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THE CLIMATE CHANGE (AMENDMENT) ACT, 2023

LEGAL ALERT

SEPTEMBER 2023

The Climate Change (Amendment) Act, 2023

On September 1st 2023, against the backdrop of Kenya hosting the Africa Climate Summit and Africa Climate Week, the Climate Change (Amendment) Act, 2023 (“the Act”) was assented to by the President. The Act is slated to come into force on 15th September 2023, and builds upon the foundations laid by the Climate Change Act, 2016, in pushing Kenya a step forward towards realising its obligations under the Paris Agreement. Notably, the Act has brought with it a wide array of changes, particularly in relation to effecting Article 6 of the Paris Agreement by introducing provisions on the regulation of and participation in carbon markets.

In an effort to boost accountability and transparency, the Act provides for the establishment of a carbon registry that would be accessible to the public, with registers on information relating to carbon credit projects and the amount of carbon credits issued or transferred from Kenya. The carbon registry will boost climate financing activities in the country by reassuring investors in carbon markets. A Designated National Authority as established by the Act, will be the custodian of the Registry.

Whilst the importance of climate financing cannot be overemphasised, it is equally important to safeguard the environment from further degradation. In this regard, the Act requires that before commencing a carbon trading project an environmental impact assessment must be carried out in compliance with international obligations. The Act also entrenches the need for carbon projects to specify the anticipated environmental, economic or social benefits of the project, which includes the extent to which the project will contribute to the removal of greenhouse gases from the atmosphere in order to contribute to meeting Kenya’s greenhouse gases emissions targets.

Community Development Agreement

In addition to this, the Act goes further to protect community resources by requiring that every land-based project carried out under the Act must be put into action through a Community Development Agreement that outlines the connections and responsibilities of the

project’s proponents on the public and community land where the project is being developed. This provision works to cushion the impacted communities as the project is required to take into consideration Kenya’s international commitments and aim to improve the environmental, economic, social and cultural wellbeing of the community around the project.

Community Development Agreements are required to be recorded in the National Carbon Registry and should include the following provisions:

1. the stakeholders of the project;
2. the annual social contribution of the aggregate earnings of the previous year of the community to be disbursed and managed for the benefit of the community;
3. the manner of engagement with local stakeholders;
4. sharing of benefits from carbon markets and carbon credits between the project proponents and impacted communities;
5. the proposed socio-economic development around community priorities; and
6. the manner in which a review or amendment of the agreement can be undertaken which ought to be at least every five (5) years.

Land-based and Non-land Based Projects

The Act does not provide a clear definition of what constitutes a land-based versus non-land-based project. A distinction can, however, be drawn from the requirement for the provision of annual social contributions in the Agreement.

Land-based projects are required to include a provision in the Community Development Agreement for annual social contributions of at least forty percent (40%) of the projects’ aggregate earnings. On the other hand, non-land-based projects are required to include at least twenty-five percent (25%) of their aggregate earnings as the annual social contribution to the community. These annual social contributions are to be managed and disbursed for

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the benefit of the community.

Aggregate earnings have been defined under the Act to mean 'the total of all income in a carbon project without adjustment for inflation, taxation or types of double counting'.

Dispute Resolution

Further to the provisions on community development agreements and annual social contributions, the Act also makes provision for dispute resolution mechanisms for disputes arising from carbon markets projects.

The Act specifies that any dispute that would arise under a land based project will be subjected to the dispute resolution mechanism as specified in the Community Development Agreement and ought to be resolved within thirty (30) days of lodging the dispute. Any other dispute that is not land-based and not subjected to the Community Development Agreement is to be resolved through alternative dispute resolution. In the event the disputes cited above are not resolved within thirty (30) days of submission, there is recourse for the dispute to be referred to the National Environmental Tribunal.

Offences

The Act has also introduced offences such as;

1. Conducting unauthorised carbon trade willingly;
2. Giving false or misleading information knowingly for environmental or financial gains in the carbon market investment;
3. Manipulating carbon credit measurements to claim additional measurements;
4. Engaging in money laundering through carbon trading;
5. Knowingly selling carbon credits to unauthorised entities; and
6. Failing to maintain carbon records.

The penalty for the offences upon conviction is a fine not

exceeding five hundred million shillings (KES 500,000,000) or imprisonment for a term not exceeding ten (10) years, or both.

Existing Carbon Offset Projects

The Act also introduces a transitional provision of certain provisions of the principal Act i.e., Climate Change Act not applying to entities that have existing carbon projects for one (1) year.

Conclusion

The Act is a welcome development as it creates the much-needed framework to allow for the regulation of carbon trading in Kenya. It is hoped that the framework will foster the growth of carbon trading in Kenya and stimulate greater investment in carbon projects in the country.

Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact Cindy Oraro, Partner, (cindy@oraro.co.ke) and Madikizela Otieno, Associate, (madikizela@oraro.co.ke) or your usual contact at our firm, for legal advice.



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