

**Reporting  
International  
Treaties**

**Environmental  
Human Rights  
&  
Other Trade Treaties  
Relevant to Kenya**

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Published by  
Friedrich Ebert Stiftung (FES)  
P.O. Box 14932  
Peponi Plaza  
Nairobi, Kenya

Design & Layout by:  
Chai Baya  
P.O. Box 43193 Nairobi  
00100 GPO  
2002

ISBN 9966-957-60-X

# Foreword

Formal relationship between states is best established through Treaties. To this end, treaties, being international legal binding instruments are fundamental in contemporary state affairs. The rights and obligations of states more often than not, emanate from established principles in treaty law. Treaties are also used to bestow rights on third party states and citizens. In practice, treaties regulate a wide spectrum of international relationship in the economic, social and political arena.

The idea of writing this handbook arose from the need to simplify for journalists and the ordinary citizens the concept of treaties, the treaty making process and the impact of treaties at various levels. The handbook uses Kenya as a case study. The handbook gives journalists a guide and quick reference to key issues in treaty law and interpretation.

To cover the various treaties in one easy to read book is somehow difficult. The treaties are, therefore, covered in four handbooks namely: Environmental, Human Rights and other Treaties Relevant to Kenya; the World Trade Organisation (WTO) Agreements: Their Impact on Kenya; the East African Community Treaty: Its Impact on Kenya and finally, the Cotonou Treaty Establishing the EU-ACP Partnership: Its impact on the East African Economies.

Journalists are targeted as the primary users and consumers of the information in this book. The focus on journalists emanates from the view that the media is one of the links to ordinary citizens. By raising awareness of the treaty making process and impact amongst journalists, it is expected that frequent reporting and highlighting of treaty issues and impact will find its way in the print and electronic media.

The Friedrich Ebert Stiftung is proud to be associated with this noble objective. The Foundation wishes journalists a good reading and understanding of the concept of treaties.

Dr. Roland Schwartz  
Resident Director  
Friedrich Ebert Stiftung

*Nairobi Office  
July 2002*

# Acknowledgements

This book is a product of a collaborative exercise that began with the discomfort of a group of Nairobi-based business writers and the patience of Dr. Otieno Odek who graciously shared his wide knowledge on international trade and development issues with them.

We at African Women and Child Features take pride in acknowledging all the business writers and correspondents from *The Nation Media Group*, the *East African Standard*, *The People*, *Kenya Times*, *Kenya Television Network* and *Kenya Broadcasting Corporation*, who actively participated in the workshop on reporting trade. We value our long association with them and our enviable history of a rich professional relationship.

With tonnes of information coming out of the numerous national, regional and international trade bodies, and every shade of opinion from hundreds of lobby groups around the world, reporting trade and development is at once exiting, and a daunting undertaking. There is simply too much to write, analyse and interpret.

In view of the technical nature of this book project, Dr Otieno Odek, a lawyer and expert in this area, co-ordinated the compilation of the data, while we at AWC Feature Service took charge of editing all the material to fit the purposes and specification of this project, that is: initially compilation of a single handbook on reporting key international treaties to serve as a guide to journalists.

The product of this exercise was a huge manuscript which, to our knowledge, could not serve as a handbook. The manuscript was then separated to cover individual treaties for ease of reference. The products are four reader-friendly handbooks under the standing title of "Reporting International Treaties". Each handbook bears the name of the treaty/agreement it covers. They include: *The Cotonou Treaty Establishing the EU-ACP Partnership: Its Impact on the East African Economies*, *The East African Community Treaty: Its Impact on Kenya*, *World Trade Organization (WTO) Agreements: Their Impact on Kenya and the Environmental, Human Rights & Other Trade Treaties Relevant to Kenya*.

Finally, all these activities would not have been possible without the unstinting support of the Friedrich Ebert Foundation (FES) which provided support for the logistics for holding the workshop as well as the framework for publishing the handbooks.

We acknowledge Esther Kamweru who was instrumental in the birth of this exciting project. Special thanks go to Wanjiku Mbugua, Programme Officer at FES, who provided technical support at the final production stages to make this book a reality. We could not have asked for a better team.

It is our hope that these books will shed light and promote a better understanding in interpretation, analysis and how to bring out the real issues when writing on issues related to this treaty.

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# Introduction

In recent years, the protection of the environment has gain prominence in national and international affairs. To this end, several international conventions on environmental matters have been signed. This booklet seeks to identify and describe in brief the salient features of some of the conventions.

## UN Convention on Biological Diversity (CBD)

Biodiversity is the term used to describe the total variety of living organism (plants, animals, fungi and microbes) that exist on the planet earth. There are three categories of biodiversity namely:

- genetic diversity: this refers to the variety of genes (biochemical units of hereditary information);
- species diversity: this refers to the measure of the total number of species in a given area;
- Ecosystem diversity: this relates to the variety of habitats such as forest, wetlands, coral reefs, rivers, savannas and deserts.

The aim of the Convention is to provide a broad global framework to conserve the Earth's biodiversity within which state parties will themselves develop the necessary measures to achieve the objectives of the Convention.

Kenya is a signatory to the Convention. The Treaty provisions incorporate the concepts of sustainable development and other emerging concepts and principles such-as the precautionary, polluter pays principle, inter and intra-generational equity principles. Under Article 15, the Convention imposes several obligations on the signatory states.

### Domestication of the CBD in Kenya

Whereas Kenya is a signatory to the CBD, it has not domesticated the treaty. Nevertheless, in enacting the Environmental Management and Co-ordination Act, Act No. 8 of 1999, Kenya substantially borrowed from the

Convention. In this sense, Kenya has sought to implement the provisions of the treaty indirectly through a statute.

### **Binding Commitments under Article 15 of the CBD**

Article 15 of the CBD outlines the national commitments under the treaty.

There are four main state obligations under Article 15 of the CBD.

- (a) Contracting states shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other contracting states;
- (b) Genetic resource providing states should not impose restrictions that run counter to the objectives of CBD.
- (c) Access, where provided shall be on mutually agreed terms.
- (d) Access shall be subject to the prior informed consent of the providing state.

### **Non binding commitment under Article 15 of CBD**

There are two non binding commitments in Article 15.

- (a) The goal of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial utilization of genetic resources is non binding.
- (b) Each contracting state shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of and where possible, in such Contracting Parties.

However, even as regards the binding commitments, enforceability is a problem. The CBD does not have administrative and legal mechanism to enforce its state obligations.

### **Nature of the Regime created by Article 15 of CBD**

Article 15 is based on the principle of sovereign rights over genetic resources. It deals with issues of national rights and obligations regarding access to genetic resources. It requires parties to take measures to facilitate access to genetic resources for environmentally friendly uses. The Convention requires contracting parties to strike a balance between national rights to determine access or obligations to facilitate access by other parties on mutually agreed terms. The

Convention is explicit that access is subject to Prior Informed Consent. The Article also provides for sharing of benefits.

## Convention for the protection of New plant varieties

The UPOV Convention is the international regime regulating the protection of new plant varieties. Under the Convention, the issues of farmers rights, essentially derived varieties and the impact on bio-diversity are critical. There have been three versions of the Convention, the 1961, 1978 and 1991 versions.

Kenya acceded to the UPOV 1978 Convention on April 13th 1999. The accession entered into force on May 13th 1999. Kenya, amongst other developing countries delayed accession because UPOV is more rigid and requires members to adopt its standards and scope of protection. These standards have quite different implications with regard to the breadth and scope of coverage, and utilization of protected material in research, and production of propagating materials and crops for sale.

### Direct Impact of the 1978 UPOV Convention to Kenya

- (i) Under the 1978 Convention, Article 4 (1) thereof stipulates that the Convention may be applied to all botanical genera and species. The member States are required to adopt measures that ensure protection of plant varieties is extended to the largest possible number of botanical genera and species. However, Article 4 (3) thereof provides that each member State, is required to protect a minimum of five genera or species on accession to the Convention. An important right given to each signatory State under the 1978 UPOV Convention is the right to limit the application of the Convention within a genus or species to varieties with a particular manner of reproduction or multiplication or a certain end use. With each progressive year, member states are required to extend protection to an increasing number of species. Within 3 years, to at least 10 genera or species, within 6 years to at least 18 species and within 8 years to at least 24 species. Kenya is thus under an obligation to implement the foregoing provisions of the Convention.
- (ii) The 1978 UPOV Convention enumerates the conditions to be fulfilled by each variety for which protection is sought. It stipulates that:
  - (a) the variety must be clearly distinguishable by one or more important



characteristics from any other variety whose existence is a matter of common knowledge.

- (b) the variety must not or, where the law of a state so provides, must not for longer than one year, have been offered for sale or marketed with the consent of the breeder in the state where the application is filed, nor for longer than four years (six in the case of grapevines and trees, including root stocks) in any other state.
- (c) the variety must be sufficiently homogenous, having regard to the particular features of its sexual reproduction or vegetative propagation,
- (d) the variety must be stable in its essential characteristics
- (e) the variety must be given a denomination.

Under the Kenya Seeds and Plant Varieties Act, Cap 236, Kenya has enacted domestic legislation to fulfil the above conditions.

- (iii) Under the 1978 UPOV Convention, a minimum standard relating to the length of protection of the breeder's right is stipulated as 18 years for trees and vines and 15 years for all other species.
- (iv) Under the 1978 version, the fact that the breeder's authorization is only required for the production of propagation material for purposes of commercial marketing means that production of propagating material that is not intended for marketing, but only for use on the farm where it was produced, falls outside the scope of protection. This provides the basis of farmer's privilege.
- (v) In recognition of the widely different natures of the agricultural industries of UPOV member states and the varying political situations therein, an optional right to exempt farm saved seeds is given to individual states in the 1991 Convention.

## Convention on Trade in Endangered Species (CITES)

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed in Washington (USA) on 3rd March 1973 and entered into force on 1st July 1975. It was ratified by Kenya on 13th December 1978. There was a subsequent Amendment to the Convention which amendment Kenya ratified on 25th November 1982.

The CITES is a treaty whose aim is to prevent international trade from threatening the survival of wild fauna (animals) and flora (flowers). The Convention prohibits or regulates among its parties trade in endangered species listed in three Appendices and to a more limited extent, trade with non-parties.

The Convention lists endangered animal and species and prohibits trade in these animals, their parts or derivatives. Presently, the endangered animals are monkeys, crocodiles, elephants, lizards, sea turtle amongst others.

The Convention requires parties to establish national management and scientific committees to administer the protection and regulatory system. The main difficulty with the implementation of the Convention is lack or insufficient national legislation particularly as regards penalties, lack of border control and insufficient co-ordination between enforcement agencies such as police and customs officers. This is not to mention the financial and technical difficulties in implementing the convention. .

## The Law of the Sea Convention (LOS Convention)

The Convention was adopted in Montego Bay, Jamaica on 10th December 1982. There are four Conventions commonly referred to as the Law of the Sea Conventions. These are:

- (i) Convention of the Territorial Sea and Contiguous Zone;
- (ii) Convention on the High Seas;
- (iii) Convention on Fishing and Conservation of the Living Resources of the High Seas and
- (iv) Convention on the Continental Shelf.

The LOS Convention fixes the outer limit of a country's territorial boundary in

the seas and oceans. It provides for a 12 nautical mile maximum breadth for territorial sea. With respect to archipelagos, the Convention sets forth a workable definition of what constitutes an archipelago then sets forth rules for sea lanes passages through the waters.

Four other issues are of concern under the Convention which areas give economic value to the states concerned. The Convention defines the Continental Shelf, the Exclusive Economic Zone (EEZ) and rules regarding scientific research and the protection and preservation of the marine environment. The EEZ covers a 200 nautical mile within which a state exercises jurisdiction.

The LOS Convention imparts a basic duty on coastal nations to protect and preserve the environment under Article 192, a requirement to exploit their natural resources in accordance with this basic duty (Article 193) and a duty to assume liability for ensuring that these responsibilities are met. The Convention also calls on all nations to establish and implement, through appropriate international and regional fora, international rules and standards to prevent, reduce and control pollution of the marine environment.

Kenya has ratified the Convention which in practical terms is most relevant to the fisheries sector especially within the Indian Ocean. Kenya's Environmental Management and Co-ordination Act covers almost all facets of the environment and principles of sustainable development applicable to the marine lands.

## The Convention on climate change

The objective of the Convention is to provide a framework for the negotiation of detailed specialist protocols on further issues - controls on the emissions of greenhouse gases, particularly carbon dioxide, deforestation and perhaps, sea level rise. It is meant to check global warming.

The Convention applies the precautionary principle in its Article 3 (3). The principle requires that once environmental damage is threatened, action should be taken to control or abate possible environmental interference even though there may be scientific uncertainty as to the effects of the activities. The Convention also espouses the concept of sustainable development. The precedence of national economic development policies over national and international

measures to check climate change is also stressed in several operative provisions of the Convention.

## Human Rights Treaties

(a) The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

The Covenant on Civil and Political Rights entered into force on 23rd March 1976 whereas the Covenant on Economic, Social and Cultural Rights entered into force on 3rd January 1976. Kenya ratified both treaties on 1st May 1972. Breach of a human rights obligation like violation of any international legal obligation is an international wrongful act for which the international legal system provides remedies. They are essentially mutual undertakings among states for the benefit of third parties namely the inhabitants of the countries party to the agreement.

The Convention on Human Rights contains various principles which the parties recognize such as the right to work, the right of everyone to social security and to an adequate standard of living for himself and his family. The machinery for supervision consists of an obligation to submit reports on measures adopted for transmission to the Economic and Social Council for the United Nations. Article 40 requires states to submit reports on the measures they have adopted which give effect to the rights. Reports shall indicate the factors and difficulties if any, affecting the implementation of the Covenant.

There exists an Optional Protocol to the Civil and Political Rights Convention which provides for applications to the Human rights Committee by individuals who claim to be victims of violations of the provisions of the covenant and who have exhausted all available domestic remedies.

The objectives of the two conventions is to ensure global respect for civil liberties in all countries of the world.

Kenya is yet to enact legislation to domesticate the two conventions. There is, however, an administrative Standing Committee on Human Rights to address the human rights concerns of Kenyan citizens.

## The Universal Declaration on Human Rights

This declaration was adopted by the General Assembly on 10th December 1948. The declaration is universalist about rights such as equal protection or physical security or free speech, freedom of religion and association. The declaration is a resolution of the General Assembly and not a convention subject to ratification and accession.

## International Labour Organization Conventions

The International Labour Organization (ILO) is a tripartite body with representatives from the Government, Employers and workers of the Member states. The primary duty of ILO is to set international labour standards on labour laws and practice. The ILO is based in Geneva, Switzerland. It discusses the issues and comes up with labour standards and sets them down in Conventions. The standards are designed to protect the interest of the workers, in matters concerning labour relations. The ILO makes other supplementary instruments called Recommendations that support the international labour standards or conventions.

The procedure for ratification of the ILO Conventions takes various forms. In Kenya, once the ILO Convention has been passed, it is discussed by the various stakeholders namely COTU, FKE and the Government through the Labour Advisory Board. After obtaining consensus, a sessional paper is prepared and discussed in Parliament. After approval of the sessional paper, a letter communicating the approval is sent to the Secretary General of the ILO for endorsement of the ratification, This ratification then binds the member state to the Convention. However, the Convention will not have the force of law unless Parliament enacts a local legislation to implement the Convention.

When Kenya attained here independence in 1963, she indicated that it was going to be bound by Convention-at had previously been ratified on its behalf by the British Government. In 1964, when Kenya became a Republic, she became a member of the ILO and ratified several conventions.

Today, Kenya has ratified 44 ILO Conventions as follows:

- C 2 Unemployment Convention (1919) ratified by Kenya in 1964
- C 3 Right of Association (Agriculture) 1921 ratified by Kenya in 1964

- C 12 Workmen's Compensation (Agriculture) Convention 1921 ratified in 1964
- C 14 Weekly Rest (Industry) Convention, 1921 ratified in 1964
- C 16 Medical Examination of Young Persons (Sea) Convention 1921 ratified in 1971
- C 17 Workmen's Compensation (Accidents) Convention 1925 ratified in 1964.
- C 19 Equality of Treatment (Accident Compensation) 1925 ratified in 1964.
- C 26 Minimum Wage - Fixing Machinery Convention 1928 ratified in 1964
- C 27 Marking of Weight (Packages Transported by Vessels) ratified in 1971
- C29 Forced Labour Convention 1930 ratified in 1964
- C 32 Protection against Accident (Dockers) Convention 1932 ratified in 1964
- C 45 Underground Work (Women) Convention 1935 ratified in 1964
- C 50 Recruiting of Indigenous Workers Convention 1936 ratified in 1964
- C 59 Minimum Age (Industry) Convention 1937 ratified in 1964
- C 63 Convention concerning statistics of Wages and Hours of Work 1938 ratified in 1964
- C 64 Contracts of Employment (indigenous Workers) 1939 ratified in 1964
- C 65 Penal Sanctions (Indigenous Workers) Convention 1939 ratified in 1964
- C 81 Labour Inspection Convention 1947 ratified in 1964
- C 86 Contracts of Employment (Indigenous Workers) 1947 ratified in 1964
- C 88 Employment Service Convention 1948 ratified in 1964
- C 89 Night Work (Women) Convention 1948 ratified in 1965
- C 94 Labour Clauses (Public Contracts) Convention (1949) ratified in 1964
- C 97 Migration for Employment Convention 1949 ratified in 1964
- C 98 Right to Organize and Collective Bargaining Convention 1949 ratified in 1964
- C 99 Minimum Wage Fixing Machinery (Agriculture) 1951 ratified in 1964
- C 105 Abolition of Forced Labour Convention 1957 ratified in 1971
- C 118 Equality of Treatment (Social Security) Convention 1962 ratified in 1971.
- C 129 Labour Inspection (Agriculture) Convention 1962 ratified in 1979
- C 131 Minimum Wage Fixing Convention, 1970 ratified in 1979
- C 132 Holidays with Pay Convention 1970 ratified in 1979
- C 132 Prevention of Accidents (Seafares) Convention 1970 ratified in 1990
- C 135 Workers' Representative Convention 1971 ratified in 1979
- C 137 Dock Work Convention 1973 ratified in 1979
- C 138 Minimum Age Convention 1973 ratified in 1979
- G 140 Paid Educational Leave Convention 1974 ratified in 1979
- C 141 Rural Workers' Organizations Convention 1975 ratified in 1979
- C 142 Human Resources Development-Convention 1975 ratified in 1979

- C 143 Migrant Workers Convention 1975 ratified in 1979
- C 144 Tripartite Consultation Convention 1976 ratified in 1990
- C 146 Seafarers Annual Leave with Pay Convention 1976 ratified in 1990
- C 149 Nursing Personnel Convention 1977 ratified in 1990
- C 100 Equal Remuneration Convention 1951 ratified in 2001
- C 111 Discrimination (Employment and Occupation) Convention 1958 ratified in 2001
- C 182 Worst Forms of Child Labour Convention 1999 ratified in 2001

In order to remove inconsistencies in the labour laws of Kenya with regards to ILO Conventions, the Kenya Government has appointed a Task Force to review its labour laws. The Force is to make recommendations on proposals for reform or amendments of labour laws to ensure they are consistent with the ILO Conventions. The Task Force is to report to the Attorney General not later than 31st December 2001.

### **The Southern African Development Cooperation (SADC)**

The Southern African Development Cooperation (SADC) was formerly known as the Southern African Development Coordination Conference (SADCC). It was born out of perceived economic benefits of close cooperation among governments and peoples of Southern Africa. SADC is a loose form of regional cooperation and integration efforts.

Whole the SADC treaty was recently signed in 1992, the seeds of economic integration in Southern Africa were planted much earlier that this year. Among the first landmarks in the evolution of SADC was a meeting of foreign ministers in May 1979 to discuss economic cooperation in SADC as an organization mainly focuses on project development. It coordinates development projects within member states with a view to equitable integration of their economies.

### **The IGAD Agreement**

The Intergovernmental Authority on Dvelopment (IGAD) is the new name of the Authority superseding the Inter-governmental Authority on Drought and Development (IGADD). IGADD was created in 1986 by six drought stricken countries of Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda to co-

ordinate development in the Horn of Africa. In 1993, Eritrea became the seventh member of IGAD.

IGAD's objectives are conflict prevention, management and resolution, preservation of peace and security, coordination of industry and economic policies, sustainable development of transport, energy and telecommunications as well as promotion of humanitarian affairs. The specific goals are to promote joint development strategies, harmonize trade, customs and transport policies, food security and environmental protection, create an enabling environment for foreign, cross-border and domestic trade and to facilitate and strengthen cooperation in research, science and technology.

In terms of organizations structure, IGAD comprises four hierarchical organs: the Assembly of the Heads of State and Government, Council of Ministers, Committee of Ambassadors and the Secretariat. While the Assembly of the Heads of State and Government is the supreme organ of the Authority, the Council of Ministers, composed of the Ministers of Foreign Affairs is the Authority's policy making organ. The Committee of Ambassadors advises and guides the Executive Secretary.

From Kenya's perspective, IGAD's success has socio-economic implications. Kenya is often regarded as an Island of peace in the region and has borne the brunt of refugees entering the country and the attendant socio-economic and environmental impact and increased insecurity. It is hoped that with IGAD succeeding, the refugee problems will reduce. It is for this reason that Article 18 of the IGAD Agreement is important. Member states agree to act collectively to preserve peace, security and stability.

## The African growth and opportunity Act (AGOA)

On October 2nd, 2000 United States President Bill Clinton signed a proclamation designating 34 sub-sahara African countries as beneficiaries under the African Growth and Opportunity Act (AGOA) -Title 1 of the Trade and Development Act 2000. The designated states are to be recipient of trade preferences made available under AGOA. The proclamation modifies the Harmonized Tariff Schedule of the United States to reflect the apparel and textile trade preferences made available under Section 112 of the Act.



The law provides duty free entry of African textiles and apparel into the US market by sub-saharan Africa nations who are making open market reforms.

In addition to its specific promotion of textiles and apparel exports to the United States, AGOA calls for;

- (i) strengthening and expanding the private sector in sub-sahara africa especially women-owned businesses,
- (ii) encouraging increased trade and investment between US and Sub-Sahara Africa
- (iii) reducing tariff and non-tariff barriers
- (iv) expanding US assistance to Sub-sahara Africa regional integration efforts and focusing countries to be more accountable in governance, economic reform and eradication of poverty. A US Sub-Sahara Africa Economic Cooperation Forum is to be established.

Exports covered under AGOA must have accompanying visas or entry documents describing the goods and their point of origin. Kenya has started exported textiles into the US under the terms of the AGOA.

## The common market for East and Central Africa (COMESA)

Regional economic integration is not a new phenomena in East and Central Africa and the world at large. The African states members to the COMESA are convinced that regional cooperation in trade is one of the roads to economic development.

The COMESA member states seek to address several issues namely:

- (i) How to deal with trade imbalance which may arise out of a free trade area.
- (ii) How to address the problem of economic imbalance.
- (iii) How does the region cope with the challenges of globalization.
- (iv) How to mobilize resources for infrastructural development.
- (v) How to attract foreign investments.

The Treaty creating COMESA establishes several organs and institutions such as the COMESA Court of Justice, the Assembly of the Heads of State and the Secretariat. The organs of COMESA perform such functions as are stated within

the Treaty. Within each member state, COMESA is a body corporate with perpetual succession and has power to acquire, hold, manage and dispose of land and other property. As a body Corporate, the organization is represented by the Secretary General.

As a regional integration area, COMESA started as a free trade area and is now a customs union. A free trade area is an economic grouping of states whereby the member states have a common tariff for the internal movement of goods and services amongst the members while each member state imposes its own external tariff for non-members. In a customs union, there is a common internal tariff amongst members and a common external tariff for non members.

There are several areas of cooperation envisaged under the COMESA Treaty. Amongst these are cooperation in trade liberalization and development which involves the establishment of a customs union, cooperation in investment and industrial development, monetary and financial cooperation, policy harmonization and standardization as well as infrastructure and service development.

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