



**NON-RECOGNITION OF SOMALILAND IN INTERNATIONAL LAW
AND ITS LEGAL IMPLICATIONS FOR FOREIGN INVESTMENT**

**Dissertation submitted in partial fulfilment of the requirements of the
Degree LLM (International Trade and Investment Law in Africa) at
International Development Law Unit, Centre for Human Rights,
Faculty of Law, University of Pretoria**

By

Mustafe Mohamed H. Dahir

30 May 2012

Certification

I, **Mustafa Mohamed H. Dahir**, hereby declare that this Research paper is originally mine; and has never been presented at this or any other tertiary institution. I also declare that any secondary information used has been duly acknowledged in this paper. In most cases quotation or footnote has been provided according to PULP Guidelines. It is hereby presented in partial fulfilment of the requirements for the award of the LLM in International Trade and Investment Law at International Development Law Unit, Faculty of Law, University of Pretoria.

Academic Year: 2011/2012

Date: 30 May 2012

Signed:

Acknowledgements

This dissertation would not have been possible without the guidance and the help of several individuals who in one way or another contributed and extended their valuable assistance in the preparation and completion of this study. In that respect, I would like to thank Professor Danny Bradlow and Professor Reikie Wandrag for their guidance and helpful comments which helped in giving clear direction for this work.

I would like to express my sincere gratitude to my academic advisor Femi Soyaju, for your willingness, merriment and helpful comments. I also diligently acknowledge Emily Laubscher for her caring and considering vigorously to all our issues. I also thank Angela Bukenya and Berita for their support. I also want to thank the Centre for Human Rights for affording me this valuable opportunity.

My sincere thanks also go to the speaker of the Somaliland Parliament Abdirahman Mohamed Abdulahi for being so human, kind and caring. I also thank the Somaliland House of Representative for giving me a study leave and physical support through my academic study. I also appreciate the moral support I received from the staff of the Somaliland Parliament.

Special thanks go to my dear Fardous Mohamoud Gahier for her tireless moral support. I thank to my Uncle Ibrahim Mohamed Aden for his physical and moral support through whole of my education. I also appreciate the useful, efficient, and endless assistance received from my colleagues Ismael Mohamoud Musa, Abdale Hussien Ismael, Maria Abulahi, Amina, Hibaq, Abdifatah Hussien, Mowlid Waris, Dr Abdirashid Hashi, Mohamed Dirie, Ahmed Hussien, Mohamoud Bihi, Abdinasir Osman, Suad and Samiya Mohamoud, Abdifatah Jabane, and Mohamed Ahmed.

I deeply extend special gratitude to my classmates Peter Chisama, Mike Chinoko, Lilian Kimaro, Aina Kauda, Tshepo Dipatane, Ephriam Makucha, Franky, Eric, Georgia, Smith, Chipacha and Fabian who we had a group reading and my real friends in Pretoria.

I sincerely thank all the above named persons and others whom I did not mention here due space limitations. I am in fact, grateful.

Dedication

This work is dedicated with immense love to my parents specially
My Father Mohamed H. Dahir and Mama Hibo Mohamed Adan.

This work is also devoted with their physical and moral support to
My Aunts Amina H.Dahir and Fowsia H.Dahir

Finally, I dedicated my younger sister Amal Mohamed H.Dahir for having me her fullest
support.

Abbreviations and Acronyms

AIT	American Institute of Taiwan
AMISOM	African Mission to Somalia
AU	African Union
BITs	Bilateral Investment Treaties
DG	Director General
EEZ	Exclusive Economic Zone
FDI	Foreign Direct Investment
FIPO	Foreign Investment Promotion Office
FAIZ	Foreign Investment Advisory Service
ICG	International Crisis Group
ICJ	International Court of Justice
NIEs	East Asian newly Industrialized Economies
MFN	Most favoured Nation Treatment
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporations
Montevideo	Convention of the Rights and Duties of States
NDP	National Development Plan
NEPAD	New Partnership for Africa's Development
OAU	Organization of African Union
OPIC	Overseas Private Investment Corporation
ROC	Republic of China
PRC	People's Republic of China
PULP	Pretoria University Law Press
SDC	Somaliland Development Cooperation

SNM	Somali National Movement
TFG	Transitional Federal Government
TNC	Transitional Corporations
TNG	Transitional National Government
UAR	United Arab Republic
UN	United Nations
UNISOM	United Nations Mission in Somalia
WWI	World War I
WWII	World War II

TABLE OF CONTENTS

Certification.....	2
Acknowledgements	3
Dedication	4
Abbreviations and Acronyms.....	5
CHAPTER ONE: INTRODUCTION	11
1.1 Background	11
1.2 Problem Statement	12
1.2.1 Research Questions	13
1.3 Thesis Statement	14
1.4 Significance of the Study	14
1.5 Limitation of the Study	15
1.6 Literature Review	15
1.7 Research Methodology.....	18
1.8 Synopsis of Chapters	19
CHAPTER TWO: INTERNATIONAL LEGAL PERSONALITY: CONCEPTUAL FRAMEWORK	20
2.1 Introduction	20
2.2 The Concept of Statehood	21
2.2.1 Somaliland Legal Claim to Statehood.....	23
i. Historical Case	24
ii. Attributes of Statehood.....	24
2.3 The Nature of Recognition in International Law	25
2.3.1 Is there a duty to recognize, or not to recognize? The Doctrine of Non Recognition.....	27
2.4 The Concept of Recognition and Non-Recognition of a State.....	28

2.5 Relationship between International Investment Regime and Public International Law.....	32
2.6 Legal Characterisation of Somaliland.....	36
2.6.1 Somaliland as <i>De Facto</i> State	38
2.7 Concluding Remarks	39
CHAPTER THREE: LEGAL STATUS OF SOMALILAND UNDER INTERNATIONAL LAW.....	42
3.1 Introduction	42
3.2 Historical Background.....	43
3.3 The Non- Recognition of Somaliland by International Community.....	45
3.4 Somaliland’s Non-recognition Ramifications.....	48
3.5 Close look at Somaliland’s Economy	50
3.5.1 Somaliland Private Sector	52
3.5.2 Somaliland Financial Sector	54
3.6 Concluding Remarks	55
CHAPER FOUR: THE IMPACT OF NON-RECOGNITION OF SOMALILAND ON FOREIGN INVESTMENT	57
4.2 Inflow of Foreign Investment.....	57
4.3 Multinational Corporation and Their Decision to Invest In a Host Country	63
4.3.1 Why is Multinational Investment Important?.....	65
4.3.2 What are the Factors Determining the Investment Decision?	66
4.3.3 How Do Countries Improve Their Competencies In These Factors?.....	67
4.4 Factors Deter Inflow of Foreign Investment	70
4.4.1 Inadequate infrastructural and Human Capital	70
4.4.2 Deteriorating Economic and Social Conditions	71
4.4.3 Market Size and GDP growth.....	72
4.4.4 Corruption.....	72
4.4.5 Inefficient Financial Sectors	73

4.4.6	Image Issue	73
4.4.8	Lack of Political Stability	75
4.4.9	Lack of Effective Legal System and Proper Regulatory Framework.....	75
4.5	The Legal Framework for Foreign Direct Investment in Somaliland.....	76
4.5.1	Overview of the Legal System of Somaliland.....	77
4.5.2	Overview of Somaliland’s Foreign Investment Law.....	78
4.5.3	Basic Elements of a Foreign Investment Law Aimed At Attracting Foreign Investors.....	78
4.5.4	National Treatment and Most Favoured Nation Treatment.....	79
4.5.5	Dispute Settlement.....	79
4.5.6	Expropriation and Compensation	79
4.5.8	Tax System	80
4.5.9	Labour law	80
4.5.10	Company Law.....	81
4.6	Concluding Remarks	82
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.....		82
5.1	Summary of Findings	83
5.1.1	Final Conclusion	84
5.2	Recommendations	84
5.3	Areas for Future Research.....	86
Bibliography		87

Eugene Meyer, the first head of the World Bank contributed a very good wisdom which says:-

Prosperity, like peace, must be viewed as indivisible. And even from the narrowest considerations of self-interest; each of us must be concerned with the economic development of the world as a whole. For we shall prosper individually only as we prosper collectively.¹

But there are even larger considerations than material welfare which dictate our recognition of the world's essential unity. Economic distress is a prime breeder of war; it makes for a desperation from which aggression seems the only avenue of escape. We are engaged in the first large-scale, practical implementation of the United Nations spirit. Our endeavour is a concrete test of the capacity of nations to work cooperatively toward the solution of a specific common problem.²

¹ D Desai et al 'Rethinking Justice Reform in Fragile and Conflict-Affected States' in DD Bradlow et al International Financial Institutions and Global Legal Governance (Vol.3 The World Bank Legal Review) Washington: International Bank for Reconstruction and Development (2012) 246.

² As above, 246.

CHAPTER ONE

INTRODUCTION

1.1 Background

The people of Somaliland are suffering due to the complex issue of International Law. On 26 June 1960, Somaliland gained its independence from Britain after 80 years of colonization with the name, the ‘British Protectorate of Somaliland.’³ After 5 days of independence, Somaliland united with Somalia or the ‘Italian Protectorate’, which took her independence from Italy on 1 July 1960.⁴ During these 5 days, Somaliland was recognized as an independent state. After that, Somaliland compromised its sovereignty and united with Somalia with the optimism that the two nations would create a more viable state based on equal justice of wealth and power sharing.⁵ This did not happen and the ambitions of the people of Somaliland became⁶ dashed.

After a long civil war, 1991 was the year that the Somalia Democratic Republic ceased to exist.⁷ The government fell and the state collapsed. Brutal civil war and famine seized the population.⁸ Hundreds of thousands of refugees fled the country. A decade of bloodshed, chaos and human suffering ensued; threatening that Somalia would enter the 21st century as a ‘black hole’ of despair.⁹

1991 was also the year that Somaliland was reborn.¹⁰ Legitimate government was restored and statehood reclaimed, ushering in a period of healing, reconciliation, and growth.¹¹ A decade of bloodshed, chaos and human suffering came to an end. Hundreds of thousands of

³ Unpublished: MD Farah ‘The tension between the right to external Self-Determination and Territorial Integrity of Africa: Somaliland as a case study’ unpublished Master thesis, University of Pretoria, (2010) 2.

⁴ A complete historical background of both Somaliland and Somalia, in J Drysdale *Stoics without pillows: A way forward for the Somaliland's* (2000) and specifically for Somaliland, see Somaliland Centre for Peace and Development ‘A self-portrait of Somaliland: Rebuilding from the ruins’ (1996) <http://www.apd-somaliland.org/docs/selfportrait.pdf> (accessed 4 December 2012)

⁵ Farah (n 3 above) 2.

⁶ As above, 2.

⁷ Somaliland Centre for Peace and Development (SCPD) ‘A self Portrait of Somaliland: Rebuilding from the Ruins’ (1999)7 from <http://www.somali-jna.org/downloads/SelfPortrait24.doc> (accessed 4 December 2011).

⁸ As above, 7.

⁹ As above,7.

¹⁰ As above, 7.

¹¹ As above, 7.

refugees returned home. Somaliland looks forward to the 21st century with confidence and hope.¹²

For the last two decades, Somaliland has embarked upon the path to recovery.¹³ The road has not been easy. By 1991, the long civil war had left the country physically devastated and socially scarred.¹⁴ Tens of thousands of people had been killed and hundreds of thousands displaced, their homes reduced to rubble, their property looted or destroyed, and their land sown with mines.¹⁵ The economy had virtually grounded to a halt.¹⁶ The army, police and civil service had disintegrated; most government offices, banks, hospitals and schools stood derelict, their contents ransacked.¹⁷ In those early days, the task of reconstruction appeared so immense as to be insuperable. But today it is easy to forget how far the country has come, and how much has already been achieved.¹⁸

On the other hand, the country has showed peaceful and stable democratic development for the last 20 years, yet the international community and regional states showed its segregation position on the Somaliland use and still Somaliland remains invisible and a victim of 21 years of political non-recognition status.¹⁹ Political non-recognition has a huge negative impact upon the lives of its people.²⁰ The government of Somaliland, setting economic growth as its first priority, has committed to undertake deep economic reforms in order to make the country more attractive for foreign investors. Many observers have stressed in this respect that foreign investment is key to Somaliland's economic and ultimately, political viability as an independent State.²¹

1.2 Problem Statement

As indicated above, despite of Somaliland's achievements, its citizens have been suffering due to the siege imposed on it by the lack of recognition.²² Somalilanders are isolated from

¹² As above,7.

¹³ As above,7.

¹⁴ Somaliland Centre for Peace and Development (SCPD) (n 7 above).

¹⁵ As above,7.

¹⁶ As above,7.

¹⁷ As above,7.

¹⁸ As above, 7.

¹⁹ Fact based observation.

²⁰ Farah (n 3 above) 4.

²¹ P-E Dupont (n.d.) 'Foreign Investment and the Status of Kosovo in International Law' from <http://www.oecd.org/dataoecd/8/63/44246234.pdf> (accessed 20 December 2011).

²² Farah (n 3 above)

the international community.²³ They cannot travel easily or trade with the world of which they are part, despite the strategic geographical location they occupy.²⁴ Education and health facilities are hardly accessible.²⁵ This is because the government is unable to deliver basic services due to the lack of access to international financial institutions or direct bilateral assistance, trade and investment are handicapped as result of the lack of recognition.²⁶ Foreign Investors banks and insurance companies are reluctant to invest in a territory that is internationally part of failed state Somalia.²⁷ Thus, this study seeks to analyse the legal implications of non-recognition of Somaliland in international law in her quest to attract foreign investment for socio-economic development. It explores the real constraints on the capacity to function as a modern state, both domestically and internationally.²⁸ In clarifying these issues, the study will be conducted with a specific focus on how foreign investors may do business within Somaliland, what is the legal environment for foreign investments like and how Somaliland may overcome the legal conundrum.

1.2.1 Research Questions

The study poses a number of questions which it will attempt to answer:-

- i. What is the legal status of Somaliland in international law?
- ii. What are the legal consequences of non-recognition of Somaliland's overseas investment?
- iii. How can Foreign Investors legally deal with Somaliland in spite of non-recognition in international law?
- iv. What are the legal remedies available to foreign investors in the event of breach of contractual obligations and investment treaties by Somaliland?
- v. How can Somaliland overcome this legal conundrum?

²³ As above, 4.

²⁴ As above

²⁵ Farah (n 3 above) 4.

²⁶ International Crisis Group ICG 'Somaliland: Time for African leadership' (2006) Africa Report N0. 110
<http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf> (accessed 4 Jan 2010)

²⁷ As above

²⁸ As above

1.3 Thesis Statement

It will be argued in this thesis that Somaliland's quest to attract foreign investment for socio-economic development still remains an impediment due to the image deficit of Somalia. Consequently, investing in Somaliland comes with a deal of risk largely due to the uncertainties stemming from the normalisation of Somalia situation's before Somaliland get recognition. Somalia can claim Somaliland as part of their territory. Nevertheless, Foreign Investors considering possibility of threats that may endanger that investment.

1.4 Significance of the Study

The study is extremely significant because it will contribute to the literature on interface of trade law and investment relating to Somaliland. This is a vital because Somaliland has a strategic significance; therefore, its study may lead to ease of commerce to the benefit of the world. The non-recognition of Somaliland is by implication hindrance to economic upliftment of the world in general. The reason is, Somaliland geographically locates in one of the most strategic regions in the world; the Gulf of Aden.²⁹ The Gulf of Aden links the three major continents of the world; Asia, Africa and Europe.³⁰ The Gulf of Aden is one of the most important trade route in the world.³¹

The study will also examine the implications of non-recognition of territories and how to overcome them legally in so far as international trade, investment and law are concerned.

The research will also be part of the literature which will put Somaliland in the lime light as her efforts to get recognised are under way. The study will expose the legal and political impediments of non-recognition in relation to the investment opportunities which are being lost in so far as Somaliland is concerned. The study will also focus on how investors may deal with Somaliland in the absence of such recognition. This will achieved by a comparative study on Taiwan and Kosovo.

²⁹ Farah (n 4 above) 48.

³⁰ As above.

³¹ R Beckman 'Somali Piracy- Is international Law Part of the Problem or Part of the Solution?' (2009) at <http://www.rsis.edu.sg/research/PDF/Beckman%20Somali%20Piracy%20RSIS%2023%20Feb%202009.pdf> (accessed 10 May 2009).

1.5 Limitation of the Study

The study does not provide in-depth analysis on the political and economic aspect of the study, but is rather limited to the legal implications of non-recognition of Somaliland in her quest to attract foreign investment. Also this study is limited because of lack of literature on the local and international legal and investment aspects of Somaliland.

1.6 Literature Review

There is little comprehensive literature on legal personality in International Law.³² Because of the controversy on the issue, scholars have tackled different angles. Gerhard Erasmus writes on the criteria for statehood.³³ He extensively discusses the criteria to be met for a geographical entity to be recognized as a state. While reputable organisations have made significant contribution to the ongoing problem of Somaliland's statehood through a number of publications ICG report advances that the denial of Somaliland's state recognition has a real constraints on the capacity to function as modern state internationally.³⁴ ICG specifically deals with that the government has no access to Banks and Insurance Companies, which insurer political risks for foreign investment projects.³⁵ Proff Geldenhuys stated a Somaliland ceremony in Johannesburg 'that Somaliland has a strategic significance in terms of fishing, minerals as well as oil.'³⁶

A study by Dolzer and Schreuer recently stresses that Foreign Investment Law consists of layers of general international law, of general standards of international economic law, and of distinct rules peculiar to its domain.³⁷ This assertion proves particularly pertinent in the context of the question brought up here. The scarcity of the case law and academic commentaries on State succession specifically contemplated under the angle of international Investment Law.³⁸ Indeed, leads the study to refer to solutions drawn from general

³² R Portman *Legal Personality in International Law* (2010) 1.

³³ G Erasmus 'Criteria for determining statehood: John Dugard's recognition and the United Nations' *South African Journal on Human Rights* (1988) 207.

³⁴ See ICG report (n 26 above) 12.

³⁵ As above, 12.

³⁶ A 21st celebration of Somaliland's Independence Day on 18 May at Jizz Hotel Johannesburg South Africa (date of the occasion 19 May 2012)

³⁷ R Dolzer & C Schreuer *Principles of International Investment Law* (2008) 3.

³⁸ Dupont (n 21 above).

international law, as well as from other fields of international law such as State responsibility.³⁹

Several scholars studying international business recognize that one cannot separate businesses from the environment they operate in. Morrison⁴⁰ argues that the relationship between businesses and environment can be characterized as dynamic interaction; social influences shape business activities and businesses create changes in the society.⁴¹ One can analyze the external environment with the help of a best analysis, which consists of political, economic, socio-cultural and technological factors.⁴²

However, Korhonen argues that the political environment is superior to others, because it creates the basis for other elements in the society.⁴³ When companies engage in international operations they enter the political sphere of host governments, which determines their rights and obligations in those locations.⁴⁴ Also, as host governments are able to interfere on the operations of companies, since they operate under their legal authority, governments are the most important actors in companies' political environment. Thus, the political environment of countries determines the framework of economic activities and therefore political factors are an essential aspect influencing international operations of businesses.⁴⁵ It is probable that political factors are especially important when operating in Somaliland, as the country is not recognized as sovereign by other states.

Consequently, it can be argued that both businesses and governments are major players in shaping the world's economic environment Meier,⁴⁶ Morrison and Dicken argue that the relationship between states and corporations is a relevant and interesting issue as they are at the centre of global economic transformation.⁴⁷ On the one hand, companies are a major influence on the global economy as they create wealth through production activities and build

³⁹ As above.

⁴⁰ Morrison & Janet The International Business Environment: Global and Local Marketplaces in a Changing World (2006) New York: Palgrave Macmillan.

⁴¹ L Leinonen 'The Role of the Governments in Finno Tiawanese Business Relations' (2009)2 from http://www.hsepubl.lib.hse.fi/EN/ethesis/pdf/12169/hse_ethesis_12169.pdf.2 (Accessed 3 December 2011)2

⁴² As above.

⁴³ As above, 2.

⁴⁴ As above.

⁴⁵ As above 2.

⁴⁶ Meier & M Gerald The International Environment of Business: Competition and Governance in the Global Economy (1998) New York: Oxford University Press.

⁴⁷ Leinonen (n 22 above) 2.

extensive inter-firm and intra-firm networks that reach across national borders. Governments, on the other hand, shape the global economy by regulating cross-border transactions and creating the infrastructure needed for economic activities.⁴⁸

Hence, this study concentrates on the interplay of the two most important actors, states which is not recognised and firms, in shaping bilateral business activities.⁴⁹ Interaction between governments and companies is born from their differing interests; business organizations aim at maximizing profit and shareholders' value, whereas states are concerned about the welfare of the society. Businesses can shape the environments they operate in through investments.⁵⁰ Governments, on the other hand, usually carry out activities that shape the national economy both directly through public sector projects and indirectly through policy formation.⁵¹ Policy formation can influence the stability of the national economy as an operating environment, and determine the level of constraints a government places on companies. Consequently, government actions can have an effect on the operating environment of Multinational Corporations (MNC) and thus influence their decision-making on whether to invest or divest in a particular national economy.⁵²

However, businesses do not need to take the political environment as given; companies can usually negotiate with host governments to reduce political risks related to their operations. Accordingly, Morrison argues that interaction between governments and businesses has grown and thus the political system of a country can be an important aspect determining the attractiveness of the location and success of investments.⁵³

More specifically regarding the case of Somaliland, Jhasbhay concludes on actual full-fledged recognition by the AU and the international community.⁵⁴ The AU mission report clearly advances Somaliland's case for attracting international donor aid and foreign

⁴⁸ . As above 2.

⁴⁹ As above 2.

⁵⁰ As above 2.

⁵¹ As Above.

⁵² As above 2.

⁵³ Leinonen (n 18 above)2.

⁵⁴ MI Jhasbhay 'Somaliland: Post-War Nation-Building and International Relations, 1991-2006' (February 2007) from http://wiredspace.wits.ac.za/bitstream/handle/10539/4942/THESIS-FINAL3_revision.pdf?sequence=1.334 (Accessed 4 December 2012).

investment that should go far in helping Hargeisa⁵⁵ overcome Somaliland's international isolation.⁵⁶ If nothing else, Somaliland's international isolation has been virtually overcome. Most of the authors concluded that it is unfair for the international community to let the people of Somaliland suffer because of the faults of others.⁵⁷

The literature above reveals that for foreign investors to operate in a host country, the home state are involved too. The home states have interests in their foreign investing entities and they usually enter into Bilateral Investment Treaties (BITs) with host states to protect such interests. The case of Somaliland in light of the idea of being host country or home state is different, as the international legal regime does not recognise her as a legal personality. This entails that the international system whether it be on investment or trade and other social and political aspect thereto are not applicable to Somaliland. Therefore, this study will contribute what no one has addressed to the existing literature a new dimension on the legal and investment implications of non-recognition.

1.7 Research Methodology

There are few literatures available on the subject under study in relation to Somaliland. Fortunately, literature on state recognition/non-recognition under international law and international investment law is available for analysis. Therefore, this study will analyse the above stated literature in light of Somaliland's.

There is so much literature on Taiwan which is doing very well on trade and investment yet it is not internationally recognised as a legal personality. Kosovo was also faced with similar issues before her recognition, but, still had investment relations with other states. Therefore, comparative analysis of Somaliland with Kosovo and Taiwan will be of paramount use in this study.

The approach of this study is desktop-based library research which entails the use of text books and journals. Internet research of online articles and study reports will also be used. The study will be legal although other areas of knowledge will also be useful because of the nature of the subject which requires an understanding of economic, political and other areas

⁵⁵ Hargeisa the capital city of Republic of Somaliland

⁵⁶ Jhazbhay (n 54 above).

⁵⁷ Farah (n 3 above).

of the issue. Therefore, this study is a qualitative study on how an investor may deal with the case of Somaliland and how Somaliland may overcome the legal conundrum.

1.8 Synopsis of Chapters

The study consists five chapters:

Chapter One: Introduction

As presented above, this chapter introduces the study and poses the problem statement. For this purpose, the chapter raises several questions and also identifies the relevant literature to the study.

Chapter Two: International Legal Personality: Conceptual Framework

This chapter will analyze the international legal framework on state recognition viz a viz legal personality. It will also deal with international Investment Law. It will emphasize by discussing the interface between international law on statehood and international Investment Law.

Chapter Three: Legal Status of Somaliland under International Law

This chapter will discuss overview of Somaliland's historical background and their claim of recognition as a state. It will also attempt to highlight the factors behind the non-recognition of Somaliland and finally will provide an overview of socio-economic situation of Somaliland.

Chapter Four: Impact of the Non-recognition of Somaliland on Foreign Investment

This chapter will reveal the problems investors may face in relation to the legal personality of Somaliland in light of the regime on investment law. The chapter will then deal with how investors may deal with Somaliland in an absence of recognition. Finally, the chapter will cover the similarities and differences between the International Investment Law and Investment Law in Somaliland.

Chapter Five: Conclusion and Recommendations

This chapter will recommend ways if any on how Somaliland may deal with the legal conundrum. Finally, this study will underline recommendations on area for future research.

CHAPTER TWO

INTERNATIONAL LEGAL PERSONALITY: CONCEPTUAL FRAMEWORK

2.1 Introduction

Legal personality is a concept in International Law.⁵⁸ It is principally employed to distinguish between those social entities relevant to the international legal system and those excluded from it. There is almost universal agreement that states are international persons,⁵⁹ Because International Law is mainly about the conduct and relations of states.⁶⁰ States as material entities naturally predate the emergence of International Law but, as these social entities began to conduct their relations on basis of law, it was necessary to identify which entities were “States” for this purpose.⁶¹ Like all legal systems, International Law developed rules on legal personality, which initially were dominated by the factual characteristics of statehood. Despite it being the case that legal statehood carries with it duties for States, it was status worth having and generally sought by any entity even controversially satisfying the characteristics for being state.⁶² Nonetheless, International Court of Justice put it in reparation for Injuries Case that ‘international personality is a concept giving to controversy.’⁶³

Legal personality is a controversial concept of international law.⁶⁴ But it is of course, not a concept confined to the international legal system.⁶⁵ It represents one of the pillars of municipal law as well.⁶⁶ To be a legal person within the rules of those systems implies three essential elements; first, a subject has duties, thereby incurring responsibility for any behaviour at variance with the one prescribed by the system. Second, a subject is capable of claiming the benefit of rights.⁶⁷ This is more than being the mere beneficiary of a right since a considerable number of rules may serve the interest of groups of individuals who do not have a legal claim to the benefits conferred by the particular rules.⁶⁸ Third, a subject possesses the

⁵⁸ Portman (n 32 above) 1.

⁵⁹ As above, 1.

⁶⁰ C Warbrick ‘States and Recognition in International Law’ in M. D.Elvens, *International Law* (2006) 217.

⁶¹ As above.,217.

⁶² As above, 217

⁶³ Portman (n 32 above) 1.

⁶⁴ As above, 7.

⁶⁵ As above.

⁶⁶ As above.7.

⁶⁷ N Mugerwa ‘Subject of International Law’ in M Sorensen *Manual of Public International Law* (1968) 123.

⁶⁸ As above.

capacity to enter into contractual or other legal relations with other legal persons recognized by the particular system of law.⁶⁹ This is especially true in international law.

Generally (and not exhaustively), international personality entails the ability to bring claims before international tribunals exercising an international legal jurisdiction, to enjoy rights and be subject to international legal obligation; participate In International Law creation; enjoy the immunities attaching to international legal person within national legal systems; participate in international organisations and conclude treaties.⁷⁰

Indeed, International personality is participation plus some form of community acceptance. The latter element will be dependent on many different factors, including the type of personality under question. It may be manifested in many forms and may in certain cases be inferred from practice.⁷¹ In consideration of the Somaliland's legal personality in International Law it has been emphasized that the question of whether Somaliland is a state is material for a number of issues arising in international practice, before international and national courts, in terms of the aspects of recognition of the acts and transactions of this entity.⁷²

Keeping this backdrop in mind, the study examines the concept of statehood and how international personality is acquired by an entity claiming statehood and doctrinal controversy of recognition/non recognition based on Somaliland case while not to enter into debate, but merely to evidence the legality of recognition and non-recognition consequences of International Law and also the study will highlight the relationship between investment regime and public international law if any.

2.2 The Concept of Statehood

Statehood is notoriously vexing concept in International Law.⁷³ Though states have been the fundamental unit of the international system for nearly four hundred years,⁷⁴ it is generally

⁶⁹ As above.

⁷⁰ D McCorquodale *Cases and materials on international law* (2003) 132.

⁷¹ MN Shaw *International Law* (2003) 177.

⁷² Dupont (n 21 above).

⁷³ BR Farley *Calling A State A State: Somaliland and International Recognition* (2011) 16 from www.law.emory.edu/fileadmin/journals/eilr/.../Farley.pdf - United States. (Accessed 15 April 2012)

⁷⁴ As above, 16.

accepted that the states is the principal legal person on the international scene.⁷⁵ There remains no generally acceptable and satisfactory modern legal definition of statehood.⁷⁶

In International Law, the most broadly accepted source as to a definition of statehood and basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention of the Rights and Duties of States, 1933 (‘Montevideo Convention’).⁷⁷ The Convention defined a state as “a person of International Law” possessing such attributes as “a permanent population, a defined territory, Government, and capacity to enter into relations with other states.”⁷⁷ The so called Badinter Commission echoes the Montevideo criteria in its opinions concerning the dissolution of Yugoslavia and stated that “a State is a community which consists of a territory and a population subject to an organized political authority and is characterized sovereignty.”⁷⁸

However, the Montevideo Convention criteria are not exclusive.⁷⁹ In practice, whether an entity is effective is central to the question of statehood. The effectiveness of an entity turns on whether the entity is in fact independent and whether its government exerts control over its territory.⁸⁰ As James Crawford review of State practice indicates that the degree of control necessary may be a function of the manner in which the government come to power.⁸¹ However, entities that have not been in fact independent or entities that do not exercise effective control over the territory that purportedly constitutes the state have been denied statehood. For example, The League of Nations refused to recognize Manchukuo, the entity established by the Empire of Japan in Manchuria after Japan’s 1931 invasion, because it was a puppet of the Empire of Japan and not formed through “a genuine and spontaneous Independence Movement.”⁸²

On the other hand, these four qualifications detailed above create an apparent paradox within the international legal framework of the state: satisfying the Montevideo criterion does not

⁷⁵ D Raic Statehood and the law of self-determination (2002) 29.

⁷⁶ Jhazbhay (n 54 above) 256.

⁷⁷ As above, 257.

⁷⁸ Opinion No 1 Conference on Yugoslavia, Arbitration Commission, 92 hereafter (Badinter Opinion)

⁷⁹ Farley (n 73 above) 17

⁸⁰ As above.

⁸¹ S D Murphy Democratic legitimacy and recognition of states and governments. In B. R. Gregory H. Fox, *Democratic Governance and International Law* (2000) 125.

⁸² Farley (n 73 above) 17.

guarantee any territory's formal recognition as a state⁸³ and also failure to satisfy the Montevideo Convention Criteria does not conclusively prevent an entity from achieving statehood. The process of decolonisation in Africa resulted in the emergence of several entities recognized as states despite their failure to satisfy one or more of the Montevideo Criteria. Former Portuguese and Belgian colonies provide the best example of states emerging from colonial dominion that substantially failed to meet one or more of the Montevideo Criteria. For example, at independence, the Democratic Republic of the Congo did not possess an effective government. The present practice asserts that many states have recognized South Sudan upon independence including all permanent members of the United Nations Security Council⁸⁴ without effective government. Thus its failure to satisfy one of the four Montevideo criteria of statehood was "admitted to the United Nations without dissent".⁸⁵

Thus, while the statehood Criteria, especially the governance and independence criteria, suggest that effectiveness is the primary determinant of statehood, effectiveness is not conclusively determinative. It is possible that an ineffective state receives international recognition. Even effectiveness operates only as a predicate for the creation of a new state. A putative state must additionally conform to existing international norms of state creation.⁸⁶ In the case of a state created through succession this means that the putative state's secession must conform to state practice regarding secession or dissolution, including the principle of *uti possidetis*.⁸⁷

2.2.1 Somaliland Legal Claim to Statehood

To assess Somaliland's legal claim to statehood, we should consider both its historical case and its demonstration of the attributes of statehood, as defined in International Law.⁸⁸

⁸³ D Forti 'Somaliland: An Examination of State Failure and Secession Movements' (December 2011) 3 from [http://www.dukespace.lib.duke.edu/..//Danial I.](http://www.dukespace.lib.duke.edu/..//Danial%20I) (accessed 6 January 2012).

⁸⁴ Wikipedia Chronology of diplomatic recognitions and relations of South Sudan from <http://en.wikipedia.org/wiki/> (accessed 19 March 2012).

⁸⁵ Farley (n 73 above) 18

⁸⁶ As above.

⁸⁷ *Uti possidetis* is a principle that governs the international frontiers of a newly emergent state. The principle evolved in the context of decolonization in South America and Africa. In Africa, *uti possidetis* has meant the conversion of colonial boundaries into international borders "the primary application of *uti possidetis* was securing respect for the territorial boundaries at the moment when [State's] independence is achieved. Thus, the boundaries that delineated separately administered territories became international frontiers at the moment of decolonization.

⁸⁸ MA Omar Forieng Minister of Somaliland 'Recognizing Somaliland: political, legal and historical perspectives' in JM Jama Somaliland: The Way Forward (2011) 20.

i. Historical Case

As indicated below, Somaliland's claim for independence is based primarily on historic title its separate colonial history, a brief period of independence in 1960, the fact that it voluntarily entered into its unhappy union with Somalia and the questionable legitimacy of the 1960 Act of Union.⁸⁹

ii. Attributes of Statehood

As stated above, the main criteria for statehood remain those set by the Montevideo Convention, generally considered a norm of customary International Law, and Somaliland unequivocally meets each of these established legal criteria.⁹⁰ So, let's take one by one:

A) A Permanent Population:

The population of Somaliland is estimated to be approximately 3.5 million.⁹¹ As with its neighbours, a large portion of the population are nomadic, and movement of people through porous borders in the Horn of Africa region is common place; but this does not affect any questions of permanency or existence of population as defined in International Law.⁹²

B) A Defined Territory

Somaliland's territory is clearly defined as that of the former British protectorate, established by treaties in the late 19th century and reaffirmed when Somaliland acquired independence in 1960. Although the eastern frontier has been contested, border disputes do not in general invalidate statehood.⁹³

Somaliland in fact exerts control over the territory it consistently claims: Somaliland collects custom duties from ships that enter the port of Berbera; Somaliland's coast guard patrol its territorial waters to prevent piracy and Somaliland armed forces have even engaged in an armed conflict to defend its borders.⁹⁴

⁸⁹ As above, 23.

⁹⁰ As above, 25.

⁹¹ Government of Somaliland, Country profile <http://www.somalilandgov.com/cprofile.htm> (accessed 25 February 2012).

⁹² Omar (n 88 above) 25.

⁹³ As above.

⁹⁴ Farley (n 73 above) 35.

C) Effective Government

Somaliland possesses a functioning central government that is in effective control of most of the territory to which it lays claim.⁹⁵ In addition to the symbolic trappings of statehood, a national flag, currency, crest and the like, it has a constitution (approved by popular vote), democratically elected authorities at all levels and basic state institutions including a bicameral parliament, independent judiciary, permanent electoral commission, army and police and custodial forces.⁹⁶ It has had several sets of elections deemed free and fair by international observers, most recently in June 2010, when observers praised presidential elections pointed out as a “peaceful expression of the popular will”.⁹⁷

D) Capacity to Enter Into Relations with Other States

Somaliland has entered into formal and informal arrangements with a wide variety of states and intergovernmental organisations. Its representatives in the United Kingdom, Sweden, the United States, Djibouti, Ethiopia and Kenya deal with their host governments. Due to its unrecognized status, Somaliland suffers limitations in the diplomatic sphere which adversely affect its ability to deliver political and economic benefits to its people.⁹⁸

Nonetheless of the above, an entity’s capacity to enter into relations with other states is an important indicator of statehood, but its realisation depends on the response of other actors on the international stage.⁹⁹ Mostly, the satisfaction of the first three criteria is essentially factual but fulfilment of this criterion depends on recognition.¹⁰⁰

2.3 The Nature of Recognition in International Law

The legal nature of recognition has been a subject of much controversy among writers in International Law.¹⁰¹ The divergent views may be grouped around two rival doctrines, the constitutive and the declaratory.¹⁰² The constitutive doctrine, maintains that is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. Thus, new states are established

⁹⁵ Omar (n 88 above) 25.

⁹⁶ see ICG report (n 26 above).

⁹⁷ See Progressio Press Release (28 June 2010) from <http://www.progressio.org.uk/blog/news/somaliland-elections-peaceful-expression-popular-will>. (accessed 2 December 2012).

⁹⁸ Omar (n 88 above) 26.

⁹⁹ RM Wallace International Law (2005) 66.

¹⁰⁰ As above.

¹⁰¹ Mugerwa (n 66 above) 275.

¹⁰² As above.

in the international community as fully-fledged subject of International Law by virtue of the will and consent of already existing states.¹⁰³ Recognition therefore becomes an additional requirement of statehood.¹⁰⁴ The disadvantage of this approach is that an unrecognised 'state' may not be subject to the obligation imposed by International Law and may accordingly be free from such restraints as, for instance, the prohibition on aggression. A further complication would arise if a 'state' were recognised by some but not other states.¹⁰⁵ Like North Korea was for many years recognized as a state by the Soviet Union, China, and some fifty other states, while it remained unrecognized by the United States, the United Kingdom, and many other states. Was it a state? Or was it a state only for those states recognized it?¹⁰⁶ Or could one talk then of, for example, partial personality? Clearly such uncertainty is undesirable. In the case of North Korea it would mean that under International Law it did not enjoy rights not to be attacked and was under no obligation not to attack its neighbours.¹⁰⁷

The declaratory doctrine considers recognition to be only a declaration of an existing fact.¹⁰⁸ A state exists as an international person subject of International Law as soon as it fulfils the conditions of statehood, and the act of recognition endows the already existing state with international personality. This is to say, before recognition, the state is deemed to exist as a fact, but not under International Law vis-à-vis existing states.¹⁰⁹ This is the doctrine to which the majority of contemporary writers adhere. The resolution adopted in 1936 by the institute of International Law on recognition expressly stated that: 'Recognition has a declaratory effect.'¹¹⁰ In line with this view, many commentators have held that state practice clearly favours the declaratory model, that is, that the entity exists as a state before recognition.¹¹¹

The fact that an existing state is generally considered to have a number of rights and duties under International Law, even before recognition, is an element in favour of the declaratory view. On the other hand, the judicial practice of many states according to which an unrecognized state or government does not enjoy the full and complete rights of a foreign state or government before national courts, points to the constitutive character of recognition.

¹⁰³ MN Show *International Law* (1997) 308.

¹⁰⁴ J Dugard '*International law: a South African Perspective*' (2009) 87.

¹⁰⁵ Show (n 103 above) 308.

¹⁰⁶ Dugard (n 104 above) 91

¹⁰⁷ As above, 91.

¹⁰⁸ Raic (n 75 above) 30.

¹⁰⁹ As above.

¹¹⁰ Mugerwa (n 66 Above) 275.

¹¹¹ W Worster 'Exploring Geopolitics: Introducing Many Faces of Geopolitics' from www.exploringgeopolitics.org/publication (accessed 03 March 2011).

The essence of this jurisprudence is that recognition creates new legal situations which did not exist simply by virtue of the effective establishment of the new state or government.¹¹²

Furthermore, in cases where the facts relating to the effectiveness of independence of a new regime are subject to different evaluations, recognition is something more than a mere declaration of an existing fact. It then has a constitutive character in so far as it precludes the recognizing state from afterward's contesting the fact. In those cases, however, there could be no controversy about the statehood of the new political entity or about the effectiveness of a new regime, recognition is purely declaratory¹¹³. From this perspective, Somaliland is an effective government that has already a de facto state, whether or not other governments choose to recognise that fact.

Let's conclude a legal opinion prepared by the South African Ministry of Foreign Affairs advances the declaratory argument for recognition in the following terms:

Although Somaliland meets the requirements of statehood, since the declaration of independence, no country has recognised the Republic of Somaliland. Somaliland officials have mastered all the arguments and precedents for recognition, but the problem is in convincing the rest of the world, especially members of the African Union, that its case is special and deserves support.¹¹⁴

2.3.1 Is there a duty to recognize, or not to recognize? The Doctrine of Non Recognition

Although existing states are bound to respect the rights of new state under International Law as soon as the new state has been established effectively, they are not under a duty to recognize the new state expressly or by implication. This is a natural consequence concerning the legal effects of recognition.¹¹⁵

As recognition was found not to be a condition of the full enjoyment of statehood, the new state is not debarred from enjoying its fundamental rights under International Law by the withholding of recognition.¹¹⁶ It might be otherwise if the view was adopted that recognition is constitutive. A new state might then be denied its rights under International Law in the

¹¹² Mugerwa (n 66 Above) 277.

¹¹³ As above.

¹¹⁴ see ICG report (n 26 above) 12.

¹¹⁵ Mugerwa (n 66 above) 277

¹¹⁶ As above

absence of recognition, and it might be argued that the refusal to recognize was a violation of an essential duty towards the new political community which fulfils the conditions of statehood. It is on this ground that Hersch Lauterpacht¹¹⁷ concludes that there is a duty to recognize.¹¹⁸

Unfortunately, Lauterpacht's contention is not supported by state practice. States do not regard themselves as having a legal duty to recognize entities as states ones they comply with the requirements of statehood. In most cases they do recognize states that meet these requirements, so recognition is not an arbitrary process.¹¹⁹ On the contrary, there is ample evidence to show that governments consider the granting or withholding of recognition primarily as an exercise of political discretion. Even those governments which sometimes justify a decision to recognize a new state by the exigencies of International Law are not always consistent.¹²⁰

If controversy exists as to whether or not there is a duty to recognize, there appears to be universal acceptance of the rule that recognition must be accorded only when all the conditions of statehood are fulfilled.¹²¹ In practice, there are other factors which influence recognition as mentioned below.

2.4 The Concept of Recognition and Non-Recognition of a State

The recognition of entities as a member of international community is governed by a complex factors that includes International Law, the self-interest of other states, politics, personality and strategic considerations including the management or prevention of conflict.¹²² There are few hard and fast rules; the act of recognition by one state of another is ultimately a discretionary act.¹²³ When a new state has been established which affects the legal relations between states, the question arises whether the legal consequences following from the new factual situation operate immediately in relation to other states, or whether they depend upon an act of recognition.¹²⁴ In the practice of states, the birth of new state, the establishment of a

¹¹⁷ The Two leading treaties on this subject are H Lauterpacht Recognition in International Law (1947); T Chen the International Law of Recognition (1951).

¹¹⁸ Mugerwa (n 66 above) 277.

¹¹⁹ Dugard (n 104 above) 92.

¹²⁰ Mugerwa (n 66 above) 277.

¹²¹ As above, 277.

¹²² See ICG report (n 26 above).

¹²³ As above.

¹²⁴ Mugerwa (n 66 above) 266

new government, or a territorial change, is frequently recognized by other states; but it can also happen that recognition is expressly refused.¹²⁵

The acceptance of a new state into the international community by means of recognition on the part of the existing states is mainly influenced by politics especially interest of other states even though as stated above certain legal criteria for statehood have been adopted to guide the decision to recognise the states.¹²⁶ Each State's recognition is juridical equivalent, but the most important players constituting this "critical mass" are the Great Powers. Though all States are both members and progenitors of international society, the Great Powers constitute an extremely powerful sub-group within that population. In fact, some argue successful recognition is impossible without the support of a powerful patron State. The Great Powers act as the gatekeepers of Statehood. Their decisions play a decisive role in recognition and, consequently, in defining 'Statehood's' meaning for its aspirants.¹²⁷ So, political recognition could be a negative or a positive depending upon the entities relationship with powerful, influential States.¹²⁸ In fact, an entity either is recognized as a state or it is not. Recognition can be unilateral or collective.¹²⁹

Unilateral recognition is the most orthodox method of recognition. Collective recognition is still relatively uncertain and controversial.¹³⁰ Recognition of a state by other states is one of the most important features of state to enter into relations with others. Thus recognition is a prerequisite for one state to do business with another in the sense of conducting diplomatic relations, asserting rights under International Law and participating in the activities of international organisations. In modern International Law, a prominent effect of recognition is participation in treaties.¹³¹

¹²⁵ As above.

¹²⁶ Dugard (n 104 above) 82.

¹²⁷ BL Coggins '*Secession, Recognition and the International Politics of Statehood*' (2006) 12 from <http://etd.ohiolink.edu/send-pdf.cgi/Coggins%20Bridget.pdf> (accessed 18 April 2012).

¹²⁸ As above, 352.

¹²⁹ Unilateral recognition occurs when an individual state already accepted as a state recognize that an entity claiming to be a state meets the factual requirement of statehood therefore should do be regarded as a state with rights and duties attached to statehood. On the other hand collective recognition took effect when a group of states such as United Nations recognises the existence of a claimant directly by an act of recognition or indirectly by the admission of the state in question the organization.

¹³⁰ Dugard (n 106 Above) 90.

¹³¹ RK Gardiner '*International Law*' (2003) 186.

On the other hand, the other concrete issue of recognition is that, lack of centralized organ in which authority is vested to determine with binding effect of the international community as a whole whether or not the condition of statehood are fulfilled in a specific case.¹³² Therefore, every state is to decide for it-self whether a new state has come into existence and the act of recognition may assume a particular legal significance. It may be understood as indicating that the recognizing state now considers the condition of statehood to be fulfilled.¹³³ In effect means, that the political existence of a state is independent of recognition by other states, and thus unrecognised states must be deemed subject to the rules of International Law. It cannot consider itself free from restraint. As Fatima Ismail, a UN human rights expert notes:

The country (Somaliland) has shown the African Renaissance spirit of self-reliance and resilience and has produced a sustainable government and constitution. They have got their act together while in the south (Somalia) the Transitional National Government (TNG) has been unable to do so. The international community must take notice of this. It cannot remain ostrich-like with its head in the sand.¹³⁴

In reality, non-recognition with its consequence of absence of diplomatic relations, may affect the unrecognised state in asserting its rights or other states in asserting its duties under International Law, but mostly will not affect the existence of such rights and duties.¹³⁵ The political communities can without recognition continue to operate as states within the four walls of their domestic (territorial) enclave; they cannot enter into relations with other state unless that other state expressly or by putting up with such relations impliedly recognizes that political community as a subject of International Law”.¹³⁶

In this perspective, some commentators argue that Taiwan’s lack of diplomatic recognition does not affect its status as a state since, in practice, “courts in foreign states explicitly and implicitly recognize that Taiwan meets the ‘State requirements for particular legal purposes’” and hold that Taiwan is not part of the People’s Republic of China (PRC) but rather of the Republic of China (ROC).¹³⁷ The prevailing view among public International Law scholars

¹³² Mugerwa (n 66 above) 266.

¹³³ As above.

¹³⁴ I Jhazbhay ‘Somaliland Africa's Best Kept Secret, A challenge to the International Community’ (2003) 78 from <http://www.iss.co.za/pubs/asr/12No4/EJhazbhay.html> (Accessed 2 May 2012).

¹³⁵ Show (n 103 above)

¹³⁶ D Johan Van der Vyver, ‘Statehood in International Law (1991)99.

¹³⁷ H-W Liu (2009) A Missing part in international investment law: The effectiveness of investment protection of taiwan’s bits vis-à-vis asean states (2012) 136 from

on this score, however, points to the opposite conclusion.¹³⁸ Professor James Crawford finds that ‘Taiwan is not a state because it still has not unequivocally asserted its separation from China and is not recognized as a state distinct from China.’ In the same vein, Professor Vaughan Lowe seems to support Professor Crawford’s argument implicitly pointed out to the fact that “Taiwan is the classic example of entities that objectively appear to meet all the criteria of statehood, but which seem not to wish to be a state.” Professor Malcolm Shaw suggests, “Taiwan would appear to be a non-state territory entity which is *de jure* part of China under separate administration”.¹³⁹

Notwithstanding the above, as Professor Lowe correctly observes, “Taiwan has dealings with foreign states and international organizations very much like those of an independent state, and is represented abroad by non-diplomatic missions.”¹⁴⁰ Many states employ institutions under various names handling consular work in Taiwan, and those ambassadors sent to Taiwan are often proclaimed to be “on leave.” like United States maintained “unofficial commercial and cultural relations with the people on Taiwan through an unofficial instrumentality and they established American Institute in Taiwan (AIT) which has offices in the US and Taiwan.¹⁴¹ The result of such informal arrangements, with the exception of Taiwan’s remaining allied states; most of the Bilateral Investment Treaties BITs that Taiwan has concluded so far were therefore made by virtue of unofficial diplomacy.¹⁴² These circumstance resulting in diplomatic isolation which has had a negative influence on Taiwan’s overseas investment.¹⁴³

Similarly, Somaliland maintained some informal cooperative arrangement with a wide variety of states and intergovernmental organisation but this doesn’t give full legal personality or capacity to enter into agreements, while the Taiwan’s uniqueness of concluded BITs, gave more attention among the public International Lawyers.

http://jilp.law.ucdavis.edu/issues/Volume%2016.1/Liu%20MACRO%20w_title%20correction.pdf (accessed 14 February 2012).

¹³⁸ As above. 136

¹³⁹ As above. 137

¹⁴⁰ As above, 136

¹⁴¹ As above.

¹⁴² As above.

¹⁴³ As above.

2.5 Relationship between International Investment Regime and Public International Law

International Investment Law is perhaps the fastest growing area of International Law and dispute settlement today.¹⁴⁴ While it is a field that has emerged in practice essentially only during the past decade, it already faces considerable challenges and serious critiques. From time to time, states, investors, civil society, nongovernmental organizations, and legal scholars of domestic and International Law call the legitimacy of International Investment Law and investment treaty arbitration into question. Despite growing amounts of literature, International Investment Law so far has not received sufficient theoretical and doctrinal attention. In practice, International Investment Law, therefore, is often not well-equipped to counter such criticism.¹⁴⁵

What is still missing is a comprehensive conceptual and doctrinal framework for the thinking on International Investment Law as a whole, as well as convincing accounts of its various elements.¹⁴⁶ What complicates matters in particular is the clash between private commercial arbitration and Public International Law approaches to International Investment Law and investment treaty arbitration. It is precisely the tension between these two models that is at the origin of much of the criticism of, and misunderstandings about, the structure, functioning, and future direction of the current system of international investment protection. At the same time, both private commercial and Public International Law approaches face significant limitations in providing a comprehensive framework for the doctrinal reconstruction of International Investment Law, as aspects of both of these fields blend into each other in the practice of international investment protection.¹⁴⁷

The public function of International Investment Law consists of establishing principles of investment protection under International Law that provide for the protection of property and endorse rule of law standards for the treatment of foreign investors by states.¹⁴⁸ These principles have the purpose of reducing the so-called “political risk” inherent in any foreign

¹⁴⁴ SW Schill ‘Enhancing International Investment Law's legitimacy: conceptual and methodological foundations of new Public Law approach (2011) 52 *Virginia Journal of International Law* from http://www.vjil.org/assets/pdfs/vol52/issue1/Schill_Final.pdf (accessed 10 March 2012) .

¹⁴⁵ As above, 58.

¹⁴⁶ As above, 58.

¹⁴⁷ As above. 59

¹⁴⁸ As above,59.

investment situation. In that sense, the substantive principles of international Investment Law, therefore, assume a function that is much closer to that of domestic Constitutional and Administrative Law than to private law and commercial contracts negotiated between equals; investment treaty arbitration, in turn, can be understood as more akin to administrative or constitutional judicial review than to commercial arbitration, even though International Investment Law makes use of the arbitral process to settle disputes between states and foreign investors.¹⁴⁹ On the notion of political risk and on understanding dispute resolution through arbitration as a form of risk management, yet, despite the functional equivalence to domestic public law, International Investment Law lacks a comparable conceptual and doctrinal clarity.¹⁵⁰

Turning to the context of state contracts, there has been a great controversy with regard to the application of Public International Law to a contract between a State and a Foreign Private Individual. Some content such contracts are not governed by public International Law *stricto sensu*, for this system is an inter-state system *jus intergentes*. However, there could not be any reason why the parties cannot choose Public International Law as the applicable law of the contract by virtue of their autonomy of will which is universal rule found in almost all legal system of the world. Thus, today the question is not whether International Law applies; but if it applies at all, and then to what extent does it apply? The whole theme relates to the nature of applicable International Law rules to such contractual relationship.¹⁵¹

At this point it is necessary to distinguish two schools of thought which favour the application of Public International Law to such contracts. One school of thought supports the application of International Law by elevating the contract between a state and a foreign private individual to the level of an inter-state treaty. The other school supports the application of International Law, but in a cautious and limited sense. With regard to the mode, nature, and degree of the application of International Law in the context, the former school may be characterised as the Strict Internationalist School and the latter as the Moderate Internationalist School.¹⁵²

¹⁴⁹ As above

¹⁵⁰ As above, 59.

¹⁵¹ AF Maniruzzaman 'Interntional Development Law as Applicable Law to Economic Development Agreements: A Prognostic View' in F Beveridge 'Globalization and Internationa Investment' (2005) 72.

¹⁵² As above, 72.

However, another confronts the foregoing doctrinal debate, some claim that parties to a state contract, by agreeing to submit it to Public International Law, have ranked themselves on the equal status in that law. Such a claim is indeed a large one which is neither supported in theory nor in practice.¹⁵³ However, a lesser claim for “Limited international legal personality of individuals of such a contract situation seems to be an attractive option to many jurists. In professor Seidl-Hohenvelden’s words:¹⁵⁴

If it is possible to recognize international organizations, insurgents, etc., as subjects of international and if some authors at least consider that even individual human beings under certain circumstances may be subject of International Law, why should a state be prevented from recognizing its partner to such a contract as a subject of International Law? Of course, such recognition does not mean that the state recognizes its partner to such a contract as a subject enjoying all rights and duties due to a state. The private partner is recognized as a subject of only those rights and duties as are embodied into the contracts concerned.¹⁵⁵

In relations to this argument, that the proposition made in the *Texato/Calasiativ v. Libya Award* stating “that a contract between a State and a private person falls within the international legal order mean that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specify international capacities. But, unlike a State, the private person has only a limited capacity and his equality as a subject of International Law does enable him only to invoke, in the field of International Law, the rights which he derives from the contract” and elsewhere in the same context, what recognition there is, is granted to the investor only as far as the execution of the agreement is concerned, the investor thus becomes merely a partial subject of International Law.¹⁵⁶

The most important of the argument against this view seems to be that if conferring international legal capacity is allowed in International Law, then a State may be at liberty to unilaterally confer international personality on certain individuals or organisations for certain purposes which may not be accepted to the international community at large, nor event to the

¹⁵³ As above, 72.

¹⁵⁴ As above, 72.

¹⁵⁵ As above, 12-15.

¹⁵⁶ As above, 12-15.

national state of the individual. Furthermore, it seems difficult to conceive the position and the role of the Home State of the foreign entity with regard to diplomatic protection, as that entity itself is formally elevated to the rank of a subject of Public International Law.¹⁵⁷

Further, it has to be noted that where a foreign company is incorporated in the law of the host State it becomes its national, and, in the absence of any special legal arrangement, it is difficult to presume the international personality of that company. However, there is no denying the fact that developments in modern International Law since World War II have extended limited international legal personality to such non-State actors as international organisations and individuals for specific purposes.¹⁵⁸ But it has to be borne in mind that the international community, in the main, has collectively by virtue of multilateral treaties recognized such non-State actors as having limited international legal personality. States have also done through bilateral arrangements.¹⁵⁹

With respect the disputes arising out of foreign investment and commerce between states and foreign entities or corporations, the latter have been granted specific capacity to pursue claims directly against States by several treaties negotiated between States.¹⁶⁰ This development in contemporary International Law is, however, an exception established by treaties, and it would be wrong to generalise this position as an encompassing one in International Law.¹⁶¹ As one scholar rightly observes “it true that certain rules of International Law seem to create direct rights or obligations for the individual. But these remain until now the very limited exception rather than the rule.”¹⁶² However, from these isolated and exceptional instances it cannot be concluded that the general International Law recognizes Multinational Corporations as its subjects nor can a State make it an international person by its unilateral act.¹⁶³

In light of the above literature, it seems Transnational Corporations (TNCs) do not have absolute international legal personality and it is unresolved whether and according to what

¹⁵⁷ As above, 12-15.

¹⁵⁸ As above.

¹⁵⁹ As above, 12-15.

¹⁶⁰ The World Bank Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) on 18 March 1965.

¹⁶¹ Maniruzzaman (n 151 above)12-15.

¹⁶² As above.

¹⁶³ As above, 18.

criteria of other than states individuals, international organisations and private corporations become international persons.¹⁶⁴ So, in respect to the effectiveness of Somaliland commitments either actual or potential in the field of foreign investment is to a certain extent dependent¹⁶⁵ upon many factors relating to the ascertaining legal personality statehood of Somaliland. Much of the literature dedicated to the question of statehood focuses on the legal effect of recognition.¹⁶⁶

2.6 Legal Characterisation of Somaliland

A preliminary question to be dealt with is the precise characterization of the situation created by Somaliland.¹⁶⁷ The case of Somaliland is complicated by the fact that it seceded from a collapsing parent state Somalia,¹⁶⁸ while Somaliland and Somalia merged voluntarily. The validity of this claim depends on the way International Law regulates secession.¹⁶⁹ State succession has indeed been described as one of the most complex issues of International Law.¹⁷⁰ Schoiswohl, who has written the most detailed legal analysis of Somaliland's claim for recognition, outlined that in international law secession is generally understood as separation of a part of a territory of a state carried out by the resident population with the aim of creating a new independent state or to accede to another state. This happens without the consent of the previous sovereign.¹⁷¹ Nevertheless, recognition usually hinges on the later acceptance of the secession by the former sovereign. Should the new political entity emerge from a collapsed state and prove a reasonable degree of stability and continuity, it can acquire statehood even without the recognition of the parent state.¹⁷² The South African state law advisers address this issue, noting that:

The interest of world peace and stability require that, where possible, the division or fragmentation of existing states should be managed peacefully and by negotiation. But

¹⁶⁴ Portman (n 32 Above).

¹⁶⁵ Dupont (n 21 above).

¹⁶⁶ H Lauterpacht recognition in International Law (1948); Thomas d. Grant, *The Recognition Of States* (1999) Dugard, J Recognition And The United Nations 89-90 (1987).

¹⁶⁷ Dupont (n 21 above).

¹⁶⁸ MV Hoehne Regional Security in The Post-Cold War Horn of Africa' in R Sharamo and B Mestfin (2011) 335.

¹⁶⁹ Dupont (n 21 above) 6.

¹⁷⁰ As above, 5.

¹⁷¹ Hoehne (n 168 above) 335.

¹⁷² As above, 335.

where this is not possible, as is the case with Somalia, international law accepts that the interests of justice may prevail over the principle of territorial integrity.¹⁷³

Besides that, legal commentary frequently highlights and deplores the instrumental weakness of State succession, its *ad hoc* character, the absence of determining rules from relevant treaty law and custom.¹⁷⁴

International Law does not grant sub-state entities a general right to secede from their parent states, nor does it prohibit secession.¹⁷⁵ Exceptions to this supposed neutrality arise from the international legal principles of territorial integrity and self-determination. Defining these exceptions is difficult, however, because territorial integrity and self-determination are legally ambiguous terms.¹⁷⁶ For instance, some scholars argue that territorial integrity merely safeguards the inviolability of international borders but does not regulate an internal affair such as secession. Others claim that territorial integrity prohibits secession because secession dismembers the territory of the state. The principle of self-determination similarly lends itself to restrictive or expansive interpretations. Some argue that self-determination only allows for the creation of new states in the context of decolonization. Many other scholars assert that the right of self-determination legally entitles peoples subject to extreme persecution to remedy their situation through secession.¹⁷⁷

As noted earlier, since the recognition of states is as much a legal as political matter, not all state-like entities enjoy recognition.¹⁷⁸ In Africa, in particular, the principle of the sanctity of the post-colonial borders originally adopted OAU, and since upheld by its successor organisation (AU) opposes secession and the formation of new states. From the perspective of existing government, this principle helps prevent large-scale instability due to the contested nature of most of Africa's state borders.¹⁷⁹ The complicated nature of international recognition and the relative lack of resources and the centralisation of the economy in many

¹⁷³ Jhazbhay (n 134 above) 80.

¹⁷⁴ Dupont (n 21 above) 5.

¹⁷⁵ The Right to Secede under International Law (2011) 35 *Journal of International Service Fall* <http://www.somalilandlaw.com> (accessed at 27 February 2012).

¹⁷⁶ As above, 35.

¹⁷⁷ As above, 35.

¹⁷⁸ Hoehne (n 116 above) 310.

¹⁷⁹ As above,310.

African states also prevent local elites into the continent from pursuing secessionist politics. Instead they compete for the resources of the existing state.¹⁸⁰

In some cases, the gap that results between the empirical reality of state-like entities and the politics of non-recognition is filled by the concept of the *de facto* states.¹⁸¹ According to Scott Pegg's definition, *de facto* states:

Feature long term, effective and popularly supported organised political leadership that provide government services to a given population in a defined territorial area. They seek international recognition and view themselves as capable of meeting the obligation of sovereign statehood. They are, however, unable to secure widespread juridical recognition (*de jure*) and therefore function outside the boundaries of international legitimacy.¹⁸²

Assumption in this point shows that the Republic of Somaliland which seceded from collapsing Somalia in May 1991, still lacks international recognition, but fulfils most criteria of this definition of a *de facto* state.¹⁸³ Interestingly enough, and in contrast to all other cases of secession in Africa, as stated above Somaliland's existence derives from the collapse of the 'parent state' of Somalia.¹⁸⁴ This particular secession from a parent state is closely related to the ongoing problems that the country faces regarding the recognition of its statehood.¹⁸⁵

The Somaliland government also adopting the declaratory view evidently anticipated that its *de facto* statehood will eventually translate into *de jure* recognition.¹⁸⁶ It is obvious that Somaliland has governed its self for the last 20 years and already enjoys a *de facto* recognition among nations around the world.

2.6.1 Somaliland as *De Facto* State

States as well as international or national courts may alternatively assume that Somaliland qualifies as a sovereign State, insofar as it is endowed with sufficient internal and external *effectivité*, or even by virtue of the application of any other legal reasoning.¹⁸⁷ If they also

¹⁸⁰ As above, 310.

¹⁸¹ As above.

¹⁸² As above, 310.

¹⁸³ As above.

¹⁸⁴ As above, 310.

¹⁸⁵ As above, 310.

¹⁸⁶ ICG report (n 26 above) 12.

¹⁸⁷ Dupont (n 21 above) 13.

assume (as previously mentioned) that Somaliland is a case of secession.¹⁸⁸ Secession implies continuation of Somalia. Secession of territory from an existing state does not affect the continuity of the latter state, even though its territorial dimensions and population have been diminished. Its international rights and obligations remain intact.¹⁸⁹ As Brownlie notes that ‘the term “continuity” of States is not employed with any precision and may be used to preface a diversity of legal problems. For example, alterations of territory as such do not affect the identity of a state.’¹⁹⁰ But the break-up of a federation into its constituent parts is fundamentally more than a mere change of territory. In view of the imprecision in the concept, it is difficult to do anything other than to treat each case on its individual merits.¹⁹¹ So, Somaliland’s case would thus be considered successor state to Somalia as a new independent state. While Somaliland’s secession conforms with limiting principle of *uti possidetis*.

In the following sections, assuming alternatively that Somaliland is a *de facto* entity and a sovereign State, the study will limit to the examination of some consequences of these qualifications in the field of foreign investment in Somaliland, i.e. How investors may deal with such case and to be a member vigorously international investment institutions, and the effectiveness of Somaliland investment related international commitments.¹⁹² But it is necessary to bear in mind that many other issues related to international trade and investment are dependent upon the solution of the problem of qualification of Somaliland’s Legal status, e.g. whether Somaliland is to be considered as a foreign State’ for particular legal purposes in judicial proceedings.¹⁹³ In other respects, the answer to the question of the status of Somaliland may need to be nuanced.¹⁹⁴

2.7 Concluding Remarks

In summary, this chapter has highlighted the fact that the concept of statehood is a controversial subject at International Law level. There is no consensus among scholars as to

¹⁸⁸ As above.

¹⁸⁹ As above, 13.

¹⁹⁰ R Rich ‘Recognition of States: the Collapse of Yugoslavia and the Soviet Union’ Symposium: recent developments in the practice of state recognition from <http://ejil.org/pdfs/4/1/1207.pdf>. (accessed 18 April 2012).

¹⁹¹ As above above,

¹⁹² Dupont (n 21 above) 14.

¹⁹³ As above, 14.

¹⁹⁴ As above.

what criteria should a state meet in order for it to graduate to the status of statehood. The criteria for statehood set under the Montevideo Convention are not conclusive since they are also subject to criticism. The study specifically highlighted the fact that Somaliland's non-recognition by the international community is an example of the complex nature of the criteria for statehood. Somaliland fulfilled the entire requirements set under the Montevideo Convention but still battling for a legal status at international level. It was noted, that Somaliland's creation conforms to those norms; it satisfies the four Montevideo Convention criteria of statehood; it gained its independence through succession. While the case of Somaliland is complicated by the fact that it seceded from a collapsing parent state Somalia,¹⁹⁵ while Somaliland and Somalia merged voluntarily. The chapter highlighted that Somaliland's Secession conforms to limiting principle of *uti possidetis*. However, the legal question relating to the non-recognition of Somaliland is primarily based on the assumption that the case of Somaliland is about secession. It was noted, the validity of this claim depends on the way International Law regulates secession. State succession has indeed been described as one of the most complex issues of International Law¹⁹⁶ because does not grant sub-state entities a general right to secede from their parent states, nor does it prohibit secession.

The chapter has observed, that the controversy on the principle of recognition in International Law comes from the facts that its not only legal principles that matter in recognition of statehood but other factors such as political, economic and self interest of other states are featured in and therefore International Law is becoming increasingly uncertain and not a conclusive factor in recognition of statehood. The chapter further noted that, the Somaliland's *de facto* state's position under International Law is may indeed offer some positive benefits to international society.

This chapter has outlined, The complexity of International Law relating legal personality resulting that Taiwan not recognized as a state and still part of China internationally but craft undiplomatic relationship among some countries and concluded BITs. It was noted, that this situation creates a lot of attention in public International Lawyers while international investment regime relating Public International Law lacks a comparable conceptual and doctrinal clarity. However, the context of the state contracts does not have any international legal arrangement between the Host States and Multinational Companies and it is difficult to

¹⁹⁵ Hoehne(note 168 above) 335.

¹⁹⁶ Dupont (n 21 above) 5.

presume the international personality of private foreign individuals companies. Ultimately, with regard the complexity of the above issues, the effectiveness of Somaliland in the field of Foreign Investment depends on the question relating the legal status of Somaliland in International Law.

CHAPTER THREE

LEGAL STATUS OF SOMALILAND UNDER INTERNATIONAL LAW

3.1 Introduction

Somaliland is an African success story,¹⁹⁷ largely unknown in the World, because international community segregated Somaliland which has many of the empirical attributes of a state. In reality has no legal personality or representation in international fora,¹⁹⁸ while Somalia despite the absence of effective government since 1991 continued to be accorded de jure sovereignty, with the Transitional National Government TNG and Transitional Federal Government TFG purporting to represent all the people of Somalia in a number of international bodies.¹⁹⁹

On 18 May 2012, Somaliland marked 21 years of independence. Though stable and functioning democracy, Somaliland has not been recognised by the international community.²⁰⁰ Instead it is still in anarchy and is regarded as a failed state.²⁰¹ This situation creates a source of great frustration among Somalilanders. The head of the *English-language Republican Newspaper* says: 'It keeps people out. It keeps the state fragile. It keeps investors out. It shuts the door on international monetary organisations. It limits the progress of the country, trade and travel. It keeps us an isolated island.'²⁰²

This chapter continues to explore the historical and legal basis for Somaliland's claim to be recognised as an independent state and explain consequences of diplomatic isolation in relation to investment. This chapter will also analyse the refutation of the objections to Somaliland's recognition. Finally, will draw some light on the socio-economic environment of Somaliland.

¹⁹⁷ F Henwood 'Contribution to the Case for Somaliland Recognition' (December 2006)1 from <http://www.hollerafrica.com/showArticle.php> (accessed 20 March 2012).

¹⁹⁸ Omar (n 88 above) 19.

¹⁹⁹ As above.

²⁰⁰ As above, 19.

²⁰¹ As above 19.

²⁰² See Brethurst Foundation Report '*African Game Changer? The Consequence of Somaliland's International Recognition*' (June 2011) from http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commissioned_Reports/BD-1105_Consequences-of-Somalilands-International-Recognition.pdf (accessed 14 February 2012).

3.2 Historical Background

Somaliland comprises the territory, boundaries and people of the former British Somaliland Protectorate, from the shores of the Gulf of Aden; Somaliland extends southwards to the Somali National Regional State of Ethiopia, bounded by Djibouti to the west and Somalia (Puntland) to the east.²⁰³ Within these borders, Somaliland's territory covers an area of 137,600 square kilometres, with a northern littoral stretch of 850 kilometres.²⁰⁴ Its population is estimated at 3.5 Million.²⁰⁵ The inhabitants of these zones are ethnic Somalis, united by race, language, religion (Sunni Islam) and culture, which they share with the Somali inhabitants of neighbouring states.²⁰⁶

The Republic of Somaliland Ex- British Protectorate of Somaliland gained its independence on 26 June 1960, five days later on 1st July 1960, the newly born state of Somaliland united with the Ex-Italian Trustee Territory of Somalia as the first step towards a greater union of all Somali territories, namely the French Somaliland (now known as the Republic of Djibouti), the western Somali Territory of Ethiopia and the Northern Frontier District of Kenya (NFD),²⁰⁷ a dream which later became impossible.

The Act of Union and the proclamation of the Somali Republic were, however, not formally signed by the parties involved. Prior to unification, the Somalia and Somaliland legislatures had approved two separate Acts of Union.²⁰⁸ There was considerable disagreement over what the Act should contain, and the new National Assembly in Mogadishu approved it retrospectively. The new constitution, based upon the supposed Act of Union, received much criticism in the former British Somaliland, but any discontent was drowned by euphoria for unification.²⁰⁹

²⁰³ Somaliland Academy for Peace and Development (SAPD) Self Portrait Somaliland Rebuilding from the Ruins (December 1999) 10 from <http://ww.somali-jna.org/downloads/SelfPortrait24.doc> (accessed 2 March 2011)

²⁰⁴ As above, 10.

²⁰⁵ UN 'Statistics' (25 March 2008) from <http://www.unpo.org/members/7916> (accessed 17 March 2012)

²⁰⁶ SAPD (n 165 above) 10

²⁰⁷ see a comprehensive historical background IM Lewis *A Modern History of the Somali, Nation and State in the Horn of Africa*,

4th Edition, Oxford: James Currey (2002).

²⁰⁸ Omar (n 88 above) 21.

²⁰⁹ As above, 21.

Initially, there was great hope that an independent Somali republic would forge a peaceful, United Somali culture, but these illusions of harmony soon evaporated.²¹⁰ While Mogadishu became the country's capital, socio-economic development was focussed on the Somalia and all key positions in the government and military were given to southern Somalis, and so Somaliland (the north) found itself in political and economic isolation.²¹¹

On 21st October 1969 when the dictator Siyaad Barre came to power, the condition became even worse, the people of Somaliland suffered from torture, rape, plunder, clan discrimination, illegal detentions, genocide etc. This painful situation continued until the fall of Siyaad Barre regime in January 1991.²¹²

The Dictatorial Said Barre Regime was overthrown in 1991 and Somalia was pitched into a state of anarchy.²¹³ Twenty years later, all attempts to re-establish central government have failed despite a UN peace keeping mission, UNOSOM II, which was established by UN Security Council Resolution 814 in 1993, and more recently the African Union Mission in Somalia (AMISOM), approved by the AU in January 2007 and endorsed the following month by UN Security Council Resolution 1744.²¹⁴

On 18 may 1991 the elders, clan leaders and the intellectuals of Somaliland gathered in Burao the second capital of Somaliland where a meeting was held to discuss the future of the country after the dictator Siyaad Barre has been ousted.²¹⁵ After weeks of debates, intensive discussions and listening to different opinions of the participants, the representatives of all Somaliland clans reached their final agreement and declared the independence of Somaliland from the rest of Somalia and regaining their sovereignty after living under the illegal union for a period of 31 years. This was followed by another meeting held in Borama on early 1993, the previous resolutions were re-approved, the late president Mohamed Ibrahim Egal was elected, and a parliament consisting of two houses namely the House Of Elders (HoE) and the House of Representatives (HoR) where nominated the transitional charter was also approved therein, and finally the government ministers and institutions were established.

²¹⁰ As above.

²¹¹ As above, 21.

²¹² Lewis (n 207 above)

²¹³ Omar (n 88 above) 22.

²¹⁴ As above.

²¹⁵ Lewis (n 207 above).

This is not the place to discuss the long, difficult but ultimately successful process through which Somaliland progressed in order to achieve internal peace and stability and establish a democracy.²¹⁶ However, it is worth noting that on 31 May 2001, 97.9 percent of Somaliland population voted in favour of a new constitution, in a referendum endorsed by international observers as free and fair.²¹⁷ As a gauge of support for the newly independent Somaliland and of the population's desire for self-determination, this result demonstrates an overwhelming majority is in favour of independence. Moreover, local elections took place in 2002, presidential elections in 2003 and 2010, and parliamentary election in 2005.²¹⁸

This anomaly of a country, Somaliland, is unrecognized by any other country in the world, even though the World Bank's chief economist for Africa touts it as a 'success story' and the World Bank itself doesn't formally recognize it.²¹⁹ Somaliland's story is all the more astonishing given that it is officially part of Somalia, archetypal failed state.²²⁰

3.3 The Non- Recognition of Somaliland by International Community

After Somaliland reclaimed its independence on May 1991, despite its many achievements, it has continuously suffered an image deficit due to the shadow of Somalia, a country that only exists on paper.²²¹ The Somaliland government has been stepping up the recognition campaign but without success among fellow African countries. A number of arguments have been advanced to rebut Somaliland's quest for recognition. One of the arguments holds that recognition would set a bad precedent in a region where weakly cohesive states struggle to hold together in the face of multiple secessionist claims from different ethnic groups. The African Union is even more worried that accepting Somaliland's request would open a Pandora's Box of secessionist claims across the entire African continent. Furthermore that there are lots of centrifugal forces around Africa which could use the recognition of Somaliland as a stepping stone to claim recognition, thus standing against the African Union

²¹⁶ Omar (n 88 above). 22

²¹⁷ As above.

²¹⁸ As above.

²¹⁹ L Solomon 'British traditions boost the de facto state of Somaliland' (25 May 2012) *Somalilandpress* from <http://somalilandpress.com/lawrence-solomon-capitalist-haven-29183> (accessed 26 May 2012).

²²⁰ As above.

²²¹ For more details on Somaliland history see

<http://www.tvsomalilandeuropa.net/?page=newsReadDetails&Detail/=699> (accessed 14 March 2011).

principle of taking colonial borders as inviolable *uti possidetis*,²²² a doctrine which African states have a sacred obligation to uphold.²²³

Ironically, in accordance AU's principle of preserving the borders bequeathed by former colonisers, Somaliland has an undeniable claim to statehood: when it obtained independence from British colonial rule on 26 June 1960, Somaliland was recognised as a sovereign state not only by the United Nations but also by more than thirty countries.²²⁴ After that, Somaliland Voluntarily chose to united with Southern Somalia (Mogadishu). The Validity of that Act of Union is anyway unclear.²²⁵ In June 1960, representatives from Somaliland and Somalia each signed different Acts of Union, and therefore agreed to different terms of unification; the official Act of Union was passed retrospectively in January 1961 by the new national assembly and in a referendum on the new of the Somali State, held in June 1961, an extremely low turnout in Somaliland (less than one sixth of the population), and an overwhelming rejection of the document by those who voted, demonstrated discontent with the union.²²⁶

However, the 1960 unification of Somalia and Somaliland failed to meet domestic or international legal standards for treaty formation, and the Act of Union falls short of the Vienna Convention's²²⁷ legal requirements for a valid international treaty. The union has essentially been secured by recognition alone.²²⁸

The problem and divisions confronting the union from the onset, the marginalisation of Somaliland people, the destruction of Somaliland by the dictatorial regime of Siad Barre, the popular uprisings by the people of Somaliland, and the all-community conferences which approved the decision to withdraw from the union on 18 May 1991, are all well known and

²²² Somaliland's independence does not violate the principle of *uti possidetis*. In 1964, the Organisation of African Unity (OAU) resolved that the principle of *uti possidetis* that former colonial borders should be maintained upon independence should be adhered to in the interests of stability of borders. The principle is also enshrined in the Constitutive Act of the African Union (AU). Somaliland's independence therefore restores the colonial borders of the former British protectorate of Somaliland.

²²³ M Urdoh 'Somaliland Political Analysis' from <http://www.18may.org> (accessed 15-03-2010).

²²⁴ S Aboa-Bradwell 'An Unsung African Marvel: The Case for Somaliland's Recognition' in JM Jama *Somaliland: The Way Forward*(2011) 34.

²²⁵ Omar (n 88 above) 24.

²²⁶ As above, 24

²²⁷ Vienna Convention on the Law of Treaties (Vienna Convention) (1969).

²²⁸ Omar (n 88 above) 24.

equally well documented.²²⁹ This was followed by resolute steps towards democracy culminating in a serious of democratic election.²³⁰

On the other hand, the legal rules that were applied to the separation of fused states into their former territories has precedents in Africa: Egypt and Syria were joined as the United Arab Republic (UAR) from 1958-1961; the failed federation du Mali united Senegal and Mali for just over a year in 1960; the Senegambia Confederation was the result of a brief merging of the now separate countries of Senegal and Gambia; and Eritrea²³¹ separated from Ethiopia in 1991.²³² All of this should also be applicable to Somaliland. Therefore, rejecting Somaliland claim on the ground of secession from the union is baseless argument.²³³

The other argument that the Horn of Africa's territories should be treated differently because of the volatility of this region does not stand up to scrutiny.²³⁴ The international recognition of Eritrea's independence from Ethiopia in 1993 did not lead to an avalanche of applications for statehood recognition from neighbouring territories.²³⁵ So, having entered voluntarily into an unhappy union, Somaliland must also be allowed to withdraw, as others have before.²³⁶

On the basis of that claim, Somaliland submitted its application for recognition as a state to the African Union (AU) in 2005; this organisation has not yet processed the said application.²³⁷ While the AU itself acknowledged that sticking to the ironclad maxim of the inviolability of borders inherited from colonialism would be neither wise nor appropriate in

²²⁹ Aboa-Bradwell (n 224 above) 34.

²³⁰ As above.

²³¹ Jankowski, J. (2002): *Nasser's Egypt, Arab Nationalism, and the United Arab Republic*. Boulder: Lynne Rienner; Kienle E. (1995): *Arab Unity Schemes Revisited: Interest, Identity, and policy in Syria and Egypt*. *International Journal of Middle East Studies*, Vol.27, p.53; Kurtz, D. M. (1970): *Political Integration in Africa: The Mali Federation*. *Journal of Modern African Studies*, Vol.8, Issue 3, p.405; Cutter, C. H (1966): *A Bibliographical Introduction*. *African Studies Bulletin* No.9, p.74; Richmond, E.B. (1993): *Senegambia and the Confederation: History, Expectations, and Disillusions*. *Journal of Third World Studies*, Vol.X, No.1, p.172; and Jacquin-Berdal, D. (2002): *Nationalism and Ethnicity in the Horn of Africa: A Critique of the Ethnic Interpretation* Lewiston: the Edwin Mellen Press, Chapter 3, p.79.

²³² Omar (n 88 above) 23.

²³³ Farah (n 3 above) 45.

²³⁴ Aboa-Bradwell (n 224 above) 36.

²³⁵ As above

²³⁶ AA Mazrui *Africa's Bondage of Boundaries: Can the Shackles be loosened?* Public lecture delivered on the 22 March at Hargeisa University under the chairmanship of the President of the University, Hargeisa, Somaliland (2006).

²³⁷ Aboa-Bradwell (n 224 above) 34.

the case of Somaliland.²³⁸ The report of AU fact finding mission to Somaliland between 30th April and 4th May 2005 states that this territory's 'case should not be linked to the notion of "opening a Pandora's box." As such, the AU should find a special method for dealing with this outstanding case'; and adds, 'the lack of recognition ties the hands of the authorities and people of Somaliland, as they cannot effectively and sustainably transect with the outside to pursue with reconstruction and development goals.'²³⁹

3.4 Somaliland's Non-recognition Ramifications

Non-recognition imposes significant costs on Somaliland.²⁴⁰ For example, under the 1982 UN Convention on the Law of the Sea, a state has special rights to exploit marine resources in an Exclusive Economic Zone (EEZ) up to 200 nautical miles from its coast.²⁴¹ As an unrecognized state, Somaliland is unable to declare an EEZ off its 850km long coast line, and foreign fishing companies can pillage Somaliland fish stocks with impunity. The fishing sector's potential is high, despite its current underdeveloped state.²⁴²

Somaliland is not a signatory of the 1944 Convention on International Civil Aviation (The Chicago Convention); it was the Somali Republic which signed the agreement in June 1964. This makes it harder for Somaliland to regulate the use of its airspace.²⁴³ It is also difficult for Somaliland to negotiate Bilateral Air Services Agreements and collect over-flight fees from Foreign Aircrafts that over fly its territory. Non recognition complicates insurance coverage as foreign vessels wanting to use the port of Berbera must pay higher insurance premiums²⁴⁴ which in turn make it harder to attract Foreign Direct Investment (FDI).²⁴⁵

Non-recognition increases the perception of risk on the part of companies which might do business in Somaliland as it is seen as being part of Somalia, the archetypal failed state,²⁴⁶ the British MP Alun Michael in the House of Parliament explained "As an unrecognized state, it

²³⁸ As above.

²³⁹ As above, 36.

²⁴⁰ Omar (n 88 above) 26.

²⁴¹ See Article 65 & 57 of the Convention on the Law of the Sea

²⁴² M Agaloglou 'Somaliland: past, Present and Future. (2011) Think Africa Press Part 10 from <http://thinkafricapress.com/somalia/somaliland-past-present-and-future-part-10> (accessed 23 March 2012).

²⁴³ Article 1 of the Chicago Convention: 'The contracting States recognize that every states has complete and exclusive sovereignty over the airspace above its territory'

²⁴⁴ M Bradbury *Becoming Somaliland*. Oxford: James Currey (2008) 154.

²⁴⁵ Omar (n 140 above) 26.

²⁴⁶ As above, 27.

is isolated. Despite its extraordinary achievements in stability and democracy, international donors cannot deal directly with its government, and foreign investors face uncertainty about whether contracts the basis of secure business can be enforced.²⁴⁷

Somaliland lacks a reliable source of protection for foreign investors in post-conflict economies are ‘political risk insurance.’ This includes government-sponsored foreign investment programs provided by investor’s home states such as the Overseas Private Investment Corporation (OPIC) and also Multilateral Investment Guarantee Agency (MIGA) which is part of the World Bank Group.²⁴⁸ MIGA can serve as an important role in encouraging post-war FDI through its investment guarantee as seen in several countries includes Mozambique and Bosnia Herzegovina.²⁴⁹ MIGA also makes an effort to promote investment flows in other ways.²⁵⁰ It provides information on investment opportunities in developing member countries, ‘with a view to improving the environment for foreign investment flows to such countries.’ MIGA may remove impediments to investment in developing member countries and may also coordinate with other agencies such as IMF, to promote foreign investment. MIGA also encourage the settlement of investment disputes between investors and host countries.²⁵¹ However, Somaliland’s absence of international investment community absolutely hinders the confidence of investors and curbs capital flight.

Arguably, the non-recognition of Somaliland is by implication hindrance to economic upliftment of the world in general. The geopolitical position of Somaliland is such a one that attracts both regional and international interests.²⁵² The reason is, Somaliland locates in one of the most strategic regions in the world; the Gulf of Aden. The Gulf of Aden links the three major continents of the world; Asia, Africa and Europe.²⁵³ The Gulf of Aden is strategic primarily for trade reasons because it is the biggest trade route in the world through which 16,000 commercial vessels cruise yearly.²⁵⁴ In addition, most countries in the Gulf region are

²⁴⁷ Solomon (n 219 above).

²⁴⁸ RM Khachaturian Foreign Investment in a post conflict Environment (2009) 341-358 *Journal of World Investment and Trade* 10 (3).

²⁴⁹ As above, 341-358.

²⁵⁰ As above, 341-358.

²⁵¹ As above,, 341-358.

²⁵² Farah (n 3 above) 48

²⁵³ The Canal--- links the Mediterranean Sea to the red sea through the Gulf of Aden and accordingly creates the connection between three continents.

²⁵⁴ R Beckman ‘Somali Piracy- Is international Law Part of the Problem or Part of the Solution?’ (2009) at <http://www.rsis.edu.sg/research/PDF/Beckman%20Somali%20Piracy%20RSIS%2023%20Feb%202009.pdf> (accessed 10 May 2009)

rich with oil and thus they need to channel their exports through the Gulf of Aden to the outside world.²⁵⁵

Ultimately, Somaliland's international isolation from the international system deters foreign investments in the country and investing in Somaliland is very tough and needs to know about a lot of critical situation that this country faced for the last two decades in socio-economic environment. Tellingly, the impact of FDI on economic growth and development cannot be derived from the details of corporate strategy but must be viewed in the context of existing domestic economic structures, capacities and strategies.²⁵⁶

3.5 Close look at Somaliland's Economy

Somaliland is a post conflict country, and its major sectors are still developing.²⁵⁷ Almost the entire country has been re-established after a brutal civil war which brought the country into its knees. All sectors of the country were affected including: education, health, infrastructure, industry, and development sectors. These were ruined during the wars. Not only were the physical items ruined but also the technicians, the elites, and much of the know-how of locally developed experts were lost.²⁵⁸ As Somaliland's Ministry of National Planning and Coordination makes clear in its 2005 report on the 'Somaliland Economic Overview',²⁵⁹ the country, as a result of 'the civil war and severe loss of all its professionals at all levels through brain drain.'²⁶⁰

After 1991, the Somaliland's economy has undergone important structural changes since the war. In a deregulated free market economy, the private business sector has grown rapidly. The dissolution of state monopolies and rigid economic controls, together with private sector expansion, has significantly contributed to the growth of Somaliland's economy in the aftermath of war, providing employment opportunities and capital investment for the process

²⁵⁵ Farah (n 4 above) 48.

²⁵⁶ PK Namizinga Integrated Framework Policy Analysis Working Paper Series No.6 Impact of Foreign Direct Investment on Development: Policy Challenges for Malawi (April 2007) from www.trade.gov.mw/6%20Kazembe_Namazinga%20- (Accessed 4 April 2012)

²⁵⁷ Watershed Legal Services Somaliland Energy Law: Why Somaliland Needs A national Legal Framework. (January 2012) Accessed from <http://watershedlegal.com/entry/somaliland-energy-law> (accessed 20 March 2012).

²⁵⁸ n 194 above

²⁵⁹ Ministry of National Planning and Coordination, (January 2005) 13.

²⁶⁰ Jhazbhay (n 54 above) 135.

of reconstruction. Trade through Berbera Port has surpassed pre-war levels.²⁶¹ The service sector has experienced rapid growth in the post-war period, with a proliferation of companies providing the latest communication facilities, airlines and financial services. Small enterprises like bakeries, restaurants, convenience stores and office supplies have returned to the marketplaces through whole the country.²⁶²

The livestock sector traditionally comprises about 60-65% of Somaliland's GDP.²⁶³ Livestock exports have played a major role in the economy as a source of employment, income, foreign exchange, government revenues, and food imports.²⁶⁴ But its dependency on single resource/single export market makes the economy vulnerable to external forces, as the Saudi ban on Somali livestock in mid September 2000 caused by fears of the spread of Rift Valley Fever.²⁶⁵ Prior to the current import ban, Somaliland's export markets had achieved unprecedented growth: 2.8 million head valued at US\$120 million were exported from Berbera port in 1997 represents the largest number of animals exported by a single port in the world that year. Between September 2000 and November 2002, however, less than 500,000 head were exported. Extrapolating average exports from 1995-1997, this represents more than 5 million head in lost exports and several hundred million dollars of foreign exchange not earned.²⁶⁶

So that, there have been two noticeable trends in markets and prices during the current import ban: a dramatic depreciation in the Somaliland shilling, and local-currency inflation of imported commodities.²⁶⁷ The dollar exchange rate of the Somaliland shilling dropped from SSh 3,487 at the time when the ban was imposed in September 2000 to SSh 6,200 in December 2002.²⁶⁸ The prices of imported goods such as petrol, rice, sugar, and wheat flour, while remaining steady in dollar terms, have risen considerably in the local currency due to depreciation, adversely affecting the purchasing power of Somaliland pastoralists.²⁶⁹

²⁶¹ United Nations Development Program (UNDP) 'Analysis of Macro-Economic Situation in Somaliland (2004) report from <http://www.mbali.info/doc122.htm> (Accessed 27 April 2012).

²⁶² n 198 above,

²⁶³ USAID The Socio-economic Implications of the Livestock Ban in Somaliland (2002) from http://pdf.usaid.gov/pdf_docs/PNADJ083.pdf (Accessed 07 May 2012).

²⁶⁴ As above.

²⁶⁵ UNDP (n 261 above)

²⁶⁶ EUAID (n 263 Above)

²⁶⁷ As above.

²⁶⁸ As above.

²⁶⁹ As above.

On the other hand, the impact of the ban has been dramatic.²⁷⁰ The ban affected all sectors of society, both urban and rural, and all economic activities. Herders, traders, service providers, petty traders, local and central government all lost income.²⁷¹

However, Somaliland's economy is what is called cash economy or 'dollarized economy,' which means their economy is dependent on maintaining the exchange rate of both the local currency and the US Dollar.²⁷² The Somaliland currency which is called (Somaliland shilling 'SISh') is not an internationally recognised currency and currently has no official exchange rate.²⁷³

Since Somaliland is unrecognised, international aid donors have found it difficult to provide aid while very little assistance channelled through Multilateral Agencies.²⁷⁴ As a result, the government relies mainly upon tax receipts mainly through Berbera port which is a trade hub of landlocked Ethiopia and remittances from the large Somali diaspora contribute immensely to Somaliland's economy.²⁷⁵

3.5.1 Somaliland Private Sector

Somaliland private sector provides most of the basic services and controls the economic and social services and infrastructure provision, including telecommunication services, energy (petroleum and electricity), hotels, construction companies, schools, clinics, pharmacies, transports, etc. For instance, Telecommunication services are 100% private, while about 96% of electricity and 80% of water are provided by private companies who were started to fill in the vacuum left by the collapse of the Somali state in 1991.²⁷⁶

One of the major changes in Somaliland over the past decade has been the phenomenal growth of the private sector.²⁷⁷ Indeed, Somaliland's private sector has experienced rapid growth that is more in line with the fast growing economies of Asia (China and India) during

²⁷⁰ As above.

²⁷¹ As above.

²⁷² DA Hassan Somaliland: Prospects for Economic Development and Future Priorities of Investment (30 December 2011) from <http://oodweynenews.com/articles/132313-somaliland-prospects-for-economic-development-and-future-priorities-for-investment-phd.html> (accessed 15 March 2012) .

²⁷³ Wikipedia Somaliland (13 April 2012) from <http://en.wikipedia.org/wiki/Somaliland#Economy> (accessed 15 April 2012).

²⁷⁴ Omar (n 88 above) 27.

²⁷⁵ As above.

²⁷⁶ Hassan (n 272 above) para 5.

²⁷⁷ As above, para 6.

the past 10 years.²⁷⁸ Although there are no reliable statistical figures showing the scale of economic growth, it is estimated that in Somaliland, the economy has been growing between 8% and 11% for the past 5 years and had not been affected by the downturn in the global economy. Some of the main businesses that have been growing most include; remittances, telecommunications and Import-Export companies as well as the service sector like hotels and restaurants and small industries.²⁷⁹

Although this growth has been closely linked to the processes of globalization another major factor is the spread of many Somalilanders in the Diaspora, as refugees, and the staggering amount of money, estimated between US \$650 and \$800 million that they remit annually back to the country. In the context of weak and often ineffectual public sector, the private sector has been playing an instrumental role in providing social services and shaping economic development and recovery.²⁸⁰ As market economy has replaced the centrally planned economy, development had become market-driven rather than government-led. The absence of restrictive government regulations and controls has tended to encourage competition and entrepreneurship. On the other hand, and somewhat paradoxically, lack of government regulations has allowed a handful of private companies to dominate essential sectors like food imports and telecommunications. Nevertheless, in Somaliland, the successes of the private sector could not be underestimated, and the future investment and growth prospects for the whole economy appear to be very promising, while there are considerable challenges.²⁸¹

However, absence of financial institutions such as commercial banks and insurances and the poor condition of Somaliland's economic infrastructures have hampered the establishment of a conducive business environment.²⁸² Local enterprises have no access to venture capital or credit-either from financial institutions, or foreign direct investment.²⁸³

²⁷⁸ Hassan (n 272 above) para 7.

²⁷⁹ As above, para 7.

²⁸⁰ As above, para 7.

²⁸¹ As above, para 8.

²⁸² See UNDP re (n 261 Above)

²⁸³ As above.

3.5.2 Somaliland Financial Sector

It is widely acknowledged that countries who tend to experience financial turmoil and collapse of their banking sector, as a result of prolonged civil conflict, find it very difficult to restart their financial sectors even long after the conflict had ended.²⁸⁴ This is so because the collapse of the central authority would mean that the international and domestic payments cease to function as existing financial institutions stop operating due to the chaos that usually follows the destruction of state institutions.²⁸⁵ The country has also been suspended from accessing global financial markets in domestic as well as international financial markets. In addition, past circulation of counterfeit currency (by individuals) has led to inflation and hyperinflation and an increasingly dollarized system within the Somali economy.²⁸⁶ Somaliland has gone through this process after the disintegration of the Somali state in 1991.²⁸⁷

The situation in Somaliland provides a more detailed view of the incipient nature of financial services in Somalia. The Bank of Somaliland, currently, operates itself under a Somaliland 1994 “Constitutive Law” while the parliament passed a new amendment of this bill on 23 March 2012.²⁸⁸ However, the Bank of Somaliland is not in a position to perform key central bank functions, as it has not developed the typical instruments necessary to conduct monetary policies.²⁸⁹ The Bank is to a large extent involved in elementary treasury and government payment functions and at the same time offers rudimentary commercial banking activities, mainly offering national remittance services through its network of 14 branches and savings and current accounts to a limited number of clients, especially government bodies.²⁹⁰ So far, no legal framework for commercial banks or Islamic banks has been created by the Somaliland Government, and no banking supervision function and regulatory know-how has been built-up within the Bank of Somaliland.²⁹¹

²⁸⁴ Hassan (n 272above) para 10.

²⁸⁵ As above, para 10.

²⁸⁶ Draft Discussion Paper ‘Banking, remittances and the role of the central bank in promoting financial and private sector’ (21-23 May 2010) 1 Istanbul Conference on Somalia from <http://www.somalitalk.com/2010/may/istambul/banking.pdf> (accessed 7 April 2012)

²⁸⁷ Hassan (n 272 above) para 10.

²⁸⁸ Draft Discussion paper (n 286 above)

²⁸⁹ As above.

²⁹⁰ As above.

²⁹¹ Hassan (n 272 Above).

In this context, the Somaliland financial sector remains underdeveloped, informal and unsupervised, with limited access to credit and savings, and no protection for consumers and financial institutions.²⁹² Apart from the limited banking services offered by the Central Bank, the main actors in financial sector are remittances companies which is called “Hawalla”,²⁹³ It has been the informal financial sector that has led the economic recovery of Somaliland and this has been largely organized around the remittance or money transfer companies and their ability to transfer funds into and outside the country through informal networks. These service providers, however, do not provide the full range of financial services required for dynamic private sector-led recovery and growth. Consequently, private sector-led growth remains highly constrained unless a functioning banking system is developed to provide financial resources and other supporting banking services to underpin these investments.²⁹⁴

Foreign investment in Somaliland can have a very strong impact on rebuilding the country, not only by bringing much need capital, technology and skills, but also by serving as ‘a visible manifestation of hope’²⁹⁵ for a better future for Somaliland citizens.

3.6 Concluding Remarks

This chapter has highlighted that the Somaliland’s efforts to achieve international recognition as an independent state have been largely unsuccessful. This is because such recognition is essentially a political act and not a legal one.²⁹⁶ The study specifically highlighted that the Republic of Somaliland remains in limbo.²⁹⁷ It acts as a state, maintains the security of its borders as a state, provides essential goods and services and represents an oasis of order and good government.²⁹⁸ It was noted, non-recognition of Somaliland ties the hands of the people of Somaliland, as they cannot effectively and sustainably transact with the outside to pursue her reconstruction and development goals.²⁹⁹

Strangely, this chapter has shown that Somaliland’s application for state recognition to the AU in 2005 is still pending. One of the major arguments of AU against Somaliland

²⁹² As above.

²⁹³ Discussion paper (n 286 above).

²⁹⁴ Hassan (n 272 above) para 10.

²⁹⁵ Khachaturian et al (n 248 above) 341-358.

²⁹⁶ Omar (n 140 above) 26.

²⁹⁷ As above.

²⁹⁸ As above.

²⁹⁹ Aboa-Bradwell (n 224 above) 36.

recognition is the fear of opening a Pandora's Box, while the AU Fact Finding Mission to Somaliland clearly stated that 'these territories case should not be linked to the notion of 'opening a Pandora's box' As such the AU should find a special method for dealing with this outstanding case.' However, the obvious question is why, almost Six years later, the AU has not yet acted upon these bold and judicious recommendations.³⁰⁰ Overall, Somaliland case remains unsettled merely for political considerations.³⁰¹

This chapter further noted that, Somaliland lacks sound financial institutions and healthy local financial markets. In particular, can adversely limit the capacity for an economy to take advantage of such potential FDI benefits.³⁰² It was noted, Somaliland cannot respond to these challenges effectively. This is because Somaliland is under a siege imposed upon it by the lack of recognition.³⁰³

³⁰⁰ As above

³⁰¹ Farah (n 3 above).

³⁰² AE Ezeoha & N Cattaneo 'FDI Flows to Sub-Saharan Africa: The Impact of Finance, Institution and Natural Resource Endowment' (2011) 5 from www.csae.ox.ac.uk/.../294-Ezeoha.pdf (Accessed 4 April 2012).

³⁰³ Farah (n 4 above) 53.

CHAPER FOUR

THE IMPACT OF NON-RECOGNITION OF SOMALILAND ON FOREIGN INVESTMENT

4.1 Introduction

The above peculiarities highlighted that Somaliland's efforts to achieve international recognition as an independent state have been largely unsuccessful. This is because such recognition is essentially a political act and not a legal one.³⁰⁴ The advancement of Somaliland's case is dependent upon the will of international community³⁰⁵ and is clearly beyond the scope of this study. However; it's unquestionable that the lack of recognition has a huge negative impact upon the people of Somaliland. This chapter examines and interrogates the impact of non-recognition of Somaliland's overseas investments. The study will also highlight the potential determinants of the Multinational Corporations (MNC) investments with different regions with a focus on Somaliland. Finally, will provide an overview of investment law in Somaliland.

4.2 Inflow of Foreign Investment

In recent times, developing countries see the role of Foreign Direct Investment (mostly referred to as FDI henceforth) as crucial to their development.³⁰⁶ FDI is regarded as an engine of growth as it provides much needed capital for investment, increases competition in the host country industries, and aids local firms to become more productive by adopting more efficient technology or by investing in human or physical capital. FDI contributes to growth in a substantial manner because it is more stable than other forms of capital flows.³⁰⁷ The benefits of FDI include serving as a source of capital, generating employment, facilitating access to foreign markets, and generating both technological and efficiency spillovers to local firms.³⁰⁸

However, The importance of FDI is envisioned in the New Partnership for Africa's Development (NEPAD), as it is perceived to be a key resource for the translation NEPAD's

³⁰⁴ Omar (n 88 above) 26.

³⁰⁵ As above.

³⁰⁶ SI Ajayi *FDI and economic development in Africa* (2006)1 from <http://www.afdb.org/fileadmin/uploads/afdb/documents/knowledge/09484246-en-fdi-and-economic-growth.pdf> (accessed 13 April 2012)

³⁰⁷ As above,1.

³⁰⁸ As above,1.

vision of growth and development into reality.³⁰⁹ This is because Africa, like many other developing regions of the world, needs a substantial inflow of external resources in order to fill the saving and foreign exchange gaps and leapfrog itself to sustainable growth levels in order to eliminate its current pervasive poverty.³¹⁰

NEPAD also recognizes the potential and benefits of globalization and states that globalization has resulted in ‘opportunities for lifting millions of people out of poverty’ except that Africa has not reaped these benefits due to lack of capacity ‘to compete effectively’ and ‘the absence of fair and just global rules’ through which the strong have been able to ‘advance their interests to the detriment of the weak, especially in the areas of trade, finance and technology.’³¹¹ Quite importantly for the kind of remedial action plan that NEPAD architects map out later in the document, it is stated that additional reasons for Africa’s inability to take advantage of globalization include “Structural Impediment,” “resource outflows and unfavourable terms of trade.” NEPAD is emphatic that for Africa to lay stake to its “rightful place in the world” a lot rests on its ability to build ‘a strong and competitive economy as the world moves towards greater liberalisation and competition.’³¹²

In effect, the NEPAD’s objective of a strong and competitive African economy and a developed continent should be realized by riding the wave of globalization when it states: “while globalization has increased the cost of Africa’s ability to compete, we hold that the advantages of an effectively managed integration present the best prospects for future economic prosperity and poverty reduction.”³¹³ It exhorts that for Africa to be part of “this new economic revolution and to make a break with its dismal past and be on course in the “new long term vision” of development, the continent will need “massive and heavy investment.”³¹⁴

³⁰⁹ SI Ajayi ‘Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential’ (2006) 12 from http://www.aercafrica.org/documents/books/FDI_papers_booklength_volume.pdf (accessed 10 Jan 2012).

³¹⁰ As above, 1.

³¹¹ V Mosoti ‘The New Partnership for Africa’s Development: Institutional and Legal Challenges of Investment Promotion’ In F Beveridge *Globalization and International Investment* (2005) 416.

³¹² As above, 416.

³¹³ As above above, 416.

³¹⁴ As aboveabove, 416.

The belief that attracting FDI is the key to bridging the resource gap of low-income countries and avoiding further build-up of debt while directly tackling the causes of poverty has been strengthened by the experiences of a small number of fast-growing East Asian newly Industrialized Economies (NIEs), and recently China. Since the Asian crisis, the call for an accelerated pace of opening up to FDI has intensified in the belief that this will bring not only more stable capital inflows but also greater technological know-how, higher-paying jobs, entrepreneurial and workplace skills, and new export opportunities.³¹⁵

Given the importance attached to FDI, Africa must therefore learn how to attract greater volumes of this important potential resource.³¹⁶ There are many studies on the theoretical determinants and a large though inconclusive econometric literature on the determinants of FDI generally. Many studies have emphasized, among others, governance failures, problems of policy credibility, macroeconomic policy failures and poor liberalization policies as deterrents to FDI flows. African countries have in the last decade made considerable efforts to improve their investment climate.³¹⁷ Many governments are liberalizing their FDI regimes because they associate FDI with positive effects for economic development and poverty reduction in their respective countries. The economic performance of the region improved in some cases from the mid 1990s as countries adopted Structural Adjustment Programmes SAP that hinged on pushing down inflation and government expenditures and establishing realistic exchange rates. The expected upsurge in FDI inflow as a result of these improvements is yet to occur.³¹⁸

Too often, potential investors shy away from Africa because of the negative perception of the continent. This conceals the complex diversity of economic performance and the existence of investment opportunities in individual countries. Indeed, some African countries have been able to attract FDI based on their macroeconomic policy framework and the conducive regimes put in place, while others have not.³¹⁹

³¹⁵ Ajayi (n 309 above) 2.

³¹⁶ As above.

³¹⁷ As above, 2.

³¹⁸ As above, 2.

³¹⁹ As above, 2.

However, the vast literature on FDI identifies a number of reasons for firms investing across national boundaries. It is difficult in reality in many countries to isolate the different motives, as one motive may overlap into another.³²⁰ The major motives often identified that have particular relevance to Africa are Natural-resource-seeking Investment, which aims to exploit the natural resource endowments of countries.³²¹ However, recent research shows that the country (Somaliland) has large offshore and onshore oil and natural gas reserves.³²²

Let's assume that the relationship between natural resource endowment and FDI inflow are expected to be positive, since the abundance of such resources tends to motivate foreign firms to be engaged in various sectors.³²³ There is evidence that significant portion of all incoming FDI to Sub-Saharan African fragile countries from 2000 to 2007 went to just five countries: Angola, Chad, Equatorial Guinea, Nigeria and Sudan, all well-endowed with natural resources. Towards this effect, natural resource endowment in this study has been captured by "oil dummy" and "arable land ratio," and both variables are expected to have a direct effect on FDI inflow.³²⁴ For investors interested in natural resources Somaliland is a good investment destination since the country has oil though some commentators have argued that future oil exploration here will depend largely on the international community's recognition of the aspirations of the breakaway state.³²⁵ While some observers feel this could happen by default, since it, at least, functions, while no other part of Somalia works at all.³²⁶

In fact, Somaliland has untapped opportunities in natural resources and the recent geological surveys indicate that Somaliland has an abundant deposits of gemstones, from emerald to aquamarine, ruby and sapphire as well as vast amounts of garnet, quartz and opal as well as lesser-known minerals such as titanite and vesuvianite. In addition to pegmatites, which are the host rocks of emerald and other kinds of beryl such as aquamarine, Somaliland has

³²⁰ Ajayi (n309 above) 2.

³²¹ As above, 2.

³²² MF Hirsi 'Research Guide to the Somaliland Legal System' (Febrary 2009) from http://www.nyulawglobal.org/globalex/somaliland.htm#_1.3_Economy (accessed 20 March 2012)

³²³ AM Khan *State Fragility and FDI in Africa* (2011) 153 from <http://www.eurojournals.com/finance.htm> (accessed 21 March 2012).

³²⁴ As above.

³²⁵ M Kielmas 'Oil Hopes Hinge on North Somalia' (1991) 58 (10) *Petroleum Economist* 19(2).

³²⁶ M Kielmas 'Somaliland: Hopes and hype on the new frontier' (2 April 1993) 20-21 *Middle East Economic Digest*.

metamorphic rocks that hold nodules of ruby and sapphire.³²⁷ There is little understanding of its mineral deposits but villagers in Somaliland use primitive tools to dig out a range of gemstones that they offer for sale to dealers locally.³²⁸ However, bringing in foreign investors to extract this natural resource is often a quick method of marketing channels for Somaliland's mineral resources as well as to generate wealth.³²⁹ Apart from that, the country still trying to recover from the ravages of the war,³³⁰ infrastructure projects are critical to rebuilding the country and can also attract more investors and generate income for the whole Somaliland.³³¹

According to the 'eclectic' theory of FDI, countries that have a "locational advantage" will attract more FDI. Location-specific advantage embodies any characteristic (economic, institutional and political) that makes a country attractive for FDI.³³² Where domestic resources to finance investment are limited, foreign capital inflows are necessary.³³³ Somaliland's strategic position as the gate way of Africa as well as Middle East and close to East African Markets could be another advantage.

So, putting the map of investors in Somaliland needs a lot of efforts as President of Somaliland Ahmed Mohamoud (Silanyo) told Reuters during his last visit to London in February 2011, that the purpose of the Somaliland Development Corporation (SDC) was 'to attract companies and institutions which want to invest in our country.' According to him 'Since we are not a recognised country, insurance is always a difficult problem in Somaliland so if this can help with that, it would be useful.'³³⁴ Energy and Mining Minister, Hussein Abdi Dualeh also said in November in a press conference in London that 'the Northern Enclave (Somaliland) had hydrocarbon potential with geology similar to basins containing 9 billion barrels across the Gulf of Aden'.³³⁵

³²⁷ Somaliaonline 'Thread: Rich Gemstone Potentials Discovered in Somaliland' (18 March 2008) from <http://www.somaliaonline.com/community/showthread.php/29894-Rich-gemstone-potentials-discovered-in-Somaliland> (accessed 10 May 2012).

³²⁸ As above.

³²⁹ Khachaturian et al (n 248 above) 341-358.

³³⁰ Somaliaonline (n 327 above).

³³¹ Khachaturian et al (n 248 above) 341-358.

³³² Namizinga (n 256 Above) 5.

³³³ As above, 5.

³³⁴ Reuters 'Breakaway Somaliland entity targets investors' (24 February 2012) Reuters News from <http://www.reuters.com/article/2012/02/24/somalia-somaliland-investment> (accessed 27 March 2012).

³³⁵ As above.

It is therefore apparent that internationally recognized Somaliland would benefit from stronger bilateral aid flows and increased FDI.³³⁶ This would strengthen Government revenue, which would allow the central administration to deliver better basic services like water supply, education, health care and infrastructure. More FDI would create jobs, improve competition, promote economic diversification and thus contribute to the welfare of Somaliland's people.³³⁷

As indicated above, the Somaliland's recognition it depends the will of international community. But in reality, Somaliland remains in limbo.³³⁸ It acts as a State like Taiwan while some commentator's argue that Taiwan is not a state.³³⁹ Truly, Taiwan admits that it has the capacity to enter into international agreements, and in particular that it's an 'Investment Entity' also it has the capacity to enter into international agreements in the field of foreign investment, and in particular, Bilateral Investment Treaties (BITs).³⁴⁰ Arguably, the same reasoning may well be applied to Somaliland, with a view to separate non-recognition for its consequences and hence avoid the legal vacuum potentially characteristic of de facto entities.³⁴¹

Besides the international state recognition and its consequence, the international community has recognized the critical importance of Transnational Corporations (TNCs) as major actors in the world economy, and in particular, the potential contribution that they can make to the economic well-being of host countries in all regions in the world. However, TNCs play a key role in the world FDI. All countries recognized the TNCs as source of increased capital and technological flow.³⁴² Their decision to invest in host country is important to the host country.³⁴³

It has been observed that FDI contributes to international integration since many foreign firms are well connected globally in terms of access to financial markets, consumer outlets

³³⁶ Omar (n 88 above) 27.

³³⁷ As above.

³³⁸ As above, 26.

³³⁹ Dupont (n 18 above) 14.

³⁴⁰ As above, 14.

³⁴¹ As above, 14.

³⁴² SK Asente 'The Concept of Good Corporate Citizen in International Business' in Beveridge, F *Globalization and International Investment* (2005) 140.

³⁴³ As above 140.

and transportation networks.³⁴⁴ Arguably, in the case of Somaliland, if multinationals invest in the country it would play a very big role in putting the country on the map and would be able to integrate internationally through trade and travel.³⁴⁵

4.3 Multinational Corporation and Their Decision to Invest In a Host Country

The proliferation of Multinational Corporations (hereinafter referred to as MNCs) began 200 years ago, but they were only a part of the foreign investment in different countries in the form of portfolio rather than long term green field or joint venture investments.³⁴⁶ With the increase of globalization, which is both the cause and the effect of internationalization of world trade, MNCs have become dominant players in the global economy.³⁴⁷ The FDI by MNC's has been paid great importance for high economic growth and strong economic performance in many parts of the world.³⁴⁸

The end of the Cold War which led to the liberalization of the developing markets and opening of their economies with the removal of foreign investment barriers, privatization of the state economic enterprises and development of FDI attractive policies, has increased the investment of MNCs, especially in the developing countries. Latin America, Eastern Europe and Asian economies have become predominantly FDI focused first with labour-intensive manufacturing industries and then with market-seeking FDI by 1990's.³⁴⁹ While MNCs are struggling to get an accurate answer for the 'where to invest' question, countries have got into the competition of 'attracting more FDI' to 'become hosts to branch plants of MNCs as well as to small- and medium-sized firms from developed countries' particularly after 1990's.³⁵⁰ FDI not only 'has become by far the single largest component of their net capital inflows' but it also has become critical for these countries in terms of their effects on the human capital of the economies.³⁵¹

³⁴⁴ Namizinga (n 248 above) 20.

³⁴⁵ As above, 20.

³⁴⁶ MF Vardar Factors of Investment Decision of Multinational Corporations the Case of Turkey (11 April 2012) *The Turkish Weekly Journal* from <http://www.turkishweekly.net/article/343/factors-of-investment-decision-for-multinational-corporations-the-case-of-turkey.html> (accessed 17 March

³⁴⁷ As above.

³⁴⁸ As above, para 1.

³⁴⁹ As above, para 7.

³⁵⁰ As above, para 4.

³⁵¹ As above, para 7.

No doubt, that FDI can play an important role in promoting economic growth in post-conflict states.³⁵² The case of Somaliland in light of the idea of being a host country foreign investment can build long-term relationships between investors and the host state. Some types of foreign investment may supplement local growth and development by, among other things: increasing financial resources for development, improving export competitiveness, boosting employment opportunities, improving the skill base of workers, enhancing technological capacity, building infrastructure and playing a role in an economy's integration into the global economic community.³⁵³

In order to obtain the benefits of foreign investment and to attract investors, a host country must assure investors that they can safely invest in the country.³⁵⁴ In post-conflict states, concerns related to physical safety and investment security, combined with a general distrust of post-conflict governments, are among the key considerations for foreign investors.³⁵⁵ While seeking to attract investors, however the host state must be careful to identify areas in which foreign investment would be favourable.³⁵⁶

In overcoming such risks and attracting foreign investors Somaliland Minister of Planning, Dr, Shire, said in a press conference that 'the purpose of Somaliland Development Cooperation (SDC)³⁵⁷ has been set up to facilitate international investment in Somaliland for the benefit of the Somaliland people.³⁵⁸ As a non-recognized State, foreign investors face considerable uncertainty about whether contacts, the basis of secure business, can be enforced or not.³⁵⁹ The SDC circumvents the problem of non-recognition by providing a transparent, accountable and enforceable means by which investors can participate in Somaliland ventures.³⁶⁰

³⁵² Khachaturian et al (n 248 above) 341-358.

³⁵³ As above, 341-358.

³⁵⁴ As above, 341-358.

³⁵⁵ As above, 341-348.

³⁵⁶ As above, 341-358.

³⁵⁷ The Somaliland government and Members of British Parliament this year established a Somaliland Development Corporation to end-run around countries that deny Somaliland the recognition, and investment, it deserves *Somalilandpress*

³⁵⁸ *Somalilandpress* Somaliland: Minister of National Planning Denies Allegations of Embezzlement of Aid Money (12 April 2012) from <http://somalilandpress.com/somaliland-minister-of-national-planning-denies-allegations-of-embezzlement-of-aid-money> (accessed 12 april 2012).

³⁵⁹ As above.

³⁶⁰ As above.

4.3.1 Why is Multinational Investment Important?

The importance of the role of multinational corporations in shaping the global economy has increased in the 20th century to a level that *'any of the top 100 or so global firms exceed the GDP of many nations'* and today the multinational companies are creating most of the output and employment in the world.³⁶¹ They have had reciprocal relationship with globalization in which globalization has led to higher FDI flows to countries while the opportunity of receiving a greater share of global FDI flows has motivated a number of countries to undertake further liberalization.³⁶² In addition to this, TNCs have facilitated the international integration of markets for goods and services, which in turn helps to create the 'global village'.³⁶³

On the other hand, corporations have started to build local relationships and establish a strong local presence through FDI's to benefit from different advantages, where the countries which were focusing on getting higher shares of FDI investment were busy with giving MNCs more freedom and assistance in seeking economic cooperation with them.³⁶⁴

As indicated above, there is no longer argued, that investments could be a source of economic growth through development and modernisation.³⁶⁵ Having realized the importance of MNCs, Somaliland is concerned the investment opportunity which has been lost. The new government of Somaliland elected in 2010 headed by President Ahmed Mohamed Mohamoud (Silanyo) is expected to focus more on its core economic development activities and functions, including: formulating and implementing strategies, policies, regulatory frameworks and mechanisms, etc, with a view to enable the right environment for economic recovery, livelihood improvements, employment creation, fair competition and equitable access to resources as well as investment opportunities.³⁶⁶

³⁶¹ Vardar (n 346 above) para 10.

³⁶² As above, para 10.

³⁶³ As above, para 10.

³⁶⁴ As above, para 11.

³⁶⁵ Namizinga (n 256 above) 6.

³⁶⁶ Hassan (n 272 above).

Above factors, are the main motivators of MNCs in different markets, but the question is ‘what shapes these motivators’ or in other words ‘what are the factors determining the investment decision’³⁶⁷

4.3.2 What are the Factors Determining the Investment Decision?

In general, MNCs try to achieve efficiency by minimizing their cost and maximizing economies of scale while reducing duplication.³⁶⁸ They invest in different locations to get different advantages from host countries in order to operate better in their home base.³⁶⁹ FDI flowing into any country depends upon the rate of return on investment and the certainties and uncertainties surrounding those returns.³⁷⁰ The expectations of MNCs in a host country are guided by several economic, institutional, and regulatory and infrastructure related factors,³⁷¹ which lead firms to expand and invest abroad and become multinational.³⁷²

Looking for domestic markets to sell more goods, seeking raw materials and managerial knowledge or technology and trying to find countries where factors of production are cheaper³⁷³ are the main motivations behind global expansion of companies.³⁷⁴ Multinational companies are looking for the perfect mix of these factors in answering the ‘where to invest’ question.³⁷⁵ While labour costs and attributes of the workforce such as skill and educational levels are critical variables of investment decision, the purchasing power of the market³⁷⁶ and proximity to other markets are taken into consideration for their investment decision.³⁷⁷ Additionally, the type of investment such as joint venture or wholly owned subsidiaries highly affects the investment decisions.³⁷⁸

Market size and growth prospects of the host country, the availability of infrastructure, reasonable levels of taxation and the overall stability of the tax regime, stable political environment, as well as conditions that support physical and personal security, legal

³⁶⁷ Vardar (n 80 above) para 13.

³⁶⁸ n 282 above.

³⁶⁹ As above

³⁷⁰ P Sahoo ‘Determinants of FDI in South Asia: Role of Infrastructure, Trade Openness and Reforms’ (2012)13 *The Journal of World Investment & Trade* 263.

³⁷¹ As above

³⁷² Vardar (n 346 above) para 14.

³⁷³ FDI uses low labour costs and available raw materials for export promotion, leading to overall output growth.

³⁷⁴ Vardar (n 346 above)

³⁷⁵ As above

³⁷⁶ Microeconomic stability like stable fiscal position, external balance and price level provides confidence and certainty for long term investment.

³⁷⁷ Vardar (n 346 above) para 14.

³⁷⁸ As above.

framework and the rule of law and corruption and governance concerns constitute the main concerns of MNCs in taking their decisions in developing countries.³⁷⁹

The openness of the host country to international trade is another dimension that affects investment decisions of MNCs which allows the companies to export their final product to alternative markets easily³⁸⁰ and without limiting their sales operations with the host country market. As a result of this, foreign investors prefer countries that trade more with the rest of the world.³⁸¹

In addition to political and commercial factors, the legal framework and rule of law concepts are of high importance in developing countries and these factors are directly linked to the existence of good institutions with structural rules and regulations.³⁸² Additionally, good governance which includes securing property rights establishing efficient public sector, minimizing ‘dead-weight’ regulations, restrictions on trade and particularly securing transparency in government are defined as factors which ‘*promote successful economic performance, encourage FDI by increasing the scope for profitable business activities.*’ While the study does not further discuss but in generally, MNCs face difficulties with regard to enforceability of the law rather than existence of necessary materials in developing countries as well emerging economies.³⁸³

All of the above mentioned factors affect investment decisions of MNCs, in different aspects. In order to promote and increase their attractiveness,³⁸⁴ Somaliland should take different actions, which will be explained in the last chapter.

4.3.3 How Do Countries Improve Their Competencies In These Factors?

Since MNCs put much more emphasis on this topic as they want to minimize the uncertainty and know that existing mechanisms will work when it is needed.³⁸⁵ As opposed to the existence of uncertainty in different investment environments with different regulatory frameworks and large political risks, MNCs expanded ‘*and are still expanding*’ their operations in different parts of the world. Mostly they expanded to African, Asian and Latin

³⁷⁹ As above, para 16.

³⁸⁰ Generally, Trade openness positively influences the export-oriented FDI inflow into an economy. Each regime, both export promotion and import substitution would attract different types of FDI.

³⁸¹ Vardar (n 346 above) para 16.

³⁸² As above, para 16.

³⁸³ As above, para 17.

³⁸⁴ As above.

³⁸⁵ As above, para 18.

American regions, taking advantage of the low wage levels and benefiting from the liberalization of the economies of these countries while countries such as Brazil, Indonesia, and Mexico have been able to maintain a significant level of FDI inflows as a result of large domestic markets, rich natural resources, and relatively growing economies even with rather restrictive foreign investment regimes.³⁸⁶ Having realized the impact on the development of the country, developing countries try to attract much more FDI than they used to do and they try to increase pull factors to attract investment growing markets and production bases, widening pools of talent skills, cost advantages and natural resources.³⁸⁷

In this ‘race to attract more FDI’, countries are trying to set strategies to attract more FDI while liberalizing investment regimes.³⁸⁸ There are many considerations that MNCs take into account such as ‘increased competitive intensity at the original location, cost-cutting requirements which prompt the search for new low-cost production locations, or pressure to enter new markets in response to similar moves by rivals.’³⁸⁹ Countries develop their own strategies in line with these considerations and their comparative advantageous areas, such as investors who are engaged in efficiency-seeking activities are offered skilled labour and wage-adjusted labour productivity like some countries do such as India; while Eastern European countries focused on investors who are looking for enhanced infrastructure rather than their costs in influencing FDI location decisions.³⁹⁰

Fiscal incentives constitute the other type of influential tools to attract FDI.³⁹¹ The incentives such as tax breaks and tax holidays, favourable utility usage fees, reduced custom duties and foreign exchange restrictions, relaxed ownership controls, and streamlined administrative procedures aim to create the best place in terms of FDI attractiveness.³⁹² Additionally, there has been the development of enclave zones under an overall national strategy.³⁹³ These zones have been *employed* ‘to bring in labour-intensive manufacturing activities to absorb surplus

³⁸⁶ As above, para 18.

³⁸⁷ As above.

³⁸⁸ As above, para 19.

³⁸⁹ National economic policies can facilitate and help create a conducive investment environment so that FDI inflows become consistent with the economic potential.

³⁹⁰ Vardar (n 346 above) 18.

³⁹¹ As above.

³⁹² As above.

³⁹³ as above, para 19.

labour, to experiment with a policy instrument that has not been used before, and to facilitate the transition from a closed economy to an open one.³⁹⁴

In consideration of the above issues, the risks of investing in post-conflict countries are well-documented; while there are many benefits, such as: low cost labour and beautiful business opportunities, stemming from a need for physical reconstruction and financial services.³⁹⁵ The presence of real and substantial business opportunities can attract foreign investors in post conflict countries.³⁹⁶ post conflict governments can create this opportunities in many ways: through privatising public industries, implementing open investment policies and signing investment agreements by providing investors with investment opportunities, and can simultaneously improve their economy and infrastructure.³⁹⁷

In the case of Somaliland, just like most of the developing countries nowadays tries as much as possible to create a conducive environment for attracting investors. In order to do this it has tried to create a favourable investment friendly environment so as to promote local investment as well as foreign direct investment.³⁹⁸ As the Somaliland Minister of Planning, Dr, Shire stated³⁹⁹ ‘Somaliland as ideally located for access to East African Markets, particularly Ethiopia, markets in the Middle East and even Asia and what must be one of the world’s most favourable regimes for foreign investors.⁴⁰⁰ Because of Foreign direct investors will pay no tax for three years. After that, they will have to pay only 10% on profits, which can be freely repatriated. There will be full compensation for any expropriations, which would be done only in the ‘public interest.’⁴⁰¹ There will also be no minimum wage. Shire listed a number of small foreign investors already doing business in Somaliland, including Western Union, Nubian Gold and now Coca-Cola.’⁴⁰²

However, Somaliland government has now developed for the first time, a five year beginning from 2012 up to 2016 a National Developmental Plan (NDP) that focuses outward-oriented

³⁹⁴ n 282 above, para 19.

³⁹⁵ Khachaturian et al (n 248 above) 341-358.

³⁹⁶ As above, 341-358.

³⁹⁷ As above, 341-358.

³⁹⁸ Namizinga (n 256 Above).

³⁹⁹ A session on Wednesday 29 March 2011 Somaliland’s supporters in the UK parliament chaired by Alun Michael from the all-party parliamentary group for Somaliland.

⁴⁰⁰ *The Guardian* ‘Somaliland: Open for Business’ (March 2012) *The Guardian Poverty Matters Plog* from <http://www.guardian.co.uk/global-development/poverty-matters/2012/mar/01/somaliland-open-for-business> (accessed 13 April 2012).

⁴⁰¹ As above.

⁴⁰² As above.

policies that encourage foreign investment; it will also pursue sound macroeconomic policies.⁴⁰³ But still it couldn't perform well due to the shadow of political instability of Somalia, as well as economic crisis specifically weak currency, fluctuation of the money, lack of strong institutions and strong vision to attract of investments. This situation creates that most of the Foreign Investors associate the country with extreme political and economic instability. Investors are rationally hesitant to invest their resources in a risky environment.

4.4 Factors Deter Inflow of Foreign Investment

It is relatively easy to realize that Africa needs much higher levels of investment to revive its economies.⁴⁰⁴ Such investment is essential in all sectors, such as education, health and agriculture. In particular, the continent needs very large doses of capital in its export goods sector in order to compete in the new world era created by the end of the Cold War and the emergence of regional trading blocs.⁴⁰⁵

In reality, Africa's bid for enhanced foreign investment flows cannot yield positive results if adequate solutions are not found to the inhibiting factors.⁴⁰⁶ In Somaliland context, Foreign Investors are still reluctant to commit in the country for a lot of common problems which most of the African countries share and are:

4.4.1 Inadequate infrastructural and Human Capital

Foreign Investors are naturally hesitant about investing in countries where basic requirements, such as roads, health services and utilities are inadequate. Because of the lack of adequate infrastructure,⁴⁰⁷ in the context of Somaliland, infrastructure possesses is in a state of disrepair, and is deteriorating year after year.⁴⁰⁸ The road network in Somaliland has never been good and has suffered from neglect since the civil war. There only sealed (tarmac) route is the Tuka Raq up to Dila Road, which crosses Somaliland from east to west. All other roads are dirt tracks, and even these are lacking in the northern mountain range, the Road links to Ethiopia and Somaliland is now better.⁴⁰⁹ The Somaliland's port infrastructure is

⁴⁰³ Somaliland Government 'Draft Somaliland National Development Plan (NDP) (October 2011) 7Ministry of National planning and Coordination from http://www.slministryofplanning.org/images/nationl_plan/ndp.pdf. (accessed 13 April 2012).

⁴⁰⁴ United Nations (UN) reviving Investment in Africa: constraints and policies (30 March 1995) from http://www.africa.upenn.edu/ECA/ECAdmin_invest.html (accessed 14 April 2012).

⁴⁰⁵ As above.

⁴⁰⁶ As above.

⁴⁰⁷ As above.

⁴⁰⁸ See Undp report (n 261 above)

⁴⁰⁹ As above.

dilapidated and underdeveloped and lack of modernized facilities.⁴¹⁰ The current use of the Berbera port by Ethiopia for its critical imports within the context of regional tensions, and the EU plans to facilitate regional infrastructure by developing a Berbera-Addis Ababa corridor, which augurs well for Somaliland's economic development prospects.⁴¹¹

In African countries, many forms of business ventures are prevented by the lack of skilled personnel.⁴¹² However, the major precondition for the economic and corporate governance dimensions of reconstruction in Somaliland revolves around human resource capacity.⁴¹³ This is perhaps the most central preoccupation of government in reversing the legacies of war-induced economic and social decline. As previously discussed, as Somaliland's Ministry of National Planning and Coordination makes clear 'the civil war and severe loss of all its professionals at all levels through brain drain,' has had to cope with a system is very weak as far as personnel is concerned.⁴¹⁴ The personnel are characterised by low levels of education, inadequate professional skills and lack of work experience "contributing to poor delivery of the Government services to the public." There are technical and institutional shortfalls at almost all levels of government.⁴¹⁵ To rebuild its civil service capacity, Somaliland's government has embarked on a 'bold step of carrying out the most feared Civil Service Reforms,' aimed at addressing major impediments in the civil service and at stimulating private sector economic growth.⁴¹⁶

Overall, Somaliland's human resources and other essential infrastructures such power supplies are short in supply, and the capacity to absorb physical capital may depend on investments in human capital and infrastructure.⁴¹⁷

4.4.2 Deteriorating Economic and Social Conditions

Somaliland is same like most of the other African countries which economic crisis are further exacerbated by natural and man-made calamities, including cyclical droughts and the

⁴¹⁰ As above.

⁴¹¹ Jhazbhay (n 54 above) 135.

⁴¹² UN (n 404 above).

⁴¹³ Jhazbhay (n 54 above) 135.

⁴¹⁴ As above, 135

⁴¹⁵ As above 135.

⁴¹⁶ As above.

⁴¹⁷ UN (n 404 above).

possibility of internal conflicts.⁴¹⁸ These are, indeed, major inhibiting factors running counter to the continent's efforts to attract foreign direct investment.⁴¹⁹

4.4.3 Market Size and GDP growth

The Somaliland growth rate of real per capita output is very low in the country and the market is very small and often fragmented.⁴²⁰ Not only is the domestic market very small but also the purchasing power of the people is very low, taking into consideration that almost half of the population lives in abject poverty.⁴²¹ This definitely deters investors since most foreign investors have a local market focus and few are seeking to develop export capacity to markets outside the country.⁴²²

4.4.4 Corruption

Corruption, in this context, refers to the abuse of public office for private benefit.⁴²³ It is often the case that post-conflict environments are riddled with corruption, which will often impair a foreign investor's ability to conduct a business.⁴²⁴ In generally, a country that is notorious for corruption cannot attract many investors effectively. Corporate governance with sleazy practices, whether in the public or private sector, is one factor that allows for demerit as a potential country for FDI inflows. While the country (Somaliland) is not a member of Transparency International it is very difficult to know Corruption Perceptions Index rank.⁴²⁵ However, The zero tolerance policy on corruption and established a Good Governance and Anti-Corruption Commission that currently introduced by the new government of Somaliland is an initiative, which is expected to attract investment, as contribution to the improvement in the macroeconomic stability of the country.⁴²⁶

⁴¹⁸ UN (n 404 above).

⁴¹⁹ As above.

⁴²⁰ Somaliland Ministry of National Planning and Coordination is available here http://www.slministryofplanning.org/images/nationl_plan/ndp.pdf.

⁴²¹ Nimizinga (n 256 above) 22.

⁴²² As above, 22.

⁴²³ Khachaturian et al (n 248 above) 341-358.

⁴²⁴ As above, 341-358

⁴²⁵ Transparency International Corruption perception index of countries is available at <http://cpi.transparency.org/cpi2011/>

⁴²⁶ Nimizinga (n 256above) 23.

4.4.5 Inefficient Financial Sectors

The financial sector is crucial to the development of any economy.⁴²⁷ So that, lack of their development can adversely limits the capacity for an economy to take advantage of such potential FDI benefits.⁴²⁸ This implies that while a developed financial system eases capital and investment flows, an undeveloped system constrains both the flow and the impact on the host countries.⁴²⁹

However, in Somaliland context there is no formal banks in the county and the informal sector has not been given adequate attention in terms of its potential in non-bank financial intermediation.⁴³⁰ On the other hand, lack of an organized framework to link these informal financial intermediaries with formal financial institutions is depriving Somaliland's economies of an important source of savings for domestic investments.⁴³¹ Nevertheless, when it comes financial services it seems very difficult the government of Somaliland to respond effectively, unless International Banks commit in the country.

4.4.6 Image Issue

Somaliland shares the negative perception of the other African countries while situation of Somalia worsening day by day and has a special influence due to the image of whole Somalia. Beyond economic policies and issues, the major obstacle Africa has to overcome in attracting foreign investment is that of negative attitudes towards the continent. More than any other continent, Africa has long suffered from⁴³² media propaganda. The stereotypical image of the continent is that of corrupt dictatorships, hunger and starvation, ethnic wars, coup d'états and now AIDS.⁴³³ The result is a sense of apathy and pessimism, even within the continent itself. A part of such attitudes is deliberately prejudicial, sometimes justified by events and the behaviour of some governments in Africa, but a part is simply due to the lack of adequate information about the continent.⁴³⁴

⁴²⁷ A Perry Effective legal system and Foreign Direct investment: in search of the evidence In F Beveridge Globalization and International Investment (2005) 4.

⁴²⁸ AE Ezeoha & N Cattaneo (n 302 above) 5.

⁴²⁹ n 334 above, 5.

⁴³⁰ Hassan (n 272 above)

⁴³¹ n 336 above.

⁴³² UN (n 404above).

⁴³³ As above.

⁴³⁴ As above.

4.4.7 Physical Security

The decision to invest in a post-conflict environment will always be impacted by the status of the physical conflict in that region, and whether it is actually over.⁴³⁵ It is difficult to invest in a state where the physical safety of the investor's personnel and the investment itself is uncertain.⁴³⁶ It goes without saying that uncertainty based on heightened international political and security risk can deter foreign investment.⁴³⁷ The threat of violence or loss of property impact investors decisions and cause them to guess the future of their investments in an unpredictable region.⁴³⁸

There are many examples where lack of physical security has jeopardized investments in post-conflict countries. One example is in the case of foreign oil companies in Nigeria, where militant groups have attacked oil facilities, affecting foreign investor operations.⁴³⁹ In the summer of 2008, militants attacked an oil facility off the Nigerian coast, forcing Royal Dutch Shell to halt production for its Bonga oil field and blocking some 220,000 barrels of oil per day. A few hours after the Bonga attack, another militant group blew a hole in a Chevron pipeline, cutting production of another 120,000 barrels of oil per day.⁴⁴⁰ Several foreign investors, such as Total SA Have already cited security concerns as the reason for dwindling investment in Nigeria.⁴⁴¹

Conversely, Somaliland has managed to deliver peace, security and several democratic governments to its people.⁴⁴² But the situation of Somalia has a much influence through the whole Somalia. Because if Somalia normalizes their situations before Somaliland get recognition it can claim Somaliland as part of its territory and it can resume civil war between Somalia and Somaliland. In a logical sense, these situations create uncertainty relating physical security.

⁴³⁵ Khachaturian et al (n 186 above) 341-358.

⁴³⁶ As above,.

⁴³⁷ As above, 341-358.

⁴³⁸ As above,341-358.

⁴³⁹ As above,341-358.

⁴⁴⁰ As above,341-358.

⁴⁴¹ As above,341-358.

⁴⁴² Aboa-Bradwell (n 224 above) 44.

4.4.8 Lack of Political Stability

Another related and equally unfavourable force is political instability.⁴⁴³ Africa today is not only facing an economic crisis characterized by famine, malnutrition, high rates of unemployment, refugees, and severe poverty, but is also burdened by serious political problems, including one-person rule, violation of human rights, inter-ethnic and interregional conflict, and the lack of tolerance for minority groups.⁴⁴⁴ All these problems have projected an image that Africa is a region riddled by crises and not conducive to investment.⁴⁴⁵ As a result of the political crisis that engulfed Africa in the 1980s and the 1990s, many investors have developed a perception that investing in Africa is ‘unsafe.’⁴⁴⁶

Besides political instability of Africa, the likelihood of expropriation contributes to the lack of investor confidence.⁴⁴⁷ Predictability of conditions and lack of arbitrariness may be the most important assurance that can be offered to investors, who seem able to adapt to practically any conditions as long as the rules are clearly established in advance and followed subsequently.⁴⁴⁸ While Somaliland put in place a much perfect investment system which gives foreign investors absolute protection, flexibility and incentives but the sensitivity of the political situation still is an impediment because of the weak institutions, lack of recognition, poor economic situation and corruption which constitute a bar of political sensitivity as previously discussed in this study.

4.4.9 Lack of Effective Legal System and Proper Regulatory Framework

In Generally, as former general council of World Bank argued in 1995 that ‘a legal and regulatory framework is a fundamental element in the stability and flexibility needed for the investment environment;’⁴⁴⁹ in line with this point 1997 World Development Report strictly noted that perhaps *the worst damage that state can do its prospects of investment is to cultivate an air of uncertainty;*⁴⁵⁰ and the Foreign Investment Advisory Service (FAIZ) of the

⁴⁴³ UN (n 404 above).

⁴⁴⁴ As above.

⁴⁴⁵ As above.

⁴⁴⁶ As above.

⁴⁴⁷ As above.

⁴⁴⁸ As above.

⁴⁴⁹ A Perry (n 427 above) 4.

⁴⁵⁰ As above, 4.

World Bank Group concludes that ineffective legal systems ‘increase the withdrawal of investors who may have made a preliminary decision to commit to a county.’⁴⁵¹

In most African Countries, restrictive regulatory frameworks for investments are turn off for foreign investors.⁴⁵² However Most of the foreign investors in Africa feel that the existing frameworks do not allow for liberal operations for them.⁴⁵³ In this juncture, some African countries do not allow investors to invest every sector. For example, public utilities and etc, in Somaliland there is an Investment Law which allows foreign investors to invest every sector but the effectiveness of the legal system is questionable. While Somaliland has made a significant progress in simplifying the legal framework and cutting red tape, there is a room for improvement, particularly in the field of enforcement of law.

Ultimately, it should be noted that although most foreign investors are discouraged with such an environment for investment, there are some who have found it quite conducive for their operations and mostly it depends the sensitivity of investors because most of the Western Investors are more sensitive than East Asian investors like China. In Somaliland there is still room for improvement of such deterring factors, in order to attract a good number of potential investors as well as small growing East Asian foreign investors.

4.5 The Legal Framework for Foreign Direct Investment in Somaliland

As already mentioned, Somaliland internationally part of failed state Somalia, while Somalia is one of the poorest country of the world (there is no absolute statistics but most of the people they live below poverty line). The government of Somaliland policy shift towards more economic rebuilding and investment regimes and drafted a NDP as well as legislative and regulatory amendments; more protection for foreign investors and their investments, the reduction or elimination of the differences of treatment between foreign and local investors, the reduction of entry and establishment conditions and the promotion of FDI by incentives.⁴⁵⁴

⁴⁵¹ As above, 4.

⁴⁵² Nimizinga (n 256 above) 22.

⁴⁵³ As above, 22.

⁴⁵⁴ Somaliland Ministry of Planning and national coordination available from http://www.slministryofplanning.org/images/nationl_plan/ndp.pdf.

Nonetheless, an investor can look beyond BITs to find protection for its investments; in fact, many post conflict states will have few, if any, BITs.⁴⁵⁵ Accordingly, investors looking at Somaliland as an option should take note of several issues related to the legal environment there:⁴⁵⁶

4.5.1 Overview of the Legal System of Somaliland

Somaliland's legal system reflects its history.⁴⁵⁷ It practiced three legal systems; Customary Law, Islamic Law, and Statutory Law.⁴⁵⁸ These three legal systems gave Somaliland Hybrid Legal System:

- a) *Customer Law*: referred to as the Somali Traditional Justice System (Traditional values and norms) and was the only widely effective law which existed during the pre-colonial era and was still the dominant law in Somaliland.⁴⁵⁹ The people of Somaliland are still entrusted to resolve their disputes through methods of traditional justice in conjunction with Islamic law.⁴⁶⁰
- b) *Islamic Sharia Law*: majority of the population of Somaliland is Muslim; hence the Islamic religion is very influential on the Constitution and legal system. The Constitution of Somaliland provides that enacted legislation will be deemed invalid if it contravenes the basic principles of Islamic law.⁴⁶¹
- c) *Statutory Civil Law Tradition*: although Somaliland was a British protectorate, an initially transplanted European Based Statutory law (Common Law). The merger with South Somalia altered the legal tradition of the nation. Hence, the common law was overruled by the civil law tradition.⁴⁶²

The Somaliland Republic era which started in 1991 and has seen a resurgence of customary, Statutory and Islamic laws, but also the introduction of a constitution entrenching human rights and modern laws, especially in the area of democratisation.⁴⁶³ In line with that,

⁴⁵⁵ Khachaturian et al (n 248 above) 341-358.

⁴⁵⁶ As above, 341-358.

⁴⁵⁷ Somaliland Law: An Overview from http://www.somalilandlaw.com/introduction_to_somaliland_law.html .

⁴⁵⁸ Hirsi (n 322 above).

⁴⁵⁹ As above

⁴⁶⁰ As above.

⁴⁶¹ As above.

⁴⁶² As above.

⁴⁶³ Somaliland Law (n 457 above).

Somaliland constitution stipulated specifically that ‘the state shall ensure the security of foreign investment in the country.’⁴⁶⁴ Such investment shall be regulated by law.

4.5.2 Overview of Somaliland’s Foreign Investment Law

In 2004, Somaliland government for the first time promulgated foreign Investment Law which is called ‘The Promotion, Protection and Guarantees of the Foreign Investment Law (Law no. 29/2004) and amended in 2008.’⁴⁶⁵ This law specifically defines foreign investor “any juridical or physical person”⁴⁶⁶ this law was set up Foreign Investment Promotion Office (FIPO) which is headed by Board of Directors (BOD) led by Director Generals (DG) of those Ministries:

- i. DG Ministry of National planning
- ii. DG Ministry of foreign affairs
- iii. DG Ministry of Finance
- iv. DG Ministry of Commerce and industry
- v. DG Ministry of Agriculture
- vi. DG Ministry Livestock fishery
- vii. DG Central bank
- viii. Chairman of Chamber Of Commerce

The Chairman of This Board Is the Director General of the Ministry of Commerce and Industry.⁴⁶⁷

4.5.3 Basic Elements of a Foreign Investment Law Aimed At Attracting Foreign Investors

Investment Laws, by and large, have standard elements providing a legal basis for enforcing the rights of the investors.⁴⁶⁸ Typically, Somaliland Investment Law tries to promote foreign investment through protection; that is to say, by assurance to foreign investors in line with policies, laws and regulations is guaranteed fair and equitable treatment, including national

⁴⁶⁴ Article 11(3) of the Somaliland Constitution

⁴⁶⁵ Somaliland House of Representatives ‘*Promotion, Protection and Guarantees of the Foreign Investment Law*’ (2008) from http://www.somalilandparliament.net/images/xeerar_dhaqan_galay/foriegn_investmen_law.pdf (accessed 12 May 2012).

⁴⁶⁶ Article 2 Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland

⁴⁶⁷ MD Ahmed *Somaliland Forieng Investment Law Analysis* (8 April 2012) from <http://www.odweynenews.com/160062-somaliland-foreign-investment-law> (Accessed 15 April 2012)

⁴⁶⁸ Nawafleh, A. S. (2010). The Legal Framework for FDI in the Hashameti Kingdom of Jordan. *The Journal of World Investment and Trade*, 11 (1), 110-120.

and most favoured nation (MFN), full and constant legal security and dispute resolution through manner agreed upon the parties. The following sets out the basic elements of foreign direct investment legislation.

4.5.4 National Treatment and Most Favoured Nation Treatment

Two of the basic elements of a foreign investment regime are National and MFN treatment, under which the host country has an obligation to treat foreign investors and foreign investment no less favourably than nationals, and an obligation to treat foreign investors and investment from one country no less favourably than foreign investors from any other country.⁴⁶⁹ In line with these international standards, Somaliland Investment Law enshrined in it that ‘foreign investment shall receive as favourable treatment as domestic enterprise.’⁴⁷⁰

4.5.5 Dispute Settlement

In terms of the Dispute Settlement Mechanisms (DSMs) the Somaliland Foreign Investment law classified in case of dispute between the Somaliland government and foreign investor in two options depending upon the nature of their agreement:

- i. In a manner to be agreed upon the investor and the government according to their contract, in the absence of such agreement. Within the frame work of the agreements in force between the Somaliland Republic and the investor’s home country;⁴⁷¹
- ii. In the absence of agreements, disputes shall be settled through arbitration. An arbitration board shall be established comprising one member on behalf of each disputing party and a third member acting as a chairman.⁴⁷²

4.5.6 Expropriation and Compensation

Somaliland Investment Law stipulates that expropriation is prohibited unless deemed to be in the public interest. It provides for fair compensation to the investor in the fair market value of

⁴⁶⁹ n 371 above, 110-120.

⁴⁷⁰ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 29 of 2004 Article 12.

⁴⁷¹ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 29 of 2004 Article 19.

⁴⁷² Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 29 of 2004 Article 19.

the assets as freely transferable.⁴⁷³ Certainty as to property ownership is a real concern among foreign investors. According to this law, foreign investment cannot expropriate, nationalized, or subjected to any other similar measures without appropriate compensation.⁴⁷⁴

4.5.7 Transfer of Capital and Profit

Somaliland investment law allows for full currency convertibility between Somaliland shilling and any other currency.⁴⁷⁵ In case were the amount realised from the liquidation or sale of capital stock exceeds the amount of the original investment plus reinvested profit registered, the foreign investor shall be free to transfer abroad, in the freely convertible currency exchange conducted and warranted by the Bank Somaliland, the difference, in accordance the prevailing tax legislation and foreign exchange regulations.⁴⁷⁶

Apart from the Law and regulation on FDI are nevertheless not the only factors of a State's policy and legal framework that impact the volume and pattern of inflowing foreign investment. To be sure, many other factors can potentially influence the volume of FDI flow. A few examples of such factors are the tax system, the stringency of the labour law, and the company law.⁴⁷⁷

4.5.8 Tax System

Tax reform has been a major concern to the government of Somaliland as per the foreign Investment Law guaranteed that any Foreign Investment is exempted from payment of tax on profit for a period of three years from commencing operations. In addition, after the expiry of the initial tax holiday period, foreign investors shall be entitled to a 50% reduction of the tax due for the profit reinvested.⁴⁷⁸

4.5.9 Labour law

The legal framework governing labour in Somaliland is set under the 2004 labour law of private sector and amended several times, these law addresses all aspects of the employee-employer relationship. It provides comprehensive guidelines for the recruitment, hiring,

⁴⁷³ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 340 of 2004 Article 12(2)

⁴⁷⁴ Nawafleh (n 371 above) 110-120.

⁴⁷⁵ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 340 of 2004 Article 18

⁴⁷⁶ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland Act 340 of 2004 Article 18 (4) .

⁴⁷⁷ Nawafleh (n 468 above) 110-120.

⁴⁷⁸ Promotion, Protection and Guarantees of the Foreign Investment Law in Somaliland (n 407 above) Article 13

compensation, working hours, and termination of employees in Somaliland. It also provides the process of the hiring and firing for firms, it promotes local workers rather foreigners.⁴⁷⁹ In addition, it outlines a number of reporting, management, and work place safety requirements that employer must meet. It established limited rights of employees to strike, as well as rules and guidelines governing mediation, and collective bargaining between employees and employers.⁴⁸⁰

4.5.10 Company Law

The Somaliland Company Law or Act 25 was promulgated in 2004 the law provides several options for registration of companies and are

- a) Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Law in respect of registration, form an incorporated company with or without liability;⁴⁸¹
- b) A company so formed may be either a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them ("a company limited by shares"),⁴⁸²
- c) Public company is a company limited by share or limited by guarantee having a share capital and formed by any seven or more persons.

The Company Law specifically mentioned registration of companies whether owned by locals or foreigners. The company's Memorandum and Articles shall be de delivered to the Registrar of Companies and office of the Attorney General in Hargeysa.⁴⁸³

The Somaliland laws are still developing while the absence of competition law, which would reduce unfair business practice, insurance law which give invertors protection for their investment and National Oil Law which will establish National Petroleum Authority (NPA) which give investors transparency and public information and etc. Overall, absence of those laws hinders the investor's decision to come in Somaliland.

⁴⁷⁹ Somaliland labour law private sector Act 31 of 2004

⁴⁸⁰ Nawafleh (n 468 above) 110-120.

⁴⁸¹ The Companies Law of Somaliland Act 25 of 2004 Section 4(1)

⁴⁸² The Companies Law of Somaliland Act 25 of 2004 Section 4(2)

⁴⁸³ The Companies Law of Somaliland Act 25 of 2004 Section 9

4.6 Concluding Remarks

This chapter has examined the impact of non-recognition of Somaliland in relation to foreign investment. It was noted, that the government of Somaliland made some improvements and has put in place much perfect investment system which can guarantee foreign investment but the lack of legal personality still remains an impediment. The non-recognition of Somaliland brings uncertainties stemming from the chaotic failed state of Somalia, and because of Somaliland is legally part of Somalia. The question is how would it look like, if Somalia normalizes their situations before Somaliland get recognition? Undoubtedly, it may claim Somaliland as part of its territory. It may create lingering security concerns. Consequently, investors would pull the country in an abeyance. Nevertheless, investors will look for long term certainty which non-recognition of Somaliland cannot guarantee them.

However, foreign investors can navigate through those risks using careful analysis of the overall investment opportunities. So, putting the map of investors in Somaliland is very tough, while Somaliland has an abundant natural resource like oil and strategic significance but the major critical think is lack of insurance over physical security, skilful workers and infrastructure. This chapter further demonstrated that, Taiwan admits to enter into international agreements like BITs, the same reasoning may well be applied to Somaliland with a view to separate non-recognition and its consequences. This, it depends on the diplomatic ties between the Somaliland government and other states. In truth, internationally recognized Somaliland would benefit from inflow of foreign investment. This would strengthen government revenue, boost employment and allow the government to deliver better basic services.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Findings

Chapter One poses and identifies the real problems of the legal implications of non-recognition of Somaliland in international law in her quest to attract foreign investment for socio-economic development.

Chapter Two examined the concept of statehood in International Law. The criteria for statehood as set under the Montevideo Convention are not conclusive since they are also subject to criticism. It was noted, in the chapter that the non-recognition of Somaliland by the international community is an example of the complex nature of the criteria for statehood. The chapter also observed, that the controversy surrounding the principle of recognition in International Law was as a result of the fact that it's not only legal principles that matter in recognition of statehood but other factors such as political, economic and self interest of other states are featured in and therefore International Law is becoming increasingly uncertain and not a conclusive factor in recognition of statehood. The effectiveness of Somaliland in attracting foreign investment into Somaliland depends on her legal status in International Law.

Chapter Three indicated that the Somaliland efforts to search for international recognition have been largely unsuccessful. While her application to join the African Union in 2005 is still pending, one of the major arguments of the AU against Somaliland's recognition was that it would open a Pandora's Box. It is obvious that the non-recognition of Somaliland remains unsettled merely for political consideration rather than legal. This chapter clearly highlighted that the non-recognition of Somaliland is hampering her developments.

Chapter Four interrogates the impact of non-recognition of Somaliland in relation to inflow of foreign investment. It was noted, that Somaliland has put in a perfect investment framework that could guarantee the protection of foreign investment, but needless to say, the non-recognition still remains an impediment. The non-recognition of Somaliland brings to the fore the pervading uncertainties that if Somalia normalized before Somaliland got recognition, it could claim Somaliland as part of its territory. It would create a civil war

between Somalia and Somaliland. Consequently, it might create a capital flight and discourage inflow of foreign investments into Somaliland.

This is because the investors would be compelled to consider the implications of the absence of the long-term certainty which non-recognition of Somaliland could not guarantee them. Most foreign investors would not want to associate the country with extreme political and economic instability.

5.1.1 Final Conclusion

In concluding this work, it is pertinent to state that Somaliland remains unrecognized despite its full compliance with all the legal requirements for statehood. It is the conclusion in this study that the main obstacles to the recognition of Somaliland are hinged on political interests rather other than legal justifications. Legally speaking that non-recognition has had a negative impact upon the people of Somaliland and this is implicated in the fact that the people of Somaliland cannot trade with and travel to interact with global community. Also on this issue, it has become impossible for the *de facto* government in Somaliland to deal with its own internal problems and the government is handicapped and cannot respond to these challenges effectively due to the non-recognition status.

Undoubtedly, the study further averred that Somaliland's international recognition would benefit from inflow of foreign investment. This would strengthen government revenue, boost employment and allow the government to be a member of international investment community as well as being able to deliver better basic services to its people.

5.2 Recommendations

Al-though the government in Somaliland has made some efforts towards full international recognition, which has not been enough. The government should spare no efforts in achieving this noble goal. Based on the outcomes of this investigation, the following are hereby recommended:

- The government must show the international community that she and the people are capable of continuing and deepening the democratization culture and process, good governance and transparency;

- A sound financial system and infrastructure couple with prudent financial management system must be holistically put in place. The annual budget must be truly based on the income, expenditure and the NDP five years plan. The Parliament should have continuous access to monitor and control the income and expenditure of the country;
- The government should also respect the national Constitution and all international conventions strictly and without violations. This should include the civil rights, basic rights of citizens, freedom of press and speech;
- The government should avoid nepotism and always appoint the right person to the right position. Nomination of ministers and vice ministers must be based on their merits. National guidance programs must be implemented in conjunction with the media and schools in order to explain to the public the disadvantages of tribalism;
- The Somaliland Government must implement developmental schemes aimed at income generating and improvement of communities' life style particularly in the areas of irrigation, agriculture and livestock development. Technical institutes should also be established in order to reduce unemployment rate;
- Somaliland is blessed with abundant natural resources like oil, coal, fishing, agriculture, livestock, and tourism etc. Therefore, the government should establish an autonomous agency that will be responsible for enlightening the global community about the investment opportunities in Somaliland in order to attract the foreign investors. Academics and students of the tertiary institutions both within the country and the people of Somaliland in Diaspora must be allowed to take part in decision making and consultative role. The role of Diaspora regarding recognition of Somaliland is to lobby and inform the world about the enormous investment opportunities that abound in Somaliland;
- The government of Somaliland must also hire international lawyers and international lobbyists to lobby and present the case of Somaliland in all international forums in the west as well as in the meetings of UN and international organisations;

- Last but not the least; the international community must be encouraged to listen the pleas of the government and the people of Somaliland.

5.3 Areas for Future Research

The complexity of this research paper has made it difficult to cope with all relevant matters without going beyond the scope of the study. Specific study should aim at evaluating economic and political aspects of Somaliland and how to circumvent economic and political factors of statehood to hasten the recognition of Somaliland.

(Word Count 25,741)

Bibliography

TEXT BOOKS

Aboa-Bradwell, S 'An Unsung African Marvel: The Case for Somaliland's Recognition' in Jama, JM (2011) *Somaliland: The Way Forward* Pisa: Ponte Invisibile.

Asente, S K 'The Concept of Good Corporate Citizen in International Business' in Beveridge, F (2005) *Globalization and International Investment law* Burlington: Ashgate Publishing Company.

Beveridge, F (2005). *Globalization and International Investment* USA: Ashgate Publishing Company. England

Bradbury, M (2008): *Becoming Somaliland*. Oxford: James Currey.

Deval Desai, D. I. Rethinking Justice Reform in Fragile and Conflict-Affected States. In Bradlow, D and Cisse, H (2012) *International Financial Institutions and Global Legal Governance* (Vol. The World Bank Legal Review, p. 246). Washington: International Bank for Reconstruction and Development.

Dolzer, R & Schreuer, C (2008) *Principles of International Investment Law*.

Dugard, J (2009) *International Law A South African Perspective* (3 ed) Juta & Co, Ltd.

Gardiner, R K (2003) *International Law* (1 ed.). Pearson Education Limited.

Hoehne, MV 'Regional Security in The Post-Cold War Horn of Africa' in Mesfin, B and Sharamo R (2011) Pretoria: Institute for Security Studies.

IM Lewis (2002) *A Modern History of the Somali, Nation and State in the Horn of Africa*, 4th Edition, Oxford: James Currey.

Johan D. Van der Vyver, *Statehood in International Law*, 5 Emory International Law. R.99 (1991)

Jama, JM (2011) *Somaliland: The Way Forward*: Ponte Invisibile Redsea-online.

Jankowski, J (2002) *Nasser's Egypt, Arab Nationalism, and the United Arab Republic*. Boulder: Lynne Rienner; Kienle E (1995) *Arab Unity Schemes Revisited: Interest, Identity, and policy in Syria and Egypt*.

Lauterpacht, *Recognition In International Law* (1948); Thomas d. Grant, *The Recognition Of States* (1999) Dugard, J *Recognition and The United Nations* 89-90 (1987).

Maniruzzaman, AF 'International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View' in Beveridge, F (2005) *Globalization and International Investment law* Burlington: Ashgate Publishing Company.

Martin Dixon (2007) *Textbook on International Law*.

Shaw, MN (1997) *International Law* (5 ed.) Oxford University Press.

McCorquodale, D. a (2003) *Cases and materials on international law*. A Blackstone Press Book.

Meier & M (1998) *Gerald the International Environment of Business: Competition and Governance in the Global Economy* New York: Oxford University Press.

Morrison & Janet 'the International Business Environment: Global and Local Marketplaces in a Changing World' (2006) New York: Palgrave Macmillan.

Mosoti, V 'The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion' in Beveridge, F (2005) *Globalization and International Investment Law* Burlington: Ashgate Publishing Company.

Mugerwa, N (1968) 'Subject of International Law. In M. Sorensen' *Manual of Public International Law* Hong Kong: The Macmilan Press Ltd.

Murphy, SD 'Democratic Legitimacy and Recognition of States and Governments' n B. R. Gregory, BR (2000) *Democratic Governance and International Law* Cambridge University Press.

Omar, MA 'Recognizing Somaliland: Political, Legal and Historical Perspectives'. In Jama, JM (2012) *Somaliland: The Way Forward*: Pisa: Ponte Invisible.

Portman, R (2010) 'Legal Personality in International Law' (1st ed.) Cambridge University Press.

Perry, A 'Effective Legal System and Foriegn Direct Investment: in Search of the Evidence' in Beveridge, F (2005) *Globalization and International Investment* Burlington: Ashgate Publishing Company.

Raic, D (2002) *Statehood and the law of self-determination*. Natherlands: Khiwar Law International.

Show, M N (1997) *International Law* (4 ed.) USA: Cambridge University Press.

Warbrick, C (2006) *States and Recognition in International Law*. In M. D.Elvens, *International* Oxford Univesity Press.

Wallace, RM (2005) *International Law* (5 ed.) London: Tomson Sweet & Maxwell London.

JOURNAL ARTICLES

Coggins, BL (2006) *Secession, Recognition and the International Politics of Statehood*. from <http://etd.ohiolink.edu/send-pdf.cgi/Coggins%20Bridget.pdf>. (accessed 18 April 2012).

Guardian, T 'Somaliland: Open for Business' (March 2012) *The Guardian Poverty Matters Plog* from <http://www.guardian.co.uk/global-development/poverty-matters/2012/mar/01/somaliland-open-for-business> (accessed 13 April 2012).

Jhazbhay, I. (2003). *Somaliland Africa's Best Kept Secret, A challeng to the International Community*. Retrieved May 2, 2012, from <http://www.iss.co.za/pubs/asr/12No4/EJhazbhay.html>.

Khachaturian, RM 'Foreign Investment in a post conflict Environment' (2009) *Journal of World Investment and Trade*, 10 (3).

Kielmas, M 'Oil Hopes Hinge on North Somalia' (1991) *Petroleum Economist*, 58 (10), 19(2).

Kielmas, M 'Somaliland: Hopes and hype on the new frontier' (2 April 1993) *Middle East Economic Digest* 20-21.

Mohamed Urdoh 'Somaliland Political Analysis' <http://www.18may.org> (accessed 15 March 2010).

Nawafleh, AS 'The Legal Framework for FDI in the Hashameti Kingdom of Jordan' (2010) *The Journal of World Investment and Trade*, 11 (1), 110-120.

Progressio Press Release, 28 June 2010, <http://www.progressio.org.uk/blog/news/somaliland-elections-peaceful-expression-popular-will> (accessed 2 March 2012).

Schill, SW 'Enhancing Interntional Investment Law's Legitimacy: Conceptual and Methodological Foundation' (2011) *Virginia Journal of International Law* from www.vjil.org (accessed 10 March 2012).

Solomon, L 'British traditions boost the de facto state of Somaliland' (25 May 2012) *Somaliland Press News* from <http://somalilandpress.com/lawrence-solomon-capitalist-haven-29183> (accesssed 26 May 2012).

Sahoo, P 'Determinants of FDI in South Asia: Role of Infrastructure, Trade Openness and Reforms' (2012) 13 *The Journal of World Investment & Trade*, Volume: 13 No 2.

Somaliaonline 'Thread: Rich Gemstone Potentials Discovered in Somaliland' (18 March 2008) Somaliland Online News from <http://www.somaliaonline.com/community/showthread.php/29894-Rich-gemstone-potentials-discovered-in-Somaliland> (accessed 10 May 2012).

Somalilandpress ‘*Somaliland: Minister of National Planning Denies Allegations of Embezzlement of Aid Money*’ Somaililand Press News from <http://somalilandpress.com/somaliland-minister-of-national-planning-denies-allegations-of-embezzlement-of-aid-money> (accessed 12 April 2012).

The Right to Secede under International Law, Journal of International Service Fall 2011 is available <http://www.somalilandlaw.com> (accessed at 27 February 2012).

Vardar, MF ‘Factors of Investment Decision of Multinational Corporations the Case of Turkey’ (11 April 2012) *The Turkish Weekly Journal* from <http://www.turkishweekly.net/article/343/factors-of-investment-decision-for-multinational-corporations-the-case-of-turkey.html> (accessed 17 March 2012).

Worster, W ‘*Exploring Geopolitics: Introducing Many Faces of Geopolitics*’ from www.exploringgeopolitics.org/publication (accessed 03 March 2011).

PAPERS, DISSERTATIONS AND REPORTS

Ahmed, MD ‘*Somaliland Foreign Investment Law Analysis*’ (8 April 2012) from <http://www.odweynenews.com/160062-somaliland-foreign-investment-law> accessed 15 April 2012).

Ajayi, SI ‘*Foreign Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential*’ (2006) African Economic Research Consortium from http://www.aercafrica.org/documents/books/FDI_papers_booklength_volume.pdf.1 (accessed 10 January 2012)

Agaloglou, M. (2011): *Somaliland: past, Present and Future*. Think Africa Press, Part 10, <http://thinkafricapress.com/somalia/somaliland-past-present-and-future-part-10> (accessed 23 March 2012)

Beckman, R ‘*Somali Piracy- Is international Law Part of the Problem or Part of the Solution?*’ (2009)

at

<http://www.rsis.edu.sg/research/PDF/Beckman%20Somali%20Piracy%20RSIS%2023%20Feb%202009.pdf>

9.pdf (accessed 10 May 2009)

Bulhan, H. A. (1999) *Somaliland Centre for Peace and Development*. Accessed December 25, 2011, from www.somali-jna.org/downloads/SelfPortrait24.doc.

Dupont, P-E ‘*Foreign Investment and the Status of Kosovo in International Law*’ OECD from <http://www.oecd.org/dataoecd/8/63/44246234.pdf> (accessed 20 December 2011).

Draft Discussion Paper Istanbul conference on Somalia ‘*Banking, remittances, and the role of the central bank in promoting financial and private sector*’ (21-23 May 2010) Istanbul

Conference on Somalia from <http://www.somalitalk.com/2010/may/istambul/banking.pdf> (accessed 7 April 2012).

Farah, M. D. (2010). *The tension between the right to external self-determination and Territorial Integrity of Africa: Somaliland As a Case Study*. University of Pretoria. Unpublished thesis.

Farley, BR (2011) Calling A State A State: Somaliland and Interntional Recognition from <http://ww.law.emory.edu/fileadmin/journals/eilr> (accessed 25 February 2012)

Brethurst Foundation Report '*African Game Changer? The Consequense of Somaliland's International Recognition*' (June 2011) from http://www.thebrenthurstfoundation.org/Files/Brenthurst_Commisioned_Reports/BD-1105_Consequences-of-Somalilands-International-Recognition.pdf (accessed 14 February 2012)

Forti, D. (December 2011) Somaliland: An Examination of State Failure and Secession Movements. from <http://ww.dukespace.lib.duke.edu/./Danial> (accessed 6 January 2012).

Hassan, DA '*Somaliland: Prospects for Economic Development and Future Prioraties of Investment*' (30 December 2011) from <http://oodweynews.com/articles/132313-somaliland-prospects-for-economic-development-and-future-priorities-for-investment-phd.html> (accessed 15 March 2012).

Henwood, F *Contribution to the Case for Somaliland Recognition* (2006) from <http://www.hollerafrica.com/showArticle.php?> (accessed 20 March 2012)

Khan, AM '*State Fragility and FDI in Africa*' (2011) from <http://www.eurojournals.com/finance.htm> (accessed 21 March 2012).

International Crisis Group (2006, May 23). *Somaliland: Time for African Union Leadership*. Retrieved December 25, 2011, from <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.pdf>.

Hirsi, M F '*Research Guide to the Somaliland Legal System*' (February 2009) from http://www.nyulawglobal.org/globalex/somaliland.htm#_1.3_Economy (accessed 20 March 2012).

Jhazbhay, MI (2007). Thesis "Somaliland Post-War Nation Building and International Relations, 1991-2006. accessed January 15, 2012, from wiredspace.wits.ac.za/bitstream/.../Thesis_-_Final3_revision.pdf?

Jhazbhay, MI '*Somaliland:Post-War Nation-Building and International Relations, 1991-2006*' (February 2007) from http://wiredspace.wits.ac.za/bitstream/handle/10539/4942/THESIS-FINAL3_revision.pdf?sequence=1.334 (Accessed4 December 2012).

Kibble, MW 'Discourse and Intervention in Somaliland: Tensions and Successes in the Transition from deliberation to representation' In Jama, JM (2011) *Somaliland: The Way Forward* Pise: Ponte Invisible.

Leinonen, L 'The Role of the Governments in Finno Tiawanese Business Relations' (2009) from http://www.hsepubl.lib.hse.fi/EN/ethesis/pdf/12169/hse_ethesis_12169.pdf.2 (Accessed 3 December 2011)2

Liu, H.-W 'A Missing Part in International Investment Law: The Effectiveness of Investment Protection Of Taiwan's Bits vis-à-vis Asean States' (2010) from http://jilp.law.ucdavis.edu/issues/Volume%2016.1/Liu%20MACRO%20w_title%20correction.pdf (accessed 14 Feb 2012).

Mazrui, AA (2006) 'Africa's Bondage of Boundaries: Can the Shackles be loosened?' Public lecture delivered on the 22 March at Hargeisa University under the chairmanship of the President of the University, Hargeisa, Somaliland.

Namizinga, PK '*Integrated Framework Policy Analysis Working Paper Series No.6 Impact of Forieng Direct Investment on Development: Policy Challenges for Malawi*' (April 2007) from www.trade.gov.mw/6%20Kazembe_Namazinga%20-. (accessed 4 April 2012)

News '*Breakaway Somaliland entity targets investors*' (24 February 2012) Rauters from <http://www.reuters.com/article/2012/02/24/somalia-somaliland-investment> (accessed 27 March 2012).

Reviving Investment In Africa: Constraints and Policies (30 March 1995) University of Pennsylvania African Studies Center from http://www.africa.upenn.edu/ECA/ECAdmin_invest.html (accessed 14 April 2012).

Rich, R 'Recognition of States: the Collapse of Yugoslavia and the Soviet Union' *Symposium: Recent Developments in the Practice of State Recognition* from <http://ejil.org/pdfs/4/1/1207.pdf> (Accessed 18 April 2012).

SomaliaIand Centre for Peace and Development (SCPD) *A self Portrait of Somaliland: Rebuilding from the Ruins* (December 1999) from www.somali-jna.org/downloads/SelfPortrait24.doc (accessed 4 December 2011).

Somaliland, Government '*Draft Somaliland National Development Plan (NDP)*' (2011, Oct) Minstry of National Planning and Coordination from http://slministryofplanning.org/images/nationl_plan/ndp.pdf.7 (accessed 13 April 2012).

United Nations Development Program (UNDP) '*Analysis of Macro-Economic Situation in Somaliland*' (2004) from <http://www.mbali.info/doc122.htm> (accessed 27 April 2012).

USAID '*The Socio-economic Implications of the Livestock Ban in Somaliland*' (2002) from http://pdf.usaid.gov/pdf_docs/PNADJ083.pdf (accessed 07 May 2012).

See the International Crisis Group (ICG) ‘Somaliland: Time for African Union leadership’ (2006) Africa Report N0. 110 <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/somalia/Somaliland%20Time%20for%20African%20Union%20Leadership.ashx> (accessed 25Dec 2010).

Watershed Legal Services ‘*Somaliland Energy Law: Why Somaliland Needs A national Legal Framework*’ (January 2012) from <http://watershedlegal.com/entry/somaliland-energy-law> (accessed 20 March 2012).

INTERNATIONAL TREATIES

Constitutive Act of the African Union adopted in 2000 at the Lome Summit (Togo) entered into force in 2001.

Convention on International Civil Aviation signed at Chicago on 7 December 1944 (Chicago Convention).

Montevideo Convention on the Rights and Duties of States Signed at Montevideo on 26 December 1933 (Montevideo Convention).

The World Bank Convention (ICSID Convention) on the Settlement of Investment Disputes between States and Nationals of other States (1965).

UN Convention on the Law of the Sea: The third United Nations Conference on the Law of the Sea 10 December 1982 (UNCLOS).

Vienna Convention on the law of Treaties (23 May 1969).

INTERNATIONAL ARBITRAL AWARDS

Texato/Calasiativ v. Libya award.

SOMALILAND LEGISLATION

Promotion, Protection and Guarantees of the Foreign Investment Law no 29 of 2004.

Somaliland Constitution.

The Companies Law of Somaliland Law no. 25 of 2004.

Somaliland Labour Law of Private Sector law no 31 of 2004.

Draft of National Development Plan.