DECENTERING TREATY MAKING POWER OF THE FEDERAL GOVERNMENT UNDER THE ETHIOPIAN FEDERAL SYSTEM: IN SEARCH OF BETTER SAFEGUARDING MECHANISMS

Zelalem Eshetu Degifie*

Abstract

Due to globalization, the numbers of treaties signed between countries are on the increase. The subject matter of treaties is also broadening so that it includes those areas conventionally considered as domestic affairs. This proliferation of treaties in number and subject matter renders treaty making power troubling in federal countries since the federal government may override the jurisdiction of the constituent units by concluding treaties falling under their competence. This article examines the safeguarding mechanisms of treaty making power of the federal government in order to reduce its impact on the autonomy of Regional States under the Ethiopian Federal System. The article, through analysis of treaties ratified by the Federal Government of Ethiopia and experience of other federal countries, shows that, treaty making power under the Ethiopian Federal System undermines the constitutional distribution of power and autonomy of Regional States by enabling the federal government to conclude international agreements falling under the competence of the Regional States. The article demonstrated that the Ethiopian Federal System lacks mechanisms and institutions to safeguard the interest of Regional States from the unchecked treaty making power of the federal government. Finally, the article proposes institutionalized consultation between the levels of government as a safeguarding mechanism in order to maintain the autonomy and interests of Regional States.

Keywords: Consultation, constituent units, Ethiopia, federalism, safeguarding mechanisms, treaty making power

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* LL.B, LL.M, and currently Lecturer of Law at Wollo University, School of Law. I would like to thank Dr. Solomon Negussie, Associate Professor of Law, for his comments on an earlier version of this article which was part of my unpublished LL.M Thesis at Civil Service University. I am also grateful to Mr. Brightman G/Michael, Lecturer of Law and Dean of the School of Law at Wollo University for his valuable comments on the draft version of this article. Any remaining errors are the author's sole responsibility. For further comments the author can be reached by e-mail: zelalemeshetu84@gmail.com.

INTRODUCTION

Constitutional division of power is one of the cardinal principles of federalism. Political power which is related to legislative, executive, judicial and financial functions is constitutionally divided between the federal government and the constituent units.[1] Moreover, both orders of the government are autonomous with respect to the respective powers granted to each of them. Neither the federal authority nor the constituent units have the power to override the sphere of the other.[2] The federal government has power on matters that are the concern of the nation as a whole, for example, in national defense; whereas, the constituent units are empowered on matters which are not primarily of common interest and considered as relevant for the expression of regional identity.[3] Thus, federalism combines the notion of 'shared rule' and 'self-rule' within a single political system through the constitutional distribution of powers between the federal government and constituent units.[4]

Conventionally, foreign policy has been considered as the responsibility of the federal government which represents the country as a whole in its international relations. This is mainly due to the need to present a common front towards the foreign environment. One of the main powers of the federal government over foreign policy includes conclusion of treaties which are the main source of rights and duties under international law.[5] The importance of treaties in the international *fora* has increased due to economic and political interdependence of countries, the process of internationalization and globalization, technological and communication revolution, the concern for human right and environmental protection.[6] These proliferations of international treaties, which are also becoming broader in scope, gradually blurred the boundary between domestic matters allocated for the constituent units and foreign policy covered by the federal government.[7] Nowadays, treaties deal more with matters habitually assigned to the constituent units. According to Bernier, for instance, "matters which fifty years ago were regulated only by national law or not regulated at all, have now became the object of international agreements.'' [8]

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[1] RONALD WATTS, COMPARING FEDERAL SYSTEMS 83-87 (3rd ed. McGill-Queen's University Press, 2008), ASSEFA FISEHA, FEDERALISM AND ACCOMMODATION OF DIVERSITY IN ETHIOPIA: COMPARATIVE STUDY 93-99 (3rd ed. Eclipse Printing Press, 2010).

[2] RAMESH DUTTA DIKSHIT, THE POLITICAL GEOGRAPHY OF FEDERALISM: AN INQUIRY INTO ORIGINS AND STABILITY 1-10 (Macmillan Company of India Ltd., 1975).

[3] *Id*.

[4] FISEHA, *Supra* note 1, at 93-122.

[5] *Id.* at 269.

[6] Molla Ababu , *Some Problems Related with Reservation to International Treaties: Focus on Human Right Treaties,* 1 BAHIR DAR UNIVERSITY JOURNAL OF LAW. 49, 50-55(2010), MALCOLM SHAW, INTERNATIONAL LAW 86-89 (5th ed. Cambridge University Press, 2004).

[7] Rayan Morrow, Treaties and the Federal Balance in an Era of Globalization (August, 24, 2012), http://www.e-ir info/2011/01/18/treaties-and–the federal balance- in an era- of globalization pdf.

[8] *Id*. on this point *see* also: FISEHA, *Supra* note 1, at 269-270.

Therefore, most matters which are under the constitutional competence of the constituent units including social and economic matters, protection of human rights, labour conditions, environmental and cultural matters have at the present time become the subject of international treaties. [9] As the result, the federal government can circumvent the jurisdiction of the constituent units through its treaty making power by concluding treaties on matters falling under their competence. [10] In such a way, under the guise of treaty making power, the federal government deals with state matters which may not be applicable in the exercise of domestic legislative power.[11] This situation in turn opens a channel for the federal government to disturb the powers and interests of the constituent units and hence creates serious problems in federal countries which are defined by internal division of powers.[12] Thus, federalism and the structural design of federal countries live uneasily with the federal government's treaty making power. To use the words of K.C. Wheare as cited in Weiler, "Federalism and a spirited foreign policy go ill together. There is some sort of tension between internal federalism and external legal relations."[13]

It is against this background that this article examines the impact of the treaty making power of the Federal Government of Ethiopia *vis-à-vis* the Regional States' legislative power in relation to their constitutional competence. This article is divided into three parts. The first part deals with the constitutional framework of federations on the allocation of treaty making power in a comparative perspective with a view to search for safeguarding mechanisms. By analyzing a number of treaties, the second part of the article demonstrates the threat of the treaty making power on the autonomy of Regional States under the Ethiopian Federal System. The third part primarily focuses on safeguarding mechanisms which can be used to protect the federal system and interest of the Regional States from the threat of treaty making power of the Federal Government. Finally, the article ends with conclusions and recommendations.

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[9] José Woehrling, *The Relationship between Federalism and the Protection of Rights and Freedoms* in PROCEEEDINGS OF THE THIRD INTERNATIONAL CONFERENCE ON FEDERALISM, (2005).

[10] FISEHA, *Supra* note 1, at 269-270.

[11] Kenneth Dam, International Legal Aspects of Federalism, in FEDERALISM AND THE NEW NATION OF AFRICA 340,345-348 (David Currie ed., 1964). see also; Woehrling, *Supra* note 9, at 42.

[12] *Ibid*. In federal countries power is divided between the federal government and constituent units. This division of power may be in the form of exclusive power, concurrent power and residual power. An exclusive form of power connotes those powers which are monopolized by either level of the government. These powers are exercised either in the hands of the federation or the constituent units exclusively. The shared power form of allocation also denotes those powers which are exercised by both levels of the government at some point. Potentially both levels of governments have the power to exercise over it. The residual one also denotes those areas which are not included in the list of exclusive or shared powers. For more detail on the internal division of power in federal countries see; SOLOMON NUGUSSIE, FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC BASED FEDERAL SYSTEM 60-67 (Revised ed., Wolf Legal Publisher (WLP) 2008).

[13] JOSEPH WEILER, THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?' AND OTHER ESSAYS ON EUROPEAN INTEGRATION 130-184 (Cambridge University Press, 1999).

1. ALLOCATION OF TREATY MAKING POWER IN FEDERATIONS: A COMPARATIVE ANALYSIS

As a general trend, treaty making power is placed under the jurisdiction of the federal government. In most federal states it is considered as the proper and real domain of the federal government which acquired virtual monopoly over it.[14] The United States of America (USA) and India fall under this category since treaty making power is hanged at the center. However, some federation like German and Switzerland turn aside from the general trend and decentralize their treaty making power because their constitution allows constituent units to have an active role on treaty making.[15]

1.1. Centralized Treaty Making Power

In the general pattern of centralized treaty making power, while the federal government has been dominant, the constituent units are limited in their authority of treaty making. The USA is a typical example of centralizing treaty making power. The Constitution of USA confers treaty making power under the jurisdiction of the federal government.[16] It accords full authority for the federal government to make treaties. Moreover, the constitution prohibits constituent units from an act of treaty making. Hence, it does not allow the constituent units to enter into agreements with foreign states. Nevertheless, the prohibition under the Constitution of the United States is not absolute. For instance, the constituent units may enter into agreements with the consent of the Congress.[17]

However, the constituent units have hardly used this power because agreements that involve congressional approval are complex, legalistic, rigid and difficult to negotiate. The congressional scrutiny is so hard that it is difficult for them to obtain its consent.[18] Therefore, the Constitution of USA gives the federal government a determinant role on treaty making. Likewise, the Constitution of India confers an exclusive power for the federal government over treaty making. The federal government controls this area strongly, and the constituent units have no role in treaty making under the Indian Federal System. [19] Therefore, one can appreciate how the USA federal

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[14] Ronald Watts, *Comparative Conclusion,* in DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES (Akhtar Majeed, Ronald Watts, and Dougles M. Brown eds., 2006).

[15] Hans J. Michelmann, Comparative Reflections on Foreign Relations in Federal Countries in DIALOGUES ON FOREIGN RELATIONS IN FEDERAL COUNTRIES 1, 4 (Roul Blindenbacher and Chandra Pasma eds., 2007).

[16] See U.S. Const Art. II Section 2(2) and Art. I Section 10(1). On this point *see also*: CHRISTOPHER PYLE AND RICHARD PIOUS, THE PRESIDENT, CONGRESS AND THE CONSTITUTION: POWER AND LEGITIMACY IN AMERICAN POLITICS 243 (The Free Press: A Division of Macmillan Inc., 1984).

[17] *Id.*

[18] John Kincaid, Comparative Observations on the International Activities of Constituent Governments, in FOREIGN POLICY OF CONSTITUENT UNITS AT THE BEGINNING OF THE 21ST CENTURY 19, 19 (Ferran Reguejo etl ed., 2010).

[19] Michelmann, *Supra* note 15.

system is somewhat flexible as compared to the Indian Federal System in so far as providing a space for constituent units to make treaties under exceptional circumstances.

1.2. Decentralized Treaty Making Power

The trend of decentralized treaty making power demands multi-level governance of the matter and requires the participation of the constituent units in the country's foreign policy in general and treaty making in particular. In Europe, this trend of decentralizing treaty making power has been practiced since 1980s, particularly as a result of the growth of the European Union as a supra national government.[20] As a result, many European countries consequently decentralized treaty making power to enable their constituent units to have a voice in treaty making and on matters affecting constitutionally protected powers of the constituent units.[21] Switzerland represents a good example in decentralizing its treaty making power in the context of European countries. In principle, it should be noted that, matters of foreign relation including treaty making power is a federal affair in Switzerland.[22]

However, the Constitution of Switzerland accords *Cantons*, which are the constituent units in Switzerland, with a full authority of treaty making with foreign countries in all the issues which fall under their competence.[23] The only obligation imposed on *Cantons* is to provide information for the federal government concerning the treaties they are about to ratify.[24] Hence, as a safeguarding mechanism, the Constitution requires *Cantonal* participation in which they are required to provide preliminary information with regard to treaties affecting their interests.[25] Furthermore, the Constitution requires Cantons to also participate in international negotiations when their powers are concerned in a bid to consider their views seriously, particularly, when the treaty is on matters affecting their powers.[26] Therefore, in Switzerland the constitutional framework allows *Cantons* to have an active role in treaty making. This active *Cantonal* participation is primarily attributable to globalization in general and European integration process

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[20] Kincaid, *Supra* note 18, at 19-20.
[21] *Id.*
[22] Art. 54(2) of the 1999 Swiss Constitution.
[23] *Id*. at Art. 56(1).
[24] *Id.* at Art. 56(2).
[25] *Id.* at Art.55.
[26] Thomas Fleiner, Foreign Politics/Policies, National Pluralism and Globalization in the First Decade of the 21st Century. The Case of Switzerland in FOREIGN POLICY OF CONSTITUENT UNITS AT THE BEGINNING OF THE 21ST CENTURY 143, 143-154 (Ferran Requejo *et al.* eds., 2010) , Beat Habeggar, Participation of Sub National Units in Foreign Policy of the Federation, in FEDERALISM IN A CHANGING WORLD: LEARNING FROM EACH OTHER 160, 163-164 (Raul Blindenbacher and Arnold Koller eds., 2003) and Yves Lejeune , Participation of Sub National Units in the Foreign Policy of the Federation, in FEDERALISM IN A CHANGING WORLD: LEARNING FROM EACH OTHER 97, 97-113(Roul Blindenbacher and Arnold Koller eds., 2003).

in particular.[27] Although the country is not a member of the European Union, it is influenced by the decision and the development within the Union. As Beat Habeggar noted, "it is primarily a response to the counting process of European integration". [28]

Under the German Federal System, treaty making power is also decentralized. Although the federal government plays a predominant role in treaty making process, the Basic Law of German (Constitution) allows the *Landers*, which are the constituent units in the German Federal System, to conclude treaties with in their sphere of competence. Similar to the USA Federal System, this power of treaty making depends on the approval of the federal government.[29] However, unlike the United States', this condition does not affect the capacity of the *Landers* to make treaties. It is not totally discretionary and it may not also be withheld without genuine reasons. Thus, it is not difficult for the *Landers* to get either approval or permission for treaty making—making it more flexible as compared to the Federal System of USA.[30] Moreover, the German Basic Law requires the *Landers* to be consulted in matters affecting their interests. The federal government is duty bound to consult the *Landers* in time before the conclusion of a treaty affecting their interests.[31]

1.3. The Allocation of Treaty Making Power Under the Ethiopian Federal System

The treaty making power under the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) is placed under the competence of the federal government.[32] The FDRE Constitution empowers the federal government to formulate foreign policy and to negotiate and ratify international agreements.[33] The Regional States in Ethiopia, which are the constituent units of the federation, have no power to conclude international agreements though they can make agreements among themselves.[34] On top of this, unlike the Constitution of Switzerland and German, the FDRE Constitution does not clearly require the federal government to consult Regional States on treaty matters which can have impacts on their powers and interests.

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[27] The European Union leads member countries to experience a double movement of centralization and decentralization. The centralization movement consists of a partial transfer of national decision-making to collective decision-making at the level of the European Union. So far, it has affected all the member countries in a fairly uniform way. More on the area see; Pierre Salmon, Decentralization and Supernationality; The Case of the European Union (University de Bourgogne, November, 2000).

[28] Habeggar, *Supra* note 26.

[29] *See* the German Basic Law, Art. 32.

[30] WEILER, *Supra* note 13, at 141.

[31] Art. 32(2) of the German Basic Law. See also, WEILER, *Supra* note at 13, at 156, Klaus J. Nagel, Foreign Policy: The Case of the German Lander in FOREIGN POLICY OF CONSTITUENT UNITS AT THE BEGINNING OF THE 21ST CENTURY 120, 122-126 (Ferrean Requejo ed., 2010) and Uwe Leonardy, Federation and Lander in German Foreign Relations: Power Sharing in Treaty Making and European Affairs in FEDERATION, UNIFICATION AND EUROPEAN INTEGRATION 110, 121-125 (Charlie Jeffery and Ronald Strum eds., 1993).

[32] THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Art.51 (8), 55(12), 74(6) and 78(8), FED.NEG.GAZETTA (NO.1/1995). (Hereinafter THE FDRE CONSTITUTION)

[33] *Id.* at art.51 (8).

[34] *Id.* at Art.48.

Therefore, the Ethiopian constitutional framework puts treaty making power on the hands of the federal government.[35]

2. THE CENTRALIZING FEATURES OF TREATY MAKING POWERS UNDER THE ETHIOPIAN FEDERAL SYSTEM

The Federal System of Ethiopia is not established in globalization free zone. Of course, the federal system cannot be free from the impact of globalization and international integration. This is clearly evident from the country's foreign policy.[36] In response to globalization and international integration, Ethiopia has also engaged in different multilateral and bilateral negotiations and treaties. The subject matters of these treaties are so broad that they include tax, tourism, culture, human rights, trade, investment, education, health and environment issues, to mention just a few. The following sub-sections subsequently analyze centralizing features of those treaties in order to demonstrate how the treaty making power of the federal government under the Ethiopian Federal System could be exercised in the manner that affects the powers and interests of the Regional States.

2.1. Double Tax Avoidance Treaties

Ethiopia has signed many double tax avoidance treaties which are also ratified by the House of People's Representatives (HoPRs)—the Federal House with the highest legislative power.[37] These treaties are bilateral agreements concluded between countries in order to set out rules on how to eliminate double taxation upon their residents, with respect to incomes received in

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[35] Despite this constitutional framework, there are some instances in which Regional States may engage in agreements with neighboring regions. This is common between Amhara and Tigray Regional States and the Sudanese regions which entered into agreement on border related matters. Thus sometimes Regional States conclude agreements with adjacent regions of the Sudan. The State of Tigray for instance, concluded an agreement with the State of Kassala of the Republic of Sudan. The Amhara Regional State also concluded an agreement with Gadarif and Sinnar States of the Republic of Sudan. The Southern Nations, Nationalities and Peoples and Gambella Regional States are also involved and participated on the agreement concluded between Ethiopia and Southern Sudan. For further information on the area see Zelalem Eshetu, Treaty Making Power Under The Ethiopian Federal System; A Comparative Study 28-41 (LL.M. Thesis, Civil Service University, 2012).

[36] MINISTRY OF INFORMATION PRESS AND AUDIOVISUAL DEPARTMENT (MIPAD), THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA FOREIGN AFFAIRS AND NATIONAL SECURITY POLICY AND STRATEGY, 1-22 (Berhane and Selam Printing Press, 2002). The policy document helps build development, democratic system, national pride and prestige and globalization as foundations of the foreign affairs policy of the country.

[37] Ethiopia, for instance, has signed double tax avoidance treaties with Russia, Italy, Kuwait, Yemen, South Africa, Turkey, Romania, Israel, Algeria, Tunisia, China, Egypt, Sudan and Indian. The analysis in this article is based on the agreement made with Egypt and India. The choice is made simply due to accessibility of the documents and the relevant information therein. However, as the author has seen most of the treaty documents, there is no substantial difference among them..

the other country.[38] Their main operation is to provide solution for the tax claims of the two governments on a particular source of income. They do this either by assigning the whole claim to one of the governments or to prescribe the base on which the tax claim is to be shared between them.[39] Thus, the agreements help allocate the taxing jurisdiction among the contracting parties with regard to different heads of incomes which are the subject matters of the treaty.[40] Double tax agreements do not create a right to tax which does not already exist under the countries' own domestic law. Rather they decide the party who exercises jurisdiction to tax on income. Thus, they limit the taxes otherwise imposed by the contracting parties.[41]

Double tax avoidance agreements signed by Ethiopia also aimed at avoiding double taxation. As the titles and the provisions of the agreements demonstrate, they are applicable only on income taxes.[42] On top of this, the treaty documents provide that the agreement is not confined only to income taxes imposed by the federal government. It is also applicable on income taxes which are under the competence of the Regional States.[43] Moreover, the Ministry of Finance and Economic Development (MoFED), the chief negotiator of the treaties, under its memoranda proclaims that "(….) as the aim of the treaties is to create conducive environment for investment (…), their provisions are applicable on all income taxes imposed by each level of the government".[44] The agreements also provide the list of incomes which are the subject matter of the treaty. Incomes from mining, petroleum and agricultural activities fall under the scope of the double tax avoidance treaties.[45]

However, under the Ethiopian Federal System, mining activities are not entirely under the exclusive powers of the federal government. As has been the case, small scale mining activities are under the exclusive jurisdiction of the Regional Governments.[46] Similarly, incomes derived from agricultural activities are under the powers of the Regional States.[47] Furthermore, incomes from large scale mining activities and petroleum are under the concurrent powers of taxation in

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[38] ANGHARAD MILLER AND LYNNE OATS, PRINCIPLES OF INTERNATIONAL TAXATION 70(2nd ed. Tottel Publishing Ltd., 2009).

[39] Wassihun Abate, Double Taxation Avoidance Treaty and Its Role in Promoting Investment in Ethiopia 26-39 (LL.B. Thesis, Civil Service College, 2007).

[40] *Id.*

[41] MILLER AND OATS, *Supra* note 38, at 124.

[42] Agreement Between the FDRE and the Arab Republic of Egypt for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Art. 2(2), September 15, 2011 and Agreement between the FDRE and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Art.2(2), May 25, 2011(Hereinafter The Ethio-Egypt and Ethio-India Double Tax Avoidance Treaties).

[43] *Id.*

[44] የሥምምነቶች አንቀፆች በየትኛውም የመንግስት አስተዳደር እርከን በተጣሉና በሚጣሉ ተመሳሳይ ታክሶቹ ላይ ተፈፃሚነት ይኖራቸዋል፡፡ (literally translated: the treaties shall be applicable on taxes levied or similar taxes to be levied at any government administration level)

[45] The Ethio-Egypt and Ethio-India Double Tax Avoidance Treaties, Art. 2(3) (a) (ii).

[46] THE FDRE CONSTITUTION, Art. 97(8).

[47] *Id*. Art. 97(3).

the sense that they are administrated by the federal and regional governments share from the proceeds collected by the federal government.[48] However, all these sources of incomes are included under the double tax avoidance treaties. Besides, the agreements provide that the treaty is also applicable to new income taxes that will be imposed in the future.[49] This provision is not in line with the undesignated power of taxation provided under Article 99 of the Constitution of the FDRE. According to this provision, a new source of tax which is not provided under the Constitution will be allocated by the joint session of the House of Peoples Representatives and the House of Federation. Hence, if these Houses jointly decide that a new source of income tax to be exercised by the Regional States, its application will also be limited by the treaties. Therefore, double tax avoidance treaties may also affect the potential or future tax powers of the Regional States under the Ethiopian Federal System.

The experience of other federal countries with regard to double tax avoidance treaties is different from Ethiopia. In Canada and USA, tax treaties are applied only to national taxes. These federations restrained from entering into tax treaties that limit the power of their constituent units. This is due to constitutional constraints and established traditions.[50] However, under the Ethiopian Federal System the taxation power of the Regional States basically rests on domestic sources. According to Article 97 of the Constitution of FDRE, Regional States have no power of taxation on incomes pertaining to international organizations and activities. Practically, this may minimize the impact of double tax avoidance treaties on the powers and interests of the Regional States.

Indeed, the treaties have direct and indirect impact on the powers and interests of the Regional States in Ethiopia. For instance, Article 14 of the Ethio–Egypt double tax avoidance treaty directly limits the powers of the Regional States to collect income tax from independent, scientific, literacy, educational or teaching activities as well as from the independent activities of physicians, lawyers, engineers, architects, dentists and accountants of a resident of a contracting country. Similarly, Article 21 of the same treaty restricts the powers of the Regional States in terms of collecting income tax from professors, teachers and researchers of residents of

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[48] *Id*. Art. 98.
Practically, there is no concurrent power of taxation. In the Ethiopian Federal System, there is no clearly provided concurrent power albeit the wording of Article (98) of the Constitution. This provision does not actually confer concurrent legislative power over taxation. The practice and the unofficial 'constitutional amendment' changes the spirit of concurrency into revenue sharing which allows the specified taxes to be determined and administered by the federal government while the constituent units share the proceed from it. See; NEGUSSIE, *Supra* note 12, at 63-64.

[49] The Ethio-Egypt and Ethio-India Double Tax Avoidance Treaties, Art. 2(4).

[50] BRIAN J.ARNOLD AND MICHAEL J. MCLNTYRE, INTERNATIONAL TAX PREIMIER 94 (Kluwer Law International, 1995). *See also* : MILLER AND OATS, *Supra* note 38, at 20-21.

contracting parties who are working within institutions of Regional States. Besides, these treaties indirectly affect the interests of the Regional States by limiting the amount of total revenue collected by the federal government. As they are dependent on grants[51] from the federal government, any act affecting the total revenue can easily affect the interests of the Regional States. Therefore, it is on the bases of the above premises that double tax avoidance treaties have direct and indirect impact on the powers and interests of the Regional States under the Ethiopian Federal System.

2.2. Bilateral Co-operative Treaties

Ethiopia has also signed bilateral co-operative agreements with different countries mainly focusing on areas like tourism, culture, health and education which are relates to the competence of Regional States under the Ethiopian federal system. In the Ethiopian Federal System, the powers that are not exclusively or concurrently assigned to the federal government are considered as residual powers of Regional States.[52] As a result, since the affairs of tourism are not exclusively and concurrently assigned to the federal government, it may fall under the category of residual powers of Regional States. The framework power[53] provided under Article 51(3) and 51(5) of the FDRE Constitution does not include the subject matter of tourism as a federal competence, as can be understood from the reading of Minutes of the Constitutional Assembly.[54] Moreover, a careful investigation on the lists of powers and functions of federal organs provided under Articles 55, 74 and 78 of the FDRE Constitution indicate that tourism is not specifically assigned to the federal government as an exclusive power. Therefore, as long as it is not exclusively given for the federal government, it is possible to argue that tourism is either residual power or at least concurrent power under the Ethiopian Federal System.

Despite this constitutional background, the Federal Government of Ethiopia concluded tourism cooperative agreements with the Republic of Sudan, Hellenic Republic and Kuwait.[55] As

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[51] Grant is simply a portion of revenue transferred to Regional States based on a formula made by the House of Federation. In Ethiopia Regional States are financially dependent on this grant. For detail *see* NEGUSSIE, *Supra* note 12.

[52] THE FDRE CONSTITUTION, Art.52.

[53] Framework power is a kind of shared power more prevalent under the German Federal System. The Basic Law of Germany specified matters for which the federation has the right for framework legislation. On such matters specified under framework power, the federation has the power to issue framework legislations. However these federal legislations give only a general outline and need subsequent *Landers'* legislations for their implementation. As a result, framework powers allow the *Landers* to decide on the details of the matter.

[54] Minutes of the Constitutional Assembly Volume 4 (Nov.1994) (Unpublished, available at the House of Peoples Representatives (HoPR) archive, Addis Ababa).

[55] Cooperative Agreement in the field of Tourism between the Government of the FDRE and the Government of Sudan, and Hellenic Republic Ratification Proclamation, FED.NEG.GAZETTA (No. 437/2005) and (326/2003) receptively. Ethiopian-Kuwait Tourism Cooperative Agreement signed in Kuwait on the 13th Day of May, 2007(available at the archive of HoPR, Addis Ababa). On Top of this, the Ethiopian government also made a Cultural Cooperative

the preambles of these agreements indicate, the treaties aim to promote mutual understanding, good will and close relations with their people. Moreover, the agreements aim to promote tourism for economic development. More importantly, the substance of the treaty made with Kuwait indicates that the parties agreed to exchange expertise in the field of developing handicrafts and manufacturing, to invest on the historic and cultural locations and to give legal protection for such tourism investments, to exchange expertise thereby to preserve culture, environmental and social aspects of historical and cultural sites. Generally, the two countries agreed to promote the tourism sector through co-operation. [56]

Ethiopia also concludes many cultural co-operative agreements with different countries. It concludes agreements with Sudan, Libya, Turkey, Italy and Kuwait.[57] The preambles of these co-operative agreements indicate that the agreements aim to encourage co-operation in the field of culture and arts. This co-operation is effected by exchange of artistic troupes and cultural delegation, participating in cultural and artistic exhibitions held in both countries through exchange of experiences and artists visits, writers, and specialists in the cultural and art affairs, and promotion of co-operation between cultural institutions.[58] Moreover, the two countries agreed to design and implement projects aimed at preserving and conserving the cultural and folkloric[59] heritages in both countries.

The FDRE Constitution recognizes Ethiopia as a multicultural state and gives a special attention for cultural rights of Nations, Nationalities and Peoples as one component of the right to self-determination. As a result, Nations, Nationalities and Peoples in Ethiopia have the right to develop, promote and preserve their own cultures.[60] These rights are not even suspended under the state of emergency.[61] This indicates the special place accorded for the cultural rights of the Nations, Nationalities and Peoples under the Ethiopian Federal System as an important aspect of exercising cultural autonomy peculiar to the Regional States. Moreover, the cultural agreement

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Agreement with the government of Kuwait in addition to the Tourism Cooperative Agreement. This indicates that Culture and Tourism are two different things governed under two different agreements.

[56] Ethiopian- Kuwait Tourism Cooperative Agreement signed in Kuwait on the 13th Day of May, 2007(available at the archive of House of Peoples Representatives (HoPR), Addis Ababa).

[57] Cooperative Agreement in the Field of Culture between the Government of FDRE and the Government of Sudan, Libya, Turkey and Italy Ratification Proclamations, FED.NEG.GAZETTA (No. 403/2004), (422/2005), (462/ 2005) and(107/2004) respectively.

[58] The Ethio-Kuwait Cultural Cooperative Agreement, Art. 2. See also Ethio-Sudan, and Ethio-Turkey Cultural Cooperative Agreements. (Ratified Proclamations, official decisions and discussions held at the 4th session of the 2nd House of Peoples' Representatives Vol. 1, available at the HoPR archives, Addis Ababa, 2004).

[59] Folkloric heritages are those traditional beliefs, stories and customs of a community passed by word of mouth.

[60] THE FDRE CONSTITUTION, Art. 39(2).

[61] *Id.* Art. 93(4).

made with Kuwait contains provisions for co-operation in preventing illegal import, export and transference of cultural heritage goods to be conducted in pursuance of national legislations and international treaties signed by each party.[62] Besides, Ethiopia also signed and ratified a multicultural treaty for prohibiting and preventing illicit import, export and transference of ownership of cultural property.[63] However, the Ethiopian Constitution gives the federal government a framework power on the prevention and protection of cultural heritages[64] and historical objects while the Regional States have the power to regulate the details on the matter.[65]

Ethiopia has also signed bilateral cooperative agreements on top of cultural and tourism matters. It signed an agreement with the Republic of Turkey on cooperation in the field of health.[66] Both countries have agreed to cooperate through exchange of information, expertise and contact among the related foundations, institutions and organizations. The two sovereign states agreed as to their institutions to treat patients of the other on a commercial basis.[67] However, constitutionally speaking, health is a shared power under the Ethiopian Federal System. The federal government set the policy standard and the Regional States regulate the detail on the subject. Moreover, the Regional States are not precluded from designing their health policy with in the standard set out by the federal government.[68]

In addition, Ethiopian has also signed a cooperative agreement in the field of education with the government of Turkey and Israel. In these agreements, both parties agreed to cooperate in elementary, secondary, technical and vocational and higher education.[69] However, the whole aspect of education is not under the exclusive jurisdiction of the federal government under the Ethiopian Federal System. Elementary education is under the competence of the Regional States. Besides, Ethiopia has also signed general co-operative agreements with different countries. These agreements are so general that they include different subject matters as economic, trade, investment, culture, youth and sports.[70] These general co-operative agreements, among other

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[62] *See* The Ethio-Kuwait Cultural Cooperation Agreement, Art.5.

[63] Convention on the Means of Prohibiting and Preventing the Illicit Import-Export and Transfer of Ownership of Cultural Property. Ethiopia Ratified this Convention through Ratification Proclamation, FED.NEG.GAZETTA (No.374/2003).

[64] THE FDRE CONSTITUTION, Art. 51 (3).

[65] *Id*. Art. 51(5).

[66] The Ethio-Turkey Health Cooperative Agreement signed in Ankara, on March 13, 2003, and Ratified by HoPR through Ratification Proclamation, FED.NEG.GAZETTA (No. 325/2003).

[67] The Ethio-Turkey Health Cooperative Agreement, Art. (2) and (5).

[68] THE FDRE CONSTITUTION. Art. 51(3) and 52(2) (C). On this area; see FISEHA, *Supra* note 1, at 275-276.

[69] Ethio-Turkey and Ethio-Israel Cooperative Agreements on the Field of Education, Culture, Science, Mass media, Youth and Sport. These agreements are approved by the HoPR through Ratification Proclamations, FED.NEG.GAZETTA (No.462/2005) and (No. 509/2006) respectively. See also FISEHA, *Supra* note 1, at 275-276.

[70] The Ethio-Saudi Arabia and Ethio-Belgium Cooperative Agreement. These agreements are approved by the HoPR through Ratification Proclamations, FED.NEG.GAZETTA (No. 350/2002) and (No. 312/2003) respectively.

things, cover health, education and cultural subject matters which are under the competence of Regional States under the Ethiopian Federal System.

2.3. Investment Treaties

The Ethiopian government also concluded bilateral and multilateral agreements on the reciprocal promotion and protection of investment with different countries.[71] All these investment agreements require the contracting parties to promote and encourage investment by creating favorable conditions for investors of the other contracting party to invest capital in their territory. They require each contracting party to accord fair and equitable treatment for investors. They also demand restitution, indemnification, compensation or other settlements to be taken by the contracting parties for any loss owing to war or other armed conflicts, revolutions or riots in one's territory. Besides, the investment treaties require nationalization, expropriation and other similar measures to be done in pursuance of law only on public interest grounds. These investment treaties stipulate that when any party is involved in expropriation acts, it is required to provide adequate compensation for the investor or the legal beneficiary without delay. These treaties are primarily intended to protect the investor from arbitrary acts of the host country thereby to establish the confidence of the investor to invest his/her capital within the host country.[72] Therefore, it is possible to assume that investment treaties play a significant role in terms of attracting foreign direct investment with in a country. On this point, the Ethiopian Investment Agency provides that "since local investors are short of capacity to add value to the investment sector, the government is forced to take measures with a view to attract foreign direct investment".[73] Among others, conclusion of bilateral investment treaties is one of the measures taken by the Ethiopian government in order to attract foreign direct investments. As the result of these investment treaties and other incentives, foreign investment in agriculture has increased.[74]

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[71] Turkey, USA, Netherland, Israel, Algeria, German, France, Libya, Tunisia, Iran, Sweden, are countries having investment treaty with Ethiopia which are ratified by the HoPR through proclamations, FED.NEG.GAZETTA (No. 323/2003) (No.324/2003), (No.388/2004) (No.389/2004) (No.397/2004), (No.404/2004), (No.405/2004), (No.406/2004), (No.408/2004), (No.417/2004), (No.423/2004) and (No. 461/2004) respectively. Moreover, Ethio-Djibouti, Ethio-Finland and Ethio-Egypt Investment Agreements are also signed Nov. 18, 2006, Feb. 23, 2006 and July, 27/2006 respectively. Most of these agreements are similar in their contents.

[72] *Id.*

[73] The Ethiopian Press Agency, *"The Ethiopian Herald: Daily Published News Paper*" 1 (Thursday, 14 June 2012 No. 237).

[74] THE ETHIOPIAN INVESTMENT AGENCY, ETHIOPIA INVESTMENT GUIDE; INTRODUCING ETHIOPIA 21-37 (2010) The government of Ethiopia, in recognition of the role of the private sector in the economy, has revised the investment law over three times for the last twenty years to make it more attractive for investors. Through these revisions the government introduced many incentives. For instance, investors who invest in the areas of agriculture will be eligible to obtain loan up to 70 percent of their investment capital from the Development Bank of Ethiopia (DBE) if their

Investment in general and agricultural investment in particular by its very nature requires the allocation of land. Constitutionally speaking, the administration of land is under the competence of the Regional States, which are mandated to administer land in accordance with the policies and laws issued at the federal level.[75] Until recently, the administration of land and its allocation for investment purpose had been carried out by the Regional States on the bases of the constitutional mandate given to them.[76] Nowadays, it is observable that the federal government takes the power of administration and allocation of land through the alleged delegations from the Regional States. For instance, the Federal Ministry of Agriculture and Rural Development established an Agricultural Investment Support Directorate to administer the allocation of rural land above 5000 hectares for investment purpose.[77] This recent practice has transferred the allocation of land above 5000 hectares to the federal government. The federal government acquired this power on the basis of delegation by the Regional States.[78] This upward delegation is not clearly recognized under the FDRE Constitution, however. It was also contested and debated during the drafting of the FDRE Constitution.

The primary challenge emanated from the perspective of the Regional State's autonomy that constitutes the Ethiopian federation. The members of the assembly objected the upward delegation indicating that it will threaten the competence of the Regional States. Finally, their challenge was accepted and the provision which allows the upward delegation was deleted from the final text of the FDRE Constitution.[79] Despite this original legislative intent, the federal government takes the administration of agricultural investment land to facilitate investment and observe its commitments made under treaties which in turn results in the contradiction of the supreme law of the land. At this point, Mr. Aklilu, who is the former head of the Ethiopian Investment Agency, provides that in order to attract foreign direct investment the government provides foreign investors with arable lands coupled with many other incentives.[80] According to this authority, the federal government has already received about 3.6 million hectares of arable land from the Regional States out of the 4 million hectares set aside.[81] This upward delegation practice was criticized since it stands on a shaky constitutional base.[82] The federal government allocates these lands based on lease contracts concluded between the Ministry of Agriculture and

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investment is sound to be feasible. Thus, the government will cover up to 30 percent of the cost of infrastructures (access to road, water supply and electric and telephone line) for investors investing in industrial zone development.

[75] THE FDRE CONSTITUTION, Art. 50 (4).

[76] Imeru Tamrat, Governance of Large Scale Agriculture in Africa: The Case of Ethiopia; A Paper Presented at the World Bank Conference on Land Policy and Administration (Washington DC, April 26-27, 2010).

[77] *Id.*

[78] *Id.*

[79] Minutes of Constitutional Assembly Volume 4 (Nov. 1994) (Unpublished, available at HoPR archive, Addis Ababa).

[80] The Ethiopian Press Agency, *Supra* note 73.

[81] *Id.*

[82] Tamerat, *Supra* note 76.

Rural Development and investors. For instance, studies indicated that with ten lease contracts alone, the federal government transferred 285,012 hectares of land to foreign investors out of which Indian investors have acquired 61 percent of the total land allocated to foreign investors.[83] Investors from China and Saudi Arabia have also acquired significant amount of land.[84]

2.4. Environmental Treaties

The constitutional power allocation on environmental matters is far from being clear under the Ethiopian Federal System. The federal government has the power to enact law for the utilization and conservation of natural resources. Moreover, it has also the power to determine and administer the utilization of water, rivers and lakes which are linked with two or more states.[85] Apart from this legal basis, the constitutional provisions which deal with the powers of the federal government do not allocate environmental issues for the federal government as an exclusive power.[86] If we see this matter in light of the experience of federal countries, the whole aspect of environment is not an area to be left for one level of the government. In Canadian Federal System, for instance, different aspects of environmental matters are assigned exclusively to the federal and state governments. The same is true in USA and Australia.[87] In Switzerland, the federal government has the power to enact legislations on environmental matters which are administered by the *Cantons*.[88] In the Republic of South Africa, environmental matters under the constitution are listed under concurrent powers.[89]

As indicated before, FDRE Constitution is not clear on the allocation of power on environmental issues. It is therefore possible to argue in two ways. One way of argument is based on the strict wording of the Constitution. As long as environment is not exclusively given for the federal government, then it can be considered as residual power for Regional States based on Article 52 of the Constitution. The second way of argument which is based on Article 51(5) of the FDRE Constitution is that it makes environment a shared power between the federal government and the Regional States. Accordingly, the federal government enacts environmental laws which can be administered by the Regional States. This argument is supported by Article

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[83] Elias N. Stebek, *Between Land Grabs and Agricultural Investments; Land Rent Contracts With Foreign Investors and Ethiopian's Normative Setting In Focus, 5* MIZAN LAW REVIEW 175-202 (2011).
[84] *Id.*
[85] THE FDRE CONSTITUTION, Art.51 (5) and 51(11).
[86] *Id.* Art.51, 55, 74 and 77.
[87] WATTS, *Supra* note 1, at 41-42.
[88] *Id.*
[89] Christina Murray and Salim A. Nakhjavani, *South Africa; Provinces Take A Back Seat* in Dialogues On Foreign Relations in Federal Countries (Raoul Blindenbacher and Chandra pasma eds., 2007).

51(2) and 52(2) (c) of the Constitution which empowers both levels of the government to formulate policies and strategies on economic, social and development matters including environmental issues.

Form the above argument it is possible to understand that some aspects of environmental matters fall under the realm of concurrent powers under the Ethiopian Federal System. Moreover, the implementation of environmental treaties needs the cooperation of the Regional States and their local governments like Municipalities. To this end, the Environmental Protection Authority at the federal level is empowered to implement most of the environmental treaties by taking all actions necessary for implementation in cooperation with the appropriate regional and city administration government organs.[90] Therefore, this fact demonstrates that environmental treaties have some kind of implication on the powers and interests of the Regional States under the Ethiopian Federal System.

To sum up, all these treaties which are dealt above have significant implications towards the powers and interests of the Regional States within the Ethiopian Federal System. Most of the agreements are concluded on matters falling under concurrent or framework powers. Health, tourism, education, environment and culture related issues are at least under concurrent or framework powers under the Ethiopian Federal System. Besides, the implementations of some of the treaties have an impact on the interests of the Regional States. For instance, the implementation of environmental treaties in Ethiopia needs cooperation of the Regional States. The implementation of investment treaties also requires the allocation of land, which is under the competence of the Regional States under the Ethiopian Federal System. The implementation of investment treaties also affects the environment and ecosystem of the Regional States. For instance, the large scale agricultural investment practiced in Gambella Regional State affects the natural forest falling under the administrative competence of the Region.[91]

Double tax avoidance treaties have also direct and indirect impact on the powers and interests of the Regional States. They limit the application of regional income tax laws directly with regard to certain sources of income derived from independent activities of professional services such as physicians, lawyers, engineers, architects, dentists, and accountants.[92] These treaties have also indirect impact on the interests of the Regional States such as by limiting the application of the federal income tax laws, and that the double tax avoidance treaties affect the overall revenue generated by the federal government. This in turn affects the amount of grant allocated by the

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[90] Rotterdam Convention Ratification Proclamation, FED.NEG.GAZETTA, Art. 3 (No.278/2002), Stockholm Convention Ratification Proclamation, FED.NEG.GAZETTA, Art.3 (No.279/2002) and Kyoto Protocol Ratification Proclamation, FED.NEG.GAZETTA, Art.3 (No.439/2005).
[91] Stebek, *Supra* note 83, at 200-201.
[92] The Ethio-Egypt Double Tax Avoidance Treaty, Art.14.

federal government to Regional States. Therefore, it could be safe to argue that the powers and interests of the Regional States provided by the FDRE Constitution could inexorably be affected through treaties concluded by the federal government in the absence of safeguarding mechanisms.

3. SAFEGUARDING MECHANISMS OF TREATY MAKING POWER UNDER THE ETHIOPIAN FEDERALISM

The preceding discussion clearly indicated that the treaty making power of the federal government creates trouble in many federations. Ronald Watts, for instance, concludes that a sweeping federal jurisdiction over treaties has been used to override the competence of the constituent units.[93] As a result of this scenario, most federations have designed safeguarding mechanisms to protect the federal structure and the interests of constituent units against the threat of treaty making powers of the federal government. Generally, studies on the constitutions and practice of federal countries identify three forms of safeguarding mechanisms or approaches—adjudicatory mechanisms, political mechanisms and intergovernmental relations.

3.1 Adjudicatory Mechanisms

Disputes between the federal government and the constituent units on the constitutional divisions of powers are inevitable phenomena in federal countries. This unavoidability of power confrontation in federations raises the need for adjudication and resolution of conflict mechanisms. As a result, federations commonly establish an adjudicating body in order to umpire the federations thereby to ensure the proper functioning of the federal system.[94] However, the nature of the institution and its jurisdiction is not the same among federations. While some federations may provide a broad power for this adjudicatory institution, other federations may restrict its jurisdiction.[95] Despite these differences, the institutions, *inter alia,* deal with disputes relating to the constitutional division of powers between the federal government and constituent units.[96]

As indicated above, treaty making power is one of the potential areas capable of engendering disputes in federations. It is also indicated that this situation occurs when the federal government concludes a treaty—the subject matter of which falls under the competence of the constituent

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[93] Watts, *Supra* note 14, at 40.
[94] FISEHA, *Supra* note 1, at 333-336.
[95] *Id.*
[96] When Compared to its American counterpart, the German Constitutional Court has an extensive and wide-ranging jurisdiction regarding the Basic Law. On this point *see* also Assefa Fiseha, *Constitutional Interpretation: The Respective Role of Courts and the House of Federation* in PROCEEDING OF THE SYMPOSIUM ON THE ROLE OF COURTS IN THE ENFORCEMENT OF THE CONSTITUTION (2000).

units. Hence, at this time it is inevitable that the federating units claim the legitimacy of the treaty making power of the federal government by bringing the case before the umpiring body designed for resolving constitutionality issues. In federal systems, having such coincidence, judicial review of treaties can be used as an important adjudicatory mechanism to limit the plenary treaty making power of the federal government.[97]

The German Federal System is a typical example for such judicial review of treaties. In Germany, the Federal Constitutional Court has been established as guardian of the constitutional order. While this specialized tribunal is empowered to decide only on constitutional issues, it has extensive powers enumerated under the Basic Law. For instance, it is authorized to adjudicate matters involving, *inter alia*, federal-state conflicts and abstract judicial review.[98] Constitutional scholars indicate that the Constitutional Court of Germany has comprehensive jurisdiction for all questions of federal constitutional law.[99]

Specifically, the Constitutional Court adjudicates constitutional disputes between *Landers* and the federal government. Accordingly, either the *Lander* government or the federal government may bring proceedings before the Constitutional Court. The party that brought the case is required to assert that the act or omission complained of has resulted in a direct infringement of a right or duty assigned by the Basic Law.[100] Moreover, the Constitutional Court may also decide on "difference of opinion or doubts about the compatibility of a federal or state law with the Basic Law" on the mere request of the federal or a state government or one-third of the members of the *Bundersat* (parliament).[101] These procedures generally enable the *Landers* to seek a ruling on legislative matters including international treaties which they think is unconstitutionally evaded by the federal government.[102] For instance, in the *Concordant Case,*[103]

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[97] Dam, *Supra* note 11, at 345-359.

[98] DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMAN 1-10 (2nd ed. Duke University Press, 1997).

[99] Philip Blair and Peter Coller, *Federalism Legalism and Political Reality: The Records Federal Constitution Court* in RECASTING GERMAN FEDERALISM: THE LEGACIES OF UNIFICATION (Charle Jefery ed., 1999).

[100] KOMMERS, *Supra* note 98.

[101] *Id.*

[102] The Basic Law of Germany. Art. 25. This provision makes the general rules of public international law as an integral part of the federal law.

[103] Concordat Case (1957) 6 Bverf Ge 309. In 1933 Hitler's regime concluded a Concordat with the Holy See. The Concordat recognized the right of the Catholic Church to freedom of religion and control over church properties. It also included guarantees of religious education in the public schools and state supported confessional schools for the children of catholic parents. In 1954 Lower Saxony which was a predominantly protestant State, provided for non-denominational schools for all children. The federal government, at the urging of the Holy See, contested the validity of the State's new policy, claiming that the State has usurped federal authority to conduct foreign relations. The Court sustained the validity of the Concordat under the general principle of international law. But then proceeded to rule that Art. 23 of the Concordat, guaranteeing confessional schools, is not enforceable in States with conflicting school legislation. (For more detail on the case *see* KOMMERS, *Supra* note 98, at 80-82).

and *Televisions I Case,*[104]*,* the issues are all brought in view of the above procedures. As Blair and Coller noted, the Constitutional Court plays a significant role in balancing the federal principles with German international obligation. They further provide that "where the Court sees important principles of the federal system under threat, it comes strongly to their defense."[105] *Concordat* and *Television I Cases* illustrate this role of the German Constitutional Court. In these cases, the Court balanced German's international obligation with the need to ensure proper protection of the federal principle of the Basic Law. In the process, thus, the Court has developed and revived the principle of federal comity.[106]

Under the Ethiopian Federal System, the House of Federation (HoF) is a political organ entrusted with the power of adjudicating constitutional issues. Due to the nature of the HoF, the political question doctrine[107] has no place under the Ethiopian Federal System. As a result, highly politicized matters can also be adjudicated under the jurisdiction of HoF.[108] It is for this reason that federalism in its broader sense, *inter alia,* is a proper jurisdictional area of the HoF.[109] This position can be substantiated by legislative practices in which the HoF monopolizes the power to define the respective powers of the federal government and the Regional States including issues of checking the compatibility of the federal law with the Constitution.[110] As a result, it could be argued that the HoF may adjudicate issues concerning federalism including the treaty making power under the Ethiopian Federal System. In this regard, the Council of Constitutional Inquiry

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[104] Television Case (1961) 12 Bverf Ge 205. In this case, the Court was asked to rule on the constitutionality of the federal cabinets' decision to approve European community guidelines on television programming. Recall that under Art. 70, governmental power resides with the *Lander* unless otherwise provided for in the Basic Law; Bavarian supported by eight other states brought an action against the federal government. The Court approved the guidelines, but found that the federal government, by ignoring the opposing view of the states has violated the principle of comity. When the federal government approves a community regulation affecting a power reserved to the *Lander* state, governments are entitled to be consulted before the regulation is approved. (*See* KOMMERS, *Supra* note 98, at 74-75).

[105] Blair and Coller, *Supra* note 99.

[106] *Id.* The Doctrine of Comity has been developed under the German Constitutional jurisprudence. This principle has an important implication towards the treaty making power of the federal government. The principle of comity requires federalism to be a way of establishing relationship and trust between the two levels of government. As a result, each level of government has a constitutional duty to respect the rightful prerogative of the other. The doctrine obligates federal and state governments to consider each other's interest in exercising their authority. Thus, it demands both levels of government to behave in a pro-federal manner. (*See* KOMMERS*, Supra* note 98, at 69-72).

[107] "*Political question doctrine"* has been developed under the American constitutional jurisprudence. The US Supreme Court invoked this doctrine and imposed self-restraint on issues relating to foreign policy and relations by alleging that the matter has political elements which have to be dealt by the President or Congress.

[108] FISEHA, *Supra* note 1, at 344-346. In addition, horizontal separation of power in federal and state levels can also be adjudicated under the HoF.

[109] *Id.* s*ee* also Fiseha, *Supra* note 96, at 7-26.

[110] Consolidation of Powers of the House of Federation (HoF) and Definition of its Powers and Responsibilities, FED.NEG.GAZETTA, Art. 24(3) (No. 251/2001). Hereinafter, the HoF Proclamation.

(CCI) Proclamation specifies the Federal and the Regional State governments and one-third of the members of the Federal and State Councils to have the right to stand before the HoF.[111] This procedure enables the regional governments to bring constitutional issues in the event that the federal government encroaches on their powers and interests. The procedure is also justifiable when the encroachment into the powers and interests of the Regional States is through the treaty making power of the federal government.

Firstly, excluding foreign policy and treaty matters from the ambit of adjudication based on the political questions doctrine is not tenable in Ethiopia, since the House of Federation itself is a political organ. Second, the political safeguard mechanisms which can be ensured through the participation of the second chamber in the lawmaking and treaty making process is absent in the Ethiopian Federal System. As a result, bringing complaint against the treaty making power of the federal government before the HoF is a logical necessity for the Regional States in order to protect their interests in the continuum of the Ethiopian federal power bargain which is enshrined under the Constitution. Thirdly, Proclamation No. 251/2001 that deals with the powers and responsibilities of HoF and the Council of Constitutional Inquiry Proclamation No. 250/2001, later on amended through proclamation No. 798/2013, define the term law so broadly that it includes treaties ratified by the Ethiopian Federal Government. Consequently, the constitutionality of international agreements ratified by Ethiopia can be challenged before the Council of Constitutional Inquiry (CCI) and finally decisions can be passed by the HoF.[112] Therefore, the legal framework allows the Regional States to challenge the treaty making power of the federal government in the event that it concludes agreements on matters affecting their competence.

In Ethiopian federal parlance, the HoF is expected to play an important role to maintain the federal balance through reviewing the constitutionality of international agreements ratified by the Ethiopian Federal Government.[113] The only worry in this regard is how efficient and practical the House of Federation could be in exercising its function of maintaining the federal balance through reviewing the constitutionality issues of treaty making powers. The FDRE Constitution establishes the Council of Constitutional Inquiry (CCI) composed mostly of high standing legal experts headed by Chief Justice of the Federal Supreme Court.[114] This body of inquiry is

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[111] Council of Constitutional Inquiry Proclamation, FED.NEG.GAZETTA, Art. 3 (No. 798/2013).

[112] The HoF Proclamation, Art. 2(2) and Council of Constitutional Inquiry Proclamation, FED.NEG.GAZETTA, Art. 2(5) cum 6(No. 250/2001).

[113] The American system disregards the allocative limitation against the treaty power due to their trust on the political process. In the USA, the treaty making process allows States' interests to be protected at the Senate. The HoF in Ethiopian is not involved in the law making as well as treaty making processes. Therefore, it is logical and necessary for the House of Federation to review international agreements based on subject matter limitation.

[114] THE FDRE CONSTITUTION, Art. 82 and Council of Constitutional Inquiry Proclamation, FED.NEG.GAZETTA, Art. 15 (No. 798/2013).

entrusted with the power of examining constitutional issues submitted to it and provides the House of Federation with its findings.[115] Though the CCI provides authoritative and sufficient legal advice to the HoF, the final decision on constitutional issues is passed by the latter.[116] Therefore, it could be argued that while issues of competence and legal knowledge cannot be raised as impairment on the task of adjudication, the HoF may ultimately impact the nature of the final decision. In this context, the adjudicatory function of the HoF in matters of constitutional disputes over treaty making power could be less relevant as compared to the experience of the German Federal Constitutional Court. However, despite its nature as a political organ capable of adjudicating cases having political issues, it could be argued that the HoF could not practically provide a platform for keeping away the threat of the treaty making power of the federal government in a bid to protect the interests of the Regional States.

At this juncture, it is important to note that it is very difficult to find any corporative evidence as to the practical application of challenging the unconstitutionality of the treaty making power of the federal government before the HoF. In so far as the knowledge of the author is concerned, there is no Regional State that brought a case against the treaty making power of the federal government on the ground of its unconstitutional encroachment on its autonomy.[117] However, as discussed before, there are many international agreements concluded by the federal government which in turn have impacts on the exclusive or concurrent powers and functions of the Regional States. The reasons could be attributed to lack of practice on the part of the Regional States to invoke the adjudicatory safeguarding mechanism as aptly provided under the Constitution and other relevant legislations. It can also be argued that the lack of prudent exercise of this safeguarding mechanism is attributed to the lack of information and vigilant checking system by the Regional States. It is observable that Regional States are mostly less concerned about what is happening at the floor of the parliament. Specifically, the Regional States have no systematic list of documents of the international agreements ratified by the federal government of Ethiopia.[118] This problem is further precipitated by the failure of the federal government to publish treaties in

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[115] THE FDRE CONSTITUTION. Art. 84.

[116] *Id.* See also FASIL NAHUM, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT 59 (The Red See Press, Inc., 1997).

[117] Interview with Ato Woldu Merne, Senior Legal Researcher of the HoF. (Addis Ababa ,Ethiopia, 2 May, 2012) and Interview with Hon. Million Assefa, Former Members of CCI (Addis Ababa, Ethiopia, 2 May 2012). After two years the author confirms the same fact from an interview with Ato Seifu G/Mariam, Senior Legal Researcher of the HoPR (Addis Ababa, Ethiopia, 7 May 2014).

[118] For instance, Amhara National Regional State has no such trends. Interview with Ato Geremew G/Tsadik: Former Legal Advisor for Regional House of the Speaker (Bahir Dar, Ethiopia, 15 May 2012) and The same is confirmed by Hon. Ato Tesfaye Daba, Chairperson of the Parliamentary Standing Committee for Foreign, Defense and Security Affairs and Former Legal Advisor to the President of Oromia Regional State (Addis Ababa, Ethiopia, 3 May 2012).

the official *Negarit Gazette* as required by the law in order to help the Regional States and other concerned bodies to take judicial notice.[119] Moreover, the one party dominance at the two levels of government takes the lion's share for the silence of the Regional States.[120]

Hence, the issue of unbounded treaty making power of the federal government could be a hot spot of dispute when the Regional States began to be governed by another party as a robust exercise of genuine regional autonomy. Consequently, whatever reason it may be, currently, the interest of the Regional States to challenge the unconstitutionality of treaty making power is an exercise in futility. Thus, the writer of this paper has the opinion that the adjudicatory legal mechanism is not providing sufficient safeguard and protection for the powers and interests of the Regional States under the Ethiopian Federal System.

3.2. Political Mechanisms

This mechanism relates with the representation of the constituent units in the process of lawmaking in general and treaty making process in particular.[121] As a mechanism, it has an important place in the United States Federal System. In the USA, treaty can be made only with the consent of the Senate. The USA Constitution accords a special power for the Senate with regard to treaty ratification. As a result, the President of USA is required to politically persuade the Senate to its side as a significant process of treaty making power.[122] Within the treaty making power of the federal government, members of the Senate usually reflect State sentiment. This is clear to some extent from the Senate's refusal of some 250 treaties out of 1000 in the first 150 years.[123] Recently, it also limits the impact of human right treaties by being reserved. The reservation is motivated by the notion of federalism. For instance, the reservation attached to the International Covenant on Civil and Political Rights (ICCPR) stated that "the United States understands that this covenant shall be implemented by the federal government to the extent that it exercises legislative and judicial jurisdiction over the matter covered there in and otherwise by the States and local government (…)".[124] This two-third Senate requirement is used as an

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[119] THE FDRE CONSTITUTION, Article 71 and The Federal Negarit Gazetta Establishment Proclamation, FED.NEG.GAZETTA, Art. 3(No.3/1995). Although the law requires their publication, practically neither bilateral nor multilateral treaties have been published in Ethiopia.

[120] FISEHA, *Supra* note 1.

[121] Dam, *Supra* note 11, at 383-385.

[122] Art. II, Section 2. of the USA Constitution: He (the president) shall have, by and with the advice and consent of the Senate, to make treaties provided with two-third of senators (…). In USA the Senate is composed of State representatives. Each State is represented equally irrespective of its size and population, with (2) senators elected directly by the people. Its power and composition makes it an important organ to represent the interests of the States.

[123] Dam, *Supra* note 11, at p.383-386.

[124] Laura Moranchek, Enforcing the Treaty Rights of Aliens, The Yale Law Journal: Student prize paper 2008, 691-692 (August 24, 2012), http://digitalcommons.law.yale.edu/ylsspps-papers/40 pdf. See also ROBERT SCHUTZE, FROM DUAL TO COOPERATIVE FEDERALISM:THE CHANGING STRUCTURE OF EUROPEAN LAW 112-113 (Oxford University Press Inc. 2009).

important political safeguarding mechanism of American federalism against the treaty making power of the federal government. As a result, the Senate either refuses to ratify or attaches reservations on a treaty in order to protect the interest of the States, which are the constituent units under the USA Federal System.

Unlike the American Senate, the German *Bundesrat* (second chamber) has no special power of treaty ratification under the German Federal System. But, it has participated in the national lawmaking process. It has a veto power to suspend all legislations including an absolute veto over all legislations affecting the vital interests of the *Landers.*[125] On top of this, the Basic Law requires treaties regulating the political relations of the federation to be approved by the appropriate legislative body in the form of federal law. Moreover, treaties related to matters of federal legislation also need the approval of the legislative body.[126] As most international treaties fall under Article 59(2) of the Basic Law, the *Bundesrat* has the right to oppose or veto on treaties depending on their topics. Therefore, such participation of the *Bundesrat* on the lawmaking process enables it to protect the interest of the *Landers.*[127] This constitutional role of the *Bundesrat* has been scaled up by the Constitutional Court's interpretation of Article (59) of the Basic Law. [128] It interpreted the provision so broadly[129] that the scope of treaties presented before the legislative body has been increased. Consequently, the *Bundesrat* participates in a significant number of treaties.

In the context of Ethiopia, the House of Federation, which is the second chamber, is a political organ composed of representatives of Nations, Nationalities and Peoples.[130] This House

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[125] KOMMERS, Supra note 98, at p.97.

[126] The German Basic Law, Art. 59 (2) which reads: "The treaties which regulate the political relations of the federation or relate to matters of federal legislation shall require the approval or participation of the appropriate legislative body in the form of a federal law…"

[127] Habegger, *Supra* note 26, at P.160-161.

[128] KOMMERS, *Supra* note 98, at 150-153.

[129] *Id.* The Constitutional Court in the commercial treaty case (1952) Bverf GeE 372 provided that to be a political treaty within the meaning of Art. 59(2), the treaty must deal with public affairs, the good of the community or affairs of the states. A treaty must also directly affect the existence of the state, its territorial integrity, its independence and its position or relative weight within the community of the states. Political treaties in this sense are those directed at asserting, securing or expanding a state's position of strength *vis-a-vis* other states. They include treaties related with alliance, agreements on political cooperation, non-aggression pacts, treaties on peace, neutrality disarmament, and arbitration and similar international agreements. The Court further argued that in the present day international relation, a commercial treaty may have a political character similar to a treaty of alliance where the contracting parties, by concluding a commercial treaty, intended to strengthen their economic position in comparison with other states. Besides, in the same case, the Constitutional Court provided that treaties related with federal legislation include those treaties that can be fulfilled only through the enactment of the federal law.

[130] THE FDRE CONSTITUTION, Art. 53 and 62.

is unique with regard to the powers assigned to it. Firstly, unlike second chambers of other federations, it has no involvement in the lawmaking process. Second, it has the power to adjudicate constitutional issues, which, in other federations, are entrusted to an independent constitutional court or ordinary courts.[131] The rationale for this is that the federal constitution is considered as a political covenant between the "Nations, Nationalities and Peoples" of Ethiopia. Thus, it is argued that those who represent the House of Federation should be the ultimate interpreters and guardians of the Constitution.[132]

This makes the second chamber (HoF) of the Ethiopian Federal System unique from other contemporary second chambers. This unique feature of the second chamber makes the political safeguarding mechanisms found in other federations to be untenable in Ethiopia. The HoF has no role with regard to treaty making[133]since it does not have any involvement in the treaty making process. Therefore, the political safeguarding mechanism under the USA federal arrangement could not be justifiable under the Ethiopian Federal System. Moreover, the safeguarding mechanism under the German federal arrangement, owing to the participation of the *Bundesrat*-second chamber in the law making process, is missing in the context of the Ethiopian federal setup. As the FDRE Constitution denies lawmaking power for the House of Federation, the HoF has no role in the task of treaty approval, which is conducted at the floor of the parliament. Thus, the political safeguarding mechanisms which are included in Western federations are missing in Ethiopia.

3.3. Intergovernmental Relations

Co-operation through Intergovernmental Relations (IGRs)[134] is crucial for maintaining the continuum of federal balance. The IGR helps to carry out treaty making smoothly in federal systems by facilitating the role and considering the interests of the constituent units in the conduct of foreign relations. It is on such basis that one could argue that IGR is a typical mechanism of keeping the balance of federalism.[135] For instance, in Canada, IGR has been used for maintaining the federal balance though there is no intergovernmental forum specifically designed to address foreign policy issues. However, when a specific question related with provincial jurisdiction becomes a focus of international negotiation, IGRs framework will be developed. The bottom line

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[131] FISEHA, *Supra* note 1, at 123-144.
[132] *Id* .
[133] THE FDRE CONSTITUTION, Art. 62 and The HoF Proclamation, FED.NEG.GAZETTA, (No. 251/2001).
[134] Inter Governmental Relations refers to the formal and informal relation between the federal government and the constituent units as well as among constituent units concerning the coordination of policies on shared programs. It deals with interactions between the federal government and the states. It is a mechanism that serves as a forum for the frequent interaction of the two levels of government. For detail *see* FISEHA, *Supra* note 1, at 306-327.
[135] Habegger*, Supra* note 26, at 158-167.

in Canadian IGR system is that relevant consultation takes place between the federal government and the constituent units.[136]

In the Ethiopian Federal System, IGRs are generally weak due to lack of institutions, policy frameworks and guidelines.[137] In particular, there is no specific vertical intergovernmental forum developed with regard to treaty making. For example, the Ministry of Foreign Affairs which negotiates and signs treaties does not hold such intergovernmental forums with regard to treaties affecting the interests of the Regional States.[138] Likewise, the Ministry of Finance and Economic Development (MoFED), which often exercises treaty making power, has not yet developed intergovernmental forums with regard to double tax avoidance treaties that are capable of affecting the interests of the Regional States.[139] The Ministry of Federal Affairs, which is an implementing agency of intergovernmental relations in Ethiopia, is busy for being engaged in other activities such as in dispute resolution and in assisting the emerging regions. The Intergovernmental Relations Strengthening Directorate General, established under the Ministry of Federal Affairs, is concerned with awareness creation and gathering past experiences in interstate interactions.[140] The issue of treaty making is not the focal area of the Ministry. Moreover, the Forum of the Speakers, created as a legislative intergovernmental institution, does not deal with such issues. Foreign affairs and treaty making matters have not been dealt under the forum.[141] Therefore, the intergovernmental relations which have played a decisive role in Canada to maintain the federal balance have no place under the Ethiopian Federal System.

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[136] Andra Lecours and George Anderson, Foreign Policy and Intergovernmental Relations in Canada, in DIALOGUES ON FOREIGN RELATIONS IN FEDERAL COUNTRIES 20, 21-23 (Raoul Blindenbache and Chandra Pasama eds., 2007).

[137] FISEHA, *Supra* note 1, at 306-332.

[138] Interview with Ato Reta Alemu , Director in International Legal Affairs Directorate within the Ministry of Foreign Affairs (Addis Ababa, Ethiopia, 1 May 2012).

[139] Confidential Interview (3 May 2012) After the challenges posed by parliament (HoPR) with regard to Ethio-Egypt, India and Sudan double tax avoidance treatise. The Ministry of Finance and Economic Development promised to conduct such forums with regional governments. Interview with Hon. Ato Wana Wake, Chairperson of the Parliamentary Standing Committee for Finance and Budget Affairs (Addis Ababa, Ethiopia, 3 May 2012). But until this Article is to be finalized, the promise has not yet been realized.

[140] Tsegabrhane Taddesse, The Ministry of Federal Affairs as an Implementing Agency of Intergovernmental Relations in Federal Ethiopia in ETHIOPIAN FEDERALISM PRINCIPLES, PROCESSES AND PRACTICE: 59, 59-79 (Alem Habtu ed., 2010).

[141] The forum re-organized so as to include speakers of the House of Federation, Chairperson of Parliamentary Standing Committees and Addis Ababa and Dire Dawa Administrations.It is also conducted twice a year. The forums were conducted at Gambella, Assossa, Jigjiga, Mekelle and Harrar. The participants discussed and shared experiences with regard to different issues like parliamentary working procedures, and the over sighting role of the legislature. But the issue of treaty making was not an issue at the Forums. (Interview conducted with G/Tsadek, *Supra* note 118).

Consultation as a form of co-operations and channels of IGR has been used in many federations on the basis of constitutional recognition. As it has been discussed in the previous section, the constitutionally recognized consultation has been used in Germany and Switzerland to protect the interest of the constituent units. Federal countries may also introduce the practice of consultation through ordinary legislation without constitutional backing. For instance, the experience of Australia suggests that constituent units are practically consulted with regard to matters falling under their competence though the federal government has plenary treaty making power under the Constitution. Moreover, representatives of the constituent units are also involved in negotiating delegations.[142] All these are the result of reforms carried out in 1996, on treaty making procedures in order to make it more consultative and democratic. As a result of the reform, principles and procedures for consultation on treaties have been developed in Australia.[143] These procedures and principles require, *inter alia*, all treaties to be tabled at the Common Wealth parliament before ratification. Besides, the reform established the "Parliamentary Joint Standing Committee", the Treaty Council and the Joint Standing Committee on Treaties to facilitate the consultation process.[144]

Unlike the cases in Germany and Switzerland, consultation during treaty making process has no clear constitutional backing under the Ethiopian Federal System. However, the need for consultation is envisaged under Article 50(8) of the FDRE Constitution in a general context.[145] This provision seems to incorporate the comity principle which presupposes and underpins consultation. As a result, the federal government is obligated to consult and take into account the opinions of the Regional States. This way of reasoning is also supported by the German Constitutional Court. The Court in the *Television I Case* asserted that due to the principle of comity, the *Landers* are entitled to be consulted by the federal government before the approval of a treaty as long as such treaty affects their powers and interests.[146] Furthermore, Leonardy noted that the principle of comity alone obliged the federal government to take into account the opinion of the *Landers*[147]-- indicating the fact that the principle of comity presupposes consultation.

As indicated in the preceding discussion, though the need for consultation is recognized under Article 50(8) of the FDRE Constitution, it is not hitherto practically invoked with regard to treaty making. For instance, the Ministry of Foreign Affairs is empowered to negotiate and sign treaties that Ethiopia enters into with foreign countries and international organizations in

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[142] WEILER, *Supra* note 13, at p. 150-155.
[143] Anne Towmey, Foreign Relations in Australia: Evolution and Reform, in DIALOGUES ON FOREIGN RELATIONS IN FEDERAL COUNTRIES 12, 12-14 (Raoul Blindenbacher and Chandra Pasma eds., 2007).
[144] *Id*.
[145] THE FDRE CONSTITUTION, Art. 50(8). This provision provides that "(…) the State shall respect the powers of the federal government. The Federal government shall likewise respect the powers of the State."
[146] KOMMERS, *Supra* note 98, at 74-75.
[147] Leonardy, *Supra* note 31, at 126.

consultation with the concerned organs.[148] However, this consultation does not cross the jurisdictional borders of the federal government. Rather it is confined only with federal ministries and agencies including other federal organs concerned with the subject matter of treaty. This fact could be understood from the phrasing of "consultation with the concerned"[149] that does not purportedly include the Regional States. Of course, there is no trend of consultation with regional governments.[150] Nor are regional governments included in the negotiating team on treaties so far.[151] In the same token, a senior expert from the Ministry of Finance and Economic Development also confirmed that consultation has not yet been made with the Regional States with regard to double tax avoidance treaties.[152] A study conducted by Wasihun Abate indicates that "it is only two lawyers from the Ministry of Finance and Economic Development who are appointed as members of the Ethiopian government delegations."[153] The parliamentary standing committees which scrutinize treaties before ratification discussed the documents of the treaties with experts and stakeholders from federal agencies. In this deliberation process, no one is represented from the Regional Sates.[154]

Moreover, failure of the Constitution to specifically recognize consultation in the treaty making process cannot be justified as a ground for disregarding Regional States from the ambit of treaty making in totality. The issue of consultation can also be addressed through ordinary legislations as is the case in Australia.[155] Unlike the case in Australia, there is no ordinary legislation dealing with treaty making procedures in Ethiopia. The treaty making procedures that are currently in use were enacted during the unitary regime.[156] This unitary treaty making procedure is not repealed or amended to address the unique nature of treaty making power in the federal system. However, this treaty making procedure is *de facto* functional to the extent that it is consistent with the FDRE Constitution.[157] It should however be noted that the whole spirit of the procedures is not consistent with the Constitution since it was enacted to accommodate the treaty making needs of the unitary regime inherently lacking the flavor of federalism. As such, it is not conducive to protect the interests of the Regional States that otherwise requires

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[148] Definition of Powers and Duties of the Executive Organs of the FDRE Government Proclamation, FED.NEG.GAZETTA, Art.15 (3) (No.691/2010).
[149] *Id.*
[150] Interview with Alemu, *Supra* note 138.
[151] *Id.*
[152] Confidential Interview (Addis Ababa, 3 May 2012) and an Interview with G/Mariam, *Supra* note 117.
[153] Abate, *Supra* note 39, at 62.
[154] Minutes of the Parliamentary Finance and Budget Affairs Standing Committees (Unpublished, available at the archive of HoPR, Addis Ababa, Ethiopia).
[155] Towmey, *Supra* note 143.
[156] Treaty Making Procedures Proclamation, FED.NEG.GAZETTA, (No. 25/1988).
[157] Interview with Alemu, *Supra* note 138.

accommodative treaty making procedures such as consultation. Therefore, despite the appearance of the Ethiopian federal structure, the treaty making process of the federal government has made no clear departure from the past unitary regime as it genuinely lacks clear consultative approaches with the Regional States. The important question is what instructive lessons could be drawn from the experiences of comparative perspectives in order to devise best consultative approaches to accommodate the interests of the Regional States during the treaty making process.

In German federation, for instance, the problems pertaining to issues of consultation during the treaty making process are solved through cooperative compacts signed between the federation and constituent units. It ends the debate over treaty making power through the seminal *Lindau* agreement.[158] In the agreement, the *Landers* give plenary treaty making power for the federal government to conclude treaties with regard to matters falling under their competence. On the other hand, the federal government agreed to consult and seek approval of the *Landers* before an agreement become binding.[159] This compact, according to Weiler, opened the way to smooth treaty making practice.[160] This compact further re-enforced the spirit of mutual cooperation and co-ordination enshrined under the Basic Law.[161]

In Ethiopian, there are no similar cooperative compacts and agreements signed between the regional governments and the federal government with regard to treaty making power.[162] The alleged agreement[163] made between the federal government and the regional governments with regard to land administration has no spirit of co-operation in the strict sense of the term. This agreement generally does not allow the Regional States to participate in the process of making investment treaties. It only requires the Regional States to surrender the power of land administration partly to the federal government through upward delegation thereby further strengthening the centralized treaty making power of the latter.

In short, from the preceding comparative study, one can understand that federations have used different IGR mechanisms to exercise and to retrain the broad and unlimited treaty making power of the federal government. The IGR mechanisms that can be exercised through formal and informal consultations and cooperative agreements enable the constituent units to be part of treaty making process. However, these mechanisms are not readily available under the Ethiopian Federal System. As a result, the federal government approaches treatise without seriously taking the interests of the Regional States into consideration, which ultimately influences the federal experiment in the futures to come.

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[158] WEILER, *Supra* note 13, at 155-158. This solution was sought after the Concordat Case (1957).
[159] Leonardy, *Supra* note 31, at 122-129.
[160] WEILER, *Supra* note 13, at 157.
[161] Rudolf Hrbek, German : Cooperation with the *Lander* in DIALOGUES ON FOREIGN RELATIONS IN FEDERAL COUNTRIES, 24, 24-26 (Raual Blindenbacher and Chandra Pasma eds., 2007).
[162] Interview with Alemu, *Supra* note 138.
[163] Tamerat, *Supra* note 76.

CONCLUSIONS AND RECOMMENDATIONS

Constitutional distribution of power is the hallmark of every federation. However, treaty making power of the federal government is a daunting task since it creates anxiety in federations by shaking the constitutional distribution of power. It opens the channel for the federal government to override the jurisdiction of the constituent units. This anxiety is also prevalent in Ethiopia. This article found out that the federal government concluded significant number of bilateral and multilateral treaties affecting the powers and interests of the Regional States. It also demonstrated how some treaties are concluded by the federal government regardless of the residual, exclusive and concurrent powers of the Regional States provided under the Constitution. More importantly, the article revealed how double tax avoidance treaties, co-operative agreements on the issues of health, culture, tourism, education, investment and environmental treaties, the subject matter of which falls under the powers of the Regional States, are negotiated and signed without consulting the latter.

This article also presented the experiences of western federations to show how they prudently designed different mechanisms and institutions to protect the interests of the constituent units thereby to maintain the federal balance. Generally, adjudicatory, political and IGR mechanisms are analyzed as the main safeguarding instruments used by the federations for comparative perspectives. It is argued that the second chamber, the constitutional adjudicating body, and with some extent the national legislative assembly, permanent and ad hoc committees and commissions are identified as appropriate institutions to safeguarding the federal system, particularly the interests of the constituent units, against the treaty making power of the federal government. It is also revealed that the Ethiopian Federal System lacks sufficient and effective safeguarding mechanisms as compared to the experiences of other federations under this comparative study.

Specifically, the political safeguarding mechanism is not available under the Ethiopian Federal System due to the unique features of the second chamber. The adjudicatory safeguarding mechanism is also not practical and viable for the protection of the rights of the Regional States. Although consultation is presupposed by the comity principle which is recognized under the FDRE Constitution, it is also far from being practical. Intergovernmental relations through cooperative agreements have not also been used to safeguard federalism against the unbounded treaty making power of the federal government. Moreover, cooperative institutions and forums have not been developed to facilitate and to coordinate treaty making affairs. Therefore, the Ethiopian Federal System is characterized by lack of sufficient safeguarding mechanisms and institutions against the treaty making power of the federal government. In order to make the

treaty making power more effective and productive from the perspectives of international relations and the contexts of federalism, the following recommendations could be helpful.

It is aptly indicated in this article that the existing scenario that prevails in the practice of treaty making gives unlimited power to the federal government and it is inconsistent with the autonomy of the Regional States as enshrined under the FDRE Constitution. Therefore, in order to encourage participation of Regional States in the treaty making process, I recommend to introduce "institutionalized consultation" mechanisms with regard to treaties affecting the powers and interests of the Regional States. This will help to balance the need of effective foreign relations with the necessity of maintaining regional autonomy. However, in order to establish robust and more effective institutionalized consultation mechanisms, the following legal and institutional reforms should be introduced.

Firstly, in order to provide constitutional recognition that will help and guarantee protection given for the Regional States, the FDRE Constitution should be amended to explicitly recognize consultation in the process of treaty making.

Secondly, in order to realize the participation right of the Regional States on treaty making, treaty making procedure law that specifically contains sufficient provisions to govern the details of consultation should be enacted.

Thirdly, an institution should be introduced to coordinate Regional States among themselves and with the federal government. This institution should be empowered to organize and condense the views and interests of the Regional States in the case of treaty making power in cooperative manner for defending their interests and exerting pressure on the federal government. In this regard, it is recommended to adopt the experience of the Switzerland's Council of *Cantonal* Government (GCC) as a best practice.

Fourthly, the existing de facto intergovernmental institutions and forums have to be strengthened, and their powers, roles and functions have to be broadened so as to include treaty matters. This enables the treaty making power to be smooth and in line with the notion of federalism.

Fifthly, a joint forum on treaties that comprise officials or experts of the regional and federal government should be established. This forum should be entrusted with the function to conduct researches; assess the impact of treaties on the autonomy of constituent units and advise the federal and regional governments on treaty matters and other related issues. This may facilitate the process of consultation and cooperation on treaty matters among the levels of governments.