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TREATY MAKING AND RATIFICATION ACT

NO. 45 OF 2012

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TREATY MAKING AND RATIFICATION ACT

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NO. 45 OF 2012

TREATY MAKING AND RATIFICATION ACT

[Date of assent: 13th December, 2012.]

[Date of commencement: 14th December, 2012.]

An Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes

[Act No. 45 of 2012, Act No. 18 of 2014, Act No. 18 of 2018.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Treaty Making and Ratification Act, 2012.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

“**bilateral treaty**” means an agreement concluded between Kenya and any other State or between Kenya and an international organisation;

“**Cabinet Secretary**” means the Cabinet Secretary responsible for the time being responsible for matters relating to foreign affairs;

“**full powers**” means all those powers conferred, by way of a legal document, to a person or persons designated by a competent state authority, to represent the State for negotiating, adopting, or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect of a treaty;

“**international organisation**” means an intergovernmental organization;

“**ratification**” means the international act by which the State signifies its consent to be bound by a treaty and includes acceptance, approval and accession where the treaty so provides;

“**Registrar**” means the Registrar of Treaties appointed under section 14;

“**Registry**” means the Registry of Treaties established by section 10;

“**relevant Cabinet Secretary**” means the Cabinet Secretary for the time being responsible the subject matter of the treaty;

“**relevant State department**” means the State department responsible for the subject matter of the treaty to be approved for ratification;

“**reservation**” means a unilateral statement made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State;

“**signature**” means an act whereby the State expresses its willingness to consent to the text of a treaty and has the effect of obligating the said State, even though it may not be a party to the treaty, to refrain, in good faith, from acts that would defeat the object and purpose of the treaty;

“**treaty**” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes a convention.

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “**Cabinet Secretary**” and “**State Department**” shall be construed to mean “**Minister**” and “**Ministry**” respectively.

[Act No. 18 of 2014, Sch.]

3. Application

(1) This Act applies to treaties which are concluded by Kenya after the commencement of this Act.

(2) This Act shall apply to—

- (a) multilateral treaties;
- (b) bilateral treaties which deal with—
 - (i) the security of Kenya, its sovereignty, independence, unity or territorial integrity;
 - (ii) the rights and duties of citizens of Kenya;
 - (iii) the status of Kenya under international law and the maintenance or support of such status;
 - (iv) the relationship between Kenya and any international organisation or similar body; and
 - (v) the environment and natural resources.

(3) A treaty relating to the adjustment, alteration or variation of the present position of Kenya on matters of sovereignty, independence and territorial integrity shall be approved in a referendum in accordance with Article 255 of the Constitution:

Provided that the process of ensuring that the boundaries are correctly marked on the ground in accordance with the instruments establishing them shall not be deemed to amount to adjustment, variation or alteration under this section.

(4) Notwithstanding subsection (2)(b), the Government may enter into bilateral agreements—

- (a) necessary for matters relating to government business; or
- (b) relating to technical, administrative or executive matters.

[Act No. 18 of 2018, Sch.]

PART II – INITIATION AND NEGOTIATION OF TREATIES

4. General responsibility for treaty initiation

(1) Subject to the provisions of this Act, the national executive shall be responsible for initiating the treaty making process, negotiating and ratifying treaties.

(2) The responsibility provided for in subsection (1) may be delegated to a relevant State department.

5. Initiation of treaty making process

(1) Subject to the provisions of this section, the relevant national executive or

the relevant State department shall initiate the treaty making process in such manner as may be prescribed by the Cabinet Secretary.

(2) When deciding whether to initiate the treaty-making process or not, the national executive or the relevant State department shall consider the following—

- (a) the need that the new treaty is to meet;
- (b) the existing legal regime, including the extent of its applicability to the perceived problem;
- (c) the probability of reaching the required measure of agreement on the solution aimed for;
- (d) any relevant legislative efforts related to the perceived problem;
- (e) the optimal form for the proposed treaty;
- (f) the likelihood that the proposed treaty shall be accepted by a sufficient number of states, where the treaty is multilateral;
- (g) the anticipated time schedule for completing the treaty-making process;
- (h) the expected costs of formulating and adopting the treaty to Kenya;
- (i) in formulating treaties relating to technical or scientific problems; whether extensive scientific studies or research have been carried out to determine the parameters of the problem and the lines of potential solutions.

(3) The national executive or the relevant State department shall record whether the conditions in subsection (2) are met, and shall present a proposal to commence treaty-making for approval by the Cabinet.

(4) The Cabinet shall consider and approve or disapprove a proposal for treaty making presented in accordance with subsection (3) within a reasonable time.

6. Values and principles in negotiating treaties

(1) In negotiating treaties, the national executive or the relevant State department shall be bound by the values and principles of the Constitution; and shall take into account the regulatory impact of any proposed treaty.

(2) When appointing persons to negotiate a treaty, the national executive or the relevant State department shall appoint persons who are competent to undertake such negotiations in the interest of the people of Kenya.

PART III – RATIFICATION OF TREATIES

7. Approval by Cabinet

Where the Government intends to ratify a treaty, the Cabinet Secretary of the relevant State department shall, in consultation with the Attorney-General, submit to the Cabinet the treaty, together with a memorandum outlining—

- (a) the objects and subject matter of the treaty;
- (b) any constitutional implications including—
 - (i) any proposed amendment to the Constitution; and
 - (ii) that the treaty is consistent with the Constitution and promotes constitutional values and objectives;
- (c) the national interests which may be affected by the ratification of the treaty;

- (d) obligations imposed on Kenya by the treaty;
- (e) requirements for implementation of the treaty;
- (f) policy and legislative considerations;
- (g) financial implications;
- (h) ministerial responsibility;
- (i) implications on matters relating to counties;
- (j) the summary of the process leading to the adoption of the treaty;
- (k) the date of signature;
- (l) the number of states that are party to the treaty;
- (m) the views of the public on the ratification of the treaty;
- (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations;
- (o) the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the Constitution; and
- (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.

8. Consideration by the National Assembly

(1) Where the Cabinet approves the ratification of a treaty, the Cabinet Secretary shall submit the treaty and a memorandum on the treaty to the Speaker of the National Assembly.

(2) *Deleted by Act No. 18 of 2014, Sch.*

(3) The relevant parliamentary committee shall, during its consideration of the Treaty, ensure public participation in the ratification process in accordance with laid down parliamentary procedures.

(4) The National Assembly may approve the ratification of a treaty with or without reservations to specific provisions of the treaty.

(5) A proposed reservation shall be introduced as a provision into the treaty in accordance with the procedure set out in the Standing Orders.

(6) *Deleted by Act No. 18 of 2014, Sch.*

(7) Where the National Assembly refuses to approve the ratification of a treaty, the Clerk of the National Assembly shall submit the resolution of the House to the relevant Cabinet Secretary within fourteen days of the resolution.

(8) *Deleted by Act No. 18 of 2014, Sch.*

(9) The National Assembly shall not approve the ratification of a treaty or part of it if its provisions are contrary to Constitution, nor shall the House approve a reservation to a treaty or part of it if that reservation negates any of the provisions of the Constitution even if the reservation is permitted under the relevant treaty.

[Act No. 18 of 2014, Sch.]

9. Approval for ratification

(1) Where the ratification of a treaty referred to in section 7 is approved by the National Assembly without any reservations to the treaty, the relevant Cabinet Secretary shall, within thirty days from the date of the approval of the ratification of treaty request the Cabinet Secretary to prepare the instrument of ratification of the treaty.

(2) Where a treaty referred to in section 7 is approved for ratification with reservations to some provisions of the treaty, the treaty shall be ratified with those reservations to the corresponding article in the treaty.

(3) Where the National Assembly refuses to approve the ratification of the treaty referred to in section 7, the Government shall not ratify the treaty.

[Act No. 18 of 2014, Sch.]

10. Ratification of Treaty

(1) All instruments of ratification of a treaty shall be signed, sealed and deposited by the Cabinet Secretary at the requisite international body and a copy thereof shall be filed with the Registrar.

(2) Where a treaty ratified under this Act is subsequently amended or modified, the amendment or modification shall be ratified only after compliance with the procedure set out in this Part.

(3) The provisions of subsection (2) shall apply similarly to protocols signed under a treaty.

11. Granting of full powers

The Cabinet Secretary may grant full powers to such persons as may be appropriate for the purposes of ratification of any treaty in accordance with this Act.

12. Offence to ratify without approval

(1) A person shall not ratify any treaty on behalf of the Government of Kenya unless the treaty has been considered and approved by the Cabinet and Parliament in accordance with this Part.

(2) A person who contravenes subsection (1) commits an offence and shall be liable to imprisonment for a term not exceeding fifteen years or to a fine not exceeding twenty million shillings or to both such fine or imprisonment.

PART IV – REGISTRY OF TREATIES

13. Registry of Treaties

(1) There shall be a Registry of Treaties which shall be a department within the State Department responsible for matters relating to foreign affairs.

(2) The Registry shall—

- (a) be the depository of all treaties to which Kenya is a party;
- (b) contain a record of all treaties in such manner as may be prescribed;
- (c) contain the status of all treaties pending ratification or domestication and the timelines for such ratification or domestication;
- (d) perform such other function as may be assigned to it by the Cabinet Secretary.

[Act No. 18 of 2014, Sch.]

14. Registrar

(1) The Registry shall be headed by the Registrar of Treaties who shall be appointed by the Cabinet Secretary through an open and competitive process, with the approval of the Public Service Commission.

(2) The office of the Registrar shall be an office in the public service.

(3) A person shall be qualified to be appointed as Registrar if such person has—

- (a) at least a degree in law from a university recognised in Kenya; and

- (b) at least seven years experience in the practice of law or international relations;
- (4) The Registrar shall—
- (a) maintain a record of—
 - (i) the treaties to which Kenya is a signatory;
 - (ii) the treaties proposed for ratification by Kenya;
 - (iii) the treaties that Kenya has ratified;
 - (iv) Kenya's reports to any treaty body;
 - (v) the recommendations and concluding observations from any treaty body on Kenya's reports;
 - (b) monitor the implementation of the treaties ratified by Kenya;
 - (c) inform lead State departments to observe and uphold the obligations of the respective lead state department under the respective treaties;
 - (d) advise any citizen of Kenya on the rights and obligations of Kenya under a treaty;
 - (e) maintain a website of the treaties to which Kenya is a signatory;
 - (f) keep copies of the published reports of proceedings of the negotiations that led to the adoption of the treaties ratified by Kenya;
 - (g) facilitate public access to treaties which Kenya has ratified;
 - (h) respond to public inquiries on any treaty ratified by Kenya; and
 - (i) perform such other functions as may be prescribed by the Cabinet Secretary.

PART V – GENERAL PROVISIONS

15. Public awareness

(1) The Cabinet Secretary shall cause to be laid before the National Assembly, at least once every financial year, a report containing records of all treaties which Kenya has ratified and which may in any way bind Kenya to specific actions.

(2) The Cabinet Secretary shall, through publication in at least two newspapers of nationwide circulation, notify the public of every treaty, which may in any way bind, or to which Kenya is a party.

(3) The relevant State Department in respect of each treaty shall take measures to inform and create awareness to the public about the effects and benefits of the treaty.

16. Reporting in compliance with terms of treaties

Where a treaty provides for the submission of periodic reports as part of its monitoring mechanisms the Cabinet Secretary shall, in conjunction with the Attorney-General and the relevant State Department facilitate the preparation and submission of such report within the prescribed period.

17. Denunciation of certain treaties

(1) Where Kenya wishes withdraw from a treaty, the relevant Cabinet Secretary shall prepare a cabinet memorandum indicating the reasons for such an intention.

(2) The provisions of sections 4, 5 and 6 shall apply with necessary modifications, to withdrawal from a treaty.

18. Rules

(1) The Cabinet Secretary may make Rules for giving effect to this Act.

(2) Without limiting the generality of subsection (1) the Cabinet Secretary may make Rules—

- (a) prescribing anything that needs to be prescribed under this Act;
 - (b) for the granting of full powers in other areas in addition to the one specified under section 8;
 - (c) providing for the administrative steps to be taken prior to the preparation of the cabinet memorandum for cabinet approval of a treaty under this Act;
 - (d) the dissemination of information under this Act.
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