Energy Practice |
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EMPOWERING LOCAL COMMUNITIES THROUGH NATURAL RESOURCES

Wind and Sunlight included in scope of natural resources that will be the subject of benefit sharing agreements with county governments and local communities

Background:

The issue of revenue share of royalties accruing from natural resources remains a contentious issue between the National, County governments and local communities in Kenya. The Natural Resources (Benefit Sharing) Bill, 2018 (the "2018 Bill") was introduced before the Senate House in the last quarter of 2018 and is currently under review by the Senate committee on Land, Environment and Natural Resources.

This is the second time the Bill has been introduced to the Senate house, with the first attempt being in 2014 (the "2014 Bill") when it was successfully passed by the Senate and referred to the National Assembly.

Like its predecessor, the 2018 Bill seeks to establish a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between resource exploiters, the National Government, affected County Governments and local communities.

It is also noteworthy that the 2014 Bill envisioned that the exploitation would be undertaken by an organisation in its definition of affected organisation while the 2018 Bill defines an "affected entity" to include an organisation or person – presumably a natural person.

Scope of Natural Resources:

With the enactment of the Mining Act, 2016 and the introduction of the Petroleum (Exploration, Development & Production Bill), 2017, the natural resources governed by the 2018 Bill now exclude petroleum, natural gas and minerals from the ambit of the proposed legislation. The 2018 Bill will therefore only apply to sunlight, water resources, forests, biodiversity and genetic resources, wildlife resources, industrial fishing and wind. The inclusion of wind and sunlight is significant as it will affect developers of power projects such as wind and solar farms, which was not previously the case.

Today, Section 183 of the Mining Act governs the revenue share from royalties payable from mineral resources, and should the Petroleum Bill 2017 be passed to law, then the issue of revenue share of the profits derived from upstream petroleum and natural gas operations shall be governed in accordance with Section 85 of the Petroleum Bill, 2017.

Multiple Funds:

The Natural Resources Royalties and Fees Fund has been renamed to the Natural Resources Royalties Fund. Like the 2014 Bill, a Sovereign Wealth Fund is to be established and capitalised through twenty percent of the total revenues collected as royalties and fees.

Additional funds introduced in the 2018 Bill include: (i) a Futures Fund to cater for future generations; and (ii) a Natural Resources Fund for social and economic development and rehabilitation of depleted natural resources. Both these funds are to be capitalised from funds set aside from the Sovereign Wealth Fund on a 60:40 basis.

Enhanced Powers of the Commission on Revenue Allocation:

Unlike its predecessor which sought to establish an independent National Resources Benefits Sharing Authority, the 2018 Bill envisages that the oversight role will be undertaken by the Commission of Revenue Allocation established under Article 215 of the Constitution of Kenya.

The Bill therefore proposes that the Commission shall, in addition to its powers as provided for under Article 216 (1) of the Constitution and section 10 (1) (d) of the Commission on Revenue Allocation Act, have the powers to among other things: (i) co-ordinate the preparation of benefit sharing agreements between the affected county and the affected entity; (ii) review and determine the royalties payable by an affected entity engaged in natural resource exploitation; (iii) identification of counties that are required to enter into a benefit sharing agreement and (iv) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement.

Significantly, where there is no law prescribing the applicable royalties or fees for specified natural resources, the Commission is now empowered to determine and review the amount of royalties or fees that would be payable by affected entities within a particular sector. Where a written law exists, then the Commission's role is limited to monitoring and compliance of the implementation of the benefit sharing agreement concluded under that particular legislation. It is therefore obliged, within one of the commencement date of the legislation, to undertake a review of all existing laws and agreements prescribing the ratio of natural resource sharing.

The power of the Kenya Revenue Authority to collect and share the revenue collected remains the same in both Bills, with twenty percent being payable into the Sovereign Wealth Fund and the balance being split between the National and County Governments on a 60:40 basis. This is a shift from the ratio in the Mining Act which is seventy percent to the National Government, twenty percent to the County Government and ten percent to the community where the mining operations occur. The Commission is also mandated to review the revenue sharing ratio every five years and present its recommendations to Parliament.

Finally, the Natural Resources Royalties Fund established under Section 14 of the Bill vests in the Commission, which is also empowered to make Regulations prescribing the administration of the Fund.

Benefit Sharing Agreement:

Every affected entity will be required to enter into a benefit sharing agreement with the County before the exploitation of a natural resource in an affected county. Like the 2014 Bill, the 2018 Bill requires that each county that has a natural resource to which the legislation applies, shall establish a County Benefit Sharing Committee whose functions shall, among others, include the negotiations of the terms of the Benefit Sharing Agreement with an affected entity on behalf of the county government. With the introduction of sunlight and wind into the scope of natural resources governed by the legislation, this provision therefore effectively makes it mandatory for all county governments to establish the Committee given that these resources are available in every County.

Every Benefit Sharing Agreement shall be approved by the respective county assembly prior to its execution by the respective county government. The Agreement shall then be deposited with the Commission within thirty days of its execution and a copy simultaneously submitted to the Senate.

The Bill also proposes the establishment of a Local Community Benefit Sharing Forum whose function shall be inter alia to negotiate with the County Benefit Sharing Committee for the purpose of entering into a local community benefit sharing agreement on behalf of the community, identify local community projects to be implemented and oversee the implementation of projects undertaken at the local community. The local community benefit sharing agreement shall also be deposited with the

Mary Chege
mary.chege@emsi.co.ke
+254 780 9444 410 | www.emsi.co.ke

Maryanne Wachira
maryanne.wachira@emsi.co.ke