historical continuity does not create a territorial entitlement.

⁴⁸ Treaty of Peace with Italy (signed 10 February 1947, entered into force 15 September 1947) 49 UNTS 3, art 23; UNGA Res 390(V), *supra* note 31.

⁴⁹ United Nations Commission for Eritrea, *supra* note 31.

⁵⁰ Eritrea-Ethiopia Claims Commission, *supra* note 32.

4. Counterarguments and the Scope of the Human-Rights Imperative

4.1 Sovereignty, territorial integrity, consent and legal personality

The first objection is that maritime access is negotiated by states while the rights invoked belong to individuals and peoples. That distinction identifies the legal actors rather than defeating the claim. Individuals hold the rights to food and health; peoples hold the guarantees of subsistence and development. Ethiopia bears primary obligations toward persons within its jurisdiction and may represent affected rights-holders in interstate proceedings, and the transit state answers for its own exercise of authority over the route.⁵¹ The state-to-state access relationship is therefore the legal channel through which the rights of persons and peoples are protected. The claim concerns the human consequences of transit authority, and its remedy secures the effective operation of that authority for the rights-holders who depend upon it.

A related objection warns that governments may re-describe national economic preferences as rights of ‘the people’. The African Commission’s reasoning in *Endorois* provides the answer: collective status, material effect, participation and benefit must be demonstrated.⁵² A claim under common Article 1(2) or Article 22 must identify the people affected and show how the transit measure deprives them of their collective means of subsistence or impairs their capacity to participate in and benefit from development. Where the evidence instead concerns the price or availability of food and health goods for individuals, Articles 11 and 12 provide the proper legal basis. The framework thus prevents a governmental preference from substituting for proof of the underlying human right.

Sovereignty and consent present the central objection. A coastal state controls its territory, ports, customs, infrastructure and security regulation; *Bolivia v Chile* confirms that an obligation to negotiate sovereign access requires a recognized legal source, and *Right of Passage* confirms the continuing authority of the territorial state to regulate passage.⁵³ Those propositions coexist with the human-rights obligations binding the same state. Sovereignty identifies the public authority responsible for the port and corridor; it does not place the exercise of that authority outside Articles 11 and 12 of the ICESCR or Articles 16 and 22 of the African Charter. Consent

⁵¹ ICESCR, arts 11 and 12; African Charter, art 22.

⁵² *Endorois v Kenya*, *supra* note 6.

⁵³ *Bolivia v Chile*, *supra* note 9; *Right of Passage over Indian Territory (Portugal v India)*, Judgment, ICJ Reports 1960, p. 6, pp. 39–45.

creates or specifies a new route, while human-rights law governs the administration of a route already established or legally recognized.

Nor do Article 62 of the Vienna Convention or intergenerational equity provide an alternative source of territorial entitlement. Fundamental change of circumstances is an exceptional ground for terminating or withdrawing from an existing treaty obligation, subject to the demanding conditions applied in *Gabčíkovo-Nagymaros* and the exclusion of boundary treaties.⁵⁴ Eritrea's independence and Ethiopia's resulting landlockedness may strengthen the political and developmental case for negotiation, but Article 62 creates no corresponding obligation in a neighbouring state. Intergenerational equity, developed principally in environmental and natural-resource law, supports the normative value of durable access and long-term development; it has not become a rule reallocating territory or compelling a specified corridor.⁵⁵ The human-rights claim rests instead on present rights and present authority over the conditions of their enjoyment.

The claim likewise does not depend upon the contested proposition that all economic and social rights have *erga omnes* status. *Barcelona Traction* identified obligations owed to the international community by reference to basic rights, and the extension of that category and its procedural consequences remains disputed.⁵⁶ The maritime-access claim requires no such classification. It rests on treaty obligations binding the states concerned, on the respondent's own conduct and on the specific transit relationship through which that conduct affects protected persons and peoples. A duty may be fully binding between the relevant parties and judicially reviewable without first being owed to every state.

Territorial integrity, *uti possidetis* and the prohibition of force relate to any attempt to obtain access through unilateral territorial rearrangement. Public accounts of the Ethiopia-Somaliland Memorandum raised precisely these questions because the contemplated access was linked to recognition and to authority over contested territory. The African Union reaffirmed Somalia's unity and territorial integrity, while *uti possidetis* protects inherited frontiers

⁵⁴ Vienna Convention on the Law of Treaties, art 62; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, paras 104–112.

⁵⁵ Edith Brown Weiss (1989), *In Fairness to Future Generations* (Transnational Publishers).

⁵⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, ICJ Reports 1970, p. 3, paras 33–34; Christian J Tams (2005), *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press).

and regional stability.⁵⁷ Article 2(4) of the UN Charter and Article 4 of the Constitutive Act of the African Union prohibit coercive acquisition and require peaceful settlement.⁵⁸ These rules confine the human-rights imperative to lawful access relationships. They also reinforce it: a doctrine grounded in food, health, subsistence and development must protect neighbouring populations from the displacement and deprivation that coercion would produce.

4.2 Extraterritoriality, causation and the scope of responsibility

The strongest extraterritorial objection is that cross-border economic effects could subject every trade, tax or transport decision to human-rights review. The ICESCR contains no jurisdiction clause, the *Wall* opinion involved territorial authority, and commentators disagree over the legal status and breadth of effects-based approaches.⁵⁹ The control test answers that objection. Responsibility arises from authority over the challenged transit measure, joined to an indispensable route and a direct pathway to a protected right; it does not arise from economic influence alone. The respondent is asked to answer for the closure, restriction, charge or condition it imposed, not for the general welfare of a foreign population. That nexus makes the duty determinate while preserving the cross-border protection required by the Covenant and Charter.

Positive duties raise a separate question of legal source and content. Existing law establishes the duty to respect through the CESCER's treatment of food embargoes, restrictions on medicines and direct or indirect interference abroad.⁶⁰ Article 2(1) of the ICESCR, Article 22(2) of the African Charter and Articles 55 and 56 of the UN Charter establish cooperation as a

⁵⁷ Constitutive Act of the African Union, art 4(b); *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, p. 554, paras 20, 23–26; African Union Peace and Security Council (2024), 'Press Statement of the 1192nd Meeting Held on 17 January 2024 to Consider the Situation between Ethiopia and Somalia', 18 January 2024.

⁵⁸ Charter of the United Nations (1945), art 2(4); Constitutive Act of the African Union, *supra* note 57, art 4(b), (e) and (f).

⁵⁹ ICESCR, art 2(1); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para 112; Bartels, *supra* note 7; Maastricht Principles, *supra* note 13, principles 8, 13 and 20.

⁶⁰ CESCER, General Comment No 12 and General Comment No 14, *supra* note 18; General Comment No 24, *supra* note 27, paras 25–37.

legal commitment, while the applicable transit agreement or regional regime determines its parties and content.⁶¹

The prohibition of obstruction is therefore *lex lata*; consultation, non-discrimination, continuity planning, emergency passage and consideration of less harmful alternatives follow through interpretation of the particular access regime. A universal obligation to build infrastructure or create a new route remains *lex ferenda* and is unnecessary to the treaty-based duty to respect an established route.

Causal complexity presents a further objection because landlockedness, domestic policy, conflict, drought and world prices may all contribute to the same deprivation. International responsibility attaches to the injury materially produced by the respondent's own measure, even when that measure is not the sole cause.⁶² The claimant must compare the actual position with the position that would have resulted from lawful administration of the established route, quantify the difference in supply, price or delay, and identify the rights-holders affected. Purpose, necessity, duration, alternatives and severity then distinguish legitimate regulation from an arbitrary, discriminatory or politically coercive obstruction. Concurrent Ethiopian causes reduce the injury attributable externally; they do not extinguish responsibility for the contribution that remains.

These objections delimit rather than defeat the human-rights imperative. The right-holders are persons and peoples; the relevant duty-bearer is the state controlling the impugned measure. The protected interests are subsistence, food, health and development, and the required connection consists of control, indispensability, directness, foreseeability, severity and causal contribution. Sovereignty governs title, consent and legitimate regulation, while human-rights law governs the consequences of exercising transit authority. Within an established or legally recognised access relationship, effective maritime access is therefore a binding condition of rights, not a discretionary commercial favour.

4.3 Legal consequences and enforcement

On Ethiopia's side of the relationship, the legal consequences begin with protection and mitigation. It must direct the resources and regulatory powers within its control to customs, inland transport, dry ports, storage, taxation, domestic distribution, strategic reserves and contingency planning, and it must

⁶¹ ICESCR, art 2(1); African Charter, art 22(2); Charter of the United Nations, *supra* note 58, arts 55–56.

⁶² International Law Commission, *supra* note 40; Plakokefalos, *supra* note 19.

pursue lawful diversification where alternatives are reasonably available.⁶³ Those measures give practical effect to Articles 11 and 12 and reduce the scale of injury attributable to external disruption. They also sharpen any interstate claim by separating domestic inefficiency from the effect of the challenged transit measure. Ethiopia's duty to mitigate and the transit state's duty to respect operate concurrently, each within the scope of that state's authority.

For the transit state, the corresponding consequence is cessation or modification of an arbitrary, discriminatory or rights-impairing measure. COMESA requires cooperation and non-discrimination; the general duty of good-faith treaty performance further supports consultation and continuity of supply where material changes threaten it.⁶⁴ The ordinary law of responsibility supports assurances against repetition and reparation for injury causally attributable to the breach.⁶⁵ The remedy follows the protected function: reopen or regularize transit, remove the discriminatory burden, preserve food and medicine flows and compensate for the proven loss resulting from the violation. This relief makes effective access enforceable while keeping the response proportionate to the measure and injury established.

The applicable instruments also determine the fora through which the substantive duties may be enforced. Article 10 of the Optional Protocol to the ICESCR permits interstate communications only between states that have accepted that procedure, and it is presently unavailable between Ethiopia and Djibouti.⁶⁶ Articles 47 to 54 of the African Charter provide an interstate procedure before the African Commission.⁶⁷ The COMESA Court offers a complementary route for regional transit obligations through interstate references and, subject to its requirements, proceedings by legal or natural persons.⁶⁸ A COMESA proceeding would enforce the Treaty provisions governing cooperation, transit and non-discrimination, interpreted alongside the human-rights rules applicable between the parties. The African Commission and COMESA Court therefore provide forums in which the relevant duties and remedies may be pleaded.

⁶³ ICESCR, art 2(1); CESCR, General Comment No 3, *supra* note 39.

⁶⁴ COMESA Treaty, *supra* note 10, arts 84(d), 88(d) and 88(i); Vienna Convention on the Law of Treaties, *supra* note 12, art 26.

⁶⁵ International Law Commission, *supra* note 40, arts 30, 31 and 36.

⁶⁶ Optional Protocol to the ICESCR (2008), UNGA Res 63/117, art 10; OHCHR (2026), 'Ratification Status for Ethiopia' and 'Ratification Status for Djibouti', status checked 16 August 2026.

⁶⁷ African Charter, arts 47–54.

⁶⁸ COMESA Treaty, *supra* note 10, arts 23, 24, 26 and 30.

5. Conclusion

Effective maritime access constitutes a human-rights imperative where authority over transit determines whether persons and peoples can obtain food, medicines, the means of subsistence and the material conditions of development. Common Article 1(2) protects collective subsistence; Articles 11 and 12 of the ICESCR protect the availability and accessibility of food and health goods; and Article 22 of the African Charter protects development through duties undertaken individually and collectively. Read with Part X of UNCLOS and the legal regimes governing transit, these provisions place the exercise of corridor authority within international human-rights law. They prohibit arbitrary, discriminatory and politically coercive obstruction and require cooperation capable of preserving the rights whose enjoyment depends on an established access relationship.

The Ethiopian case confirms the doctrine's practical force. Reliance on a single corridor makes essential supplies and development dependent on decisions taken beyond Ethiopia's territory, while COMESA and bilateral law identify the states, route and cooperative structure through which responsibility is allocated. Ethiopia answers for domestic logistics, resource allocation, contingency planning and diversification; the transit state answers for closures, restrictions, charges and conditions imposed through its control of the route. When control, indispensability, directness, foreseeability, severity and causal contribution are established, an obstruction of maritime access is an interference with the human rights that depend upon it. Secure, continuous and non-discriminatory maritime access is therefore a legally reviewable condition of human dignity and development under international human-rights law. ■

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Law and Communication: Insights from the Plurality of Norms in Ethiopia

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Abstract

Communication is essential in formulating law and ensuring its effectiveness. How effectively we communicate the rules determines whether they will achieve their objectives by creating awareness and expectations that influence behaviour. Laws that are not effectively communicated remain largely ineffective. The law-making process needs to be open, transparent, and participatory; sufficient time must be allowed for all interested stakeholders to discuss and digest the laws and their impact. By giving sufficient time to discuss the laws not only with government officials but also with community leaders, local elders, local business enterprises and the wider community, laws can be designed in a way that can be acceptable to society, thereby ultimately reducing the gap between laws in paper and laws in action. In addition to the law-making process, courts are important players in communicating laws. Courts adjudicate based on laws, thereby communicating to stakeholders what the law is in practice and how it affects society and individuals. Consistency, predictability, and clarity in these court decisions are critical for laws to be effective and for society to take them into account in its decision-making. On the contrary, inconsistent, contradictory, or unclear decisions undermine the effective communication of laws to society, thereby undermining the rule of law. This article provides a brief review of legal theories with some insights from Ethiopian court decisions as examples to highlight how court decisions can hinder or facilitate the effective communication of laws, thereby perpetuating or addressing the gap between laws in action and those in the law codes.

Keywords: Law and society, law as a culture, law as communication, law as a belief, legal pluralism, laws as court decisions, law in action

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Contents

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1. Introduction

Ethiopia has a long history, enriched by diverse values, norms, laws, traditions, and religions. Ethiopia has long been linked to significant civilisations worldwide. Ethiopia is also one of the countries that claims a long history of connection to both Christianity and Islam. This has made Ethiopia a country of diversity and hybridity. Ethnic diversity has also contributed enormously to its mosaic culture, values, social philosophy, and notions of law. The sources of law, the law-making process, the interpretation of laws, and their enforcement differ from one ethnic group to another.

This diversity has provided the country with multiple options for building a legal and political system that strengthens bonds among different cultures and peoples. However, it also poses a particular challenge in ensuring that laws and regulations have a full impact on shaping individuals and social decisions. The lawmaking process and its implementation require systematic, strategic decisions on how to communicate enacted laws effectively. For the laws to be embedded and integrated with local custom and traditions and to be accepted, they need to be communicated to the people in a way that does not contradict their intrinsic values. When it is decided to shift these intrinsic values it must be done by focusing on changing the values and norms by inculcating a shift within rather than imposing these laws as externally imposed values that make people to resist and reject them.¹

¹ Pierre Guibentif. (1994). Approaching the production of law through Habermas's concept of communicative action. *Philosophy & Social Criticism*, 20(4), 45-70.

The country's power structure has also contributed to diversity remaining the country's main focus for the future. For most of its history, Ethiopia's kings did not exercise direct control over local people and did not attempt to impose a uniform, centrally administered legal system. Law and order are commonly left to the local chiefdoms and local elders. So, almost all ethnic (linguistic) groups have customary laws and institutions that enforce them. This does not mean there are no similarities or connections between these laws. Given the interconnections in both peace and war, it is logical to expect these people to learn from one another.

However, it is clear to anyone who follows Ethiopia's history that the various local peoples and their rulers have maintained significant autonomy in regulating their internal affairs, including how they handle criminal, civil, and other interactions and transactions within society. This includes important decisions about the allocation of resources, such as land and other property, and how to resolve conflicts with other people in their localities. So, when the central government later showed greater interest in taking these important decisions into its own hands and introducing uniform laws that apply horizontally and vertically to all people living within the country's boundaries, the challenge of communicating these laws to them is considerable.

Emperor Zerayakob made attempts to introduce uniform written laws during the 15th century. He brought a book known as *Magʿmuʿ al-qawaʿin* (Collection of Canons) and translated it into the local language, Geez. This book is known as *Fetha Negast* (Justice of Kings). However, the extent to which the *Fetha Nagast* influenced society's legal culture is unclear. It was not accessible to most people because it was not widely distributed. It was available only to a very few high-ranking clergymen and members of royal families. It seems, therefore, that the laws provided in the *Fetha Nagast* had little chance of being known by the more significant majority. Most people lacked the literacy required to use the book in day-to-day social and economic interactions. In effect, *Fetha Nagast* could not penetrate society deeply. Despite gaps in penetration, Christian Ethiopians consider the *Fetha Nagast* a legitimate source of authority and law (David, 1967).² “The *Fetha Nagast* is indisputably the progenitor of Ethiopian Christian customs and laws (Heron, 2019).”³

² Rene David. (1967). Sources of the Ethiopian Civil Code. *Journal of Ethiopian Laws*, 4, 341-370.

³ Cyril Heron. (2019). A Christian oasis: The role of Christianity and custom in the laws of Ethiopia. *Cornell International Law Journal*, 51, 754-772.

Although the Fetha Nagast was not prepared based on Ethiopian customs and traditions, it was interpreted and applied in line with them (Teshome, 2009).⁴ The learned scholars, whose job was to assist the kings in administering justice in Ethiopia, interpreted the Fetha Nagast intellectually and creatively, in line with the people's customs and traditions. Therefore, the Fetha Nagast is expected to have indirectly influenced people's legal norms and thinking, having remained an official law of the land in most of the country for more than 600 years.⁵ As Rene David points out: "Fetha Nagast has been constantly considered in Ethiopia as the model, crowned with a character nearly sacred."⁶

Emperor Haile Selassie made the most significant efforts to introduce centralised, uniform laws applicable nationwide. Under the influence of Ethiopian intellectuals and Western advisors, Emperor Haile Selassie embarked on significant reforms. He introduced the first written constitution in 1931 and the revised constitution in 1955. Furthermore, a wholesale transplantation of laws from Western countries was carried out to materialise the aspiration for a uniform, centralised legal system that transforms society's social, cultural, political, and economic realities.

Ethiopia that has not been subjected to physical colonisation opened its doors for wholesale transplantation, lured by promises of modernisation and economic development. Therefore, Ethiopia decided to replace plurality with unity and diversity with uniformity by introducing legal codes. However, the objective of centralisation and unification set by the architects of the modernisation project has been only partially achieved. Non-state laws, usages, and practices, as diverse as they are, remain important regulators (informants) of social behaviour, shaping individual behaviours and expectations and resolving disputes between individuals and groups. There is considerable consensus among scholars, lawyers, and policymakers that the rules embodied in Ethiopia's codes of law are less influential than the laws and practices we find enmeshed in the traditions and cultures of the people⁷. So, what makes a law effective in achieving its objective, whatever the objective, is the central question we try to address in this article.

⁴ Tilahun Teshome. (2009). The affinity between the sale of goods provisions of the Fetha Nagast and modern *lex mercatoria*. *Journal of Ethiopian Law*, 23(2), 132-153.

⁵ The people transmit key decisions supported by legal principles and reasoning from generation to generation, orally in different forms and styles.

⁶ Rene David. (1963). Civil Code for Ethiopia: Considerations on the codification of the civil law in African countries. *Tulane Law Review*, 37, 192.

⁷ Gebreyesus Yimer. (2025). *The Nexus between Legal Pluralism and Inclusive Finance*. Springer.

Communication of the law to society can take different forms and be carried out by different actors. Courts are one of the most important players in this regard. Courts are expected to declare laws when delivering their judgments. This article argues that the primary justification for the limited effectiveness of codified laws lies in limited communication. The article primarily relies on court decisions and secondary sources to examine how the lack of a clear communication strategy affects the effectiveness of codified laws in achieving law unification in Ethiopia. It is argued that almost all potential causes of the limited success of codified laws stem from the failure to communicate to society what the enacted laws stipulate. This failure has denied the formal principles and norms (in various codes of law) their actual meaning as laws of the land in the prevention of conflicts and as a mechanism for resolving disputes once they arise.

2. Theoretical Framework: Law as Culture, Belief and Communication

Many legal theories offer essential insights into the nature and function of law. However, the discussion in this article focuses on three related theories: law as culture, law as belief, and law as communication. These theories explain how and why people respect the law. The theories explain how law affects human actions and decisions.

Law is presented *as culture* by Rosen and Mezey. According to this theory, law is considered both an element of culture and a product of culture. On the other hand, Basu considers law to be the *result of beliefs or expectations*; for Basu, law is created by belief in the mind of individuals that is shared by others. The decision to do or not to do depends on a person's beliefs and how others react to the same order. He relied on the assumption that human beings are rational maximisers who respect the law when they expect others to do the same and when the benefits of respecting the law outweigh its costs. In the third theory, Hoecke relates law, prominently with communication and gives emphasis to the affinity between the two.⁸ The three theories provide essential insight into how a particular law affects human actions and decisions, and the context in which laws may not have a significant effect on the decision-making process. The theories also explain what needs to be done to enact laws that achieve optimal results as tools for influencing individual and group behaviour.

⁸ Mark Van Hoecke. (2002). *Law as communication*. Bloomsbury Publishing.

2.1 Law as culture

The relationship between law and culture is complex and controversial. For those who consider law as independent, autonomous, self-sustaining, and objective, whose claims of sources and validity rest with supreme powers, grand norms, or sovereign powers, the law has nothing to do with culture. In positive law theories, law and culture are concepts with little connection to one another. On the other hand, for scholars like Geertz, the law is merely part of culture.⁹ Rosen states that “[t]he ordering of law and local practice is far more dependent on the culture of the group involved than on the mere imposition of rules from a sovereign.”¹⁰ Culture creates law, embraces law, explains law, and allows it to change from within. Law constitutes culture, and culture constitutes law. For Mezey, culture and law are not only related; they have a constitutive relationship.¹¹

Rosen argues that law shapes individual and group identity, social practices, and the meaning of cultural symbols. However, these things also shape law by changing what is socially desirable, politically feasible, and legally legitimate.¹² Culture defines the law's degree, scope, and effectiveness, as well as its impact on society. It also specifies what the law can do and how it can do it.¹³ According to Mezey, “law and culture are mutually constituted, and legal and cultural meanings are produced precisely at the intersection of the two domains, which are themselves only fictionally distinct.”¹⁴

2.2 Law as a ‘republic’ of beliefs

In his book “The Republic of Beliefs”, Basu argued that law results from individuals' expectations about others' behaviour. He argued that law is created by a thread of beliefs supported by expectations. His arguments are based on an analysis of law and economics. Humans are rational beings who focus on maximising self-interest. They respect the laws only when doing so is to their advantage. He argued that law enforcement is possible only when there is an expectation that regulators will enforce the law. Regulators enforce the laws when they expect their supervisors to do so. Therefore, the law becomes an effective social control mechanism when expectations shape the

⁹ Clifford Geertz. (2008). *Local knowledge: Further essays in interpretive anthropology*. Basic books.

¹⁰ Lawrence Rosen. (2006). *Law as culture: An invitation*. Princeton University Press, 37.

¹¹ Naomi Mezey. (2001). Law as culture. *Yale Journal of Law & the Humanities* 13(1), 35

¹² Ibid.

¹³ Lawrence Rosen (2006), *supra* note 10, p. 15.

¹⁴ Naomi Mezey, *supra* note 11.

beliefs of individuals. The expectation is that violations of the law will be punished and that respecting the law is in the individual's interest. Therefore, there is an incentive to respect the law. The beliefs create a (focal point) convergence of interests, in which everyone considers that respecting the law serves their interests best rather than violating it.

Basu argued that if we expect human beings to be rational actors who respond to incentives and seek to change their behaviour by changing the law, we must also include the individuals who enforce the law in our analyses to achieve a comprehensive theory. As individuals choose to disregard or respect the law, regulators can choose to enforce or disregard it when an individual violates it. So, traditional law and economics theory is limited to the individual level (level one) and does not adequately address the regulator (level two). He argued that a government declaration could be effective only if there were a thread of beliefs among those expected to obey and enforce the law. He noted that the law could do nothing more than affect individuals' beliefs.¹⁵

Legal anthropologists or law-and-culture scholars are more likely to subscribe to Basu's ideas.¹⁶ For legal anthropologists, law and culture are intertwined.¹⁷ Law affects culture, and culture affects law. A law's existence, nature, effect, and validity depend on the specific culture and tradition. On the other hand, the law can shape culture when there is a belief that it is meant to be enforced and respected. Cultural interpretation of law explains the intersection between law and culture. "It explores the interventions of culture in law and law in culture."¹⁸

Law is an instrument through which goals are adapted, implemented and reviewed.¹⁹ So, culture is vital for communicating individuals' expectations to one another. If the culture in a society supports respect for the rule of law, everyone expects the laws to be respected. On the other hand, if the culture tolerates law violations, individuals expect others not to respect the laws and tend to violate them, as doing so is a rational decision given the society's culture. Therefore, law as a culture and law as beliefs seem to be connected in some way, though the two have employed different analytical frameworks to explain law and its role in regulating society.

¹⁵ Kaushik Basu. (2018). *The republic of beliefs*. Princeton University Press, p. 52

¹⁶ Naomi Mezey, *supra* note 11

¹⁷ Lawrence Rosen. (2017). Law as culture. In *Law as Culture*. Princeton Univ. Press.

¹⁸ Naomi Mezey, *supra* note 11, p. 62.

¹⁹ Muna Ndulo & Cosmas Emeziem (Eds.). (2021). *The Routledge handbook of African law*. Routledge.

2.3 Law as a communication

The communication theory of law defines law as a dynamic communicative process.²⁰ Law is considered as the result of dialogue and social interaction, mediated by language²¹. According this theory, law is created and validated through communication in society²². Niklas Luhmann considers society itself to be communication rather than a collection of people²³. Jürgen Habermas considers law as a product of consensus formed through transparent, free dialogue²⁴. He considers rational bargaining and will formation, grounded in ethical and moral political discourse as a vital element in the formation of law²⁵. Niklas Luhmann considers law an autopoietic system that sustains itself through communication²⁶. Luhmann considers law an independent system that operates through its own internal communication systems.

Communication plays a central role in positive law theory. Expressions common in positive law theory, such as “law is the command of the sovereign” or “law is what is declared by the legislature”, entail communication as an essential element of the lawmaking process. Law serves as a language of its own. It functions as a system of communication. For example, we can use traffic laws to explain this concept. Two drivers of a street communicate through the traffic laws. Two drivers coming from different directions who cannot communicate verbally use the law as a language to determine who has priority, who must wait, and whether the car behind can pass or must wait for the other car. So, law enables individuals and society to communicate effectively by creating mutually agreed-upon interpretations of actions, inactions, and signs.

Communication is also an important element in legal realism. For a legal realist, the law is what society, or the courts, practically apply in solving disputes. The individual does not know what is expected to be within the boundaries of the law unless society communicates, orally or otherwise, what

²⁰ Richard Munch. (1991). The law as a médium of communication. *Cardozo L. Rev.*, 13, 1655.

²¹ John Peter Gibbons. (2014). *Language and the Law*. Routledge.

²² Jürgen Habermas. (1989). Towards a communication-concept of rational collective will-formation. A thought-experiment. *Ratio Juris*, 2(2), 144-154.

²³ Stine Piilgaard Porner Nielsen. (2024). Introduction: A Special Issue on Niklas Luhmann’s systems theory and law. *Oñati Socio-Legal Series*, 14(5), 1206-1226.

²⁴ Mathieu Deflem. (2008). Law in Habermas’s Theory of Communicative Action. *Vniversitas*, 57(116).

²⁵ Jürgen Habermas, *supra* note 22.

²⁶ Stine Piilgaard Porner Nielsen. (2024). Introduction: A Special Issue on Niklas Luhmann’s systems theory and law. *Oñati Socio-Legal Series*, 14(5), 1206-1226.

needs to be or not to be done. Anything that is not communicated is, therefore, not a law in the real sense of the term. The communication theory of law is also closely related to legal pluralism, as dialogue between different cultures and traditions is considered key to the formation of valid, legitimate laws.²⁷ Communication can bridge gaps between different norms and values in diverse societies, find common ground, and build a system that accommodates the interests of different groups.

3. The Plurality of Norms in Ethiopia: Attempts and Challenges

3.1 Background on the codification of laws in Ethiopia

Emperor Haile Selassie I launched a massive codification effort in Ethiopia to transform people's social, economic, and political conditions in the 1950s and 1960s. The need for massive, rapid changes in Ethiopia's legal culture, particularly since the 1930s, was driven by two main factors. The first reason for the codification process was to abolish consular jurisdiction over disputes involving foreign elements. Some treaties required the establishment of special courts that applied foreign law to adjudicate claims involving foreigners.²⁸ The special courts did not apply Ethiopian laws, and the judges were foreigners.²⁹ Foreign countries, therefore, used these treaties to apply their laws in Ethiopia, thereby seriously compromising Ethiopian sovereignty. Therefore, after the modernization of the country's legal system foreign countries could no longer have an excuse to demand special courts to hear cases involving their citizens.³⁰

The second main reason for legal reform was the conviction that it would facilitate the country's economic development³¹ and social progress. The Preface of the Civil Code reads: "To consolidate the progress already achieved and to facilitate yet further growth and development, precise and detailed rules

²⁷ Patrick Glenn. (2014). *Legal traditions of the world: Sustainable diversity in law*. Oxford University Press.

²⁸ Tameru Wondem Agegnehu. (2013). The Future of law and legal institutions in Ethiopia. In EN Stebek, & Muradu Abdo, eds (2013), *Law and development, and legal pluralism in Ethiopia*. Addis Ababa Justice and Legal System Research Institute (JLSRI). p. 92.

²⁹ For a comprehensive discussion on this issue see: Hailegabriel G. Feyissa. (2016). European Extraterritoriality in semi-colonial Ethiopia, *Melbourne Journal of International Law*, 17, 16.

³⁰ Tameru Wondem Agegnehu, *supra* note 28.

³¹ Daniel Haile. (1973). Law and social change in Africa: A preliminary look at the Ethiopian experience. *Journal of Ethiopian Law*, 9, 380-418.

must be laid regarding those problems, which not only face the individual citizen but the nation as a whole.”³² Rene David, the drafter of the Civil Code, confirms that the legal reform was mainly influenced by the need to enhance investment and trade in the country. He states that “the role of a Civil Code ... is to create the material conditions for the economic development of the country, and on the other hand, to renew at a social level the very foundations of the society, which has been frozen for too long.”³³

These statements show that the revolution in the country's legal culture was intended to bring fundamental changes to trade and investment, ultimately transforming society. Krzeczunowicz, also noted that Ethiopia needs a modern, unified legal system to remain competitive in the new globalised world. The drafters of the new codes hoped to introduce a unified and modern legal system in Ethiopia by reducing the role of non-state laws.³⁴

3.2 The codification's failure to achieve unification of norms

Plenty of evidence shows that the legal codes are not Ethiopia's only source of laws. Sometimes, the codified laws may not even be considered relevant and applicable.³⁵ The survival of the plural system after the introduction of the legal codes is a well-researched topic. This article thus focuses on the potential reasons why pluralism has remained the dominant feature of the Ethiopian legal system, contrary to the intentions of the 1960s Codification.

Van Doren provides five reasons for the limited success in eliminating or replacing diverse laws with codified laws. They are (1) problems in the uniform interpretation of the Code from French to Amharic, (2) failure to incorporate the values and norms of ethnic and religious minorities, (3) the continued role of the church in informal adjudication, (4) the application of extra-code norms that nullify the provisions of the Code, and (5) the lack of a case reporting system. It can be argued that these and other causes stem from a lack of communication (of the law codes as laws) by different authorities, including courts. In many cases, legal provisions in a code of law remain mere letters of the law due to failure to communicate them effectively to the public as laws that must be observed in creating relationships. Laws that have never been communicated effectively cannot be considered laws in the minds and hearts of the people, so they fail to create the required unified legal system.

³² The Civil Code, 1960.

³³ Rene David (1963), *supra* note 6, 193.

³⁴ George Krzeczunowicz. (1963). The Ethiopian Civil Code: Its usefulness, relation to custom and applicability. *Journal of African Law*, 7(3), 172-177.

³⁵ Gebreyesus Yimer. (2021). *The Informal Credit Markets in Ethiopia: A Comparative Legal Study*.

3.3 Problems relating to the language of background documents

Many researchers consider the language barrier as a major obstacle against implementing legal reform, particularly because background reading materials that clarify the Code's concepts and principles are often in foreign languages, such as French, which many Ethiopian scholars are not familiar with. As a result, the legal codes became “orphans,” detached from the sources that explain and elaborate on the social, political, and economic backgrounds that have shaped them as they are today. As Briottet explains:³⁶

... problems facing the implementation of the reform ... are closely linked to the language in which the law is written. Even more importantly, they relate to the sources of the law, which are expressed in a different language, concepts, traditions, and meanings, and laws are not necessarily understood without these sources. This is why, in any country and to various degrees, judges and attorneys study judicial precedents, consult learned commentators, and generally speaking keep abreast of the evolution of the law in any given field ... Unfortunately, this is precisely what most Ethiopian lawyers can no longer do, since few are proficient in French, let alone in Latin.

The impact of translation on the quality of the law and its effect on the success of legal reform is now a well-researched topic.³⁷ Both legal and linguistic experts consider various theories to guide the translation of legal documents and avoid problems in their implementation.³⁸

The literature on law and translation shows that law encompasses more than norms, institutions, and ideas. Some concepts and words are deeply rooted in the traditions of the country of origin and are difficult to translate into the recipient's language and culture. Law has a deep-rooted connection to tradition, and how professionals interpret words makes legal translation a growing challenge. “Law is not only shaped by norms, institutions, and ideas but also by structures of legal thinking that are rooted in tradition.”³⁹ As

³⁶ Roger Briottet. (2009). French, English, Amharic: the law in Ethiopia. *Journal of Romance Studies*, 9(2), 1-9.

³⁷ Jan Engberg. (2013). Comparative law for translation: The key to successful mediation between legal systems. In A. Borja Albi & F. Prieto Ramos (Eds.). (2013). *Legal translation in context: Professional issues and prospects*. (pp. 9-25). Peter Lang.

³⁸ Susan Šarčević. (2000). Legal translation and translation theory: A receiver-oriented approach. In International Colloquium, ‘Legal translation, theory/ies, and practice,’ (pp. 17-19). University of Geneva www.tradulex.org.

³⁹ Lena Foljanty. (2015). *Legal transfers as processes of cultural translation: On the consequences of a metaphor*. Max Planck Institute for European Legal History Research Paper Series No. 2015-09. <https://ssrn.com/abstract=2682465>.

Foljanty notes, “[t]ranslation is always a cultural exchange – it cannot be understood as a mere giving and receiving between two closed-off entities. Instead, it points out that cultural exchanges depend heavily on how the other is conceived”.⁴⁰

To date, no empirical research has examined the impact of language limitations on the effective application of laws heavily borrowed from foreign sources. However, some preliminary observations suggest that language barriers have hindered the effective communication of the laws to society. A good example is the lack of clarity and confusion among law students and scholars regarding Article 2074 of the Civil Code, which stipulates that “[w]here a domestic animal causes damage, the owner may relieve himself[/herself] of his[/her] liability by surrendering the animal's ownership to the person who has suffered the damage.” This principle of limited liability is well explained and traces its roots to Roman law. However, in Ethiopia, some lawyers find this provision counterintuitive, and they underestimate its logic and rationality.

Furthermore, the Civil Code and all other principal law codes published in Amharic and English are not translated into other major local languages in Ethiopia. For example, the courts in Tigray and Oromia are expected to write their judgments in Tigrigna and Afan Oromo, respectively. This means they have to read the Amharic or English versions of the codes and then write their judgments in the official languages of their respective regional states. This creates another problem for judges, who must introduce new words and terms in their judgments. The terms and words used in the judgment may not always concur in context with the words and terms used in the law codes.

As English is the medium of instruction in law schools, there is no opportunity for judges to become familiar with legal terms in regional languages used in courts when writing judgments, which underscores the responsibility of regional Law and Justice Institutes to fill these gaps through training. The judges may also use different terms in their local language to describe the same provision in the Civil Code, adding another challenge to creating a harmonised and shared legal understanding among legal scholars and society.

3.4 Failure to incorporate indigenous values and customary norms

Laws closely aligned with the general culture and traditions of the people, or at least those that do not contradict the norms and beliefs of society, can be communicated to the public and be accepted as laws of the land. By contrast,

⁴⁰ Ibid.

laws that do not derive from a society's values and culture require additional effort to be accepted as legitimate within that society. Communicating laws to the public depends on many factors, and the extent to which the laws align with society's existing values, customs, norms, and practices directly affects the time and effort required to communicate them. Therefore, incorporating local values and customs into the law codes directly affects how effectively we can communicate the laws to the public.

To communicate the laws effectively, we need to understand society's values and norms. The drafting team (of the 1960s) in Ethiopia was not fortunate enough to benefit from well-organised data and knowledge to support the preparation of the laws. Shihata considers law as an instrument for orderly development and for balancing the nation's different interests in the development process.⁴¹ However, he notes that for the law to play a positive role in the development of a country, two conditions must be fulfilled: "The legal reform processes should ensure that the rules incorporated in these instruments respond to genuine social needs, reflect pre-existing or emerging public opinion, and are based on adequate data, studies, and the results they affect. The second [condition] is enforcing legal rules, regardless of their content."⁴²

Shihata's standards can be used to evaluate the codification process in Ethiopia in the 1960s. We use Shihata's standards because they help clarify the theoretical arguments in this article in practical terms. Historical accounts of the codification process of the Civil Code indicate that the standards set by Shihata were not met in Ethiopia. There were insufficient data to reflect the country's socio-economic realities during the codification process. The Central Statistics Office was established in the same year.⁴³ Hence, the Code did not benefit from systematic data on the country's social, economic, and other relevant realities, or from a scientific projection of the country's development.⁴⁴ Transforming these social foundations requires government and other actors to organise, systematise, and communicate effectively.

Research shows that formal courts and formal laws may play a positive role in transforming traditional institutions. However, legal reform is more productive and beneficial if it is supported by the underpinning culture and

⁴¹ Ibrhaim Shihata. (1997). The Role of Law in Business Development. *Fordham International Legal Journal*, 20, 1577-1588. <https://heinonline.org/HOL/license>

⁴² Ibid.

⁴³ The First- official statistical department established in 1960.

⁴⁴ Lan S. Fraser. (1966). The administrative framework for economic development in Ethiopia. *Journal of Ethiopian Laws*, 3, 118.

tradition.⁴⁵ Communication is the key to translating the literal readings of legal provisions into accepted legal norms, preventing conflicts and resolving disputes. People's perceptions of the research have indicated that “truthful information favourable to state courts makes our respondents more willing to trust in and work with these courts.”⁴⁶ Therefore, what we communicate must also be perceived by society as accurate and beneficial to people for the newly introduced laws to be effective.

Various efforts are needed to create a shared legal knowledge that transforms legal thinking in society. Tamanaha argues that: “[a] sizable group of trained legal practitioners is needed to handle cases and help develop legal practices and shared legal knowledge. Competent clerks and transcribers, along with adequate office space and equipment, are also necessary to process cases and record proceedings”.⁴⁷

3.5 Concept of justice and dynamic realities

When the law differs from the dominant social conception of justice and morality, legal communication becomes difficult or requires more effort. Both Friedman and Luhmann underline the critical role of social norms for the effectiveness of laws.⁴⁸ When laws are fundamentally different from the social norm, they require additional effort to embed them in the social system and make them known and acceptable. Another possible reason for the persistence of non-state laws in Ethiopia is that they confirm the longstanding Ethiopian concept of justice.⁴⁹ In Ethiopia, people commonly associate fairness and justice with a judge's personality rather than the law, and they expect justice

⁴⁵ Patricia Jones. (2013). History matters. New evidence on the long-run impact of colonial rule on institutions. *Journal of Comparative Economics*, 41(1), 181–200;

F. Cecchi & B. M. Melesse. (2016). Formal law and customary change: A lab-in-field experiment in Ethiopia. *Journal of Economic Behavior & Organization*, 125, 67-85.

⁴⁶ Daron Acemoglu, A. Cheema, I. Khwaja, & J. Robinson. (2020). Trust in state and non-state actors: Evidence from dispute resolution in Pakistan. *Journal of Political Economy*, 128, 3090-3147.

⁴⁷ Brian Z. Tamanaha. (2011). The Rule of law and legal pluralism in development. *Hague Journal on the Rule of Law*, 3, 1-17.

⁴⁸ Niklas Luhmann. (2004). *Law as a social system*. Oxford University Press;
See also, Lawrence Friedmann. (1975). *A legal system, A social system perspective*, Russell Sage Foundation.

⁴⁹ Professor Vanderlinden describes the traditional Ethiopian notion of justice that law should never be used to obliterate justice using the Latin maxim “summum ius should never be summa infuria.”

See: Jacques Vanderlinden. (1966). Civil law and common law influences on the developing law of Ethiopia. *Buffalo Law Review*, 16, 250-266.

from the person rather than the law. Krzezunowicz articulates this issue as follows:⁵⁰

The Ethiopian litigant of the past often had to rely more on the sense of fairness of the particular ruler or adjudicator at hand than on prior knowledge of precise written or customary rules strictly applicable to his[/her] case. Justice was often based on rulers rather than rules. At other levels, it was primarily based on conciliatory arbitration; 'equity' permeated the system. Legal certitude was lacking.

The law codes sought to introduce justice through written, predetermined, and predictable laws. This creates a problem in how we communicate the laws. People give more attention to the case's outcome than to the trial process and the laws. If the outcome is unfair and unjust, very few people care whether the court decides the case in accordance with the codified laws. This creates confusion about how the laws are communicated, as they are judged by outcomes rather than as generally accepted principles required to maintain the balance between conflicting interests, and sometimes decisions based on these laws may have unfair consequences for individuals. One example is a marriage or divorce that society considers valid and acceptable, but may not qualify as such in a court of law due to a lack of registration or certification. The court's decision in such context would show that non-state laws are customary laws, not what official lawmakers declare as law.

3.6 Change in the political economy of the country

Consistency is important in communication. Laws are supposed to reflect the policy choices of the country. In Ethiopia, the codified laws are not always in line with the country's political economy. This complicates the implementation of the laws and their role in society. Ethiopia transplanted laws from European countries, which are underpinned by an ideology of free economy and individual liberty. The political economy envisioned by the drafters of the code was different from what the country adopted after the 1974 revolution. As a result, the laws were left in limbo for a long time, and some provisions of the law were effectively frozen. The part of the Civil Code that regulates land is a good example in this regard.

Changes in the country's political economy have also disrupted the communication of laws to the people. The codes were drafted in a friendly political environment that embraced market-oriented principles and protected private property. However, the Marxist-oriented movement led to the deposition of the much-revered Emperor Haile Selassie by middle-level

⁵⁰ Georg Krzezunowicz. (1969). Present role of equity in Ethiopian civil law. *Journal of African Law*, 13, 145-157.

military officials, who very soon turned out to be ardent Marxist dictators. The socialist government that ruled the country from 1974 to 1991 became hostile to the political economy to which the Codes were anchored. Although the Code was not officially suspended or nullified, efforts to shape the market in accordance with the Civil Code's principles and concepts were largely neglected.

Communications from the socialist government conveyed messages that contradicted the principles and values underlying the law codes. Principles such as the autonomy of the individual, freedom of contract and private property, the independence of the courts, the sanctity of contract, and other similar principles and values that provide the framework for codified law were openly rejected by the socialist government. Under such contexts, what the law codes communicate to the people differs from what the government communicates, thereby rendering effective communication impossible. This hinders various provisions in the codes from becoming laws in action.

4. Court Decisions as Communication: An Overview

The lowest up to the highest courts in Ethiopia do not strictly pursue the idea of denouncing all non-state laws and practices as it was stipulated under article 3347 of the Civil Code, which reads, “Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed”. In spite of this provision, Ethiopian courts have rendered various decisions recognising customs and practices that contradict the provisions of the Civil Code relating to contracts, family, and land registration. Various researchers have provided detailed empirical evidence, including court judgments, indicating the position of Ethiopian courts.⁵¹ This is not a separate practice in Ethiopia, but also in other African countries whereby courts defend legal pluralism by declining to treat formal laws as the sole sources of authority for regulating transactions and relations among citizens.⁵² The following four Supreme Court decisions illustrate how the Court defended pluralism in its judgments.

⁵¹ Gebreyesus Yimer. (2025). *The Nexus between Legal Pluralism and Inclusive Finance: Insights from Ethiopia and South Africa* (p. 160). Springer Nature; See also: Susanne Epple and Getachew Assefa (2020). Eds.). (2020). *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*. Bielefeld: transcript Verlag. (p. 414) <https://doi.org/10.14361/9783839450215>

⁵² Christa Rautenbach. (2010). Deep legal pluralism in South Africa: Judicial accommodation of non-state law. *The Journal of Legal Pluralism and Unofficial Law*, 42(60), 143-177.

In *Zeynaba Khalifa v Kedija Siraj*,⁵³ The court admitted that bigamous marriage had been prohibited by law. The court underlined that bigamous marriage is prevalent in society. However, applying the provisions of the Family Code would only protect one of the wives. Denying other wives the right to benefit from their husbands' property causes a social crisis. The court, therefore, clearly contradicted the clear words of the law and declared that the norms and practices in society are still relevant in the court's decision-making process. The Federal Supreme Court has consistently set aside the codified laws about bigamous marriage (depending on the religious and/or customary practices of communities), thereby making it clear that the codified laws are not the only laws in the land to be considered in delivering justice to the people.

Similarly, in *Yekey Afer Gedamoch v Ato Ermias Gesesse*, the Supreme Court held that a contract for immovable property can be enforced even if it has never been registered, as provided by the Civil Code. The court reasoned that if there is no official registration service within the local administration, contracts entered into by local customers, in accordance with local practice, are valid even if they are not registered with government offices.

Ethiopian courts, in most cases, also recognise traditional institutions such as *Eqqub* and *Iddir* to bring cases before the courts without issue, even though, under the formal law, these institutions lack legal personality unless they are formally registered. For example, in *Yeka Sub-City Kebele 02, Andnet Teramaj Iddir Association v. Tilahun Alemu and Brhanu Kefyalew*, the *Federal High Court* held that *Iddir* leaders are liable only if they violate the internal rules in force during their tenure.

This shows that laws can remain enforceable and actionable only if they are responsive to constantly changing economic and social conditions,⁵⁴ and they should also accommodate realities on the ground while facilitating social change and progress. The cases indicated above imply that the Supreme Court has declined to declare that the codes are the only laws that courts should consider. The court recognised that courts need to consider non-state-backed laws and usages in deciding cases based on equity and fairness. However, courts will not overextend such interpretation because the extent to which the

⁵³ *Zeynaba Khalifa v Kedija Siraj* cassation decision file no 50489/2010 Federal Supreme Court Cassation Decisions, vol 11 (2011) at 2–5.

⁵⁴ Daniel Adler, Caroline Sage & Michael Woolcock. (2009). *Interim institutions and the development process: Opening spaces for reform in Cambodia and Indonesia*. Brooks World Poverty Institute Working Paper No. 86. University of Manchester. <https://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/bwpi/bwpi-wp-8609.pdf>

law is communicated to the grassroots enables it to be part of day-to-day civic conduct and people's expectations. In the absence of such caution, and unless greater focus is placed on enhancing awareness through communication, the court's good intention to promote pluralism can make it difficult for codified laws to become the shared laws of the people that transcend local norms, religious and cultural differences.

In a country as diverse as Ethiopia, courts may find it practically difficult to give equal protection to all customs and norms of the people, which differ from one region to another and even from one locality to another. The fact that many judges are not well-trained in those local customs and traditions may also pose a challenge for courts in providing proper interpretation of these customs and norms. This is particularly important in social or business transactions involving individuals from different cultures and traditions, as they may be guided by their own culture or tradition and may not pay attention to the laws promulgated by the government.

From a legal pluralism perspective, having multiple sources of law may not be problematic, and courts are presumed to have this awareness provided that they intentionally promote legal pluralism. Despite the merits of such judicial intervention in favour of legal pluralism, however, an issue that can arise is whether this intervention can be regarded as formulation of policy and legal norms that contradicts the principles of the separation of powers, or whether it merely shows judicial activism that can be justified.

5. Conclusions

The quest to understand what makes laws effective in preventing conflicts and resolving disputes remains one of the most important social science inquiries. Scholars have tried to answer these critical questions for many centuries. However, there is still no agreement among scholars and policymakers on the core foundations of the law, key factors that are essential for its effective application and other related issues.

In countries where the formal legal system has taken deeper roots, the state's laws are respected and enforced. However, in most developing countries, state laws are not (in some cases) considered the only laws. The rule of law as we know it across jurisdictions has yet to be attained in most developing countries, where multiple sources of law exist, and no single supreme law governs them all. It is not yet settled whether it is a good idea to have multiple sources of laws and authorities in a single jurisdiction or whether it is a problem to be solved. However, there is no dispute regarding the need to embrace legal pluralism in developing countries as a matter of policy option, and not as a manifestation of failure in unification efforts.

Many scholars have sought to provide a theory explaining why mere reliance on state laws is ineffective in developing countries. The law and development movement has sought to make state laws acceptable and enforceable in society by introducing institutional and legal reforms in Africa. In due course, a new approach has been designed that focuses on due recognition to non-state sources of law by promoting legal pluralism. The new approach has sought to use non-state laws and institutions to achieve the same objectives as the law and development movement that aimed at using the law as a tool for social engineering and development, mainly based on the modernization theory which had envisaged that developing countries could march through the path pursued by the Global North.

In his book “The Republic of Beliefs”, Basu proposes a new approach to the problem. The central question the book explores is why laws are enforced more often in some countries and less often in others. He noted that the law could do nothing more than affect individuals' beliefs.⁵⁵ Here, it appears that various legal anthropologists or law and culture scholars seem to subscribe to Basu's ideas.⁵⁶ For legal anthropologists, law and culture are intertwined.⁵⁷ Law affects culture, and culture affects the law. The existence, nature, effect, and validity of a given law depend on the specific culture and tradition. On the other hand, the law can shape culture when there is a belief that it is meant to be enforced and respected. Cultural interpretation of law explains the intersection between law and culture. This interpretation also “explores the interventions of culture in law and law in culture.”⁵⁸

As Gebrehiwot Baykedagn (1885-1923) explained, laws evolve with society, and he argued that “laws must emanate from the heart of the people.”⁵⁹ He also warned that the laws which solved problems in the Western world might not be relied on to address Ethiopian problems, as Ethiopia's social structure, traditions, and values differ, and laws must be developed with these factors in mind.⁶⁰

The discussion in the preceding sections shows that communication is vital to the formation of legal systems and to the effectiveness of laws in developing countries. A law to be accepted and considered as law must be

⁵⁵ Kaushik Basu, *supra* note 15, p. 52

⁵⁶ Naomi Mezey, *supra* note 11

⁵⁷ Lawrence Rosen (2017), *supra* note 16.

⁵⁸ Naomi Mezey, *supra* note 11, p. 62.

⁵⁹ Gebrehiwot Baikedagn, (2010). *የኢትዮጵያ ጥራዊነት ላይ የሚገኝ ሥራዎች* (Amharic). Addis Ababa University Press. (Old books republishing project). The original (the first edition) was published in 1916.

⁶⁰ Gebrehiwot Baikedagn, *Ibid*.

communicated, and it can be considered as *law in action* only after effective communication. Patrick Glenn indicates that dialogue is vital in transforming and connecting cultures.⁶¹ The literature on legal translation may also provide insights in this regard.⁶² Communication goes beyond merely publishing an official legal gazette or declaring laws at a single meeting. Communication needs to be effective for laws to be effective. Court decisions, for example, are among the means by which laws are made effective. When a court decides a case by citing a specific law and rejecting a particular law, the court is communicating to society what the laws are and the need to respect these laws. Likewise, when courts in Ethiopia accept non-state laws and give them justiciability, they communicate in precise terms that these non-state laws are laws that need to be respected in making transactions or establishing relations.

Communication is thus essential in formulating law and ensuring its effectiveness. How effectively we communicate the rules determines whether they will be effective, irrespective of their objective. What matters is not their substance, who formulated them, or when they were formulated.” These questions cannot be asked about non-state laws, as most are not formulated by a defined authority or within a defined time framework. However, communication remains vital even for non-state laws.⁶³ As Van Hoecke noted, communication is important in explaining and understanding laws. Law is a form of communication, and a law that is not effectively communicated creates no expectations, beliefs, or culture that would require the law to affect how people make decisions and resolve disputes.

To improve communication and ensure that laws bring the required change in society, the law-making process needs to be open, transparent, and participatory; sufficient time must be allowed for all interested stakeholders to discuss and digest the laws and their impact. As we have seen in the court decisions indicated above, in certain contexts, courts opted to go beyond the literal reading of certain state laws not because they dislike them, but to avoid the unwanted consequences of applying them to people who have not been effectively informed about them. By enhancing the law-making process and giving sufficient time to discuss the laws not only with government officials but also with community leaders, local elders, local business enterprises and the wider community, we can make sure that the laws are designed in a manner that can be communicated to society without much difficulty, and this makes their enforcement and effectiveness much more viable. ■

⁶¹ Patrick Glenn, *supra* note 27.

⁶² Lena Foljanty, *supra* note 39.

⁶³ Max Van Hoecke, *supra* note 8.

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Legal Status of the Legitimate Expectation Doctrine in International Investment Law: An Inquiry into its Legitimacy and Clarity

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Abstract

This article examines the doctrine of legitimate expectation in international investment law, with specific emphasis on how the doctrine has been interpreted and applied by arbitral tribunals in international investment disputes. It discusses the origins of the doctrine and traces it to domestic administrative law regimes, particularly under English law, and other common and civil law jurisdictions. It is argued that domestic administrative law jurisprudence has impacted the interpretation of the fair and equitable treatment (FET) in international investment law, resulting in the transposition of the doctrine of legitimate expectation from national law into international investment law. The article examines the doctrinal requirements that have emerged from decisions of arbitral tribunals on legitimate expectation – i.e. representation, clarity, reliance, reasonableness, detriment, timing, balancing, and good faith – and it highlights the inconsistencies discernible in their application. The legal status of the doctrine of legitimate expectation remains quite contested (as a rule) in public international law but could be more accurately considered as a norm under international investment law. Some criticisms that the article examines with respect to the legal status of legitimate expectations include legal uncertainty, sovereignty, democratic legitimacy, and fragmentation. For clarity and legal certainty to be achieved regarding the interpretation and application of legitimate expectation in international investment law, there is the need for reform through treaty drafting, proportionality analysis in arbitral decisions, and integration with broader principles such as good faith and estoppel. The future of the doctrine thus lies in its clarification with a view to ensuring predictability for both foreign investors and host states.

Keywords: Legitimate expectation; fair and equitable treatment; international investment law

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1. Introduction

There have been contentions about the legal status of the doctrine of legitimate expectation in international law, and specifically in international investment law. The doctrine's origin can be traced to domestic public law as a principle designed to constrain arbitrariness in the decisions of administrative bodies and to protect the reliance of individuals on assurances made by states.¹ From this domestic administrative law origin, the doctrine has been transposed into international investment law. In the past two decades, the field of international investment law has witnessed extensions in the interpretation of the fair and equitable treatment (FET) in bilateral investment treaties (BITs) to include the legitimate expectation of foreign investors.² The doctrine of legitimate expectation has thus assumed the function of a bridge between the principle

Acronyms

BITs	bilateral investment treaties
FET	Fair and equitable treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

¹ Stephan W Schill. (2006). Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law. *Transnational Dispute Management*, Vol.6 No.1, pp.15–16;

Paul Craig. (2021). *Administrative Law* (9th ed.), Sweet & Maxwell, pp.768–70.

² Rudolf Dolzer & Christoph Schreuer. (2012). *Principles of International Investment Law* (2nd ed.): Oxford University Press, 134–136.

of legal certainty from the perspective and interest of the foreign investor and the need for an equitable balance of the state's regulatory autonomy.

While arbitral tribunals in international investment law have made rulings on legitimate expectations, the precise legal status of the concept within public international law remains unsettled. Some investment tribunals have treated legitimate expectation as an inherent element of the FET standard while others have construed it narrowly as a matter of evidence in assessing claims of arbitrariness or transparency.³ However, the close relationship between arbitrariness and legitimate expectation should not obscure the distinct legal functions performed by each concept. Protection against arbitrary governmental conduct addresses the way public authority is exercised, whereas legitimate expectation focuses on the protection of reasonable reliance generated by specific representations, assurances or established regulatory conduct. A governmental measure may therefore be non-arbitrary and still frustrate legitimate expectations, just as arbitrary conduct may breach the FET standard even where no identifiable expectation has arisen. The concepts are complementary rather than interchangeable, and tribunals frequently consider both when determining whether the state has accorded fair and equitable treatment.

In the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* case, the International Court of Justice ('ICJ') explicitly rejected the claim that legitimate expectation has assumed the status of customary international law.⁴ The ICJ pointed to the lack of *opinio juris* in the practice of states as the clear evidence in support of its assertion. Commentary by scholars also show that there is no consensus on whether the doctrine constitutes a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute, or whether it remains treaty-specific and regime-contingent.⁵

This article charts the history of the interpretative transposition in early cases like *Metalclad* and *Tecmed* where FET was equated with regulatory stability, to cases like *Parkerings* and *El Paso* where the arbitral tribunal resorted to narrower interpretations which required that for legitimate expectation to be established, the host state must have made specific promises or representations to the foreign investor.

³ Stephan W Schill, *supra* note 1

⁴ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) [2018] ICJ Rep 507, [162].

⁵ Halil Rahman Basaran. (2024). The Protection of Legitimate Expectations in International Law. *San Diego International Law Journal*, Vol. 25, p.145.

This article examines and analyzes the doctrine of legitimate expectation in international law and specifically in international investment law. The next section traces its historical roots in domestic administrative law before considering its transplantation into international law. Section 3 presents analysis of its nature, conceptual contours, and relationship to the FET standard while Section 4 assesses its status in international law, exploring whether it has crystallized as a custom, general principle, or treaty law. Section 5 sets out the doctrinal requirements of legitimate expectation and Section 6 surveys the jurisprudence of arbitral tribunals in detail, highlighting discernible divergences in their decisions. Sections 7 and 8 respectively consider criticisms and outline possible future directions followed by a conclusion that briefly states the doctrine's current and prospective role in international law.

2 Historical Origins

2.1 Domestic administrative law

The concept of legitimate expectation is conspicuously rooted in domestic administrative law. It developed in English public law in the second half of the twentieth century as a response to the perceived inadequacy of the traditional grounds of illegality, irrationality, and procedural impropriety in judicial review cases where individuals had relied on official representations that the courts were deemed to have created legitimate expectations.⁶ The most important articulation of the doctrine appeared in *Council of Civil Service Unions v Minister for the Civil Service* ('the GCHQ case'), where Lord Fraser acknowledged that a legitimate expectation might arise from an express promise or from an established practice.⁷ Subsequently, the jurisprudence of English courts developed a distinction between procedural legitimate expectations (a right to consultation or a hearing) and substantive legitimate expectations (a right to the continuation of a benefit or policy).⁸ The latter strand proved controversial, culminating in *R v North and East Devon Health Authority, ex parte Coughlan*, where the Court of Appeal held that a public authority was bound by a clear promise to a group of severely disabled residents that their care home would remain open for life.⁹

⁶ Paul Craig *supra* note 1.

⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 401 (Lord Fraser).

⁸ *Ibid* 408 (Lord Diplock).

⁹ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA) [57]–[59].

The doctrine of legitimate expectation that developed in the English legal system was adopted in many common law jurisdictions including India, Singapore, Australia, Canada, and New Zealand albeit with divergent contours.¹⁰ Though civil law jurisdictions did not use the ‘legitimate expectation’ terminology, they also developed analogous doctrines that sought to protect good faith, reliance, and legal certainty.¹¹ Consequently, the common law and civil law comparative environment provided a fertile ground for the transposition of the legitimate expectation doctrine into international adjudication not least also because of the over-representation of English and European legal professionals in international investment arbitrations.

2.2 Emergence in international investment law

The migration of legitimate expectation from domestic law into international law occurred primarily through international investment arbitration. Beginning in the late 1990s and early 2000s, arbitral tribunals were faced with claims by investors regarding abrupt regulatory or legislative changes that undermined their reliance on the stability of the host state’s legal framework.¹² In the oft-cited award in *Tecnicas Medioambientales Tecmed SA v Mexico* (‘*Tecmed*’) the arbitral tribunal held that the FET standard required the host state to act consistently, transparently, and without ambiguity so as not to ‘affect the basic expectations that were taken into account by the foreign investor to make the investment’.¹³

The *Tecmed* case is an early illustration of the possible open-textured nature of the FET standard which has generated one of the richest bodies of jurisprudence in international investment law. This is further underpinned by the fact that investment treaties rarely define the precise content of FET resulting in arbitral tribunals having to necessarily develop the standard incrementally through case law. The jurisprudence from *Tecmed* was a harbinger of the considerable convergence regarding the importance of transparency, procedural fairness, consistency, protection against arbitrariness and respect for legitimate expectations, even though tribunals differ regarding the relative weight to be attached to each element. Consequently, contemporary investment arbitration increasingly treats FET as an integrated

¹⁰ Mark Elliott & Jason Varuhas. *Administrative Law: Text and Materials* (2nd edn, OUP 2017) 435–39.

¹¹ Matthias Ruffert. (1997). Protection of Legitimate Expectations in European Union Law. *Common Market Law Review*, Vol. 33 p.1095.

¹² UNCTAD (2012), *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, United Nations, pp.67–70.

¹³ *Tecnicas Medioambientales Tecmed SA v Mexico* (Award) ICSID Case No ARB(AF)/00/2, 29 May 2003 [154].

standard comprising several mutually reinforcing principles rather than a collection of isolated legal obligations.

In the *CMS Gas Transmission Company v Argentina* and *LG&E Energy Corp v Argentina* cases, the tribunals reinforced the jurisprudence in *Tecmed*, and held that investors may legitimately expect a stable and predictable legal framework to conduct business in the host state.¹⁴ However, in subsequent cases, such as *Parkerings-Compagniet AS v Lithuania*, the tribunal emphasized that legitimate expectations cannot be absolute as host states retain the sovereign right to regulate, particularly in the public interest.¹⁵ Over time, the doctrine has become a recurrent feature in the jurisprudence of arbitral tribunals though it has been expressed as applicable in specific situations subject to a varied list of requirements. Some tribunals required specific representations or assurances directed at the investor while others inferred legitimate expectations from the general legal framework of the host state at the time of investment.¹⁶

3. Nature and Meaning of Legitimate Expectation in International Law

The notion of legitimate expectation in international law is closely bound up with the principle of legal certainty, the rule of law, and the protection of reliance interests. Its most prominent application lies within the jurisprudence of investment treaty arbitration, although analogous reasoning has occasionally surfaced in inter-state disputes and other international fora. This section considers the doctrine's conceptual meaning, its relationship with the fair and equitable treatment (FET) standard, and the distinction between procedural and substantive expectations.

3.1 Conceptual definition

At its core, the doctrine of legitimate expectation reflects a normative conviction that an actor who has reasonably relied on assurances, representations, or the legal framework should not be arbitrarily disappointed.¹⁷ In investment law, this has often been articulated in terms of

¹⁴ *CMS Gas Transmission Company v Argentina* (Award) ICSID Case No ARB/01/8, 12 May 2005 [274]; *LG&E Energy Corp v Argentina* (Decision on Liability) ICSID Case No ARB/02/1, 3 October 2006 [124].

¹⁵ *Parkerings-Compagniet AS v Lithuania* (Award) ICSID Case No ARB/05/8, 11 September 2007 [332].

¹⁶ Christoph Schreuer. (2005). Fair and Equitable Treatment in Arbitral Practice. *Journal of World Investment and Trade* Vol.6 pp.357, 374.

¹⁷ Thomas Wälde & Todd Weiler. (2007). Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of

the foreign investor's reliance on the host state's legal and administrative environment at the time of investment. In *Tecmed*, the tribunal described FET as requiring the host state to act 'consistently, transparently and without ambiguity' so as not to 'affect the basic expectations that were taken into account by the foreign investor to make the investment'.¹⁸ This formulation of the doctrine in investment law effectively imported a standard of stability and predictability and equated disruption of the foreign investor's reliance on them to a breach of FET.

The above stated formulation was refined in later cases like *El Paso Energy International Company v Argentina*, where the tribunal held that legitimate expectations must rest upon 'specific commitments' made by the state and not merely on general regulatory stability.¹⁹ The refined qualification in the *El Paso* case was further buttressed by the decision in *Parkerings v Lithuania* where the tribunal opined that investors cannot expect complete immutability of the legal framework, particularly in dynamic sectors such as environmental regulation.²⁰ Thus, based on the briefly discussed cases, it becomes quite apparent that the locus of legitimate expectation somewhere between specific assurances given by the host state (e.g. contractual or regulatory promises) and general expectations of regulatory stability. The jurisprudence oscillates between these poles, reflecting deeper normative tensions between investor protection and state sovereignty.

3.2 Relationship with fair and equitable treatment

The FET standard is one of the most frequently invoked clauses in BITs. It is often worded in open-ended terms, obliging states to accord investments 'fair and equitable treatment' without further elaboration.²¹ This broad formulation in BITs has granted tribunals interpretative latitude, within which the doctrine of legitimate expectation has flourished. Several tribunals have treated legitimate expectation as the central element of FET. For example, the tribunal in *Duke Energy v Ecuador* held that 'the stability of the legal and business framework is an essential element of fair and equitable treatment'.²² The tribunal in *Micula v Romania* also emphasised that FET 'protects the

Conduct for Economic Regulation? *Transnational Dispute Management* Vol. 6(1), p. 21.

¹⁸ *Tecmed v Mexico* *supra* note 13.

¹⁹ *El Paso Energy International Company v Argentina* (Award) ICSID Case No ARB/03/15, 31 October 2011 [373].

²⁰ *Parkerings v Lithuania*, *supra* note 15.

²¹ UNCTAD, *Fair and Equitable Treatment*, *supra* note 12, pp.10–12.

²² *Duke Energy Electroquil Partners and Electroquil SA v Ecuador* (Award) ICSID Case No ARB/04/19, 18 August 2008 [340].

investor's legitimate expectations at the time of making the investment'.²³ Conversely, other tribunals have regarded legitimate expectations as just one of the several considerations under the FET and thus does not occupy a special position in comparison to other FET elements like transparency, consistency, good faith, and due process. It is thus worthy of mention that the tribunal in *Saluka v Czech Republic* cautioned that FET 'does not give a right to regulatory immutability' and must be balanced against the state's right to regulate in the public interest.²⁴

The broad treaty construction of the FET standard provides a cogent explanation of the prominence of legitimate expectation in the practice of arbitral tribunals. Consequently, as the doctrine's main locus is to be found in the jurisprudence of arbitral tribunals, its grounding in treaty text remains contested. Few treaties expressly mention 'expectations' and as such, tribunals have instead read the doctrine into FET by analogy to the principle of good faith or the minimum standard of treatment under customary international law.²⁵ Domestic administrative law shows a useful analytical distinction between procedural and substantive legitimate expectations.

Procedural legitimate expectations relate to the manner in which decisions are taken. An investor may expect, for example, that a licensing authority will provide notice, reasons, or an opportunity to be heard before altering an established regulatory practice. Although less prominent in arbitral jurisprudence, elements of procedural protection appear in cases such as *Waste Management v Mexico*, where the tribunal emphasised transparency and due process as part of FET.²⁶

Substantive legitimate expectations on the other hand concern the content or outcome of state action. They protect the investor's reliance on a stable legal framework or on specific commitments by the host state. The majority of investment claims that invoke legitimate expectation fall within this category. In *LG&E v Argentina*, the tribunal accepted that investors had legitimate expectations of a stable tariff regime for gas distribution, though it ultimately allowed Argentina a temporary defence under the principle of

²³ Ioan Micula, Viorel Micula, SC European Food SA and others v Romania (Award) ICSID Case No ARB/05/20, 11 December 2013 [668].

²⁴ *Saluka Investments BV v Czech Republic* (Partial Award) UNCITRAL, 17 March 2006 [305].

²⁵ Zachary Douglas. (2009). *The International Law of Investment Claims*, Cambridge University Press, pp.146–48.

²⁶ *Waste Management Inc v Mexico (No 2)* (Award) ICSID Case No ARB(AF)/00/3, 30 April 2004 [98].

necessity.²⁷ Likewise, in *Charanne v Spain*, investors in renewable energy projects claimed that Spain's abrupt withdrawal of incentive schemes violated their legitimate expectations.²⁸

Across the jurisprudence, several criteria recur in determining whether an expectation is 'legitimate':

- *Specificity of representation* involves clear, unambiguous promises directed at the investor that are most likely to generate legitimate expectations. For example, in *El Paso v Argentina*, the tribunal rejected claims based on general regulatory frameworks, and insisted specific commitments.²⁹
- *Reliance and investment decision* – According to this criterion the expectation must have influenced the investor's decision to invest. In *Tecmed*, the tribunal highlighted the role of expectations at the time of investment.³⁰
- *Reasonableness* – Expectations must be objectively reasonable in light of the host state's circumstances, and this includes its legal system and policy environment. *Parkerings v Lithuania* rejected an investor's expectation of regulatory immutability as unreasonable.³¹
- *Public interest limitations* – This criterion may enable States to override legitimate expectations where necessary for compelling public policy objectives. In *Saluka*, the tribunal stressed the need to balance investor protection with regulatory autonomy.³²

4. Legal Status in International Law

While the specific field of international investment law has been open to applying the doctrine of legitimate expectations with varying degrees of qualifications and requirements, its legal status in general international law is deeply contested. Unlike obligations that have been explicitly codified in treaties or firmly established in custom, the doctrine straddles multiple potential sources of law under Article 38(1) of the ICJ Statute.³³ This section of the article seeks to ascertain whether the doctrine can possibly be grounded

²⁷ *LG&E Energy Corp v Argentina*, *supra* note 14, pp.124–139.

²⁸ *Charanne BV and Construction Investments SARL v Spain* (Final Award) SCC Case No V 062/2012, 21 January 2016 [486]–[495].

²⁹ *El Paso v Argentina*, *supra* note 19, p.376.

³⁰ *Tecmed v Mexico* *supra* note 13.

³¹ *Parkerings v Lithuania*, *supra* note 15.

³² *Saluka v Czech Republic*, *supra* note 24.

³³ Statute of the International Court of Justice art 38(1), annexed to the Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945)

in treaty law, customary international law, and general principles of law. It further considers whether it may instead be conceptualised as a form of special customary law that is confined specifically to investment treaty practice.

4.1 Legitimate expectation as a treaty-based doctrine

The principal treaty basis for legitimate expectation is the fair and equitable treatment (FET) standard, which features in the overwhelming majority of bilateral investment treaties ('BITs') and free trade agreements.³⁴ Treaty formulations of FET vary. Some treaties define FET as no more than the customary international law minimum standard of treatment ('MST'), while others adopt an autonomous or more expansive meaning.³⁵

In *Tecmed*, the tribunal read protection of investor expectations directly into the FET clause of the Mexico–Spain BIT.³⁶ This interpretative approach was followed in *CMS v Argentina* and *LG&E v Argentina*, both of which held that FET encompasses the investor's expectation of regulatory stability.³⁷ The decision in *Duke Energy v Ecuador* followed this similar trend and considered legitimate expectation to be a 'major component' of FET.³⁸

By contrast, in *Glamis Gold v United States*, the tribunal rejected the argument that legitimate expectations formed part of the customary MST under NAFTA. The tribunal held that a breach requires conduct that is 'egregious' or 'shocking'.³⁹ This reflects the narrower approach taken where FET is expressly tied to customary international law.

A minority of modern investment treaties now attempt to clarify the relationship between FET and legitimate expectations. For example, the EU–Vietnam Investment Protection Agreement (2019) stipulates that a breach of legitimate expectations requires a 'specific representation' by the host state, thus limiting claims based on general regulatory frameworks.⁴⁰ This drafting suggests a trend towards caging the doctrine within more predictable parameters.

³⁴ Rudolf Dolzer and Christoph Schreuer, *supra* note 2, at 134–36.

³⁵ UNCTAD, *Fair and Equitable Treatment*, *supra* note 12, pp.11–14.

³⁶ *Tecmed v Mexico* *supra* note 13.

³⁷ *CMS v Argentina*, *supra* note 14; *LG&E Energy Corp v Argentina*, *supra* note 14.

³⁸ *Duke Energy v Ecuador*, *supra* note 22.

³⁹ *Glamis Gold Ltd v United States of America* (Award) UNCITRAL/NAFTA, 8 June 2009 [616].

⁴⁰ EU–Vietnam Investment Protection Agreement (signed 30 June 2019, not yet in force) art 2.5(4).

4.2 Legitimate expectation as customary international law

A more ambitious claim is that protection of legitimate expectations has crystallised into customary international law. For this to be the case, there must be widespread and consistent state practice accompanied by *opinio juris*.⁴¹ The most authoritative rejection of this claim came in the ICJ's judgment in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*. The Court dismissed Bolivia's argument that Chile had created binding obligations through the generation of legitimate expectations, holding that 'such a doctrine has not been proven to form part of general international law'.⁴² The Court opined that while investment arbitral awards sometimes recognised legitimate expectations, they could not by themselves establish international custom.⁴³

Some tribunals have, however, implicitly endorsed the view that legitimate expectation forms part of the minimum standard of treatment (MST), and thus customary law. In *Waste Management II*, the tribunal noted that FET 'is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic... or involves a lack of due process, leading to an outcome which offends judicial propriety'.⁴⁴ Though this fell short of explicitly recognising legitimate expectations, subsequent tribunals have read it as permitting expectation-based claims under customary law.⁴⁵ Likewise, scholars have expressed differing views about the status of legitimate expectation under customary international law. For example, Jung and Jung argue that arbitral reliance on legitimate expectations has not been matched by clear *opinio juris*, and that state practice remains inconsistent.⁴⁶ Hepburn on the other hand is of the view that while the doctrine lacks general customary force, it may be better understood as a form of special custom applying to states that have consistently accepted it in their treaty practice and arbitral participation.⁴⁷

⁴¹ North Sea Continental Shelf (Judgment) [1969] ICJ Rep 3, [77].

⁴² *Bolivia v Chile*, *supra* note 4.

⁴³ *Ibid.*

⁴⁴ *Waste Management II*, *supra* note 26.

⁴⁵ Stephan W Schill, *supra* note 1, at 15.

⁴⁶ Haneul Jung & Nu Ri Jung. (2022). Unraveling the Longstanding Riddle about the Doctrine of Legitimate Expectation under International Investment Law. *Northwestern Journal of International Law & Business*, Vol. 42, at 201, 225–226.

⁴⁷ James Hepburn. (2025). Legal Justification for the Doctrine of Legitimate Expectations. *European Journal of International Law*, Vol. 36, at 43, 60–61.

4.3 Legitimate expectation as a general principle of law

Article 38(1)(c) of the ICJ Statute permits reliance on ‘the general principles of law recognised by civilised nations’. Some commentators argue that the widespread recognition of legitimate expectation in domestic legal systems supports its status as a general principle of international law.⁴⁸ Basaran, however, contends that although many domestic systems protect reliance and good faith, the specific doctrinal form of legitimate expectation varies significantly.⁴⁹ It is to be noted that common law jurisdictions distinguish procedural from substantive expectations while civil law systems often employ doctrines of good faith, estoppel, or legal certainty. There is thus an evident lack of convergence and this fundamentally undermines claims that legitimate expectation could assume the status of a general principle of law.

This is buttressed by the fact that the ICJ has traditionally been cautious in recognising new general principles. For example, while good faith and estoppel are well-established, no judgment has yet affirmed legitimate expectation as a general principle. This further undermines the argument that legitimate expectation, as conceptualised in common law systems, is analogous to doctrines of good faith, legal certainty and estoppel in common law jurisdictions. If such doctrinal similarities do not exist at the national levels, it then becomes a bit of a stretch to argue that these varied doctrines denote a general principle of law. Thus, without greater doctrinal uniformity, its recognition under Article 38(1)(c) remains unlikely.

An alternative conceptualisation views legitimate expectation as a regime-specific norm, crystallised through repeated arbitral practice within the investment treaty system but not binding across international law more generally. Hepburn advances this theory, suggesting that arbitral awards, combined with the consistent participation of certain states, could amount to a form of ‘special customary law’ binding those states that accept it, much like regional or bilateral custom.⁵⁰ This framework seeks to reconcile the divergence between the ICJ’s rejection of general custom in the *Bolivia v Chile* case and the application of the doctrine of legitimate expectations in investment arbitral decisions.

Outside the field of international investment law, the recognition of legitimate expectation is considerably more limited. Although the doctrine is well established within many domestic administrative law systems,

⁴⁸ Bin Cheng. (1953). *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, at 112–115.

⁴⁹ Halil Rahman Basaran, *supra* note 5, at 145–146.

⁵⁰ James Hepburn, *supra* note 47, at 63–64.

international courts and tribunals have been cautious in recognising it as an independent rule of public international law. The International Court of Justice's decision in *Bolivia v Chile* illustrates this judicial restraint by declining to recognise legitimate expectation as a general principle or rule of customary international law. Consequently, the doctrine currently enjoys its greatest practical significance within investment treaty arbitration, where it has evolved through the interpretation of FET treaty obligations rather than through general international law.

5. Doctrinal Elements

The doctrine of legitimate expectation in international investment law does not operate as a free-standing entitlement. Instead, arbitral tribunals have developed a set of doctrinal elements that determine whether an expectation is 'legitimate' and whether disappointment of that expectation constitutes a breach of the host state's obligations. These elements reflect a compromise between investor reliance and the sovereign right of states to regulate in the public interest.

Representation, assurance or conduct by the state

A core requirement of legitimate expectation as applied in international investment dispute tribunals is that the investor's expectation must derive from an act or omission that is attributable to the state. This may take the form of: (i) legislation or regulation in force at the time of investment, (ii) regulatory permits or licences, (iii) contracts or investment agreements, (iv) official statements or commitments, or (v) established administrative practice.

In *Tecmed v Mexico*, the tribunal grounded the claimant's expectations in the regulatory framework and assurances concerning landfill permits.⁵¹ A similar outcome was reached, in *Micula v Romania*, where the tribunal held that the investors' expectations arose from Romania's incentive scheme for food-processing investments, which had been formally enacted and publicised by the state.⁵² By contrast, in *El Paso v Argentina*, the tribunal cautioned that general legislation applicable to all investors cannot, by itself, generate specific expectations of immutability.⁵³ The tribunal stressed that only specific commitments directed towards the investor could give rise to legitimate expectations.

⁵¹ *Tecmed v Mexico*, *supra* note 13.

⁵² *Micula v Romania*, *supra* note 23.

⁵³ *El Paso v Argentina*, *supra* note 19, pp.373–376.

Clarity and specificity of representation

For an expectation to be legitimate, the representation must be clear, unambiguous, and specific. Ambiguous policy statements or general governmental encouragements are insufficient. The tribunal in *Parkerings v Lithuania* rejected the investor's reliance on broad statements about foreign investment policy, noting that such assurances could not be construed as binding promises.⁵⁴ Likewise, in *Charanne v Spain*, the tribunal held that general promotional statements about renewable energy did not amount to specific commitments capable of generating legitimate expectations.⁵⁵ The *Metalclad v Mexico* case is particularly worthy of note as the tribunal found that representations by municipal officials regarding the legality of a waste facility licence were sufficiently specific to justify the investor's expectations.⁵⁶ Here, the municipal officials could be said to exercising governmental powers when the representations were made and as such, the state bore responsibility for actions and omissions of its units.

Reliance and investment decision

The doctrine requires that the expectation induced reliance by the investor, typically at the time of making the investment.⁵⁷ An expectation that did not influence the investor's decision is unlikely to qualify. In *Tecmed*, the tribunal emphasised that expectations are 'basic' if they were taken into account in deciding to invest.⁵⁸ The tribunal in *Duke Energy v Ecuador* followed this line of jurisprudence by holding that only those expectations that existed at the time of investment, and which materially affected the investor's choice, were protected.⁵⁹

Reasonableness of the expectation

The expectation must be objectively reasonable, judged in light of the political, legal, and economic circumstances of the host state. In *Parkerings v Lithuania*, the tribunal was of the opinion that foreign investors must be aware of the dynamic nature of legal systems, particularly in emerging economies.⁶⁰ The tribunal in *AES v Hungary* also held that the expectations must account

⁵⁴ *Parkerings v Lithuania*, *supra* note 15.

⁵⁵ *Charanne v Spain*, *supra* note 28.

⁵⁶ *Metalclad Corporation v Mexico* (Award) ICSID Case No ARB(AF)/97/1, 30 August 2000 [89]–[91].

⁵⁷ Christoph Schreuer, *supra* note 16, at 374.

⁵⁸ *Tecmed v Mexico*, *supra* note 13.

⁵⁹ *Duke Energy v Ecuador*, *supra* note 22.

⁶⁰ *Parkerings v Lithuania*, *supra* note 15, p.333.

for the host state's legitimate right to regulate in the public interest.⁶¹ This criterion prevents investors from claiming protection for expectations that were unrealistic, overly optimistic, or inconsistent with the host state's regulatory environment.

Detriment from frustration of expectations

Some tribunals require proof that the investor suffered detriment as a result of their reliance on the frustrated expectation.⁶² Although not always stated explicitly, this requirement underpins the compensatory rationale of investment arbitration. For instance, in *Micula v Romania*, the tribunal awarded damages for lost profits resulting from Romania's withdrawal of investment incentives, reasoning that the investors had relied on those incentives in structuring their business.⁶³

Temporal dimension

The timing of expectations is crucial as legitimate expectations are typically assessed at the time of investment and not based on later circumstances.⁶⁴ In *Duke Energy v Ecuador*, the tribunal limited the scope of legitimate expectations to those existing when the investment was made and excluded expectations that arose from subsequent state conduct.⁶⁵ Conversely, in *MTD v Chile*, the tribunal took into account assurances provided after the initial investment, though this approach has been criticised for stretching the doctrine.⁶⁶

Balancing against public interest

Even when all elements are satisfied, tribunals often balance the investor's expectations against the host state's right to regulate.⁶⁷ Legitimate expectations cannot override compelling public policy concerns such as environmental protection, public health, or macroeconomic stability. The *Saluka v Czech Republic* case exemplifies this. The tribunal in this case explicitly recognised that legitimate expectations must be balanced against the

⁶¹ *AES Summit Generation Ltd v Hungary* (Award) ICSID Case No ARB/07/22, 23 September 2010 [9.3.29].

⁶² Jeswald W Salacuse. (2015). *The Law of Investment Treaties* (2nd ed.) Oxford University Press, at 335.

⁶³ *Micula v Romania*, *supra* note 23, p.680.

⁶⁴ UNCTAD, *Fair and Equitable Treatment*, *supra* note 12, p.71.

⁶⁵ *Duke Energy v Ecuador*, *supra* note 22.

⁶⁶ *MTD Equity Sdn Bhd and MTD Chile SA v Chile* (Award) ICSID Case No ARB/01/7, 25 May 2004 [165].

⁶⁷ Rudolf Dolzer & Christoph Schreuer, *supra* note 2, at 115.

host state's legitimate regulatory interests.⁶⁸ This is further buttressed by the decision in the *LG&E v Argentina* case where the tribunal acknowledged the investors' expectations but excused Argentina's measures during its economic crisis under the doctrine of necessity.⁶⁹

Good faith and transparency

Some tribunals have linked legitimate expectation to broader principles of good faith and transparency. The tribunal in *Metalclad* framed the doctrine as part of the state's duty to ensure a transparent and predictable framework for business.⁷⁰ In *Waste Management II*, transparency and due process were emphasised as hallmarks of FET, indirectly supporting expectations.⁷¹

The jurisprudence discussed above shows eight cumulative or overlapping requirements, i.e. (i) representation, assurance, or conduct attributable to the state; (ii) clarity and specificity of that representation; (iii) reliance by the investor in making the investment; (iv) objective reasonableness of the expectation; (v) proof regarding the detriment caused by frustration of the expectation; (vi) formation of the expectation at or before the investment; (vii) balancing against the state's regulatory autonomy and public interest; and (viii) consistency with principles of good faith and transparency. These requirements reveal that legitimate expectation is not a rigid entitlement but a context-sensitive balancing test, applied on a case-by-case basis.

6. Arbitral Jurisprudence

Arbitral tribunals have been the primary fora for articulating and refining the doctrine of legitimate expectation in international investment law. This section provides a panoramic survey of the major awards, highlighting divergences in approach across different arbitral institutions, treaties, and factual contexts. The aim here is not to offer in-depth discussion and analysis of the cases featured. Skeletal sketches of the cases are provided while noting their importance in the development of the jurisprudence on legitimate expectation in the decisions of arbitral tribunals.

⁶⁸ *Saluka v Czech Republic*, *supra* note 24.

⁶⁹ *LG&E v Argentina*, *supra* note 14, pp.245–257.

⁷⁰ *Metalclad v Mexico*, *supra* note 56, at 76.

⁷¹ *Waste Management II*, *supra* note 26.

6.1 Early cases: Transparency and stability

Metalclad v Mexico (2000)

One of the earliest arbitral recognitions of legitimate expectation arose in *Metalclad Corporation v Mexico*.⁷² The dispute concerned a hazardous waste facility in San Luis Potosí. The claimant alleged that municipal authorities had given assurances that the facility was properly permitted, only to have the project later blocked by a state governor's decree. The tribunal held that Mexico had failed to ensure a 'transparent and predictable framework for business and planning', thus violating FET.⁷³ Although the award did not explicitly use the terminology of 'legitimate expectation', subsequent tribunals and scholars treated it as a foundational precedent.⁷⁴

Tecmed v Mexico (2003)

In *Tecmed*, the tribunal articulated the most influential formulation of legitimate expectation.⁷⁵ Tecmed, a Spanish company, alleged that Mexican authorities refused to renew a landfill licence despite prior representations suggesting renewal was likely. The tribunal stated that FET requires a state to act consistently and transparently so as not to 'affect the basic expectations that were taken into account by the foreign investor to make the investment'.⁷⁶ This expansive statement was later criticised for placing an unrealistic burden on host states to guarantee regulatory stability.⁷⁷

6.2 Argentina's economic crisis cases

The Argentine financial crisis of 2001–02 generated a flood of investment claims, many of which centred on legitimate expectations of tariff stability under privatisation schemes.

CMS v Argentina (2005)

In *CMS Gas Transmission Company v Argentina*, the claimant argued that the government's decision to abandon tariff indexation in US dollars breached its legitimate expectations.⁷⁸ The tribunal agreed, holding that FET encompasses the stability of the legal and business framework relied upon by the investor.⁷⁹

⁷² *Metalclad v Mexico*, *supra* note 56, at 76.

⁷³ *Ibid* at 76.

⁷⁴ Christoph Schreuer, *supra* note 16, at 362.

⁷⁵ *Tecmed v Mexico* *supra* note 13.

⁷⁶ *Ibid* at 154.

⁷⁷ Stephan Schill. (2009). *The Multilateralization of International Investment Law*, Cambridge University Press, at 275.

⁷⁸ *CMS v Argentina*, *supra*, note 14.

⁷⁹ *Ibid*.

This award established a strong precedent equating legitimate expectations with regulatory stability. However, it was later criticised for overlooking Argentina's sovereign right to respond to crisis conditions.⁸⁰

LG&E v Argentina (2006)

By contrast, in *LG&E v Argentina*, the tribunal acknowledged the legitimacy of investor expectations regarding tariff stability but held that Argentina's measures were excused under the doctrine of necessity during the crisis.⁸¹ This nuanced approach recognised expectations while balancing them against extraordinary circumstances.

Enron v Argentina (2007) and *Sempra v Argentina* (2007)

Tribunals in *Enron* and *Sempra* reiterated that investors could legitimately expect a stable regulatory framework.⁸² However, both awards were subsequently annulled by ICSID annulment committees, which criticised the tribunals for excessively expanding the doctrine.⁸³

6.3 Refining the doctrine: Specific assurances

In *Parkerings v Lithuania* (2007), a Norwegian investor claimed that Lithuania's refusal to permit a car park concession violated its legitimate expectations.⁸⁴ The tribunal rejected the claim, stressing that 'no investor may reasonably expect that the circumstances prevailing at the time of the investment remain totally unchanged'.⁸⁵ It held that legitimate expectations must be based on specific assurances and not on general legislation or policy. This case marked an important correction that recognised that host states retain regulatory autonomy and that expectations must be grounded in concrete commitments.

Although predating *Parkerings*, in *MTD v Chile* (2004) the award is often contrasted for its broader view. The tribunal held that Chile had breached legitimate expectations by approving an investment project that was

⁸⁰ William W Burke-White & Andreas von Staden. (2008). Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations. *Yale Journal of International Law*, Vol. 35, at 283, 308.

⁸¹ 79 *LG&E v Argentina*, *supra* note 14, p.257.

⁸² *Enron Corporation and Ponderosa Assets LP v Argentina* (Award) ICSID Case No ARB/01/3, 22 May 2007 [260]; *Sempra Energy International v Argentina* (Award) ICSID Case No ARB/02/16, 28 September 2007 [298].

⁸³ *Enron v Argentina* (Decision on Annulment) ICSID Case No ARB/01/3, 30 July 2010 [361]; *Sempra v Argentina* (Decision on Annulment) ICSID Case No ARB/02/16, 29 June 2010 [214].

⁸⁴ *Parkerings v Lithuania*, *supra* note 15.

⁸⁵ *Ibid* at 332.

inconsistent with its urban development plans, even though the approval came after the initial investment.⁸⁶ Critics argue that this stretched the doctrine by protecting expectations based on post-investment assurances.⁸⁷

6.4 Clarification and limitation

In *Saluka v Czech Republic* (2006) the tribunal emphasised that FET requires balancing investor expectations with the host state's right to regulate in the public interest.⁸⁸ It rejected the notion of absolute stability, observing that 'no investor may reasonably expect that the circumstances prevailing at the time of the investment remain totally unchanged'.⁸⁹

The tribunal, in *El Paso El Paso v Argentina* (2011), further refined the doctrine, rejecting claims based on general regulatory frameworks and holding that only specific commitments made directly to the investor can generate legitimate expectations.⁹⁰ This award is widely cited for recalibrating the doctrine towards a narrower scope.

6.5 Renewable energy cases in Europe

The wave of investment disputes that have arisen due to state support for renewable-energy schemes in Europe provide an important contemporary illustration of some of the above-discussed difficulties in defining the contours of legitimate expectations. Spain, for example, introduced generous regulatory incentives like feed-in tariffs as mediums for encouraging the private sector to invest in renewable energy. However, the impact of global financial crisis and the ensuing budgetary constraints resulted in amendments or withdrawal of the erstwhile incentives. One of the issues that gave rise to the investment disputes was whether, in view of the fair and equitable standard of protection, the investors' legitimate expectation of regulatory stability had been breached.

Charanne v Spain (2016)

Charanne BV and Construction Investments SARL v Spain was one of the earliest awards that arose from the reforms instituted by the government of Spain. Based on the Spain's incentive scheme to promote renewable energy, the claimants invested in photovoltaic installations. The claimants argued that the modification of the scheme frustrated their legitimate expectations and, by so doing, breached the FET standard of protection in the Energy Charter

⁸⁶ *MTD v Chile*, *supra* note 66.

⁸⁷ Jeswald W Salacuse, *supra* note 62.

⁸⁸ *Saluka v Czech Republic*, *supra* note 24.

⁸⁹ *Ibid.*

⁹⁰ *El Paso v Argentina*, *supra* note 19.

Treaty.⁹¹ This argument was, however, rejected by the tribunal. The tribunal opined that Spain did not make any specific commitment not to change its incentive scheme. Furthermore, a general regulatory framework in a particular sector aimed at incentivising economic activity could not amount to specific assurances against changes in the law.⁹² However, the decision of the tribunal in *Charanne* was not a blanket rejection of the principle of legitimate expectations in its interpretation of the FET standard of protection. The rejection of the claimant's argument hinged on the key finding that state legislation aimed at incentivising investment in a particular sector of the economy does not amount to specific assurances or promises made to the investor. Thus, in the absence of such specific assurances or promises, a determination of legitimate expectation could not be made.

Novenergia v Spain (2018)

Unlike the *Charanne* case, a different conclusion was reached by the tribunal in *Novenergia II – Energy & Environment (SCA) v Spain*. The facts in *Novenergia* were quite similar to *Charanne*. *Novenergia* invested in Spain's photovoltaic energy industry based on the state regulatory framework and encouraged investment in the renewable energy sector. *Novenergia* claimed that Spain's alterations to the regulatory framework incentivising investment in the renewable energy sector fundamentally changed the conditions that formed the basis of its investment. The tribunal decided in favour of *Novenergia* holding that the circumstances underpinning Spain's renewable energy regime were capable of raising legitimate expectations that should be protected. In its deliberations, the tribunal took due cognisance of Spain's efforts to attract substantial investments in its renewable energy sector and how its regulatory framework served as inducement for the investment.⁹³ While the tribunal reached a contrary decision in *Novenergia*, the significance of this outcome does not lie in an affirmation of the investor's right to regulatory immutability. Rather, in recognising Spain's sovereign right to legislate or amend legislation, the tribunal opined that the degree of alteration could trigger a breach of the investor's legitimate expectation where the regulatory framework had served as the inducement for the investment. The different outcomes in *Charanne* and *Novenergia* give some credence to concerns about the doctrinal inconsistencies in tribunals' interpretation of legitimate expectations.

⁹¹ *Charanne v Spain*, *supra* note 28.

⁹² *Ibid* at 486–495.

⁹³ *Novenergia II – Energy & Environment (SCA) v Spain* (Final Award) SCC Case No 063/2015, 15 February 2018 [650]–[660].

6.6 Other significant cases

Micula v Romania (2013)⁹⁴

Micula v Romania exemplifies an important illustration of the circumstances in which a generally applicable legislative incentive scheme may nevertheless generate legitimate expectations. Romania had introduced Emergency Government Ordinance 24 of 1998 (EGO 24), which provided a package of incentives designed to encourage investment in disadvantaged regions. The claimants invested in reliance upon this regulatory framework and obtained permanent investor certificates entitling qualifying investments to specified incentives. Romania subsequently repealed the relevant incentives ahead of schedule in the context of its preparations for accession to the European Union, because of concerns regarding their compatibility with EU State-aid rules.

The tribunal's reasoning is especially significant because it is indicative of the viewpoint that the distinction between general legislation and specific commitments is not always absolute. Although EGO 24 established a generally available legislative scheme, the entitlement was subsequently individualised through the permanent investor certificates granted to qualifying investors. The tribunal therefore considered whether the combination of the statutory regime and those certificates had created a legitimate expectation that the incentives would remain available for their stated duration.

The position advanced from the reasoning of the tribunal indicates that the general legislative entitlement became a specified entitlement in relation to particular investors once the relevant certificates were issued. In effect, Romania's premature withdrawal of the incentives formed an important basis for the finding that it had failed to accord FET under the Sweden–Romania BIT. From the *Micula* case it can be argued that legislation may contribute to legitimate expectations where the surrounding circumstances transform a general regulatory scheme into a sufficiently concrete assurance upon which identifiable investors reasonably rely. Moreover, the decision in *Micula* affirms the position that resulting obligations derived from legitimate expectations remain anchored to FET rather than constituting an independent standard of protection.

⁹⁴ *Micula v Romania*, *supra* note 23.

AES v Hungary (2010)⁹⁵

In *AES*, the dispute concerned Hungary's reintroduction of administrative controls over electricity prices. *AES* argued, *inter alia*, that the measures frustrated expectations arising from the regulatory and contractual framework governing its investment. The tribunal rejected the legitimate expectation argument due, in part, to its consideration of the regulatory environment existing at the time of investment. The relevant privatisation materials and investment arrangements expressly contemplated continuing governmental regulation of electricity prices. The investor could therefore not reasonably have expected that Hungary would permanently surrender its regulatory authority over electricity pricing. Notably, the tribunal found that *AES* could not have had any legitimate expectations concerning the subsequent reintroduction of administered prices of the kind challenged in the arbitration.

The decision in *AES* exemplifies the importance of assessing legitimate expectations against the legal and regulatory circumstances existing at the time of investment. Thus, an investor cannot reasonably derive an expectation of regulatory immutability from a legal environment that itself indicates the possibility of continuing State intervention. Furthermore, the existence of an investment agreement or other contractual relationship would not automatically amount to a stabilisation commitment. A much clearer undertaking is required before an investor can reasonably claim that the State surrendered its ordinary power to regulate. The *AES* decision therefore represents the more restrictive strand of legitimate expectation jurisprudence associated with *Parkerings* and *El Paso*. It reinforces FET's role in protecting reasonable reliance upon sufficiently concrete State conduct rather than an investor's subjective expectation that favourable economic regulation will continue indefinitely.

Electrabel v Hungary (2015)⁹⁶

The dispute in *Electrabel* arose principally from Hungary's termination of a long-term power purchase agreement in the context of changes to the electricity sector associated with Hungary's membership of the European Union and compliance with EU competition and State-aid requirements.

The tribunal approached legitimate expectations against the broader regulatory environment in which the investment operated. Hungary's accession to the European Union and the consequent application of EU law

⁹⁵ *AES v Hungary* *supra* note 61.

⁹⁶ *Electrabel SA v Hungary* (Award) ICSID Case No ARB/07/19, 25 November 2015 [7.78].

were highly material to assessing what the investor could reasonably have expected. The case elucidates the contextual nature in assessing legitimate expectations – i.e. that it cannot be determined in isolation from foreseeable developments in the host State’s domestic and international legal obligations.

Notably, *Electrabel* affirms the need to balance investor protection against legitimate exercises of public regulatory authority. In effect, FET does not guarantee freezing of the regulatory framework governing an investment, particularly where change results from the State’s compliance with wider legal obligations. The reasonableness of an investor’s expectations must consequently be assessed in light of the entire regulatory context, including foreseeable legal developments and the public interests underlying the challenged measures.

Read together, *Micula*, *AES* and *Electrabel* demonstrate why legitimate expectation cannot be reduced to a simple prohibition against regulatory change. In *Micula* the tribunal gave credence to circumstances in which a general legislative incentive regime, reinforced by individualised governmental acts, may create sufficiently concrete expectations to attract FET protection. In *AES* the tribunal held that no legitimate expectations arise where the regulatory environment itself indicates continuing governmental authority to intervene. *Electrabel*, on the other hand, points to the importance of evaluating investor expectations against broader regulatory obligations and public interests. The cases therefore reinforce the emerging requirement that tribunals examine specificity, reliance, reasonableness, timing and regulatory context rather than treating stability as an absolute entitlement.

6.7 Jurisprudential trends

From these cases, several trends emerge. The ‘early tribunals’ (2000–2005) cases such as *Tecmed* and *CMS* placed emphasis on broad investor expectations of stability while the ‘crisis cases’ (2005–2007) witnessed expansion of the doctrine, followed by annulments in the *Enron*, *Sempra* cases. A ‘corrective phase’ (2007–2011) is discernible in cases like *Parkerings* and *El Paso* which adopted narrower interpretations that highlighted the fundamental importance of specific assurances made by the host state. In the ‘recent cases’ (2013–present), tribunals have sought to achieve contextual balancing, as evidenced in the renewable energy disputes, which produced inconsistent outcomes (*Charanne vs Novenergia*).

7. Criticisms and Challenges

Although tribunals have widely invoked the doctrine of legitimate expectation, its application has been subject to sustained criticism from scholars, states, and even annulment committees. These critiques focus on

issues of legal uncertainty, sovereignty, democratic legitimacy, and systemic coherence.

One of the most persistent criticisms is that the doctrine lacks clear parameters, leading to inconsistent and unpredictable arbitral outcomes. Tribunals have wavered between broad protection of general expectations of stability (*Tecmed*, *CMS*) and narrow protection of specific assurances (*Parkerings*, *El Paso*).⁹⁷ The renewable energy cases in Spain demonstrate the problem vividly: rejected claims based on general legislation (in *Charanne*), as opposed to accepted claims (in *Novenergia*) even though both cases arose from similar regulatory changes.⁹⁸ Consequently, it can be reasonably argued that this doctrinal inconsistency undermines legal certainty and could deter states from entering into investment treaties.⁹⁹ Burke-White and von Staden have described the doctrine as a ‘moving target’, subject to arbitral discretion rather than grounded in objective criteria.¹⁰⁰

The doctrine is criticised for unduly constraining the sovereign right of states to regulate, especially in dynamic sectors such as energy, environment, and public health. By equating FET with stability, early cases risked freezing host states’ legal orders in ways incompatible with evolving public policy.¹⁰¹ The annulments of *Enron* and *Sempra* reflect concerns that tribunals had intruded too deeply into sovereign prerogatives during Argentina’s economic crisis.¹⁰² States have echoed this concern in treaty drafting. The EU–Vietnam Investment Protection Agreement explicitly limits protection of expectations to those based on ‘specific representation’ by the host state, thereby safeguarding regulatory space.¹⁰³

Another criticism is that the doctrine privileges private investor interests over democratic decision-making. By protecting reliance on existing regulatory frameworks, tribunals may discourage governments from enacting reforms in response to democratic demands, resulting in the phenomenon of regulatory chill. For example, Spain’s reversal of renewable energy subsidies reflected budgetary pressures and wider social policy concerns. However,

⁹⁷ *Tecmed v Mexico* *supra* note 13; *CMS v Argentina*, *supra* note 14; *Parkerings v Lithuania* *supra* note 15; *El Paso v Argentina* *supra* note 19.

⁹⁸ *Charanne v Spain*, *supra* note 28; *Novenergia v Spain* *supra* note 93.

⁹⁹ UNCTAD, *Fair and Equitable Treatment*, *supra* note 12, pp.75–76.

¹⁰⁰ William W Burke-White & Andreas von Staden, *supra* note 80, at 308.

¹⁰¹ Rudolf Dolzer. (2005). Fair and Equitable Treatment: A Key Standard in Investment Treaties. *International Law*, Vol. 39, at 87, 93.

¹⁰² *Enron v Argentina (Annulment)*, *supra* note 83 at 361; *Sempra v Argentina (Annulment)*, *supra* note 83 at 214.

¹⁰³ EU–Vietnam Investment Protection Agreement *supra* note 40, art 2.5(4).

arbitral tribunals were asked to determine whether such reforms violated investor expectations.¹⁰⁴ This raises legitimacy concerns, given that private arbitral panels, rather than domestic democratic institutions, effectively evaluate the propriety of public policy changes.¹⁰⁵ Van Harten has argued that the doctrine reflects a one-sided conception of fairness, privileging investor reliance over public interest.¹⁰⁶

As noted in Sections 1 and 4 above, the ICJ in *Bolivia v Chile* rejected the claim that legitimate expectation forms part of general international law.¹⁰⁷ Without solid grounding in custom or general principles, the doctrine's normative legitimacy is questionable. Basaran thus argues that the doctrine represents a 'transplant' from domestic law without sufficient adaptation to the structural differences of international law.¹⁰⁸ Unlike domestic administrative systems, international law lacks a coherent framework for balancing expectations against democratic accountability.

Although many tribunals recognise the need to balance investor expectations with public interest, they often fail to articulate clear criteria for doing so. In *Saluka*, the tribunal acknowledged this balance but provided little guidance on how to weigh competing interests.¹⁰⁹ In *LG&E*, the necessity defence was invoked, but subsequent tribunals have diverged on when public interest justifications suffice.¹¹⁰ This inconsistency risks both overprotection (stifling regulation) and underprotection (denying investors meaningful security).

The doctrine is also vulnerable to strategic invocation by investors. By construing general legislation or policy statements as binding commitments, claimants may expand the scope of legitimate expectation beyond its intended limits. For example, in the Spanish renewable energy cases, claimants sought to characterise broad policy frameworks as binding promises, even though such schemes were inherently contingent on budgetary and political developments.¹¹¹

¹⁰⁴ *Charanne v Spain*, *supra* note 28; *Novenergia v Spain*, *supra* note 93.

¹⁰⁵ Gus Van Harten. (2007). *Investment Treaty Arbitration and Public Law*, Oxford University Press, at 89–91.

¹⁰⁶ *Ibid* at 115–116.

¹⁰⁷ *Bolivia v Chile*, *supra* note 4.

¹⁰⁸ Halil Rahman Basaran, *supra* note 5, at 145–46.

¹⁰⁹ *Saluka v Czech Republic*, *supra* note 24.

¹¹⁰ *LG&E v Argentina*, *supra* note 14, pp.245–257.

¹¹¹ *Novenergia v Spain*, *supra* note 93, at 650–660.

Finally, the doctrine contributes to the fragmentation of international law.¹¹² While tribunals in investment arbitration apply legitimate expectation expansively, other international courts, including the ICJ, have resisted its recognition.¹¹³ This divergence risks creating parallel regimes with inconsistent obligations for states.

Overall, the criticisms suggest that while the doctrine of legitimate expectation serves a valuable function in promoting predictability and investor confidence, its current application is excessively expansive and inconsistent. Unless narrowed and clarified, it risks eroding state sovereignty, undermining democratic legitimacy, and fragmenting the coherence of international investment law.

8. Future Directions and Prospects of Reform

The criticisms identified in Section 7 demonstrate the need for recalibration of the doctrine of legitimate expectation in international investment law. While wholesale abandonment is unlikely given its entrenchment in arbitral jurisprudence, future developments would have to refine and constrain its application. The following paragraphs highlight potential directions, including treaty drafting innovations, jurisprudential clarification, balancing frameworks, and systemic integration.

Clarifying treaty text

One of the most effective avenues for reform lies in treaty drafting. A growing number of states and regional organisations have begun to address the doctrine of legitimate expectation explicitly, thereby curtailing tribunals' interpretative discretion. The EU–Vietnam Investment Protection Agreement (2019), for example, stipulates that legitimate expectations may only arise from a 'specific representation' made to an investor to induce an investment.¹¹⁴ This formulation excludes claims based on general regulatory frameworks or broad policy statements. Similarly, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) limits FET to the minimum standard of treatment under customary international law, expressly excluding broader interpretations.¹¹⁵ These drafting choices reflect states' desire to cage the doctrine within predictable limits and preserve regulatory autonomy. Future

¹¹² Stephan Schill. (2011). System-Building in Investment Treaty Arbitration and Lawmaking. *German Law Journal*, Vol.12, at 1083, 1092–93.

¹¹³ *Bolivia v Chile*, *supra* note 4.

¹¹⁴ EU–Vietnam Investment Protection Agreement, *supra* note 40, art 2.5(4).

¹¹⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) art 9.6(2).

treaties are likely to follow this trajectory, either by codifying restrictive definitions of legitimate expectation or by excluding the doctrine altogether.

Developing consistent jurisprudential tests

Where treaty text remains vague, arbitral tribunals can enhance legitimacy by articulating clear and consistent tests. Tribunals can adopt a multi-pronged framework approach that requires: (i) a clear and specific representation attributable to the state; (ii) reasonable reliance by the investor; (iii) causation between reliance and the investment decision; and (iv) consideration of overriding public interest.¹¹⁶ Some tribunals already apply elements of this test, as seen in *El Paso v Argentina* and *Parkerings v Lithuania*.¹¹⁷ If consistently applied, such a framework could help address current concerns about unpredictability.

Balancing investor reliance with public interest

Future practice should more explicitly integrate balancing tests. In *Saluka*, the tribunal articulated the principle but failed to develop operational criteria.¹¹⁸ Later cases, such as *Electrabel v Hungary*, moved closer to a proportionality approach by weighing investor reliance against Hungary's compliance with EU law.¹¹⁹ Some critical commentators have argued for adopting a proportionality analysis, akin to that used in constitutional and human rights adjudication.¹²⁰ This would require tribunals to ask whether: (i) the state's measure has pursued a legitimate public interest objective; (ii) the measure was suitable and necessary to achieve that objective; and (iii) the impact of the measure on investor expectations was proportionate to the public interest served. Embedding proportionality would enhance transparency, and meanwhile balance the protection of investors and legitimate regulatory change.

Enhancing transparency and documentation

States can reduce exposure to expansive claims by ensuring that representations are clearly documented and by providing explicit disclaimers in policy statements. For example, investment promotion materials could specify that incentive schemes are subject to change, thereby limiting the

¹¹⁶ UNCTAD, *Fair and Equitable Treatment*, *supra* note 12, pp.71–72.

¹¹⁷ *El Paso v Argentina* *supra* note 19; *Parkerings v Lithuania* *supra* note 15.

¹¹⁸ *Saluka v Czech Republic*, *supra* note 24.

¹¹⁹ *Electrabel v Hungary*, *supra* note 96, at 7.78.

¹²⁰ Alec Stone Sweet and Florian Grisel (2013). 'Transnational Investment Arbitration: From Delegation to Constitutionalization?' *Law & Contemporary Problems*, Vol. 19, at 123, 140–42.

scope for investors to claim reliance. Similarly, regulatory agencies could provide written guidance distinguishing between binding commitments and non-binding statements.

Greater role for domestic institutions

Some commentators advocate shifting disputes over legitimate expectations towards domestic courts and institutions.¹²¹ Domestic adjudication may provide a more balanced framework, integrating constitutional principles and democratic legitimacy into the assessment of reliance and regulatory change. Recent treaty practice, including the EU's proposals for a multilateral investment court, suggests growing interest in institutional reform.¹²² It must be noted that the ability of investors to gain access to international arbitration which is removed from domestic politics, is one of its greatest appeals. Thus, calls for domestic adjudication seem unlikely to gain attraction as it difficult to see its appeal to foreign investors who have come to see international arbitration as the forum for gaining impartial dispute settlement.

Integration with broader international law

A final direction is the integration of legitimate expectation with other international legal principles, such as good faith, estoppel, and transparency.¹²³ Rather than treating legitimate expectation as a freestanding doctrine, tribunals could ground it in these established principles, thereby enhancing normative legitimacy. Hepburn argues that reconceptualising the doctrine as a form of special customary law within the investment regime may also reconcile arbitral practice with the ICJ's rejection of its status as general international law.¹²⁴ This would acknowledge the doctrine's regime-specific validity without overextending its reach.

In summary, it is discernible that the future of legitimate expectation will likely involve narrowing and formalisation, rather than expansion. Treaty drafters, arbitral tribunals, and scholars converge on the need to: (i) restrict the doctrine to specific representations; (ii) require reasonable reliance and causal connection; (iii) apply balancing or proportionality tests; and (iv) anchor the doctrine in established principles of international law. Such reforms could transform legitimate expectation from a source of legal

¹²¹ Van Harten, *supra* note 105, at 137.

¹²² European Commission, 'Multilateral Investment Court Project' (2020) https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/multilateral-investment-court_en Last accessed: 11 September 2025.

¹²³ Bin Cheng, *supra* note 48.

¹²⁴ James Hepburn, *supra* note 47, at 63-64.

uncertainty into a predictable tool for balancing investor protection with sovereign regulatory autonomy.

9. Conclusion

The doctrine of legitimate expectation occupies an ambivalent position in international law. Originating in domestic administrative law, it migrated into the international investment regime through the interpretative practices of arbitral tribunals. From *Metalclad* and *Tecmed* to the Spanish renewable energy disputes, tribunals have invoked the doctrine to protect investor reliance on the stability of host state legal and regulatory frameworks. However, the trajectory of jurisprudence reveals a doctrinal pendulum: early expansive interpretations equated FET with stability, while later awards, such as *Parkerings* and *El Paso*, insisted upon specific assurances as a prerequisite. The divergence between *Charanne* and *Novenergia* epitomises the inconsistency of arbitral approaches.

From the perspective of sources of international law, legitimate expectation remains regime-specific rather than universal. The ICJ's rejection in *Bolivia v Chile* of its status as customary international law lends a very important support to the absence of consistent state practice or *opinio juris*.¹²⁵ Regarding the status of legitimate expectation as a general principle of law under Article 38(1)(c) of the ICJ Statute, considering the fact that there is a lot of divergence at the domestic law level, one cannot make a cogent argument in favour of its transition into an international law principle.¹²⁶ Instead, legitimate expectation can be best understood as a treaty-based or special customary norm, confined to the investment law regime and dependent on treaty text, arbitral precedent, and state consent.¹²⁷

Doctrinally, tribunals have converged on several key requirements: a representation attributable to the state, clarity and specificity, reliance and causation, reasonableness, detriment, and temporal nexus at the time of investment.¹²⁸ That said, even the stated requirements have not been consistently applied, resulting in a state of affairs where there is a lack of clear principled criteria that balances the expectations of foreign investors with the regulatory autonomy of states. There is therefore valid basis for the criticisms levelled against the doctrine as applied by tribunals in international investment disputes. Its vagueness undermines legal uncertainty; its

¹²⁵ *Bolivia v Chile*, *supra* note 4.

¹²⁶ Halil Rahman Basaran *supra* note 5, at 145–146.

¹²⁷ James Hepburn, *supra* note 47, at 60–64.

¹²⁸ *El Paso v Argentina* *supra* note 19; *Parkerings v Lithuania* *supra* note 15.

expansion threatens state sovereignty and democratic legitimacy; and its inconsistent application fosters fragmentation.¹²⁹ Nevertheless, outright abandonment would also sacrifice the stabilising function it provides to the investment regime.

From the foregoing, it can be argued that the path forward lies in narrowing and formalising the doctrine. Treaty drafters have increasingly restricted legitimate expectations to specific representations, while tribunals experiment with proportionality analyses to reconcile investor reliance with public interest regulation.¹³⁰ This must be encouraged. While majority of BITs currently in force do not flesh out the FET standard in a manner that leaves little room for interpretative latitude, states still have the opportunity to reform their model BITs. Such reform can make specific provisions for legitimate expectations and incorporate the above stated requirements and limitations. This will fundamentally circumscribe the interpretative latitude that arbitral tribunals have. The clarity and certainty of the doctrine can thus rest on the consent of states expressed through treaties instead of a real or perceived judicial activism by arbitral tribunals.

In conclusion, legitimate expectation in international law is neither an entrenched rule of general international law nor a doctrine in retreat. It is a contested, evolving norm, reflecting the broader tensions particularly of international investment law. The tensions are primarily between stability and change, investor protection and sovereign autonomy, and arbitral discretion and democratic legitimacy. Its future will depend not on wholesale expansion but on disciplined clarification especially by states through treaty reform. This will ensure that legitimate expectation functions as a tool of fairness and predictability in international investment law without eroding the sovereign autonomy of states to regulate in the public interest. At the end of the day, states remain the main actors in international law and this must translate into clear and predictable law-making instead of acquiescence to the decisions of arbitral tribunals. ■

¹²⁹ William W Burke-White and Andreas von Staden, *supra* note 80, at 308.

¹³⁰ EU–Vietnam Investment Protection Agreement *supra* note 40, art 2.5(4); *Electrabel v Hungary*, *supra* note 96, at 7.78.

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Peri-Urban Land Governance in Ethiopia: Legal Fragmentation and Institutional Practice in the Rural-Urban Transition

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Abstract

In the current developing world, rapid urbanization is driving the expansion of informal settlements and the transformation of rural land in peri-urban areas. In Ethiopia, peri-urban areas are rapidly transforming as urban development expands into rural areas. Although peri-urban land is subject to existing rural-urban planning, investment, expropriation, compensation, and regional rules, Ethiopia lacks a coherent and integrated legal framework governing the transition between rural and urban landholding and administration. The current legal and institutional systems are fragmented and not well coordinated, which makes it difficult to manage land-use changes and protect peri-urban landholders' rights. This article deals with the laws and governance practices that regulate how peri-urban land becomes part of urban areas in Ethiopia. Using doctrinal and empirical legal research methods, it examines federal and regional legal frameworks and governance in selected regions. The findings show that while current laws cover key parts of peri-urban transformation, they lack clear and coordinated procedures for transitions and do not clearly define institutional responsibilities. This fragmentation causes land tenure insecurity, informal land deals, administrative confusion, and challenges related to compensation and livelihood restoration, particularly for landholders. As a result, there is a need for a clear and more unified approach to managing rural-to-urban land transitions.

Keywords: Peri-urban land; Rural–urban land transition; Land governance; Land rights; Ethiopia

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1. Introduction

Ethiopia's urban expansion is one of the fastest in the world both spatially and demographically. The projection of the World Bank and the Ministry of Urban and Infrastructure shows that the urban population will be tripled, from 15.2 million in 2012 to 42.3 million by 2037.¹ This demographic change and growth is accompanied by spatial expansion of urban areas into peri-urban areas. The increasing spatial expansion of urban areas into peri-urban agricultural land is largely caused by the rising demand for land for urban housing and infrastructure.

The inadequacy of the existing legal and policy frameworks to manage land tenure and land use transitions is also contributing to the expansion of urban areas into peri-urban land. The practice largely shows that peri-urban land adjustment to urban jurisdiction is subjected to competing claims to control by different actors and unintended transformations.² The natural proximity of peri-urban land to urban centers attracts the attention of diverse groups of actors interested in residential, commercial and industrial and other purposes. Consequently, peri-urban areas in Ethiopia represent the most contested spaces where urban-rural land governance mandates overlap and

¹ World Bank. (2015). *Ethiopia Urbanization Review: Urban Institutions for a Middle-Income Ethiopia*, World Bank, Washington, DC.

² Achamyeleh Gashu Adam. (2020). Understanding competing and conflicting interests for peri-urban land in Ethiopia's era of urbanization. *Environment and Urbanization* 32, No. 1: 55-68.

land-use conflicts arise.³ The main legal challenge is fragmentation of rules and institutions, and a lack of clarity in the frameworks guiding how land changes from rural to urban status, administration, and use.

Ethiopian land law divides landholding into rural and urban systems. In rural areas, people usually have usufruct rights under rural land laws. Urban land, on the other hand, is managed through a lease system. There is no separate category for peri-urban land. Instead, it is governed by a combination of rural and urban laws, along with planning, expropriation, investment, and regional rules, depending on the extent of its transition. The main issue is that there is no clear framework for this transition, and responsibilities among institutions are not well defined. This raises important legal and governance questions such as whether peri-urban land is treated as a separate legal category; whether the law clearly guides the change from rural to urban status; whether the responsibilities of institutions during this process are clear; whether the rules are being followed in practice; and whether landholders have enough rights and protections.

Expropriation is one of the principal legal mechanisms through which peri-urban land is transferred for urban development in Ethiopia.⁴ It serves as a primary instrument for transferring land from peri-urban farming communities to urban authorities when land is required for urban development. As a result, urbanization and urban expansion often involve annexation of peri-urban land through expropriation measures. The process often terminates the usufruct rights of peri-urban local communities' or smallholder farmers' by providing compensation widely regarded as inadequate.⁵ This results in dissatisfaction and tenure insecurity among landholders and promotes the practice of informal land subdivision and sale of holdings by local communities themselves; and it further complicates land management practices in the area and contributes to the expansion of unplanned settlements over agricultural lands.⁶

Thus, Ethiopia's rapid urbanization, coupled with gaps in legal and policy frameworks for managing the diverse actors interested in peri-urban land, have

³ Hashem Dadashpoor & Somayeh Ahani. (2019). Land tenure-related conflicts in peri-urban areas: A review. *Land Use Policy* 85: 218-229.

⁴ Achamyeleh G. Adam, *supra* note 2.

⁵ Achamyeleh Gashu Adam. (2020). Urban built-up property formation process in the peri-urban areas of Ethiopia. In *Land Use Change and Sustainability*. IntechOpen.

⁶ Fentaw Baye. (2025). Informal land market mechanisms for accessing and securing land for housing development: the case of peri-urban areas of Woldia Township, Ethiopia. *Cogent Social Sciences* 11, No. 1: 2482115.

made peri-urban land governance one of the critical challenges in the country.⁷ Existing studies have addressed important dimensions of Ethiopia's peri-urban transformation, including tenure insecurity⁸, informal settlement⁹, expropriation, compensation and land administration¹⁰. However, these issues have often been examined separately rather than as interconnected consequences of the transition between rural and urban land systems. Limited attention has also been given to the institutional and legal arrangements through which regional states manage this transition and to the differences among regional approaches. Therefore, the purpose of this article is to critically examine the legal frameworks and governance practices shaping peri-urban land transformation and its incorporation into the urban land system.

Doctrinal research combined with an empirical research method was employed. The federal and regional land laws are systematically analyzed as primary sources, complemented by desk reviews from secondary sources. Desk reviews were supplemented by data from primary sources gathered through key informant interviews and focus group discussions (FGD). Interviews and group discussions were conducted with officials, experts and local community members relating to peri-urban land governance practices in the Amhara, Oromia, Sidama and Somali regions.

In these four regional states, Bahir Dar, Sheger, Hawassa and Jigjiga cities were purposively selected. The cities were chosen to represent different urban land governance contexts. Bahir Dar reflects the Amhara region's institutional reform, Sheger shows the Oromia region's urban expansion and investment, Hawassa highlights the Sidama region's transition and regularization, and Jigjiga illustrates the Somali region's formal and customary interaction. For key informant interview purposes, forty-five (45) experts and officials were purposively selected, with 12 each from Bahir Dar and Sheger, and 11 from Hawassa and Jigjiga to ensure broadly balanced representation across the four

⁷ Mihret Fentahun Yeneneh, Habtamu Sitotaw Semahagne, and Tadesse Amsalu Birhanu. (2025). Factors Influencing Peri-Urban Land Development in Ethiopia: Evidence from Assosa City. *African Journal on Land Policy and Geospatial Sciences* 8, No. 2 (2025).

⁸ Achamyeleh G. Adam, *supra* note 2.

⁹ Achamyeleh Gashu Adam. (2014). Informal Settlements in the Peri-urban Areas of Bahir Dar, Ethiopia: An Institutional Analysis. *Habitat International*, Vol. 43, pp.90-97.

¹⁰ Shiwaye Mersha, Solomon Mulugeta & Ephrem Gebremariam. (2021). Process of informal land transaction: A case study in the peri-urban area of Addis Ababa. *GeoJournal* Vol. 87(3), pp. 2067–2080. <https://doi.org/10.1007/s10708-020-10353-7>

study areas. In addition, in each city, one focus group discussion composed of 7-12 locals was undertaken. The group discussants were local landholders and community leaders.

Qualitative thematic analysis was employed to systematically identify the recurring patterns, governance challenges, and contextual variations across the selected study areas. The analysis started by transcribing and reviewing the data from interviews and focus group discussions. Next, the data were coded, organized into themes, compared across the four study areas, and checked with federal and regional laws. Participants knew the purpose of the study and took part voluntarily after giving consent. Their identities are kept confidential. Although these study areas offer useful comparisons, they may not reflect all peri-urban areas in Ethiopia.

2. Conceptualizing Peri-urban Land Tenure: Dynamics and Governance

Peri-urban land tenure is complex and constantly changing. Peri-urban areas are found between rural and urban systems, and characterized by fast growth, diverse land uses, and overlapping institutional interests.¹¹ The review of peri-urban land tenure conceptualization highlights four key aspects¹²: the definition of peri-urban land itself, the influence of different actors in shaping tenure relations, the prevalence of informal land access and transactions, and the role of institutions in shaping land access and transactions.

The *first* key aspect is the definition of peri-urban land. Peri-urban areas are understood as interfaces between urban and rural spaces, often without clearly defined boundaries or spatial extents.¹³ They are also areas in which urban or rural authorities may have overlapping or competing responsibilities. Consequently, peri-urban areas may involve overlapping administrative jurisdictions and different landholding and land-use regimes. Rather than being completely outside the legal and institutional system, however, the transitional character of peri-urban areas may create uncertainty concerning the applicable rules, institutional responsibility, and the rights of affected landholders. These institutional and regulatory difficulties may contribute to

¹¹ David Jaquinta & Axel W. Drescher. (2000). Defining the peri-urban: rural-urban linkages and institutional connections. *Land Reform* 2: 8-27.

¹² Ibid.

¹³ Meheub Sahana, Joe Ravetz, Priyank Pravin Patel, Hashem Dadashpoor & Alexander Follmann. (2023). Where is the peri-urban? A systematic review of peri-urban research and approaches for its identification and demarcation worldwide. *Remote Sensing* 15, no. 5: 1316.

informal land and housing transactions and the expansion of informal settlements. Scholars such as Follmann pointed out that peri-urban areas are always changing, shaped by city expansion, changing land uses, and competing authorities.¹⁴

The institutional and governance characteristics of peri-urban areas vary considerably across jurisdictions. In many rapidly urbanizing contexts, particularly where planning and land administration capacity is constrained, the pace of urban expansion may exceed the capacity of public institutions to regulate land-use change effectively. While these approaches demonstrate that peri-urban areas may be defined spatially, institutionally, or as processes of transformation, this article adopts a process-oriented and legally focused approach because it focuses on how landholding, administration, and rights change as rural areas are incorporated into urban development.

In this article, peri-urban land refers to land located at the rural-urban interface that is undergoing, or has been subjected to, urban expansion, planning incorporation, administrative boundary change, or transition toward urban use and administration. The article focuses particularly on rural land incorporated into or affected by urban plans and expansion processes while remaining subject to rural landholding arrangements; or land incorporated into an urban administrative boundary but not yet formally transferred to urban administration. Such land is rapidly transforming rural areas and settlements surrounding the selected cities where urban development, informal subdivision, or other processes are changing the existing landholding and land-use arrangements. Therefore, the term peri-urban is used (in this article) to describe a transitional legal and governance condition rather than to denote a separate category of landholding established independently of the rural and urban land regimes. This operational definition is applied to the four selected study areas and does not assume that all land surrounding an Ethiopian city necessarily constitutes peri-urban land.

The role of actors involving to shape peri-urban land tenure is its *second* feature.¹⁵ Peri-urban lands are mainly characterized as areas where diverse groups of people or actors interact and compete for land resources. Local peri-urban landholders have vested interest in keeping their land, while government wants to take land for various purposes that do not bring about

¹⁴ Alexander Follmann, Loraine Kennedy, Karin Pfeffer & Fulong Wu. (2023). Peri-urban transformation in the Global South: a comparative socio-spatial analytics approach. *Regional Studies* 57, No. 3: 447-461.

¹⁵ Johannes Bhanye. (2023). 'Emerging forms of spatialised and socialised authority' among 'tenure-insecure peri-urbanites' in African peri-urban spaces. *Pan-African Conversations* 1, no. 2: 26-63.

benefits to landholders.¹⁶ As a result, the principal actors involved in the transaction are mainly low-income urban households seeking residential houses. This group of the society is from diverse background and who could not afford to pay for the formal land and housing delivery system. Thus, local peri-urban landholders are the main suppliers of land for the low-income urban households and play a significant role in the construction of unauthorized and sub-standard houses in their agricultural fields. These different interests lead to competition over who uses, or controls the land, especially since the role of rural and urban institutions contradict each other. Consequently, peri-urban land can end up in a governance gap, where land tenure rules are unclear and institutional mandates are not harmonized.¹⁷ Thus, the majority of the urban residents are driven to look for alternative housing through informal channels.

Informality is the *third* key aspect of peri-urban areas. It is, *inter alia*, manifested by informal land subdivision, informal land market or transaction as well; and the construction of unauthorized houses is one of the common aspects of peri-urban areas of global south.¹⁸ Informal subdivision, refers to the division of large plots into small parcels without permission and formal approval from planning authorities with the intention to sell in the informal land market. Informal land market or transactions involve unauthorized exchange of unregistered land by which the transaction is often not legally protected and recognized by government.

Most often, failure in the formal land market creates a favorable ground for informal land market and it is accompanied by the expansion of informal settlements.¹⁹ Empirical evidence shows that exclusion from the formal land market and weak land management and planning system are the major causes for informal practices. Sometimes informal land market can be observed as an essential way through which the great majority of the urban poor get access

¹⁶ Birhan Tadesse & Fentaw Baye. (2024). The impact of land expropriation on changing livelihoods: The case of displaced peri-urban farmers in Kon and Gashena towns, Ethiopia. *Heliyon* 10, no. 11.

¹⁷ Johannes Bhanye, *supra* note 15.

¹⁸ Ahmed M. Soliman. (2021). Land Rights, Governance, and Urban Informality. In *Urban Informality: Experiences and Urban Sustainability Transitions in Middle East Cities*, pp. 189-221. Cham: Springer International Publishing.

¹⁹ Howard S Chitengi. (2016). Growth and resilience of informal settlements: toward informal contractual frameworks as alternatives for enhancing low-income housing. *Housing and Society* 43, No. 2: 138-155.

to land for housing. Although informal markets offer land for housing, they also lead to insecure land rights, poor services, and environmental risks.²⁰

Rules and norms as building blocks of institutions are the *fourth* aspects that shape peri-urban land deals. Institutions can be defined as rules of the game in a society which are also humanly devised constraints that shape human interaction by guiding how people interact either based on laws set by the state or as social customs and values.²¹ Institutions could be understood either as rules (legal orders or state-devised constraints) that shape human interaction or social orders (collection of social norms, conventions and moral values). In other words, these institutions can be either formal or informal. Institutions govern and regulate transactions, enabling land transactions to occur and regulating relations between transacting parties.²²

Formal and informal institutions/systems co-exist largely due to the inefficiency in the formal land delivery system. Failures in the formal land and housing delivery system always push people to look for alternatives to get shelter and other necessities through the informal system. In this perspective, informal land transaction process and the behavior of the actors involved are shaped by established social norms and rules. Therefore, in peri-urban areas the formal system is not operating well and the most common way of transaction is undertaken in the informal channel. In the process of informal ways of acquiring land, trust as norms of behavior and social sanction measures against rule breakers are the most important sources of stability.²³

3. International Experiences in Peri-Urban Land Governance: Lessons for Ethiopia

Experience from other countries shows several legal and institutional ways to manage changes in peri-urban areas. These include land readjustment, participatory planning, formalization, upgrading, resettlement, and planning

²⁰ Alain Durand Lasserre. (2006). Informal settlements and the Millennium Development Goals: global policy debates on property ownership and security of tenure. *Global Urban Development* 2, No. 1: 1-15.

²¹ Noriaki Okamoto. (2024). Institutions as Collectively Accepted Norms. In *Institutional Change and Performativity: The Impact of Globalization and Financialization on Accounting in Japan*, pp. 9-43. Cham: Springer Nature Switzerland.

²² Hermanus Stephanus Geyer. (2023). Conflicts and synergies between customary land use management and urban planning in informal settlements. *Land Use Policy* 125: 106459.

²³ Joao Carrilho & Jorge Trindade. (2022). Sustainability in peri-urban informal settlements: a review. *Sustainability* 14, No. 13: 7591.

controls. Each method focuses on different aspects of peri-urban governance, like the transition from rural to urban land systems, protecting land rights, managing informal development, involving landholders, and coordinating planning and land administration. For Ethiopia, the usefulness of these approaches depends not only on how effective they are, but also on whether their legal, institutional, and social conditions match Ethiopia's landholding system and federal structure.

A useful starting point for the international comparison is the urban-rural continuum. The continuum approach recognizes that peri-urban areas cannot always be understood through a rigid separation between rural and urban spaces because land uses, tenure arrangements, administrative responsibilities, and economic activities may change progressively across the rural-urban interface.²⁴ In this sense, the continuum approach broadens the range of tenure and land-management options available to different stakeholders, including vulnerable and low-income groups. For Ethiopia, this perspective is relevant because the country's peri-urban areas are characterized by the interaction of rural landholding arrangements, urban land administration, planning, and changing land uses. Nevertheless, adopting a continuum perspective does not by itself resolve the legal and institutional questions arising from Ethiopia's distinct rural and urban landholding regimes.

Although China, India, and Brazil are facing rapid urbanization, their policies are facilitating improvements in land security, easing rural-to-urban transitions, and reducing risks from unplanned growth.²⁵ The experience of China shows strong link between urban growth, rural land consolidation and infrastructure.²⁶ China's experience is relevant to Ethiopia because both countries have experienced rapid urban expansion accompanied by significant transformation of rural land for urban development. The Chinese experience illustrates the importance of coordinating urban growth, rural land conversion, land consolidation, and infrastructure development. The principal lesson is the importance of establishing clear institutional and legal mechanisms for

²⁴ Achamyeleh Gashu Adam & Teshome Taffa Dadi. (2024). Perspectives for smooth bridging of dichotomized urban–rural land development in the peri-urban areas of Ethiopia: Toward a continuum approach. *Regional Science Policy & Practice* 16, no. 3: 12733.

²⁵ Eranda Janku. (2020). Exploring the Urban-Rural Continuum, 'Liminality' and 'Continuum' as conceptual tools for identifying Spatial Typologies. See also Åse Christensen (2024), Urban Land Tenure Security in Namibia: A Comparative Perspective. [PhD thesis, Aalborg University, Denmark].

²⁶ Tian Li & Yan Guo. (2019). *Peri-urban China: Land use, growth, and integrated urban–rural development*, Routledge.

managing rural-to-urban land conversion and coordinating land development with infrastructure and spatial planning. The experience also demonstrates that urban expansion mechanisms should incorporate safeguards for the interests of affected rural landholders. The experience cannot be applied directly to Ethiopia because the two countries have different constitutions, landholding systems, institutions, and ways of developing land. Yet, Ethiopia can draw lessons from China's institutional approaches.

Flexible planning and smooth tenure regularization are the strategies applied by India; however, weak coordination between institutions becomes a challenge.²⁷ India's experience is relevant to Ethiopia because both countries are dealing with rapid urban growth and the challenges of turning rural land into urban areas. In India, land pooling, land readjustment, planning, and tenure regularization have been used as alternatives or additions to compulsory land acquisition.²⁸ These collective land-management methods can help include landholders in planned urban expansion and make it easier to provide infrastructure and land for development. India's example also shows how important it is to coordinate land administration, planning, and development agencies. However, Ethiopia cannot copy India's approach directly, since India's property, planning, and municipal systems are different from Ethiopia's public land ownership and federal land governance.

Brazil acknowledges the social aspect of land with participatory planning. But, peri-urban land management becomes harder due to informal expansion and weak enforcement.²⁹ Brazil's experience matters for Ethiopia because both countries are dealing with fast urban growth, informal settlements, and the challenge of managing land while meeting the needs of growing cities. Brazil's example shows that connecting land regularization and urban planning with community involvement can help meet the social needs of affected groups.³⁰ It also shows that informal settlements should be managed not only by enforcement, but also through careful planning, regularization, and improvement programs. Still, Brazil's methods cannot be used exactly as they are in Ethiopia, since the two countries have different legal, property,

²⁷ Suraj Kumar Mallick. (2024). Peri-urban interface: challenges and opportunities in spatial planning and management. *Modern Cartography Series* 11: 529-542.

²⁸ Aparna Soni & Nanda Triveni (2020). Land Pooling Models in India: Emerging Lessons. *Issues and Debates*: 54.

²⁹ João Tonucci. (2024). Informality through the state: How overregulation and tolerance shape informal land development in metropolitan Brazil. *Urban Studies* 61, no. 9: 1722-1737.

³⁰ Teresa Caldeira and James Holston (2015). Participatory urban planning in Brazil. *Urban Studies* 52, No. 11: 2001-2017.

municipal, and landholding systems. In Ethiopia, any participatory or regularization approach must also work with public land ownership and the way responsibilities are shared between federal and regional governments.

Therefore, these experiences demonstrate that peri-urban governance requires a balance among tenure security, planned urban development, institutional coordination, participation, and protection of affected landholders. They do not, however, establish a single model that can be directly transferred to Ethiopia.

The practice shows that the urban landholding system dominates the adjacent rural land in the areas where they converge. This differs from approaches that seek to manage the rural-urban interface as a continuum and therefore provides an important basis for assessing whether Ethiopia's existing legal framework adequately accommodates transitional landholding arrangements. Therefore, there is a need to introduce a clear legal mechanism for transitioning rural landholding rights into urban landholding arrangements in a manner that accommodates the specific circumstances of peri-urban areas.

Recognizing and protecting the land rights of the local peri-urban landholders or smallholder farmers in the process of urban development is essential for smoother urban-rural transformation. Thus, it is important to promote participatory and voluntary land acquisition strategies that enable to convert rural landholding rights into urban system in the process of urban development. One important way of recognizing local landholders' right can be introducing participatory and consensus-based land acquisition mechanisms which is land readjustment as an alternative to expropriation.

Land readjustment is internationally recognized land development tool widely used in many countries for over a century to avail land for urban expansion from peri-urban areas voluntarily.³¹ As it is proven by international experiences, it also ensures the participation of all stakeholders in the land acquisition decision-making process. It also ensures fair distribution of benefits and costs induced by urban development. Hence, an adapted and contextualized government-led land readjustment model is relevant to be introduced to address the unintended pressures on peri-urban land as well as the land rights of the local peri-urban communities in the process of urbanization.

³¹ Jay Mittal. (2014). Self-financing land and urban development via land readjustment and value capture. *Habitat International* 44: 314-323.

International experience with land readjustment and related land-pooling mechanisms demonstrates how land assembly for urban development can, under appropriate legal and institutional conditions, involve affected landholders and distribute development benefits and costs.³² The specific form and legal basis of these mechanisms, however, differ among jurisdictions. Land readjustment matters for Ethiopia because as cities grow into nearby areas, there needs to be a way to gather land for roads, infrastructure, public spaces, and development, while also considering the rights of current landowners. The main point is not that land readjustment should always replace expropriation, but that Ethiopia could look into a legally regulated and participatory way to assemble land. This approach would let affected landholders keep a stake in the development and benefit from it. For land readjustment to work there must be a solid legal framework, accurate land records, fair valuation, strong institutions, community involvement, and fair ways to share costs and benefits.

The experience in other African countries shows that bringing land governance under a unified land governance system helps to manage peri-urban change. In places with fast urban growth and both statutory and customary land systems, like Ethiopia, this approach works well. Rwanda has established an institutional coordination/integration for rural and urban land management that helps to improve tenure security and avoid institutional overlapping.³³ Rwanda's experience is useful for Ethiopia because it shows how coordinating land administration, land registration, and urban development can be beneficial when managed within a single institutional framework. For Ethiopia, the main takeaway is that reducing overlap between institutions and coordination in land information and administrative duties is important during the shift from rural to urban areas. Unlike Rwanda's unitary system, Ethiopia's federal structure divides land governance between federal and regional bodies. So, any effort to integrate institutions in Ethiopia would need to fit with the country's constitution and the differences among its regions.

³² Achamyeleh Gashu Adam. (2015). Land readjustment as an alternative land development tool for peri-urban areas of Ethiopia. *Property Management* 33, No. 1: 36-58.

³³ Robert Peter Ndugwa & Clinton Kubondo Omusula. (2025). Institutional Frameworks, Policies, and Land Data: Insights from Monitoring Land Governance and Tenure Security in the Context of Sustainable Development Goals in Kenya, Rwanda, Uganda, and Zambia. *Land* 14, No. 5: 960.

South Africa has also established national laws that coordinate planning and development at different levels of government.³⁴ South Africa provides a useful comparison for examining coordination between different levels of government in land-use planning and urban development. The principal lesson for Ethiopia is that peri-urban governance requires coordination among land administration, spatial planning, and development institutions rather than treating these functions as separate processes. South Africa's constitutional, property, planning, and historical context differ substantially from Ethiopia. Its institutional mechanisms provide comparative guidance but cannot be adopted without adaptation to Ethiopia's federal structure and public landholding system.

The establishment of a unified land administration system in Ghana has also contributed to strengthening land management and reducing institutional confusion.³⁵ Managing peri-urban land in Ghana involves working with both formal government systems and traditional landholding practices. Ghana's experience shows that it is important to consider local customs when they still matter to people and daily life. However, Ghana's system and its connection to formal land administration are not the same as Ethiopia's, which has its own mix of regional and traditional arrangements. Ghana's experience shows how formal and customary institutions can be coordinated with due attention to the necessary adjustment according to the realities in Ethiopia.

Such coordination between land administration, planning, and development helps reduce the overlap between institutions during peri-urban changes. In Ethiopia, the main takeaway is not to form a single national institution, but to create a clear legal and institutional framework. This framework should set out responsibilities, connect rural and urban land administration, protect landholder rights during transitions, and take regional differences into consideration.

Preventive and curative measures are policy instruments taken by governments to curb expansion into peri-urban areas. Preventive measures preclude the formation of new informal settlements in peri-urban areas.³⁶ In this regard, governments usually attempt to control over territorial development through land management or land and housing provision to residents. Particularly, in countries where the informal settlement phenomenon

³⁴ Jennifer L Smith. (2018). The Coproduction of Peri-Urban Space. *Geographical Review* 108, no. 4: 592-614.

³⁵ Patrick Brandful Cobbinah, Michael Osei Asibey & Yaa Asuamah Gyedu-Pensang. (2020). Urban land use planning in Ghana: Navigating complex coalescence of land ownership and administration. *Land Use Policy* 99: 105054.

³⁶ Geyer, *supra* note 22.

is relatively new, efforts have focused on the general improvement of land registration systems to secure tenure. By coordinating such policies with planning and zoning tools, it is possible to prevent illegal or unauthorized occupation of land.³⁷

A curative measure is another policy instrument applicable when a preventive measure fails. In this case, governments may implement regularization and demolition measures to mitigate informal expansion. The most implemented curative measures in addressing informality are legalization,³⁸ regularization,³⁹ development of alternative housing systems,⁴⁰ resettlement and reallocation,⁴¹ and demolition⁴². The comparative relevance of these measures depends on the nature of the informal settlement problem and the institutional capacity of the authorities responsible for planning, registration, regularization, and housing provision.

Accordingly, Ethiopia can learn from international experience by using both preventive measures, like land registration, planning, zoning, and providing planned land and housing, and curative measures, such as regularization, upgrading, resettlement, and enforcement when it is legally justified and proportionate. The best mix of these approaches should be based on the type of informal settlement, the rights of the people living there, and the capacity of the authorities in charge.

³⁷ Carely Addision, Sumei Zhang & Bradely Coomes. (2013). Smart growth and housing affordability: A review of regulatory mechanisms and planning practices. *Journal of Planning Literature* 28, No. 3: 215-257.

³⁸ Laura Notess *et al.* (2021) Community land formalization and company land acquisition procedures: A review of 33 procedures in 15 countries. *Land Use Policy* 110: 104461.

³⁹ Robina Manandhar. (2019). Land readjustment for regularization of informal settlements. *Journal of Science and Engineering*, Vol. 6.

⁴⁰ Theodore E. Downing, Guoqing Shi, Mohammad Zaman & Carmen Garcia-Downing (2021). Improving post-relocation support for people resettled by infrastructure development. *Impact Assessment and Project Appraisal* 39, no. 5: 357-365.

⁴¹ David E Dowall & Giles Clarke. (1996). *A framework for reforming urban land policies in developing countries*. Washington, DC: World Bank.

⁴² Jaideep Gupte, Dolf te Lintelo, Sheela Patel, Vinod Kumar Rao, Allister McGregor, & Rajith Lakshman. (2019). Demolition, forced evictions and wellbeing in the city. *Global Report on Internal Displacement (GRID)*.

Table 1. Comparative Approaches to Peri-Urban Land Governance

Jurisdiction	Principal peri-urban problem examined	Principal governance mechanism	Potential relevance to Ethiopia	Key limitation
China	Rural–urban land transition	Land consolidation and coordinated urban development	Coordinating rural-to-urban conversion, infrastructure and land development	Different landholding and institutional system
India	Urban expansion and land assembly	Land pooling/readjustment and planning	Participatory land assembly as an alternative/complement to acquisition	Different property, planning and federal arrangements
Brazil	Informality and urban inclusion	Participatory planning and regularization	Linking regularization with participation and planning	Different constitutional and municipal framework
Rwanda	Institutional overlap	Integrated land administration	Coordinating land administration, registration and planning	Unitary structure differs from Ethiopia's federal system
South Africa	Multi-level planning	Coordination among levels of government	Clarifying and coordinating governmental responsibilities	Different constitutional and historical context
Ghana	Formal/customary interaction	Coordination of formal and customary institutions	Recognizing customary institutions in peri-urban governance where relevant	Different customary landholding framework

Comparative evidence shows that no single international model can be applied directly to Ethiopia. Rather, the reviewed experiences highlight several useful principles, such as coordinated rural-to-urban land transition, participatory land assembly, integrated planning and land administration, regularization of informal development, multi-level institutional coordination, and engaging with customary institutions. Whether these principles can be adapted in Ethiopia depends on their compatibility with the country's constitutional landholding system, prospects of land reform, constitutional allocation of powers between federal and regional governments, regional differences, and institutional capacity.

4. Legal Frameworks and Institutional Mandates Governing Peri-Urban Land

Ethiopia does not have a comprehensive legal framework that establishes peri-urban land as an autonomous third category of landholding alongside rural and urban land. Nevertheless, peri-urban areas are subject to a combination of rules governing rural landholding, urban land administration, spatial planning, investment, expropriation, compensation, and regional land governance. Therefore, the principal legal challenge is not the complete absence of law applicable to peri-urban areas, but the fragmented and insufficiently coordinated regulation of the transition between rural and urban land systems. This section and Section 5 examine the federal legal framework and the regional legal and institutional arrangements governing peri-urban land in Oromia, Amhara, Sidama, and Somali regional states.

4.1 Intersection of rural and urban legal regimes

Existing literature defines the term *peri-urban* in several ways.⁴³ *Peri-urban* could be used to denote a place, concept, or process. As a place, it can refer to rural fringe areas surrounding cities. As a concept, peri-urban could be seen as an interface of rural and urban activities and institutions. As a process, it could be thought of as the two-way flow of goods and services and a transitional stage between rural and urban.⁴⁴ Some researchers question the tendency to define peri-urban in terms of geographical location of a place in relation to urban centers and underpin the importance of the underlying institutional contexts.⁴⁵

This article gives particular attention to the spatial and transitional dimensions of peri-urban land. Peri-urban land is understood as land located at the rural-urban interface that is experiencing, or has been subjected to urban expansion, planning incorporation, administrative boundary change, or transition toward urban use. This understanding is relevant to the Ethiopian context because land at the rural-urban interface may remain subject to rural landholding arrangements even as it is increasingly affected by urban planning and development processes.⁴⁶ Therefore, the analysis focuses on the legal and institutional consequences of this transition rather than treating peri-urban land as an autonomous third category of landholding. Accordingly, peri-urban

⁴³ Jaquinta & Drescher, *supra* note 11.

⁴⁴ Vishal Narain & Shilpa Nischal. (2007). The peri-urban interface in Shahpur Khurd and Karnera, India. *Environment and Urbanization*, Volume 19, Issue 1. 261-273

⁴⁵ Mehebbub Sahana *et al* , *supra* note 13

⁴⁶ Achamyeleh G. Adam, *supra* note 2.

transformation in Ethiopia occurs at the intersection of two principal land governance and administration regimes, i.e. the rural landholding system and the urban leasehold system. The resulting legal issue is how existing rural landholding rights are affected, transformed, or terminated as land becomes subject to urban planning, administration, development, or expropriation.

Ethiopian law separates land into rural and urban categories, without creating a specific legal category for peri-urban land. Still, this does not mean that land between rural and urban areas is left without legal rules. Rather, different legal regimes may become relevant as land is incorporated into urban plans or boundaries, subjected to development, expropriated, compensated, or transferred to urban administration. The central legal question is therefore how these regimes interact during the transition from rural to urban land administration.

Article 40(3) of the FDRE Constitution states that land and natural resources belong to the state and the people. Private ownership of land is not allowed, but landholders can use land through usufruct rights. Article 51(5) gives the federal government the authority to make laws about how land is used and conserved. These constitutional provisions set up the basic framework for managing rural and urban land, but they do not recognize peri-urban land as a distinct constitutional or legal category. The regulation of peri-urban transformation must therefore be derived from the interaction of the legislation governing rural land, urban land, planning, expropriation, compensation, and related administrative functions.

The Federal Rural Land Administration and Use Proclamation No. 1324/2024, Article 2(1), stipulates that rural land is any land outside a municipality or town. The Urban Lands Lease Holding Proclamation No. 721/2011, Article 2(2), defines urban land as land within an urban center's administrative boundary. This law, in Article 2(3), explains that an urban center is a place with a municipal administration or at least 2,000 people, where at least half the workforce has nonagricultural jobs. This definition also appears in Article 2(8) of the Urban Planning Proclamation No. 574/2008. For administrative reasons, Ethiopian land is either rural or urban. This bifurcated system started with the 1907 Decree on land registration in Addis Ababa and has been confirmed by later laws.⁴⁷

The federal legal framework continues to organize land primarily through the rural-urban distinction. Land at the interface may therefore be subject to

⁴⁷ Tewodros Mekonnen. (2025). Urban Land Policies in Imperial, Derg, and Post-1991 Ethiopia: A Summary of Policy Continuity and Discontinuity. *Abyssinia Journal of Business and Social Sciences*, Vol. 10, No. 1.

the rural land regime until the legal and administrative steps necessary for its incorporation into the urban system occur. This transitional position is particularly significant for the discussion in this article because it demonstrates that peri-urban land is not outside the legal system; rather, its legal treatment depends on the stage and manner of its transition into the urban land administration framework.

Proclamation No. 1324/2024, as indicated in Article 3(1), applies to lands that are incorporated into urban boundaries but where such lands have not yet been officially handed over to the urban administration. The significance of this provision is that it expressly contemplates a transitional situation in which land has been incorporated into an urban boundary but has not yet been formally handed over to the urban administration. It provides evidence that Ethiopian law recognizes at least some transitional circumstances at the rural-urban interface. However, the provision does not treat peri-urban land as a separate category that covers the entire transition from rural to urban areas. Instead, it shows that some transitional regulations exist. Even if this shows the legal rules in place, the federal rural land law fails to define rural landholding handover. For example, Article 2(3) of the Amhara region rural land law (Proclamation No. 310/2026) defines it as the process of incorporating rural land into urban areas by paying compensation in advance to the landholder or providing a replacement pursuant to pertinent law.⁴⁸

Empirical evidence from the four study locations indicates that urban expansion and development in peri-urban areas commonly proceed through four interconnected stages: incorporation of rural land into an urban master plan, expropriation, redevelopment and reallocation.

Table 2. Stages of Peri-Urban Land Transformation Identified in the Study

Stage	Process identified	Principal legal/institutional question
1	Incorporation into urban master plan	What legal effect does planning incorporation have on existing rural landholding rights?
2	Expropriation	When and under what conditions may existing landholding rights be terminated?
3	Redevelopment	Which institution assumes responsibility for development and administration?
4	Reallocation	How are development rights and access to the transformed land allocated?

The four stages reveal that peri-urban transformation is not a single legal event but a sequence of planning, administrative decisions, landholding, and

⁴⁸ The Revised Amhara Region Rural Land Administration and Use Proclamation No. 310/2026.

development decisions. Therefore, the legal significance of the transition depends on what happens at each stage and on whether the responsible institutions provide clear procedures and protect the rights of affected landholders. Following the incorporation of peri-urban land into an urban master plan, expropriation may be undertaken where the land is required for a legally authorized public purpose or development and the applicable legal requirements are satisfied.

Where expropriation occurs, the expropriating authority is required to provide compensation in accordance with the applicable expropriation and compensation laws. Field evidence from the study locations further indicates that following incorporation into an urban master plan, there may be a significant delay before the urban administration becomes fully operational in the newly incorporated areas. This delay can create an interim period in which residents experience uncertainty regarding the applicable land administration system and access to public services.

FGD participants reported that, during this transitional period, residents of the peri-urban areas incorporated into urban areas neither receive urban municipal services nor the previous rural kebele or woreda services. The rural and urban landholding registration process is delayed during this transitional period in such peri-urban areas. Participants in the study locations reported that temporary committees involving rural and urban officials sometimes determined urban boundaries. Participants reported that these boundary-setting processes lacked sufficiently clear and transparent criteria. This causes the incorporation of peri-urban communities into the urban boundary without the provision of urban services. Uncertainty about land administration and service provision during the transition can lead to informal land deals, speculation, insecure tenure, and disputes. The findings show that the main governance issue is not merely the lack of a peri-urban legal category, but also confusion over how rules for rural-to-urban transition are applied, coordinated, and implemented.

4. 2 Regional legal frameworks and institutional mandates in peri-urban land

In Ethiopia, land governance is divided between the federal government and the regional states. The federal government enacts laws on land utilization and conservation, while regional states are responsible for land administration within the federal framework. As a result, the four regions studied here have developed their own ways of managing the transition from rural to urban land. These differences matter for peri-urban governance because they shape who is responsible for what, how land is held during transitions, development

opportunities, compensation and resettlement, and how formal and customary systems interact.

For purposes of comparison, the four regional frameworks are assessed according to nine common criteria: (1) recognition and regulation of the peri-urban condition; (2) institutional responsibility; (3) transitional tenure; (4) investment and development opportunities; (5) priority development rights; (6) expropriation and compensation; (7) resettlement and livelihood restoration; (8) regularization of informal transactions; and (9) participation and recognition of customary practices. These criteria are used to distinguish differences in the formal legal framework from the variation in institutional practice and implementation across the four study regions.

The Amhara National Regional State has a detailed land governance framework. Recently, the Regional State Council has approved Proclamation No. 300/2025⁴⁹ that defines and establishes the powers and duties of the regional executive organs, and it replaces the previous Proclamation No. 280/2021⁵⁰. The regional government has also approved the Revised Rural Land Administration and Use Proclamation No. 310/2026 that replaces the previous proclamation No. 252/2017. Proclamation No. 310/2026 defines rural land the same as the federal Rural Land Administration and Use Proclamation No. 1324/2024. Article 2(2) of Proclamation No. 310/2026 defines rural land as “land outside of a municipality holding or a town designated as such by the relevant law.” As stated in Article 3(2), this Proclamation applies to lands that are incorporated into urban boundaries but where such lands have not yet been officially handed over to the urban administration. In Article 2(3), it defines rural landholding handover as “the process of incorporating rural land to urbans” by prior payment of “compensation to the landholder or giving replacement pursuant to pertinent law.”

The previous Proclamation No. 280/2021, in Articles 17(12) and 18(5), had empowered both the Land Bureau and the Urban and Infrastructure Bureau to administer peri-urban land. These overlapping mandates given to both institutions were creating problems in peri-urban areas. However, the recently adopted Proclamation No. 300/2025 has mandated only the Bureau of land to administer both rural and urban land. This newly enacted framework assigns the regional land bureau responsibility for the administration of both

⁴⁹ The Amhara National Regional State Executive Organs Re-Establishment and Determination of Powers and Duties Proclamation No. 300/2025.

⁵⁰ The Amhara National Regional State Revised Executive Organs Re-Establishment and Determination of its Powers and Duties Proclamation No. 280/2021.

urban and rural land, including surveying and recording land, determining and regulating landholding use and management, and issuing landholding certificates and maps. This represents a significant institutional shift from the previous arrangement in which responsibilities were distributed between the land and urban and infrastructure institutions. This reduces formal institutional overlap, but its effectiveness remains an empirical question.

Under Article 26(2) of this proclamation, the regional bureau of land is entrusted to “study and maintain records of urban and rural land found in the region by type and size; determine and control the administration and use of land holdings, and provide land holding certificates and maps to landholders.” Unlike other regions using federal laws, the Amhara region has issued the expropriation, compensation, and resettlement law.⁵¹ This closes the gap between rural and urban land administration and provides rules that fit the region’s needs. However, the reform should be distinguished from its practical effectiveness. Whether the unified institutional structure reduces peri-urban governance problems depends on its implementation, institutional capacity, and coordination with urban planning and other relevant administrative authorities.

In Oromia Region, the land bureau is now responsible for both rural and urban land.⁵² This change is important for peri-urban areas because it unifies how land is managed, instead of keeping rural and urban systems separate. According to Article 4(2) of the Rural Land Proclamation No. 248/2023, it regulates land added to a city’s boundaries but not yet taken over from rural landholders. This rule matters for peri-urban land because it creates a transition period, so the land does not become urban immediately when it joins a city. Until the land is officially transferred, rural land law still applies. Article 2(8) of the Oromia Urban Land Lease Regulation No. 182/2016 defines urban land as land inside municipal boundaries, highlighting the difference between land being added to a city and the formal change in how it is managed. Oromia Regional State Investment Administration

The Oromia Regional State Investment Administration Proclamation No. 249/2023, Article 2(21) and (22), also clearly distinguishes between rural and urban land.⁵³ These rules clarify which types of land can be used for investment and development, particularly in areas shifting from rural to urban.

⁵¹ Amhara Region Expropriation, Compensation, and Resettlement Directive No. 44/2020 (as amended by Directive No. 54/2024).

⁵² Oromia Regional State Executive Organs Proclamation No. 242/2021; Oromia Region Rural Land Proclamation No. 248/2023.

⁵³ Oromia Regional State Investment Administration Proclamation No. 249/2023

When the Proclamation allows landholders to take part in investment or development, it is important to specifically state this apart from a general priority development right, unless the law specifically gives current landholders a special right to develop the land. As a result, the investment rules add another layer to peri-urban governance and should be considered separately from transitional tenure.

Unlike the Amhara region, Oromia does not have its own compensation law. In this region, compensation for expropriation follows the federal legal framework. However, key informants stated that Oromia has set up a rehabilitation and resettlement office to help people who lose land because of development or expropriation. They also noted that this office offers social protection when land is taken for public purposes. These arrangements are administrative responses to displacement and should not be confused with the legal rules for compensation. Having a rehabilitation and resettlement office shows an administrative effort, but it does not mean that there is a separate regional compensation system.

Overall, the Oromia region framework brings together institutional integration and a legally recognized transitional period between expanding urban boundaries and the formal transfer of authority. It also includes investment rules and plans for rehabilitation and resettlement to address other effects of urban growth. However, these measures are different from transitional tenure or priority development rights. The Oromia region's case shows how institutional integration and transitional tenure can work alongside separate tools for development participation and managing displacement.

The Sidama and Somali regions do not have strong frameworks for managing peri-urban areas. According to Article 3 of the Sidama Rural Land Administration and Use Proclamation No. 27/2023, rural land is defined as land outside city boundaries. Unlike Amhara and Oromia regions, Sidama does not clearly recognize peri-urban land as a separate regulatory category. This does not mean there are no legal rules at all. Instead, the legal status of land moving from rural to urban use depends on how rural land, urban land, planning, expropriation, compensation, and administrative rules work together. There is a draft rural land administration and use regulation that deals with certifying rural land that becomes part of urban areas, which shows an effort to address this transition. However, since this regulation is still a draft, it does not have the same legal weight or impact on tenure security as a fully enacted law. Interviews with experts reveal that compensation and resettlement in Sidama are handled only under federal laws. Unlike the Amhara region, Sidama region has not introduced its own compensation and resettlement laws.

In addition to formal laws, customary practices are applicable in the Somali region. FGD participants reported that local authorities in the study area recognize or accommodate certain informal peri-urban land transactions in practice. Key informants further indicated that government authorities may assess whether informal subdivision is consistent with the applicable urban master plan before approving or regularizing the transaction. In Jigjiga, communities experience communal land ownership. Since land is held by clan, peri-urban land transactions are undertaken outside the formal system. The clan leaders have the authority to decide on such transactions. As key informant experts also added the government plays a role in checking whether informal subdivision is in compliance with city's master plan and finally approves the informal transactions.

Article 2(1) of the Somali Regional State Rural Lands Administration and Use Proclamation No. 128/2013 provides that all land outside towns is rural. This implies that peri-urban areas are managed as rural until they are officially changed. Article 14, sub-articles 1, 20, and 23 of Proclamation No. 185/2019 give the Bureau of Agriculture and Natural Resources the power to issue licenses, monitor land use, and manage compensation.⁵⁴ Amendment Proclamation No. 209/2021 improves coordination between rural and urban offices.⁵⁵ Therefore, the Somali region case illustrates the interaction between formal and customary land governance. Customary allocation and clan-based authority may continue to influence access to and transactions involving peri-urban land, while formal authorities retain responsibilities relating to planning, land use, and urban development. When there are no region-specific rules for expropriation and compensation, and different governance systems exist side by side, it becomes unclear how consistent, predictable, or well-protected landholder interests are during peri-urban change.

This comparison shows that each of the four regional states approach peri-urban transformation in their own ways, using different mixes of institutional integration, landholding rules, development and investment methods, compensation and resettlement plans, and both formal and customary governance. In the Amhara region, the regional land bureau is responsible for both rural and urban land administration. Oromia region also uses a single land institution and keeps rural land administration in place for land that has become part of urban areas but has not yet been formally transferred. Sidama region does not specifically define peri-urban land as a separate category, but

⁵⁴ Definition of Powers and Duties of the Executive Organs of the Somali Regional State Proclamation No. 185/2019.

⁵⁵ Definition of Powers and Duties of the Executive Organs (Amendment) Proclamation No. 209/2021 of the Somali Regional State.

transitional land issues may be handled through other legal tools and new regulations. In the Somali region, customary and pastoral landholding practices play a bigger role and interact with formal planning and land administration.

These differences do not mean that one regional model is better than another. Instead, they show that peri-urban governance relies on factors such as how institutions are set up, the region's legal history, settlement patterns, landholding customs, and administrative capacity. The comparison also highlights common challenges that need clearer rules, especially about who is responsible during rural-to-urban transitions, how to handle transitional land tenure, how to protect affected landholders, compensation and restoring livelihoods, development opportunities, and coordination between different land uses.

5. Provisions Supporting Land Rights Transitions in the Peri-Urban Areas

This section highlights the legal provisions that support the transition of the rural land rights system to the urban system during urbanization. It focuses on how peri-urban landholder rights are recognized and how transitions from rural to urban tenure are managed. As a result of variation in governance frameworks, the applicability of investment, development, and compensation or resettlement rules differs across the regions. Hence, this section deals with three key areas: investment and development rights for peri-urban landholders, compensation and resettlement during expropriation, and recognition of semi-formal land subdivisions and transactions.

5.1 Investment rights and development participation

The legal framework provides several mechanisms through which rural and peri-urban landholders may participate in economic development, but these mechanisms are not legally identical. In particular, a priority development opportunity, joint development, shareholding or equity participation, land pooling, and land readjustment involve different legal foundations, procedures, forms of participation, and consequences for landholders. The analysis therefore distinguishes these mechanisms before examining their application in the four regional states.

Table 3. Conceptual distinction between priority development rights and related development mechanisms

Mechanism	Meaning in this study
Priority development right/opportunity	An existing landholder is given a first or preferential opportunity to develop the holding, subject to applicable legal and planning requirements.
Joint development	The existing landholder and an investor/developer participate together in developing the holding or project.
Shareholding/equity participation	The landholder receives shares, equity, or another legally recognized financial interest in the development project.
Land pooling	Several landholders collectively contribute land for coordinated development and receive land or development benefits according to the applicable arrangement.
Land readjustment	Land parcels are reorganized or reconfigured to facilitate infrastructure and urban development while providing participating landholders with an interest or development benefit.

The following analysis focuses on the mechanisms identified in the Ethiopian legal and empirical materials, namely joint development, investment participation, shareholding, and the priority development opportunity. Land pooling and land readjustment are considered separately where relevant as comparative or potential reform mechanisms. These mechanisms are different from each other. Joint development does not always create a priority development opportunity. Shareholding does not always give a landholder control over development. Land pooling and land readjustment are not the same as compulsory acquisition or ordinary compensation. So, just because landholders have a legal chance to take part in investment, it does not mean they automatically have a priority development right.

Proclamation No. 1324/2024, Article 8, allows landholders at the federal level to take part in arrangements like sharecropping and joint ventures. These rules help rural landholders to join in economic activities, even in areas that are becoming more urban. Yet, these rights should not be seen as priority development rights. They mainly support joint or collaborative economic participation and the use of landholding rights in development projects.

In the Amhara region, Proclamation No. 310/2026 (particularly Articles 8(2), 13 and 14) recognizes sharecropping and permits landholders to develop their holdings jointly, including through the use of land-use rights as capital. These provisions are better characterized as forms of joint development and investment participation rather than, by themselves, as a priority development right. They provide a legal basis through which landholders may participate in development and derive economic benefits from their landholding rights. Field evidence nevertheless indicates that procedural delays may limit the

practical exercise of these opportunities. Focus group discussants stated that they had trouble getting approvals and taking part in development processes. Key informants also pointed out that bureaucracy makes it unclear how landholders can use their investment rights in practice.

The Oromia region provides several forms of development participation. First, the Rural Land Proclamation No. 248/2023 (including Articles 2(36) and 5(8)), permits landholders to jointly develop their holdings and protect landholders' benefits. This can be characterized as joint development rather than a priority development right. Second, the Investment Administration Proclamation No. 249/2023 provides additional opportunities for farmers, pastoralists and semi-pastoralists to participate in investment, including through shareholding in relevant circumstances. Shareholding should be distinguished from joint development because it concerns an equity or financial interest in the investment rather than necessarily joint control or development of the land itself. Field evidence indicates that these mechanisms have created opportunities for greater participation, although focus group discussants reported difficulties in obtaining information and participating effectively in decision-making.

Compared with the Amhara and Oromia regions, the legal frameworks in Sidama and Somali regions offer fewer clear ways for peri-urban landholders to take part in formal investment and development projects. This difference should, however, be understood as a difference in the legal mechanisms identified rather than lesser development in land governance.

Sidama's Rural Land Proclamation No. 27/2023 defines rural land narrowly, leaving peri-urban land without a clear legal definition. New rules focus on registering land, not on giving landholders more power. The Somali region's Rural Lands Administration and Use Proclamation No. 128/2013 also regulates peri-urban land as rural, and does not provide special investment rights. Customary leaders in this region often control land allocation. The regional Proclamation No. 185/2019 focuses on control and compensation, not on helping landholders' investment.

As a result, people in both regions do not mostly have the opportunity to develop (or benefit from) their landholding before it is taken. This increases tensions and retards regional economic development. In Sidama region, focus group discussants responded that they are excluded from investing in their landholding rights. In the Somali region, traditional leaders make most decisions and peri-urban communities are left out of formal projects. Key informant experts also added that although the laws recognize joint investment rights for landholders, relying on informal systems limits their ability to benefit from economic changes. While the Sidama and Somali regions restrict landholders from investing, Amhara and Oromia regions have

systems that recognize investment rights for landholders. This shows that land governance in Ethiopia differs among regions.

5.2 Priority development opportunity

A priority development opportunity should be distinguished from other forms of investment participation. It relates to whether an existing landholder is given a first or preferential opportunity to develop the holding, subject to an approved plan and applicable legal requirements. It is therefore different from joint development, where the landholder and another developer participate together; from shareholding, where the landholder receives an equity or financial interest; and from land pooling or land readjustment, which concern collective land assembly or reconfiguration.

At the federal level, Article 7 of Proclamation No. 1161/2019 provides an existing landholder with an initial opportunity to develop the landholding in accordance with an approved plan. This provision is therefore relevant to a priority development opportunity. It should nevertheless be distinguished from joint development or shareholding, because the existence of an initial opportunity to develop does not necessarily mean that the landholder must develop the land jointly with an investor or receive an equity interest in the resulting project. The practical scope of this opportunity, including applicable conditions, procedures and timelines, requires further clarification and effective implementation.

In the Amhara region, Article 14 of Proclamation No. 310/2026 allows landholders to use their land-use rights as capital to take part in joint development. This does not automatically mean they have a priority development right just because they can join in development. Instead, it enables landholders to participate in joint development or investment. Whether this also gives the current landholder a special chance to start or carry out development depends on whether the law gives this priority before the land is given to someone else. The reform aims to reduce the fragmentation that used to affect rural and urban land administration. However, how well landholders can actually take advantage of development opportunities depends on how the reform is put into practice, how well it is coordinated with planning authorities, and whether landholders can access the necessary procedures.

The Oromia region provides additional opportunities for landholders to participate in investment. Articles 18 and 19 of the Investment Administration Proclamation No. 249/2023, as discussed above, provide for participation by farmers, pastoralists and semi-pastoralists and recognize shareholding in relevant investment projects. These provisions demonstrate investment participation and, in certain circumstances, equity participation; and they

should not automatically be treated as establishing a priority development right. The distinction is important because participation as a shareholder does not necessarily give the landholder the first opportunity to develop the landholding.

Sidama Region's Rural Land Proclamation No. 27/2023 defines rural land narrowly and does not recognize peri-urban land in transition. Somali Region's Rural Land Proclamation No. 128/2013 treats peri-urban land as rural. Neither region gives landholders a way to use priority rights, so they are often left out during redevelopment. The comparison shows that Amhara and Oromia have clearer legal framework for landholders to take part in development. This includes joint development in both regions and, in Oromia, there are specific options for investment and shareholding. These differences demonstrate that investment participation, joint development, shareholding, and priority development opportunities should be assessed separately when the protection of peri-urban landholders is evaluated. They also indicate the need for clearer rules governing the transition from rural landholding to urban development and the circumstances in which existing landholders may participate in or benefit from that development.

5.3 Compensation and resettlement mechanisms

Urban expansion and development in Ethiopia are closely associated with the expropriation of land, particularly in peri-urban areas. The legal consequences of expropriation should, however, be distinguished between compensation for property and other legally recognized losses, on the one hand, and resettlement and livelihood restoration, on the other. Compensation usually covers the value of landholding, property, improvements, and other interests affected by expropriation. Compensation for the value of land is substantially undervalued due to the land ownership model in the FDRE Constitution and other laws which do not recognize private land ownership. On the other hand, resettlement and livelihood restoration are about helping people relocate and supporting their economic and social well-being after they have been displaced. Paying compensation alone does not thus always mean that an affected landholder's livelihood has been restored.

At the federal level, Proclamation No. 1161/2019 establishes the principal framework governing compensation for persons affected by expropriation. The framework provides different forms of compensation and related assistance, including cash payment, replacement land, housing-related assistance, moving costs, and income support.⁵⁶ Article 15 also provides for

⁵⁶ Expropriation of Landholdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019. Expropriation of Landholdings for Public

residential land of up to 500 m² for eligible displaced peri-urban landholders and their adult children. Regulation No. 472/2020 provides further rules concerning replacement land and housing-related arrangements. These provisions demonstrate that the federal framework addresses more than the monetary valuation of expropriated property and seeks to provide affected landholders with alternative land and other forms of support.⁵⁷

In the Amhara region, compensation and replacement land have been managed under both federal and regional rules. Previously, the Land Bureau and the Bureau of Urban and Infrastructure Development shared responsibilities, which, according to key informant interviews, led to delays and uncertainty in compensation and in providing replacement land. Group discussions also highlighted poor communication and confusion about how to obtain compensation and replacement residential land. The new Proclamation No. 300/2025 now gives the regional Land Bureau responsibility in rural and urban land administration. This change aims to reduce the earlier overlap, but whether it will improve compensation delivery depends on how well it is implemented and coordinated with other authorities.

The Oromia region mainly follows the federal compensation framework. Interviews with key informants show that people affected may get monetary compensation or replacement land. However, focus group discussions revealed mixed views about whether compensation was fair or enough, how much people could participate in decisions, and how well they could recover their livelihoods. These results suggest that having compensation rules does not always lead to the same outcomes in practice. Because of this, it is important to look at regional rehabilitation and resettlement arrangements separately from compensation.

The laws and responses during interviews show that compensation and resettlement in the Sidama region, for people who lose peri-urban land are mainly guided by the federal legal framework. Unlike the Amhara region, Sidama has not created its own separate rules for compensation and resettlement; and compensation and resettlement are carried out according to the federal framework and local administrative practices.

In the Somali region, formal compensation and resettlement laws are not used. Community leaders rely on local customs to manage land. Interviews and focus group discussions show that many people see land rights as

Purposes, Payments of Compensation and Resettlement (Amendment) Proclamation No. 1336/2024

⁵⁷ Expropriation and Valuation, Compensation and Resettlement Council of Ministers Regulation No. 472/2020

something shared by the whole community. Federal laws set the official rules for expropriation and compensation, but these often mix with local customs and informal land use. The main issue is not a lack of compensation laws, but the difficulty of matching formal procedures with the local and informal ways people use and hold land.

Resettlement should be distinguished from compensation because displacement may produce economic and social consequences that are not necessarily addressed by payment for the expropriated property. Proclamation No. 1161/2019 recognizes rehabilitation and resettlement measures for persons affected by expropriation. The Proclamation defines relevant forms of loss and provides for support measures intended to address income and recovery. It also requires the establishment of compensation and rehabilitation funds and provides for mechanisms through which displaced landholders may participate economically in projects developed on expropriated land. These provisions indicate that the federal framework adopts a broader conception of post-expropriation assistance than compensation alone.

Nevertheless, there are differences among regions in implementation. In the Amhara region, the revised rural land law and related regional laws recognize compensation and rehabilitation for expropriated landholders. However, the empirical evidence indicates that resettlement has often been experienced primarily through monetary compensation and relocation. Comparatively, limited attention has been given to long-term livelihood recovery. In the Oromia region, the regional rehabilitation and resettlement arrangements and the investment administration law provide additional mechanisms through which displaced farmers and pastoralists may participate economically in investment projects or obtain alternative economic opportunities. These mechanisms should be understood as forms of rehabilitation or economic participation rather than automatically characterized as compensation.

In the Sidama and Somali regions, compensation and relocation are more common than long-term efforts to restore livelihoods. Key informants and focus group discussions noted that affected communities have little involvement and receive limited support to rebuild their lives after displacement. In the Somali region, the mix of customary landholding systems and formal resettlement rules makes it difficult to identify who should benefit and to offer suitable replacement options.

This comparison shows that the main difference among the four regions is not only whether compensation is legally available, since the federal framework sets the basic legal rules for all regions. The main differences lie in who is responsible for institutions, how compensation is carried out, access to replacement land, the involvement of affected people, and how well

resettlement measures restore livelihoods beyond the payment of compensation. Amhara region has recently changed how it manages rural and urban land, while the Oromia region has added new programs for rehabilitation and investment. Sidama region depends more on the federal framework, and the Somali region faces extra challenges because of the mix of formal laws and customary landholding systems. These differences show why it is important to separate the legal right to compensation from how it is implemented and how well it helps people recover their livelihoods.

5.4 Regularization and informal/customary land transactions

The regulation of informal and semi-formal land subdivision and transactions in the peri-urban areas of the study locations takes different forms. These include enforcement measures, government-led regularization, and recognition of customary or semi-formal transactions subject to planning requirements. Informal subdivision and transactions are common practices in the peri-urban areas of the case-study cities, and city administrations have adopted different institutional responses. Key informant interviews indicate that Bahir Dar and Sheger cities have used demolition and enforcement measures in response to informal settlement practices, whereas Hawassa city administration has applied regularization as a means of addressing existing informal settlements. These different responses show that informal peri-urban development does not produce a uniform regulatory response; rather, the response depends on the institutional and legal arrangements operating in each locality.

In the Sidama region, regularization of informal settlements is used as a means of bringing previously unregistered or informally occupied land into the formal land administration system. Focus group discussants said that regularization provides greater legal recognition and security to landholders who previously lacked formal documentation, and reduces uncertainty concerning land rights. It also helps to prevent disputes associated with informal occupation and subdivision and facilitate more orderly urban development by incorporating existing informal development into the formal system. Thus, the Sidama region's approach primarily represents a government-led formalization response to existing informal development, in which the state seeks to reconcile existing occupation and subdivision with formal land administration and planning requirements.

In the Somali region, in Jigjiga, semi-formal and customary systems are important for dividing and transferring peri-urban land. Focus group discussants explained that customary landholders can divide and transfer clan land through customary leaders, as long as this follows the urban master plan. Key informants noted that government officials may review these deals to

make sure they meet planning rules and, if so, help make them official. This arrangement lets customary institutions play a key role in managing peri-urban land, while government planners stay involved. Still, having both customary and formal systems can make it unclear with regard to clarity in legal authority, the status of transactions, and the steps that are needed to make customary deals official. The Somali region handles this differently from the Sidama region. Here, customary land management and formal urban planning work together more smoothly than government-led regularization.

The comparison indicates that the two regional approaches respond to the same general problem –informal peri-urban land development– through different institutional mechanisms. Sidama relies primarily on government-led regularization and formal inclusion, seeking to bring existing informal occupation and subdivision within the formal land administration system. The Somali region, by contrast, allows customary institutions to play a more significant role in land subdivision and transactions, while government authorities retain a planning and regulatory function. The difference reflects the distinct institutional and land-governance contexts of the two regions, including the role of customary institutions in Somali peri-urban areas.

Regularization and recognition of customary systems have their own legal and governance challenges. Empirical evidence shows that regularization has improved formal tenure security. However, this is based on administrative capacity, clear eligibility requirements, and effective implementation. Likewise, evidence shows that recognition of customary or semi-formal transactions preserves local institutions and promotes landholder participation. But it creates uncertainty if there is an overlap between customary authority and formal planning and land administration. Accordingly, neither approach should be treated as invariably preferable. The comparative significance lies in showing how regularization and recognition of customary systems provide different responses to peri-urban land transformation. Moreover, the effectiveness of the regularization and customary systems depends on the institutional context in which they operate.

6. Conclusion and the Way Forward

The preceding sections have examined how peri-urban land is governed in Ethiopia by analyzing the legal framework and governance practices during urban expansion. Land governance in peri-urban areas is influenced by the divergent or complementary roles of actors emanating from their authority, power, and interests both formally and informally. The principal legal challenge is not the complete absence of regulation of peri-urban land, but the absence of a coherent and integrated framework governing the transition between rural and urban land systems. Existing federal and regional rules

regulate different aspects of this transition, including landholding, planning, investment, expropriation, compensation and resettlement, but these rules are fragmented across legal and institutional frameworks and do not always provide clear transitional procedures or coordinated institutional responsibility.

Ethiopian law does not thus treat peri-urban land as a distinct category, unlike rural or urban land. Yet, some laws cover situations where land falls within new urban boundaries but has not yet been officially transferred to urban administration. The main legal issue is that these transitions are handled in a fragmented way, rather than being governed by clear rules. Under such context, it is often unclear with regard to who manages the land, how it should be registered, how services are provided, and when the formal transfer will take place. These uncertainties can cause informal land divisions and sales, disputes, insecure land rights, and delays in urban services. As a result, peri-urban transformation involves both formal legal steps and informal practices that fill gaps or address unclear areas in the system.

The study also shows significant differences in governance practices among Amhara, Oromia, Sidama and Somali regions. Amhara region demonstrates a significant move toward institutional integration through the consolidation of rural and urban land administration under the regional land institution. The effectiveness of this institutional reform, however, depends on its implementation and coordination with urban planning and other relevant authorities. Oromia region provides comparatively explicit mechanisms for landholder participation in investment and development, including joint development and, in specified circumstances, shareholding. It also maintains transitional rural land administration for land incorporated into urban boundaries until its formal handover. Sidama region has fewer explicit legal mechanisms governing the rural-to-urban transition but has developed practices concerning regularization of informal settlements. In the Somali region, formal land administration and customary institutions often work together in their own ways, especially in peri-urban land transactions. Customary systems are flexible and help involve local people. But when these systems are combined with formal planning and land administration, it can be harder to coordinate legally and ensure certainty. These differences demonstrate that the four regional approaches should be assessed according to their respective institutional arrangements, transitional tenure rules, development participation mechanisms, compensation and resettlement arrangements, regularization practices, and interaction with customary institutions.

Expropriation is still a key path in the conversion of peri-urban land into urban areas in the study locations. Expropriation to expand cities affects tenure security, compensation, resettlement, and how people rebuild their livelihoods. Although the federal legal framework provides compensation, resettlement and rehabilitation protections (for persons affected by expropriation), the empirical evidence indicates variation in implementation across the study areas. Compensation and livelihood restoration should therefore be distinguished. Compensation addresses legally recognized losses resulting from expropriation, whereas livelihood restoration concerns the longer-term recovery of agricultural production, income, employment, housing, business opportunities and social networks.

Meaningful participation of affected landholders in redevelopment decisions remains limited in some study areas. Although the federal legal framework provides a basis for examining priority development opportunities, the practical exercise of such opportunities is affected by procedural, institutional and implementation challenges. The existence of investment participation, joint development or shareholding mechanisms should not thus be treated as equivalent to a priority development right.

Based on these findings, the way forward envisages a more coherent and integrated framework for peri-urban land governance. *First*, Ethiopia should establish a transitional legal framework that clearly regulates the process through which land moves from rural to urban administration, including the legal status of landholders at each stage of the transition. *Second*, institutional responsibility should be clearly allocated for planning incorporation, land registration, handover, development, expropriation, compensation, resettlement and regularization. *Third*, transitional tenure protection should clarify the rights and obligations of rural landholders whose land has been incorporated into urban plans or boundaries but has not yet been formally transferred.

Fourth, the legal framework should distinguish among different development and participation mechanisms. Priority development rights, joint development, shareholding, land pooling and land readjustment should not be treated as interchangeable mechanisms. Each should have clearly defined beneficiaries, procedures, conditions, participation requirements and legal consequences. In particular, the existence of economic participation through joint development or shareholding should not by itself be treated as establishing a priority development right. Land pooling and land readjustment may be developed as participatory land-development mechanisms where appropriate, while their legal relationship with expropriation should be clearly specified.

Fifth, compensation and livelihood restoration need to be treated as separate but related responsibilities. Compensation needs to cover losses that are legally recognized and result from expropriation. Livelihood restoration should help people to recover by supporting their housing, land, farming, income, jobs, businesses, and social connections. *Sixth*, transparent and legally certain procedures should be established for regularizing existing informal transactions and settlements, while maintaining planning and public-interest requirements. *Seventh*, customary institutions should be recognized where they play a legitimate role in land governance, while their relationship with formal land administration and planning should be clearly regulated. *Finally*, meaningful participation of affected landholders should be required before major decisions concerning the transformation, acquisition or development of peri-urban land.

A *clear transitional framework* of this kind would make it easier to define who is responsible, give landholders more security, encourage their involvement, and reduce confusion about informal transactions. It would also help link rural and urban land governance. With this approach, Ethiopia could move forward with urban development while offering better legal protection for landholders and focusing more on restoring livelihoods and promoting inclusive growth. ■

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Revisiting Self-Determination and Land Rights in Ethiopia's Post-1991 Federal Context

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Abstract

The right to self-determination is closely linked to the protection of cultural, religious, linguistic, and economic rights, as well as the right to participation. Ethiopia recognizes ethnic diversity and seeks to accommodate it through self-determination, where authority over land plays a central role. However, the interplay between federalism, self-determination, and land rights complicates the full realization of these rights. Regional constitutions and laws often exclude 'latecomers' by vesting land ownership in 'original settlers', while recent trends in power (re)centralization in land administration undermine local participation. These dynamics violate constitutional principles of land ownership and egalitarian access to land, resulting in a constrained exercise of self-determination. The article employs a positivist legal methodology and analyzes relevant laws and literature. The way forward necessitates (i) establishing minimum standards for equality and non-discrimination in land allocation and access; (ii) ensuring that access to land-use rights, administrative services, and legal protection cannot be deprived of mainly based on ethnic identity; and (iii) introducing measures to balance federalism, land rights, and self-determination, which can be facilitated by adopting a comprehensive national land policy.

Keywords: Federalism, self-determination, land rights, power (re)centralization, revisiting

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1. Introduction

The right to self-determination is one of the core rights recognized under international, regional, and national human rights instruments.¹ This right is exercised not only by peoples or groups but also constitutes an individual human right.² It is a prerequisite for the exercise and enjoyment of all other individual and collective rights of indigenous nations, peoples, and communities. The right is closely connected with the protection of cultural, religious, linguistic, and ethnic identity, as well as to effective participation in economic and political spheres.³ Since land holds central importance in the economic sphere and carries wide-ranging global implications, the right to control and administer land serves as a vital instrument for realizing self-determination.⁴ In this sense, control over land and other natural resources represents the very core of the right to self-determination.⁵

The exercise of the right to self-determination is closely tied to the right to control and manage land. This is partly because land is a basic resource through which individuals and groups secure economic self-sufficiency. It is also central to cultural heritage, spiritual practices, and social organization of indigenous and ethnic groups; and loss of land often leads to their marginalization and cultural erosion. Secure land rights further provide a

¹ Hurst Hannum. (1998). *The Right of Self-Determination in the Twenty-First Century*. *Washington and Lee Law Review*, Vol. 55(3), 773-780, p. 773.

² Mark Weller. (2008). *Escaping the Self-Determination Traps*, Martinus Nijhoff Publishers.

³ Hurst Hannum, *supra* note 1, p. 773.

⁴ Muluneh Kassa. (2017). The Paradox of Administration of Nationalities in Post-1991 Ethiopia. *International Journal of Advancements in Research & Technology*, Vol. 6(2), 1-31.

⁵ Hurst Hannum, *supra* note 1, p. 773.

foundation for political autonomy, without secure tenure, self-determination efforts risk being undermined by displacement, resource exploitation, and related challenges.⁶

The question of land rights extends beyond effective governance, agricultural growth, capital accumulation, and economic development. It is more about agency and power, as well as politics and representation at both national and local levels.⁷ Secured land rights are crucial for sustainable development, poverty eradication, good governance, and the realization of human rights.⁸ To this end, 'state-protected property rights' should not result in the exclusion of people from access to land-based needs and rights, regardless of their social, economic, or political status.⁹

Rooted in an ethnic-based federal system, Ethiopia recognizes ethnic diversity and exhibits a willingness to accommodate it through the right to self-determination.¹⁰ Major ethno-national groups have established their own regional states, and the 1995 Constitution (the Constitution) mandates the realization of their socio-cultural, economic, and political rights.¹¹ Recognition of this right has helped diffuse ethnic discontent and has enabled regional states to exercise functional autonomy, particularly in resource control.¹² Since land plays an important role in the social, political, cultural, and economic lives of ethnic groups, the absence of authority over it renders the full exercise of self-determination meaningless.¹³

Articles 40(3), 51(5), and 52(2) (d) of the Constitution recognize that regional states have roles in the control and regulation of natural resources, implying that authority over land constitutes an important part of the right to self-determination.¹⁴ Nevertheless, the right to self-determination does not

⁶ Habtamu S. Semahagne. (2021). *Vertical Delegation of Power over Land in Ethiopia* (PhD Dissertation, Bahir Dar University).

⁷ Pauline Peters. (2013). Land Appropriation and Agrarian Futures in Africa. *Journal of Peasant Studies*, Vol. 40(3), 537–562.

⁸ Klaus Deininger. (2003). *Land Policies for Growth and Poverty Reduction*, World Bank.

⁹ Thomas Sikor *et al.* (2017). Property-Rights Regimes and Natural Resources. *World Development*, Vol. 93, 338–340.

¹⁰ Constitution of the Federal Democratic Republic of Ethiopia, Article 39.

¹¹ *Ibid.*

¹² Sibuh Tareke. (2020). Federalism and Ethnic Conflict in Ethiopia. *Global Scientific Journal*, Vol. 8(2), 3485–3508.

¹³ Fasil Zewdie. (2013). Right to Self-Determination and Land Right in Ethiopia. *Law, Social Justice & Global Development*, 1–25; Habtamu Semahagne, *supra* note 6.

¹⁴ Ojot Ojulu. (2013). *Large-Scale Land Acquisitions and Indigenous Peoples' Rights* (PhD Dissertation, University of Bradford);

grant states sole ownership of the land within their territorial boundaries, as land is collectively owned by the Nations, Nationalities and Peoples (NNPs).¹⁵ Instead, this right enables regional states to administer their lands, as a means to fully realize their economic self-determination.¹⁶

Ethiopia's historically strong social fabric, rooted in cultural, religious, historical, and other bonds, now faces significant challenges and threats. Regional constitutions and subsidiary land-related legislation often classify ethnic groups into two categories: 'indigenous' and 'non-indigenous'.¹⁷ The laws grant economic and political self-determination to 'indigenous' or 'owner' ethnic groups within their respective regions, while denying the same recognition to other groups. As a result, the country has witnessed widespread displacement of people, often on the grounds that they are 'latecomers' to a given area.¹⁸ These practices undermine effective local participation and egalitarian access to land. Besides, the repeated centralization of power in land governance, when viewed from both (federal and constitutional) perspectives, undermines the right to self-determination and threatens the realization of secure land rights.

Ethiopia's efforts recognize and protect shared-rule and self-rule, individual rights, equality and national unity has been creating complexity in determining how these should operate together when they generate competing claims in relation to land. The article does not advocate for any one of these at the expense of the others. It also does not choose between decentralization and centralization in respect to land administration, nor between collective rights and individual rights. It centrally argues for well regulated legal and institutional mechanisms capable of reconciling Ethiopia's diversity with the need for equality, unity and diversity, and ensuring egalitarian access to land without discrimination.

The article employs a qualitative legal methodology, giving in-depth consideration to relevant laws and literature against appropriate benchmarks.

Assefa Fiseha. (2018). Federalism and Development: The Ethiopian Dilemma. *International Journal on Minority and Group Rights*, Vol. 25(3), 333–368.

¹⁵ FDRE Constitution, *supra* note 10, Art. 39.

¹⁶ Habtamu Sitotaw *et al.* (2019). The Power of Land Administration under the FDRE Constitution. *Journal of Ethiopian Law*, Vol. 31, 83–119.

¹⁷ Belete Mehari. (2020). The Right to Self-Determination under the FDRE Constitution: Issues, Challenges and the Way Forward. *Arts and Social Science Journal*, Vol. 11(6), 1–5.

¹⁸ *Ibid*; Assefa Fiseha. (2017). Intra-Unit Minorities in the Context of Ethno-National Federation in Ethiopia. *Utrecht Law Review*, Vol. 13(1), 170–189, p. 178.

The approach mainly reflects a law-in-books scholarship.¹⁹ Data are drawn from literature on federalism, self-determination, land rights, and related issues; international, regional, and national legal instruments, regional constitutions and land laws; and newspaper reflections.

The next section overviews theoretical and comparative perspectives, and Section 3 discusses the right to self-determination. The fourth section explores the indispensable nexus between land rights and self-determination while section five examines the scope of land rights protection within the FDRE Constitution. Section six addresses the challenges in realizing land rights and self-determination, including ambiguities surrounding land ownership, (re)centralization and its implications for public participation and consultation, and the displacement and dispossession of local communities. This is followed by a discussion on potential interventions and concluding remarks.

2. Theoretical and Comparative Perspectives

2.1 Theoretical Perspectives

The article provides an overview of relevant theoretical frameworks linked to self-determination and land rights: institutional theory, multilateral theory and property rights theory. The theories in part help to explain how institutional arrangements influence the realization of the right to self-determination, the right to effective participation, and land rights and to assess the formal distribution of constitutional powers specific to land.

Institutional theory argues that the protections in a constitution could be realized only when effective institutional arrangements are put in place to regulate authority, accountability, participation, and implementation.²⁰ Ostrom underlines that institutional arrangements govern how authority is exercised, accountability is maintained, and competing interests are reconciled.²¹ On the basis of the theory, one can argue that the mere recognition of the right to self-determination does not by itself guarantee meaningful participation or egalitarian access to land. The realization of all these shall depend on the existing institutional design regulating the relationship between federal and regional governments, how autonomy is exercised, and the means to ensure accountability and predictability in land

¹⁹ Ian Dobinson & Francis Johns. (2007). Qualitative Legal Research. In McConville M & Chui WH (eds), *Research Methods for Law*, Edinburgh University Press.

²⁰ Douglas C. North. (1990). *Institutions, Institutional Change and Economic Performance*, Cambridge University Press. <https://doi.org/10.1017/CBO9780511808678>;

Elinor Ostrom. (2005). *Understanding Institutional Diversity*, Princeton Univ. Press.

²¹ Ibid.

administration.²² In Ethiopia, the constitutional right to self-determination does not, *inter alia*, automatically lead to equitable land access and effective participation in land governance affairs. This is partly because land administration practices are shaped by fragmented institutional setups, overlapping mandates, and inconsistent administrative practices.²³

The other relevant theory is *multilateral theory*, which can significantly influence the Ethiopian constitutional framework. Under this theory, territorial autonomy is intended to accommodate diversity while also promoting and preserving the integrity of the federal compact.²⁴ According to this theory, while States' stake over land is an important indication of self-rule, multinational federalism does not imply that access to public resources may be conditioned upon ethnic origin. Rather, regional autonomy must be exercised in line with constitutional rights to equality, freedom of movement, and equal protection of the laws.

Property rights theory establishes that secure, certain, and equitable access to land constitutes an important foundation for economic development, social inclusion, and effective participation.²⁵ Conversely, insecure and inequitable access to land would undermine both individual rights and institutional legitimacy.²⁶ Under Ethiopia's federal system, both excessive political centralization and exclusionary regional land governance would weaken

²² Elinor Ostrom. (2010). Beyond Markets and States: Polycentric Governance of Complex Economic Systems. *American Economic Review*, 100(3), 641–672. <https://doi.org/10.1257/aer.100.3.641>, pp. 646–648.

²³ Nanesa Wata Dereso & Pradeep Sharma. (2025). Comparative Analysis of Land Governance System in Ethiopia: Reflection towards Land Reform in Ethiopia. *International Journal of Novel Research and Development*, 10(5);

See also Worku Nega *et al.* (2021). Evaluating Institutional Dichotomy between Urban and Rural Land Administration in Amhara Region, Ethiopia, *Sustainability*, 13(16), 9431. <https://doi.org/10.3390/su13169431>;

Kena Deme. (2023). Decentralized Urban Land Management in Ethiopian Federal System: Case Study of Ambo Town, *Ethiopian Journal of Governance and Development*, 2(1). <https://doi.org/10.20372/cj1r1k30>.

²⁴ Will Kymlicka. (2001), *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford University Press;

Alfred Stepan. (1999). Federalism and Democracy: Beyond the US Model, *Journal of Democracy*, 10(4), 19–34.

²⁵ JW Bruce. (2021). *Land Tenure and Sustainable Development: Global Perspectives on Property Rights and Governance*, Routledge.

²⁶ IPCC. (2019). “Summary for Policymakers.” In *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems*, eds: PR Shukla *et al.* <https://doi.org/10.1017/9781009157988.001>

tenure security, limit participation, and restrict the equal enjoyment of constitutional rights. In effect, the main question is not whether land administration should be centralized or decentralized, but whether the institutional arrangements governing land administration adequately address the land rights of its citizens.

2.2 Comparative perspectives on federalism and land governance

Workable federal systems shall always be designed with local conditions in mind as every federation has specific conditions that would make it different from other federations.²⁷ Despite this, there are established practices of drawing lessons from other federations.²⁸ An overview on three federations about how they managed land rights/governance and self-determination/federalism can provide examples in the search for relevant lessons to Ethiopia. The practices in these federal systems (India, Nigeria and Canada) show that balancing territorial autonomy with national unity is a recurring challenge, mainly where land is closely tied to identity, economic development, and constitutional rights. While Ethiopia's federal system has its own distinctive features, the overview of lessons in selected federal jurisdictions illustrates that tensions between decentralized land administration, equal citizenship, and the pursuit for national unity are not unique to Ethiopia.

The 1949 Constitution of India established a parliamentary federal system. As India is vast, populous, and diverse and threatened by insecurity and disintegration, a strong central government was found vital.²⁹ The manner the federal structure is framed places the national interest to be overriding and this leaves the Indian federation unique in enforcing national unity and growth.³⁰ Legislative authority over land policies, which includes land, agriculture, and land improvement, belongs to States.³¹ The legislative role of the States shall consider the fundamental rights of every Indian Citizen stated under the Indian Constitution: equality before the law (Article 14), the prohibition of discrimination (Article 15), and the right of citizens to reside and settle freely anywhere in the territory of India (Article 19). Moreover, the Union

²⁷ Felix Knuepling. (2016). Federal Governance and Weak States. In Wilhelm Hofmeister & Edmund Tayao (eds), *Federalism and Decentralization: Perceptions for Political and Institutional Reforms*, Local Government Development Foundation, p 8.

²⁸ Ronald Watts. (2008). *Comparing Federal Systems*, 3rd edn, McGill-Queen's University Press, p. 31.

²⁹ Id. p. 36.

³⁰ Roshni Duhan. (2016). Federal System in India and the Constitutional Provisions. *Innovare Journal of Social Sciences*, 5(1), 1-4, P. 3.

³¹ Kumar Chanchal. (2014). Federalism in India: A Critical Appraisal. *Journal of Business Management & Social Sciences Research*, 3(9), 31-43, p. 32.

Government plays regulatory role via framework legislation, judicial oversight, and policy frameworks leaving land administration affairs to State governments. At the normative level, the Indian federal system is a typical instance whereby decentralized land administration can coexist with the prevailing principle of equal protection of citizens of India anywhere in the federation.³²

The Nigerian federal system is known for appropriate division of responsibilities and resources between the federal, regional and local level administrations.³³ Following the major reform of the land regime in the 1970s, which sought to consolidate and simplify the previous mixture of customary and statute law, nearly all land is vested in the Governor of each state to be held on trust for Nigerian citizens. The State Governors have power to grant rights of occupancy over land, to consent the alienation of such rights and to override them in the public interest.³⁴ The 1978 Nigerian Land Use Act places all lands in the territory of each state under the exclusive authority of the state governor. The Federal Government does not involve itself in administering state lands since this power is already assigned to Regional Governments.³⁵

The Constitution of Nigeria guarantees freedom from discrimination and protects the rights of all citizens regardless of their state or ethnic origin.³⁶ There is continued tension between the constitutional principle of equal citizenship and distinction for “indigenes” from “settlers” mainly in access to public resources and political participation.³⁷ Nearly similar debates persist in the Ethiopian federal system about “original settlers” and “latecomers” dichotomy when it comes to egalitarian access to land in several regional states. This is happening in the presence of federal system of governance where, in principle, adequate power is decentralized to regional and local level

³² Bola Fajemirokun. (2002). Land and Resource Rights: Issues of Public Participation and Access to Land in Nigeria. Paper presented at the First Workshop of the Pan-African Programme on Land and Resource Rights (PAPLRR), Cairo, Egypt, 25–26 March 2002, p. 3.

³³ D. Joel. (2001). *State and Local Governance in Nigeria*. Public Sector and Capacity Building Program in Africa Region, World Bank, 2 August 2001.

³⁴ Emmanuel O. Nwabuzor. (1994). Real Property Security Interests in Nigeria: Constraints of the Land Use Act. *Journal of African Law*, 38(1), 1 – 18.

³⁵ African Union, African Development Bank & Economic Commission for Africa (2011). Land Policy in Africa: West Africa Regional Assessment, p. 51.

³⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 15(2), 17(2)(a), 42 and Chapter III.

³⁷ Brandon Kendhammer. (2014). Citizenship, Federalism and Power Sharing: Nigeria’s Federal Character and the Challenges of Institutional Design. *Ethnopolitics*, 13(4), 396–417.

of government. This shows that decentralization is not an end by itself, and there is the need to effective constitutional safeguards and judicial enforcement to ensure that territorial autonomy does not evolve into exclusionary governance.³⁸

Canada became a federation in 1867 in a bid to overcome the political difficulties and deadlocks within the United Province of Canada created by the 1840 Act of Union.³⁹ The 1867 Canadian Constitution, its first constitution, was marked by strong central powers, including powers of the center to surpass the provinces on certain occasions.⁴⁰ Yet, later developments urged Canada to be a relatively decentralized federation, both legislatively and administratively.⁴¹ In broad terms, provincial governments exercise constitutional authority over public lands and natural resources under sections 92 and 92A of the *Constitution Act, 1867*.⁴² The constitution also recognizes indigenous rights through Section 35 of the *Constitutional Act, 1982*, while the Canadian Charter of Rights and Freedoms guarantees equality and free movement right within the territory of the federation.⁴³ The federation displays a kind of cooperative federalism, in which both the federal and provincial governments share responsibility for addressing local autonomy and national interest.⁴⁴ The Canadian experience establishes that territorial autonomy need not amount to arbitrariness, and it promotes national constitutional coherence and self-government by pursuing carefully designed mechanisms of intergovernmental cooperation.

Three lessons can be drawn from the experience highlighted in the preceding paragraphs. *First*, centralized or decentralized land administration system cannot be considered as an obstacle to realize equal treatment of citizens provided appropriate legal and institutional safeguards are in place. *Second*, federal role in land affairs shall be confined to regulatory functions such as establishing minimum standards, promoting interoperability of land

³⁸ Ibrahim Abdullah. (2024). Indigenes, Settlers and Citizens: Multiple and Conflicting Subjectivities in Nation State Making. *Development and Change*, 55(1), 157–172.

³⁹ Ronald Watts, *supra* note 28, p. 32.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Robert D Cairns. (1992). Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution. *The Journal of Federalism*, 22(1), 55–70, p. 66.

⁴³ Article 6(2) of the Charter of Rights and Freedoms states that “Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.

⁴⁴ Cairns, *supra* note, 42, p. 56.

administration systems, and ensuring constitutional compliance. *Third*, the recognition and protection to collective identities in a federation does not refute the effective balance in self-rule, shared rule, and the protection of individual rights.

3. Conceptualizing the Right to Self-Determination

Self-determination is based on the idea that “peoples should collectively have control over, and be able to make decisions about, their own lives”.⁴⁵ This envisages that self-determination intersects with a number of related concepts: group autonomy, self-government, independence, democracy, and noninterference. This is fundamental in the sense that the proper realization of self-determination, *inter alia*, requires the legal and practical protection of independence, democracy, noninterference, and respect to both group and individual autonomy.

Self-determination implies the ability of peoples to decide on their own political status and pursue economic, social, and cultural development within the given legal framework.⁴⁶ It is also a prerequisite for the exercise and enjoyment of all other individual and collective human rights of indigenous nations, peoples and communities. It is “(a) the act or power of making one's own decisions and determining one's political status; or (b) the state of being free from the control or power of another”.⁴⁷ Thus, self-determination is not a right exercised only by peoples or groups but it is also a human right of individuals.⁴⁸

Agnieszka Szpak maintains that self-determination is “a fundamental principle of international law which should be considered in the context of the whole body of international law, i.e., in the UN Charter, such as the prohibition of the use of force, territorial integrity, or respect for human

⁴⁵ Lino Dylan. (2010). The Politics of Inclusion. *Melbourne University Law Review*, Vol. 34(3), 839–869, p. 845.

⁴⁶ Hurst Hannum *supra* note 1, p. 773.

⁴⁷ Amanda Cats-Baril. (2018). *Self-Determination*, International Institute for Democracy and Electoral Assistance.

⁴⁸ Mark Weller, *supra* note 2. Given that under international law, the right of self-determination is vested in “peoples,” who are entitled to determine their political status and pursue their economic, social and cultural development, it has an important individual dimension, too. This is because the realization of the right to self-determination is a condition for the effective enjoyment of individual human rights and freedoms, including meaningful participation in public affairs and equality without discrimination (Human Rights Committee. (1984). *General Comment No. 12: Article 1 (Right to Self-Determination)*, UN Doc HRI/GEN/1/Rev.1).

rights”.⁴⁹ In line with this, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in their first articles, state: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development”.

According to the ICCPR and ICESCR, the right to self-determination encompasses the following elements. *First*, it implies the right to freely determine one's political status and to pursue economic, social, and cultural development. *Second*, it involves collective ownership of land and natural resources, including the right of access and use such resource by members, as well as the rights to manage, exploit, conserve, and freely dispose of those resources. The UN Declaration, under Article 1(2), also stipulates the need to “respect for the principle of equal rights and self-determination of peoples as essential to international peace and security.”

In the context of indigenous peoples' rights, Article 3(1) of the International Labour Organization Convention on Indigenous and Tribal Peoples states that “[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. This necessarily includes indigenous peoples' right to self-determination”. Furthermore, Article 3 of the UN Declaration on the Rights of Indigenous People (UNDRIP), specifies that indigenous people have the freedom to determine their political status and freely pursue their economic, social and cultural development. Article 4 of the same Declaration emphasizes the need for autonomy for indigenous peoples. The provision reads that: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. Even if Ethiopia did not ratify ILO Convention No. 169 (the Indigenous and Tribal Peoples Convention, 1989) nor vote for the UNDRIP, both are relevant in appreciating the meaning and scope of the right to self-determination as a concept.

Ethiopia recognizes both internal and external forms of self-determination. Internal self-determination is reflected in the rights of NNPs to speak, write, and develop their language; to express, promote, and develop their culture; to preserve their history; and to enjoy equitable representation in both regional state and federal governments. However, the right to secession that constitutes

⁴⁹ Agnieszka Szpak. (2018). The Right of Indigenous Peoples to Self-Determination. *Polish Political Science Studies*, Vol. 59, 178–204.

an expression of external self-determination⁵⁰ is unduly included in the FDRE Constitution. In the context of internal self-determination, the right to self-determination encompasses the authority to establish governmental institutions within the territory inhabited by the group. It imposes a duty on the government to promote and support the people's self-rule, representation and participation in government affairs.⁵¹

The right to promote one's culture, language, and history does not imply a restriction on others from promoting their own. The right to self-determination neither entails discrimination against other ethnic groups or individuals nor permits the expulsion of those who do not belong to a specific ethnic group. This reflects the broader view that every right must be exercised without infringing upon the rights of others. The Constitution largely fails to address the rights of people or groups residing in regions where they are not considered native.⁵² It, however, guarantees the right to freedom of movement and the choice of residence.⁵³ Moreover, the preamble of the Constitution aspires to establish a common economic and political community while preserving its internal diversity. Accordingly, when a specific NNP exercises the right to self-determination, it also assumes the responsibility to treat 'non-native' groups on an equal basis with 'natives' in all respects.

4. The Indispensable Nexus: Self-Determination and Land Rights

Land rights and self-determination are deeply interconnected, because access to and control over land are fundamental aspects of a people's ability to exercise autonomy, preserve cultural identity, and achieve sustainable development.⁵⁴ For ages, land has been central to struggles for self-determination, particularly among indigenous populations, colonized territories, and ethnic minorities.⁵⁵ International legal frameworks

⁵⁰ FDRE Constitution, *supra* note 10, Article 39.

⁵¹ Abera Zegeye. (2021). The Right to Self-Determination vis-à-vis Irredentism: Comprehensiveness or Otherwise of Article 39 of the FDRE Constitution in Addressing Irredentism. *Haramaya Law Review*, Vol. 10, No. 1, 43–63, p. 46.

⁵² Getachew Assefa. (2011). Federalism and Legal Pluralism in Ethiopia. *East African Journal of Peace & Human Rights*, Vol. 17(1), p. 68.

⁵³ FDRE Constitution, *supra* note 10, Article 31.

⁵⁴ Agnieszka Szpak, *supra* note 49.

⁵⁵ Alexandra Xanthaki. (2007). *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land*, Cambridge University Press;
D. Erica-Irene. (2009). Striving for Self-Determination for Indigenous Peoples. *International Journal on Minority and Group Rights*, Vol. 16(4), 577–608.

increasingly recognize this nexus, emphasizing that self-determination is not only a political right but also a socioeconomic and territorial imperative.⁵⁶

The intrinsic link between land rights and the right to self-determination is clearly established in both the ICCPR and the ICESCR. Article 1 of each Covenant affirms that “all peoples have the right to self-determination” and are entitled to freely “dispose of their natural wealth and resources”. This connection is further reinforced in Article 26 of the UNDRIP, which emphasizes the legal protection of indigenous peoples’ rights to their traditional lands, territories, and resources. The provision obliges States to recognize and incorporate these rights into their domestic legal systems. Additionally, Article 8 of UNDRIP requires States to prevent or provide redress for the dispossession of indigenous lands. Article 10 asserts that indigenous peoples have the right to determine and control their own development, with land serving as a critical foundation for the realization of this right.⁵⁷

The nexus between land rights and self-determination can be observed across four key areas. *First*, land rights are foundational to the exercise of self-governance and autonomy. They provide the territorial basis upon which indigenous and other self-governing communities assert political authority.⁵⁸ Within indigenous land tenure systems, land rights play a critical role in delineating territorial jurisdiction and supporting institutional structures for governance.⁵⁹ This includes legal safeguards such as restrictions on the alienation of land, co-ownership frameworks that favor collective decision-making, and protections against external interference.⁶⁰ The authority to regulate land use, manage natural resources, and direct development is a tangible expression of the right to self-determination.⁶¹

Second, the right to land is central to the preservation of cultural identity, which is an integral component of self-determination. For many indigenous peoples, land is not merely a resource but a vital element of cultural heritage,

⁵⁶ James Anaya. (2004). *Indigenous Peoples in International Law* (2nd ed), Oxford University Press.

⁵⁷ Anne Flaherty. (2016). Indigenous Land Rights and Self-Determination in Botswana. *Indigenous Policy Journal*, Vol. 27(1), 1–13, p. 9.

⁵⁸ Rachel Sieder. (2011). Indigenous Women’s Access to Justice in Latin America. *International Journal of Constitutional Law*, Vol. 9(3–4), 705–729.

⁵⁹ *Ibid.*

⁶⁰ United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples*.

⁶¹ Anaya James, *supra* note 56.

spiritual practice, and community cohesion.⁶² Therefore, the protection of land rights directly supports the continuity and flourishing of cultural traditions and identities.⁶³

Third, land rights are essential for the realization of economic self-determination and the pursuit of sustainable livelihoods.⁶⁴ The ability to control, access, and manage land and its resources directly influences the economic well-being and development potential of a people. Secure tenure provides the foundation for economic stability and enables communities to engage in productive activities without compromising traditional or customary uses of land.⁶⁵ In this regard, the restoration of access to natural resources can significantly enhance economic activity, fostering increased productivity and long-term sustainability. Land, therefore, is not only a cultural and political asset but also a critical economic resource that underpins self-determined development.⁶⁶

Fourth, the relationship between land rights and self-determination is also evident in the recognition and protection of customary land tenure. The right to self-determination includes the right of indigenous peoples to own, use, and manage their traditional lands and resources according to their customs and traditions. This encompasses the principle of free, prior, and informed consent, enabling indigenous communities to exercise a form of permanent sovereignty within the framework of nation-states.⁶⁷ However, the incorporation of customary tenure into formal state legal systems remains inadequate. While some legal frameworks acknowledge and provide space for customary practices, the integration process often results in legal and institutional pluralism that can undermine customary authorities and reshape local land governance norms.⁶⁸

While international law establishes a clear link between land and self-determination, its application within Ethiopia's ethnic federal system introduces unique complexities. The constitutional model of state and public

⁶² Rachel Sieder, *supra* note 58.

⁶³ Leanne B. Simpson. (2014). Land as Pedagogy. *Decolonization*, Vol. 3(3), 1–25.

⁶⁴ Habtamu Semahagne, *supra* note 6.

⁶⁵ Gaim James Lunkapis. (2015). Secure Land Tenure as Prerequisite towards Sustainable Living. *Springer Plus*, Vol. 4(1), 1–10.

⁶⁶ Robert Costanza *et al.* (2017). Twenty Years of Ecosystem Services: How Far Have We Come and How Far Do We Still Need to Go? *Ecosystem Services*, Vol. 28, 1–16.

⁶⁷ Erwin Nuar & Gaim James Lunkapis. (2019). Customary Land and Indigenous People of Sabah. Paper presented at International Geography Seminar 2018.

⁶⁸ Doolittle Amity. (2007). Native Land Tenure, Conservation, and Development in a Pseudo-Democracy: Sabah, Malaysia. *Journal of Peasant Studies*, Vol. 34(3), 474–497.

ownership of land has generated considerable ambiguity regarding the actual connection between land rights and the exercise of self-determination. This ambiguity is particularly pronounced within the framework of ethnic federalism, where regional states are granted broad autonomy over land administration. Despite this autonomy, uncertainty persists about the true ownership of land, i.e. whether it resides with the state, the public or specific communities, thereby complicating the practical realization of both land rights and self-determination.

Allocating land as communal property underpins ethnic groups' right to self-administration and casts each regional state as the *de facto* homeland of a particular community. This territorial autonomy can enhance the confidence and authority of the majority group while simultaneously denying other groups' equal socio-economic and political participation. While land is not solely vested to any particular ethnic group, local interpretations that endorse exclusive ownership have hastened internal displacement, forced evictions, and fierce clashes across the country.⁶⁹ Daniel Hailu, in his reflection published in *The Elephant* newspaper, summarizes the clear setbacks in the link between self-determination and land rights within the context of public land ownership and the ethnic federal system in Ethiopia. He notes that ethnic federalism promotes autonomy and self-determination for ethnic groups, while public land ownership centralizes land control under the state. This contradiction between ethnic autonomy and limited land rights creates ongoing challenges for governance, development, and interethnic relations.⁷⁰

From the above discussion, it is clear that the right to self-determination is essentially linked to the protection and realization of land rights. Land is not merely a source of material wealth but also the cornerstone of collective identity, the foundation of political autonomy, and a prerequisite for cultural survival. The effectiveness of self-determination hinges on the extent to which a people can exercise genuine control over their land and resources, and effectively participate in decisions that can potentially affect their land rights.

5. The Scope of Land Rights under the FDRE Constitution

A comprehensive understanding of land rights protection requires an examination of federal and regional land legislation, the relevant provisions of the Constitution, and other applicable legal instruments. This is important

⁶⁹ Assefa Fiseha, *supra* note 18, p. 178; See also: Tom, Lavers (2018). 'Responding to Land-Based Conflict in Ethiopia', *African Affairs*, Vol. 117(468), 462–484.

⁷⁰ Daniel Hailu. (2025). Ethnic Federalism and Public Land Ownership in Ethiopia. *The Elephant*.

in further appreciating and realizing the right to self-determination, in this case, in the Ethiopian context. However, for the purposes of focus and clarity, this section concentrates on the scope of land rights as enshrined in the Constitution. These include the rights to free access to land, the scope and security of landholding rights, protection from arbitrary eviction, entitlement to compensation and relocation, the right to consultation and participation, and the guarantee of fair pricing for agricultural products.

One of the rights recognized under the Constitution is the right to free access to land. Peasants, pastoralists, and semi-pastoralists are entitled to access rural land without payment. This right is grounded in the principle that these groups should not be required to pay for the land they use for their livelihoods. Its constitutional recognition reflects an egalitarian approach to land allocation, suggesting that the framers of the Constitution aimed to ensure equitable distribution of land resources.⁷¹ Nevertheless, this raises a practical concern: Is it feasible to allocate rural land freely to everyone who wishes to engage in agricultural activities?

Given population growth and increasing demand for land, the government would inevitably face significant challenges in maintaining an egalitarian and unrestricted allocation system. The assumption during that time may have been that reliance on agricultural land would decline over time due to rural-to-urban migration and the broader process of urbanization. In light of prevailing population pressure, this assumption may not hold true in practice.⁷² Closely related to the right of access to land is the issue of its duration. While the Constitution does not explicitly specify the duration, subsidiary rural land legislation stipulate that the rights of rural landholders over their holdings are not subject to time limitations.⁷³

Although the Constitution outlines the general scope of land rights, it does not explicitly enumerate the specific rights of landholders. It is said that unless expressly prohibited, landholders are assumed to have the right to exercise certain powers over land.⁷⁴ Article 40(3) of the Constitution is key to

⁷¹ Brightman G. Ganta. (2018). *The Post-1991 Rural Land Tenure System in Ethiopia* (LLD Dissertation, University of Pretoria).

⁷² Daniel W. Ambaye. (2013). *Land Rights and Expropriation in Ethiopia* (PhD Dissertation, Royal Institute of Technology, Stockholm).

⁷³ Oromia National Regional State. (2023) *A Proclamation to Amend the Oromia Rural Land Use and Administration Proclamation*; Federal Democratic Republic of Ethiopia (2024) *Federal Rural Land Administration and Use Proclamation*; Amhara National Regional State (2017) *The Revised Amhara National Regional State Rural Land Administration and Use Determination Proclamation*.

⁷⁴ Brightman G. Ganta, *supra* note 71.

understanding the limits placed on individual landholders. Specifically, the Constitution prohibits the sale or any form of transfer that has the same effect as a sale. Therefore, while land cannot be sold or exchanged, other rights related to land may be exercised, subject to legal restrictions typically outlined in subsidiary legislation.

The scope of land rights is further detailed in subsidiary rural land legislation, which elaborates on the constitutional provisions. A key example is the Federal Rural Land Administration and Use Proclamation No. 1324/2024. Article 8 of this proclamation defines the scope of rural land rights as a “*holding right*”. It states that “[t]he right that farmers, pastoralists, semi-pastoralists, and religious institutions have over their land is a holding right”.⁷⁵ Holding right includes the rights to use, lease, sharecrop, and collateralize the use right; jointly develop the land with investors; bequeath; donate; transfer ownership of properties fixed on the holding through sale or other means; consolidate holdings; exchange similar rural land holdings; and cultivate land through cluster arrangements.⁷⁶ The Oromia National Regional State Rural Land Administration and Use Proclamation also incorporates a comparable list of landholder rights.⁷⁷

The Constitution also guarantees landholders’ protection against arbitrary eviction by recognizing their right to immunity from displacement.⁷⁸ This constitutional safeguard serves as a warning to both the government and other potential land users not to evict individuals from their legally held land. There are exceptions that permit state intervention in landholding rights, notably through expropriation. Article 40(8) of the Constitution provides that private property may be expropriated for public purposes. Article 40(7) contains a further limitation against the exercise of land rights.

To mitigate the adverse consequences of land takings by the government, the Constitution establishes a compensation mechanism, and such actions must not leave affected landholders uncompensated.⁷⁹ Article 44(2) affirms that “[a]ll persons who have been displaced or whose livelihoods have been adversely affected as a result of state programmes have the right to commensurate or alternative means of compensation, including relocation with adequate state assistance.” Moreover, Article 40(8) provides that

⁷⁵ Proclamation No. 1324/2024, *supra* note 73, Article 8.

⁷⁶ *Ibid.*

⁷⁷ Proclamation No. 248/2023, *supra* note 73.

⁷⁸ FDRE Constitution, *supra* note 10, Articles 40(4&5).

⁷⁹ Brightman G. Ganta, *supra* note 71; Daniel W. Ambaye, *supra* note 72.

landholders whose property is expropriated must be paid commensurate compensation in advance.

The Constitution also grants landholders the right to be consulted and to participate in decisions that affect their land rights. Meaningful participation by affected stakeholders is essential to ensure that such decisions are fair, transparent, and aligned with the public interest. Participation in decision-making processes is a core element of democratic governance.⁸⁰ In the context of land rights, it serves not only to protect individual interests but also to enhance the legitimacy and effectiveness of public policy decisions.⁸¹

Article 43(2) of the Constitution affirms that “nationals have the right to participate in national development and, in particular, to be consulted concerning policies and projects affecting their community”. Beyond recognizing this right, the Constitution also imposes a resultant duty on the government to promote public participation across various spheres. Specifically, it provides that “the government shall at all times promote the participation of the People in the formulation of national development policies and programs; it shall also have the duty to support the initiatives of the People in their development endeavors”.⁸² These constitutional protections aim to foster inclusive decision-making processes that align development goals with the rights and interests of local communities.

Another important but often overlooked protection accorded to landholders under the Constitution is the right to receive a fair price for their products.⁸³ This constitutional guarantee is intended to safeguard farmers’ economic freedom and to prevent the recurrence of past practices such as state-imposed price controls and compulsory grain acquisitions.⁸⁴ The government bears the duty to facilitate market access for agricultural products. Ensuring that fair market conditions is essential not only for protecting farmers’ livelihoods but also for fostering a sustainable and equitable agricultural economy.⁸⁵

⁸⁰ Gerardo Munck. (2016). What is Democracy? *Democratization*, Vol. 23(1), 1–26, p. 12.

⁸¹ Vanda Carreira, João Reis Machado & Lia T. Vasconcelos. (2016). Engaging Citizen Participation –A Result of Trusting Governmental Institutions and Politicians in the Portuguese Democracy. *Social Sciences*, Vol. 5(4), 1–11, p. 1.

⁸² FDRE Constitution, *supra* note 10, Article 89(6).

⁸³ *Id.*, Article 41(8).

⁸⁴ Brightman Gebremichael & Habtamu Sitotaw (2022). Legal Protection and Judicial Enforcement of Farmers’ Land Rights in Ethiopia. In Muradu Abdo (ed), *Property Law Reform*, Addis Ababa University Press.

⁸⁵ *Ibid.*

6. Challenges in Implementing Land Rights and Self-Determination

6.1 The confusions on land ownership

One of the fundamental rights over property in general and land in particular is ownership. Precise determination of the ownership of land is significant, apart from addressing socio economic and political questions, in protecting and conserving the resource for the current and future generation. As indicated under Article 40/3 of the Constitution, it is evident that land in Ethiopia does not belong to private individuals. However, the nature of land ownership under the Constitution lacks clarity.

To start with, there is blurred understanding of the distinction between state and government, which are not actually similar terminologies in the political and legal usage. According to Article 1 of the Montevideo Convention on the Rights and Duties of States, a State, under international law, must possess the following elements: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states (sovereignty). In this context, the State is understood to encompass the government, with the latter being just one component of the former. Therefore, using the two terms interchangeably is incorrect and can lead to confusion. Governments may change due to elections or other political transitions, whereas the State is a permanent entity that persists over time.

On the other hand, regional subsidiary rural land administration and use laws and constitutions go beyond what is envisaged within the Constitution and appear to adopt exclusive land ownership within their administrative jurisdictions. While each ethnic group and their respective people are beneficiaries of the joint ownership of land in the federation, there are clear tendencies by regional states to exclude other groups in land ownership. For instance, one may look at the Constitution of Benishangul Gumuz National Regional State that confers the right to self-determination on five nationalities, which are referred indigenous, namely: *Berta, Gumuz, Shinasha, Mao and Como*.⁸⁶

The reading of Article 2 of the Constitution of Bانشangul Gumuz National Regional State further shows that the ownership of the region is reserved to the above mentioned five nationalities. Other peoples, considered late comers, are treated guests of the region hosted by the 'owners'. In a

⁸⁶ Benishangul Gumuz Regional State (2003). *Revised Constitution of the Benishangul Gumuz Regional State*.

federation that aspires to create one economic community⁸⁷ in which land is the wheel to that end,⁸⁸ this kind of discrimination would highly affect the land rights of groups threatened ‘non-owners’. According to Bereket and Kiya, “ ‘locals’ consider themselves to be the sole owners of resources”.⁸⁹ The effects of such discrimination have been felt over the years as the region experienced massive internal displacement.

The discriminatory treatment of non-indigenous people is also reflected under the Revised Constitution of the Oromia National Regional State, which grants sovereign power exclusively to the “*people of the Oromo Nation*”.⁹⁰ It also confers the ‘people of Oromo nation’ with the right to self-determination.⁹¹ This largely excludes significant number of groups and communities who are not labelled ‘People of the Oromo nation’. Similar provisions are also included in Articles 9(1) and 39 of the Somali National Regional State Constitution.⁹² Furthermore, Article 46 of the Gambella National Regional State Constitution clearly identifies ethnic groups as the “*founder nation*” of the region, while the rest of the people are referred as “*non-founder nation*”.⁹³

Confusion over land ownership is compounded by divergent interpretations among scholars. Two lines of argument are prevalent in the literature about the ownership of land in the federation. One line of argument attaches land ownership exclusively to the State.⁹⁴ The second line of argument considers the nature of land ownership to be a kind of joint ownership between the State and the People.⁹⁵ The two approaches in understanding land ownership are not without justifications. For the first line,

⁸⁷ FDRE Constitution, *supra* note 10, Preamble.

⁸⁸ Habtamu Semahagne, *supra* note 6.

⁸⁹ Bereket Tsegay & Kiya Gezahegne. (2023). Internal Displacement in Ethiopia. *Migration & Displacement Series*, p. 4.

⁹⁰ Oromia National Regional State (2001) *Revised Constitution of the Oromia National Regional State*.

⁹¹ *Ibid.*

⁹² Southern Nations, Nationalities and Peoples’ Regional State (2001) *Revised Constitution*.

⁹³ Gambella Peoples’ National Regional State (2002) *Revised Constitution of the Gambella Peoples’ National Regional State*.

⁹⁴ Achamyelch G Adam. (2014). *Peri-Urban Land Tenure in Ethiopia* (PhD Dissertation, Royal Institute of Technology, Stockholm), p.10.

⁹⁵ Daniel W. Ambaye, *supra* note 72;

See also Stephen Devereux et al. (2005). Too Much Inequality or Too Little? Inequality and Stagnation in Ethiopian Agriculture. *Institute of Development Studies Bulletin*, Vol. 36(2), 121–126, p.121.

in the very beginning, the Constitution does not intend to create any distinction between State and People in utilizing these terms when it comes to attaching land as a public property.

The second line, in turn, can be justified on the basis that the Constitution considered 'State' and 'People' as separate entities. Accordingly, as separate entities, the understanding that land can be owned jointly between state and people appears sound. In spite of this ambiguity, the Constitution seems to confer the ownership of land for the NNPs indivisibly. This implies that the NNPs are the joint owners of land in the federation, and a claim of sole and exclusionary ownership of land by one or more ethnic identities is inconsistent with the spirit the Constitution.

Under subsidiary rural land administration and use laws, the issue of land ownership is further complicated. For instance, under the ANRS rural land administration and use law, "the right to ownership of land is vested in the (regional) state and the public".⁹⁶ Under the ONRS rural land administration and use proclamation, "ownership of rural land shall be only the right of the government and the people; and it is the common resource of the entire people of the region that shall not be sold or exchanged".⁹⁷ While this approach of stating land ownership protects the land rights of the people within the regional state, it defeats the indivisible nature of land ownership within the Constitution. What is missing in these laws is the joint ownership of land of the NNPs at the national level. This stance of the laws effectively excludes other peoples of the country from feeling the sense of ownership of the land that belongs to other regional state(s) as they are excluded due to the exclusive land ownership approach of regional states. Such exclusive regional ownership undermines national cohesion and equitable land rights.

Having examined the regional constitutions and subsidiary laws, it is important to consider how these ambiguities have manifested in social unrest and conflicts. Since 2010, various ethnic groups have raised grievances over land rights as part of broader struggles for self-rule. One notable example is the mass protest movement that erupted between 2014 and 2018 in response to the proposed expansion of Addis Ababa into the surrounding areas of the Oromia National Regional State.⁹⁸ While the protests had multiple causes, one of the core grievances was related to land dispossession and the perceived threat of land grabbing. The issue of land ownership was a central catalyst in

⁹⁶ Proclamation No. 252/2017, *supra* note 73.

⁹⁷ Proclamation No 248/2023, *supra* note 73.

⁹⁸ Mohammed Ademo. (2019). Abiy's Year One: Ethiopia's Best Hope for Stability. *Al Jazeera*, available at: <https://www.aljazeera.com>.

the unrest.⁹⁹ Under closer scrutiny, genuine concern for peri-urban land holders could have been demand for non-eviction and request for schemes of inclusive development such as land readjustment rather than mere focus on the spatial contraction or expansion of a regional state's control over land which is clearly susceptible to discretionary allocation and corruption.

Similarly, the 2019 referendum by the Sidama people to form their own regional state cited control over land and natural resources as a key motivation. A comparable demand for statehood, also grounded in land ownership claims, has been raised by the Wolayta community.¹⁰⁰ In the Northern Ethiopia conflict, disputes over land and governance have been fundamental drivers of the war between the federal government and the Tigray People's Liberation Front. In particular, contested territorial claims in areas such as Wolkayt and Raya became areas of intense conflict that escalated into broader violent confrontation.

6.2 Recentralization as a setback of self-determination

Ethiopia's federal system provides autonomy to regional states and decentralizes decision-making power up to the lowest level, mainly in the administration of both rural and urban lands.¹⁰¹ According to the Constitution, regional states have the power to administer land while enacting laws on the utilization and conservation of land is the prerogative of the federal government.¹⁰² The Constitution lacks clarity in the allocation of power over land. The obscurity leads to "varied interpretations, potential encroachments on authority, and challenges in conceptualizing the delegation of powers related to land issues".¹⁰³ Previous researches underscore that the specification and determination of "land rights, the manner to acquire rights over land, the scope of these rights, the manner they operate in the holding, transfer, and inheritance of land, and when and how rights over land shall come to an end" are elements of land utilization.¹⁰⁴ Thus, "enforcing the rights over land, administering the acquisition of land, transfer of land, and inheritance of land

⁹⁹ Solomon Goshu & Asrat Seyoum. (2014). Ethiopia: Master Plan Controversy. *All Africa*.

¹⁰⁰ Kjetil Tronvoll, Filata Boroje & Kairedin Tezera. (2020). *The Sidama's Quest for Self-Rule*, available at: <https://www.eip.org>.

¹⁰¹ Assefa Fiseha. (2007). Constitutional Adjudication in Ethiopia. *Mizan Law Review*, Vol. 1(1), 1–32, p. 1.

¹⁰² FDRE Constitution, *supra* note 10, Articles 51(5) & 52(2, d).

¹⁰³ Habtamu S Semahagne & Brightman G Ganta. (2025). Land Governance Power Delegation in Federal Systems. *Regional & Federal Studies*.

¹⁰⁴ Brightman G. Ganta *supra* note 47.

based on federal laws shall fall under regional states' jurisdiction to administer land".¹⁰⁵

Likewise, regional states' administrative power over land includes, but not limited to, the following activities: delimiting parcel boundaries; adjudicating disputes over land use, valuation, taxation, and parcel boundaries; determining and undertaking land valuation for compensation, taxation, and similar activities; establishing and administering land administration institutions; gathering revenue from land-related taxes; and registration of land rights and issuance of certificates.¹⁰⁶

While it is widely agreed that there should be no intervention in the powers and functions assigned to each level of government, there are ample instances where the federal government involves itself in regional matters. One notable example is the federal government's interference in land administration. Instances for this include the power to allocate land for corporate farmers, enacting rural land administration and use laws, legislative power over urban land registration, and land transfers in industrial parks established at regional territories. All these are issues of land administration, which should have been undertaken by regional states.¹⁰⁷

Corporate farming land allocation

The practices over the years show that the central government has been allocating large tracts of land for corporate farmers. The regional governments were required to identify suitable land for investment (5,000 hectares and above) to be incorporated into the land bank and administered at the federal level. This was supported by establishing a land bank at the federal level and enacting an enabling legislation to that end. As Assefa notes, the federal government, employing party machinery, coerced regional states to surrender the power to allocate land for local and foreign investors in their respective territories.¹⁰⁸ Even if transferring regional mandates to the center requires a constitutional amendment, to centralize the allocation of large-scale agricultural land, executive orders were used to centralize land allocation. Such centralization by virtue of delegation appears out of the spirit and tenet of the federal system.¹⁰⁹

¹⁰⁵ Habtamu S. Semahagne & Brightman G. Ganta, *supra* note 103.

¹⁰⁶ *Ibid.*

¹⁰⁷ Habtamu Semahagne, *supra* note 6.

¹⁰⁸ Assefa Fiseha, *supra* note 14.

¹⁰⁹ Melisew Dejene Lemma & Logan Cochrane. (2021). The Power of Policy and the Entrenchment of Inequalities in Ethiopia: Reframing Agency in the Global Land

Legal regulation of urban land registration

The other instance for power centralization in land administration is the legal regulation over urban land and property registration. The federal government adopted Proclamation No. 818/2014 to regulate urban land registration and facilitate registration of real properties in urban settings. This law desires for the uniform administration of urban land registration at the national level, which is very much appreciable. Yet, given that registration of land is an element of land administration,¹¹⁰ the fact that this proclamation is enacted by the federal government directly encroaches into regional states' legislative authority over matters of land administration.¹¹¹ Besides, some of the provisions allowed the federal government to play administrative roles in urban land registration. It is questionable whether the federal government can go beyond regulating land use rights in the regions and involve itself in the administration of the same. Moreover, this law has established a central institution to deal with activities in land registration, which is purely an issue of land administration.¹¹²

Land Lease in Industrial Parks

Land administration in federal industrial parks takes another instance of centralization. To lay the legal and regulatory foundations for the development and operation of industrial parks, the federal government enacted Industrial Parks Proclamation No. 886/2015 and Regulation No. 417/2017. According to Article 22(1) of the Proclamation, industrial park developers may possess industrial park land via lease system. Industrial park operators may possess and administer industrial park land acquired through agreement from industrial park developers. Industrial Parks Development Corporation (IPDC) is responsible to keep the lands it gets from regions through an agreement in its land bank and develop it or transfer to other industrial park developers.¹¹³

On this basis, once a regional states agrees to transfer the land to the federal government, it will lose their roles to administer land. The federal government via IPDC is responsible to develop the land itself, secure leasehold certificate

Rush. In Cochrane L & Andrews N (eds), *The Transnational Land Rush in Africa*, Palgrave Macmillan, 215 – 234.

¹¹⁰ Daniel Steudler. (2004). *A Framework for the Evaluation of Land Administration Systems* (PhD Dissertation, University of Melbourne).

¹¹¹ Habtamu Semahagne, *supra* note 6.

¹¹² Assefa Fiseha. (2017). Constitutional Adjudication through Second Chamber in Ethiopia. *Ethnopolitics*, Vol. 16(3), 295–313, p. 299.

¹¹³ Federal Democratic Republic of Ethiopia (2017) *Industrial Parks Development Corporation Establishment Council of Ministers Regulation*.

that enables it to do so from an appropriate regional institution. Also, the IPDC shall transfer land in leasehold from the land bank to another industrial park developer that has secured an investment permit. According to Article 10(3) of the regulation, following the conclusion of such leasehold, the industrial park developer shall get a leasehold certificate from the commission.¹¹⁴

Regulating Rural Land Administration and Use

To add another instance of power centralization in land administration, the Federal Rural Land Administration and Use Proclamation No. 1324/2024 shows a clear centralized law-making power in relation to land administration and use. The clear case is that even state governments regard legislative authority over land administration as an inherent prerogative of the national government, while the matter of law-making in matters pertaining to land administration falls to regional states.¹¹⁵ The Proclamation contains several matters that should have otherwise been entertained by the regional states. It, in detail, regulates issues pertaining to land administration. While the federal government shall enact framework legislation in relation to land, the situation within the new law is different, as the federal parliament follows the approach of determining the details of land administration within the law.

According to the Proclamation, regional states “shall issue detailed laws in conformity with this Proclamation”,¹¹⁶ meaning that any form of deviation by regional laws is not allowed. This can be found from the reading of Article 67(2) of the Proclamation: “No law, Regulation, Directive or Practice shall, in so far as it is inconsistent with this Proclamation, be applicable with respect to matters provided for in this Proclamation”. In all these cases, it is the federal government that controls every aspect of land administration leaving no room for regional states to administer their land.

Implications for Self-Determination and Land Rights

Centralization in land administration undermines public participation and consultation in matters where such engagement is essential,¹¹⁷ particularly in the context of self-determination and land rights. Meaningful participation and consultation are not only core democratic principles but also internationally recognized as fundamental human rights.¹¹⁸ These rights require the establishment of institutional mechanisms that enable community-

¹¹⁴ Ibid.

¹¹⁵ Habtamu Semahagne, *supra* note 6.

¹¹⁶ Regulation No. 417/2017, *supra* note 113.

¹¹⁷ Habtamu Semahagne, *supra* note 6.

¹¹⁸ Evans Baines-Johnson & İlhan Bilici. (2018). Participation and Development; A Critical Assessment. *Journal of International Social Research*, Vol. 11, 112–116.

level deliberations on the environmental, social, economic, and cultural implications of proposed projects. Without such mechanisms, affected communities are denied a voice in decisions that may significantly alter their lives and environments, thereby weakening the legitimacy and sustainability of land governance practices.¹¹⁹

Articles 18 and 19 of the UNDRIP are particularly significant in affirming the right of communities to participate in decisions that directly impact them. Article 18 states that indigenous peoples have “the right to participate in decision-making in matters which would affect their rights ... as well as to maintain and develop their own indigenous decision-making institutions”. Article 19 stipulates that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”. These provisions underscore the importance of ensuring meaningful participation and consultation of indigenous communities in governance processes, especially in matters that influence their rights and interests. The principle of free, prior, and informed consent is only effective when communities are genuinely involved in decision-making processes that concern them.¹²⁰

Centralized land governance has consistently undermined the participation and consultation of local communities.¹²¹ The process often lacks meaningful opportunities for local populations and other stakeholders to engage in decision-making. Centralization here poses a significant barrier to inclusive participation and transparent communication of government actions. Decisions made at the national level tend to be fewer representatives of local interests compared to those made by local authorities.¹²² This perspective is grounded in the argument that the closer decision-making bodies are to the people, the greater the likelihood of genuine participation.¹²³ Moreover, the influence of interest groups tends to intensify at higher levels of government,

¹¹⁹ Ibid.

¹²⁰ Agnieszka Szpak, *supra* note 49.

¹²¹ Muradu Abdo. (2014). *State Policy and Law in Relation to Land Alienation in Ethiopia* (PhD Dissertation, University of Warwick), p. 239.

¹²² Daniel Esty. (1996). Revitalizing Environmental Federalism. *Michigan Law Review*, Vol. 95(3), 570–653, p. 609.

¹²³ Delworth Gardner. (2001). Federalism and Agricultural and Resource Policy. In Racheter, D. P., & Wagner, R. E. (eds), *Federalist Government in Principle and Practice*, Kluwer Academic Publishers, p. 214.

leading to potential distortions in political decision-making.¹²⁴ In contrast, local-level governance not only enhances opportunities for public participation and consultation but also reduces the likelihood of undue influence by powerful interest groups, making the process more democratic and responsive to community needs.

Centralization in resource management undermines both accountability and representation in governance.¹²⁵ According to Anne Larson & Fernando Soto, local-level institutions tend to be more representative of, and accountable to, their constituents compared to national-level bureaucracies.¹²⁶ This distinction is particularly significant given that local governments are physically and socially closer to the communities they serve. Furthermore, when local authorities are granted limited control over natural resources, they are less likely to be motivated to manage these resources sustainably. In such cases, local officials may prioritize short-term economic gains over long-term conservation efforts.¹²⁷ In land governance too, without genuine decentralization of authority over land, local administrations and the communities they represent may lack the incentive to invest in the sustainable use and protection of land resources.

Empowering regional states on matters of local significance can enhance public participation and consultation in governance processes. Research indicates that local officials possess the contextual knowledge and on-the-ground experience necessary to effectively regulate land.¹²⁸ In contrast, the federal government is often physically and symbolically distant from local realities. Unlike federal officials, local authorities are embedded within the communities they serve and maintain closer ties with the population.¹²⁹ Consequently, when decisions regarding land administration are made at the central level, the constitutional rights of affected communities to participation and consultation are more likely to be compromised. Conversely, decentralizing land administration to the local level increases the likelihood that communities will be meaningfully consulted and involved in decision-making processes.

¹²⁴ Daniel Esty, *supra* note 122, p. 610.

¹²⁵ Anne Larson & Fernando Soto. (2008). Decentralization of Natural Resource Governance Regimes. *Annual Review of Environment and Resources*, Vol. 33, 213–239.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Vincent Ostrom. (1991). *The Meaning of American Federalism*, ICS Press, p. 1442.

¹²⁹ *Ibid.*

Fassil Zewdie observed that the federal-level adoption of economic and social development plans has significantly undermined the proper participation and consultation of local communities. For him, “the plan for large scale agricultural investment in the lowland areas and the resettlement programmes were implemented without participation/consultation of the people affected by them”.¹³⁰ Centralized land administration, particularly in the context of allocating land to corporate farms, has been carried out without sufficient engagement of the local communities.¹³¹

Ojot Ojulu also emphasized that the land allocation process in the Gambella National Regional State disregarded the constitutional rights of local communities to be consulted and to participate.¹³² This trend is not limited to one region; in other parts of the country, land has also been allocated for investment projects without adequate community consultation. An empirical study in Oromia indicates that “large-scale land transactions ... have caused considerable agrarian transformation involving massive land use change as well as land ... accumulation that resulted in the displacement of smallholders”.¹³³

As a result of centralized land administration, regional states and their populations face an increased risk of exclusion from the land governance process. This centralization has enabled the federal government to make unilateral decisions on critical land matters, effectively eroding the authority of regional governments. Muradu Abdo notes that centralized control over agribusiness land allocation plays a key role in the broader process of land alienation. While regional states claim certain land-related decision-making powers under the Constitution, the federal government continues to assert dominance over major economic decisions, including land transfers.¹³⁴ Similarly, John Markakis underscores that federal involvement in allocating land for investment purposes represents a clear departure from the decentralization of power envisioned under Ethiopia’s federal arrangement. This encroachment undermines both constitutional principles and the autonomy of regional states in managing their own land resources. According to Markakis, “...the process of leasing land touched the very core of the federal arrangement, since the main advantage of power decentralization from

¹³⁰ Fassil Zewdie, *supra* note 13.

¹³¹ Mesay Girma. (2015). *The Socio-Economic and Environmental Impacts of Large Scale Land Transfer* (MSc Thesis, Addis Ababa University), p. 69.

¹³² Ojot Ojulu, *supra* note 14.

¹³³ Moges Belay. (2025). The Spectacular Land Rush and its Consequences in Ethiopia. *Globalizations*, p. 13.

¹³⁴ Muradu Abdo, *supra* note 121, p. 13.

the viewpoint of the periphery was to give its communities a measure of control over their land ...".¹³⁵

At this stage, it is worth to note that the every form of federal involvement in land administration cannot be considered as inconsistent with Ethiopia's constitutional order and federal structure. As the federal system is based on the balance and synergy that involves *self-rule* and *shared-rule*, effective federal governance requires members of the federation to effectively coordinate in policy implementation, administrative consistency, safeguarding constitutional rights, and addressing matters that require horizontal and vertical harmony and cooperation. The issue is not thus whether the federal government should not play any role in land administration at all because its participation is necessary as long as it is consistent with the constitutional distribution of powers.

For instance, the federal government may legitimately support the realization of nationwide effective land and property governance. The potential roles of the federal government in this regard could include the following: the development of nationally harmonized technical standards for land administration; national land information systems and cadastral and registration standards; the facilitation of intergovernmental cooperation; the promotion of environmental sustainability; and ensuring the compliance of regional land administration with constitutional standards of equality, due process, and tenure security.¹³⁶ All these roles do not ordinarily involve direct administration of land at the regional level. There is indeed the need for federal intervention in making the land administration system effective, subject to the caveat against the creation of a centralized land administration system at the cost of regional autonomy, thereby undermining their right to self-determination. Such caveat is also necessary in undue over-centralization at regional state level that adversely affects grassroots empowerment at zonal, woreda, and community levels.

¹³⁵ John Markakis. (2011). *Ethiopia: The Last Two Frontiers*, Boydell & Brewer, p. 260.

¹³⁶ Adenew Taffa Ariti *et al.* (2019). The role of institutional actors and their interactions in the land use policy making process in Ethiopia. *Journal of Environmental Management*, 237, 235–246;

Temesgen Solomon Wabelo. (2020). Legal and Institutional Frameworks Regulating Rural Land Governance in Ethiopia: Towards a Comparative Analysis on the Best Practices of Other African Countries. *Beijing Law Review*, 11, 64–98.
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6.3 Dispossession and displacement

Ethiopia has been experiencing high levels of internal displacement, driven by a complex interplay of ethnic violence, political instability, and climate-related disasters.¹³⁷ Millions of people have been forced to flee their homes, with many facing protracted displacement and limited prospects for returning to their land or establishing alternative livelihoods. This ongoing crisis not only exacerbates humanitarian challenges but also raises serious concerns about land rights, resource access, and long-term social stability.¹³⁸

Ethiopia's land tenure system and its ethnic-based federal structure pose distinct challenges for IDPs seeking to reclaim lost land or access alternative resettlement options.¹³⁹ In particular, the land rights of non-indigenous groups within regional states remain precarious, as land is often closely tied to ethnic identity and claims of "native" status.¹⁴⁰ Although the nature and dynamics of internal displacement have evolved over time, data from 2022 indicates that more than 4.6 million people were forcibly displaced from their land.¹⁴¹ IOM's 2023 report shows that at the national level, about 3.46 million people are internally displaced, among which about 2.2 million had been displaced by conflict. The report documented more than 2.53 million returning IDPs, with Tigray and Amhara representing the largest returnee populations.¹⁴² These figures provide support to the argument that land and territorial questions remain central because of the displacement which highly threatens their ability to recover land, houses and productive assets.¹⁴³

One significant contributing factor has been disputes over land ownership and territorial claims between different ethnic groups within regional states. In this context, Bereket and Kiya observe that "while intended to promote the empowerment of ethnic groups in their respective regions, the reality of Ethiopia's three decades of ethnic-federalism has been a contributing factor in conflict and displacement. Conflicts have erupted over disputed land claimed by ethnically defined administrative authorities".¹⁴⁴

¹³⁷ Tadele Tesfaw. (2022). Internal Displacement in Ethiopia: A Scoping Review of Its Causes, Trends and Consequences. *Journal of Internal Displacement*, 12(1): 2–31.

¹³⁸ Ibid.

¹³⁹ Bewunetu Zewude & Getahun Siraw. (2024). Sustainable Integration of IDPs in Ethiopia. *Cogent Social Sciences*, Vol. 10(1).

¹⁴⁰ Mehari Belete, *supra* note 17.

¹⁴¹ Bereket Tsegay & Kiya Gezahegne, *supra* note 89, p. 3.

¹⁴² IOM. (2023). *Ethiopia-National Displacement Report 17: August-September 2023*. Displacement Tracking Matrix.

¹⁴³ Tadele Tesfaw, *supra* note 137.

¹⁴⁴ Bereket Tsegay & Kiya Gezahegne, *supra* note 89, p. 3

The competition over land has directly resulted in the displacement of numerous people.¹⁴⁵ As highlighted by Bereket and Kiya, for example, “the Afar-Somali border conflict primarily affected the Adaytu, Undufo, and Garba-Issa administrative areas. Since 2019, such clashes have displaced more than 150,000 individuals into the Sitti zone of the Somali region”. Likewise, internally displaced persons who have already been in resettlement sites face ongoing risks of further displacement. In Metekel and Wollega zones, for instance, there has been a significant threat of re-displacement, as hosting regional states invoke the Constitution's ethno-federal framework to deny resettled populations access to land, perpetuating cycles of vulnerability and insecurity.¹⁴⁶

Daniel Hailu argues that “as land is allocated and administered by ethnically defined regional governments, access becomes a function of ethnopolitical affiliation rather than legal equity”.¹⁴⁷ Local authorities often prioritize the interests of their ethnic constituencies, frequently at the expense of marginalized groups within the same region. This dynamic contributes to land-related conflicts, where minority groups or internal migrants are effectively excluded from fair access to land.¹⁴⁸ Although public and state land ownership is intended to promote equitable land distribution,¹⁴⁹ in practice, it has exacerbated ethnic tensions, fueled disputes over territory, and created conditions that facilitate the marginalization and forced displacement of vulnerable populations.¹⁵⁰

The displacement of so-called ‘non-natives’ often occurs through various mechanisms, primarily through the creation of tenure insecurity. Although the state formally owns all land and grants only usufruct rights, the security of these rights frequently hinges on one's ethnic identity and status within a regional state.¹⁵¹ As Daniel Hailu observes,

The intersection of ethnic federalism and public land ownership creates a structural contradiction: land, though constitutionally framed as a national resource, is controlled at the regional level by ethnically defined governments. This control transforms land into a political asset, used to consolidate local power, reward ethnic loyalty, and marginalise ‘outsiders’ within the region ... Larger and politically

¹⁴⁵ Id., pp. 20 – 21.

¹⁴⁶ Id., p. 4.

¹⁴⁷ Daniel Hailu, *supra* note 70.

¹⁴⁸ Ibid.

¹⁴⁹ Daniel W. Ambaye, *supra* note 72.

¹⁵⁰ Fasil Zewdie, *supra* note 13.

¹⁵¹ John Markakis, *supra* note 135

dominant ethnic groups can leverage their territorial and administrative control to attract investment and expand development projects, while smaller or landless groups face systemic exclusion.¹⁵²

Post-2008 land allocations aimed at attracting investment. These efforts sought to boost the economy by bringing in foreign currency, technology, and job opportunities. However, these initiatives have also generated unintended consequences. These include the displacement of smallholder farmers and indigenous communities. They have also led to increased ethnic tensions due to local populations losing access to their ancestral lands. For many ethnic groups, such dispossession undermines their right to self-determination by stripping them of control over their economic and cultural resources.

Another factor contributing to the displacement of ‘non-natives’ is their exclusion from local decision-making processes. Although the Constitution decentralizes land administration authority to regional states,¹⁵³ these governments often fail to adequately represent the interests of minority ethnic groups.¹⁵⁴ As a result, policies and practices tend to favor the ‘native’ ethnic majority, leaving minorities vulnerable to land dispossession. During periods of intensified ethnic nationalism or conflict, groups labeled as ‘non-native’ frequently become targets of exclusion, displacement and dispossession.¹⁵⁵

7. The Viable Path Forward

Daniel Hailu suggests three potential reforms to address the challenges of imbalanced federalism, land rights, and self-determination: liberalizing land tenure, recentralizing governance, and shifting to a geographic-based federal system with privatized land ownership. The *first reform* advocates for “liberalizing land tenure while retaining ethnic federalism”. Privatizing land would “foster economic freedom, encourage migration, and boost cross-regional investment while preserving cultural autonomy at the regional level”.¹⁵⁶ He further argues that land privatization could reduce the politicization of land by aligning economic rights with individual citizenship rather than ethnic identity. This reform agenda can indeed be viable as privatizing land can diminish political manipulation by securing ownership

¹⁵² Daniel Hailu, *supra* note 70.

¹⁵³ FDRE Constitution, *supra* note 10, Art. 52/(2,d); Habtamu Semahagne, *supra* note 6.

¹⁵⁴ Melese Chekol. (2017). Inclusion or Exclusion of Exogenous Political Communities at Local Level in Ethiopia. *Research & Reviews: Journal of Social Sciences*, Vol. 3(3), 196–201.

¹⁵⁵ Temesgen Halabo. (2019). The Politics of Ethnic Identity and Conflicts under Ethnic Federal System in Ethiopia. *Journal of International Politics*, Vol. 1(2), pp. 15–27.

¹⁵⁶ Danie, Hailu, *supra* note 70.

rights at the individual level. Private landowners would have greater security in their land rights, as ownership represents the most comprehensive form of property right, thereby limiting arbitrary interference by officials.

The *second reform option* calls for recentralizing land governance without altering the current system of state land ownership. Specifically, Daniel Hailu argues that land administration powers should be transferred back to the national government to “ensure uniform access and standards, minimizing the ability of regional elites to politicize land”.¹⁵⁷ However, he acknowledges that implementing this reform would be challenging, as it would require constitutional amendments and would likely encounter resistance from groups that view ethnic federalism as central to their identity and right to self-determination.

Recentralizing land administration may not be the most effective or sustainable solution.¹⁵⁸ Ethiopia's federal system has long been criticized for imbalanced power dynamics between the federal and regional governments. Over the years, federal intrusion into regional affairs has marginalized regional states, limiting their participation in agenda-setting and developmental planning.¹⁵⁹ Given this context, granting the federal government additional authority over land administration risks perpetuating, and even deepening, this existing imbalance of power between two levels of government thereby undermining the autonomy and interests of regional states.¹⁶⁰

In a federal system, when the federal government arrogates powers reserved for the states, it undermines constitutional supremacy. Such encroachment weakens the autonomy of each level of government. For a durable and effective federal structure, mutual respect, shared cooperation, and non-interference among the federation's members must be upheld. The federal system aims to ensure meaningful participation of people in governance, particularly at the grassroots level. Recentralization of land administration risks weakening this principle by concentrating decision-making authority at the federal level, thereby reducing opportunities for local

¹⁵⁷ Ibid.

¹⁵⁸ Jorg Broschek. (2016). Federalism in Europe, America and Africa. In Watts RH & Tayao E (eds), *Federalism and Decentralization*, Local Government Development Foundation, P. 45.

¹⁵⁹ Nigussie Afesha. (2016). The Ethiopian Constitutional Promises to the Nation and Nationalities: The Myth and the Operational Reality. *Bahir Dar University Journal of Law*, Vol. 6(2), 225–261, p. 367.

¹⁶⁰ Habtamu Semahagne, *supra* note 6.

communities to engage in decisions that directly affect their control over land and livelihoods.¹⁶¹

A more effective approach towards addressing these challenges is to pursue further decentralization of power, while simultaneously holding state governments accountable for enforcing the land rights of ‘non-native’ communities fairly and consistently. This requires revising regional land administration and land use laws, as well as constitutional provisions that currently grant exclusive land ownership rights to ‘natives’ within regional territories. Legislative reforms alone will not be sufficient; the practical implementation and protection of the land rights of ‘non-native’ communities must also be prioritized to ensure equitable access and prevent marginalization.

While recentralization may compromise regional autonomy, the *third reform option* offers a more structural solution that addresses both land ownership and federal organization. Specifically, Daniel Hailu proposes “privatizing land and shifting to a geographic-based federal system”. Although he acknowledges that this approach could streamline governance and foster economic growth, he also warns that it carries the risk of provoking ethnic backlash by weakening the autonomy protections that are vital to regional identity and self-rule.¹⁶²

The federation is witnessing a growing tension between collective self-determination and equal citizenship within the Ethiopian federal project. As discussed in the preceding sections of this article, the empowerment of regional states in the realm of land administration is an important condition where the NNPs exercise their right to self-administration. Likewise, the rights to equality, freedom of movement, and equal protection of the law require that access to public resources may not be restricted because of ethnic origin or historical settlement.¹⁶³ This article does not argue that regional states’ power over land administration should be replaced by centralized federal control. It rather strongly argues that the right to self-determination should not be construed as permitting exclusionary practices that undermine the constitutional rights of Ethiopian citizens residing outside their region of ethnic affiliation. Similarly, the federal system should not be practiced in a manner that undermines the autonomy of regional states.

¹⁶¹ Ibid.

¹⁶² Daniel Hailu, *supra* note 70.

¹⁶³ FDRE Constitution, *supra* note 10, Arts. 25, 32 and 40

There is thus the need to focus on the development of legal and institutional safeguards capable of protecting both regional autonomy as well as equal citizenship. Accordingly, regional states shall retain the authority to administer land while strictly adhering, *inter alia*, to equality, non-discrimination, due process, and freedom of movement.¹⁶⁴ On the other hand, the central government can continue in its role to enact laws on the utilization and conservation of land provided that such laws do not undermine self-rule, which is, a foundation of Ethiopia's federal order. Overall, a key challenge within the federal project is the absence of institutional mechanisms that can ensure that decentralized authority is not undermining the guarantees for equal citizenship.¹⁶⁵ A working federal system requires institutions that preserve regional autonomy in land administration, protect constitutional rights to land, and contribute to the realization of the constitutional objective of establishing one economic community.

8. Conclusion

The right to self-determination is inherently and deeply linked to the protection and realization of land rights. This connection is not merely incidental but forms a foundational aspect of peoples' ability to freely determine their political status and pursue their economic, social, political and cultural rights. In this regard, for indigenous peoples and ethnic minorities in particular, control over land is tantamount to the exercise of their shared identity and autonomy.

The Ethiopian federal system involves a complex interplay between federalism, land rights, and the constitutional right to self-determination. This article has examined the intersection of these elements, revealing significant ambiguities in the country's land ownership regime, the (re)centralization tendencies that affect local level participation, the emergence of a 'native' versus 'non-native' dichotomy, and the resulting patterns of displacement and dispossession. These dynamics reflect a persistent imbalance rooted both in the legal framework and its operation.

While the right to self-determination is widely recognized in international law and fairly enshrined in the Constitution, regional state constitutions and rural land administration laws often discriminate against the perceived 'non-native' communities. Likewise, the (re)centralization of power at the national level has further undermined the realization of self-determination. As

¹⁶⁴ Id. Arts. 25, 32 and 40.

¹⁶⁵ Melese Chekol, *supra* note 154.

authority shifts away from local communities, opportunities for meaningful participation in decisions that affect their interests continue to diminish.

This shows the need for strengthening participatory governance and enhancing local autonomy. Although the federal system is designed to decentralize power, it often exhibits centralizing tendencies. Genuine self-determination over land requires meaningful local decision-making authority. To achieve a more balanced federal arrangement, the current (re)centralization of land administration must be addressed. A deeper devolution of power should be pursued, provided that it does not undermine efforts to build and sustain the constitutional pursuit of “one economic community”. Monitoring regional activities is essential to ensure the effective protection of self-determination and land rights within each regional state.

The discussion in the preceding sections further shows the need for the establishment of minimum legal standards for equality and non-discrimination in land allocation and access. The autonomy of regional states in land administration should continue to constitute an essential component of self-determination. However, regional land legislation and administrative practices should strictly observe the constitutional guarantees of equality, non-discrimination, and freedom of movement. The laws and administrative practices shall ensure that access to land-use rights, administrative services, and legal protection cannot be denied primarily on the basis of ethnic identity or origin. Such reforms would not undermine multinational federalism but would reinforce the right to equality enshrined within the Constitution.

It is also necessary to reform land ownership and enhance tenure security, particularly for ‘non-native’ communities. This requires clarity in the respective roles of the state and communities within the existing framework. Such clarity is essential to harmonize federalism, land tenure, and the right to self-determination in both principle and practice.

The adoption of a comprehensive land policy is another essential intervention. The inconsistency in the regulation and application of land governance across regional states is partly related to the absence of a comprehensive national land policy that articulates principles applicable across the federation alike. A national land policy does not undermine the power of regional states to administer land within their administrative boundaries. Instead such policy would, *inter alia*, establish nationally agreed principles concerning tenure security, equality, transparency, sustainable land management and intergovernmental cooperation while allowing regional governments to freely exercise their constitutional mandates. ■

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SDG 8 on Decent Work through the Lenses of the National Industrial Court of Nigeria Decisions: Quo Vadis?

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Abstract

The Sustainable Development Goal 8 (SDG8) is aimed at attaining “full and productive employment and decent work for all” by 2030. Members of the United Nations (UN) are enjoined to adopt laws and policies that facilitate the realisation of SDG 8 and where employment practices impinges on it, the courts of the affected jurisdiction decision, should promote its realisation. Pursuant to section 254C (1) and (2) of Nigeria’s Constitution (Third Alteration) Act, 2010 the National Industrial Court of Nigeria (NICN) is vested with exclusive original civil jurisdiction over a wide range of labour/employment disputes. There is thus the need to examine the extent to which adjudication of claims by the NICN has advanced the attainment of decent employment in Nigeria, including termination of employment, discrimination, trade unionism, and employee compensation. This article adopts a doctrinal method in interrogating the strides of the NICN towards the attainment of SDG8, particularly from 2010, when it became a superior court of record. The article further examines the legal and institutional constraints that adversely affect the NICN’s strides towards promoting SDG8, particularly and loopholes. The NICN, through judicial foresight and its evolving jurisprudence of employee protectionism, amid pushback from the Court of Appeal, has significantly advanced the actualisation of SDG8 by abolishing several unfair common law employment doctrines/principles. It has also mainstreamed International Labour Organisation (ILO) standards into Nigeria’s labour sphere through purposive interpretation and application of the Constitution (Third Alteration) Act, 2010. Upward attitudinal change is necessary with regard to the quantum of damages awarded, review of existing obsolete laws and sustained activism by the NICN to consolidate its SDG8 achievement strides.

Keywords: Casualisation of labour, decent employment, deemed confirmation, labour justice, National Industrial Court of Nigeria, SDG8

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1. Introduction

The United Nations (UN) aims at global development, peace and prosperity, and it adopts measures towards the realisation of its aims and objectives.¹ In September, 2015, as part of the 2030 global agenda for sustainable development, the UN launched the Sustainable Development Goals (SDGs) as a replacement for the Millennium Development Goals (MDGs).² The SDGs comprise 17 (seventeen) goals cutting across themes on politics, social, economic, environmental, labour, women, climate change, education, etc.³ Every UN member State is expected to adopt policies and implement programmes geared towards the actualisation of the SDGs.⁴ Goal 8 of the SDGs deals with decent work/employment, and it is championed by the International Labour Organisation (ILO), which is a UN special agency and the global labour vanguard.

¹ Rawa Amalkky. (2023). The Role of International Organisations in the Development of International Law: An Analytical Assessment of the United Nations. 9(4) *International Journal of Law*, 44-60.

² Jerin Jacob. (2025). A Background History of the Sustainable Development Goals. 33(3) *Sustainable Development*, 3747-3759.

³ Robert Doya Nanima. (2021). Towards the Realisation of SDG 16.3 on Access to Justice: Contextualising the Role of the ACERWC. 22(3) *ESR Review* 4-9.

⁴ Ese Eunice Anenene & Olawale Oyewole. (2019). Towards ensuring the Realization of Sustainable Development Goal 16 by Governments in Nigeria: The Role of the Archives. 1 *Comma*, 29-36.

The aim of SDG8 is to promote decent work/employment by ensuring that labour policies, legislation and regulations (adopted by Member states) promote human and humane employment practices beneficial to all contracting parties and ultimately, the society in general. This requires that rights and privileges of employees especially, the vulnerable ones are protected, termination of employment is not arbitrary, security of employment is guaranteed, working conditions are fair, just and humane, collective bargaining is recognised and collective agreements are sanctioned, the right to join or form trade union of one's choice is recognised and protected, mobility of labour is encouraged, and the expectation of the employer to profit is recognised and adequately protected in a symbiotic manner.⁵ The recognition, protection and promotion of these civilised indicia, culminating in decent labour/employment, often result in disputes between employers and employees, which require judicial and administrative resolution.

Nigeria is a member of the UN as well as the ILO. In order to ensure that labour, employment and ancillary disputes pertaining to the world of work in Nigeria are resolved, the government of Nigeria, through the legislature, created the National Industrial Court of Nigeria (NICN) as a specialised court with the mandate and power to adjudicate over labour and employment disputes.⁶ Since its creation, the NICN has evolved through a tumultuous journey into a formidable first-instance judicial forum for the settlement of labour and employment disputes in Nigeria.⁷ However, it was in 2010 when the Constitution (Third Alteration) Act, 2010 (which amended the Constitution of the Federal Republic of Nigeria, 1999) was enacted that the NICN statutorily emerged victorious from the constitutional and jurisdictional travails which had bedevilled it since its creation.⁸

As a superior court with specialised status and powers, the determination of the NICN is not only profound but also binds parties who litigate before it. Thus, the NICN is constitutionally empowered to shape the labour and employment legal landscape of Nigeria through its pronouncements on cases

⁵ Kehinde Mary Bello & Fisayo Fagbemi. (2024). Unemployment and Decent Work in Nigeria. In Walter Leal Filho, Ismaila Rimi Abubakar, Izael da Silva & Rudi Pretorius Eds, *SDGs in Africa and the Middle East Region: Implementing the UN Sustainable Development Goals* Springer, Cham, 871-887.

⁶ Fred Agbaje. (2007). The Legal and Constitutional Anatomy of the New Industrial Court Act (2006). 1(1) *Labour Law Review*, 73-78.

⁷ *Ibid.*

⁸ Bimbo Atilola (2012). "National Industrial Court of Nigeria and Exclusive Jurisdiction on Labour, Trade Union and Employment Related Matters under the Third Alteration Act: A Review of NUT, Niger State v COSST, Niger State. 6(2) *NJLL&IR* 1-12.

adjudicated by it.⁹ Based on this, the questions are: since 2010, after the NICN experienced a constitutional rebirth, how has its adjudicatory stance advanced the protection, promotion and realisation of SDG8 in Nigeria? What are the factors militating against the effectiveness of the NICN towards advancing SDG8, and what is the leeway? What roles can stakeholders such as the government, trade unions, employees' rights groups, etc. perform to enhance the effectiveness and efficiency of the NICN towards maximal realisation of SDG8 in Nigeria? These questions form the crux of this article.

This article adopts doctrinal method and relied on primary sources such as the Constitution of the Federal Republic of Nigeria, 1999, National Industrial Court Act, 2006, Labour Act, 2004, Employees Compensation Act, 2010, National Industrial Court (Civil Procedure) Rules, 2017, Caselaw and secondary sources such as standard labour law textbooks, online materials, newspaper publications, and articles in learned journals. These data were subjected to content and jurisprudential analysis on the various themes, wherein findings were made, conclusions were drawn, and suggestions were proffered as solutions to the research questions.

The next section takes a graphic chronicle of the developmental odysseys of the NICN. Section 3 focuses on explicating the nuances of decent employment as the fulcrum of SDG8. Section 4 of the article critically examines the stance of the NICN through its decisions (particularly from 2010 to 2026) geared towards the protection, promotion and realisation of SDG8 in Nigeria, highlighting militating factors as well as advancing leeways. Section five highlights the conclusion and the way forward based on the discussion.

2. The Developmental Journey of the National Industrial Court of Nigeria

Necessity is said to be the hub of invention, and this is true about the developmental journey of the NICN. Prior to the advent of colonialism, labour and employment relations in Africa and, in particular, the geographical entity today known as Nigeria, were organised through a cooperative labour system and not wage labour.¹⁰ Thus, through colonialism, the British introduced wage labour as opposed to the cooperative labour system which was subsisting in

⁹ Id., p. 4.

¹⁰ Oladosun Ogunniyi. (2004). *Nigerian Labour and Employment Law in Perspective*, 2nd Ed, Ikeja, Folio Publishers Ltd., 1.

Nigeria.¹¹ Typically, in an employment relationship, there is a vested interest. While the employer seeks to maximise profit, the employees push for enhanced terms and conditions of employment, and often, there is a clash of these interests, resulting in conflict.¹² The occurrence of such conflict should not degenerate into the determination of the relationship. Being aware of this, the colonial government put in place a legal framework for the settlement of labour and employment disputes by the promulgation of the 1941 Trade Dispute (Arbitration and Inquiry) Ordinance, meant to regulate the settlement of labour/employment disputes within Lagos and its environs.¹³

The identified shortcoming of the Ordinance was that it was made applicable to Lagos and its environs and had no permanent adjudicatory/settlement structure for the settlement of trade disputes, but made use of *ad hoc* settlement structures. This Ordinance introduced the British government trade dispute governance pattern of non-interventionism that only allows the government to intervene in the settlement of a trade dispute at the behest of the parties or either of them.¹⁴ Thus, in 1957, in an effort to assuage the defects associated with the 1941 Ordinance, another Ordinance known as the Trade Disputes (Arbitration and Inquiry) Federal Application Ordinance was promulgated.¹⁵ At the time this Ordinance was promulgated, the pangs of independence were strong on Nigeria. By the 1st of October, 1960, Nigeria gained political independence from Britain and was technically cut off from her political *cum* administrative apron strings through the establishment of an autochthonous government as well as the 1963 Republican Constitution. Unfortunately, the Nigerian government soon ran into troubled waters when, on the 6th day of July, 1967, the Civil War started and ended on the 15th day of July, 1970.

Due to the impact of the war, the hitherto British-introduced non-interventionist pattern of trade dispute settlement became impracticable to enable the government to navigate economic recovery and wealth creation.¹⁶

¹¹ David T Eyongndi. (2024). Trade Unions and Judicial Exposition on the Practice of Casualisation of Labour in Nigeria. (A PhD Thesis submitted to the Postgraduate School, University of Ibadan) 2.

¹² Clinton Uranta (2012). *The Nigeria Labour Movement*, Ikeja, Daily Labour Publications Ltd., 2012, 114.

¹³ The Trade Disputes (Arbitration and Inquiry) (Lagos) Ordinance 1941.

¹⁴ Offornze D Amucheazi & Paul U Abba. (2013). *The National Industrial Court of Nigeria: Law, Practice and Procedure*, London, Wildfire Publishing House, 45.

¹⁵ *Ibid.*

¹⁶ Babatunde A Adejumo. (2008). The Role of the National Industrial Court in Dispute Resolution in Nigeria. (Faculty of Law Public Lecture of University of Abuja organized by the Law Student Association of Nigeria, UNIABUJA Chapter, 15 September, 2008).

In order to lay down a regulatory framework for the management and settlement of trade disputes post-civil war, the Federal Military Government (FMG) promulgated two Decrees. They are the Trade Disputes (Emergency Provisions) Decree,¹⁷ and the Trade Disputes (Emergency Provisions) Amendment Decree.¹⁸ The 1969 Decree, apart from outlawing strikes and lockouts with the punishment of an imprisonment term without the option of a fine, mandated parties to report, within fourteen days of its occurrence, such a strike/lockout to the Inspector General of Police (IGP).¹⁹ This Decree, realising the need to create a permanent tribunal for the settlement of trade disputes, established the Industrial Arbitration Panel (IAP) charged with the responsibility of settling trade disputes.

Further reforms in the trade disputes settlement and labour management mechanisms were made upon the promulgation of the Trade Disputes Decree No. 7 of 1976. Section 20 of this Decree (which subsequently transmogrified into the Trade Dispute Act, 2004) established the National Industrial Court (NIC) as a specialised court with exclusive original civil jurisdiction over labour, employment and ancillary matters.²⁰ Under the TDA, 2004, the National Industrial Court (NIC) was created; and at present, it is known as the National Industrial Court of Nigeria (NICN) pursuant to the Constitution (Third Alteration) Act, 2010. This article uses the acronym NICN (instead of NIC in some instances and NICN in others) while referring to the court for congruity's sake.

The NICN under the Trade Disputes Decree No. 7 of 1976 grappled with the overbearing interferences of the Minister of Labour, Employment and Productivity (MLEP) as only through the Minister's referral could matters be adjudicated by the NICN except direct access granted to litigants/disputants pertaining to disputes having to do with the interpretation of the award of the

¹⁷ No. 21 of 1968.

¹⁸ Amendment No. 2 of Decree No. 53 of 1969.

David T Eyongndi & Stephen I Ilesanmi (2022). Territorial Jurisdiction of the National Industrial Court of Nigeria (NICN) and the requirement of Endorsing Originating Processes under the Sheriffs and Civil Process Act (SCPA) Determined. 9(2) *Journal of Comparative Law in Africa*, 162-178;

²⁰ Brown E Umukoro & Peter A Oboreh (2022). Is the National Industrial Court (NIC) Still a Special Court? A Review of the Extra Luggage of Ancillary Jurisdiction of the NIC as a Disservice to Labour Justice. 13 *Beijing Law Review*, 948-966;

See also, Temple Adawari M Damiari. (2020). Revisiting the Controversies on the Jurisdiction of National Industrial Court of Nigeria over Labour-Related Human Rights Matters. 3 *National Journal of Labour and Industrial Law*, 35;

Andrew E Abuza. (2008). An Examination of the Jurisdiction of the National Industrial Court in Nigeria. 2(4) *Labour Law Review*, 7-34.

IAP or interpretation of a collective agreement.²¹ Section 20(3) of the TDA, 2004 provided that no appeal shall lie to anybody or person from the determination of the NICN. Section 20(4) provided that notwithstanding the provisions of subsection (1) or (3), nothing in the section shall prejudice any jurisdiction conferred on the Supreme Court of Nigeria (SCN) in respect of appeals from the decision of the Court of Appeal (CA) on fundamental rights matters pursuant to section 259 or 213 (2) (c) of the 1979 CFRN or any jurisdiction of the High Court under section 42 (now section 46 of the 1999 CFRN) of the same Constitution.

The NICN here had (and exercised) exclusive original and non-appealable jurisdiction over labour matters with the narrow exceptions of the appellate jurisdictions of the Court of Appeal and Supreme Court. However, when the Constitution of the Federal Republic of Nigeria, 1979 was enacted, the NICN was conspicuously omitted from the list of constitutionally mentioned courts, thereby making the constitutionality of the NICN and its expansive exclusive original civil jurisdiction controversial.²² Hence, the Trade Disputes (Amendment) Decree No. 47 of 1992 was promulgated with curative effect, whereby it elevated the NICN to the status of a Superior Court of Record (SCR)²³ whereof, the NICN became equal in status with the High Court and Federal High Court.

When the Constitution of the Federal Republic of Nigeria, 1999 (CFRN, 1999) was enacted, the NICN was once again omitted in section 6(5) (a)-(k), and the omission caused it to be regarded that the NICN was not a constitutionally recognised court and its exclusive original civil jurisdiction under Decree 47 of 1992 was usurpation of the jurisdiction of the State High Court, Federal High Court and the High Court of the Federal Capital Territory, Abuja pursuant to sections 272, 251 and 256 of the CFRN, 1999. To address this issue, the National Industrial Court Act, 2006 (NIC Act, 2006) was enacted, but it was unable to resolve the jurisdiction *cum* constitutionality quagmire of the NICN since it was not a Constitution amendment Act but an

²¹ Rule 13 of the National Industrial Court Rules 1979.

²² *Western Steel Workers Ltd. v. Iron and Steel Workers Union of Nigeria (No. 2)* [1987] 1 NWLR (Pt. 49) 284 at 303; *Kalango & Ors. v. Dokubo & Ors.* [1987] 1 NWLR (Pt. 49) 248; (2004) NLLR (Pt. 1) 180.

²³ Akintunde Emiola. (2008). *Nigerian Labour Law*, (Emiola Publishers, Ogbomosho, Nigeria) 481.

ordinary Act of Parliament.²⁴ As a result, the problem persisted therefore making its redress imperative.

To finally resolve this impasse, the Legislature in 2010 amended the CFRN, 1999, through the Constitution (Third Alteration) Act, 2010. Section 1 of the 1999 CFRN (Third Alteration) Act, 2010, altered section 6(5) of the CFRN, 1999 by inserting a new paragraph cc- the National Industrial Court. Hence, section 254A (1) of the Constitution (Third Alteration) Act, 2010 provides that there shall be a National Industrial Court of Nigeria, while subsections 2 (a) and (b) thereof provide for the composition of the NICN. Section 254C(1) confers an expansive original civil jurisdiction on the NICN over labour, employment and ancillary matters.²⁵ Civil appeals from the decisions of the NICN lie to the Court of Appeal either as of right or with leave, and the determination of the Court of Appeal of such appeals is final, as was held by the Supreme Court in *Skye Bank Plc. v. Victor Anaemem Iwu*.²⁶

Judging from the foregoing, one can safely assert that the NICN's developmental odyssey has been a tumultuous one which is now finally settled. At present, the NICN has engaged in purposive and egalitarian adjudication of labour and employment matters, revolutionising employment practices by striking down anachronistic common law doctrines that have perpetuated sheer injustice over the years.²⁷ It has evolved the jurisprudence of employee protectionism, bolstering decent work/employment while recognising the need to mutually protect labour and capital.

3. Explicating the Nuances of SDG8 in Nigeria against ILO Prescriptions

The concept of decent work/employment is associated with the ILO. With specific focus, it was in 1999 that the ILO institutionalised decent work based

²⁴ *National Union of Electricity Enterprises v. Bureau of Public Enterprises* (2010) 3 SCM 165 at 167; *Oloruntoba-Oju & Ors. v. Dopamu & Anor* (2008) 4 SCM 128; *Attorney General of Oyo State v. Nigeria Labour Congress* [2003] 8 NWLR (Pt. 821) 1

²⁵ Afolasade A Adewunmi. (2013). The National Industrial Court and the Prospects of Efficient Industrial Conflict Resolution in Nigeria. 7(3) *Nigeria Labour Law Review*, 1-19.

²⁶ [2017] 7 SC (Pt. 1) 1;

Philip E Oamen & Tijani A Abdul-Hakeem. (2013). The Constitutional Jurisdiction of the National Industrial Court: The Unsettled Exclusive Question. 3 *Ambrose Ali University Law Journal*, 12.

²⁷ *Aloysius v Diamond Bank Plc.* [2015] 58 N.L.L.R. (Pt. 199) 92, *Sahara Energy Resources Ltd. v Oyebola* (2020) LPELR-51806 (CA); David T Eyongndi, and Adekunbi Imosemi (2023), *infra* note 37.

on the report of its former Director General to the 1999 International General Conference of the ILO.²⁸ Decent work as a concept is not ubiquitous, it evolved to ensure egalitarianism in employment ensuring that work and working conditions are humane, fair, just and mutually beneficial to the parties and promotes societal progress. Somavia defines decent work as productive work in which rights are protected, which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have access to income-earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and sound standards.²⁹ He indicated that one of the objectives of ILO Member Countries should not only be to create jobs but to create jobs with acceptable quality.

In 2008, the ILO Decent Work Report presented in 1999 was formally adopted after tripartite consultation and resolution as a part of the ILO Declaration on Social Justice for a Fair Globalisation.³⁰ The ILO has noted that decent work is not just about getting a job.³¹ It involves work opportunities that are productive and deliver a fair income, security in the workplace and social protection for families. Where there is a lack of decent work, there is also poverty, inequality, social tension or outright social conflict. The concept of *decent work* stands against work that traps people in bondage or poverty or exposes them to hazards, discrimination or insecurity, does not allow individuals or the economies they are part of to advance and fulfil their potential.³² Based on continued clamour and promotion of the

²⁸ Juan Somavia. (1999). "Report of the Director-General: Decent Work" presented at the 87th Session of the International General Conference of the International Labour Organisation, Geneva, June 1999
<https://webapps.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>
 Accessed 11 February, 2026.

²⁹ Ibid.

³⁰ ILO.Org, "ILO Declaration on Social Justice for a Fair Globalization"
<https://www.ilo.org/resource/ilo-declaration-social-justice-fair-globalization> Accessed 11 February, 2026.

³¹ Iroye Samuel Opeyemi, Tonbara Mordi & Chima Mordi. (2023). The Legal Regulations of Employment Relations and Conflicts in Nigeria. In Chima Mordi, Hakeem Adeniyi Ajonbadi, and Olatunji David Adekoya Eds, *Employee Relations and Trade Unions in Africa: A Critical Approach* Cham, Palgrave Macmillan, 175-191.

³² International Labour Organization (2024). *Responding to Globalization: The Decent Work Agenda*
<https://www.ilo.org/resource/article/responding-globalization-decent-work-agenda>
 Accessed 11 February, 2026.

ideals of decent labour globally and the imperativeness of achieving it, the UN incorporated it into its Agenda 2030 on Sustainable Development Goals, and SDG 8 focuses on decent work and economic growth.³³

The ILO decent work agenda, which is a framework to promote work opportunities that is productive, delivers a fair and competitive income and it ensures social protection for workers and their families. It is aimed at fostering personal development, social integration and equal treatment for all workers in a workplace that fosters social dialogue. Its four integrated pillars are: promoting jobs and enterprise, guaranteeing rights at work, extending social protection, and promoting social dialogue.³⁴ These four pillars, which are the litmus test for testing the decency of a particular work, are not mutually exclusive. That is, all of the indicia of each pillar need not be mandatorily present for an employment to be classified as decent, but a significant number of the indicia should be present.

For instance, work that delivers fair income, social security, safe workplace can be regarded as decent even if its continuity is apparently not guaranteed. Thus, these pillars of decent employment, from their characteristic nature, require that every employment recognises and promotes basic employment rights as recognised by the ILO. These four anchorages of decent work are complemented by the essential need for gender equality, which is a cutting theme necessary for the realisation of UN Agenda 2030. In fact, decent work is a catalyst for sustainable economic and human capital growth.

The first two components of decent work (adequate opportunity and remuneration) are social security components, while the two others (safety at the workplace and healthy workplace) are the social relations component of decent work/employment. The pillar of promoting job and enterprise focuses on creating sustainable, productive and freely chosen employment; encouragement of entrepreneurship and skill acquisition/development geared at promoting sustainable economic growth. The pillar of guaranteeing rights at work focuses on ensuring that the rights of employees are recognised and protected during the course of employment; hence, it emphasises the non-transactional nature of labour while at the same time protecting capital. Thus, this pillar ensures that employees are not exploited by the refusal of basic

³³ Kehinde Mary Bello & Fisayo Fagbemi, *supra* note 5, pp. 871-887.

³⁴ Luqman Raimi. (2020). Transitioning to Decent Work and Economic Growth in Sub-Saharan Africa: Implications for the Attainment of Sustainable Development Goal 8. 20(6) *Global Journal of Human-Social Science: E Economics* 23-31.

workplace rights and benefits such as equal pay for equal work, maternity leave and pay protection, freedom of association, protection against indiscriminate termination, security of tenure/employment, etc.

The pillar of extending social security seeks to provide safe conditions, especially physical, income security, pension and healthcare coverage to all employees, especially those in the formal sector, while the social dialogue pillar seeks to entrench in the world of work strong, independent negotiation between employers and their employees in decision-making, participation in management and collective bargaining aimed at promoting industrial harmony.

These components foreground, and with the complementary stance of gender equality and non-discrimination, enhance the realisation of decent work/employment whether in the formal or informal sector. One of the ways the ILO has pursued its decent work/employment agenda is by the promotion of standards and fundamental principles and rights at work. This is done by the adoption of ILO Conventions and Recommendations. While ILO Conventions are international legal instruments that become binding and enforceable against a Member state after ratification and domestication (where the Member is a dualist state), the ILO Recommendations are non-binding instruments, often dealing with the same subject as Conventions, which set out guidelines orienting national policy and action, which become binding once domesticated. The contents of these legal instruments contain what has come to be known as international labour standards and best practices in labour which gains widespread application through repeated usage/adoption and reliance by policy makers or courts of member states.

Thus, decent work/employment demands that the termination of employment is not flagrant/arbitrary but for just and justifiable cause. Hence, the common law position that in a simple contract of employment, the employer can terminate the employment for no reason at all or any reason (right or wrong) upheld by the Supreme Court of Nigeria in *Oforishe v Nigerian Gas Company Ltd*,³⁵ is an anathema to decent work/employment.³⁶ The ILO, in realisation of the injustice that such a position perpetuates, has advanced the ideal position that termination of employment should be hinged

³⁵ [2018] 2 NWLR (Pt. 1602) 35.

³⁶ Gbenga Ojo (2007). Legal Redress for Unlawful Termination of Employment: It is Time to Call a Spade a Spade. 1 (3) *NJLL & IR* 7-8.

on a reason which is confined to the operational needs of the enterprise, or inability of the employee to perform (incompetence).³⁷

In advancing decent work/employment, certain ILO Conventions have come to be described as core/fundamental because they serve as a catalyst for the realisation of decent work/employment. These Conventions are set out in the ILO Declaration on Fundamental Principles and Rights at Work, which was adopted by the International Labour Conference in June 1998. Some of these conventions include Freedom of Association and Protection of the Right to Organise Convention No. 87, 1948 and Right to Organise and Collective Bargaining Convention No. 98, 1949, Abolition of Forced Labour, Convention No. 105, 1957, Forced Labour Convention No. 29, 1930; Minimum Age Convention No. 138, 1973, Worse Forms of Child Labour Convention No. 182, 1999, Equal Remuneration Convention No. 100, 1951; and Discrimination (Employment and Occupation) 1958. These Conventions deal with subjects revolving around the effective abolition of child labour, protection of the right of freedom of association and recognition of the right to effective collective bargaining, effective elimination of all forms of force/compulsory labour, protection of wages and equal remuneration for equal work done, and elimination of discrimination in respect of employment and occupation.³⁸

Globally, freedom of association, explicated in the right to form or join a trade union of one's choice, is a core labour right.³⁹ Pursuant to this right,

³⁷ David T Eyongndi & Adekunbi Imosemi. (2022). Aloysius v. Diamond Bank Plc: Opening a New Vista on Security of Employment through the Application of International Labour Organisation Conventions. 31(1) *African Journal of International and Comparative Law* 356-376.

³⁸ Temitope M Fapohunda. (2012). Towards improved Access to Full Employment and Decent Work for Women in Nigeria. 2(8) *International Journal of Humanities and Social Science*, 104-112.

³⁹ Ovunda VC Okene. (2007). The Right of Workers to Strike in a Democratic Society: The Case of Nigeria. 17 *Sri Lanka Journal of International Law*, 193-221;
Bokolo PS Giame, Ufuoma V Awhefeada & Omerionwan K Edu. (2020). An Overview of the Right to Strike in Nigeria and Some Selected Jurisdictions. 11(2) *Beijing Law Review*, 464-488;
Odunola A Orifowomo. (2004). An Appraisal of the Right to Strike under Nigerian Labour Laws. 1 *Ife Juris Law Review*, 380-391;
Israel Nsitelem E Worugji, & James A Archibong. (2009). The Repressive Face of Law to Strike in Nigeria: Hope for Industrial Peace 7(2) *Journal of Commonwealth Law and Legal Education*, 101-120;
David T Eyongndi. (2017). The Right to Strike under Nigerian Labour Law: The Need to Delineate the Meaning of Right. 5(1) *Akungba Law Journal* 87-107.

trade unions, on behalf of their members, engage in collective bargaining with employers or employers' unions, whereupon collective agreements are reached.⁴⁰ At common law, collective agreements (CAs) are inherently unenforceable, regarded as mere gentleman's agreements only binding in honour due to lack of *consensus ad idem* and privity of contract.⁴¹ Of course, this position clearly and always prejudices the employee and does not therefore support decent employment.⁴²

However, ILO's position regarding international best practice and international labour standard in relation to the bindingness and enforceability of collective agreement⁴³ based on ILO Conventions 87 and 98 and Article 3 of the ILO–Collective Agreement Recommendation, 1951 (No.91)⁴⁴ is that, once reached, a CA is binding and enforceable between the signatories and their privies without need for any other step whatsoever to be taken.⁴⁵

Thus, decent work/employment would require that employees be treated with decency. While common law requires that where an employment contract has stipulated the period of notice to be given for the termination of an employment, where there is wrongful termination, the expectation is that, the damages to be awarded will be the equivalent of the stipulated notice period. However, the termination of an employment contract may do more to an employee than merely bringing to an end the relationship and the benefit accruable therefrom. For instance, the termination of an employee's contract could affect their prospect of securing another job or expose them to ridicule. Where the termination is proven to be wrongful, entitling the affected employee to damages, the circumstances of the termination and its impact on an affected employee can render inadequate damages equivalent to the agreed notice period. In such a situation, the tenets of decent work/employment

⁴⁰ Gogo George Otuturu. (2006). The Enforceability of Collective Agreements in Nigeria: A New Approach. 4(2) *Nigerian Bar Association Journal*, 65.

⁴¹ Friday C Nwoko. (2000). Rethinking the Enforceability of Collective Agreements in Nigeria. 4(4) *Modern Practice Journal of Finance and Investment*, 353-354.

⁴² *CAC v. Amalgamated Union of Public Corporations, Civil Service Technical and Recreational Service Employees* [2004] NLLR (Pt. 1) 1 at 29-30.

⁴³ David T Eyongndi, Nzeribe E Abangwu, Clement C Chigbo, Itunu Kolade-Faseyi, Emmanuel N Nwambam & Olasupo Bada. (2025). International Labor Organization Prescriptions and Enforceability of Collective Agreement in Nigeria: Is there now Light at the End of the Tunnel? 14(3) *E-Journal of International and Comparative Labour Studies*,

⁴⁴ Harold Dunning. (1998). The Origins of Convention No. 87 on Freedom of Association and the Right to Organise. 137(2) *International Labour Review* 149-163.

⁴⁵ Nicolas Valticos. (1996). The ILO: A Retrospective and Future View. 135(3-4) *International Labour Review*, 473.

require that a higher amount, over and above the monetary equivalent of the agreed period of notice, be awarded by the court to the affected employee. This is in recognition of the fact that where an employee unjustly loses their job and suffers collateral damage, the law must remedy both damages.

With regard to remuneration, decent employment requires that remuneration be commensurate with the work done and employees be remunerated equally for equal work done. Thus, where employees perform the same work but are remunerated differently based on status, it is an indecent work practice. This practice is dominant in workplaces where casualisation of the workforce is practised.⁴⁶ Generally, casual employees are remunerated less than their counterparts in standard employment despite performing the same roles.⁴⁷ This kind of wage discrimination persists irrespective of the fact that they perform the same role, have the same qualifications, expertise and knowledge.

The discrimination between casual and permanent employees in standard employment contracts is not limited to wage disparity; it extends to entitlement to compensation for work-related injury, although the Employees Compensation Act, 2010 (ECA, 2010), in defining employee, captures casual workers providing a respite.⁴⁸ Thus, section 73 of the ECA, 2010, in defining who an employee is for entitlement to compensation for injuries sustained during the course of employment, which has been expanded under section 7(1) thereof,⁴⁹ provides in section 73 that employees include persons employed as casuals.

It must be noted that while Nigeria, pursuant to section 12 of the CFRN, 1999 operates a dualist system regarding the application of international treaties, by virtue of section 254C (2) of the Constitution (Third Alteration) Act, 2010 and the Geneva Convention on the Law of Treaties, 1969, Nigeria does not only have a core minimum obligation but in fact, the NICN is constitutionally empowered to apply labour and employment treaties ratified by Nigeria. Thus, the ILO Employment Injury Benefits Convention, 1964, which although not yet ratified by Nigeria, has its 'spirit' or guiding principle

⁴⁶ Lydia Odiase. (2022). *Casualisation of Labour under the Nigerian Labour Relations*. Eliva Press

<https://www.amazon.ae/Casualisation-Labour-under-Nigerian-Relations/dp/1636485650>

⁴⁷ John I Ebokpo. (2019). Role of Trade Unions in Curbing Casualisation of Labour in Nigeria. 1(2) *IRLJ*, 29-37.

⁴⁸ Offornze D Amucheazi. (2019). *Employees Compensation under Nigerian Labour Law* (Ibadan: Kraft Books Ltd., 2019) 40.

⁴⁹ Israel Nsitelem Eneme Worugji. (2001). Compensable Injuries under the Workmen's Compensation Act. 1(2) *Calabar Journal of Politics and Administration*, 67-82.

incorporated into Nigeria's domestic law through the ECA, 2010, is applicable in furtherance of the ILO Decent Work Agenda. This is to ensure that the need for adequate social security for employees or their dependants for any death, injury, disease or disability arising out of and in the course of employment, and occupational health and safety is made available and seamlessly accessible. In fact, a functional and efficient work-related injury compensation scheme bolsters the right to dignity of the human person embedded in section 34 of the CFRN, 1999.

Moreover, decent employment requires that terms and conditions of employment are humane and human, remuneration is fair and competitive, security of employment, entitlement to prompt and adequate compensation for work-related injuries, freedom from all forms of work-related discrimination such as wages, sex, etc., and protection of the rights of vulnerable employees such as females, children and persons living with HIV/AIDS is accorded. Payment of salaries to employees by employers must be prompt; hence, the practice of owing salary is an indecent work practice.

Any action/inaction of an employee taken to deliberately expose the employer to avoidable losses/hardship, despite the employee's implied duty to render reasonable and faithful service, is a detraction from the concept of decent employment. The concept is at the core of clothing labour and employment relationships with a human face. The employment and exploitation of apprentice and domestic workers in terms of remuneration and other work benefits runs afoul of decent employment. Thus, all forms of employment exploitation, especially against the employee, must be checked, resolutely resisted, and where they occur, adequately redressed.

It is worthy to note that decent employment is greatly supported by the presence of a protective legal framework which the court leverages to advance the rights of employees and employers alike. For instance, outsourcing is an acceptable global employment practice. Despite this, it is susceptible to abuse in the absence of strict legal regulation.

However, in Nigeria, the existing legal framework regarding the regulation of outsourcing, casualisation and triangular employment relationships is grossly inadequate and obsolete.⁵⁰ Thus, the effectuation of these employment relationships is left purely to the contractual abilities of the parties, and of course, at all times, the employer has an undue advantage over the employee and will always exploit it to the prejudice and the greatest chagrin of the

⁵⁰ John I Ebokpo, *supra* note 47, pp. 29-37.

employee. This has exposed many employees in these employment relationships to unquantifiable exploitation and hardship.

To explicate the inadequacy of Nigeria's legal framework on these 'new' forms of employment relationship, a comparison with other jurisdictions is necessary such as what is obtainable in Ghana and Kenya, based on the provisions of the Ghana Labour Act, 2003 and Kenya Labour Act, 2007. In Ghana and Kenya, these employment relationships are well-regulated; hence, the rate of employees' exposure to abuse is minimised. Thus, there is an urgent need to review Nigeria's existing legal framework to regulate these novel employment relationships and provide ample protection to employees in them. Thus, the NICN, through its adjudicatory stance geared towards advancing the realisation of SDG8, has evolved the jurisprudence of employee protectionism aimed at counterbalancing the long-standing and prevailing common law position that has prejudiced labour, rendering it as a commodity which can be sold and bought and not a cherished factor of production that should be valued and protected.

4. Examining the NICN's Adjudicatory Stance and the Realisation of SDG8

This section of the article examines how and to what extent the NICN, through its adjudicatory stance, has advanced the actualisation of SDG8 through judgments delivered particularly from 2010 to 2026. From 2010, when the status and jurisdiction of the NICN were statutorily enhanced and fortified by the enactment of the Third Alteration Act, 2010, the NICN has engaged in proactive and purposive adjudication of labour and employment disputes which re-echo the advancement of decent labour/employment.

For instance, by virtue of section 40 of the CFRN, 1999, employees are allowed to join or form a trade union of their choice for the protection and promotion of their interests.⁵¹ Pursuant to this, a trade union, on behalf of its members, often engages in collective bargaining with the employer, which often culminates in a collective agreement.⁵² At common law, which is applicable in Nigeria, a collective agreement is neither binding nor enforceable between the signatories due to an assumed lack of privity of contract; hence, it is a gentleman's agreement binding only in honour.⁵³ Unfortunately, over the years, the ideal implied obligation to be bound by a collective agreement had remained weak. The lack of bindingness and non-

⁵¹ *Adams Oshiomhole v. Federal Government of Nigeria* [2004] 8 NWLR (Pt. 860) 105.

⁵² *Abdul-Raheem v. Olufeagba* [2006] 17 NWLR (Pt. 1008) 280.

⁵³ *Kwara State Polytechnic v. Adetilo* [2007] 15 NWLR (Pt. 1056) 42 at 48-50.

automatic enforceability of collective agreements operative in Nigeria has been a catalyst for several industrial disputes in Nigeria, especially within the tertiary educator sector, as exemplified by the protracted Academic Staff Union of Universities (ASUU) strike with its debilitating impact on tertiary education in Nigeria.⁵⁴

In fact, this state of the law makes a mockery of the whole scheme of collective bargaining despite the narrow exception of a collective agreement being binding and enforceable via express or implied incorporation into the individual contract of employment.⁵⁵ In Nigeria, under this position, a collective agreement can be rightly described as an agreement without an agreement. This position of the law is diametrically opposed to the concept of decent employment, which requires that where parties have mutually agreed, they are bound by the agreement. This is reinforced by the ILO Collective Bargaining Convention No. 154 of 1981, and the Right to Organise and Collective Bargaining Convention No. 98 of 1949.⁵⁶

The ILO decent employment stance on the enforceability of a collective agreement is that once signed, a collective agreement becomes binding and therefore enforceable between the signatories and those on whose behalf the agreement was reached, as contained in Article 3 of the ILO–Collective Agreement Recommendation, 1951 (No.91).⁵⁷ The NICN, pursuant to section 254C(1) (j) (i) and (2) of the (Third Alteration) 2010, has rendered this common law position redundant and inoperative in Nigeria.⁵⁸ In *Chiazor v. Union Bank of Nigeria Plc.*⁵⁹ the Claimant alleged that pursuant to a collective agreement between his trade union and the Defendant, his termination was wrongful, entitling him to damages.

The Defendant argued that the collective agreement between it and the trade union, of which the Claimant is a member, is neither binding nor enforceable but a mere gentleman’s agreement binding only in honour. The NICN, applying Article 3 of the ILO–Collective Agreement Recommendation, 1951, based on section 254C(1) (j) (i), and (2) of the (Third

⁵⁴ Ifedolapo O Ajayi. (2024). *Legal Framework for Industrial Disputes and Collective Bargaining in Public Universities*. (PhD Thesis Submitted to the College of Postgraduate Studies, University of Ibadan). 23-29.

⁵⁵ *The Registered Trustees of the Planned Parenthood Federation of Nigeria & Anor. v. Dr. Jimmy Shogbola* (2005) 1 WRN 15 at 167.

⁵⁶ ILO Conventions 87 and 98 was ratified by Nigeria on the 17th of October, 1960.

⁵⁷ Harold Dunning, *supra* note 44.

⁵⁸ Friday C Nwoke. (2000). Rethinking the Enforceability of Collective Agreements in Nigeria. 4(4) *Modern Practice Journal of Finance and Investment Law*, 353.

⁵⁹ Unreported Suit No. NICN/LA/122/2014 judgment delivered on July 12, 2016.

Alteration) 2010, held that the collective agreement became binding and enforceable between the parties once it was signed; hence, the Defendant's objection was dismissed. By this judgment, the NICN has dealt a fatal blow to the anachronistic common law position which is adverse to decent employment as it promotes a situation of 'agreement without an agreement' which promotes industrial distraught and precipitate industrial disputes. The NICN took the same stand in *Dennis & 1677 Ors. v. First Franchise Ltd. & Anor.*⁶⁰

Moreover, at common law, in a master-servant employment relationship, the employer has and exercises the power to hire and fire. In fact, the employer can terminate the employee's employment for no reason or any reason (good or bad).⁶¹ This state of the law leaves an employee unprotected, which is adverse to security of employment, a core component of decent employment. The NICN has reversed this trend in *Aloysius v. Diamond Bank Plc.*⁶² Based on Article 4 of ILO's Termination of Employment Convention, 1982 and Recommendation 166, the NICN came to the conclusion that it is no longer fashionable to terminate the employment of an employee for any reason or no reason at all except for justifiable reason(s) connected with the performance of the employee's work or the employer's operational requirements or business. This position taken by the NICN accords with the ILO Termination of Employment Convention.

For example, Sections 36 and 37 of the Tanzania Employment and Labour Relations Act, 2004 prohibit unfair termination, especially the practice of not giving a reason or if the reason is unjustified. By sections 39 and 40 thereof, where an aggrieved employee who is bound to prove unfair termination discharges the burden, appropriate damages have to be awarded in consonance with the equitable principle of *ubi jus, ibi remedium*. There is a judicial pushback (in Nigeria) by the Court of Appeal on this position obtained in Tanzania and Ghana (i.e. termination must be for a reason and not for any reason (good/bad) or no reason at all as it is at common law). The decisions in *Keystone Bank v. Afolabi*⁶³ and *Oak Pensions Limited & Ors v. Mr. Michael Oladipo Olayinka*⁶⁴ ruled that termination from employment can be in accordance with the common law position. This pushback has made the position of the NICN contingent on a possible review and realignment/

⁶⁰ Unreported Suit No. NICN/LA/526/2013 judgment delivered on 6th February 2019 (2019) 2 NICLR 27.

⁶¹ *Isheno v. Julius Berger Nig. Plc.*

⁶² [2015] 58 NLLR (Pt. 206) 92.

⁶³ (2017) LPELR-42390(CA).

⁶⁴ (2017) LPELR-43207(CA).

approval by the Court of Appeal despite the fact that, from a pragmatic standpoint, the NICN's position accords more with prevailing socio-economic and global standards, therefore warranting a reconsideration by the Court of Appeal to align with the plausible position of the NICN, which accords more with reality and the law.

Despite this pushback, the NICN came to its earlier position as explicated above in its recent decision in *Biragbara v. Unity Bank Plc.*⁶⁵ It is doubtful whether this subsequent decision of the NICN (delivered after the pushback decisions of the Court of Appeal), despite its plausibility and humaneness, is not *per incuriam* and an act of judicial impertinence, save that the NICN had ingeniously explored the safeguard of distinguishing to avert the wrath of the Court of Appeal based on the doctrine of *stare decisis*.⁶⁶ One way the NICN can continue to improvise and sustain its progressive stance on this issue is to distinguish the position taken by the Court of Appeal, which accords more with common law instead of prevailing labour reality and international best practice, especially the need to protect labour and make the employment relationship humane. At the same time, considering the fact that the position taken by the NICN (which is faced with the Court of Appeal pushback) is what the law "ought to be" based on contemporary global labour realities and demands, it is argued that the course of justice and humanity will be better served by the Court of Appeal, where the opportunity presents itself, it reverses itself by approving the NICN's stance.

Employers have attempted to discriminate against casual employees with regard to entitlement to compensation for injuries.⁶⁷ Thus, casual employees are often excluded from work-related injury compensation as the definition of worker under section 91 of the Labour Act, 2004 does not cover them. This stance is blatantly discriminatory, and the NICN has extinguished it by purposively interpreting and applying section 73 of the Employees Compensation Act, 2010 (ECA, 2010), which, for the purpose of entitlement to workplace-related injury compensation, defines employee to include casual employees. Thus, the NICN in *Abel v. Trevi Foundation Nig. Ltd*⁶⁸ held that casual employees, like their counterparts in standard employment, are entitled

⁶⁵ Unreported Suit No. NICN/PHC/41/2014 Judgment delivered 23 November, 2022).

⁶⁶ *Stare decisis* is a doctrine that obligates inferior courts to be bound and follow the decisions of superior courts on the judicial organogram hence, the decision of the Supreme Court of Nigeria is binding on all court beneath it and the same goes for the decision of the Court of Appeal in adherence to judicial precedent.

⁶⁷ Emeka E Okafor. (2012). Nonstandard Employment Relations and Implications for Decent Work Deficits in Nigeria. 6(3) *Africa Research Review*, 93-108.

⁶⁸ Unreported Suit No. NIC/PHC/55/2013.

to compensation for work-related injuries under the ECA, 2010. This decision has ensured that discriminatory compensation practice, which is antithetical to decent employment, does not subsist. The provisions of section 73 of the ECA and the NICN's decision resonate with the provision of section 7 of the Tanzanian Employment and Labour Relations Act, 2004, which prohibits all forms of discrimination on whatever basis.

Another remarkable instance in which the NICN has advanced the decent work/employment agenda in Nigeria is by finding co-employer status in a triangular employment relationship (TER). In *PNGSSAN v. Mobil Producing Nig. Unlimited*⁶⁹ the NICN acknowledged the existence of triangular employment in Nigeria, which involves the Agent, the employee and the End-User, unlike the traditional two-party employer-employee relationship.

In *Stephen Ayaogo & Ors. v. Mobil Producing Nig. Unltd. & Anor*⁷⁰ where the Agent and End-User sought to abdicate employer responsibility towards the employee in a TER, the NICN held that the Agent and the End-User were co-employers of the employee, therefore jointly and severally liable. If the court had held otherwise, the Agent and End-User would have used the disguised nature of TER to send the employee on a wild goose chase as to who is the employer and therefore liable towards him. This situation exposes an employee to unquantifiable hardship and exploitation as it cheapens labour by commodification.

The NICN, by taking the stance it did (i.e. holding a co-employer status between the Agent and End-User Employer in a TER), amplified the primacy of the right to freedom from discrimination and dignity of the human person guaranteed by sections 42 and 34 of the CFRN, 1999, Articles 2, 3, 5 and 19 of the African Charter on Human and Peoples Rights, 1981,⁷¹ Articles 2, 7, 10 and 26 of the International Covenant on Civil and Political Rights, 1966. These frameworks are *in tandem* with the ILO Discrimination (Employment and Occupation) Convention, 1958, which recognises the dignity of labour and prohibits discrimination in terms of hiring and wage benefits. These human rights frameworks foreground and amplify the immutability and primacy of the right to dignity of the human person and freedom from discrimination, which TER practice in Nigeria covertly reinforces. Decent work de-emphasises the commodification and mere commercialisation of labour.

⁶⁹[2013] 32 N.L.L.R. (Pt. 92) 10.

⁷⁰ [2013] 30 N.L.L.R. (Pt. 85) 95.

⁷¹ See also the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. A9 Laws of the Federation of Nigeria, 2004.

Furthermore, placing an employee under probation is an established employment practice aimed at enabling the employer to determine the suitability of an employee as a precursor to confirmation and a permanent employment contract.⁷² However, some employers have unscrupulously used probation to perpetuate unfair labour practices whereby, after the lapse of the probationary period, either no decision is communicated or the period is unilaterally extended by the employer without any recourse to the concerned employee. This practice encourages exploitation of labour, bearing in mind that probationary employees are not entitled to certain benefits. This practice obliterates the tenets of the ILO Forced Labour Convention, 1930 and ILO Abolition of Forced Labour Convention, 1957 as it systematically perpetuates forced labour because no employee will willingly remain or stay long on probationary status. The NICN has evolved the concept of ‘deemed confirmation’ to the effect that where the employer, at the expiration of the probation period, fails to communicate its decision but retain the employee in its employ, the action is regarded as conductual confirmation of the employee also, employers are prohibited from extending probation period as it is regarded as deemed confirmation as was held by the NICN in *Anyim v. HOGL Energy Ltd.*⁷³ This decision effectively ensures that an employer does not keep an employee perpetually on probation. Doing so is not only inhumane but exploitative and dehumanising.

While an employer has the power of hiring and firing within the bounds of the law, the employee counterbalances this with the right of resignation. The expectation is that where an employee is to activate the right to resignation, it will be voluntary; and there are instances where the resignation of the employee is forced by the employer’s action/inaction. As Atilola⁷⁴ notes, the practice of employers directing employees to resign against their will is known in employment spheres in Nigeria such as the banking subsector. This practice goes against the spirit and letter of the ILO Termination of Employment Convention, 1982⁷⁵ as well as the ILO Abolition of Forced Labour Convention, 1957. These conventions envisage that resignation will be voluntary and not foisted on the employee sinisterly by the action/inaction of the employer.

⁷² *Ihezukwu v. Unijos & Ors.* [1990] 7 SC (Pt.1) 201.

⁷³ Unreported Suit No. NICN/CA/45/2018 Judgment delivered 25 April 2024 by Kado J.

⁷⁴ Bimbo Atilola (2017). *Recent Developments in Nigerian Labour and Employment Law* (Lagos: Hybrid Consult) 53.

⁷⁵ Omon Blessing Omoghani. (2022). Termination of Employment: The Effect of the ILO Convention on Contracts of Employment. *SSKÖHN NOTES*

The NICN has risen to safeguard employment rights of the employee against this employer's shenanigans. Thus, in *Ebere Ugoji v. Alliance Life Assurance Ltd*,⁷⁶ where the defendant forced the claimant to resign by persistent unfavourable and repressive conduct, the NICN found the resignation to be involuntary, orchestrated by the employer, which is an act of unfair labour practice and awarded the claimant damages. The same position was reached by the NICN in *Patrick Modilim v. United Bank of Africa*.⁷⁷ The fact that this practice offends decent work is obvious. The employer owes the employee a duty of care and to provide a safe place of work. The safety of the workplace transcends the physical space to the mental and emotional wellbeing of the employee. For an employee to resign involuntarily, the irritable behaviour of the employer towards the employee must have been sustained; becoming intolerable and heinous, thereby making life extremely difficult that the only option left to the employee is to resign. We can safely conclude that the situation leading to forced resignation is the zenith of mental and psychological torture, which is a detraction from decent work/employment.

Ordinarily, in a master-servant employment, where there is wrongful termination by the employer, the employee's entitlement to damages is equivalent to the agreed period of notice to be given for its effective termination and nothing more.⁷⁸ This position does not recognise the fact that beyond ending the employment contract, certain wrongful terminations can adversely affect an employee, extending to future employment prospects.⁷⁹ Where this is the case, fairplay requires that the employee be compensated via award of damages to the extent of *restitutio ad integrum*. Thus, the NICN has held that despite the subsisting common law position on quantum of damages for wrongful termination of "master-servant" employment, where a wrongful termination transcends bringing the contract to an end to affecting the rights or future employment prospect of an employee, the amount of damages to be awarded shall be over and above the equivalent of the agreed notice period for its effective termination.

In *Oyebola v. Sahara Energy Resources Ltd*⁸⁰ where the wrongful termination, beyond bringing the employment to an end, prejudiced the employee. The NICN, despite the monetary equivalent of the agreed period of notice for the rightful termination of the contract, awarded two years' salary

⁷⁶ [2014] 47 NLLR (Pt. 154) 531.

⁷⁷ Unreported Suit No: NICN/LA/353/2012 Judgment delivered 9th June, 2014.

⁷⁸ *Chukwuma v Shell Petroleum Nig. Ltd* (1993) 4 NWLR (Pt. 269) 512.

⁷⁹ *Oforishe v. Nigerian Gas Company Ltd.* (2017) LPELR-SC.175/2006.

⁸⁰ CA/L/1091/2016.

as damages for wrongful termination of the employment, which on appeal was upheld by the Court of Appeal. This decision reinforces the fact that termination should be humane and confined within legal limits. Where the decision is prejudicial against an employee beyond bringing to an end the employment, the quantum of damages, as rightly argued by Abangwu *et al*⁸¹ will exceed the monetary equivalent of the period of notice. Decent employment practice requires that termination be humane and within permissible legal limits. Where an employer causes injury, the remedy cannot be confined to the monetary equivalent of the agreed notice period since it is inequitable to let a legal wrong subsist without adequate remedy.

From the foregoing, it is clear that the NICN has, through proactive and purposive adjudication, enhanced SDG8 in Nigeria by sternly knocking off anachronistic common law employment practices that epitomise unfair labour practices. The NICN has obliterated systemic industry discriminatory practices against casual employees, recognised and protect the rights of employees in TER, safeguard probationary employment from being exploited against employees by employers by recognising deem confirmation and as well as ensure that, resignation from employment is voluntary and not foisted on an employee by the action/omission of the employer.

The NICN, pursuant to its jurisdiction under the Constitution (Third Alteration) Act, 2010, has awarded damages over and above the monetary equivalent of the agreed period of notice where the employer, in wrongly terminating an employment contract, prejudiced the employee. Thus, the NICN has proven to be supportive towards the realisation of SDG8 despite legal and institutional constraints. The present rate of unemployment in Nigeria is unprecedentedly high and the frightening situation is exacerbated by the absence of practical governmental policies and programmes aimed at combating the menace. The rise and “acceptance” of non-standard forms of employment as alternatives to standard employment couple with their inherent challenges, have exacerbated the situation. Regardless, the NICN has remained undaunted towards the protection and promotion of decent work/employment in Nigeria.

While the NICN has admirably adjudicated against indecent work practices in Nigeria, the increasing level of unemployment and underemployment exacerbated by the absence of strategic government

⁸¹ Nzeribe E Abangwu, Ufuoma G Oyibodoro, David T Eyongndi, Sampson Shaba & Faith N Opara. (2025). Measurement of Quantum of Damages for Wrongful Termination of Employment in Nigeria: Gleaning Lessons from Ghana and Malaysia. 12(1) *Lentera Hukum Journal* 62-93.

intervention to create an enabling environment for job creation and entrepreneurial flourishing couple with the existing redundant labour legal framework exemplified by the Labour Act, 2004, several challenges keep evolving and revolving.⁸² The wild increase and acceptance of irregular forms of employment with their indecent work proclivities remains a formidable challenge within Nigeria's employment sphere.⁸³

Casualisation of labour is on the increase, and with it, is the practice of wage and employment benefit disparity, which is antithetical to the ILO decent work agenda.⁸⁴ For instance, casual employees, especially in the banking sector, are not remunerated the same as their counterparts in standard employment, notwithstanding that they perform the same work. This practice persists despite Nigeria's social objective encapsulated under section 17(2) (b), 3(a) (b), and (e) of the CFRN, 1999, as well as the ILO Equal Remuneration Convention, 1951, that prohibits remuneration disparity and promotes equal pay for equal work done.

The need for a robust institutional framework cannot be overemphasised. The Federal Ministry of Labour, Employment and Productivity (the FMLEP) under the leadership of the Minister of Labour is the main regulator of labour in Nigeria with the powers to make Rules on certain matters to fill up statutory operational gaps. The obsolete legal framework remains a major drawback to progressive adjudication by the NICN despite its frantic effort at standardising labour and employment relations practice in Nigeria. The FMLEP should be proactive in making complementary/supplementary Rules and Guidelines to regulate novel and grey areas in labour and employment relations in Nigeria where the existing legal framework is inadequate, such as casualisation of the workforce and TER. Such Rules and Guidelines, if they exist, would become impetus for the NICN to engage in purposive and egalitarian adjudication aimed at promoting decent work/employment.

Decent employment is meant to balance the mutual benefits of employers and employees by ensuring that labour and employment practices are fair, humane and just for the parties as well as the society in general; it is about balancing contending interests in a symbiotic manner. Interestingly, in comparison, jurisdictions such as Ghana, Tanzania and Kenya have revised their labour legal frameworks, making ample regulatory guardrails on these

⁸² Olushola Animashaun. (2007). Casualisation and casual employment in Nigeria: beyond contract. 1(4) *NJLL&IR*, 18.

⁸³ Barnabas C Okoro. (2013). *Law of Employment in Nigeria*, Lagos (Concept Publications Ltd.) 102.

⁸⁴ Emeka Okafor & Rasak Bamidele. (2015). Casual Employment-A Nostrum to Unemployment in Nigeria. 4(2) *FJMSS*, 100.

new forms of employment relationships, unlike Nigeria. For instance, sections 73 to 78 of the Ghana Labour Act, 2003 contain provisions regulating the duration, rights, obligations, remuneration and holiday remuneration entitlement of casual workers in Ghana. Section 7 of the Tanzanian Employment and Labour Relations Act, 2004 prohibits all forms of discrimination, including wage discrimination, which is what characterises casualisation of labour as practised in Nigeria. Sections 2, 35, and 37 of the Kenya Employment Act, 2007 define who a casual employee is, protect their right to adequate remuneration and prevent the bizarre practice of permanent casualisation by making provision for deemed conversion of casual employment to standard/permanent where the casual employment period exceeds a month. Once converted, the employment contract can only be terminated by giving the requisite notice, as was held in *Kesi Salim v. Kwale International Sugar Co. Ltd.*⁸⁵

Despite the laudable adjudicatory efforts of the NICN at promoting the actualisation of SDG8 as seen above, several factors militate against the effectiveness and efficiency of the NICN. As seen above, one of the militating factors is the pushback from the Court of Appeal as seen in its decisions in *Keystone Bank v. Afolabi*⁸⁶ and *Oak Pensions Limited & Ors v. Mr. Michael Oladipo Olayinka*⁸⁷ reaffirming the objectionable common law position that termination of employment can be for any reason (good or bad) or no reason at all. This pushback is debilitating and poses a serious challenge to the progressive stance of the NICN, although not without a ray of hope.

While from the above, it is clear that the NICN has been taking a positive stance against several unhealthy common law employment practices and doctrines, the fact that the NICN is a court of first instance subject to the appellate and final jurisdiction of the Court of Appeal is a legitimate concern that questions the effectiveness and efficiency of its adjudicatory efforts at promoting the actualisation of SDG8 when its “precedential strength” vis-à-vis the doctrine of *stare decisis* is considered. However, the “first instance” nature of the NICN’s decision does not affect the recondite nature of its determination and its potency is not diminished as a judicial determination when the specialised nature and stature of the NICN is taken into cognisance. Besides, the NICN and the Court of Appeal have not always been at loggerheads but have even agreed more than disagreed over several anachronistic common law employment/labour doctrines as seen above.

⁸⁵ [2017] EkKL (Cause 841 of 2015).

⁸⁶ (2017) LPELR-42390(CA).

⁸⁷ (2017) LPELR-43207(CA).

Hence, there is a high ray of hope that sooner than later, the Court of Appeal will reassess its pushback position above and align with the NICN. Moreover, not too many decisions of the NICN get on appeal to the Court of Appeal, which accounts for most decisions of the NICN being the position of the law contingent on the fact that the NICN under the Constitution (Third Alteration) Act, 2010 is a Superior Court of Record.

Another militating factor is the obsolescence of Nigeria's labour and employment law legal regime, which is significantly out of tune with prevailing global standards and socio-economic realities. At present, there is a rise in non-standard employment relationships (e.g. outsourcing, casualisation of the workforce, triangular employment, and gig/platform work arrangements). Regrettably, the subsisting legal framework makes no provision for the regulation or administration of these new work arrangements. Hence, these employment relationships are primarily practised based on agreement between the parties. Of course, the outcome is that the employer who has the undue advantage of capital (aided by the inclement socio-economic weather of Nigeria) often explores this to exploit the employees. This state of the law makes it cumbersome for the NICN to effectively and efficiently adjudicate, as the legal framework is the foundation needed by the NICN for adjudication. Thus, the NICN, in most cases, is constrained to rely on its ingenuity to salvage the legal framework shortfall.

The competing consideration of business viability, employer cost, risk to formal hiring and labour protection is another challenge facing the NICN. In advancing SDG8, the NICN is placed in the in-between position of striking a logical balance between these competing interests, which requires caution. At present, the cost of keeping a business afloat, formal hiring and business viability in Nigeria is a major concern as the socio-economic situation is inclement, with rising inflation and non-viability of the Naira amidst the need to protect labour. This situation is worsened by a lack of urgent, viable government rescue/remedial socio-economic recovery (immediate and long-term) policies. The presence of real support for entrepreneurial development and government-enabled employment creation opportunities by the private sector are necessary to assuage the situation.

One way to address these militating factors is to examine the roles of stakeholders such as the government, trade unions, employees' rights groups, etc. in enhancing the effectiveness and efficiency of the NICN towards maximal realisation of SDG8 in Nigeria. Based on the challenge of an obsolete regulatory legal framework in the face of rising non-standard work arrangements in Nigeria, the government as regulator needs to urgently review the existing labour legislation to ensure that these novel labour/employment realities are adequately catered for statutorily.

The NICN cannot adjudicate at large because legislation is the backbone of adjudication. The needed review must take into cognisance the imperativeness of protecting and promoting the advancement of SDG8 in its provisions while affording capital the needed protection as well. Also, the government should ensure that the employer cost in doing business, cost of formal hiring, as well as business viability, is mainstreamed in its plans and policies by creating the enabling environment for the creation of gainful employment, especially by the private sector, as unemployment and underemployment are the major twin factors exacerbating precarious resort to non-standard work arrangements by employers to the greatest chagrin of employees.

Trade unions and employees' rights groups have the onerous role of sensitisation and advocating for the protection and promotion of SDG8 in labour and employment relations. The high rate of unemployment has placed most job seekers in a position of "half bread is preferred to none", to the extent that employers are exploring this situation to exploit them. Most employees are unaware of their labour and employment rights; hence, they are unable to seek their protection when violated, just as the enforcement of these rights could also be costly. Their lack of financial wherewithal is an inhibition which employee rights promoters can assuage through *pro bono* and sponsoring of litigation. All these efforts will ensure that the stance of the NICN in advancing the actualisation of SDG8 in Nigeria becomes more effective and efficient, thereby positioning Nigeria as a progressive jurisdiction in the comity of nations in terms of decent employment and exhibiting her alignment to global standards.

5. Conclusion and the Way Forward

The UN adopted the SDGs to serve as global developmental blueprints for member States. SDG8 seeks to entrench decent work amongst member States ensuring that there is guarantee for security of employment, recognition and promotion of the right of freedom of association through the formation/joining of trade union and participating in collective bargaining, terms and conditions of employment are fair, just, humane and human, there is no wage discrimination amongst workers irrespective of status in an employment undertaking, termination of employment is not flagrant but only effectuated on just cause, remuneration is adequate and paid promptly, there is adequate and prompt payment of compensation for work-related injuries suffered by an employee in the course of the employment. It seeks to ensure that labour is treated as an indispensable factor of production that must be protected. The SDG8 also ensures that in the enjoyment of their rights, employees do not

unlawfully or unjustifiably prejudice the interest of their employer; rather, a balance is created between these competing interests.

Since the NICN was created, it has gone through a tumultuous evolutionary journey and has emerged as an SCR (Superior Court of Record) having exclusive original civil jurisdiction over labour and employment matters. Since 2010 when its status and jurisdiction were enhanced by the Constitution (Third Alteration) Act, 2010, through its adjudicatory stance, despite pushback from the Court of Appeal, the NICN has admirably advanced the ILO decent work/employment agenda enshrined in SDG8 by holding that while an employer has the right to hire and fire, globally, it is no longer fashionable for an employer to fire an employee for no reason or any reason (good/bad) but can only do so for justifiable reasons.

It has further advanced decent work by holding that a collective agreement, once reached and signed, is binding and therefore enforceable between the signatories and their privies; hence, it is no longer merely binding in honour as a gentleman's agreement. Moreover, in a simple contract of employment, contrary to common law prescription, the NICN, in advancing decent work/employment, has held that the quantum of damages to be awarded in the event of wrongful termination of employment is not restricted to the monetary equivalent of the period of notice that ought to be given, but the circumstance of the termination will determine the quantum of damages awardable. The NICN has advanced SDG8 by originating the concept of deemed confirmation where an employer who places an employee on probation fails to make a determination at the end of the period but keeps the employee in his/her employ. Pursuant to SDG8, the NICN has recognised the plague of forced resignation and characterised it as an unfair labour practice.

Considering the predilection of new forms of work arrangements such as outsourcing, casualisation and TER to abuse by employers due to the fact that the existing Nigerian labour regulatory framework is largely inadequate and obsolete when compared to developing jurisdictions like Ghana, Tanzania and Kenya, a holistic review is imperative. The Nigerian legislature is thus expected to review the Labour Act, 2004 particularly section 7 and 91 thereof that deals with the matters to be provided for in a written statement of employment by incorporating the matters contained in sections 73-78 of the Ghana Labour Act, 2003, Section 36 and 37 of Tanzania Employment and Labour Relations Act, 2004 and sections 2, 35, 37 of the Kenya Employment Act, 2007. Thus, making ample regulatory provisions for these new forms of work will enhance the attainment of SDG8 in Nigeria. At present, these forms of employment relationships are not regulated; hence, their adoption is a matter of bargaining between the employer and employee, with the result that,

more often than not, employers explore and exploit their vantage position to prejudice employees.

The implementation of such legislative reforms requires that due attention is paid to the realities on the ground so that the economic foundation allows the mutual satisfaction of both interests, i.e., sustainable business, reasonable profit and employee engagement through decent work. While the NICN exercises exclusive original civil jurisdiction over labour and employment matters, appeals from its civil jurisdiction lie to the Court of Appeal, whose determination is final. The plausible strides of the NICN at advancing Nigeria's labour and employment jurisprudence will be greatly enhanced by the Court of Appeal if it approves novel introductions ushered by the NICN.

Thus, there is a need for sustained harmony between these courts to ensure that the several novel introductions, especially the ones displacing anachronistic common law principles, are judicially rectified. This can be achieved through regular inter-court interaction between the NICN and the Court of Appeal. At present, there is no constitutional requirement that every judicial division of the Court of Appeal must have a judge knowledgeable in labour/employment matters despite the volume of cases adjudicated at the NICN with potential for appeal to the Court of Appeal. Thus, section 237(2)(b) of the Constitution of the Federal Republic of Nigeria, 1999 should be amended to insert a provision that each judicial division of the Court of Appeal shall have at least a justice knowledgeable in labour and employment matters.

While the current state of obsolete and inadequate labour and employment regulatory framework poses a challenge to effective adjudication, the NICN must sustain its evolving jurisprudence and purposive interpretation and application of the law aimed at fostering decent work/employment in Nigeria amidst rising indecent work/employment practices. Moreover, there is a need for the NICN to instil deterrence by awarding exemplary damages against employers where a case of indecent work/employment practice is established. Such damages will serve as deterrence to other employers from engaging in such or similar practices which have become rampant in Nigeria, especially in the private sector.

Furthermore, section 245C(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999, which empowers the NICN to rely on domesticated international labour instruments in adjudicating, can revolutionise Nigeria's labour and employment jurisprudence bearing in mind its forward-looking potentials. Thus, the NICN should relentlessly explore it to standardise Nigeria's labour and employment law and practice by ensuring that common law employment principles adverse to ILO prescriptions are sequestered through the adoption and application of international best practices and

standards. This can also be leveraged upon by the NICN to fill the gap where there is a dearth of domestic law on any SDG8 issue before the court.

Pending the review of the existing labour legal framework of Nigeria, the Minister of Labour and Employment, as the head of the Federal Ministry of Labour, Employment and Productivity that regulates labour and employment practices in Nigeria, should issue Rules and Guidelines to regulate novel developments and grey areas such as casualisation of labour and TER. These proposed Rules and Guidelines should clearly specify the rights and obligations of parties to a TER, its duration, and insulate it from abuse by the employer. Doing this will give the NICN impetus towards balancing the diverse interests in employment relations aimed at promoting decent work/employment in Nigeria. Beyond issuance of these Rules and Guidelines, they should be made accessible both in print and soft copy, particularly by uploading them online on the Ministry website and that of the NICN.

Furthermore, it has been shown that stakeholders such as the government, trade unions and employment rights groups have pivotal roles towards fostering the effectiveness and efficiency of the NICN at promoting the actualisation of SDG8 through its adjudication. Thus, the government should ensure that the economy resulting into the creation of jobs is stimulated through policies and programmes, an enabling environment for the creation of gainful employment opportunities through provision of grants for start-ups, issuance of business permits, tax rebate and waivers to emerging entrepreneurs, fostering easy-of-doing business by manufacturer, encouragement of local manufacturer by reduction of importation, accessibility to forex exchange for importation of foreign sourced raw materials and reduction of demurrage, etc. It has been shown that indecent employment thrives where and when there is inaccessibility to gainful employment.

Moreover, trade unions and employees' rights groups need to aggressively engage in sensitising employees of their rights aimed at empowering them to seek remedy in the event of breach. This can be done through organising seminars, symposiums, stakeholder briefings, etc., especially on special occasions such as Worker's Day celebration. Additionally, impecuniosity may stall an aggrieved employee from seeking remedy from the court; hence, these stakeholders should make *pro bono* and sponsored litigation available and accessible to such employees. —————■

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Taxation of Private Equity Sector in Ethiopia: Challenges and Reform Options

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Abstract

Private equity funds, as an alternative investment, play a critical role in mobilizing capital and promoting economic growth. However, their tax treatment raises complex issues. Drawing on the legal frameworks of the United States, the United Kingdom and Kenya, this article examines how different jurisdictions address the taxation of funds, fund managers, investors and portfolio companies. The article then evaluates the Ethiopian income tax regime and its applicability to private equity, showing that while funds are exempt at the fund level, significant uncertainties remain regarding the taxation of fund managers, investors and portfolio companies. The analysis shows that Ethiopia's current system does not adequately accommodate the unique features of private equity. The article culminates with suggestions for reform.

Keywords: Tax, capital market, private equity funds, investors, fund managers, portfolio companies, legal gaps

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Abstract

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1. Introduction

Private equity has evolved from a niche corner of alternative investments into a central pillar of global markets that has displaced public companies.¹ Today, it manages trillions of dollars in assets worldwide², financing innovation, restructuring mature businesses and generating substantial returns for institutional investors such as pension funds, insurance companies and sovereign wealth funds. For emerging economies, private equity represents not only a source of capital but also a potential driver of long-term growth and foreign direct investment.³

The rise of private equity has simultaneously exposed deep tensions in income-tax design. At the core of these tensions lies the principle of tax neutrality: the idea that the interposition of a collective investment vehicle should neither increase nor decrease the aggregate tax burden that would have arisen had the investors held the underlying assets directly.⁴ Closely related is the long-standing policy of partnership taxation that partners should be taxed as if they are engaged in the partnership's activity themselves, an aggregate rather than entity approach.⁵

A second foundational question concerns the characterization of income. Jurisdictions must decide whether private-equity activity is *trading* (taxed as ordinary business income) or *investment* (taxed as capital gain). This distinction is especially acute for carried interest, the 20 per cent profits share typically allocated to fund managers, because the same receipt can be

Acronyms

AIF	Alternative investment funds
CIS	Collective Investment Schemes
EBIT	Earnings before interest and tax
ECMA	Ethiopian Capital Market Authority
EBITDA	Earnings before interest, taxes, depreciation and amortization

¹ Brian Cheffins & John Armour. (2007). The Eclipse of Private Equity. *Working Paper* 339. (Centre for Business Research, University of Cambridge), p. 6-7. See also, Kevin Moss. (2025). Private Equity: From Niche to Necessity, *GAM Investment*.

² Nori Gerardo & Lietz Philipp Chvanov. (2024). *Does the Case for Private Equity Still Hold?* (Working Paper 24 066), Harvard Business School, pp. 10-11.

³ Eric M. Zolt. (1998). Taxation of Investment Funds. In Victor Thuronyi (ed.), *Tax Law Design and Drafting*. Vol. 2, International Monetary Fund.

⁴ Richard V. Thomson. (2023). Tax Neutrality in Private Equity and Venture Capital. *Invest Europe*, pp. 1-2. See also, Eric M. Zolt, *Ibid*.

⁵ David A. Weisbach. (2008). The Taxation of Carried Interests in Private Equity. 94 *Virginia Law Review* 715, pp. 715-717;
Victor Fleischer. (2008). Two and Twenty: Taxing Partnership Profits in Private Equity Funds. 83 *New York University Law Review* 1, P. 8-12.

recognized either as compensation for services or to an allocation of investment profits.⁶ A third cluster of issues arises from the heavy use of leverage: interest-deductibility limits and thin-capitalization rules can materially alter the after-tax economics of leveraged buyouts.⁷

Different jurisdictions have grappled with these issues in different ways. In the United States, private equity funds are typically structured as limited partnerships or limited liability companies treated as pass-through entities, though debate persists over the treatment of carried interest.⁸ In the United Kingdom and Europe, controversy centers on whether private equity activity constitutes trading or investment, a classification that determines whether returns are taxed as ordinary business income or capital gains.⁹ Kenya, by contrast, faces challenges of structuring: many funds domicile abroad to avoid unfavorable local rules such as compensating tax on limited partnerships and high corporate tax on limited liability companies.¹⁰

However, in Ethiopia, the question of private equity taxation is entirely novel. Until the enactment of the Capital Market Proclamation¹¹ and the establishment of the Ethiopian Capital Market Authority, there was no legal recognition of private equity funds. Recent income tax amendment has taken an important first step by exempting funds themselves from corporate income tax. However, fundamental questions remain unresolved: the treatment of carried interest, the deductibility of interest in leveraged buyouts, the application of thin capitalization rules, and the taxation of selling shares of the private equity fund. While these issues are still largely theoretical given the infancy stage of Ethiopia's capital market (in the near future), they could be sources of contention. Without clear rules, the country risks deterring

⁶ Victor Fleischer, id, pp. 1-5; David A. Weisbach, *supra* note 5. 715-720; Steven M. Rosenthal. (2013). Taxing Private Equity Funds as Corporate 'Developers'. *Tax Notes*, 21 January 2013, pp. 361-363.

⁷ Patrick Fenn & David Goldstein. (2002). Tax Considerations in Structuring US-Based Private Equity Funds. *International Financial Law Review (IFLR)* pp. 1-3; See also Brad Badertscher *et al.* (2010). The Impact of Private Equity Ownership on Portfolio Firms' Corporate Tax Planning, *Harvard Business School Working Paper* 10-004, pp. 1-5.

⁸ Patrick Fenn & David Goldstein, Id, pp. 5-6; Victor Fleischer, *supra* note 5, pp. 1-8; Steven M. Rosenthal. (2013). Taxing Private Equity Funds as Corporate 'Developers'. *Tax Notes*, 21 January 2013, pp. 361-363].

⁹ Dan Neidle. (2023). Carried Too Far? A Challenge to the Tax Treatment of Carried Interest in the Private Equity Industry. *British Tax Review*, Issue 1, pp. 49-59.

¹⁰ Shanthi Divakaran *et al.* (2018). Survey of the Kenyan Private Equity and Venture Capital Landscape. *Policy Research Working Paper 8598* (World Bank Group), 33-46.

¹¹ Capital. Market Proclamation No.1248/2021, *Neg Gaz*, Year 27 No. 33.

investors, inviting disputes with the Ministry of Revenue and falling behind regional peers such as Kenya.

This article proceeds from the theoretical premises outlined above. The central questions relate to: (i) how the Ethiopian income-tax regime currently treats private-equity funds, fund managers, investors and portfolio companies; and (ii) what reforms are required to align Ethiopian law with the core principles of tax while remaining realistic for an emerging capital market. Methodologically, the study combines doctrinal analysis of Ethiopian primary legislation with a structured comparative examination of the United States, the United Kingdom, France, Germany and Kenya. The comparative materials are used not as models to be transplanted wholesale but as sources of principle against which Ethiopia's rules can be tested.

The taxation rules of the private equity sector in Ethiopia are analyzed in light of international experience. Section 1 introduces the study by outlining the background, significance and the emerging nature of private equity taxation in Ethiopia. Section 2 provides an overview of the legal and regulatory framework of private equity funds in the international arena and Ethiopia. Section 3 examines the taxation of private equity sector in a comparative perspective focusing on the United States, the United Kingdom and Kenya. Section 4 analyzes the tax treatment of private equity in Ethiopia at four levels: the fund, the fund manager, the investors, and the portfolio companies. Section 5 concludes with the challenges of the private equity sector and provides suggestions for reform.

2. General Overview of Private Equity Funds

2.1 Conceptual and theoretical framework

Private equity funds cannot be adequately analyzed for tax purposes by a purely definitional exercise. A more useful starting point is to locate them within the family of alternative investment vehicles and to identify the features that distinguish them from related forms of collective investment, particularly venture capital and hedge funds. These distinctions, such as stage of investment, degree of control, liquidity, holding period, and the use of leverage, have direct consequences for the characterization of income, the treatment of carried interest, the application of interest-deductibility and thin-capitalization rules, and the overall tax neutrality of the structure.¹²

¹² Dan Neidle, *supra* note 9, p. 49;

Harry Cendrowski *et al.* (2012). *Private Equity: History, Governance and Operations* (2nd Edition), *Wiley Finance Series*, pp. 3–5.

Private equity funds typically invest in relatively mature businesses, seek substantial or controlling equity interests, hold investments over the medium to long term, and frequently participate actively in the management or restructuring of portfolio companies before exiting through a sale or public offering. Venture capital funds, by contrast, focus on early-stage or high-growth companies and usually take minority stakes, with returns dependent primarily on capital appreciation and eventual exit. Hedge funds invest predominantly in liquid financial instruments and employ shorter-term strategies involving long/short positions, derivatives, and arbitrage.¹³

These structural differences are relevant to the taxation of private equity because they affect how the investment vehicle, the income it generates, and the interests of its participants are treated for tax purposes. A central consideration is tax neutrality: whether the use of a collective investment vehicle should alter the overall tax burden that would arise if investors make the underlying investments directly.¹⁴ This raises the related question of whether the investment vehicle should itself be subject to tax or whether income should instead be attributed directly to the investors as a pass-through entity. The choice between entity-level taxation and fiscal transparency is therefore central to the taxation of private equity funds because it determines where taxation occurs and, ultimately, how the tax burden is allocated between the fund and its investors.

A second foundational question concerns the characterization of income. Jurisdictions must decide whether private-equity activity is trading, which is taxed as ordinary business income or investment, which is eligible for preferential capital-gains treatment. This distinction is especially acute for carried interest, the performance-based share of profits typically allocated to fund managers, because the same receipt can be assessed either as compensation for services or allocation of investment profits.¹⁵

A third cluster of issues arises from the heavy use of leverage in buyout transactions. Interest-deductibility limits and thin-capitalization rules can materially alter the after-tax economics of leveraged acquisitions and therefore influence both fund structuring and portfolio-company behavior.¹⁶ Finally, the presence of tax-exempt investors, such as pension funds,

¹³ Dan Neidle, *supra* note 9; Victor Fleischer, *supra* note 5, pp. 8–12.

¹⁴ Richard V. Thomson, *supra* note 4, 1–2; Eric M. Zolt, *supra* note 3, pp. 1–3;

¹⁵ Victor Fleischer, *supra* note 5, pp. 1–5; David A. Weisbach, *supra* note 5, pp. 715–720 Steven M. Rosenthal; (2013). Taxing Private Equity Funds as Corporate ‘Developers’. *Tax Notes*, pp. 361–363.

¹⁶ Patrick Fenn & David Goldstein, *supra* note 7, pp. 1–3.

endowments, sovereign wealth funds raises questions about residual entity-level taxation and the generation of unrelated business taxable income.¹⁷

These theoretical concerns, such as tax neutrality, the aggregate approach to partnership taxation, the contested characterization of carried interest, the interaction of leverage with anti-avoidance rules, and the position of tax-exempt investors provide the analytical framework against which the comparative experience of the United States, Europe and Kenya, and ultimately the Ethiopian rules, will be assessed.

2.2 Private Equity in International Arena

2.2.1 Origin of private equity funds

Private equity, particularly venture capitals trace their root to the 19th century private financing of railroads and textile mills; soon, government intervention transitioned venture capitals to investment activities.¹⁸ Private equity funds first came to public attention after the success story of the American Research and Development Corporation (ARD).¹⁹ ARD Corporation was a successful venture capital firm that invested in start-ups, notably Digital Equipment Corporation (DEC).²⁰ After its combined equity and loan investment in DEC worth \$70,000, the ARD Corporation's contribution became valued multiple times more than the original contribution, and when DEC went public, it raised \$38 million through an initial public offering.²¹

The success of ARD Corporation shifted the focus of the business world from large companies to start-ups and shifted venture capital from being financed by high net worth individual to organized alternative investment mechanisms.²² In the 1980s, venture capital grew stronger; however, it did not

¹⁷ Omri Marian. (2016). The Other Eighty Percent: Private Investment Funds, International Tax Avoidance, and Tax-Exempt Investors. *BYU Law Review* 1713, pp. 1715–1720.

¹⁸ Harry Cendrowski *et. al.* (2012), *supra* note 12, p. 29. The US government established various entities that provide credit and financing to private companies such as the War Finance Corporation during the First World War, Reconstruction Finance Corporation during the Great Depression Era, Smaller War Plants Corporation during the Second World War, Small Defence Plants Administration during the Korean War and Small Business Investment Company after 1958.

¹⁹ Jiawen Li. (2024). Venture Capital Investment: A Full Look at Its History, Importance, Investment Dynamics, Effects on Entrepreneurship, and Outlook for the Future. *Proceedings of the 3rd International Conference on Business and Policy Studies*, p. 313.

²⁰ *Ibid.*

²¹ *Ibid*; and Cendrowski *et. al.*, *supra* note 12, p. 31.

²² *Ibid.*

match the growth of the leveraged buyouts that dominated the private equity industry. Private equity funds were able to buy huge public corporations that were out of reach a decade earlier.²³ To achieve this success, the industry has invented various alternative financing mechanisms, including high-yield bonds, commonly known as junk bonds.²⁴

2.2.2 Types of private equity Funds

There are various types of private equity funds. The first one is buyout funds whose main financial model is acquiring or controlling a significant amount of a certain company.²⁵ To achieve this goal, two strategies have been employed. The first is investing in private companies and the second is investing in public companies and delisting them from the stock exchange.²⁶ Concerning buyout funds, the most prominent financial model is leveraged buyouts. According to this model, the private equity fund contributes a limited amount of equity and borrows a substantial amount from the market to acquire a company.²⁷ To avoid liability for the borrowed capital, private equity funds collateralize the soon-to-be-acquired company. Hence, the lender's security is the asset or cash flow of the acquired company, not the private equity fund.²⁸

From a tax perspective, the distinguishing feature of buyout funds is the extensive use of acquisition leverage. The allocation of acquisition debt between the fund, the acquisition vehicle and the portfolio company determines the availability of interest deductions, the application of thin-capitalization or earnings-stripping rules, and the allocation of taxable income across jurisdictions. Because interest is generally deductible while equity returns are not, the debt-equity mix can materially alter the after-tax return of the transaction and is therefore a central element of buyout structuring.²⁹

²³ In 1989, the small private equity firm Kohlberg, Kravis and Roberts (KKR) bought and delisted the food and tobacco giant RJR Nabisco in a deal that valued at \$25 billion.

²⁴ Junk bonds are bonds that have a higher risk of defaulting. This is because mostly the borrowers are financially struggling companies. To offset this set back, junk bonds charge a higher percentage of interest.

²⁵ Luc Renneboog & Cara Vansteenkiste. (2017). Leveraged Buyouts: An Overview of the Literature. *Finance Working Paper* N° 492, p. 2.

²⁶ For instance, in US one should control two-third of the company's equity to delist it from the stock exchange.

²⁷ Renneboog & Vansteenkiste, *supra* note 25, p. 2.

²⁸ *Id.*

²⁹ Patrick Fenn & David Goldstein, *supra* note 7, pp. 1–3;

Brad Badertscher, Sharon p. Katz & Sonja Olhoft Rego. (2010). The Impact of Private Equity Ownership on Portfolio Firms' Corporate Tax Planning. *Harvard Business School Working Paper* 10-004, pp. 1–5]

The second type is a venture capital fund, which is an asset class that belongs to the broader private equity sector. It has the same features as private equity, such as being mostly structured as a limited partnership. Moreover, the managers are remunerated in two ways. The first one is a managerial fee and the other one is a performance-based fee.³⁰ Venture capital funds may finance the start-up company in three stages.³¹ The first stage is when no product or commodity can be commercialized, also known as seed investing. The second one is when there is a creation or commodity; however, the start-up company needs financing to enter the market, also known as early-stage investing. The third one is when the start-up company has already entered the market but needs financing for expansion.

The tax profile of venture capital differs in important respects from that of buyouts. Because these investments typically involve minority stakes, younger companies and little or no acquisition debt, interest-deductibility and thin-capitalization rules are far less significant. The principal tax questions instead concern the characterization of exit gains as capital rather than ordinary income, the treatment of losses from unsuccessful investments, the availability of start-up or innovation incentives, and the taxation of carried interest received by fund managers.³²

Another type of private equity fund is the distressed debt fund. These funds typically invest in the assets, debt or other financial claims of financially distressed companies and seek to generate returns through the subsequent restructuring, recovery or disposal of those investments. They may also target companies subject to bankruptcy or insolvency proceedings and acquire assets following foreclosure or acquire the business where it is offered for sale as a going concern. Structured product funds, by contrast, specialize in investing in securities backed by specified assets or cash flows. Common examples include mortgage-backed securities and collateralized loan obligations. Funds of funds (FoF) constitute another category of investment fund that invests in other private equity or alternative investment funds rather than directly participating in buyouts, venture capital, distressed debt or structured product investments.

³⁰ Francis Koh & Winston T. H. Koh. (2003). *Venture Capital and Economic Growth: An Industry Overview and Singapore's Experience. Working Paper No. 21* (Singapore Management University, School of Economics and Social Sciences) p. 7.

³¹ *Id.*, p. 6

³² Victor Fleischer, *supra* note 5, pp. 1–8.

These different investment strategies give rise to distinct tax considerations. Distressed debt funds primarily raise questions concerning the characterization of returns realized from distressed investments, including whether such returns should be treated as interest, ordinary business income or capital gains. Structured product funds may raise questions concerning the characterization and timing of income and gains derived from the underlying assets or financial instruments. For funds of funds, the principal tax issue is often the treatment of income flowing through multiple investment vehicles. Where the relevant fund is treated as pass through, income and gains may retain their character as they pass to investors; where the fund is treated as a separate taxable entity, taxation at the fund level may arise. These issues may be particularly significant where the ultimate investors are tax-exempt or non-resident.³³

2.2.3 Structure and regulation

Private equity funds may take different legal forms depending on the jurisdiction. In most countries, the preferred structure is the limited partnership.³⁴ This form has two types of partners the general partner, who manages the fund and assumes unlimited liability and the limited partners, who provide capital, enjoy limited liability and do not participate in daily management. In many jurisdictions, the limited partnership is recognized as a pass-through entity, whereby income is taxed at the investor level rather than the fund level.

In the US, most private equity funds are structured as limited partnerships or limited liability companies. Regulatory oversight focuses primarily on the fund manager. The Investment Advisers Act requires investment advisers to register unless they qualify for exemptions.³⁵ The Dodd-Frank Act strengthened this framework by requiring private fund advisers to register and file systemic risk reports unless they are exempted.³⁶ In the US, private equity funds are not subject to a single, comprehensive regulatory regime. Instead,

³³ Omri Marian. (2016). The Other Eighty Percent: Private Investment Funds, International Tax Avoidance, and Tax-Exempt Investors. *BYU Law Review* 1713, pp. 1715–1720; Eric M. Zolt, *supra* note 3, pp. 1–4.

³⁴ Patrick Fenn & David Goldstein, *supra* note 7, p. 5; Ronald Frankl & Tatiana Wittek. (2018). *Austria*. In *An Insight into the Private Equity Sector*, p. 8; Sebastian Voigt *et al* (2018). *Germany*. In *An Insight into the Private Equity Sector*, p. 91.

³⁵ United States Investment Advisers Act of 1940, 15 U.S.C. § 80b–3, (2025).

³⁶ United States Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 404 and § 408, 124 Stat. 1376, 1571, 1578, (2010).

the regulatory framework administered by the Securities and Exchange Commission primarily governs the activities of entities associated with the fund, particularly investment advisers,³⁷ rather than establishing a harmonized body of law specifically regulating private equity funds as a distinct investment vehicle.³⁸

In Europe, the regulatory framework is more centralized. The Alternative Investment Fund Managers Directive (AIFMD) establishes comprehensive rules for managers of hedge funds, private equity funds, and other alternative investment vehicles. It imposes authorization requirements,³⁹ minimum capital requirement,⁴⁰ limits on leverage⁴¹ and restrictions on asset stripping in portfolio companies.⁴² Fund managers must also comply with extensive disclosure and reporting obligations.⁴³ While the Directive has enhanced oversight and harmonization, it has also significantly increased compliance costs, especially for smaller fund managers. The funds are regulated by the members of the European Union such as the German Investment Code (KAGB) which governs investment funds from their establishment, management, and asset allocation to investor protections, valuation procedures, and supervision.⁴⁴

Kenya is notable for developing a domestic regulatory framework for private equity and venture capital through its Collective Investment Schemes (CIS) Regulations and the specific Venture Capital Company (VCC) Regulations. The Collective Investment Schemes (CIS) Regulation requires all investment funds, including private equity funds, to be approved by the Capital Market Authority.⁴⁵ The CIS Regulation prescribes the governance of

³⁷ United States Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1–80b-21, United States Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64, United States Securities Act of 1933, 15 U.S.C. §§ 77a–77aa, United States Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), etc.

³⁸ McKenna, C., Private Equity and Capital Markets Policy, Congressional Research Service(2022).

³⁹ European Union Alternative Investment Fund Managers Directive, Directive 2011/61/EU, Arts. 6–8, 2011 O.J. (L 174) 1 (EU).

⁴⁰ Id, Art. 9. The minimum capital requirement for AIFMs is set at €300,000, while external managers of AIFs are subject to a reduced threshold of €125,000.

⁴¹ Id, Art. 25.

⁴² Id, Art. 30

⁴³ Id, Arts. 22-24.

⁴⁴ German Investment Code (Kapitalanlagegesetzbuch ,2013).

⁴⁵ Kenya Collective Investment Schemes Regulations, Legal Notice No. 144, Section 10/1, (2001).

the scheme⁴⁶, reporting obligations⁴⁷ and rules to protect investors such as avoiding conflict of interest.⁴⁸

2.3 Private equity in Ethiopia

Before the enactment of the Capital Market Proclamation in 2021, Ethiopia had no dedicated regulatory framework for private equity or other collective investment schemes. Private equity activity, to the extent it existed, operated under the general commercial laws, principally the Commercial Code and the ordinary income-tax rules. Under that regime, investors could establish share companies or private limited companies to hold equity stakes in other businesses. However, these vehicles were not designed as collective investment schemes: they lacked specialized rules on fund governance, investor protection, asset custody, disclosure or the pooling of capital from multiple investors for professional management. In practice, most private equity-type investments were structured informally or through offshore vehicles, and domestic activity remained limited and largely invisible to the regulatory authorities.⁴⁹

The primary legislations that govern private equity funds are the Capital Market Proclamation, the Collective Investment Schemes Directive (CIS) and the Commercial Code. The Capital Market Proclamation provides that CIS activities are one of the regulated activities under the Proclamation⁵⁰ and to achieve that the Directive is prepared by the Ethiopian Capital Market Authority (ECMA). The CIS Directive provides that the CIS shall be one of the five options including an alternative investment fund.⁵¹ Private equity funds are one of alternative investment funds (AIF). Thus, they are required to comply with requirements provided for AIFs.

The Directive provides that the AIFs should be structured as a share company, private limited company (PLC) or limited partnership.⁵² The shares

⁴⁶ A collective investment scheme shall appoint a fund manager and a custodian. A collective investment scheme that is constituted as a trust shall appoint a trustee. *Id.*, Sections 30, 49 and 64.

⁴⁷ *Id.*, Sections 42, 70, 81, 122, 132 and 162.

⁴⁸ *Id.*, Sections 36/d, 45, 51/b and 74.

⁴⁹ Interview with Natae Eba, Legal Director of the Tax Department at Meherteab and Getu LLP, Notes on File.

⁵⁰ Capital Market Proclamation, Art. 55/1/g.

⁵¹ The five options are a public money market fund, a public mutual fund, a public real estate investment fund, an alternative investment fund and a special designation scheme which is approved by ECMA. Directive on Collective Investment Scheme (Draft), (2025). At the time of the preparation of this article, the directive is in the draft stage.

⁵² *Id.*, Art. 11/1.

of the AIF shall be issued by exempt offer mainly through private placement and qualified investor.⁵³ However, this exemption entails a prohibition from issuing any document or advertisement to the public.⁵⁴ The AIF is also required to have board of directors if it is a share company and PLC; and regarding limited partnership there should be the equivalent decision-making body that includes the general partner. The Directive provides investor disclosure rules for AIFs which require the offer document to include an overview of the regulatory and legal framework applicable to the AIFs, the restriction on trading of the units, a description of subscription agreement, etc.⁵⁵

The other issue is regarding service providers particularly CIS Operators and Custodians. To apply for CIS Operators license, a company shall be a share company or PLC and it should have a valid certificate of commercial registration or investment permit.⁵⁶ The CIS Operator is responsible for day-to-day administration of the scheme, formulation of investment policy, aligning all the activities of the scheme with the investment policy and laws, etc.⁵⁷ The other service provider is Security Custodian which shall be a share company or PLC and shall have a valid certificate of commercial registration or investment permit.⁵⁸ The Security Custodian shall ensure that the assets of the CIS is properly held and managed.⁵⁹ Moreover, the Security Custodian is responsible for receiving payments from investors for the subscription of units, collecting and holding income of the scheme and deposit money received by or on behalf of the scheme.⁶⁰

3. Taxation Rules on Private Equity Sector in Comparative Perspective

3.1 General Overview

Private equity has become a significant feature of capital markets worldwide, mobilizing large pools of long-term capital for investment in unlisted companies. Globally, the dominant model is the limited partnership (or

⁵³ Id, Art. 32. The issuance of the units of the AIF shall comply with the Public Offering and Trading of Securities Directive No. 1030/2024.

⁵⁴ Id, Art. 57/1.

⁵⁵ Id, Art. 58/2.

⁵⁶ Capital Market Service Providers Directive, (2024), Art. 61, Directive No. 980.

⁵⁷ CIS Directive, Art. 66.

⁵⁸ Capital Market Service Providers Directive, Art. 78.

⁵⁹ CIS Directive, Art. 80/2.

⁶⁰ Id, Art. 80/3.

equivalent fiscally transparent vehicle), which allows income and gains to flow through to investors without entity-level taxation, thereby achieving a degree of tax neutrality.⁶¹ Nevertheless, important differences persist across jurisdictions regarding the characterization of carried interest, the treatment of management fees, the deductibility of acquisition debt, the application of thin-capitalization rules, and the tax position of tax-exempt and foreign investors.⁶²

The three jurisdictions selected for comparison: the United States, Europe, and Kenya were chosen for complementary reasons. The United States is the largest and most mature private equity market and has developed the most elaborate body of tax rules and administrative practice governing pass-through structures, carried interest, and the treatment of tax-exempt and foreign investors.⁶³ The United Kingdom and other European jurisdictions illustrate the ongoing debate over the trading-versus-investment characterization of private equity activity and the evolving regulatory framework under the Alternative Investment Fund Managers Directive, while also offering recent policy responses such as the UK's asset-holding-company regime.⁶⁴

Kenya is included for a different and more immediate reason. Ethiopia's capital-market legislation, including the Capital Market Proclamation and the emerging collective-investment-schemes framework, has drawn significant inspiration from Kenya's capital-market laws and regulations. Kenya therefore provides a relevant regional comparator: faces comparable challenges of market development and administrative capacity, and has already confronted the practical tax consequences of limited-partnership and company structures for private equity and venture capital.⁶⁵ Examining Kenya's experience helps identify both transferable lessons and pitfalls that Ethiopia may wish to avoid.

The comparative analysis that follows applies a consistent set of criteria fund-level taxation, treatment of management fees and carried interest, investor-level taxation, and portfolio company issues while remaining alert to the institutional and administrative differences between these more developed systems and Ethiopia's emerging capital market.

⁶¹ Patrick Fenn and David Goldstein, *supra* note 7, pp. 1–2.

⁶² Victor Fleischer, *supra* note 5, pp. 1–8 and David A. Weisbach, *supra* note 5, P. 715–720.

⁶³ Patrick Fenn and David Goldstein, *supra* note 7, pp. 1–5

⁶⁴ Dan Neidle, *supra* note 9, pp. 49–59.

⁶⁵ Shanthi Divakaran *et al.*, *supra* note 10, pp. 33–46.

3.2 Taxation of Private Equity Funds in the US

The taxation of the private equity sector differs from the taxation of ordinary commercial enterprises because several distinct participants derive different categories of income from the same investment. At the fund level, the principal concern is whether the fund is subject to entity-level taxation or treated as a pass-through vehicle. Fund managers earn management fees and carried interest, each of which may attract different tax treatment. Investors derive returns through dividends and capital gains, while portfolio companies remain subject to ordinary corporate income taxation. Accordingly, the U.S. tax regime addresses each category of income separately according to its economic character.

The US tax regime regarding the private equity sector is more elaborate and comprehensive than its counterparts in other parts of the world. The advancement of taxation rules in the US is mainly attributed to the development of the private equity sector.⁶⁶ To obtain favorable tax treatment, many U.S. private equity funds adopt tax-efficient structures through careful tax planning and compliance with the applicable tax rules.⁶⁷ To this end, a fund sponsor should address tax issues at the fund level, the fund manager level, the investor level and the portfolio company level.

At the fund level, taxation primarily concerns the legal form through which private equity funds are organized and whether the fund itself is subject to income taxation. Sponsors of private equity funds employ various rules. The fund that is organized as a partnership is exempted from corporate income tax.⁶⁸ Most US private equity funds are structured as either limited partnerships⁶⁹ or limited liability companies.⁷⁰ This structuring has two main advantages for the funds. First, it protects the partners from double taxation at the corporate and individual levels. Second, since the LPs and LLCs are tax exempted, they do not have tax filing and disclosure requirements.

The limited partnership and limited liability company structures are preferred among private equity funds primarily for their favorable tax

⁶⁶ Victor Fleischer, *supra* note 5, p. 83.

⁶⁷ See generally, Fenn and Goldstein, *supra* note 7; See also, Internal Revenue Service, Tax on Unrelated Business Income of Exempt Organizations (Publication 598, Cat. No. 46598X), (2021).

⁶⁸ Steven M. Rosenthal. (2013). Taxing Private Equity Funds as Corporate ‘Developers’, *Tax Notes*, Vol. 138 No. 4, p. 361.

⁶⁹ Limited partnerships are pass-through entities for the tax purposes. This means that, the partnership is not taxed itself rather the tax liability is transferred to the partners.

⁷⁰ Limited Liability Company is another pass-through entity.

treatment.⁷¹ Business development companies⁷² and S corporations⁷³ also have the same tax advantage as LPs and LLCs.⁷⁴ However, private equity funds such as Blackstone Group prefer C corporations⁷⁵ not because of their tax advantage but rather their advantage to access the wider public.⁷⁶ Business development companies also have the same advantage in this regard.⁷⁷

Private equity funds are often organized as LPs or LLCs. This allows the firms to constitute two types of partners; general and limited. The general partner⁷⁸ is the fund manager that is responsible for the day-to-day management of the fund. There are varying compensation arrangements for the fund manager. Among them, the management fee and carried interest are the prominent ones. Their distinction is that the former is paid annually for operational purposes, whereas, the latter is not payable annually and it is contingent on the success of the fund.

At the fund manager level, the tax issues are how management fee and carried interest are treated under tax law. The fund manager has to incur costs to be profitable such as hiring professionals, researching the market and other

⁷¹ Patrick Fenn & David Goldstein, *supra* note 7, pp. 5-6.

⁷² Business Development Companies are a category of closed-end investment companies created under the Investment Company Act of 1940 to facilitate investment in small and developing businesses. Unlike traditional private equity funds, BDCs may raise capital from the public through stock exchanges while benefiting from a tax regime that generally avoids entity-level taxation if the applicable distribution requirements are satisfied.

⁷³ An S corporation is a corporation that elects to be taxed under Subchapter S of the Internal Revenue Code. Unlike a traditional corporation, its income, losses, deductions, and credits pass directly to shareholders, thereby avoiding double taxation at the corporate level. However, S corporations are subject to statutory restrictions, including limitations on the number and type of shareholders.

⁷⁴ United States Internal Revenue Code, §§ 851-855 (Regulated Investment Companies) and United States Internal Revenue Code, §§ 1361-1379 (S Corporations).

⁷⁵ A C corporation is the default form of corporation under U.S. federal tax law. It is a separate taxable entity that pays corporate income tax, while shareholders are taxed separately on dividends received, resulting in potential double taxation. Nevertheless, C corporations can issue multiple classes of shares and access public capital markets, making them suitable for large enterprises seeking broad investment.

⁷⁶ Victor Fleischer. (2008). Taxing Blackstone. 61 *Tax Law Review*, pp. 90-96 and Andrew Ross Sorkin.

See also, Michael J. de la Merced. (2007). News Analysis behind the Veil at Blackstone? Probably Another Veil. *The New York Times*.

⁷⁷ United States Investment Company Act of 1940, §§ 54-65.

⁷⁸ General partners in limited partnership have unlimited liability for the debts of the partnership. Hence, to avoid unlimited liability, the general partner itself often organized as LLP.

operational costs. To cover these costs, the fund manager will charge 2% of the overall amount of the fund which is taxed as an ordinary business income. The other compensation mechanism is carried interest in which upon the attainment of certain hurdle rate⁷⁹, the fund manager will charge the investors 20% of the overall profit. The controversial issue is how the carried interest should be characterized. Some argue that it should be treated as an ordinary business income and taxed at a progressive tax rate of 35%. However, the Internal Revenue Service accepts that carried interest is a capital gain and taxed at 28% favorable rate.⁸⁰

At the investor level, taxation concerns how returns such as dividends or capital gains received by investors from private equity funds are treated under tax law. According to Patrick Fenn and David Goldstein, investors of private equity funds have general and specific objectives.⁸¹ The general objectives include; the fund should be a pass-through entity for tax purposes, investors should enjoy favorable tax treatment, the fund should minimize phantom income⁸², etc. The specific objectives are regarding tax-exempted organizations, particularly pension funds, private foundations, and charitable trusts. The tax exemption of these organizations has an exception concerning unrelated business taxable income.

Unrelated business taxable income is tax-exempted organizations' income that does not relate substantially to the organization's exempt purpose or function.⁸³ In this regard, even though the organization is tax-exempted for public policy reasons (if its undertaking is unrelated to the exempted purpose or function), it will bear a tax liability. Unrelated business taxable income does not include dividends, interest, or capital gains of the tax-exempted organization⁸⁴. However, if the income derived from investments uses debt

⁷⁹ In most private equity funds, the hurdle rate is 8% profit of the capital.

⁸⁰ Samuel Brunson (2010). Taxing Investment Fund Managers Using a Simplified Mark-to-Market Approach. 45 *Wake Forest L. Rev.* p. 79.

⁸¹ Fenn and Goldstein, *supra* note 7, p. 1.

⁸² Phantom income is an investment gain that has not been realized yet, however, it is attributed to the partners which increase the tax liability. For instance, one partnership gains a 100,000 birr profit for the calendar year. If the partners share profit 50-50, the partners will receive 50,000 Birr each. However, if the partners agree to take only 25,000 Birr each and use the remaining income for operational purposes, the law still treats their income and imposes a 50,000 Birr income tax on 25,000 Birr. Hence, the difference between the profit and the received amount is what they called phantom income.

⁸³ Internal Revenue Service, *supra* note 67, p. 4.

⁸⁴ *Id.*, p. 9.

financing (called unrelated debt-financed income) in whole or in part, then that income will be taxed.⁸⁵

At the portfolio company level, taxation relates to the operating businesses acquired or invested in by private equity funds. Unlike the private equity fund itself, portfolio companies generally conduct commercial activities and generate operating income that is subject to corporate taxation. The tax treatment of portfolio companies is particularly important in private equity transactions because acquisitions are often conducted through leveraged buyouts, where significant amounts of debt are used to finance the acquisition. Consequently, rules governing interest deductions, directly affect the profitability of private equity investments.

In the United States, corporations are subject to a 21% flat corporate tax rate.⁸⁶ Entities that are considered corporations for tax purposes are C corporations.⁸⁷ In some instances, if the shareholders consented, a limited liability company can also be subject to corporate tax. Hence, the income tax rules will apply to the C corporation always and mandatorily and on LLCs sometimes with the consent of the partners of the LLC. One should note that other types of business organizations are pass-through entities for tax purposes.

In the US, the portfolio companies can deduct any expenses that they incurred in the course of conducting business and this includes the deduction of interest expenditure.⁸⁸ To deduct interest expenditure, the amount should not be more than 30% of earnings before interest and tax (EBIT).⁸⁹ This margin is essential for leveraged buyouts because the company takeover is done by using a substantial amount of debt. However, the use of EBIT instead of EBITDA (earnings before interest, taxes, depreciation and amortization) as the limit of interest deductibility has caused the sector to pay more taxes.⁹⁰

⁸⁵ Fenn and Goldstein, *supra* note 7, p. 2.

⁸⁶ This tax rate is applicable only at the federal level.

⁸⁷ The other type of corporation is S corporation which is not taxed at corporate level.

⁸⁸ United States Inland Revenue Code, §163 (j), Interest Expense Limitation, Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 254, (2017).

⁸⁹ Before this, the rule was earnings before interest, taxes, depreciation and amortization (EBITDA). But starting 2022, depreciation and amortization have been dropped which makes the tax more burdensome. This is because the amount of deductible interest in EBITDA is higher than EBIT.

⁹⁰ The Tax Cuts and Jobs Act introduced a limitation on business interest deductions under Section 163(j) of the Internal Revenue Code. Initially, adjusted taxable income was calculated using an EBITDA-based approach; however, after 2021, the exclusion of depreciation and amortization deductions resulted in an EBIT-based limitation. Since

3.3 Taxation of private equity funds in Europe

In their early stages, private equity funds in Europe were structured as subsidiaries of financial institutions, and their funding came from the parent companies. This structure affects the funds' tax liability because, unlike limited partnerships, subsidiaries of financial companies are subject to corporate tax. Later, these funds became independent of their parent companies and successfully raised funds from other sources, reaching \$69 billion in equity and \$140 billion in loans by 2007. The European private equity industry has since experienced significant growth, with private equity and venture capital assets under management reaching approximately €1.25 trillion in 2024, managed by more than 3,000 active firms across Europe. There are unsettled issues regarding the tax treatment of various incomes from this sector.

Despite the growth and maturity of the sector, the taxation of private equity activities remains subject to debate in several European jurisdictions. The main tax issues concern the characterization of income generated from private equity activities, the taxation of investment returns received by investors, the compensation of fund managers, and the taxation of portfolio companies acquired by private equity funds. Since European countries adopt different approaches to taxing investment vehicles and related income streams, the following section examines selected European jurisdictions: the United Kingdom, France, and Germany.

At the fund level, all three jurisdictions favour fiscally transparent vehicles, most commonly limited partnerships, to achieve tax neutrality. In the United Kingdom, the long-running controversy is whether private-equity activity constitutes trading or investment. Current administrative practice treats it as investment, so that gains are subject to the lower capital-gains tax rate rather than the higher income-tax rate.⁹¹ This approach is favourable to the industry but creates revenue and fairness challenges for the tax authorities, because the same activity can produce very different tax outcomes depending on how it is characterized.

In France, collective investment vehicles are generally exempt from tax at the fund level; taxation arises only on distributions.⁹² This exemption is a clear

EBIT is generally lower than EBITDA, the change reduced the amount of deductible interest expenses, affecting highly private equity-backed companies that frequently rely on debt financing in leveraged buyout transactions.

⁹¹ Dan Neidle, *supra* note 9, p. 59.

⁹² Guillaume Ansaloni *et al* (2018). *France*. In *An Insight into the Private Equity Sector*, pp. 66–74.

best practice from the standpoint of tax neutrality, yet it places greater pressure on the correct withholding and reporting of distributions. In Germany, limited partnerships are treated as fiscally transparent under the Income Tax Act, so the fund itself is not taxed and income is attributed directly to the partners.⁹³ The German model is relatively stable and predictable, but it still requires careful monitoring of the partners' tax status, especially where foreign or tax-exempt investors are involved.

At the fund-manager level, the treatment of carried interest remains the most contested issue and illustrates both challenges and diverging best practices. In the United Kingdom, the characterization of carried interest follows the same trading-versus-investment distinction that applies to the fund; where the activity is accepted as investment, carried interest benefits from capital-gains treatment.⁹⁴ The principal challenge is the uncertainty and potential for dispute that this case-by-case approach creates.

France treats carried interest as capital income subject to capital-gains tax rather than progressive income tax.⁹⁵ This is administratively simpler and more predictable for managers, although it has been criticized as overly generous. Germany has adopted a more structured statutory preference: where the remuneration is performance-based, linked to the success of the fund, received by a person involved in management, and paid only after investors have received their agreed return, 40% of the carried interest is exempt from income tax.⁹⁶ The German approach provides clear legislative criteria while still subjecting a majority of the income to tax. Management fees, by contrast, are taxed as ordinary business income in all three jurisdictions.

At the investor level, the tax consequences depend on the character of the income that flows through the transparent fund and on the status of the investor. In the United Kingdom, investors are taxed according to the character of the income, ordinary income or capital gain that is attributed to them.⁹⁷ In France, investors are taxed on dividends and capital gain tax on the sale of their interests in the fund.⁹⁸ In Germany, 95% of gains realized on the disposal of shares in corporations is generally exempt from corporate income tax, subject to certain conditions.⁹⁹ This exemption is a significant advantage

⁹³ German Income Tax Act §§ 15, 18.

⁹⁴ Dan Neidle, *supra* note 9, p. 56–59.

⁹⁵ Laurent Grillet-Aubert. (2023). Private Equity: Overview and Vulnerabilities. *Autorité des Marchés Financiers*, p. 14.

⁹⁶ German Income Tax Act § 18(1)(4)

⁹⁷ Dan Neidle, *supra* note 9, p. 46.

⁹⁸ See generally Guillaume Ansaloni *et al.*, *supra* note 111.

⁹⁹ German Corporate Income Tax Act § 8b.

for taxable corporate investors and can be regarded as a best practice for encouraging private equity investment, although it reduces the tax base.

At the portfolio-company level, ordinary corporate tax applies in all three countries, but the rules on interest deductibility create important differences in the after-tax cost of leveraged buyouts. In the United Kingdom, portfolio companies are subject to the standard corporation-tax regime and to the corporate interest restriction, which limits deductions by reference to tax-EBITDA.¹⁰⁰ France levies a 25% corporate income tax on net profits and limits the deductible interest rate on related-party loans, subject to an arm's-length exception.¹⁰¹ The arm's-length escape clause is a useful best practice because it allows commercial flexibility while still protecting the tax base. Germany imposes a 15% corporate income tax plus a 5.5 % solidarity surcharge and a municipal trade tax; net interest expense is generally deductible only up to 30 % of tax-adjusted EBITDA, with excess interest carried forward.¹⁰² Across the three jurisdictions, the common challenge is to strike a balance between allowing legitimate interest deductions on acquisition debt and preventing excessive base erosion.

3.4 Taxation of private equity funds in Kenya

In Kenya, even though the capital market is an attractive sector for investors, private equity funds are domiciled in other countries due to regulatory issues. One of those issues is the forms of business organization and their tax implication. In Kenya, private equity funds can be structured as a limited liability company (LLC), limited liability partnership (LLP), and limited partnership (LP).¹⁰³ All of these legal forms have an adverse effect on the fund's tax liability.

At the fund level, limited liability companies are subject to a 30% corporate income tax.¹⁰⁴ In addition, profits distributed as dividends attract a further 5 % tax for residents and 15% for non-residents.¹⁰⁵ Limited partnerships are treated as pass-through entities and therefore escape corporate income tax, but they are subject to a special compensating tax when profits that have not borne the full corporate rate are distributed.¹⁰⁶ The compensating tax can effectively

¹⁰⁰ Dan Neidle, *supra* note 9, pp. 49–59.

¹⁰¹ Guillaume Ansaloni *et al.*, *supra* note 111, p. 66

¹⁰² German Corporate Income Tax Act § 8a

¹⁰³ Shanti Divakaran *et. al.*, *supra* note 10, p. 33.

¹⁰⁴ Kenya Income Tax Act, Cap. 470, Sections 3/2/a/i, 4 and Third Schedule, (2021).

¹⁰⁵ *Id.*, Section 7.

¹⁰⁶ Compensating tax comes to a play when an SPV of the private equity fund disposed of a portfolio company. In this case, the SPV will be liable for 15% capital gains tax.

raise the overall tax burden significantly above the nominal 30 % rate.¹⁰⁷ Limited liability partnerships remain relatively untested for private-equity use. These cumulative tax disadvantages at the fund level explain why many private equity and venture capital funds that invest in Kenyan assets are still structured and domiciled offshore.

At the fund manager level, fund managers are subject to the standard 30% corporate income tax on their profits.¹⁰⁸ In addition, management fees are subject to 16% value-added tax when the services are consumed in Kenya.¹⁰⁹ Where the services are consumed outside Kenya, the VAT rate is zero.¹¹⁰ Unlike the United States and certain European jurisdictions, Kenya does not appear to have developed a preferential rate for carried interest; any performance-based remuneration is therefore taxed according to the ordinary rules applicable to the recipient.

At the investor level, the principal issue is capital gains tax. When a special purpose vehicle used by a private equity fund disposes of shares in an unlisted portfolio company, the gain is subject to capital gains tax at the current rate of 15%.¹¹¹ Shares listed on the Nairobi Securities Exchange are exempt from capital gains tax.¹¹² This differential creates a clear incentive for private equity funds to seek exits through public listings rather than private sales. Tax-exempt investors face the additional risk that certain income streams could be recharacterised in a manner that affects their exempt status, although the detailed application of unrelated-business-income concepts remains less developed than in the United States.

At the portfolio-company level, interest is in principle a deductible expense provided it is incurred wholly and exclusively in the production of income. However, thin-capitalization rules impose a constraint on foreign-owned Kenyan companies. Where the debt-to-equity ratio exceeds 3:1, interest on the

However, since corporate income tax is 30%, compensating tax penalizes companies that are taxed lower than 30% rate. Hence, when it is computing the compensating tax, the rate can be as high as 42.86%. Shanti Divakaran *et al.*, *supra* note 10, P. 46.

¹⁰⁷ Shanthi Divakaran *et al.*, *Id.*, pp. 33–46.

¹⁰⁸ *Id.*, p. 35

¹⁰⁹ Kenya Value Added Tax Act, No. 35 of 2013, Sections 5(2)(b), (2021).

¹¹⁰ *Ibid.*, Sections 7(2) and Second Schedule, Part A, Paragraph 1.

¹¹¹ Kenya Income Tax Act, *supra* note 133, Eighth Schedule, Paragraph 6(1).

¹¹² In Kenya, companies that are listed in Nairobi Securities Exchange are not subject to capital gains tax. Hence, private equity funds prefer to go public than selling the portfolio company in private placement. Kenya Investment Authority, Tax Procedure, (2024).

excess debt is disallowed as a deduction.¹¹³ Because many private equity acquisitions are financed with substantial leverage, these rules can materially increase the effective tax cost of leveraged buyouts and therefore influence both the capital structure of portfolio companies and the overall attractiveness of Kenya as an investment destination.

4. Taxation of Private Equity Sector in Ethiopia

4.1 Taxation of private equity funds

The taxation of private equity funds under Ethiopian law comprises two distinct regimes. The first is the general tax framework applicable to private equity funds as Collective Investment Schemes under the Income Tax (Amendment) Proclamation.¹¹⁴ The second consists of the special tax incentives available where private equity funds invest in startups and are designated as Startup Ecosystem Builders under the Startup Proclamation No. 1396/2025 and the Investment Incentives Regulation.¹¹⁵ Accordingly, this section first examines the general tax treatment of private equity funds before discussing the additional incentives available for investments in startups.

4.1.1 General tax treatment of private equity funds

The practice of investment funds in Ethiopia is largely confined to venture capital firms of predominantly foreign origin. The existence of these firms can be unknown to Ethiopian authorities for various reasons including taxation concerns.¹¹⁶ Hence, the private equity funds are established in a foreign country where the fund is treated as a tax-transparent entity. Then that fund incorporates a special purpose vehicle (SPV) in one of the tax haven countries.¹¹⁷ The SPV will invest directly in a portfolio company to protect the fund from exposing itself to the tax authority of Ethiopia.

Investment funds are not popular in Ethiopia and funds that operate are mostly of foreign origin. However, the recent enactment of the Capital Market Proclamation and the establishment of the ECMA have prompted the stakeholders to devise a legal framework for investment funds, including private equity funds. Before the introduction of the Capital Market

¹¹³ Kenya Income Tax Act, Section 15(3)(a)(i).

¹¹⁴ Income Tax (Amendment) Proclamation, Art. 19/2.

¹¹⁵ Investment Incentives Regulation, Art. 11.

¹¹⁶ Interview with Natae Eba, Legal Director of the Tax Department at Meherteab and Getu LLP, Notes on File.

¹¹⁷ Interview with Natae Eba, *ibid*, Notes on File. There are tax haven countries in the world that levy from little to zero tax in the foreign investors such as Cayman Islands, Monaco, Mauritius, etc.

Proclamation, private equity funds were structured in the manner that is provided in the Commercial Code.¹¹⁸ However, since collective investment schemes are now under the scope of the ECMA, they have to comply with the Capital Market Proclamation and the CIS directive.

When it comes to the tax treatment of the private equity funds, the Income Tax (Amendment) Proclamation provides that private equity funds are exempt from taxation at the fund level irrespective of the legal form in which they are established.¹¹⁹ The detailed rules governing this exemption are left to be prescribed by the forthcoming Income Tax Regulation.¹²⁰ This shifts the burden of taxation onto the investors when proceeds are distributed. This exemption is a deliberate policy choice that aligns Ethiopia with international practice, prevents double taxation and redefines where the central tax issues in the private equity sector arise.

The Ethiopian approach aligns with international practice. The exemption at the fund level is commonly adopted to prevent economic double taxation while preserving investor-level taxation. In the United States and United Kingdom, private equity funds are exempt at the fund level and taxation arises only upon distribution to investors if they adopt qualifying pass-through forms such as limited partnerships and limited liability companies.¹²¹ Ethiopia's adoption of this exemption regime situates its private equity sector within global norms and prevents competitive disadvantage, especially in comparison to regional peers such as Kenya.

This tax exemption is crucial because otherwise private equity funds would have faced two levels of taxation. First, the fund would pay 30% corporate income tax¹²² or 15% capital gain tax¹²³ on profits realized from its portfolio companies.¹²⁴ Second, when profits were distributed, investors would pay an

¹¹⁸ Business organizations that could be established under the 1960 Commercial Code were ordinary partnership, general partnership, limited partnership, joint venture, private limited company and share company. However, the new Commercial Code has omitted ordinary partnership provisions and instead includes limited liability partnership and one-person private limited company to the list of business organizations.

¹¹⁹ Income Tax (Amendment) Proclamation, (2025), Art. 19/3, Proclamation No. 1395.

¹²⁰ *Id.*

¹²¹ Fenn and Goldstein, *supra* note 7, p. 5.

¹²² Income Tax Proclamation, (2016), Art. 19/1, Proclamation No. 979, Neg Gaz Extra Ordinary Issue.

¹²³ Income Tax (Amendment) Proclamation, Art. 61/2.

¹²⁴ The type of tax will be determined based on the characterization of income of the private equity fund. If the business activity is trading, the corporate income tax will be

additional 15% dividend tax.¹²⁵ This double layer taxation would make private equity unviable, discouraging both domestic and foreign investors. By exempting the fund itself, Ethiopian law ensures that the income is only taxed once at the investor level thereby encouraging the investment activities in this sector. The resulting economic double taxation would increase the aggregate tax burden on investment returns, although the precise burden would depend on the legal characterization of the fund's income and the nature of the distribution. By exempting the fund itself, Ethiopian law removes taxation at the fund level and instead places taxation principally at the investor level when taxable distributions arise.

Another important implication of the exemption is that it sets aside the long-debated issue of whether private equity funds are engaged in trading or investment activities. Ordinarily, this distinction determines whether profits are taxed as ordinary business income or as capital gain. In the Ethiopian case, because the fund itself is exempt regardless of characterization, the debate loses practical significance at the fund level. However, the issue may resurface at the fund manager level where the fund manager receives carried interest, and at the investor level where the investor sells his/her share of the private equity fund.¹²⁶

4.1.2 Tax incentives for private equity funds investing in startups

The Startup Proclamation recognizes private equity funds as one of the startup ecosystem builders that contribute to the establishment, development and sustainability of startups.¹²⁷ However, recognition alone does not automatically entitle a private equity fund to the incentives provided under the investment laws. To benefit from such incentives, the private equity fund must first obtain designation as a Startup Ecosystem Builder by satisfying the statutory eligibility requirements and obtaining a certificate from the Ministry.¹²⁸

Once designated as a Startup Ecosystem Builder, a private equity fund becomes eligible for the tax incentives provided under the Investment Incentives Regulation. First, any capital gain realized from the disposal of its ownership interest in a startup is exempt from income tax.¹²⁹ Since the

applicable. Whereas, the business activity is investment, then the capital gain tax will be applicable.

¹²⁵ Income Tax (Amendment) Proclamation, Art. 57/1.

¹²⁶ See, *infra* note 106-116 and *infra* note 130-139.

¹²⁷ Startup Proclamation, Art. 2/20

¹²⁸ Startup Proclamation, Arts. 16/1-3

¹²⁹ Investment Incentives Regulation, Art. 11/1

principal source of return for private equity funds is the appreciation in the value of portfolio companies and their eventual disposal, this incentive substantially reduces the tax burden on successful startup investments. Secondly, dividends distributed by a startup to a designated private equity fund are exempt from income tax for a period of five years.¹³⁰ This exemption reduces the tax cost associated with distributions received during the investment period and complements the exemption granted on the disposal of the investment.

Thirdly, a designated private equity fund that incurs losses from its investment in a startup is exempt from the Minimum Alternative Tax for a period of three years, to the extent of the loss suffered, provided that it demonstrates that the loss resulted from its investment in the startup.¹³¹ Under the Income Tax (Amendment) Proclamation, taxpayers are generally required to pay a Minimum Alternative Tax where the tax payable is less than 2.5 per cent of their turnover.¹³² The applicable rate is 2.5 percent of the taxpayer's turnover, or, in the case of banks and insurance companies, 2.5 percent of the prescribed tax base.¹³³ Accordingly, the exemption granted under the Investment Incentives Regulation relieves designated private equity funds from the application of the Minimum Alternative Tax where losses arise from startup investments, thereby mitigating the financial risk associated with investing in early-stage enterprises.

These incentives demonstrate the government's policy of encouraging private investment in startups by reducing the tax burden associated with high-risk investments. The combination of exemptions from capital gains tax, dividend tax and the Minimum Alternative Tax enhances the attractiveness of startup investments for private equity funds and supports the broader objective of facilitating access to finance for innovative enterprises.

4.2 Taxation of fund managers

Private equity funds have fund manager. However, unlike other institutions where a natural person is a manager, the fund managers of the private equity funds are legal persons with their own distinct personality. For instance, where the fund is structured as a limited partnership, the general partner who

¹³⁰ Investment Incentives Regulation, Art. 11/2

¹³¹ Investment Incentives Regulation, Art. 11/3

¹³² Income Tax (Amendment) Proclamation, Art. 23/1

¹³³ Income Tax (Amendment) Proclamation, Art. 23/2

manages the fund is formed as a legal person.¹³⁴ In the US, the general partner managing the fund is mostly structured as a limited liability partnership.¹³⁵

Under the Capital Market Proclamation, the private equity fund manager is called the collective investment scheme operator. A collective investment scheme operator under the proclamation is defined as “a legal entity that has overall responsibility for management and performance of the functions of a collective investment scheme”.¹³⁶ The Directive for Capital Market Service Providers Licensing and Supervision has provided that only a share company and private limited company are eligible to obtain a CIS Operator’s license.¹³⁷

A CIS Operator is a legal entity that is entrusted with managing the assets of the collective investment scheme. This legal entity is formed with the intent to make a profit as any other business organization, hence, it is expected that the CIS Operator has income. The issue here is how incomes of the CIS Operator should be treated for tax purposes. In Ethiopia the CIS Operator should be a share company or a PLC which has a tax implication. In this regard, two types of income; namely management fee and carried interest will be discussed.

Another entity that participates in the administration of the assets of a private equity fund is the Securities Custodian. The Directive for Capital Market Service Providers Licensing and Supervision has provided that only a share company or PLC is eligible to obtain a Securities Custodian license.¹³⁸ Under the Draft CIS Directive, every collective investment scheme is required to appoint a Securities Custodian, which is entrusted with holding the assets of the fund, ensuring their safekeeping and supervising the management of the assets comply with applicable laws and the fund’s establishment documents.¹³⁹ The remuneration it receives for these services shall be classified as a form of management fee. Since this income has no

¹³⁴ In limited partnership, the general partner has unlimited liability to the debts of the partnership, whereas the limited partner liability extends only to its capital contribution. One of the reasons that general partners are structured as a legal person is to avoid unlimited liability.

¹³⁵ In Ethiopia, the possibility of structuring the general partner as limited liability partnership is prohibited under the Directive for Licensing of Capital Market Service Providers. However, if LLP was not excluded by the directive, the legal form would have been fit for the CIS Operator because LLPs are formed by professionals and in this case the CIS Operators role can be regarded as investment advisory which is a professional activity.

¹³⁶ Capital Market Proclamation, Art. 2/12.

¹³⁷ Capital Market Service Providers Directive, Art. 61.

¹³⁸ Capital Market Service Providers Directive, Art. 78.

¹³⁹ CIS Directive, Art. 80.

performance-linked component, Securities Custodians fall outside the scope of the carried interest discussion.

4.2.1 Management fee

To discharge the task of managing a collective investment scheme, there are necessary expenses that should be incurred. These expenses are mainly related to risk management and the selection of plausible businesses.¹⁴⁰ Thus, the CIS Operator has to hire personnel to discharge tasks. These personnel include risk analysts, portfolio managers, lawyers, directors, and the executive members of the company. All these expenses shall be compensated to the CIS Operator.

The manager of the fund in other countries charges the limited partners a management fee of 1.5% - 2% of the total assets of the fund annually.¹⁴¹ This means that, for a \$1 billion fund, the annual management fee will be \$20 million. This fee is charged even if there is no positive return in that year. In Ethiopia, the draft CIS Directive provides that the Establishment Documents shall provide how the amounts payable are determined and the relevant factors that are involved.¹⁴² However, it is silent on how much the management fee should be.¹⁴³

This fee should be taxed because it is derived from the business activities of the CIS Operator. Since the CIS Operator is a share company or a PLC, the provisions of corporate income tax should be applicable to determine the taxable amount. Hence, as per the Income Tax Proclamation, the tax rate is a flat 30%.¹⁴⁴ However, as any other taxpayer of Schedule C, the operator can deduct any expenses incurred in its business activities.¹⁴⁵

The characterization of management fees is less controversial because the entitlement generally arises from the provision of identifiable investment related services and is payable irrespective of whether the fund generates a successful investment return. The distinction is relevant when compared with carried interest: a management fee ordinarily represents remuneration for

¹⁴⁰ In private equity funds transactions, one of costly tasks is due diligence issues. The fund before it acquires the shares of the portfolio company should make various due diligences such as business due diligence, legal due diligence and tax due diligence. These due diligences have an effect of minimizing the risk.

¹⁴¹ F Koh & TH Koh, *supra* note 30, p. 7.

¹⁴² CIS Directive, Art. 90/2.

¹⁴³ We can infer from the silence of the directive that the amount of management fee is left for the contractual agreement between the collective investment scheme and the operator.

¹⁴⁴ Income Tax Proclamation, Art. 19/1.

¹⁴⁵ These expenses are salaries for employees, expenses in case of due diligence, any payments made to independent contractors for the business purposes, etc.

services, whereas carried interest is contingent upon the performance of the investment portfolio. The two forms of remuneration should therefore not be treated as economically or legally interchangeable merely because both are received by the same fund manager.

In addition to management fees earned by the CIS Operator, Securities Custodians also generate income in the form of custody fees charged to the fund.¹⁴⁶ Since Securities Custodians under the Ethiopian framework must be a share company or PLC, their income falls under the general rules of corporate income taxation. Accordingly, the income of the Securities Custodian is subject to the flat 30% corporate income tax.¹⁴⁷ However, the Securities Custodian is entitled to deduct business expenses in computing taxable business income.¹⁴⁸

4.2.2 Carried interest

Carried interest is the other type of income for the CIS Operator and it can be more attractive as compared to management fee. These two fee arrangements have different objectives in the private equity sector. In the case of the management fee, it is a way of compensating the expenses of the CIS Operator, whereas, carried interest is a performance fee that rewards the success of the CIS Operator for bringing a positive return.¹⁴⁹ Regarding carried interest, there is a concept called hurdle rate. According to this concept, to charge carried interest, the CIS Operator should bring at least an 8% positive return on the investments.¹⁵⁰ If the CIS Operator achieves that, it can charge up to 20% of the positive return. In Ethiopia, the draft CIS directive recognizes performance fees but it fails to set the hurdle rate and carried interest rate.

The carried interest is more controversial than the management fee when it comes to its characterization as an ordinary business income or capital gain. The controversy is exacerbated by the existence of differences in the tax rate of ordinary business income and capital gains tax. For instance, in Kenya corporate tax is 30%, whereas, capital gains tax is 15%. If one views carried interest as an allocation of the fund's profits, then the CIS Operator income should inherit the character of the fund. Since most private equity funds earn income primarily through the disposal of shares in portfolio companies, such profits are capital gains. Under this view, carried interest qualifies as capital

¹⁴⁶ CIS Directive, Art. 54/2.

¹⁴⁷ Income Tax Proclamation, Art. 19/1.

¹⁴⁸ Id, Art. 22.

¹⁴⁹ F Koh & TH Koh, *supra* note 30, p. 7.

¹⁵⁰ Dan Neidle, *supra* note 9, p. 48.

gains, consistent with the treatment adopted in the United Kingdom and the United States.¹⁵¹ This approach is often justified because carried interest aligns the CIS Operator's incentives with the long-term growth of portfolio companies, thereby distinguishing it from a management fee.

On the other hand, it can also be argued that carried interest is a form of compensation. The CIS Operators receive this performance-based fee for their investment and management expertise. On this reasoning, carried interest resembles ordinary business income; therefore, it should be taxed the same as a management fee. This characterization is particularly persuasive where the recipient has no substantive capital investment in the fund, where the entitlement arises solely from the performance fee in relation to investment-related services.

Regarding the carried interest, there are some developments such as Germany and Spain moving toward taxing carried interest as employment income.¹⁵² The United States has also reformed its regime by extending the period from 1 year to 3 years for which the private equity fund is required to hold the portfolio company for the carried interest to be taxed as capital gain.¹⁵³ If the private equity fund disposes of the portfolio company before three years, carried interest will be taxed at 37% as ordinary income.¹⁵⁴

Until recently, Ethiopia's rates for corporate income tax and capital gains were the same. The capital gain tax rate when a share or bond is disposed of was 30%.¹⁵⁵ On the other hand, the corporate tax rate that applied on a body that engages in a business activity is 30%.¹⁵⁶ However, the recent amendment of the Income Tax Proclamation has reduced the capital gain tax for shares and bonds from 30% to 15%.¹⁵⁷ According to the Ministry of Finance, which initiated the draft for the amendment proclamation, the change was made because some of the tax rates under Schedule D were low while others were

¹⁵¹ Royal Commission on Taxation, Report on the Taxation of Profits and Income (1955). See also, Samuel Brunson, *supra* note 80, p. 79.

¹⁵² Ceinwen Rees & George Apps (2023). "Carried Interest Taxation: The European Landscape", *Tax Journal*, p. 18.
<https://www.taxjournal.com/articles/carried-interest-taxation-the-european-landscape>

¹⁵³ Donald J. Marples, (2022), Taxation of Carried Interest (Congressional Research Service) p. 3. <https://www.congress.gov/crs-product/R46447>

¹⁵⁴ *Id.*

¹⁵⁵ Income Tax Proclamation, Arts. 59/2/b and 59/7/c.

¹⁵⁶ *Id.*, Art. 19/1.

¹⁵⁷ *Id.*, Art. 61/2.

high compared to other countries.¹⁵⁸ Hence, the tax rates are amended to attract foreign direct investment.¹⁵⁹

The amendment of the capital gains tax rate has significant implications for the future taxation of carried interest in Ethiopia. Previously, the issue attracted little attention because both corporate income tax and capital gains tax were imposed at the same rate of 30%.¹⁶⁰ Consequently, the characterization of carried interest as either business income or capital gains did not produce any meaningful difference in tax liability. However, following the reduction of the capital gains tax rate to 15%,¹⁶¹ the distinction has become practically significant. If carried interest is characterized as capital gains rather than business income, the CIS Operator may be subject to a substantially lower tax burden than would otherwise apply under corporate income tax.

The controversy becomes even more pronounced when the capital gains tax rules are considered as a whole. Under the amended Income Tax Proclamation, the gain realized from the disposal of shares and bonds is adjusted for inflation at the rate of 30%.¹⁶² As a result, if carried interest is characterized as capital gains, the CIS Operator may benefit not only from the reduced tax rate but also from the inflation adjustment mechanism, thereby significantly reducing the effective tax burden. This creates a strong incentive for fund managers to argue that carried interest constitutes an allocation of investment profits rather than compensation for management services. Accordingly, unless the tax treatment of carried interest is expressly clarified in the tax legislation or the proposed CIS Directive, disputes regarding its characterization are likely to arise as Ethiopia's private equity sector develops.

The preferable approach is not necessarily to assign all carried interest automatically to either ordinary business income or capital gains. Rather, Ethiopian law should identify the legal conditions under which a performance fee may receive capital-gain treatment and distinguish those returns from remuneration for investment-management services. Such a rule could consider the fund manager's proprietary interest, capital contribution, entitlement under the fund documents, and the extent to which the interest is genuinely aligned with the long-term performance of the fund's investments.

¹⁵⁸ Ministry of Finance, (2025), Explanatory Notes (አጭር ማብራሪያ) of Income Tax (Amendment) Proclamation, p. 10.

¹⁵⁹ *Id.*

¹⁶⁰ Income Tax Proclamation, Art. 19/1 and Art. 59/2/b.

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¹⁶¹ Income Tax (Amendment) Proclamation, Art. 61/2.

¹⁶² *Id.*, Art. 61/2/b.

Framing such inquiry in this manner would encourage a substance-over-form analysis and help ensure that performance fees related to investment-management services receive preferential capital-gain treatment.

4.3 Taxation of investors

The Capital Market Proclamation and the draft CIS Directive provide that Collective Investment Schemes should be structured as a limited partnership, a share company or a PLC.¹⁶³ One should note that different taxation rules are applicable based on the nature of the investors. Some investors are tax-exempted, some are partially exempted on certain sources of income and some investors are subject to the standard income tax. To determine whether certain investors are tax-exempted, we should consult other laws besides the Income Tax Proclamation.

In Ethiopia, the presumption is that all bodies, as per the definition of the Tax Administration Proclamation, are subject to taxation. The Income Tax Proclamation does not provide the organizations that are exempted from taxation. Hence, we should consult various establishment proclamations to determine which bodies are exempted from the income tax rules. Hence, this section will discuss the tax liability of tax-exempted and non-tax-exempted investors, whether they are natural or legal persons.

4.3.1 Tax-exempted investors

As previously mentioned, since the Income Tax Proclamation does not provide the tax-exempted persons, we should consult other laws to determine who are tax-exempted entities and to what activities their exemption extends. Most tax exemptions are bestowed upon businesses as well as community organizations. In this regard, three tax-exempted organizations; namely cooperative societies, pension funds and Ethiopian Investment Holding will be discussed.

Cooperative societies are autonomous entities that have a distinct personality from the founding members who are united voluntarily to establish it.¹⁶⁴ They can be established by those who live or work or are engaged in specific professions and they may participate in production or service-rendering activities.¹⁶⁵ These cooperative societies are beneficiaries of various investment incentives that are provided under Ethiopian laws. The investment incentives are mostly provided in terms of tax exemptions for a

¹⁶³ Capital Market Proclamation, Arts. 85/2 and 85/3.

¹⁶⁴ Cooperative Societies Proclamation, (2016), Art. 2/1, Proclamation No. 985, Neg Gaz Year 23 No. 7.

¹⁶⁵ Id, Arts. 7/2 and 8/1.

certain period¹⁶⁶ but regarding cooperative societies, income tax incentives are not essential because the societies are excluded from the scope of the Income Tax Proclamation.¹⁶⁷

The reading of the provision that exempts cooperative societies gives the impression that the exemption excludes all types of taxes, from business income tax to capital gains tax, dividend tax to undistributed profit tax, etc. Hence, if a cooperative society invests in a private equity fund, the profit that it receives in terms of dividends is tax-exempt. Moreover, the disposal of the shares of the private equity funds does not entail a capital gains tax. This exemption, however, should not be extended to the members of the cooperative society. Hence, in the income tax regime, the responsibility of the cooperative societies is to withhold the dividend from the members.

The second tax-exempted organizations are the two main pension fund schemes. These are the public employees' pension fund and the private organization employees' pension fund. These two funds are statutorily established institutions and any pension arrangement outside their control is illegal.¹⁶⁸ These two pension funds are empowered to invest for the benefit of the beneficiaries from the pension contributions of the private and public employees.¹⁶⁹

The two Pension Proclamations provide that in three instances no tax should be levied.¹⁷⁰ One of those instances is relevant for our discussion, which is the benefits earned from the investment of pension funds. Here, we should bring in the UK experience, which exempts pension funds only to their non-trading activities. Hence, the activity should be an investment to be tax-exempt. In the two Ethiopian Pension Proclamations, the term investment is used; however, it is not clear whether trading activities are taxable or not.

The third organization is Ethiopian Investment Holding which is a sovereign wealth fund of Ethiopia that holds various state-owned enterprises such as Ethiopian Airlines, Ethiotelcom, Ethiopian Insurance Corporation, etc. Ethiopian Investment Holding has been instrumental in advancing the economic objectives of the country since it directly controls strategic

¹⁶⁶ See generally, the Investment Incentive Regulation, (2022), Regulation No. 517, Neg Gaz, Year 28 No. 39.

¹⁶⁷ Cooperative Societies Proclamation, Art. 43/1/a.

¹⁶⁸ Public Servants' Pension Proclamation, (2022), Proclamation No. 1267, Neg Gaz, Year 28 No. 15 and Private Organization Employees' Pension Proclamation, (2022), Proclamation No. 1268, Neg Gaz, Year 28 No. 16.

¹⁶⁹ Id, Art. 14/1/b and Art. 14/1/b.

¹⁷⁰ Id, Art. 58 and Art. 57. The first two instances are when a beneficiary receives the pension allowance and when the beneficiary contributes to the pension funds.

enterprises. Hence, the issue of taxation is essential considering the amount of profit Ethiopian Investment Holding makes every year on top of the profits of its organizations.

The regulation that defines Ethiopian Investment Holding has been issued recently. According to the regulation, the dividends that Ethiopian Investment Holding receives from its organizations are tax-exempted incomes.¹⁷¹ However, the tax exemption does not extend to sub-funds and companies in which the Ethiopian Investment Holding is a shareholder.¹⁷² The other issue worth considering is whether other types of income are payable. Since the law specifically mentions only dividend tax, we should not extend the tax exemption to other types of tax. Hence, Ethiopian Investment Holding is liable for the remaining income taxes.

4.3.2 Non-tax-exempted investors

The taxation of non-tax-exempt investors primarily depends on the nature of the income they receive from the collective investment scheme. Since private equity funds generate returns through different investment activities, investors may derive income in different forms, each of which raises distinct tax considerations. Accordingly, it is necessary to determine whether the income constitutes dividend income or capital gains, as the applicable tax treatment differs under the Income Tax Proclamation.

The *dividend* is defined as a distribution made to the investors of the business organizations from the net profit. Hence, to pay dividends the body has to make a profit, then it has to pay a 30% corporate tax and if there is any profit left that is not reinvested in the company it should be distributed to the shareholders of the company. As mentioned earlier, the Income Tax (Amendment) Proclamation provides that Collective Investment Schemes are tax exempted. However, the Collective Investment Schemes are obliged to withhold the 15% dividend tax from the profits that is distributed to investors.

Generally, investors may receive three types of income. The first is dividends derived from the operating profits of the portfolio company during the period it is owned by the private equity fund.¹⁷³ The second is the gain realized by the Collective Investment Scheme from the disposal of the

¹⁷¹ The Definition of Objectives and Function of the Ethiopian Investment Holding Regulation, (2022), Article 16/1, Regulation No. 487, Neg Gaz, Year 28 No. 6.

¹⁷² Id, Art. 16/2.

¹⁷³ In most of leveraged buyouts, due to high amount of debt and related interest expenses, it is difficult for the portfolio company to earn profit. Hence, it is less likely that the investors receive this type of income.

portfolio company and subsequently distributed to investors.¹⁷⁴ The third is the gain realized when an investor disposes of his or her interest in the private equity fund.¹⁷⁵

The first category of income is appropriately subject to dividend tax because it represents a distribution of profits. The second category, however, requires further consideration. Although the underlying income arises from the disposal of the portfolio company and therefore constitutes a capital gain at the fund level, the Proclamation requires Collective Investment Schemes to withhold dividend tax on profits distributed to investors.¹⁷⁶ Accordingly, under the current legal framework, distribution of gains realized from the disposal of portfolio companies appear to be treated as dividends. However, subjecting the third type of income to dividend tax is not appropriate. This is because it does not arise from a distribution of the collective investment scheme's profits but from the investor's independent disposal of his or her ownership interest in the fund. Since the disposal of shares or partnership interests constitutes the disposal of a capital asset, that type of income should be subject to capital gains tax.¹⁷⁷

Another issue concerns fictitious dividends. A fictitious dividend is a distributed capital of a company that is not an actual profit.¹⁷⁸ Since the Income Tax Proclamation requires Collective Investment Schemes to withhold dividend tax on distributions of profits, it remains uncertain whether a distribution that merely returns investors' capital, without representing actual profits, should also attract dividend tax. Clarifying this issue is important to ensure that only distributions representing actual profits are subject to dividend tax.

4.4 Taxation of portfolio company in Ethiopia

The last topic of this section is about the taxation rules that apply to the portfolio companies that are owned by private equity funds. The main business model of private equity funds is acquiring shares of the portfolio companies to derive a dividend from ordinary business activities and earn capital gains through the disposal of the shares. Besides the remaining parts

¹⁷⁴ This income is the major type of income in which the whole private equity funds business model relied on.

¹⁷⁵ This also a rare occasion because most of private equity funds are closed-ended funds which gives the fund manager the power to refuse the departure of the investors.

¹⁷⁶ Income Tax (Amendment) Proclamation, Art. 19/3.

¹⁷⁷ Income Tax Proclamation, Art. 59. If the investor regularly sells his/her share of the private equity fund, then that activity will be subject to business income tax.

¹⁷⁸ Commercial Code, Art. 529/1.

of the private equity sector, portfolio companies will also pay taxes on their income. Hence, the tax liability of portfolio companies should be addressed separately.

4.4.1 Corporate tax for portfolio Company

To be liable under Schedule C, the portfolio company should conduct business per the definition that the proclamation provides. Business is defined as any commercial activity that is conducted for profit.¹⁷⁹ The other instance is where the person conducts any activity that is trading as per the Commercial Code.¹⁸⁰ However, the civil business organization and commercial business organization dichotomy persists in the Income Tax Proclamation, in which the activities of a share company and a PLC are treated as business, whatever the objective of the company is.¹⁸¹

If any of the abovementioned requirements are met, the portfolio company will be regarded as conducting a business, which makes it subject to business income tax. For instance, if the private equity fund acquires a pharmaceutical company, two tax liabilities will arise. The first one is that the pharmaceutical company should pay corporate tax on its net profit. The second one is that the pharmaceutical company has an obligation to withhold tax from the gross amount of dividends when it distributes the annual profit.¹⁸²

Regarding the first one, since the portfolio companies are bodies as per the Tax Administration Proclamation, the income should be characterized as business income tax, which attracts a 30% flat corporate tax rate.¹⁸³ However, to determine the net income, the law allows the taxpayer to deduct expenses from the gross income of the company. One of those deductions is interest expenditures, which are incurred in a tax year.

An important exception to the ordinary corporate income tax regime applies where the portfolio company qualifies as a startup under the Startup Proclamation. A startup is defined as a person or group with no or limited business history that creates economic value through the introduction,

¹⁷⁹ Income Tax Proclamation, Art. 2/2/a.

¹⁸⁰ In the 1960's commercial code, there is a distinction between a civil business organization and a commercial business organization. If the business organization is a share company or PLC, it will be considered a commercial business organization. However, the new commercial code has eradicated this distinction and provides that whether a person is participating in trading is determined by referring to Article 5.

¹⁸¹ Income Tax Proclamation, Art. 2/2/c and Ministry of Finance and Economic Development, (2018), Federal Income Tax Proclamation 979/ 2016 Technical Notes, p. 4.

¹⁸² Id, Art. 90/2.

¹⁸³ Id, Art. 19/1.

creation, transplantation, or reverse engineering of an innovative, technology-enabled, scalable, and market-changing product, service, or process.¹⁸⁴ To qualify for this status, the entity must satisfy the eligibility requirements prescribed under the Startup Proclamation and obtain a certificate evidencing its designation as a startup.¹⁸⁵

Where a portfolio company is recognized as a startup, it is entitled to a reduced business income tax rate of five per cent for a period of ten years from the commencement of business, after which the ordinary business income tax rate becomes applicable.¹⁸⁶ Furthermore, dividends distributed by the startup to its shareholders are exempt from income tax for a period of five years.¹⁸⁷ Accordingly, where a private equity fund invests in a designated startup, the portfolio company benefits from a substantially reduced corporate income tax burden during its early years of operation, while distributions made to the fund are exempt from dividend tax for the prescribed period. These incentives reduce the overall tax burden on startup investments and encourage private equity funds to provide capital to innovative and high-growth enterprises.

To deduct interest expenditure, the Income Tax Proclamation provides that the portfolio company should “...use the proceeds or benefit of the debt or other instrument or agreement that gives rise to the interest to derive business income”.¹⁸⁸ The requirement is whether the loan is used to derive business income or it is used for other purposes. The reading of the aforementioned provision gives the impression that all loans should be used to derive business income to deduct the interest of the loan as an expense at a later stage.

Here the controversial issue that can be raised is what the tax implication of acquiring a portfolio company would be in a leveraged buyout financial model. According to the leveraged buyout model, a private equity fund would acquire a certain company with heavily leveraged terms/ using a large amount of loan. But unlike other loan arrangements where the borrower gives security from its assets, in leveraged buyout transactions the collateral is not the fund’s assets but rather the assets of the portfolio company.

In other countries, an interest that is due from the leveraged buyout terms is deductible from the gross income of the company. However, in Ethiopia, the interest deduction is allowed only when the loan is used to derive business

¹⁸⁴ Startup Proclamation, Art. 2/1

¹⁸⁵ Startup Proclamation, Art. 7/1-4

¹⁸⁶ Investment Incentives Regulation, Art. 10/1

¹⁸⁷ Investment Incentives Regulation, Art. 10/2

¹⁸⁸ Id., Article 23/1.

income.¹⁸⁹ The question here is whether using a loan to change the ownership of the company is using the loan to derive business income. From the fund's standpoint, it can be argued that using the loan to change ownership is deriving business income because private equity funds are well-known for improving the portfolio company due to their expertise and market experience. However, in the Ethiopian case, leveraged buyout does not entitle the deduction of interest expenditure. This is because the loan is not directly used to derive business income but rather to change ownership.

The other issue in relation to interest expenditure is the rule of thin capitalization. According to this rule, if a foreign company acquires a portfolio company by leveraging it heavily, the interest will not be deducted from the loan that is above the 2:1 debt-to-equity ratio.¹⁹⁰ This can be an obstacle for private equity funds particularly leveraged buyouts because their business model is acquiring a portfolio company with limited equity and high amount of debt. However, the law provides an exception that may be utilized by private equity funds. The exception is that if the average debt of the company does not exceed the arm's length debt amount, then the 2:1 debt-to-equity ratio shall not be applicable.¹⁹¹ To be regarded as arm's length debt, the private equity fund shall prove that an independent financial institution would have lent the same amount of debt having regard to circumstances of the company.¹⁹²

4.4.2 Underlying control change

The concept of change in control of a body is recognized in Ethiopia.¹⁹³ Under the Income Tax Proclamation, underlying ownership of a body¹⁹⁴ is defined as "a membership interest in the body held directly or indirectly through an interposed body or bodies, by an individual or by an entity not ultimately owned by individuals".¹⁹⁵ In the Ethiopian Income Tax Proclamation, to consider that there is a change in control of the body, the same person should control more than 50% of the ownership of the body in the loss year, carry year and all intervening years.¹⁹⁶ The effect of change in control of the body

¹⁸⁹ Ibid.

¹⁹⁰ Id, Art. 47/1

¹⁹¹ Id, Art. 47/2.

¹⁹² Id, Art. 47/4.

¹⁹³ Income Tax Proclamation, Art. 34/1.

¹⁹⁴ Body is defined as "a company, partnership, public enterprise or public financial agency or other body of persons whether formed in Ethiopia or elsewhere". Tax Administration Proclamation, Art. 2(5), Proclamation No. 983/2016.

¹⁹⁵ Income Tax Proclamation, Art. 2/25

¹⁹⁶ Id, Article 34/1

is that the company will be prohibited from using its loss carry forward.¹⁹⁷ This is an anti-avoidance rule which prevents the trading of loss entities whose main purpose is to utilize the tax carry forwards.¹⁹⁸

However, the Income Tax Proclamation provides exceptions for this rule.¹⁹⁹ The first one is that if the body conducts the same business in the loss year, carry forward year and all intervening years, then it is exempted from the rule. The second one is if the body does not enter into a new business before the loss is fully deducted or it entered into a new business but proves that it was not entered to utilize the body's tax losses. In this regard, the Technical Note provides that if the new business is closely related to the existing business, it can be argued that the primary purpose of change in the control of a body is not accessing the tax losses.²⁰⁰ To this end, the Technical Note indicates that any diversification of the company's business activities should be confined to sectors that are closely related to its existing business.

These exceptions are particularly relevant to private equity investments. Private equity funds frequently acquire companies with the objective of improving their operational and financial performance. This may involve restructuring the business, expanding into related business activities, introducing new products or services, or reorganizing the company's operations. Although these measures are commercially driven, they may create uncertainty as to whether the acquired company continues to satisfy the statutory exceptions to the change-in-control rule.

The current framework presents a challenge for private equity funds. While the exceptions are intended to distinguish genuine commercial transactions from tax avoidance arrangements, concepts such as 'same business', 'new business' and 'closely related business' are not clearly defined under the Income Tax Proclamation or the Technical Notes. As a result, private equity funds undertaking legitimate post-acquisition restructuring may face uncertainty regarding the continued availability of tax loss carry-forwards. Clarifying these concepts through legislation or administrative guidance

¹⁹⁷ Ibid.

¹⁹⁸ Technical Notes, *supra* note 170, p. 91.

¹⁹⁹ Income Tax Proclamation, Art. 34/2. There is a discrepancy between the Amharic and English versions. The Amharic version states that fulfillment of *either* of the two grounds is sufficient for the exception to apply. In contrast, the English version, supported by the Technical Notes prepared by the Ministry of Finance, requires that both conditions be met for the exception to be applicable. Since the Amharic version is the binding text, our analysis proceeds on the basis that satisfying either of the two grounds is adequate to trigger the exception.

²⁰⁰ Technical Notes, *supra* note 170, p. 93.

would enhance certainty for investors while preserving the anti-avoidance purpose of the rule.

5. Conclusion and the Way Forward

The taxation of private equity funds presents one of the most complex intersections of capital market regulation and income tax law. Although the private equity sector remains at an early stage of development in Ethiopia, the recent enactment of the Capital Market Proclamation, the Startup Proclamation and the Income Tax (Amendment) Proclamation demonstrate the government's intention to establish an enabling legal framework for alternative investment vehicles. The challenge is therefore not the absence of taxation rules, but the need to ensure that the tax framework accommodates the unique characteristics of private equity funds while preserving the integrity of the tax system.

The Income Tax (Amendment) Proclamation duly exempts Collective Investment Schemes, including private equity funds, from taxation at the fund level. This exemption reflects the conduit nature of private equity funds, which merely pool investors' capital for investment purposes rather than generating income for their own benefit. Taxing both the fund and its investors would result in economic double taxation without advancing any identifiable tax policy objective. The exemption therefore promotes tax neutrality by ensuring that activities of a private equity fund does not attract an additional layer of taxation at the fund level compared to direct investment.

The Ethiopian tax framework further demonstrates a policy of encouraging investment in startups. Where a private equity fund invests in a startup that qualifies under the Startup Proclamation, both the fund and the startup benefit from significant tax incentives. Designated Startup Ecosystem Builders, including private equity funds, enjoy exemptions from capital gains tax, dividend tax and the Minimum Alternative Tax in respect of qualifying startup investments. Likewise, designated startups benefit from a reduced corporate income tax rate and a temporary exemption from dividend tax. These incentives recognize the higher commercial risks associated with startup financing and seek to facilitate the flow of capital to innovative businesses.

Notwithstanding these positive developments, several aspects of the tax framework remain uncertain. The tax treatment of management fees is relatively straightforward, as such fees constitute remuneration for services rendered and should therefore be taxed as business income. Greater uncertainty surrounds carried interest. Since carried interest is contingent upon the successful realization of profit and does not constitute recurring remuneration, its economic characteristics differ from ordinary management

fees. Accordingly, it should be treated as capital gains rather than business income, and the law should expressly clarify its tax treatment.

The taxation of investors also requires further clarification. Although the legal framework governing exempt investors, including cooperative societies, pension funds and Ethiopian Investment Holding, already grants them tax-exempt status, it should expressly clarify that such exemptions extend to income derived from investments made through private equity funds. For non-exempt investors, distributions of profits are appropriately subject to dividend tax. Under the current legal framework, gains realized by a Collective Investment Scheme from the disposal of portfolio companies and subsequently distributed to investors likewise appear to be treated as dividends. However, gains realized by an investor upon the disposal of his or her ownership interest in a private equity fund arise from the disposal of a capital asset rather than from the distribution of profits. Accordingly, such gains should be subject to capital gains tax instead of dividend tax. Clarifying this distinction would improve certainty and ensure that the tax treatment reflects the economic substance of the transaction.

At the portfolio company level, the corporate income tax regime applies to companies owned by private equity funds, subject to tax exemption available to designated startups. However, the current interest deductibility rules do not adequately accommodate leveraged buyout transactions, which constitute a common acquisition model in the private equity industry. While permitting unlimited deduction of acquisition debt could undermine the tax base, completely denying deductibility where acquisition financing is used is equally undesirable. A more balanced approach would be to permit the deduction of interest up to a specified percentage of EBITDA or EBIT, as adopted in other jurisdictions, thereby protecting government revenue while recognizing legitimate financing arrangements. Similarly, the thin capitalization rules should be reviewed to ensure that they do not unnecessarily discourage genuine private equity investments financed through commercially acceptable debt structures.

Although many of these issues remain prospective given the nascent state of Ethiopia's private equity industry, legislative clarification should precede rather than follow market development. Establishing clear tax rules at an early stage will reduce uncertainty, encourage domestic and foreign investment, and minimize future disputes between taxpayers and the tax administration. As Ethiopia's capital market develops, a coherent tax framework grounded in the principles of tax neutrality, certainty, investment promotion and the prevention of tax avoidance will be essential to the sustainable growth of the private equity sector. ■

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COMMENT

Ethiopia's Entry into BRICS and the Politics of Multipolarity

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Abstract

This comment examines what BRICS membership means for Ethiopia in legal and political terms. It situates the accession within the debate on multipolarity and the contested liberal international order, and then turns to the legal character of BRICS itself. BRICS has no founding treaty, no charter and no permanent secretariat; so Ethiopia's accession is an act of political invitation rather than treaty accession in the ordinary sense. The comment assesses the bloc's principal institutions, the New Development Bank and the Contingent Reserve Arrangement, against Ethiopia's own constitutional framework for foreign relations and its commitments under the African Union and the African Continental Free Trade Area. It argues that membership offers Ethiopia diplomatic diversification and a potential source of development finance, but that the gains are limited by the bloc's informality, its internal asymmetries and the continued centrality of the institutions BRICS claims to rival. The comment closes with reform-oriented observations on Ethiopia's engagement.

Keywords: Multipolarity, BRICS, Ethiopia, Sovereignty, Finance

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Abstract

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1. Introduction

On 1 January 2024 Ethiopia became a full member of BRICS, joining Egypt, Iran and the United Arab Emirates in the grouping's first major enlargement. The invitation had come five months earlier, at the fifteenth summit of the grouping held in Johannesburg in August 2023, where the existing members agreed to admit six new states.¹ Four of them, Egypt, Iran, the United Arab Emirates and Ethiopia, took up the offer at the start of 2024.² For Ethiopia the decision carried particular weight because the country was in acute financial difficulty and it was negotiating a restructuring of its external debt under the Group of Twenty Common Framework.³ Seven months after joining BRICS, in July 2024, it entered a four-year arrangement with the International Monetary Fund worth about 3.4 billion United States dollars.⁴

Most of the writing on Ethiopia and BRICS has approached the subject through the lens of foreign policy and international relations, asking whether membership serves the country's economic and diplomatic interests. Less attention has been paid to the legal character of the arrangement Ethiopia has entered. That character is unusual. BRICS is an informal grouping. It has no founding treaty, no charter, no permanent secretariat and no headquarters.⁵ Decisions are taken by consensus at annual summits chaired by a member on rotation. Membership is therefore not acquired by ratifying an instrument, as it is with the United Nations or the World Trade Organization, but by invitation and acceptance. Ethiopia's accession, to use the term adopted in public discussion, is in strict terms an act of political alignment rather than accession to a treaty.

This distinction matters for two reasons. First, it shapes the legal questions that membership raises within Ethiopia, including whether joining a body of this kind engages the treaty-ratification procedure of the Constitution at all. Second, it bears on what membership can realistically deliver. Although the

¹ BRICS, *Johannesburg II Declaration: BRICS and Africa*, XV BRICS Summit, Johannesburg, 22-24 August 2023.

² John Curtis. (2024). *The BRICS Group: Overview and Recent Expansion*. House of Commons Library Research Briefing No. CBP-10136.

³ International Monetary Fund, African Dept. (2024). *The Federal Democratic Republic of Ethiopia: Request for an Arrangement under the Extended Credit Facility*. IMF Staff Country Reports 2024, 253 (2024).

⁴ International Monetary Fund. (2024), *IMF Executive Board Approves Four-Year US\$3.4 billion Extended Credit Facility Arrangement for Ethiopia*. Press Release No. 24/291, 29 July 2024.

⁵ House of Commons Library, *supra* note 2.

grouping does not involve binding instruments that commit its members, the institutions through which BRICS operates, principally the New Development Bank and the Contingent Reserve Arrangement, are treaty-based bodies with their own membership and their own limits. The value of BRICS for Ethiopia turns out to depend less on the bloc itself than on these subsidiary institutions and on the wider political project the bloc represents.

That wider project is usually described in the language of multipolarity. BRICS and its members present enlargement as a step towards a world order in which power is distributed among several centres rather than concentrated in the United States and its allies.⁶ Whether the international system is in fact becoming multipolar, and what a multipolar order would mean for an African state, are contested questions. The politics of multipolarity provide the setting in which Ethiopia's decision was taken and against which its consequences must be assessed.

The following section deals with the legal and financial architecture through which BRICS operates, with attention to the New Development Bank and the Contingent Reserve Arrangement. Section 3 addresses Ethiopia's entry. The fourth section assesses the opportunities and constraints that membership presents followed by the final section that offers concluding observations.

2. BRICS as an Institution: Legal and Financial Architecture

Multipolarity is more than a description of the distribution of power. It is also a political programme. When BRICS and its members invoke a multipolar world, they are doing more than reporting a change in the balance of capabilities; they are advancing a claim about how international order ought to be arranged and who ought to have a say in it.⁷ The claim has a critical edge. It holds that the institutions built after 1945, and reshaped after 1991, reflect the interests of the Western states that designed them, and that the states of the global South are under-represented within them. The demand for multipolarity is in this sense a demand for a redistribution of voice and authority in global governance.

BRICS is a product of the shift towards multipolarity and an instrument for advancing it. Through bodies such as the New Development Bank it has begun

⁶ BRICS, *Kazan Declaration*, XVI BRICS Summit, Kazan, 22-24 October 2024.

⁷ Mihaela Papa *et al.* (2023). The Dynamics of Informal Institutions and Counter-hegemony: Introducing a BRICS Convergence Index. *European Journal of International Relations*, Vol. 29.

to build institutions that run parallel to the World Bank and the International Monetary Fund, offering an alternative channel for finance and a forum in which the global South sets the agenda.⁸ Whether these parallel institutions amount to a genuine alternative, or remain dependent on the structures they are meant to rival, is a question that needs due attention.

2.1 The informal character of BRICS

An international organization is normally created by a treaty, possesses legal personality and acts through permanent organs. BRICS has none of these features. It rests on no founding instrument. It has no charter, no permanent secretariat and no headquarters.⁹ Its central event is an annual summit of heads of state and government, hosted by each member in turn, and its decisions are reached by consensus and recorded in declarations that bind no one. The chair for the year sets the agenda and organizes the summit, and that is the extent of the bloc's standing machinery.

Membership follows from this character. Because there is no treaty to accede to, a state does not join BRICS by depositing an instrument of ratification. It joins because the existing members agree, by consensus, to invite it, and because it accepts. At the Johannesburg summit in 2023 the members adopted a set of guiding principles, standards, criteria and procedures for the expansion process, the nearest thing the grouping has to a law of membership.¹⁰ The criteria are modest. They include support for the reform of the United Nations Security Council and an undertaking not to have imposed sanctions outside the United Nations framework on a member, but the decisive requirement is simply the positive consensus of the existing members. There is no application to a registry, no qualifying threshold of the kind found in the constituent treaties of formal organizations, and no legal act of accession.

The consequence is that BRICS membership carries few legal obligations. The declarations a member subscribes to are political commitments, not binding rules, and a member that departs from them breaches no law.¹¹ This is part of the bloc's appeal. A state can align itself with its positions, and gain whatever standing the association confers, without surrendering authority to a supranational body or accepting enforceable constraints. For a state that prizes

⁸ Oliver Stuenkel. (2016). *Post-Western World: How Emerging Powers Are Remaking Global Order*, Polity Press.

⁹ House of Commons Library, *supra* note 2.

¹⁰ BRICS, Johannesburg II Declaration, *supra* note 1.

¹¹ Anne-Gaëlle Crowley-Vigneau *et al.* (2024). Diplomats on BRICS: Drawbacks and Benefits of Cooperation without Integration. *Terra Economicus*, Vol. 22, No. 2.

its sovereignty, as Ethiopia does, the absence of binding commitment is a feature rather than a defect. But it also means that membership, taken alone, delivers little of material substance. Whatever concrete benefit BRICS offers a new entrant comes not from the loose political grouping but from the two treaty-based institutions it has created, to which the discussion now turns.

2.2 The New Development Bank

The New Development Bank is the most developed of the BRICS institutions and the one most often described as the bloc's principal achievement. Unlike BRICS itself, the bank is a creature of treaty. The five founding members signed the Agreement on the New Development Bank at Fortaleza on 15 July 2014, and it entered into force on 3 July 2015.¹² The bank has its headquarters in Shanghai and began operations in 2016. Its declared purpose is to mobilize resources for infrastructure and sustainable development in the BRICS countries and in other emerging and developing economies, and in this it presents itself as a complement, and in some accounts an alternative, to the World Bank.

The bank's initial authorized capital was 100 billion United States dollars, of which 50 billion was initially subscribed in equal shares by the five founders. Equal shareholding is one of the features the bank advertises as a departure from the weighted voting of the Bretton Woods institutions, in which the United States holds an effective veto. The Agreement is careful, however, to preserve the founders' control: membership is open to members of the United Nations, but the combined share of the founding members may not fall below 55 per cent of the voting power. New members have been admitted on this basis. Bangladesh and the United Arab Emirates joined in 2021, Egypt in 2023 and Algeria in 2025, and others have been approved or are in the process of acceding.¹³

It is here that a distinction important to the present subject emerges. Membership of BRICS and membership of the New Development Bank are not the same thing, and the two lists of members do not coincide. Algeria and Bangladesh are shareholders of the bank without being members of BRICS, while Iran, Indonesia and Ethiopia are members of BRICS that have not joined the bank.¹⁴ Ethiopia appears on the bank's roll only as a prospective member,

¹² Agreement on the New Development Bank, Fortaleza, 15 July 2014 (entered into force 3 July 2015), Arts. 2, 7 and 8.

¹³ New Development Bank, Members, available at <www.ndb.int/about-ndb/members>.

¹⁴ New Development Bank, Members (Ibid). Ethiopia is listed only as a prospective member.

a state admitted in principle by the Board of Governors but yet to complete accession by depositing its instrument.

The separate act of accession has since begun to take shape. Ethiopia applied for membership of the bank in October 2023, before it joined BRICS, and lodged a formal application with the Board of Governors in January 2024; the Board approved its admission as a prospective member in 2025. On 26 June 2026 the Council of Ministers, chaired by Prime Minister Abiy Ahmed, endorsed a draft proclamation on Ethiopia's accession to the Agreement on the New Development Bank and transmitted it to the House of Peoples' Representatives. Full membership will follow ratification by the House, the deposit of Ethiopia's instrument of accession with Brazil as depository of the Agreement, and payment of the first instalment of its subscribed capital, reported at about 295 million United States dollars. Ethiopia therefore remains, at the date of writing, a prospective rather than a full member of the bank.¹⁵

Even for its existing members, the bank's capacity to function as an alternative to the established institutions is qualified. Its strategy for 2022 to 2026 sets a target of conducting 30 per cent of its financing in the local currencies of its members, a central element of the wider effort to reduce dependence on the dollar. In practice the dollar still predominates. On recent accounting roughly two-thirds of the bank's lending, some 24.5 billion dollars across 76 projects, had been denominated in United States dollars, with local-currency lending concentrated almost entirely in Chinese yuan and South African rand and none yet extended in the currencies of the other members.

The bank also depends on the international capital markets in which it raises funds and on the credit ratings that give it access to them; when sanctions were imposed on Russia in 2022, it suspended new transactions with one of its own founders in order to protect its standing in those markets. Niall Duggan and his co-authors draw the broader conclusion that the New Development Bank, for all its symbolic weight, has not given the BRICS states the structural power to change the rules that govern development finance; it operates within the system it was meant to rival rather than displacing it.¹⁶

¹⁵ New Development Bank, Members, and Investor Presentation, June 2026; Ethiopian Monitor, 1 July 2026; Capital, 5 July 2026. The *Reporter*, Ethiopia, July 2026.

¹⁶ Niall Duggan *et al.* (2022). The Structural Power of the BRICS in Multilateral Development Finance: A Case Study of the New Development Bank. *International Political Science Review*, Vol. 43, No. 4, pp. 495-511.

2.3 The Contingent Reserve Arrangement

The second BRICS institution is less visible but more revealing. The Treaty for the Establishment of a BRICS Contingent Reserve Arrangement was signed at Fortaleza on the same day as the bank's Agreement and entered into force alongside it. The Arrangement is a pool of currency reserves, with a committed size of 100 billion dollars, on which members may draw to meet short-term balance-of-payments or liquidity pressures. It is, in intention, what the New Development Bank is to the World Bank: an alternative to the International Monetary Fund, a facility through which a member in difficulty can obtain support without recourse to the Fund and its conditions.

The committed contributions reflect the bloc's internal hierarchy. China commits 41 billion dollars, Brazil, India and Russia 18 billion each, and South Africa 5 billion. The reserves are not transferred to a common fund; they remain with each member's central bank and are made available, when called upon, through currency swaps. Voting on requests is weighted by contribution, which gives China the largest single voice. The Arrangement has not been activated since its creation, and its members, all holding substantial reserves of their own, have so far had little occasion to use it.

The most striking feature of the Arrangement, for present purposes, is its relationship with the institution it was meant to supplement. Under the Treaty, a member may draw only 30 per cent of its maximum entitlement on the decision of the BRICS members alone. Access to the remaining 70 per cent is conditional on the member having an arrangement in place with the International Monetary Fund and on compliance with that arrangement.¹⁷ An instrument designed as an alternative to the Fund thus defers to the Fund for the greater part of its lending. The point is not a technicality. It shows how far the BRICS institutions remain tied to the structures they present themselves as challenging.

2.4 Parallel institutions and persistent dependence

Taken together, the two institutions support a measured conclusion. BRICS has built genuine machinery. The New Development Bank lends real money for real projects, and the Contingent Reserve Arrangement is a real treaty commitment of reserves. They give the bloc an institutional substance that distinguishes it from a mere diplomatic forum, and they have begun, at the margins, to create channels for finance and settlement that run outside the

¹⁷ Treaty for the Establishment of a BRICS Contingent Reserve Arrangement, Fortaleza, 15 July 2014 (entered into force 3 July 2015), Arts. 2 and 5.

Western-led system.¹⁸ But their reach is limited and their independence partial. The bank lends mostly in dollars and answers to the capital markets; the reserve pool defers to the Fund; and both retain the founders' control through capital shares and weighted votes. The parallel order that BRICS is building is, for now, built alongside the existing one and substantially dependent on it. What this means for Ethiopia is the subject of the next two sections.

3. Ethiopia's Entry and Foreign Policy

Ethiopia's removal from the United States African Growth and Opportunity Act with effect from 1 January 2022, over the conduct of the war in northern Ethiopia, had cost it duty-free access to the American market for a large share of its exports. Membership in a grouping led by China and Russia signalled that the country had other options, while promising access to finance and investment and a louder voice in global forums. For a government working to rebuild its international standing after the Tigray conflict, the value of admission lay as much in the signal it sent as in any immediate material gain.

Membership needs to be read against the longer arc of Ethiopian foreign policy. Ethiopia has a tradition of non-alignment, and a long-standing participant in African and non-aligned diplomacy. Its Foreign Affairs and National Security Policy and Strategy of 2002 placed economic development and the survival of the state at the centre of external relations, and treated diplomacy largely as an instrument of development.¹⁹

Ethiopia's standing rests on a paradox that bears on its place in the bloc. It is a regional power in the Horn of Africa, populous and historically influential, yet through much of the recent period, internally strained. Membership must also coexist with the commitments Ethiopia already carries as an African state. It hosts the African Union, it is a party to the African Continental Free Trade Area, and it has long been a central member of the Intergovernmental Authority on Development in the Horn.²⁰ These commitments point towards continental and regional integration, and Ethiopia and its supporters have presented BRICS membership as complementary to them, a larger platform from which to advance the goals of Agenda 2063 and to amplify an African

¹⁸ Zongyuan Zoe Liu & Mihaela Papa. (2022). *Can BRICS De-dollarize the Global Financial System?* (Cambridge University Press).

¹⁹ Federal Democratic Republic of Ethiopia (2002), *Foreign Affairs and National Security Policy and Strategy*.

²⁰ Agreement Establishing the African Continental Free Trade Area, Kigali, 21 March 2018; and African Union, *Agenda 2063: The Africa We Want* (2015).

voice in global economic governance. The subtitle of the very declaration that admitted Ethiopia, 'BRICS and Africa', invites that reading.

There is, however, a tension the optimistic reading passes over. The African projects (Ethiopia is committed to) are collective and rule-based, proceeding through negotiated instruments that bind all their members. BRICS is neither collective in that sense nor rule-based; it is a grouping of great powers in which there is disparity in the level of influence and in which alignment can shade into dependence on a particular patron, most obviously China. Whether membership strengthens Ethiopia's hand in its African commitments or quietly competes with them is not a question the bloc's African framing settles, and it is one to which the assessment in the next section turns.

4. Implications

4.1 What membership offers

The economic gains are more promising on paper than in hand. Three channels matter. The *first* is development finance from the New Development Bank, which lends without the policy conditions attached to Western assistance; the obstacle, set out in the third section, is that Ethiopia has not joined the bank and would have to accede separately and subscribe capital before it could borrow. The *second* is trade and settlement in local currencies, which could ease the foreign-exchange shortage that has held the economy back, though here the bloc's ambitions still run well ahead of its practice and the bank itself lends mostly in dollars. The *third* is investment from fellow members, and this is the most concrete: China is already Ethiopia's largest creditor and a principal builder of its infrastructure, and the Gulf members, the United Arab Emirates above all, have become important sources of capital. None of these depends on BRICS as such, but membership thickens the relationships through which they run.

4.2 The constraints

Several constraints weigh against these gains, and they are not minor. The first is that BRICS is not a community of friends. Its enlargement brought in states with their own quarrels. For example, Egypt, admitted in the same intake, is locked in a long dispute with Ethiopia over the waters of the Nile. The grouping meant to amplify Ethiopia's voice also seats, a few chairs away, the government with which it is most at odds in its own region. A bloc this mixed, holds India and China, Iran and the Emirates, Egypt and Ethiopia.

The second constraint is the asymmetry that has run through this article. China holds the largest share of Ethiopia's external debt and built much of its recent infrastructure, and a closer BRICS relationship runs along that same

channel. Diversification that ends in reliance on a single patron is not diversification.

The third constraint is that Ethiopia is in no position to choose sides. Its escape from the debt crisis runs through the institutions BRICS sets itself against. The restructuring of its external debt under the Group of Twenty Common Framework needs the cooperation of its official creditors, Western and Chinese alike, and of its bondholders, and it proceeds alongside the IMF programme whose conditions Ethiopia has accepted.²¹ The country needs Western finance, Chinese forbearance and BRICS goodwill at once. In that position membership can work as a hedge, a way of widening options, but not as a realignment. Treated as a realignment, it would jeopardize the Western support Ethiopia still leans on while offering BRICS benefits that remain mostly prospective.

4.3 Motives and assessment

The United Arab Emirates joined as a capital exporter, already a shareholder of the New Development Bank, interested in influence and in placing investment rather than in borrowing. Iran joined as a sanctioned state looking for routes around its exclusion from Western finance. Egypt, like Ethiopia, joined as an indebted borrower under an IMF programme, hoping to diversify its partners and draw in Gulf capital. Argentina, invited in the same round, declined after a change of government.²²

The balance is modest on both sides. Membership has given Ethiopia a diplomatic lift and a hedge at almost no legal cost, because nothing binding was undertaken. It has not yet delivered, and may take years to deliver, the finance that is its main material attraction, and it brings risks that Ethiopia will have to manage with care: dependence on China, friction with a fellow member over the Nile, and the wariness of Western partners on whom the country still relies. None of these risks is disabling, and none of the gains is transformative. Read soberly, BRICS membership is a sensible diversification for a state in Ethiopia's position, worth having so long as Addis Ababa treats it as one relationship among several and not a replacement for the rest. The reforms that would make the most of it follow from that.

²¹ International Monetary Fund (*supra* note 3).

²² On the 2024 entrants and Argentina's decision not to take up membership, see House of Commons Library (*supra* note 2).

5. Conclusion

BRICS is an informal grouping with no founding treaty, and Ethiopia joined it by invitation and acceptance rather than by any act its Constitution treats as the conclusion of an international agreement. The multipolar project that BRICS pursues is real, and Ethiopia's membership is a genuine part of it. But the project's institutions are still modest and still partly dependent on the order they were built to rival: the bank lends mostly in dollars, and the reserve pool defers to the Fund for most of its lending. For Ethiopia the practical content of membership is, for now, diplomatic rather than material, and what material content it may gain depends on accessions, and capital subscriptions, that still lie ahead.

Three conclusions follow for Ethiopia's engagement. *First*, if the country wants the finance that is membership's main attraction, the decisive step is institutional rather than symbolic: accession to the New Development Bank, with the capital subscription and the parliamentary ratification that accession would carry. As of mid-2026 this step is under way: the Council of Ministers has approved a proclamation ratifying accession to the New Development Bank and referred it to the House of Peoples' Representatives, though the deposit of the instrument of accession, and with it full membership, still lies ahead.

Second, the choice to align with BRICS is consequential enough to deserve the scrutiny that ratification would have brought; the House of Peoples' Representatives could be given a deliberative role in major external alignments even where no treaty compels it. *Third*, Ethiopia's interest lies in keeping its options open rather than closing them. Its debt restructuring, its currency reserves and its development finance still depend on Western institutions and on China at the same time, and the prudent course is to treat BRICS as an addition to its partnerships, not a substitute for them. Membership has widened Ethiopia's room. Whether that room narrows into dependence or stays a real widening of choice will be settled less by the politics of multipolarity than by the ordinary decisions about accession, finance and debt that Ethiopia takes next. ■

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COMMENT

Unstamped Arbitration Agreement and the Role of Courts in Arbitration: Lessons from India

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Abstract

Arbitration law has undergone significant development in India. These changes are in line with the push of the Government to make India a preferred destination for both domestic and international arbitration. However, despite its progress, due to certain reasons, including hastily drafted arbitration law and undue judicial intervention, the very objective of speedy resolution of disputes through arbitration has encountered challenges. This comment explores one such major blockade revolving around the enforceability of an arbitration agreement which forms part of an unstamped (unstamped) or insufficiently stamped contract, and critically analyses the recent seven-judge bench judgment of the Supreme Court of India upholding the enforceability of an arbitration agreement, despite it being unstamped/ insufficiently stamped to finally settle this issue. This comment argues that this approach of the Supreme Court is significant as it reaffirmed the position of Indian arbitration law at par with the international standards as prevailing in the United Kingdom and Singapore. The discussion gives due attention to prominent international arbitration jurisdictions along with the UNCITRAL Model Law on Arbitration on key fronts, including on minimal court intervention, the principle of competence-competence, and the doctrine of severability.

Keywords:

Unstamped Agreement, Competence-Competence, Severability, Judicial Intervention, UNCITRAL

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1. Introduction

“It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.”¹

When commercial parties enter into an agreement, they accept a number of legal rights and obligations.² It is well known that where there are commercial agreements, there can be disputes. Speedy resolution of such commercial disputes is essential in the field of international trade.³ Amongst a number of dispute resolution mechanisms, arbitration is regarded as one of the most suitable for commercial disputes. As a mechanism of dispute resolution, arbitration reaffirms party autonomy wherein the neutral third person is appointed by the parties to decide the dispute and render the award which is final and binding on the parties.⁴ Arbitration has obtained wider acceptability due to its independence, and impartiality of the arbitrators are attached to it.⁵

In India, arbitration is undergoing a momentous headway. In last few years, Government of India has repeatedly shown its intention and made several policy changes to become an international center for commercial arbitration⁶. However this aspiration has received major challenges due to India's overburdened courts.⁷ Moreover, certain inconsistencies between the

¹ Nigel Blackaby KC, Constantine Partasides & Alan Redfern. (2023). *Redfern and Hunter on International Arbitration*. (Oxford University Press).

² Ronan Feehily. (2022). *International Commercial Mediation: Law and Regulation in Comparative Context*. (Cambridge University Press).

³ Jory Canfield. (2014). Growing Pains and Coming-of-Age: The State of International Arbitration in India. *Pepp. Disp. Resol. L.J.* 14(3), 335-353.

⁴ Christopher Gardner. (2011). Arbitration in India: The Challenges of the 21st Century. *IBA Arb. News* 16(2) 51-52.

⁵ Ronan Feehily. (2019). Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice. *Penn St. J.L. & Int'l Aff.* 7 88, 110.

⁶ Ajar Rab. (2019). Defining the Contours of the Public Policy Exception – A New Test for Arbitrability in India. *Ind. J. Arb. L.*, 7(2), 161.

⁷ Amelia Rendeiro. (2011). Indian Arbitration and Public Policy. *Tex. L. Rev.* 89(3) 699.

arbitration statute and the judicial decisions have also persisted.⁸ Amongst such barriers, one such hindrance which was persisting for the last thirteen years was the complex connection arbitration agreements and the need of its stamping under the Indian Stamp Act, 1899. This complex issue encircled around the enforceability of those arbitration agreements which are unstamped or insufficiently stamped.

In this context, earlier judgments of the Supreme Court have given varying decisions in the past. To put the matter to rest, finally a seven-judge bench of the Supreme Court of India has delivered a momentous judgment in the matter of *“In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899”*⁹ upholding the enforceability of an arbitration agreement, despite it being unstamped or insufficiently stamped. This judgment is significant not only because it resolves the complex question of enforcement of an unstamped or insufficiently stamped arbitration agreement but it also reaffirms fundamental principles of arbitration jurisprudence which relate to minimal judicial intervention in arbitration, the principle of party autonomy and the doctrine of severability. The judgment has also upheld the superior status of the Arbitration and Conciliation Act, 1996 as a special law over other general laws thereby paving and strengthening the path of arbitration landscape in India.

2. Setting the Background

Arbitration agreement is frequently entrenched in the substantive contract. In India, stamping requirement is subjected to the Indian Stamp Act, 1899¹⁰ which “consolidates the laws relating to the payment of stamp-duty on the execution of certain instruments in the manner specified.”¹¹ It casts a duty “on every such person having by law or consent of parties (an arbitrator as well) who have conferred with the authority to take evidence and to impound such instruments which appears to be unstamped or insufficiently stamped.”¹² The Stamp Act further provides that “an instrument which is not duly stamped is inadmissible in evidence for any purpose and it shall not be acted upon.”¹³ However, Section 35 of the Stamp Act provides that this restriction is curable

⁸ Sumeet Kachwaha. (2007). The Indian Arbitration Law: Towards a New Jurisprudence. *Int. A.L.R.* 13, 17.

⁹ Curative Petition (C) No. 44 of 2023.

¹⁰ Indian Stamp Act, No. 2, Acts of Parliament, 1899 (India).

¹¹ *Ibid.*

¹² *Id.*, s. 33.

¹³ *Id.*, Section 35.

upon the payment of stamp duty and the penalty.¹⁴ Only when such an impounding is done and the shortfall stamp duty and penalty is paid, can the Court proceed on the basis of such an agreement.¹⁵ Further, Section 42 of the Stamp Act makes it clear that the non-payment or insufficient payment of stamp duty is a curable defect.¹⁶

Judicial precedents which have expressively molded the discourse on this matter are ‘SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.’¹⁷, ‘Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.’¹⁸, ‘M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors.(N.N.Global I)’¹⁹ and ‘M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors.(N.N.Global II).’²⁰

In ‘SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.’²¹, the Division Bench of the Supreme Court held that “if the document is found to be not duly stamped, Section 35 of the Stamp Act, 1889 bars the said document from being acted upon.”²² Consequently, even the arbitration clause therein cannot be performed. Subsequently, in ‘Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.’²³, a Division Bench of the Supreme Court restated the same position as decided in the case of SMS Tea Estates (P) Ltd. It was also held by the Supreme Court in this case that “when Section 11 of the Arbitration and Conciliation Act, 1996 is invoked by a party for appointment of arbitrator before the competent court on the basis of an arbitration clause in an agreement which is unstamped or insufficiently stamped, it will be the responsibility of the court to first impound the said agreement and then send it to the concerned authorities for due compliance, payment of stamp duty and penalty as per the provisions of the Stamp Act, 1899 and only after such stamp duty and penalty have been duly paid by the parties then proceed with the application.”²⁴

¹⁴ Ibid.

¹⁵ Id., s. 38.

¹⁶ Id., s. 42.

¹⁷ (2011) 14 SCC 66.

¹⁸ (2019) 9 SCC 209.

¹⁹ (2021) 4 SCC 379.

²⁰ (2023) 7 SCC 1.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Id. para. 27.

Thereafter, in the matter of ‘M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors.’²⁵ (N. N. Global I) the Supreme Court had to decide the enforceability of an unstamped arbitration agreement. A three judge bench of the Supreme Court differing from earlier decisions in SMS Tea Estates and Garware Wall Ropes held that even if stamp duty is not paid on the original agreement, it is a curable defect. Therefore, it does not invalidate the agreement. It was also held by the Supreme Court in this case that as an arbitration agreement is “separate and distinct” from the underlying contract, it cannot be declared “invalid, unenforceable or non-existent.”

The five-judge Constitution bench of the Supreme Court in ‘M/s NN Global Mercantile Private Limited v. M/s Indo Unique Flame Limited & Ors’ (NN Global II)²⁶ held that NN Global I does not lay down the right point. It was held that “*An unstamped instrument, when it is required to be stamped, being not a contract and not enforceable in law, cannot, therefore, exist in law.*”²⁷ It further held that “an unstamped instrument as postulated by Sections 33 and 35 of the Stamp Act, is deprived of the status of a contract and therefore will not be regarded as a contract and such instrument containing an arbitration agreement would be void and unenforceable unless the stamp duty on it was duly paid.”²⁸

Lastly, in the matter of ‘Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers’²⁹ wherein a three judge bench of the Supreme Court had applied the ratio of SMS Tea Estates case to decide, this matter subsequently went through review petition which was dismissed and finally submitted for curative petition. By this time, Supreme Court has already delivered the NN Global II judgment.

Therefore, Supreme Court while referring the matter to a seven judge bench observed that

“having regard to the larger ramifications and consequences of the view of the majority in N N Global Mercantile Private Limited vs Indo Unique Flame Limited and Others, we are of the considered view that the proceedings should be placed before a seven-Judge Bench to reconsider the correctness of the view of the five-Judge Bench.”³⁰

²⁵ Ibid.

²⁶ (2023) 7 SCC 1.

²⁷ Id. para. 110.

²⁸ Ibid.

²⁹ (2020) 4 SCC 612.

³⁰ Curative Petition (Civil) No. 44 of 2023 in Review Petition (Civil) No. 704 of 2021 in Civil Appeal No. 1599 of 2020.

In view of the wider ramifications of this matter and to check the precision of the ratio of N N Global II case, the seven judge bench of the Supreme Court directed the name of the matter to be changed to “*In Re: Interplay between the arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*”³¹ (referred hereinafter as Stamping Judgment) to conclusively decide over the matter.

3. Reaffirmation of the Key Principles of Arbitration in the Stamping Judgment

Supreme Court in the stamping judgment has emphasized and reaffirmed the key principles of international arbitration jurisprudence including the doctrine of separability, the doctrine of competence-competence and the principle of minimal judicial intervention in arbitration. Manifestation of key principles of arbitration law along with harmonious interpretation of pertinent provisions of the Arbitration Act, Indian Contract Act, 1872 and the Stamp Act, 1899 has constituted the core aspect which has driven the apex court to lay down the legal position on this seminal matter.

3.1. Drawing the distinction between inadmissibility and voidness of an agreement

In stamping judgment, the Supreme Court of India has drawn a difference between the admissibility of an agreement as evidence and its enforceability or validity under the law. The Indian Contract Act, 1872 provides that, “an agreement not enforceable by law is said to be void.”³² It was held by the Supreme Court that “when an agreement is void, it is not enforceable in the court of law. On the other hand, an agreement which cannot be relied upon as an evidence, is inadmissible before a court of law.”³³

In this regard, the bench noted a judgment rendered by Singapore High Court which held that “a defect in the arbitration agreement does not render it *void ab initio* unless the defect is fundamental or irretrievable as to negate the parties’ intent or agreement to arbitrate.”³⁴ As void contract cannot be cured, the court held that since unstamp or insufficient payment of stamp duty is a curable defect, this reinforces the inference that such shortcoming cannot make an arbitration agreement void and therefore once it has been cured, it is admissible as evidence.

³¹ *Supra* note 9.

³² The Indian Contract Act, § 2(g), No. 9, Acts of Parliament, 1872 (India).

³³ *Supra* note 9, para. 46.

³⁴ BNA v. BNV and Another [2019] SGHC 142.

3.2. Principle of severability of arbitration agreements

The term severability or separability underscores that the arbitration clause is considered distinct from the principal contract and remains valid even if the contract is terminated.³⁵ This principle renders an independent status to the arbitration clause which can be separated from the main agreement.³⁶ In U.K., in the case of Harbour Assurance Co (UK) Ltd.,³⁷ the Court of Appeal held that “the arbitration clause, as a matter of construction, was wide enough to cover disputes as to the initial illegality of the contract and, since the particular type of illegality alleged had nothing to do with the arbitration clause itself, the arbitration clause remained operative even if the rest of the contract were to fail.”

Supreme Court of India, quoting Redfern and Hunter on International Arbitration on the principle of separability, observed that “an arbitration agreement is juridically independent from the underlying contract in which it is contained”.³⁸ It was further observed that “the concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract.”³⁹

The Supreme Court dwelled into the position regarding principle of separability under the UNCITRAL Model Law and UNCITRAL Arbitration Rules, 2021. Other jurisdictions including U.K., U.S.A and Singapore have made a comparative analysis with this position. The Supreme Court observed that the Indian position on separability⁴⁰ is akin to the UNCITRAL Model Law which in no uncertain terms recognized the principle of severability. Similar provisions were noted in the arbitration law of major jurisdictions including U.K., U.S.A and Singapore.

In the light of the above discussion, the Supreme Court observed that in NN Global II case although that bench recognized the principle of separability

³⁵ Ayten Mustafaveya. (2015). Doctrine of Separability in International Commercial Arbitration. *Baku St. Uni. L. Rev.*, 1: 93-98.

³⁶ Frans Hendra Winarta. (2013). *Hukum Penyelesaian Sengketa Arbitrase Nasional Indonesia dan Internasional*. (Sinar Grafika, Jakarta).

³⁷ Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] Q.B.701.

³⁸ Redfern *et al.*, *supra* note 1 at 81.

³⁹ *Supra* note 9, para. 90.

⁴⁰ Arbitration and Conciliation Act, No. 26, Acts of Parliament, 1996 (India), Section 16.

but refused to apply the same in the context of Sections 33 and 35 of the Stamp Act.⁴¹ This position was held to be opposing to law in the stamping judgment.

3.3. Principle of Competence-Competence

It is one of the fundamental pillars in contemporary arbitration law enabling the arbitral tribunal to determine its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement.⁴² This power is inherent with the appointment of an arbitral tribunal as the tribunal can effectively render the award once it is duly empowered to decide on its own jurisdiction.⁴³ To balance this, limited judicial review is available to an aggrieved party from the decision of the arbitral tribunal.⁴⁴

Supreme Court of India in the stamping judgment while reaffirming the Principle of Competence-Competence compared the provision of the current arbitration law with the previous statute⁴⁵ (now repealed) wherein any party to arbitration agreement can file an application to determine the issue of existence or validity of arbitration agreement before the competent court.⁴⁶ Due to this, the question of jurisdiction and validity was exclusively to be decided by the court. However, this position is completely changed under the current arbitration law. Section 16 of the Arbitration Act, 1996⁴⁷ which is analogous to Article 16 of the UNCITRAL Model Law makes suitable provision for the Principle of Competence-Competence under the Indian Arbitration Law. Section 16 of the current arbitration law empowers the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreement. It also makes provision for the aggrieved party to challenge the jurisdiction of the arbitral tribunal before the arbitral tribunal itself and not before the court.⁴⁸ After the arbitral tribunal has delivered the arbitral award, by virtue of Section 16(6) read with Section 34(2)(a)(ii) of the Arbitration Act, 1996⁴⁹ provides for the aggrieved party to make an application for setting aside the award before the competent court.

⁴¹ Id. para. 113.

⁴² Vaishnavi Chillakuru. (2013). The Rule of Competence-Competence: A Comparative Analysis of Indian and English Law. *Contemp. Asia Arb. J.* 6, 133.

⁴³ Redfern *et. al.*, *supra* note 1.

⁴⁴ Doug Jones. (2009). Competence-Competence. *Arb.*, 75(2) 56-64.

⁴⁵ The Arbitration Act, No. 10, Acts of Parliament, 1940 (India).

⁴⁶ Id. s. 33.

⁴⁷ *Supra* note 41.

⁴⁸ Id. s. 16(2), 16(3).

⁴⁹ Id. s. 34.

Therefore, it was held by the Supreme Court that “as per the principle of competence-competence as provided in the Arbitration Act, 1996, the arbitral tribunal is conferred with the power and jurisdiction to determine all preliminary issues touching its jurisdiction which includes the issue of unstamp or insufficiently stamped arbitration agreement.”⁵⁰

3.4. Minimal judicial interference

Section 5 of the Arbitration Act, 1996 provides for minimum judicial intervention of the courts in the arbitral process and restrict it only “so provided” under the Arbitration Act, 1996. Section 5 of the Act ‘gives effect to the true intention of the parties to have their disputes resolved through arbitration in a quick, efficient, and effective manner by minimizing judicial interference in the arbitral proceedings.’⁵¹ On the other hand, Article 5 of the UNCITRAL Model Law confines court intervention to those issues explicitly governed by the law, thereby giving due regard to the power and jurisdiction of the arbitral tribunal by virtue of the principle of competence-competence. It is to be noted that one of the reasons of the popularity of arbitration is due to the principle of party autonomy bestowing the parties the freedom to work out the process which suits their needs.⁵² In the light of the above, the Supreme Court of India observed that “every provision of the Arbitration Act, 1996 ought to be construed in view of Section 5 to give true effect to the legislative intention of minimal judicial intervention.”⁵³

3.5. Arbitration Act as a comprehensive law

The Supreme Court of India in several judgments echoed that “the Arbitration Act, 1996 is a self-contained code, with regard to appointment of arbitrators, commencement of arbitration, making of an award and challenges to the arbitral award, as well as execution of such awards.”⁵⁴ As a comprehensive law, the Arbitration Act, 1996 explicitly excludes application of general legal procedures that are not provided under the Arbitration Act. Accordingly, it was observed by the Supreme Court that “matters governed by the Arbitration Act, 1996 such as the arbitration agreement, appointment of arbitrators and competence of the arbitral tribunal to rule on its jurisdiction have to be assessed in the manner specified under the law. Therefore, provisions of other

⁵⁰ Ibid.

⁵¹ Food Corporation of India v. Indian Council of Arbitration, (2003) 6 SCC 564.

⁵² Okezie Chukwumerije. (1994). *Choice of Law in International Commercial Arbitration*, 11 (Bloomsbury Publishing).

⁵³ *Supra* note 9, para. 82.

⁵⁴ See generally, Psl Wind Solutions (P) Ltd v. GE Power Conversion (India) (P) Ltd., (2021) 7 SCC 1; Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715.

statutes cannot interfere with the working of the Arbitration Act, unless specified otherwise.”⁵⁵

3.6. Harmonious interpretation of Arbitration and Conciliation Act, 1996, Indian Stamp Act, 1899 and the Indian Contract Act, 1872

To harmonize the provisions of the Arbitration and Conciliation Act, 1996, Indian Stamp Act, 1899 and the Indian Contract Act, 1872, the Supreme Court of India in the stamping judgment applied the rules of harmonious interpretation. The Supreme Court in this case observed: “The Arbitration Act and the Stamp Act must be construed harmoniously to preserve their workability and efficacy and not defeat their purpose or render them ineffective.”⁵⁶

Further, Supreme Court applied the doctrine of ‘*generalia specialibus non-derogant*’ in this matter and “held that the Arbitration Act, 1996 is a special law, and the Contract Act, 1872 and Stamp Act, 1899 are general law in terms of the laws governing arbitration proceedings as well as arbitration agreement.”⁵⁷ The Supreme Court thus upheld that with respect to the arbitration agreements, the Arbitration Act, 1996 will prevail over the Stamp Act and the Contract Act. Since the Arbitration Act, 1996 does not provide for impounding of an agreement in which an arbitration clause is contained, application of Sections 33 and 35 of the Stamp Act, 1899 by a court while exercising jurisdiction under Sections 8 and 11 of the Arbitration Act, 1996 is excluded by virtue of Section 5 of the Arbitration Act, 1996.⁵⁸

Even though the Arbitration Act, 1996 was enacted much after the Stamp Act, 1899, the legislature does not confer the power to the court to examine the stamping requirement while appointing arbitrator under Section 11 of the Arbitration Act, 1996 which is subsequently to be done by the arbitral tribunal.

4. Comparative Perspective

The relationship between statutes governing stamp duty and the admissibility and enforceability of arbitration agreements has historically created disagreement in other jurisdictions as well. While Indian courts till the Stamping judgment had undergone prolonged uncertainty and accorded stamping of arbitration agreement vital to the validity of the agreement, other prominent jurisdictions such as United Kingdom and Singapore have taken a

⁵⁵ *Supra* note 9, para. 85.

⁵⁶ *Id.* para. 165.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

more sensible approach which is in tune with the principles embedded in the UNCITRAL Model Law on Arbitration and the New York Convention.

4.1 United Kingdom

The UK Stamp Act, 1891 requires instruments such as contracts to be duly stamped to be legally valid. However, it does not have an exclusive provision with regard to arbitration. Section 14(4) of the UK Stamp Act, 1891 makes unstamped arbitration agreement inadmissible as evidence before the courts in the UK.⁵⁹ Through subsequent amendments under section 12 of the Act, provisions have been made for adjudication by Commissioners for duty determination and penalties to legalize such agreements.⁶⁰ As courts require proof of duty paid, once the adjudicatory orders under section 12 of the Act are complied with, instruments including an arbitration agreement become admissible as evidence.⁶¹ In addition to this, section 15 of the Act permits stamping of instruments even after their execution on payment of unpaid duty and interest/penalty as payable in this regard.⁶²

In the UK, the validity and enforceability of an arbitration agreement is governed by the Arbitration Act 1996 UK with updates in the Arbitration Act 2025 and common law principles of contract. The seminal doctrine of severability (separability) is one of the fundamental pillars of the UK Arbitration Act, 1996 as amended by Arbitration Act, 2025. Accordingly, courts in UK generally do not restrain the parties from proceeding with arbitration even if the main contract is not duly stamped which has the bearing on its enforceability until rectified in accordance with the provisions of the UK Stamp Act. This is akin to the Indian position as held in the Stamping judgment.

4.2 Singapore

Singapore's arbitration system is divided amongst two statutes. The International Arbitration Act, 1994 provides a structure for international commercial arbitrations seated at Singapore whereas the Arbitration Act, 2001 makes provision for domestic arbitration. The Stamp Duties Act, 1929 mandates for stamping of certain instruments including arbitration agreements to be admitted as evidence before the courts in Singapore.

Under section 52 of the Stamp Duties Act, 1929 an instrument including an arbitration agreement which is not duly stamped will not be admitted as

⁵⁹ The Stamp Act, 1891 (UK) Section 14(4).

⁶⁰ Id. Section 12.

⁶¹ Ibid.

⁶² Id. at Section 15.

evidence in any proceedings unless stamp duty and any applicable penalties are paid in accordance with section 46 of the Stamp Duties Act. However, unstamp or insufficiently stamped arbitration agreement does not affect the arbitration process as it is a curable defect which can be rectified under the provisions of the Stamp Duties Act. Section 51 of the Act mandates for impounding of such insufficiently stamped instruments by persons having (by law or consent of parties) authority to receive evidence which includes an arbitrator. Under section 53 of the Act, such impounded instruments will be sent to the Commissioner for proper stamping of the instrument in accordance with section 46 of the Act.

The Stamping Judgment of the Supreme Court of India has thus laid down the principle which is in harmony with the legal principles prevailing in both UK as well as Singapore which are amongst the top five prominent seats for international commercial arbitration.⁶³

5. The Way Forward and Conclusion

Since arbitration in India is still in its nascent phase⁶⁴, the stamping judgment of the Supreme Court of India has reaffirmed the objective of the 1996 Act in rendering “speedy and efficacious alternative dispute resolution” to disputants which is also in consonance with the arbitration laws of prominent jurisdictions such as U.K. and Singapore and. The judgment is also in harmony with the UNCITRAL Model Law on Arbitration. Examination of stamping conditions by the courts before the matter has been referred to arbitration tribunal will cause unnecessary deferment in the process which is basically in the realm of the arbitral tribunal to satisfy itself with the stamping requirements. The Supreme Court in this judgment has very precisely laid down that though the unstamp or insufficiently stamped agreements are not admissible under Section 35 of the Stamp Act, 1899 as evidence, however, it is enforceable under the law. As unstamp or insufficiently stamped agreement is a curable defect and such agreement is not ‘void or void ab initio’. The arbitral tribunal is competent to take evidence under section 35 of the Stamp Act, 1899 wherein it can follow the process provided under this section to decide on the issue of unstamp or insufficiently stamped agreements.

⁶³ 2025 Queen Mary, University of London International Arbitration Survey, The path forward: Realities and opportunities in arbitration, available at: <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf> (accessed on November 25, 2025)

⁶⁴ Ridhima Sharma. (2018). Third Party Funding in International Commercial Arbitration. 12 *NUALS Law Journal*, 61.

The Supreme Court of India has categorically stated in this judgment that the Arbitration Act, 1996 exemplifies the seminal principles applicable in the context of arbitration such as doctrine of separability and competence-competence which is in consonance with the UNICITRAL Model Law on Arbitration. Though the role of courts are not completely excluded under the arbitration law, priority is to be given to the arbitral tribunal to resolve the issues related to jurisdiction, validity of arbitration agreements etc. in accordance with the principle of competence-competence. The Supreme Court in this judgment has also recognized the duty of the courts in interpreting the arbitration law in such a manner that reaffirms the principles of modern arbitration law.

The Stamping Judgment sheds light on and restructures the legal backdrop regarding unstamp or insufficiently stamped arbitration agreements in India. This judgment of the Supreme Court purposefully lines up with the international standards of minimal judicial interference in arbitration for providing effective resolution of dispute and it reaffirms the principles of competence-competence and doctrine of severability whereby the tribunal is entrusted not only to decide the substantive issues between the parties but also to rule on its own jurisdiction. This strengthens the seminal principle of party autonomy and re-affirms the key role of arbitral tribunals in the determination of the issue involved in the Supreme Court's judgment. This judgment places India's arbitration law within the realm of modern global arbitration practices and it can be followed by other jurisdictions aspiring to be a global arbitration hub.

Prior to this judgment, the NN Global II judgment, had held against the ethos of India's arbitration law whereby, and this had allowed the impounding of the arbitration agreement by the courts under section 8 or 11 of the Arbitration Act, 1996, thereby directing the parties to cure the defects only after the court refers the matter to arbitration/appointment of arbitrator as the case maybe. However, as per the stamping judgment, the role of courts in case of unstamp or insufficiently stamped arbitration agreement has been completely taken away and conferred on the arbitral tribunal to act and decide on it. Nonetheless, stamping judgment is a constructive step towards the push for promoting arbitration in India as per the commitment of international best practices in this sphere. ■

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