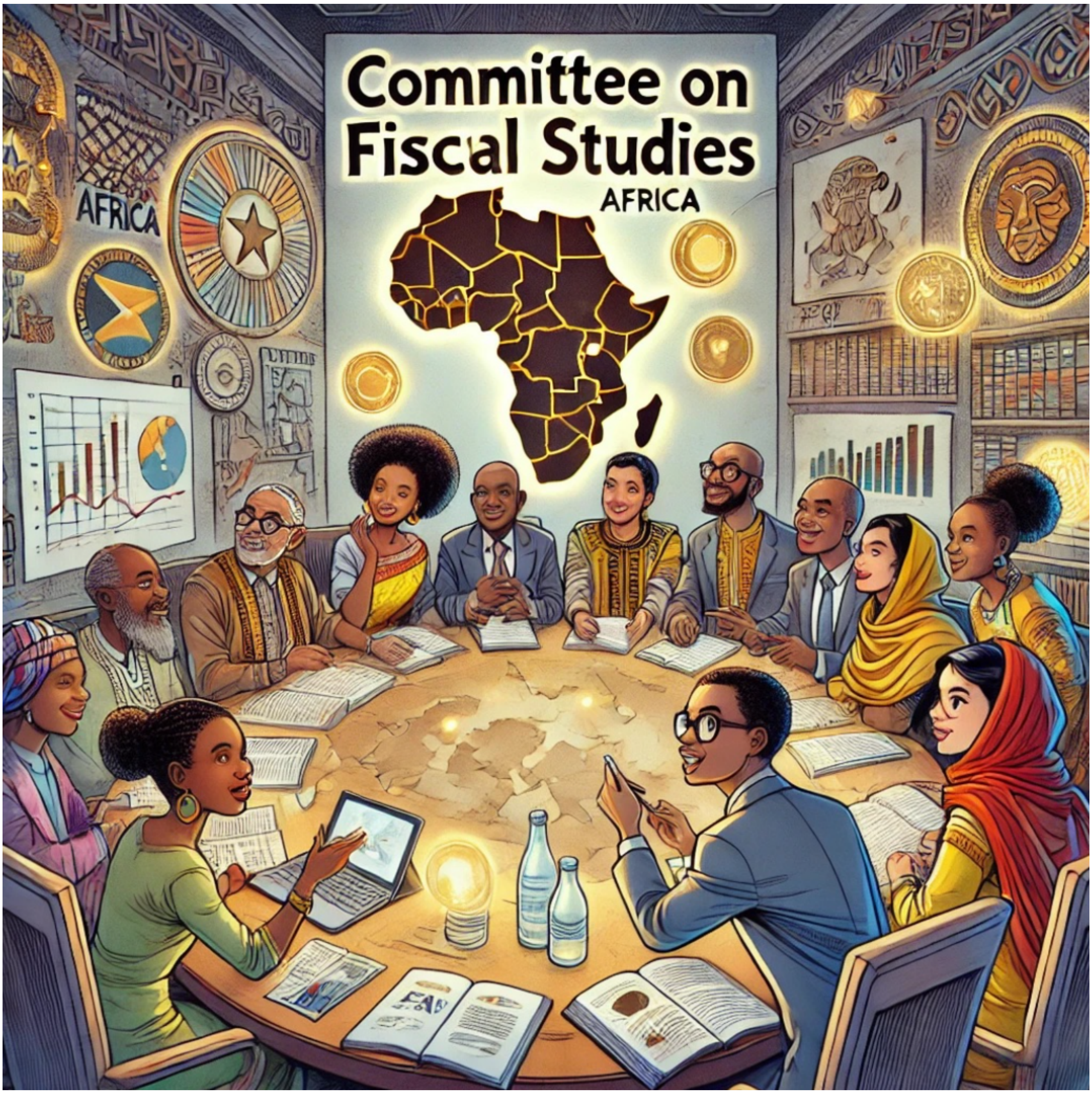
Draft Kenya Sovereign Wealth Fund Bill, 2025



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No.	Provision of the Bill	Issue	Proposal	Justification
1	**Section 6 - Sources of funds to the Fund**	Complete absence of provisions for investment arbitration awards won by Kenya	**Insert new Section 6 (i): Treatment of Investment Dispute Awards and Settlements** All monetary awards, damages, costs or settlements received by Kenya from: ICSID arbitrations, other investment treaty arbitrations, petroleum/mining contract disputes, settlement payments, cost awards shall be remitted to the Fund within 30 days, classified as windfall revenues, with priority for reimbursing legal costs then allocation across components.	Kenya has faced several investor-state disputes (e.g., Cortec Mining Kenya Limited v. Kenya, World Duty Free v Kenya, WalAm v Kenya etc). When Kenya successfully defends or wins awards, these should strengthen intergenerational wealth, not disappear into general budget. Norway's GPFG benefits from state oil company dividends; similarly Kenya should benefit from protecting its interests.
2	**Section 6 - Sources of funds to the Fund**	No mechanism for investor contributions beyond mandatory fiscal obligations	**Insert new Section 6 (j): Investor Contributions to Sustainable Development** Fund may receive voluntary investor contributions to sustainable development, environmental performance bonds forfeited for non-compliance, penalties/fines for violations, benefit-sharing agreement payments, technology transfer contributions, payments in lieu of performance obligations.	International best practice (Chile's copper funds, Botswana's diamond revenues) shows diversified revenue sources strengthen funds. Environmental bonds are standard in mining codes but forfeited amounts often lost in budget. Channelling to SWF ensures they benefit future generations. Timor-Leste's petroleum fund includes various contractor payments beyond taxes. Incentivises corporate responsibility while protecting intergenerational equity.
4	**Section 8(3)(c) - Minimum savings for future generations**	10% minimum savings rate is insufficient given resource exhaustibility and climate risks to petroleum value	**Replace Section 8(3)(c):** "the need to provide at least fifteen percent savings for future generations, increasing to thirty percent upon forecast resource depletion within twenty years or significant climate transition risks to petroleum values"	International research (IMF, World Bank) suggests 20-30% of resource revenues should be saved for genuine intergenerational equity. Chile saves 15-30% depending on commodity prices. Norway effectively saves 100% offshore. 10% is inadequate, especially given Kenya's low development baseline and risk that petroleum becomes stranded asset before full extraction. Escalation trigger responds to depletion urgency.
5	**Section 11(7)(a)(i) - Debt servicing from Stabilisation Component**	Dangerous loophole allowing sovereign wealth fund to be raided for general debt servicing	**Amend Section 11(7)(a)(i):** "shall be utilized to service only concessional development debt directly linked to strategic	Resource funds globally have been destroyed by debt servicing raids (Venezuela, Trinidad & Tobago). General debt servicing converts intergenerational wealth into current consumption to service potentially imprudent borrowing. Norway explicitly prohibits this. Only allowing use for concessional infrastructure

			infrastructure investments; and shall not be used for general budget support or servicing of commercial debt"	debt maintains investment discipline while acknowledging development financing needs.
8	**Section 27 - Powers and Functions of the Board**	Insufficient protection against political interference in investment decisions	**Amend Section 27 to insert:** The Board shall have powers necessary for the proper performance of its functions under this Act, with functional independence in investment decisions, fund manager selection, asset allocation, risk management	Political interference has destroyed resource funds globally (Kazakhstan, Libya, Venezuela, Nigeria before reforms). Malaysia's 1MDB scandal exemplifies capture risk. Norway's GPFG success stems partly from operational independence - Ministry sets broad strategy, NBIM manages independently. Singapore's GIC and Temasek have strong political insulation. Without explicit protections, Kenya's fund vulnerable to: directing investments to politically connected firms, using fund for election spending, favouring investments in swing constituencies, withdrawing funds imprudently. Santiago Principles (GAPP 6, 18) emphasise operational independence. Provisions balance legitimate policy role (Cabinet Secretary sets objectives) with depoliticised implementation (Board executes professionally).
10	**Entirely absent from Bill**	No formal civil society oversight mechanism	**Insert new Section: Civil Society Oversight and Public Participation** The Act establishes an Independent Sovereign Wealth Fund Civil Society Oversight Coalition with representatives from natural resource governance, public finance, environmental, community, academic, women's and youth organisations with powers to access non-confidential information, observe Board meetings, submit shadow reports, convene public forums, make recommendations The Board shall have an obligation to respond substantively to recommendations within 60 days	International evidence overwhelmingly shows civil society oversight improves sovereign fund governance. EITI dramatically improved extractive sector transparency in 50+ countries including Nigeria, Ghana, Indonesia. Timor-Leste's Petroleum Fund has strong civil society monitoring through La'o Hamutuk - credited with preventing misuse. Santiago Principles emphasise transparency and accountability (GAPP 24). Civil society brings: political independence, public legitimacy, continuity across governments. Natural Resource Governance Institute research shows civil society monitoring correlates with better fund performance and lower corruption. Kenya's 2010 Constitution (Article 35) guarantees access to information - provisions operationalise this for SWF.
11	**Entirely absent from Bill**	No beneficial ownership transparency or anti-corruption due diligence for fund managers	**Insert new Section: Beneficial Ownership Transparency and Anti-Corruption Due Diligence** The Act establishes mandatory beneficial ownership disclosure for all service providers (threshold 20%); Disqualification of entities owned/controlled by: Kenyan	1MDB scandal in Malaysia involved shell companies and hidden beneficial ownership - enabled theft of billions. Angola's sovereign fund investigations revealed ownership opacity in contractor selection. Panama Papers and Pandora Papers exposed how politicians globally use anonymous companies to capture state contracts. FATF Recommendations emphasise beneficial

			politically exposed persons (unless Parliament approves), sanctioned individuals, organised crime links; Comprehensive due diligence before appointments; Public register of service providers with beneficial owners, contract values, performance; Contract provisions: ownership representations, ongoing update obligations, anti-corruption covenants, termination rights for false information; Prohibition of shell companies in secrecy jurisdiction. Criminal penalties: 20M shillings / 10 years for individuals, 100M shillings + permanent debarment for corporates	ownership transparency for corruption prevention. G20 endorsed this after 1MDB. Kenya's Public Procurement Act requires beneficial ownership but enforcement weak - explicit provisions for SWF create higher standard. Norway's GPFG publishes all external manager contracts. Singapore requires strict transparency. OECD research shows beneficial ownership transparency reduces corruption by 30-40%. Provisions prevent: politically connected individuals secretly owning fund managers, criminal networks laundering through SWF contracts, sanctions evasion.
12	**Section 43(2), 44(2) - Prohibition of domestic investment**	Complete ban on domestic investment may be overly rigid for developing country context	**Replace Section 43(2) with nuanced framework:** Allow up to 20% domestic investment in: Infrastructure bonds for renewable energy, sustainable transport, climate adaptation (meeting green bond standards); Listed NSE equities in sectors reducing extractive dependence; Development finance instruments catalysing private investment	Norway's 100% foreign investment rule works because Norway is wealthy, developed, with deep capital markets. For developing countries, context differs. Botswana's Pula Fund invests ~25% domestically in infrastructure. Chile's funds invest domestically in crisis periods.
15	**Entirely absent from Bill**	No dispute resolution mechanisms for conflicts between Board and Cabinet Secretary or with service providers	**Insert new Section: Dispute Resolution** For Board-Cabinet Secretary disputes: 30-day consultation, 60-day mediation by jointly appointed mediator, High Court jurisdiction if unresolved, expert technical opinions. Fund operations continue during disputes, no unilateral prejudicial actions For service provider disputes: negotiation, mediation, arbitration under Arbitration Act with Nairobi seat and UNCITRAL Rules or under AfCFTA Protocol on Investment. Board shall have the right to immediate termination and court relief for fraud/corruption/gross negligence	Investment treaties typically include dispute resolution - domestic SWF legislation should too. Without clear procedures, disputes could paralyse fund or escalate destructively. Provisions should: (1) create graduated process (consultation > mediation > court) encouraging resolution, (2) protect fund operations during disputes, (3) ensure transparency of outcomes, (4) provide for expert input on technical matters, (5) give Board enforcement powers against service providers, (6) recognise citizen standing for public interest matters - consistent with Kenya's 2010 Constitution Article 22 (enforcement of Bill of Rights) and 258 (judicial authority).

			Publication of awards/judgments within 30 days (redacting confidential commercial information); Parliamentary reporting for disputes exceeding 1 billion shillings; High Court jurisdiction for judicial review; Citizen/civil society standing for judicial review on constitutional/public interest/environmental grounds	
19	**Section 6(h) - "any other minerals and petroleum revenue"**	Overly broad discretionary power for Cabinet Secretary to add revenue sources	**Amend Section 6(h):** "any other minerals and petroleum revenue or monies from other sources as may be determined by the Cabinet Secretary through regulations approved by Parliament specifying the rationale, projected amounts, and consistency with intergenerational equity principles"	Current provision gives Cabinet Secretary unlimited discretion to add revenue sources by gazette notice - no Parliamentary approval, no criteria. Risk of abuse: channeling general tax revenues to SWF to show impressive growth, then withdrawing for current spending (defeating purpose), or excluding revenues from SWF by not gazetting them.

23	**Section 55 - Offences for misappropriation**	Penalty of "pay twice the amount" creates perverse incentive (embezzle 100M, caught, pay 200M but perhaps kept 300M offshore)	**Amend Section 55:**
			
			A person who misappropriates Fund assets commits an offence and is liable on conviction to:
			- Pay five times the amount misappropriated as restitution
			- Forfeit any assets globally (domestic or foreign) traceable to the misappropriation
			- A fine not less than twenty million shillings or 50% of misappropriated amount (whichever is greater)
			- Imprisonment for a term not less than ten years
			- Permanent disqualification from public office or contracting with government
			- Courts shall have powers to:
			    o Order global asset tracing and recovery
			    o Cooperate with foreign jurisdictions for asset recovery
			    o Freeze assets of accused pending trial
			    o Pierce corporate veils and nominee arrangements
				Corruption in resource funds can be catastrophic. Penalties must genuinely deter. Current "pay twice the amount" insufficient because: (1) sophisticated criminals hide assets offshore (Jersey, Switzerland, Dubai) - only pay if caught AND assets found domestically, (2) paying 200M for stealing 100M still profitable if 200M+ hidden abroad, (3) no imprisonment minimum. Kenya has committed to asset recovery (Proceeds of Crime and Anti-Money Laundering Act) - provisions operationalise for SWF.

24	**Section 46 - Prohibition of collateralisation**	Good provision but lacks enforcement mechanisms and disclosure requirements	**Amend Section 46 to add:** (c) The Cabinet Secretary shall certify annually to Parliament that no component of the Fund has been pledged, collateralised, or encumbered in any manner. (d) Any agreement, contract, or instrument purporting to collateralise or encumber Fund assets shall be void ab initio and unenforceable in any jurisdiction. (e) Any person who attempts to pledge or collateralise Fund assets commits an offence and is liable on conviction to a fine not exceeding fifty million shillings or imprisonment not exceeding fifteen years, or both. (f) The Board shall immediately report to Parliament, the Auditor-General, and the Director of Public Prosecutions any attempt to collateralise or inappropriately encumber Fund assets.	History of resource funds shows collateralisation danger: Libya's fund had complex derivative positions that created contingent liabilities; some funds became entangled in state enterprise financing. Prohibition is necessary but insufficient without enforcement.
25	**Section 11, 14 - Withdrawal procedures**	Insufficient safeguards against election-cycle political raids or imprudent withdrawals	**Amend Sections 11 and 14 to add:** Additional withdrawal restrictions: - No withdrawals from any component during the six-month period immediately preceding a general election, except for previously budgeted amounts approved at least 12 months in advance - Withdrawals from Stabilisation Component exceeding 20% of beginning-year balance require super-majority Parliamentary approval (two-thirds) - Emergency withdrawals under Article 223 require simultaneous notification to: Auditor-General, Controller of Budget, Budget Policy and Finance Committee, Defence and Foreign Relations Committee - Cabinet Secretary must publish detailed justification for all withdrawal requests on	Political business cycles are real risk for resource funds.

			National Treasury website within 48 hours of request - Ex-post evaluation required for all withdrawals exceeding 5 billion shillings, assessing whether funds achieved stated objectives, published within one year	
29	**Section 54 - Annual performance report**	No requirement for independent performance evaluation or benchmarking against peer funds	**Amend Section 54:** (4) The Board shall commission, every three years, an independent evaluation by internationally recognized sovereign wealth fund experts to assess: - Investment performance relative to approved benchmarks and peer sovereign funds - Governance quality and compliance with Santiago Principles - Operational efficiency and cost-effectiveness - Risk management effectiveness - Transparency and accountability - Strategic positioning and achievement of Fund objectives - Recommendations for improvement (5) Independent evaluations shall be conducted by evaluators jointly selected by the Board and the Parliamentary Committee on Finance and Planning, with no conflicts of interest. (6) Evaluation reports shall be published in full and tabled before Parliament within 14 days of receipt.	Self-reporting is insufficient. All major SWFs undergo independent evaluation.
30	**Part III - Fiscal Responsibility Principles**	No fiscal rule limiting non-resource deficit to ensure resource revenues aren't just replacing other revenues	**Insert new Section after Section 20: Non-Resource Fiscal Balance Rule** 1) The government shall manage its non-resource fiscal balance (total revenue excluding resource revenues, minus expenditure excluding Fund withdrawals) to ensure resource revenues supplement rather than substitute for normal revenue effort.	Resource wealth often paradoxically reduces development (resource curse). Governments reduce tax effort, become dependent on resource revenues, suffer fiscal crises when resources deplete or prices fall. Non-resource fiscal balance rule addresses this.

			2) The medium-term non-resource primary deficit (NRPD) shall not exceed 2.5% of non-resource GDP, calculated as a three-year rolling average. 3) If NRPD exceeds threshold for two consecutive years, the Cabinet Secretary shall table before Parliament within 60 days a Fiscal Consolidation Plan including: - Analysis of reasons for excess deficit - Measures to reduce NRPD to compliant levels within two years - Assessment of resource revenue dependency - Tax administration and domestic revenue mobilisation measures 4) The Budget Policy Statement shall report NRPD and demonstrate compliance. 5) This rule may be temporarily suspended with two-thirds Parliamentary approval in circumstances of: severe economic crisis, natural disaster, armed conflict, or exogenous shock causing GDP decline exceeding 3%.	