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The Legal Capacity of Federated Entities with Foreign States: Somaliland-Punt-Land Port Pact Deal

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ABSTRACT

The study examines the legal capacity of federated entities with foreign States especially Puntland and Somaliland's port agreements with an international subject. The notion of federal State is primarily characterized by a constitutional separation of sovereign competences between the federal Government level on the one hand and the authorities of the sub-national states on the other hand. The main objective of the study is to analyze whether federated entities have powers to exercise in the foreign relations including international agreements. The study employs doctrinal legal methodology and other secondary materials involved. The legal framework centered on this study includes the Federal Constitution of Somalia 2012, Public Procurement Act 2015, Foreign Investment law 2015, the 1970 Declaration of Principles of International law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nation, the Vienna Convention on Law of Treaties 1969 while Secondary information includes judicial precedents, text materials, articles, journals, and the internet within and outside Somalia. The study concludes that, the federal Government has, to a large extent, an exclusive executive and legislative competence in matters of international concern. Since the 2012 constitutional reform, the federal government are vested with considerable external competence. The study recommends that, the field of international law of inter-state systems both legal and structural arrangements should adopt a comprehensive action against federal state's participation in foreign policy in order to defend national interests effectively. Since the question of the treaty-making capacity of a State's federated entities remains contentious in international order.

***Keywords*:** Somalia, Federal, States, Treaty, Foreign, Policy

INTRODUCTION

In the colonial era, the decolonization of Africa marked one of the most significant events in modern world history, this led to formally end of European's dominant in the African continent. During the decades of imperialism, the industrializing powers of Europe viewed the Africans as reservoirs of raw materials, labor, economic benefits as well as their military conscript's settlement. The history of European colonials especially Italy was first emerged into the Horn of Africa at the starting point of the Eritrean red-sea connecting to the Indian ocean of Somalia in the 19th Century. Today, the Arab Emarat is among a number of Gulf and Middle-Eastern countries scrambling for control of ports across the Horn of Africa, especially Somaliland and Puntland which are the integral parts of the federal Republic of Somalia, the Emarat took benefits from the political unrest of Somalia.[1] The main goal is to exert political influence in the region or aggressively control and expand key trade routes and markets.[2]

In 2000, Somalia adopted federal system of government which consists of five federated states, Banadir Region as well as the *de facto* state of Somaliland in the northern part of Somalia. No foreign country recognized Somaliland as sovereign state including the international organizations and intergovernmental states though it considered to be a quasi-federal state of Somalia.

CITIES OF THE PORTS AND THE UAE-BASED DP WORLD

Somalia had several maritime transport facilities across the country, the major classes are Mogadishu port which is the principal port of Somalia, and others include Berbera, Bossaso and Kismayo among others. All these ports were originally under the Somalia Port Authority in 1973[3]. Somalia became the focal point for DP World in the Horn of Africa in the recent days. The DP World has struck a number of deals with Somalia's federated states for infrastructural development and port management.[4] On April 2017, DP World signed a deal with the semi-autonomous north-eastern region of Puntland to develop and operate the port of Bossaso, the largest city of Puntland state of Somalia.[5] Likewise, in 2016, Somaliland signed a 30-years contract with United Arab Emirates-owned DP World, the world's third-largest port operator, to

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[1] Matt Kennard, Ismail Einashe (2019), For Somaliland and Djibouti, Will New Friends Bring Benefits? available at https://foreignpolicy.com/2019/03/19/somaliland-somalia-horn-of-africa-djibouti-military-oil-uae-qatar-berbera-port/. Accessed 10/September/2021

[2] R. Advani (2019) 'Constructing Commercial Empire: The United Arab Emirates in the Red Sea and the Horn', https://tcf.org/content/report/constructing-commercial-empire-united-arab-emirates-red-sea-horn/. Accessed 9/September/2021

[3] A. Kheir (2021) 'Modern Law of Sea Zones and Its Practice in Somalia' 2nd Edition, published by Jescho Co. Ltd, Uganda, Kampala

[4] Ibid (N, 2)

[5] M. Hassan (2017), 'Somali Official Says Somaliland Deal with UAE Corrupt, Illegal available at https://www.voanews.com/africa/somali-official-says-somaliland-deal-uae-corrupt-illegal. Accessed 13/Sep/2021

manage and expand the port at Berbera. The joint-venture Berbera deal is between Somaliland (30%), DP World (51%) and Ethiopia (19%).[6]

However, on 12 March 2018, Somali parliament rejected Berbera and Bossaso port pact deal over DP World Company. A crushing majority of 168 lawmakers in the 170-seat parliament rejected all agreements signed with DP World to operate the ports of Berbera and Bossaso. The same were banned by the Ministry of Port and Marine Transport of Somalia on press released on 2nd March 2018.[7] Nonetheless, all these actions done by the DP-World were against the state sovereignty and the fundamental principle of international law.

STATE SOVEREIGNTY AND NON-INTERFERENCE IN INTERNATIONAL LAW

Mogadishu accuses Abu Dubai of violating its sovereignty and non-interference principle by allowing its company to sign an agreement with an agent or authority which had no constitutional mandate or power to do so under the state's domestic law. A strong presumption exists internationally that the head of states can exercise such an international agreement unless the authority or agent shall have full powers ***as per article 7 of the Vienna Convention on the Law of Treaties***.

The non-intervention principle is the corollary of every state's right to sovereignty, territorial integrity and political independence. It derives from and safeguards the general principle of sovereignty. ***The 1970 Declaration on Principles of International Law concerning Friendly Relations*** provides that:

> 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another State…. all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. The sovereignty in the relations between States … is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own affairs ***(Netherlands vs.USA, 1928),***

[6] L. Seleshie (2020), 'Will Somaliland's Berbera port be a threat to Djibouti's?' https://www.theafricareport.com/54136/will-somalilands-berbera-port-be-a-threat-to-djiboutis/. Accessed on 23/September/2021

[7] D. Mumbere, (2018) 'Somalia Rejects Somaliland Port Deal with Ethiopia and UAE Company' https://www.africanews.com/2018/03/04/somalia-rejects-somaliland-port-deal-with-ethiopia-and-uae-company//. Accessed 11/Sep/2021

The ICJ said in *Nicaragua* that the non-intervention principle is 'part and parcel of customary international law', notwithstanding the fact that 'examples of trespass against this principle are not infrequent'. (***Nicaragua vs. United States of America 1986***). According to the Preamble in the law of treaties, agreements are a source of international law, if an act or lack therefore is condemned under international law.

THE NATIONAL ASPECTS OF THE FEDERATED STATES IN *JUS TRACTATUUM*

Seen the fact that the only applicable source for a treaty-making capacity of the federated entities has to be originated from the national constitutional law, an examination of the pertinent provisions in the respective federations is absolutely necessary. In such federal states where the constitutional provisions take a firm stand as to the exclusive federal ***ius tractatuum*** as we shall have discussed it below: -

A. Invalidation by violation of domestic law governing treaties

According to the federal Constitution of Somalia, the federated entities shall not possess any ***Jus Tractatuum*** in the strict sensu of the word. ***Under Article 53 clause 3*** explicitly forbids any state to enter into any international agreements. Besides, the treaty-making power is vested in the executive of the central government of Somalia ***by virtue of article 90***, but subject to be brought before the Houses of parliament, lower and upper house respectively. ***Under Article 51 (4) of the constitution*** restricts all levels of government to just assume more powers than the national constitution has granted it. Furthermore, ***Article 54 of the Somali constitution,*** the federal government has several powers including the foreign policy decision-making, national defence, citizenship among others.

Regardless of how, both leaders of Somaliland and Puntland acted beyond their powers in which their competences contravene the national law of Somalia including the supreme law of the land, public Procurement law of 2015, foreign investment law as well the parliament which shall be brought for every international agreement to be incorporated by the Somali national law.

B. Invalidation by fraud, corruption and coercion

According to the Auditor General of Somalia accused that the United Arab Emirates a company owned state gave bribes to the ***De facto*** state of Somaliland and Puntland in exchange of authorizing in the port city of Berbera and Bossaso respectively. He also reiterated that both senior officials of the federated states are backing the deal for the sake of illegitimate private gains. Therefore, it is corrupted and illegal.[8] (M. Olad, 2017).

[8] M. Hassan (2017), 'Somali Official Says Somaliland Deal with UAE Corrupt, Illegal available at https://www.voanews.com/africa/somali-official-says-somaliland-deal-uae-corrupt-illegal. Accessed 13/Sep/2021

According to ***Article 16 of the Public Procurement Act of Somalia*** states that the act of corruption is to receive, offer or giving directly or indirectly, of anything of value to influence improperly the actions of another party. The same act also defined Fraud that any act or mission, including misrepresentation, that knowing or recklessly misleads or attempts to lead a part to obtain a financial or other benefits.

It was evidenced that the DP-World where never given to any concession or contract within the ambit of the law laid down. The Federal Government only grants in the interest of public asset including Ports to a private sector entity for a specified period during which the asset may be operated, managed, utilized or improved by the private sector entity who pays fees or royalties under the condition that the Federal Government retains its overall interest as per the ***Article 108 of the Public Procumbent Act as amended in 2015***.

So far as the Federal Republic of Somalia is concerned, the international agreements cannot be concluded unless the parties involved intended their acts to be legally binding. For this matter, the constitution of Somalia gave only powers to the executive branch of government to conclude international agreements but in these scenario Puntland and Somaliland leaders acted ***ultra-virus***.

Under the customary international law of treaties, which is applicable in this case though Somalia is not party to the 1969 Vienna Convention on the Law of Treaties, an international agreement concluded between two or more States in written form and governed by international law constitutes a treaty as per the ***Article 2 of the Vienna Convention on law of treaties 1969 said that,*** a treaty is a contract between the governments of two or more sovereign states or a treaty is product of negotiations between legal equals which has contractual obligation between consenting parties.

Conversely, federated states do not have standing as entities of international law. Instead, the federal union as a single entity is the sovereign state for purposes of international law. Such states differ from fully sovereign states, in that they do not have full sovereign powers, as the sovereign powers have been divided between the federated states and the central or federal government.[9]

The legal rights and obligations contained in the treaty, it must *Consent* to be bound by the treaty and it may be expressed in various ways (Vienna Convention, 1969). Since consent implies a voluntary decision, it can be negated by coercion, fraud and corruption of agents who are either acting ***ultra-virus*** or authorized consent for their state. For these reasons, the so-called the cities port pact deal of Berbera and Bossaso with UAE-based DP-World was procured by fraud and corruption in violation of the principles of international

[9] J. Crawford, (2006) 'The Creation of States in International law' 2nd Edition, Oxford, Clarendon Press

law embodied in the United Nations Charter as well as the Vienna Convention on the Law of Treaties. In the lieu of handing over the DP-World to the Port of Bossaso, the company gave the leaders of Puntland what they named it as a 'golden hand-shake' which cost of more than 16 million dollars as an appreciation.[10]

SOMALIA'S FEDERALISM AND FOREIGN AFFAIRS

Due to the overall predominance of the central government in foreign affairs of all kind that no federated states can have legal capacity whatsoever to conclude any international agreement since the states have no independent foreign affairs power as such. Certainly, as the oft-quoted passage from the Permanent Court's *Wimbledon* judgment suggests, the capacity 'of entering into international engagements is an attribute of sovereignty' (***United Kingdom v. Japan, 1923***). So-long-as, federated states have such international legal personality rely on two fundamental requirements.

i. The Constitutional attribution of international competences to a federated entity

To begin with, a treaty-making power of the federated states should be accepted as valid under the federal constitution. This requirement is rather the expression of the principle of sovereignty than a denial of it: international law leaves to each individual State to choose whether and to which degree it attributes competences in the international field to its federated entities. The right of federated state to conclude international agreements must thus first be scrutinized on the basis of the federal constitutional provisions. Hence, this principle is called the Doctrine of ***Renvoi*** whereby international law refers to national law.[11]

In the final document of the Vienna Convention on the Law of Treaties (VCLT), of ***Draft Article 5(2) of the 1966 Draft Articles on the Law of Treaties,*** stated that 'states members of a federal union may enjoy a capacity to conclude international agreements if such a provision is recognized by the federal constitution and within the limits there laid down'.[12]

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[10] A. M. Farah, (2020), 'Will the Puntland Parliament expels DP-World, which controls Bossaso Port' *Puntland Times Newspaper*, This document was translated from Somali language into English Version, available at https://puntlandtimes.ca/2020/06/xog-baarlamaanka-puntland-miyey-ceyrinayaan-shirkada-dp-world-ee-gacanta-ku-haysa-dekeda-boosaaso/. Accessed 6/November/2021

[11] Hugo Cyr, 'Treaty Powers of Federated States and International Law' published by Jus Politicuum, available at https://juspoliticum.com/article/Treaty-Powers-of-Federated-States-and-International-Law-1117.html.

[12] G. Hernández (2015), 'The Practice of Shared Responsibility in relation to Federal States' Amsterdam Center for International Law, SHARES Research Paper 66 (2015) available at http://www.sharesproject.nl/wp-content/uploads/2015/05/66.-Hernandez-Practic.pdf. accessed on 20/October/2021

In the Somalia context, the federal constitutional arrangements do not permit for the autonomous to enter into international action as a guarantor of the federal state's obligations. More so, the constitution suggests a restrictive or *'closed'* federation. It was one of the major goals of the Constitution to make us, so far as regards our foreign affairs, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities.[13]

ii. The recognition of the federated entities by other existing subjects of international law

International law still suffers from its 19th Century obsession with foreign subjects[14]. It has remained equivocal in relation to the treaty powers of member states within a federal union. Currently, it admits the possibility of their international capacity, but left behind some extent of treaty powers to the internal constitution of the Federal State.[15] However, any deliberate process of State involvement in the foreign affairs obviously begs for constitutional and international legal orders. It also raises more important issues as to the appropriate specific duties and obligations of the Federal and federated entities in the conduct of foreign affairs having regard to the history and present stage of development of the Somali federal structure.

PARTICIPATION IN THE FOREIGN AFFAIRS AS AN EXPRESSION OF THE NATIONAL INTEREST

The conduct of federated states in the foreign affairs has recently received under rigorous academic analysis. Although all the States in the world, which is one way or the other present federal characteristics, but by far not all of them deserve the name federal state.[16] If such federated states can however individually participate in external relations when even the constitution prohibits and nullified from participation in international activities which are deliberately calculated or embarrass the federal government and eventually lead diplomatic rows as it has been seen in the case between Somalia and Arab Emirates. Mogadishu voiced its disappointment regarding the UAE's engagements in Somaliland and Puntland, a semi-autonomous state. The UAE-based DP World has agreed both states to develop and manage their Barbera and Bossaso seaports respectively.

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[13] S. Robert (2009), Federalism and Foreign Affairs: Mixity as an International Phenomenon Durham Law School Research Paper, Available at SSRN: http://dx.doi.org/10.2139/ssrn.1494513. Accessed on 24/September/2021

[14] M Koskenniemi, From Apology to Utopia (Cambridge, Cambridge University Press 2005), esp. Chapter 4

[15] Ibid (N, 13)

[16] M. Frank L.M. Van De Craen, 'The Federated State and Its Treaty-Making Power' (1982), http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201983/RBDI%201983-1/RBDI%201983.1%20-%20pp.%20377%20%C3%83%C2%A0%20424%20- %20Frank%20Van%20De%20Craen.pdf. Accessed 4/November/2021

This study considered as appropriate to borrow a judicial decisions or case law from another jurisdiction outside Somalia. The Indian Supreme Court decision in the case of ***Grosby vs. National Foreign Trade Council (2000)*** the court refrained from holding broadly that the constitution categorically exclude the states from the foreign policy arena. More so, the court maintained that the state's involvement in foreign affairs can only harmful to the nation.

The same were articulated in the US Court in the case of ***Brown v. Maryland*** (***1827).*** Where Justice John Marshall noted that state restrictions on foreign commerce and on the importation of goods would inevitably lead to adverse diplomatic consequences for the Nation as a whole. In Marshall's view, a State would provide judiciously for its own interests, and thus predictably fail to respect the interests of others. Finally, the Court's jurisprudence on the different jurisdiction discussed above on federalism in foreign affairs has consistently focused on the detriment of state activity in this area to the nation as a whole and it may well adversely affect the power of the central government to deal with those problems.

CONCLUSION

With foreign affairs of sub-national territorial authorities has characterized features of the old federal state whereby the constituent states and to some extent, local government authorities are increasingly become active in foreign affairs as independent players. However, the Somali context, some federated entities have set up their own representative office in foreign capitals as well as concluding treaties with foreign States. Thus, this could certainly lead to hostile diplomatic consequences for the nations as whole. Somalia is universally recognized as an independent member of the community of nations, and the Somalia Government enjoys full power to enter into treaties and agreements on all subjects. It is equally clear, however, that in the modem world foreign relations cannot be disintegrated and that parts of it cannot be sifted off or treated in isolation from the larger considerations which lie at the roots of national policy. In the circumstance, it is fundamental both that the Government make clear the responsibilities which it alone can exercise in this field and the manner in which its powers are used to the benefit all Somalis.

REFERENCE

[1] Mumbere, (2018) 'Somalia Rejects Somaliland Port Deal with Ethiopia and UAE Company' https://www.africanews.com/2018/03/04/somalia-rejects-somaliland-port-deal-with-ethiopia-and-uae-company//. Accessed 11/Sep/2021

[2] Halberstam, (2001), The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation, 46 Vill. L. Rev. 1015 Available at: https://digitalcommons.law.villanova.edu/vlr/vol46/iss5/4. Accessed 4/October/2021

[3] M. Farah, (2020), 'Will the Puntland Parliament expels DP-World, which controls Bossaso Port' *Puntland Times Newspaper*, This document was translated from Somali language into English Version, available at https://puntlandtimes.ca/2020/06/xog-baarlamaanka-puntland-miyey-ceyrinayaan-shirkada-dp-world-ee-gacanta-ku-haysa-dekeda-boosaaso/. Accessed 6/November/2021

[4] Oluoch, (2018)'Somalia Regions Maintain UAE As Ally Amid Diplomatic Row Over Port Deals', the East African Newspaper,) https://www.theeastafrican.co.ke/tea/news/east-africa/somalia-regions-maintain-uae-as-ally-amid-diplomatic-row-over-port-deals--1393578. Accessed 4/November/2021

[5] Hernández (2015), 'The Practice of Shared Responsibility in relation to Federal States' *Amsterdam Center for International Law*, SHARES Research Paper 66 (2015) available at http://www.sharesproject.nl/wp-content/uploads/2015/05/66.-Hernandez-Practic.pdf. accessed on 20/October/2021

[6] L. Seleshie (2020), 'Will Somaliland's Berbera port be a threat to Djibouti's?' https://www.theafricareport.com/54136/will-somalilands-berbera-port-be-a-threat-to-djiboutis/. Accessed on 23/September/2021

[7] M Koskenniemi, From Apology to Utopia (Cambridge, Cambridge University Press 2005), esp. Chapter 4

[8] M. Frank L.M. Van De Craen, 'The Federated State And Its Treaty-Making Power' (1982) available at http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201983/RBDI%201983-1/RBDI%201983.1%20-%20pp.%20377%20%C3%83%C2%A0%20424%20-%20Frank%20Van%20De%20Craen.pdf. Accessed 4/November/2021

[9] M. Hassan (2017), 'Somali Official Says Somaliland Deal with UAE Corrupt, Illegal available at https://www.voanews.com/africa/somali-official-says-somaliland-deal-uae-corrupt-illegal. Accessed 13/Sep/2021

[10] Matt Kennard, Ismail Einashe (2019), *For Somaliland And Djibouti, Will New Friends Bring Benefits*?, available at https://foreignpolicy.com/2019/03/19/somaliland-somalia-horn-of-africa-djibouti-military-oil-uae-qatar-berbera-port/. Accessed 10/September/2021

[11] Military and Paramilitary Activities (Nicaragua/United States of America) Merits. J. 27.6.1986 I.C.J. Reports 1986, http://www.worldlii.org/int/cases/ICJ/1986/1.html. Accessed 9/September/2012

[12] H. Istiila, (2018) 'Somali MPs scrap UAE ports deal' available at https://www.aa.com.tr/en/africa/somali-mps-scrap-uae-ports-deal/1086861. 11/September/2021

[13] R. Advani (2019) 'Constructing Commercial Empire: The United Arab Emirates in the Red Sea and the Horn', https://tcf.org/content/report/constructing-commercial-empire-united-arab-emirates-red-sea-horn/. Accessed 9/September/2021

[14] S. Robert (2009), Federalism and Foreign Affairs: Mixity as an International Phenomenon Durham Law School Research Paper, Available at SSRN:http://dx.doi.org/10.2139/ssrn.1494513. Accessed on 24/September/2021

Books

A. Kheir (2021) 'Modern Law of Sea Zones and Its Practice in Somalia' 2nd Edition, published by Jescho Co. Ltd, Uganda, Kampala

J. Crawford, (2006) 'The Creation of States in International law' 2nd Edition, Oxford, Clarendon Press