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# Reconstructing Power and Governance in Economic Diplomacy in Ethiopia: Putting Health at the Center

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***Abstract***
*The Sustainable Development Agenda of 2030 recognizes the promotion and protection healthcare as one of its priorities. In particular, reducing non-communicable diseases (NCDs) through effective prevention and control policy is a global development imperative that calls for both unilateral and collective efforts. This study aims at examining the adequacy of the efforts put in place by the Ethiopian government in preventing and controlling NCDs by closely looking at the legal and policy frameworks. This doctrinal research uses both primary and secondary sources of data. It heavily relies on binding national and international legal and policy instruments designed for the regulation of NCDs as primary sources and organizational reports and related literatures as secondary ones. The study finds, among others, that while efforts have been made in order to control the NCDs in the country, the existing legal and policy frameworks are inadequate in responding to the needs of the day. It recommends that the concerned organs need to take effective measures that would help mitigating the scourges of NCDs.*
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## 1. Introduction

The Sustainable Development Agenda of 2030 recognizes NCDs as a critical challenge for sustainable development.[1] Non-communicable diseases pose a severe threat to humanity at every level of social structures through increasing individual and household hardships and hindering social and economic development.[2] Prevention and control of NCDs require, among others, broader public health policy interventions to address the common risk factors, unhealthy but modifiable lifestyles (mainly tobacco use, unhealthy diets, physical inactivity, and the harmful use of alcohol) that result in the development of NCDs.[3] Countries have been engaged in combat against morbidity and mortality from NCDs at the international level, mainly under the World Health Organization's (WHO) leadership and their domestic policy framework.[4] Most importantly, the prevention of

[1] The 2030 Agenda for Sustainable Development recognizes NCDs as a major challenge for sustainable development. See, Sustainable Development Goal (SDG) 3 includes at target 3.4 to reduce premature NCD mortality by a third by 2030.
[2] Taulant Muka et al., *The global impact of non-communicable diseases on healthcare spending and national income: a systematic review*, 30 EUR. J. EPIDEMIOL. 251–277 (2015).
[3] Rohina Joshi et al., *Task shifting for non-communicable disease management in low and middle income countries - A systematic review*, 9 PLOS ONE (2014)., p. 1-9.
[4] *See for instance,* Luke N. Allen et al., *Implementation of non-communicable disease policies: a geopolitical analysis of 151 countries*, 8 THE LANCET GLOBAL HEALTH e50–e58 (2020); Niloofar Peykari & Bagher Larijani, *A multi-sectoral approach to combatting non-communicable diseases: Iran's experience*, 18 JOURNAL OF DIABETES AND METABOLIC DISORDERS 719–720 (2019); Martin McKee et al., *Towards a comprehensive global approach to prevention and control of NCDs*, 10 GLOBALIZATION AND HEALTH 1–7 (2014).

 

NCDs' key risk factors forms part of the State's obligation to respect, protect, and fulfil under international, regional, and domestic legal frameworks.

In Ethiopia, the prevalence of NCDs is reportedly high, and its risk factors are mainly associated with the consumption of tobacco, alcohol, and ultra-processed food products. NCDs cause 42% of deaths, of which 27% are premature deaths.[5] Some of the available data indicate that chronic diseases and their risk factors in Ethiopia tend to occur at younger age groups and result in higher mortality than in the developed world.[6] Many chronic NCDs share risk factors that are mostly preventable by reducing their four main behavioural risk factors: tobacco use, physical inactivity, harmful use of alcohol, and unhealthy diet.[7] NCDs and the main risk factors cost Ethiopia annually an estimated 1.1 billion U.S. dollars.[8]

Despite the domestic and international obligations the country possesses, more recently, there has been a growing recognition among public health officials about the challenges presented by the worrying trends in the magnitude of chronic diseases and their risk factors. The development of a strategy document focusing on NCDs, to be instrumental in reorienting the overall health response to address chronic diseases, shows the start of Ethiopia's engagement.[9] Furthermore, the Ethiopian government started to take regulatory measures that directly target investments (both domestic and foreign) associated with NCDs' risk factors (mainly investments in the alcohol sector) to promote public health.[10]

More strikingly, foreign investors enjoy protections under Ethiopia's Bilateral Investment Treaties (BITs) for the protection and promotion of investments.[11] For instance, the Ethiopia - Switzerland BIT (1998)[12] and Ethiopia - Netherlands BIT (2003) [13] protect, respectively, the Japan Tobacco Company and the Heineken Brewery Company, both are foreign investments. Thus, the Ethiopian government's efforts to reduce NCD by regulating risk factors (tobacco, alcohol, soft drinks, and unhealthy foods) and promote public health could give rise to expensive legal proceedings, as proven through recent claims challenging tobacco control legislation in Uruguay

[5] Fassil Shiferaw et al., *Non-communicable Diseases in Ethiopia: Disease burden, gaps in health care delivery and strategic directions*, 32 ETHIOP. J. HEAL. DEV. (2018).
[6] Girma Desta, Dereje Seyoum & Worku Sharew, *Emerging Public Health Problems in Ethiopia : Chronic Non-Communicable Diseases*, ETHIOP. PUBLIC HEAL. ASSOC. 118 (2012).
[7] *Id.*
[8] MOVENDI INTERNATIONAL, Ethiopia Strengthens Efforts to Beat NCDs (10 September 2019), available at https://movendi.ngo/news/2019/09/10/ethiopia-strengthens-efforts-to-beat-ncds/ (Accessed on 1st of October 2019).
[9] Ministry of Health, Federal Democratic Republic of Ethiopia, *NATIONAL STRATEGIC ACTION PLAN (NSAP) FOR PREVENTION & CONTROL OF NON-COMMUNICABLE DISEASES IN ETHIOPIA ( 2014-2016)* (2014).
[10] See, Food and Medicine Administration Proclamation, Proclamation No. 1112/2019, FED. NEGARIT GAZETA, 25th Year No. 35, Addis Ababa, Ethiopia, 28th February 2019.
[11] So far, Ethiopia has concluded around 35 BITs for the promotion and reciprocal protection of investments and out of these 21 BITs are in force and 2 are terminated.
[12] Agreement between the Swiss Confederation and the Federal Democratic Republic of Ethiopia on the Promotion and Reciprocal Protection of Investments, signed on 26th of June 1998 and entered in to force on 7th December 1998.
[13] Agreement on encouragement and reciprocal protection of investments between the Federal Democratic Republic of Ethiopia and the Kingdom of the Netherlands, signed on 16th of May 2003 and entered in to force on 1st July 2005.

 

and Australia. And also Ethiopian health policymaking bodies may restrain from regulating NCD risk factors due to fear of future claims as witnessed in New Zealand.

The above scenario raises vital and timely questions about how Ethiopia's BITs, particularly the FET standard and indirect expropriation provisions, can affect its regulatory autonomy in designing and implementing measures for preventing NCDs. The Fair and Equitable Treatment (FET) standard and (indirect) expropriation provisions are the most frequently used BIT provisions in Investor-State Dispute Settlement (ISDS). Some studies have raised concerns regarding Ethiopia's BIT regime's effects on the country's regulatory autonomy and, generally speaking, have identified that the BITs do not adequately recognize strong regulatory power.[14]

Hence, it is essential to exhaustively analyze the FET standard and prohibition of indirect expropriation under Ethiopia's BITs provisions vis-à-vis the State regulatory autonomy for the public interest, such as NCD risk factors regulation. Accordingly, the study examines emerging treaty practices of other countries and practices of the arbitral jurisprudence to identify the relevant issue that needs contemplation as to the provisions.

## 2. Objectives of the Study

The main objective of this study is to assess conditions limiting the autonomy of Ethiopia to regulate NCDs risk factors concerning foreign investors' rights to FET and protection from indirect expropriation under its BITs, thereby to circumscribe the provisions through an assessment of emerging treaty practice and arbitral jurisprudence to safeguard regulatory autonomy of Ethiopia for prevention of NCDs.

## 3. Research Methodology

The study employs a qualitative doctrinal methodology. It means the research has based on analyzing the FET standard and (indirect) expropriation provisions under the Ethiopian BITs and their implication on NCD risk factors regulation promulgated per national and international legal obligations of the country via examination of arbitral cases, best treaty practice, as well as existing literature. In examining the provisions, the research asks the scope of the provisions, the underlying principles of these provisions, the regulatory space, and the trend in arbitration decisions under these provisions. The primary sources of data for this research are the Ethiopian BITs, domestic public health laws, and policies, including the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) and relevant International Human Rights and Public Health Instruments, including the WHO Framework Convention on Tobacco Control.

[14] See, G. Seifu, '"Regulatory Space" in the Treatment of Foreign Investment in Ethiopian Laws,' the Journal of world investment & trade 405 (2008); Wakgari Kebeta, The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to the Bottom, A Thesis Submitted in Partial Fulfillment of the Requirements of LL.M Degree in International Economic and Business Law, Haramaya University, Ethiopia (2017); Mekete Teferi, The Existing Status of Bilateral Investment Treaties in Ethiopia: Issues and Trends, A Thesis Submitted in Partial Fulfillment of the Requirements of LL.M Degree in Public International Law, Addis Ababa University, Addis Ababa (2011); Asamnew D. Gizaw, ETHIOPIA'S BILATERAL INVESTMENT TREATIES AND PROTECTION OF THE ENVIRONMENT, LL.M Short Thesis, Central European University April 7, 2017 available at http://www.etd.ceu.hu/2017/gizaw_asamnew.pdf (accessed on 5th January 2021).

 

In addition, the study relies on secondary sources that include: arbitral awards of investment arbitration tribunals, IIAs of different countries to analyze the best treaty provision formulations, soft laws concerning public health, and others such as books, journal articles, internet, and official reports of different governmental and international organizations. The data collected from all sources were critically analyzed and interpreted based on the essential tools of legal reasoning.

## 4. Data Presentation and Analysis

### i. NCD Risk Factors Regulation in Ethiopia

*"Developing relevant policies and legislations and multi-sectorial engagement - Parliamentarians, policymakers, various government sector offices, and civic societies is one of the critical measures of interventions to tackle NCDs."*[15]

According to the WHO 2018 report, in Ethiopia, NCDs-related annual death rates account for 39% of all deaths in 2016.[16] The shared behavioural risk factors for the NCDs controlled through effective regulation include tobacco use, alcohol consumption, khat, and unhealthy diets, as indicated in the survey conducted in 2016.[17] The study recommends effective implementation of prevention and control strategies, including effectively implementing the WHO Framework Convention on Tobacco Control (FCTC) and tobacco-related national laws and restricting the distribution and use of selected risk factors.[18] The former minister's above-quoted statement shows the government's commitment to developing relevant policy and legislation that restrict accessibility, affordability, and availability of selected risk factors products.

Recognizing the increasing challenge of NCDs, Ethiopia launched the National NCD Prevention and Control Strategy based on the 2011 United Nations (UN) Declaration on NCDs.[19] Early in 2004, the country signed the WHO FCTC,[20] and lately, in 2014, enacted a ratification proclamation and mandated the Ethiopian Food, Medicine, and Healthcare Administration and Control Authority (FMHACA) to issue directives and follow its implementation;[21] the authority then issued tobacco control directive in 2015.[22]

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[15] Dr. Amir Aman, former Minister of Ministry of Health, stated when Ethiopia disseminates the results of a case report for Investment in prevention and control of non-communicable diseases (NCDs). See, WHO Africa, Ethiopia launches investment case for non-communicable diseases, 10 September 2019, **https://www.afro.who.int/news/ethiopia-launches-investment-case-noncommunicable-diseases** (Accessed on 11th January 2022).

[16] WHO, *WHO NCD report country profile, Ethiopia* (2018). Available at https://www.who.int/nmh/countries/2018/eth_en.pdf?ua=1 (Accessed on 7th February 2020).

[17] ETHIOPIAN PUBLIC HEALTH INSTITUTE, *Ethiopia Steps Report On Risk Factors For Non-Communicable Diseaes And Prevalence Of Selected Ncds*, STEPS (2016).

[18] *Id.*, p. 117.

[19] UNGA, *Resolution A/RES/65/238: Scope, modalities, format and organization of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases*, 11759 1–4 (2011).

[20] World Health Organization. WHO Framework Convention on Tobacco Control (hereafter WHO FCTC) available at https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=AC860D1FDD0292947C82875F645E35BF?sequence=1 (accessed on 5th January 2022).

[21] A Proclamation to Ratify the World Health Organization Framework Convention on Tobacco Control, Proclamation No. 822/2014, NEGARIT GAZETTE, 20th Year No. 16 Addis Ababa 17,H February2014.

 

In 2019, Ethiopia enacted a comprehensive national legal framework (Proclamation No. 1112/2019) to establish a regulatory system for food and medicine.[23] The legal framework's objective is to prevent and control the public's health from the devastating health, social, and economic consequences of unhealthy food and tobacco products and install a regulatory scheme compatible with its expanding industry and manufacturing sector the defined products.[24] Article 3 establishes the scope of regulated products under the proclamation of food and tobacco products, among other things. Further 'food' is defined under Article 2 (1) of the proclamation to include alcohol, soft drinks, salt, other drinks (including soft drinks), and any other substance, whether processed or semi-processed. Hence, all identified behavioural risk factors for NCDs included under the new proclamation.

Most importantly, the new proclamation stipulates tobacco products' regulation according to WHO FCTC and provides comprehensive regulatory frameworks for tobacco products that restrict availability, affordability, and accessibility.[25] For instance, Article 52 of the proclamation obliges the responsible organ to initiate and levy a tax on tobacco products consistent with the WHO FCTC, which Ethiopia has ratified. The proclamation in its relevant part that deals with tobacco products' health warnings, packaging, and labelling provides that tobacco packaging includes health warnings comprised of combined images and full-colour pictures covering 70 % of the front and backside of each package.[26]

Further, the new proclamation provides a detailed regulation of marketing, advertisement, and packaging of alcohol products.[27] Similar stipulations were provided regarding other foods that are considered detrimental to public health if they are not sufficiently regulated. Essentially, the proclamation mandates 'executive organs' to initiate regulatory standards, implement standards, and take other measures to regulate food and tobacco products according to relevant laws.[28]

Ethiopian government recently introduced an excise tax on various excisable products, including the products that are considered hazardous for public health.[29] The proclamation was enacted to review the existing excise tax regime on goods that are believed to be hazardous to health or cause social problems. [30] The WHO Representative for Ethiopia welcomes the new bill as a ground-breaking law to significantly reduce cigarette smoking in Ethiopia so that the country can save lives.

A recent study conducted by many health sector researchers appreciated substantial progress in responding to NCD challenges but presented the need for more substantial effort to impact NCDs' prevention in Ethiopia

[22] Tobacco Control Directive, Directive No 28/2015, March 2015.
[23] A Proclamation to Provide Food and Medicine Administration Proclamation, Proclamation No. 1112/2019, NEGARIT GAZETTE, 25th Year No. 39 Addis Ababa 28th February, 2019.
[24] *Id*, Preambular Statements.
[25] See *Id*, Arts. 4 (15) & (16) (regarding implementation of the regulation of tobacco products), 52 (1) (regarding tobacco products taxation).
[26] *Id*, Art. 57 (1) & (2).
[27] See, *Id*, Arts. 18, 55, 60.
[28] Id, Art. 4.
[29] The Excise Tax Proclamation, Proclamation No. 1186/2020, NEGARIT GAZETTE, 26th Year No. 25 Addis Ababa 17th March, 2020.
[30] *Id*, Preamble.

 

sufficiently.[31] The study further calls for multi-sectoral engagement and effective prevention policy, and legislation targeting the four major NCDs share common risk factors to avert deaths and morbidity from NCDs.[32] In a recent meeting convened to discuss strategies for establishing NCD prevention and control systems, the Ministry of Health announced that NCD's risk had peaked, posing a greater risk to the country's community.[33] Recognizing the social and economic pressure NCDs pose, State Minister of the Ministry of Health Dr. Dereje Duguma vowed strong risk factors regulation.[34]

Despite the measures installed to tackle the prevalence of NCDs in the country, it is vital to understand that the country has national and international obligations to protect general public health, including NCDs. In its preambular statement, the WHO Constitution states that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human."[35]

To begin with, the general obligations to protect public health, the Universal declaration on Human Rights (UDHR) on its part declares that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family […]"[36], albeit it does not impose specific obligations on state parties. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as an implementation document to the UDHR, provided a comprehensive set of right to health. The Convention places an obligation on state parties to ensure *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"* by taking active steps towards realizing the various aspect of the right to health, including those measures necessary for "*the prevention, treatment, and control of epidemic, endemic, occupational and other diseases."*[37]

Further, the UN Committee on Economic, Social and Cultural Rights - a treaty body which is responsible for the monitoring and implementation of ICESCR - has interpreted the state's failure to fulfil its obligation to public health on its General Comments 14 as:

> *[…] the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations to prevent them from violating*

[31] Fassil Shiferaw et al., *Non-communicable diseases in Ethiopia: Policy and strategy gaps in the reduction of behavioral risk factors*, 33 ETHIOP. J. HEAL. DEV. 259–268 (2019)., p. 259.
[32] *Id.*
[33] FBC, Risk of Non Communicable Diseases Reaches A Peak: Health Ministry, 19th September 2020, available at **https://www.fanabc.com/english/risk-of-non-communicable-diseases-reaches-a-peak-health-ministry/** (Accessed on 16th January 2022).

[34] *Id.*
[35] Constitution of the World Health Organization, preamble. July 22, 1946, 62 Stat. 6349, 14 U.N.T.S. 185, reprinted in 15 DEP'T ST. BULL. 211 (Aug. 4, 1946).
[36] *Universal Declaration of Human Rights*, Art. 25 G.A. Res. 217A (III)U,.N . GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948)
[37] *International Covenant on Economic, Social and Cultural Rights, Art. 12* adopted in 16 Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976)

 

> *the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g., by […] the failure to discourage production, marketing, and consumption of tobacco […].*[38]

At the regional level, the right to health is recognized, *among other things*, under Article 16 of the African Charter – also known as the "Banjul Charter."[39] The Charter pledged an unrestricted right to "*enjoy the best attainable state of physical and mental health*."[40] Further, it imposes an obligation on State parties to take the necessary measures *"to protect the health of their people and to ensure that they receive medical attention when they are sick*."[41] The African Charter on the Rights and the Welfare of the Child also recognizes health as a human right.

Specific obligations are also incorporated on the WHO FCTC.[42] For instance, Article 5 obliges State Parties to develop, implement, and review multi-sectorial national tobacco control strategies and programs intended to reduce tobacco use, addiction to nicotine, and exposure to second-hand smoke. Articles 6 and 7 of the Convention also require parties to implement price and tax policies and non-price measures to tobacco products to reduce tobacco consumption. Further, Article 13 of WHO FCTC obliges States Parties to undertake a comprehensive ban on all tobacco advertising, promotion, and sponsorship.

The FDRE Constitution[43] recognizes the afore-discussed documents stating "all international agreements ratified by Ethiopia as an integral part of the law of the land" except for the soft laws.[44] Further, the Constitution itself provides an obligation on the government and sets policy objectives regarding public health, including preparing and implementing national standards and policy measures.[45]Hence, the policies, legislations, and directives, including afore-discussed national and international documents promulgated or ratified as per the Constitution, oblige the country to regulate NCD risk factors.

According to the Ethiopian Investment Commission (EIC), 537 food processing investment projects, wholly owned by foreign investors or jointly with domestic investors, are licensed from 1992 to 2020 in different investment activities for establishment or expansion.[46] Dozens of factories were licensed for manufacturing alcoholic and soft drink beverages, including beer.

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[38] *Committee on Economic, Social and Cultural Rights (ESCR Committee),* General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2000/4 (2000). General Comment 14, phara 17.
[39] Organization of African Unity (OAU): African Charter on Human and Peoples' Rights ("Banjul Charter"); June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[40] *African Charter on Human and Peoples" Rights (Banjul Charter),* June 27, 1981, art. 14(1) I.L.M. 59 (1981) (entered into force Oct. 21, 1986).
[41] Id at art. 14(2).
[42] World Health Organization. WHO Framework Convention on Tobacco Control (hereafter WHO FCTC)
[43] The Constitution of the Federal Democratic Republic of Ethiopia, FDRE Constitution, Proclamation No. 1/1995, FED. NEGARIT GAZETTE, 1st Year No. 1, 1995.
[44] *Id*, Art. 9 (4).
[45] See, Id, Arts. 41, 51 & 90.
[46] A data accessed from the Information and Technology Directorate of Ethiopian Investment Commission, Addis Ababa, Ethiopia (EIC data). Accessed on 11th August 2020.

 

For instance, BGI Ethiopia PLC owned jointly by domestic investor and the BGI, a large-scale brewery and beverage production wing of Group Castel, operating internationally in more than 53 countries, has been operating in Ethiopia since 1998 and engaged in the production and distribution of beer, wine, and beverages with massive capacity.[47] BGI Ethiopia owns five brewery companies in Ethiopia with a combined production capacity of 3.6 million hectolitres of beer, including the St. George Brewery, the Kombolcha Brewery, the Hawassa Brewery, Zebidar Brewery, and Machew North Brewery. The foreign share of the BGI Ethiopia is owned by the BGI Company incorporated and registered in France.[48]

The other giant company in the alcohol industry is Heineken Ethiopia, owning three companies, including Bedele Brewery S.C., Kilinto Brewery S.C., and Harar Brewery S.C., with combined production of 4 million hectolitres.[49] The foreign share of the Heineken Ethiopia is owned by companies incorporated and registered in Netherlands and Britain. There are ample other investment projects that are owned wholly or jointly with domestic investors involved in producing and distributing beer, alcohol, soft drinks, or processed or semi-processed foods. Foreign investors in the sectors are originated from various countries, including the Netherlands, Italy, the USA, Britain, France, China, France, Japan, and Sudan.[50]

Unlike the food processing sector, there is only one tobacco manufacturing company, which was previously owned by the government but now transferred to the giant Japan Tobacco Inc. with a 70.95 % share and Yemen's Sheba Group with 30.05 % share.[51] The countries of origin of both companies are registered as Netherlands, Germany, British Virgin Island, and Yemen under manufacturing license.[52] As it is not the study's objective to identify the foreign investors that are susceptible to NCD risk factors regulation, the above manufacturing industries are good examples of foreign investments in the sector of food processing and tobacco products manufacturing. Notably, most of the investments are protected through Ethiopian BITs since their country of origin has a BIT concluded with Ethiopia and a separate contract with the government.

### ii. The Potential Impacts of the Ethiopian BITs

The FET standard and (indirect) expropriation provisions were formulated broadly under the Ethiopian BITs. The FET provisions have formulated under Ethiopian BITs as autonomous standards with some list of elements commonly identified by arbitral tribunals forming part of the FET standard. The provisions do not address legitimate expectations and the concern regarding the requirement of stability of the general regulatory framework under the FET standards and the specific obligations of the State under the FET provision. The (indirect) expropriation provisions also do not contour between compensable indirect expropriation and other

[47] Id. See also, https://bgiethiopia.com/homepage/ (accessed on 12th May 2021).
[48] EIC data.
[49] EIC data. See also, https://heinekenethiopia.com/our-breweries/ (accessed on 27th June 2021).
[50] EIC data.
[51] EIC data; Japan Tobacco Inc. (JT) Becomes Majority Shareholder of Ethiopia's NTE, Press Release on 21st December 2017, Tokyo, Japan available at **https://www.jt.com/media/news/2017/pdf/20171221_E01.pdf** (accessed on 10th June 2021); Japanese company now monopolizes Tobacco business in Ethiopia, Capital Magazine, 25 December, 2017 available **https://www.capitalethiopia.com/featured/japanese-company-now-monopolizes-tobacco-business-ethiopia/** (accessed on 4th July 2020).

[52] EIC data.

 

legitimate regulatory measures that are non-compensable. There is no regulatory carve-out under the (indirect) expropriation provisions of Ethiopian BITs.

Ethiopia has active BITs with many source countries for foreign investments in food processing and tobacco products. For instance, the above-mentioned Japanese Tobacco Inc., who has a majority share in the National Tobacco Enterprise, is protected by the Ethiopia-Netherlands BIT, which has broadly formulated FET standard and (indirect) expropriation provisions.[53] The list continues, and also Ethiopia will continue being a destination for foreign investments in the sectors associated with the NCD risk factors. However, the government's measures for the prevention and regulation of NCDs might affect such investments' business interests, and investors may sue the country for affecting their business interests. Investors will use the BITs as a means to challenge NCDs risk factors regulatory measures that are promulgated as per national and international obligations and under its sovereign right to regulate.

As witnessed in the arbitral jurisprudence, tribunals transgress to States' legitimate regulation by interpreting FET standards that are broadly formulated. The main elements that contribute to breach of FET when regulatory measures are challenged are tribunals reading of the general legitimate expectation of investors and investors' expectations regarding stable regulatory framework through an unruly interpretation of the provision. The Ethiopian BITs do not address or limit the scope of FET standards regarding those elements with specified state obligations and limited scope of legitimate expectations.

Regarding the (indirect) expropriation also when tribunals interpret broadly formulated provisions, sometimes they consider the economic impact of the measure on the investment and sometimes the legitimacy of the measure applying different rules. At this time, there is a high probability of finding state regulatory measures in breach of the provision requiring compensation. All Ethiopian BITs have incorporated broad provisions regarding the prohibition of (indirect) expropriation. Hence, Ethiopia's regulatory measures for preventing NCD could be interpreted by arbitral tribunals as (indirect) expropriation requiring the country to compensate.

### iii) Clarifying Ethiopian BIT Provisions to Safeguard Regulatory Autonomy

To avoid the legal uncertainty and to avert the possible impacts of the Ethiopian BIT provisions on the country's regulatory autonomy, the FET standard and (indirect) expropriations need to be clearly and precisely formulated. Doing this will benefit the county's effort to effectively regulate NCD risk factors by avoiding the possible constraint from the BITs and safeguards the country's overall regulatory autonomy to regulate legitimate public interests.

Regarding the (indirect) expropriation clause, clarifying the provision's scope is of relevance to avoid unnecessary encroachment to legitimate regulations by way of interpretation. Delimiting the precise boundary between the (indirect) expropriations from legitimate non-compensable measures can be achieved by a pure carve-out concerning legitimate public purposes. In this regard, Ethiopia can follow the practice followed by BITs signed under the Indian Model BIT, such as the Belarus-India BIT. Caution needs to be taken not to attach any 'exceptions/rare circumstances' on the clause that provides the carve-outs to avoid any interpretation

[53] See, Arts. 3 & 6 of the Ethiopia - Netherlands BIT (2003).

 

gateway. Specifically, incorporating public health carve-out with emphasis on NCDs prevention enhances regulatory autonomy to regulate NCD risk factors.

Ethiopia can guarantee legal predictability under its BITs through clarified provisions on FET standard provisions and (indirect) expropriation provisions. Clarified BIT provisions would achieve dual purposes; 1) it helps the country in the combat against NCDs mortality and morbidity by narrowing the constraints laid by the BITs and 2) helps in safeguarding the general regulatory autonomy of the country to regulate foreign investments. Hence, it is timely and appropriate to follow current treaty practices of clarifying the BIT provisions to control the unruly interpretations of tribunals to avoid unnecessary encroachment of International Investment Agreements (IIAs) towards the sovereign right to regulate.

## 5. Conclusion and the Way Forward

This study has indicated that states have the right to take necessary regulatory measures to promote public welfare objectives, such as health, safety, and the environment, in the context of their sovereign power. However, such regulatory measures come in sharp contrast to the foreign investors' standards of treatment under IIAs designed to ensure stability and predictability of host states' investment conditions. At this time, investors could bring investment claims before arbitral tribunals as per the agreements.

Further, this research has analysed the range of investment arbitral tribunals' interpretation of the FET standard and (indirect) expropriation provisions based on the provisions' various types of formulations. It has also indicated that the provisions' broader formulations have contributed to unnecessary interpretations of those provisions. Some tribunals' through interpretation, excessively read the protection of investors' legitimate expectations into the FET standard provisions as a requirement and apply the 'sole effect doctrine' or 'proportionality test' to determine whether there is indirect expropriation when states take legitimate measures to promote public welfare objectives. Some other tribunals recognize states' right to regulate for legitimate public interests. Such mixed and a broader interpretation of the provisions creates legal uncertainty and a lack of predictability or regulating states.

As a way forward, the author recommends the following:

Firstly, the FET standard provisions and the indirect expropriation provisions under Ethiopian BITs should be clarified to safeguard the regulatory autonomy of the country

- Ethiopian BITs should include a clear and precise provision regarding what constitutes a breach of FET (the obligations of state parties) and the scope of protection of legitimate expectation or the right to a stable and predictable legal environment.
- Indirect expropriation clause under Ethiopian BITs should include pure public health curve-out.

Secondly, the FET standard and (indirect) expropriation provisions under Ethiopian BITs should either be jointly interpreted or amended to incorporate clarified BIT provisions

Finally, the researcher recommends that the country's health policymakers and any other health sector stakeholders engage in Ethiopian BITs to narrow constraints on NCDs risk factors regulations.

 

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*Committee on Economic, Social and Cultural Rights (ESCR Committee),* General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2000/4 (2000). General Comment 14.

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