ECONOMIC CRIMES UNDER ETHIOPIAN BILATERAL INVESTMENT TREATIES AND ARBITRATION LAW

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ABSTRACT

Besides multilateral instruments, states have started to conclude bilateral investment treaties (BITs) with provision expressly aimed at preventing economic crimes. On related subject, recently arbitration tribunals began to assume jurisdiction over all kinds of economic crime claims that arises in investors-state dispute settlement, except where the BITs provide otherwise. In the absence of explicit provision under BITs, the jurisdiction of tribunals' delimited by the arbitrability of the economic crime claims under domestic laws. Therefore, the purpose of this article is, one, to examine whether Ethiopian BITs are incorporated provision aimed at preventing economic crimes. Two: to examine whether Ethiopian BITs are incorporated provision that limit tribunals' jurisdiction over certain kinds of economic crime claims. Three: to examine the arbitrability of economic crime claims under Ethiopian arbitration law. To achieve the purpose, the article examined different Ethiopian BITs, Ethiopian arbitration law and other secondary materials. The article also examined other countries BITs that can serve to drive a lesson for Ethiopia. Accordingly, it comes to conclude that most Ethiopian BITs are not familiar with economic crime provision though the problem is too serious in the country. It also concludes that all kinds of economic crime claims are inarbitrable under Ethiopian arbitration law. Finally, it recommends, one, incorporating provision that aimed at preventing economic crimes, two, limiting the jurisdiction of arbitration tribunals over certain kinds of economic crime claims for the public policy matter, three, making some economic crime claims arbitrable since total inarbitrability is against new generation of arbitrability.

Keywords: *Arbitrability, Ethiopian BITs, Economic Crimes, Investors-state dispute settlement, Jurisdiction of tribunals.*

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1. INTRODUCTION

It is difficult to have one legal definition of the concept of economic crimes all over the world because the criminal policy, especially in the economic area, varies greatly from one country to another.[1] Nevertheless, it can be understood broadly as, any action or omission that runs counter to the public economic policy.[2] Narrowly, it can be understood as, any activity committed with the objective of gaining wealth illegally there by violating existing legislation governing the economic activities of government and its administration.[3]

In practice, the concept of economic crimes are associated with various deeds such as corruption, tax evasion, banking offences inclusive of money laundering, fraud (consumer fraud, corporate fraud, credit card fraud, advanced fee fraud, computer related fraud), embezzlement, cybercrime, crimes of money contraband, customs offences, trade offences (adulteration, illicit competition, trademark imitation, fraudulent bankruptcy, default bankruptcy, high prices, monopoly, etc.), cheating the state in the course of tenders, bids and production quality and in execution of the state economic projects, manipulation of stock markets, including the abuse of privileged legal information and capital flight and many others.[4]

The real costs of economic crimes and abuse are immense. They retard social and economic progress, particularly in developing and transition economies. Trade and investment flows, the functioning and integrity of financial markets and hence the allocation of resources are distorted. Most importantly, confidence in democratic institutions and public support for an open modern world economy are seriously undermined.[5]

For these reasons, the international community has paid increasing attention to tackling economic crimes through multilateral conventions aimed at

[1]United Nation (2006), Measures to Combat Economic Crime, Including Money-Laundering, https://www.unafei.or.jp/publicat, ions/pdf/11th_Congress/00All.pdf, P.107 <Accessed on Sep.10, 2022 >.
[2]*Ibid.*
[3] *Ibid.*
[4]Monica Violeta Achim *et al* (2021), *Economic and Financial Crimes and the Development of Society*, https://www.intechopen.com/chapters/75343 <Accessed on Sep. 10, 2022 >
[5]William Witherell (2004), *Combating Financial Crime through International Standards and Cooperation*, Available at: https://www.oecd.org/newsroom/33866667.pdf, <Accessed on Sep. 10, 2022>.

combating economic crimes. Besides, States have recently started to conclude BITs with provisions expressly aimed at the prevention of economic crimes.[6] On related subject, recently arbitration tribunals began to assume jurisdiction over all kinds of economic crime claims that arises in investors-State dispute settlement, except where the BITs provide otherwise.[7] In response to the same, some States are also began to incorporate provisions in BITs that limit tribunals' jurisdiction over certain kinds of economic crime claims for the public policy matter.[8] In the absence of explicit provision under BITs, the jurisdiction of tribunals' delimited by the arbitrability of economic crime claims under domestic laws.

In line to the above, the purpose of this Article is: one, to examine whether Ethiopian BITs are incorporated provision aimed at preventing economic crimes, and to indicate the need to incorporate the same if not incorporated. Two: to examine whether Ethiopian BITs are incorporated explicit provision that delimit the jurisdiction of arbitration tribunals over certain kinds of economic crime claims that arises in investors-State dispute settlement, and to indicate the need to incorporate the same if not incorporated. Three: to examine the arbitrability of economic crime claims under Ethiopian domestic law.

In order to achieve its objectives, the Article employed doctrinal research methodology. In this regard, the article examined different Ethiopian BITs, Ethiopian arbitration law and other secondary related materials. Here, there are many more domestic laws that have direct or indirect relevance to address economic crimes. However, they are mostly not applied to foreign investors except in some circumstances where the BITs mention the obligation to be abided by domestic laws. In all other circumstances, the foreign investors are regulated by BITs and contractual agreement with the government. Scope wise, that is why the author is limited to examine Ethiopian BITs. Regarding to Ethiopian arbitration law, the article discusses and examines 'Arbitration and Conciliation Working Procedure Proclamation No. 1237 /2021' (here in

[6]Yarik Kryvoi, *Economic Crimes in International Investment Law*, International and Comparative Law Quarterly (2018), Vol. 67, P.579.
[7]*Id*., P.584.
[8] Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (Apr 11, 2018), Art.15 (2). See also Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Jan. 19, 2016), Art.14 (2).

after Proclamation No. 1237 /2021) since it is the recently enacted and mostly applied or used arbitration law in the country. The Article also examined different countries BITs that can serve to drive a lesson for Ethiopia. In this regard, as will be examined below, the Author used many other countries BITs that can be serve as a bench mark to drive a lesson for Ethiopia. These BITs are selected because they are agreements between or with developing countries on similar status with Ethiopia.

The article is structured as follow: Section 2 discusses in general issues in relation to jurisdiction of international investment dispute settlement. Among other thing, this section discusses historical debate between host and home States on jurisdiction over international investment dispute settlement. It also discusses how international arbitration under the guise of BITs takeout host States' jurisdiction over international investment dispute settlement. It also discusses how currently international arbitration began to takeout host States' jurisdiction over crimes by adjudicating economic crime claims that arises in international investors-state dispute settlement. Finally, this section tries to indicate the proper solution that needed to be taken by Ethiopian government in general.

Section 3 examines how jurisdiction of arbitration tribunals is delimited under BITs over economic crime claims that arise in investors-State dispute settlement in general. This section also discusses the jurisdiction of international arbitration tribunals' over economic crimes under Ethiopian BITs. Besides, this section discusses how the jurisdiction of tribunals over economic crime claims that arise in investors-State dispute settlement are delimited by the arbitrability of the subject matter under domestic law in the absence of clear provision under BITs that determine the jurisdiction of tribunals over economic crime claims. This section also examines the arbitrability of economic crime claims under Proclamation No. 1237 /2021 will be discussed. In addition, this section tries to indicate to the measure that will be taken by Ethiopian government to delimit the tribunals' jurisdiction over economic crime claims that arise in investors-State dispute settlement both under Ethiopian BITs and Proclamation No. 1237 /2021.

Section 4 discusses the severity of economic crimes at international level. It also discusses the move taken by States to combat these economic crimes through multilateral and bilateral instruments. This section also tries to show

the severity of economic crimes in Ethiopia. It also examines whether Ethiopian BITs are accommodated economic crime provision that aimed at preventing economic crimes commission by foreign investors. Besides, this section tries to indicate the amendment that need to be taken on Ethiopian BITs in this regard by Ethiopian government.

Section 5 provides conclusions and recommendations from what is discussed in other sections. Particularly, from what is discussed under section 3 and 4, it tries to recommend on the amendment that need to be taken by Ethiopian government on the subject matter under discussion.

2. STATES' JURISDICTION OVER INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT: PAST AND PRESENT

It was in the aftermath of World War II that the issue of jurisdiction over international investment dispute settlement began to evolve. The Post-World War II brought about decolonization of Latin American states which was followed by independence of many Asian and African countries.[9]The independence of these countries brought new development to jurisdiction over international investment dispute settlement. When these countries decolonized in many of those countries foreign companies/individuals controlled different investment activities.[10] At this juncture, as they have confirmed their political sovereignty, in order to confirm their economic sovereignty too, the foreign policy of these countries regarding to foreign investment regulation, followed the rule that exclusively subject foreign investors to the national jurisdiction (i.e. national laws and court).[11] However, the investors countries challenged this assertion by arguing that international minimum standard (IMS) under customary international law (CIL) shall apply to foreign investors rather than national laws.[12]

[9]Mohammad Belayet Hossain and Saida Talukder Rahi*, International Economic Law and Policy: A Comprehensive and Critical Analysis of the Historical Development*, Beijing Law Review (2018), Vol. 9, P. 528.

[10] *Ibid.*

[11]*Ibid*. See also Witness Nabalende, *Protecting Foreign Investments Using the Calvo Doctrine,* Journal of Financing for Development (2020), Vol.1, Pp.168-169.

[12] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, U.C. Davis Journal of International Law & Policy (2005), Vol. 12, No.1, Pp.166-169. See also Andrew T.

The decolonized state those who claim the application of national laws adhered to Calvo doctrine which assert the application of domestic laws through domestic court for international investment dispute settlement.[13] The justification for Calvo doctrine was based on the assertion that[14]: application of two different laws for domestic and foreign investors are against the principle of equality since the application of IMS under CIL provides favorable advantages to foreign investors than domestic laws applicable to domestic investors; the application of extra-territorial standards (IMS) under CIL is against the principle of sovereignty[15]; the claim of IMS for foreign investors on dispute settlement do not qualify the status of CIL.[16]

In the absence of an agreement by the host states to negotiate or to submit the dispute to international arbitration, the only mechanism offered by CIL for the enforcement of one's right was espousal.[17] Espousal is a remedy whereby an injured national's state assumes the national's claim as its own and presents the claim against the state that has injured the national through military intervention.[18] Due to the ineffectiveness of the remedy and its prohibition under UN charter[19], some colonizer countries (i.e. here in after referred as home states/countries) believe that the conclusion of treaty with the decolonized countries (i.e. here in after referred as host states/countries) are the most effective means for preventing the disagreement.[20] Accordingly, these home countries have concluded some BITs with some host countries.[21]

Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, Virginia Journal of International Law (1998), Vol. 38, P 641.

[13] Wenhua Shan, *Is Calvo Dead?*, The American Journal of Comparative Law (2007), Vol. 55, Issue 1, P. 123.

[14] *Ibid.*

[15] The application of IMS under CIL is against the sovereignty that takeout the use of domestic court and application of domestic laws because the CIL are used to be applied by tribunals at international arbitration centers.

[16] The objection was based on the allegation that it is only a practice under home countries and their colonies which were not include host countries since they were under colony and not recognized as independent states during that time.

[17] Vandevelde, *supra* note 12, Pp. 168-69.

[18] *Ibid.*

[19] The military intervention/the use of military force by one state against another state are prohibited under UN charter except in self-defense.

[20] Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,* The International Lawyer (1990), Vol. 24, P.655.

[21] *Ibid*. The first treaty of this kind was the BIT which is signed between Germany and Pakistan in 1959.

Except these very few BITs that provide the use of extra-territorial jurisdiction (laws and court) for dispute settlement that arise between host states and foreign investors, the idea of Calvo doctrine continued to persist until the end of 1990.[22]

However, in the after math of 1990, many of these host countries began to conclude BITs that accommodate international arbitration and IMS for foreign investors.[23] A number of factors are contributed to conclude these BITs[24]: debt crises of host states since early 1980s (hence hunger for foreign direct investment); the collapse of the Soviet block in the 1990s (hence a further boost of market oriented economic reform in the former Soviet Union and Eastern socialist European countries) and the success stories of Asian Tigers characterized by private investment and export trade. Many of these BITs set IMS alleged under CIL for foreign investors and guarantee access to international dispute settlement platforms, both of which run in the opposite direction of the Calvo doctrine.[25] Through such process, the Calvo doctrine is deactivated by the network of BITs that takeaway the host states jurisdiction over international investment dispute settlement by providing international platform for the same.[26]

Other pushing factors to conclude BITs with international platform for investor-state dispute settlement was the prevailing perception that was exist on international arbitration as forum of dispute settlement. International arbitration perceived as a system that solve international investment dispute that entails numerous advantages. It is perceived as system that strikes a balance between the interest of investors' and host states. To illustrate: in the one hand, investors want to invest in host countries, while at the same time they fear the risk of exposure to a number of non-commercial risks at the hands of the host state. These include regime change, a change of general or sectorial economic policy, economic or political emergencies in the host state

[22] Wenhua Shan, *From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, North Western Journal Of International Law & Business(2007), Vol. 27, P. 631.
[23] *Ibid.*
[24] Shan, *supra* note 13, P. 130.
[25] Shan, *supra* note 22, P. 634
[26] *Ibid*.

including public violence etc.[27] In this circumstance, if they resort to domestic court as viable forum of dispute settlement between investors and host state, they fear that domestic courts are organs of the state and judges are its employees.[28] Lack of independence and impartiality of these courts and a sense of loyalty towards local interests are recurring problems that they consider. In addition, they question on the quality of domestic courts to adjudicate complex issue of international investment dispute that need high qualified expertise in the field.[29] So, these factors demonstrate to accept international arbitration as independent, qualified and neutral body from the side of foreign investors.[30] On the other hand, host countries need to attract foreign investment to support their development.[31] Therefore, in order to avoid the foreign investors fear in the one hand, and to attract foreign investment on the other hand, agreeing between to resolve the dispute through international arbitration is perceived as a middle way that strikes a balance between both parties interest.[32]

Nevertheless, the jurisdictions to adjudicate over economic crime claims that arise in investors-State dispute settlements are mainly persist to exist as sole jurisdiction of the States.[33] However, in more recent time, the practice that takeout this States jurisdiction over economic crime claims began to evolve. The international arbitration tribunals began to takeout States jurisdiction over all kinds of economic crime claims that arise in investors-State dispute settlement, the details of which will be discussed below in section 3.[34] The Author believes that, this may verily minimize the control of host States over foreign investors/investments together with the control that they have ceased to have over civil matters in the past. In fact the situation applies to host and

[27]Christoph Schreuer, *Do We Need Investment Arbitration?*,https://www.international-arbitration-attorney.com/wp-content/uploads/1do-we-need-investment-arbitrationby-christoph –schreuerinvestment-protection-in-general-and-i.pdf, <visited Sep. 27, 2022>.
[28]*Ibid*. Pp.5-10.
[29] *Ibid*. See also Robert Brew, *Exception Clauses in International Investment Agreements As A Tool for Appropriately Balancing the Right to Regulate with Investment Protection,* Canterbury Law Review (2019), vol. 25, P. 208.
[30]This means that they need to protected from the entire problem under domestic jurisdiction through independent extra territorial body- that is-international arbitration. Schreuer, *supra* note 27, P. 10.
[31]*Ibid*. P.1.
[32] Brew, *supra* note 29, Pp. 208-209.
[33] Inan Uluc, *Corruption in International Arbitration* (2016), P.4 & 97.
[34]*Ibid*.

home States equally. But since the rate of investment flow is very high from home States to host States than vice versa, the impact of jurisdictional loss becomes more severe over host States.

3. INTERNATIONAL ARBITRATION TRIBUNALS JURISDICTION OVER ECONOMIC CRIME UNDER BITS IN GENERAL

In the international investment law context, the 'legality requirement' touches on the central nerve system of foreign investment arbitration. Provisions requiring that investments be made 'in accordance with the law' are frequently included in investment treaties to ensure the legality of investments. The legality of investment in turn help to determine the jurisdiction of tribunals over the claims related to that investment. Examples of such provisions under BITs are framed in the following or similar other languages:

> "This Agreement shall apply to all Investors and Investments made by investors of either Party in the territory of the other Party, accepted or admitted as such in accordance with its laws and regulations…" Or "This Agreement shall apply to an investment, made in accordance with the applicable law of the host Contracting Party at the time the investment is made…" Or "This Agreement shall apply to investments made by investors of either Contracting Party in the territory of the other Contracting Party, admitted in accordance with its laws, regulations or policies" etc. What we understand from these treaty provisions are that they require an investment to comply with host-state law at the time of its making for 'legality requirement'.

In the following, we will examine the approaches taken by tribunals to determine their jurisdiction over allegation of economic crime that arises in investor-state dispute settlement based on the 'legality requirement' under BITs. In defining the term 'in accordance with the law', some tribunals have suggested that if economic crimes arose at the stage of acquiring an investment in a host State, investors might be barred from seeking protection before international arbitration for the jurisdictional matter. The logic of this

approach is that the State would never have approved the investment if it had known the facts which were misrepresented by the investor.[35] For example, in '*Inceysa v El Salvador case*[36]:

"Inceysa initiated lCSID arbitration against El Salvador, alleging numerous violations of BITs between Spain and El Salvador. The case arose from a decision by El Salvador not to proceed with a concession contract it had signed with Inceysa. Inceysa alleged that this termination violated several provisions of the Treaty, including provisions providing for 'fair and equitable treatment' and 'protection' and prohibiting expropriation absent prompt, adequate and effective compensation. El Salvador's objections was that lnceysa had obtained the concession contract through massive fraud in the public bidding process, and that accordingly the investment had not been established 'in accordance with law', as it argued that the Treaty required. Finally, the tribunal issued its final award, upholding El Salvador's objections to jurisdiction. The tribunal accepted that El Salvador's consent to ICSID jurisdiction embodied in the Treaty did not extend to investments that were made fraudulently, and therefore the investment is not in accordance with law of El Salvador".

What we understand from this tribunal decision is if the BITs contain 'legality requirement', for the purpose of determining jurisdiction over economic crime claims that arises in investors-state dispute settlement, it is important to see the timing on which such allegation is committed. Accordingly, if it is committed during the acquiring of the investment (or before making the investment), the tribunal decline the claim for not having the jurisdiction since the contract of agreement is invalid for its infection by fraudulent misrepresentation that infringe host state laws. This means, deceit full conduct which is made during the agreement between host states and investors, make the contract invalid for being against the obligation 'in accordance with the law' requirement under BITs. It is this illegality which prohibits the parties to claim protection under BITs since it applies only to legal investment which is made in accordance with the law of host state. In other way, it is this illegality which result for the rejection of parties substantive claims as a matter of jurisdiction since the

[35] Kryvoi, *supra* note 6, P. 582.
[36]Inceysa Vallisoletana, S.L.Vs. Republic of El Salvador, ICSID Case No. ARB/03/26 (2006), Pp.101-102.

tribunals adjudicate only legal investment which is made in accordance with the law of host state.

The question is what will happen if the allegation of economic crime is made after making of the investment? According to the logic of this tribunal and many other scholars, if the investor acted illegally after making the investment, the host State can respond by using domestic law sanctions. If the investor challenges the legality of such sanctions, it must have the possibility of doing so in accordance with the relevant investment treaty.[37]

In contrast to the above, if the BITs have no provision on the 'legality requirement', the tribunals assume jurisdiction over economic crime claims, and decide on the matter at the merit phase.[38] In other word, many investment treaties do not contain an 'in accordance with the law' provision. In cases where BITs have not expressly required that the investment in question comply with host-state law, the legality of the investment is not a jurisdictional prerequisite. A tribunal should, however, consider whether there is a general principle of law that nonetheless requires a consideration of the investment's compliance with the law at the merits phase.[39] In this regard, it is helpful to consider the decision of *Plama Consortum Ltd. v. Republic of Bulgaria*, an arbitration arising under the Energy Charter Treaty (ECT). In *Plama*, the tribunal noted that the ECT does not include a provision calling for the investment's conformity with a given law. The lack of such a provision, however, does not suggest that ECT's protections would apply to all kinds of investments, including those contrary to domestic or international law.[40] From this it is understood that the tribunals assume jurisdiction over economic crime claims when the relevant treaty is silent on the issue of the investment's legality, and decide on the matter at merit phase not at jurisdictional phase.

Nevertheless, in the above circumstances where 'legality requirement' (in accordance with the law) is used as jurisdictional prerequisite for economic crime claims, are currently superseded by the 'doctrine of separability'. The 'separability doctrine' entails that an arbitration clause is not invalid by virtue

[37]Kryvoi, *supra* note 6, Pp. 582 -83.
[38]*Ibid.*
[39] Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, Fordham International Law Journal (2011), Vol. 34, P.1474.
[40]*Ibid*.

alone that the contract in which it is set is invalid. The modem trend in international arbitration is to regard an arbitration clause in a contract as constituting a separate and autonomous contract.[41] The application of the 'separability doctrine' has a fairly strong justification, namely the parties' intention to resolve disputes arising from the main agreement through arbitration, including disputes regarding the validity of the main agreement and the consequence there of.[42] Investment treaties (BITs) contain an offer to arbitrate disputes with eligible investors rather than the arbitration agreement (after all, investors cannot be parties to international treaties). The arbitration agreement is perfected only when the eligible investor accepts the offer, creating a separate arbitration agreement between the State and the investor. Therefore, denying jurisdiction even when the relevant treaty contains provisions on 'legality requirement' may breach the 'doctrine of separability'.[43]

To sum up, today, arbitrability of disputes involving economic crime claims are well settled. The scope of arbitration now extends to disputes involving economic crimes claims. Besides, adjudication of criminal and administrative liability and imposition of relevant sanctions, civil claims relating to economic crimes are now capable of settlement by arbitration in major arbitration venues.[44] Today, arbitration tribunal assume jurisdiction over economic crime claims that arises in international arbitration on BITs which have 'legality requirement' and on BITs which are silent on the 'legality requirement'. Currently, 'legality requirement' (in accordance with the law), which have been used as a pre-requisite to decline the jurisdiction, have ceased to exist by 'doctrine of separability'.

What we understand from the above analysis is the immateriality of 'legality requirement' (in accordance with the law) provision as a pre-requisite to hold jurisdiction over economic crime claims. This reveal that tribunals has full jurisdiction over all kinds of economic crime claims in international arbitration regardless of 'legality requirement' (in accordance with the law) provision

[41]Miftahul Huda, *The Doctrine of Separability of Arbitration Clause in Commercial Arbitration Revisited*, http://jhp.ui.ac.id/index.php/home/article/viewFile/192/129 <visited Sep 5, 2022 >.
[42]Winner Sitorus, *Separability Doctrine in Arbitration Agreement (A Comparative Study),* Journal of Legal, Ethical and Regulatory Issues (2021), Vo. 24, Issue 6, P.1.
[43] Kryvoi, *supra* note 6, P.584.
[44] ULUC, *supra* note 33, Pp. 5 &99.

under BITs. The way out to limit the tribunals' jurisdiction over some kinds of economic crime claims (perhaps for the public policy matter) is, incorporating explicit and specific provision in the BITs that delimit the extent to which the tribunals are allowed to involve in economic crime claims. Otherwise, the tribunals has full jurisdiction over all kinds of economic crime claims regardless of the 'legality requirement' (in accordance with the law) provision in the BITs.

3.1. JURISDICTION OF INTERNATIONAL ARBITRATION TRIBUNALS' OVER ECONOMIC CRIMES UNDER ETHIOPIAN BITS AND THE ARBITRABILITY OF ECONOMIC CRIMES UNDER DOMESTIC LAWS IN GENERAL

In line to the above discussion, when we see the Ethiopian BITs, some of Ethiopian BITs are incorporated the 'legality requirement' (in accordance with the law) provision, but some others are not. As we have said above, the existence of 'legality requirement' is immaterial to determine tribunals' jurisdiction over economic crime claims. Nevertheless, most Ethiopian BITs has no explicit provision that delimit the jurisdiction of tribunals over economic crime claims that arise in investors-State dispute settlement. As to the Author knowledge, except the 2018 Ethio-Brazil BIT that delimit the jurisdiction of tribunals over some economic crime claims that arise in investors-State dispute settlement, almost all Ethiopian BITs has no explicit provision that delimit the jurisdiction of tribunals over economic crime claims that arise in investors-State dispute settlement. The 2018 Ethio-Brazil BIT provides the following under Article 15 (2):

> "Nothing in this Agreement shall require any Contracting Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture".

Therefore, in order to limit the tribunals' jurisdiction over some kinds of economic crime claims (for the public policy matter) that arise in investors-State dispute settlement, it is very important to incorporate explicit provision

in this regard under Ethiopian BITs. Besides, incorporating the explicit provision that delimit the jurisdiction of tribunals over economic crime claims that arise in investors-State dispute settlement is the feature of new generation BITs. Nevertheless, in the absence of explicit provision in the BITs, the jurisdiction of arbitration tribunals over economic crime claims are limited only based on the arbitrability of the economic crime claims under domestic laws. The details of this will be elaborated as follow in the next paragraph.

Party autonomy in arbitration allows parties to submit any dispute to arbitration. However, national laws restrict the doctrine of arbitrability.[45] There is no such international rule or regulation outlining which issues are arbitrable and which are not. Because of this absence, arbitrators pay attention to applicable laws governing arbitrability in each dispute.[46] An arbitral tribunal is charged with determining which law applies to the arbitration agreement and subsequently, assess whether the dispute is capable of being settled by arbitration under applicable law.[47] Laws applicable to arbitrability vary according to the stage in which the arbitrability question arises. If the question of arbitrability arises at the pre-award stage, it is determined by applicable national law. In contrast, if the arbitrability question arises during the enforcement and recognition stage, it is likely that the law of the country where enforcement and recognition is sought will be decisive on arbitrability. The New York Convention to which Ethiopia is a party corroborates this fact under 5 (2) (a) as follow:[48]

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country".

[45] *Ibid*., P.96.
[46] *Ibid*.
[47] *Ibid.*
[48] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Jun. 7, 1958), Art.5 (2) (a).

3.2. THE ARBITRABILITY OF ECONOMIC CRIMES UNDER PROCLAMATION NO. 1237 /2021

In conjunction to the above discussion, recently Ethiopia has enacted Proclamation No. 1237 /2021. The proclamation stipulated under Article 7 a type of non-arbitrable cases:

> "(1) Divorce, adoption, guardianship, tutorship and succession cases; (2) Criminal cases; (3) Tax cases; (4) Judgment on bankruptcy; (5) Decisions on dissolution of business organizations; (6) All land cases including lease; (7) Administrative contract, except where it is not permitted by law; (8)Trade competition and consumers protection; (9) Administrative disputes falling under the powers given to relevant administrative organs by law; (10) other cases that is not arbitrable under the law".

Among the list, the 'criminal cases' are a kind of cases which are not arbitrable as stipulated under Article 7 (2). However, the scope of the term 'criminal cases' are not explicit and it is ambiguous. This means, it is not clear whether it include all kinds of economic crime claims in investor-state dispute settlement as discussed. The Amharic term 'የወንጀል ጉዳዮች' (*Yewenjel Gudayoch*) seems more explicit than English term 'criminal cases'. According to Amharic term, it seems meaning that includes all kinds of criminal cases including economic crime claims under investors-state dispute settlement. The effect of the generality of meaning can be shown as follow:

Widening the scope of inarbitrability is not the feature of modern domestic laws in many countries.[49] Similarly, total exclusion of the jurisdiction of arbitration tribunals over economic crime claims that arises in investors-State dispute settlements are not the feature of new generation BITs.[50] Currently most commercial dispute and issues in relation to commercial dispute are

[49] Natalja Freimane, Arbitrability: Problematic Issues of the Legal term (Unpublished LL.M Thesis, Riga University, 2012), https://sccinstitute.com/media/56097/arbitrability-problematic-issues.pdf.

[50] As it is discussed in the main body, tribunals has full jurisdiction over all kinds of criminal matter attached to civil claims except where it is limited by explicit provision. In conjunction to this, the new generation BITs that started to limit tribunals' jurisdiction in this regard, exclude only limited area of economic crime claims. See in this regard the 2016 Slovak and Iran.

subject to arbitrablity. Many countries, particularly developed countries are considerably limiting the scope of inarbitrablity regarding to issues under international business transaction.[51] In many countries, legislation and judicial decisions have narrowed the scope of inarbitrability in order to encourage arbitration between parties.[52] Now a day, in view of globalization of international contracts and denationalization of commercial disputes, many countries are toward opening their gates for unlimited arbitrablility of commercial dispute and issues in relation to the same.[53] Widening or narrowing the scope of arbitrability is considered as event which reveals the State's interest and promotion of international business transaction and arbitration, as well as respect of parties' freedom and autonomy to arbitrate.[54] Therefore, the Author believe that the exhaustive meaning of the term 'criminal cases' may mirror Ethiopia before capital exporting countries as a country with no willful interest to promote international business transaction and arbitration.

Above all, Ethiopia may object the inarbitrability of case (under Ethiopian law) as of a contest to the jurisdiction of tribunals for all kind of economic crimes claims (since the term 'criminal cases' are an all-inclusive), to dismiss substantive claims of the investors. In such circumstance, in order to determine the arbitrability of subject matter, the tribunals apply the applicable laws governing arbitrability.[55] The tribunals may use laws other than Ethiopian laws to determine the arbitrability of the subject matter. No matter what kind of laws are used by tribunals. However, if the matter is inarbitrable under Proclamation No.1237/2021 or Ethiopian laws, the award will be refused during the recognition and enforcement. Because the New York Convention to which Ethiopia is a party allows under Article 5 (2) (a) the refusal of recognition and enforcement if the subject matter is not arbitrable as per the law of the country where the recognition and enforcement are sought.[56] Likewise, Article 52 (3) of Proclamation No. 1237 /2021 gives for Ethiopian courts the jurisdiction to 'set aside' foreign award if the matter under dispute is

[51] Freimane, *supra* note 49, P. 15-16.
[52] Mohammed Zaheeruddin, *The Arbitrability of the Subject Matter of Disputes in Arbitration*, Journal of Legal Ethical and Regulatory Issues (2020), Vol. 23, Issue 1, P.1.
[53] Freimane, *supra* note 49, Pp. 15-16.
[54] *Ibid.*
[55] Gururaj Devarhubli and Bushra Sarfaraj Patel, *Analyzing the Arbitrability of Subject-Matter of Disputes in Arbitration*, Commonwealth Law Review Journal (2022), Vol. 8, P.202.
[56] Convention, *supra* note 48.

not arbitrable as per this proclamation. It stipulate: "The court may set aside the arbitral award if the following conditions exist: The matter upon which the award is based is not arbitrable under this Proclamation…".Furthermore, the same proclamation under Article 53 (2) (e) prohibit the court the recognition and enforcement of foreign award if the matter in which award is given not arbitrable under Ethiopian laws. It stipulates:

"Without prejudice to Sub-Article (1) of this Article, a foreign arbitral award shall not be recognized or enforced only on the following grounds: ….Where the matter on which the award is rendered is not arbitrable under Ethiopian law…". From these, it can be understood that all kinds of award on economic crime claims are not recognized and enforced in Ethiopia regardless of its arbitrability under applicable law determining arbitrability. Therefore, the Author believe that the possible outcome that will arise from the generality of the term 'criminal cases' may reveal Ethiopia as a country which is inconvenient to the enforcement/execution of international arbitration award.

4. THE PROGRESS TO COMBAT ECONOMIC CRIMES

It is clear that internationalization of trade and investment has brought a lot of benefit to the States. However, this globalization of trade and investment has brought new challenges for policy-makers and regulators. It facilitates the commission of different economic crime and other abuses.[57] Today, economic crimes become a global concern, while a modus operandi of criminal groups has become more sophisticated and the scale of their activities has increased considerably.[58]

The real costs of financial crimes and abuse are immense. They retard social and economic progress, particularly in developing and transition economies. Trade and investment flows, the functioning and integrity of financial markets and hence the allocation of resources are distorted.[59] Most importantly, confidence in democratic institutions and public support for an open, modern world economy are seriously undermined. Mostly since the economic crimes

[57]Witherell, *supra* note 5, P.1.
[58] U.N. *supra* note 1, P. 2.
[59] Witherell, *supra* note 5.

are made by traders or investors of the countries, it impairs friendly relations between countries in the international matrix of trade and commerce.[60]

The ultimate objective of combating economic crimes is to manage economic development for the wellbeing of the peoples. If economic crimes are not criminalized and sanctioned, the consequences of this undesirable activity go beyond economic loss and wellbeing of the society.[61] It results for people feeling that the society in which they live is unfair and unjust. This places a heavy toll on people's emotional resource and negatively affects their wellbeing.[62] The feeling that one leaves in a fair and just society is as important as, or even more important than the economic well-being. If the public feel void of this social well-being, they will feel thoroughly disheartened, unwilling to be good law-abiding citizens, unwilling to invest, unwilling to contribute to the society they live in.[63]

4.1. SEVERITY OF ECONOMIC CRIMES IN ETHIOPIA

In Ethiopia too, the rapid development of globalization promoted international transaction and diversification of economic activities. Together with these changes, however, economic crimes become the concern of Ethiopia too. In 2016, the National Rifle Association of America identified 23 types of economic crimes in Ethiopia. Among these types of crimes, corruption, goods smuggling (contraband), illegal hawala, fraud and tax evasion are the high threat to the country as per the report.[64] In the following let see the specifics of some types of economic crimes in Ethiopia (Money Laundering, Illicit financial Flight, and Corruption).

In Ethiopia, due to the clandestine nature of the crime and absence of consolidated data, it is impossible to extrapolate the amount of money laundered in Ethiopia. However, there are indications that money laundering is

[60] *Ibid*.
[61] M.R. Pridiyathorn Devakula, *Economic and Financial Crimes: Challenges to Sustainable Development*, https://www.bis.org/review/r050428b.pdf <visited Aug. 10, 2022>.
[62] *Ibid.*
[63] *Ibid*.
[64] Cusack, Solomon, Tilahun and Serba, *Financial Crime Threat Assessment in Ethiopia*, https://thefinancialcrimenews.com/wp-content/uploads/2020/07/Ethiopia-Deep-Dive-2020-Pbd-3.pdf <visited Sep. 22, 2022>.

breaking out in the country.[65] There is some initiated and decided case in relation to money laundering in Ethiopia. In addition, it becomes norm to listen the news from private and government media on the prosecution and conviction of money launderer by the police and public prosecutor. According to the report of Addis Fortune News Paper, the European Commission blacklisted Ethiopia for being very risky in money laundering and terrorism financing, urging banks situated in Europe to apply enhanced due diligence on financial flows from the country.[66] Aiming to ensure proper functioning of the European market, the Commission, in its latest regulation released on October 27, 2017, added the country to the list of high-risk third countries along with Iran, Syria, Yemen and seven other nations.[67]

According to the report of Center on Global Counterterrorism Cooperation also, Ethiopia faces a number of significant vulnerabilities that pose continual and increasing risks of money laundering due to the following reasons[68]:

- the prevalence of a significant informal and largely cash-based economy;
- the prevalence of high-level serious crimes, such as corruption, tax evasion, smuggling, trafficking (human, drugs, and arms), and illicit financial flows;
- limited awareness of the problems of money laundering and terrorist financing and their impacts;
- poorly managed, porous borders;
- limited control mechanisms over movement of cash;
- regional instability and the growing presence of transnational criminal networks in the region, extending into other sub regions; and limited measures on anti–money laundering and countering the financing of

[65]Biniam Shiferaw,Money Laundering and Countermeasures: A Critical Analysis of Ethiopian Law with Specific Reference to the Banking Sector (Unpublished L.L.M Thesis, Addis Ababa University, 2011), https://chilot.me/wp-content/uploads/2013/05/money-laundering-and-countermeasures-a-critical-analysis-of-ethiopian.pdf.

[66]Samson Berhane, *EU Lists Ethiopia over Money Laundering* (Addis Fortune Nov. 12, 2017), https://addisfortune.net/articles/eu-lists-ethiopia-over-money-laundering/, P.1. See also UN Refugee Agency Report on Displaced & Disconnected, https://www.unhcr.org/ innovation/wp-content/uploads/2020/05/Country-Reports-WEB.pdf, <Visited on Sep. 30, 2022>

[67]*Ibid*.

[68]Tu'emay Aregawi Desta, *The Anti-Money Laundering and Countering Terrorist Financing Regime in Ethiopia*, https://globalcenter.org/wp-content/uploads/2013/03 /13Feb27_ Ethiopian FIC-SecondAsmntRpt_TAD_Final.pdf <visited Sep. 25, 2022>.

terrorism and inadequate capacities to implement existing frameworks and legislation.

According to Global Financial Integrity estimations, between 2005 and 2014, an estimated average of US$1,259 million – US$3,153 million dollars left Ethiopia as illicit financial flight (capital flight) every year.[69] This is equivalent to: 11% – 29% of the country's total trade, 40% – 97% of the total aid inflows to the country and 10% –30% of the government's total revenue.[70] Some source of these illicit financial flights includes: Trade mis-invoicing, Informal remittance systems, and Embassies and diplomatic channels (i.e. there is evidence that some embassies use diplomatic channels to assist their citizens and companies doing business in Ethiopia to illicitly transfer funds out of the country).[71] Between 2000/01-20012/13, the average annual economic growth lost owing to capital flight is found to be about 2.2%. This would have reduced poverty in the country by about 2.2 percentage points.[72]

The problem of corruption in Ethiopia is pervasive though there are some legal and administrative mechanisms to combat it. However, those Ethiopian legislations did not incorporated many of legislative measures devised by the international conventions. Due to such failure in legislative intervention, the fight against corruption in Ethiopia is limited both in scope and design.[73] According the reports of Transparency International, Ethiopia is one of among the highly corrupt countries in the world despite the improvements of its ranks from one year to the next as per the report.[74] Let see the prevalence of corruption in some specific sectors (construction, Telecommunication and Mining sector):

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[69]Roberto Martinez B. Kukutschka, *Illicit financial flows in Ethiopia*, https:// www.u4.no /publications/illicit-financial-flows-in-ethiopia.pdf <Visited Sep. 4, 2018>.
[70]*Ibid.*
[71]*Ibid*.
[72]Alemayehu Geda and Addis Yimer, *Capital Flight and its Determinants: The Case of Ethiopia*, https://www.researchgate.net/publication/303976950_Capital_ Flight_ and_ its_ Determinants_The_Case_ of_Ethiopia <Visited Sep. 30, 2022>.
[73] Berihun Adugna Gebeye, *The Legal Regime of Corruption in Ethiopia: An Assessment from International Law Perspective*, https://papers.ssrn.com /sol3/papers.cfm? abstract _id= 268 3686 <Visited Sep. 30, 2022>.
[74] Zemelak Ayitenew, *Corruption in Ethiopia: A Merely Technical Problem or a Major Constitutional Crisis?*' https://www.researchgate.net/publication /318108041_ Corruption_ in_Ethiopia_ A_Merely_Technical_Problem_or_a_Major_Constitutional_Crisis <Visited Sep. 25, 2022>.

Construction sector in Ethiopia exhibits most of the classic warning signs of corruption risk, including instances of poor-quality construction, inflated unit output costs, and delays in implementation. In turn, these factors appear in some cases to be driven by unequal or unclear contractual relationships, poor enforcement of professional standards, high multipliers between public sector and private sector salaries, wide-ranging discretionary powers exercised by government, a lack of transparency, and a widespread perception of hidden barriers to market entry.[75] The risk of corruption in construction sector extends to regulatory and policy making level, and Licensing and market entry in this sector are determined based on favoritism.[76]

Telecommunication sector is one of the most seriously infected sectors by the corruption.[77] Amid its low service delivery, an apparent lack of accountability, and multiple court cases, the sector are perceived by both domestic and international observers to be deeply affected by corruption.[78] This is where the sector was under the exclusive control of the government. However, currently the sector is opened to private sectors. Unless effective regulatory control is made, the likelihood of being exposed to international corruption under the control of private sector is very high.

There is significant risk of corruption throughout the mining cycle in mining sector. The three major areas of corruption risk in the Ethiopian mining sector is, (License issuing) Licensing authority officials may extort or be offered bribes by mining companies in return for issuing licenses, for issuing licenses more quickly, or for specifying less-onerous license conditions; (License operation) Mining companies may deliberately breach mining conditions (for example, environmental, health, and safety regulations, as well as the extent or area of mining permitted); and (Mining revenue) Mining companies may deliberately understate output and profit and overstate costs to reduce royalties and profit taxes. If the license operation and mining revenue breaches are discovered, the mining company may also bribe inspectors to overlook the breaches.[79]

[75]World Bank (2012), Diagnosing Corruption in Ethiopia Perceptions, Realities, and the Way Forward for Key Sectors, P. 238.
[76] Zemelak, *supra* note 74, P.3.
[77]*Ibid.*
[78]World Bank, *supra* note 75, P. 328.
[79]*Ibid*., P.379.

4.2. PREVENTION OF ECONOMIC CRIMES UNDER MULTILATERAL RULES

Due to its pervasive nature, the economic crimes are highlighted the importance of multilateral policy responses and cross-border co-operation to address the threats. In response to this many international organization takes the initiative of tackling economic crimes through enactment of laws in some selected area such as corruption and bribery, tax crimes, money laundering, illicit trade, organized crime etc.

For example: the United Nations Convention against Corruption (UNCAC) is one of the legally binding global instruments on all forms of corrupt behavior. The Convention calls upon States to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to crime such as embezzlement, misappropriation or other diversion of property, illicit enrichment, abuse of functions, trading in influence and obstruction of justice.[80]

The Organization for Economic Co-operation and Development(OECD) Anti-Bribery Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions which came into force in February 1999, is the one of the global instrument that focus primarily on the prohibition of bribery of foreign public officials in international business transactions.[81]

The Financial Action Task Force (FATF) is an intergovernmental organization founded in 1989 on the initiative of the G7 to develop policies to combat money laundering and terrorist financing. It has the mandate to establish international standards for combating money laundering and terrorist financing.[82] In addition to FATF, the requirement to criminalize money laundering is included in several international conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized

[80] OECD, *International Co-operation dealing with Economic Crime, Offenders and Recovery of Stolen Assets*, http://www.g20.utoronto.ca/ 2020/Scoping_ Paper_on_ International_Coope-ration_ 04092020_V4_final.pdf <Visited Sep. 16, 2022>.
[81] *Ibid*.
[82] Financial Action Task Force, *An Introduction to the FATF and Its Work*, https://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/Introduction%20to%20the%20FATF.pdf <Visited Sep. 16, 2022>.

Crime and the United Nations Convention against Corruption.[83] However, the FATF has led efforts to prioritize the investigation and prosecution of those that profit from crime and seek to hide those profits. The FATF has developed a comprehensive set of standards to assist countries in developing legal, regulatory, and operational measures to counter money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.[84]

Illicit trade is serious economic crime. It costs governments and the private sector billions in foregone revenue and profits, translating into lost jobs, lower service delivery and higher inequality. Some of the existing international instruments that aimed at to combat illicit trade are United Nations Single Convention on Narcotics andUnited Nations Office on Drugs and Crime (UNODC). The Single Convention on Narcotic Drugs, is an international treaty that controls activities (cultivation, production, supply, trade, transport) of specific narcotic drugs and lays down a system of regulations (licenses, measures for treatment, research, etc.) for their medical and scientific uses. UNODC focus is the trafficking in and abuse of illicit drugs, crime prevention and criminal justice, international terrorism, and political corruption.[85]

The United Nation Convention against Transnational Organized Crime (UNCTOC) adopted in Palermo in 2000. Its goal is to promote co-operation to prevent and combat transnational organized crime more effectively. It aimed at combating organized criminal group, a serious crime and a transnational crime. To achieve its purpose, requires its members to criminalize participation in crime like an organized criminal group, money laundering, corruption, obstructing justice etc.[86]

4.3. PREVENTION OF ECONOMIC CRIMES UNDER ETHIOPIAN BITS AND SOME OTHER SELECTED COUNTRIES BITS

Nevertheless, BITs are typically silent on economic crime prevention generally. However, in recent years some countries have started to include

[83] OECD, *supra* note 81, P. 16.
[84] *Id.,* P.17.
[85] *Id.* P. 23.
[86] Neil Boister, *The Cooperation Provisions of the UN Convention against Transnational Organized Crime: A 'Toolbox 'rarely used?* https://ir.canterbury.ac.nz/ bitstream/ handle/10092/101209/Law%20Enforcement%20Cooperation%20through%20the%20UNTOC%20Boister.pdf?sequence=2 <Visited on Sep. 10, 2022>.

provisions relating to economic crimes in their BITs.[87] The purpose of inclusion under BITs is to ensure investors' accountability for economic crimes, and to ensure strategic alliance between the signatories that helps to prevent and combat economic crimes in international investment.[88] Some notable BITs in this regard is: the 2016 Morocco -Nigeria BIT, the 2016 Brazil–Peru Economic and Trade Expansion Agreement, the 2015 Burkina Faso–Canada BIT, the 2013 Colombia–Panama Free Trade Agreement, the 2015 Japan–Oman BIT, the 2008 Japan–Uzbekistan BIT, the 2010 Iraq–Japan BIT etc.

For example Japan–Uzbekistan BIT in Article 9 and Japan–Oman BIT in Article 8 provides in similar language: 'Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations'. Likewise, the 2016 Morocco-Nigeria BITs in Article 17 provides: "(1) Each Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations. (2) Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favor in relation to a proposed investment or any licenses, permits, contracts or other rights in relations to an investment. (3) Investors and their Investments shall not be complicit in any act described in Paragraph 1 above, including incitement, aiding and abetting, and conspiracy to commit of authorization of such acts. (4)A breach of this article by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment. (5) The States Parties to this Agreement, consistent with their applicable law, shall prosecute and where

[87] Kryvoi, *supra* note 6, P.596.
[88] Belen Olmos Giupponi and Hong-Lin Yu, *Analysing Obstacles and Challenges in Fighting Corruption in Cases of Illegal Investments,* https://www.mdpi.com/2075-471X/11/4/59, <Visited on Sep. 10, 2022>.

convicted penalize persons that have breached the applicable law implementing this obligation".

In contrast to the above, most Ethiopian BITs has not incorporated provision on economic crimes prevention. Ethiopia has around 34 BITs and some of these BITs are entered in to force, while some others are not entered in force. Most of these BITs did not incorporated provision on economic crime prevention since they are traditional model BITs. As to the Author knowledge, except the 2018 Ethio-Brazil BIT that incorporated explicit provision on economic crimes prevention, almost all Ethiopian BITs has no explicit provision that aimed at prevention of economic crimes. The 2018 Ethio-Brazil BIT provide the following under Article 15(1): "Each Contracting Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations."

As we have seen above, as it is critics globally, the problems of economic crimes are severe in Ethiopia too. Foreign investment is one way (perhaps the biggest way) through which economic crimes are made. These problems are not tackled only through domestic laws. Due to its pervasive nature, it needs extra-territorial co-operations. This requires a critical government attention.

5. CONCLUSION AND RECOMMENDATIONS

In addition to increasing the socio-economic development of the states, the recent rapid developments in international business transactions has brought in to light the concern of economic crimes. Today, the economic crimes become a global concern. Due to the universality of the crime, it highlighted the importance of multilateral policy responses and cross-border co-operation in addressing these threats. In response to this, many international organizations takes the initiative of tackling these threats through enactment of laws in some selected area of economic crimes such as corruption and bribery, tax crimes, money laundering, illicit trade and organized crime. Nevertheless, BITs are typically silent in this regard in general. However, in recent years some countries have started to include provisions that aimed to prohibit the commission of economic crimes in their BITs. The purpose of this inclusion was to ensure investors' accountability for economic crimes and to create co-operation between the signatories to tackle the same. In contrast, most

Ethiopian BITs (except the 2018 Ethio-Brazil BIT) has not incorporated provision aimed at to prevent economic crimes. Ethiopia has around 34 BITs and some of these BITs are entered in to force while some others are not. Most of these BITs did not incorporated provision on economic crime prevention since they are traditional model BITs. This requires a critical government attention since the problem of economic crimes is severe in Ethiopia, and do not tackled only through domestic laws.

Previously, in order to determine their jurisdiction over economic crime claims in investor state dispute settlement, tribunals are tend to rely on 'in accordance with the law' provision in the BITs. If the BITs contain 'in accordance with the law' provision, they use the legality of the investment as a pre-requisite to determine their jurisdiction. If the BITs has no such provision, the legality of the investment do not taken as a pre-requisite to determine their jurisdiction, instead the tribunals decide on the admissibility of the claim at the merit phase. However, currently the circumstance in which the legality of investment is taken as a pre –requisite to assume the jurisdiction is superseded based on the 'doctrine of separability'. In such circumstance, in the absence of explicit and specific provision (under BITs) that delimit the jurisdiction of tribunals over economic crime claims, the tribunals has full jurisdiction over all kinds of economic crime claims that arise in investors-State dispute settlement. For this reason, the new generation BITs began to incorporate explicit provision in the BITs that delimit the scope of tribunals over economic crime claims that arise in investors-State dispute settlement for the public policy/interest matter. In contrast to this, most Ethiopian BITs (except the 2018 Ethio-Brazil BIT) has no explicit provision that delimit the scope of tribunals over economic crime claims that arise in investors-State dispute settlement for the public policy matter. This requires a critical government attention since it is very important to exclude certain kinds of economic crime claims from the jurisdiction of tribunals for the public policy/interest matter.

In the absence of explicit and specific provision (under BITs) that delimit the jurisdiction of tribunals over economic crime claims, the sole circumstance that limit the jurisdiction of tribunals are the arbitrability of the subject matter under domestic laws. In line to this, Proclamation No. 1237 /2021 stipulated the 'criminal cases' in general as non-arbitrable. It is not clear whether the term 'criminal cases' include all kinds of economic crime claims that arises in investor-state dispute settlement. However, the literal meaning of the term

seems that it includes all kinds of economic crime claims that arise in investor-state dispute settlement. The exhaustive nature of the meaning has some consequence. One, since widening the scope of inarbitrability is not the feature of modern domestic laws in many countries, it may reveal the country as with no willful interest to promote international business transaction and arbitration. Two, it result for non-recognition and enforcement of all kinds of award on economic crime claims in Ethiopia regardless of its arbitrability under applicable law determining arbitrability as per Article 5 (2) (a) of New York Convention and Article 52 (3) and 53 (2) (e) Proclamation No. 1237/ 2021. This may reveal Ethiopia as a country which is inconvenient to the enforcement/execution of international arbitration award.

Therefore, in order to tackle economic crime commission through cooperation; in order to limit the jurisdiction of tribunals over certain kinds of economic crime claims that arises in investor- State dispute settlement in line to the new generation of BITs; and in order to reduce the circumstance that renders all kinds of award on economic crime claims unenforceable in Ethiopia; the Author recommends (for Ethiopian government) the following:

1. Economic crimes are very severe in Ethiopia. Foreign investment is one way (perhaps the biggest way) through which this economic crimes are made. Economic crimes are not tackled only through domestic laws. Therefore, in order to ensure the accountability of investors and to create strategic alliance between the signatory states (to fight economic crimes), incorporating provisions that aimed to prevent economic crimes under Ethiopian BITs are very important. The new generation of Ethiopian BITs needs to take in to account this fact. The Author believes that by incorporating provision in the Ethiopian BITs that prohibit/criminalize the commission of economic crimes, it is possible to reduce the degree of cross-border economic crimes in general and that of international investment in particular. In this regard, the 2018 Ethio-Brazil BIT, the 2016 Morocco -Nigeria BIT, the 2016 Brazil–Peru Economic and Trade Expansion Agreement, the 2015 Burkina Faso–Canada BIT, the 2013 Colombia–Panama Free Trade Agreement, the 2015 Japan–Oman BIT, the 2008 Japan–Uzbekistan BIT, the 2010 Iraq–Japan BIT etc. can be serve as best example for Ethiopia. In this regard, the progress to Ethiopian BITs can be made both through renegotiation and amendment. For the BITs with the expiry date is too close, renegotiation is more

appropriate. But, for the BITs with the expiry date is too long, the amendment is more suitable.

2. As it is discussed above, tribunals has full jurisdiction over all kinds of economic crime claims in international arbitration except where there is explicit and specific provision in the BITs that delimit the extent to which the tribunals are allowed to involve in economic crime claims. Therefore, for the public policy matter it is very important to delimit the scope of the jurisdiction of arbitration tribunals explicitly under Ethiopian BITs over economic crime claims. Under their BITs, the signatory States are at liberty to determine the scope of application of BITs regarding to economic crime claims that arise in investor-State dispute settlement. This means, signatory States are at liberty to determine the kinds of economic crime claims that not subject to the jurisdiction of international arbitration. Similarly, signatory States are at liberty to determine the standard up on which this exclusion applies. In this regard, the 2018 Ethio-Brazil BIT which discussed above and the 2016 Slovakia –Iran BIT can be taken as a best example. For example, the 2016 Slovakia – Iran BIT in Article 14 (2), limits the jurisdiction of arbitration tribunals to adjudicate investment which is made through fraudulent misrepresentation, concealment and corruption. It is provided as follows:

> "For avoidance of doubt, an investor may not submit a claim under this Agreement where the investor or the investment has violated the Host State law. The Tribunal shall dismiss such claim, if such violation is sufficiently serious or material. For avoidance of any doubt, the following violations shall always be considered sufficiently serious or material to require dismissal of the claim: a) Fraud; b) Tax evasion; c) Corruption and bribery; or d) Investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process".

In this regard, the progress to Ethiopia BITs can be made both through renegotiation and amendment. For the BITs with the expiry date is too close, renegotiation is more appropriate. But, for the BITs with the expiry date is too long, the amendment is more suitable.

3. As discussed above, in the absence of clear and specific provision under BITs, the jurisdiction of arbitration tribunals over economic crime claims are determined by the arbitrability of economic crime claims under domestic laws. Therefore, in order to expand the scope of arbitrability in line to the current legislation on arbitrability and to prevent the circumstance that renders all kinds of award on economic crime claims unenforceable in Ethiopia, it very import to do the following amendment on Article 7(2) of Proclamation No. 1237 /2021:

- Differentiating between the arbitrable and inarbitrable kinds of economic crimes claims under Article 7(2) (i.e. identifying between arbitrable and inarbitrable cases based on the public interest). This may help not only international arbitration, but also national arbitration and international arbitration whose seat is in Ethiopia. Because it extend their jurisdiction to handle certain economic crime claims that arises in arbitration. Currently, beside the international arbitrations, the jurisdiction to entertain economic crime claims by national tribunals is gaining progress quickly. For example, decision by the *Swiss Federal Tribunal in National Power Corp v Westinghouse* is the reflection of this reality. In this case, the arbitral tribunal's exercise of jurisdiction on economic crime claims contentions was approved.

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