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MESSAGE FROM THE EDITORIAL BOARD

The Editorial Board is delighted to bring Volume 11. No. 2 of Bahir Dar University Journal of Law. The Board extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors.

The Journal is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Board appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. Hence, the Board calls for scholarly contributions and use Bahir Dar University Journal of Law as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Board is hopeful that the Bahir Dar University Journal of Law will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of the country in general.

Disclaimer

The views expressed in this Journal do not necessarily reflect the views of the Editorial Board or the position of the Law School/the University.

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Introducing Third-Party Litigation Funding in Ethiopia: Implications for Enhancing Access to Justice

Tajebe Getaneh[*]

Abstract

In our day-to-day experience, it is common to observe persons encountering challenges to exercise their right to access justice due to costly litigation. The litigation expenses that include the advocate's fee, court fee, and witnesses' expense are so onerous to some litigants that they resist to start litigation. To mitigate this problem, countries introduced an innovative litigation-funding scheme known as third-party litigation funding or alternative litigation funding (ALF). It is a business system that an investor, not a party to the litigation, funds the costs of litigation of a litigant upon the agreement to receive some portions from the recovery. ALF eases litigants to fund their litigation and thereby ensure their right to access to justice. In Ethiopia, there is no legally recognized scheme of ALF. The aim of this article is, therefore, to examine whether Ethiopia should introduce ALF. In doing so, the author employs a doctrinal research approach. Particularly, the study analyzed commentaries and scholarly research reports as major source of insights on the subject. After examining the issue, the author concluded that the situation in Ethiopia especially the limitations in the legal aid program imperatively requires the introduction of ALF. Finally, this article indicates some regulatory concerns of ALF including disclosure of the agreement, privilege and confidentiality, and funder litigation control.

Keywords*: Third-Party Litigation Funding, Access to Justice, Litigation Cost, Regulatory Concerns*

Introduction

A party in litigation commonly expends a cost to exercise the right to access to justice. A litigant, the plaintiff or defendant, has to pay a court fee, cover witnesses' expenses, advocate's fee, and other miscellaneous costs as the case may be. For example, to get legal representation in litigation, one must pay the agreed advocate's service fee in advance or enter a contingency fee arrangement.[1] Yet the advocate's fee in litigation is largely costly for many citizens.[2]

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[1] Contingency fee means, "where the lawyer discounts or commutes his fee in return for a share of the damages or out-of-court settlement should the action succeed." See Cento Veljanovski, Third party

Consequently, these litigants get frustrated to hire a lawyer in their lawsuit.[3] Because of this, persons are obliged to seek legal service from free legal aid service providers. Nevertheless, seeking legal service from free legal aid service providers may not be always successful. This is because, for several reasons, legal aid service providers are not mostly readily accessible to legal service seekers. First, free legal aid service providers' personnel and offices are situated in urban areas and are inaccessible for remote area residents. In addition, free legal aid service is available only for indigent and vulnerable persons. Moreover, it is expensive for litigants to pay court fees. A litigant who wants to start litigation must first pay the court fee. Though there are possibilities whereby parties can institute their cases to the court in a pauper, the pauper scheme is available only in limited situations.

As a result of high costs of litigation, some individuals do not want to commence litigation though they have a fundamental right to access to justice.[4] Consider the case of a businessperson, who has no cash money other than his businesses, wants to bring legal action in a court of law. In this scenario, the businessperson cannot receive free legal aid or the privilege to sue in pauper for he has business assets. In this instance, the businessperson may be forced to sell one or more of his business to acquire money to pay the costs of the litigation.

Nevertheless, it is wearisome to see that a businessperson loses his business because of litigation costs. Thus, apart from obstructing individuals' right to access to justice, their inability to cover litigation costs could also derail business and investment ventures. To overcome these hurdles to access to justice, countries introduced a new business model whereby an investor, not a party in litigation, funds the legal costs of litigation in exchange for a reward if the funded party wins.[5] This business model is named third-party litigation funding,[6] also known as alternative litigation funding or legal

Litigation Funding in Europe, Conference Paper on Third Party Litigation: Civil Justice Friend or Foe?, George Mason University, (2011), p. 6.

[2] Jarrett Lewis, Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice? *The Georgetown Journal of Legal Ethics*, Vol. 33, (2020), Pp. 687-701, P.687.

[3] Mariel Rodak, It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement, *University of Pennsylvania Law Review*, Vol. 155: No. 2, (2006), Pp.503-535, P. 505.

[4] Anna Schmallgger, Commodification of Claims: The Admissibility of Various Tort Claim Assignments and Implications for Third-party Funding, A Comparative Analysis of Regulation of United States, England, Australia and Germany, LL.M Thesis Leiden University, (2017), p. 1.

[5] Solas G.M., Third Party Litigation Funding: A Comparative Legal and Economic Analysis and the European Perspective, Ph.D. Dissertation, Maastricht University, (2017), P. 22.

[6] *Id*., p. 23.

funding (herein after ALF),[7] is an arrangement by which a plaintiff or defendant in litigation is financed for his litigation cost including costs of the advocate and court fee by a third-party funder.[8] The third-party funder will receive some return from the proceeds of the litigation if the case is successful or will receive nothing if the case is unsuccessful.[9] Such an arrangement is imperative to enhance access to justice to individuals who otherwise could not afford to pay for it.

In Ethiopia, there is no legally recognized practice of ALF. Litigants fund their litigation costs by themselves or through free legal aid service program, if any. However, because of different reasons, access to justice through free legal aid service providers is inefficient, inaccessible, and unsatisfactory.[10] With this in mind, this article tries to analyze the need for introducing ALF in civil litigation in Ethiopia and its implication towards enhancing access to justice.

As regards structure, this article is divided into three sections. The first section explains the conceptual foundation of ALF and the next section examines the development of ALF in common law and civil law jurisdictions. Following that, the third section demonstrates the need for ALF in Ethiopia by highlighting its potential to improve access to justice. Important regulatory considerations are also addressed in this section. Finally, concluding remarks are made in the last section.

1. Overview of Third-Party Litigation Funding

1.1. The Concept of Third-Party Litigation Funding

Different writers provide varying definitions[11] for the term ALF. For example, Jackson, R. defines it as;

[a] funding of arbitration or litigation proceedings by a party who (i) has no pre-existing interest in the proceedings, (ii) will be paid out of any amounts recovered as a

[7] Thomas Healey and Michael B. McDonald, Litigation Finance Investing: Alternative Investment Return in the Presence of Information Asymmetry, (2021), p. 3.

[8] Victoria Sahani, Third-Party Funding in Dispute Settlement in Africa, Proceedings of the Annual Meeting (American Society of International Law), Vol. 110, (2016), Pp. 90-92, p. 90.

[9] Marco de Morpurgo, A comparative Legal and Economic Approach to Third-Party Litigation Funding, *Cardozo J. of Int'l and Company Law*, Vol.19, (2011), Pp. 343-412, p. 352.

[10] Anchinesh Shiferaw and Ghetnet Mitiku, Assessment of Legal Aid in Ethiopia: A Research Report and Proceeding of the National Workshop of Legal Aid Providers, Center for Human Rights, Addis Ababa University, (2013), P. 94-98.

[11] Dmytro Galagan & Patricia Zivkovic, If They Finance Your Claim, Will They Pay Me If I Win: Implications of Third Party Funding on Adverse Costs Awards in International Arbitration, *European Scientific Journal*, (2015), Pp. 173-181, P. 173.

consequence of the proceedings, often as a percentage of the sum recovered, and (iii) the funder is not entitled to any payment if the funded party's claim fails.[12]

Similarly, Gian Marco Solas conceptualizes it as "[a] professional practice of funding the dispute costs in exchange for a percentage of the sum recovered, only in case of victory, sometimes entailing the transfer of the claim."[13] Still other writers also defined ALF as an agreement where "a person (a non-lawyer funder or lay-man) provides a litigant with funds to prosecute an action in return for a share of the proceeds of the legal action if the litigation is successful."[14] From the aforementioned definitions, one can infer that ALF is a means of funding any litigation costs based on an agreement in which the funder receives some profit from the proceeds of the case. The funder, however, will not receive any return or will not even recourse to the costs incurred in the litigation provided the funded party loses the case. Hence, ALF is non-recourse. ALF model involves three parties: the funder, the client, and the lawyer.[15] The funder concludes a contractual arrangement with the litigants and may not become a party to the lawsuit unless the funding agreement is made through assignment of claim.[16] In this case, the funder has two goals: (1) to assist the litigant to access justice in a lawsuit who otherwise cannot afford to cover the litigation cost, and (2) to drive a reasonable profit from its investment in the litigation. Where the litigant is a plaintiff, the funder agrees to receive certain percentage of the outcomes of the case, if it is successful.[17] In ALF, unlike a loan, the funding litigant is not required to reimburse the funder, if the case is unsuccessful.[18] Where the litigant is a defendant, the funder will receive a prefixed payment, and may receive additional reward provided the defendant wins.[19]

ALF has two models namely, passive (hand-off) and active (hand-on) model.[20] In a passive model, the role of the funder is limited to covering the costs of the litigation to

[12] *Id.*, P. 173.
[13] Gian Marco Solas, Third-Party Litigation Funding: A Comparative Analyses, Ph.D. Thesis, Università degli Studi di Cagliari, (2017), P. 10.
[14] MJ Khoza, Formal Regulation of Third-Party Litigation Funding Agreements? A South African Perspective, *PER/ PELJ*, (2018), p. 2.
[15] Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, *Cardozo Law Review*, Vol. 36, (2015), Pp. 861-912, p. 870.
[16] Victoria Sahani, Reshaping Third-Party Funding, *Tulane Law Review*, Vol. 91: No. 3, (2017), Pp. 405-472, p. 416.
[17] *Id.*, p. 416.
[18] *Id.*, p. 416.
[19] *Id.*, p. 416.
[20] Ines Nasr, Third Party Funding in International Arbitration, Dissertation for the Fulfillment of Requirements for the degree of Master in Common Law, Republic of Tunisia Ministry of Higher Education and Scientific Research University of Carthage, Faculty of Legal, Political and Social Science of Tunisia, (2015), p. 127.

derive some return, if the case is successful.[21] The full responsibility to select the attorney and manage issues in the claim other than paying the litigation cost is left to the funded litigant.[22] In the contrary, in the active model, the funder is actively involved in the claim by 'helping in the management of the case, providing resources and lobbying.'[23] Sometimes, the active funder may even buy the lawsuit from the litigant and collects the whole proceeds of the litigation, if the case is successful.[24] In such a case, the funder becomes a litigant party to the claim.

Historically, the practice of funding litigation has been practiced since ancient Greek or Roman times.[25] In ancient Greek, litigating in a court of law was considered as dignity and power, and even those who lack support from other people were considered as 'wretched friendless people.'[26] However, the primary motive of funding litigation was to get social dominance or political support while the profit-making motive was incidental.[27] Nonetheless, the practice of helping litigants of a lawsuit had been prohibited in the middle ages.[28] It has been prohibited in common law jurisdictions due to the doctrine of maintenance and champerty.[29] Maintenance in this context refers to the "intermeddling of someone who provides financial assistance to either party in the action to defend a claim, when the provider holds no connection or valid interest in the claim itself."[30] Champerty, on the other hand, denotes a subcategory of maintenance in which the "intermeddle enters into an agreement with a party involved in the action for the sole purpose of being compensated from the proceeds of the action."[31]

These two doctrines of common law countries emerged in the medieval period in response to the practice where the rich individuals fund the litigation of the poor to "attack personal or political enemies."[32] In medieval times, claims were assigned to wealthy individuals as they could influence the outcomes of the claim though they

[21] Veljanovski, *supra* note 1, p. 6.
[22] Solas, *supra* note 13, P. 11.
[23] Nasr, *supra* note 20, p. 127-128.
[24] Solas, *supra* note 13, P. 11.
[25] Solas G.M., *supra* note 5, p. 41.
[26] *Id*., p. 43.
[27] *Id*., p. 41.
[28] *Id*., p. 41.
[29] Ekkachat Sirivichai, Third-Party Funding in Dispute Resolution Proceedings, *Thammasat Business Law Journal*, Vol. 9, (2019), Pp. 205-224, p. 208.
[30] Vienna Messina, Third-Party Funding: The Road to Compatibility in International Arbitration, *Brooklyn Journal of International Law*, Vol. 45: No. 1, (2019), Pp. 434-461, p. 442.
[31] *Id.*, p. 442.
[32] *Id.*, p. 442.

have no interest in the suit.[33] For example, in England, it was a tool for economic war between rich landowners.[34] Consequently, maintenance and champerty were denounced on the ground that they "encourage speculative lawsuits, needlessly disrupt societal peace, and lead to corrupt practices of law."[35] As such, both practices were criticized as illegal, immoral, and unethical, and those who commit such acts were subject to civil and criminal liability.[36]

Similarly, though ALF was practiced in ancient Roman times from which most civil law legal systems emerged, it was prohibited in civil law jurisdictions in the medieval age.[37] Lawyers or non-lawyer individuals were prohibited from entering a litigation fund agreement with the litigant and receiving profit from the sum recovered, and this prohibition was called Pactum de Quota Litis.[38] Moreover, in the medieval period, civil law countries prohibit the agreement to purchase lawsuits to drive profit therefrom, which was called Redemptio Litis.[39] However, as time went by, these limitations and prohibitions were relaxed that some countries, especially in the early twentieth century, created exceptions to the old existing prohibition of ALF.[40] Australia and United Kingdom are the first countries to abolish the common law doctrine of maintenance and champerty.[41]

Accordingly, ALF in its modern sense has started in the 1990s in Australia and nowadays, it becomes common practice in many civil and common-law countries.[42] In Australia, ALF was allowed in bankruptcy litigation, and later, it was extended to all civil matter litigations.[43] Particularly, it has been widely practiced in the Australian justice system especially after 2006 when the Australian high court explicitly permits third parties to fund and to control the case in its decision in the lawsuit of Campbells Cash & Carry v. Fostif (emphasis added).[44] Following Australia, United Kingdom has recognized the practice of ALF since 2005, when the English Court of Appeal in Arkin v. Borchard Lines Ltd allows third-party litigation funder without, however,

[33] Nasr, *supra* note 20, p. 25.
[34] Solas G.M., *supra* note 5, p. 41.
[35] Messina, *supra* note 30, p. 442.
[36] Nasr, *supra* note 20, p. 25.
[37] Solas G.M., *supra* note 5, p. 27.
[38] *Id.*, p. 27.
[39] *Id.*, p. 27.
[40] Cassandra Burke Robertson, The Impact of Third-Party Financing on Transnational Litigation, *Case Western Reserve Journal of International Law*, Vol. 44: No.1, (2011), Pp. 159-181, p. 164.
[41] *Id.*, p.164.
[42] Olivier Marquais & Alain Grec, Do's and Dont's of Regulating Third-Party Litigation Funding: Singapore Vs. France, *Asian International Arbitration Journal*, Vol. 16, (2020), Pp. 50-67, P. 50.
[43] Maya Steinit, Whose Claim Is this Anyway? Third-Party Litigation Funding, *Minnesota Law Review*, (2011), Pp. 1269-1336, p. 1279.
[44] Robertson, *supra* note 40, p.165.

acquiring a power to control the management of the case.[45] Nowadays, the practice is recognized and flourishing in many countries cognizant of its role to enhance access to justice. Mainly, it has spread out in Australia, Germany, United Kingdom, Ireland, and the USA.[46] It has also begun to develop in some African and Asian countries such as Hong Kong, Indonesia, South Africa, and Nigeria.[47] It is being practiced in court and arbitration litigation both nationally and internationally.[48]

1.3. The Role of Third-Party Litigation Funding to Enhance Access to Justice

Since the 1948 Universal Declaration of Human Rights (UDHR), access to justice has been regarded as a fundamental human right 'guaranteed under, virtually, all universal and regional human rights instruments as well as in many national constitutions.'[49] The UDHR explicitly states, "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or subordinate laws."[50] An individual whose right is violated is entitled to seek an effective remedy by instituting a claim before a competent national tribunal, which includes informal justice institutions. Moreover, most international human rights instruments recognized the right to access to justice, at least indirectly, through other human rights provisions such as the right to be treated equally before the law. International human rights instruments such as International Covenant on Civil and Political Rights, European Convention on human right and the African Charter on Human and People right also indirectly recognize the right to access to justice through other human rights provisions.[51]

While the concept of access to justice gets wider recognition in human rights instruments, its meaning is elusive, lacking a single definition. The scholarly literature widely provides the meaning of access to justice, and the author constructs neither a new definition nor comments on the existing definitions. Rather, for this article, access to justice is understood to mean the 'ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights

[45] Steinitz, *supra* note 43, P.1281.
[46] Chen Wenjing, An Economic Analysis of Third Party Litigation Funding, *US-China Law Review*, Vol.16: No. 1, (2019), Pp.34-42, P. 34.
[47] Leslie Perrin, Third Party Litigation Funding Law Review, 2nd ed., Law Business Research, (2018), p. 1ff.
[48] Shannon, *supra* note 15, p. 863.
[49] Maya Steinitz, Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements, *University of California, Davis*, Vol. 53, (2019), Pp. 1073-1116, p. 1085.
[50] Universal Declaration of Human Rights (UDHR), 1948, Art 8.
[51] Mizanie Abate et al, Advancing Access to Justice for the Poor and Vulnerable through Legal Clinics in Ethiopia, *Mizan Law Review*, Vol. 11: No.1, (2017), p. 4.

standards.'[52] Yet it is important to note that the mere recognition of the right to access to justice is not a guarantee to realize such a right. It requires avoiding barriers to access to justice such as unaffordable litigation costs. Due to expensive litigation costs, parties with limited finance hesitate to bring their court action and remain uncompensated.[53] Even those who can afford to pay the costs of litigation are sometimes discouraged to start their litigation due to uncertainty of litigation outcome i.e., the problem of risk-aversion.[54] As the outcome of litigation is mostly uncertain, the plaintiff may expect reduced compensation than the costs of the litigation and prefers to abandon initiating litigation.[55] On top of that, those who decide to initiate the lawsuit always assume the risk of losing the case.[56] This may also discourage to start the lawsuit. One may also become reluctant to initiate the case when the damage sustained is diffused over many victims.[57] For example, in case of environmental damage, the damage is dispersed in many victims and no one may will to initiate a lawsuit.[58]All of these are hindrances to access to justice.

Cognizant of these obstacles to access to justice, countries have implemented different strategies to enable everyone to access justice. Provision of free legal aid to vulnerable and destitute persons had been one of such strategies widely in use over the ages in different countries.[59] However, at the end of the 20th century, the free legal aid program is criticized as "costly, inefficient, and arbitrary."[60] Following this, countries come up with a new business model of litigation financing called ALF. This model enables the claimant to institute a lawsuit who cannot otherwise afford to start the case and thereby advances access to justice.[61] ALF levels the game field for disputing parties and it helps to achieve the public policy mission of securing access to justice to societies.[62] It also allows litigants to shift associated risks to funders and encourage them to access to justice.[63] The funded party begins the suit by avoiding the risks

[52] Kinfe Micheal Yilma & Tadesse Melaku, 'Petitioning the Executive in Ethiopia: Trends, Implications and Propriety of Institutionalizing Petitioning' in Pietro s. Toggaia et' al (ed.), Access to Justice in Ethiopia: Towards an Inventory of Issues, Center for Human Right, Addis Ababa University, 1st ed., (2014), p. 75.
[53] Joanna M. Shepherd, Ideal versus Reality in Third-Party Litigation Financing, (2011), p. 6.
[54] Id., p. 7.
[55] Id., p. 7.
[56] Morpurgo, *supra* note 9. p. 346.
[57] Michael Faure & Louis Visscher, Third Party Litigation and Its Alternatives: An Economic Appraisal, (2017), P. 2.
[58] *Id*., P.2.
[59] Morpurgo, *supra* note 9, p. 346.
[60] *Id.*, p. 346.
[61] Steinit, *supra* note 43, p. 1276.
[62] Thibault De Boulle, Third-Party Funding In International Commercial Arbitration, Master's Thesis in Masters of Laws, Ghent University, (2013), p. 25.
[63] Steinit, *supra* note 43, p. 1276.

associated with litigation costs in case he loses. The funder wholly assumes the risk related to the litigation cost without even the possibility of recourse if the litigant loses. It also entitles insolvent or small business entities to institute their claim in which they could not otherwise pay for the costs of the litigation and would face a risk of failure to reach for contingency fee arrangements.[64] This in effect would protect small and insolvent corporations from imminent threats for their existence.

Apart from small or insolvent corporations, big corporations would benefit from ALF. It enables big corporations to keep their cash circulation normal by receiving funds from litigation funders for their litigation.[65] From the perspective of investors, ALF allows investors to gain some returns from the outcome of the suit without being affected by market conditions.[66] Litigation funders are investors and benefit by driving reasonable profits from their investment in the litigation. Unless the funded party loses the case, their investment is certain that any market condition would not affect it.

1.4. Critiques over Third-Party Litigation Funding

Though ALF has the aforementioned benefits, it does not escape the criticism of scholars. Some scholars argue that ALF causes an increment of lawsuits, which, in turn, results in delay of justice.[67] The premise of this argument is that when there is an ALF, everybody will prefer to bring a lawsuit, which he would not otherwise want to start due to the risks and costs associated with the litigation.[68] This argument, in fact, has been supported by empirical evidences reported in Australia. The evidences particularly confirm that ALF causes an increment of lawsuits.[69] Yet looking more closely into the latter argument, one could see that it is comparing the incomparable variables of access to justice. Even if ALF causes an increment of lawsuits that probably results in delay in the administration of justice, this should not be a ground for prohibiting ALF. This externality of ALF can be minimized, if not abolished, by increasing the capacity of justice-administering institutions. It can be addressed by increasing the number of courts and their human resources.

[64] Rachel Howie & Geoff Moysa, Financing Disputes: Third-Party Funding in litigation and Arbitration, *Alberta Law review*, Vol. 57: No. 2, (2019), Pp.466- 502, P.470.
[65] *Id.*, p. 471.
[66] *Id.*, p. 471.
[67] Jason Lyon, Revolution in Progress: Third-Party Funding of American Litigation, *UCLA Law review*, (2010), Pp. 571- 609, p. 590.
[68] *Id.*, p. 590.
[69] *Id.*, p. 591.

Scholars also criticized ALF alleging that it increases the institution of frivolous claims.[70] As the funded litigants are risk-free, they will be encouraged to bring unmerited lawsuits. This criticism is not, however, sound enough to prohibit ALF. Funders obviously evaluate the merit of the lawsuit before they agree to fund the litigation costs.[71] They would not fund unmerited lawsuits, as they are investors who want to drive return from their investment. Even in economics, it is irrational to fund unmerited litigation as an investor.[72] Rather, it serves as a tool to reduce the institution of unmerited lawsuits.[73] Moreover, opponents of ALF criticized the arrangement contending that it becomes a deterrent for settlement of litigation in the negotiation of parties and causes prolonged litigation.[74] This is based on the logic that, as the litigant shifts all litigation risks to the funder, he will not be interested to accept any dispute settlement offer from the other litigant.[75] Nevertheless, proponents of ALF provide a counter-argument that ALF does not deter settlement in the negotiation as the funder's payment increases as litigation become lengthy.[76] Overall, though the debate as to permitting ALF continues, the practice of funding litigations is flourishing in many jurisdictions.

2. Third-Party Litigation Funding in Common Law and Civil Law Jurisdictions

2.1. Third-Party Litigation Funding in Common Law Countries

Though ALF is widely practiced in many common law countries, only countries with relatively well-established experiences are considered for the purpose of this article. Particularly, the article examines the development of ALF in Australia, United Kingdom, and United States. The Australian legal system is where modern ALF model originates and evolve into its advanced form.[77] In the beginning, ALF was permitted only for insolvency cases in this country.[78] Currently, however, it is also

[70] Steinitz, *supra* note 43, P.1299.
[71] Miltiadis G. Apostolidis, Third-Party Funding in Dispute Resolution: Financial Aspects & Litigation Funding Agreements, LL.M Thesis in Transnational & European Commercial Law, Mediation, Arbitration and Energy Law, School of Economics, Business Administration & Legal Studies, International Hellenic University, (2017), p. 37.
[72] J.B. Heaton, The Siren Song of Litigation Funding, *Michigan Business & Entrepreneurial Law Review*, Vol. 9: No. 1, (2020), Pp. 139-155, p. 154.
[73] Apostolidis, *supra* note 71, p. 37.
[74] Lyon, *supra* note 67, p. 595.
[75] *Id.*, p.595.
[76] *Id.*, p.596 & 597.
[77] Christopher Hodges et al, Litigation Funding: Status and Issues, Research Report, (2012), p.47.
[78] Jasminka Kalajdzic et al, Justice for profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation, The American Journal of Comparative Law, Vol. 61: No. 1, (2013), Pp. 93-148, P. 96.

allowed for class actions, especially in security cases.[79] It is also permitted to fund large commercial claims more than $ 500,000.[80] However, the arrangement is not allowed in case of personal injuries.[81] Three main justifications are cited for the development of ALF in Australia. First, Australia adopts a loser pay litigation cost principle in which the losing litigant pays the litigation cost.[82] Based on this principle, the losing party pays the litigation costs of the winner as well as his litigation cost. This cost-shifting causes the introduction of ALF in the country. Second, in Australia, the contingency fee arrangement is forbidden. As litigants are prohibited to arrange a contingency fee with their lawyer, they are obliged to look for an alternative litigation funding.[83] Thirdly, the existence of limited legal aid service in civil litigation and the absence of litigation cost insurance in the country demands developing ALF in Australia.[84] Finally, it is important to note that wealthy persons are excluded from the provisions of free legal aid in civil litigations, and this gave rise to the ALF.

Currently, there is no formal or separate regulation of ALF in the country. It is regulated with the existing laws through the "supervision of courts, the Trade Practices Act 1974, the Federal Court of Australia Act 1976, and other State/Territory consumer protection legislation."[85] The practice is also subject to the regulations of the Australian Securities and Investment Commission Act 2011, which regulates unfair, unconscionable, misleading, and deceptive agreements.[86] In Australia, third-party funders are allowed to control the management of the funded lawsuit.[87]

Like the case in Australia, ALF is relatively well developed in the United Kingdom. The development of the practice is largely attributed to (1) the cutting of the legal aid budget by the government and (2) the judicial recognition of the importance of ALF to advance access to justice.[88] In the beginning, it was exercised in insolvency cases.[89] Unlike the Australian case, this arrangement in the UK is allowed even in personal

[79] Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, *Defense Counsel Journal*, (2020), p. 3.
[80] Morpurgo, *supra* note 9, p. 361.
[81] *Id.*, P. 362.
[82] Stroble & Welikson, *supra* note 79, p. 3.
[83] *Id.*, p. 3.
[84] Dominique Demougin & Felix Maultzsch, Third-Party Financing of Litigation: Legal Approaches and a Formal Model, (2013), p. 6.
[85] Law Council of Australia, Regulation of third party litigation funding in Australia, p. 13.
[86] Jason Geisker & Jenny Tallis, 'Australia', in Leslie Perrin (ed.), Third Party Litigation Funding Law Review, 2nd ed., Law Business Research, (2018), P. 4.
[87] Steinitz, *supra* note 43, P. 1280.
[88] Morpurgo, *supra* note 9, P. 363.
[89] *Id.*, p. 361.

injury and family (divorce) suits in addition to commercial litigation.[90] It is also being practiced in arbitration litigation.[91] Most of the entities operating the business of ALF in the country are hedge funds, insurers, and private investors.[92] In the UK practice, the funder is required to pay the successful adverse litigant's cost.[93] As such, the funder pays not only the litigation costs of the funded litigant but also the costs of the successful adverse litigant. Furthermore, the loser party pays the costs of litigation including costs of the successful party (British rule). That is why the funder is required to pay the costs of the successful adverse litigant. Nowadays, ALF is well-practiced and serves as a means to advance access to justice.

Recognizing the importance of ALF in the UK, Lord David Neuberger, the president of the UK's Supreme Court described it as 'the life blood of the justice system.'[94] Concerning its regulation, in the UK, ALF is mainly regulated by the market itself, through self-regulation, by the association of litigation funders and of course, supervised by the Financial Conduct Authority.[95] Litigation funders formed an association and come up with a voluntary based code of conduct to regulate their business.[96] This model of regulation of ALF, however, has been criticized as inefficient since the approach is based on voluntary membership to the association.[97] Studies show that third-party funders are operating in the UK without, however, becoming a member of the association of funders in the country. In a study conducted by Rachael Mulheron, though there were sixteen litigation funder companies in UK in 2014, only seven of them were members of the litigation funders association.[98] This shows that voluntary self-regulation invites unregulated market operators.

The other common law country with relatively developed ALF is the USA. In the USA, even though ALF is practiced in commercial litigation, it is mostly practiced in small cases and consumer litigations.[99] Of course, it is also growing in commercial disputes such as "breach of contract, business torts, antitrust violations, intellectual

[90] *Id.*, P. 363.
[91] Stroble & Welikson, *supra* note 79, p. 5.
[92] Susan Lorde Martin, Litigation Financing: Another Subprime Industry that has A Place in the United States Market, *Villanova Law Review*, Vol. 53: No. 1, (2008), Pp. 83-116, p. 113.
[93] Galagan & Zivkovic, *supra* note 11, P. 174.
[94] Solas, *supra* note 13, P. 51.
[95] Stroble & Welikson, *supra* note 79, p. 5.
[96] Solas, *supra* note 13, P. 51.
[97] Rachael Mulheron, England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments, *The Cambridge Law Journal*, Vol. 73: No. 3, (2014), Pp. 570-597, P. 578.
[98] *Id.*, P. 578.
[99] Morpurgo, *supra* note 9, P. 362

property infringement, and trade secret theft."[100] In contrast to the case in Australia and the UK, the contingency fee is allowed in the USA.[101] Also, regarding the litigation cost allocation, the loser pays only his cost in the USA.[102] Notwithstanding the USA adopts this cost allocation principle and allows contingency fees, ALF is growing rapidly.[103] Like the case in the UK, courts in the USA order the funder to pay the winner's adverse cost.[104] Some states in the USA, particularly, in Florida State, allow the funder to have control over the case including direct participation in the selection of a lawyer and determining how the litigation should be pursued.[105] In the USA, ALF is not regulated at the federal level.[106]Accordingly, states come up with their own regulatory regime of ALF. To this end, Oklahoma, Nebraska, Maine and Ohio enacted specific legislation on ALF.[107] In Maine and Ohio, the legislation on ALF requires funders to be registered in the state authority and to disclose the ALF agreements such as fees and interest rate. Also, funders are required to show evidences to the effect that the funder does not intervene in the process of the litigation.[108]

2.2. Third-Party Litigation Funding in Civil Law Countries

Though ALF originates in common law countries, nowadays, it is increasingly growing in civil law countries as well. Similar to the case in common law countries' experience, the author focuses on the experiences of a few selected civil law countries with established ALF experience. Accordingly, the author considers the experiences of Germany, Switzerland, and Austria.

In Germany, ALF is widely accepted since there is no common law doctrine of maintenance and champerty.[109] The country has a well-developed practice of ALF in both court litigation and arbitration.[110] ALF is practiced in legal claims of copyright, labor and employment, trade, corporate, insolvency, and commercial matters.[111] This

[100] Sean Tompson et al, 'United States', in Lesile Perrin (ed.), Third Party Litigation Funding Review, (2018), P. 217.
[101] Demougin & Maultzsch, *supra* note 84, p. 8.
[102] *Id.*, p. 8.
[103]*Id.*, p. 9.
[104] Galagan & Zivkovic, *supra* note 11, P. 174.
[105] *Id.*, P. 174.
[106] Austin T. Popp, Third-Party Litigation Finance, *Anderbilt Law Review*, Vol. 72: No. 2, (2019), Pp. 727-756, P.745.
[107] *Id.*, P.745.
[108] Lawrence S. Schaner, Third-Party Litigation Funding in United States, (2012), p. 179.
[109] Stroble & Welikson, *supra* note 79, p. 8.
[110] Daniel Sharma, 'Germany', in Lesile Perrin (ed.), Third Party Litigation Funding Review, 2nd ed., Law Business Research, (2018), p. 59.
[111] U.S. Chamber Institute for Legal Reform, Third Party Financing: Ethical and Legal Ramifications in Collective Actions, (2009), P. 8.

funding arrangement has developed in Germany due to the restriction made in the contingency fee arrangement and the losing party paying cost-shifting approach.[112]

On the one hand, though a contingency fee is allowed in Germany, the advocate cannot be refunded by the client the costs of the court and adverse costs of the successful party.[113] Regarding regulation, in Germany, there is no special regulatory regime to ALF. Litigation funders are treated in the provisions of partnership, though with some objections from scholars, and court decisions.[114]

In Switzerland, ALF has been practiced for a decade and it is growing fast.[115] A decade ago, the 2003 Zurich Cantonal Act of Switzerland on the Legal Profession (the Zurich Lawyers Act) made illegal the acts of funding on "a commercial basis and against a participation in the success of the suit."[116] Nevertheless, Switzerland's court had amended this provision of the Zurich Cantonal Act justifying that it limits individuals' freedom of commerce.[117] This decision automatically invites litigation funders to enter the litigation-funding market in Switzerland. Moreover, the prohibition of the contingency fee arrangement[118] between the attorney and client-that prohibits an agreement by a lawyer based on a "full-success fee" arrangement[119]-in effect introduced ALF in Swiss.

The contingency fee agreement is also prohibited if the payment modality is fully based on a contingency fee arrangement. It is, however, possible to enter a contingency fee partly for an additional payment by receiving a part fee irrespective of the success of the case.[120] Though ALF is widely practiced in Switzerland, there is no specific legislation that regulates it; evidencing that there is neither self-regulation nor government regulation.[121]

ALF is also a growing in Austria recently, which is getting acceptance in the court decisions.[122] The supreme court of Austria passed a landmark decision in 2013 in

[112] Demougin & Maultzsch, *supra* note 84, P. 4.
[113] *Id.*, p.4.
[114] Sharma, *supra* note 109, p. 61 & 62.
[115] Solas, *supra* note 13, P. 74.
[116] Martin Bernet & Urs Hoffmann- Nowotny, 'Switzerland', in Leslie Perrin (ed.), Third Party Litigation Funding Law Review, 2nd ed., Law Business Research, (2018), P. 155.
[117] Solas, *supra* note 13, P. 74.
[118] *Id*, P. 74.
[119] Bernet & Nowotny, *supra* note 116, P. 155.
[120] *Id.*, P. 155.
[121] *Id.*, P. 158.
[122] Solas, *supra* note 13, P. 75.

which the court officially legalize the ALF investment in the country.[123] Yet it is worth noting at this juncture that, while ALF is rapidly growing in Austria, it doesn't receive sufficient attention of governmental regulation.[124] As a way to fill this gap, courts evaluate ALF arrangements by applying some related rules of professional rules of advocates in country.[125]

3. Introducing Third-Party Litigation Funding in Ethiopia: Its Implications to Access to Justice and Regulatory Concerns

3.1. The Legal Recognition of Access to Justice in Ethiopia: An Overview

Unlike the case in the international human rights instruments, access to justice is explicitly recognized in the constitution of the Federal Democratic Republic of Ethiopia (FDRE). The constitution expressly grants every person the right to "bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."[126] Thus, everyone has a right to access justice by bringing justiciable matters to a regular court, administrative tribunal, the constitutional tribunal (if any), labor tribunal, arbitration tribunal, and other bodies with judicial power. One can seek justice over civil, administrative, or criminal matters. Moreover, the constitution also allows access to justice to be exercised through individual or collective actions.[127] Individually, one may move to get remedy for violation of his right by instituting a claim before an organ with competent judicial power. One may also seek justice for collective damage or violation of the rights of many individuals. This is particularly important to realize access to justice in environmental harms, which mostly violates the rights of numerous persons. Besides, as international agreements ratified by Ethiopia are integral parts of the Constitution,[128] provisions of international human rights instruments on access to justice are also parts of the FDRE constitution. Overall, access to justice is a constitutionally guaranteed right in Ethiopia.

[123] Marcel Wegmiiler & Jonathan Barnett, 'Austria', in Leslie Perrin (ed.), Third Party Litigation Funding Law Review, 2nd ed., Law Business Research, (2018), p. 21.
[124] *Id.*, p. 22.
[125] *Id.*, p. 22.
[126] The Constitution of the Federal Democratic Republic of Ethiopia, Art. 37/1.
[127] *Id.*, Art. 37/2.
[128] *Id.*, Art. 9/4.

3.2. Available Litigation-Funding Options and Their Limitations

In any judicial system, litigation entails costs ranging from attorney fee to court fee, adverse cost of the winning party, costs for witnesses, and other miscellaneous costs including costs for material duplication. The magnitude of these sets of costs is always a variable in the course of the litigation. As a rational person, a litigant always weighs these costs and looks for options of minimizing these costs, including those provided by the law. Before embarking on the available options of funding the litigation, it is important to investigate the cost-shifting rules recognized under the Ethiopian civil litigation system. Normally, there are three approaches of cost-shifting practiced in different jurisdictions namely, the losers pay; parties cover their own cost, and judge-based principles.[129] In a loser pay principle, the loser indemnifies the costs and fees of the successful litigant.[130] The loser pays all necessary costs of the winning litigant in addition to his costs. Such an approach is mostly employed as a means of discouraging the losing party from bringing unmerited claims. The second principle is that litigants are required only to cover their costs.[131] No litigant may be required to reimburse the costs of the other litigant. In a judge-based approach, the cost-shifting is entirely left to the discretion of the rendition court.[132] The rendition court decides who should pay the litigation cost and how much should that litigant pay.

Turning to the case in Ethiopia, we can observe from the civil procedure code that Ethiopia has adopted a judge-based cost-shifting approach in civil litigation. The Ethiopian Civil Procedure Code unambiguously stipulates:

Unless otherwise provided, the costs of an incident to all suits shall be in the discretion of the court and the court shall have a full power to decide by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.[133]

From this stipulation, one can understand that the rendition court has full discretion to decide as to whom, how much and out of what property the cost should be paid. As the mandate to decide on the cost-shifting is in the discretion of the court, both litigants are at risk of paying litigation costs i.e., the cost-shifting decision of the court is

[129] Kahsay Giday, Allocation of Cost and Fees of Civil Litigation in Federal Supreme Court Cassation Division: 'Does One Approach Really Fit All'?, Oromia *Law Journal*, Vol.7, No.1, (2018), pp. 24-43, p. 28.
[130] *Id., p.* 31.
[131] *Id., p.* 31.
[132] *Id., p.* 31 & 32.
[133] Civil Procedure Code of the Empire of Ethiopia, 1965, Decree No. 52, Art. 462.

unpredictable. The rendition court may order either each litigant to cover the cost or order the loser or winner litigant to pay litigation costs. Generally, in Ethiopia, the issue of who shall bear the litigation costs and how much the cost bearer pays are left to be decided by judges.

Moreover, in Ethiopia, there are different alternatives to fund the litigation of a lawsuit. A litigant may use self-litigation funding, government funding, free legal aid providers funding, or lawyer funding in their *pro bono* service obligation as the case may be. Litigants opt for either of these options depending on their economic resources to cover the costs of litigation. This section explorers all these available options of funding and their limitations to ensure access to justice.

3.2.1. Self-Litigation Funding

Self-litigation funding is the prime means of funding litigation costs in Ethiopia. Litigants are supposed to cover the court fees, attorney's fees, and other costs. However, this mode of litigation funding has some limitations. First, in self-litigation funding, the litigant cannot shift the possible risks associated with litigation. Initially, a litigant pays himself the cost regardless of the prospective settlement of the claim. Upon the final settlement, the cost may be shifted to the losing party or kept at the originally paying litigant depending on the court's decision. This becomes frustrating especially when the losing party is ordered by the rendition court to pay the costs of the winning litigant.

Hence, though wealthy litigants could fund their litigation, they always assume the risks related to the cost. Second, self-litigation funding may affect negatively even the wealthy litigant's daily financial flow. For example, a corporation's business operation may be stuck if it pays its business-operating budget for litigation costs. This spoils the normal business operation of the litigants. It may also result in the sale of the only asset that a litigant has during the litigation. This may substantially damage the property rights of a litigant. Litigation cost is so costly that it is burdensome even for wealthy litigants and completely unaffordable for ordinary litigants.[134] It costs the litigant an arm and a leg. Thus, in some cases, self-litigation funding may not be an appropriate means to ensure access to justice in the country.

[134] Kokebe W. Jemaneh, 'Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach' in Pietro s. Toggaia et' al (ed.), Access to Justice in Ethiopia: Towards an Inventory of Issues, Center for Human Right, Addis Ababa University, 1st ed. (2014), p. 37.

3.2.2. Government Funding

Most of the time, government litigation fund is available in criminal cases.[135] The government is striving to ensure access to justice for defendants in a criminal charge by authorizing the general attorney and public defender office to render free legal services to the criminally accused person.[136] The government also provides free legal aid services in civil matters but for selected individuals. Looking into the Federal Attorney-General Establishment Proclamation of Ethiopia, one could see that the General-Attorney has the power and responsibility to deliver free legal aid to vulnerable societies. Specifically, the Attorney-General has the power and duty to "conduct litigation by representing citizens without financial capacity to institute civil action under federal courts especially women, children, disabled and elderly."[137] According to this provision, the General-Attorney may fund litigation of women, children, disabled, elderly, and others who cannot afford to pay litigation costs by representing the litigants directly. Correspondingly, the General-Attorneys of the regional states have a duty and power to represent financially weak and/or poor individuals.[138] Furthermore, the government is rendering free legal aid service to children through the Children's Legal Protection Center established under the Federal Supreme Court.[139] The government is also rendering free legal aid service to the poor through the legal aid wing of the human rights commission.[140]

Yet, such services rendered by the government suffer from some limitations. The General-Attorney litigation funding is limited only to avoid the attorney fees. Lawyers of the General-Attorney prepare legal documents; provide advice on civil legal matters and represent in a court of law without requiring any fee from the litigants. Other costs of litigation are still borne by the litigant. A litigant should cover court fees, costs of the winning party if the court orders so, and other miscellaneous costs of litigation. Besides, the government-delivered legal aid service is criticized as inaccessible geographically and available only for vulnerable and/or poor persons i.e., those with

[135] Mizanie Abate et al, *supra* note 51, p. 8.
[136] *Id.*, p. 8.
[137] The Federal Attorney General Establishment Proclamation, (2016), Federal Negarit Gazzeta, Proc. No. 943, 22nd year, No. 62, Art. 6/4 (e).
[138] For example, the Attorney General of the Amhara National Regional State has the power and duty, among others, to provide free legal assistance in civil matters to those persons who cannot afford to pay the litigation costs, vulnerable children, poor women, persons with disabilities, the elderly and patients of HIV/AIDS (The Amhara National Regional State Office of Attorney General Establishment Proclamation, (2018), Zikre Hig Gazette, Proc. No. 263, 23rd year, No. 25, Art. 6/8 (k)).
[139] Mizanie Abate et al, *supra* note 51, p.9.
[140] Mohammed Abdo, 'Reconsidering Access to Justice in Ethiopia: Towards A Human Rights-Based Approach' in Pietro s. Toggaia et' al (ed.), Access to Justice in Ethiopia: Towards an Inventory of Issues, Center for Human Right, Addis Ababa University, 1st ed. (2014), P. 178ff.

medium income cannot receive free legal aid service from the government.[141] Because of these shortcomings, it is hardly possible to say that government-delivered free legal aid service adequately avoids litigation cost and ensures access to justice for all individuals.

3.2.3 University or NGO Legal Aid Center Funding

The other available litigation funding option in Ethiopia is funding by university or NGOs affiliated legal aid centers. The Ethiopian universities are rendering free legal aid to vulnerable societies by establishing legal aid centers under the auspices of law schools in the nearby cities or towns.[142] The majority of law schools of the Ethiopian Universities have established free legal aid centers to serve the poor and vulnerable parts of the community and thereby achieve their community service mission.[143] They provide legal services including legal advice, preparation of pleadings, legal awareness, and court representations. By doing so, they are funding litigation costs_ avoiding costs to be incurred for attorney's fee, and contributing positively towards ensuring access to justice. Equally, NGOs are working on enhancing access to justice, especially for the vulnerable citizens by rendering free legal aid services through their Free Legal Aid Centers.[144]

Owing to different factors, these types of litigation funding are not, however, sufficient to realize access to justice. Most legal aid centers of law schools are facing financial constraints.[145] Though most university-affiliated legal aid centers, initially, were established with the financial support of the Ethiopian Human right Commission,[146] nowadays, they are carrying out their service through the support of their university, or

[141] Mizanie Abate et al, *supra* note 51, p. 9.

[142] For example, Mekele University which is well known for providing free legal aid has been helping the vulnerable groups of the society to access justice since 2004 (Anbesie Fura Gurmessa, The Role of University-Based Legal Aid Centers in Ensuring Access to Justice in Ethiopia, *Beijing Law Review*, Vol. 9, (2018), Pp. 357-380, p. 371). Similarly, Bahir Dar University School of law has also provided free legal aid through its free legal aid center known as Bahir Dar University Free Legal Aid Center, BDU FLAC, since 2005 (Bahir Dar University Free Legal Aid Center, Annual Report, (2019), p.1).

[143] Anchinesh Shiferaw and Ghetnet Mitiku, *supra* note 10, P. 58

[144] Ethiopian Women Lawyers' Association (EWLA) is the pioneer in this regard. It is providing free legal service to the disadvantaged woman whose right is violated (Ethiopian Women Lawyers' Association (EWLA), Legal Aid Services, https://ewla-et.org/legal-aid-service/, accessed on July 23/2021).

[145] Anbesie Fura Gurmessa, *supra* note 142, p. 374.

[146] *Id.*, p. 374.

NGOs.[147] However, some legal aid centers are not supported by universities or NGOs to the required level and this becomes a barrier to them achieving their mission.[148]

Besides, university-affiliated legal aid centers are facing getting well-qualified legal experts.[149] Universities use employed legal experts in addition to instructors and students to render legal aid to vulnerable societies. However, due to the financial constraint and low salary scheme of employed legal experts, it is hardly possible that legal aid centers employ legal experts.[150] Moreover, legal aid centers of NGOs or universities are inaccessible as most of them are centered in urban areas, and geographically too remote for considerable number of needy citizens.[151] Their services are limited to urban communities. Even for such communities, the service of the centers is limited to avoiding litigation costs that may be paid to the advocate. That is, the free legal aid centers do not cover other costs of litigations including court fees, witnesses' expense, and adverse costs of the successful party, if any. Hence, NGOs or University affiliated legal aid litigation funding is full of drawbacks to ensure access to justice.

3.2.4. Lawyer Funding in the *Pro Bono* Service Scheme

Litigation costs may also be funded by the *pro bono* legal service of advocates working in Ethiopia. In this mode of service, advocates working in their private capacity are mandatorily required to render free legal service for vulnerable citizens.[152] At the federal level, the previous federal advocacy law imposes an obligation on every advocate licensed by the federal government to render free legal aid to vulnerable or poor individuals for at least fifty hours per year.[153] The new federal advocacy licensing and registration proclamation, however, changes the fifty hours requirement. Rather, the new federal advocacy licensing and administration proclamation requires advocates to provide a free legal aid service at least for three separate cases.[154]

[147] For example, if we look at the experience of Bahir Dar University Free Legal Aid Center, it is funded by the university budget, which is nearly one million Ethiopian birr annual budget (Interview with Fikreabnet Fikadu, Former vice Coordinator, Bahir Dar University Free Legal Aid Center, (15 July 2021)).

[148] *Id*.

[149] *Id.*

[150] If we see the experience of Bahir Dar University Free Legal Aid, there is continued legal experts resignation from their job due to low salary scale; and it is difficult to retain a legal expert in the employed post for more than six months. (Interview with Fikreabnet Fikadu, Former vice Coordinator, Bahir Dar University Free Legal Aid Center, (15 July 2021)).

[151] Anchinesh Shiferaw and Ghetnet Mitiku, *supra* note 10, P. 67 & 68.

[152] Mohammed Abdo, *supra* note 140, P. 162.

[153] Mizanie Abate et al, *supra* note 51, p.10.

[154] The Federal Advocacy Licensing and Administration Proclamation, (2021), Federal Negarit Gazzeta, Proc. No. 1249, 27th year, No. 42, art. 31/1.

Likewise, at the regional state level, advocates are mandatorily required to provide free legal aid for the destitute without receiving any payment in return.[155]

Therefore, the mandatory *pro bono* legal service of advocates in Ethiopia is one method of funding litigation costs in the country. Yet, this modality of legal service in not defect free. Particularly, it is found to be an unsatisfactory alternative to litigation funding due to the absence of advocates in the remote provinces.[156]

3.2.5. Litigation Funding Through the Pauper Suit Scheme

The other mechanism that avoids or at least reduces the costs of litigation and enables the indigent persons to access justice as equal as wealthy persons by reducing court fee is a suit in pauper. According to the Ethiopian Civil Procedure Code, a litigant may institute a suit in pauper provided the court granted a litigant a pauper certificate.[157] As such, the code under Articles 467 stipulates as: "[w]hosoever is not possessed of sufficient means to enable him to pay all or the prescribed court fee shall be deemed to be a pauper… and may apply for leave to sue as a pauper."[158] This provision, while it helps indigent persons to bring a lawsuit and access justice without being discouraged by the court fee, it sets a control mechanism to exclude those who could afford a litigation fee. However, a suit in pauper has its own limitations as it avoids only the costs of a court fee in a lawsuit. It does not help to fund or avoid the costs of a lawyer's fee, the cost of witnesses and other miscellaneous costs. In addition, a suit in pauper is available only for persons who have no sufficient means, cash and non-cash means, to pay the court fee. It does not work if a person has some assets even if he has no cash money at the time of the suit.

3.3. Introducing Third-Party Litigation Funding in Ethiopia: Implications to Advance Access to Justice

3.3.1. The Role of Third-Party Litigation Funding in Advancing Access to Justice in Ethiopia

As stated before, it has been reiterated that the available options of litigation funding in Ethiopia are inadequate to advance access to justice in the country. As briefly discussed in the previous section, all civil litigation-funding options in litigation are

[155] For example, in Tigray Regional State, advocates must provide at least one legal representation to the vulnerable person per year (Mizanie Abate et al, *supra* note 51, p.10).
[156] *Id.*, p.10.
[157] Civil Procedure Code of the Empire of Ethiopia, *supra* note 132, Art. 467ff.
[158] *Id.*, Art. 467/2.

full of shortcomings. Consequently, litigation cost is still one of the impediments to advancing access to justice in the country. Once we understand that the existing litigation funding schemes are not sufficient to ensure citizens' right to access to justice, we need to look for another litigation-funding option to develop in the country. The most acclaimed alternative litigation funding to solve problems in the existing funding options is ALF.

The introduction of ALF in Ethiopia will address many of the shortcomings of the existing civil litigation-funding schemes in the country. It avoids litigants' risks of litigation costs. As explored in the first section, ALF helps litigants to shift risks associated with litigation costs, with the funder assuming the whole risk of litigation costs. At the beginning of the claim, the funder pays litigation costs including the advocate's fee, court fee, and other miscellaneous costs. This payment is non-recourse that the funder cannot claim a refund of litigation cost incurred unless the funded party wins the case. Of course, some who thinks of the non-recourse nature of ALF may wonder about its practicability in Ethiopia. Such concern, however, would not be an issue when we think of the practice of the insurance business in the country. In the insurance business, the insurer buys the risks of the insured item or person with an insignificant premium. Though the insurer receives some premium, it may not sufficient to refund its liability when the damage happens. For example, an insurance business that covers the insurance of a car will compensate the value of the car without the possibility of reimbursement by the owner when the car is damaged on the next day of the conclusion of the insurance. With this in mind, it can be concluded that ALF would be practicable in Ethiopia once the system is introduced.

Unlike the legal aid-funded litigation, in ALF, the funding extends even to court fees, witnesses' costs, and other miscellaneous costs. The funder may also pay the adverse costs of the winning party upon the settlement of the case on the condition that the court orders the losing party to cover the litigation cost of the successful litigant. In ALF, the litigant avoids not only the advocate's fee, but also shifts the adverse costs of the successful party. As Ethiopia adopts judge-based litigation cost determination, the litigant may be ordered to cover even the litigation costs of the other party. In such a case, ALF helps citizens shift the adverse costs to the funding entity. By shifting the litigation costs for another third party, citizens will be encouraged to seek justice. Thus, it levels the playing field of the litigation and litigants will not be reluctant to start litigation.

Further, ALF avoids the financial constraint problems of litigants to fund their claims. Today, we notice a considerable number of individuals failing to fund their civil

litigation. ALF will become a finance source to solve the financial problems of litigants. Notably, it is indispensible for the poor, insolvent, or bankrupt litigant persons who have no options to fund their litigation by themselves. It is even important for non-indigent persons without, however, extra funds other than their daily budget for their business operation.

Finally, ALF is also important to fund class actions, and public interest litigation, which is a missing practice in the country. The absence of litigation funding is one of the reasons for the under-development of public interest litigation. Imagine that a civic-minded citizen in Ethiopia who brings public interest litigation for environmental damage is ordered to pay the litigation cost of the winning party following the loss of the case. This discourages civic-minded persons to bring public interest litigation. ALF will rectify such a problem since the funder bears the litigation cost with no risk of reimbursement if the public interest litigant loses. It also encourages group victims to begin the class action.

Of course, unlike Australia and UK, Ethiopia does not prohibit a contingency fee arrangement. Litigants are free to enter contingency fee arrangements with their advocates in this country. They can agree to the effect that the advocate covers all legal expenses in exchange for sharing the proceeds of the lawsuit. Contingency fee, however, is not an appropriate litigation funding option compared to ALF. Unlike ALF, in a contingency fee arrangement, the litigant pays costs other than the advocate's fee including court fee, evidence production and other miscellaneous costs.[159] Contingency fee does not avoid all categories of litigation costs. In a contingency fee, since the advocate is at a risk of losing the contingent fee, it is criticized that it invites advocates to worry about their contingent fee than the administration of justice to the victim.[160] Thus, the advocate will endeavor to get the agreed contingent fee and the issue of access to justice of the victim becomes subsidiary.

Moreover, the contingency fee arrangement is open for exploitation of litigants by the advocate.[161] As clients are mostly not experienced with legal claims, advocates will exploit this advantage by setting onerous terms and conditions in the contingency fee arrangement. For example, they may set a condition to receive a very high portion of

[159] Christopher Mendez, Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options for Plaintiffs, *Mississippi College Law Review*, Vol. 39: No.1, (2020), Pp.102-123, P. 114.
[160] *Id.*, P. 115.
[161] *Id.*, P. 115.

the recovery, thereby opening a space for unjust enrichment of advocates by taking away the needs of the litigants. Hence, ALF avoids even the limitations in the contingency fee arrangements. In general, ALF is the best litigation funding option to resolve financial related impediments of access to justice to citizens in Ethiopia. It is the best alternative litigation funding to fill the loopholes in the existing funding options in the country. Therefore, it can be certainly concluded that Ethiopia needs to introduce a ALF scheme.

3.2.2. Major Regulatory Concerns of Third-Party Litigation Funding

Though there are strong reasons that necessitate introducing ALF in Ethiopia, it has some regulatory concerns that need to be settled by regulation. Major regulatory concerns of ALF are disclosure of the ALF agreement to the court, conflict of interest, privilege, and confidentiality, and funder control of the litigation. The next sections elucidate explores the major regulatory concerns of ALF.

I. Disclosure of Third-Party Litigation Funding Agreement and Conflict of Interest

Disclosure of the ALF agreement is one of the major regulatory issues that attract the attention of scholars and countries. Disclosure of the ALF agreement is important to know the existence of a conflict of interest between the funder, and judges and even between the funder and the advocate.[162] By disclosing the ALF agreement, litigants, arbitrators, and judges can know whether there is a conflict of interest, which would result in the removal of the judge. Though the disclosure of ALF agreement helps to avoid conflict of interest between the funder and the judges, there is no uniform mandatory disclosure requirement in the world. For example, in Hong Kong arbitration law, a party must reveal the presence of the ALF agreement and the identity of the funding organ.[163] Unlike the case in Hong Kong, the arbitration law of Singapore gives the disclosure requirement to be decided by the arbitration tribunal; thus, following it discretionary power, the tribunal may or may not demand the disclosure of the arbitration-funding agreement.[164]

[162] Giorgio F. Colombo and Dai Yokomizo, A Short Theoretical Assessment on Third Party Funding in International Commercial Arbitration, (2018), P. 113.
[163] Caroline Overgaard & Johan Tufte-Kristensen, Disclosure of Third-Party Funding in Commercial Arbitration, *NJC*, Vol. 2, (2020), p. 8.
[164] *Id.*, p. 8.

In Canada, in case of class action, it is compulsory to disclose the existence of ALF to the court during approval as the court must approve it.[165] Likewise, in Australia class action third-party litigation funding, the party is required to disclose the identity of the funder and its prospective share from the recovery.[166] Unlike these countries, in US, the disclosure requirement varies from jurisdiction to jurisdiction in that some states set mandatory disclosure requirement while other not.[167]

By introducing ALF in the country, Ethiopia also needs to set a mandatory disclosure requirement in its ALF regulation to avert the potential conflict of interest between the funder and judges. The existing laws of Ethiopia require judges to resign by themselves or upon the petition of the litigants when there is conflict of interest with either of the litigant party.[168] Similarly, a judge in ALF should also resign from the bench if there is a conflict of interest with the funder as it may cause him to be partial. Nevertheless, this can be done only if there is a disclosure of the identity of the funder in the ALF. Yet, it is important to note that the disclosure should not include the detailed contents of the agreement. It must not be allowed to the extent of disclosing the private concerns of parties. Knowing the identity of the funder is sufficient to avoid conflict of interest. Therefore, upon introducing ALF, Ethiopia needs to come up with a new regulatory regime that requires disclosure of the existence of funding but not the detailed content of the agreement.

II. Privilege and Confidentiality

In principle, the litigation process especially in arbitration is confidential that it is accessible only to advocates, litigants and judges or arbitrators.[169] Materials that the advocate accesses due to his involvement in the litigation are considered as privileged.[170] This principle, however, may be challenged by a funder in ALF. While funding the litigation, the funder would demand to access all litigation-related documents and information to evaluate its investment.[171] This may violate the confidentiality of some documents of the client due to which the client would resist allowing the funder to access such documents. Equally, the funder may want that the funded client not to disclose its financial strategy to other potential litigation

[165] Stroble & Welikson, *supra* note 79, p. 12.
[166] *Id.*, p. 12.
[167] *Id.*, p. 12 & 13.
[168] The Federal Courts Proclamation, (2021), Federal Negarit Gazzeta, Proc. No. 1234, 27th year, No. 26, Art. 33/ 1 &2).
[169] Colombo & Yokomizo, *supra* note 162, P. 118.
[170] *Id.*, P. 118.
[171] Wayne Attrill, Ethical Issues In Litigation Funding, IMF (Australia) LTD, (2009), p. 8.

funders.[172] Thus, the nature of the funder-funded party relationship requires the funder and funded party to access the private information of each other. To protect the confidentiality of information of each party, in many countries, it is common that the funder and the funded party to conclude a confidentiality protection agreement.[173] The confidentiality agreement prohibits the funder from disclosing the confidential information of the funded party, and the funded party from disclosing the confidential financial information of the funder.

To prevent such problems, there are different approaches in common law and civil law countries. In common law jurisdictions, funders are entitled to access the confidential information of the litigation by invoking the 'common interest' exception, which allows any party that has an interest in the outcome of the case to access even confidential information.[174] Apart from allowing the funder to access confidential information, funders are required to abide by the principles of confidentiality. They are prohibited from sharing confidential information of the client with another third party. Unlike common law countries, in civil law countries, the confidentiality of the information between the funder and funded party is left to be regulated by their contractual agreement.[175] The funded and the funder conclude a confidentiality agreement not to disclose confidential information of one another. Unlike these options, there are countries like Hong Kong that expressly empower the funder to access confidential information of the funded party through their legislation.[176]

In Ethiopia, though there is a confidentiality principle in the relationship between client and advocates, there is no such doctrine regulating the relationship between the litigation funder and the client. This is mainly because the ALF scheme is missing in the entire system. This scenario suggests that Ethiopia— by imperatively introducing the ALF— should regulate access to confidential information of the client by the funder. Given the fact that the funder is a profit seeking entity, it inevitably demands access to confidential information of the litigation as a way to assess the investment risks and cost-benefit analysis. Yet it is important to note that, while these driving forces necessitate the introduction of this scheme, it should be made with a strict duty to protect the confidentiality of the information. Both the funder and funded part should be prohibited from disclosing the confidential information they acquire in their relationship and failure to do so shall be subject to civil and criminal liability.

[172] Mendez, *supra* note 159, P. 121.
[173] Shannon, *supra* note 15, p. 900.
[174] Colombo & Yokomizo, *supra* note 162, P. 118.
[175] *Id.*, P. 118.
[176] *Id.*, P. 118.

III. Funder Control of the Litigation and Advocate's Professional Independency

The role of the funder in controlling the management of litigation is another prudential area of ALF regulation. Funders prefer to control the litigation to keep their investment safe in the litigation.[177] The funder litigation control includes participation in the advocate selection and determining the litigation strategy of the suit, including terms of settlement of the case out of court.[178] Funder control of litigation has, however, some unwanted consequences. It may expose the advocate to be abused by the direction of the funder while entertaining litigation. For example, the funder may force the advocate to accept a low settlement offer of the other litigant provided the funder would receive an adequate return in the end. The advocate may be obliged to negotiate even at the cost of the client's interest so long as the funder's return is high. It would also deny the advocate to work with professional independence and loyalty to the client.[179] When the funder is allowed to dictate the litigation strategy, the advocate's professional freedom will be lost, denying his role of leading the litigation management. It will also cause the client to 'relinquish [critical] decision-making authority to the funder' during the conclusion of the funding agreement.[180] In such a case, the funder develops a litigation strategy that suits to maximize its profit mission irrespective of the client's interest. These may negatively affect the justice system as the investor's interest outweighs the litigant's interest.

Therefore, to overcome such problems, Ethiopia needs to regulate the role of the funder in litigation management. Funders should be restricted from intervening in the freedom of the client to select the advocate and negotiate the terms and conditions of the service. They should also be prohibited from intervening in the freedom of the advocate in the management of the litigation and in deciding the litigation strategy. Such prohibition limits the unnecessary intervention of investors in the justice system.

Conclusion

Access to justice is a fundamental human right recognized by international and regional human rights instruments, as well as national constitutions. The FDRE constitution entitles every person to bring any justiciable claim before a court or other

[177] David R. Glickman, Embracing Third-Party Litigation Finance, *Florida State University Law Review*, Vol. 43, (2016), Pp. 1043-1070, P. 1062.
[178] *Id.*, p. 1062.
[179] *Id.*, p. 1062.
[180] Sasha Nicols, Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance Sasha Nichols, *UC Irvine Law Review*, Vol. 5, (2015), PP. 197-238, P. 230.

competent judicial organs. It is common, however, to see that some individuals face trouble accessing justice due to expensive litigation in the country. Some individuals cannot afford to pay the litigation cost including court fee, advocate's fee, witnesses' expense, and other miscellaneous costs. Thus, individuals are discouraged to start their litigation and seek justice. This obstructs the realization of the constitutional right to access to justice. To limit the impact of this problem, the country employs free legal aid service. Free legal aid service is given by government, NGOs, universities, professional associations, and advocates. However, free legal aid program is inadequate to remedy the litigation cost impediment to access justice in Ethiopia. Legal aid based litigation funding is inaccessible, inefficient, unsustainable, available only to the poor and vulnerable, and does not avoid costs of court fee, witness' expense and miscellaneous costs.

Accordingly, the Author holds that there is a need to introduce ALF in Ethiopia. By introducing ALF, Ethiopia can ensure individuals' constitutional rights since it is the best means to avoid financial barriers to access to justice. Particularly, this funding scheme avoids litigation cost risk to the litigant (risk aversion); it enables litigants to fund their litigation, to accesses judicial organs, to employs experienced advocate, and to seek justice for any violation without worrying about its litigation cost. In introducing this scheme, Ethiopia should develop a new regulatory framework. In the regulation, an endeavor shall be made to prevent a conflict of interest by requiring disclosure of the ALF agreement, making the funder and funded party to protect the confidentiality of information, and restricting the funder from controlling the litigation.

The Legal Regime Governing Criminal Trials in Absentia under Ethiopian Law: A Threat to the Right to a Fair Trial

Mohammed Seid [*]

Abstract

Despite countervailing arguments as to trial in absentia, nations recognize it on exceptional grounds. The ICCPR under Article 14(5) unequivocally recognizes the right to presence of an accused before a trial. In civil law legal systems, trial in absentia takes place as an ordinary procedure, so long as the accused is informed and fails to appear. Whereas, the common law countries outlawed trial in absentia as a principle due to the fear that it endangers the right to fair trial. Overall, trial in absentia may be held exceptionally upon the fulfillment of justified grounds. This study explores the regulation of trial in absentia under the Ethiopian criminal law and controversies therein. To this end, the study employed a doctrinal legal research methodology. The study argues that although the criminal procedure code recognizes trial in absentia under article 160 and the following, the requirements are controversial in its practical application. Furthermore, the procedures to deliver summon for the accused are also vague. Moreover, in contrast to international jurisprudence, the Ethiopian law kept silent as to disruptive behavior of an accused and the effect of partial presence. Finally, the study explores that though the accused has the right to lodge an application to set aside a default judgment, the decision on the application is final and non-appealable. This may potentially undermine the accused's right to a retrial. In sum, the criminal procedure code controversially governs trial in absentia, and consequently may jeopardize the right to fair trial.

Keywords: *Trial in Absentia, Right to be Present and Defend, Right to Retrial*

Introduction

The right to presence is one of the fundamental principles of modern criminal procedure laws.[1] As an element of procedural due process, the court should adjudicate the case in the presence of the accused. This procedural element is a widely established principle in varying regimes of criminal jurisprudence. Reflecting this principle under international human right instruments, it is stipulated that, "upon accused of unlawful

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[1] Elizabeta Ivičević Karas, Decisions Rendered in Absentia as a Ground to Refuse the Execution of a European Arrest Warrant: European Legal Standards and Implementation in Croatian Law, EU and Comparative Law Issues and Challenges Series – Issue 3, p. 460.

acts, every citizen of states will be given an opportunity to share his/her side of the story and be heard by the court adjudicating the accusation."[2] As such, the right to be present has been recognized under international human rights instruments as a foundation of the right to a fair trial.[3]

While this principle is in place, scholars still question whether the defendant's presence before the trial is a right or it also imposes a corresponding duty to appear.[4] The issue begs this question because the principle suggests a bundle of legislative intents. Yet in exceptional circumstances, a trial might proceed in the absence of the accused.[5] Moreover, it is important to note that these legislative intents are tools of ensuring social justice while at the same time attaining the goals of the criminal justice system.[6] Turning to institutional practices, one would notice divergence as to the legality of trial in absentia in different legal systems. Particularly, the civil law and common law legal traditions hold different positions on trial in absentia. In some jurisdictions, trial in absentia is considered as an evil procedure while other jurisdictions apply it as a normal course of procedural due process.

The Constitution of Federal Democratic Republic of Ethiopian (hereinafterFDRE Constitution), under Article 20(4), sets forth the right to defend and cross-examination of evidence as basic fair trial rights of an accused.[7] Notwithstanding this, the criminal procedure code of Ethiopia recognizes trial in absentia in some exceptional circumstances.[8]

This article explores the legal gaps noticeable under the Ethiopian laws in connection with this right. Particularly, it examines the regulation of trial in absentia from the perspective of international law and its compatibility with the right to a fair trial.

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[2] Rashid Jalali, Trial in Absentia: A Violation of the Right to a Fair Trial, *PCL Student Journal of Law*, Vol.2: No. 2, (2018), p.85.

[3] Universal Declaration of Human Rights (UDHR) *Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948*, art. 11(1), International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 16 Dec. 1966, art.14(3)(d), African Charter on Human and Peoples' Rights(ACHPR), OAU Doc. CAB/LEG/67/3 rev.5, 27 June 1981 art 7(1) (c).

[4] Mohammad Hadi Zakerhossein and Anne-Marie, Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals, *Criminal Law Forum springer*, Vol. 26, (2015), p.220.

[5] Id., p. 210.

[6] Maggie Gardner, Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, *George Washington International Law Review*, Vol. 43, (2011), p. 100.

[7] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 20. [Herein after FDRE Const.].

[8] Ethiopian Criminal Procedure Code, Proclamation No.185/1961, *Negarit Gazetta*, (1961) Article, 160. [Hereinafter Criminal Procedure Code].

1. Trial in Absentia and The Right to Presence

1.1. The Notion of Trial in Absentia: An Overview

Trial in absentia is one of the concepts crystalized in scholarly and legislative discourse of criminal law regime. Black's Law Dictionary defines the concept as "trial held without the accused being present."[9] In legislative documents, it is construed as a condition where one party usually the defendant is physically absent in criminal proceedings to present rebuttal, or confrontation against the charge.[10] The situation happens when the defendant absconds, disrupts the proceeding or for other stronger reasons.

Many scholars are against the policy of trial in absentia, arguing that it strongly undermines fundamental principles of the right to fair trial such as equality of arms, right to defend and others.[11] So long as the accused is not physically present before a court of law, one party will control the trial; hence, no defense will be forwarded. [12]

Nevertheless, a closer look into such policy suggests a number of concrete justifications for employing trial in absentia. First, it is one of the most important means to avoid delay of justice. As the maxim 'justice delayed is justice denied'[13] connotes, courts are duty-bound to adjudicate legal proceedings as fast as possible.[14] However, courts may be hindered from administering justice on time because the criminal suspect may be hided and it might be impossible to bring the accused before the court. In such circumstances, the court is not expected to wait until the accused appears in the trial as it will lead to the risk of losing the chance to do justice.[15] Particularly, the interest of the victim will be at stake.

Further, the accused should not profit from his wrongdoing.[16] Unless exceptions are set to this general principle (right to present), there is a tendency that the accused will not be tried at all. Moreover, in a course of time, the quality of evidence inevitably would depreciate, witnesses may die, memory fades, or physical exhibits may be lost.

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[9] Black's Law Dictionary 1645 (9th ed. 2009), see also, Gardner and Maggie, "Reconsidering Trials in Absentia, p p. 99, (2011), *see also* Jalali, *supra* note 2, P. 83.
[10] Jalali, *supra* note 2, p. 85.
[11] Id. *See also* Zakerhossein and Marie, *supra* note 4.
[12] Karas, *supra* note 1, p. 463.
[13] Naomi Burstyner and Tania Sourdin, Justice Delayed is Justice Denied, *Victoria University Law and Justice Journal*, Vol. 4, (2014), p.49.
[14] Jalali, *supra* note 2, p. 86.
[15] Karas, *supra* note 1, p. 462.
[16] Id.

Consequently, the accused will go free because of his concealment and undermines the proper administration of justice.

1.2. Presence of an Accused: A right to Opt or an Obligation too?

The international human rights law has long recognized the right to be present for the accused as part of the right to a fair trial.[17] Yet, this stipulation is highly debated in criminal law literature, and begs a question like whether it is a right, a duty or both. For many scholars, the presence of an accused is a right and entails a duty at the same time. As a right, it constitutes a bundle of rights such as the right to be heard, the right to defend, and the right to cross-examination which are instrumental to attain the ends of fair trial.[18] While the accused is the main subject in the adjudication of the criminal trial, he may be duty bound to discharge his obligation to appear too. This duty mainly suggests the link between fair trial and public interest. As such, while the accused is entitled to those bundles of rights packed in the right to be present, he is obliged to appear in the trial where the ends of public interest so requires. To this effect, the court may require the presence of the accused for interrogation and to examine his or personal wellbeing as a way to make viable investigation.[19] Moreover, every individual including the accused has to co-operate with the justice system for its effectiveness.

Consistent with these underlying set of rationale, article 63(1) of the ICC statute expressly requires the accused to appear in a criminal trial where his case is in hearing. Evidencing this express obligation, the provision reads, "the accused shall be present during the trial.'[20] The attendant provisions of this stipulation also suggest that[21] once the accused has been informed of the indictment, he has to be present before the trial and defend himself.[22] The court is equally required to sufficiently inform the accused of the indictment, the trial date, and avenue of trial. Yet, if the accused refuses to do so, after a sufficient notice, proceeding in absentia would take place.[23]

[17] *See*, Art. 10 and 11 of UDHR, Art, 14 of ICCPR, Art. 7 of ACHPR, art. 11 of Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, Entered Into Force Dec. 7, 2000, here in After ECHR.

[18] Caleb H. Wheeler, Right or Duty? Is the Accused's Presence at Trial a Right or a Duty Under International Criminal Law?, *Criminal Law Forum*, Vol. 28, (2017), p.1.

[19] Jalali, *supra* note 2 p.87.

[20] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 63(1).

[21] Zakerhossein and Marie, *supra* note 4.

[22] Id.

[23] Id.

Now we turn to the African human rights commission guideline on right to fair trial. This document, in principle, prohibits trial in absentia for accused persons.[24] Yet it states that if the accused waives his/her right to present or fails to appear without good cause, the trial may proceed in absentia.[25] In sum, the legislative intents and rationale underlying the doctrinal sources reviewed so far clearly show that the presence of an accused before the trial is a hybrid of rights and duties[26].

2. Trial in Absentia under International Human Right Instruments: An Overview

According to article 14(3) (d) of the ICCPR, the right of the accused to present in trial and defend his case is explicitly recognized. As such, this provision states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to [be] tried in his presence and to defend himself in person or through legal assistance of his choosing." [27]

From the wording of the convention, the right to be present is a fundamental entitlement for an accused person. Moreover, the convention entitles this right to the accused without an exception limiting its scope thereto. Therefore, one may argue that, as a rule, trial in absentia is not allowed under the ICCPR. Notwithstanding the above principle of the law, it is explained under General Comment No. 13 of (HRC)[28] that "… trials in absentia could be held for justified reasons. Yet this could be carried out under strict observance of the rights of the defense with the intent to protect the rights of the accused."[29] However, it is important to note that although the HRC provides an exception on the right to present, it leaves open as to what constitutes 'justified reasons'. Accordingly, the committee decides many cases through the unqualified use of justified reasons. For example, from the opinion of the court in Mbenge Vs Zaire, one could argue that trial in absentia is possible in cases where the accused unequivocally waived his right to appear in trial.[30] Hence, voluntarily relinquishment is a ground for trial in absentia. The committee further explained the condition of such

[24] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human & Peoples' Rights, Banjul Gambia (hereinafter African Fair Trial Guideline).
[25] Id.
[26] Id.
[27] ICCPR, *supra* note 3, Article 14.
[28] UN Human rights committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 04/13/1984, para 11;[hereinafter General comment, 13].
[29] Id.
[30] *Daniel Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 (1990), p. 76.

a waiver in Maleki vs Italy.[31] In the latter case, the committee urges that an absent trial is possible where the court has discharged its obligation to notify the accused and need to be certain that the summons has reached the defendant duly. The absence of such proof, in the eyes of the HRC, constitutes a breach of the right to present.[32]

3. Trial in Absentia under the African Human Right System

Almost all regional instruments had recognized the right to fair trial and its components in detailed and explicit terms.[33] Unfortunately, the African Charter on human and people's rights does not expressly recognize the right to present in a criminal trial; rather it stipulates some rights which can be exercised with presence before the trial.[34] It considers the right to present as implied rights of an accused since other rights are exercised in the presence of an accused person.[35] In addition, the Charter also guarantees authoritative interpretation to the African Commission in line with other human rights instruments under article 60.[36] This provision enables the Commission to interpret article 7 of the charter and article 14 of the ICCPR. The Charter also empowered the Commission to 'formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation.'[37] Accordingly, the commission enacted a guideline,[38] which comprehensively addresses matters related to the right to be present and conditions of trial in absentia.

The guideline in the relevant sections provides:

(i) In criminal proceedings, the accused has the right to be tried in his or her presence.

[31] U.N. Human Rights Comm. [HRC], Communication No. 699/1996: Views of the Human Rights Committee under Article 5, Paragraph4, of the Optional Protocol to the International Covenant on Civil and Political Protections, *see also*, (Maleki v. Italy), I 7(b), U.N. Doc. CCPR/C/66/D/699/1996 (Sept. 13, 1999).

[32] Alexander Schwarz, The legacy of the Kenyatta case: Trials in absentia at the International Criminal Court and their compatibility with human rights, *African Human Rights Law Journal*, Vol.16, (2016), P.105.

[33] Charter of Fundamental Rights of the European Union (ECHR), 2000 O.J. (C 364) 1, Entered Into Force Dec. 7, 2000. Art. 47 see also American Convention on Human Rights (ACHR), Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, art. 8(2)(d).

[34] ACHPR, *supra* note 3, Article 7.

[35] Schwarz, *supra* note 32, p. 106, see also, *Alex Thomas v. The United Republic of Tanzania*, Communication No. 005/2013, African Court on Human And Peoples' Rights, (November 2015), para 91.

[36] ACHPR, *supra* note 3, Article 60.

[37] Ibid Article. 45(b).

[38] African Fair Trial Guideline, *supra* note 24.

(ii) The accused has the right to appear in person before the judicial body. The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon showing that inadequate notice is given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.

(iii) The accused may voluntarily wave the right to appear at a hearing, but such a waiver shall be established unequivocally and preferably in writing.

A closer look into these provisions shows that the guideline, unlike other human rights instruments such as the ICCPR and ECHR,[39] constitutes fundamental and elaborate rules which make trial in absentia an exception. Of course, the guideline, unlike the ICCPR and ECHR, is not binding on member states and its impact to practical protection of this right may be limited. Yet it would lend substantial insights to the formulation of national laws on the protection of this right.

Furthermore, the African Court on Human and Peoples Right reflected the same position in its binding judgment in Thomas v Tanzania[40]. The facts of the case show that the Tanzanian court held trial in absentia as the applicant was hospitalized at the time of the trial. In an appeal to a competent court, the applicant moved to explain his absence on grounds of good cause. Yet the court denied him the claim. Then the African Court, which entertained this case as a next appellate court, invoked article 7 of the charter and article 14 (3)(d) of ICCPR to render a decision to the effect that the applicant has the right to appear during the trial and also the right to be represented by a counsel.[41] However, the lower court neither considered the serious illness of the accused nor allows representation by a legal counsel. Finally, this appellate court concluded that the Tanzanian court had violated the right to be present stipulated under article 7(3) (C) of the charter.[42]

3. The Jurisprudence of Trial in Absentia in Different Jurisdictions

As far as the recognition of trial in absentia is concerned, there are divergent approaches in different jurisdictions. In countries with civil law traditions, trial in

[39] Schwarz, *supra* note 32, p. 107-108.
[40] Thomas v.Tanzania, *supra* note 35.
[41] Id.
[42] Id.

absentia is recognized as one of the major principles of criminal procedure.[43] This is because 'trials in absentia are necessary for the effective running of the criminal justice system.'[44] It is also believed that, in absentia, proceedings require less investigatory work by police, little time for trial, and low-economic costs.[45] In addition, trial in absentia is essential for the rights of victims to have the accused brought to justice with limited difficulties related to obtaining/preserving evidence for the case where the accused cannot be caught within a reasonable period.[46] Furthermore, civil law traditions follow the inquisitorial system and the role of the judge is pivotal in fact-finding. In other words, though the accused was absent from the trial, his right will be protected through the active involvement of judges.[47]

These justifications, along with the features of criminal procedure rules, are largely visible in prototypical civil law jurisdictions such as the French legal system. The French criminal procedure code allows trial in absentia for all crimes including felony cases. While this is allowed in principle, the defendant, upon capture, is entitled to retrial.[48] However, at this junction, one would question the relevance of trial in absentia; given the fact that the defendant has the right to retrial upon his capture. Still another surprising point in the French criminal legal system is the discretionary power of courts. The courts may adjudicate any case in absentia irrespective of its gravity.

Stan Starygin, one of the scholars examining the procedural practices of the courts, observes that "if the accused has been properly summoned and fails to appear, courts have the discretion to proceed in his absence".[49] However, if the court doubts about the service of the summons, a second one will be issued. Other European countries, such as Belgium, Italy, Spain, and the Netherlands also allow trials in absentia while Germany prohibits such practice despite its long-standing civil law tradition.[50] The prohibition is justified on the ground that judges have to find facts through

[43] Gardner, *supra* note 6, p. 103, *see also* Zakerhossein and Marie, *supra* note 4, p. 185.
[44] Id.
[45] Evert F. Stamhuis, Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal System, *Victoria University of Wellington Law Review*, Vol. 32, (2001), p. 720,
[46] Id.
[47] International Bar Association(IBA), International Criminal Court and International Criminal Law Program Report on the 'Experts' Roundtable on trials in absentia in international criminal justice at p. 3.
[48] France code of criminal procedure, (2006), chapter VIII, Art.379. [hereinafter, France Criminal Procedure Code]
[49] Stan Starygin and Johanna Selth, Cambodia and the Right to be Present: Trials in Absentia in the Draft Criminal Procedure Code, *Singapore Journal of Legal Studies*, Vol.170, (2017), p. 4, *see also* article 487 of the French criminal procedure code.
[50] The German Code of Criminal Procedure, Federal Law Gazette Part I, Act of 23.4.2014, art. 230(1), (hereinafter Germany criminal procedure code.)

interrogation and from the defendant's behavior within a courtroom.[51] This, in effect, means the presence of the accused is a primary condition for fact-finding mechanisms of interrogation and examination. In sum, with limited exceptions, the civil law tradition adopts the principle of trial in absentia on reasoned grounds of balancing the interest of the individual and public policy.

Turning to the common law jurisdictions, in contrast to the civil law, trial in absentia had been outlawed as a principle.[52] This is justified on the ground that the presence of the accused before the trial ensures the fairness of the trial, allowing the accused to confront the case and to cross-examine witnesses. However, exceptionally, the right to be present is waived where the accused absconds from custody or escapes while on bail.[53] Because the presumption is the accused upon being notified of the trial date may intentionally hide from the reach of justice.

In the USA, one of the long-standing common law jurisdictions, the right to be present is codified in the Constitution. Accordingly, the accused must present before the trial to confront the allegation.[54] In addition, if the accused is absent in the pretrial stage or absconds before the trial has begun, trial in absentia is not possible.[55] The only exception to this rule is a situation where the defendant is unequivocally and voluntarily absent after the trial has begun and due to his/her disruptive behavior.[56] Under such situations, the court repudiates the obligation not to hold trial in absentia. The effect of such a move would entail the completion of the trial and sentencing in the defendant's absence.[57]

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[51] Starygin and Selth, *supra* note 49.
[52] Id.
[53] Id.
[54] USA Constitution, amendment VI, U.S. House of Representatives, (1978), http://www.house.gov/Constitution/Amend.html (last accessed 12/1/20)
[55] USA Federal Rules of Criminal Procedure, House of Representatives, (1994), rule 43(a) (1), https://www.legislationline.org/download/id/8744/file/USA_Criminal_procedure_1944_am2020_en.pdf, (accessed 11/19/20.) This provision provides that, …*the defendant must be present at:*
(1) the initial appearance, the initial arraignment, and the plea;
(2) every trial stage, including jury impanelment and the return of the verdict; and
(3) sentencing
[56] Rule 43(C) of the US federal rules of criminal procedure provides an exception to the right to be present as;-
(1) (…)A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during the trial;
(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.
[57] Id. Article 43(2).

4. Trial in Absentia under Ethiopian Legal system

Ethiopia is a party to major fundamental human rights instruments such as the UDHR, ICCPR, and ICCSER which are required to be integrated to the domestic laws of the land.[58] The principle of integrating such instruments to domestic ones dictates that once a state ratifies an international instrument, it is obligated to enforce the provisions of the treaty with due concern and diligence. To this end, the next sections of the paper examine the position of Ethiopian laws vis-à-vis these instruments on the issue at hand.

4.1. The FDRE Constitution

The FDRE Constitution under Articles 19 and 20 guarantees several rights related to fair trial. These bundles of rights include the right to bail, the right to remain silent, habeas corpus, the right to counsel, the right to presumption of innocence, and the right to appeal.[59]

Looking closely into the contents of these constitutional provisions, one could observe that the Constitution failed to expressly mention the right to be present. Rather, it tries to set forth rights the exercise of which mandatorily requires the presence of the accused in trial.[60] Thus, we can argue that the Constitution has recognized the right to be present at least indirectly. This is because the fruits of all these sets of rights is unlikely to be achieved without exercising the right to be present in trial. Thus, from these stipulations, one can argue that the right to presence is one of the fundamental rights recognized under the FDRE Constitution.

In addition to this, the right to be tried in one's presence is provided as one component of the right to a fair trial under Article 14(3)(d) of the ICCPR . The FDRE constitution under Article 9(4) also states that '[a]ll international agreements ratified by Ethiopia are … integral part of the law of the land.'[61] Furthermore, Article 13(2) of the constitution urges that 'fundamental rights and freedoms specified under Chapter three shall be interpreted in a manner conforming to International Covenants and

[58] UN Office of High Commission of human rights, Ratification Status of Ethiopia, available at, http://tbinternet.ohchr.org/-layouts/15/treatyBodyExternal/Treaty.aspx?countryID=59&Lang=EN . Since Ethiopia has ratified these international instruments, it has to implement the provision provided therein by virtue of art 9(4) cum. 13(2) of the constitution. The right to be present before the trial as well as to defend has been recognized under art, 14 of the ICCPR and Ethiopian courts have to take judicial notice of this provision.

[59] FDRE const., *supra* note 7, Article 9.

60.Id.

[61] FDRE const. *supra* note 7, Article 9(4).

instruments adopted by Ethiopia.'[62] In so doing, the provisions that address the rights of the accused person shall be interpreted in line with the wording and intention of the ICCPR and other international instruments to which Ethiopia is a party. Consistent with this stipulation, the UNHRC has set out ample authoritative General comments on the application and limitation of rights specified under the ICCPR. Although General Comments are not as such legally binding instruments, they are highly authoritative interpretations of individual human rights or the legal nature of human rights obligations enshrined in the Convention.[63] Therefore, Ethiopian courts are expected, in due course, to use these instruments as an authoritative interpretive document, though not legally obligated to take judicial notice of these comments.

The question worth pondering here is why the constitution is silent as to the possibility or otherwise of trial in absentia and whether it is possible to limit such natural and constitutional rights through subsidiary procedural laws. As we can infer from article 20 of the constitution, the accused person has the right to defend any allegation against him and there is no limiting clause provided therein. Unlike other provisions of the constitution, it fails to provide limitation clause on the right to presence of an accused.[64] This in turn begs a question as to whether a trial in absentia is unconstitutional.

The author would argue that although the constitution failed to provide an exception, it does not prohibit trial in absentia too. Further, the purpose of the law is to attain justice and to inhibit a person from profiting out of his misconduct. As such, through the application of trial in absentia, we can protect the interest of the victim to the minimum. The victim's satisfaction also mainly depends on the administration of justice against the wrongdoer. Apart from such grounds underlying the constitutional intent regarding this right, the HRC general comment exceptionally recognizes trial in absentia under circumstances where there is a ground that serves the interest of justice.[65]

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[62] Id., Article 13(2).

[63] Stig Langvad, 'The Purpose and Use of UN Treaty Body General Comments,' European Network on Independent Living, 2018, https://enil.eu/news/the-purpose-and-use-of-un-treaty-body-general-comments/,
[last accessed, 11/20/20.]

[64] The Constitution provides, specific limitation clause on some rights of an accused as well as an arrested person under Articles 19 and 20. Rights like the right to bail, physical release, and others have an exception. However, the constitution lefts no room to limit the right to be present under Article 20.

[65] Although the HRC leaves open what 'Justified grounds' are, in the case *Mbenge vs. Zair*e, to say there is a justified reason, the accused must be informed of the charge against him, the date fixed for hearing and the consequences of his absence. After all these procedures if the accused voluntarily waves his right to present, trial in absentia can be justified.

4.2. The Criminal Procedure Code

The Ethiopian criminal procedure code was enacted back in the 1960s, remotely preceding the current constitution. The drafting history of the Code revealed that it was adapted from Malaysia and India, which are proponents of the common law legal system.[66] Countries are not the same in their stand regarding the issue of trial in absentia and the view varies across legal systems. The civil law jurisdictions largely follow the inquisitorial system in which the role of judges is pivotal.[67] As such this system is the main proponent of trial in absentia with the belief that though the accused is absent from a proceeding, the judges have an active role in fact-finding, and hence, can safeguard the rights of the accused.[68] Common law jurisdictions, on the other hand, adhere to the adversarial system which takes the trial as 'a duel' between two parties, namely the Prosecutor and the accused. Therefore, it requires the presence of both sides at a proceeding.

As the Ethiopian criminal procedure code draws its source from the countries that the followers of the adversarial system,[69] one would conjecture that trial in absentia is not allowed in the code as a principle.[70] Yet the Ethiopian code does not, at least, directly adopt this position of common law legal systems such as the Indian code. Evidencing this fact, the code under article 160 provides:

1. *The provisions of this Chapter shall apply where the accused fails to appear whether the prosecution is public or private but shall not apply to young offenders.*
2. *Where the accused does not appear on the date fixed for the trial and no representative appears satisfactorily to explain his absence, the court shall issue a warrant for his arrest.*[71]

[66] Aderajew Teklu and Kedir Mohammed, History of Ethiopian Criminal Procedure, Abyssinia Law blog, (June 2018), https://www.abyssinialaw.com/online-resources/study-on-line/item/442-history-of-ethiopian-criminal-procedure, (accessed 11/21/20).

[67] Adele, Justice, Comparative Analysis between Adversarial and Inquisitorial Legal Systems (2017), SSRN: https://ssrn.com/abstract=3077365, or http://dx.doi.org/10.2139/ssrn.3077365, (accessed December, 2020)

[68] Starygin and Selth, *supra* note 49.

[69] Teklu and Mohammed, *supra* note 66.

[70] Zakerhossein and Marie, *supra* note 4, p .224.

[71] The Amharic and English version of the code has some differences on this sub-article. The English version says *"... the date fixed for trial* " and the Amharic version says "…ነገሩን ለመስማት በተቀጠረበት ቀን ካልቀረበ). The Amharic version refers first hearing and the English version refers to the trial date, which is the main stage of the proceeding.

3. *Where the warrant cannot be executed, the court shall consider trying the accused in his absence. Where an order to this effect is made the provisions of the following articles shall apply.*

From the wording of this provision, one may argue that trial in absentia is justified as a principle. However, the provisions of the code, i.e., articles 160 and 161 must be construed cumulatively. This reading makes it clear that trial in absentia is an exception to the right to be present.

Accordingly, trial in absentia takes place where either of the two conditions provided under article 161(2) of the criminal procedure Code is satisfied. The first condition requires evidences showing that the offense is punishable with not less than twelve (12) years. Alternatively, in the second exception, it shall be established that the alleged crime is committed against the fiscal and economic interests of the State and punishable with rigorous imprisonment or fine not exceeding five thousand birr. Thus, courts can proceed with default hearings where either of the requirements is met. Yet, looking into this principle of trial in absentia under Article 160 of the code, one would notice contradictions with those enshrined in international human rights instruments. For example, under article 14(3) (d) of the ICCPR, the right to be present had been prescribed as one component of the right to a fair trial. Accordingly, it is in narrow and exceptional circumstances that trial in absentia can be entertained. This is particularly justified under the UNHRC general comment 13 and in the decision rendered on Mabeng vs. Zair.

Be this as it may, as per article 161(1) of the criminal procedure code, trial in absentia is possible where the accused fails to appear on the date fixed for hearing. At this point one may notice some confusion with Article 160(2) and 161(1) of the code. As per Article 160(2) of the code, if the accused fails to appear on the date fixed for hearing, the court may issue an arrest warrant. In a similar vein Article 161(1) of this same provision states that, if the accused fails to appear on the date fixed for hearing, the court may direct default proceeding.

The question here is whether it is a mandatory requirement to issue an arrest warrant before commencing default proceeding, or it would be possible for the court to simply proceed with default hearing. Concerning this issue, the author would hold the view that the court has to first issue an arrest warrant to effect his presence. This is mainly because his presence primarily benefits the accused himself to defend his case. In addition, trial in absentia is an exception. Hence, it must be construed narrowly, and be

applied as a last resort to administer justice.[72] Therefore, the court, before making a default hearing, shall exhaust all mechanisms that enable it to bring the accused before the trial. The court can commence trial in absentia only, where it is established that the accused absconds or a competent body is unable to arrest him.

Apart from these underlying rules in the criminal procedure code, one can also understand from the provisions of the constitution that trial in absentia is an exception to the right to be present. Particularly, the constitution under article 20(4) dictates that accused persons have the right to access any evidence presented against them, to cross-examine, to adduce or to have evidence produced in their defense. These sets of rights would get effect only when the accused is present at the trial.

5. Major Legal Gaps under Ethiopian Law and Their Consequences

While different sets of legislative intents underlie the stipulations regarding the right to be present, one can still notice caveats of ambiguity and inconsistency among the different legislative sources for this right. Particularly, the Ethiopian criminal procedure code suffers clarity as far as trial in absentia is concerned. This, in effect, is causing many practical problems such as inconsistent decision by judges and erosion of the uniform application of the law. The next section examines the major contentions over this issue pervading the practice world and the scholarly discourse.

A. Summoning the accused and practical problems

To effect the presence of the accused, due notification about the allegations is a mandatory requirement.[73] The human rights committee under General Comment 13 urges that trial in absentia can be held exceptionally with strict observance of the rights of the accused.[74] Furthermore, the HRC in Maliki case also reminds that trial in absentia is permissible only when the court has discharged its obligations with respect to the procedures for summoning and informing the defendants. To this end, the court is obligated to ensure that the summons to appear has in fact reached to the accused.[75] Any failure to deliver summons duly to the accused constitutes a violation of the ICCPR.[76]

[72] Karas, *supra* note 1, p. 461-465.
[73] Chris Jenks, Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?, *Fordham International Law Journal*, Vol. 33, Issue 1, (2009), p.77.
[74] General Comment 13, *supra* note 28.
[75] Schwarz, *supra* note 32, p. 105.
[76] Id.

Coming back to the national law, the Ethiopian Criminal Procedure Code provides controversial provisions regarding issuance of summons. One of the sources of such contentions is the semantic discrepancy between the Amharic and English versions under article 162 of the criminal procedure code.[77] The Amharic version, which is the authoritative one, provides that 'when the accused fails to appear in the trial, the court shall issue a summons in a newspaper' as a principle. However, this provision does not take into account the current reality of Ethiopia,[78] where most of the population is resides in rural areas inaccessible to newspapers.[79] Moreover, Ethiopians do not have a well-developed culture to read and follow newspapers.[80] Illiteracy is also one of the basic problems for most rural communities who cannot read and understand the contents of newspaper even if it is accessible. Given such problems, it is futile to issue a summons in newspapers and it is unjust to conduct trial in absentia by the mere fact that the accused is being summoned.[81]

The other problem worth mentioning in this respect is the lack of specificity on the type of newspaper in which the summons is to be issued. The provisions in the code do not make it clear whether the summons should be published only in a government-owned newspaper or includes private newspapers. At this point, it is important to note that the draft criminal procedure and evidence code order another modality of summoning in cases where it is impossible to address in person.[82] The new code, under Article 223, ensures that summon may be pronounced via newspaper or television, where it is impossible to address in person. Despite this progressive move, this draft, too, fails to consider the realities of rural life by including television as one of the media of issuing summons. Given the economic conditions of most rural

[77] The English version provides only the court will publicize the summon and shall state as if the trial will be held in the absence of the accused if he fails to appear. However, the Amharic version contains two sub provisions and states that፡

ሀ) ተከሳሹ የተከሰሰበት የወንጀል ዝርዝር፣ ነገሩ እንድሰማ የተቀጠረበት ቀን፣ተከሳሹ ሳይቀርብ ቢቀር በሌለበት የሚፈረድ መሆኑን የሚገልፅ ማስታወቂያ በጋዜጣ እንድወጣ ያዛል

ለ)ለተከሳሹ የሚደርስ መስሎ ከታየው ፍርድ ቤቱ መጥሪያውየሚደርስበትን ሌላ መንገድ ሊያዝ ይችላል

[78] World Bank Report on Ethiopian Rural Population 1960-2019, (hereinafter World bank report) available at, <ahref='https://www.macrotrends.net/countries/ETH/Ethiopia/rural population>Ethiopia Rural Population 1960 2021. www.macrotrends.net. Retrieved 2021-06-19. According to this report, in Ethiopia, more than 78% of the total population are living in the countryside. Having this fact, it is difficult to presume that, the accused will be summoned via television broadcast.

[79] Zewege Abate, Understanding the Local Media Environment and International Media as Sources for Local News: Five Newspapers in Focus, MA Thesis, University of Oslo, 2010 p. 61.

[80] Abiy Hailu, The Dying Reading Culture in Ethiopia, The Ethiopian Herald Newspaper, March 21, 2018

[81] Once the summon was issued under a newspaper, it is immaterial for the court, whether the accused accessed the newspaper and aware of the allegation against him, to conduct trial in absentia. Such presumption may strongly affect the right to defend of an accused and may be taken as a violation of the ICCPR and the constitutional rights of an accused.

[82] The Federal Democratic Republic of Ethiopia, Draft Criminal Procedure and Evidence Law, art. 223 (1)

communities, the state of electric supply to use this device, and the status of road accessibility to supply television and newspapers, it is still unjust for such communities to be subject to such rules.[83] The author would hold that radio services, which is relatively accessible to such communities, should be the most binding medium to issue summons.

B. Conditions to effect trial in absentia and controversies

One of the perspectives of examining the contents of the criminal procedure code is its connection to sister substantive criminal laws. Article 162 of the code, stating one of the qualifications of trial in absentia, makes cross reference to provisions of the old penal code. The penal code in the relevant section provides:

No accused person may be tried in his absence under the provisions of this Section unless he is charged with: (a) an offense punishable with rigorous imprisonment for not less than twelve years;[84] or (b) an offense under Art.354-365 Penal Code punishable with rigorous imprisonment or a fine exceeding five thousand dollars.[85]

Looking into this provision, one could see that the stipulations in the procedure code were procedural instruments formulated to enforce substantive rules of the old penal code. In addition, it is important to note that this penal code was repealed in 2004.Yet the procedure code, enacted furthest before the coming into force of the current FDRE criminal code, is still in force. Moreover, it is employed to enforce the rules of trial in absentia through a cumulative reading of conditions set out in the old penal code, the current FDRE constitution, and the procedure code itself. This combined use of repealed laws with others, this author argues, would open a room for unconstitutional legislative interpretation and law enforcement. The next sections explicate the questions and controversy surrounding the substantive elements of these grounds through which the code justifies trial in absentia.

I. Offenses punishable with more than 12 years: examining manner of operation

One of the major grounds for trial in absentia explicitly indicated in the code is the existence of a situation where the alleged crime is punishable with more than 12

[83] World Bank report, *supra* note 78.
[84] Ethiopian criminal procedure code, *supra* note 8.
[85] Id.

years.[86] However, this ground is quite controversial as far as its practical application is concerned and one would ask: what about crimes that is punishable with less than 12 years? And is its maximum limit higher than 12 years? For instance, according to article 540 of the FDRE Criminal Code, a person who commits ordinary homicide is punishable with five to twenty years of rigorous imprisonment. In this instance, the threshold is five years and the maximum limit is twenty years of rigorous imprisonment. The 12 Years requirement set by the code is in the middle of this range. Therefore, whether courts can direct trial in absentia in such scenario is unclear from the wording of the code.

Further, evidences from the practice world suggest divergent positions held by Ethiopian courts over this issue. The first position holds that the twelve years requirement is determined depending on the maximum years of punishment.[87] Hence, although the initial years of punishment are lower than 12 years, it does not matter to proceed with the trial in absentia, as the sealing punishment is above 12 years.[88] However, the accused might be punished with term of less than 12 years since the initial punishment is lower than the 12 years requirement as provided under article 540 of the criminal code.

The second position advances the argument that the 12 years requirement is the minimum and mandatory threshold. The law under article 162 of the code makes it clear that the 12 years requirement is nonnegotiable.[89] Thus, a crime with initial punishment of less than 12 years cannot be entertained in the absence of the accused. According to this position, in the above scenario trial in absentia is not possible since the initial punishment is below 12 years.

This debate from the two camps has been alive for a long period and different courts have been advancing divergent positions. The Federal Supreme Court Cassation Division gives an authoritative decision on this issue under file no.179416.[90] The history of the case demonstrates that the accused was charged under article 669(3) (b)

[86] According to the draft, Ethiopian criminal procedure and evidence law the offence must be punishable with more than seven years and above punishments in its article 227(1). However, this requirement may strongly affect the right to defend of an accused hence; there is a tendency for many crimes to be tried in the absence. When a new law is enacted, it should give a better place for human rights than the former law but it reduces from 12 to 7 years requirements.

[87] *Amanuel Getachew, and Sentayehu Ayelew V. prosecutor*, Bahir Dar Area High Court, File No. 04170, May 9/2009.

[88] Interview with, Ergo Sirage, and Tadele Belayneh, Judges, Bahir Dar Area High Court, (June 2019)

[89] Interview with Benyam Babu, judge and president, Bench Shoko Zone High court, (SNNPR) (June 2020)

[90] *Haleka Negusa Abereha v. Tigray region justice bureau*. Federal supreme court Cassation Division, File no. 179416, June 22, 2012, E.C.

of FDRE criminal code for the crime of aggravated theft, which is punishable with simple imprisonment not less than one year and rigorous imprisonment not exceeding fifteen years. The court decided that 'the provision contains optional punishments, and hence, the accused may be punished with simple imprisonment less than twelve years or with more than 12 years rigorous imprisonment where he is convicted.[91] In such circumstances, the court should presume that the accused will be punished with terms of less than 12 years and trial in absentia is not possible.[92] This is because if the court initially presumed as if the accused will be punished with more than 12 years imprisonment, it may affect the constitutional rights of the accused to be present and defend himself.[93]

The decision of the cassation court is justifiable from the view that trial in absentia is an exception to the fundamental right to be present. Thus, exceptions must be interpreted narrowly and in a manner not hampering the purpose of the underlying rights.[94] Furthermore, in the case of ambiguities, criminal law must be interpreted in a manner which is more favorable to the accused.[95] The problem at this juncture is the fairness of allowing trial in absentia for more serious crimes, which lead to more than 12 years up to life imprisonment and death penalty. This makes the Procedure Code deviant from the adversary system in which trial in absentia is allowed for less serious crimes.[96] The Code was adapted from the common law legal system, which prohibits trial in absentia and allow exceptionally for less serious crimes. However, the criminal procedure code as well as the cassation court upholds the position of civil law countries particularly that of France, where trial in absentia is allowed for grave cases. This, in effect, means the court may decide death penalty without the accused being present and duly defend his case.

II. Offenses against the fiscal and economic interests of the state[97]

The other condition set forth under the code to proceed with trial in absentia is concerned with offenses committed against the economic and financial interest of the

[91] Id.
[92] Id.
[93] Id.
[94] Katherine Hutchison, That's the Ticket: Arguing for A Narrower Interpretation of the Exceptions Clause in the Driver's Privacy Protection Act, *Seventh Circuit Review*, Vol. 7, Issue 2, (2012), p. 128-129.
[95] Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Addis Ababa Ethiopia,(9th of May, 2005), Article 2 cum 6. [here in after FDRE criminal code]
[96] In the common law legal system, particularly in the USA trial in absentia is not possible except for disruptive behavior of the accused.
[97] These offenses are provided under art, 354-365 of the old penal code, which is already repealed. Under the current criminal code, the applicable provision for this requirement is from art. 343-354

state. This requirement of the Procedure Code (cross-referring to the provisions of the old penal code) roughly corresponds to provisions ranging from article 343-354 of the current criminal code of Ethiopia.

A closer look into article 162(2) (B) of the Procedure Code suggests that to commence default hearing first the alleged crime should lie within the ambit of article 343-354 of the criminal code. It should also be established that the crime is punishable with rigorous imprisonment or a fine exceeding five hundred Birr.[98] In other words, without considering the twelve years requirement, it is possible to commence default proceedings once the alleged offense lies under these provisions, and it is at a level of gravity punishable with rigorous imprisonment or a fine exceeding 500 birr.

Yet, the absence of either requirement will prohibit trial in absentia. The underlining rationale behind this exception is to give more priority and preferences for government and state interest. Since the state is duty-bound to fulfill public goods, it's economic and financial interest needs special protection. However, this condition may open a discretionary space for courts to employ trial in absentia as an ordinary procedure, unduly justifying that the crime is committed in the monetary interest of the state. As such, allowing trial in absentia on all crimes committed against the financial interest of the state will invite courts to apply it in principle and it may substantially narrow the defendant's right to be present and defend his case.

C. Disruptive behavior of the accused

Under international jurisprudence, disruptive behavior of the accused can be a major ground for carrying on a trial in absentia.[99] As one of such evidences, the ICC in prosecutor Vs. Ruto and Sang implicitly repudiated the right to be present for 'the continuously disruptive behavior of the accused'.[100] As such, an accused's continuous disturbance amounts to court contempt that damages institutional hounour and efficiency in the administration of justice.[101]

While this room of exception for trial in absentia is recognized, courts are required to ensure that it does not infringe the interest of justice. To this effect, courts must

[98] Ethiopian Criminal Procedure Code, *supra* note 8, Article 162(2)(B)

[99] Serena Quattrocolo and Stefano Ruggei, personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe, *Legal Studies in International, European and Comparative Criminal Law series*, vol. 2, (2019) p. 72. See also, ICC Statute, *supra* note 21, art. 63

[100] *Prosecutor v. Ruto and Sang*, International Criminal court, file No. ICC-01/09-01/11 OA5, (18 June 2013).

[101] Zakerhossein and Marie, *supra* note 4.

sufficiently establish elements of such behavior. The ICC particularly notes that a 'repeated or continuous disruption must exist to conduct trial in absentia'. Further, this room of exception must not be used as a 'tool to muzzle defendants in circumstances where they challenge the charges.'[102] Thus, courts must take into account the interest of the defendant to attend the proceeding through technological tools.[103] Finally, courts are given the discretion to determine the elements of such behavior on a case-by-case basis. Accordingly, any physical as well as verbal intimidations or misbehaviors disturbing the proceeding or prevents the court from administering justice amounts to disruptive behavior.[104]

Turning to the contents of the Ethiopian legislative sources, one observes that they provide insufficient considerations and the code mentions nothing about disruptive behavior of the accused. The FDRE criminal code under article 449 considers contempt of court as a crime where the accused or any party insults, disturbs, ridicules, or in any other manner disrupts the activities of the Court.[105] Yet the code, other than providing a penalty for contempt of court, states nothing as to whether the accused should attend the trial or it could be conducted in his absence. This, in turn, begs such question as what if the accused repeatedly disrupts the atmosphere of the court. Should the court remove the accused from the courtroom and deny the right to be present or should it tolerate the disruptive behavior of the accused? In this regard, the criminal procedure code remains silent and fails to consider the behavior of the accused as a ground for trial in absentia.

In other jurisdictions, particularly in Germany, disruptive behavior of the accused is the prominent ground to administer trial in absentia.[106] As pointed out earlier, Germany is not a proponent of trial in absentia, yet it makes the accused's disruptive behavior an exception to conduct trial in absentia. Also, in the common law legal system, particularly in the USA, persistent disruptive behavior of an accused amounts to a voluntary waiver of the right to be present.[107] Apart from such practices, other human right documents such as the Amnesty International fair trial guideline restricts

[102] Id, *see also*, W. A. Schabas, International Criminal Court: A Commentary on the Rome Statute, *New York, Oxford University Press*, (2010), p. 755.
[103] ICC Statute, *supra* note 20, Article 63.
[104] Quattrocolo and Ruggei, *supra* note 99, p. 460.
[105] FDRE Criminal Code, *supra* note 95, Article. 449 *ff*.
[106] The German Code of Criminal Procedure, *supra* note 50, Section 231 b.
[107] James G. Starkey, Trial in Absentia, *St. John's Law Review*, Vol. 53:No.4, (1979), p.741. According Rule 43(C) of the USA federal rules of criminal procedure 'when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom' *see also*, Zakerhossein and Marie, *supra* note 4 p.183.

the right to presence temporally in cases where the accused repeatedly disrupts the proceedings to such an extent that the court deems it impractical for the trial to continue with the accused's presence.[108] In such circumstances, the court can remove the accused with strict observance of the accused's right to defend his case.[109] Particularly, the court, while it may conduct the trial in absentia, must ensure the accused to observe the trial and access confidential counsel instruction from outside of the courtroom.'[110]

Finally, looking into the stipulations in the Ethiopian legislative sources vis-à-vis the international practice we can observe a considerable disparity as to whether it is possible to conduct trial in absentia in cases where the accused disturbs the proceeding. To mention an illustrative example for such disparities, the ICC in Prosecutor Vs Ruto, unlike the case in the Ethiopian sources, makes it clear that disruptive behavior of an accused can be a ground to precede trial in absentia.[111] The court bases its decision on article 63(2) of its statute and states disruptive behavior of the accused as the only ground to direct default proceeding.[112] Furthermore, it can be presumed that the accused is abusing and having an intention to waive his right to present, where he repeatedly disrupts the courtroom.[113] From this, it is tenable to argue that disruptive behavior of an accused must be regulated as a ground to effect trial in absentia under Ethiopian law as it would be difficult to administer justice while the accused is disrupting the trial.[114]

D. The fate of partial trial in absentia

As its name suggests, partial trial in absentia refers to a situation where the defendant appears before the court at some stage of the trial. The defendant may appear initially and may waive his right to appear or initially abscond and appear in person at the middle or final stage of the trial.[115] In this scenario, if the defendant initially appears before the trial and failed to appear in the next proceedings, the court may commence a

[108] Amnesty International, Fair Trial Manuel, Amnesty International Publications, 2nd ed., Easton Street, London WC1X 0DW, United Kingdom, (2014), p. 157.
[109] Id.
[110] W. Jordash and T. Parker, Trials in Absentia at the Special Tribunal for Lebanon', *Journal of International Criminal Justice*, Vol. 8, (2010) p. 507.
[111] Prosecutor v. Ruto and Sang), supra note 100.
[112] Zakerhossein and Marie, *supra* note 4, p.210.
[113] Jordash W. and Parker T. Trials in Absentia at the Special Tribunal for Lebanon', *Journal of International Criminal Justice*, vol.8, (2010), p.490.
[114] Id., *see also*, Zakerhossein and Marie, *supra* note,4
[115] Id.

default hearing as the defendant already has the knowledge of the indictment and is sufficiently informed of the case.

Yet, a problem arises when the defendant does not initially appear but comes in the middle of the trial. Under such circumstances, the court would face two difficult options: to entertain the case again from the beginning or to continue with what been progressing. Let's say, the defendant appears after the public prosecutor presents its evidences. Now whether the court should quash the prosecutor's evidence and entertain the case again or continues its judgment is not made clear under the procedure code.[116] Consequently, courts hold different positions, some courts retrying the case again to protect the rights of the defendant, while others continue with the case as it was.[117]

The author takes the view that the issue must be interpreted in favor of the defendant.[118] Accordingly, in the case where the defendant appears in the middle of the proceeding, it is better to retry the case and open a room for the defendant to duly defend his case. This option can further be rationalized on the ground that the right to be present is one of the fundamental human rights of an accused, which must be interpreted consistent with their object and purpose. [119]

E. The right to re-trial under the code: issues worth considering

The right to retrial is a vital chance for the accused to exercise his right to defend where his charge has been decided in his absence.[120] The UN Human Rights Committee under general comment No, 32 recognizes the right to retrial of a person convicted in absentia.[121] The Ethiopian Criminal Procedure Code under article 199 states that, if the defendant is not duly summoned or he was prevented by force majeure from appearing in person, he can claim retrial of judgment.[122]

Two strong justifications underlie this principle. First, it is to reduce the risk of trial in absentia where the defendant is unaware of the charge as well as the accusation

[116] The criminal procedure code is silent on this issue and it may create a problem in its practical application. Some courts retried the case again and others.
[117] Phone Interview with, Germa Debasu, judge, Federal High Court, Addis Ababa, (September 2020).
[118] Shon Hopwood, Restoring The Historical Rule of Lenity As a Canon, *New York University Law Review*, Vol. 95, (2020), p.918.
[119] Vienna Convention on the law of Treaties (VCLT), United Nations, Treaty Series, Vol. 1155, (1969), article. 31 (1).
[120] International Bar Association Report, *supra* note, 54, p.6.
[121] UN Human rights committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial): Geneva, (9 to 27 July 2007), para 54 ;[hereinafter General comment, 32].
[122] Ethiopian Criminal procedure code, *supra* note *8*, article,199.

presented against him[123]. Secondly, though the person knows the trial as well as the elements of the charge, he may be hindered to appear due to force majeure and it is not rational to affirm the decision rendered in the defendant's absence that occurred due to good cause.[124]

To strike a balance between these two competing interests, the law allows retrial of a criminal proceeding. To this effect, the criminal procedure code, under article 197, stipulates that the person who is sentenced in his absence has the right to apply to set aside a judgment to a court that rendered the decision.[125] This application must be made within thirty days from the date on which the applicant becomes aware of the judgment.[126] Now, it is important to note that this time limit is different from that set for an appeal, period of limitation of which, runs from the date on which the accused is aware of the judgment.[127]

Practically, public prosecutors are facing problems on such issues due to potential bad faith defendants who claim retrial contrary to its objectives.[128] A defendant may come and claim retrial after a long period by presenting good cause.[129] In such a scenario, as time goes by, the witness of the prosecutor may die or be unavailable, memories may fade, and documentary evidence may be destroyed. Thus, one would ponder: how can the prosecutor prove its charge against the defendant under such circumstances?[130] Further, there are defendants who intentionally hide for a long time to escape punishment or for other reasons and the case may be adjudicated in their absence. If such a defendant claims retrial, let's say after 10 or 15 years, it is difficult for the prosecutor to prove the allegation again. Yet the law, over the last decades, fails to provide a mechanism to deal with such challenges.[131]

[123] Elizabeta Ivičević Karas: Reopening of Proceedings in Cases of Trial in Absentia, EU and Comparative Law Issues and Challenges Series – Issue 2, p. 294. [here in after Elizabeta on retrial]
[124] Id.
[125] Ethiopian Criminal procedure code *supra* note 8, Article 197.
[126] Id.
[127] According to article 187(1) of the criminal procedure code, the time limit given to lodge an appeal is within 15 days after the judgment has been given. However, the application to set aside a default judgment is within thirty days after the accused knows the judgment.
[128] Phone Interview with, kal'ab, Public Prosecutor at Amhara region Attorney General bureau, on problems in a default proceeding June 2021. (herein After interview with Kal'ab) and interview with, Tadele Belayneh, judges at Bahir Dar area high court, *on conditions to commence absence trial in Ethiopia and the practice,* 19 June 2018,(hereinafter Interview with, judge Tadele Belayneh)].
[129] Interview with public Prosecutor Kal'ab.
[130] Id.
[131] Id .

The practice demonstrates that public prosecutors are using two mechanisms to fill this gap.[132] Firstly, prosecutors use evidence gathered during the preliminary inquiry,[133]Particularly, in situations where the accused is charged with aggravated homicide or aggravated robbery.[134] As such, public prosecutors can attach the result of preliminary inquiry as evidence where the judgment was given in default and the accused claims retrial.[135] Secondly, for crimes which are not eligible for preliminary inquiry, prosecutors may reuse the evidence of prior proceeding. However, this may affect other rights of the accused such as the right to cross-examination.[136] Yet it is important to note that, accessing evidence and proving an accusation is not an easy task in such situations where the accused claims retrial after a long period, opening a space for the defendant to evade justice. In sum, this gap in the law alerts courts to follow strict observance on the intention of the defendant, while they consider the grounds of absence as force majeure.[137]

F. Retrial and the right to appeal

The right to appeal is one of the constitutional rights on all decisions or judgments rendered by lower courts.[138] Yet the criminal procedure code constitutes a contentious clause (article 202(3) related to an appeal against a ruling on retrial. As outlined above, if the summons to appear is not adequately address to the defendant, or the accused hindered to appear due to force majeure application to retrial is possible.[139]

However, the law fails to define what conditions constitute force majeure, and it leaves a room for courts to decide on a case-by-case basis. Overall, where the defendant fails to prove either of the grounds, the application to set aside the judgment would be

[132] Id .

[133] Interview with Masresha, public prosecutor at Bench Shoko zone Justice Department, June 2021. (hereinafter interview with public prosecutor Maseresha).

[134] Ethiopian Criminal Procedure Code, *supra* note, *8* Article 80(1).

[135] Interview with public prosecutor Maseresha, *supra* note 133.

[136] As prosecutors inform that, sometimes the defendant may claim re-trial after a long time in which, all pieces of evidence are quashed through natural or manmade reason. A personal witness may die, documentary evidence will destroy, and to collect forensic examination the victim may die or materials may be lost.

[137] Elizabeta Ivičević Karas *supra* note, 1, p. 463-68. at 460.

[138] FDRE Constitution, art. 20 (6). This provision provides that, the accused person has the right to appeal against an order or judgment rendered against him. This fundamental and constitutional right is construed freeform an exception.

[139] Ethiopian Criminal Procedure Code, *supra* note 8, article 199(a &b).

dismissed.[140] This is because under such circumstances, a convicted person is presumed to have moved to evade justice.[141]

These issues prompt further examination of the possibility or otherwise of the right to appeal on dismissal of an application to set aside a judgment rendered in the absence of the defendant. The criminal procedure code in its article 202(3) provides that '[no] appeal shall lie against a decision dismissing the application for retrial …' However, this will not prevent the accused from submitting an appeal against the sentence or penalties of the court.[142] This provision is the most debatable and contrary to the inherent rights of the accused to claim the right to appeal because of two grounds.

First, force majeure/ good cause is one of the grounds to apply for retrial of a judgment given in absence. Here, courts have the discretion to decide whether an act that prevents the accused to appear constitutes force majeure. However, such discretion is vulnerable to subjective interpretations of courts. Consequently, an act, which is force majeure for someone, may not constitute as such for others. Therefore, a judge may arbitrarily or for other reasons dismiss the accused's application presented for a retrial. This may, in turn, create procedural irregularities and strongly hamper the rights of the accused. Yet appeal is an essential procedural tool to rectify such kind of procedural as well as substantive irregularities. The criminal procedure code limits the appeal rights of an accused only on the penalty part. Thus, the defendant has no chance to challenge the case or to cross-examine, to be heard, and to defend. Limiting the right to appeal only on penalties and prohibiting appeal on an application for re-trial strongly affects the accused's right to a fair trial. The federal cassation court in Semahegn Belew Vs. the prosecutor decided that dismissal of an application for retrial is not a final judgment and not appealable.[143] However, the provision undermines the defendant from appealing against the conviction.

Secondly, as recognized under article 20(6) of the constitution, the right to appeal is possible against an order or a judgment rendered by a court. Most importantly, there is no exception set forth to limit the right to appeal under the constitution or international

[140] Id, Art. 202.

[141] Federal supreme court Cassation Division, Semahegn Belew vs Federal prosecutor, File No. 57632 December 25, 2003, E.C.

[142] FDRE constitution, *supra* note *7*, Article 20(3).

[143] FSCCD, Semahegn Belew Vs Prosecutor. According to the ruling of the court, it states that " … በወ/መ/ሕ/ሥ/ሥ/ቁ. 202 መሠረት በጥፋተኝነቱ ውሣኔ የይግባኝ መብት አይኖረውም በሚል መደንገጉ ከላይ ከተቀመጠው ምክንያት አንፃር የመከራከር መብቱን የነፈገ እንጂ በዚህ ድንጋጌ መሠረት የይግባኝ አቤቱታ ማቅረብ አይቻልም መባሉ ፍርዱን የመጨረሻ አድርጎታል የሚል ትርጉም መስጠት የሚቻል አይሆንም።

human rights instruments.[144] Pursuant to article14 (5) of the ICCPR, 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' Accordingly, the defendant has the right to lodge an appeal against the conviction as well as the sentences by virtue of this provision. However, the criminal procedure code disregards this principle and prohibits the right to appeal against a conviction rendered in the absence of the defendant.

Accordingly, the stipulation in the code is against the right to appeal to the defendant, which is guaranteed under international human rights law. [145] Moreover, in the absence of any constitutional exception, it is not justified to limit this fundamental right, and the limit set by procedure code remains a point of contention.[146]

Conclusion

The right to presence has been recognized under international human right instruments and the FDRE constitution. This right is the foundation of fair trial rights, such as the right to be heard, to defend a case, and to cross-examine witnesses. While the foundation of this bundle of rights in some exceptional and justified reasons, a trial may proceed in the absence of the defendant.

The primary rationale behind trial in absentia is to protect the victims' right to access justice and to avoid delay of justice for several reasons. While the civil law legal system used it as part of a regular proceeding, the common law system prohibits this practice in principle with the exception of the accused's disruptive behaviour.

Under the Ethiopian legal system, trial in absentia has been recognized under the criminal procedure code with a proviso of some conditions. However, the conditions provided under article 161 of the code are so contentious, prompting a lot of controversy in the scholarly discourse and the practice world. One of the major elements of this contention is related to the determination of whether a certain crime should or shouldn't be tried in the absence of the defendant. The criminal procedure

[144] The FDRE constitution under art 20(6) and ICCPR under art. 14(5) too, did not provide any exception thereto.

[145] The right to appeal is recognized against the final conviction or a sentence given by the court according to the ICCPR. However, the criminal Procedure Code limits the right to appeal only on the sentences which are rendered in the absence of the defendant and the defendant cannot appeal against the convection.

[146] ICCPR, *supra* note *3*, art. 14(5).

code, under article 161(2), stipulates that a person may not be tried in his absence unless the crime is punishable with not less than twelve years rigorous imprisonment.

Yet this rule poses difficulties when it comes to its application for crime with penalties of a different range such as 5-15 years of rigorous imprisonment. Where the defendant fails to appear in a trial of an alleged crime punishable within such range, the court would face a difficulty to proceed in the absence of the defendant. As such, adjudication of such cases has long been a source of controversy resulting in inconsistent rulings. Given such problems, one would expect legislative actions or authoritative decision of the federal cassation court that fills this void in the law.

Yet, no such significant move is visible in the recent past. Of course, the federal cassation court, under file No. 179416, rendered an authoritative decision in which it urges that the twelve years requirement is non-negotiable, and it refers to crimes, which have more than twelve years of initial punishment. Looking into the contents of the ruling, one could see that it does not fully resolve the contention while it obliges courts to employ trial in absentia for crimes punishable with more than twelve years of rigorous imprisonment.

The other apparent problem of the code is its failure to govern disruptive behaviors of an accused as a condition for a default hearing. Under international experiences, particularly in common law jurisdictions, disruptive behaviour of an accused with in the courtroom is the only exception to direct trial in absentia. Also, in civil law countries, particularly in Germany, trial in absentia is not possible unless the presence of the accused disrupts the courtroom. However, the Ethiopian criminal procedure code is unclear as to whether it is possible to remove the accused under such circumstances. Thus, unless it is properly regulated, it might create a problem on the proper administration of justice.

The third problem of the law lies in the summoning procedure to inform an accused. The wider international practice shows that the accused has the right to be informed about the contents of his case. As one of such representative evidences the General Comment No.32 of the commeettee on civil and political rights unequivocally requires ‘all due steps to be taken to inform accused persons of the charges and to notify them of the proceedings before trial in absentia’

However, the Ethiopian criminal procedure code lacks clear and sufficient stipulations regarding a summoning procedure. The only procedure provided under the code is the publication of summons on the “official gazette”. As such, the code fails to provide

other alternatives to serve summons for the accused. Evidences from the practice world show that police officers are not diligent to search the accused or to deliver summon. They rather simply publicize summons on a gazette without making due effort to deliver it to the accused. Further, the code, in considering Gazzatte as channel of summoning, fails to consider the accessibility of the gazette, literacy rate and reading culture of the community. Besides, the term "Gazette" is not clear as to whether it refers to the public (official gazette) only or it includes a private gazette as well. As a way to fill this gap, the author contends, the code should have also incorporated other media such as radio, and other social media, which are more accessible to the community.

In addition, it is aptly indicated in previous sections of this paper that, the defendant has the right to apply to set aside a judgment rendered in his absence. The criminal procedure code also recognizes the same, depending on the conditions provided under article 199. Yet it is important to note that the decision of the court on the application to set aside the judgment is not appealable. The author holds the view that such restriction may adversely affect the rights of the defendant to claim an appeal. The code allows an appeal only on the penalty and it is impossible to appeal on the conviction, too. Thus, this provision locks the rights of the defendant to appeal as well as to defend his case.

Finally, in some instances, the accused may appear after the default hearing has been started. Yet the code is silent whether the trial would continue in default or it should be retried again under such circumstnces. Procedural laws in other jurisdictions such as France, if the accused comes in the middle of the trial, the court will investigate and try the case again. In contrast, no mechanism is available in the Ethiopian case and this can apparently cause procedural irregularities.

In summary, these varying forms of gaps pertaining to trial in absentia, if left unadressed, would continue to threaten the fundamental right to fair trial. Thus, the legislature bodies, the judiciary, and law enforcement organs in this country are expected to make a concerted move to devise a lasting solution to the contentions, irregularities, and inconsistencies of court decisions regarding this right. The review made in this article suggests that these bodies can draw considerably useful input from the international experience and human right documents pertinent to the issue in question.

Tax Treaty Shopping in Ethiopia: The Need to Integrate Anti-Treaty Shopping Rule into Double Taxation Avoidance Agreements and domestic income tax law.

Alemu Balcha Adugna[*]

Abstract

Many countries of the world have signed bilateral tax treaties to avoid or mitigate double taxation and control tax evasion and planning in cross-border economic activities. However, such networks of bilateral tax treaties have in effect opened room for tax treaty shopping. As of September 2020, Ethiopia has signed more than 32 bilateral tax treaties. Yet, no study has been made on the issues of tax treaty shopping. Hence, this study examines whether the existing treaty provisions are sufficient to prevent the abuse of double taxation agreements by treaty shopping, and identifies its shortcomings. To this end, doctrinal legal research methodology is employed to investigate Ethiopia's pertinent income tax law and double taxation avoidance agreements. Accordingly, the findings show that tax treaty shopping is not sufficiently regulated under the Ethiopian bilateral tax treaties and domestic income tax system. Most of the Ethiopian bilateral tax treaties are devoid of anti-treaty shopping rules. Save for few bilateral tax treaties, most of the bilateral tax treaties have no anti-treaty shopping rules. Although the Federal Income Tax Proclamation has provided seemingly anti-avoidance rule, it may not serve its purposes since it cannot override treaties which may otherwise constitute a breach of the treaty under international law. In other words, the general anti-avoidance rule provided under the Federal Income Tax Proclamation may not extend to tackling treaty shopping as its scope is limited to domestic matters. Accordingly, Ethiopia should revisit its domestic anti-avoidance rules and incorporate anti-treaty shopping rules into bilateral tax treaties either by renegotiation or termination.

Keywords: *Double taxation agreement, Treaty shopping, beneficial ownership, Limitation of benefits, principal purpose test.*

Introduction

The international tax system as it stands today has its roots in the 1920s.[1] It was developed under a bilateral paradigm of extensive taxation in the residence state and a source state that fully uses its taxation rights by which the architecture of tax treaties

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[1] Moritz Scherleitner, The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: An Analysis of the Principal Purpose Test from the Perspective of Finnish Tax Treaty Practice, *Journal of Financial Times*, Vol.2, (2018), P.126.

had been developed.[2] Over the last decades, bilateral tax agreements, concluded by nearly every jurisdiction globally, have prevented harmful double taxation and remove obstacles to cross-border trade in goods and services and movements of capital, technology, and persons across the borders.[3] Bilateral tax agreements or treaties are also called double taxation avoidance agreements.[4] Hence, the term bilateral tax agreement or tax treaties, or double taxation avoidance agreements (hereinafter called DTA) are interchangeably used throughout this article.

The primary objective of tax treaties is to avoid double taxation derived from the overlap of different tax jurisdictions.[5] The phenomenon may take economic or juridical manifestations. Economic double taxation arises in international taxation when the same economic transaction, item, or income is taxed in two or more states during the same period but in different taxpayers' hands.[6] On the other hand, in juridical double taxation, two or more states levy their respective taxes on the same entity or person on the same income and identical periods.[7] International double taxation can be eliminated using one of two forms: states may willingly enter into mutually binding double taxation treaties (DTTs), or the resident states may enact unilateral measures to prevent double taxation.[8] For instance, a capital-exporting country may allow for either a deduction of taxes paid in the host country, a credit of the amount which would have been incurred under domestic taxation, or a complete exemption from taxation.[9] While there are different methods employed to mitigate double taxation, a more detailed discussion of their respective uses and implications is beyond the scope of this paper.

Although avoiding double taxation is, in principle, possible through the terms of a tax treaty, individuals and business entities mostly tend to use the tax treaty network to avoid taxes through aggressive tax planning strategies.[10] In other words, the taxpayers may use the treaties' advantages to shift their incomes to lower jurisdictions, avoid domestic tax rules, or benefit from tax treaties that were not entitled to be used by them. The latter is known as the phenomenon of treaty shopping, a tax planning

[2] *Id.*
[3] Michael Lang, Treaty Abuse in Introduction to the Law of Double Taxation Conventions, 7th edition, Amsterdam, International Bureau of Fiscal Documentation,(2013), p.30.
[4] Brian J.Arnold, Introduction Tax to Treaties, p.1.
[5] Lang, *supra note 3.*
[6] Roy Rohitagi, Basic International Taxation, 2nd edition, Richmond Law & Tax Ltd, Vol.1,(2005), P.2.
[7] *Id.*
[8] Janeba, E. Corporate Income Tax Competition, Double Taxation Treaties, and Foreign Direct Investment, Journal of Public Economics, Vol.56, No.2, (1995), p.320.
[9] *Id.*
[10] Lang, *supra* note3, p.30

strategy where a taxpayer shops the most appropriate tax treaty to achieve a lower tax burden or a double non-taxation.[11]

Treaty shopping is, therefore, a practice where multinational enterprises (MNE's), rather than investing directly in a host country, funnel the investment through a third country to take advantage of treaty provisions not found between the host and the home country of the investment.[12] As such, as treaty benefits should only be available to residents of the contracting states, the attainment of treaty benefits by non-residents is achieved by the imposition of a conduit legal entity in a treaty state.[13]

Turning to the effect of treaty shopping, one notices that it has various impacts on the international tax system. One of such effects is the loss of revenue by contracting parties to the bilateral double taxation avoidance agreements since the treaty shopper does not pay taxes which it would otherwise owe.[14] As a response to the potentially harmful effects of tax avoidance practices, the tax treaty system has focused on designing measures to counter avoidance practices.[15] To this end, the OECD has discussed the problem since 1961, which has resulted in quite a few proposals of how treaty shopping should be limited.[16] Accordingly, countries have employed domestic legislation that includes general or specific anti-avoidance rules to deny treaty benefits to prevent and attack treaty abuse.[17] Besides, governments have implemented specific anti-avoidance provisions from a tax treaty perspective, such as the Limitation on benefits provisions, beneficial ownership, and exclusion of tax-favored entities from treaty benefits, *bona fide* approach, and principal purpose test to limit the scope of the treaty.[18]

Turning to the Ethiopian context, one could observe that the country has been making considerable efforts to attract foreign direct investment as an instrument for growth and development. At the center of this move is signing bilateral investment treaties

[11] Christiana HJI Panayi, Double Taxation, Tax Treaties, Treaty-Shopping, and the European Community, Kluwer Law International, (2007), pp. 34-37.
[12] Ronald B. Davies, Tax Treaties and Foreign Direct Investment: Potential versus Performance, *International Tax, and Public Finance*, Vol.11, No.6,(2004), pp. 775-802.
[13] *Id.*
[14] Stef van Weeghel, The Improper Use of Tax Treaties: with particular reference to the Netherlands and united states, Kluwer law international,(1998),p.105.
[15] José Domingo Palomino Pérez, Are the LOB Provisions Efficient Measures to Prevent Tax Treaty Shopping By Taxpayers?, Master's thesis, Tilburg University, (2017), p.5.
[16] Helmut Becker &Felix J Wurm, Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries, Deventer, Kluwer Law, and Taxation Publishers, (1988), p. 2.
[17] Pérez, *supra* note 15, p.5.
[18] *Id.*

(BITs) and double tax avoidance treaties.[19] With the primary objective of minimizing the impacts of double taxation, the country has taken unilateral measures such as foreign tax crediting and tax exemption.[20] In addition, it has signed more than 32 bilateral tax treaties with other countries of the world.[21] A closer look into these bilateral tax treaties demonstrates that it has been signed based on the OECD Model Tax Treaty.[22] Signing bilateral tax treaties can play a pivotal role in attracting foreign direct investment as it increases multinational enterprises' involvement in the domestic industry. Yet, this would cause loss of revenue to the government through the strategy called treaty shopping. While such loss may pose a threat to the industry and the national economy at large, its magnitude and manifestations are not sufficiently explored. Further, no study has been made on tax treaty shopping issues under Ethiopia's income tax system.

Therefore, this study aims to examine whether the existing legal system is strong enough to prevent abuse of double taxation agreements by treaty shopping, identify its shortcomings, and explore opportunities for proper regulation. To this end, doctrinal legal research methodology is employed to investigate the pertinent provision of income tax law and double taxation avoidance agreements. Since most of the double taxation treaties are similar concerning treaty shopping, the researcher took representative treaties for examination instead of exploring every treaty. Accordingly, double taxation agreements with Cyprus, Singapore, and China were randomly selected. Besides, double taxation agreements with the Netherlands, South Korea, and Mozambique are also chosen as they have adopted anti-avoidance rules for tackling treaty shopping.

The article is organized into six sections. The first section highlights the general overview of tax treaties and tax treaty shopping. The second section presents common strategies for tax treaty shopping. The third section uncovers the impacts of treaty shopping, while the fourth section deals with the possible approaches to prevent tax treaty shopping. The fifth section explores Anti-treaty-shopping measures proposed by BEPS Action Plan 6 and 15. The sixth section analyses tax Treaty shopping under the Ethiopian tax system and Ethiopia's pressing need to integrate anti-treaty shopping

[19] Martha Belete Hailu and Tilahun Esmael Kassahun 'Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration', *Mizan Law Review*, Vol. 8, No.1, (2014).

[20] Federal Income Tax Proclamation of Ethiopia, Proclamation No. 979/2016, *Federal Negarit Gazetta*, year 22 No.104, (2016), (hereafter called Income Tax Proclamation No.979/2016), Art.45.

[21] Serkalem Eniyewu, Involving Constituent States in Negotiating Tax Treaties in Ethiopia, Master's thesis, Addis Ababa University,(2017),p.35.

[22] Aschalew Ashagre, A Note on Resolution of Tax Disputes Arising from DTTs and Implications for Developing Countries, *Mizan Law Review*, Vol. 13, No. 3,(2019), p.513.

rules into its double taxation agreements and domestic income tax law. Finally, the article ends with a brief conclusion and recommendation.

1. Tax Treaties and Tax Treaty Shopping: An overview

Double taxation agreements have been around for a long time. They first appeared in what is now Germany as an inter-state agreement entered among components of Prussia in 1899.[23] This treaty is largely regarded as the first modern DTA, serving as the major instrument of regulating business interaction among member states. A closer look into the historical literature on DTAs shows that only a few of such treaties were created until 1920. Yet, the wider inter-state interaction in the next half of the 20th century necessitated harmonizing taxation principles among other states in the rest of the world. This gave birth to modern international tax treaties.[24] These treaties, widely known as bilateral tax treaties, are international agreements in which their creation and consequences are determined according to the Vienna Convention rules on the Law of Treaties of May 23, 1969.[25] They are negotiated under international law as legally binding State-to-State agreements signed by two or more countries (called the *Contracting States* under the treaty).[26]

The double taxation treaty, one of the variants of such treaties, is set to pursue varying objectives. First, it seeks to avoid juridical double taxation, which mainly emanates from tax laws of countries that apply source–source or residence-residence or source-residence rule.[27] As such, the causes of international juridical double taxation take on three major forms. Dual residency conflict, the first of these forms, manifests when a person is taxed on worldwide income or capital in more than one country because they are deemed a resident for tax purposes in each of those countries.[28] The second is residence/source conflict, whereby a resident's income derived from the other state is subject to tax in both the resident state and the other state.[29] The third form is termed as source/source conflict. Under this situation, more than one country regards the same income as having a source in their territory under domestic law.[30] Finally, these

[23] Arvid Age. Skaar, Permanent Establishment: Erosion of Tax Treaties Principle, Kluwer Law and Taxation,(1991), p.65.
[24] *Id.*
[25] Klaus Vogel, Double Tax Treaties and Their Interpretation, *Berkeley Journal of International Law*, Vol. 4,(1986), p.15.
[26] Rohitagi, *supra* note 6, p.3.
[27] Ariane Pickering, Why Negotiate Tax Treaties, 2014, p.9 available at https://www.un.org/esa/ffd/wp-content/uploads/2014/08/Papers_TTN.pdf&ved last accessed on June 18, 2020).
[28] *Id.*
[29] Eric Kemmeren, Principle of Origin in Tax Conventions: A Rethinking of Models, Dongen, Peijnenburg publishers,(2001), p.73.
[30] *Id*.

manifestations of taxation are so detrimental to inter-state trade activities, and it requires a double taxation treaty that particularly prunes these forms of taxation triggered by the juridical status of legal subjects.

Further, such treaties are vital to delimit the taxing rights between two contracting parties or the allocation of taxing rights. As such, the double taxation treaty grants taxing rights between parties to avoid double taxation for every single type of income and assets.[31] Still looking into another important role of such treaties, one could see their contribution to prevent fiscal evasion and avoidance. Evidencing this key role, a double taxation treaty characteristically tends to hinder evasion and avoidance of taxes on income and assets by exchanging taxpayer information and a legal framework for administrative co-operation and mutual assistance in tax matters between the two governments.[32] In doing so, the tax treaty goes far beyond merely addressing the problem of double taxation.

Apart from such roles, the tax treaty serves the purpose of establishing a unified procedure for dispute settlement. Through the terms of tax treaties, contracting states could reach an agreement on a dispute resolution mechanism arising from the observance of each related party's tax laws regarding cross-border transactions.[33] Such dispute resolution with the tax treaty is carried out based on a reciprocal agreement called Mutual Agreement Procedure (MAP) between the two parties' competent authorities.[34] Finally, a double taxation treaty could be employed as an instrumental means to harmonize tax definitions of contracting states. As states can levy taxes in their sovereign territory, they can describe the same term without a tax treaty.[35] For example, the concept of the *source according to service* may denote varying meanings. In one of the party states, "source" may mean where services are performed, while the other state may take *it* " as the place where services have their effects.[36] Such differing definitions would make double taxation too general and ambiguous. Yet, by standardizing such definitions, an inter-state tax treaty can eliminate the double

[31] Anh D. Pham, Ha Pham & Kim Cuong Ly, Double Taxation Treaties as a Catalyst for Trade Developments: A Comparative Study of Vietnam's Relations with ASEAN and EU Member States, *Journal of Risk and Financial Management*, Vol.12, No.4, (2019), p.177.
[32] *Id.*
[33] Pham et al, *supra* note 31, p.178
[34] *Id.*
[35] Xiaoye Xiong, The Effect of Tax Treaties on Foreign Direct Investment: A Study of China's Shifting Tax Treaty Policy, Master's thesis, Tilburg University, (2018), P.10.
[36] Dan Throop Smith, the Functions of Tax Treaties, *National Tax Journal*, vol.12, No.4, (1959), p.317.

taxation of foreign profits, strengthen legal certainty for individual taxpayers, and stimulate capital flows.[37]

While these varying roles of double taxation treaties are identified in the literature, the extent of their practical application is not yet clear. This is mainly because their application is inherently prone to the counter-effect of aggressive tax planning strategies in which individuals and business entities tend to use tax treaty network to avoid taxes.[38] Estimating such counter effects of aggressive tax planning requires assessing the magnitude of bilateral double taxation agreements (DTA) network in force today. Yet, it isn't easy to find a centralized, complete, and public database of such networks.[39] One can only find as many as 3,000 Double Taxation Agreements (DTAs) in the literature, which could be a fraction of potential bilateral tax relationships in force today.[40]

Despite the above-mentioned tax treaties' objectives, such bilateral tax treaties network may let individuals and business entities to employ aggressive tax planning strategies to avoid taxes.[41] Such moves of treaty abuse involve transactions or arrangements structured by persons who are not residents of a contracting state to obtain the benefits of a tax treaty whose benefits are only intended to be granted to the contracting states' residents. Such practices are widely known as *treaty shopping.* [42]

The concept is of American origin, and it is closely related to the term '*forum shopping,'* which has been commonly used in the U.S. civil procedure.[43] Its specific origin can be traced to Aiken *Industries Inc. v. Commissioner*, a case adjudicated by the U.S. Congress in April 1971.[44] In this case, a U.S. subsidiary borrowed funds from its parent company in Ecuador. To escape the interest payments under the U.S.-Honduras treaty, it paid the interest to a subsidiary in Honduras.[45] The U.S. Tax Court

[37] Bruce A. Blonigen & Ronald B. Davies, Do Bilateral Tax Treaties Promote Foreign Direct Investment? *SSRN Electronic Journal*, 2002, p. 526, available at https://www.researchgate.net/deref/http%3A%2F%2Fdx.doi.org%2F10.2139%2Fssrn.445964 last accessed on July 28, 2020.

[38] Panayi, *supra* note 11.

[39] Martin Hearson, Measuring Tax Treaty Negotiation Outcomes: the Action Aid Treaties Data set. ,(2016a), ICTD Working Paper 47, Institute of Development Studies, p.13, available at http://eprints.lse.ac.uk/67869/1/Hearson_measuring_tax_treaty_negotiation.pdf (last accessed on May 20, 2020).

[40] *Id.*

[41] Lang, *supra* note3, p.30.

[42] Pérez, *supra* note 15, p.14.

[43] Andreas Nyberg, Treaty shopping, Master thesis, University of Lund, (2001), p.6.

[44] *Id.*

[45] Anna A. Kornikova, Solving the Problem of Tax Treaty Shopping using Limitation on Benefits Provisions, *Richmond journal of law and business*, Vol. 8, No. 2, (2008), P. 259.

disallowed treaty benefits in this back-to-back loan because, in the absence of a business purpose, the Honduran affiliate acted as a "conduit" to pass the interest payments to the parent in Ecuador.[46]

Although this is supposedly the time when the expression was created, the tax planning method dates even further back. As early as 1945, the tax treaty between the U.S. and the U.K. had an abuse clause trying to limit treaty abuse.[47] Therefore, in its historical essence and current use, treaty shopping is an artificial arrangement implemented by an economic operator to secure the benefits of a double tax treaty that were not intended by the contracting states in their negotiation. This activity may result in very sophisticated schemes mainly put in place by using conduit companies.[48]

Capturing its fundamental elements, Vogel describes it as "a situation where transactions are entered, or entities are established, in other States, solely to enjoy the benefit of particular treaty rules existing between the State involved and a third State which otherwise would not be applicable".[49] One of the major characterizing features implied in this definition is the fact that Treaty shopping involves at least three states. The first state is *the residence state*, where the law subject (like a physical person or a business) has its residence.[50] The company in the residence state then starts another business or invests in the second state. The second state is called the *base company state, conduit company state,* or *holding company state,* [51] *whereas the third state is a source state,* where the actual income or the appreciation of an investment is obtained.

Thus, the base/conduit/holding company state is an intermediary between the residence state and the source state.[52] As such, the residents of a third country may design their business structure to take advantage of the DTAs of a country with another country and avoid tax payment.[53]

2. Tax Treaty Shopping Strategies

Treaty shopping can be done in various ways. The most typical structure for a multinational group includes an intermediate holding company, acting as a link

[46] *Id.*
[47] Nyberg, *supra* note *43*, p.6.
[48] Weeghel, *supra* note14, p. 119.
[49] *Id.*, p. 117.
[50] Nyberg, *supra* note *43*, p. 9.
[51] *Id.*
[52] *Id.*
[53] Sanjay Kumar Yadav, Abuse of Double Taxation Avoidance Agreement by Treaty Shopping in India, *Journal of Humanities and Social Science*, Vol.23: No. 10, (2018), p.68.

between the parent company located in a given country and the controlled companies operating in other countries.[54] An intermediate holding company is often a body through which treaty shopping is done and generally applicable in two forms: through *a direct conduit* and *stepping stone conduit.*[55] A direct conduit is achieved by interposing an entity in the state of residence. The entity then forwards the income, inbound from the source state, to an entity in a third state through a dividend distribution.[56] Direct conduits lead to no erosion of a company's taxable base as dividends are usually not deductible expenses.[57]

Further, in a direct conduit modality, an interposed corporation, taking advantage of a tax treaty, is used to shift income to another country whose residents cannot benefit directly from the treaty provisions.[58] In other words, whenever two countries, say A and B, have entered a tax treaty where a third country, say C, has signed a tax treaty with country B, the taxpayers in country C may take advantage of the tax treaty between A and B by incorporating a company in country B. Therefore, if the residents in country C want to invest in country A, by interposing a company resident in country B, they take advantage, firstly, of the tax treaty between countries A and B, avoiding the withholding tax on the income transferred from the country A to country B. Secondly, they benefit from the treaty provisions in force between countries B and C[59]concerning the withholding tax on the dividends distributed from the company in country B to the residents of country C.[60]

Alternatively, the income may be tax-exempted in country B because of the application of a parent-subsidiary regime. In other words, assets and rights giving rise to passive income are transferred to the company in country B to take advantage of the full or partial exemption from the withholding tax that country A would have levied in

[54] Nyberg, *supra* note *43*, p.17.
[55] Federico G. Scarlata, Global Tax Planning and Offshore Opportunities, Helsingborg, Comtax AB publishing, (1995), p. 90.
[56] Benjamin Malek, The Concept of Beneficial Ownership in Tax Treaty Practice, Master's thesis, University of Lausanne, (2018), P.2.
[57] *Id*.
[58] Paolo Burattin, Anti-Avoidance Measures against Treaty Shopping and the Employment of Base Companies, Master's thesis, Ca' Foscari University,(2015), P.18.
[59]Simone M. Haug, The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative
Analysis, *Vanderbilt Journal of Transnational Law*, No. 29, (1996), p. 205.
[60] Burattin, *supra* note 58, p.19.

case the investment had been made directly by using a company incorporated in country C.[61]

Turning to the stepping stone conduit modality, one can observe similar operations with limited differences. In this case, instead of dividend distribution, the payment takes the form of a deductible expense. More precisely, the company's tax base, interposed in the state of residence, is reduced with deductible expenses (e.g., interests, royalties, management fees) paid to the final beneficiary.[62] The stepping stone structure mainly relies on the erosion of the income produced through the investment in one country, say country A, by a company incorporated in country B, under the assumption that country B is a high tax jurisdiction.[63] In this case, the corporation in country B pays another company in country D, a low tax jurisdiction, deductible expenses, so that country B's net income is lower.[64]

Therefore, the income arrives at the residents of country C from the company in country D, which enjoys a privileged tax regime, and not directly from the company in country B.[65] In general terms, the essence of treaty shopping under the scenario of the modalities involves interposing a company entitled to claim the treaty benefit between the payer of the income and the recipient. As such, it occurs when a person, not a resident of a contracting state to a double taxation convention, attempts to obtain benefits granted to residents of that state.[66]

Still, treaty shopping is conducted through a third modality called a *base company* scheme.[67] In this case, the tax benefit arises in the residence state.[68] For example[69], if a company in state A owns all shares in a company situated in country X, based on state A's domestic tax legislation and the double taxation treaty between states A and X, the

[61] OECD, Double Taxation Conventions and the Use of Conduit Companies, R(6) in Model Tax Convention on Income and on Capital, 2014, paragraph 1(hereafter called OECD,2014) available at https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/r-6-double-taxation-conventions-and-the-use-of-conduit-companies_9789264239081-99-en&ved (last accessed on July 28, 2020).

[62] Daniel Vries Reilingh, Manual of International Tax Law,2nd Edition, Zürich, 2014, p. 69.

[63] Burattin, *supra* note 58,p.19.

[64] Haug, *supra* note 59, p. 206.

[65] OECD,2014,paragraph 1.

[66] OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report, OECD/G20 Base and Erosion Profit Shifting Project (hereafter called OECD, Action 6 Final Report), p. 17. available at **https://www.oecd.org/tax/treaties/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf&ved** last accessed on July 28, 2020.

[67] Nyberg, *supra* note 43, p.9.

[68] *Id*., p.20.

[69] *Id*.

disposition of the shares would trigger a tax effect. Accordingly, the company in state A transfers the shares to a wholly-owned company in state B. This internal transaction does not render any tax in state A.[70] The Company in state B then sells the shares of the company situated in country X, and such disposition of share is not taxed as the domestic laws may render capital gains to be tax-free.[71] The tax-free capital gain can then be transferred to the mother company in state A through dividends. It is assumed that the dividends are tax-free through the double taxation treaty between states A and B. In-state A, the company has, through this scheme, completely avoided a tax on the capital gains when selling the shares of the company in country X.[72] In sum, the tax benefit in this modality arises in the residence state.[73]

3. Major Impacts of Tax Treaty Shopping

Tax treaties play an important role in international tax planning.[74] To reduce tax liability, a taxpayer needs an incentive to undertake economic activities in a state that has a tax treaty with their state of residence. Suppose there is no applicable tax treaty between the state of their residence and the states in which the taxpayer wants to invest. In that case, the taxpayer will arrange their economic activities to utilize another state's tax treaty.[75] As treaty benefits should only be available to residents of the contracting states, the attainment of treaty benefits by non-residents is achieved by the imposition of a legal entity, a conduit, in a treaty state.[76] To this effect, treaty shopping has various impacts on the tax system.

The first impact of treaty shopping is the loss of revenue for contracting parties to bilateral double taxation avoidance agreements.[77] States expect that income is to be taxed in at least one of the states. If a state gives up its right to tax a particular income item, it expects the other state to tax it.[78] One situation in which income may not be subject to taxation is where a state has the exclusive right to tax that income and exempts that income from taxation.[79] Consequently, the taxpayer incurs no tax liability in one state yet still seeks the tax treaty's application against the other state. If the

[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] Louisa Boyd, Double Taxation Agreements: New Zealand's Approach to Treaty Shopping, *Auckland University Law Review*, Vol.4:No.13,(2007), P.65.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] Weeghel, *supra* note14, p.105.
[79] *Id*.

taxpayer were entitled to treaty protection, this would result in non-taxation, also known as tax avoidance.[80] Yet, there is no evidence of a general principle that a taxpayer must show that double taxation would arise as a pre-requisite to entitlement to treaty benefits. Consequently, a treaty becomes a convention for the avoidance of any taxation.[81] This, in effect means, treaty shopping opens a space for unintended use of tax treaties by third-country residents or individuals from non-contracting states. It makes bilateral treaties effectively "treaties with the world" and leads to a loss of tax revenues in the source State.[82]

Apart from such effects, treaty shopping also causes a loss of interest to enter tax treaties. If treaty shopping were permitted, the third state has a reduced incentive to enter into tax treaties as its residents can benefit from another state's tax treaty.[83] Furthermore, if the third state were to enter into treaty negotiations, its bargaining power would be increased.[84] As the residents of this state can utilize other treaties' benefits, the terms of a new treaty would be more beneficial than existing treaties.[85] Hence, treaty shopping creates a disincentive for countries to negotiate tax treaties.[86]

Finally, it is argued that treaty shopping is often linked to the breach of the reciprocity principle. As one of the forms of inter-state treaties, tax treaties are expected to be built on principles of reciprocity. Where such principle is not observed, a state will not enter a tax treaty[87], or it gives up or limits its rights to the treaty partner's tax residents and reciprocally would move to obtain the same benefits for its residents. Such effects are particularly associated with the involvement of a third state. When a third-country resident "shops" into a treaty, then the treaty concessions are extended to a resident whose state has not participated in this arrangement and may not reciprocate with corresponding benefits.[88] To this effect, the treaty's usual quid pro quo is therefore compromised and the process subverted.

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[80] *Id.*

[81] Charles Kingson, The Coherence of International Taxation, *Columbia Law Review*, Vol. 81, (1981), p.1153.

[82] Rohitagi, *supra* note 6, P.6.

[83] Haug, *supra* note 59, p. 219.

[84] *Id.*,p.220.

[85] *Id.*

[86] H.David Rosenbloom &Stanley Langbein, United States Tax Treaty Policy: An Overview, *Columbia Journal of Transnational Law*, Vol.19, (1 98 1), p. 676.

[87] Weeghel, *supra* note14,p. 116.

[88] Reuven S. Avi-Yonah & Christiana HJI Panayi, Rethinking Treaty-Shopping: Lessons for the European Union, Michigan university, book chapters,2010, p.25, available at https://repository.law.umich.edu/book_chapters/78 (last accessed on May 28, 2020).

4. Global Responses to Tax Treaty Shopping

Treaty shopping is an integral part of global transactions and is, in principle, permitted as a general tax planning method. Yet, there are limits to such principles, the violations of which would lead to unacceptable transactions.[89] As such, the use of treaty shopping largely requires cautiously forecasting transaction consequences that may lead to undesirable outcomes.[90]

Accordingly, the tax treaty system has focused on designing mechanisms to counter specific practices that result in abuse of tax treaties by persons whom the treaties were not intended to benefit or persons who access benefits which the treaties were not designed to confer.[91] Through these moves, two major mechanisms have been devised as a way to contain such undue benefits. This can firstly be made by incorporating specific anti-treaty shopping provisions in the treaties. Alternately, countries may formulate domestic legislation prohibiting the use of a treaty for shopping.[92] Each of these two mechanisms involves several steps leading to the desired outcome. The following sections discuss these steps in greater depth.

4.1. Treaty Rules to Combat Treaty Shopping

Tax planning on the domestic or the international level is by no means objectionable, though extensive tax planning is an indication of imperfect legislation.[93] Nevertheless, tax planning may reach a point beyond which it cannot be tolerated within a legal system intended to conform to justice principles.[94] As a usual course of process, countries devise anti-abuse rules to prevent the residence principle's circumvention from allowing treaty benefits to taxpayers that are not residents of contracting states.[95]

As it has been pointed out earlier, one of such mechanisms is incorporating specific anti-treaty shopping provisions in a double taxation agreement.[96] This mechanism is widely in use in several countries such as the Netherlands, India, the USA, Switzerland, and the U.K. These countries incorporated specific provisions in their

[89] Klaus Vogel, Double Taxation Conventions, A Commentary to the OECD, UN, and US Model Convention for the Avoidance of Double Taxation of Income and Capital, With Particular Reference to German Treaty Practice, 3rd edition, London, Kluwer Law International, (1997), P.119.
[90] Nyberg, *supra* note 43, p.32.
[91] Pérez, *supra* note 15, p.5.
[92] Yadav, *supra* note 53, p.72.
[93] Nyberg, *supra* note 43, P.30.
[94] *Id.*
[95] Pérez, *supra* note 15, P.16.
[96] Yadav, *supra* note 53, p.72.

inter-state treaties mainly to prohibit misuse of a treaty by residents of a third state.[97] Looking into the contents of the terms in such treaties, one could observe that containing such adverse effects of treaty shopping requires incorporating important rules that effectively contain the adverse effects of treaty shopping. The next subsections identify these rules and characterize each of them with sufficient details.

4.1.1. Limitation on Benefits Provision

The limitation on benefits provision is one of the containing terms in use against treaty shopping since the 1945 US-UK tax treaty.[98] The rule is largely referred to be the first foundation of what would later become the United States standard Limitation on Benefits Provision. The provision is included in almost all U.S. tax treaties today. Also, the historical literature shows that the 1962 U.S-Luxembourg treaty contained the first separate anti-treaty shopping provision. These terms specifically aimed at limiting benefits under the treaty to those who were citizens or residents of one of the contracting states by disallowing any treaty benefits to any holding company entitled to any special tax benefit under the specific treaty or any income derived from such companies by any shareholder thereof.[99]

The contents and intents of the limiting provision were refined in the next decades. In 1977, the United States published a Model Treaty to act as a coherent guide for future treaty negotiations.[100] This model treaty has included a Limitation of Benefits (LOB), which denies treaty benefits to a company resident in a contracting state if non-residents own more than 25% of the company's capital.[101] As an extension of this development, a more enriched LOB article was formulated in the 1989 U.S-Germany tax treaty. This article was the first provision representing all elements of a modern LOBs clause and was received by the tax community as a major innovation and has been used as a model for subsequent treaty negotiations.[102]

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[97] *Id.*

[98] I.K. Sugarman, "The U.S.-Netherlands Income Tax Treaty: Closing the Doors on the Treaty Shoppers", *Fordham International Law Journal*, Vol.17:No.3, pp. 776-824.

[99] Convention Between the United States of America and the Grand Duchy of Luxembourg concerning Taxes on Income and Property, signed on Dec. 18, 1962 (1962 U.S.-Luxembourg tax treaty) available athttps://www.irs.gov/pub/irstrty/luxem.pdf&ved (last accessed on May 28, 2020).

[100] Sugarman, *supra* note 98, pp. 776-824

[101] M.F. Huber and M.S. Blum, "Limitation on Benefits under Article 22 of the Switzerland-U.S. Tax Treaty", *Tax Notes International*, Vol.39, No.l 6, (2005), pp. 547-568.

[102] Sugarman, *supra* note 98, pp. 776-, see also P.T. Kaplan, "Treaty Shopping Under the New U.S.-Netherlands Treaty" *Bulletin for International Fiscal Documentation*, Vol.47: No. 4, (1993), pp.175-180.

The LOB provisions in the latter treaty limit the treaty's applicability only to the other state's residents by defining the term *resident* in the definition part of the tax treaty. For example, as a precondition to benefit from a tax treaty, it requires that state's residents to own half of a company's assets established in the third country.[103] Thus, the LOB clause denies the treaty benefits to taxpayers who would not pass its tests, thereby treating them more disadvantageously than others. Hence, from the perspective of fundamental freedom, the LOB clause treats the qualified resident from the non-qualified residents differently and creates a burden on cross-border activities.[104] This approach is well known in the international arena, and it is present in the U.S. tax treaty model and some Indian and Japanese treaties.[105]

4.1.2. Beneficial Ownership

The notion of beneficial ownership was originated in the equity law of England.[106] It is largely common in the trust practice, in which the English law uses it primarily to draw a difference in the ownership rights of trustees and ownership rights of beneficiaries in a trust.[107] As such, the concept of beneficial ownership manifests in two major forms: legal ownership in the head of the trustee and economic or beneficial ownership in the beneficiary's head[108] This distinctive use of the ownership forms has particular importance in identifying the rights and duties of respective subjects connected to tax benefits. For example, although the trustees as legal owners can administer the trust in themselves, they only can perform their duties and hold the ownership for the benefit of the beneficiaries.[109] Therefore, only the beneficiaries, as beneficial owners, will be entitled to appropriate the tax benefits of the trust.

The distinction between such rights can further open space to ensure that inter-state treaty benefits are limited to the contracting states' residents.[110] Accordingly, the concept of beneficial ownership provides that a resident invoking a withholding tax reduction should own the income. This requirement signifies that the purpose of treaty tax benefit, instead of merely allowing to pass income to a resident of a non-

[103] Rohitagi, *supra* note 6, P.6 .
[104] Filip Debelva, Dina Scornos, Jan Van den Berghen & Pieter Van Braband, LOB Clauses and EU-Law Compatibility: A debate Revived by BEPS, EC Tax Review, Kluwer Law International, (2015), pp. 134-135.
[105] OECD, Action 6 Final Report, Para. 19, p. 18.
[106] Pérez, *supra* note 15, P.17.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*,p.26.

contracting state,[111] is to reward legal subjects because of their involvement in transactions as residents of a contracting state, Therefore, according to this approach, treaty benefits on passive income can only be granted to residents of the contracting states that are ultimately the recipients of the economic benefits, irrespective of who the immediate recipient of the income is.[112] Thus, in the tax treaty system, the concept operates as an economic test applied to counter treaty-shopping strategies through conduit companies.[113]

Internationally, the concept of beneficial ownership was first introduced by the OECD in the Model Convention in 1977, and it has been serving as one of the anti-abuse rules directly provided for double taxation avoidance agreements.[114] Further, it is currently incorporated into more than 2400 Double Tax Treaties concluded by more than 170 countries worldwide.[115] Therefore, the idea is critical for determining a person's eligibility for the tax treaty benefits and allocating the taxing rights between two contracting states concerning the relevant category of income.[116]

4.1.3. Third Country Articles or Bonafide Approach

It is pointed out earlier that moves of treaty shopping inherently involve the interaction of three states.[117] The major motive to include the third state, which could be a contracting state, is to reduce or avoid a tax.[118] In the absence of a treaty, the withholding tax rate may be substantial, and by routing the payment through a treaty country, the rate could be reduced. Yet, business entities or individuals may abusively move through these routes to escape taxes or other forms of payment. To prevent the treaty's abuse in this way, some articles (particularly interest and royalty articles) include a paragraph stipulating that the article shall not be applicable if payment was created or assigned mainly to take advantage of the treaty and not for *bonafide*

[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.see* OECD Model Convention of 1977, available at https://www.oecd-ilibrary.org/taxation/model-double-taxation-convention-on-income-and-capital_9789264055919-en&ved (last accessed on May 28, 2020. Articles 10, 11, and 12 of this Model Convention was applied the term beneficial owner as a provision to prevent the design of tax planning to allow residents of a third state to incorporate a conduit company in a contracting state to obtain a withholding tax reduction.
[115] Anna Vitko, Per Aspera ad Astra: Towards the International Fiscal Meaning of the Concept 'Beneficial Owner, Master's thesis, Lund University, (2011), p.3.
[116] *Id.*
[117] Lars Pelin, Internationell skatterätt Ur et svenskt perspektiv, 2nd edition, Lund, Student littérateurs,(2000), p.114.
[118] Nyberg, *supra* note 43, p.35.

commercial reasons.[119] To take a practical example, in a treaty between the U.K. and the Netherlands, a pertinent provision with this intent: provides;

> *This article's provision shall not apply if the debt-claim regarding which the interest is paid was created or assigned mainly to take advantage of this article and not for bona fide commercial reasons.*[120]

Looking into the contents of this provision, one can see that the *bona fide* approach is adopted to counter the treaty shopping concerning interest payment. Accordingly, if the debt claim in which the interest is paid were created or assigned to take the treaty's advantage and not for *bona fide* commercial reasons, the special privilege accorded by the concerned treaty would never be extended to such kinds of arrangements.

4.1.4. Exclusion of Tax-Favored Entities from Treaty Benefits

Treaties could exclude particular tax-favored entities in treaty countries. These entities may be excluded from all forms of treaty benefits or benefits emanating from certain articles.[121] The U.K., for example, excluded certain holding companies in Luxembourg and Barbados from treaty benefits in their double taxation conventions.[122] Also, Sweden has used the same approach in its inter-state tax treaty with Barbados.[123]

At this point, it is important to note that often treaty shopping involves the interposition of companies in countries that enjoy a favorable tax regime. Thus, companies always tend to distance themselves from countries with such excluding treatments. Also, governments have been reluctant to sign treaties with so-called tax havens. Therefore, the abstinence approach means that countries will cautiously think to include or not include a treaty with states known for their low tax regime or as a place for conduit companies.[124]

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[119] Wenehed, L-E., A Guide to Effective Tax Planning Within a Global Group, Helsingborg, Comtax Publishing AB, P.31.

[120] The UK – Netherlands Double Taxation convention and protocol, signed on September 26, 2008, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732461/netherlands-dtc-2008-2013.pdf&ved,Art.11(6) (last accessed on May 28, 2020).

[121] Nyberg, *supra* note 43, p.34.

[122] Wenehed, *supra* note 119, P. 30.

[123] Nyberg, *supra* note 43, p.35.

[124] Becker &Wurm, *supra* note 16, P.6.

4.2. Anti -Treaty Shopping Measures Proposed By BEPS Action Plan 6 and 15

Base Erosion and Profit Shifting (BEPS) refers to tax avoidance strategies whereby MNEs exploit the gaps or mismatches in tax rules to artificially shift profits to low or no-tax jurisdictions where there is little or no economic activity to minimize tax payment.[125] As one of the major developments in this area, In September 2013, the OECD and G-20 countries adopted a 15-point Action Plan with the primary purpose of managing BEPS by MNEs.[126] Out of the 15-points, Action Plan 6 was mandated to prevent granting treaty benefits in inappropriate circumstances.[127]

Further, in September 2015, the OECD released the final report on BEPS action plan 6, According to which treaty shopping is one of the most important sources of BEPS concern.[128] Accordingly, the OECD has presented three main recommendations.[129] First, it recommends the inclusion in the tax treaties of a special anti-abuse rule as the *Limitation on Benefits clause* (LOB), which would prevent the treaty's granting benefits to residents that do not fulfill its requirements. This approach is well known in the international arena, and it is largely in use in the U.S. tax treaty model and couple of Indian and Japanese treaties.[130]

The second recommendation justifies incorporating a general anti-abuse rule as the *principal purpose test* (PPT).[131] It is rationalized in the recommendation that the general anti-abuse rule would prevent the treaty benefits by testing the transactions or arrangements' principal purposes.[132] Capturing its essence in the final report of BEPS Action 6, the OECD has particularly proposed the following for the *principal purpose test*:

> *Notwithstanding with other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude that any arrangement or transaction is directly or*

[125] OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report, (hereafter called OECD BEPS action 7,2015 final reports) available at https://www.oecd.org/ctp/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htmlast (accessed on July 28, 2020).
[126] *Id.*
[127] OECD, Action 6 Final Report, p. 9.
[128] *Id*.
[129] Amela Juka, Is the BEPS Action Plan 6 " Preventing Treaty Abuse" Compatible With the EU Law Concept of Abuse?, Master's thesis, Lund University, 2015/16, p.3.
[130] OECD, Action 6 Final Report, p. 18.
[131] *Id.*
[132] *Id.*

> *indirectly for the principal purposes of obtaining benefit unless it is established that the granting of benefit is in light of the objective and purpose of this Convention.*[133]

Turning to the third recommendation, the institution directly refers to the amendment of the title and preamble, clearly stating that the tax treaties' purpose is not intended to generate treaty abuse opportunities of double non-taxation.[134] Accordingly, the OECD recommended an amendment of the title and preamble of the OECD Model Convention, which reads that "[c]onvention between State A and State B for eliminating double taxation concerning taxes on income and capital and prevention of tax evasion and avoidance."[135]

A closer look into the spirit of the convention shows that the OECD seeks to encourage states to enter into a tax treaty agreement that eliminates double taxation on income and capital taxes without creating opportunities for double non-taxation or reduced taxation through tax avoidance and evasion.[136] Yet, it is important to note that these actions are only proposals, and therefore they constitute soft laws. However, with their implementation in the tax treaties and domestic law, they will become hard laws.[137] Thus, the BEPS Action plan 6 recommendations will have legal consequences in the taxpayer's cross-border activities and the domestic legal system. Based on the BEPS Action Plan, the OECD Model Convention has integrated anti-treaty shopping rules, specifically, *principal purpose test* and *Limitation of benefits clause* as a part of the BEPS Action Plan.[138] Besides, a multilateral instrument (MLI) developed based on BEPS action plan 15 has also integrated the principal purpose test and Limitation of the benefits clause for fighting treaty shopping.[139] Hence, based on BEPS Action Plan 6 and 15, both the OECD Model Convention and MLI have brought these two instruments together as syndetic tools for fighting treaty shopping.

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[133] *Id*., p.55.
[134] *Id*., p. 9.
[135] OECD, Action 6 Final Report, p.91.
[136] Frans Vanistendael, Is Tax Avoidance the Same thing under the OECD Base Erosion and Profit Shifting Action Plan, National Tax Law and EU Law, Bulletin for International Taxation, IBFD, (2016), p. 169.
[137] Juka, *supra* note 129, p.3.
[138] OECD Model Convention, 2017 update, paragraph 9 to Art. 29 & paragraph 1 to Art.7,(hereafter called OECD Model Convention) available at https://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf (last accessed on June 03, 2020).
[139] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base erosion and profit shifting, 24th November 2016, Art.6 &7(1), available at https://www.oecd.org/tax/beps/beps-actions/action7/ (last accessed on June 03, 2020).

4.3. **Domestic Anti-Avoidance Rules**

Treaty shopping can also be combated through domestic laws, using general anti-tax avoidance or anti-abusive provisions. Some countries have specific anti-treaty shopping provisions in their domestic law and sometimes contain Limitation on Benefits provision in their treaties to counter unintended treaty shopping.[140] Domestic anti-avoidance rules are domestic tax law rules intended to curb tax avoidance (including tax avoidance in cross-border situations).[141] The rules can be either established through judicial precedent[142] or introduced by the legislature in statutory law.[143] Accordingly, governments endeavor to combat abusive tax avoidance through specific anti-avoidance rules (SAARs) and general anti-avoidance rules (GAARs).[144]

According to Chris Evans, specific anti-avoidance rules constitute "smart bombs" in the war against specific abusive tax avoidance. They target individual subjects to contain their abusive moves in treaty shopping. On the other hand, general anti-avoidance rules act as “weapons of mass destruction,” curbing a mass of treaty shopping moves at a time[145]. In doing so, enactment of general anti-abuse provisions saves the tax system from "the far greater proliferation of detail that would be necessary if tax avoiders could succeed merely by bringing their scheme within the literal language of substantive provisions written to govern the everyday world."[146] Finally, it is important to note that specific anti-avoidance rule, unlike general anti-abusive rules, applies only to "stipulated or suspected" transactions and are rarely retroactive in an application. Therefore, they "cannot prevent avoidance transactions not previously detected."[147]

Another point worth considering under this subject is the varying moves of states in using the instruments. Some countries, as a supplement to specific statutory rules and

[140] Rohitagi, *supra* note 6, P.6.

[141] Larisa Gerzova &Oana Popa, Compatibility of Domestic Anti Avoidance Measures with Tax Treaties, *European Taxation*, Vol.53.No. 9, (2013), p. 421.

[142] Vikram Chand, The Interaction of Domestic Anti-Avoidance Rules with Tax Treaties (with special references to the BEPS project), Tax Policy Series, Geneva/Zurich 2018, Schulthess,p.47.

[143] Bob Michel, Anti Avoidance And Tax Treaty Override: Pacta Sunt Servata, *European Taxation*, Vol.53.No.9, (2013), p. 414.

[144]David G. Duff, Tax Avoidance in the 21st Century, In Australian business reform in retrospect and prospect in Chris Evans & Rick Krever (eds), Thomson: Sydney, (2009), P. 492.

[145] Chris Evans, Containing Tax Avoidance: Anti-Avoidance Strategies, University of New South Wales Faculty of Law Research Series No. 40, (2008), P. 32.

[146] Surrey Stanley, Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail, *Law &Contemporary Problems*, Vol. 34, No. 32, (1969), P. 707.

[147]Finance Quebec, Aggressive Tax Planning, 2009, P.28 available at http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN_DocCons_PFA.pdf&ved (last accessed on May 28, 2020).

GAARs, would introduce statutory GAARs to discourage abusive tax avoidance. Also, others opt between SAARs and GAARs to discourage treaty shopping's harsh effects. In most cases, because of their advantages, governments continue to rely on SAARs to counteract abusive tax avoidance schemes.

It is argued that countries opt for the latter instruments due to the "boost to real-time intelligence" created by enacting disclosure regimes.[148] As such general anti-avoidance rules are amenable to domestic payments and could be difficult to apply to international payments.[149] Sometimes, they are not even applicable to the international arena. It isn't easy to prove that a global structure is not set up for *bona fide* commercial reasons but only for treaty benefits.[150] Currently, many states have SAARs instead of statutory GAARs[151], though this trend has changed in light of international developments, especially the OECD's BEPS project.[152]

Turning to another scenario of application for these tools, we could observe that domestic anti-avoidance rules may only be applied to double taxation treaties if justified by domestic and international laws.[153] At the domestic level, countries introduce anti-avoidance rules in their tax codes or treaties to combat the perceived abuse of their tax legislation and deny the granting of benefits of their bilateral tax treaties.[154] Such measures, in some circumstances, may override the existing treaty obligations. Thus, the determination of a tax treaty can be overridden by new domestic tax legislation depending on how the treaty is implemented into the domestic law.[155] Although some states permit specific domestic law to override treaty obligations, such override is considered as a breach of the treaty itself under international law.[156]

A final point worth noting is the relationship tax treaties have with international laws. As tax treaties are part of international law, their legal effects are also embodied in the Vienna Convention. Evidencing this fact, the principle of *pact sunt servanda*, adopted

[148] Evans, *supra* note 145, P. 15.
[149] Vogel, *supra* note 25, P.122.
[150] *Id*.
[151] Chand, *supra* note 142, p.8.
[152] *Id*., p.6.
[153] Nyberg, *supra* note 43, p.2.
[154] Luc De Broe, International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law Concerning Conduit and Base Companies, International Bureau of Fiscal Documentation, (2008), p.280.
[155] Craig Ellife, the Lesser of Two Evils: Double Tax Treaty Override or Treaty Abuse? *British Tax Review*, No.1,(2016), P.65.
[156] Nyberg, *supra* note 43, P.13.

under Article 26 of the Vienna Convention, does not allow states to invoke domestic laws to justify that they did not fulfill their obligation under tax treaties.[157]

5. The Need to Integrate Anti-Treaty Shopping rules into Ethiopian Income Tax System

Ethiopia's international business and investment activities involve global entities' interactions that inherently make sensible moves to gain the most out of their transactions. Further, the global business environment is so complex that it brings into contact varying business entities with multi-connections in terms of place of origin and residence. This, in effect, means that international business interactions are highly susceptible to abusive treaty shopping moves, requiring proactive responses on the part of trading states. Among others, this proactive move requires identifying areas of risk and devising protective measures against them. As part of the effort to achieve this in Ethiopia, the next sections of this article assess the legislative actions that the country has taken, identify the areas of vulnerability to abusive treaty shopping, and justify the need to incorporate containing mechanisms for such damaging moves.

5.1. The Need to Integrate Anti-Treaty Shopping Rules into Ethiopian Double Taxation Avoidance Agreements of Ethiopia

As pointed out in the explanatory sections of this article, the problem of double taxation is attributed to income tax jurisdiction whereby some countries adopt a source or a resident tax rule or a hybrid of both. Looking into the Ethiopian income tax jurisdiction, it sets out global jurisdiction concerning resident and source jurisdiction for a non-resident.[158] Accordingly, in the case of cross-border transactions, double taxation would inevitably occur. Double taxation tends to discourage international trade and investment. That is why the world communities have provided remedies for double taxation. This can be made either through unilateral acts of state via domestic laws or by multilateral and bilateral tax treaties.

To this end, Ethiopia has employed both unilateral actions and bilateral tax treaties as a remedy for double taxation. Unilaterally, Article 45 of the Income Tax Proclamation has integrated foreign tax credit into the Ethiopian income tax system.[159] Further, Article 48(1) of the Income Tax Proclamation has also allowed the tax authority to conclude bilateral tax treaties with the primary purpose of avoiding double taxation

[157] Ellife, *supra* note 155, p.66.
[158] Income Tax Proclamation No.979/2016, Art.7.
[159] Income Tax Proclamation No.979/2016, Art.45.

and fiscal evasion.[160] As such, Ethiopia has concluded several tax treaties with various countries to attract foreign direct investment and increase its participation in the international arena.[161]

Through all these moves, Ethiopia has signed more than 32 tax treaties to date.[162] However, the treaties' status differs in that some of them are ratified by the two governments, and the ratification document is exchanged between the parties, while in other instances only the Ethiopian government ratifies the documents. Yet the remaining category of treaties is just signed by the respective higher official of the two governments.[163] As such, only 11 tax treaties became effective after being approved by both governments, and ratification instruments were exchanged.[164] From a legal perspective, these are the only tax treaties binding on Ethiopia and its counterparts.[165]

The other set; (about 13 treaties) are ratified by the Ethiopian government.[166] These treaties are not binding on Ethiopia since the Ethiopian government does not have any information about the treaty's status on the other side.[167] The remaining set of treaties (8) are signed but not ratified.[168] Finally, it is important to note that Ethiopia's tax treaties' structure across the documents assessed is more or less the same since Ethiopia has her Tax Treaty Model presented to the other party when the need arises.[169]

The facts discovered through the documents' assessment suggest that such networks of bilateral tax treaties that Ethiopia has signed would inevitably open a room for tax treaty shopping unless a competent institution properly regulates it. Assessing the status and handling treaty shopping essentially requires examining the contents of Ethiopia's double taxation agreements in force. One of such agreements is the double

[160] Income Tax Proclamation No.979/2016, Art.48(1).
[161] Serkalem, *supra* note 21, p.34.
[162] *Id.*, p.35.
[163] *Id.*
[164] The tax treaty between the FDRE and Italy, Egypt, India, Sudan, China, French Republic, Turkey, United Kingdom of Great Britain and Northern Ireland, Kingdom of Netherlands, Kingdom of Saudi Arabia, and the Republic of Ireland is the one that is in force at this time.
[165] Serkalem, *supra* note 21, p.35.
[166] Tax Treaties between the FDRE government and Kuwait, Russian Federation, Yemen, Algeria, Tunisia, Romania, South Africa, Israel, Czech Republic, Seychelles, Portugal, Peoples Democratic Republic of Korea, and United Arab Emirates are ratified.
[167] Serkalem, *supra* note 21, p.35.
[168] Tax treaties between the FDRE government and Palestine, Poland, Cyprus, Qatar, South Korea, Slovakia, Morocco, and Singapore are signed but not ratified.
[169] Serkalem, *supra* note 21, p.36.

taxation and fiscal evasion agreement the country signed with China.[170] A closer look into this document shows that it has no anti-treaty shopping rules. The Ethio-Singapore double taxation treaty signed in 2016 is the second treaty that invites this examination.[171] Like the Ethio-China's double taxation agreement, no provision of this double taxation agreement set out the remedies for tackling treaty shopping. The same is true for Cyprus and Ethiopia's double taxation agreement signed on December 30, 2015, and came into force on October 18, 2017.[172] In sum, the scrutiny into Ethiopia's double taxation avoidance agreements reveals that bilateral tax treaties Ethiopia entered with potential trading states are devoid of anti-treaty shopping rules.

Though these bilateral tax treaties have not included anti-treaty shopping provisions, others, relatively the latest ones, have incorporated limitations of benefits provision as a remedy for fighting treaty shopping. For example, the double taxation agreement between the Federal Democratic Republic of Ethiopia and the Republic of Mozambique, signed on February 15, 2017,[173] provides a limitation of benefits provision to tackle treaty shopping. Evidencing this, Article 29 of this treaty provides that "a resident of a Contracting State will not be entitled to the benefits of the treaty if its affairs were arranged in such a manner as if the primary purpose or one of the primary purposes was to take the benefits of the treaty."

Looking into the intents of the provision, we notice a limit set by the treaty parties against moves of treaty shopping through conduit companies. As such, if the resident of the third states uses the conduit companies in one of the contracting states to the treaty with the primary purpose of taking treaty benefits between the contracting states, the resident of the third states cannot enjoy the benefits of the treaty as the contracting

[170] Agreement between the Federal democratic republic of Ethiopia and the government of the People's Republic of China for the avoidance of double taxation and prevention of fiscal evasion concerning taxes on income,(hereafter called double taxation agreement between Ethiopia and China) available at http://www.chinatax.gov.cn/n810341/n810770/c1152674/part/1152675.pdf (last accessed on June 03, 2020).

[171] Agreement between the Republic of Singapore and the Federal Democratic Republic of Ethiopia for the avoidance of Double Taxation and the Prevention of Fiscal Evasion concerning Taxes on Income, signed 24th August 2016,(hereafter called double taxation agreement between Singapore and Ethiopia) available at https://www.iras.gov.sg/irashome/Quick-Links/International-Tax/ (last accessed on June 03, 2030).

[172] Convention between the Republic of Cyprus and the Federal Democratic Republic of Ethiopia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion concerning taxes On Income, signed on 30th December 2015,(hereafter called double taxation convention between Cyprus and Ethiopia) available athttp://mof.gov.cy/assets/modules/wnp/articles/201610/45/editor/ethiopiaen.pdf (last accessed on June 03, 2020).

[173] Double taxation agreement between the Federal Democratic Republic of Ethiopia and the Republic of Mozambique, signed on 15 February 2017, but not ratified yet, available at https://www.orbitax.com/news/archive.php/Update-Tax-Treaty-between-Ethi-29984&ved (last accessed on June 03, 2020).

states itself denied the benefits of the treaty. Particularly, those legal entities without *bona fide* business activities are denied benefits of the treaty.

The other double taxation treaty that incorporated remedies for treaty shopping is a double taxation treaty between Ethiopia and the Netherlands. Accordingly, the Protocol amending the Convention between the Kingdom of the Netherlands and the Federal Democratic Republic of Ethiopia was signed on August 18, 2014. As of January 1, 2017, it has inserted a LOBs provision to curb treaty shopping.[174] Again, Article 28 of the double taxation agreement between the Federal Democratic Republic of Ethiopia and the Republic of Korea has included a limitation of benefits provision.[175]

As illustrated through the assessments outlined earlier, except the latest three bilateral tax treaties, others (more than 29) are devoid of anti-treaty shopping rules. This would inevitably open a room for multinational enterprises to resort to international tax planning treaty shopping. This abusive move inherently results in revenue loss since treaty shoppers do not pay the tax that otherwise owed. Besides, the possibility of treaty shopping also defeats an incentive for third states to negotiate a double taxation agreement with Ethiopia. Such third states do not need to concede their source taxation of Ethiopian residents as their residents already have an opportunity to take advantage of existing Ethiopia's double taxation agreements with other countries.

Currently, there is growing attention to the question of tax treaties signed by developing countries, and the costs of tax treaties to such countries have been highlighted in recent years by NGOs such as Action Aid and SOMO.[176] In one of such assessments, an influential IMF paper warned that developing countries "would be well-advised to sign treaties only with considerable caution." Further, the OECD, as part of its Base Erosion and Profit Shifting (BEPS) project, proposes to add text to the commentary of its model treaty to help countries decide "whether a treaty should be concluded with a State or whether a State should seek to modify or replace an existing

[174] Protocol amending the Convention between the Kingdom of Netherlands and the Federal Democratic Republic of Ethiopia signed on 18th of August 2014, and effective on January 1, 2017, available at https://zoek.officielebekendmakingen.nl/trb-2014-178.html?zoekcriteria (last accessed on June 03, 2020).

[175] Double taxation agreement between the Federal Democratic Republic of Ethiopia and the Republic of Korea that signed on May 26, 2016, available at https://www.orbitax.com/news/archive.php/Tax-Treaty-between-Ethiopia-an-28087&ved (last accessed on June 03, 2020).

[176] Mike Lewis, Sweet Nothings: The Human Cost of a British Sugar Giant Avoiding Taxes in Southern Africa, London: Action Aid UK, (2013); Katrin McGauran, "Should the Netherlands Sign Tax Treaties with Developing Countries?," SOMO, 2013, available at http://somo.nl/publications-en/Publication_3958/at_download/fullfile (last accessed on June 03, 2020).

treaty or even, as a last resort, to terminate a treaty."[177] Meanwhile, some developing countries seem recently to have been concerned with some of their treaties' negative impacts.[178] This evidence suggests that uncertainties pervade tax treaties in developing and developed economies alike.

Accordingly, there is a growing interest in counter mechanisms such as the Limitation of benefit. This instrument, widely taken as one of the prominent mechanisms for fighting treaty shopping, has its origin in the US.[179] The US had introduced a Limitation of benefits considerably a long time ago. Yet, most of the USA's bilateral tax treaties were devoid of LOBs provision.[180] The US then had to renegotiate her bilateral tax treaties and integrated LOB provision into all bilateral tax treaties with no anti-treaty shopping rules.[181]

What is interesting about the US moves is that it had terminated all of her bilateral tax treaties that were not successfully renegotiated.[182] The same is true for some African countries like the Republic of South Africa, Malawi, Zambia, and Rwanda.[183] They have successfully renegotiated their agreements with Mauritius to curb treaty shopping.[184] Accordingly, Ethiopia should renegotiate her bilateral tax treaties and integrate limitations of benefits to all of her bilateral tax treaties that are devoid of anti-treaty shopping rules. Renegotiation may not be easily realized as it needs the consent of states that are parties to the concerned bilateral tax treaties.Further,renegotiation of all bilateral tax treaties may need a long time and high costs. Where renegotiation is impossible, resorting to termination of a bilateral tax treaty is largely recommended.. Opportunities for such options could be readily available for countries as some double taxation agreements have a termination clause.

To this effect, the Ethiopian double taxation agreements include such clauses. For example, the double taxation agreement between China and Ethiopia provides for a

[177] OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, 2014), available at https://www.oecd.org/ctp/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-9789264219120-en.htm&ved (last accessed on June 03, 2020).
[178] Martin Hearson, Tax Treaties In Sub-Saharan Africa: A Critical Review, Tax Justice Network- Africa, Nairobi, Kenya, Working Papers,(2015), p.6.
[179] Nyberg, *supra* note 43,p.33.
[180] *Id.*
[181] *Id.*
[182] *Id*.
[183] Martin Hearson, Tax Treaties In Sub-Saharan Africa: A Critical Review, Tax Justice Network- Africa, Nairobi, Kenya, Working Papers,(2015), p.6.
[184] *Id*.

termination clause.[185] The same holds for the double taxation agreement between Ethiopia and Singapore[186]and a double taxation agreement between Ethiopia and Cyprus.[187] Thus, Ethiopia would be in a strong bargaining position in negotiating the terms of treaties with other states. It can strongly work to convince the partner states to renegotiate the terms, or, failing to attain that, it can terminate the treaty as per the specific clause to that effect.

5.2. Tax Treaty Shopping and Anti-Avoidance Rules under Ethiopian Domestic Income Tax Law

As explained in the relevant section earlier, Treaty shopping could also be combated through domestic law by general anti-tax avoidance (GAARs) or specific anti-avoidance rules (SAARs). Accordingly, countries may introduce SAARs or GAARs to discourage the abusive effects of treaty shopping. Ethiopia's Federal Income Proclamation has both Specific Anti-Avoidance Rules (SAARs) and general anti-avoidance rules (GAARs). The specific anti-avoidance rules on income splitting, transfer pricing, and thin capitalization are among the rule aimed at tackling tax avoidance's abusive effects.[188] Likewise, Article 48 of the Federal Income Tax Proclamation has integrated the Limitations of Benefits for tackling treaty shopping.[189] Further, Article 48 (2) of the income proclamation sets a priority rule where a tax treaty prevails in cases where there is a conflict between the tax treaty and Federal Income Tax Proclamation. Providing a solution to this conflict, the proclamation stipulates that "if there is any conflict between the terms of a tax treaty having a legal effect in Ethiopia and this Proclamation, with the exception of sub-article (3) of this Article and Part eight of this Proclamation, the tax treaty shall prevail over the provisions of this Proclamation."

Yet, it is important to note that while a priority rule applies as a solution for such conflicts, it will be overridden to fight against treaty shopping as provided under Article 48 (3) and the anti-avoidance rules under part eight of the Federal income tax law. In this regard, Article 48(3) of the Federal Income Tax Proclamation provides that:

[185] Double taxation agreement between Ethiopia and China, Art.29.
[186] Double taxation agreement between Singapore and Ethiopia, Art .28.
[187] Double taxation convention between Cyprus and Ethiopia, Art .30 .
[188] Income Tax Proclamation No.979/2016, Art.47,78 &79.
[189] Income Tax Proclamation No.979/2016, Art.48(3).

> *When a tax treaty provides that Ethiopian source income is exempted or excluded from tax, or the application of the tax treaty results in a reduction in the rate of Ethiopian tax, the benefit of that exemption, exclusion, or reduction is not available to a resident of the other contracting state when fifty percent or more of the underlying ownership or control of that body is held by an individual or individuals who are not residents of that other contracting state.*[190]

From this provision, the Limitation of benefit could be adopted to tackle tax treaty shopping. Besides, from the cumulative reading of articles 48(2) and (3), it is clear that where there is a conflict between the terms of a tax treaty, having a legal effect in Ethiopia, and the Federal Income Tax Proclamation regarding tax treaty shopping, the provision of income tax proclamation will prevail. This would lead to the issues of treaty override.

Thus from the interplay of these rules, we could notice that, though providing a Limitation of benefits is an instrumental tool for tackling treaty shopping, the way it is provided under the Federal Income Tax Proclamation is not recommendable as treaty override is a breach of international law.[191] Besides, states cannot invoke the domestic laws to justify that they did not fulfil their tax treaty obligations.[192] Hence, specific anti-avoidance rule (Limitation of benefits) as provided under the Federal Income Tax Proclamation may not tackle treaty shopping as the implementation of the domestic law that overrides the treaty amounts to a breach of international law.

Turning to another legislative provision under Ethiopian law, the Ethiopian Income Tax Proclamation has general anti-avoidance rules (GAARs). This can be inferred from Article 80 of the new income tax proclamation, which states:

> *If a person has obtained a tax benefit (reduction in liability of tax or postponement of liability of tax or any other avoidance of liability of tax) from an agreement, arrangement, promise, or undertaking, whether express or implied, and whether enforceable by legal proceeding or not, or from any plan, proposal, course of action or course of conduct that was undertaken for the sole purpose of obtaining tax benefits, the tax authority can determine the*

[190]Income Tax Proclamation No.979/2016, Art.48.
[191] Nyberg, *supra* note 45,p.17.
[192] Ellife, *supra* note 159, p.66.

> *tax liability of the person who obtained the tax benefit or considers the appropriate measures for the prevention or reduction of tax benefits.*[193]

From this provision, it is clear that when a person undertakes a legally enforceable agreement, arrangement, or promise, with the sole purpose of obtaining tax benefits, the tax authority can consider the appropriate measures for the prevention or reduction of tax benefits. However, as pointed out under 4.3 of this paper, the general anti-avoidance rules are made for domestic payments and could be challenging to apply to international payments.[194] Sometimes, they are not even applicable in the international arena, and it isn't easy to prove that a global structure is not set up for *bona fide* commercial reasons but only for the use of treaty benefits.[195] Hence, the domestic anti-avoidance rules of Ethiopia may not be used for tackling treaty shopping.

Concluding Remarks

The host of analyses made so far show that double taxation is a major barrier to international transactions. As a proactive move to this challenge, States of the world have generally agreed on the desirability of removing such barriers to increase global welfare. Moving a step forward, states have signed bilateral tax treaties to avoid or mitigate double taxation in cross-border economic activities. These treaties come under the umbrella of international agreements in which their creation and consequences are determined according to the Vienna Convention's rules on the Law of Treaties. They are negotiated under international law as legally binding State to State agreements signed by two or more countries. While these concerted moves of states would have a substantial role in avoiding or mitigating double taxation in cross-border economic activities, such networks of bilateral treaties would open room for treaty shopping.

Treaty shopping is a tax planning strategy where a taxpayer shops the most appropriate tax treaty to achieve a lower tax burden or a double non-taxation. It is an artificial arrangement implemented by an economic operator to secure the benefits of a double tax treaty, which were not intended by the contracting states in their negotiation. This activity is affected through sophisticated schemes that involve the use of direct conduit and stepping stone conduit companies. It can also be out through a base company scheme, where the benefit appears in the residence state. These abusive moves would entail varying adverse impacts such as loss of revenue, loss of incentive to enter

[193] Income Tax Proclamation No.979/2016, Art.80.
[194] Vogel, *supra* note 93, P.122.
[195] *Id*.

treaties, and breach of the principle of reciprocity which in turn cause substantial damage to national economies. Yet, global experience and practice show that tax treaty shopping can be tackled either through bilateral tax treaties themselves or domestic laws while it requires a substantial effort from different actors.

Looking into the Ethiopian situation in this light, one would see a considerable gap in attaining this goal. Ethiopia has signed more than 32 bilateral tax treaties with other countries. Yet, tax treaty shopping is not adequately regulated under domestic laws or bilateral tax treaties. As far as the domestic anti-avoidance rules are concerned, the Federal Income Tax Proclamation has provided specific ant- avoidance rules (Limitation of benefits) in a way that overrides treaty shopping. Hence, it may not serve its purposes as treaty override is a breach of the treaty itself under international law. The general anti-avoidance rule provided under the Federal Income Tax Proclamation may not be extended to treaty shopping as it is made for domestic payments. Besides, most of the Ethiopian bilateral tax treaties are devoid of anti-treaty shopping rules. Except for the double taxation agreement with Mozambique, the Netherlands, and South Korea, which constitute limitations of benefits provision as a remedy for tackling treaty shopping, Ethiopia's remaining double taxation agreements have no anti-treaty shopping rules.

Thus, these hosts of lacuna in the treaties and the country's domestic law would pose considerable economic damage, and it imperatively requires two important actions. First, Ethiopia should renegotiate and incorporate principal purpose tests and limitations of benefits provision into all of her bilateral tax treaties that are devoid of anti-treaty shopping rules. Where a renegotiation is impossible, it should terminate all of her bilateral tax treaties that are devoid of treaty shopping remedies. To achieve all the goals of these preventive moves, the researcher would recommend the inclusion of a provision widely recognized for its safeguarding potentialities. This provision, reflecting the safeguarding elements, reads as " a resident of a Contracting State would not be entitled to the benefits of the treaty if its affairs were arranged in such a manner as if the primary purpose or one of the primary purposes was to take the benefits of the treaty."

Finally, it should be noted that bilateral tax treaties may not fully tackle treaty shopping unless supplemented by domestic laws. Accordingly, it is recommendable for Ethiopia to revisit its domestic anti-avoidance rules and amend them to complement the tax treaty for tackling tax treaty shopping.

Private Trust under Ethiopian Law: Constitution, Nature and Administration

Yibekal Tadesse Abate[*]

Abstract

A trust can be constituted for private interest as a private trust or for the public benefit as a charitable trust. Until Ethiopia promulgated a proclamation governing Charities and Societies in 2009, trusts had been primarily regulated under Ethiopian Civil Code of 1960. The Civil Code provides the legal regime for trusts recognizing, inter alia, that a person can establish trust for the benefit of any person, idea, or action. This shows that the Code has envisaged that a trust can be constituted as a private or charitable trust. However, currently, while charitable trusts are mainly governed under the Organization of Civil Societies Proclamation, private trusts remain under the ambit of the Civil Code. Given the fact that private trusts are not commonly known in Ethiopia, it is important to examine questions surrounding the nature of such institutions and how they are to be regulated in Ethiopia. The aim of the Article is, therefore, to elucidate the nature, purpose, formation and administration of these institutions in this country. To this end, doctrinal legal research approach is employed in the course of which pertinent legislations and literature have been explored, analysed and synthesized. The researchfound out, in the context of Ethiopian trust law, the feature and purpose of private trust is different from other comparable legal relationships such as agency, third party beneficiary contract, testate succession and bailment. The trustee is a major player while other parties such as the trust maker, beneficiaries, courts and the General Attorneys could be involved in the administration of trust.

Keywords*: Trust, Private Trust, Trustee, Administration, Ethiopia.*

Introduction

At a basic level a trust is a legal mechanism through which individuals transfer assets or property to others who will hold it legally in trust for the benefit of certain persons or for a particular purpose. Consistent with this conception, legal scholars such as Hepburn described, trust as "a three-party equitable relationship arising where the creator (settlor) confers an enforceable equitable interest in a person or a charitable institution (the beneficiary or the charitable purpose) in property (trust property), against the legal owner of that property (the trustee)."[1] A closer look into this

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[1] Samantha J Hepburn, Principles of equity and trusts law – 2nd ed., Principles of law series, Pty Limited, (2001), P. 263. www.cavendishpublishing.com.

definition shows that a trust is a conveyance of property in which legal title is given to a trustee and equitable title to a beneficiary. As such, in a trust relationship, the trustees actually own the assets, but are not allowed to benefit from those assets themselves. Instead, the trustees have a duty to use the income and capital of the trust for the benefit of certain persons or for a particular purpose. This is why this arrangement is called a "trust" – i.e. the trustees are in a position of trust and have a duty, among other things, to protect and secure the trust property, and to use the assets of the trust as instructed by the trust deed.

A person creating a 'trust' can establish it for the benefit of certain persons or for a particular purpose as long as the constituted trust does not offend public morals and orders.[2] Accordingly, a trust can be constituted for private interest as a private trust or to the public benefit as a charitable/public trust. Though public and private trust can be distinguished in a number of ways, the nature of beneficiaries is a common differentiating means between them. If the beneficiaries make up a large or substantial body of the public, the trust in question is a public trust.[3] Such forms of trust exist to accomplish a substantial social benefit for some portion of the public, and they largely last for an indefinite period of time or exist permanently.[4] In contrast to public trust, the beneficiaries for a private trust are narrow and specific groups such as children of the settlor.[5] Further, as a typical distinguishing feature between these two forms of the institution, the interest in public trust is vested in an uncertain and fluctuating body while the beneficiaries in private trust are definite and ascertained individuals.

Under the Ethiopian law, trust can be established for private benefits as a private trust or for public benefits as a charitable trust. These features of the institution are largely discernable under the relevant provisions of the Civil Code and the Proclamation for the Organizations of Civil Societies.[6] A closer look into these legislations shows that, until Ethiopia promulgated a separate law governing Charities and Societies in 2009, trusts had been primarily regulated under Articles 516 through 544 of the Civil Code.

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[2] Quizlet, Trusts: Characteristics and Creation, https://quizlet.com/103790919/chapter-6-trusts-characteristics-and-creation-flash-cards/ (accessed on 10 June 2019).

[3] Peter Hefti, Trusts and Their Treatment in the Civil Law, *the American Journal of Comparative Law*, Vol. 5:No4, (1956), p. 556.

[4] Nishith Desai Associates, Legal and Tax Perspective, Use of Trusts in Wealth Management and Succession Planning, (2017), p.5.

[5] Comparison of a Private Trust with a Public Trust, https://blog.ipleaders.in/comparison-of-a-private-trust-with-a-public-trust/ (accessed on 10 June 2019).

[6] The Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960), (hereinafter the Civil Code) Articles 516- 544. See also the Organizations of Civil Societies Proclamation No. 1113/2019, Negarit Gazeta, (2019), (hereinafter the OCS proclamation). See for example, the Amhara National Regional State Charities and Societies Registration and Regulation Proclamation, Proclamation No. 194/2012. [hereinafter Amhara Charities and Societies Proclamation].

Yet with the coming into effect of Charities and Societies Proclamation No 621/2009, it has become clear that the Civil Code provisions would not be the primary legal regime, at least, as regards to what is called *charitable trus*t.[7]

The Civil Code had put in place legal regimes for trusts acknowledging, *inter alia*, that a person can establish trust for the benefit of any person, idea, or action.[8] This shows that, in Ethiopia, a trust can be constituted for private benefits as a private trust or for public benefits as a charitable trust. Currently, however, while public trusts are principally governed under charities and societies laws of the federal and regional governments[9], private trusts remain to be regulated under the Civil Code. Even though the legislative provisions for the regulation of private trust were in place for a long time, such institutions are not common in this country, or at least the establishment of such institutions is a recent phenomenon .Thus, it is worth examining issues surrounding the nature, formation, and the legal framework dealing with private trusts.

As signified under the Civil Code, the nature and regulation of private trust is analogous to other legal relationships such as will, agency, *a stipulation of contract* for the benefit of third party and bailment. In addition, the Civil Code clearly provides that the constitution of trust shall be subject, as regards the form and substance, to the rules relating to donations or wills.[10] Further, the relevant provisions of the Code on agency also apply to regulate the liabilities of a trustee.[11] Finally, trust in its generic form, is also related to property. While these features are attributes of trust in its generic form, Private trust constitutes neither of these features What then is private trust? The aim of this Article is, therefore, to explain the concept, formation, purpose and regulation of private trust in Ethiopia. To meet its purpose, the Article analysed related researches, pertinent provisions of the Civil Code, and other relevant laws.

The Article is organized under four Sections. The first section examines the concept of trust and the nature and purpose of private trust. Section two provides the concept of trust in general terms under Ethiopian law. The Third section characterizes private

[7] See Charities and Societies Proclamation No 621/2009, *Federal Negarit Gazeta*, 2009. Currently, at the Federal Government Level, for the public trusts, the applicable law is the OCS Proclamation.

[8] See the Civil Code, Art. 518.

[9] See the OCS proclamation. See for example, the Amhara Charities and Societies Proclamation. Except the Amhara National Regional State, other regional states do have a separate Charities and Societies. Hence, for public trust created in regions the applicable law is the Civil Code provisions (See Mamenie Endale, Some Legal Controversies Regarding Party-affiliated Endowments and Their Participation in Business Activities: The Case of EFFORT and TIRET Endowments, *Bahir Dar University Journal of Law*, Vol. 9(1), (2018)

[10] The Civil Code, Art.517 (2).

[11] See the Civil Code, Arts. 537(2) and 533.

trust under Ethiopian Law. In this section the formation, nature and administration of private trust, as regulated under Ethiopian law, are examined. Finally, concluding remarks and recommendations are provided.

1. The Concept, Character, Creation and Purpose of Trust: General

1.1 The Concept and Character of Trust

The concept of trust dates back to the time of the Roman Empire in the 7th century A.D.[12] In this legal system, only Roman citizens were allowed to own property and trust was one of the tools to ensure such ownership of property. As such Roman soldiers had used to transfer ownership of their property to trusted friends to make sure that their families were cared for where the soldiers were ordered to leave their locality for duty.[13] Later, trust had also become a familiar tool in the Roman Empire to protect lands from rogue governors and lords.[14]

While this relationship has such a long historical root, its modern form evolved from an early device known as 'use' which would arise where legal ownership was transferred to one party for the use of another.[15] This relationship was created by the transfer of property by the owner to a trustee for the benefit of a third person. As such, the rights of the beneficiary depend on the good faith of the transferee (trustee) who in law was to be the legal owner of property.[16] Trusts were also regarded as an instrument for the administration/protection of property in a family and in many societies its role expands to almost any socio-economic class and affairs.[17] Currently, it is one of the most widely utilized tools of property administration in instances such as succession, preservation and protection of assets.[18]

International instruments such as the Hague Convention also recognize such roles of trust. Evidencing this, the convention defines it as a form of "legal relationships created, *inter vivos* or on death, by a settlor when assets have been placed under the

[12] Randall W. McKee, What Everyone Should Know About Trusts? (2014), p.62. https://www.uwyo.edu/uwe/passiton/passingitonchapter7d-trusts.pdf, (accessed on 17 December 2019).
[13] Id.
[14] Id.
[15] Hepburn, *Supra* note 1, p 261.
[16] Joseph R. Long, The Definition of a Trust, *Virginia Law Review*, Vol. 8(6), (1922), p.428.
[17] McKee, *Supra* note 12, p 62.
[18] Angelique Devaux *et al* 'The Trust as More Than a Common Law Creature', *Ohio Northern University Law Review*, Vol. 41 No. 1, (2014), pp. 91-119.

control of a trustee for the benefit of a beneficiary or a specified purpose".[19] In this definition, the convention set out four major elements constituting the essence of the relationship. The first element is the settler who makes the trust. Second, there should be a trustee who will manage the trust assets and perform the functions of the trust in accordance with the terms of the trust and of the law. The settlor may appoint himself as a trustee.[20] The trustee may also be an individual or a corporation (such as companies).[21]

In most jurisdictions, not only individuals but corporations (such as private trust companies) also provide trusteeship services.[22] The third element is the person or class of persons in interest benefit the trust is created. The beneficiaries could be defined individuals (all of the settlor's children, wife, etc.) or the public.[23] In general terms, the beneficiaries are the only persons who are entitled to use or enjoy the income or assets of the trust. The last category of element consists of the "assets" inside the trust which are called the trust res, trust property, corpus, principal, or subject matter.[24] Common assets that can be used as a trust property include real estate, cash, bank accounts, stocks, shares, and personal property.[25] The assets constitute a separate fund and are not part of the trustee's own estate.[26]

In the administration of trust, the management and enjoyment functions of ownership are split between different persons and as such trustee and beneficiaries should not be identical.[27] The net effect of fragmenting management and enjoyment in turn results in fragmentation of title.[28] Accordingly, incidents of ownership are further divided between a trustee and beneficiary with the common usage of the terms 'beneficial owner' and 'legal owner' to describe the position of beneficiary and trustee

[19] The Hague Convention on Law Applicable to Trusts and Their Recognition, 1985, Article 2 https://www.jus.uio.no/english/services/library/treaties/11/11-02/law-trusts-recognition.xml.

[20] Bruno Herbots, Can The Most Characteristic Product of the English Legal Genius Survive in a Civil Law Environment? Vol.62, (2016).

[21] Andrew Rogerson, The Trust Concept, https://www.rogersonlaw.com/estate-lawyer/trust-concept/ [accessed on 11 May, 2019]; See also John Mcleod, Private Trust Companies, TTN New York Conference, (2014), p.1, https://www.ttn-taxation.net/pdfs/Speeches_NewYork_2014/NY14-JohnMcLeod.pdf [accessed 13 October 2020]

[22] Christopher Weeg, The Private Trust Company: A DIY for the Über Wealthy, 52 Real Prop. Trust & Est. L.J. 121 (2017).

[23] Andrew Rogerson, *Supra* note 21.

[24] McKee, *Supra* note 12, p. 62.

[25] McKee, *Supra* note 12, pp 64-65.

[26] James Douglas, Trusts and Their Equivalents In Civil Law Systems: Why Did the French Introduce The Fiducie Into The Civil Code In 2007? What Might Its Effects Be? Vol.4, (2012), https://www.jus.uio.no/english/services/library/treaties/11/11-02/law-trusts-recognition.xml.

[27] Hefti, *Supra* note 3, p. 554.

[28] Mcleod, *Supra* note 21.

respectively.[29] While the trustees hold the legal title, which is a nominal title, the beneficiaries assumes the beneficial ownership.[30] Upon transferring the title of the assets to a trustee, the assets cease to be the personal possessions of the settlor.[31]

Thus, an essential feature of every trust is that a trustee is an owner to the trust property but is bound to use the legal position as an owner for the benefit of another person or for the advancement of some purpose. [32] Once the settlor has dedicated certain assets as a trust, an asset automatically comes into being, protected by the right of action of the beneficiaries and by the court.[33] Besides, the assets constitute a separate fund and are not part of the trustee's own estate.[34] Unlike the common nature and mode of ownership right, benefits from a trust property belong to one party (beneficiary) while, at the same time, all the burdens belong to another party (trustee).[35] The feature distinguishing a trustee from the persons to whom benefits and burdens of property ownership belong is that title to property is vested in the trustee to be held for the benefit of the beneficiary.[36]

1.2. Creation of the Trust

A person may establish trust for the management of assets while he is alive or after his death.[37] During his life time, a settlor creates an *inter vivos* trust by donation inter vivos. *Inter vivos* trusts, the administration of which begins during the lifetime of the trust maker, may also continue after his death.[38] Yet this form of trust can be revocable or irrevocable. Revocable trust can be amended, added to, or revoked during its maker's competent lifetime. Irrevocable trusts, on the other hand, can't be changed after they are made. Irrevocable trusts serves varying purposes. Some of them might be used for purposes such as funding legacies for children while others are used to

[29] Hefti, *Supra* note 3, p. 554.
[30] Browne C. Lewis, The Law of Trusts, eLangdell® Press, Vol.3, (2013), http://elangdell.cali.org/
[31] And so they become immune to claims against the settlor from creditors, bankruptcy cases, family disagreements, financial setbacks, and lawsuits. See Peter Hefti, *Supra* note 3, p. 556.
[32] Douglas, *supra* note 26, p. 3.
[33] Hefti, *Supra* note 3, p.556. Once the trust is set up, the Settlor no longer has control over the assets. Nor does the Beneficiary have control; the Beneficiary may be unhappy about how the trust is managed, but the Trustee is not obliged to obey the Beneficiary's orders, and often a trust is set up precisely because the Beneficiary's desires are to be thwarted. See Eric Rasmusen, Not Principals and Agents, but Beneficiaries and Trustees, Working Paper, 3(2005) http://www.rasmusen.org/papers/backburner/trustees-rasmusen.pdf
[34] Herbots, *Supra* note 20, p.72.
[35] Jonathan R. Macey, Private Trusts for fhe Provision of Private Goods, *Emory Law Journal*, (37), (1988), p. 295.
[36] Douglas, *supra* note 26, p. 3.
[37] Frances H. Foster, The Dark Side of Trusts: Challenges to Chinese Inheritance Law, *Wash. U. Global Stud. L. Rev*, Vol.2(151), (2003), p.156.
[38] Id.

make gifts of property or life insurance.[39] Finally, it is important to note that *inter vivos* trusts are typically irrevocable after the death of the settlor.[40]

A person may also establish a testamentary or Will trust which is enforceable only after his death.[41] Such trust is established when an individual dies and the trust is detailed in his last will and testament.[42] This trust could also be considered a revocable trust as the will can be changed at any time during the lifetime of its maker.[43] However, once the testamentary trust is established, it will be irrevocable. Moreover, a trust may be short-lived in situations where a trustee receives money on behalf of a beneficiary. While the cession of a trust under such situations is determined based on a case-by-case basis, it may cease to exist after a few days or it may last for years. Yet in the case of a charitable trust it lasts for centuries.[44]

1.3. Types and Purposes of Trust

Trusts are mainly divided into private and public.[45] A public trust is created for the benefit of indefinite and fluctuating body of persons who cannot be ascertained at any point of time. For instance, the beneficiary could be the public at large or a section of the public following a particular religion, profession or faith. Such trusts are characterized by their eleemosynary ends. In consequence, their beneficiaries are not persons previously ascertained but frequently selected from a larger group. In terms of its ends, a public trust is generally a non-profit venture with charitable purposes and consequently it is also referred to as the charitable trust. Contrary to private trusts, charitable trusts aim to benefit the public by achieving a charitable purpose and are enforced by government agencies.[46] The trust designed for public benefits are important for relief of the poor, education, medical relief, preservation of environment

[39] McKee, *Supra* note 12, p. 63.
[40] Id.
[41] Investopedia, Inter Vivos Trust vs. Testamentary Trust: What's the Difference? https://www.investopedia.com/ask/answers/062515/what-difference-between-intervivos-trust-and-testamentary-trust.asp [last accessed on 9 April 2020].
[42] Id.
[43] McKee, *Supra* note 12, p. 63.
[44] Douglas, *supra* note 26, P. 3.
[45] Margaret Ryznar, Trusts in Social History of American Families: An Encyclopedia, Lawrence Ganong ed., (2014), http://ssrn.com/abstract=2311055. A business trust is created for almost any business venture with that particular goal of that business in mind. Complex business arrangements, most often in the finance and insurance sectors, sometimes use trusts among various other entities (e.g., corporations) in their structure.
[46] Law Commission, Review of the Law Of Trusts Preferred Approach Paper, *Law Commission issues paper; (31)*, (2013), p.17, www.lawcom.govt.nz.

and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility.[47]

Now we turn to the features of a private trust. A trust is called a private trust where it is instituted for the benefit of one or more individuals whose identity is ascertained beforehand.[48] That is, in this form of trust "there is no probate file for strangers to look at"; instead, the beneficiaries are already identified or defined under the trust document.[49] A couple of justifications are inferable behind these sets of conditionality. First, private trusts can only be enforced by beneficiaries through a legal action instituted against trustees.[50] Secondly, although the settlor may bring a legal action against the trustee, he may be a deceased or otherwise unable to bring a legal action. In such cases, there would be nobody to challenge the actions or inaction of the trustee unless there are definite beneficiaries.

In contrast to such cases of a private trust, a public trust does not need to have definite beneficiaries because it could be enforced by a relevant government organ.[51] Moreover, a private trust is completely private, created between persons who have a family relationship, and serves the interest of those involved – trustees and beneficiaries.[52] In some circumstances, such trusts may also be created by people who, while capable of managing their own affairs, nevertheless wish to be relieved of the burden of administration.[53] Yet irrespective of the mode of formation, all the rights and obligations of this institution belong to the two private parties.

Turning to its functions, one could see that private trust plays a key role in estate planning and protection of assets of a trust maker for spendthrift[54]. Further, people use it to protect assets in times of adverse political events such as war, excessive

[47] DEVAUX *et al*, s*upra* note 19, p 96.
[48] Desai, *supra* note 4, p.4.
[49] McKee, *Supra* note 12, p. 65.
[50] John Duddington, Essentials of Equity and Trust law, Pearson Education Limited 2006, p. 64, www.pearsoned.co.uk.
[51] Id.
[52] McKee, *Supra* note 12. p.65.
[53] Herbots, *Supra* note 20, p. 62.
[54] Trusts may be used to protect beneficiaries (for example, children) against their own inability to handle money.

expropriation, and social or political persecution.[55] They may also use it to protect their property from the claim of creditors.[56]

At this juncture, it is important to note that private trusts are mainly constituted for the benefit of people such as minors, persons of unsound mind or spendthrifts, who are not able to administer their property by themselves.[57] For example, "testators, in the creation of testamentary trust, are motivated by the incapacity of the beneficiary to act or a lack of maturity or inability by a beneficiary to manage substantial assets."[58] Similarly, an *inter vivos* private trust is especially useful when caring for someone (beneficiary) incapacitated by a physical or mental disability.[59]

In modern times private trust is widely used to create a structure that fosters family engagement for multiple generations.[60] Particularly, it may be used to own specific assets such as land or an interest in a family company, which would not be appropriate or practical for a settlor to divide between individuals.[61] Such arrangements in trust enable individuals to enjoy the assets although they do not own them. At the same time, it will be helpful to maintain the capital value of such assets for future generations.

2. Trust under the Ethiopian Legal System: An overview

The Civil Code is a starting point for the conceptualization of trust in the Ethiopian legal regime. It represents the start of a regulatory framework with regard to trust in the country. The Code recognized trust as one scheme by which a person may destine his property for the benefit of other individuals or purposes. As outlined in the last sections, trusts were primarily regulated under Articles 516 through 544 of the Code until 2009. Also, there exist separate legal frameworks in the regulation of private and public trusts following the promulgation of the Charities and Societies Proclamation No 621/2009. Particularly, charitable trusts are regulated under the charities and

[55] Mandaris, The Malta Private Trust - Explanation of Its Characteristics And Uses, (2018) p. 1, https://www.mondaq.com/wills-intestacy-estate-planning/727926/the-malta-private-trust--explanation-of-its-characteristics-and-uses [accessed on 9 October 2020].
[56] Jesse Dukeminier *etal*, Wills, Trusts, and Estates, 8th ed., (2009), p.609.
[57] Herbots, *supra* note 20, p. 62.
[58] Nel E, "The Testamentary Trust: Is it a Trust or a Will? Hanekom v Voigt 2016 1 SA 416 (WCC) " PER / PELJ (21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2917, (2018).p.3.
[59] Dukeminier *et al* , Wills, Trusts, and Estates, 8th ed. (2009), p. 439.
[60] Mcleod, *supra* note 21, p. 3.
[61] Nexgen, Specific Reasons of Setting up a Trust, https://www.nexgentransfer.com/special-purpose-trust.aspx (accessed on 12 January 2020).

societies laws of the federal and regional governments[62] while private trusts remain under the regulation of the Civil Code provisions.

The Code, under Article 516, defines trust as "an institution by which specific property is constituted as an autonomous entity to be administered by a person, the trustee, under the instructions given by the person constituting the trust." Similarly, the OCS Proclamation defines charitable trust as "an organization established by an instrument by which specific property is constituted solely for a charitable purpose to be administered by persons, the trustees, in accordance with the instructions given by the instrument constituting the charitable trust."[63] A closer look into these definitions shows that, In Ethiopia, trust is generally a legal device whereby ownership of property is split between the trustee, who has the right and powers of an owner, and the beneficiary.[64]

Also, one could see that the definitions constitute the major elements of trust such as the settler, trustee, the beneficiaries, and the trust property. For example, the definition in the Civil Code suggests that institutions such as the court and the Ministry of Interior (now the Federal General Attorney) may be involved in the trust administration. The court may be involved in cases of dismissal or revocation of the trustee, appointment of the trustee, judicial measures, and termination of the trust.[65] Also, the General Attorney has the mandate to approve private trusts constituted in a foreign country.[66] Moreover, the authentication and documentation offices could get involved in their authentication of the juridical act (will or donation) which constitutes the private trust.[67] From the beneficiaries' perspective, Article 518 of the Civil Code sets out that a trust may be constituted "for the benefit of any person, action or idea, provided it does not offend public order or morals." Accordingly, it can be contended that a settlor may constitute a trust for the benefit of persons such as his children, family, and a friend or to any other persons.

As the OCS Proclamation governs only charitable trusts, the Civil Code provisions on trusts would still be the applicable legal rules in relation to establishment and

[62] See *supra* note 9.
[63] See OCS Proclamation, Art 30.
[64] See the Civil Code, Article 527(1) , 528(2), 538, 539, 541.
[65] See the Civil Code, Articles 522, 521, 541, and 543.
[66] See the Civil Code, Article 546.
[67] Private trusts are created in accordance with the substance and form applicable for donations or will. Thus, as a form requirement, wills or donation upon the trust going to be established must be authenticated at the authentication and documentation office.

functioning of private trusts.[68] The OCS Proclamation is clear in characterizing charitable trust. As such it defines charitable organization as "an organization established with the aim of working for the interest of general public or third party.[69] Thus, while charitable organizations are mainly meant to serve the interest of the general public, there is a possibility of instituting such organizations working for the interest of third party. Yet even in the cases of working for the benefit of third parties, the sole aim of the organization shall be charitable purpose.[70]

In case of private trust, however, though the trust maker destines a property for the interest of a third party, the trust is not constituted solely for a charitable purpose. Thus, the subjects of the OSC proclamation are trusts which are constituted for sole charitable purposes. In other words, the proclamation is not applicable for trusts which are not constituted for sole charity purposes. Indeed, in labeling the purposes or determinations of constituted trusts, the meaning and scope of charitable purpose is worth examining. In Ethiopia, there have been attempts, in the repealed Charity and Societies Proclamation which defines charitable purposes, to set out activities that shall be deemed as a charitable purpose.[71] Surprisingly enough, under the current OSC Proclamation, however, areas considered as charitable purposes are not explicitly illustrated.

Moreover, the OSC Proclamation governs trusts having organizational status or legal personality. Even though, the benefit given for the third party could be labeled as charity purposes, to be governed under the OCS Proclamation, the constituted trust must be a registered entity holding legal personality. However, as can be understood from the Civil Code, private trusts have no legal personality.[72] In other words, private

[68] Yet, the trust provisions of the Civil Code could still govern cases of public trust as long as the provisions are not conflicting with the OSC Proclamation.

[69] OCS Proclamation. Article 2(4).

[70] Look at the specific definition given for each type of charitable organizations. For example, Article 31 of the OSC Proclamation.

[71] Charities and Societies Proclamation, Article 14(2). The relief of poverty, the improvement of animal welfare, advancement of human and democracy right, the promotion of conflict resolutions and reconciliation, the advancement of culture, education, and health are some examples of charitable purposes.

[72] Although there are some states that treat private trust as juridical person , majority of states do not bestow legal personality to private trusts. In Ethiopia, too, private trust is not made to have legal personality. In itself is not a legal entity, rather, it is an inimitable legal relationship whereby property is held by a person for the benefit of another person. The fact that a private trust is not a legal person can be understood from some provisions of the Civil Code. As it is discussed above, the property that makes part of the trust are not owned by the private trust as a legal person. More vividly, Article 526 of the Civil Code envisages that a person who claims to have interest on the property constituted in the trust will sue the trustee, not the trust. Needless to state, being able to sue or sued, or to own properties

trust is not an organization which administers the trust property at a body level. In Ethiopia, the constitution of private trust will be completed at the time of authentication of the juridical acts (will or donation) which establish the trust. Having legal personality is not an element in the constitution of private trust. Hence, in general terms, the OCS Proclamation does not regulate private trust as it applies for public/charitable trust organizations which are constituted *solely* for a charitable purpose. In the next section, the nature, character and regulation of private trust are examined based, primarily, on the relevant provisions of the Civil Code.

3. Private Trust under Ethiopian Law: Constitution, Nature and Administration

3.1. Creation and Nature of Private trust

It can be discerned from Article 516 of the Civil Code that certain elements should be satisfied in order for a private trust to be constituted. The elements are similar to those elements discussed in section II above. First, there should be a trust maker who must have the intention to create a trust. The trust maker needs to provide an express provision in the donation or will showing that he intends to constitute a trust. According to Article 517(3) of the Code, the intent shall be demonstrated with an express provision in the trust document. Secondly, there must be a trustee and a trust instrument naming ascertainable beneficiaries.[73] The beneficiaries do not have to be specifically enumerated in the trust instrument; however, they must be readily identifiable. To be regarded as ascertained beneficiary an express appellation of beneficiaries is not as such required. The trust maker may, sometimes, put beneficiaries with identifiable designations. For example, the person constituted a trust might put the beneficiaries as "my children" as they are identifiable persons. In some cases, the beneficiaries may be persons who are not yet born. Finally, Article 516 also shows that the trust must be funded with property which is referred to as the trust property (trust res or corpus).

Apart from these stipulations, the Civil Code also sets forth the means by which a trust may be created. The specifics for such process are provided under Article 517 of the Code. Accordingly, a private trust may be constituted by donation *inter vivos* or by a Will. Article 909 also clearly mentions that a will may be used as an instrument to constitute a trust. According to this same provision, while *inter vivos* trusts shall be

are among the attributes of personality. However, they are not applicable in relation to private trust in Ethiopia since the later is not a person.

[73] See the Civil Code, Arts. 516, 518.

created through a donation contract, testamentary trusts can be formed through a will. It is stipulated under this provision that a trust which is constituted by donation is known as *inter vivos* trust while a trust constituted by Will is known as testamentary trust.

Another provision worth considering in this respect is Article 517(2) of the Civil Code. This provision states that the constitution of a trust is subject, with respect to form and substance, to the rules relating to donation or Will.[74] Thus, the essential conditions and contents (substance) and the formality requirements applicable to the making of a valid Will and donation inter vivios shall be met. As such, inter vivos trusts shall be made in the form and substances governing in the making of donation inter *vivos*. It means that in constituting the trust, the essential conditions and formality requirements for validity of 'an *inter vivos* donation shall be met.

Thus, from the cumulative reading of Articles 517(2) and Article 2436 of the Civil Code, the beneficiary's acceptance of the trust created by donation inter vivos is a mandatory requirement for the creation of such trust. Such acceptance by the beneficiary would not be valid where it is expressed after the death of the trust maker or his having become incapable.[75] Moreover, as an essential condition, a trust may only relate to property belonging to the trust maker on the day of the constitution of the trust.[76] Also, as can be understood from the cumulative reading of Articles 517(2) and Article 2452 of the Civil Code, the trust cannot be created in relation to property which, on the day of the creation of trust, is the subject matter of a dispute.

The provisions of the Civil Code on donation are also important as regards to the form of constitution of a trust by donation. If the trust is to be created over an immovable, the formality for valid public will needs to be fulfilled.[77] Particularly, for such trust to be valid, (a) the trust maker or a person under his dictation should write it; (b) the document should be read in the presence of the trust maker and four witness, mention to the fulfillment of this formality and of its date is made; and (c) that the trust maker and the witnesses should immediate sign it should be satisfied.[78] While these elements are strictly required for the formation of trust related to immovable property under Articles 517(2) and Article 2452 , a slightly different requirement is provided under

[74] The scope is limited to substance and form. Substance means the contents written in the trust. And form has to do with the solemnity.
[75] See the Civil Code, Art. 2436(2) cum Art.517 (2).
[76] See the cumulative reading of Articles 517(2) and Article 2451 of the Civil Code.
[77] See Civil Code, Art. 2443 cum Arts.881-883.
[78] Civil Code, Arts.881-883.

Article 2444 and Articles 2451 through 2454 of the Code . Pursuant to Article 2444, an *inter vivos* trust involving corporeal chattels and bearers can be destined in trust either by delivery or using the form applicable to immovables. Further, if a person wants to create a living trust, a trust that takes effect during the maker's lifetime,[79] it needs to be made as a donation *inter vivos* as per the stipulations provided under Article 2451 through 2454.

It is also important to note at this point that although an *inter vivos* trust is constituted by donation, it is different from an ordinary donation *inter vivos*. A donation having no express provision indicating the intention of the donor to constitute trust would remain to be an ordinary donation.[80] Unlike an ordinary *inter vivos*, *inter vivos* trust is created for property administration by transferring the ownership title of the property to a trustee for the benefit of beneficiaries. Conversely, Article 2427 of the Civil Code envisages that the donor in an ordinary donation will transfer ownership over his property to the donee. Moreover, he may reserve for himself the usufruct of property donated by him as stated under Article 2453. If it is a trust, however, the trust maker has to transfer a legal ownership over the property to the trustee and the beneficial ownership to the beneficiary.

The constitution of testamentary trust is subject to the fulfillment of essential conditions of a valid will namely, capacity, consent[81], and legality. Another important feature of such trust is that a Will, constituting the trust, is inherently personal to the testator. Thus, a person may not delegate his testamentary power to whom the law gives to dispose of his estate in favor of ascertainable persons. It is one of the strict principles in jurisprudence that one cannot appoint another person as his agent to make a Will on behalf of him. This basic principle has been enshrined in Article 857 of the Civil Code. Accordingly, in constituting a valid trust, the trust maker shall create the trust by himself. The succession law of Ethiopia also obliges that the Will of one person to be made by a separate document. Accordingly, Article 858 of the Civil Code prohibits making of a Will by several persons through one and the same instrument.

[79] McKee, *Supra* note *12*, at 63.

[80] See Civil Code, Art. 517(3).

[81] Free and full consent is an essential condition for validity will. Hence, the trust maker shall make the trust without influence. As stated under article 867 of the Civil Code, a will made by the testator under the influence of force lacks the inherent element of will and hence it has no effect in the eyes of the law. Moreover, whenever the will is made in favor of a person due to the excessive influence of the beneficiary, it will be subjected to the revision of the court. The provisions of the Civil Code enshrined in Arts.868- 875 of the Civil Code govern the situation where a Will made by undue influence can be either invalidated or reduced by the court. From these and other rules of succession, free will of the deceased is one of the essential conditions for the validity of will. Thus, this requirement shall also be met in the constitution of trust created by will.

With respect to form, if the trust is constituted within a public will or holographic will, the requirements of the Civil Code for the public will and holographic will must be satisfied. Accordingly, a trust made in a "public will" should be made in writing by the testator himself or by any person under the dictation of the testator.[82] Besides, the trust document shall be read and signed in the presence of the trust maker and four witnesses mentioning the fulfillment of this formality and of its date therein.[83] In the case of a holographic will, the trust document must be wholly written by the maker himself.[84] Also, as stated under article 903(cum with 517(2)) of the Code, a trust constituted under a holograph will shall lapse where it is not deposited with a notary or in a court registry within seven years after it has been made. Here, one may wonder whether a trust can be constituted through an oral will. To address this issue, it is helpful to note that it can be made through this form of will. In such forms of will, the testator is allowed to regulate only limited matters. As specified under Article 893 of the Civil Code, a testator may only give direction as to his funeral, dispose legacies whose value may not exceed 500 Birr, and make provisions regarding guardian and tutor of his minor child. Although it may not be practically attractive, it can therefore be said that a person could use oral will to constitute a trust using legacies as far as the value of the property does not exceed Birr 500.

In terms of form, a trust made through an oral will is required to be made in the presence of two witnesses as it is stated under Article 892 of the Civil Code. In accordance with Article 902, it is also clear that such trust will come to an end if the trust maker is still alive on the third month of the oral trust. Moreover, there are cases where deposition of trust is required at the notary or in court. Currently, it is the Federal Documents Authentication and Registration Agency where legal documents can be deposited.[85] At regional levels, documents authentication and registration is being undertaken by an office organized as a unit within the regional General Attorney.

While these hosts of detailed specifications on requirements on making a valid will another important question may arise as to whether the trust maker can effectively transfer all property out of her estate during life and bypass inheritance law restrictions on disposition, including protections for her neediest survivors. As it is alluded above,

[82] See Civil Code Art. 517(2), 2443, Cum Arts, 881-883.
[83] See Civil Code Arts. 517(2) Cum Arts, 881-883.
[84] See Civil Code Arts. 517(2) cum Arts. 884.
[85] Proclamation to Provide For Authentication and Registration of Documents, Proclamation No. 922/2015, Art 8.

the trust property will not constitute part of the estate of the trust maker. In other words, the property constituted is separated and *autonomous entity or unit* to be used solely for the purpose set by the settler. Consequently, the property can never be part of the estate of the trust maker. Despite this, the Civil Code provisions on trust are silent with regard to the question raised here.

In the author's view, this issue can be approached on the basis of the rules of the Civil Code regulating dishersion. As a starting point to resolve the issue Article 517(2) of the Civil Code need to be considered. This provision states that constitution of trust by a will should be subject to the rules relating to will as regards to substance. Thus, if a trust maker, under the trust document, effectively transfers all property out of her estate during his lifetime without making any protections for her neediest survivors during the trust or termination of the trust, the trust shall not be valid. Article 938 of the Code is also closely consistent with this principle except the requirement of justified reasons to exclude the descendants of the trust maker from the trust. Thus, the cumulative reading of Article 517(2) and Article 938 of the code suggest that the trust maker can effectively transfer his property out of her estate during life by meeting the requirements of dishersion.

Turning to another perspective on the nature of trust under Ethiopian law, one can easily note that the feature of trust lies on the fragmentation of ownership between the trustee and the beneficiaries. The trustee holds the legal title for the benefit of the beneficiary who holds the beneficial ownership.[86] As a result, the trustee cannot use nor dispose the trust property for his own personal interest since the property is held for the interest of the beneficiary.[87] It is also noticeable that the nature of the ownership rights of the trustee is different from the ordinary notion of ownership right as regulated under the Ethiopian property law.

In relation to the concept of separation of ownership and enjoyment, it is important to further examine the nature of the ownership right that the trust will have over the trust property. Under Article 527 of the Civil Code, it is mentioned that the power of the trustee on the property which forms the object of the trust are "those of an owner." This provision does not directly state that the trustee is the owner of the property which needs, as the case may be, transfer of title deed and registration of the property in the name of the trustee. By virtue of Article 1205 of the Civil Code, an owner may use his property and exploit it as he thinks fit, including disposing it for consideration or

[86] See the Civil Code, Arts. 516, 527, 538 and 539.
[87] See the Civil Code, Arts. 516, 538 and 539.

gratuitously. Obviously, the widest ownership right will not be available to a trustee as regards to the object constituting the trust. As stated under Section II of this Article, although a trustee is an owner to the trust property, he is bound to use the legal position as owner for the benefit of another person or for the advancement of some purpose. Since the trustee is required to administer the trust as per the instruction given by the person creating the trust, the power in relation to the trust property will be limited.[88] For example, in the absence of power to sale by the court, the trustee is unable to dispose an immobile property which is the subject matter (trust property) of the trust.[89] In no case may the trustee alienate the property, which is the subject of the trust, by a gratuitous title.[90] Also, as stated under art 536 of the Code, the creditors of the trustee are not allowed to seize trust property either.

The Ethiopian Trust Law, as stated under Article 527 of the Code, does categorize the trustee as "owner" of the trust property. Indeed, the law does not state that the trust maker must "transfer" property to the trustee. Rather, it uses the phrase "of an owner". To this effect, it provides that "the powers of the trustee on the property which form the object of the trust are those of an owner." Understandably, the phrase as "an owner" suggests that, upon the creation of trust, a settlor must have transferred the trust property together with its ownership title to a trustee. Unless ownership is transferred to a trustee the latter may not be able to manage the trust property *as an owner*. Hence, in order to administer the trust property as an owner, having a legal title over the property is an essential requirement.

Besides, upon termination of the trust, Article 544 obliges the trustee to hand over "the property" which formed object of the trust "together with the documents which are required to prove the ownership of such property" to the persons who are entitled to it in the act of constitution of the trust. From the reading of Article 544, it is possible to infer that upon the creation of the trust, the settlor had transferred to a trustee the trust property together with the ownership title. This suggests that it is not possible to create a trust without transferring legal title to the trustee. The experience of other countries also shows that the transfer of ownership right to the trustee is an essential of trust.[91] As the legal ownership of the property is vested to a trustee and since the trust property shall be put as an autonomous entity, the trust will be protected from unexpected

[88] Civil Code, Art 528.
[89] See the Civil Code, Arts. 527(2).
[90] See the Civil Code, Arts. 527(3).
[91] Mohamed Ramjohn, Unlocking Equity and trusts, Fifth edition. ISBN: 978-1-315-74090-4 (ebk) , p. 77(2015)

grabbing activities of the trust maker.[92] It also serves as a ring-fencing of assets against possible losses due to business liabilities, family related liabilities arising from divorce/maintenance claims.[93] The other crucial matter worth of consideration whether a private trust has a legal personality, under Ethiopian law. This issue could be raised on two grounds. First, Article 516 of the Civil Code defines trust as an "institution" which may be understood to refer to a certain body. Second, trust in the Civil Code is regulated under law of persons parallel to association, endowment and committee, whereas[94] charitable trusts, in the current OSC proclamation, are regarded as legal entities.[95]

Although there are some states that treat private trust as juridical person[96], majority of states do not bestow legal personality to private trusts.[97] In Ethiopia, too, private trust is not made to have independent legal personality. It is rather an inimitable legal relationship whereby property is held by a person for the benefit of another person. The fact that a private trust is not a legal person can be understood from some provisions of the Civil Code. As it is discussed above, the property that makes part of the trust are not owned by the private trust as a legal person. More explicitly, Article 526 of the Civil Code envisages that a person who claims to have interest on the property constituted in the trust will sue the trustee, not the trust. Needless to state, being able to sue or sued, or to own properties are among the attributes of personality. However, they are not applicable in relation to private trust in Ethiopia since the later is not a person.

[92] As can be inferred from article 522 of the Code, after the creation of the trust, the settlor has no action against the trustee to perform the trust instead the settlor can apply to the court. Once the settlor has dedicated certain assets as a trust, it automatically comes into being, protected by the right of action of the beneficiaries and the control exercised by the courts. See the Civil Code, Arts. 516, 522, 520, 529(3), 538, 541, and 543.

[93] See the Civil Code, Arts. 516, 522, 520, 529(3), 538, 541, and 543.

[94] Associations are, as stated under Article 454 of the Civil Code, legal person that can perform civil act by their own name, can sue and be sued by their own name etc. The same holds for endowments as the provisions of the Civil Code on capacity of associations shall apply to endowments (the Civil Code, Arts 501 and 502). When we see endowments and the committees for charities; after they are approved by the then Minister of Interior, they will own the endowed property by their own name, and the administration is by directors by representing the institution (Art 494 cum Art 429). However, as regulated under the Civil Code trust is, in its own, not treated as a legal person in judicial proceedings since any lawsuit must be made against the trustees in its name. Had the trust is regarded as a legal person; trust related claims would have been made in the name of the trust. See the Civil Code, Article 526.

[95] The OCS Proclamation, Art 31.

[96] Devaux *etal*, *supra* note 18, p. 93.

[97] Mandaris, *supra* note 55, p.2.

3.2. Administration of Private Trust

While the trustee is the major player, there are different persons that would be involved in the administration of trust. The next section explicates the features of these persons, extent of their roles, power, and related issues of administration. The discussion takes each of the points for a deeper examination based on a closer reading of the pertinent provisions of the civil code and other pertinent legislative documents.

3.2.1. The Roles of the Trust Maker

Various provisions of the Civil Code envision the significant roles of the trust maker in the administration of a trust which he has constituted. In this regard, it is obvious that the trust maker can appoint the trustees or designate another person to do the same. This power of the trust maker is stipulated under Article 519 of the Civil Code. As per Article 522, the trust maker could also submit application to the court requesting the dismissal of a trustee if there is a just reason for so doing.[98] Thus, as can be understood from the Civil Code, the trust maker will not dismiss the trustee on his own.

As a creator of the trust, the trust maker has the power to give directions as to how the trustee should act while administering the trust. He may set limitations to the powers of the trustee and on the manner in which such powers must be exercised. These powers of the trust maker are provided under Articles 528 and 529(1) of the Civil Code. Yet the instructions given by the trust maker may not be fully materialized, particularly where the interest of the beneficiary requires deviation from them. As a result, Article 528(2) allows the trustee to seek court authorization to disregard the instructions of the trust maker. The trustee may not ignore the instructions of the trust maker without obtaining court authorization.

Yet, as can be understood from the reading of the same provision, in authorizing the trustee, by deviating from the instruction of the trust document, the primary consideration of the court shall be the interest of the beneficiary. In other words, deviance from the instruction is authorized where the interest of the beneficiaries so requires. Principally, as stated before, in other systems, characteristically, after the creation of the trust, the settlor has no action against the trustee to perform the trust.[99]

[98] Since a trust is, mainly, made for the interest of the beneficiary, the reason for the dismissal might have associated with cause affect the interest of the beneficiaries or if the trustee depart from the instructions arbitrarily.

[99] Hefti, *supra* note 3, p. 556.

However, under the Ethiopian Trust Law, the trust maker may have a say after the creation of the trust. For example, the trust maker may apply to the court for the revocation of trustee rights for just reasons.

The trust maker can also provide rules regarding the termination of the trust that he has constituted. As per Article 542, the trust maker may provide the time or the condition on which the trust will come to an end. In addition, he is entitled to prohibit the court from terminating the trust even if beneficiaries submit application to the court seeking the termination of the trust as stated in Article 543 of the Civil Code. Normally, trusts are created for the interest of the beneficiaries. Accordingly, upon the application of the beneficiaries, the court may declare the termination of the trust in case where the trust is not beneficial to the former. However, as noted above, this power of the court might be prohibited by the person constituting the trust, expressly, under the trust document.

Here, one may wonder whether the trust maker can prohibit this power of the court though the trust is not beneficial to beneficiaries. In the author's view, compelling the beneficiary to continue as a party in the trust relationship which is detrimental to him may not be plausible. This power of the trust maker shall be given in case where the beneficiaries are willing to go out from the trust for negligible reasons. Essentially, it should be understood and shall be presumed that the trust maker prohibits, in the trust document, the termination of the trust with a view to maintain the interest of the beneficiaries of the trust. Thus, if the trust is not functioning in the interest of the beneficiaries, it could be suspended by the court though the trust maker prohibits the power of the court to do so.

Moreover, the trust maker may, in the trust document, prohibit the income of the trust not to be attached in the hands of the trustee by the creditors of beneficiaries.. Where the income has been declared non-attachable, it may not even be validly transferred or subjected to obligations by the beneficiary of the trust.[100] The court may, however, on the application of the beneficiary of the trust or of one of his creditors, authorise the attachment or the assignment of the income if such is the interest of the beneficiary of the trust or if the claim which is brought forward in relation to a criminal offence or to a fraud for which the beneficiary of the trust is responsible.[101]

[100] The Civil Code, Articles 540(2).
[101] The Civil Code, Articles 540 to 541.

3.2.2. Trustees

As noted in the forgoing discussion, trust is administered by trustee/s. This section addresses appointnment, composition, powers, duties and liabilities of trustees under Ethiopian law.

I. Number and Appointment of Trustees

As stated under Article 520 of the Civil Code, trustees may be appointed by the settlor or by the person designated to appoint them. In situations where the person designated to appoint trustee fails to exercise his/her power, the trustee refuses to take the office, dies or becomes incapable, the court will designate a person as a trustee. This means that the trust will not fail due to lack of appointed trustee. Further, if the trust maker fails to appoint the trustee or fails to assign a person to appoint the trustee, the court will appoint the trustee. In sum, as can be understood from Article 520, the silence, over appointing the trustee, of the trust maker may not amount to the absence of the intention of the trust maker to constitute trust. The law limited the number of trustees to four. This is explicitly mentioned under Article 519(1) of the Civil Code. If more than four trustees are appointed, as per Article 519(2), the "first four" alone will exercise the functions of trustees. The other persons will replace, "in the order in which they are designated", trustees that refuse to exercise their functions, died or incapacitated.

Hence, from the provision, it is possible to understand that the order of names in the document is relevant. Understandably, the issue of *order of list of names of trustees* arises in case where the trust maker assigns many trustees in the trust document. Presumably, the trust maker is required to put the names of trustees with a clear sequential order depending on their level of prudence in the trust management. The person who is mentioned first would be regarded as the one who is trusted more than the one who is listed in the second list and so on. This standard could also be considered in other scenarios, if, for example, trustees are appointed at different times.

Finally, it is important to note that specific rules apply to the task of trusteeship where the numbers of trustees appointed are more than one. Under such circumstances, as can be understood from Article 524 of the Code, trustees shall administer the trust collectively. In other words, unless there is a contrary decision between the trustees themselves, decisions relating to the administration of the trust should be taken

collectively and with agreement between themselves. Yet, if they all are not able to agree on the decision, the decision of the majority will be upheld.

II. Powers, Duties and Liabilities of Trustees

It could be noted from various provisions of the Civil Code that a trustee has a fiduciary obligation to hold the trust property for the benefit of the beneficiaries. Accordingly, , the trustee has various duties and powers while administering the trust. Reflecting the trustee's fiduciary obligation, Article 525(1) states that the trustee should administer the trust like a "prudent and cautious businessman." As such, the trustee is required to take all necessary measures in to make sure that properties forming the object of the trust are not mixed with his own personal properties. This obligation is consistent with the fact that the trustee could not draw any personal benefit from the trust apart from the advantage that is expressly given to him in the act constituting the trust. This is mentioned under Article 531 of the Civil Code. The prohibition of mixing the properties of the trustee with that of the trust is also essential to enforce Article 536 of the Civil Code which bars creditors of the trustee to have any claim on the property forming the object of the trust.

Be the above as it may, one may wonder whether the trustee manages the trust for free if the act constituting the trust is silent as to the advantage that the trustee could obtain by assuming the position of trusteeship. In this regard, the Civil Code does not contain an express provision. However, as can be inferred form Article 532 of the Code, the trustee is entitled to be indemnified for all the expenses and obligations arising out of the administration of the trust. Thus, as long as he has incurred costs (including labour costs) in the trust administration, the trustee is entitled to be indemnified. Yet, remuneration or costs of labour may not be paid to him if the trustee has agreed to manage the trust gratuitously.

Moreover, rendering accounts of his administration of the trust and of the actual state of the property forming the object of the trust is part of the duty of the trustee. Accordingly, as stated under Article 534 of the Code, the trustee shall render an account of his administration and of the actual state of the property forming the object of the trust, to the person appointed in the act of constitution of the trust. In case where the person to whom the account rendered is not assigned under the trust document, the trustee shall render an account to any person who has an interest therein in accordance with the act of constitution of the trust. For example, the trustee may be required to render an account to the beneficiaries as a person having an interest in the trust.

Moreover, during the replacement of a trustee by another one, the trustee to be replaced shall render an account to the person who replaces him in the office of trustee.

The trustee is also given a number of powers to exercise in the course of trust administration. He has the power to represent the trust in judicial proceedings. Accordingly, Article 526(2) of the Code provides that the trustee is going to be sued in his capacity as a trustee by those persons who claim to have an interest on the property constituted in trust. More importantly, the trustee assumes an ownership power on the property forming the object of the trust. Yet it important to note that this power of the trustee to act as an owner is subject to certain limits. To this end, Article 527 of the Civil Code sets out essential limits on the power of the trustee to dispose properties constituting the trust. First, the trust is prohibited from disposing a property forming the object of the trust gratuitously. Second, the mere assumption of trusteeship position will not entitle the trustee to alienate immovable property forming the object of the trust. The trustee may alienate an immovable property if the power to do so is approved by the court provided that the power to alienate is not prohibited under the act constituting the trust. However, from contrary reading of Article 527(2) of the Code, this prohibition has to do only with an immovable property. In other words, the court may authorize the trustee to sale a movable property of the trust though it has been prohibited under the trust document.

Yet a critical examination is needed as to the extent to which the interest of beneficiaries could be maintained in this process.[102] The Civil Code contains provisions concerning the liabilities of the trustee in connection with its administration of the trust. In the trust administration, the duties of the agent, as stated under the law of agency, such as the duty of loyalty, the duty to inform and report, the duty of good faith, the duty of care, shall apply to the trustee in the trust arrangement too.[103] Pursuant to Article 525(1) of the Code the trustee, while administering the trust property, must act as *a bonus Paterfamilias* (prudent and cautious businessman). Further, according to Article 531 of the Code, in the trust management, trustee(s) may not profit from the trust.[104]

The liability which a trustee faces, as set out in the Civil Code, is twofold. First, as stated under Article 529(2) of the Code, a liability may manifest as a sanction against a

[102] Civil Code, Art 538 cum 516.
[103] See the Civil Code, Art. 533.
[104] Also, as stated under article 536 of the Code, in the trust administration, the creditors of the trustee are not allowed to seize the trust property either.

trustee for the ultra-virus act he makes in his relation with third parties. If a trustee transacts with third parties beyond its power stipulated in the trust document, the damage incurred on third parties shall be made good by the trustee himself. Further, unless it is proved that such third parties were or should have been aware of such provisions about the limit on the power of the trustee in the trust document, such limits cannot be raised as a defence against third parties.[105] Of course, the trustee may be relived from liability if he infringed the trust deed rules in good faith.[106] Secondly, a liability for damage incurred on beneficiaries or to persons who are to receive the property at the termination of the trust. As can be inferred from Article 533 of the Code, the trustee might be liable to pay compensation for damages sustained by beneficiaries or for persons who are to receive the property at the termination of the trust. Accordingly, as stated under Article 533 of the Code, a trustee will be liable for good management of the trust in accordance with the provisions relating to agency, to the beneficiaries of the trust, and to the persons who are to receive the property at the termination of the trust.

Finally, the trustee is liable if he administers the trust outside of his power given under the trust document and against the provision of the Code.[107] Moreover, according to Article 516 of the Code, he shall carry out activities in accordance with the trust document. If this duty is violated, as indicated under article 538(2) of the Code, the court will dismiss the trustee upon the application of the beneficiaries.

3.2.3. The Beneficiaries

Though the Civil Code does not specifically put about the beneficiaries of private trust, as stated before, naturally, the beneficiaries of private trust are identified or ascertained individuals. According to the Civil Code, the beneficiaries must be persons who are alive.[108] Nevertheless, unborn child can be beneficiaries of the trust as it can be ascertained. Also, it is generally stipulated that the trustee is responsible to administer the trust for the benefit of the trustees and in compliance with instructions given by the trust maker. However, the trustee may neglect the instructions of the settlor so long as doing so will be in the interest of the beneficiaries. Such departure from the instruction should, however, be exercised after securing court authorization in accordance with Article 528(2) of the Civil Code. More specifically, Articles 538 and 539 deal with the rights of the beneficiary in relation to the trustee and on the property of the trust. To

[105] Civil Code, Art. 529(1).
[106] Civil Code, Art. 529(3).
[107] See the Civil Code, Article 533 cum 2190.
[108] The Civil Code, Art. 518 [the Amharic version].

this end, Article 538(1) entitles the beneficiary to claim from the trustee the making over of the profits which the act constituting the trust makes accrue to him. Besides, as stated under article 544 of the Code, up on the termination of the trust the beneficiaries may be entitled to receive the trust property.

Finally, it is important to note that the provisions in the regime of the Civil Code also confer rights over beneficiaries. If these rights are jeopardized by the action or inaction of the trustee, the beneficiary may apply to the court seeking either of two remedies: dismissal of the trustee or provision of guarantee from the trustee.[109] Yet this power of the beneficiaries is limited in a number of ways. For example, the beneficiary has no right to dispose or administer the property forming the object of the trust. In relation to the property constituting the trust, he or she may only take actions to preserve his/her *right in rem* such as the interruption of a prescription and making publications with a view to informing third parties of the fact that certain property forms the object of the trust.[110] Nonetheless, the Ethiopian trust law fails to respond to beneficiary misconduct. It is particularly too lenient to sanction of heinous crimes. For example, the succession law and donation contract law penalizes murderer of a contributor of the property (in trust context a trust maker).[111] In other jurisdictions, when a trust maker killed in the hands of the beneficiary, the former has a right to change the beneficiary or revoke the trust.[112]

3.2.4. The Court

The role of the court in the administration of a trust may start from the time of constituting a trust. The court could also get involved during trust administration, termination and liquidation of trust. As stated under Article 520 of the Civil Code, the court may be involved in the appointment of the trustee even at the beginning of the trust. For example, as can be seen from the Civil Code, the court may be asked to appoint a trustee. The duty of the court to appoint a trustee could arise under the circumstances provided in Article 520 of the Civil Code. As already discussed, in one way or another, the court may involve in the appointment, revocation or replacement of trustees. In addition, according to Article 523(1), the court will also play a

[109] The Civil Code, Articles 522 and 538(2).
[110] The Civil Code, Art.539.
[111] The Civil Code, Arts. 830, 838, and 2448.
[112] Foster, *supra* note 38, p. 161.

significant role in the administration of a trust by providing, to the trustee, a document showing his capacity and his powers.[113]

As stated under the Civil Code, the trustee has the duty to undertake its functions in accordance with the instruction contained in the act constituting the trust. The court is, however, instrumental if such instructions of the trust maker do not safeguard the interest of the beneficiaries at it may allow the trustee to neglect the instructions stated under the trust deed. Also, when the purpose of the trust or the interest of the beneficiaries so requires, the court may authorize the trustee to sale and attach the trust property.[114] Moreover, as stated under article 535 of the Code, the court may adjust account reporting periods. Normally, unless otherwise prescribed by the trust deed, a trustee shall render accounts every year during the month when the trustee begins his management.[115] However, as stated under article 535(2), the court may for good cause authorise an interested party to ask for the accounts at an intermediate time or authorise the trustee to retard or modify the date fixed for the rendering of the accounts. In this regard, the interested parties can be beneficiaries or the trust maker, respectively, for whose interest the trust is created and as a person who destines his property in the trust.[116]

In addition, the court is also entrusted to certain roles during the termination and liquidation of a trust. In this regard, Article 543 of the Code entitles the court to declare termination of the trust when it thinks fit in the circumstance of the cases. This could be exercised at any time upon the application of the beneficiary. However, as noted above, this power of the court might be prohibited by the person constituting the trust under the trust document.[117] In essence, it should be understood and need to be presumed that the trust maker prohibits, in the trust document, the termination of the trust with a view to maintain the interest of the beneficiaries of the trust. Hence, if the trust is not functioning for the interest of the beneficiaries, the trust could be terminated by the court though the trust maker prohibits the power of the court to do so.

[113] The Civil Code, Art. 534.(2). Mainly, such document is important to show the capacity and power of the trustee, to smoothly transact with third parties in its capacity as trustee, in the management of the trust. If appropriate, the document should specify the period for which the powers have been granted to the trustee. If for example, the trustee is to be replaced by another trustee, the period when the power of the trustee shall be lapsed might be required to be specified.

[114] See the Civil Code, Arts. 527(2) cum 541.

[115] See the Civil Code, Art. 535(1).

[116] As the trust is mainly created for the interest of beneficiaries, it can be contend that they are interested parties to audit the trust assets. Besides, the trust maker would also be an interested party to check up how the trustee is administering the trust as per the trust document and for the purposes intended under the trust.

[117] See the Civil Code, Art. 543.

3.2.5. The General Attorney

Article 546 of the Civil Code sets forth that trusts constituted in a foreign country will not be able to carry out any activity in Ethiopia unless they have obtained the necessary approval from the then Ministry of Interior". Given the existing federal set up in Ethiopia, a question may arise as to which level and organ of the government is responsible to approve private trusts constituted abroad. As stated under Article 3 of the OSC Proclamation, it is the Organization of Civil Societies Agency that has the mandate to regulate the non-profits organizations including properties destined for certain purpose (trusts, endowments and committees). With regard to trust, however, it is obvious that the Agency regulates charitable trusts only.[118] In other words, in the context of foreign constituted trusts, the Agency registers or approves *public trusts* which are constituted abroad.[119] Consequently, one would wonder where a foreign constituted private trust should get approval. Yet, based on Article 546 of the Civil Code, it can be maintained that the Ministry of Justice could be responsible for the approval of private trusts constituted abroad.[120]

Conclusion

A trust is created when one party, the settlor/trust maker, grants some property to be controlled by a second party, the trustee, on behalf of a third party, the beneficiary. Until Ethiopia promulgated a separate law governing Charities and Societies in 2009, trusts were primarily regulated under Articles 516 through 544 of the Civil Code. Currently, at federal government level and in the Amhra national regional state government, charitable trusts are mainly governed under respective charities and societies laws while private trusts remain to be governed under the Civil Code Provisions. In other regional states, however, both public and private trusts are to be governed under the Civil Code provisions.

If a person needs to benefit other person (beneficiaries or heirs) without transferring the property directly to them, the trust is an appropriate legal device. Private trust is a legal relationship by which property is destined or transferred by the settlor to the

[118] The OCS Proclamation Art. 3, Article 31(1).

[119] The OCS Proclamation, Arts. 57, 3, and 31.

[120] In *dejure* and *defacto*, the Ministry of Justice has acquired the powers and responsibilities of the then Ministry of Interior. Proclamation No. 4/1995 Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation. Art. 23(9). See, for example, different Proclamations on Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 803/2013, Proc. No.916/2015 and Proc. No. 1097/2018, and see also Federal Attorney General Establishment Proclamation No. 943/2016.

trustee who manages that property for the benefit of someone else (the beneficiary). Private trust is peculiar, mainly, by the existence of fragmentation of the management and enjoyment functions of ownership. A trustee holds legal title for the welfare of the beneficiary, who holds beneficial ownership. Under the Ethiopia legal system, the feature and purpose of private trust is different from other comparable legal relationships such as agency, third party beneficiary contract and bailment. Neither of these relationships can replace the trust as an alternative to trust arrangement because administering a property with an arrangement of technical ownership (fragmentation of ownership) is solely possible through a private trust.

However, the existing private trust law of Ethiopia does not regulate the trust relationship adequately. Even though the Civil Code, with regard to substance and form, requires that the creation of trust shall be subject to the rules relating to donations or wills, the scope and denotation of substance is not specific enough to attain this. Hence, there is a need for more legislative actions clarifying the extent to which the rules governing succession and donation applies to private trust. In the absence of such clarity, knowing the extent of application of the rules of governing succession and donation to cases of private trust is difficult. To this end, the law needs to stipulate the scope of application of rules of succession and donation to private trust cases. Most importantly, the Ethiopian private trust law is unduly silent regarding the consequences of beneficiary's misconduct. In all kinds of private trust, the consequence of beneficiaries' misconduct has to be seriously revised. Although it could be possible to use the law of succession provisions for cases arising at the stage of creation of trust, the trust law is silent regarding the beneficiaries' misconduct arising during the trust administration.

Hence, the law needs to regulate the effect of beneficiaries' misconduct including at the time of trust administration. In general, if private trust is to work well, Ethiopia needs to regulate its constitution or formation and its administration in a clear and adequate way.

Rethinking the Standards of Treatment in the Ethiopian and Kenyan BITs: An Approach Towards Certainty

Yehualashet Tamiru[♦] *and Nelly C. Rotich*[φ]

Abstract

One of the policy justification behind concluding BITs is to extend protection of home state investors and investment to foreign investors. The typical mechanism for doing so is by providing entitlements and privileges to investors and imposing obligations on the host state in the form of standards of treatment. As such, conclusion of BITs send a signal to all investors that the host states are willing to protect the interest of foreign investors. With a view to demonstrate that they are investor-friendly and to attract foreign direct investment(FDI), Ethiopia and Kenya have entered into various Bilateral Investment Treaties (BITs) with developing and developed countries. This paper examines the standards of treatment in Ethiopia's and Kenya's BITs. A doctrinal research methodology has been employed to explore the issues surrounding this subject. The research found out that many of the existing BITs of the two countries are investor-oriented and have crippled the policy space and sustainable development of the two countries. This is largely attributed to the countries' adoption of century old models of FDI.

Keywords*: Bilateral Investment Treaty, Fair and Equitable Treatment, Full Protection and Security, Investment, Most-Favoured-Nation, National Treatment*

Introduction

Currently, in almost all countries, there is a wave of movement to attract Foreign Direct Investment (FDI).[1] At the same time, since the aftermath of the First World War, capital exporting countries have been in a precarious position to enforce their conception of appropriate foreign investors' treatment in capital importing countries.[2] It can be observed that investment could not occur unless there is a reasonable prospect of profit and an assurance of security. In many undeveloped countries, though

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[1] Tobin J and Ackerman S R, Bilateral Investment Treaties: Do They Stimulate Foreign Direct Investment?, unknown publisher (2006), p. 7-8. The Pdf is available at http://s3.amazonaws.com/zanran_storage/www.upf.edu/ContentPages/822485.pdf (accessed Feb. 23, 2021).

[2] Lipson C, Standing Guard: Protecting Foreign Capital in the nineteenth and Twentieth Centuries, *University of California Press* (1985), p. 8-11.

the prospect of profit is present, the assurance of security is largely missing.[3] After the end of the First World War, various forms of effort to establish a comprehensive multilateral agreement on protection of foreign investors and investment was made. Yet the effort didn't bear any fruit,[4] and still there is no comprehensive single legal regime governing the issue of investment.[5]

Looking more into the historical developments, one can see that customary international laws concerning protection of foreign investors were under attack from developing countries in the 1950s. The nationalization of British oil assets by Iran in 1951, the expropriation of Liamco's concession in Libya in 1955, and nationalization of Suez Canal can be cited as typical cases in point.[6] Though states were in agreement as to the obligation of compensation, there were gulf of difference on the requirements and conditions of payment.[7] The emergence of Calvo Doctrine in the 1960s made things even worse[8]. As per this doctrine, because all states are equal and independent, where dispute arises between the host state and investor the latter is not entitled to a higher degree of protection than domestic investors, and therefore, foreign investors should submit their claim to the local courts.[9]

The United Nations General Assembly, in 1962, passed a resolution on Permanent Sovereignty over Natural Resources which provided that public utility, security and national interest were key driving forces behind the nationalisation, requisition or expropriation of natural resources.[10] Where this happens, the owner is to be paid the appropriate compensation by the state. Where there is controversy on compensation, the disputant(s) is called upon to exhaust all the dispute resolution measures available

[3] Wilcox C, *A Charter for World Trade*, The Macmillan Company, (1949), p. 145.

[4] Abs and Shawcross, The Proposed Convention to Protect Private Foreign Investment: A Round Table, *Journal of Public Law*, Vol. 9, (1960), p. 115.

[5] At different times, various efforts were made to establish a multilateral investment agreement which would have worldwide application like GATT. However, for many reasons it never come into force. For more detailed discussion concerning OECD initiative for such agreement see Canner J, The Multilateral Agreement on Investment, *Cornell International Law Journal*, Vol. 31, (1998).

[6] Elkins and others, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, *International Organization*, Vol. 60: No. 4, (2006), p. 813.

[7] Vicuna FO, Some International Law Problems Posed by the Nationalization of the Copper Industry in Chile, *The America Journal of International Law*, Vol. 67: No. 4, (1973), p. 722.

[8] Weston BH, The Chapter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, *The America Journal of International Law*, Vol.75: No.3, (1981), p. 438.

[9] Garcia-Mora MR, The Calvo Clause in Latin American Constitutions and International Law, *Marquette Law Review*, Vol.33: No.4, (1950), p. 206.

[10] United Nations General Assembly Resolution 1803 (XVII), Permanent Sovereignty Over Natural Resources, A/RES/1720, (Dec. 14, 1962), https://legal.un.org/avl/ha/ga_1803/ga_1803.html (accessed Oct. 26, 2021); See also O'Connor LA, The International of Expropriation of Foreign-owned Property: The Compensation Requirement and the Role of the taking Sates, *Loyola of Los Angeles International and Comparative Law Review*, Vol.6, (1983), p. 360.

in the state taking the measures.[11] This is further fuelled by the General Assembly resolution on New International Economic Order, which requires payment of appropriate compensation by the state adopting the measures of nationalisation.[12] In so doing, the state is required to take into consideration relevant laws and regulations.[13]This Resolution opens a space for integrating the principle of compensation into national laws.[14] Further, the General Assembly, which was dominated by developing states,[15] underscored once and for all its loyalty for 'appropriate compensation' standard by encompassing the same term under Article 2 (2) (c) of the Charter of Economic Rights and Duties of States.[16] As a result, the appropriate compensation standard is only subject to assessment of national law to which international law is not necessarily relevant.[17]

Parallel to these developments, there were pressing needs from capital exporting countries to come up with a comprehensive multilateral agreement respecting the principle of 'appropriate compensation'. The USA, for instance, during the Uruguay round negotiation process on the General Agreement on Tariff and Trade (GATT hereinafter), 1986-1994, proposed the idea to embody comprehensive international legal frameworks to govern the issue of investment. The idea was, however, rejected by many developing countries.[18] Similar effort was made by the USA duringthe discussion to establish an International Trade Organization (ITO) to embody provisions concerning foreign investors. Although the USA was very successful in including investment terms, the treaty has never come into force.[19]

In making such moves, developed nations insisted on the application of the hull formula which calls on host states to promptly, adequately, and effectively compensate

[11] Id.

[12] United Nations General Assembly Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, A/RES/S-6/3201, (May 1, 1974), http://un-documents.net/s6r3201.htm (Oct. 26, 2021), Article 2(2) (c).

[13] Id; see also Weston BH, The Chapter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, *The America Journal of International Law*, Vol. 75: No.3, (1981), p. 438..

[14] Declaration on the Establishment of a New International Economic Order, supra note 12.

[15] Unlike many other institution, as per rule 82 of the UN General Assembly each member has one vote regardless of any other factors like economy or population. See Rules of Procedure of the General Assembly, A/520/Rev.18, (Sept 2016), https://undocs.org/en/A/520/rev.18 (accessed Feb. 23, 2021).

[16] General Assembly Resolution 3281(XXIX), Charter of Economic Rights and Duties of States, A/RES/29/3281, (Dec. 12, 1974), https://www.un.org/documents/ga/res/29/ares29.htm (accessed Feb. 23, 2021).

[17] Brower CN and Tepe JB, The Charter on Economic Rights and Duties of States: A Reflection or Rejection of International Law?, *The International Lawyer*, Vol. 9: No.2, (1975), p. 305.

[18] Kurtz J, A General Investment Agreement in the WTO: Lesson from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, *University of Pennsylvania Journal of Law*, Vol. 23: No.4, (2002), p. 717.

[19] Id., p. 717-718.

investors in case of expropriation of foreign property.[20] This formula is well established under customary international law as is evident in cases such as the Norwegian ship owners' case, the Spanish-Morocco claim, and the Chorzow factory case.[21] Conversely, developing countries objected to the hull formula and restricted compensation to appropriate standard in case of expropriation.[22] Therefore, the failure of efforts to develop multilateral investment legal regime led to the development of BITs as a visible option.

Initially, BITs were intended as effective legal tools to protect and promote investments coming from capital exporting states to the developing countries.[23] This pattern, however, has drastically changed since the late 1980s and especially in the 1990s, as developing countries began to sign BITs between themselves with the view to enhance their economy.[24] The number of BITs concluded between and among developing countries leaped from 47 in 1990 to 603 by the end of 2004, involving 107 developing countries.[25] The rise in South-South FDI flows have been motivated by pushing and pulling factors like increased competition or limited growth opportunity in domestic markets, efficiency-seeking and procurement of raw materials.[26] This, in turn, has demonstrated that developing countries are more and more integrated than before.[27] Unlike BITs with developed states, developing countries are more likely to agree to a different set of rules which permit a substantial ground for developmental objectives than its coutnter part North-South BITs since the party states have relatively equal bargaining power. In case of South-South BITs, for instance, national treatment standard is either not legally binding or subject to domestic law.[28]

Kenya and Ethiopia, belonging to the south camp, have entered into BTIs with varying states at this point in time. For example, Kenya has signed twenty (20) BITs; of these

[20] Dolzer R, New Foundation of the Law of Expropriation of Alien Property, *American Journal of International Law*, Vol.75, (1981), p. 558.
[21] Id., p. 558-559.
[22] Elkins Z, AT Guzman and BA Simmons Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, *International Organization*, Vol. 60: No.4, (2006), p. 818.
[23] Poulsen LS, The Significant of South-South BITs for the International Investment Regime: A Qualitative analysis, *Northwestern Journal of International Law and Business*, Vol. 30, (2010), p. 101.
[24] United Nations Conference on Trade and Development, Bilateral Investment Treaties 1959-1999, (2000) p. 2, available at https://unctad.org/system/files/official-document/poiteiiad2.en.pdf (accessed Oct. 26, 2021).
[25] United Nations Conference on Trade and Development, South-South Cooperation in International Investment Agreements, (2013), UNCTAD Series on International Investment Policies for Development XIII, https://unctad.org/system/files/official-document/iteiit20053annex_en.pdf (accessed Oct. 26, 2021)
[26] Id.
[27] Id.
[28] Poulsen, supra note 23.

eleven (11) are in force,[29] eight (8) were signed but are not in force[30] and one (1) has been terminated.[31] Kenya signed its first BIT with the Nertherlands in 1970 and its latest in 2018 with Singapore.[32] Ethiopia has, on the other hand , signed thirty-five (35) BITs; of which twenty (20) are in force,[33] twelve (12) were signed but are not in force[34] and two (2) have been terminated.[35] Ethiopia signed its first BIT in 1964 with Germany and the latest in 2018 with Brazil.[36]

It is against this backdrop that this article proceeds to explore and analyze the standards of treatment in Ethiopia's and Kenya's BITs. The contents of exploration and analysis is organized in seven sections. The first section provides the background to the exploration of the subject. The second section contextualizes the standards of treatment in BITs. The Third section analyses the standard of fair and equitable treatment while the fourth section examines the most-favoured nation treatment. Section five explores the national treatment standard and section six is devoted to the examination of the standard of full protection and security. Finally, a concluding remark is providedin the the seventh section.

1. Contextualizing Standards of Treatment in BITs

With the view to secure the special benefit of investors and restrain the possible negative action of the host state, in almost all BITs there is standards of treatment provisions. This standar is defined as' … the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investment made by

[29] These include BITs between Kenya and Japan, United Arabs Emirates, Korea, Kuwait, Burundi, Finland, France, Switzerland, United Kingdom, Germany and Netherlands.

[30] These are BITs between Kenya and Singapore, Qatar, Turkey, Mauritius, Slovakia, Libya, China and Islamic Republic of Iran.

[31] The BIT between Kenya and Italy has been terminated.

[32] United Nations Conference on Trade and Development, International Investment Agreements Navigator-Kenya, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya> (accessed Feb. 29, 2021); see also Waruhiu PW, Kenya's Bilateral Investment Treaties: Rethinking the Vaguely Drafted Substantive Provisions, Thesis Submitted to the University of Nairobi, (2019).

[33] UNCTAD, supra note 32. These are BITs between Ethiopia and Egypt, Finland, Sweden, Austria, Libya, , Israel, Islamic Republic of Iran, France, Netherlands, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Kuwait and Italy..

[34] Id. These are BITs between Ethiopia and Brazil, Qatar, United Arabs Emirates, Morocco, United Kingdom, Equatorial Quinea, Spain, South Africa, BLEU (Belgium-Luxembourg Economic Union) signed in 2006, Nigeria, BLEU (Belgium-Luxembourg Economic Union) signed in 2003 and Russian Federation.

[35] These are BITs between Ethiopia, India and Germany.

[36] United Nations Conference on Trade and Development, International Investment Agreements Navigator-Ethiopia, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> (accessed Feb. 29, 2021).

investors covered by the treaty.'[37] There are different types of standards of treatment provided in various BITs. It is quite common to find such provisions in a treaty dealing with the issue of standard of treatment. Yet this provision usually encompases several types of standards of treatments.[38] The standards of treatment accorded to foreign investors in BITs, among other things, includes : Fair and Equitable Treatment (FET), Most Favoured Treatment (MFN), National Treatment (NT), full protection and security standard.

It is possible to classify these standards of treatment into two broad categories: Contingent or non-contingent standards of treatment. Generally, MFN and NT are contingent entitlements in the sense that their contents are determined in reference to the domestic laws of host state or in reference to treaties entered into by host states with third countries.[39] On the other hand, fair and equitable treatment which is understood also to include international minimum standard is non-contingent because it does not depend on external factors.[40] The full protection and security standard is also regarded as an absolute entitlement which is not contingent upon host state treatment to other investors and investments.[41]

2. Fair and Equitable Treatment

Although it's currently common to come across FET clause as one of the key features of any BIT, it was historically not recognized as an entitlement.[42] For instance, the first proper BIT concluded between Germany and Pakistan doesn't contain this entitlement as investor's right and the host state's obligation.[43] Likewise, the prominent early effort to come up with a global investment treaty, i.e the 1948 Havana Charter for establishment of International Trade Organization convention (Havana Charter), didn't

[37] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/O3/19, Para. 212 (2010), Decision on Liability, https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf, (accessed on Feb. 23, 2021).

[38] Sornarajah M, *The International Law on Foreign Investment*, 3rd ed. Cambridge University Press, (2010), p. 201.

[39] Falsafi A, International minimum standard of treatment of foreign investors' property: A contingent standard, *Suffolk Transitional Law Review*, Vol. 30, (2007), p.354.

[40] Kill T, Don't Cross the Streams: Past and Present Over Statement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations, *Michigan Law Review*, Vol. 106, (2008), p. 855.

[41] Junngam N, The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully Protected and Secured from?, *American University Business Law Review*, (2018), p. 4.

[42] Dolzer R and Stevens M, Bilateral Investement Treaties, *Martinus Nijhoff Publisher*, (1995), p. 58.

[43] According to Kalil around 28 of the early BITs don't contain FET as entitlement; see Khalil M, Tretament of Foreign Investment in Bilateral Investment Tretaies, *ICSID ReviewForeign Investment Law Journal*, Vol. 8, (1992), p. 351-355.

provide for a binding obligation rather it provided an aspirational or good to do clause. The Havana Charter calls on organizations, in collaboration with other organizations, to make recommendations on bilateral and multilateral agreements to provide for just and equitable treatment for the skills, enterprise, capital, technology and arts brought into a country by another.[44]

FET is one of the most prominent standards of treatment which is found in different BITs and it's one of the most frequently invoked standards in investment arbitration.[45] Despite the popularity of this treatment in BITs, there is no uniformity in terms of qualification and wording. Some treaties simply state the FET without any qualification[46] while others opt to link FET with international law.[47] Particularly, some treaties prefer to link FET with the minimum customary international law[48] and there are also a few instances in which treaties rather provide illustrative list of grounds[49] that constitutes breach of FET.[50]

2.1. Defining Underlying Notions

Although there is a lack of clarity as to whether the two notions ,— namely, fair and equitable — are either similar or different treatments, there is a general assumption that these two terms are the same and hence 'represent a single unified standard.'[51] Yet arising from the inherently open ended nature of the standard, there is no uniform

[44] The Havana Charter for an International Trade Organization, World Trade Organization, (Mar. 24, 1948), https://docs.wto.org/gattdocs/q/GG/SEC/53-41.PDF (accessed Oct. 26, 2021), (hereinafter 'Havana Charter'), Article 11(2); see generally the OECD Fair and Equitable Tretament Standard in International Investment Law Working Papers on International Investment 2004/2003, Fair and Equitable Treatment Standard in International Investment Law, (2004), p. 3, http://dx.doi.org/10.1787/675702255435

[45] Zhu Y, Fair and Equitable Treatment of Foreign Investors in Era of Sustainable Development, *Natural Resource Journal*, Vol. 58, (2018), p. 321.

[46] This is the case of China Model BIT, Agreement between the Government of the People's Republic of China and the Government of _____ Concerning the Encouragement and Reciprocal Protection of Investments, https://edit.wti.org/document/show/d30dc028-3527-4b44-96ee-990fcfa775c3 (accessed Oct. 26, 2021).Article 3(1) states that 'Investments of investors of each contracting party shall all the time be accorded fair and equitable treatment in the territory of the other contracting party.'

[47] See the BIT agreement between the Republic of Croatia and the Sultanate of Oman under Article 3(2) state that'….Contracting party shall be accorded fair and equitable treatment in accordance with international law.'

[48] Article 5(1) of the USA Model BIT which states that 'Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.. .'.

[49] Article 11(1) cum (2) of the Asean Comprehensive Investment Agreement which states that each Member states shall accord fair and equitable treatment which include not to deny justice in any legal or administrative proceeding and full protection and security measures which is reasonable necessary to protect investors.

[50] Zhu, supra note 45, p. 324.

[51] Id., p. 91.

meaning of FET and its substance. As such, it has been suggested that the clause may be interpreted to mean a catch-all provision which includes very broad acts of government.[52] In an effort to find out the meaning of FET, ICSID in a case brought to it under the Additional Facility rule,[53] encapsulated the minimum standard of treatment of FET in the following terms:

> *…the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process…*[54]

Thus, FET sets out the minimum terms/standards for treating an investor in the host state. It particularly employes descriptors that capture the notion of fairness and equitablity.

2.2. FET as a Standalone Entitlement

There are instances where FET is employed as a stand alone entitlement. The provision on FET would in such instances elaborate the terms for provision of FET.[55] Where FET has been employed as a stand alone entitlement, at least three problems against the host state would arise. First, the investor might argue that fair and equitable treatment standards provide a higher standard of treatment than what is provided under

[52] Dolzer R, Fair and Equitable Treatment: A Key Standard in Investment Treaties, *The International Lawyer*, Vol. 39, (2005), p. 88.

[53] The ICSID Additional Facility Rule was created in 1978 with the view to provide the same service which otherwise fall outside the jurisdiction of ICSID. This can be triggered in three instances. First, when the dispute arise between state and foreign investor (the home state) and one of them is not the member of ICSID Convention. Second, if the dispute arise between investor and the state which doesn't directly arise from investment and finally, institution of finding proceeding by any nation. For more information on additional facility rule please see https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx, accessed Feb. 24, 2021.

[54] *Waste Management Inc v United Mexican States(Award),* ICSID Additional Facility Rule Case No. AB(AF)/00/3, para. 98,https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf (accessed Feb. 24, 2021).

[55] For instance, Article 7 of the BIT between Kenya and Netherlands. Agreement on Economic Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, (Sept. 11, 1970), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1793/download.

minimum customary international law which imposes cumbersome obligation on the host state. Second, because the term is illusive and subjective, the investor will have unfettered power to invoke this standard for any reasons which might lead to breach of treaty. This is partly because the 'role of fair and equitable treatment varies from case to case.'[56] The nature and content of FET also remains to be determined.[57] The third one is related to FET's function in the protection of reasonable and legitimate expectation of investors[58], which is a presumption taken by the investor as to the overall investment environment and any explicit or implicit act of the host state, leading the investor to believe as its entitlement.[59]

Logically speaking, foreign investors make many considerations before investing in a given country. One of these is the legal framework of the host state. According to the FET standard, change or even amendment of one of the laws might be interpreted as an inconsistent behaviour from host states constituting breach of legitimate expectation of investors embodied in rules of FET. The ICSID Tribunal, in a case ivolving enforcement of this rule, observed that the FET obligation had been seriously breached in what the Tribunal termed as the "roller-coaster" effect of the continuing legislative changes.[60] Therefore, any change or amendment of laws might be interpreted as a 'roller-coaster' to the investors. This is more likely to cripple the lawmaker from enacting a new law for fear of breach of this illusive obligation.

2.3. FET and Customary International Law

In some other BITs, FET is employed in connection to MFN and customary international law. For instance, the BIT between Denmark and Ethiopia provides that the FET shall be accorded to foreign investors in no less favourable terms than that accorded to local investors.[61] Similarly, the BIT between Kenya and the Islamic

[56] *Pseg Global INC. AND Konyailgin Elektrk Üretm Ve tcaret Lim!ted "!rket! v. Republic of Turkey* (2007) Award, ICSID Case No. ARB/02/5, para. 239,https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf (accessed Feb. 24, 2021).

[57] Alvarez-Jimenez A, Minimum Standards of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice, *Journal of World Investment and Trade*, Vol. 9: No. 1, (2008), p. 52.

[58] *Electrabel S.A. v The Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, applicable law and liability, para 7.75, https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf, (accessed Feb. 24, 2021).

[59] Dolzer R and Schreuer C, Principle of International Investment Law, *Oxford University Press*, (2008), p. 134-140. See also *Parkering-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/ 8, para. 334.

[60] *Pseg Global inc. and konya ilgin Elektr!k üret!m ve t!caret l!m!ted "!rket! v. Republic of Turkey,* supra note 48, Para. 250.

[61] See Article 3(1) of the Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, (Apr. 24, 2001), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-

Republic of Iran provides that fair treatment shall be accorded by contracting parties to foreign investors in no less favourable terms than that accorded to its investors.[62] In another instance, the BIT between Kuwait and Ethiopia indicated that Contracting States should extend protection in a manner consistence with customary international law.[63] This implies that the applicability of FET is contingent on MFN and customary international law.[64] This approach is problematic in that the content of customary international law with which FET is equated is also unknown and have different rules of interpretation. This is well captured by Borchard when he describes this standard as "vague, deceiving and delebrately calculated to produce an error". Borchard further points out that " the standard pretends to express a conception of reality that barely exits".[65] Needless to say, to establish international customary international law there must be two elements: opioin juris and uniform state practice. The fact that the state failed to reach an agreement on multilateral investment agreement is partly because of lack of consensus on minimum customary international law. This is because developing countries were objecting to the existence of customary international law and hence, it's difficult to find out what constitutes it.

In the L.F.H Neer and Pauline Neer (USA) v United Mexican States case , the ICSID Tribunal tries to flesh out the content of minimum standard of treatment based on reasonable man standard. It reasoned in the ruling that : "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far

files/1005/download. This is the same exact situation for BITs Ethiopia concluded with Egypt, Article 2; Sudan, Article 3(2) and Yemen, Article 3(2).

[62] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments (Feb, 24, 2009), Legal Notice No. 150, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5535/download, Article 4.

[63] Article 3(1) of the BIT concluded between Ethiopia and Kuwait. Agreement between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, (Sept. 14, 1996), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1169/download.

[64] Actually the comparison is with MFN principle which is attain customary international law. see Paparinskis M, The international minimum standard and fair equitable treatment, *Oxford University Press*, (2013), p. 105-112. Such type of Ethiopia's BITs are numerous for instance under Article 3(2) of BIT between Ethiopia- Denmark state that' Contracting party fair and equitable treatment which in no case shall be less favorable than accorded to its own investors or to investors of any kind state.'

[65] Borchard M, Diplomatic Protection on Citizens abroad, (1916) as quoted in Falsafi A, The International Minimum Standard of Treatment of Foreign Investor's Property: A Contingent Standard, *The Suffolk Transnational Law Review*, Vol. 30: No. 2, (2007), p. 336.

short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[66]

One may, like the reasoning provided in this ruling, identify and show investors' rights which are believed to have attained status of customary international law. Yet it is not important to incorporate them under BITs. This is because, once customary international law is established, then it binds all countries except those consistently objecting to the practice (consistent objector).[67] Hence, providing what is binding on all countries under BITs will be very superfluous and fails to serve any purpose other than bringing more confusion and opening a leeway for investors' to manipulate the situation.

Therefore, equating FET with a minimum standard of treatment doesn't help much since the interpretation become unmanageable and unpredictable. Also, the approach of equating FET with customary international law is problematic and put the host state in a more precarious position. The most viable option to avoid this asymmetry is by adopting BITs which obviate the requirement of minimum customary international law and fair and equitable standard of treatment altogether such as Indian BIT Model.

2.4. Fair and Equitable Treatment in Ethiopia's and Kenya's BITS

Although most BITs concluded by Ethiopia largely recognize FET, there are still instance where this is not true at all. For example, in the BITs concluded by Ethiopia with Turkey and Brazil, in which FET is incorporated, no mention of this standard is made. As such, there is no consistency in the use of the standard. In some instances, FET is used without any qualification. For instance, Article 3(1) of the BIT between Ethiopia and Austria calls on the parties to accord FET to investors in their territory.[68]

[66] *L.F.H Neer and Pauline Neer (USA) v United Mexican States* (1926) Volume IV 61, Report of International Arbitration Awards, http://legal.un.org/riaa/cases/vol_IV/60-66.pdf, accessed Feb. 26,2021.

[67] Kadens E and Young E, How Customary is Customary International Law?, *William and Mary Law Review*, Vol. 54, (2013), p. 889.

[68] This is the same exact situation in BITs Ethiopia concluded with Belgium- Luxembouge Economic Union Agreement between the Belgian- Luxembourge Economic Union and The Federal Democraic of Ethiopia on Reciprocial Promotion and Protcetion of Investments 2006, Article 3(1); Article 3(1) of Libya, ; Article 4(1) of Kuwait Agreement between the The Federal Democraic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocial Proetction of Investments 1996, Article 3(1) of Iran; Article 3(1) of Malaysia Agreement between The Federal Democraic of Ethiopia and the Government of Malaysis for the Promotion and Protcetion of Investments 1996; Article 2(1) of Finland Agreement between the Government of the Republic of Finland and The Federal Democraic of Ethiopia on the Promotion and Protcetion of Investments 2006 and Article 3(1) of Spain Agreement between the Federal Democraic of Ethiopia and the Kingdom of Spain the Promotion and Reciprocial Protcetion of Investments 2006

In other instances, some BITs prefer to provide the terms for provision of FET. For instance, the BIT between Ethiopia and Sweden calls on the paties "not [to] impair the management, maintenance, use, enjoyment or disposal [of any interest in the the investment] , nor the acquisition of good and services or the sale of their product, through unreasonable or discriminatory measures," [69] which is stipulated in the FET clause.[70] It can be deduced from this provision that FET is a stand alone entitlement. Thus, practically speaking, the investors may come up with any conceivable reasons as their legitimate expectation before the investment is made and it will automatically shift the burden to the host state, Ethiopia, to prove otherwise.

On the other hand, a close examination of Kenya's BITs shows that all of the eleven BITs currently in force contain provisions on FET. The FET is provided either as stand alone entitlement, without any qualification, in accordance with the MFN treatment or in accordance with customary international law. For instance, in the BITs between Kenya and Switzerland,[71] and Kenya and the United Kingdom,[72] the FET is provided as a stand alone entitlement. FET is provided without any qualification in the BITs between Kenya and Burundi,[73] Kenya and Finland,[74] and Kenya and Germany.[75]

[69] Article 2(3) of the BIT.

[70] This is the same exact situation in Agreement on Encouragement and Reciprocal Protection of Investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, (May 16, 2003), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1172/download, Article 3(1); Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, (Feb. 10, 2000), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1173/download, Article 3(1); Agreement between the Swiss Confederation the Federal Democratic Republic of Ethiopia on the Promotion and Reciprocal Protection of Investments, (Jun. 26, 1998), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4813/download, Article 4(1) and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments, (Nov. 19, 2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download, Article 2(2).

[71] Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments, (Nov. 14, 2006), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3263/download,Article 4(1).

[72] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments,(Sept. 13, 1999), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1795/download, Article 2(2).

[73] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 151, (Apr. 1, 2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5533/download, Article 3(2).

[74] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 148, (Sept. 1, 2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5534/download, Article 2(2).

[75] Treaty between the Federal Republic of Germany and the Republic of Kenya Concerning the Encouragement and Reciprocal Protection of Investments, (May 3,

Also, the BITs between Kenya and United Arabs Emirates states that FET is provided on MFN basis.[76] Following the same principle, the BIT between Japan and Kenya requires FET to be provided in accordance with customary international law.[77] This BIT sets out the minimum standard of treatment of aliens as "the minimum standard of treatment to be afforded to investments of investors of the other state".[78] This is similarly the case with the BIT between Korea and Kenya,[79] and the Netherlands and Kenya.[80] Finally, the BIT between Kenya and Kuwait provides for FET in accordance with "recognised principles of international law.[81]

3. Most Favoured Treatment

MFN is one of the most important provisions in any BITs agreement and is regarded as 'the corner stone of all modern commercial treaties'.[82] MFN is a promise made by contracting parties that neither state will extend more favoured treatment to third states than what is given to investors by the other state party.[83] The policy justification behind MFN treatment is not to create the most favoured nation that is more favoured than the rest, but, to the contrary, it is meant to secure equality of treatment between

1996),https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1350/download, Article 2(1).

[76] Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirates on the Promotion and Protection of Investments, (Nov. 23, 2014),https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5544/download, Article 4.

[77] Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment, (Aug. 28, 2016), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download, Article 5.

[78] Id, under Note.

[79] Agreement between the Government of the Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investments, (Jul. 8, 2014), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5261/download, Article 2(2) & (3).

[80] Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, (Sept. 11, 1970), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1793/download, Article 7.

[81] Declaration of Special Arrangments for the Reciprocal Promotion and Protection of Investments, Legal Notice No. 170, (Nov. 12, 2013), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5539/download, Article 2(2).

[82] Hornbeck SK, The Most-Favored-Nation Clause(part 1), *America Journal of International Law*, Vol. 3, (1909), p. 395 as quoted in Vesel S, Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, *Yale Journal of International Law*, Vol. 32, (2007), p. 126.

[83] Cole T, The Boundaries of Most Favoured Nation Treatment in International Investment Law, *Michigan Journal of International Law*, Vol. 33, (2012), p. 539.

states by extending any treatment to each state as the most favoured one.[84] The international court of justice reinforced this purpose when it sated that " …the intention of the MFN clauses was to establish and maintain at all time fundamental equity without discrimination among all of the countries concerned".[85] Incidentally, MFN clauses are a significant tool in preventing fragmentation of legal regime in international investment law[86] and mitigating the risk of over interpretation.[87] From a foreign investor's perspective, it has an important role in stabilizing their expectation over time to commit themselves for long term investment.[88]

MFN clauses in BITs have also the effect of 'multilateralization'. Particularly, they give direct access to an investor who is covered under basic treaty to rely on a completely different treaty concluded between host and third states .[89] It is important to note at this juncture that while multilateralization is a feature of recent MFN clauses, the earlier ones were unilateral, specific and retrospective in nature.[90] They were 'unilateral' in a sense that prior agreement between states was not required to extend MFN treatment reciprocally; rather, only one of the party states promised to extend MFN to another state. Further, the early MFN clauses were specifically limited to items negotiated between two states. Finally, unlike the recent counterparts, the early MNF clauses were 'retrospective', extending MFN to those benefits already provided to third party states.[91]

Turning to another feature of MFN clauses, one would see that it is not an absolute entitlement. Exceptions to such rule have been recognized in instances such as free trade area,[92] regional trade agreement,[93] preferential and different treatment,[94] and

[84] Culbertson W S, Most-Favored-National Treatment, *America Society International Law Proceeding*, Vol. 31, (1973), p. 76.

[85] Right of Nationals of the United States of America in Morocco France v United States Para 176, http://www.worldcourts.com/icj/eng/decisions/1952.08.27_rights_of_nationals.htm, (accessed Feb.27, 2021).

[86] In the absence of MFN state will enter into competition to secure the most favoured terms for their investors which fragment the international investment law

[87] Cole, Supra note 82, p. 540.

[88] Vesel, Supra note 81, p. 142.

[89] Schill SW, Mulitilateralizing Investment Treaties through Most-Favored-Nation Clause, *Berkeley Journal of International Law*, Vol. 27, (2009), p. 519.

[90] Schill, Supra note 88, p. 545.

[91] Id.

[92] Free Trade Agreement is an agreement between two or more states to enhance cooperation by reducing trade barrier. The aim of Free Trade Areas exception is to enhance liberalization of substantially all trade between the members belonging to such area. See Yadav SK, The Proliferation of Free Trade Areas: A Threat to Multilateralization, *International Trade Law Journal*, Vol. 22, (2014), p. 9 .

[93] Regional Trade Agreement is reciprocal preferential trade agreement between two or more states. The main purpose is to enhance global economic integration. See Mathis JH, Regional Trade Agreement in the GATT/WTO: Article XXIV and Internal Trade requirement, (2001) T.M.C Asser Press.

custom union.[95] It has however been construed in other instances that non-discrimination under international trade is tantamount to discrimination against developing and less industrialized countries.[96]

Still another point worth considering is the scope of the MFN entitlement. In more general terms, there has been a consensus that the principle of MFN extends to only substantive entitlement. Yet recent developments demonstrate that there is an emerging decision and a trend which associates procedural matters to MFN principles.[97] The argument underlying such moves is that ,if there is no waiting period (the so called eighteen month law) or exhaustion of local remedy requirement under other BIT concluded by the host state, then — even if there is a clear waiting period or exhaustion of local remedies — the investor is not obliged to follow such procedure by virtue of MFN principle.

To illustrate this point , let's take the BIT between Ethiopia and Isreal. In this treaty, it is required that the investor should wait for six months to bring an international arbitration claim, whereas under BIT between Ethiopia and Turkey there is no such procedural requirement. Therefore, according to the above argument, an Isreali investor can invoke the MFN principle to escape procedural hurdle imposed by the treaty arguing that Turkish investors get more favoured treatment by accessing international dispute settlement without such requirement and hence, the act is discriminatory. The same issue was raised in Emilio Augustin Maffezini v. The Kingdom of Spain in which the Tribunal observed:[98]

> *…if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the*

[94] An arrangement in which developed country provided different and special treatment without reciprocity with the view to enhance trade opportunity for developing countries.

[95] It's an agreement in which member states agree to zero duty imposed to import goods and service and they will have common external tariff. See Neyapt B, Taskin F and Ungor M, Has European Customs Union Agreement Really Affected Turkey's Trade?, *Applied Economic*, Vol. 39: No.16, (2007), p. 2121.

[96] Rubin S, Most Favoured Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution, *International Trade Law Journal*, Vol. 6, (1980), p. 225.

[97] Teitelbaum R, Who's afraid of Maffezini-Recent Developments in the Interpretion of Most Favoured Nation Clauses, *Journal of International Arbitration*, Vol. 22: No. 3, (2005); see also Noh M, Establishing Jurisdiction through Most-Favoured-Nation Clause, *International Trade and Business Law Review*, Vol. 15, (2012); Further see Vesel S, Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation in Bilateral Investment Treaties, *Journal of International Law*, Vol. 32 (2007).

[98] ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, Para. 56, https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (accessed Feb. 27, 2021).

beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis[99] *principle.*

3.1. Like Circumstances in MFN

The India Model BIT developed a more comprehensive measure on what constitutes 'like circumstances'. The Model BIT provides that the criteria for 'like circumstances' are the goods and services consumed or produced by the investment, the actual and potential impact of the investment on a third person, whether the investment is public, private or state owned or controlled and the practical challenges of regulating the investment.[100] Likewise, the Draft Pan African Investment Code, in explicating the notion of 'like circumstance', sets out four characterizing features. As such like circumstance is determined based on the effect of the investment on third person and local communities, its effect on the environment and health, the sector in which the investment is active, the objective of the measure in question, the regulatory process, company size and other factors which are directly related to the investment.[101]

Looking into the national context, the BIT between Ethiopia and Brazil states that like circumstances depend on the totality of the circumstance—among other things whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objective.[102] From this qualifying phrase, one could see that the standard of like circumstance is quite vague and illusive from the begining and the explanation under the treaty don't remedy this but instead brings more confusion.

3.2. Exception to MFN Treatment

In all BITs without any exclusion, it's possible to find exception to MFN treatment. However, there is a marked variation in the wording of those limits set out in these treaties Ethiopia entered with other counrtries. Generally speaking with the exception of Israel BIT, in others , any preference or privilege arising from customs union, free

[99] This is a latin jargon which means 'of the same kind', https://legal-dictionary.thefreedictionary.com/Ejusdem+generis (accessed Feb. 27, 2021).

[100] See footnote to Article 4(1).

[101] Article 7(3) of the Draft Pan-Africa Investment Code (2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed Feb. 27, 2021).

[102] BIT between Brazil and Ethiopia, Agreement between the Federative Republic of Brazil and The Federal Democraic of Ethiopia on Investment Cooperation and Facilitation Promotion and Protcetion of Investments 2018 https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

trade agreement, economic community, common market and tax related treaties shall not be covered under MFN.

Further looking into the documents, one can see that in some BITs exceptions are drafted in broad terms endangering the very existence of the principle. For instance, under Article 7 of the BIT between UK and Ethiopia, apart from the general exception, it provides:

> *…[t]he provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to …any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order.'*[103]

Likewise, the BIT with South Africaunder Article 3(4)(c) sanctions 'any law or other measures the purpose of which is to promote the achievement of equality in its territory or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.'[104] it is worth noting that the Ethiopia-Germany BIT excludes the application of MFN on measures taken for reasons of public security and order, public health or morality.[105]

In the Kenyan context some BITs provide very elaborate provisions on MFN exceptions. For instance, the BIT between Japan and Kenya exludes measures such as

[103] BIT Between UK and Ethiopia, Agreement between the Government of the United Kingdom of Great Britain and Northern Irland and and The Federal Democraic of Ethiopia for the Promotion and Protcetion of Investments 2009https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021). It's quite difficult to interpret what are public security or public order means. This difficulty is well noted in one of the old England Court in a case between *Richardson v Mellish* when the judge said' public policy;-it is a very unruly horse, and when once you get astride it you never know where it will carry you',http://www.uniset.ca/other/css/130ER294.html (accessed Feb. 27, 2021). For elaborate discussion on vagueness of public policy see Edwards HT, Judicial review of labour arbitration awards: The clash between the public policy exception and the duty to bargain, *Chicago-Kent Law Review*, Vol. 64, (1988).

[104] BIT between South Africa and Ethiopia,Agreement between the Government of the Republic of South Africa and The Federal Democraic of Ethiopia for the Promotion and Reciprocal Protcetion of Investments 2008https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021). This provision seems envisage the South African situation of Black Economic Empowerment (BEE) which aim to address the power difference between historically disadvantaged majority black and white minorities. See Southall R, Ten Propositions about black economic empowerment in South Africa, *Review of African Political Economy*, Vol. 34, (2006).

[105] BIT between Germany and Ethiopia, Agreement between the Federal Republic of Germany and The Federal Democraic of Ethiopia concerning the Ecouragement and Reciprocal Protcetion of Investments 2004https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

the acquisition of land property, subsidies, and government procurement. Further, this treaty elaborates the treatment accorded to investors on the basis of reciprocity, preferential treatment involving the "protection of new varieties of plants, aviation, fishery or maritime matters" and "any measure relating to investments in public law enforcement and correctional services, and in public social services such as income security or insurance, social security or insurance, social welfare, primary and secondary education, public training, health and child care." Finally, other BITs exclude MFN on judicial and procedural matters[106] and taxation.[107]

3.3. MFN in Ethiopia' and Kenya's BITs

All of the BITs to which Ethiopia or Kenya is a party have elements of MFN. However, there are differences in the wording and scope of MFN across the treaties. Some BITs provide for the obligation to extend MFN principle without any qualification.This is evident in Article 3(1) of the BIT between Israel and Ethiopia,[108] and in the BIT between Germany and Kenya,[109] and United Kingdom and Kenya.[110] Such an approach will make it very difficult to implement international agreements like that of regional arrangements and customs union, which inherently presuppose special and differential treatment for member states.

Whereas, in some BITs the application of MFN is qualified and limited. Ethiopia's and Kenya's BITs use two ways of limiting the applicability of MFN. The First way is by qualifying the benefit of MFN to those 'like circumstance'. This has been used, for instance, under Article 6 of the BIT between Ethiopia and Brazil [111] and Article 6 of the BIT between Japan and Kenya.[112] The second mechanism for limiting the applicability of MFN is by restricting its scope only to certain benefits. This has been used, for instance, in the BIT between Austria and Ethiopia under Article 3(3),[113]

[106] Article 4(3) of the BIT between Kenya and United Arabs Emirates
[107] Paragraph 1 and 2 of Article 3 of the Korea and Kenya BIT.
[108] Article 3 of BIT between Ethiopia and Israel, Agreement between The Government of The Federal Democraic of Ethiopia and the Government of Israel for Reciprocial Promotion and Protcetion of Investments 2002https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).
[109] Article 4(4).
[110] Article 3.
[111] BIT between Brazil and Ethiopia, Supra note 104https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).
[112] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download.
[113] BIT between Austria and Ethiopia,Agreement between the Republic of Australia and The Federal Democraic of Ethiopia for Promotion and Protcetion of Investments

which calls on states to "…accord to investors no less favourable than it accords […]) to investors of any third state and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor". This holds true in the BIT between Korea and Kenya as well.[114] Thus, from these provisions we can infer that the MFN is limited to those mentioned benefits.

The BIT entered between Ethiopia and Germany addresses the issue of MFN by sanctioning less favourable treatment moves by contracting states. As such the treaty defines " less favourable treatment as :

> *….unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the wholesale marketing of products inside or the marketing of products outside the country, as well as any other measures having similar effects.* [115]

In conclusion, while the BITs entered by Kenya and Ethiopia, more or less, include MFN rules, the contents of these rules and the scope of application varies across the treaties. While some are exhaustive others are simply illustrative, making the obligations umpredictable .

4. National Treatment Standard

National treatment is defined under the OECD Draft Consolidated Investment Law as treatment accorded to investors by host states in no less favourable terms than the treatment accorded to own investors in like circumstances.[116] The primary purpose of national treatment in BITs is to create a level playing field by subjecting both domestic and foreign investors to the same rule and regulation by the host state and accordingly 'domestic measures should not unduly favour domestic investors.'[117]

2004https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a55 (accessed Feb. 27, 2021).

[114] Article 3(2) and (3).

[115] Article 3(3).

[116] OECD (1998) The multilateral Agreement on investment draft consolidated Text, Article 3(1).

[117] Al-Louzi R, A Coherence Review of Investment Protection under Bilateral Investment Treaties and Free Trade Agreement, *Manchester Journal of International Economic Law*, Vol. 12, (2015), p. 279.

Although there are similarities between the national standard of treatment in trade (i.e. under World Trade Organization),[118] there are equally substantial differences among these standards. First, under WTO rules, likeness is more concerned about the negative impact of the regulation on the competitiveness of two products, whereas likeness in investment is more concerned with like circumstance and its impact on foreign investors.[119] Second, less favoured treatment in the WTO is assessed based on the competitiveness of the product, whereas in investment the criteria is whether a single foreign investor is treated differently from any single domestic investor irrespective of the competitiveness.[120] Third, under the WTO individual investor cannot directly invoke national treatment to invalidate domestic legislation,[121] yet it' is possible under investment treaties.[122]

4.1. Like Circumstances under National Treatment

In most of the BITs the applicability of national treatment extends to any rights emanating from that treaty. All the same, some treaties opt to limit the scope of the principle to 'management, operation, maintenance, use, employment, sale and liquidation of an investment.'[123] Still in some other treaties the scope of national treatment extends only to like circumstance.[124] There is no yardstick which serves as a benchmark for likeness of the investment and this will have a detrimental effect on the host state, Ethiopia and Kenya, by leaving wider discretion to the Tribunal in cases where dispute arises. The effect of yardstick manifested in two practical cases: Marvin Feldman v. Mexico and SD Myers v. Canada. In the ruling over the disputes in these cases , the Tribunal employed business sector criteria in justifying that "….there are at least some rational bases for treating producers and re-sellers differently, e.g., better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales, even if some of these may be anti-competitive.."[125]

[118] Basically there are three similarities: the obligation not to discriminate, the need to prove the existence of nexus between measure taken and its negative impact and the measure should be regulator nature. See Galea I and Biris B, National Treatment in International Trade and Investment Law, *Acta Juridica Hungarica*, Vol. 55, (2014), p. 181.

[119] Id.

[120] Galea and Biris,supra note 117.

[121] WTO dispute settlement is state-state dispute settlement system. see Osterwalder NB, State-State Dispute Settlement in Investment Treaties: Best Practices Series, *International Institution for sustainable development*, (2014), p. 6.

[122] Galea and Biris, Supra note 177.

[123] for instance Article 3(3) of Ethiopia and Austria BIT.

[124] As per Article 4(1) of BIT between Spain and Ethiopia state that''…..no less favourable than that which it accord, in like circumstance, to the investment made by its own investors.''

[125] *Marvinn Feldman v. Mexico*, (2002), ICSID Case No. ARB AR/99/1 para. 170,https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (accessed Feb. 27, 2021).

On the other hand, in SD Myers Inc. v. Government of Canada, the Tribunal employed both economic and business sector criteria cumulatively. As such, it reasoned out that ,"the concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'"[126] This is because 'like-circumstance' is inherently susceptible to wide and variety of interpretations. Evidencing this situation, the BIT between Korea and Kenya provides the standard for NT in respect of sub-national government as the treatment no less favourable than that provided in like circumstances to its investors and investments.[127]

Thus, in setting out the rule of standard treatment, this treaty does not distinictively indicate how and whther an economic or business sector chriteria can be employed in assessing the like circumstances. Thus, in conclusion , this scenario suggests the need for formulating more elaborate and clear criteria in the BITs for the determination of like circumstances.

4.2. Limits to National Treatment

Usually, there are limits set for national treatment as a way to give a policy space for the host state from its national treatment obligation. The limits may take general or specific forms with defining phrases to this effect. In case of general limitation, it is common to come across phrases like 'without prejudice to its laws and regulation and in accordance with its laws and regulation.'[128] This method is typically used in Chinese Model of BIT which states: "without prejudice to its laws and regulations, each contracting party shall accord [treatment] to investments and activities associated with such investment by the investors of the other contracting party not less favourable than that accorded to the investments and associated activities by its own investors."[129]

In contrast to the scenario in general limits, the specific forms impose fewer and predictable type of limits on the treatment. This type of limit is used under Indian Model of BIT which is evidenced by a stipulation reading as : "extension of financial assistance or measure taken by a party in favour of its investors and their investment in

[126] (Partial award) Para. 250 in NAFTA Arbitration under the UNCITRAL Arbitration Rules, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (accessed Feb. 27, 2021).
[127] Article 3(3).
[128] For more discussion see Zhu W, The National Treatment Clause in Chinese Bilateral Investment Treaties, *Journal of WTO and China*, Vol. 4: No. 2, (2014), p. 79-81.
[129] Article 3(2) of China Model BIT.

pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article."[130]

4.3. National Treatment in Ethiopia's and Kenya's BITs

The principle of national treatment is embodied in all Ethiopia's and Kenya's BITs without any exception. The definition of national treatment can be either the same standard criteria or no less favourable criteria. The same standard criteria is employed, for instance, in the BIT concluded between China and UK which mandates the states to accord the same treatment to foreign investors or companies as that accorded to nationals or local companies.[131] This phrasing is adopted in the BIT between the Netherlands and Kenya.[132] However, the Ethiopian BITs categorically adopt the not less favourable criteria. For instance, under Ethiopia-Turkey BIT it is indicated that 'once the investment is accepted, each Party shall accord to this investment, treatment no less favorable than that accorded in similar situations to investments of its investors…'[133] This is similarly the position in some of Kenyan BITs such as the BIT between Japan and Kenya that calls on a contracting party to "accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its own investors and to their investments with respect to investment activities".[134]

Further, in most BITs the applicability of the principle is restricted to post-admission of the investment. For instance, Article 3(2) of Turkey-Ethiopia BIT made it clear that the principle of national treatment only once the investment is accepted. However, in some instances the applicability of the principle of pre and post admission is not well stated.[135] In other instances the BITs seem to suggest that the principle will extend to pre-admission of an investment.[136]

[130] Article 4(5) of the Indian Model BIT.
[131] Article 3(3) of BIT between China and UK.
[132] Article 5.
[133] Article 3(2) of BIT between Ethiopia and Turkey Agreement between the Republic of Turkey and The Federal Democraic of Ethiopia concerning the Reciprocial Promotion and Protcetion of Investments 2000.
[134] Article 3.
[135] See for example Article 3(1) of BIT between Israel and Ethiopia. "Neither Contracting Party shall, in its territory, subject investments or returns of investments of investors of the other Contracting Party, to treatment less favourable than that which it accords to investments or returns of investments of its own investor.''
[136] Article 4(1) of the BIT between Ethiopia and Brazil state that ''Each Contracting Party shall admit and encourage investments of investor of the other party, according to their respective laws and regulations.''

Other BITs also provided national security or public order exception to the national treatment standard.[137] Yet no general or specific way of putting limits to national treatment is envisaged under Ethiopia's and Kenya's BITs. This implies that the host state doesn't give any leeway to deviate from the principle and provide differential and special treatment to its investors. Moreover, the existing Ethiopian and Kenyan BITs make it impossible to provide discriminatory measure against the foreign investor for essential security interest. This will in turn adversely affect the right to regulate and the policy space of the couuntries. Therefore, it is imperative to have limits or exclusionary clause in the BITs .

Some BITs entered by these countries also excludes the application of NT in respect of incentives meant to promote small and medium-sized enterprises. The cases in point in this respect are the BIT between Japan and Kenya, and [138] the BIT between Korea and Kenya which exclude NT in government procurement, tax measures and subsidies and grants provided by the host government.[139]

5. Full Protection and Security Treatment

Under international law, the term Full Potection and Security (FPS) refers to the standard of treatment accorded to investors and investors' property against physical damage.[140] Unlike NT or MFN principles, FPS is one of the most widely known non-contingent and absolute type of standard of treatment, not dependent on the host state treatment of third party investors or its own investors.[141] FPS is also known as constant protection and security standard involving the obligations of the host state to protect foreign investors from negative consequence that arise from state or individual action.[142]

[137] For instance the Protocol to BIT concluded between China and Japan state that' ….. it shall not be deemed " treatment less favourable" for either Contracting Party to accord discriminatory treatment, in accordance with its applicable laws and regulations, to nationals and companies of the other Contracting Party, in case it's really necessary for the reason of public order, national security or sound development of national economy.'(emphasis supplied), https://www.meti.go.jp/policy/trade_policy/epa/bit/china_e.htm (accessed Feb. 28, 2021).

[138] Article 3(3).

[139] Paragraph 1 and 2 of Article 3.

[140] Collins D, Applying the Full Protection and Security Standard of Investment Law to Digital Asset, *Journal of Investmment and Trade*, (2011), p. 225.

[141] Salacuse W, *The Law of Investment Treaties* Oxford University Press, (2010), p. 229.

[142] Titi C, Full Protection and Security, Arbitration or Discriminatory Treatment and the Invisible EU model, *The Journal of World Investment and Trade*, Vol. 15, (2014), p. 540.

Evidencing this role of the FPS, the Arbitral Tribunal, in Rumel Telekom A.S and Telsim Mobil Telekomikasyon Hizmetleri A.S v Republic of Kazakhstan,[143] made it clear that this standard 'obliges the state to provide certain level of protection to foreign investments from physical damage.' In another instance, the Tribunal has clarified that this obligation of the state is due-diligent and the mere absence of it triggers the violation of the standard without any need to prove the existence of malice or negligence from the host state.[144]

Unlike strict liability or obligation of results, under FPS standard of treatment, the principal duty of the host state is to behave in a more reasonable and diligent manner.[145] However, it has been argued that legal protection is within the ambit of this principle. This argument is quite evident under ASEAN Comprehensive Investment Agreement which states that " if a member state denies justice in any legal or administarative proceeding, it is considered to have violated the FPS treatment."[146] It is further argued that not only commission but also omission, on the part of the government, to prevent anything hindering the proper function of foreign investors may tantamount to violation of this principle.[147]

5.1. Full Protection and Security Treatment and Customary International Law

There are divergent points of views on the content of the FPS standard vis-a-vis minimum customary international law. It is argued that FPS standard doesn't provide a higher standard than what is provided under minimum customary international law, and it is simply another way of referring to traditional customary international law accorded to the investor.[148]

Reflecting this view, Article 5 of the Canada Model of BIT provides that " the concept of […] full protection security […] do not require treatment beyond that which is required by the customary international law minimum standard of treatment of aliens."

[143].ICSID Case No. arb/05/16 Para. 668,https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf (accessed Feb. 28, 2021).
[144] Titi, Supra note 142, p. 658-660.
[145] Moss C, *Full protection and security in A Reinisch(ed.) Standards of Investment Protection* Oxford University Press, (2008), p. 139.
[146] Article 11(2) of the ASEAN Comprehensive Investment Agreement.
[147] Walde TW, Energy Charter Treaty-Based Investment Arbitration, *Journal of World Investment and Trade*, Vol. 5, (2014), p. 390 as quoted in Schreuer C, Full Protection and Security, *Journal of International Dispute Settlement*, Vol. 1, (2010), p. 7.
[148] Collins, Supra note 139, p. 229.

The same is provided under USA Model of BIT.[149] Such argument is further endorsed by various international arbitration cases. For instance, in El Paso v Argentina, the Arbitral Tribunal held that "[….] the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law[…]"[150]

In contrast to this positon outlined so far, it has been argued that FPS standard of treatment is a higher standard than what is provided under minimum customary international law. The historical background was also meant to accord foreign investor protection "which was more than their entitlement to non-discriminatory treatment under international law."[151] The Norway Model of BIT seems to adopt this approach. It provides that a contracting party has an obligation to extend FSP in accordance with customary international law.[152] This argument was adopted in Azurix v Argentina where the Tribunal held "fair and equitable treatment and full protection and security as higher standards than required by international law….It is further justified that the purpose of invoking these standards is to set a floor, not a ceiling; in order to avoidpossible interpretation of these standards below what is required by international law."[153]

Looking into the BIT between Japan and Kenya in this light , one can see that this BIT conditions the provision of FPS on customary international law.[154] It specifically notes that provision of FPS do not require any additional treatment or treatment beyond what is provided for under customary international law. No additional substantive rights is also created.[155] This is similarly the position in the BITs between Korea and

[149] Article 5(2) of the USA Model BITprovided that " for greater certainity.. full protection and security do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights,".

[150] *EL Paso Energy International Company v The Argentina Republic(award),* ICSID Case No. ARB/03/15, para. 522, https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (accessed Feb. 28,2021).

[151] Subedi P, The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Specific Reference to the Recent Trend in the Interpretation of the Term Expropriation, *The International Lawyer*, Vol. 40, (2006), p. 126.

[152] Article 5.

[153] *Azurix Corp. v. The Argentina Republic (award),* ICSID Case No ARB/01/12, para 361 https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf, accessed Feb. 28, 2021.

[154] Article 5(1).

[155] See the Note under Article 5(1).

Kenya,[156]and Kenya and Kuwait.[157] The Korea-Kenya BIT calls on the parties to engage the police in providing FPS.[158]

5.2. Full Protection and Security Treatment in Ethiopia's and Kenya's BITs

A close examination of Ethiopia's BITs exhibit that FPS is provided, with the exception of the BIT with Brazil. In the case of Kenya, all BITs in force with the exclusion of the BIT between the Netherlands and Kenya provide for FPS. Another striking feature of the documents is the significant variations on the wording of the standard. In the case of Ethiopia, while some BITs use full protection and security,[159] others employ full protection,[160] continuous protection and security[161]. Still others use adequate protection and security,[162] protection,[163] full and adequate protection and security,[164] full and constant protection and security.[165]

In the case of Kenya, 'full and constant protection and security',[166] 'sufficient protection and security,'[167] and 'full protection and security'[168] are used. It is also importan to note that in most instances the full protection and security standard of treatment is treated as a separate and stand alone standard. However, exceptionally, in the BIT between Libya and Ethiopia this standard is found together with fair and equitable treatment. Consistent with this view, the Tribunal in Wena Hotels Ltd v Arab Republic of Egypt, for example, held that FPS can be found together with fair and equitable treatment.[169]

[156] Article 2(2) & (3).
[157] Article 2(2).
[158] Article 2(3).
[159] Article 2(2) of BIT between Israel and Ethiopia, Supra note 108.
[160] Article 2(2) of BIT between Denmark and Ethiopia.
[161] Article 3(2) of BIT between Belgium- Luxembouge Economic Union and Ethiopia, Supra note 68 .
[162] Article 2(2) of BIT between Egypt and Ethiopia, Agreement for the Promotion and Protcetion of Investments between The Arab Republic of Egypts and Federal Democraic of Ethiopia 2006.
[163] Article 3(1) of BIT between Libya and Ethiopia Agreement between The Federal Democraic of Ethiopia and the Great Socialist People's Libyan Arab Jamahirya concerning the Encouragemnet and Reciprocal Protection of Investments 2004.
[164] Article 2(2) of BIT between Malaysia and Ethiopia, Supra note 68.
[165] Article 2(2) of BIT between Finland and Ethiopia, Supra note 68.
[166] See for example Article 2(2) of the BIT between Kenya and Finland.
[167] See for example Article 3(3) of the BIT between Kenya and Burundi.
[168] See for example Article 4(1) of the BIT between Swiss Confederation and Kenya; Article 4(1) of the BIT between Germany and Kenya; and Article 2(2) of the BIT between the United Kingdom and Kenya.
[169] *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, para 89 as quoted in Islam R, Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protections and Standards, *Bangladeshi Journal of Law*, Vol. 1: No. 2, (2014), p. 119.

From the analysis provided so far, one can observe a marked consensus among scholars as to the non-contingent nature of full protection and security treatment in Ethiopian and Kenyan BITs. Yet there are limited instances in which some BITs opt exercising of this standard on a contingent basis. The BIT between Ethiopia and Sweden, for example, makes the enjoyment of FPS contingent on its consistency with "recognized principles in international law, the municipal law of the Contracting Party and the provisions of this Agreement as applicable".[170]

In the case of Kenya, the BIT between Kenya and the United Arabs Emirates conditions the enjoyment of FPS on domestic laws and applicable international law.[171] This makes the exercise of this right contingent upon the existence of international law and more importantly its consistency with national laws. Thus, as per these provisions the content of this standard will be determined in reference to international and national laws.

Conclusions

A broader look into the global practice largely shows that standards of treatment is one of the key features in any BIT. Historically, there was substantial difference between the developed and developing countries as to the very existence of customary international law as a standard of treatment for aliens. The developed countries (usually capital exporting countries) argue that there is customary international law which extend special and differential treatment for foreign investors. This includes prompt, adequate and effective compensation in case of expropriationwhereasthe developing countries (largely capital importing countries) take the position that there is no such standard of treatment of aliens, and foreign investor should be treated on the same level with domestic investors. Back then, the United Nation General Assembly was dominated by developing countries and hence came up with three different but related resolutions which reaffirm the position of developing countries. That is why in every BIT the issue of standards of treatment pops out as the outstanding feature.

Generally speaking, standards of treatment are privileges and rights accorded to investors and duty and obligation to host states. These treatment can be broadly classified into two categories: contingent or conditional and non-contingent or non-conditional types of standard of treatment. Arguably, FET and FSP standard of

[170] Article 2(4) of the BIT between Kenya and Sweden.

[171] Article 3(2) of the BIT between Kenya and the United Arabs Emirates , Agreement between the Government of the Republic of Kenya and the Government of the United Arab Emirate on the Promotion and Protection of Investment 2014.

treatments are non-contingent (automatic and absolute) type of entitlement. In contrast, national treatment and most favoured nation treatment are contingent upon how the host state treats its own investors or investors of third parties. Looking into the Ethiopian and Kenyan BITs in this lense, we can see that they recognize all the four major types of standards of treatment despite the lack of consistency and/or a clearly established pattern of using the rules in question.

To appreciate these realities in the documents, it is important to point out the most striking manifestation of each stadard under consideration. To this end, FET is a well recognized type of standard of treatment under Ethiopia's and Kenya's BITs. However, the definition and content of FET cannot be found in the BITs. This is attributed to the illusive and vague nature of this standard. This makes the obligation of the host state very burdensome as it doesn't exactly know the contents and cannot act accordingly. On the other hand, the illusive and vague nature of the standard advances the interest of the host state since the host state is not subjected to a specific or pre-defined commitment. Thus, several scholars have argued in favour of either side of the divide. That is, the standard can favour either the investors or the host state, whichever way one sees it.

The practice of international arbitration exhibited that the illusive and the subjective nature of this standard makes it a blessing in disguise for foreign investors to allege almost every action and potential action of the host state under the violation of FET. This will create the undesirable fear for the host state to come up with the regulatory framework which potentially violate the FET and results in tremendous amount of compensation. By doing so, it will deprive policy space and result in regulatory chill effect.

Furthermore, there is a tendency from international arbitration tribunal to examine the intent behind the legislation if they found it in contradiction to the good faith principle. This in effect may cause the host state to withdraw from the agreement. This will in turn create counter-majoritarian dilemma and adversely affect the sovereignty of the country. In cumulative terms it suggests a pressing need for omitting this standard altogether and replacing it with a more precise and objective rights of the investor that clearly set out the fundamental due process of law and access to justice in any judicial and administrative tribunal.

Turning to the MFN , we can observe that it is a well entrenched type of standard of treatment under Ethiopia's and Kenya's BITs. Yet there are two major problems obstracting its realization in this connection. First, both Ethiopia's and Kenya's BITs

do not indicate the national security and public order/morality exception. These exceptions are the most widely used and prominent grounds to give breathing space and retain the sovereignty of the host state. Moreover, national security exceptions are usually not subject to arbitration review and hence the host state can determine the matter single handedly and avail a policy space. Second, under some Ethiopia's and Kenya's BITs, the standard of MFN is qualified only to like circumstance, although what constitutes like circumstance is not well defined. This will lead investors and international arbitration tribunals to come up with a definition and criteria which fit their own purposes..

This imparatively neccessitates practical acctions to do away this problem. Particularly, it requires to include national security and public order/moral exceptions and to provide a clear yardstick as to what constitutes like- circumstance. The authors would hold that Ethiopia and Kenya will be better off if they adopt combined criteria employed by the USA Model of BIT and Draft Pan African Investment Code. The same can be applied to the problem exhibited in the national standard of treatment.

Apart from these problems, the standard of national treatment under the Ethiopian and Kenyan BITs also substantially lack consistency and uniformity of contents. For instance, in some BITs of the two countries, the benefit of MFN and NT must meet requirements of like- circumstances whereas in some other BITs there is no such requirement. Further, the national standads demonstrate varying irregularities of treatment manifested in several ways.

In some BITs the applicability of national treatment is limited only to post-admission types of investment whereas in some other BITs the applicability of national treatment extends to pre-admission. In other BITs, FPS is not provided at all. Still some BITs tend to consider FPS as contingent entitlement and in others it is not. Further, as discussed ealier, the standards of treatment under Ethiopia's and Kenya's BITs have a substantial adverse effect on the sovereignty of the states, especially their right to regulate all the events related to the investment as a host state.

Such problems and the inconsistency outlined are so wide spread in BITs of Ethiopia and Kenya that they require remedial actions. One way of doing this is through drafting Model BIT. A Model BIT that serves as a basis for any bilateral investment negotiation. This will help Ethiopia and Kenya to have consistent and unified BITs and result in predictability of the system. The fact that many countries develop their own model BIT as a starting point for further negotiation exhibits its significance. This

would also contain the adverse effect of the stadards on the sovereign rights of of the two states.

Selected Court Cases /የተመረጡ ፍርዶች

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ/መ/ቁ 186329
ቀን መጋቢት 30 ቀን 2013 ዓ.ም

ዳኞች፡- ብርሃኑ አመነው
ተሾመ ሽፈራው
ሀብታሙ እርቅይሁን
ብርሃነ መንግስት
ነፃነት ተገኝ

አመልካች፡- አቶ ንጉስ ሹመት

ተጠሪ፡- 1. ወ/ር ሲሳይ ፈጠነ
2. ወ/ሮ የዚህዓለም ፈጠነ
3. አቶ ምስጋናው ፈጠነ

መዝገቡ ተምርምር ተከታዩ ፍርድ ተሠጠ፡፡

ፍርድ

የሰበር አቤቱታው የቀረበው የአማራ ክልል ጠቅላይ ፍርድ ቤት ሠበር ችሎት በሠጠው ውሳኔ መሠረታዊ የሕግ ስህተት ተፈጽሞበታል በሚል ነው፡፡ አመጣጥ ከስር ፍርድ ቤት የመዝገብ ግልባጭ እንደተረዳነው አመልካች የስር ተከሳሽ ሲሆኑ ተጠሪዎች ከሳሾች ነበሩ፡፡ ተጠሪዎች ሕዳር 19 ቀን 2011 ዓ/ም በተጻፈ የክስ ማመልከቻ በደብረማርቆስ ከተማ ቀበሌ 07 ክልል የሚገኝ 61/2 (ስድስት ተኩል) ጥማድ የእርሻ መሬት ከአያታችን አቶ ድንቁ አገኘሁ በውርስ ያገኘነውን ስለያዘ በድርሻችን በአይነትና የሀብል ግምት እንዲከፍለን የሚል ነው፡፡ አመልካች ያቀረቡት መልስ ክስ የቀረበበትን መሬት አያታችን አቶ ድንቁ አገኘሁ በ1989 ዓ/ም ከሞቱ በኋላ ከወላጅ እናቴ ውዴ ድንቁ ጋር በውርስ ይዜ ከ10 ዓመት በላይ ስጠቀምበት ስለቆየሁ ክሱ በፍ/ሕ/ቁ 1845 መሠረት በ10 ዓመት ይርጋ ቀሪ ነው በማለት የመመሪያ ደረጃ መቃወሚያ አቅርበዋል፡፡ በፍሬ ነገሩም የሚች አያት የቤተሰብ አባላት ወራሽ ነኝ ተጠሪዎች የቤተሰብ አባልና ወራሽ አይደሉም በማለት ክስ ውድቅ ሊሆን ይገባልብለዋል፡፡

ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው የደብረማርቆስ ከተማ ወረዳ ፍርድ ቤት የይርጋ መቃወሚያዉን በማለፍና ማስረጃ በመስማት አመልካችና የተጠሪዎች እኩል ደረጃ ያሉ ወራሾች በመሆናቸው መሬቱንና በቀበሌ አስተዳደር በኩል የተከበረዉን ሰብል እኩል ይካፈሉ በማለት ወስኗል፡፡ አመልካች ያቀረቡትን ይግባኝ የምስራቅ ጎጃም ዞን ከፍተኛ ፍርድ ቤት ተቀብሎ ካከራከራ በኋላ ግራ ቀኙ ወራሾች በመሆናቸው በወራሾች መካከል ክርክር ሲኖር ተፈጻሚነት የሚኖረው የይርጋ ድንጋጌ የፍ/ሕ/ቁ. 1000(1) የተመለከተው የሦስት ዓመት ይርጋ ነው፡፡ የይርጋ ጊዜው የሚቆጠረው

በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመዝገብ ቁጥር 20295 በሰጠው ትርጉም መሰረት አውራሻቸው ከሞተበት ጊዜ ሳይሆን የወራሽነት ማስረጃ ካወጡበት ጊዜ ጀምሮ ስለሆነ ተጠሪዎች በ2009 ዓ/ም የወራሽነት ማስረጃ አውጥተው በ2011 ዓ/ም ክስ ስላቀረቡ የሦስት ዓመት የይርጋ ጊዜ አላለፈም። ጉዳዩ በፍ/ሕ/ቁ. 1845 በተመለከተዉ የ10 ዓመት የይርጋ ጊዜ ቢታይ እንኳን መሬቱ በተጠሪዎች አባት እጅ ከ1999 ዓ/ም እስከ 2004 ዓ/ም ስለመቆየቱ አመልካቾችም የገለጹ በመሆኑ መሬቱን አመልካች በእጃቸው ከያዙበት ከ2004 ዓ/ም ጀምሮ ክስ እስከቀረበበት 2011 ዓ/ም ድረስ 10 ዓመት ያልሞላው በመሆኑ ክሱ በይርጋ የሚታገድ አይደለም። አመልካችና ተጠሪዎች እኩል ደረጃ ላይ ያሉ ወራሾች በመሆናቸው መሬቱን እንዲካፈሉ መወሰኑ ተገቢ ነው በማለት የሥር ፍርድ ቤት ዉሳኔን አጽንቷል። የክልሉ ሰበር ሰሚ ችሎት ውሳኔው መሠረታዊ የሕግ ስህተት የተፈጸመበት አይደለም በማለት የአመልካችን የሰበር አቤቱታ ሠርዟል።

ይህ የሰበር አቤቱታ የቀረበው በዚህ ውሳኔ ነው። የአመልካች የሰበር አቤቱታ ይዘትም ወላጅ እናቴ የሟች አያቴ የቤተሰብ አባል ሆና ወርሳ ስትሞት የሟች እናቴና የአያቴ ተተኪ ወራሽ ሆኜ መሬቱን ለ22 ዓመት ስለያዝኩት ክሱ በይርጋ ቀሪ ሊሆን ይገባል። በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመዝገብ ቁጥር 47201 በቅጽ 1 እና በመዝገብ ቁጥር 26422 በቅጽ 6 ላይ የይርጋ ጊዜ የሚቆጠረው ተከሳሽ ከሆነው ወገን ንብረቱን ከያዘበት እንጂ ወራሾች ወራሽነታቸውን ካረጋገጡበት ጊዜ ጀምሮ አለመሆኑ ላይ ትርጉም ሰጥቷል። ክሱ በይርጋ ሊታገድ ይገባል የሚል ነው። የሰበር አጣሪ ችሎት ጉዳዩን ተመልክቶ አመልካች የሟች የቤተሰብ አባል መሆናቸውንና የተጠሪዎችአባትየመንግሥት ሠራተኛ መሆናቸውን ባስረዱበት ሁኔታ እኩል ይካፈሉ መባሉ ከክልሉ የገጠር መሬት አዋጅ አንጻር ተገቢነቱን ለመመርመር ለሰበር ሰሚ ችሎቱ ያስቀርባል በማለት ተጠሪዎች መልስ እንዲያቀርቡ ያዘዘ ሲሆን ተጠሪዎች ያቀረቡት መልስ በሰበር አጣሪ ችሎቱ የተያዘው ጭብጥ የፍሬ ነገርና የማስረጃ ምዘና በመሆኑ በሰበር ችሎት የሚመረመር ጭብጥ አይደለም። አባታችን ጡረተኛና አነስተኛ ገንዘብ ሲከፈለው የነበረ ስለመሆኑ ስላስረዳን ከመውረስ የሚከለክል አይደለም። አመልካችም ወራሽነታቸውን ያረጋገጡት በ2010 ዓ.ም ነዉ።መሬቱ በአባታችን ተይዞ ስለቆየ ክሱ በይርጋ ሊታገድ አይገባም። ውሳኔው ላይ የተፈፀመ መሰረታዊ የህግ ስህተት የለም ብለዋል። አመልካች የመልስ መልስ በማቅረብ የሰበር አቤቱታቸውን በማጠናከር ተከራክረዋል።

የክርክሩ ሂደት ባጭሩ ከላይ የተገለፀው ሲሆን እኛም ተጠሪዎች ያቀረቡት የውርስ እርሻ መሬት ድርሻ ያስረከቡን ክስ በይርጋ የታገደ መሆን አለመሆኑና በጭብጥነት በመያዝ መዝገቡን መርምረናል። እንደመረመርነው ተጠሪዎች ህዳር 19 ቀን 2011 ዓ.ም በተፃፈ የክስ ማመልከቻ በደብረ ማርቆስ ከተማ ቀበሌ 07 ክልል የሚገኝ 6ከ1/2 ጥማድ የእርሻ መሬት ከአያታቸው አቶ ድንቁ አገኘሁ በውርስ ያገኘነውን ስለያዘ በድርሻችን በአይነትና የሰብል ግምት እንዲያካፍለን የሚል ሲሆን አመልካች

በበኩላቸው ክስ የቀረበበትን መሬት አያታችን አቶ ድንቁ አገኘሁ በ1969 ዓ.ም ከሞቱ በኋላ ከወላጅ እናቴ ውዴ ድንቁ ጋር በውርስ ይዠ ከ10 ዓመት በላይ ስጠቀምበት ስለቆየሁ ክሱ በፍ/ሕ/ቁ 1845 መሰረት በ10 ዓመት ይርጋ ቀሪ ነው በማለት የመጀመሪያ ደረጃ መቃወሚያ አቅርበዋል። አመልካች የይርጋ ክርክር ያነሱ በመሆኑ ለቀረበው ክስ ተፈፃሚ የሚሆነው የይርጋ ደንብ የመለየት ተግባር የፍርድ ቤት ነው። በስር ፍርድ ቤቶች አመልካች እና ተጠሪዎች እኩል ደረጃ ያሉ ወራሾች ስለመሆናቸው ተረጋግጧል። በወራሾች መካከል የውርስ ድርሻ ይገባኛል ክርክር በቀረበ ጊዜ ተፈጻሚነት ያለው በፍ/ሕ/ቁ. 10000(1) የተመለከተው የሦስት ዓመት ይርጋ ጊዜ ነው። በፍ/ሕ/ቁ 1000(1) መሠረት ንብረቱ ተከሳሽ በሆነው ወገን መያዙን ባወቁ በሦስት ዓመት ጊዜ ውስጥ ክሱ ካልቀረበ በይርጋ የሚታገድ ይሆናል።

በተያዘው ጉዳይ አመልካች ክርክር ያስነሳው ይዞታ ከ2004 ዓ/ም ጀምሮ ክስ እስከቀረበበት 2011 ዓ/ም ድረስ በእጃቸው አድርገው መያዛቸውን ከስር ከፍተኛ ፍርድ ቤት ውሳኔ ይዘት ተረድተናል። ይሕም ክሱ እስከቀረበበት ጊዜ ድረስ ያለው የሦስት ዓመት የይርጋ ጊዜ እንዳለፈው ያሳያል። የሥር ከፍተኛ ፍርድ ቤት የይርጋ መቃወሚያውን ያለፈው ተጠሪዎች የወራሽነት ማስረጃ ያወጡት በ2009 ዓ/ም በመሆኑና የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመዝገብ ቁጥር 20295 (በቅጽ 06 የታተመ) ይርጋው መቆጠር ያለበት የወራሽነት ማስረጃ ካወጡበት ጊዜ ጀምሮ ስለመሆኑ ትርጉም ሰጥቶበታል። የወራሽነት ማስረጃ ካወጡበት ጊዜ ጀምሮ ሲታይ ደግሞ የሦስት ዓመት ጊዜ አላለፈውም በማለት ነው። በተጠቀሰው መዝገብ የሠበር ሰሚ ችሎቱ የፍ/ሕ/ቁ 1000(1) ንብረቱ ተከሳሽ በሆነውወገን መያዙን ካወቀበት ጊዜ ጀምሮ በሚለው የድንጋጌው ክፍል ላይ ግልጽ የሆነ ጭብጥ በመያዝ ትርጉም አልሰጠበትም። የወራሽነት ማረጋገጫ በሕግ የተገኘን መብት ለማረጋገጥ የሚሰጥ ማስረጃ እንጂ በራሱ መብት የሚሰጥ ወይም የሚፈጥር አይደለም። የወራሽነት ማረጋገጫ ማውጣት ንብረቱ ላይ ክርክር ከማድረግ የተለየና የማስረጃ ውጤት ብቻ ያለው በመሆኑ በውርስ ንብረቱ ላይ ያለውን የይርጋ ጊዜም ሊያቋርጥ አይችልም።

በሠበር መዝገብ ቁጥር 26422 (በቅጽ 06 የታተመ) እና በሰበር መዝገብ ቁጥር 47201 (በቅጽ 11 የታተመ) ላይ ይርጋው መቆጠር ያለበት የወራሽነት ማስረጃ ከወጣበት ጊዜ ጀምሮ ሳይሆን ንብረቱን ተከሳሽ የሆነው ወገን ከያዘበት ጊዜ ጀምሮ ሊሆን እንደሚገባ ውሳኔ ሰጥቶበታል። ስለሆነም መሬቱ በአመልካች ከ2004 ዓ.ም ጀምሮ የተያዘ በመሆኑና ተጠሪዎች በ2011 ዓ.ም ያቀረቡት ክስ የሶስት አመት ይርጋ ጊዜ ካለፈ በኋላ የቀረበ ስለሆነ ክሱ በይርጋ የታገደ ነው ብለናል። የስር ፍርድ ቤቶች ክሱ በይርጋ ቀሪ አይደለም በማለት በፍሬ ነገሩ አከራክረው መወሰናቸው መሠረታዊ የሕግ ስህተት የተፈጸመበት ሆኖ አግኝተነዋል።

ውሳኔ

1. የአማራ ክልል ጠቅላይ ፍርድ ቤት ሰበር ችሎት በመዝገብ ቁጥር 91765 ህዳር 16 ቀን 2012 ዓ/ም የምሥራቅ ጎጃም ዞን ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 0141877 ሀምሌ 30 ቀን 2011 ዓ.ም እና የደብረ ማርቆስ ከተማ ወረዳ ፍርድ ቤት በመዝገብ ቁጥር 15122 ግንቦት 15 ቀን 2011 ዓ.ም የሠጡት ውሳኔ በፍ/ብ/ሥ/ሥ/ህ/ቁ 348(1) መሰረት ተሽሯል።
2. ተጠሪዎች ያቀረቡት ክስ በይርጋ ቀሪ የሆነ ነው በማለት ወስነናል።
3. በዚህ ችሎት ለወጣ ወጭና ኪሣራ ግራና ቀኙ የየራሳቸውን ይቻሉ ብለናል።

ትዕዛዝ

- የውሳኔው ግልባጭ ለስር ፍርድ ቤቶች ይተላለፍ።
- አፈጻጸሙ ላይ የተሠጠው እግድ ተነስቷል። ይጻፍ
- መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመሰስ፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የፌዴራል ጠቅላይ ፍረድ ቤት ሰበር ሰሚ ችሎት

የሰመ.ቁ 196753
ቀን ግንቦት 25 2013ዓ.ም

ዳኞች፡ ተፈሪ ገብሩ(ዶ/ር)
ቀነዓ ቂጣታ
ፈይሳ ወርቁ
ደጅኔ አያንሳ
ብርቅነሽ እሱባለው

አመልካቾች፡-

1ኛ ወርቅነህ በላይ
2ኛ ሰዋገኝ በተስ
3ኛ እሱባለው እህራ
4ኛ. ጥላዬ ዳኛው
5ኛ ምስራቅ ጌታነህ
6ኛ. እመምነሽ ሙሉጌታ
7ኛ የሰራሽ ስሜነህ
8ኛ. አበበ አሻግሬ
9ኛ. ሀይማኖት አበበ
10ኛ ክንዴ ግድየሰው
11ኛ ተወክስገን ገድፍ
12ኛ. አማረ ሁንዬ

ተጠሪ፡ የአዊ ብሔረሰብ አስተዳደር ዞን ገቢዎች መምሪያ አቃቤህግ-መላኩ ጥላሁን ቀረቡ

ፍርድ

ጉዳዩ ለሰበር ችሎት ሊቀርብ የቻለው አመልካቾች የአብክመ አዊ ብሄረሰብ ዞን ከፍተኛ ፍ/ቤት በመ.ቁ 09:00741 በ5/10/12 ዓ.ም በሰጠው ውሳኔ የአብክመ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ 54026 በ14/11/12ዓ.ም በሰጠው ትእዛዝ እንዲሁም የአብክመ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 97690 በ20/1 1/12ዓ.ም በሰጠው ትእዛዝ ቅር በመሰኘት በ6/2/13ዓ.ም በተጻፈ የሰበር እቤቱታ ስላቀረቡ ነው፡፡

የጉዳዩ አመጣጥ አመልካቾች በስር የአብክመ የዳንግላ ወረዳ ፍ/ቤት 1ኛ ተከሳሽ በነበረው(አሁን በሰበር ክርክሩ ላይ የሌል) የዳንግላ ወረዳ ገቢዎች እና ኢኮኖሚ ልማት ጽ/ቤት እና ኣባሪ ተከሳሽ ሆኖ በገባው የአሁን ተጠሪ ላይ ባቀረቡት ክስ አመልካቾች የወረዳ አቃቤ ህግ እና የጽ/ቤቱ ሀላፊ ስንሆን በሙያችን በማገልገል ላይ እያለን በተቋሙ የተለያዩ ጥቅማጥቅሞች እንዲከበሩልን ጥያቄ ቀርቦ የአብክመ ርእሰ መስተዳድር ጽ/ቤት በ4/3/12ዓ.ም ባደረገው አስቸኳይ ስብሰባ ከተጠየቁት ጥቅማጥቅሞች ውስጥ በየደረጃው ላለን እቃቢያነ ህጎች ከ1/11/11ዓ.ም ጀምሮ ተግባራዊ የሚሆን የቤት ኪራይ አበል ተወስኖልናል፡፡ በዚህ ውሳኔ መሰረት ከተራ

ቁጥር 1ኛ-11ኛ አመልካቾች በየወሩ ብር 2500 በተራቁጥር 12ኛ የተጠቀስኩት አመልካች ደግሞ በየወሩ ብር 3500 ማግኘት የሚገባን ቢሆንም 1ኛ ተከሳሽ ህግን ባልተከተለ መንገድ ከተ.ቁ 1-11ኛ አመልካቾች ከ1/11/11ዓ.ም እስከ 30/3/12ዓ.ም ድረስ የእያንዳንዳቸን ብር 800 የአስራ አንዱን ብር 8800 እና የ12ኛ እመልካች ከ1/11/11ዓ.ም እስከ 30/3/12ዓ.ም ድረስ የ5 ወር ብር 1463 ከ1ኛ-9ኛ አመልካቾች የታህሳስ እና የጥር ወር 2012ዓ.ም የ2 ወር የእያንዳንዳቸን ብር1534 የዘጠኙን ብር 13806 የ10ኛ እና 11ኛ አመልካቾችን የታህሳስ እና የጥር ወር 2012ዓ.ም የእያንዳንዳቸንን ብር 1554.86 የሁለቱን ብር 3109.72 እና 12ኛ አመልካችን የታህሳስ እና የጥር ወር 2012ዓ.ም የ2 ወር ብር 2376 በአጠቃላይ ብር 29,554 የቆረጠብን እና አሁንም በመቁረጥ ላይ ስለሚገኝ የስር 1ኛ ተከሳሽ አላግባብ የቆረጠውን መጠኑ ከላይ የተገለጸውን ብር እንዲመልስልን እንዲወሰንልን ፡ የስር 1ኛ ተከሳሽ አላግባብ እየቆረጠ ያለዉንም ወደፊት እንዳይቆርጥ ተብሎ እንዲወሰንልን! እነዚህ ከታለፉ የቤት ኪራይ አበሉ ከደመወዝ ጋር ሳይደመር ራሱን ችሎ ግብር እንዲቆረጥ ተብሎ እንዲወስንልን በማለት ዳኝነት ጠይቀዋል።

በስር 1ኛ ተከሳሽ ባቀረበው የመጀመሪያ ደረጃ መቃሚያ የአብክመ የገቢ ግበር አ/ቁ 240/2008 አንቀጽ 84(1)ን እንዲሁም የአብክመ ታክስ አስተዳደር አ.ቁ 241/2008 እንቀጽ 36(1(ሀ)ን በመጥቀስ አመልካቾች ክስ ሊያቀርቡ አይገባም በማለት የተከራከረ ሲሆን በስር አባሪ ተከሳሽ (ተጠሪ) ባቀረበው የመጀመሪያ ደረጃ መቃወሚያ የአብክመ ታክስ አስተዳደር አ.ቁ 241/2008 አንቀጽ 5 እና ተከታዮቹን ድንጋጌዎች በመጥቀስ ፍ/ቤቱ ጉዳዩን የማየት ስልጣን የሌለው በመሆኑ መዝገቡ እንዲዘጋ በማለት ተከራክረዋል። በፍሬ ጉዳዩ ላይ ባቀረቡት መልስ ተከሳሽ በአብክመ የገቢ ግብር አ/ቁ 240/2008 እንቀጽ 84(1) መሰረት ከመቀጠር ከሚገኝ ገቢ ግብር ቀንሶ የማስቀረት ግዴታ ያለበት ከመሆኑም በላይ አመልካቾች ከስራ ቅጥር ጋር በተያያዘ የሚያገኙት የቤት ኪራይ አበልም ከደመወዝ ጋር ተደምሮ ግብር መከፈል እንዳለበት የአዋጁ አንቀጽ 8(2) የደነገገ በመሆኑ የተከሳሽ ተግባር አግባብ ስለሆነ ክሱ ውድቅ እንዲደረግ። በዚሁ አዋጅ አንቀጽ 62 ከግብር ነጻ የተደረጉት ገቢዎች በዝርዝር ሲቀመጡ የቤት ኪራይ አበል በድንጋጌዉ አለመካተቱ በቤት ኪራይ አበል ግብር እንደሚቆረጥበት የሚያሳይ ከመሆኑም በላይ ከቅጥር ጋር በተገናኘ መንገድ የተገኘ ገቢ ከደመወዝ ጋር ተደምሮ በሰንጠረዥ ላይ በተቀመጠው የግብር ማስከፈያ ምጣኔ መሰረት ግብር እንደሚከፈል በአዋጁ አንቀጽ 8(2) የተደነገገ በመሆኑ ከአመልካቾች የቤት ኪራይ አበል ግብር የተቆረጠው በህግ አግባብ በመሆኑ ክሱ ውድቅ እንዲደረግ።

በአብክመ የገቢ ግብር አ/ቁ 240/2008 አንቀጽ 62 ላይ ከገቢ ግብር ነጻ የተደረጉትን ገቢዎች በዝርዝር ለማስፈጸም በወጣው መመሪያ ቁጥር 1/2011 አንቀጽ 3(1) ላይ የደመወዝ እና የአበል ትርጉም ተለያይቶ የተሰጠ እና ከግብር ነጻ የተደረጉት የአበል አይነቶችም በዝርዝር ሲቀመጡ የቤት ኪራይ አበል አለመካተቱ መመሪያው ከላይ ከተጠቀሰው የአዋጁ አንቀጽ 62 ጋር የሚጣጣም በመሆኑ በዚሁ መሰረትም ተከሳሽ

የቤት ኪራይ አበልን ከደመወዝ ጋር ደምሮ መቁረጡ ህጋዊ በመሆኑ ክሱ ውድቅ እንዲደረግ በማለት ጠይቀዋል፡፡

ፍርድቤቱም የመጀመሪያ ደረጃ መቃወሚያውን በብይን ውድት ካደረገ በኋላ ፍሬ ጉዳዩን በተመለከተ የቤት ኪራይ አበል ግብር መቆረጡ ህጋዊ ነው አይደለም? ህጋዊ ነው ከተባለ መቆረጥ ያለበት ከደመወዝ ጋር ተደምሮ ነው ወይስ ሳይደመር ለብቻ ነው? የሚሉትን ጭብጦች በመያዝ ጉዳዩን መርምሮ ተከሳሽ የአመልካቾችን የቤት ኪራይ አበል ግብር እየቆረጠ ለገቢዎች ገቢ እያደረገ ስለመሆኑ በስር ተከሳሾች አልተካደም፡፡ በአብክመ የገቢ ግብር አ.ቁ 240/2008 አንቀጽ 84(1) የዚህ አንቀጽ ንኡስ አንቀጽ 2 እንደተጠበቀ ሆኖ ማንኛውም ቀጣሪ በአዋጁ አንቀጽ 10 መሰረት ከመቀጠር የሚገኝ ግብር የሚከፈልበትን ገቢ ለተቀጣሪው በሚከፍልበት ግዜ በአዋጁ አንቀጽ 11 መሰረት ተፈጻሚ በሚሆነው የግብር ምጣኔ መሰረት በእያንዳንዱ የክፍያ ግዜ መክፈል የሚኖርበትን የገቢ ግብር ከጠቅላላው ክፍያ ላይ ቀንሶ የማስቀረት ግዴታ እንዳለበት ይደነግጋል፡፡ ከመቀጠር የሚገኝ ገቢ ግብር እንዴት እንደሚጣል በአንቀጽ 19 በዝርዝር የተቀመጠ ከመሆኑም በላይ ከመቀጠር በሚገኝ ገቢ ላይ ለሚጣለው ግብር ተፈጻሚ የሚሆኑት ምጣኔዎችም በአንቀጽ 11 ተቀምጠዋል፡፡ ስለሆነም ከመቀጠር የሚገኝ ገቢ ደመወዝ ብቻ ሳይሆን ምንዳ፣ አበል፣ ጉርሻ፣ ኮሚሽን እና ሌሎችንም እንደሚጨምር የአዋጁ አንቀጽ 2(9) እና 12 ያስገነዝባሉ፡፡ የተለያዩ አበሎች ባሉበት ሁኔታም በድንጋጌው አበል በሚል ከመቀመጡ ባለፈ በግልጽ ትርጉም አለመሰጠቱ የቤት ኪራይ አበል በድንጋጌው ተካቷል ለማለት የማያስችል ከመሆኑም በላይ ተካቷል ቢባል እንኳ የክልሉ መስተዳድር ምክር ቤት ከደመወዝ ውጭ ባሉት ገቢዎች ላይ ግብር የሚከፈልበትን ሁኔታ አስመልክቶ ደንብ እንደሚያወጣ በአዋጁ አንቀጽ 12(4) የተደነገገ እና አዋጁን ለማስፈጸም በወጣው ደንብ ቁጥር 162/2010 በጉዳዩ ምንም የተባለ ነገር በሌለበት ሁኔታ እና በመመሪያ ቁጥር 1/2011 አንቀጽ 3(1) ደመወዝ አበልና ሌሎች ጥቅማጥቅሞችን እንደማይጨምር ትርጉም ሰጥቶበት እያለ በቤት ኪራይ አበል ግብር መቁረጥ የሚቻል አይደለም፡፡

ከስራ ባህሪ እኳያ ምቹ የስራ ሁኔታ ለመፍጠር ሲባል የመንግስት የቤት ተጠቃሚነትን ሲወስን የሚወሰነው የቤት ኪራይ አበል ብቻ ሳይሆን በአይነት የሚኖርበትን ቤትም ጭምር በመስጠት በመሆኑ እና የሚኖሩበት ቤት በአይነት የተሰጣቸው ሰዎች ግብር እንዲከፍሉ ባልተደረገበት ሁኔታ ቤት ለመከራየት በተከፈለው ገንዘብ ግብር እንዲቆረጥ ማድረግ ኢፍትሀዊነትን የሚያሳይ እና የእኩልነትን መርህ የሚጥስ በመሆኑ በቤት ኪራይ አበል ግብር መቁረጥ የሚቻል አይሆንም፡፡ ተጠሪ የቤት ኪራይ ኣበሉ ከደመወዝ ጋር ተደምሮ ከላይ በተጠቀሰው አዋጅ አንቀጽ 8(2) መሰረት ህጋዊነት አለው ሲል ያቀረበውን መከራከሪያ በተመለከተ ድንጋጌው ግብር መክፈል እንደሚገባ በግልጽ በህጉ የተመለከቱት ገቢዎች እንዴት

እንደሚከፈሉ ያስቀመጠ እንጂ በህጉ ግብር መክፈል እንደሚገባው ያልተመለከተውን ለክርክሩ መነሻ በሆነው የቤት ኪራይ አበል ግብር አቆራረጥን የሚመለከት ባለመሆነ ክርክሩ ተቀባይነት የለውም። ስለሆነም የአመልካቾች የቤት ኪራይ አበል ግብር መቆረጡ እና እየተቆረጠ ያለው ህጋዊ አይደለም። በመሆኑም የስር ተከሳሽ ከአመልካቾች የቤት ኪራይ አበል አላግባብ ግብር በመቁረጥ ገቢ የተደረገውን ገንዘብ ለአመልካቾች ሊመልስ ይገባል፣ ከአመልካች የቤት ኪራይ አበል አላግባብ እየቆረጠ ያለውን ግብር የስር ተከሳሽ ለወደፊቱ ሊቆርጥ አይገባም በማለት ውሳኔ ሰጥቷል።

ተጠሪ ከላይ በተገለጸው ውሳኔ ቅር በመሰኘት ለአብክመ አዊ ብሔረሰብ ዞን ከፍተኛ ፍ/ቤት ባቀረበው ይግባኝ የቤት ኪራይ አበል ግብር መከፈል ያለበት ነው። ከግብር ነጻ የሆነ ገቢ ስለመሆኑ በህግ አልተቀመጠም። ግብሩም ሊከፈል የሚገባው ከደመወዝ ጋር ተደምሮ በስሌት ነው በማለት ከላይ የተገለጸው ውሳኔ እንዲሻርለት ጠይቋል። ፍርድ ቤቱም ጉዳዩን መርምሮ የአብክመ አ.ቁ 240/2008 አንቀጽ 12(1)(ሀ) ለተቀጣሪ የሚከፈል አበል አንዱ ገቢ እንደሆነ ደንግጓል። በዚሁ ድንጋጌ ንኡስ ቁጥር 2 ስር ከመቀጠር የሚገኝ ገቢ ከግብር ነጻ የተደረገን ገቢ አይጨምርም በማለት ደንግጓል። ከዚህ ድንጋጌ አንጻር አንድ የተቀጣሪ ገቢ እንዴ ገቢ ተቆጥሮ ግብር እንዳይከፈልበት ለመደምደም ከግብር ነጻ ሆኖ መደንገግ ይጠበቅበታል። የቤት ኪራይ አበልም ከግብር ነጻ ነው በሚል በህግ ላይ አልተቀመጠም። ይህ በሆነበት ሁኔታ የቤት ኪራይ አበል ከግብር ነጻ የሚሆንበት የህግ መሰረት ፍ/ቤቱ አላገኘም። የአዋጁ አንቀጽ 8(2) የተቀጣሪዎች ደመወዝ እና አበል የተለያየ የገቢ ምንጭ ቢሆንም ግብር ሲሰላ ድምሩን መሰረት ባደረገ ስሌት ስለሆነ ከድንጋጌው አንጻር አመልካቾች ድንጋጌው በአመቱ ግብር ከፋይ የሆኑትን አካላት የሚመለከት እንጂ በየወሩ የምንከፍለውን አመልካቾች አይመለከትም ሲሉ ያቀረቡት መከራከሪያ ተቀባይነት የለውም በማለት የስር የወረዳውን ፍ/ቤት ውሳኔ በመሻር ተጠሪ የቆረጠውን የአመልካቾች የቤት ኪራይ አበል ግብር መመለስ የለበትም። የግብር ክፍያ አፈጻጸም ተቋርጦ ከሆነ ከተቋረጠበት ግዜ ጀምሮ ተጠሪ ማግኘት የነበረበትን የግብር ገቢ መሰብሰብ ይችላል በማለት ወስኗል።

አመልካቾች ከላይ በተገለጸው ውሳኔ ላይ ይግባኝ ለአብክ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት አቅርበው ፍ/ቤቱም በሰጠው ትእዛዝ ይግባኙን ሰርዞታል። በዚሁ ላይ አመልካቾች የሰበር አቤቱታ ለአብክመ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቅርበው ፍ/ቤቱም በሰጠው ትእዛዝ አቤታው ለሰበር ችሎት አያስቀርብም በማለት መዝገቡን ዘግቷል።

የአሁነ የሰበር አቤቱታ የቀረበውም አላይ የአብክመ አዊ ዞን ከፍተኛ ፍ/ቤት እና የአብክመ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የሰጡትን ውሳኔ እና የአብክመ የጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የሰጠውን ትእዛዝ በመቃወም ሲሆን ይዘቱም

በአጭሩ የስር ፍ/ቤቶች የቤት ኪራይ አበል ግብር ይቆረጥበታል የሚል ግልጽ ህግ በሌለበት ሁኔታ የቤት ኪራይ አበልን በተመለከተ ግብር አይቆረጥበትም የሚል ህግ ስለሌለ የቤት ኪራይ አበል ከደመወዝ ጋር ተደምሮ ግብር ሊቆረጥበት ይገባል በማለት የሰጡት ውሳኔ የአብክመ የገቢ ግብር አ.ቁ 240/2008 እንቀጽ 2(9) ፣ 11 እና 12 የቤት ኪራይ አበል ግብር ይቆረጥበታል በማለት በግልጽ ካለማስቀመጡ አንጻር መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ ከላይ የተገለጹት ፍ/ቤቶች የሰጡት ውሳኔ እንዲሻር እና የዳንግላ ወረዳ ፍ/ቤት የቤት ኪራይ አበል ላይ ግብር ሊቆረጥ አይገባም በማለት የሰጠው ውሳኔ እንዲጸናልን የሚል ነው፡፡

ይህ አቤቱታቸው በሰበር አጣሪ ችሎቱ ተመርምሮ የስር ፍ/ቤት የአመልካቾች የቤት ኪራይ አበል ከደመወዝ ጋር ተደምሮ ግብር ሊከፈልበት ይገባል በማለት የሰጠውን ውሳኔ አግባብነት ከአብክመ የገቢ ግብር አ.ቁ 240/2008 እና ከፌደራል የገቢ ግብር አ.ቁ 979/2008 አኳያ ለመመርመር ለሰበር ችሎቱ ይቅረብ ተብሎ በ16/4/12ዓ.ም በመታዘዙ ለተጠሪ ጥሪ ተደርጎ ተጠሪ በ7/5/13ዓ.ም በተጻፈ ባቀረበው መልስ በአ/ቁ 240/2008 አንቀጽ 2(10) ከግብር ነጻ የሆነ ገቢ ማለት በአዋጁ ሰንጠረዥ "ሠ" ከግብር ነጻ የሆነ ገቢ እንደሆነ በዚሁ አዋጅ አንቀጽ 62 ከግብር ነጻ የሆኑ ገቢዎችን በዝርዝር ያስቀመጠ ሲሆን ይህን አዋጅ ለማስፈጸም በጠጣው ደንብ ቁጥር 162/2010 እና ይህነኑ ለማስፈጸም በወጣው መመሪያ ቁጥር 1/2011 መሰረት ከታክስ ነጻ የተደረጉትን ጥቅማጥቅሞች በግልጽ አስቀምጧል፡፡ የቤት ኪራይ አበል ከታክስ ነጻ መሆኑ አልተደነገገም፡፡ የአዋጁ አንቀጽ 2(9) ከመቀጠር የሚገኝ ገቢ ማለት ከመቀጠር በጥሬ ገንዘብ ወይም በአይነት የተገኘ ማናቸውም ክፍያ ወይም ጥቅም ሲሆን በአዋጁ አንቀጽ 12 የተሰጠውን ትርጉም እንደሚጨምር እና ማንኛውም ተቀጣሪ ከመቀጠር ከሚያገኘው ጠቅላላ የወር ወይም የወሩ ከፊል ገቢ ላይ በተወሰነው ምጣኔ መሰረት በእያንዳንዱ ወር ግብር መከፈል እንዳለበት በዚሁ አዋጅ አንቀጽ 10 እና 11 ላይ የደነገገ በመሆኑ የአመልካቾች ክርክር የህግ መሰረት የለውም፡፡

ማንኛውም ከመቀጠር የተገኘ ጥቅም ወይም ክፍያ በአዋጁ አንቀጽ 62 ነጻ ከተደረጉት ውጪ ያሉት ገቢዎች በአዋጁ በአንቀጽ 11 በተቀመጠው የማስከፈያ ምጣኔ መሰረት ያገኘው ገቢ ተጣምሮ ግብር የሚወሰንበት ስለመሆኑ የአዋጁ አንቀጽ 8(2) የሚያስገነዝብ በመሆኑ አመልካቾች የሚከፈላቸው የቤት አበል ከቅጥራቸው ጋር በተያያዘ የተገኘ ገቢ ስለሆነ ይህ ደግሞ በሰንጠረዥ "ሀ" ስር የሚወድቅ በመሆኑ ከደመወዛቸው ጋር ተጣምሮ እንዲከፈል የስር የከፍተኛ እና የጠቅላይ ፍ/ቤቶች መወሰናቸው በአግባቡ ነው ተብሎ እንዲወሰንልን፣ ወጪና ኪሳራም እንዲከፈለን እንዲወሰንልን የሚል ነው፡፡

አመልካቾች በ27/5/13ዓ.ም በተጻፈ የሰበር አቤቱታቸውን በማጠናከር የመልስ መልስ አቅርበዋል፡፡ይህ የሰበር ችሎትም የአመልካቾችን የሰበር አቤቱታ፣ አቤቱታ ከቀረበበት ውሳኔ እና ከተገቢዎቹ የህግ ድንጋጌዎች አንጻር የስር የአብክመ አዊ ብሄረሰብ ዞን ከፍተኛ ፍ/ቤት የሰጠው ውሳኔ የአብክመ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት እና የሰበር ሰሚ ችሎቶች የሰጡት ትእዛዝ መሰረታዊ የህግ ስህተት የተፈጸመበት መሆን አለመሆኑን እንደሚከተለው መርምሯል፡፡

የአማራ ብሄራዊ ክልላዊ መንግስት የገቢ ግበር አ.ቁ 240/2008 አንቀጽ 2(14) ገቢ ማለት መደበኛ ያልሆነ ገቢን ጨምሮ ከማንኛውም ምንጭ በጥሬ ገንዘብ ወይም በአይነት የተገኘ ወይም በማንኛውም መንገድ ለግብር ከፋዩ የተከፈለው፣ በስሙ የተያዘለት ወይም የተቀበለው ማንኛውም የኢኮኖሚ ጥቅም እንደሆነ የደነገገ በመሆኑ ይህም በተያዘው ጉዳይ ለአመልካቾች የሚከፈለው የቤት ኪራይ አበል ገቢ ለመሆኑ የሚያስገነዝብ ነው፡፡ የዚሁ አዋጅ አንቀጽ 2(9) ከመቀጠር የሚገኝ ገቢ ማለት ከመቀጠር በጥሬ ገንዘብ ወይም በአይነት የተገኘ ማናቸውም ክፍያ ወይም ጥቅም ሲሆን በአዋጁ አንቀጽ 12 የተሰጠውን ትርጉም የሚጨምር ስለመሆኑ፤ እንዲሁም የአዋጁ እንቀጽ 12(1)(ሀ) የአንቀጹ ንዑስ አንቀጽ 2 እና 3 ድንጋጌዎች እንደተጠበቁ ሆነው ከቀጠር የሚገኙት ገቢዎች የሚባሉት ሰራተኛው ካለፈው፣ አሁን ካለው ወይም ወደፊት ከሚመጣው ቅጥር ጋር በተያያዘ የተቀበለው ደመወዝ፣ ምንዳ፣አበል፣ ጉርሻ፣ ኮሚሽን፣ የመልካም ስራ አፈጻጸም ማበረታቻ፣ ስጦታ ወይም ሌላ የአገልግሎት ዋጋ ክፍያ ስለመሆኑ ደንግገዋል፡፡ በዝሁ ድንጋጌዎች መነሻ በተያዘው ጉዳይ አመልካቾች የሚከፈለው የቤት ኪራይ አበል ከመቀጠር የሚገኝ ገቢ ስለመሆኑ የሚያስገነዝብ ነው፡፡

የአብክመ የገቢ ግብር አ.ቁ 240/2008 አንቀጽ 84(1) ከመቀጠር ከሚገኝ ገቢ ላይ ቀጣሪ ግብርን ቀንሶ የማስቀረት ግዴታ ያለበት ስለመሆኑ የአዋጁ አንቀጽ 12(2) በመቀጠር የሚገኝ ገቢ ከግብር ነጻ የተደረገ ገቢን የማይጨምር ስለመሆኑ ደንግጓል፡፡ የአዋጁ አንቀጽ 62(1) የገቢ ግብር ነጻ የሆኑ ገቢዎችን በዝርዝር ያስቀመጠ ሲሆን አሁን ስክርክሩ መነሻ የሆነው ለአመልካቾች የሚከፈሰው የቤት ኪራይ አበል ከገቢ ግብር ነጻ ናቸው ተብለው ከተዘረዘሩት ገቢዎች ውስጥ አልተካተተም፡፡ በአብክመ የገቢ ግብር አዋጁን ለማስፈጸም በወጣው የክልል መስተዳደር ምክር ቤት ደንብ ቁጥር 162/2010 ዓ.ም አንቀጽ 54 ከገቢ ግብር ነጻ የሆኑ ገቢዎች ተብለው ከተዘረዘሩት ገቢዎች ውስጥ ለክርክሩ መነሻ የሆነው የቤት ኪራይ አበል አልተካተተም፡፡ የክልሉ የገንዘብ እና ኢኮኖሚ ትብብር ቢሮ ባወጣው ከገቢ ግብር ነጻ የተደረጉ ገቢዎች አፈጻጸም መመሪያ ቁጥር 1/2011 ከገቢ ግብር ነጻ ናቸው ተብለው ከተዘረዘሩት የአበል አይነቶች ውስጥ ለክርክሩ መነሻ የሆነው ለአመልካቾች የሚከፈሰው የቤት ኪራይ አበል አልተካተተም፡፡ የአብክመ የገቢ ግብር አ/ቁ 240/2008 አንቀጽ 8(2) ግብር ከፋዩ ከተለያዩ የገቢ ምንጮች ገቢ ያገኘ እንደሆነ ሁሉም ገቢዎች ተጣምረው ግብር የሚከፈል መሆኑን ደንግጓል፡፡

ከሳይ ከተዘረዘሩት የህግ ድንጋጌዎች አንጻር በተያዘው ጉዳይ ለክርክሩ መነሻ የሆነው ለአመልካቾች የሚከፈለው የቤት ኪራይ አበል ከገቢ ግብር ነጻ ናቸው ተብለው በህጎቹ ከተመለከቱት ገቢዎች ውስጥ ያልተካተተ በመሆኑ የገቢ ግብር ሊከፈልበት የሚገባ ገቢ እና የሚከፈለውም ለአመልካቾች ከሚከፈለው የተለየ የገቢ ምንጭ (ደመወዝ) ጋር ተደምሮ ነው። ይህ ከሆነ ደግሞ የስር የአብክመ አዊ ማህበረሰብ ዞን ከፍተኛ ፍ/ቤት የስር የዳንግጎ ወረዳ ፍ/ቤት ተጠሪ ከአመልካቾች የቤት ኪራይ አበል ላይ ግብር መቁረጡ ህጋዊ አይደለም። ስለዚህ ከቤት ኪራይ አበላቸው ላይ ግብር በመቁረጥ ገቢ የተደረገው ገንዘብ ለአመልካቾች ሊከፈል ይገባል፣ ለወደፊቱም ከአመልካቾች የቤት ኪራይ አበል ላይ ግብር ሊቆረጥ አይገባም በማለት የሰጠውን ውሳኔ በመሻር ተጠሪ የቆረጠውን የአመልካቾች የቤት ኪራይ አበል ግብር ለአመልካቾች ሊመልስ አይገባም፣ ቤት ኪራይ አበል ግብር መቁረጥ ተቋርጦ ከሆነ ከተቋረጠበት ግዜ ጀምሮ ተጠሪ ማግኘት የነበረበትን የግብር ገቢ መሰብሰብ ይችላል በማለት የሰጠውን ውሳኔ፣ በዚሁ ውሳኔ ላይ የቀረበውን ይግባኝ የአብክመ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመሰረዝ የሰጠውን ትእዛዝ፣ በዚሁ ላይ የቀረበውን የሰበር አቤቱታ የአብክመ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት ለሰበር ችሎት አያስቀርብም በማለት የሰጠውን ትእዛዝ ይህ የሰበር ችሎት መሰረታዊ የህግ ስህተት የተፈጸመበት ሆኖ አላገኘውም። ስለሆነም ተከታዩ ተወስኗል።

ውሳኔ

1. *የአብክ አዊ ብሄረሰብ ዞን ከፍተኛ ፍ/ቤት በመ. ቁ 09-00741 በ5/10/12ዓ.ም የሰጠው ውሳኔ የአብክ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመ.ቁ 54026 በ14/11/12ዓ.ም የሰጠው ትእዛዝ እንዲሁም የአብክመ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በመ.ቁ 97690 በ29/11/12 ዓ.ም የሰጠው ትእዛዝ በፍ/ብ/ስ/ስ/ህ/ቁ 348(1) መሰረት ጸንቷል።*
2. *በዚህ የሰበር ችሎት በተደረገው ክርክር ወጪና ኪሳራ ግራቀኙ የየራሳቸውን ይቻሉ።*
3. *የዚህ ውሳኔ ግልባጭ ለስር ፍ/ቤቶች ይድረስ።*
4. *መዝገቡ ተዘግቷል። ይመለስ።*

የማይነብ የአምስት ዳኞች ፊርማ አለበት።