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Committee  
19/6/19

SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND  
NATURAL RESOURCES

.....  
COMMITTEE REPORT ON THE NATURAL RESOURCES (BENEFIT  
SHARING) BILL  
(SENATE BILLS NO. 31 OF 2018)  
.....

Clerk's Chambers,  
First Floor,  
Parliament Buildings,  
NAIROBI.

Hon. Speaker  
You may approve.  
*[Signature]*  
18/6/19, 2019

Approved  
*[Signature]*  
18/6/2019



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## PREFACE

### Establishment of the Committee

The Standing Committee on Land, Environment and Natural Resources is established under standing order 218(3) of the Senate Standing Orders. The mandate and the functions of the committee are set out under the Second Schedule of the Senate Standing Orders which mandates the Committee to consider all matters relating to lands and settlement, housing, environment, forestry, wildlife, mining, water resource management and development.

### Membership of the Committee

The Committee is comprised of the following members:-

- |                                       |                           |
|---------------------------------------|---------------------------|
| 1. Sen. Mwangi Paul Githiomi, M.P.    | - <b>Chairperson</b>      |
| 2. Sen. Prengei Victor, M.P.          | - <b>Vice Chairperson</b> |
| 3. Sen. George Khaniri, MGH, M.P.     | - Member                  |
| 4. Sen. (Eng.) Godana Hargura, M.P.   | - Member                  |
| 5. Sen. Ndwiga Peter Njeru, EGH, M.P. | - Member                  |
| 6. Sen. Halake Abshiro, M.P.          | - Member                  |
| 7. Sen. Boy Issa Juma, M.P.           | - Member                  |
| 8. Sen. (Arch.) Sylvia Kasanga, M.P.  | - Member                  |
| 9. Sen. Mwaruma Johnes, M.P.          | - Member                  |

### **Mr. Speaker,**

The Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018 seeks to provide a legislative framework for the establishment and enforcement of a system for sharing of benefits that accrue from the exploitation of natural resources between natural resource exploiters, the national government, county governments and local communities.

The Committee considered the Bill at length, conducted public participation and deliberated on the submissions received from various stakeholders. Based on the deliberations and public participation, the Committee will present a raft of amendments with a view of strengthening the provisions of the Bill for consideration by this House.

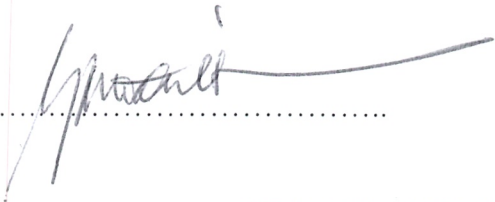
## **Acknowledgement**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate as well as the Secretariat comprised of Mr. Victor Bett, Mr. Mitchell Otoro and Mr. Ahmed Odhwa for the support extended to it in the conduct of the public hearings and in fulfilling its mandate. Further, the Committee wishes to thank stakeholders who made both written and oral submissions such as the Ministry of Petroleum and Mining, the Commission on Revenue Allocation, the Council of County Governors, the Kenya Forestry Service, the National Alliance of Community Forest Associations, the Kenya Wildlife Conservancies Association and Nature Kenya.

**Mr. Speaker,**

It is now my pleasant duty, pursuant to standing order 143 of the Senate Standing Orders, to present a Report of the Standing Committee on Land, Environment and Natural Resources on the Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018.

Signed.....



Date.....

13-06-2019

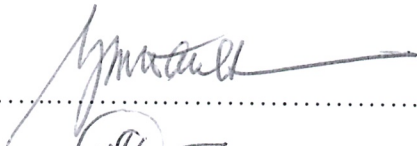
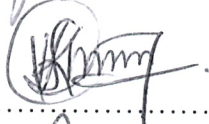
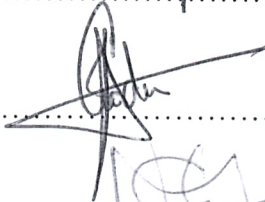
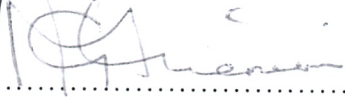
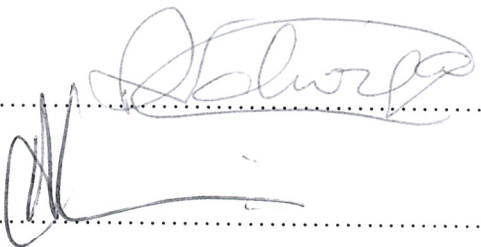
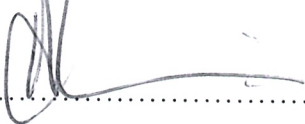


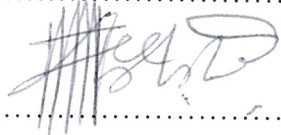
**SEN. MWANGI PAUL GITHIOMI, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL  
RESOURCES**

**ADOPTION OF THE REPORT OF THE SENATE STANDING COMMITTEE  
ON LAND, ENVIRONMENT AND NATURAL RESOURCES  
ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL,  
SENATE BILLS NO. 31 OF 2018**

**We, the undersigned members of the Senate Standing Committee on Land, Environment and Natural Resources, do hereby append our signatures to adopt the Report-**

1. Sen. Mwangi Paul Githiomi, M.P. 
2. Sen. Prengei Victor, M.P 
3. Sen. Godana Hargura, M.P. 
4. Sen. George Khaniri, MGH, M.P. 
5. Sen. Ndwiga Peter Njeru, EGH, MP. 
6. Sen. Halake Abshiro, M.P. 
7. Sen. Boy Issa Juma, M.P. 
8. Sen. (Arch.) Sylvia Kasanga, M.P. 
9. Sen. Mwaruma Johnes, M.P. 

## CHAPTER ONE

### INTRODUCTION

#### **1.0 Background**

The Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018 is sponsored by Sen. (Dr.) Agnes P. Zani, MP. It seeks to provide a legislative framework for the establishment and enforcement of a system of the sharing of benefits that accrue from the exploitation of natural resources between natural resource exploiters, the national government, county governments and local communities.

The Bill was published on 23<sup>rd</sup> October, 2018, and read a First Time before the Senate on 29<sup>th</sup> November, 2018. Following the First Reading in the Senate, it stood committed, pursuant to standing order 140(1) of the Senate Standing Orders, to the Standing Committee on Land, Environment and Natural Resources for facilitation of public participation. Subsequently, the Committee, pursuant to Article 118(1)(b) of the Constitution and standing order 140 (5) of the Senate Standing Orders, invited submissions from members of the public on the Bill via an advertisement on the Standard and the Daily Nation Newspapers.

#### **1.1 The Object of the Bill**

The object of the Bill is to provide a legislative framework for the establishment and enforcement of a system of the sharing of benefits that accrue from the exploitation of natural resources between natural resource exploiters, the national government, county governments and local communities.

Article 69(1)(a) & (h) of the Constitution states that—

69. (1) The State shall—

- (a) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; and

(h) utilize the environment and natural resources for the benefit of the people of Kenya.

Article 174(g) of the Constitution further states that the objects of the devolution of government are to ensure equitable sharing of national and local resources throughout Kenya.

The Bill operationalizes the above constitutional provisions with respect to the equitable sharing of resources by providing a framework for the establishment and enforcement of a system of sharing of benefits that accrue from the exploitation of natural resources between natural resource exploiters, the national government, county governments and local communities.

## **1.2 Overview of the Bill**

The Bill makes, among others, the following provisions:

### **Application**

The Bill, once enacted, shall apply to the following natural resources—

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

### **Functions of the Commission on Revenue Allocation**

The Bill confers on the Commission on Revenue Allocation the authority to oversee its implementation once enacted. The Commission shall be responsible for, among others,—

- (a) coordinating the preparation of benefit sharing agreements;
- (b) facilitating and monitoring implementation of benefit sharing agreements;
- (c) reviewing and determining royalties and fees payable by resource exploiters in sectors where no written law prescribes;
- (d) overseeing the administration of funds set aside for community projects;
- (e) advising the National Government on policy and legislation regarding natural resource benefit sharing;
- (f) promoting local content initiatives and environmental restoration;

- (g) determining the ratio for sharing revenue allocated to counties where the relevant natural resource lies in more than one county; and
- (h) reviewing the revenue sharing ratio every five years in consultation with all relevant lead agencies and presenting its recommendations to Parliament for approval.

### **Collection and Sharing of Royalties and other Revenues**

The Bill provides that the Kenya Revenue Authority shall be responsible for collecting all royalties from the natural resources specified under the Bill. The Authority will be required to pay the revenue collected into a Natural Resources Royalties Fund and declare and account to the Commission on Revenue Allocation the total sum collected with respect to each natural resource.

The Bill further provides that the revenue collected from natural resource exploiters be shared as follows—

- (a) 20% be paid into a sovereign wealth fund established by the National Government where 60% of the amount would be paid into a futures fund and 40% would be paid into a natural resources fund; and
- (b) 80% be shared between the National Government and county governments as follows—
  - (i) 60% to the National Government; and
  - (ii) 40% to the respective county government(s) where 40% of the amount would be utilised to implement the respective local community projects and 60% utilised for the benefit of the entire county.

### **Benefit Sharing Agreements**

The Bill mandates all entities intending to exploit a natural resource to enter into a benefit sharing agreement with the respective county government(s) before starting the exploitation. To this end, the Bill proposes establishment of County Benefit Sharing Committees in each county whose key functions would be to negotiate the terms of benefit sharing agreements, to determine the amount of money allocated to local communities under benefit sharing agreements and to

monitor implementation of projects undertaken under benefit sharing agreements. A County Benefit Sharing Committee will consist of—

- (a) the county executive committee member responsible for finance;
- (b) the chairperson of the respective county assembly committee responsible for natural resources; and
- (c) five elected representatives of the relevant local community representing its diversity.

The Bill also provides for the establishment of Local Community Benefit Sharing Forums in each community where a relevant natural resource is being exploited. The forums will consist of five elected representatives of the respective local community and their functions will be to negotiate benefit sharing agreements with the respective County Benefit Sharing Committee and to propose and oversee the implementation of projects undertaken using funds devolved under the Bill.

The Bill further provides that benefit sharing agreements have to be approved by the respective county assemblies before being executed by the county government and thereafter copies submitted to the Commission on Revenue Allocation and the Senate.

### **Financial Provisions**

The Bill also provides for the establishment of a Natural Resources Fund where all revenue collected in relation to natural resources shall be deposited. The fund will be vested in the Commission on Revenue Allocation and the Commission will be mandated to make regulations prescribing the fund's administration.

### **Miscellaneous Provisions**

The Bill creates various offences, including failing to provide information to the Commission and making false statements, prescribing a punishment of a maximum fine of Kshs. 2,000,000/- or imprisonment for a maximum of 3 years or both. Companies that commit the offences created will be punishable with a maximum fine of Kshs. 5,000,000/-. The Bill further provides that a company that continues to breach its provisions may be punished by the cancellation of its licence.

The Bill also mandates the Commission on Revenue Allocation to, within one year, review all laws and agreements prescribing relevant natural resource sharing ratios and report to Parliament. When reporting to Parliament, the Commission will be required to propose policy and legislative amendments necessary to implement the provisions of the proposed Bill.

The Bill finally gives the Cabinet Secretary responsible for mining the authority to make regulations for the better carrying out of the provisions once enacted.

### **1.3 Consequences of the Bill**

The Bill provides a legislative framework for the establishment and enforcement of a system of the sharing of benefits that accrue from the exploitation of natural resources between natural resource exploiters, the national government, county governments and local communities. Relevant parties will therefore benefit from the exploitation of natural resources in their areas, including the local community who have hitherto never adequately benefited from the same.

The Bill will also ensure local communities in particular and the public in general are involved and their input taken into account prior to the exploitation of a relevant natural resource. This will be done through the consultative processes that will precede any benefit sharing agreement as the Bill requires an exploiter of a natural resource to enter into a benefit sharing agreement before commencing its exploitation.

## CHAPTER TWO

### PUBLIC PARTICIPATION

#### **2.0 Attendance by Stakeholders**

The Committee, pursuant to Article 118 of the Constitution and standing order 140 (5) of the Senate Standing Orders, invited submissions from members of the public on the Bill via an advertisement on the Daily Nation Newspaper and Standard Newspapers on 23<sup>rd</sup> February, 2019. On 19<sup>th</sup> March, 2019, the Committee met in Committee Room 10, 1<sup>st</sup> Floor, Main Parliament Buildings, Parliament Road, Nairobi and received views on the Bill from stakeholders and members of the public. The Committee received oral and written submissions from —

1. Ministry of Petroleum and Mining
2. The National Treasury and Planning
3. Ministry of Tourism and Wildlife
4. Ministry of Energy - Kenya Electrical Generating Company PLC (KenGen)
5. Commission on Revenue Allocation
6. National Alliance of Community Forest Associations
7. Forestry Society of Kenya
8. Nature Kenya – the East Africa Natural History Society
9. The Council of Governors (CoG)
10. Kenya Forestry Service
11. The Kenya Wildlife Conservancies Association
12. Prof. Gideon H.N. Nyamasyo – University of Nairobi
13. Dr. Francis Mwaura – University of Nairobi
14. Michael M.K. Kimani

## **2.1 Submissions from Stakeholders**

The Committee received and considered the proposals from stakeholders on specific provisions of the Bill as follows-

### ***(1) Long title***

#### Proposal 1

Replace the word “resource exploiters” with “investors” or “contractors”

#### Rationale 1

User of “resource exploiters” does not sound very professional

#### Proposal 2

Make reference to Articles 69 and 202 of the Constitution.

#### Rationale 2

Does not reflect constitutional provisions.

#### Proposal 3

Amend the long title to read as follows:

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.

#### Rationale 3

For specificity.

(2) Clause 2- Interpretation

Proposal 1

Cross reference the definition of the term “Local Community” with the one provided by the Mining Act, 2016.

Rationale 1

This definition differs from the one given by the Mining Act, 2016 which recognized the community as a group of people living around an exploration and mining area as well as a group of people who may be displaced by an exploration or mining activity.

Proposal 2

Redefine the definition of the term “affected County” to include other counties that may be affected by exploitation of a natural resource.

Rationale 2

The Affected County is only the County in which a natural resources is located but may include County(s) that may be affected owing to effects of exploitation.

Proposal 3

Designate CS to Treasury and Planning as the principal on this Bill.

Rationale 3

The Bill excludes minerals from its purview. The CS Mining cannot then be charged with the responsibility of administering this Act by way of making regulations.

Proposal 4

Define the Cabinet Secretary to be the Cabinet Secretary responsible for matters relating to natural resources provided for under clause 3 of the Bill.

#### Rationale 4

The Bill applies to natural resources which include sunlight, water resources, forests, biodiversity and genetic resources, wildlife resources, industrial fishing and wind which fall under different Ministries.

Additionally, clause 17(2) provides that the Commission on Revenue Allocation shall submit a report to the National Assembly, the Senate and the Cabinet Secretary responsible for Mining on the outcome of the review of all existing laws and agreements prescribing the ratio of natural resource sharing. This clause fails to take into account other ministries responsible for the respective natural resource prescribed under the Bill. Therefore the term Cabinet Secretary should be construed to mean the Cabinet Secretary responsible for Natural Resources.

#### Proposal 5

Amend the definition of the term “Natural Fund” to state “Natural Resources”.

#### Rationale 5

The definition is erroneous.

#### Proposal 6

Exclude “fees and any other payments” from the definition of royalties

#### Rationale 6

The definition includes fees and other payments payable for exploitation of Natural resources

(3) Clause 3- Application of the Act

Proposal 1

Include minerals and all other natural resources.

Rationale 1

Minerals are excluded.

Proposal 2

Include minerals and fossil fuels.

Rationale 2

The clause provides a narrow definition of the term natural resources. As such, it does not conform to the Constitutional definition under Article 260 (d) which provides that natural resources are completely contained on or under the surface.

Proposal 3

Remove Genetic Resources.

Rationale 3

Genetic resources are unique and should have their own Act.

Proposal 4

Remove Wildlife Resources.

Rationale 4

Wildlife Resources are adequately provided for under the Wildlife Conservation and Management Act, 2013.

#### Proposal 5

Include Geothermal Resources.

#### Rationale 5

Geothermal Energy Resources are excluded.

### ***(4) Clause 5- Functions of the Commission***

#### Proposal

Consider revising and give the powers to the National Treasury.

#### Rationale

The proposed Bill has given a lot of powers to the Commission on Revenue Allocation (CRA).

### ***(5) Clause 6- Imposition of Royalties and Fees***

#### Proposal 1

Consider defining clearly what will constitute “Overall Capital Expenditure” Section 6 (2) (a)

#### Rationale 1

Overall capital expenditure has not been defined. Will it include exploration expenditure? The interpretation of what is capital expenditure has a huge bearing on viability of a natural resource project as it affects taxation.

### Proposal 2

Consider deleting Section 6 (2) (b).

### Rationale 2

Prevailing international market value is subject to fluctuations and cannot therefore be used as a guide to setting royalties.

### Proposal 3

Consider deleting Section 6 (2) (c).

### Rationale 3

Commercial viability of any natural resource project is determined by among others the rate of royalty that the operator will be required to pay. It cannot therefore be feasible that a rate is set after a project has been declared commercial

### Proposal 4

Consider deleting Section 6 (2) (d).

### Rationale 4

The impact of the exploitation on the community includes the effect of the royalties and fees that are to be charged. It is not feasible therefore that a royalty rate will be set after evaluating the impacts.

### Proposal 5

The Commission shall, in consultation with the respective county governments, 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.

### Rationale 5

In the spirit of Article 6(2) of the Constitution on consultation and cooperation, it would be prudent to involve the county government through the county benefit sharing committee on the determination and review of royalties and fees. This will help to minimise conflicts arising from valuation.

### Proposal 6

Delete Clause 6.

### Rationale 6

Currently there are no levies payable in respect of exploitation of wind and solar for power generation. The market structure that obtains in the energy sector is interlinked with set tariff structures and a regulator. For any new levies to be built into the existing tariff structure, the Energy Regulatory Commission (ERC) must grant approval under a pass-through arrangement. This will increase the cost of power and go against government policy of provision of cheap power.

### Proposal 7

Amend clause 6 to provide for consultation by the Commission on Revenue Allocation when determining and reviewing royalties and fees paid in the exploitation of the natural resources.

### Rationale 7

The Bill solely assigns to the Commission on Revenue Allocation the role of reviewing and determining the royalties and fees payable by an affected entity engaged in natural resource exploitation. Owing to the far-reaching ramifications of any additional levies to the tariff across the entire sector, it would be appropriate if the Bill were to set out a consultative process prior to implementation. The Bill currently does not envisage such a process.

## **(6) Clause 7- Kenya Revenue Authority to collect royalties**

### Proposal

Exclude fees payable under the mining Act from this requirement (Section 7 (3)) by deleting the words “and fees” from this section.

### Rationale

Some fees under the Mining Act are classified as A-in-A and collected by the State Department for Mining.

(7) Clause 8- Revenue Sharing Ratio

Proposal 1

Cross reference with the Sovereign Wealth Fund Bill

OR

State the sharing formula as follows;

SWF – Futures Fund 12%

– Natural resources fund 8%

National Government – 48%

County Government – 19.2%

Local Community – 12.8%

Rationale 1

This section contradicts the draft Sovereign Wealth Fund Bill proposed by the National Treasury as well as section 183 of the Mining Act, 2016.

Proposal 2

Amend clause 8(1) to read as follows:

One hundred 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.

## Rationale 2

The Sovereign Wealth Fund is anchored in the National Government. Therefore the benefit to the national government is higher than that of the county government as 20% is required to be paid into the Sovereign Wealth Fund and out of the remaining 80%, the National Government is entitled to 60% and County Governments 40%. Further, the Bill makes reference to the Sovereign Wealth Fund which is not established in the Bill and as such, the Fund should be deleted.

On the other hand, the revenue sharing ratio for County Governments which is 40% is to be shared for community projects and county projects.

In view of the foregoing, the revenue sharing ratio should be 100% to be shared between the National Government and County Governments at the ratio of 60% and 40% respectively so as to ensure equitable benefit.

## Proposal 3

Consider deleting section 8 (5) (a) and (b).

## Rationale 3

Contribution of and inconvenience caused to each county by existence of some natural resources applicable to this Act may face challenges given their nature – (Sun, Wind etc).

## Proposal 4

Consider revision to take place after at least 10 years (Section 8(6)).

## Rationale 4

Five years is a short period to review revenue sharing ratios. Natural resource projects are long term in nature and are very dependent on, among others, rates of royalty payable. Frequent

revision of sharing framework is likely to affect the rates and in essence projects and render Kenya an unfavourable investment destination.

#### Proposal 5

Align the revenue sharing ratios proposed under this clause with those in the Mining Act, 2016.

#### Rationale 5

No rationale provided.

#### Proposal 6

Exclude reference to the Sovereign Wealth Fund.

#### Rationale 6

The Sovereign Wealth Fund should be provided for separately.

#### Proposal 7

Align clause 8(4) with clause 10(6).

#### Rationale 7

Clause 8(4) conflicts with clause 10(6) as it vests a similar function to both the Commission and the relevant County Benefit Sharing Committee.

#### Proposal 8

Amend clause 8(6) to read as follows:

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

#### Rationale 8

The revenue sharing formula should be reviewed after three years to allow for adjustments of the ratio if necessary.

### **(8) Clause 9- Benefit Sharing Agreement**

#### Proposal

Make it clear with who is the affected entity to enter into a benefit sharing agreement – County or local community.

#### Rationale

The proviso is not clear as with who the affected entity is entering into a benefit sharing agreement.

Amend the proposed subsection (3) to provide that title is held in trust for the beneficiaries by the respective county government.

### **(9) Clause 10- Establishment of a County Benefit Sharing Committee**

#### Proposal 1

Insert section (2) (d) 2 members co-opted from the department in whose responsibility lies the natural resource under consideration.

#### Rationale 1

Need to co-opt technical members from the State Department whose responsibility lies the natural resource for advice.

Proposal 2

Delete this clause.

Rationale 2

Counties already have established structures that can cater for its intended purpose and its functions can be executed by the Local Community Benefit Sharing Forum established under clause 13.

**(10) Clause 12- Approval of a Benefit Sharing Agreement**

Proposal 1

Delete this proposal and include a new proposal to require the CEC Finance to make annual report to the County Assembly on all Agreements entered in the County during that Financial year

Rationale 1

Approval of every Benefit sharing agreement by the County Assembly is likely to derail the process. Since the committee consists of the CEC in charge of Finance, it would be prudent to assume that the County is aware of this agreement and instead require the CEC to make an annual report to the County Assembly.

**(11) Clause 13- Local Community Benefit Sharing Forum**

Proposal 1

Cap the committee expenditure to not more than 10% of the fund (13(c))

Rationale 1

Assuming the allowances will come from the fund, there is need to cap this expenditure to avoid over use.

#### Proposal 2

Add functions of the County Benefit Sharing Committee to this Forum.

#### Rationale 2

To avoid duplicity.

### ***(12) Clause 14- Natural Resources Royalties Fund***

#### Proposal 1

Consider clarifying that mineral royalties are exempt from the requirement.

#### Rationale 1

While this Bill has excluded Minerals from its purview, it proposes that Royalty and fees payable under the Mining Act be deposited in the Fund. This is likely to contradict the current situation where mining royalties are paid directly to the Consolidated Fund.

#### Proposal 2

Delete clause 14 in total.

#### Rationale 2

This clause is in conflict with the Public Finance Management act in terms of administration of a national government public fund.

Additionally, such a fund cannot vest in the Commission as it is not envisioned under its mandate.

***(13) Clause 15- Use of Retained Funds***

Proposal

Align with the CDA committee provision under the Mining Act, 2016.

Rationale

This section contradicts the Community Development Agreement (CDA) Committees regulations in as far as selection of projects, committee membership and project(s) implementation.

***(14) Clause 16- Offences***

Proposal 1

Clearly define “Principal Officer”.

Rationale 1

The definition of Principal Officer is missing.

Proposal 2

Tighten this provision by including a requirement for consultation with the Licence issuer”.

Rationale 2

The CRA cannot cancel a licence that it did not issue in the first place.

### Proposal 3

Delete subclause (3).

### Rationale 3

The rationale for this offence is unclear as body corporates are largely legal persons with capacity to sue and be sued. This appears to be double jeopardy on the part of the principals.

## ***(15) Clause 17- Transitional Provisions***

### Proposal 1

Delete this provision and allow the Commission to focus only on agreements entered into after coming into effect of this Act.

### Rationale 1

Reviewing of all agreements including the just concluded Mineral Development Agreements provided for in the Mining Act is likely to cause some discomfort from Mining entities.

### Proposal 2

Increase the duration under subclause (1) from one year to two years.

### Rationale 2

For practicability.

## ***(16) Clause 18- Power to make Regulations***

### Proposal 1

Designate CS to Treasury and Planning as the principal on this Bill.

### Rationale 1

## Rationale 2

For consistency with other laws.

This is in view of other legal regimes on specified natural resources. Additionally, minerals do not form part of the scope under this proposed law (Clause 3).

### **(18) General**

#### Proposal

The Bill should be harmonised with the provisions of the Energy Act, 2019.

#### Rationale

Both the Energy Act and the Bill have provisions for payment of royalty and fees and provisions governing the sharing of revenue arising out of exploitation of natural resources. It would be prudent for the provisions to be harmonised under one umbrella reference point for ease of implementation and planning, especially when considering project costs.

Further, the Energy Act provides that all royalties should be paid to the National Treasury while the Bill specifies a fund in which royalties should be paid to through the Kenya Revenue Authority. This provision supersedes any other law including the Energy Act. The Bill should not only standardise royalty ratios but the payment mode as well.

## CHAPTER THREE

### COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

#### 3.0 Observations and Determinations

The Bill is not a money Bill within the meaning of Article 114 of the Constitution. Article 114 states, in part, as follows:

*(1) A money Bill may not deal with any matter other than those listed in the definition of “a money Bill” in clause (3).*

*(2) ...*

*(3) In this Constitution, “a money Bill” means a Bill, other than a Bill specified in Article 218, that contains provisions dealing with—*

*(a) taxes;*

*(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;*

*(c) the appropriation, receipt, custody, investment or issue of public money;*

*(d) the raising or guaranteeing of any loan or its repayment; or*

*(e) matters incidental to any of those matters.*

*(4)...*

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.

The term ‘investors’ or ‘contractor’ does not cover all entities that exploit natural resources in Kenya. The term resource exploiters, on the other hand, covers all exploiters of resources and is therefore best suited for the Bill.

A 'local community' in the Bill should include those displaced to pave way for the exploitation of a natural resource.

This Bill covers very diverse natural resources. These natural resources fall within dockets of several Cabinet Secretaries and county executive committee members in various counties. To avoid confusion and ensure responsibilities lie with specific offices, the Cabinet Secretary, and by extension the respective county executive committee member, tasked with the implementation of this Bill should be the one(s) responsible for finance.

The funds covered under this Bill include fees and other payments made by resource exploiters. It is necessary to include fees and other payments made to ensure that all monies paid by a resource exploiter are taken into consideration when sharing the benefit of that resource.

The intention of the Bill is to provide a one stop shop to make provision for the sharing of benefits accruing from natural resources. It is therefore not advisable to remove specific resources from the Bill and make provision in statutes specific to those natural resources as that would defeat the purpose of the Bill. Furthermore, some natural resources do not presently have resource specific legislation and removing them from the ambit of this Bill would result on their benefit not shared with equity.

The above notwithstanding, the issue of benefit sharing agreements has largely been addressed under the Mining Act, 2016, the Energy Act, 2019 and the Petroleum Act, 2019. It is in this regard that the Bill excludes minerals and amends the Mining Act to harmonise its provisions on benefit sharing ratios with the provisions in the Bill. Petroleum, natural gas and geothermal energy are also excluded from the scope of the Bill as they are contained in the Energy Act, 2019 and the Petroleum Act, 2019. It may therefore be prudent to harmonise the provisions of the two Acts with those of the Bill on the issue of benefit sharing ratios.

The Commission on Revenue allocation is best placed to oversee the implementation of this Bill to ensure that natural resources are shared adequately between the National Government, county governments and local communities. Conferring this authority on the National Treasury, which is an office in the National Government, may not result in the equitable sharing of the benefits as the Treasury would likely favour the National Government, whose funds it actually administers.

The prevailing international market value of the commodity from which royalty is payable and the commercial viability of the natural resource being exploited are important factors to consider when determining the amount of fees and royalties payable by a natural resource exploiter.

The Bill does not introduce new fees and royalties to be paid by natural resources exploiters before exploitation. It just provides for the sharing of the benefits collected by government agencies between the national government, relevant county governments and affected communities. It will therefore not increase the cost of power. If anything it will reduce tension between the exploiters and the affected local communities and therefore foster better relations resulting in more productivity in the exploitation.

The Bill provides that the Commission on Revenue Allocation will 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. This provision needs to include a consultative process between stakeholders before the Commission can make such a determination or review.

The Bill provides that a County Benefit Sharing Committee shall include five persons elected by the local community where the resource is found representing the diversity of the local community. These five persons should include at least two people of either gender to ensure sufficient gender representation in the Committee. The five should also represent the areas with the main natural resources within the county covered under the Bill

The Cabinet Secretary is empowered to make regulations for the conduct of the affairs of the County Benefit Sharing Committees. This authority should be exercised in consultation with county governments.

The Sovereign Wealth Fund is meant to ensure that the future generation benefits from the present exploitation of natural resources. It is therefore important as a preserve of resources due to the future generations. After all, it is their birth right too.

It is necessary to increase the period required for the Commission on Revenue Allocation to review all existing laws and agreements prescribing the ratio of natural resource sharing under clause 17(1) to ensure that the Commission has adequate time to complete this arduous task.

- When determining the ratio of sharing retained revenue among counties sharing a natural resource, the contribution of each affected county in relation to the resource and the inconvenience caused to the county in the exploitation of the natural resource are very necessary and should be considered. The same are relevant irrespective of the natural resource being exploited.

As the representatives of the people in the county, the county assembly plays a crucial role and should be involved in the benefit sharing agreement process. It is therefore necessary to ensure that benefit sharing agreements are approved by the county assembly before they are effected. The process may take longer but that would be a necessary delay as the voice of the people should always be taken into consideration.

The substance of the Bill does not cover minerals. It however amends the Mining Act to insert the benefit sharing formula used in the Bill. Once passed, the Mining Act will stand amended to that extent.

The Bill aims to not only punish companies that commit offences under it but also to punish the principal officers of the offending companies. This will ensure that once a company commits an offence, officers of that company who abetted the offence or failed to stop the offence from being committed face the consequences of their actions or inactions.

The definition of a principal officer under the Bill should reflect the definition envisaged under the Companies Act.

The Bill does not give the Commission on Revenue Allocation powers to cancel licences.

Once the Bill is enacted into law, all exploiters of natural resources covered under the Bill shall have to comply with it, irrespective of when their exploitation commenced. This can be done within a period of two years.

## **Recommendations**

The Committee makes the following recommendations and proposes to make the following amendments to the Bill:

1. To amend the long title to the Bill to state “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”.
2. To amend clause 2 of the Bill in the definition of the term ‘local community’ to include those displaced to pave way for the exploitation of a natural resource.
3. To amend clause 2 of the Bill in the definition of the term ‘Natural Fund’ to state ‘Natural Resources’.
4. To amend clause 2 of the Bill in the definition of the term ‘Cabinet Secretary’ to refer to the Cabinet Secretary responsible for finance.
5. To amend clause 2 of the Bill to include the following definition—  
  
    ‘county executive committee member’ means the county executive committee member responsible for finance in each county.
6. To amend clause 6 (1) to provide that the Commission on Revenue Allocation consults all relevant national government agencies before determining or reviewing the amount of royalties or fees payable by affected entities in respect of a particular sector where a written law does not prescribe such royalties or fees.
7. To amend clause 6 (2) (a) to remove the phrase ‘overall capital investment’ and replace it with the phrase ‘total capital investment’ to provide more clarity.
8. To amend clause 9 (1) of the Bill to specify that every affected entity shall enter into a benefit sharing agreement with the relevant county government.

9. To amend clause 10 (2) to include 'two technical officers of the relevant county department appointed by the county executive committee member responsible for finance' in the membership of the County Benefit Sharing Committee.
10. To amend clause 10 (2) (c) to include the representation of at least two members of each gender in the membership of the County Benefit Sharing Committee and further to ensure that the membership represents areas with the main natural resources within the county covered under the Bill.
11. To amend clause 10 (5) to provide that the Cabinet Secretary make regulations for the conduct of the affairs of the County Benefit Sharing Committees in consultation with county governments.
12. To amend clause 13 (2) to cap the number of meetings a local benefit sharing forum can hold in a year to 8.
13. To delete clause 14(4).
14. To amend clause 16 to remove reference to a principal officer and refer to 'an officer' as envisaged under the Companies Act.
15. To amend clause 17(1) to increase the period for the Commission on Revenue Allocation to review all existing laws and agreements prescribing the ratio of natural resource sharing by from one year to two years.
16. To amend the Bill to provide that all exploiters of natural resources shall comply with the Bill within a period of two years after commencement.

The Committee shall introduce the above amendments during the committee of the whole house for consideration and approval of the Senate.

## APPENDICES

**Annex I:** Minutes of the meetings

**Annex II:** Submissions by Stakeholders

**MINUTES OF THE 14<sup>TH</sup> MEETING OF THE SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON THURSDAY, 13<sup>TH</sup> JUNE, 2019 IN COMMITTEE ROOM 5, MAIN PARLIAMENT BUILDING AT 12.00 NOON.**

**MEMBERS**

1. Sen. Mwangi Paul Githiomi, M.P.
2. Sen. Prengei Victor, M.P.
3. Sen. George Khaniri, MGH, M.P.
4. Sen. Halake Abshiro, M.P.
5. Sen. Mwaruma Johnes, M.P.

**PRESENT**

- **Chairperson**
- **Vice Chairperson**
- Member
- Member
- Member

**ABSENT WITH APOLOGY**

1. Sen. Ndwiga Peter Njeru, EGH. M.P. - Member
2. Sen. Godana Hargura, M.P. - Member
3. Sen. Boy Issa Juma, M.P. - Member
4. Sen. Sylvia Kasanga, M.P. - Member

**IN ATTENDANCE**

1. Mr. Victor Bett
2. Mr. Mitchell Otoro
3. Ms. Joyce Chelang'at
4. Mr. Abdallah Mbore
5. Ms. Winnie Stephen

**SENATE SECRETARIAT**

- Clerk Assistant
- Legal Counsel
- Audio Recording
- Sergeant At Arms
- Intern

**MINUTE SEN/SCLNDR/078/2019: PRELIMINARIES**

The meeting was called to order at 12.30 pm by the Chairperson followed by a word of Prayer.

**MINUTE SEN/SCLNDR/079/2019: ADOPTION OF AGENDA**

The agenda was therefore proposed by Sen. George Khaniri, MGH, MP and seconded by Sen. Mwaruma Johnes, MP as follows;

1. Preliminaries;
  - *Prayer,*
  - *Chairpersons remarks*
2. Adoption of the agenda;
3. Confirmation of Minutes;
4. **Consideration and adoption of the Committee Report on the Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018;**

5. Any other Business;
6. Date of the next meeting;
7. Adjournment.

**MINUTE SEN/SCLNR/080/2019: CONFIRMATION OF MINUTES**

The Committee differed the confirmation of minutes of previous sittings to the next sitting.

**MINUTE SEN/SCLNR/081/2019:**

**CONSIDERATION AND ADOPTION OF THE COMMITTEE REPORT ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, SENATE BILLS NO. 31 OF 2018;**

The Committee adopted its recommendations as follows:

1. To amend the long title to the Bill to state “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”.
2. To amend clause 2 of the Bill in the definition of the term ‘local community’ to include those displaced to pave way for the exploitation of a natural resource.
3. To amend clause 2 of the Bill in the definition of the term ‘Natural Fund’ to state ‘Natural Resources’.
4. To amend clause 2 of the Bill in the definition of the term ‘Cabinet Secretary’ to refer to the Cabinet Secretary responsible for finance.
5. To amend clause 2 of the Bill to include the following definition—  
  
‘county executive committee member’ means the county executive committee member responsible for finance in each county.
6. To amend clause 6 (1) to provide that the Commission on Revenue Allocation consults all relevant national government agencies before determining or

- reviewing the amount of royalties or fees payable by affected entities in respect of a particular sector where a written law does not prescribe such royalties or fees.
7. To amend clause 6 (2) (a) to remove the phrase ‘overall capital investment’ and replace it with the phrase ‘total capital investment’ to provide more clarity.
  8. To amend clause 9 (1) of the Bill to specify that every affected entity shall enter into a benefit sharing agreement with the relevant county government.
  9. To amend clause 10 (2) to include ‘two technical officers of the relevant county department appointed by the county executive committee member responsible for finance’ in the membership of the County Benefit Sharing Committee.
  10. To amend clause 10 (2) (c) to include the representation of at least two members of each gender in the membership of the County Benefit Sharing Committee and further to ensure that the membership represents areas with the main natural resources within the county covered under the Bill.
  11. To amend clause 10 (5) to provide that the Cabinet Secretary make regulations for the conduct of the affairs of the County Benefit Sharing Committees in consultation with county governments.
  12. To amend clause 13 (2) to cap the number of meetings a local benefit sharing forum can hold in a year to 8.
  13. To delete clause 14(4).
  14. To amend clause 16 to remove reference to a principal officer and refer to ‘an officer’ as envisaged under the Companies Act.
  15. To amend clause 17(1) to increase the period for the Commission on Revenue Allocation to review all existing laws and agreements prescribing the ratio of natural resource sharing by from one year to two years.

16. To amend the Bill to provide that all exploiters of natural resources shall comply with the Bill within a period of two years after commencement.

The Committee adopted the report after being proposed by Sen. Prengei Victor, M.P. and Seconded by Sen. Halake Abshiro, M.P.

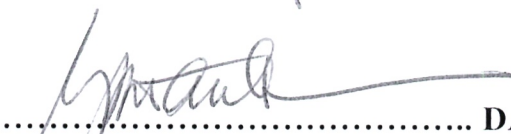
**MINUTE/ SEN/SCLNR/082/2019: ANY OTHER BUSINESS**

The Committee discussed correspondences received and resolved that:

- On the letter from the Ministry of Lands and Physical Planning and that of National Land Commission, the Committee considered their request for rescheduling and noted that the date they are requesting is during recess and therefore resolved that the meeting be rescheduled to Wednesday, 3<sup>rd</sup> July, 2019 at 11.00 am;
- On the Petition by residents of Tinderet Sub County, Nandi County on the operations of Karebe Gold Mining Ltd in Tinderet Sub County, Nandi County; the Committee noted that it has been approved by the speaker that the Petition be diverted from the Labour and Social Welfare Committee to the Land, Environment & Natural Resources Committee;
- On the letter from James Kinuthia regarding water tunneling in Dandora, the Committee resolved that it is a matter that can be dealt with by the County Assembly of Nairobi;
- On the Petition regarding Thange River Basin Residents on oil spillage in River Thange, the Committee resolved that the Petition be diverted and sent to the Senate Committee on Energy as it is a matter that was previously dealt with by Energy Committee and is similar to Petition on another oil spillage in the same county by the same Kenya Pipeline Company.
- On the matter of Isiolo Petition and the proposed visit by the Committee to Isiolo, the Committee discussed the matter of lack of funds for local visits and resolved that a letter to the Clerk and Speaker is done expressing the disappointment of the Committee with how funds are being reallocated hampering the operations of the Committee.
- The Committee also discussed two (2) letters from the State Department of Mining on Taita Taveta matters to do with mining on statements and petitions and the Committee resolved that the matter can be discussed once the Senator of Taita Taveta, Sen. Mwaruma Johnes has gone through the responses.

**MINUTES/SEN/SCLNR/083/2019: ADJOURNMENT**

The meeting was adjourned at 2:25 pm. The date of the next meeting was scheduled for Wednesday, 26<sup>th</sup> June, 2019.

SIGNATURE.......... DATE.....13/6/2019.....

**(CHAIRPERSON: SEN. MWANGI PAUL GITHIOMI, MP.)**

**MINUTES OF THE 12<sup>TH</sup> MEETING OF THE SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON WEDNESDAY, 15<sup>TH</sup> MAY, 2019 IN COMMITTEE ROOM 10, MAIN PARLIAMENT BUILDING AT 11.00 AM.**

**MEMBERS**

1. Sen. Mwangi Paul Githiomi, M.P.
2. Sen. Prengei Victor, M.P.
3. Sen. Halake Abshiro, M.P.
4. Sen. Godana Hargura, M.P.

**PRESENT**

- **Chairperson**
- **Vice Chairperson**
- Member
- Member

**ABSENT WITH APOLOGY**

1. Sen. George Khaniri, MGH, M.P. - Member
2. Sen. Ndwiga Peter Njeru, EGH. M.P. - Member
3. Sen. Boy Issa Juma, M.P. - Member
4. Sen. Mwaruma Johnes, M.P. - Member
5. Sen. Sylvia Kasanga, M.P. - Member

**IN ATTENDANCE**

1. Mr. Victor Bett
2. Mr. Mitchell Otoro
3. Ms. Joyce Chelang'at
4. Mr. Abdallah Mbore
5. Ms. Sharon Eleman

**SENATE SECRETARIAT**

- Clerk Assistant
- Legal Counsel
- Audio Recording
- Sergeant At Arms
- Intern

**MINUTE SEN/SCLNDR/065/2019: PRELIMINARIES**

The meeting was called to order at 11.23 am by the Chairperson followed by a word of Prayer.

**MINUTE SEN/SCLNDR/066/2019: ADOPTION OF AGENDA**

The agenda was therefore proposed by Sen. Halake Abshiro, M.P. and seconded by Sen. Godana Hargura, M.P as follows;

1. Preliminaries;
  - *Prayer,*
  - *Chairpersons remarks*
2. Adoption of the agenda;
3. Confirmation of Minutes;
4. **Consideration and adoption of the Draft Committee Report on the Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018;**

5. **Petition submitted by residents of Isiolo County on the Illegal encroachment of the community land by the Kenya Army;**
6. Any other Business;
7. Date of the next meeting;
8. Adjournment.

**MINUTE SEN/SCLNR/067/2019: CONFIRMATION OF MINUTES**

The Committee deferred the confirmation of minutes of previous sittings to the next sitting.

**MINUTE SEN/SCLNR/068/2019:**

**CONSIDERATION AND ADOPTION OF THE DRAFT COMMITTEE REPORT ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, SENATE BILLS NO. 31 OF 2018;**

The Committee adopted its recommendations as follows:

1. To amend the long title to the Bill to state “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”.
2. To amend clause 2 of the Bill in the definition of the term ‘local community’ to include those displaced to pave way for the exploitation of a natural resource.
3. To amend clause 2 of the Bill in the definition of the term ‘Natural Fund’ to state ‘Natural Resources’.
4. To amend clause 2 of the Bill in the definition of the term ‘Cabinet Secretary’ to refer to the Cabinet Secretary responsible for finance.
5. To amend clause 2 of the Bill to include the following definition—

‘county executive committee member’ means the county executive committee member responsible for finance in each county.

6. To amend clause 6 (1) to provide that the Commission on Revenue Allocation consults all relevant national government agencies before determining or reviewing the amount of royalties or fees payable by affected entities in respect of a particular sector where a written law does not prescribe such royalties or fees.
7. To amend clause 6 (2) (a) to remove the phrase ‘overall capital investment’ and replace it with the phrase ‘total capital investment’ to provide more clarity.
8. To amend clause 9 (1) of the Bill to specify that every affected entity shall enter into a benefit sharing agreement with the relevant county government.
9. To amend clause 10 (2) to include ‘two technical officers of the relevant county department appointed by the county executive committee member responsible for finance’ in the membership of the County Benefit Sharing Committee.
10. To amend clause 10 (2) (c) to include the representation of at least two members of each gender in the membership of the County Benefit Sharing Committee and further to ensure that the membership represents areas with the main natural resources within the county covered under the Bill.
11. To amend clause 10 (5) to provide that the Cabinet Secretary make regulations for the conduct of the affairs of the County Benefit Sharing Committees in consultation with county governments.
12. To amend clause 13 (2) to cap the number of meetings a local benefit sharing forum can hold in a year to 8.
13. To delete clause 14(4).
14. To amend clause 16 to remove reference to a principal officer and refer to ‘an officer’ as envisaged under the Companies Act.

15. To amend clause 17(1) to increase the period for the Commission on Revenue Allocation to review all existing laws and agreements prescribing the ratio of natural resource sharing by from one year to two years.

16. To amend the Bill to provide that all exploiters of natural resources shall comply with the Bill within a period of two years after commencement.

The Committee adopted the report after being proposed by Sen. Prengei Victor, M.P. and Seconded by Sen. Halake Abshiro, M.P.

**MINUTE SEN/SCLNR/069/2019:**

**PETITION SUBMITTED BY RESIDENTS OF ISIOLO COUNTY ON THE ILLEGAL ENCROACHMENT OF THE COMMUNITY LAND BY THE KENYA ARMY;**

The Committee had invited the Sen. Isiolo County, Sen. Fatuma Dullo, MP to present her submissions to the Committee regarding the aforementioned Petition in which she had tabled in the Senate on 10<sup>th</sup> April, 2019.

In the Petition these were the matters raised;

1. THAT in 1977, there was a gazette notice No. 3210 of 1977 that allocated specified land in Isiolo County which was then Trust Land and now is Community Land, to the Ministry of Defence for Military purposes.
2. THAT, further the Commissioner of Lands vide Allotment Letter Ref No. 189464/II dated July, 2018 allocated the said land measuring 3,764 Ha to the Ministry of Defence for Military purposes (School of Artillery).
3. THAT the said allocation was made in total disregard of the law and without consultation with the Community, this being Community Land.
4. THAT the Ngaremara/Gambella land area now being claimed by the Military is situated in Isiolo County and is fully occupied by the pastoral communities and the people of Isiolo County.

5. THAT the allotment was done in consultation with the Meru County Government and yet the Ngaremara/Gambella Land area which is part of the Allotment, is in Isiolo County.
6. THAT the NgareMara/ Gambella adjudication section is a community land which was already occupied long before the purported letter of allotment was issued by the said National land commission.
7. THAT National land commission has no mandate to allocate community land which is already occupied to any military institution.
8. THAT on the contrary our president his Excellency Uhuru Kenyatta has approved the Ngaremara/Gambela adjudication section and the process of issuance of titles commenced on 11<sup>th</sup> March, 2016 and is already ongoing.
9. THAT we will not allow anything contrary to our settlement. We would like to make it clear that any purported letter of allotment to the artillery within our community residence is a double titling process because the adjudication has been going on for the last 3 years as National Land Commission is giving an allotment outside their mandate on an area already gazetted as an adjudication section.
10. THAT the Ngaremara/Gambella residents are constantly being harassed by the Military who have a constitutional mandate of protecting them.
11. THAT about 40,000 families is affected by the illegal occupation by Kenya Defense Force.
12. THAT our efforts to have the matter addressed by the relevant authorities including National Land Commission have gone unanswered.
13. The issues in respect of which the Petition is made are not pending before any court of law or any other body mandated to deal with the matter.

**The Petitioners pray that the Senate —**

1. Investigates the matter with a view to returning the land back to the community;
2. Stops any further development by the Kenya Defence Forces in the said area until matter is settled; and

3. Resolves that the Kenya Defence forces vacate the land in question and compensate the residents for the loss of livelihoods and any other losses suffered as a result of the illegal occupation by the Kenya Defence Forces.

The Committee noted that the matter has been outstanding for a long time. The matter also affects two counties and being a boundary matter the Committee intends to hear both sides. The Committee therefore resolved to invite the Stakeholders mentioned in the aforementioned Petition and to carry out a site visit thereafter on a date to be appointed by the Committee.

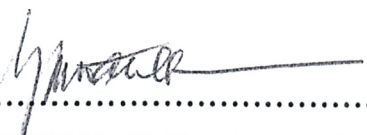
**MINUTE/ SEN/SCLNENR/070/2019: ANY OTHER BUSINESS**

The Committee discussed correspondences received and resolved that:

- On the letter from the Ministry of Foreign Affairs regarding a request by the Parliament of Uganda, the Committee agreed but would like to first know the tentative dates they are willing to come.
- On the invitation letter to attend the convention of International trade endangered species of Wild Fauna and Flora(CITES cop18), Colombo, Sri Lanka, 22<sup>nd</sup> May – 3<sup>rd</sup> June, 2019, the Committee had nominated Sen. Jones Mwaruma, MP to represent the Committee at the Forum, but unfortunately there were no funds to support this activity.
- The Committee acceded to the invitation by the Ministry of Environment & Forestry to attend the consultative session on the proposed Meteorological Policy and Bill, 2019 scheduled for 24<sup>th</sup> – 25<sup>th</sup> May, 2019 in Mombasa County.

**MINUTES/SEN/SCLNENR/071/2019: ADJOURNMENT**

The meeting was adjourned at 1:25 pm. The date of the next meeting was scheduled for 16<sup>th</sup> May, 2019.

SIGNATURE.......... DATE..... 15/5/2019.....  
(CHAIRPERSON: SEN. MWANGI PAUL GITHIOMI, MP.)

**MINUTES OF THE 8<sup>TH</sup> MEETING OF THE SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON TUESDAY, 19<sup>TH</sup> MARCH, 2019 IN COMMITTEE ROOM 10, MAIN PARLIAMENT BUILDING AT 11.00 AM.**

**MEMBERS**

1. Sen. Mwangi Paul Githiomi, M.P.
2. Sen. Boy Issa Juma, M.P.
3. Sen. Mwaruma Johnes, M.P.

**PRESENT**

- **Chairperson**
- Member
- Member

**ABSENT WITH APOLOGY**

1. Sen. Prengei Victor, M.P.
2. Sen. Godana Hargura, M.P.
3. Sen. George Khaniri, MGH, M.P.
4. Sen. Ndwiga Peter Njeru, EGH. M.P.
5. Sen. Halake Abshiro, M.P.
6. Sen. Sylvia Kasanga, M.P.

- **Vice Chairperson**
- Member
- Member
- Member
- Member
- Member

**IN ATTENDANCE**

**SENATE SECRETARIAT**

1. Mr. Victor Bett - Clerk Assistant
2. Mr. Mitchell Otoro - Legal Counsel
3. Mr. Wilson Bosumet - Seargent at Arms
4. Ms. Joyce Chelangat - Audio Recording
5. Ms. Sharon Eleman - Intern

**MINUTE SEN/SCLN/041/2019: PRELIMINARIES**

The meeting was called to order at 11.30am by the Chairperson followed by a word of prayer.

**MINUTE SEN/SCLN/042/2019: ADOPTION OF AGENDA**

The agenda was therefore proposed by Sen. Boy Issa Juma, M.P. and seconded by Sen. Johnes Mwaruma, M.P as follows;

1. Preliminaries;
  - *Prayer,*
  - *Chairpersons remarks*
2. Adoption of the agenda;
3. Confirmation of Minutes;
4. **Meeting to deliberate on the views from Stakeholders and the Public on the Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018;**
5. Any other Business;

6. Date of the next meeting;
7. Adjournment.

**MINUTE SEN/SCLNDR/043/2019: CONFIRMATION OF MINUTES**

The Committee differed the confirmation of minutes of previous sittings to the next sitting.

**MINUTE SEN/SCLNDR/039/2019: MEETING TO DELIBERATE ON THE VIEWS FROM STAKEHOLDERS AND THE PUBLIC ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, SENATE BILLS NO. 31 OF 2018**

The Committee received and considered the proposals from stakeholders on specific provisions of the Bill as follows-

**(1) Long title**

Proposal 1

Replace the word “resource exploiters” with “investors” or “contractors”

Rationale 1

User of “resource exploiters” does not sound very professional

Proposal 2

Make reference to Articles 69 and 202 of the Constitution.

Rationale 2

Does not reflect constitutional provisions.

Proposal 3

Amend the long title to read as follows:

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.

Rationale 3

For specificity.

**(2) Clause 2- Interpretation**

Proposal 1

Cross reference the definition of the term “Local Community” with the one provided by the Mining Act, 2016.

### Rationale 1

This definition differs from the one given by the Mining Act, 2016 which recognized the community as a group of people living around an exploration and mining area as well as a group of people who may be displaced by an exploration or mining activity.

### Proposal 2

Redefine the definition of the term “affected County” to include other counties that may be affected by exploitation of a natural resource.

### Rationale 2

The Affected County is only the County in which a natural resources is located but may include County(s) that may be affected owing to effects of exploitation.

### Proposal 3

Designate CS to Treasury and Planning as the principal on this Bill.

### Rationale 3

The Bill excludes minerals from its purview. The CS Mining cannot then be charged with the responsibility of administering this Act by way of making regulations.

### Proposal 4

Amend the definition of the term “Natural Fund” to state “Natural Resources”.

### Rationale 4

The definition is erroneous.

### Proposal 5

Exclude “fees and any other payments” from the definition of royalties

### Rationale 5

The definition includes fees and other payments payable for exploitation of Natural resources

### **(3) Clause 3- Application of the Act**

### Proposal 1

Include minerals and all other natural resources.

### Rationale 1

Minerals are excluded.

### Proposal 2

Remove Genetic Resources.

### Rationale 2

Genetic resources are unique and should have their own Act.

### Proposal 3

Remove Wildlife Resources.

### Rationale 3

Wildlife Resources are adequately provided for under the Wildlife Conservation and Management Act, 2013.

### Proposal 4

Include Geothermal Resources.

### Rationale 4

Geothermal Energy Resources are excluded.

### **(4) Clause 5- Functions of the Commission**

### Proposal

Consider revising and give the powers to the National Treasury.

### Rationale

The proposed Bill has given a lot of powers to the Commission on Revenue Allocation (CRA).

### **(5) Clause 6- Imposition of Royalties and Fees**

### Proposal 1

Consider defining clearly what will constitute "Overall Capital Expenditure" Section 6 (2) (a)

### Rationale 1

Overall capital expenditure has not been defined. Will it include exploration expenditure? The interpretation of what is capital expenditure has a huge bearing on viability of a natural resource project as it affects taxation.

### Proposal 2

Consider deleting Section 6 (2) (b).

### Rationale 2

Prevailing international market value is subject to fluctuations and cannot therefore be used as a guide to setting royalties.

### Proposal 3

Consider deleting Section 6 (2) (c).

### Rationale 3

Commercial viability of any natural resource project is determined by among others the rate of royalty that the operator will be required to pay. It cannot therefore be feasible that a rate is set after a project has been declared commercial

### Proposal 4

Consider deleting Section 6 (2) (d).

### Rationale 4

The impact of the exploitation on the community includes the effect of the royalties and fees that are to be charged. It is not feasible therefore that a royalty rate will be set after evaluating the impacts.

## **(6) Clause 7- Kenya Revenue Authority to collect royalties**

### Proposal

Exclude fees payable under the mining Act from this requirement (Section 7 (3)) by deleting the words “and fees” from this section.

### Rationale

Some fees under the Mining Act are classified as A-in-A and collected by the State Department for Mining.

## **(7) Clause 8- Revenue Sharing Ratio**

### Proposal 1

Cross reference with the Sovereign Wealth Fund Bill

Amend the proposed subsection (3) to provide that title is held in trust for the beneficiaries by the respective county government.

**(9) Clause 10- Establishment of a County Benefit Sharing Committee**

Proposal

Insert section (2) (d) 2 members co-opted from the department in whose responsibility lies the natural resource under consideration.

Rationale

Need to co-opt technical members from the State Department whose responsibility lies the natural resource for advice.

**(10) Clause 12- Approval of a Benefit Sharing Agreement**

Proposal

Delete this proposal and include a new proposal to require the CEC Finance to make annual report to the County Assembly on all Agreements entered in the County during that financial year

Rationale

Approval of every Benefit sharing agreement by the County Assembly is likely to derail the process. Since the committee consists of the CEC in charge of Finance, it would be prudent to assume that the County is aware of this agreement and instead require the CEC to make an annual report to the County Assembly.

**(11) Clause 13- Local Community Benefit Sharing Forum**

Proposal 1

Cap the committee expenditure to not more than 10% of the fund (13(c))

Rationale 1

Assuming the allowances will come from the fund, there is need to cap this expenditure to avoid over use.

Proposal 2

Align with the CDA committee provision under the Mining Act, 2016.

Rationale 2

This section contradicts the Community Development Agreement (CDA) Committees regulations in as far as selection of projects, committee membership and project(s) implementation.

**(12) Clause 14- Natural Resources Royalties Fund**

Proposal

Consider clarifying that mineral royalties are exempt from the requirement.

Rationale

While this Bill has excluded Minerals from its purview, it proposes that Royalty and fees payable under the Mining Act be deposited in the Fund. This is likely to contradict the current situation where mining royalties are paid directly to the Consolidated Fund.

**(13) Clause 16- Offences**

Proposal 1

Clearly define “Principal Officer”.

Rationale 1

The definition of Principal Officer is missing.

Proposal 2

Tighten this provision by including a requirement for consultation with the Licence issuer”.

Rationale 2

The CRA cannot cancel a licence that it did not issue in the first place.

**(14) Clause 17- Transitional Provisions**

Proposal

Delete this provision and allow the Commission to focus only on agreements entered into after coming into effect of this Act.

Rationale

Reviewing of all agreements including the just concluded Mineral Development Agreements provided for in the Mining Act is likely to cause some discomfort from Mining entities.

**(15) Clause 18- Power to make Regulations**

Proposal

Designate CS to Treasury and Planning as the principal on this Bill.

Rationale

The Bill excludes minerals from its purview. The CS in charge of Mining cannot then be charged with the responsibility of administering this Act by way of making regulations.

**(16) Clause 19- Amendment to the Mining Act**

Proposal

Adopt the revenue sharing formula provided for in the Mining Act and the Draft Sovereign Wealth Fund Bill.

In particular, the Bill should only be concerned with funds share with the National Governments.

Rationale

The proposed Formula is not likely to be understood by the citizenry and more so given that the sharing formula provided in the Mining Act is already known to all. The fact that this proposal will see a reduction of monies going to the local community is also likely to face challenges.

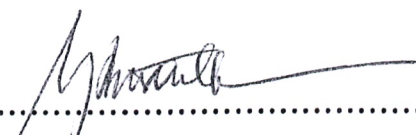
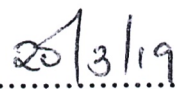
The Committee met and deliberated on the views of the stakeholders as indicated above and resolutions to adopt the proposals suggested will be indicated in the Committee's report.

**MINUTE SEN/SCLNR/044/2019: ANY OTHER BUSINESS;**

There was no other business discussed.

**MINUTE SEN/SCLNR/045/2019: DATE OF NEXT MEETING**

The meeting was adjourned at 12.20 pm and the next meeting was to be called on notice.

SIGNATURE.......... DATE..........

**(CHAIRPERSON: SEN. MWANGI PAUL GITHIOMI, MP.)**

**MINUTES OF THE 6<sup>TH</sup> MEETING OF THE SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON WEDNESDAY, 27<sup>TH</sup> FEBRUARY, 2019 IN COMMITTEE ROOM 10, MAIN PARLIAMENT BUILDING AT 9.00 AM.**

**MEMBERS**

1. Sen. Mwangi Paul Githiomi, M.P.
2. Sen. Prengei Victor, M.P.
3. Sen. Halake Abshiro, M.P.
4. Sen. Mwaruma Johnes, M.P.
5. Sen. Slyvia Kasanga, M.P.
6. Sen. Boy Issa Juma, M.P.

**PRESENT**

- Chairperson
- Vice Chairperson
- Member
- Member
- Member
- Member

**ABSENT WITH APOLOGY**

1. Sen. Godana Hargura, M.P. - Member
2. Sen. George Khaniri, MGH, M.P. - Member
3. Sen. Ndwiga Peter Njeru, EGH. M.P. - Member

**IN ATTENDANCE**

**A. STAKHOLDERS/MEMBERS OF THE PUBLIC**

1. Mr. John M. Omenge, FGSK, R. Geol., - PS, State Department of Mining,
2. Prof. Gideon Nyamasyo - University of Nairobi, School of Biological Sciences
3. Ms. Eva Sawe - Legal Officer, COG
4. Ms. Zipporah Muthama - Legal Officer
5. Ms. Joy Gatwiri - Legal Assistant
6. Dr. Irene Asiega - Commissioner, CRA
7. Ms. Anastasia Wanjohi - Manager, Natural Resources
8. Ms. Irene Wanjiku - Legal Assistant
9. Ms Emily Kimani - Manager, Legal Affairs
10. Ms. Ann Lidelis Itubo - Assistant Director, KFS
11. Ms. Lilian Moraa - S.S.C
12. Ms. Polyn Wanja - D.C.S.C
13. Ms. Gladys Wariga - Policy/Legal Coordinator KWCA
14. Mr. Stephen Manegene - Director, Wildlife

**B. SENATE SECRETARIAT**

1. Mr. Victor Bett - Clerk Assistant
2. Mr. Mitchell Otoro - Legal Counsel
3. Mr. Wilson Bosumet - Seargent at Arms
4. Mr. Abdalla Mboore - Seargent at Arms
5. Mr. Ian Otieno - Audio Recording
6. Ms. Sharon Eleman - Intern

**MINUTE SEN/SCLENR/030/2019: PRELIMINARIES**

The meeting was called to order at 9.30am by the Chairperson followed by a word of prayer.

**MINUTE SEN/SCLNDR/031/2019: ADOPTION OF AGENDA**

The agenda was therefore proposed by Sen. Halake Abshiro, M.P. and seconded by Sen. Sylvia Kasanga, M.P as follows.

1. Preliminaries;
  - *Prayer,*
  - *Chairpersons remarks*
2. Adoption of the agenda;
3. Confirmation of Minutes;
4. **Views from Stakeholders and the Public on the Natural Resources (Benefit Sharing) Bill, Senate Bills No. 31 of 2018;**
5. Any other Business;
6. Date of the next meeting;
7. Adjournment.

**MINUTE SEN/SCLNDR/032/2019: CONFIRMATION OF MINUTES**

The Committee deferred the confirmation of minutes of previous sittings to the next sitting.

**MINUTE SEN/SCLNDR/033/2019: VIEWS FROM STAKEHOLDERS AND THE PUBLIC ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, SENATE BILLS NO. 31 OF 2018;**

The Committee received presentations on the Bill from:

**(a) Kenya Forest Service (KFS)**

The Committee met the KFS and among the issues that arose is; the matter of Community Ownership of Forests and Royalties gained from the Forests. A comprehensive inventory that extends beyond public forests should be included and that the Bill should clearly show how the real stakeholders will benefit and what shared benefits are used for and how to implement benefit sharing under private ownership. KFS informed the Committee that collection of Revenue from the small forests is there but is done by the respective County Governments.

KFS informed the Committee that the Forest Conservation Fund is there but operationalizing the Fund has since been a challenge to them and that frameworks of revenue sharing are not well defined.

**(b) Commission on Revenue Allocation(CRA)**

The CRA represented by a Commissioner presented as follows;

1. Long Title - AN ACT of Parliament to establish a system of benefit sharing in resource

exploitation between resource exploiters, the national government, county governments and local communities; and for connected purposes.

*Recommendation: There is need to add the term 'natural' after the phrase 'to establish a system of benefit sharing in' to make it more specific.*

2. Clause 5; Functions of the Commission - This clause outlines additional functions to the Commission such as coordination and the preparation of benefit sharing agreements between an affected county and an affected entity. They support the argument as it will strengthen the commissions' mandate.

3. Clause 8; Revenue Sharing Ratio – *Recommendations:*

i) *Align the revenue sharing ratios proposed under this provision with those in the Mining Act 2016.*

ii) *Exclude reference to the Sovereign Wealth Fund as it will be provided separately.*

4. Clause 8 (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 –

*Recommendations: This sub clause conflicts with sub clause 10 (6) as it vests a similar function to the Commission and also the relevant County Benefit Sharing Committee. (Align Clause 8 (4) with Clause 10 (6).)*

5. Clause 10 Establishment of a County Benefit Sharing - Under this provision, each county that has a natural resource to which the Act applies is required to establish a County Benefit Sharing Committee and the composition of such committees is also outlined.

*Recommendation: Delete because counties already have established structures that can cater for its intended purpose and its functions can be executed by the Local Community Benefit Sharing Forum established under Clause 13*

6. Clause 13 Local Community Benefit Sharing Forum - This clause establishes Local Community Benefit Sharing Forums

*Recommendation: Adding of functions of the County Benefit Sharing Committee to this forum to avoid duplicity.*

7. Clause 14 Natural Resources Royalties Fund - 14 (i) There is established a Natural Resources Royalties Fund which shall vest in the Commission. This Clause is in conflict with the Public Finance Management Act in terms of administration of a national government public Fund. Additionally, such a Fund cannot vest in the Commission as it is not envisioned under its mandate.

*Recommendation: Delete Clause 14 in total since Provision is in conflict with PFMA*

8. Clauses 16 Offences - 16 (3) Where a body corporate is found guilty of an offence under this Act, every principal 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

*Recommendation: The rationale for this offence is unclear as body corporates are largely legal persons with capacity to sue and be sued. This appears to be double jeopardy on the part of the principals. This is to avoid double jeopardy.*

9. Clause 17 Transitional Provisions - 17 (i) 'The Commission shall, within one year 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;

*Recommendation: Increase duration provided from one year to two years for practicability.*

10. Clause 18 Power to make regulations - This provision in some areas conflicts with other clauses under the Bill e.g. Clause 18 (2) (b) conflicts with Clause 14 (4) - both grant regulating making authority to different entities i.e. the Commission and Cabinet Secretary responsible on matters relating to mining.

*Recommendation: Redraft and align content to alleviate ambiguity and duplicity*

11. Clause 19 Amendment to Act No. 12 of 2016 - Section 183 of the Mining Act is amended by (a) by deleting subsection (5) and substituting therefore the following new subsection (5) - (5).

*Recommendation: Delete Clause 19 in view of other legal regimes on specified natural resources. Additionally, minerals do not form part of the scope under this proposed law – see Clause 3. For consistency with other laws*

### **(c) University of Nairobi (UoN)**

UON was represented by a professor who presented as follows:

1. **Statement:** In its present format, they find the Natural Resources (Benefit Sharing) Bill, 2019 Inconsistent with the Kenya Constitution, 2010, Article 2(6) which states, “Any treaty or convention ratified by Kenya shall form part of the law of Kenya.....”

2. **The proposed bill is an omnibus:** in that it proposes to cover 6 (six) or 8 issues each of which deserves to be treated on its own. These are:-

(a) Sunlight

(b) Water Resources

- (c) Forest, biodiversity and genetic resources.. {these are 3 issues}
- (d) Wildlife resources
- (e) Industrial fishing and
- (f) Wind

**3. The Bill if passed into law will create a conflict between the Commission for Revenue Allocation (CRA) and County Governments. Ref: Part II of Bill.**

**Ref. 1 Statement**

- The Bill proposes to cover among other issues GENETIC RESOURCES.
- Access to Generic Resources and Benefit Sharing is the subject of:-
  - (a) The 3<sup>rd</sup> Broad Objective of the Convention on Biological Diversity (CBD) (1994) which Kenya is a signatory to.
  - (b) The issue is dealt with in details in Article 8(j) of the CBD.
  - (c) Due to its importance, the Access to Genetic Resources & Benefits Sharing (ABS) became the subject of a Supplementary Agreement to the CBD called the “Nagoya Protocol on Access to Genetic Resources and the Sharing of the Benefit’s” (2014). Likewise, Kenya is signatory to this protocol.
  - (d) The country has been involved in the process of developing the ABS law, since **2001** when the “African Model Legislation for the Protection of Rights of Local Communities, Farmers and Breeders for the Regulation of Access to Biological Resources” was enacted by the former OAU, now AU. Currently, there are consultants working under the Ministry of Tourism and Wildlife to develop the ABS law.

Each of the 8 issues proposed to be covered by the proposed law, perhaps needs its own law.

- (a) Wind and Solar Power – these are major sources (and therefore resources) of renewable energy. They are the most abundant sources of energy in the world and they are free...But when used to generate electricity, then this benefit may require discussion before talking of benefit sharing with “community from which the wind and sunlight come”!.
- (b) Forest Biodiversity, Genetic and Wildlife Resources are **ALL** BIODIVERSITY. Excluding Genetic Resources issue which has been dealt with in notes (01) above, then Forests & Wildlife are the subject matter.
  - (i) Already the Executive Order No. 1 of 2018, the reorganization of government created the “Ministry of Tourism and Wildlife”, the “Ministry of Environment and Forestry” and Ministry of Agriculture, Livestock, Fisheries and Irrigation”.
  - (ii) Thus three (3) of the issues the Bill proposes to cover will be spread in 3 (three) different ministries. The implication here is a “**CONFLICT**” of management.
  - (iii) Ref. to Legal Notice No/160 of 2006 on EMCA.

## **Potential Conflict between CRA and County Governments**

(a) Part II of the Bill gives all “powers and responsibilities” to the Commission on Revenue Allocation.

(b) Those arrangements seem to ignore the roles of:-

- National Focal Point as envisaged in the Nagoya Protocol (NP).
- National Competent Authority also as per the NP.
- The Pillars of Access to Genetic Resources and Benefit Sharing include:-
  - Mutually Agreed Terms (MAT)
  - Prior Informed Consent (PIC)
  - Material Transfer Agreements(MTA)
  - Community Empowerment

CRA wouldn't be the best body to manage these pillars. It may be consulted in as far as the revenue allocation to counties is concerned.

(c) I propose that a national Biodiversity & Bioprospecting Authority or Commission be created (i.e. NBBC/NBBA) whose functions are as follows:-

The NBBC (or NBBA) shall be the highest natural resource management body in the country. The genetic resources business is quite unlike other businesses because it involves several business developmental attributes:-

- (i) Detailed scientific studies of targeted organisms, usually at the molecular and genetic levels and using high (state of the art) technology equipment.
- (ii) Professional harvesting of the raw biological materials and manufacture of the targeted finished products.
- (iii) Partnership between local community, a national research organization, a university and a foreign company.
- (iv) The challenge posed by the application of the “Full Disclosure Principle” in the light of maintaining strict confidentiality of research outputs until a patent is obtained.
- (v) The challenge posed by the demand by Nagoya Protocol for the Genetic Resource potential benefits to be worked out for inclusion in the Prior Informed Consent (PIC) signed as an access condition. In this case, the NBBA will facilitate the calculation (and/or monetization) of the targeted genetic resource.
- (vi) The need to hold regular joint meetings between national institutions involved in one way or the other with biodiversity management.
- (vii) The need to develop and implement joint research programmes or projects. This is partnerships as envisaged in the WSSD outputs (2002). The country has participated in joint project implantation before such as the ‘Below Ground Biodiversity Conservation’, ‘The Vic-Res’, ‘The Global Pollinators Conservation’ e.t.c.

- (viii) The need to organize and run educational tours to create awareness of bioprospecting and partnership establishment between scholars, learners and government institutions.
- (ix) The challenge of ownership of an indigenous knowledge and/or technology and hence the benefits sharing arrangements.
- (x) The challenge of coordinating biodiversity and bioprospecting information from the various ecosystems – marine, soda lakes, freshwater systems, dry lands, forests, soil and mountainous.

In Conclusion the presenter informed the Committee that there is need to have a well-defined way to take on board the natural resources and see how revenue should be shared, apart from sunlight, water and wind, the other natural resources should be combined to biodiversity. Geothermal energy is expected to play a major role in boosting the National Economy of Kenya through industrial growth and geothermal steam to be considered as a renewable natural resource as it is continuously replenished by heated water from below the earth's surface and discharged in specific places. It further requires an international dimension on who identifies and who trains the Community.

#### **(d) Kenya Wildlife Conservancies Association (KWCA)**

The KWCA presented as follows;

While the objective of the Bill is to establish a system of benefit sharing in exploitation and use of natural resources, listed in section 3, the Bill, by including wildlife, has the unintended consequence of adversely affecting the existing benefit sharing arrangement largely managed by the local communities, further driving wildlife conservation in community and private land beyond the tipping point.

In the foregoing, **it is KWCA's submission** that the Natural Resource Benefit Sharing Bill be withdrawn in its entirety or amended by deleting section 3 (d) to exclude wildlife resources.

#### **General Grounds:**

1. The *Bill is drafted within the concepts of mining*, a depleting and non-renewable resource, whose exploitation and benefit sharing models are differently governed and managed relative to renewable resources including wildlife.
2. In the last 3 decades, Kenya has lost more than half of its wildlife; the creation of conservancies to complement Parks and Reserves has seen a reversal of this worrying trend. *This Bill has the potential to deny wildlife conservancies much needed revenue to manage this resource*, offset opportunity costs and

costs associated with hosting wildlife, thereby pushing more wildlife to the brink and discourage voluntary stewardship.

3. ***By allocating a paltry 12.8% of benefits from natural resources for projects within the communities and disproportionately allocating 68% to National government and the 2 funds, 19.2% to projects within the county, local communities who incur the larger costs of living with wildlife and who are currently not being compensated for such losses will replace wildlife with other land uses.***
4. 5 of 7 members of the County Benefit sharing Committee are local community representatives, this is a case of devolving responsibility while centralizing benefits, benefit sharing should favorable compare with responsibility
5. Reference to the benefit sharing ratio above (3), the Bill ***contravenes the Article 69 (1) (a) of the Constitution of Kenya that demands equitable benefit sharing of benefits accrued from natural resources separation.***
6. ***Further the Bill fails to align with sectoral laws including the Wildlife Act 2013 under its guiding principles, section 4 (e), requires that benefits from wildlife conservation are derived to offset costs and ensure value and management of wildlife do not decline.***
7. The implementation of the Bill, upon becoming an Act of Parliament, ***will create more financial burden to the people of Kenya.*** The Bill identifies three funds (Sovereign Wealth Fund, Futures Fund and Natural Resources Royalties Fund), at a time where government policy is funds consolidation; management of such funds has historically proved to be unviable and costly.
8. Further, the Bill creates County Benefit sharing committees and local community fora which are paid allowances by County Governments; such committees shall further ***increase county governments wage bills at a time when the country is focusing on expanding development budgets and add to other already existing county level committees within sectoral laws.***
9. The ***Bill is silent on the roles of state agencies (Kenya Wildlife Service, Kenya Forest Service, Water Resources Management Authority)*** with the mandate and charged with the overall management of natural resources, and further excludes them from benefit sharing process.
10. The Bill ***does not align with the Sovereign Wealth Fund Bill 2019,*** which under section 7, provides that the Fund will receive royalties from mining and

petroleum, while other natural resources in the Natural Resource Benefit Sharing Bill are excluded.

11. The Bill assigns functions to the Commission on revenue allocation, *far beyond the principle functions assigned by Article 216 (1) of the Constitution including administrative and executive roles* such as (e) monitoring benefit sharing agreements, (f) research on exploitation of natural resources, and (i) establishment of County committees and community Forums.
12. While the Bill is designed to cover benefit-sharing management, several sections including (6, 7 and definition of royalties,) *go beyond benefit sharing to include provisions on management of royalties from exploitation of natural resources*, already provided in the respective sectoral laws hence acting beyond the objects of this Bill.

#### **(e) Ministry of Tourism and Wildlife**

The committee also met the Ministry of Tourism and Wildlife and among the issues raised are that most benefits according to the Bill are indirect, the Bill should be sector specific and it should be split.

#### **(f) Ministry of Petroleum and Mining**

The Ministry presented as follows:

Following the call for submission of written memoranda on the proposed Natural Resources (Benefit Sharing) Bill for consideration, the Ministry of Petroleum and Mining having carefully examined the proposed bill wishes to make the following submissions:-

#### **Introduction**

The Mining Act of 2016 came into force on the 27th May 2016. This Act has been hailed as one of the most progressive legislation in the African Continent as it has addressed most of the issues that many resources rich nations have grappled with and continue to experience difficulties in managing. Key among these issues is community benefits and revenue sharing. However, in dealing with these matters, the Act provides for comprehensive and robust measures to ensure Kenyans benefit from the mining sector while promoting transparency and inclusivity.

Whereas **Section 3** of the Natural Resources (Benefit Sharing) Bill excludes minerals from the list of Natural Resources that it applies to, the Ministry of Petroleum and Mining, through the State Department for Mining, makes the following submissions with regard to other provisions of this Bill as they relate to Mining.

#### **Specific submissions**

| Section  | Issue  | Recommendation  |
|--|--|---|
| <b>Object</b>                                    | User of “resource exploiters” does not sound very professional   | Replace the word “resource exploiters” with “investors” or “contractors”                      |
| <b>Section 2 – Definition of Local Community</b> | This definition differs from the one given by the Mining Act, 2016 which recognized the community as a group of people living around an exploration and mining area as well as a group of people who may be displaced by an exploration or mining activity | Cross reference the definition with the one provided by the Mining Act, 2016                  |
| <b>Section 2 definition of “affected County”</b> | The Affected County is only the County in which a natural resources is located but may include County(s) that may be affected owing to effects of exploitation   | Redefine to include other counties that may be affected by exploitation of a natural resource |
| <b>Section 2 – Cabinet Secretary Responsible</b> | The Bill excludes minerals from its purview. The CS Mining cannot then be charged with the responsibility of administering this Act by way of making regulations   | Designate CS to Treasury and Planning as the principal on this Bill.                          |
| <b>Section 2 – Definition of “Natural Fund”</b>  | The definition is erroneous  | Replace with “Natural Resources”  |
| <b>Section 2 – Definition of royalties</b>       | The definition includes fees and other payments payable for exploitation of Natural resources  | Exclude “ <i>fees and any other payments</i> ” from the definition of royalties               |
| <b>Section 5</b>                                 | The proposed Bill has given a lot of powers to the Commission on Revenue Allocation (CRA)  | Consider revising and give the powers to the National Treasury                                |
| <b>Section 6 (2) (a)</b>                         | Overall capital expenditure has not been defined. Will it include exploration expenditure? The interpretation of what is capital expenditure has a huge bearing on viability of a natural resource project as it affects taxation                          | Consider defining clearly what will constitute “Overall Capital Expenditure”                  |
| <b>Section 6 (2) (b)</b>                         | Prevailing international market value is subject to fluctuations and cannot therefore be used as a guide to setting royalties.   | Consider deleting this provision  |
| <b>Section 6</b>                                 | Commercial viability of any  | Consider deleting this  |

|                                 |   |  |
|---------------------------------|---|--|
| (2) (c)                         | natural resource project is determined by among others the rate of royalty that the operator will be required to pay. It cannot therefore be feasible that a rate is set after a project has been declared commercial | provision  |
| Section 6<br>(2) (d)            | The impact of the exploitation on the community includes the effect of the royalties and fees that are to be charged. It is not feasible therefore that a royalty rate will be set after evaluating the impacts       | Consider deleting this provision   |
| Section 7<br>(3)                | Some fees under the Mining Act are classified as A-in-A and collected by the State Department for Mining.   | Exclude fees payable under the mining Act from this requirement by deleting the words " <i>and fees</i> " from this section  |
| Section 8<br>(1)                | This section contradicts the draft Sovereign Wealth Fund Bill proposed by the National Treasury as well as section 183 of the Mining Act, 2016  | Cross reference with the Sovereign Wealth Fund Bill<br><br>OR<br><br>State the sharing formula as follows;<br>SWF – Futures Fund 12%<br>– Natural resources fund 8%<br>National Government – 48%<br>County Government – 19.2%<br>Local Community – 12.8% |
| Section 8<br>(5) (a) and<br>(b) | Contribution of and inconvenience caused to each county by existence of some natural resources applicable to this Act may face challenges given their nature – (Sun, Wind etc)  | Consider deleting this section   |
| Section 8<br>(6)                | Five years is a short period to review revenue sharing ratios. Natural resource projects are long term in nature and are very dependent on, among others,   | Consider revision to take place after at least 10 years  |

|                       |   |   |
|-----------------------|---|---|
|                       | <p>rates of royalty payable.<br/>Frequent revision of sharing framework is likely to affect the rates and in essence projects and render Kenya an unfavorable investment destination</p>  |   |
| <b>Section 9 (1)</b>  | <p>The proviso is not clear as with who the affected entity is entering into a benefit sharing agreement</p>  | <p>Make it clear with who is the affected entity to enter into a benefit sharing agreement – County or local community?</p>   |
| <b>Section 10 (2)</b> | <p>Need to co-opt technical members from the State Department whose responsibility lies the natural resource for advice</p>   | <p>Insert section (2) (d) 2 members co-opted from the department in whose responsibility lies the natural resource under consideration</p>  |
| <b>Section 12</b>     | <p>Approval of every Benefit sharing agreement by the County Assembly is likely to derail the process. Since the committee consists of the CEC in charge of Finance, it would be prudent to assume that the County is aware of this agreement and instead require the CEC to make an annual report to the County Assembly</p> | <p>Delete this proposal and include a new proposal to require the CEC Finance to make annual report to the County Assembly on all Agreements entered in the County during that Financial year</p> |
| <b>Section 13 (6)</b> | <p>Assuming the allowances will come from the fund, there is need to cap this expenditure to avoid over use</p>   | <p>Cap the committee expenditure to not more than 10% of the fund</p>   |
| <b>Section 14 (3)</b> | <p>While this Bill has excluded Minerals from its purview, it proposes that Royalty and fees payable under the Mining Act be deposited in the Fund. This is likely to contradict the current situation where mining royalties are paid directly to the Consolidated Fund</p>  | <p>Consider clarifying that mineral royalties are exempt from the requirement.</p>  |
| <b>Section 15</b>     | <p>This section contradicts the Community Development Agreement (CDA) Committees regulations in as far as selection of projects, committee membership and project(s) implementation</p>   | <p>Align with the CDA committee provision under the Mining Act, 2016</p>  |

|                           |   |   |
|---------------------------|---|---|
| <b>Section 16 (2) (3)</b> | The definition of Principal Officer is missing  | Clearly define “Principal Officer”  |
| <b>Section 16 (4)</b>     | The CRA cannot cancel a licence that it did not issue in the first place.   | Tighten this provision by including a requirement for consultation with the Licence issuer  |
| <b>Section 17 (1)</b>     | Reviewing of all agreements including the just concluded Mineral Development Agreements provided for in the Mining Act is likely to cause some discomfort from Mining entities.   | Delete this provision and allow the Commission to focus only on agreements entered into after coming into effect of this Act.   |
| <b>Section 18</b>         | The Bill excludes minerals from its purview. The CS in charge of Mining cannot then be charged with the responsibility of administering this Act by way of making regulations   | Designate CS to Treasury and Planning as the principal on this Bill.  |
| <b>Section 19</b>         | The proposed Formula is not likely to be understood by the citizenry and more so given that the sharing formula provided in the Mining Act is already known to all. The fact that this proposal will see a reduction of monies going to the local community is also likely to face challenges | Adopt the revenue sharing formula provided for in the Mining Act and the Draft Sovereign Wealth Fund Bill.<br><br>In particular, the Bill should only be concerned with funds share with the National Governments |

### Conclusions

- 1) The Ministry of Petroleum and Mining has comprehensively addressed the issue of revenue sharing in respect of mineral resources through the Mining Act, 2016 and the attendant regulations as demonstrated above.
- 2) To ensure ease of compliance, monitoring and evaluation on the fulfillment of the requirements on revenue sharing by investors in the sector, it is more effective and efficient to have them supervised by the State Department for Mining in the Ministry. The law requires them to submit quarterly reports on training of locals, procurement and utilization of local goods and services and achievements on the Community Development Agreements. In addition, once the National Treasury releases the royalty-sharing framework, the same will implemented to the letter and ensure the revenue is shared by the National Government, County Government and Mining (Local) Community as provided for by the framework in the Mining Act.
- 3) There is need for carefully cross-referencing the Natural Resources (Benefit Sharing) Bill to the Mining Act, 2016.
- 4) The State Department for Mining, and Ministry of Petroleum and Mining as a

whole, requests that the Committee excludes the Mining Industry from the scope of this Bill because the Mining Act, 2016 has provided for a comprehensive revenue sharing regime and provisions for royalty setting by the Cabinet Secretary in charge of Mining.

**MINUTE SEN/SCLNENR/034/2019: ANY OTHER BUSINESS;**

There was no other business discussed.

**MINUTE SEN/SCLNENR/035/2019: DATE OF NEXT MEETING;**

The meeting was adjourned at 12.30 pm and the next meeting was to be called on notice.

SIGNATURE.......... DATE..........

(CHAIRPERSON: SEN. MWANGI PAUL GITHIOMI, MP.)

