REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2015

NAIROBI, 18th August, 2015

CONTENT

Bill for Introduction into the National Assembly—

PAGE

The Natural Resources (Classes of Transactions Subject to Ratification) Bill, 2015 ........................................................... 3067
THE NATURAL RESOURCES (CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION) BILL, 2015

ARRANGEMENT OF CLAUSES

Clause

PART I—PRELIMINARY

1 — Short title.
2 — Interpretation.
3 — Application.

PART II—CLASSES OF TRANSACTIONS

4 — Classes of transactions.

PART III—SUBMISSION OF AGREEMENTS TO PARLIAMENT

5 — Submission of agreement to Cabinet Secretary.
6 — Transmission of agreement to Parliament.
7 — Validity of agreements.
8 — Consideration by Parliament.
9 — Relevant considerations on transactions subject to ratification.
10 — Procedure in case of different resolutions.

PART IV—ADMINISTRATIVE ARRANGEMENTS

11 — Register of transactions.
12 — Confidentiality.

PART V—MISCELLANEOUS

13 — Regulations.
14 — Computation of time.
15 — Savings.

SCHEDULE—CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION
THE NATURAL RESOURCES (CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION) BILL, 2015

A Bill for

AN ACT of Parliament to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2015.

2. In this Act, unless the context otherwise requires—

   "concession" means the right to exploit a natural resource pursuant to an agreement between the grantor and the beneficiary or a permit issued under national or county legislation;

   "Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to environment;

   "days" means calendar days;

   "effective date" has the meaning assigned to it in Article 260 of the Constitution;

   "exploitation" means an activity that confers or is aimed at conferring a benefit on the beneficiary of the grant of the concession or right but does not include an activity that is exploratory in nature;

   "grantor" means the person who or which under an agreement relating to natural resources has granted to another the concession or right to exploit a natural resource of Kenya;

   "natural resources" has the meaning assigned to it in Article 260 of the Constitution;

   "permit" includes a licence or other authorization validly issued under national or county legislation;

   "state organ" has the meaning assigned to it in Article 260 of the Constitution; and

   "transaction" means an arrangement or other dealing between a grantor and a beneficiary under which the
beneficiary lawfully acquires a concession or a right to exploit a natural resource of Kenya.

3. (1) This Act applies to any transaction entered into on or after the effective date which, under Article 71 of the Constitution, is subject to ratification by Parliament on account of the fact that the transaction—

(a) involves the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya; and

(b) falls within the class of transactions designated as subject to ratification by section 4 of this Act.

(2) This Act applies to any transaction involving the—

(a) national government, county government, state organ and all county government entities; and

(b) grant of a right or a concession by a private person in cases in which such transaction is required by this Act to be ratified by Parliament.

PART II—CLASSES OF TRANSACTIONS

4. (1) The classes of transactions set out in the Schedule are subject to ratification by Parliament pursuant to Article 71 of the Constitution.

(2) The following classes of transactions shall not be subject to ratification by Parliament—

(a) subject to paragraph (e), the grant of a concession or right to exploit a natural resource through a permit, licence or other authorization issued in accordance with the requirements of national or county government legislation;

(b) the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract;

(c) the grant of a concession or right to exploit a natural resource for scientific research, educational or other non-commercial purposes unless the exploitation involves taking the natural resource or an portion of it outside of the jurisdiction of Kenya;

(d) the exploitation of a natural resource by a Kenyan national for subsistence purposes in circumstances
in which the law does not require that a permit, licence or other authorization be obtained; and

(e) the exploitation of a natural resource in quantities falling below a threshold prescribed by the Cabinet Secretary by notice in the Gazette or below a threshold specified in the Schedule to the Act

PART III—SUBMISSION OF AGREEMENTS TO PARLIAMENT

5. (1) As soon as practicable, but not later than fourteen days after entering into a transaction, a beneficiary shall submit an agreement or other instrument evidencing the transaction to the Cabinet Secretary responsible for the natural resource that is the subject of the transaction.

(2) The agreement shall be accompanied by a memorandum in the prescribed form.

6. Within seven days of receiving the agreement and the memorandum, the Cabinet Secretary responsible for the natural resource that is the subject of the transaction shall submit the agreement and memorandum to Parliament for ratification in terms of Article 71 of the Constitution.

7. (1) A transaction which under this Act, is subject to ratification by Parliament shall only be effective once it is ratified, and where Parliament has declined to ratify any transaction under this Act, the transaction shall be null and void.

(2) A public officer shall not give effect to or otherwise take cognisance of a transaction subject to ratification under this Act which has not been ratified in accordance with this Act.

8. Parliament shall deal with any agreement submitted to it under this Act within sixty days of receiving such agreement in accordance with the laid down procedures.

9. (1) The following shall be relevant considerations in deciding whether or not to ratify an agreement—

(a) the applicable Government policy;

(b) recommendations of the relevant regulatory agency;

(c) comments received from the county government within whose area of jurisdiction the natural
resource that is the subject of the transaction is located;
(d) adequacy of stakeholder consultation;
(e) the extent to which the agreement has struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement;
(f) the benefits which the local community is likely to enjoy from the transaction; and
(g) whether, in granting the concession or right the applicable law has been complied with.

10. (1) Where one House of Parliament resolves to ratify the transaction but the other House resolves not to ratify the transaction, the matter shall be dealt with in accordance with the procedures and mechanisms provided in Articles 112 and 113 of the Constitution and the relevant Standing Orders of both Houses.

(2) Where a mediation committee is constituted under subsection (1), the period for dealing with the agreement shall be extended by thirty days.

PART IV—ADMINISTRATIVE ARRANGEMENTS

11. (1) Each Cabinet Secretary responsible for a natural resource that is subject to ratification shall establish and maintain a register of agreements relating to natural resources and other transactions which have been ratified as provided under this Act.

(2) The Register shall be maintained in electronic format and any member of the public may inspect it without the payment of any fee.

(3) Upon request and on payment of a reasonable fee, any member of the public may obtain an authenticated printout of an agreement from the Cabinet Secretary.

(4) The Cabinet Secretary shall, on an annual basis, publish a report on the summary of the transactions submitted under this Act and the status of ratification of transactions.

12. (1) The Cabinet Secretary responsible for the transaction that is subject to ratification may, pursuant to
Article 35 of the Constitution, grant a request that the agreement or portions of it ought not to be publicly disclosed on account of commercial confidentiality, national security or other public interest considerations.

(2) Where the request for confidentiality is granted, the Cabinet Secretary responsible for the natural resource that is the subject of the transaction shall not submit the agreement to Parliament, but shall prepare a summary of the agreement without disclosing any confidential material and it is the summary that shall be submitted to Parliament and made available to the public.

(3) The decision of the Cabinet Secretary on the request for confidentiality may be challenged by any person through appropriate proceedings in the High Court, and the High Court shall have the power to call for and examine the Agreement in camera before determining the matter.

PART V—MISCELLANEOUS

13. (1) The Cabinet Secretary may, in consultation with the Cabinet Secretary responsible for the applicable natural resource, make regulations for giving effect to the provisions of this Act and prescribing anything required under the Act.

(2) Without prejudice to the generality of subsection (1), the regulations made under this section may—

(a) require that particular classes of transactions entered into between the effective date and commencement date be audited, the modalities for such audit, and the use to which the findings may be put;

(b) define the thresholds, quantitatively, qualitatively or a combination of both, below which transactions need not be subject to ratification;

(c) prescribe requirements and provide guidelines on the memorandum to accompany the agreement; and

(d) prescribe procedures for making applications and requests to the Cabinet Secretary.

14. Where under this Act the computation of time depends on the Parliamentary calendar, the period during which Parliament is not in session shall be excluded in the computation.
15. A transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.

SCHEDULE (ss. 4(1), 4(2)(e))

**CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION**

<table>
<thead>
<tr>
<th>Resource</th>
<th>Transaction requiring Parliament Ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crude Oil and Natural Gas</td>
<td>Authorization to extract crude oil or natural gas following approval of the development plan.</td>
</tr>
<tr>
<td>Water resources</td>
<td>The extraction of sea water within the territorial sea for private commercial use.</td>
</tr>
<tr>
<td>Underground water resources</td>
<td>The extraction of underground steam within a water conservation or other water resource protected area.</td>
</tr>
<tr>
<td>Wildlife</td>
<td>Extraction of oil, gas, and minerals within a wildlife conservation area or other wildlife protected area.</td>
</tr>
<tr>
<td>Wildlife</td>
<td>Export and re-export of endangered wildlife species.</td>
</tr>
<tr>
<td>Wildlife</td>
<td>Excision or change of boundaries of gazetted national park or wildlife protection area.</td>
</tr>
<tr>
<td>Forests</td>
<td>Long term concession of a gazetted forest resource.</td>
</tr>
<tr>
<td>Genetic material</td>
<td>Grant of an access permit or a material transfer agreement.</td>
</tr>
<tr>
<td>Genetic resources</td>
<td>Grant of a permit to conduct field trials of Genetically Modified Organisms</td>
</tr>
<tr>
<td></td>
<td>Any other transaction subject to ratification under an Act of Parliament.</td>
</tr>
</tbody>
</table>
MEMORANDUM OF OBJECTS AND REASONS

The main object of the Bill is to give effect to Article 71 of the Constitution. Article 71 of the Constitution requires Parliament to enact legislation to provide for the classes of transactions subject to ratification on account of the fact that the transaction involves the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya.

PART I of the Bill deals with preliminary matters.

PART II of the Bill deals with classification of transactions which are subject to ratification by Parliament under clause 4(1). Clause 4(2) of the Bill sets out the classes of transactions that are exempt from ratification by Parliament.

PART III of the Bill deals with submission of agreements by the beneficiary to Parliament for purposes of ratification. The Agreement shall be accompanied by a memorandum which should provide specified particulars.

Clause 8 of the Bill requires Parliament to consider and make a decision on whether to ratify or not within sixty days of receipt while clause 9 of the Bill specifically provides for the matters that Parliament should make note of when deciding whether to ratify a transaction or not.

PART IV of the Bill provides for administrative arrangements. It requires the establishment of a register of all agreements relating to natural resources and other transactions submitted under the Act. Clause 12 of the Bill deals with confidentiality and gives the Cabinet Secretary responsible for the natural resource that is the subject of the transaction, the power to declare an agreement or portions of it confidential and in that regard not make it available for public scrutiny. The same clause permits an aggrieved party to apply to the High Court for redress on a decision made by the Cabinet Secretary and the High Court may offer appropriate relief after consideration of sufficient evidence.

PART V of the Bill contains miscellaneous provisions. Clause 13 empowers the Cabinet Secretary responsible for matters relating the environment, to make regulations to give effect to the provisions of the Act. Clause 15 saves transactions that were lawfully entered into after the effective date but before the commencement of this Act.

This Bill is a Bill concerning counties within the meaning of Article 110 of the Constitution, and is an ordinary Bill.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 11th August, 2015.

ADEN DUALE,
Leader of Majority Party.