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**THE NATURAL RESOURCES (BENEFIT
SHARING) BILL, 2020**

A Bill for

AN ACT of Parliament to establish a system of benefit sharing in natural resource exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes

ENACTED by the Parliament of Kenya, as follows —

PART I— PRELIMINARY

1. This Act may be cited as the Natural Resources (Benefit Sharing) Act, 2020. Short title.

2. In this Act, — Interpretation.

“affected county” means a county in which a natural resource is exploited;

“affected entity” means an organization or person involved in the exploitation of a natural resource to which this Act applies;

“benefit” mean any gains, proceeds or profits from the exploitation of natural resources;

“benefit sharing” means the sharing of any benefits arising from the exploitation of natural resources in a fair and equitable manner;

“benefit sharing agreement” means an agreement on the manner in which revenue accruing from natural resources shall be shared out between an affected entity and a county;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to finance;

“Commission” means the Commission on Revenue Allocation established under Article 215 of the Constitution;

“county executive committee member” means the county

executive committee member responsible for matters relating to finance in the respective county;

“exploitation” means the extraction or use of a natural resource for commercial benefit;

“Fund” means the Natural Resources Royalties Fund established under section 14;

“futures fund” means a fund set aside from the sovereign wealth fund for future generations;

“industrial fishing” means the exploitation of fishing resources—

(a) using an industrial or a semi industrial fishing vessel as provided under the Fisheries Management and Development Act; or

No. 35 of 2016.

(b) by a foreign entity.

“local community” means—

(a) people living in a ward within which a natural resource is situated; and

(b) people displaced to make way for the exploitation of a natural resource;

“natural resources” means the natural resources provided under section 3 of this Act;

“natural resources fund” means a fund set aside from the sovereign wealth fund for social and economic development and rehabilitation of depleted natural resources;

“officer” has the meaning assigned to it under section 3 of the Companies Act;

No. 17 of 2015.

“royalties” includes fees or payments by whatever name, paid by an affected entity for the exploitation or exploration of a natural resource in Kenya; and

“sovereign wealth fund” means monies set aside from monies that accrue to the national government including royalties collected under any written law for use by the future generations.

3. This Act shall apply to the following natural resources—

Application of the Act.

(a) sunlight;

- (b) water resources;
- (c) forests, biodiversity and genetic resources;
- (d) wildlife resources;
- (e) industrial fishing; and
- (f) wind.

4. All persons shall be guided by the following principles in the performance of their functions under this Act—

Guiding principles of benefit sharing.

- (a) transparency and inclusivity;
- (b) revenue maximization and adequacy;
- (c) efficiency and equity;
- (d) accountability and participation of the people;
- (e) rule of law and respect for human rights of the people; and
- (f) sustainable natural resources management.

PART II — FUNCTIONS OF THE COMMISSION ON REVENUE ALLOCATION

5. (1) In addition to its principal functions under Article 216(1) of the Constitution and section 10(1)(d) of the Commission on Revenue Allocation Act, the Commission shall be responsible for the implementation of this Act and shall, for this purpose —

Functions of the Commission.

No. 16 of 2011.

- (a) co-ordinate the preparation of benefit sharing agreements between an affected county and an affected entity;
- (b) review, and where appropriate, determine the royalties payable by an affected entity engaged in natural resource exploitation;
- (c) identify counties that are required to enter into a benefit sharing agreement under this Act in consultation with the respective county governments;
- (d) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement;

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- (e) facilitate and monitor the implementation of a benefit sharing agreement entered into between a county government and an affected entity;
 - (f) conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya;
 - (g) determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements;
 - (h) advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation;
 - (i) oversee the establishment of benefit sharing committees and forums;
 - (j) ensure the proper and timely payment of funds to counties and local communities as provided under this Act;
 - (k) build the capacity of local communities in negotiations for benefit sharing and implementation of related projects;
 - (l) prepare national guidelines on benefit sharing in consultation with the relevant sectoral leaders;
 - (m) identify, in consultation with sector specific organizations, incentives and benefits to promote the conservation of natural resources;
 - (n) ensure and promote value addition in natural resources;
 - (o) promote local content initiatives; and
 - (p) promote the restoration of the environment after the exploitation of a natural resource in an affected county.
- (2) The Commission may, in furtherance of its functions, collaborate with such other bodies or organizations within or outside Kenya as it may consider necessary for the better performance of its functions under this Act.

(3) The Commission shall have regard to the following in the performance of its functions—

- (a) all existing law regulating the natural resources sector in Kenya;
- (b) all existing arrangements for benefit sharing between local communities and an affected entity under any law in Kenya; and
- (c) obligations imposed on Kenya under any international treaty or agreement relating to the exploitation of natural resources.

PART III—COLLECTION OF ROYALTIES AND FEES

6. (1) The Commission shall, in consultation with the Council of County Governors and relevant national government entities, determine and review the amount of royalties and fees payable by affected entities in respect of a particular sector where a written law does not prescribe the royalties or fees.

Imposition of royalties and fees.

(2) In making a determination under subsection (1), the Commission shall take into account—

- (a) the total capital investment of the affected entity;
- (b) the prevailing international market value of the commodity from which royalty is payable;
- (c) the commercial viability of the natural resource being exploited;
- (d) the impact of the exploitation on the local community, the affected county and the environment; and
- (e) obligations of the affected entity under any existing benefit sharing agreement with the affected county.

(3) Where a written law prescribes the royalty, fees, payments or benefit sharing in a particular natural resource sector, the relevant written law shall apply with respect to that sector.

(4) The Commission shall monitor compliance with the written law and the implementation of any benefit sharing agreement entered into pursuant to this Act or any other written law.

7. (1) The Kenya Revenue Authority shall collect royalties as determined by the Commission under section 6 from affected entities and any other payment of royalties from natural resource exploitation undertaken under any other written law.

Kenya Revenue Authority to collect royalties.

(2) The monies collected pursuant to this section shall be paid into the Fund.

(3) This section shall supersede the provisions of any law with respect to the collection of royalties and fees charged for the exploitation of natural resources in Kenya.

(4) The Kenya Revenue Authority shall declare and account to the Commission the total sum collected from affected entities with respect to each natural resource as provided for under this Act.

8. (1) The revenue collected under this Act shall be shared as follows—

Revenue sharing ratio.

(a) twenty per cent of the revenue collected shall, subject to subsection (2), be paid into a sovereign wealth fund established by the National Government; and

(b) eighty per cent of the revenue collected shall, subject to subsection (3), be shared between the National Government and respective county governments in the ratio of sixty per cent to the National Government and forty per cent to the county governments.

(2) The monies paid into the sovereign wealth fund under subsection (1)(a) shall be paid as follows into the following funds constituting the sovereign wealth fund —

(a) sixty per cent shall be paid into a futures fund; and

(b) forty per cent shall be paid into a natural resources fund.

(3) At least forty per cent of the revenue assigned to county governments under subsection (1)(b) shall be utilised to implement local community projects and sixty per cent of that revenue shall be utilised for the benefit of the entire county.

(4) Where natural resources bestride two or more counties, the Commission shall determine the ratio of sharing the retained revenue amongst the affected counties in consultation with the affected counties.

(5) In determining the ratio of sharing the retained revenue amongst counties sharing a resource under subsection (4), the Commission shall take into account —

- (a) the contribution of each affected county in relation to the resource;
- (b) the inconvenience caused to the county in the exploitation of the natural resource; and
- (c) any existing benefit sharing agreement with an affected entity.

(6) The Commission shall, in consultation with the lead agencies with respect to each natural resource, review the revenue sharing ratio after every five years and present its recommendations to Parliament for approval.

PART IV— BENEFIT SHARING AGREEMENT

9. (1) Every affected entity shall enter into a benefit sharing agreement with the relevant county government before the exploitation of a natural resource in the affected county.

Benefit sharing
agreement.

(2) The benefit sharing agreement shall include non monetary benefits that may accrue to the county and the contribution of the affected entity in realizing the same.

10. (1) Each county that has a natural resource to which this Act applies shall establish a County Benefit Sharing Committee.

Establishment of
a County Benefit
Sharing
Committee.

(2) A County Benefit Sharing Committee shall consist of—

- (a) the county executive committee member responsible for finance;
- (b) the chairperson of the committee of the respective county assembly responsible for matters relating to natural resources;
- (c) two technical officers of the relevant county departments, appointed by the county executive

committee member in consultation with the county executive committee member responsible for the respective natural resources; and

(d) five persons, two of whom shall be of the opposite gender, elected by the local communities where the natural resource is found and representing the areas with the main natural resources within the county.

(3) The members of the County Benefit Sharing Committee shall be paid such allowances as shall be determined by the County Public Service Board in consultation with the Salaries and Remuneration Commission.

(4) The members of the County Benefit Sharing Committee shall elect a chairperson from amongst the members elected under subsection (2)(c).

(5) The Cabinet Secretary shall, in consultation with the Council of County Governors, make Regulations for the conduct of the affairs of the County Benefit Sharing Committees.

(6) Where a resource bestrides two or more counties, the affected counties' Benefit Sharing Committees shall constitute a joint committee with equivalent membership to oversee the negotiation of a joint benefit sharing agreement with an affected entity.

11. The functions of each County Benefit Sharing Committee shall be to—

- (a) negotiate the terms of a benefit sharing agreement with an affected entity on behalf of the county government;
- (b) monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement;
- (c) determine the amount of money to be allocated to each local community from monies that accrue under a benefit sharing agreement under this Act;
- (d) convene public forums to facilitate public participation with regard to proposed benefit sharing agreements during negotiations prior to execution by the county government;

Functions of a
County Benefit
Sharing
Committee.

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- (e) convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and
 - (f) make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.

12. (1) Every benefit sharing agreement shall be approved by the respective county assembly prior to the execution of the agreement by the respective county government.

Approval of a benefit sharing agreement.

(2) Each county and local community benefit sharing agreement shall be deposited with the Commission within thirty days of its execution and a copy shall simultaneously be submitted to the Senate.

13. (1) There shall be established by each affected local community a Local Benefit Sharing Forum comprising of five persons elected by the residents of the local community.

Local Community Benefit Sharing Forum.

(2) A public officer shall not be eligible for election as a member of a local community benefit sharing forum.

(3) The members of a local community benefit sharing forum shall serve for a single term of five years.

(4) The respective county government shall facilitate meetings and the election of the members of the Local Community Benefit Sharing Forum.

(5) A local community benefit sharing forum shall not hold more than eight meetings in one year.

(6) The functions of a Local Community Benefit Sharing Forum shall be to—

- (a) negotiate with the County Benefit Sharing Committee for the purpose of entering into a local community benefit sharing agreement on behalf of the community;
- (b) identify local community projects to be supported by money allocated to the local community by the

County Benefit Sharing Committee under this Act; and

- (c) oversee the implementation of projects undertaken at the local community using money devolved under this Act.

(6) The members of a local community benefit sharing forum shall be paid such allowances as shall be determined by the County Public Service Board in consultation with the Salaries and Remuneration Commission.

PART V— FINANCIAL PROVISIONS

14. (1) There is established a Natural Resources Royalties Fund which shall vest in the Commission.

Natural
Resources
Royalties Fund.

(2) There shall be paid into the Fund —

- (a) all royalties collected as a result of exploitation of natural resources in Kenya;
- (b) all fees and other charges levied on affected entities for the exploitation of natural resources in Kenya; and
- (c) all contributions and other payments required by this Act to be paid into the Fund.

(3) Where any written law provides for the payment of royalties or fees from exploitation of a natural resource in a particular sector, such royalties and fees shall be paid into the Fund.

PART VI — MISCELLANEOUS PROVISIONS

15. (1) Monies distributed to counties under this Act shall be utilized for projects that—

Uses of retained
funds.

- (a) are prioritized by the County Benefit Sharing Committee;
- (b) are prioritized by the local community benefit sharing forums;
- (c) meet the socio-economic needs of the residents of the County or local community; and
- (d) are of public interest and are community-based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area.

(2) The County Benefit Sharing Committee shall prioritize projects to be supported by funds received under this Act.

16. (1) A person who—

Offences.

- (a) fails to furnish information required to be furnished to the Commission under this Act;
- (b) makes a statement which the entity knows to be false or which the entity has no reason to believe to be true; or
- (c) knowingly makes a false statement under this Act; commits an offence.

(2) A person who is found guilty of an offence under subsection (1) is liable, on conviction,—

- (a) in the case of a natural person, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment; and
- (b) in the case of a body corporate, to a fine not exceeding five million shillings.

(3) Where a body corporate is found guilty of an offence under this Act, every officer of that corporation is deemed to have committed an offence and is liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

(4) An affected entity that continues to be in breach of this Act may be liable to cancellation of its licence.

17. (1) The Commission shall, within two years of the commencement of this Act, review all existing laws and agreements prescribing the ratio of natural resource sharing, taking into account the provisions of this Act and international best practice in revenue sharing.

Transitional provisions.

(2) The Commission shall submit a report to the National Assembly, the Senate and the Cabinet Secretary on the outcome of the review within three months of the conclusion of the review.

(3) The report submitted under subsection (2) shall, in addition to the requirements set out under subsection (1), set out proposals on legislative and policy amendments required to fully implement this Act.

(4) An affected entity that, immediately before the commencement of this Act, was lawfully authorised to exploit a natural resource under this Act shall be considered to be authorised to conduct such exploitation under this Act.

(5) Despite subsection (4), an affected entity shall comply with the provisions of this Act within two years of its commencement.

18. (1) The Cabinet Secretary may make Regulations for the better carrying out of the provisions of this Act.

Power to make
Regulations.

(2) In particular and without prejudice to the generality of the power conferred by sub-section (1), the Cabinet Secretary shall make Regulations—

- (a) prescribing the fees in respect of anything required to be done under this Act;
- (b) prescribing the administration of the Fund;
- (c) prescribing mode for the payment of royalties under this Act;
- (d) prescribing the revenue sharing formula between counties that share a natural resource; and
- (e) prescribing anything which is required to be prescribed or is necessary to give effect to this Act.

19. Section 183 of the Mining Act is amended by —

Amendment to
Act No. 12 of
2016.

(a) by deleting subsection (5) and substituting therefor the following new subsection (5)—

(5) The royalties payable under sub-section (1) shall be distributed as follows —

(a) twenty per cent of the royalties shall, subject to subsection (6), be paid into a sovereign wealth fund established by the National Government; and

(b) eighty per cent of the royalties shall, subject to subsection (7), be shared between the National Government and respective county governments in the ratio of sixty per cent to the National

- Government and forty per cent to the county governments; and
- (b) by inserting the following new subsections immediately after subsection (5)—
- (6) The royalties paid into the sovereign wealth fund under sub-section (5)(a) shall be paid as follows into the following funds constituting the sovereign wealth fund—
- (a) sixty per cent shall be paid into a futures fund; and
- (b) forty per cent shall be paid into a natural resources fund.
- (7) At least forty per cent of the royalties assigned to county governments under sub-section (5)(b) shall be utilised to implement respective local community projects and sixty per cent of the royalties shall be utilised for the benefit of the entire county.
- (8) Where mineral resources beset two or more counties, the Commission on Revenue Allocation established under Article 215 of the Constitution shall determine the ratio of sharing the retained royalties amongst the affected counties in consultation with the affected counties.
- (9) In determining the ratio of sharing the retained royalties amongst counties sharing a mineral resource under sub-section (8), the Commission on Revenue Allocation shall take into account—
- (a) the contribution of each affected county in relation to the mineral resource;
- (b) the inconvenience caused to the county in the exploitation of the mineral resource; and
- (c) any existing benefit sharing agreement with an affected entity.
- (10) The Commission on Revenue Allocation shall, in consultation with the lead agencies with respect to each mineral resource, review the revenue sharing ratio after every five years and present its recommendations to Parliament for approval.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The Bill seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities and to that end provides that the Commission for Revenue Allocation oversees the same.

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

This Bill, once enacted, would confer on the Cabinet Secretary responsible for matters relating to natural resources the power to make regulations for the purpose of bringing into effect the provisions contained in the Bill. It therefore delegates limited and conditional legislative powers. The Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Bill concerns county governments in that it contains provisions that among others affect local community participation and prioritisation, administration and utilization of funds within counties. The Bill therefore affects the functions and powers of county governments in terms of 110(1)(a) of the Constitution.

Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution

The Bill deals with matters other than those listed in the definition of a money Bill under Article 114 (3) of the Constitution and is therefore not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 12th November, 2020.

AGNES ZANI,
Senator.

Section 183 of Act No. 12 of 2016 that the Bill proposes to amend—

Royalties

183. (1) The holder of a mineral right shall pay royalty to the State in respect of the various mineral classes won by virtue of the mineral right.

(2) The Cabinet Secretary shall prescribe the rates payable under subsection (1).

(3) The Cabinet Secretary may require the holder of a mineral right to make returns relating to any royalties paid in such manner and within a period as may be prescribed.

(4) Any mineral samples including core samples, removed for the purposes of testing, shall not be subject to royalty unless they exceed maximum value stipulated in regulations

(5) The royalties payable under sub-section (1) shall be distributed as follows—

- (a) seventy percent to the National Government;
- (b) twenty percent to the County Government; and
- (c) ten percent to the community where the mining operations occur.