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FOREIGN CAPITAL OUTFLOW REGULATION UNDER ETHIOPIAN BITS AND DOMESTIC INVESTMENT LAWS

*Zakariyas Berhanu Tufa**

Abstract

In foreign investment, investors need to repatriate their capital and the investment returns to their home country or third country at any time they want. On the other hand, host states require foreign capital for balance of payment and need to control capital outflow in fear of large currency outflow. At the same time, states, particularly developing ones, need to attract foreign investment. In this regard, states' regulation of foreign capital outflow has significant implication. Like others, Ethiopia attempts to regulate repatriation of investment capital and its returns through its BITs and domestic investment laws. The aim of this Article is to investigate whether the Ethiopian investment laws are designed to meet the development need of the country when they regulate repatriation of foreign investment. To this end, the Article examines the relevant provisions of Ethiopian BITs and domestic investment laws. It also consults relevant literatures and foreign experiences. By so doing, it reveals that most of the Ethiopian BITs fully liberalize repatriation of investment capital and its returns which may affect the ability of the country to control capital outflow. Besides, the domestic investment laws are not clear enough on whether they allow repatriation of foreign capital though they expressly allow the repatriation of current account transactions. This could affect the objective of attracting foreign investors to come to Ethiopia. Accordingly, the BITs and domestic investment laws shall be revisited to allow the country to control foreign capital outflow when it is necessary and to create certainty for the foreign investors about the possibility and conditions of investment repatriation.

Keywords: *Bilateral investment treaties, capital account, current account, foreign direct investment, foreign capital, foreign investors*

* LL.B (Bahir Dar university), LL.M in International Economic and Business Law (Haramaya University), Lecturer at College of Law, Haramaya University. He can be reached through zaakmaan@gmail.com or bzakariyas@yahoo.com.

I. INTRODUCTION

Nowadays, it is a fact that foreign investment, largely in the form of FDI and portfolio, is the largest mechanism by which huge capital revolves throughout the world. It is also known that FDI inflow and technology transfer are increasingly concentrated in a handful of countries while the developing countries and least developed countries are marginalized though they liberalize their investment legal regime.¹ In FDI, the foreign investors aim at generating profit from their investment. As a result, they need to be sure if they are, *inter alia*, allowed to repatriate their foreign capital and other returns from their investment. This means that they require liberalization of foreign capital outflow. To define it, liberalization of capital outflow means the abolition of government restrictions on both initial capital (capital that foreign investors brought to host state at entry level) and payments related to transactions.² On the other hand, host states need to get foreign capital and also to regulate its outflow for various reasons including solving or preventing balance of payment problem. Hence, compromising these two conflicting interests remains a headache for policy and law makers.³

Unlike international trade, which is largely regulated through various multilateral agreements, the international investment regime is mainly regulated through BITs. BITs are concluded specifically to protect foreign investment⁴, and their core objectives are promotion and protection of foreign investment which include facilitation of free transfer of capital. BITs are introduced to ensure that investments are secured from political and other risks in host states.⁵ The 1959 BIT between Germany and Pakistan being the first, there are about 3000 BITs in the world to facilitate the foreign capital flows.⁶ BITs in general have the goal of strengthening economic co-operation between states and creating favorable conditions for investors.⁷ It does not, however, mean proliferation of BITs in facilitation of foreign capital flow from capital exporting countries to host state may always guarantee development of host states.⁸

Foreign capital flow liberalization is said to have both advantages and disadvantages. On one hand, the liberalization can enhance managerial efficiency, promote financial sector competitiveness and facilitate greater productive investment in a state.⁹ It can support long-term

¹ SIMA MOTAMEN-SAMADIAN, CAPITAL FLOWS AND FOREIGN DIRECT INVESTMENTS IN EMERGING MARKETS, 145(2005).

² STEPHANY GRIFFITH-JONES, *et al*, THE OECD EXPERIENCE WITH CAPITAL ACCOUNT LIBERALIZATION 5 (Institute of Development Studies, University of Sussex Brighton, UK) (2000), at foot note 6.

³ Frank L. Bartels & S.A.de Crombrughe, *FDI Policy Instruments: Advantages and Disadvantages*, (UNIDO, Research and Statistics Branch Working Paper), (2009), at 2

⁴ M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 172 (3rded, Cambridge University Press) (2010).

⁵ *Id.*

⁶ JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 1 (1st ed., Gabler Verlag) (2011)

⁷ Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, INTERNATIONAL INVESTMENT PERSPECTIVES, 145 (2006).

⁸ *Id.* at 177-178

⁹ INTERNATIONAL MONETARY FUND, THE LIBERALIZATION AND MANAGEMENT OF CAPITAL FLOWS: AN INSTITUTIONAL VIEW, 2(2012), available at :<http://www.imf.org/external/np/pp/eng/2012/111412.pdf> (Accessed on 15 September 2016).

growth with short term policy challenges.¹⁰ It is also alleged that there is positive correlation between capital account openness and economic growth.¹¹ On the other hand, most empirical studies show that there is rare consensus among professionals on whether full capital account liberalization and economic growth are positively related.¹² Accordingly, it is noted that the balance of costs and benefits of capital flow liberalization must depend on the domestic political economy, institutions, ideological inclinations and level of economic development of the country in question.¹³ Furthermore, it is claimed that free capital mobility would have potential problems like appreciation of exchange rate, exposure of domestic manufacturers to stiff competition, sudden withdrawal of large fund, dislocation or accumulation of foreign currency and loss of monetary autonomy that affect a state's monetary regulation and policy.¹⁴ Given the above facts, countries should devise the appropriate ways in the regulation of capital outflow from investment and other sources.

In the same fashion, the investment law and policy of Ethiopia have the mission of enhancing investment and promoting investment opportunities.¹⁵ Till 2018, Ethiopia has signed about 34 BITs among which 21 are in force.¹⁶ Most of the BITs signed by Ethiopia allow full liberalization of capital outflow for foreign investors though they use different terms like "any kind of asset" or "free transfer of investment" to refer to transfer of foreign capital. In addition, there are few BITs that put restriction on free transfer of capital when the transfer may cause or threaten to cause serious difficulties for operation of monetary policy, exchange rate and balance of payment. The BITs that Ethiopia has with France¹⁷, UK¹⁸, Israel¹⁹ and Brazil²⁰ have such exceptional conditions. From this, it can generally be concluded that the Ethiopian BITs can be categorized into two based on how they regulate foreign capital outflow. As such, there are BITs that fully liberalize foreign capital outflow and that which allow transfer of foreign capital on the fulfillment of certain conditions.

¹⁰ STEPHANY GRIFFITH, *supra* note 2, at 2.

¹¹ Mihir A. Desai, *et al*, *Capital Controls, Liberalizations, and Foreign Direct Investment*, (The Review of Financial Studies, Vol. 19 No. 4 2006), at 1436.

¹² Barbara Friz & Daniela Prates, *The New IMF Approach to Capital Account Management and its Blind Spots: Lessons From Brazil and South Korea*, INTERNATIONAL REVIEW OF APPLIED ECONOMICS 210, 212 (2014).

¹³ PIERRE-OLIVIER GOURINCHAS AND OLIVER JEANNE, ON THE BENEFITS OF CAPITAL ACCOUNT LIBERALIZATION FOR EMERGING ECONOMIES 4(2002).

¹⁴ Mihir A. Desai, *supra* note 11, at 1433

¹⁵ Elias N. Stebek, *The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture: The Legal Regime and Global value Chain*, (Phd Dissertation, War Wick School of Law), (2012), at 9-10.

¹⁶ UNITED NATION CONFERENCE ON TRADE AND DEVELOPMENT, INVESTMENT POLICY FRAME WORK, *available at* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/67>, (Accessed on 25 April 2018).

¹⁷ Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, signed on 25/6/2003, Art 6(3)

¹⁸ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and Ethiopia for the Promotion and Protection of Investments, signed on 19/11/2009, Art 6.

¹⁹ Agreement between Ethiopia and the Government of The State of Israel for the Reciprocal Protection and promotion of Investments, signed on 26/11/2003, Art 6.

²⁰ Agreement Between the Federative Republic of Brazil and Ethiopia on Investment Cooperation and Facilitation, signed on 11/4/2018, Art 10(2 & 3).

Practically speaking, the above categorization may be superficial. Through the application of Most Favoured Nation (MFN) principle, foreign investors can use other BITs signed by Ethiopia to benefit from treaty obligations that arise from such BITs.²¹ Hence, foreign investors may still claim the repatriation of their capital and returns according to those BITs that fully liberalize repatriation of foreign capital outflow. Based on this, one may be interested to question the approach that Ethiopia has followed to regulate repatriation of foreign capital through its various BITs. On the other hand, when it comes to the relevant domestic legislations that regulate repatriation of foreign capital in Ethiopia, there exist certain issues that worth close consideration. The relevant domestic laws in the regulation of repatriation of foreign capital primarily include Ethiopian Investment Proclamation No.769/2012 (Investment Proclamation), Ethiopian Investment Incentive Regulation No.270/2012 (Investment Regulation) and the Ethiopian Customs Duties Proclamation No. 859/2014.

The Investment Proclamation contains rules that are meant to regulate repatriation of foreign investment. As can be read from Article 26 of the Investment Proclamation, there are lists of ‘funds’ that the investor is allowed to remit out of Ethiopia. In so doing, there is no express stipulation under Article 26 that allows remittance of foreign capital. The proclamation is explicit as to remittance of funds related to current account like remittance of profit, dividend, proceeds from sale or liquidation of enterprise, and proceed from sale of share. Since Article 26 (1(f)) of the Proclamation allows remittance of ‘*proceeds from sale or liquidation of the enterprise (investment)*’, it may be argued that it is possible for the foreign investors to remit foreign capital including the initial capital.²² Despite this, the Investment proclamation is not clear at all whether or not the foreign investors are allowed to repatriate their capital in kind rather than selling it in Ethiopia or if it is possible to relocate the investment before liquidation. In respect of repatriation of capital in kind, one should investigate the Ethiopian Investment Incentive Regulation No.270/2012 if it can have any help. However, this regulation seems to deal with how the foreign investor can transfer some duty free imported capital goods, construction materials or vehicles to another investor with same privileges or in the form of re-exporting.²³

Therefore, Article 15(3) of the regulation does not seem to allow foreign investors to repatriate their capital goods. It is rather concerned with the requirements, including payment of custom duties, to transfer those imported goods. Even if this provision can be interpreted to allow transfer of capital goods, the practice in Ethiopia tells us that capital goods entered the country can be re-exported in exceptional circumstances as this will be discussed in this article. The Custom Duty Proclamation also contains provisions that require payment of customs when duty-free imported goods are to be re-exported.²⁴ Therefore, it is worthwhile to examine whether the Ethiopian domestic investment regime allows repatriation of foreign capital in general and

²¹ Martha Belete Hailu & Tilahun Ismael Kassahun, *Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration*, 8(1) MIZAN LAW REVIEW 117, 143 (2014).

²² *Investment Proclamation*, Proclamation No.769/2012, FED. NEGARIT GAZETTE, 18thYear No. 63, Addis Ababa, (2012), Art 26(1,f).

²³ *Investment Incentive and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation*, Regulation No. 270/2012, FED. NEGARIT GAZETTE, 19th Year No.4, Addis Ababa, (2012), Art 15(3)

²⁴ *Customs Proclamation*, Proclamation No. 859/2014, FED. NEGARIT GAZETTE, 20th Year No.82, Addis Ababa, (2014), Art 71(6&7).

foreign capital in kind in particular that relate to foreign investment and the related effects that it may have.

Moreover, it is recommendable that there should be consistency between BITs and domestic investments laws when they regulate repatriation of foreign capital. It is known that the International Monetary Fund (IMF) Articles of Agreement, under Article VI (3), gives the power to Member States to regulate capital movement while it requires them to liberalize their current accounts. In regulating transfer of foreign capital in relation to investment, Member States can thus use BITs or/and their domestic laws. Through these laws, countries can liberalize or control capital outflow. At this junction, it would be inevitable to raise an issue when there may be a conflict between BITs and domestic investment laws in their treatment of capital outflow from foreign investment. Indeed, the Vienna Convention on Law of Treaty (VCLT) prohibits Member States to invoke the provision of domestic law to justify failures to perform a treaty.²⁵ As such, it provides us with a means to handle the issue when there is conflict between BITs and domestic laws. Despite this, having similar objective of attracting foreign capital via investment, compatibility between Ethiopian BITs and its domestic investment laws foreign capital outflow regulation is essential to build confidence of investors to invest in Ethiopia.

The aim of this Article is therefore to examine the above mentioned and other issues that arise in connection with the regulation of capital outflow under the BITs signed by Ethiopia and its domestic investment laws. To this end, the Article investigates the relevant provisions in the BITs and domestic laws. In addition, the Article consults relevant literatures and BITs signed by other countries and their domestic laws. In particular, experiences of South Korea, Kenya and South Africa are given particular attention. This is due to their historical economic policy and current legal practice regarding the issues addressed in this study.

The remaining part of the Article is organized into four sections. Section II discusses the regulation of capital outflow under major international legal instruments. This includes regulation of foreign capital outflow under the IMF Articles of Agreement, OECD Code of Liberalization and generally under BITs. Section III presents experiences from Kenya, South Korea and South Africa on the regulation of capital outflow from foreign investment. Section IV, on its part, examines the regulation of foreign capital outflow from investment in Ethiopia. It separately discusses the regulation of repatriation of investment capital under Ethiopian BITs and under the relevant domestic investment laws. It also singles out the problems that arise in relation to the regulation of repatriation of investment in Ethiopia. Finally, section V provides conclusion and recommendations.

II. FOREIGN CAPITAL FLOW REGULATION UNDER DIFFERENT INTERNATIONAL INSTRUMENTS

In addition to domestic laws of each state, there are certain international instruments that regulate international capital flow. This section briefly discusses the major international instruments that regulate capital flow.

²⁵ *Multilateral Vienna Convention on Law of Treaty*, No. 18232, UN, (1969), Art 27.

A. Regulation of Capital Flow under IMF Articles of Agreement

The issue of international monetary regulation in general and international capital flow regulation in particular came into attention at the Bretton Woods Conference of 1944.²⁶ As a result, IMF was established with the objective of regulating the international financial system.²⁷ With regard to capital flow regulation, IMF distinguishes two types of capital flow management measures (capital control): residency based and others.²⁸ Residency-based refers to capital control by a country based on residency of the capital owner through taxes, regulations and others, and ‘other capital flow measures’ refer to prudential policies generally introduced to influence cross-border capital flow like reserve requirement or foreign exchange deposits.²⁹ Capital control is necessitated since its full liberalization does not perfectly complement a country’s development needs at all time and in all conditions. Countries have diverging interests which demand them to put control on movement of capital and at the same time they need to liberalize their capital flow regulation to attract FDI to meet their development needs.³⁰

Under the IMF Articles of Agreement, Members are given full discretion to regulate capital transfer from or to their country.³¹ However, the IMF Articles of Agreement is keen in regulation of exchange rate, elimination of restriction on payment for current account transactions and international liquidity.³² Art VI (3) of IMF Articles of Agreement provides:

Members may exercise such controls as are necessary to regulate *international capital movements*, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV Section 2.³³

This sub-article indicates that the IMF Articles of Agreement regulates international money/financial transfer in two nature/forms, **capital account** and **current account** transfer, which are interdependent and useful to know the balance of payments condition of a country. Both capital account and current account transfers are components of balance of payment record which is important to describe a country’s international transaction and its linkage with domestic

²⁶ ASIF H. QURESHI, INTERNATIONAL ECONOMIC LAW 109 (Sweet & Maxwell, London) (1999).

²⁷ ROBERT O’BRIEN & MARC WILLIAMS, GLOBAL POLITICAL ECONOMY: EVALUATION AND DYNAMICS 209-210, (2nd ed, Palgrave Macmillan, New York) (2007)

²⁸ IEO Independent Evaluation Office of the International Monetary Fund, *The IMF’s Approach to Capital Account Liberalization: Revising the 2005 IEO evaluation*, 5 (2015), available at: www.ieo.imf.org/ieo/.../The%20IMFs%20Approach%20to%20Capital%20Account%.. (Accessed on 3 January 2017).

²⁹ *Id.*

³⁰ Mihir A. Desai, *et al*, *Capital Controls, Liberalizations, and Foreign Direct Investment*, 19 (4) THE REVIEW OF FINANCIAL STUDIES 1433(2006).

³¹ International Monetary Fund, Articles of Agreement, Art VI(3).

³² *Id.*, Art IV(3)

³³ *Id.*, Art VI(3)

economy.³⁴ Moreover, it tells that IMF has jurisdiction over regulation of current account transfer (liberalization), but not over capital account movement.³⁵

According to Black Law Dictionary, the term ‘capital’ refers to as “Money or asset invested or available for investment, in business”, and also ‘total assets of a business that helps generate profits.’³⁶ This definition shows that the term ‘capital’ refers to the accumulation of money (both in kind and cash) prepared for investment or which already started investment. This would be equivalent with ‘initial capital’ as provided under different investment laws. Capital account similarly refers to the statistical record of investment flows between a country and the rest of the world which results in transfer of capital.³⁷ It covers financial flow mainly from FDI, portfolio, foreign loan/ bank borrowing which are common acquisitions of assets in one country by residents of the other country.³⁸

Capital account transfer has special characters which differentiate it from current account transfer. Capital account transfer includes transfer of capital in kind when ownership of fixed asset is transferred³⁹ and transfer of capital in cash when it is linked to the acquisition or disposal of a fixed asset (for example, an investment grant) by one or both parties to the transaction.⁴⁰ On the other hand, current account transfer consists of all transfers not included under capital account transfer.⁴¹ Current account transfer is more related to current transactions among a government or individuals and companies of other countries. It can also be transfer in kind (gifts of food, clothing, medical supplies, consumer goods, etc.) or in cash (workers’ remittance, current tax on income, social benefit, refund of taxes, interest, debt, dividend, reinvested earnings etc) between governments of different countries or between governments and international organizations (foreign investors).⁴²

In principle, Member States are not allowed to control transfer of current account as per Article VI(3) of IMF Article of Agreement. In two exceptional conditions, however, it is possible to control transfer of current account transactions. The first is when the Fund declares the scarcity of currency of the country in which payment was required.⁴³ The second is when the

³⁴ ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW, INTERNATIONAL ECONOMIC LAW SERIES 508-509 (Oxford University Press, New York, 2002).

³⁵ M. Ayhan Kose & Eswar Prasad, Liberalizing Capital Account Restrictions, *in* FINANCIAL GLOBALIZATION: THE IMPACT ON TRADE, POLICY, LABOUR, AND CAPITAL FLOWS, A COMPILATION OF ARTICLES FROM FINANCIAL & DEVELOPMENT, (Jeremy Clift & Elisa Diehl, eds., International Monetary Fund, 2007), at 6

³⁶ BRYAN A. GARNER, BLACK’S LAW DICTIONARY, 200 (7th ed., 1999).

³⁷ INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENT MANUAL 74 (5th ed, International Monetary Fund, 1993)

³⁸ BLACK LAW DICTIONARY, *supra* note 36, at 6

³⁹ INTERNATIONAL MONETARY FUND MANUAL, *supra* note 37

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*, at 75-79

⁴³ IMF Articles of Agreement, Art VII (3, b). Foreign investor may need payment to be made in a currency of a country which was already declared by the IMF as scarce. In such conditions, the country from which the investor requires payment cannot be forced to perform payment even if it is current account.

Member notified the Fund that it is under transitional arrangement preparing itself to accept the obligations of IMF Articles Agreement.⁴⁴

B. Regulation of Capital Flow under the OECD Code of Liberalization

Since developed countries were not satisfied with the capital flow regulation under the IMF Articles of Agreement which authorizes member state to control capital movement (either directly or indirectly), they have moved to establish the Organization for Economic Cooperation and Development (OECD) with a view to have capital flow liberalization strategy in 1961.⁴⁵ The OECD Code of Liberalization is an important instrument which provides Member States with the necessary mechanism for ordinary capital flow liberalization.⁴⁶ It dictates Members to progressively abolish restriction on capital movement.⁴⁷ However, this guideline applies only between the Members which are developed countries.

To accommodate interests of its Members, the OECD Code recognizes the possibility of reservation and derogation by a Member State. Reservation is allowed when a country accedes to the organization or when new rule is added to the Code.⁴⁸ And derogation is also possible for a Member by totally suspending the application of the Code of liberalization.

C. Regulation of Capital Flow under BITs

Foreign capital can originate and flow from one country to the other in the form of FDI, Portfolio investment and foreign loan.⁴⁹ Among these, FDI has huge effect on the economic growth of both the home and host states. It is an essential wealth creating asset that has significant impact on the economic development of the host and home states.⁵⁰ The home state expects to benefit from foreign capital through repatriation of the investment. On its part, the host state hopes to benefit, directly or indirectly (like through employment and technology transfer), from foreign capital gain. The effectiveness of FDI depends, however, on the economic policies, laws and the performance of key sectors of the state.⁵¹ On the other hand, portfolio is a form of foreign investment by which movement of capital is made through buying share in company/enterprise formed or functioning in other country.⁵² Foreign loan is also another form of foreign capital flow which entails capital outflow on repayment of the loan. Mostly developing countries and least developed countries use foreign loan to expand their investment activities.

⁴⁴ IMF Articles of Agreement, Art XIV (2), Member of IMF, as exception to Art VI(3), can restrict transfer of current international transaction through foreign exchange rate policy to secure its balance of payment.

⁴⁵ OECD Code of Liberalization of Capital Movements, Promoting Ordinary Capital Flows: The Approach of the Code 1 (2015), available at www.oecd.org/daf/investment/flows (Accessed on 18 October 2016).

⁴⁶ STEPHANY GRIFFITH JONES, *supra* note 2, at 5.

⁴⁷ Organization for Economic Co-operation and Development, *OECD Code of Liberalization of Capital Movements*, (2013), Art 1(a).

⁴⁸ *Id.* Art 2(b).

⁴⁹ M. Ayhan Kose & Eswar Prasad, *supra* note 35.

⁵⁰ BIJIT BORA *ed.*, FOREIGN DIRECT INVESTMENT RESEARCH ISSUES 1 (Taylor & Francis e-Library, 2002).

⁵¹ Tibabu Aragie, *Nexus between Foreign Direct Investment and Domestic Private Investment in Ethiopia*, (LL.M Thesis, Addis Ababa University, (2014), at 2.

⁵² M.SORNARAJA, *supra* note 4, at 8.

In relation to investment, multilateral regulation of investment was dropped from Havana Charter which was intended to form International Trade Organization including foreign investment regulation.⁵³ Consequently, countries start resorting to conclude BITs among themselves⁵⁴ to regulate investment including the sensitive issue of liberalization of foreign capital repatriation. BITs are instruments which attract capital by shifting consumption of domestic investment and stimulating new international capital investment, and by initiating or arranging international capital flow.⁵⁵ Almost all BITs contain certain core provisions that deal with issues like national and most favored nation treatment, fair and equitable treatment, full protection and security, free transfer of capital and investment proceeds, transparency and performance requirement and due process of law.⁵⁶

It is said that repatriation of capital including its returns to home state or to a third state is among the major purposes of foreign investors while host states need to control it since they may suffer from financial instability and serious balance of payment problem due to large currency outflow.⁵⁷ BITs do not oblige capital exporting countries to ensure capital inflow. Rather they stipulate the duties of the host state in relation to protection of investment and investors of which ensuring free transfer of capital and returns is the main.⁵⁸

BITs govern transfer of capital and investment proceeds in different ways. Some BITs provide exceptional situations where free transfer of foreign capital may be restricted and others allow free transfer of investment and return/proceeds. However, they do not provide definition of free transfer of investment or proceeds from investment.⁵⁹ Restriction of free transfer of capital and investment proceeds would have adverse consequence by decreasing investors' confidence to invest.⁶⁰ On the other hand, full liberalization of transfer of investment and its proceeds/returns requires special attention as it may not be advantageous for all countries.

III. REGULATION OF CAPITAL OUTFLOW FROM INVESTMENT: EXPERIENCES OF SELECTED COUNTRIES

The approaches that states would follow in relation to capital flow liberalization differ based on their financial and economic standards. Among different developing countries and least developed countries, Kenya, South Korea and South Africa are selected since their historical and development policy on foreign investment resembles to Ethiopia. Their historical experience and recent condition in regulation of foreign capital outflow would be given consideration.

⁵³ Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 JOURNAL OF INTERNATIONAL LAW & POLICY 157, 162 (2005).

⁵⁴ *Id.*, at 169

⁵⁵ Zachary Elkins *et al*, *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, *International Organization*, 825 (Vol. 60, No. 4, Cambridge University Press, 811-846, 2006).

⁵⁶ Amanuel Debessay Gebregergis, *The Role of Bilateral Investment Treaties in Securing Foreign Investments in Ethiopia*, (LL.M Thesis, University of South Africa, 2015), at 17-18.

⁵⁷ Zachary Elkins, *supra* note 55, at 191.

⁵⁸ Marie-France Houde, *supra* note 7, at 163.

⁵⁹ Amanuel Debessay Gebregergis, *supra* note 56, at 43.

⁶⁰ *Id.*

A. Regulation of foreign Capital Outflow in Kenya

Kenya regulates repatriation of foreign capital both under its domestic laws and BITs. Kenya's domestic investment law regulates the issue of capital remittance expressly and almost all Kenyan BITs have provisions which force foreign investors to fulfill domestic tax regulation before remittance.⁶¹ Kenya has a Foreign Investment Act which is promulgated to protect the interest of foreign investors independently from the domestic investors and the Act guarantees capital repatriation or remittance of dividends and interest to foreign investors.⁶² The Act allows foreign investors to get certificates showing the assets proposed to be invested or initial capital of their investment.⁶³ Among other things, the certificate should state "capital, being deemed to be a fixed amount representing the equity of the holder..."⁶⁴ This means that foreign investor, who had certified his initial capital (capital proposed for investment as per Art 3(4i) of the Act), can request and repatriate it freely to home state or other third country. Hence, the Act allows foreign investors to repatriate their initial capital asset, whether in cash or in kind, if the capital has been mentioned in the certificate.⁶⁵ Any additional amount not mentioned in the certificate is not allowed for repatriation by the foreign investor.⁶⁶

So far, Kenya has signed 19 BITs among which 11 are in force.⁶⁷ Though with slightly different wordings, almost all of these BITs include provisions related to capital transfer. Most of them fully liberalize foreign capital outflow.⁶⁸ During repatriation, these BITs impose obligation to obey domestic tax regulations and other relevant law as conditions to transfer of capital.⁶⁹ On the other hand, there are BITs which provide exceptional conditions when contracting parties can restrict or delay capital transfer. The Kenya-Japan BIT⁷⁰, Kenya-Korea BIT⁷¹ and Kenya-Slovakia BIT⁷² provide exceptional conditions under which the contracting party can restrict capital repatriation from investment. In the Kenya-Korea BIT, under Article 6(3&4), bankruptcy or insolvency, protection of creditors, trading or dealing in securities, criminal or penal offences, taxation, serious balance of payment problem are provided as grounds to restrict capital transfer.

⁶¹ For example, see Art 7(b) of Kenya-United Kingdom BIT and Art 7(3) of Kenya-Slovakia BIT.

⁶² United State of America Department of State, *Kenya Investment Climate Statement*, (2015), at 9.

⁶³ UNCTAD Compendium of Investment Laws, *Kenya Foreign Investment Protection Act*, (1964), Art 3(1)

⁶⁴ *Id.*, Art. 3(4, i).

⁶⁵ *Id.*, Art. 7(b).

⁶⁶ *Id.*

⁶⁷ UNCTAD, INVESTMENT POLICY FRAMEWORK, at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108> (Accessed on 25, April 2018).

⁶⁸ For example, see Art. 5(a) of Kenya-Germany BIT, Art. 6 of Kenya-United Kingdom, and Art. 6(1) of Kenya-Burundi BIT.

⁶⁹ Kenya's BITs which does not impose fulfillment of domestic tax obligation are the Kenya-Slovakia BIT, Kenya-German BIT, Kenya-Finland BIT, while BITs which have such exceptional conditions are the Kenya-Burundi BIT, Kenya-Netherlands BIT, Kenya-Iran BIT, Kenya-UK BIT, Kenya-Switzerland BIT, and Kenya-Italy BIT.

⁷⁰ Agreement between the Government of Japan and the Government of Republic of Kenya for the Promotion and Protection of Investment, signed on 28/8/2016, Art 13(3).

⁷¹ Agreement between the Government of Republic of Korea and the Government of the Republic of Kenya for the Promotion and Protection of Investment, signed on 8/7/2014, Art 6(3,4).

⁷² Agreement between the Government of the Slovak Republic and the Government of the Republic of Kenya for the Promotion and Reciprocal Protection of Investments, signed on 14/12/ 2011, Art 7(3,6).

There are also similar exceptional conditions in the BITs Kenya has with countries like Japan (2016) and Slovakia (2011) to protect its economy and finance from sudden risk.

B. Regulation of Foreign Capital Outflow in South Korea

South Korea is selected to be reviewed under this article for its past experience of capital flow liberalization and controlling mechanism during financial crises especially from 1990s onward. It is noted that South Korea has been considered as model of Ethiopian economic development and it has provided different assistances.⁷³ It had experienced Developmental State Model (where government plays great role in economy) from 1960-1990s.⁷⁴ South Korea had experienced rapid economic growth in presence of capital controls for several decades though the country had encountered with financial crisis when it adopted capital flow liberalization.⁷⁵

Before the 1997 Asian financial crises, FDI had much less role in the development of South Korea due to the economic model it had been following.⁷⁶ From 1997 to 2010, however, South Korea was engaged in reforming its policy on FDI by removing statutory barriers and liberalizing investment.⁷⁷ After 2010, South Korea started taking capital control measures to address issue of exchange stability and balance of payment problems through putting series of regulations on foreign exchange derivative and other investments.⁷⁸ Few South Korea BITs including its BITs with China and Kenya have exceptional conditions to impose restriction on free transfer of investment and its returns, like event of serious balance of payment and cause or threaten to cause external financial difficulties and other conditions like bankruptcy, implementation of legal order, protection of right of creditors which is subjected to the domestic law and regulation.

On other hand, South Korean Foreign Investment Promotion Act allows foreign investors to transfer capital goods entered duty-free on confirmation by the Minister of Knowledge Economy.⁷⁹ The investor has to apply to the Minister in advance to get certificate allowing transfer of capital goods and the same procedure is applicable for transfer of stock/equity investment.⁸⁰ However, the act does not provide the criteria to allow or reject transfer of foreign capital.

⁷³ Mohammed Yimer, *Economic and Social Transformations of Korea; Lessons for Developing Countries with a Particular Relevance to Ethiopia*, 3(3) INTERNATIONAL JOURNAL OF POLITICAL SCIENCE AND DEVELOPMENT 138, 139(2015).

⁷⁴ Philippe Burger, *How suitable is a 'Developmental State' to Tackle Unemployment, Inequality and poverty in South Africa?* 1(2014), available at: www.econ3x3.org/.../how-suitable-'developmental-state'-tackle-unemployment-inequ. (Accessed on 17 March 2017).

⁷⁵ *Id.*

⁷⁶ Francoise Nicolas *et al*, *Lesson From Investment Policy Reform in Korea*, (OECD Working Papers on International Investment, (2013), at 7.

⁷⁷ *Id.*, at 8.

⁷⁸ Brittany A. Baumann & Kevin P. Gallagher, *Post-Crisis Capital Account Regulation in South Korea and South Africa*, (Political Economic Research Institute, University of Massachusetts Amherst, Working Paper Series No. 320,2013), at 2.

⁷⁹ Republic Of Korea Ministry of Legislation, Foreign Investment Promotion Act, Amended by Act No. 10232,(2010), Art 22(1).

⁸⁰ *Id.* Art 23(1).

C. Regulation of Foreign Capital Outflow in South Africa

South Africa is currently dissatisfied with the impacts of its BITs on its development and has moved to govern the issue of foreign investment including the capital outflow under its domestic law by terminating its BITs.⁸¹ Like the BITs signed by Ethiopia and other developing countries, most of its BITs allow full transfer of foreign capital.⁸² The decision of South Africa to represent BITs with domestic law alarmed foreign investors for the inevitable change of proprietary right through the new policy, and scholars have proposed that South Africa could avoid such negative signal by joining the third-generation (new generation) investment agreements where it can preserve its regulatory space.⁸³ This is because foreign investors rely more on BITs for the protection of their investment than domestic investment regulations. However, scholars argue that the mere representation of BITs with domestic investment legislation could not create problem as far as international principles and standards of protection of investment are properly included.⁸⁴

On other hand, South Africa Protection of Investment Act regulates the capital transfer in a very general term which says “A foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.”⁸⁵ The Act does not define the term ‘fund’, and not clear as to which legislation may be applicable in repatriation of fund except tax law. Regarding definition of fund, black law dictionary defines it as “A sum of money or other liquid assets established for a specific purpose...”⁸⁶ Based on this definition, one may argue that South African Investment Act allows only repatriation of liquid money rather than capital in kind which makes it similar with Ethiopian investment proclamation. However, unlike Ethiopian Investment Proclamation, South African Investment Act expressly rejects free transfer of capital in kind. Using contextual rule of interpretation, the term ‘fund’ may also refer to all forms of capital engaged for investment in the country which obviously includes capital goods and shares. Hence, based on the second way of interpretation one may conclude that the Act allows repatriation of funds including capital goods on fulfillment of some requirements. Nevertheless, the writer is convinced with the first line of interpretation.

IV. REGULATION OF REPATRIATION OF INVESTMENT UNDER ETHIOPIAN INVESTMENT REGIME

Currently, the Second Five-Year Growth and Transformation Plan (GTP-II) and Sustainable Development Goals are driving Ethiopian’s demand for foreign capital from investment to meet

⁸¹ Engela C. Schlemmer, *An Overview of South Africa’s Bilateral Investment Treaties and Investment Policy*, Foreign 31 INVESTMENT LAW JOURNAL 167, 167(2016).

⁸² There are few South African BITs which allow contracting party to restrict repatriation of capital under exceptional conditions. These are South Africa-Canada BIT (Art 9(3)), South Africa-Israel BIT(Art 6(4)), South Africa-United Kingdom (Art 7).

⁸³ Azwimpheleli Langalanga, *Imagining South Africa Foreign Investment Regulatory Regime in a Global Context*, (South African Institute of International Affairs, Occasional Paper 214, 2015), at 20.

⁸⁴ *Id.* at 21.

⁸⁵ UNCTAD Compendium of Investment Laws, South Africa Protection of Investment Act, No.22, (2015), Art 11.

⁸⁶ BRYAN A. GARNER, BLACK LAW DICTIONARY 1982 (8th ed, (2004).

its objective of becoming a middle-income country by 2025.⁸⁷ Accordingly, achieving 11% of annual average real GDP growth rate is among the four main objectives of GTP-II.⁸⁸ To be successful in her plan, Ethiopia strives to create favorable investment climate for foreign investment by giving consideration for more efficient process in the areas of registration (one-stop-shop), logistics, and for tax incentives. In addition, Ethiopia allows repatriation of the investment capital by the foreign investor.

Ethiopia is currently able to attract a huge amount of foreign capital through foreign investment. As already said, it is clear that there is an issue of capital outflow regulation when a country allows foreign investors to repatriate their investment. This is also true in the case of Ethiopia. In the following sub-sections, the manner Ethiopia attempts to regulate repatriation of foreign capital under its BITs and domestic investment laws and related issues are briefly discussed.

A. Foreign Capital Repatriation under Ethiopian BITs

With respect to regulation of capital outflow, it is said somewhere above that the Ethiopian BITs can be categorized as BITs which fully liberalize foreign capital outflow and BITs which provide exceptional conditions to control repatriation of capital in case of serious balance of payment problems or other monetary dispositions.⁸⁹ Also, it is alleged that the way most of the BITs that fully liberalize repatriation have used to regulate repatriation of investment may trigger certain questions to arise. These BITs try to list the payments related to current accounts including dividend, profits, interest, payments for loan agreement, royalties, and payment of proceed from the sale or liquidation of enterprise etc.⁹⁰ It is not, for instance, clear whether or not they include ‘initial capital’ to be repatriated. In fact, there are Ethiopian BITs which clearly allow repatriation of initial capital.⁹¹ As such, it is inevitable that foreign investors would invoke MFN principle to claim application of these BITs to get repatriation of initial capital. And no Ethiopian BIT disregards inclusion of MFN principle. Hence, whether or not initial capital is clearly allowed under Ethiopian BITs, foreign investors can request full transfer of their capital by claiming MFN principle.

In addition, another concern may arise if we examine the time of repatriation as regulated under the BITs signed by Ethiopia. In relation to timing of repatriation, the Ethiopian BITs commonly use terms like “without delay”, “immediately” or “without unnecessary delay”.

⁸⁷ African Development Bank Group, *Federal Democratic Republic of Ethiopia Country Strategy Paper 2016-2020*, available at https://www.afdb.org/fileadmin/.../afdb/Documents/.../ETHIOPIA_CSP_BPPS_EN.pdf (Accessed on 2 February 2017).

⁸⁸ Federal Democratic Republic of Ethiopia, Growth and Transformation Plan II(GTP II), Volume I, Main Text, National Planning Commission, Addis Ababa, (2016), at 80.

⁸⁹ Ethiopia-France BIT, Ethiopia-United Kingdom BIT, Ethiopia-Israel BIT and Ethiopia-Brazil. See *supra* note 12, 13, 14 and 15. These BITs are those that include exceptional conditions while the remaining Ethiopian BITs are categorized as treaty that fully liberalize foreign capital outflow.

⁹⁰ For example, see Art 9 of Ethiopia-Iran, Art 6(1) of Ethiopia-Algeria, Art 6(1) of Ethiopia-China, Art 6(1) of Ethiopia- Libya BIT.

⁹¹ For instance, see Art 7(1a) of Ethiopia-Austria BIT, Art 7(1,a) Ethiopia-Kuwait, Art 7(1,a) of Ethiopia-Finland BIT.

Despite this, the BITs do not define such technical expressions to avoid vagueness. Only Ethiopia-Germany BIT⁹² and Ethiopia-Iran BIT⁹³ have defined the term ‘without delay’. In both BITs, it is stated that “a transfer shall be deemed to have been made *without delay* if effected within such period as is normally required for the completion of transfer formalities.”⁹⁴

Let alone for capital account, foreign investors in Ethiopia are practically required to wait for a long period of time to repatriate their payments (current account) due to shortage of foreign currency in the country.⁹⁵ Foreign investors in Ethiopia usually encounter the difficulty of delays of repatriation of high USD sales up to 2 years and they usually wait 3 weeks to 3 months due to shortage of foreign currency.⁹⁶ The problem that relate to the timing of repatriation and the absence of exceptional condition under the BITs that permit Ethiopia to restrict the payment in the BITs could have some negative effects. First, the investors may sue the country for non-performance of BIT provisions on such delay of payment. Second, the practical delay of payment for foreign investors may affect capital outflow which may, in turn, discourage potential foreign investors to invest in the country.

Let us now turn to briefly discuss the Ethiopian BITs that have provided exceptional conditions to restrict or control the full liberalization of foreign capital outflow. These exceptions aim at giving safety valve for the parties during the time of financial crises or threat of balance of payment problem. In this regard, the Ethiopia-France BIT includes exceptional provision which states the following.⁹⁷

When, in exceptional circumstances, capital movements from or to third countries *cause or threaten to cause a serious disequilibrium to its balance of payments*, each Contracting Party may *temporarily apply* safeguard measures to the transfers, provided that these measures shall be *strictly necessary*, would be imposed in an equitable, *non-discriminatory and in good faith* basis and shall not exceed in any case a *six months* period.

Apart from the above, some of the BITs signed by Ethiopia incorporate interesting stipulations with respect to enforcement of transfer of foreign investment and returns. For example, the Ethiopian BITs with China, Libya, Sudan, Malaysia, Russia, Turkey and Yemen, regarding the implementation of transfer of foreign investment, have the phrase “*subject to the laws and regulation of contracting parties*.”⁹⁸ No doubt, this reference is given for domestic laws

⁹² Ethiopia-German BIT, Art 6(2).

⁹³ Agreement on Reciprocal Promotion and Protection of Investments between The Government of the Federal Republic of Ethiopia and the Government of the Islamic Republic of Iran, signed on 21/10/2003, Art 9(3).

⁹⁴ *Id.* Art 9(3), However, still there is vagueness to determine the ‘normal time’ required to transfer the capital.

⁹⁵ United States of America Department of State, *Ethiopia Investment Climate Statement*, 6 (2015), available at <https://www.state.gov/documents/organization/241767.pdf> accessed on 10/9/1016. See also Art 9(3) of Ethiopia-Iran BIT Ethiopia-German BIT Art 6(2). The payment should be made before 6 month from the date of request.

⁹⁶ *Id.*

⁹⁷ Ethiopia- France BIT, *supra* note 12. Those qualifications provided under Ethiopia-France are also included directly or indirectly including threat or serious balance of payment difficulties or serious difficulties for the operation of the exchange rate/monetary policy, the measure must be necessary to remedy the situation, the restriction must expire within six months, the contracting party should inform the other about the controlling measures taken and its time table for extinction and those measures should be applied in equitable, non-discriminatory and in good faith.

⁹⁸ See the first paragraph of Art 6 of Ethiopia-China BIT, Ethiopia-Libya BIT, Ethiopia-Sudan BIT, Ethiopia-Malaysia BIT, Ethiopia-Malaysia BIT, Ethiopia-Yemen BIT, and Art 5 of Ethiopia-Turkey BIT.

to regulate foreign capital outflow from investment. This may enable Ethiopia to use its domestic laws to control capital outflow through implementation mechanism though the BITs fully liberalize capital transfer. It may also be possible for the host state and the foreign investor to enter into private investment contract (concession agreement) to regulate capital transfer. Such private investment contracts “usually derive their validity from the domestic law of the host state.”⁹⁹ Since it is independent contract, based on general principle of freedom of contract, parties (host state and foreign investors) may agree on terms related to capital transfer. It is also possible to regulate the foreign capital transfer requirements expressly in the domestic investment law.

When dispute arises, there may still be a problem as foreign investors usually prefer to invoke BIT provisions than the terms of their concession agreement. In addition, except the above few BITs, the other BITs signed by Ethiopia do not give reference to the application of domestic laws in case of foreign capital repatriation. Even if the country wants to use such BITs to control the capital outflow, investors from such countries may claim the application of other BITs which have not given reference to domestic law by the MFN principle. This may oblige Ethiopia to extend the application of the BITs that fully liberalize capital outflow even in the existence of the BITs that refer to the application of domestic laws to regulate foreign capital repatriation. This shows that the existence of few BITs which refer to the application of domestic law does not provide a meaningful restriction on capital repatriation, even with respect to these BITs, because of the possibility of invoking MFN treatment.

B. Foreign Capital Repatriation under Ethiopian Domestic Investment Laws

Besides the BITs, the relevant domestic laws in connection with regulation of repatriation of investment in Ethiopia include the Ethiopian Investment Proclamation (herein after, Investment Proclamation) No.769/2012, Ethiopian Investment Incentive Regulation No.270/2012 and Ethiopian Custom Duties Proclamation No. 859/2014.

The Investment Proclamation defines “capital” as “local or foreign currency, negotiable instruments, machinery or equipment, buildings, working capital, property rights, patent rights or other business assets.”¹⁰⁰ Obviously, capital consists of both cash and in kind items. The Investment Proclamation further defines foreign capital as “capital obtained from foreign sources, and includes the re-invested profit and dividend of foreign investors.”¹⁰¹ This indicates that profit and dividend of foreign investors would be categorized as foreign capital if the investors used them for re-investment rather than repatriation. Moreover, the proclamation defines foreign investor as:

a foreigner or an enterprise wholly owned by foreign nationals having invested in Ethiopia or a foreigner or an Ethiopian incorporated enterprise owned by foreign nationals jointly

⁹⁹ Yuval Shany, *Contract Claims v. Treaty Claims: Mapping Conflicts Between ICSID Decisions Multi Sourced Investment Claims*, AMERICAN JOURNAL OF INTERNATIONAL LAW, 835(2005).

¹⁰⁰ Ethiopian Investment Proclamation, *supra* note 22, Art 2(3).

¹⁰¹ *Id.* Art 2(7).

investing with a domestic investor, and includes an Ethiopian permanently residing abroad and preferring treatment as a foreign investor.¹⁰²

In examining the relevant provisions that are meant to regulate repatriation of investment, it is worthwhile to briefly discuss some issues. The Investment Proclamation provides that “any foreign investor, as defined above, shall have the right, in respect of his approved investment, to make the following remittances out of Ethiopia in convertible foreign currency at the prevailing rate of exchange on the date of remittance”.¹⁰³

- Profit and dividends accruing from the investment;
- Principal and interest payment on external loans;
- Proceeds from the transfer of shares or of partial ownership of the enterprise to a domestic investor;
- Proceeds from the sale or liquidation of the enterprise; and

Many of the above remittance relate to current account. Among others, Article 26 (1f) of the Investment Proclamation allows remittance of “proceeds from the sale or liquidation of ‘enterprise.’” Here, it may be noted that enterprise is defined as “undertaking established for the purpose of profit making.”¹⁰⁴ Hence, it may be argued that the ‘proceeds from the sale or liquidation of enterprise’ may include the total capital of the investment including the initial capital. However, whether the investor can repatriate the capital in kind rather than selling domestically or without liquidation for different reasons like the relocation of the investment is not clear. The phrase ‘...in convertible foreign currency.....’ under Article 26(1) of the Investment Proclamation may lead us to conclude that the foreign investor cannot repatriate his capital in kind. This means that foreign investors are allowed to repatriate their capital in convertible foreign currency rather than in kind.

In practice, foreign investors cannot repatriate capital goods (capital in kind) from Ethiopia.¹⁰⁵ The same is true where an enterprise is liquidated voluntarily and the foreign investor wants to repatriate the capital goods, and such capital goods may be permitted to be re-exported under two exceptional conditions.¹⁰⁶ First, it may be allowed if the goods are encountered with damages and cannot be maintained domestically. Secondly, if the capital goods were imported temporarily, the goods may be re-exported on expiry of the period without payment of customs duty. Obviously, requiring the foreign investor to sale or liquidate his investment to get its cash value may be disadvantageous for the investor. At times, it may even be impossible to dispose the investment so that it cannot be converted into cash.

The other laws which should be investigated with regard to repatriation of foreign capital are the Investment Incentives Regulation and the Ethiopian Customs Proclamation. The Investment Incentives Regulations, under Article 15, regulates how the investor can transfer capital goods which are imported free of duty. Indeed, this Article deals only with transfer of duty-free

¹⁰² *Id.* Art 6.

¹⁰³ Ethiopian Investment proclamation, *supra* note 22 Art 26(1).

¹⁰⁴ *Id.* Art 2(2).

¹⁰⁵ Interview with Ato Eliyas Hailemeskel, Custom Duty Information Center Director, Ethiopian Revenues and Customs Authority, on 1st February 2017, Addis Ababa.

¹⁰⁶ *Id.*

imported goods by the investor. The investor may transfer such duty-free imported goods to a person within Ethiopia or may re-export them. Domestically, the investor may transfer to persons with similar duty-free privileges or to persons having no similar duty-free privileges.¹⁰⁷ In the later case, the transfer shall be made up on effecting the appropriate custom duties. The regulation is silent as to payment of custom duty when the duty-free imported goods are to be re-exported. At this time, it is essential to consult the provisions of the Ethiopia Customs Proclamation No. 859/2014. It should be remembered here that the tax system could offer one method to control foreign capital outflow in the form of repatriation.

This Customs Proclamation, under Article 71(1), enumerates the goods that may be temporarily imported without payment of custom duties.¹⁰⁸ Among the goods mentioned, it can be noted that some of them can be imported by investors. For instances, the provision mentions goods necessary for construction works and consultancy services as part of the goods that may be imported duty-free. What is more, Article 71(1) states that spare parts and other consumable goods may not be temporarily imported. This may mean that they cannot be imported duty free. In addition, the Custom Proclamation requires the temporarily imported goods to be re-exported with a given time limit. This is regulated under Article 73 of the proclamation. For example, goods imported for the purpose of tourism, cultural exchange or technology transfer shall be re-exported with 6 months and those goods imported for trade promotion and welfare service shall be re-exported within 2 months.¹⁰⁹ In addition, it is stated that goods imported for construction works, consultancy services and welfare services shall be re-exported within the period specified in the project agreement or within 3 months after completion of the project.¹¹⁰ On failure to re-export within the time limitation, the goods shall be transferred to government treasury.¹¹¹ In practice, as mentioned above, foreign duty-free imported capital goods for investment are not normally allowed to be repatriated.

A systematic domestic control of foreign capital outflow as discussed above may have positive effect for the economy of the country. However, it would create mismatch with Ethiopian BITs which fully liberalize foreign capital outflow. Since BITs are governed by the principle of freedom of contract in which countries can willingly limit their freedom to control capital movement, the domestic investment law needs to be compatible with BITs standards. The standard of the law may affect transparency and predictability in attraction of foreign investment with respect to regulation of foreign capital -repatriation.

Generally, it can be observed that a similar pattern of regulation of foreign capital repatriation is not adopted by the BITs signed by Ethiopia and the relevant domestic laws regulating the same. Particularly, the practice and the domestic laws do not commonly allow repatriation of capital in kind which contradicts with those BITs that fully liberalize repatriation

¹⁰⁷ Investment Regulation, *supra* note 23, Article 15(1) (2).

¹⁰⁸ Goods necessary for trade promotion, technology transfer, tourism and cultural exchange, construction works, consultancy service or relief may temporary be imported upon the authorization of the Authority without payment of duties and taxes subject to their re-export.

¹⁰⁹ Custom Proclamation, *supra* note 24 Art 73(1&2).

¹¹⁰ *Id.* Art 73(3).

¹¹¹ *Id.* Art 73(5).

of foreign capital from investment. In fact, it is a generally recognized principle that a country cannot evade its obligation under treaties through its domestic laws. In relation to the conflict between BITs and domestic laws, it is noted that “many states have argued before international investment tribunals that they have a right to adopt regulatory measures and any foreign investor entering the country should assume the risk of being regulated by the host state.”¹¹² This argument is based on the principle of economic sovereignty and the right of economic self-determination of state which contends to qualify international principle of jus cogens.¹¹³ However, it is also known that states can willfully give up part of their sovereignty through concluding BITs. For example, in case between *BG Group v. Argentina*, US Court found that Argentina could not be exempted from its responsibilities to investors by invoking economic crisis of 2002 since Argentina’s policies contributed to the crisis and the measure taken was not the only way for it to safeguard its interest.¹¹⁴

V. CONCLUSION

In relation to foreign investment, the issue of capital outflow is one of the very sensitive issues for the host states and foreign investors. As the foreign investors are profit makers, they need to repatriate their capital and returns at any time they want. On the other hand, host states need to attract foreign capital through foreign investment and to control outflow of such capital for various economic reasons. Therefore, states should have well-articulated laws (both domestic and BITs) to strike a balance between the conflicting interests of host states and foreign investors on capital outflow.

It is revealed that countries use both their domestic laws and BITs in the regulation of foreign capital repatriation. Similarly, Ethiopia attempts to regulate capital repatriation from foreign investments through various BITs and its domestic investment laws. However, the BITs and the relevant domestic laws are not consistent in regulating foreign capital outflow from foreign investments. On one hand, the BITs Ethiopia has signed, except few, have fully liberalized foreign capital outflow. Apart from re-export of certain goods which are entered the country for specific period of time, the domestic investment legal regime does not allow foreign investors to repatriate their capital in kind. Besides, the practice in Ethiopia does not allow foreign investors to repatriate their capital in kind. They are rather permitted to repatriate in a convertible currency at the time of repatriation. Such control on foreign capital outflow may be compatible with the economic need of the country.

¹¹² SURYA P SUBEDI, *INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE* 170(Hart Publishing Ltd, Oxford and Portland, Oregon, 2008).

¹¹³ *Id.*

¹¹⁴ Arturo C. Porzecanski, *The Origin of Argentina’s Litigation and Arbitration Saga, 2002-2014*, (School of International Service American University, Washington, DC, Working Paper, (2015), at 5. There were three investment cases decided against Argentina in 2014 by U.S. court which were the first dispute involving BIT (U.S-Argentina) presented before U.S court. In all cases, decision was made against Argentina which had tried to defend itself based on the sovereign immunity and necessity conditions of financial crisis for the failure to abide by its obligation under the BIT. Example, *BG Group (British multinational Oil and Gas Company) v. Argentina* was decided against Argentina on March 5, 2014.

However, it should be noted that control on foreign capital outflow should not arbitrarily affect the interest of foreign investors in the country. In this regard, it may be said that the domestic investment laws should incorporate clear provisions which, in principle, liberalize foreign capital outflow like the BITs. At the same time, the domestic laws should be conspicuous about the exceptional grounds on which foreign capital outflow can be delayed or restricted. Of course, this should also work for many of the BITs which are silent regarding such kinds of exceptional grounds. Absence of such legal basis would prevent Ethiopia from putting controls when that is essential for the country like in the case of maintaining balance of payment, assurance of judicial order and protection of creditors. Furthermore, the Ethiopian BITs and domestic investment laws do not seriously regulate the timing for the repatriation which should be given attention as foreign investors may complain for any delay.

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