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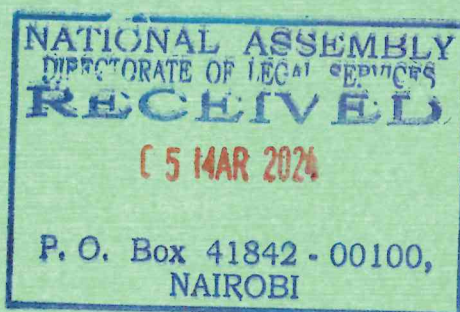
NAIROBI, 26th February, 2024

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THE UNIVERSITY OF CHICAGO



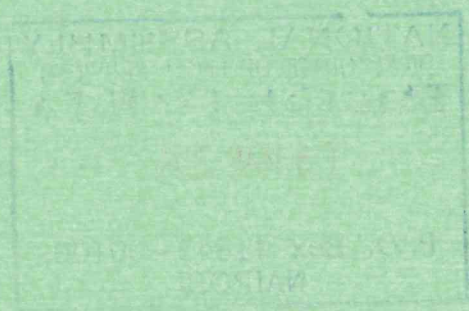
PHYSICS DEPARTMENT

PHYSICS 350

LECTURE NOTES

BY

PROFESSOR JOHN H. COOPER



CHICAGO, ILLINOIS

**THE TREATY MAKING AND RATIFICATION
(AMENDMENT) (No. 2) BILL, 2024.**

A Bill for

AN ACT of Parliament to amend the Treaty Making and Ratification Act and for connected purposes

ENACTED by the Parliament of Kenya, as follows —

1. This Act may be cited as the Treaty Making and Ratification (Amendment) (No. 2) Act, 2024.

Short title.

2. Section 2 of the Treaty Making and Ratification Act, 2012, (in this Act referred to as the “principal Act”), is amended by —

Amendment of section 2 of No. 45 of 2012.

(a) inserting the following new definitions in their proper alphabetical sequence —

“accession” means the consent by Kenya to be bound by a previously ratified agreement;

“economic treaty” means a treaty relating to taxation, trade or investment;

(b) deleting subsection (2).

3. Section 3 of the principal Act is amended in sub section (2) —

Amendment of section 3 of No. 45 of 2012.

(a) by deleting paragraph (a) and substituting therefor the following new paragraph —

“(a) multilateral treaties including treaties which deal with trade agreements where Kenya undertakes to engage in fewer trade protections with other countries to promote more trade.

(b) in paragraph (b) by inserting the following new subparagraphs immediately after subparagraph (v)—

“(vi) taxation, trade or investment;

(vii) unilateral trade agreements between Kenya and any other country involving a one-sided arrangement in which Kenya benefits from lower trade barriers from the other country”.

4. The principal Act is amended by inserting the following new section immediately after section 5—

Insertion of new section 5A in No. 45 of 2012.

Notification to the National Assembly.

5A. (1) Within fourteen days of commencing negotiations for a treaty, the Cabinet Secretary responsible for matters relating to the treaty shall notify the National Assembly of—

- (a) the negotiation objectives;
- (b) the proposed heads of agreement;
- (c) the need for the treaty;
- (d) the potential benefits of the agreement to Kenya;
- (e) implications of the agreement on—
 - (i) the economy;
 - (ii) existing agreements;
 - (iii) laws; and
 - (iv) taxes.

(2) The relevant Cabinet Secretary shall notify the National Assembly of any changes to information relating to the negotiation of a treaty within seven days of such change.

(3) The relevant Committee of the National Assembly may, in so far as is practically possible, confer with the responsible Cabinet Secretary on areas that may attract reservations by the National Assembly.

(4) The relevant Cabinet Secretary shall table an annual report to the National Assembly on the status of on-going negotiation of treaties.

5. Section 6 of the principal Act is amended by inserting the following new subsection immediately after subsection (1)—

Amendment of section 6 of No. 45 of 2012.

(1A) In negotiating an economic treaty, the national executive or the relevant State department shall ensure that the terms of the treaty do not adversely affect—

- (a) the ability of country to mobilise domestic revenue;
- (b) the food security of the country;
- (c) the establishment and growth of local industries; and
- (d) the ability of the government to regulate an industry in the public interest.

6. The principal Act is amended by inserting the following new sections immediately after section 6—

Regulatory impact statement.

6A. (1) The relevant Cabinet Secretary shall, prior to signing an economic treaty, prepare a regulatory impact statement.

(2) A regulatory impact statement shall contain information in respect to the proposed economic treaty in clear and precise language including —

- (a) a statement of the objectives of the proposed treaty and the reasons for it;
- (b) a statement explaining the effect of the proposed treaty on the Kenyan economy;
- (c) a statement of other practicable means of achieving the objectives of the proposed treaty;
- (d) an assessment of the costs and benefits of the proposed treaty and of any other practicable means of achieving the same objectives; and
- (e) the reasons why the other means are not appropriate.

(3) The assessment of the costs and benefits shall specify an assessment of the economic, environmental and social impact

Insertion of new sections 6A and 6B in No. 45 of 2012.

and the likely administration and compliance costs including resource allocation costs.

(4) The relevant Cabinet Secretary shall ensure that independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement is obtained and considered.

(5) The responsible Cabinet Secretary shall before an economic treaty is signed, give a certificate in writing specifying that—

- (a) the requirements relating to regulatory impact statements in this Act have been complied with; and
- (b) in the Cabinet Secretary's opinion, the regulatory impact statement adequately assesses the likely impact of the proposed treaty.

(6) The relevant Cabinet Secretary shall ensure that a copy of the regulatory impact statement and the certificate is tabled in the National Assembly with the economic treaty.

Notification of regulatory impact statements.

6B. (1) Preparation of a regulatory impact statement for an economic treaty shall be notified in the *Gazette* and in a newspaper likely to be read by people particularly affected by the proposed treaty.

(2) If the proposed treaty is likely to have a significant impact on a particular group of people, the notice shall be published in a way likely to ensure members of the group understand the purpose and content of the notice.

(3) The notice shall—

- (a) include a brief statement of the policy objectives sought to be achieved by the proposed treaty;

- (b) state where copies of the regulatory impact statement may be obtained or inspected;
- (c) state that anyone may comment on the proposed treaty;
- (d) state how and when comments may be made; and
- (e) state how consultation about the proposed treaty will take place.

(4) The notice shall allow at least fourteen days from publication of the notice for the making of comments.

(5) A copy of the regulatory impact statement may be available free, or on payment of a reasonable price, at the place, or each of the places, stated in the notice.

(6) The responsible Cabinet Secretary shall ensure that—

- (a) all comments and submissions are considered before an economic treaty is made; and
- (b) a copy of all comments and submissions is submitted to the National Assembly as soon as practicable after the economic treaty is tabled or when requested by the relevant Committee.

7. Section 8 of the principal Act is amended by deleting subsection (5) and substituting therefor the following new subsections—

Amendment of section 8 of No. 45 of 2012.

“(5) The National Assembly may introduce any reservations as a provision into a treaty.

(5A) Where the National Assembly introduces a reservation under this section, the Clerk of the National Assembly shall indicate, in writing, to the relevant Cabinet Secretary the specific clause or clauses of a treaty for which the National Assembly proposes to make reservations and shall specify the reasons for which the reservations are made.

8. The principal Act is amended by inserting the following new section immediately after section 9 —

Insertion of a new section 9A in No. 45 of 2012.

Procedure during the ratification process at the National Assembly.

9A. (1) A treaty submitted to the National Assembly for ratification shall be laid on the Table of the House and shall upon being laid, stand committed to the relevant Committee for consideration.

(2) A committee to which a treaty is committed for consideration, shall undertake public participation before submitting its report to the House.

(3) In addition to the information required to be submitted to the National Assembly under written law, the committee may require the relevant Cabinet Secretary to submit further information, including—

(a) the social and environmental impact of the treaty in the short-term, medium-term and long-term; and

(b) the nature and evidence of any public participation conducted on the treaty.

(4) The report of the committee to the House shall include—

(a) information on the views of the people on the ratification of the treaty emanating from public participation conducted by the committee;

- (b) the findings of the committee on the treaty and any other information the committee may deem necessary; and
- (c) a recommendation that the House —
 - (i) approves the ratification of the treaty;
 - (ii) approves the ratification of the treaty with reservations, or;
 - (iii) rejects the ratification of the treaty.

(5) In approving ratification of a treaty with reservations, the House shall specify the affected provisions of the treaty and the proposed text of each reservation, which may include prescription of timelines within which an obligation is to be fulfilled before implementation of the treaty.

(6) Where the House makes a resolution in respect to a particular treaty, the Clerk of the National Assembly shall, within seven days, notify the relevant Cabinet Secretary and shall enter the information in the register of treaties.

9. Section 10 of the principal Act is amended by inserting the following new subsection immediately after subsection (1) —

“(1A) The relevant Cabinet Secretary may at the point of ratifying a treaty under this Act, be accompanied by the Leader of the Majority Party or the Leader of the Minority Party of the Party forming the Government, or a representative.

Amendment of
section 10 of No.
45 of 2012.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons for the Bill

The principal object of this Bill is to amend the Treaty Making and Ratification Act, 2012 to incorporate a special enactment procedure for economic treaties, strengthen the participation of the National Assembly in the treaty making process and to generally enhance efficiency in the treaty making process.

Clause 2 of the Bill seeks to amend section 2 of the Act to define the terms “accession” and “economic treaty”. It also seeks to delete section 2(2) which makes reference to the first elections under the Constitution as the same has been spent.

Clause 3 of the Bill proposes to amend section 3 of the Act to include economic treaties in the list out of treaties that the Act applies to under the section. This will extend the application of the Act to treaties relating to taxation, trade and investment matters. A special enactment procedure for this type of treaties is required due to their significant economic and social impacts on various sectors of the economy. The additional procedures and mechanisms for scrutinizing economic treaties is aimed at complying with the principles and values of the Constitution on public consultation, sustainable development, robust representation and promotion of social and economic rights.

Clause 4 of the Bill seeks to amend the Act to introduce a new section 5A requiring the Executive to engage the National Assembly upon commencing negotiations of a treaty. This is aimed at eliminating the existing problem where the National Assembly only becomes seized of treaty matters at the tail end of the treaty making process. The active participation of the National Assembly in the Treaty Making process will not only enhance transparency and accountability in the process but it will also mitigate against risks attendant to the structure of treaties that regulate the flow of investment.

Clause 5 of the Bill seeks to amend section 6 of the Act to ensure that the Kenya does not enter into treaties that jeopardize the ability of the country to mobilize tax resources domestically. It is further intended that no agreement which has the effect of undermining national food security should be concluded by the Executive. The amendment is also intended to ensure that treaties concluded by government do not undermine the establishment and growth of local industries or the ability of the government to regulate any particular industry in public interest by limiting the ability to pass laws or regulations for matters such as protection of the environment.

Clause 6 of the Bill seeks to amend the Act to insert a new section 6A and 6B. The new sections require the Executive to have undertaken a regulatory impact assessment prior to the initiation of the treaty making process. This will ensure that a proper cost–benefit analysis is carried out before the government enters into negotiations for a treaty. It will also foster stakeholder participation in the treaty-making process as a copy of the regulatory impact statement, is supposed to be made available to the general population, who may then make relevant comments on the documents. A proposal has also been made in the amendment that the public comments are supposed to be submitted to the National Assembly by the Cabinet Secretary for consideration. The amendment further seeks to solve the existing problem in section 6(1) of the Act which does not provide the specific procedure for public participation. The section leaves room for error as it is unclear what quantum of public participation is sufficient. The amendment therefore seeks to create a greater sense of accountability in the treaty making process.

Clause 7 of the Bill seeks to amend section 8 of the Act to outline the procedure for making reservations to a treaty. The amendment requires the National Assembly to indicate to the national executive the specific clause or clauses of a treaty for which it proposes to make a reservation and the reason for which the reservation is made. The amendment further precludes the national executive from concluding any treaty without effecting a reservation made by the National Assembly.

Clause 8 of the Bill seeks to insert a new section 9A to provide for the procedure during the ratification process at the National Assembly. It provides for committal to the relevant Committee, submission of further information by the Cabinet Secretary and the contents of the report of the Committee.

Clause 9 of the Bill provides for the amendment of section 10 of the Act to allow the Leader of Majority Party or Minority Party or their representatives to accompany the Cabinet Secretary at the point of treaty ratification.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill does not delegate any legislative powers or limit any fundamental rights or freedoms.

Statement on whether the Bill concerns county governments.

The Bill does not concern county government as treaty- making and ratification falls under the functions of foreign affairs, foreign policy, and

international trade, which are functions of the national government under paragraph 1 of Part I of the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 26th February, 2024.

GEORGE GITONGA MURUGARA,
*Chairman, Justice and Legal Affairs
Committee, National Assembly.*

Section 2 of Cap 4D which it is proposed to amend

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 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 organization” 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.

Section 3 of Cap 4D which it is proposed to amend

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.

Section 6 of Cap 4D which it is proposed to amend

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.

Section 8 of Cap 4D which it is proposed to amend

8. Consideration by Parliament

(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 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.

*Section 10 of Cap 4D which it is proposed to amend***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.