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THE INTERGOVERNMENTAL RELATIONS (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS, 2021

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THE INTERGOVERNMENTAL RELATIONS ACT, 2012

(No. 2 of 2012)

IN EXERCISE of the powers conferred by section 38(2)(c) of the Intergovernmental Relations Act, 2012, the Cabinet Secretary, in consultation with the Summit, makes the following Regulations —

THE INTERGOVERNMENTAL RELATIONS (ALTERNATIVE DISPUTE RESOLUTION) REGULATIONS, 2021

PART I — PRELIMINARY

1. These Regulations may be cited as the Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2021. Citation.
2. In these Regulations, unless the context otherwise requires— Interpretation.
- “Act” means the Intergovernmental Relations Act, 2012; No. 2 of 2012.
- “alternative dispute resolution mechanisms” means any method of resolving disputes instead of litigation that is used by the parties to resolve an issue in controversy or any dispute and may include negotiation, conciliation, mediation, traditional dispute resolution or arbitration;
- “alternative dispute resolution practitioner” means an individual appointed to assist, guide or determine an intergovernmental dispute;
- “award” means the final decision of an arbitrator, in an intergovernmental dispute;
- “Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to intergovernmental relations;
- “Council” means the Council of County Governors established under section 19 of the Act;
- “dispute” means an intergovernmental dispute as defined under section 30 of the Act;
- “intergovernmental forum” means any intergovernmental forum and includes such forum as may be established pursuant to section 13 (2) or 38 (2) (e) of the Act;
- “line ministry” means the ministry for the time being responsible for a sector within which an issue in controversy or dispute has emerged;
- “recognised institution” means a registered institution that trains, accredits or validates alternative dispute resolution practitioners upon attaining the requisite standards;
- “Summit” means the National and County Government Co-ordinating Summit established under section 7 of the Act;
- “Technical Committee” means the Intergovernmental Relations Technical Committee established under section 11 of the Act;

“traditional body” means an institution recognised by the parties or registered within the Republic of Kenya as an authority with respect to traditional knowledge and cultural practices relating to any ethnic community; and

“traditional dispute resolution mechanism” means an intergovernmental dispute resolution process carried out by a traditional body.

3. The objects and purposes of these Regulations are to—

Objects and purpose of the Regulations.

- (a) enable parties to a dispute exhaust the alternative dispute resolution mechanisms provided under these Regulations before resorting to judicial proceedings;
- (b) promote and ensure effective, efficient and amicable resolution of intergovernmental disputes as contemplated under Article 189(3) and (4) of the Constitution;
- (c) facilitate and promote intergovernmental consultation and cooperation as contemplated under Article 6(2) of the Constitution; and
- (d) foster mutual trust and good faith between the national government and a county government or amongst county governments.

4. These Regulations shall be guided by the following principles—

Guiding principles.

- (a) prompt and amicable resolution of disputes before resorting to judicial proceedings;
- (b) prudent use of public funds in the resolution of intergovernmental disputes;
- (c) upholding the Constitutional principles of consultation and co-operation; and
- (d) compliance with the procedures, decisions and outcomes made through the dispute resolution processes under these Regulations.

5. (1) These Regulations shall apply to the resolution of disputes arising —

Application of Regulations.

- (a) between the national government and a county government;
- (b) amongst county governments; or
- (c) out of an agreement between the national government and a county government or amongst county governments where—
 - (i) no dispute resolution mechanism is provided in the agreement; or
 - (ii) the agreement provides for a dispute resolution mechanism that does not accord with the provisions of section 32(2) of the Act.

(2) These Regulations shall apply to State organs and public offices in both levels of government, particularly—

- (a) ministries, departments and agencies within the national government; and
- (b) county governments, county departments and agencies within a county government.

PART II —PROCEDURE BEFORE FORMAL DECLARATION OF A DISPUTE

6. (1) Pursuant to section 33(1) of the Act, parties shall undertake all necessary measures to amicably resolve issues in controversy through consultation, conciliation or negotiation, before a dispute is formally declared.

Procedure before formal declaration of a dispute.

(2) The measures envisaged under paragraph (1) may include—

- (a) direct negotiations between parties;
- (b) consultations with either—
 - (i) a constitutional commission or an independent office;
 - (ii) a line ministry or county department;
 - (iii) the Council;
 - (iv) an intergovernmental forum;
 - (v) a joint committee constituted pursuant to section 23 of the Act;
 - (vi) a traditional body; or
 - (vii) any other person or institution as the parties may agree to consult; or
- (c) conciliation through an intermediary agreed upon by the parties.

(3) With respect to any nature of dispute including boundaries and natural resource disputes, the parties shall consult the relevant statutory or constitutional body in accordance with the existing laws.

(4) The parties shall determine the procedure for conducting negotiations, conciliations or consultations provided under paragraph (2).

(5) Where parties resolve the issues in controversy pursuant to paragraphs (1) and (2), the parties shall, within seven days, enter into a written agreement stating—

- (a) the names of the parties;
- (b) the nature and particulars of the dispute, and in particular whether the dispute relates to —
 - (i) the assignment or implementation of functions;

- (ii) a financial matter;
 - (iii) a written agreement between the parties;
 - (iv) a boundary;
 - (v) natural resource management; or
 - (vi) any other form of intergovernmental dispute; and
- (c) the resolution or outcome of the process under this regulation.

(6) The parties shall, within seven days of entering into an agreement as contemplated under paragraph (4), submit a copy of the agreement to the Cabinet Secretary, the Technical Committee and the Council for their information.

(7) Where parties fail to resolve the issues in controversy under this regulation, a party may, within seven days, issue and serve a notice of intention to declare a dispute in the form set out in the Schedule.

PART III — FORMAL DECLARATION OF A DISPUTE

7. (1) Within seven days of the expiry of the notice issued under regulation 6(6), a party may formally declare a dispute in the form set out in the Schedule and accompanied by a summary of the dispute, to—

Formal
declaration of a
dispute.

- (a) the Summit through the Technical Committee;
 - (b) the Council where the dispute is amongst county governments; or
 - (c) an intergovernmental structure established under the Act or any other written law.
- (2) The declaration made under paragraph (1) shall be served on—
- (a) the parties to the intergovernmental dispute;
 - (b) the line ministry; and
 - (c) the Cabinet Secretary.

(3) Where a party fails to formally declare the dispute within seven days after the expiry of the time specified under regulation 6(6), the notice shall be deemed to have lapsed.

(4) Where the notice under paragraph (3) lapses, the party seeking to resolve the dispute shall issue a fresh notice under these Regulations.

8. (1) Pursuant to section 34 (1) of the Act, the Summit, or the Council, or any other intergovernmental structure, to which the declaration was made shall, within twenty-one days of receipt of the notice of formal declaration of a dispute, convene an initial meeting between the parties or their designated representatives.

Initial meeting.

(2) The parties at the initial meeting convened under paragraph (1) shall—

- (a) determine any material issues that are not in dispute;
- (b) determine the precise issues in dispute;
- (c) determine the nature of dispute including whether the dispute relates to—
 - (i) the assignment or implementation of functions;
 - (ii) a financial matter;
 - (iii) a written agreement between the parties;
 - (iv) a boundary;
 - (v) natural resource management; or
 - (vi) any other form of intergovernmental dispute; and
- (d) identify and agree on the appropriate alternative dispute resolution mechanism to be applied by the parties in settling the dispute, which may include—
 - (i) mediation;
 - (ii) traditional dispute resolution mechanisms; or
 - (iii) any other alternative dispute resolution mechanisms under other legislation.

(4) The parties shall, at the conclusion of the initial meeting, enter into a written and signed agreement detailing—

- (a) the names of the parties;
- (b) the designated representatives of the parties;
- (c) the nature of the dispute;
- (d) any material issues that are not in dispute;
- (e) the precise issues in dispute;
- (f) the dispute resolution mechanism agreed to;
- (g) the date of commencement of the dispute resolution process;
- (h) the venue and logistics with respect to conduct of the dispute resolution process; and
- (i) their commitment to the obligations of the parties under these Regulations.

(5) Where parties fail to agree on an alternative dispute resolution mechanism, the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made shall, within seven days and in writing, identify an appropriate mechanism specified under Part IV of these Regulations.

9. (1) The Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made, may give directions on any interim measures to be undertaken by either of the parties, pending the final determination of the dispute.

Interim measures
and conservatory
orders.

(2) Without prejudice to the generality of paragraph (1), a party to a dispute may seek conservatory orders from the Court at any time pending the final determination of the dispute.

PART IV— ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

10. (1) Where the parties agree to refer the dispute to mediation, the parties shall, within seven days of the initial meeting, identify and agree on an accredited mediator to be appointed by either the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made. Mediation.

(2) Where the Parties do not agree on a mediator, the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made shall, within seven days of the initial meeting and in writing, request a recognized institution to appoint a mediator.

(3) The mediator shall commence the mediation proceedings within fourteen days of appointment.

(4) The mediator shall assist the parties to resolve the dispute within fourteen days from the date of commencement of the mediation proceedings.

(5) The Parties may extend the mediation proceedings for a period not exceeding seven days.

(6) Except as otherwise provided in these Regulations, the mediator and the parties shall determine their own procedure.

(7) The mediator and the parties may, in determining the procedure under paragraph (6), adopt the existing rules or procedure of a recognized mediation institution.

(8) Where the dispute is resolved under this regulation, the mediator shall, within seven days of determination of the dispute, submit—

- (a) a written and signed agreement where parties reach a settlement; or
- (b) a report on the outcome where the parties did not reach a settlement,

to the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made.

(9) Where a party fails to comply with the agreement reached under paragraph (8), the aggrieved party may within ninety days of the determination of the dispute, apply to the High Court that the settlement be adopted as a judgment or order of the Court

11. (1) Where parties agree to refer the dispute to a traditional dispute resolution mechanism, the parties shall, within seven days of the initial meeting and in writing, identify and agree on a traditional body to be appointed by the Summit through the Technical Committee, Traditional dispute resolution.

the Council or the intergovernmental structure to which the declaration was made.

(2) Where the parties fail to agree on a traditional body, the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made shall, within seven days of the initial meeting and in writing, identify and appoint a suitable traditional body.

(3) The traditional body appointed under this regulation shall commence the dispute resolution process within fourteen days of appointment.

(4) The traditional body shall assist the parties to resolve the dispute within twenty-one days from the date of commencement of the proceedings.

(5) The parties may extend the proceedings for a period not exceeding seven days.

(6) Except as otherwise provided in these Regulations, the traditional body and the parties shall determine their own procedure.

(7) The traditional body shall conduct the process in conformity with the provisions of Article 159 (3) of the Constitution.

(8) Where the dispute is resolved under this regulation, the traditional body shall submit to the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made, the outcome of the dispute resolution process, and any other document that may be necessary.

(9) Where a party fails to comply with the agreement reached under paragraph (8), the aggrieved party may within ninety days of the determination of the dispute, apply to the High Court that the settlement be adopted as a judgment or order of the Court.

12. (1) Where the parties agree to refer the dispute to arbitration, the parties shall within seven days of the initial meeting, identify and agree on an accredited arbitrator to be appointed by the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made.

Arbitration.

(2) Where the Parties fail to agree on an arbitrator, the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made shall, within seven days of the initial meeting and in writing, request a recognized institution to appoint an arbitrator.

(3) The arbitrator shall commence the arbitration proceedings within 14 days of appointment.

(4) The arbitrator shall hear and determine the dispute referred to arbitration within thirty days of the date of commencement of the arbitration proceedings.

(5) The Parties may extend the arbitration proceedings for a period not exceeding fifteen days.

(6) The Arbitration Act, 1995 and the arbitration rules of the institution selected by the parties shall apply to the arbitration process provided under this regulation.

(7) Where the dispute is resolved under this regulation, the arbitrator shall, within seven days, submit the arbitral award to the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made.

13. (1) Where parties agree to resolve the dispute through mechanisms established under other legislation, the parties shall make every reasonable effort to resolve the dispute through the alternative dispute resolution mechanism or procedure under that legislation.

Mechanisms
under other
legislation.

(2) Where the parties agree to resolve the dispute pursuant to paragraph (1), the Summit through the Technical Committee, the Council or the intergovernmental structure to which the declaration was made shall, within seven days of the initial meeting and in writing, notify the relevant body responsible for the mechanism established under that legislation.

(3) The body under paragraph (2) shall—

- (a) hear and determine the dispute in accordance with its own procedure; and
- (b) within seven days of the determination and in writing, communicate the outcome to the Summit or the Council, through the Technical Committee, or the intergovernmental structure to which the declaration was submitted.

(4) Where a party fails to comply with the determination reached under this regulation, the aggrieved party may within ninety days of the determination of the dispute, apply to the High Court that the determination be adopted as a judgment or order of the Court.

14. (1) Where a dispute fails to be resolved in accordance with the mechanisms provided under these Regulations, a party may in writing and within fourteen days of such failure, notify the Summit through the Technical Committee in accordance with section 34(3) of the Act.

Referral to the
Summit.

(2) The Summit shall, within fourteen days, convene a meeting between the parties in an effort to resolve the dispute and may recommend an appropriate course of action for the resolution of the dispute.

(3) Upon determination of the dispute under this regulation, the Technical Committee shall, within thirty days and pursuant to section 12 of the Act, prepare a report on the resolution of the Summit and submit the report to the parties and the Cabinet Secretary.

15. (1) Subject to section 31 of the Act, a party that has exhausted any of the mechanisms specified under Part IV of these Regulations shall not be precluded from instituting judicial proceedings.

Duty to exhaust
alternative dispute
resolutions
mechanism.

(2) Where all efforts of resolving the dispute under these Regulations fail, a party may institute judicial proceedings as provided under section 35 of the Act.

PART V—MISCELLANEOUS PROVISIONS

16. A party to an intergovernmental dispute shall—

Obligation of parties.

- (a) comply with the procedures set out in these Regulations;
- (b) promptly respond to requests for information;
- (c) not institute parallel proceedings in respect of the same subject matter pending the determination of the dispute;
- (d) take all necessary measures to ensure that the provision of services in respect of the subject matter in dispute is not adversely affected;
- (e) ensure that the subject matter in dispute is preserved; and
- (f) take all necessary measures to ensure that the dispute is not escalated.

17. (1) Where a person, other than the parties involved in the dispute, has an interest in the subject matter of the dispute instituted under these Regulations, the person may apply to the alternative dispute resolution practitioner handling the matter to be enjoined.

Interested parties.

(2) Upon receipt of the application under paragraph (1), alternative dispute resolution practitioner shall make a determination and communicate to the applicant before the next sitting.

18. (1) A party or any person involved in any dispute resolution process under these Regulations shall not disclose, without authorisation in writing from the parties and the body in charge of the dispute resolution process, any information relating to the dispute before its determination.

Non-disclosure and confidentiality.

(2) A party to a dispute or any person involved in a dispute resolution process shall sign a confidentiality agreement at the initial meeting.

19. (1) Unless otherwise agreed, each party to an alternative dispute resolution mechanism shall bear its costs.

Costs.

(2) The costs and expenses of the dispute resolution process shall be shared equally by the parties, and may include —

- (a) the fees of the alternative dispute resolution practitioner;
- (b) the costs of the venue;
- (c) the charges incidental to the alternative dispute resolution process; and
- (d) any costs in respect of an expert witness.

(3) For purposes of paragraph (2)(d), the alternative dispute resolution practitioner shall consult the parties before inviting an expert witness.

(4) In assessing the costs of the alternative dispute resolution process adopted, the parties shall apply the prevailing fee guidelines of the recognized institution.

20. The Technical Committee shall compile a report on the disputes determined under these Regulations which report shall form part of the quarterly report submitted to the Summit and the Council pursuant to section 14 of the Act. Reporting.

21. The Cabinet Secretary may, in consultation with the Council and the Technical Committee, issue Guidelines for the better carrying out of the provisions of these Regulations. Guidelines.

SCHEDULE

(r. (7(8)))

NOTICE OF INTENTION TO DECLARE AN INTERGOVERNMENTAL DISPUTE
BETWEEN

.....

AND

.....

To:

..... (name)

..... (address)

Take notice that(insert name) being a party to the negotiations/ consultations of the issues arising out of
.....(state the precise issue in controversy), and having failed to reach an amicable settlement, we intend to declare a dispute between..... (Party A) and..... (Party B)

Take Further Notice THAT we will formally declare a dispute within Seven Days of the receipt of this notice, unless the following steps/ measures are undertaken—

(a).....

(b).....

(c).....

Dated at..... this..... day of.....20.....

Name

Designation.....

Signature.....

SEALED WITH THE COMMON SEAL OF

(r. (8(1)))

INTERGOVERNMENTAL DISPUTE DECLARATION FORM

BETWEEN

.....

AND

.....

To:

.....(name)*

..... (address)

DECLARATION OF A DISPUTE

Take Notice that following the lapse of the Notice of intention to declare a dispute dated the..... (date of the notice) and upon failure to amicably resolve the issues in controversy, we (Party A) hereby formally declare a dispute between(Party A) and (Party B) in relation to (the nature of dispute)

The parties have in compliance with the provisions of the Intergovernmental Relations Act, 2012 and the Intergovernmental (Alternative Dispute Resolution) Regulations, 2018 held the requisite consultations/negotiations/conciliations.

Take further notice that the Technical Committee/ Council/ Intergovernmental Structure to which the declaration is made, shall within 21 Days of receipt of this Notice of formal declaration convene an initial meeting between the parties in accordance the Intergovernmental (Alternative Dispute Resolution) Regulations, 2018.

Dated at..... this.....day of.....20.....

Name

Designation.....

Signature.....

SEALED WITH THE COMMON SEAL OF

*NOTE:

To be served upon

- (a) the relevant parties;
- (b) the line ministry;
- (c) the Cabinet Secretary

Made on the 14th December, 2021.

CHARLES KETER,
Cabinet Secretary,
Ministry of Devolution, Arid and Semi-Arid Lands.