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Legal and Institutional Framework for Implementing a Hybrid
Approach to Local Content in Kenya's Petroleum Sector:
Lessons from Norway

Mutai Oliver Kipchumba



Master of Laws

2020

Legal and Institutional Framework for Implementing a Hybrid
Approach to Local Content in Kenya's Petroleum Sector:
Lessons from Norway

Mutai Oliver Kipchumba

Submitted in Partial Fulfillment of the Requirements for the
Degree of Master of Laws at Strathmore University



Strathmore University

Nairobi, Kenya.

DECEMBER, 2020

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11 November 2020

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Abstract

Kenya has recently discovered Oil and Gas reservoirs creating an imperative to promote Local Content in its oil and gas industry. The concept of Local Content has, as a result, been legislated through the recently enacted Petroleum Act 2019. This study contemplates the existing legal and institutional framework within which the government of Kenya has introduced Local Content requirements in the oil and gas industry in order to tackle various aspects of Local Content. The study scrutinizes key drivers of Local Content within Kenya's legislative framework and evaluates the determinants that impede successful implementation of Local Content in Kenya's oil and gas industry. The study also examines the adequacy of the Local Content provisions under the several oil and Gas related legislations especially the petroleum Act to establish whether they meet international best practice requirements.

The research uses Norway as a yardstick of an advanced oil and gas legal, institutional and regulatory framework to question the mechanisms in place to measure and monitor implementation. This is done in order to identify factors that explain the achievement of positive Local Content outcomes and gauge whether the practices and structures can be imported into Kenya through a Legal Transplant mechanism. In particular, the study analyses the legal and institutional framework that promotes Local Content in Norway in order to evaluate its applicability in Kenya. The study concludes that Norway's Local Content requirements in law are well structured and tailored to its needs. This has resulted to positive Local Content outcomes. This study was conducted through analysis of primary and secondary data such as statutes, books, scholarly articles, journals and reports. It hopes to inform the government of Kenya and policy makers on the best approach towards the implementation of a Local Content framework in order for the country and its citizens to capitalize on the benefits of the oil and gas sector.

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List of Abbreviations

ASCM Agreements on Subsidies and Countervailing Measures

CDA Community Development Agreement

CS Cabinet Secretary

EPRA Energy and Petroleum Regulatory Authority

EEA European Energy

FDI Foreign Direct Investment

GATT General Agreement on Tariffs and Trade

GATS General Agreement on Trade in Services

GOK Government of Kenya

IOCS Increase the Level of Domestic Capabilities and Competencies

LC Local Content

LCB Local Content Bill

LCR Local Content Requirements

IOC International Oil Company

LCDC Local Content Development Committee

LCP Local Content Policy

IMF International Monetary Fund

IP Intellectual property

KEBS Kenya Bureau of Statistics

KNQA Kenya National Qualifications Authority

MDA Ministries Department and Agencies

NOCK National Oil Corporation of Kenya

NPD Norwegian Petroleum Directorate

OECD Organisation for Economic Co-operation and Development

PSC Production Sharing Agreement

R&D Research and Development

TRIMS Trade-Related Investments Measures

SMEs Small and Medium Enterprises

UNGA United Nations General Assembly

WTO World Trade Organization

Statutes

Constitution of Kenya, 2010.

Energy Act, 2019

Petroleum Act, 2019

Mining Act, 2016.

Public Procurement and Asset Disposal Act, 2015.

National Construction Authority Act, 2014.

Local Content Bill, 2018



International Statutes

Petroleum Act (Act No. 72 of 29 November 1996) Norway

Mineral and Petroleum Resources Development Act 28 of 2002, South Africa.



List of Authorities

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010)



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My friend and boss Lawrence Tanui emboldened my resolve to go back to class, his fatherly advice and guidance as I resigned from my place of work to pursue this course is finally bearing fruits. He urged me to just begin and everything else will fall in place. True to his words, every step of the odyssey fell in place. His soft words have got me here and all I can say is a huge Thank You. When I was conflicted on where and what to pursue my friends Prof Tom Ojienda and Annah Konuche came through for me. The new intellectual horizons conquered is courtesy of them.

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Looking back, I realize how the journey has been.
Looking ahead, I see Ithaca.



God Bless You All.

Dedication

I dedicate this thesis to my family. You made all of this possible. I shall be eternally grateful to you.



Chapter 1: Introduction To Local Content In Kenya's Oil And Gas Industry

1.1 Background

The implementation of Local Content policies in Kenya has been boosted by legislative instruments such as the Petroleum (Exploration, Development and Production) Act 2019, the Local Content Bill 2018, Local Content Oil and Gas Regulations, and the Kenya Local Content Policy. The Kenya's Petroleum Act and the Energy Act (2019) defines Local Content as “the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procurement locally available workforce, services and suppliers, for the sharing of accruing benefits”.¹

However, since their introduction, a number of practical and on the ground challenges continue to hinder their effective implementation. This thesis demonstrates that Local Content objectives may not be successfully achieved in Kenya by legislation alone. As can be learned from Norway which is renowned for its hybrid approach to Local Content, a hybrid approach, which includes the use of contracts and legislation, could allow a more efficient implementation of Local Content objectives in Kenya. This thesis examines the nature, scope and content of the hybrid approach to Local Content, and examines legal and institutional requirements for its implementation in Kenya.

In March 2012, Tullow Oil Company² announced it had discovered viable oil in Kenya. Soon after there was an influx of international oil companies (IOCs) seeking to exploit this discovery while the residents of Turkana County revelled in their new perceived instant wealth. In addition, there was a marked increase in the interest of foreign direct investment in Kenya's economy³. Petroleum extraction has become the center of every aspect of this newfound Kenyan world.⁴

¹ Section 2, *Petroleum Act* (Act No. 2 of 2019). Section 2, *Energy Act* (Act No. 1 2019)

² BBC, 'Kenya Oil Discovery after Tullow Oil Drilling, 26 March 2012 — <http://www.bbc.com/news/worldafrica-17513488> on 5 March 2020

³ Katrina Mason, 'Kenya's Oil and Mineral Prospects Fire Global Interest' *The Financial Times*, 25 November 2013 - <https://www.ft.com/content/20badca4-504b-11e3-9f0d-00144feabdc0> on 5 March 2020.

⁴ Bridge G and Le Billon P, *Oil*, Cambridge: Polity Press, London, 2013.

However, as the rate of economic activity in the energy, oil and gas sector increases, it has become clear that Kenya's vibrantly celebrated oil find might lead to civil strife and political unrest due to the opaque nature of resource distribution and the lack of a proper framework of engaging the local community.⁵

In 2018, social unrest in Turkana, occasioned by disagreement between the IOC and the local community, led⁶ to the temporary closure of Tullow Oil Company operations five years after its operations began. The chief complaint against Tullow Oil was its perceived failure to employ local community members at the exploratory wells. The pre-existing security situation in the region further compounded this issue. This impasse was resolved through the intervention of the head of state, President Uhuru Kenyatta. The president, through the Cabinet Secretary, Interior and Coordination, sent a delegation to meet Turkana leaders (County Government, local leaders and representatives of Tullow Oil) for a truce meeting over the operations of the oil exploration⁷. The government reached an agreement with the local leadership to have the residents as a priority in terms of employment and contracts on material supply.

Lessons must be picked up from Tullow and other resource-rich developing countries. Residents can suffer detriment because of gaps in legal frameworks intended to protect the interests of all parties involved. Most oil and gas contracts in Kenyan are skewed towards the IOCs because of their technical and intellectual dominance in exploration along with the enormous amounts of money they pump into risky projects. Besides, the lack of clear geological data makes it difficult for host countries to claim the right stake during contract formulation.

It has been argued that developing countries and more particularly in Africa suffer from a *resource curse or paradox of resource*.⁸ The discovery of extractive resources

⁵ Kiraitu Murungi, 'Maximizing Local Content in Kenya's Upstream Oil and Gas Sector', Daily Nation, 4 February 2014.

⁶ Lucas Ng'asike, 'Tullow Oil suspends operations over conflict with locals' The Standard, 28 October 2013 <http://www.standardmedia.co.ke/business/article/2000096359/tullow-oil-suspends-operation-over-conflict-with-locals> on 7 March 2020

⁷ Jeremiah Wakaya, 'Interior Ministry seeks talks with Turkana leaders over oil dispute' Capital Fm News, June 30 2018 — <https://www.capitalfm.co.ke/news/2018/06/interior-ministry-seeks-talks-turkana-leaders-oil-dispute/> on 23 March 2020

⁸ Duruigbo E, 'The World Bank, multinational oil corporations, and the resource curse in Africa' 26 *University of Pennsylvania Journal of International Law*, 2005, 1.

has contributed to massive social-economic inequalities, political and civil unrest. In the worst cases, corruption and violent conflict over control of the resources and benefits ensue. This study, therefore, will propose ways through which oil and gas contracts can ensure better Local Content gains for the local communities.

Key to avoiding this resource curse for developing countries is to ensure equitable sharing of both the revenue as well as the opportunities arising from the oil resource. Sharing of local resource equitably needs the development of effective Local Content regulations that transform short term benefits of the oil extraction through economic development, capacity development and job creation. Local Content regulations are the policies, laws and institutions that monitor how the operation of oil and extracts are managed. Local Content regulation has been championed as Africa's solution to the resource curse⁹. The best way to go about this is for host countries to develop a robust legal framework and policies that guide extractive contracts formulation. Contracts are the stage at which Local Content is recognized and birthed.

Therefore, oil and gas contracts in Kenya by IOCs must take into consideration the Local Content aspiration of the legal regime in the host nation. Presence of Local Content clauses in the contracts is not enough; the local community must also be involved in the implementation. This will provide an avenue for collaboration and consultation between the local community and the IOC.

1.2 Problem Statement

The nature, scope and content of Local Content policies in Kenya has been elaborated through legislation. Being a developing country, it has a low negotiation power as against international oil companies that have an upper hand financially and technologically in contract negotiations in the extractive sector. Therefore, like most resource rich African countries, Kenya has not been able to satisfy the desire of its populace to benefit from the values deriving from the extractive industry. This dissatisfaction has led to disputes associated with this industry e.g the Lokichar Basin dispute.¹⁰

⁹ Duruigbo E, 'The World Bank, multinational oil corporations, and the resource curse in Africa'

¹⁰ Duruigbo E, 'The World Bank, multinational oil corporations, and the resource curse in Africa', 7

The reasons of this dissatisfaction include limited stakeholder engagement and participation, lack of case to case consideration of issues facing the community such as lack of infrastructure, lack of social amenities, unemployment, displacement making the community feel like they are not benefiting from the oil and gas extraction activity. This study examines the gap in legislative approach to Local Content implementation in Kenya. It then seeks to remedy these problems by adopting both the use of contracts and legislation- a hybrid approach – to tackling this problem. The hybrid approach has been adopted by oil and gas producing countries such as Norway, Australia and Qatar with significant measure of success. Transplanting the positive aspects of the hybrid approach, especially from Norway, to the Kenyan jurisdiction will help in averting the disputes such as the one seen in the Lokichar Basin by making sure indigenous and local communities realize the full benefit arising from the exploitation of the natural resource.

1.3 Theoretical Framework

The concept of legal transplant theory is credited as being the brainchild of Allan Watson, a Scottish legal historian.¹¹ According to him, in the adoption of the laws from other countries, of necessity is the relationship of one legal system and its rules with another.¹² Watson's view is to be adopted as it is particularly relevant for this study because he underlined the role of legal transplants in developing legal systems and in this study we are looking at the adoption of Norwegian jurisprudence in the extractive sector by Kenya which is a developing legal system in the extractive industry. Generally, rule-of-law reforms have been about developing a legal system.

When a legal transplant is based on a foreign model, a corresponding construction of one's own law is designed. Once this is done, it can be said that the foreign law has been borrowed and the legal culture of the receiving country has been affected. What takes place is a movement of law or practice through states.

¹¹ Watson A, *Legal transplants an approach to comparative law*, 2nd ed, University of Georgia Press, Athens, 1993.

¹² Watson A, *Legal transplants an approach to comparative law*, 23.

Kahn-freund envisions a two-step process in the determination of the viability of a legal transplant.¹³ It begins with ascertaining the relationship between the legal rule to be transplanted and the socio- political structure of the donor state. Thereafter, the socio-political environment of both the receiving and the donor state is compared.

In selecting Norway as the comparator country for this thesis, the key aim was to examine a country with a successful track record of Local Content implementation, especially through the hybrid approach. The choice of Norway amongst forty other possible oil and gas producing countries with Local Content policies is influenced by the ease of access to its governance instruments on Local Content, which are heralded as some of the best worldwide; its historically active levels of oil and gas activity as well as the fact that it has had a successful track record of a hybrid approach to Local Content implementation.¹⁴ An indepth assessment of the scope and content of Norway's Local Content law made it possible for consious conclusions to be drawn on what represents international best practices on the implementation of a hybrid approach to Local Content for Kenya.

In the natural resource governance index Norway ranks higher than Kenya.¹⁵ In the case of a legal transplant, a transplant happens from a developed legal system to a less developed legal system. Hence, using this alone as a basis, it is safe to conclude that Norwegian law can provide adequate lessons on Local Content design and implementation in Kenya.

1.4 Research Objectives

The overall aim of this research is to show how Local Content regulations in Kenya can be implemented and streamlined through a hybrid approach that harnesses the strengths of both legal and contractual frameworks in order to minimize disputes through targeted Local Content obligations. Notably, this study aims to:

1. Understand the legal structures underlying Local Content requirements introduction in Kenya's oil and gas exploration in order to establish the existing loopholes.

¹³ Kahn-Freund O, 'On Uses and Misuses of Comparative Law', 37(1) *Modern Law Review*, 1974.

¹⁴ UNCTAD, *Local Content Requirements and The Green Economy*, UNCTAD/DITC/TED/2013/7, https://unctad.org/en/PublicationsLibrary/ditcted2013d7_en.pdf on 5 May 2020

¹⁵ National Resource Governance Institute, *Resource Governace Index*, 2017 <https://resourcegovernanceindex.org/> on 24 March 2020

2. Analyze whether regulating Local Content through law alone meets international best practice by drawing lessons from Norway which has adopted a hybrid approach to Local Content.
3. Analyze the feasibility of a legal transplant from Norway that has adopted a hybrid approach with some success.

1.5 Hypothesis

1. A legal transplant of the hybrid approach would lead to the successful realization of Local Content in Kenya's extractive industry.
2. Regulating the Local Content policies through a hybrid approach could correct market weaknesses such as inadequate access to the necessary knowledge, technology, and capacity of the locals to participate in an open market.

1.6 Research Questions

In achieving the study objectives, the study aims to answer the following broad questions.

1. Are there practical and implementation gaps in current legal and institutional framework governing Local Content in Kenya?
2. Do the statutory regulatory and compliance mechanisms in Kenya effective in implementing legal content?
3. Is a transplant of the Local Content implementation structure in Norway feasible for Kenya?

1.7 Literature Review

This section explores existing literature on Local Content with an explanation incorporated of how researchers have defined Local Content as a concept. At present Local Content is being used by both developed economies in the mould of Norway, Australia and United Kingdom as well as by emerging economies. Understanding Local Content is therefore imminent in the sense that it is the gateway to an elaboration of contractual provisions, laws, and policies that prioritizes domestic workforce programs.

Two decades ago, the world started witnessing tremendous growth in the mining sector due to the increase in the prices of extractives¹⁶. However, this increase in resources has led to the emergence of conflicts due to the social¹⁷, economic, and political turbulence caused by mining. The conflicts experienced not only in Turkana but also in other countries are attributed to weak Local Content regulatory mechanisms. The uncertain regulatory mechanisms gave a chance to investors to overuse the local resources with the residents not benefiting. It, therefore, rendered the extraction inadequate in terms of sustainable contribution to the local employment or income generation¹⁸.

Gillian Moon¹⁹ and Sornarajah, in support of resource sharing state²⁰ claim that Local Content laws are a foolproof method through which developing countries can attain economic goals. Through an assessment of Local Content policies in oil and gas, producing countries can evaluate the presumed advantages of FDI in the host country, ensuring they are achieved.

Determined to increase the benefit of FDI, oil-producing counties have improved the application of Local Content laws and policies. These laws require that precedence be given to nationals, domestic companies and local citizens by foreign investors seeking to procure and supply local goods and services in petroleum operations²¹. In general, Local Content policies provide the locals with a degree of benefits from the extractive sector beyond what would be possible in the case of absence of such policies. The

¹⁶ Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing in developed countries', 45, *Resources Policy*, 2015, 80.

¹⁷ Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories' 37, *Resources Policy Journal*, 2012, 343-347.

¹⁸ Esteves, Maria A, and Barclay MA, 'Enhancing the benefits of Local Content: integrating social and economic impact assessment into procurement strategies', *Impact Assessment and Project Appraisal* 29 (3), 2011, 205-215.

¹⁹ Moon G, 'Capturing the Benefits of Trade? Local Content requirements in WTO law and the human rights-based approach to development' *University of South Wales Faculty of Law Research Series*, 2008, 8-9.

²⁰ Sornarajah M. , "The International law on foreign investment" Cambridge University Press, United Kingdom, 2004.

²¹ McKinsey Global Institute, *Reversing the Curse: Maximizing the Potential of Resource-Driven Economies*, December 2013.

local benefits discovered include the promotion of local employment, national industry participation, and skills development²².

Despite the positivity brought about by the Local Content laws, especially in providing a level playing field for locals, discontent between governments and investors exist. Job creation to local citizens and transfer of expertise and skills lead to misalignments between governments and investors as a result of the unclear and unspecific legal framework.²³ There is an often unclear policy on what amounts to local expenditures on locally sourced goods. Governments also do not always have clear cut regulations on the extent of control and regulation of IOCs. The lack of clarity and misalignment between the government and the investors can lead to significant political and legal risks.²⁴

The readiness to explore oil is not only about the infrastructure but also about the availability of regulations, laws, and legislation. Drawing from the specific examples of Ghana, Kimathi et al. ²⁵ explain that there is need to pass necessary laws that would monitor explorations. In the event where laws are insufficient due to weaknesses in compliance, contractual obligations have been applied. While at it, different countries comply differently with the set regulations. A case example is Norway, which apply contracts but with no Local Content law or regulation. The government gives preference to Norwegian-based firms if they are competitive in price, quality, and delivery.

Additionally, foreign companies are to set their subsidiaries and encouraged to employ local staff.²⁶ This, however, is possible given the Norwegian competency in terms of petroleum laws and regulations — a situation difficult for developing economies in Africa that still struggle to apply strict regulatory measures.

²²Organization for Economic Co-operation and Development (OECD), 'Local Content requirements impact the global economy' 2017 — <https://www.oecd.org/trade/topics/local-content-requirements/> on 25 June 2020.

²³Trade Arabia, 'Big boost to Saudi industries as Aramco to double local market sourcing', December 1 2015 http://www.tradearabia.net/news/IND_295936.html

²⁴ McCormick, R. *Legal Risk in the Financial Markets*, Oxford University Press, London, 2010, 1–3.

²⁵ Kuenyehia Sr K, Kuenyehia S and Kidisil A, 'Oil Regulation: Ghana', in B. P. (ed.), *Law Business Research*, Encompass Print Solutions, London, 2011.

²⁶ UNCTAD, 'Domestic Requirements and Support Measures in Green Sectors: Economic and Environmental Effectiveness and Implications for Trade', 2013—
<http://unctad.org/meetings/en/Contribution/DITC_TED_13062013_Study_WTI.pdf> on 9 May 2020.

1.7.1 Understanding Local Content

1.7.1.1 Local

The term *Local Content* is a complicated concept.²⁷ First, researchers prefer to have the word ‘local’ defined as various researchers do it differently. In North Africa, for example, a ‘local’ is a person of a particular nationality, or instead of a specific locality. It applies explicitly owning a company from but identifying with a particular nationality²⁸. Olawuyi states that, in Middle Eastern countries, locals include services offered by a locally registered entity.²⁹ The need to understand a local is crucial in the sense that their involvement in extractive economics is detrimental. Additionally, the lack of a good relationship between locals and IOCs can cause legal risks if an exploration does not receive acceptance from a local community.³⁰ Understanding the word ‘local’ therefore is crucial in the development of this research.

According to Olawuyi³¹, regimes often give preference to Local Content in terms of priority on services, consumables, enterprises, works, local enterprises, and local goods. Most governments do not provide choice to the definition of the word *local*, and therefore it creates a considerable variation in terms of understating the broad concept of a local.

Qatar, for example, contextualizes a ‘local’ has a national, owning a company and in control of it.³² It is often called ‘Qatarisation’ policy, and the key is to nationalize Local Content policies to increase the social skills and competencies among the Qatari personnel. Qatar's regime aims to ensure that qualified nationals get the first consideration in terms of employment, and adequate provision is offered to the nationals to be better qualified for a job. A local in the country, therefore, is explained in terms of nationality rather than in terms of a locality or region. On the other hand, Norway and Nigeria adopt a rather expansive form of definition, which includes the services offered by locally registered companies and employment of the workforce

²⁷ Damman S, Akon-Yamga G and Mohammed KS, Developing Local Content: knowledge, attitude and practice among Ghanaian supply companies’ *SINTEF -STEPRI Report*, 2011.

²⁸ Olawuyi DS, ‘Local Content requirements in oil & gas contracts: Regional trends in the Middle East and North Africa’, *Journal of Energy and Natural Resources Law*, 2018.

²⁹ Olawuyi DS, ‘Local Content requirements in oil & gas contracts.

³⁰ World Bank, ‘*Human Capital for the Oil, Gas and Minerals Industries*’ Science, Technology, and Skills for Africa’s Development, 2014.

³¹ Article 23, *Development and Production Sharing Agreement*, 2002, State of Qatar.

³² In Kingdom Total Value Add (IKTVA) program 2011— <https://iktva.sa/> on 12 March 2020.

locally available. The local man-power includes nationals and residents.³³ The expansive definition of a 'Local' means a subnational jurisdiction, where the real extraction occurs rather than the nationality of the provider of the goods, services or labour. Norway for instance, expressly specifies that traditional owners and indigenous communities must have preferential opportunities for employment.³⁴

According to the World Bank,³⁵ the distinction of the term local is essential since no proper definition may create a legal risk if not well handled or clarified. As it has happened with the Tullow oil exploration, where agitation arose from the local community due to no proper agreements between the IOCs, the locals, nationals, expatriates, avoiding the fragile disagreements is crucial. Direct partition of the TOs and ICs in running the extractive operations should get the priority from the governments and interested stakeholders.³⁶

1.7.1.2 Local Content

Local Content has varied definitions depending on the intention of use or purpose. This thesis adopts the definition by Financial times as "the materials, parts, etc. that have been made in that country rather than imported. A minimum level of Local Content is sometimes a requirement under trade laws when giving foreign companies the right to manufacture in a particular place."³⁷ Precisely explained, Local Content is the value-added to host nations by petroleum products on top of the revenue brought in through the sale of hydrocarbons.³⁸ Additionally, the paper merges this working definition with a concept of Local Content called 'Kuwaitization.' It identifies Local Content through three stream of value activities, which include; workforce development, supply industry development, and partnership developments.³⁹

³³ Esteves, Maria A, and Barclay MA, 'Enhancing the benefits of Local Content: integrating social and economic impact assessment into procurement strategies'.

³⁴ Esteves, Maria A, and Barclay MA, 'Enhancing the benefits of Local Content: integrating social and economic impact assessment into procurement strategies'.

³⁵ World Bank, *Human Capital for the Oil, Gas and Minerals Industries*.

³⁶ Organization for Economic Co-operation and Development (OECD), 'Local Content requirements impact the global economy'.

³⁷ Financial Times, *Lexicon*, <http://lexicon.ft.com/Term?term=local-content>

³⁸ Financial Times, *Lexicon*

³⁹ Meyer KE and Estrin S, 'Local Context And Global Strategy: Extending The Integration Responsiveness Framework To Subsidiary Strategy' 4 *Global Strategy Journal*, 2014.

The definition of Local Content shows that LCRs must contain laws, policies and contractual provisions to prioritize locally manufactured and available goods, service and domestic manpower in the oil and gas value chain. LCR is designed to leverage both national economic benefits through the provision of development of local skills, diversification of economics, transfer of technology and creation of knowledge.⁴⁰

Local Content operates through policies created to promote local goods and services when, otherwise, foreign goods and services would have been preferred. These policies focus on attracting investors while at the same time clarifying the minimum levels of expectation of products and services sourcing, working with locals and investing in their value chain addition.⁴¹ This direction advantages the local economy and thus reverses the effect of ‘resource curse.’

No matter how well the Local Content is designed, it adds little value in terms of effectiveness if there are little no regulatory and compliance mechanisms. Most Local Content regulations are enforced by government agencies with jurisdiction over petroleum resources, with applications of the regulation embed on the law. Regulations by contracts are subject to court enforcement, but it’s often carried through arbitrations. The challenge that exists herein is lack of clarity on the scope of Local Content requirements in developing economies due to weak institutions or mechanisms that enforce the LCRs.⁴² Due to this developed jurisdictions are resorting to a mixture of both legal and contractual this approach is known as the hybrid approach.

1.7.2 Arguments in support of Local Content

Justifications abound why governments are increasing the use of LCPs in the oil and gas sector and the extractive industry in general. One is to correct market weaknesses.⁴³ Market weakness occurs when a country lacks the requisite knowhow, technology or capacity to take part in an open market without the assistance of foreign

⁴⁰ Organisation for Economic Co-operation and Development, Working Party of the Trade Committee, *Local Content Policies in Minerals-Exporting Countries*, 02 June 2017, 6-7.

⁴¹ Pereira E, Mathews C and Trischmann H, ‘*Local Content policies in the petroleum industry: Lessons learned*’, (631) 4 *Oil & Gas, Natural Resources & Energy Journal*, 2019.

⁴² Olawuyi DS, ‘Local Content requirements in oil & gas contracts’.

⁴³ Calmer RA, People and Sustainable Development, Offshore Europe Society of Petroleum Engineers, 2007.

companies. As a result, the local workforce cannot obtain placement because they lack the skills or training; hence they are not offered job opportunities or further education⁴⁴.

From a domestic point of view therefore, market failure is occasioned by a dearth of domestic skills among locals to enable them participate in the industry. In turn, the allocation of resources to the market is impacted.⁴⁵ Local skills can be fostered by ensuring foreign companies actively empower the local workforce to meet the technical expertise required by the industry⁴⁶. Alternatively, skills may be developed through partnership between IOCs and local companies. When this occurs, the local company gains knowledge through technology transfer from the foreign company⁴⁷. Part of the argument in favor of LCP, especially in developing countries, is that it creates jobs in the local communities and protects the nascent energy industry until it is capable of competing in the international market⁴⁸. By protecting infant industries, it presents an attractive solution as it allows enterprises to become competitive internationally by offering local companies' incentives to produce, innovate and lower their production costs over a specific period⁴⁹.

1.7.3 Arguments against Local Content

Globally, IOCs may view Local Content policies as retrogressive protectionist measures meant to give indigenous companies preferential treatment.⁵⁰ In contrast, though, African countries do not enjoy this preferential treatment due to lack of capacity, technical know-how, and financial muscle to take the risk.⁵¹ The other concern relating to Local Content is its disputation with international regulations on

⁴⁴ Calmer.R.A. 'People and Sustainable Development.'

⁴⁵ Akinrele AA, 'Transparency in the Nigerian Oil and Gas Industry', 7, *Journal of World Energy Law and Business*, 2014, 221-230.

⁴⁶ Segura Vasi AA, Zarate W, Pastor GC and Klueh UH, 'Inter Sectorial Linkages and Local Content in Extractive Industries and Beyond', International Monetary Fund, Working Paper No. 07/213, 2007, 1-23 — <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Inter-sectoral-Linkages-and-Local-Content-in-Extractive-Industries-and-Beyond-The-Case-of-So-21123>

⁴⁷ Rosenblum P and Maples S, *Contracts confidential: Ending Secret Deals in the Extractive Industries*, Revenue Watch Institute, 2009.

⁴⁸ Asiago BC, 'Fact of Fiction: 'Harmonising and Unifying Legal Principles of Local Content Requirements'', *Journal of Energy and Natural Resources Law*, 7-20.

⁴⁹ Calmer.R.A. 'People and Sustainable Development'.

⁵⁰ Hufbauer GC, Schott JJ, Cimino-Isaacs C, Viero M and Wada E, *Local Content Requirement: A Global Problem*, Peterson Institute for International Economics, Washington DC, 2013.

⁵¹ Karl TL, 'Oil-led Development: Social, Political and Economic Consequences' 4 *Encyclopaedia of Energy*, 2007, 660-670.

trade. Case in point are the concerns raised about the resulting conflict when World Trade Organization (WTO) members impose LCPs on international trade agreements, specifically the Agreements on Subsidies and Countervailing Measures (ASCM), the General Agreement on Tariffs and Trade (GATT) and Trade-Related Investments Measures (TRIMs)⁵². These trade protocols require WTO member countries to treat one another in the same way they would treat their citizens. However, these international trade tools limit the application of the LCP.⁵³ Additionally, more countries use performance requirements to attract foreign direct investment (FDI). These policies are a performance requirement as they are utilized for the creation of jobs, promoting local industry and technology transfer⁵⁴.

IOCs, however, are not happy with the use of performance requirements because they interrupt their investments, violating some trade-related investment considerations. An actual illustration, the LCP as its requirements violate Article III of General Agreements on Tariff and Trade (GATT)⁵⁵. Trade-Related Investments Measures (TRIMs), for example, prohibit the LCP requirements that mandate a specific level of domestic purchase by a company, such as the requirement of minimum targets for the participation of local companies. Therefore, LCP may go against a country's WTO undertakings⁵⁶. Hence, the LCP constrains trade by deterring foreign importation and suppressing competition between foreign and domestic companies. Its effect depends on the percentage of the LC needed and the effectiveness and efficiency of existing companies⁵⁷. Take for example a country with inefficient companies, having a higher degree of LCP hinders competition. Nonetheless, Rodrik argues that while the LCP breaches international trade agreements⁵⁸, it is crucial to developing countries in pursuing their economic development goals⁵⁹.

⁵² Nwapi C, 'Corruption Vulnerabilities in Local Content Policies in the Extractives Sector: An Examination of the Nigerian Oil and Gas Industry Content Development Act 2010', 46, *Resources Policy*, 90-94.

⁵³ Ado R, 'Local Content Policy and the WTO Rules of Trade-related Investment Measures', 2, *Journal of Business and Management Studies*, 137-145.

⁵⁴ Ado R, 'Local Content Policy and the WTO Rules of Trade-related Investment Measures'.

⁵⁵ Ado, R. 'Local Content Policy and the WTO Rules of Trade-related Investment Measures'.

⁵⁶ Ado, R. 'Local Content Policy and the WTO Rules of Trade-related Investment Measures'.

⁵⁷ Stephenson S, *Addressing Local Content Requirements in a Sustainable Energy Trade Agreement*, ICTSD issue paper 9013, 1-3.

⁵⁸ Rodrick D, *One Economics, Many Recipes: globalization, institutions and economic growth*, Princeton University Press, 2007.

⁵⁹ Rodrick D, 'One Economics, Many Recipes: globalization, institutions and economic growth'.

Also against LCP is the requirement for companies to purchase domestic inputs. Invariably, they are costlier than foreign inputs⁶⁰. The opacity in which LCP sometimes operates renders incalculable its effects on downstream operators regarding quality and price making it difficult for the responsible officials and legislators to evaluate the benefit of the LCP.⁶¹ The protection offered by LCP also insulates Domestic companies, due to the protection offered by LCP, are shielded from foreign competition. This ultimately occasions delays in adopting novel technology and goes against the aims of a healthy infant industry.⁶² Enamoured by the notion that imposing domestic labour hiring conditions on them is unfair, more so given that current domestic labour lacks the necessary skills to undertake the job, foreign companies believe that they face undue pressure and are discouraged from making further investments in the host nations⁶³.

Of consequence to the above is the susceptibility of LCP to corruption, which is yet another argument against LCP. While touted as a policy purposed to aid oil-rich countries benefit from their natural resource, if LCP is not implemented correctly, it opens avenues for corrupt practices. Government policies are vulnerable to corruption, especially in the area of trade and investment policies⁶⁴. Furthermore, the reason for adopting LCP might be aligned with the investors, local elites, and public officials' interests rather than benefitting the nation⁶⁵. This may further minimize competitive solutions to problems.⁶⁶

A number of the new oil-producing nations have shallow tax bases, pushing the reigning political elites there towards alternative sources of income to leverage for political loyalty. Here the LCP discourages local capacity development and promotes

⁶⁰ Rodrick D, 'One Economics, Many Recipes: globalization, institutions and economic growth'.

⁶¹ Cimino C, A Proposed to Disciple Local Content Requirement. Peterson Institute for Economic Policy, Brief Number PB 4-6 , Washington DC, 2007.

⁶² Cimino, C. 'A Proposed to Disciple Local Content Requirement'.

⁶³ Nwaokoro JE, 'Signed, sealed but will it deliver? Nigeria's Local Content bill and cross-sectoral growth', 4(1), *Journal of world energy law and business*, 2011, 45-63.

⁶⁴ Nwaokoro, J.E. 'Signed, sealed but will it deliver? Nigeria's Local Content bill and cross-sectoral growth.'

⁶⁵ Esteeves AM, Coyne B and Moreno A, Local Content Initiatives: Enhancing the Sub-National Benefits of the Oil, Gas and Mining Sectors, Revenue Watch Institute, 2013.

⁶⁶ Marcel V, Tissot R, Paul A and Omonbude EA, *Local Content Decision Tree for Emerging Producers*, Chatham House, 2016.

*rentier capitalism*⁶⁷. Furthermore, the LCP can create delays and increase the cost of projects that are contingent on the market forces of supply and demand in the local economy.⁶⁸

The motivation of this study is to provide host communities, international oil companies, and the government guidelines on how to successfully develop and implement Local Content regulations, strategies, and policies through the armpit of public participation.

1.8 Approach And Methodology

This research being a doctrinal legal research the questions raised will be answered through extensive review and synthesizing of primary and secondary sources. Most of the primary material that this study relies on will be drawn from the Constitution, Acts of Parliament as well as executive policy documents. Additionally further information will be derived from case law. Secondary sources information used in this study will be obtained from text books, scholarly articles, and where it is practicable to do so, international instruments.

1.9 Chapter Breakdown

To pursue this research extensively and conclusively, the author will break it down into the six chapters. This chapter, **Chapter one**, has provided a general background of the gaps the author seeks to fill and how to fill them through the various approaches. The thesis critically analyses multiple past scholarly works, which are in tandem with this discourse.

Chapter two will define Local Content and introduce the concept of a Hybrid approach to Local Content to ensure maximum implementation of Local Content in Kenya

Chapter three will analyse and examine the key strengths and gaps in legal frameworks on Local Content in Kenya. It unpacks the key practical challenges associated with the effective implementation of Local Content policies in Kenya, especially lack of adequate opportunities for stakeholder participation in framing Local Content outcomes.

⁶⁷ Martini M, Local Content Policies and Corruption in the Oil and Gas industry, Transparency International, 2014.

⁶⁸ Cimino C, A Proposed to Disciple Local Content Requirement.

Chapter four will look at the best practice through benchmarking with the Norwegian jurisdiction, to identify positive Local Content milestones that can be transplanted in Kenya to ensure successful Local Content outcomes. This chapter will form a basis for recommendations of Kenya’s Local Content strategy

Chapter five will outline the recommendations and conclusions.



Chapter 2 : The Hybrid Approach To Local Content

2.1 Introduction

The aim of this chapter is to define Local Content and introduce the concept of a hybrid approach to Local Content to ensure maximum implementation of Local Content in Kenya.

The chapter defines what Local Content is as well as what it appertains. The chapter goes ahead to explain what a hybrid approach is and why it is the best approach for the Kenyan situation.

2.2 Definition Of Local Content

Local Content in the Kenyan context is articulated as:

“the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available workforce, services and suppliers, for the sharing of accruing benefits”.⁶⁹

Generally defined, Local Content connotes the extent to which the output of the extractive industry sector benefits the local communities; aside from its direct economic contribution through productive linkages with other sectors.⁷⁰ The link is created through the use of local goods, employing local labour and the transfer of knowledge from the company to the locals through .⁷¹ Strategies employed by the State in the adoption of Local Content vary. One such strategy involves making it a legal requirement through legislation and including in the contract. Another is by the insertion of a contractual clause requiring the development of local environment and the promotion of corporate social responsibility. Primarily though, States apply Local Content concepts through adoption of a legal and regulatory framework that encompasses Local Content.⁷²

⁶⁹Section 2, *Petroleum Act* (Act No. 2 of 2019). Section 2, *Energy Act* (Act No. 1 2019).

⁷⁰Tordo S, Warner M, Manzano O and Anouti Y, Local Content policies in the oil and gas sector, World Bank Study, Washington, DC Bank, 2013— <https://doi.org/10.1596/978-0-8213-9931-6> on 23 April 2020

⁷¹Auty R, ‘Mining Enclave to Economic Catalyst: Large Mineral Projects in Developing Countries’, *Brown Journal of World Affairs*, 2006, 135-145.

⁷² Olawuyi DS, ‘Local Content requirements in oil & gas contracts.

The need for involvement of locals in upstream petroleum operations can create a delicate relationship between IOCs and the locals.⁷³ Legal risks may arise for IOCs in situations where it is hard to find an acceptable standard for the required goods and services from the local workforce, despite the fact that LCRs that are designed to recognise and prioritise nationals may provide a mechanism for addressing this fragility.⁷⁴ According to Olawuyi, higher costs of production of local goods and their relative scarcity could lead to project delays and cost inflation for the investor, especially where the ‘local’ is conceptualized in term of nationality.⁷⁵ Most investors are however keen on maintaining social stability within the host communities and are therefore motivated to acquire the social license to operate, than dwell on the loss resulting from the aforementioned trade offs.⁷⁶ Olawuyi asserts that such tradeoffs can be managed with better flexibility in a model where the Contractor, where possible, give first consideration to locally manufactured or locally available goods. This allows a contractor to consider other categories of locals for operational reasons, or when qualified locals or service providers are not available. Such a model is seen in the Qatari PSC.

LCPs aim to encourage the use of Local Content where ordinarily an industry would source for goods and services from foreign sources. Not only do they seek to attract investors into the relevant host nation industry but also notify them of the basic level at which they would be required to operate in conjunction with local companies should they chose to invest.⁷⁷ LCPs seek to foster the training and employment of host country nationals within the industry, as well as technology transfer through mutual assistance.⁷⁸

The conventional perception of LCPs is that they encourage the economic growth of the host nation through promotion of foreign investments. They are contemplated as a means of job creation for locals, furthering the development of entire new industries

⁷³ World Bank, *Human Capital for the Oil, Gas and Minerals Industries*.

⁷⁴ World Bank, *Human Capital for the Oil, Gas and Minerals Industries*.

⁷⁵ World Bank, *Human Capital for the Oil, Gas and Minerals Industries*.

⁷⁶ World Bank, *Human Capital for the Oil, Gas and Minerals Industries*.

⁷⁷ Pereira E, Mathews C & Trischmann H, ‘Local Content policies in the petroleum industry: Lessons learned’, (631) 4, *Oil & Gas, Natural Resources & Energy Journal*, 2019.

⁷⁸ International Petroleum Industry Environmental Conservation Association (IPIECA), ‘Local Content strategy: A guidance document for the oil and gas industry’ 6th January 2020—<http://www.ipieca.org/resources/good-practice/local-contentstrategy-aguidance-document-for-the-oil-and-gas-industry-1st-edition> on 27 March 2020.

as well as to build technological capabilities for the host nation.⁷⁹ LCPs are grounded on maximizing domestic employment, fortifying the local economy, and aiding the host country ease its dependence on foreign capital and expertise.⁸⁰

The requirement, through LCPs, that international companies to purchase goods and services from local businesses helps broaden the host nation's economic base.⁸¹ The effect is to cushion the host nation in the event international commodity prices crash. Thus preventing debilitating losses, more so where export revenues for domestic resources decrease while their cost of production remains the same.⁸² Through expansion and diversification touted by LCPs, a nation's overall economic development is precipitated, hence alleviating the effects of the so-called "Dutch disease" where an unchecked expansion of the natural resource sector overwhelms other sectors of the domestic economy.

2.3 Obligations Matrix

Extractive industries having been surveyed, with cases of Norway, Qatar, and Nigeria on the fore, have key variations in terms of approaches towards LCRs. These variations are pegged on the definition of Local Content, role of the governments/oil companies, monitoring, and coordination of LCRs and source of domestic content obligations.

Extractive countries have codified LCRs through a legislative, contractual and hybrid approach. The researchers seek to explain these approaches as source of Local Content obligations using cases of Norway, Qatar, and Nigeria.

2.3.1 Legislative Approach

Obligations relating to LCRs in the legal approach are stipulated in legislation, regulations, guidelines and government directives. In Nigeria and Norway, legislations are comprehensively enacted on Local Content, and therefore providing a

⁷⁹ Pereira E, Et al, 'Local Content policies in the petroleum industry: Lessons learned'.

⁸⁰ Marcel V, Tissot R, Paul A and Omonbude EA, *Local Content Decision Tree for Emerging Producers*, Chatham House, 2016.

⁸¹ Marcel V, Tissot R, Paul A and Omonbude EA, *Local Content Decision Tree for Emerging Producers*, Chatham House, 2016.

⁸² International Monetary Fund (IMF), 'Economic diversification of oil-exporting arab countires' Annual Meeting of Arab Ministers of Finance in Manama, Bahrain, April 2016—<https://www.imf.org/external/> on 17 May 2020.

clear meaning on scope and nature of LCRs on petroleum operations⁸³. The legislative approach gives certainty and clarity in terms of expectations and offers limited opportunities on LCRs negotiations in case-by-case basis. A threshold legislated may work in one project but inappropriate and irrelevant in another project.

2.3.2 Contractual Approach

In contractual approach, obligations on the LCR are expressly codified in the MDAs, PSCs, CDAs, and indigenous industry agreements such as community agreements, indigenous land use agreements, and impact benefit agreements. Under the contractual approach, the LCRs are enshrined in domestic legislation and regulations, but laid on a case-by-case basis in petroleum contracts that explains the extractive community's expectation in respect to employment and value addition. The agreements further explain the expectations in terms of capacity development, procurement of goods and training for the local community's owned business.

The contractual approach provides a flexible opportunity for communities to negotiate on opportunities on case by a case-by-case basis, but the challenge is that the scope and content of the LCRs may change when the community renegotiates on them. Most emerging economies enter into partnership with oil companies due to enormous economic problems and infrastructural deficits. For example, most African countries in collaboration with local communities have consented to contract to regulate Local Content.⁸⁴

2.3.3 Hybrid Approach

The legislative and contractual approach suffer risks such as 'non-discriminative obligations' where countries may not be forced to buy from local suppliers if there is a better alternative in price and quality. To cushion itself, Norway has leveraged both legislative and contractual approaches for a hybrid source of obligation. The Norwegian hybrid approach increasingly has a mix of legal and contractual obligations on LCRs. Legislatively, the LCRs are comprehensively codified in Local Content, which clarifies the threshold on employment, procurement of goods and services and training provisions in all extractives in Norway. To certainly mitigate risks of

⁸³ Esteves MA, Coyne B, and Moreno M, 'Local Content initiatives: Enhancing the subnational benefits of the oil, gas and mining sectors' *Natural Resource Governance Institute*, 2013.

⁸⁴ Bazilian M, Onyeji I, Aqrabi, Sovacool BK, Ofori E, Kammen DM, and Van de Graaf T, 'Oil, Energy Poverty and Resource Dependence in West Africa', (1)31 *Journal of Energy & Natural Resources Law*, pp. 33-53.

legislations in terms of uncertainty and misalignment; timeline and reporting provisions are contractually negotiated case-by-case basis, between the extractive industry and indigenous stakeholders. Such clarity, based on contracts are factored in the state agreements on extracts and often used in Norway.

2.4 Nature, Scope And Drivers Of The Hybrid Approach

Key drivers of Local Content Policies in Kenya research has shown that Local Content either in form of policies, laws, regulations, contracts clauses and initiatives, remain an investment challenge and a legal test to both governments and business operating in the petroleum sector.⁸⁵ Rigid legal and ambiguous institutional frameworks hinder governments and business practices in the petroleum sector. However, there are various factors that drive oil and gas producing countries to adopt LCRs in their petroleum sector despite the legal test. This section aims to answer the question ‘what drives Kenya to adopt Local Content requirements in its petroleum sector?’

2.4.1 Increasing Domestic Capabilities and Competencies

In many resource rich countries, local industries diminished experience and technological capacity to effectively undertake petroleum operations means IOCs are often brought in to bridge the gap.⁸⁶ Olawuyi opines that LCRs emanate from the basis that local workforce and industries should over time develop the capacity to sustain and drive the oil and gas value chain without having to resort to imported goods and foreign-based labour.⁸⁷

LCRs in Kenya emphasize the desire and need for IOCs to incorporate practices that encourage the development of a better-trained, qualified local workforce over the period of the petroleum contract. Section. 50(3) Petroleum Act (2019) states that a person carrying out works under the Act shall submit an annual Local Content plan that includes a list of consumables. Generally, all Local Content laws in Kenya’s Petroleum industry mandate IOCs to give preference to local goods, services the relevant skills needed in the industry.

⁸⁵Asiago BC, Wasuna MK, ‘Are Local Content requirements in developing petroleum sectors sustainable? Managing expectations while aligning sustainable principles with regulatory policy.’ *Oil, Gas & Energy Law Intelligence (OGEL)*, 2018.

⁸⁶Muller T, and Schitzer M ‘Technology transfer and spillovers in international joint ventures’, Discussion Paper No. 2003–22, 2003.

⁸⁷Olawuyi DS, ‘Local Content requirements in oil & gas contracts.

IOCs have a responsibility to give due and proper consideration to preferring locally-sourced services where the goods meet the relevant specifications as prescribed by KEBS or in the absence of a KEBS standards, other internationally accepted standard.⁸⁸ LCRs also mandate the IOC to prepare plans and programs for training and educating nationals during the term of the contract.⁸⁹ This is meant to enhance the capability of the domestic workforce overtime.⁹⁰

2.4.2 Creating a Level Playing Field

If resource rich countries do not create a level playing field for new or emerging local industries and workforce to participate in upstream petroleum operations, they will remain dependent on foreign good and services, effectively unable to compete with foreign suppliers.⁹¹ LCRs therefore aim to ensure that domestic industries are given an opportunity to compete with foreign suppliers.⁹² For example, the LCB emphasises the need to create a level playing field for domestic participation in procurement of goods and services by requiring an operator to maintain a bidding process which provides a fair opportunity to local persons to participate in the process.⁹³ The Bill further proposes that an IOC should ensure equal treatment of local persons and accord fair opportunity to local companies to compete in the bidding process of projects in the industry.⁹⁴ The Bill further proposes a requirement on the IOC to give preference to local persons where the price differential does not exceed 10% of the bidding price quoted by a foreign entity.⁹⁵ The aim is to provide a level playing field for domestic industries to participate in oil and gas activities.

2.5 Designing Optimal LCRs

This section examines the core elements of an effective Local Content regime. Understanding what constitutes a good and effective Local Content policy can help us properly analyse and unpack the strengths and pitfalls of current approach to Local

⁸⁸ Section 50-51 Petroleum Act (Act No. 2 of 2019) and Section 206 Energy Act (Act No. 1 of 2019)

⁸⁹ Section 50(3) Petroleum Act (Act No. 2 of 2019) and Section 206(4) (a) of Energy Act (Act No. 1 of 2019).

⁹⁰ Olawuyi DS, 'Local Content requirements in oil & gas contracts'

⁹¹ Tordo S et al, Local Content policies in the oil and gas sector, 115-117.

⁹² Olawuyi DS, 'Local Content requirements in oil & gas contracts'

⁹³ Section 41(1), Local Content Bill (2018).

⁹⁴ Section 41(3), Local Content Bill (2018)

⁹⁵ Section 41(3) Local Content Bill (2018).

Content implementation in Kenya. An effective LCR must exhibit a host of features, including the ones that follow in the discussion below.

2.5.1 Inclusive Hiring

An effective LCR should ensure that an oil company, in their human resource procurement hire locals to be part of their employees. However, requiring companies to hire locally while there are no qualified personnel with the skills required for the job cannot work. The government should therefore set up programmes and trainings to ensure that there are personnel among the locals with the skills on both the extraction and manufacturing work. With this, the locals will have increased value to be employed in the Oil and gas sector.

The government should cater the cost of training as that will serve as an incentive for the IOC's to hire the locals as they do not carry the full financial burden of training the locals.

2.5.2 Local Procurement

There should be in place policies requiring the consideration and prioritization of locals in the procurement process. Such a policy should be aimed at ensuring that the Local Content in bids and the awarding of contracts is assessed to ensure that contracts are awarded to local firms save for situations where the local firms lack the capacity to deliver on the contract even where it is slightly more expensive for IOCs.

The percentage of local products required influences the impact LCRs will have. For maximum value addition to the host economy, there should be a gradual introduction of LCR. There should be a balance between the percentage of Local Content required, the size of the green industrial sector and the opportunity cost of capital.

2.5.3 Data must inform policy

The government must research on the Local Content needs before coming up with policy to ensure that the interventions by the government are informed by up to date accurate data. The research should be aimed towards obtaining detailed information on both the needs of the locals and the IOCS as well as the supply chain. The areas of research focus should be:

- a) Revenue sources
- b) Business opportunities

c) Employment opportunities and needs

This ensures that the government policies are strategic and effective.

2.5.4 Definition of local

The definition of “local” must match the government’s primary policy goal In order to ensure that government intervention is strategic

2.5.5 LCRS should be in line with other policies

It is imperative for government to remain aware that LCP exists and that it is heavily influenced by other policies. Government should therefore remain open to other policy improvements that might be more direct than LCP.

2.5.6 Emphasis on employee training on site

Finally, LCRs will be more valuable if there is a high learning-by-doing potential, or if they do not overemphasize manufacturing portions of the value chain, but also target training-by-doing to establish high-skilled workers.

2.6 Maximizing Economic Benefits

All legislative and contractual provisions on Local Content in Kenya’s oil and gas industry mandate IOCs to prioritise employment of suitably qualified Kenyans.⁹⁶ The intention is to create opportunities for local employment and contribute to growth in income, capacity development and the overall increased economic growth.⁹⁷ Local employment is among the topmost concerns for citizens, and it is an issue that often drives disputes, grievances and conflicts between locals and IOCs.⁹⁸ Employing citizens and members of the host community where petroleum activities are conducted, can improve company-community relations, enabling IOCs to obtain the social license to operate.⁹⁹ Local Content can help compensate afflicted communities through job creation and value addition in the communities, given the adverse impacts of petroleum operations on the host communities.¹⁰⁰ These provisions mandate IOCs

⁹⁶ Section 50(1) Petroleum Act (Act No. 2 of 2019); Section 206 (3) (b) Energy Act (Act No. 1 of 2019); Clause 20 of Kenya’s Model Production Sharing Agreement (2019)

⁹⁷ Olawuyi DS, ‘Local Content requirements in oil & gas contracts’.

⁹⁸ Ovadia J, ‘The role of Local Content policies in natural resource-based development’, *Österreichische Entwicklungspolitik Rohstoffe Und Entwicklung*, 2015, 37-38.

⁹⁹ Tordo S, Tracy B, and Arfaa N, ‘National oil companies and value creation’ World Bank Working Paper 218, 2011, 1-10; See also, ‘Human capital for the oil, gas and minerals industries’ Science, Technology, and Skills for Africa’s Development; also Esteves & Barclay, ‘Enhancing the benefits of Local Content’.

¹⁰⁰ Ado R, Local Content Policy and the WTO Rules on Trade-Related Investment Measures.

to submit Local Content plans with a technology transfer plan in order to develop skills and capacity of local persons and enterprises to prepare an implement strategies and plans for technology transfer with local enterprises to provide credible measurable plans on increment and transfer of technological know-how to locals.

2.7 Improving National Technological Capacity

The law mandates the development of technology transfer programs by contractors to promote the local transfer of technology and skills on upstream petroleum operations.¹⁰¹ The aim of these programs is to have local specialized technical management and professional skills relevant to upstream petroleum operations.¹⁰²

Mandating the use of local technology in petroleum operations compels IOCs to put more investment towards technologies and facilities for local manufacturing and service provision.¹⁰³

2.8 Managing Social and Political Risks for Equitable Distribution of Wealth

An ever increasing demand for equitable distribution ‘oil wealth’ inevitably leads to an increase in the associated social and political risks. These can be better managed and mitigated through LCRs.¹⁰⁴ Locals may not see what they may regard as tangible benefits of the oil resources despite the subsidy programmes designed to increase the direct financial flows of oil wealth to nationals and this may result to conflicts and pressure from locals to the government to increase more tangible benefits.¹⁰⁵ Most resource rich countries have used LCRs as a tool to mitigate such conflicts by requiring that IOCs bring jobs and income to communities where there is considerable dissatisfaction with the presence of the oil and gas operations.¹⁰⁶ To avoid unnecessary pressure and conflicts, Kenya should ensure that its LCRs are specific to the needs of

¹⁰¹ Section 50(3) (c)Petroleum Act (Act No. 2 of 2019; Section 206(4)(c) Energy Act (Act No. 1 of 2019).

¹⁰² Clause 23, Kenya Model PSC.

¹⁰³ Muller T, and Schitzer M ‘Technology transfer and spillovers in international joint ventures’, Discussion Paper No. 2003–22, 2003.

¹⁰⁴ Cook M and Mahdavy H, ‘The pattern and problems of economic development in rentier states: The case of Iran’, *Studies in the Economic History of the Middle East: From the Rise of Islam to the Present Day*, Oxford University Press, 1970, 435-436.

¹⁰⁵ Hanlin C, ‘The drive to increase local procurement in the mining sector in Africa: Myth or reality?’ Discussion Paper No 4, Making the Most of Commodities Programme (MMCP), 2011.

¹⁰⁶ Ovadia J, ‘The role of Local Content policies in natural resource-based development’.

the local person and ensure that access to the control of oil wealth is evenly distributed among the interest groups and tribes across the country.¹⁰⁷

2.9 Conclusion

Sustainable development and the uplifting of the standards of living of host communities can be achieved through the sustainable management of oil and gas resources. That being said, a considerable number of petroleum operations occur in jurisdictions with several structural and governance challenges. Common issues are an ineffective or virtually non-existent legal and regulatory framework juxtaposed against an increased expectation of employment and economic development by the host community. This scenario is made worse by runaway corruption and unethical practices by public officers. These challenges result in an inequitable distribution of both employment opportunities and benefits accruing from the oil and gas industry. In the end, the resultant tensions precipitate conflict in varying degrees, from community protests to actual armed struggle for the control of natural resources.

This chapter has demonstrated that the nature of Local Content requires LCPs and LCRs to prioritise local employment, skills development, technology transfer, locally manufactured and/or available goods, services in the procurement of goods and services required in the oil and gas value chain in order to achieve economic benefits.

While the revenue deriving from petroleum operations may be quite substantial, it does not automatically lead to the creation of significant local employment or value-added opportunities.¹⁰⁸ The legal transplant of the hybrid approach will ensure that the people derive full benefit from the mining operations. It is also important for the country to have a framework that provides clarity and certainty for efficient monitoring and enforcement.

¹⁰⁷ Olawuyi DS, 'Local Content requirements in oil & gas contracts.

¹⁰⁸ Tordo Et al, Local Content Policies in the Oil and Gas Sector, 23-26.

Chapter 3: The Legal Framework Of Local Content In Kenya: Analysis Of Strengths And Limitations

3.1 Introduction

In this chapter, I attempt to analyse and examine the key strengths and gaps in legal frameworks on Local Content in Kenya. This is done by unpacking the main issues that constrain the effective implementation of Local Content policies in Kenya, especially lack of adequate opportunities for stakeholder participation in framing Local Content outcomes.

Recently, through the exploration activities of Tullow Oil, Kenya has discovered that it holds commercially viable oil reserves. As a result, thereof, Kenyan Citizens desire to get the maximum benefit obtainable from the exploitation and mining of the oil. Of specific interest are the residents of the areas where the oil has been discovered are intent on accruing maximum benefit from the oil exploration. Legislation has therefore been enacted to cover Local Content in Kenya, it these legislations that we will be examining and auditing.

3.2 Monitoring And Enforcement Of Local Content

Under the Constitution, minerals and mineral oils are categorized as part of public land, held in trust for the people of Kenya by the National Government and administered by the National Land Commission.¹⁰⁹

The concept of Local Content is therefore imperative in order to ensure that the residents derive and accrue maximum benefit possible from the production of oil and incidentally gas.

No matter how well-designed a Local Content policy is, without an effective enforcement mechanism to support it, it will flounder. In most cases, LCP enforcement is by a national energy ministry or other government agencies with jurisdiction over petroleum resources. Contractual provisions embodying LCRs may be subject to enforcement by courts. One of the reasons for lack of clarity on the scope of Local Content requirements in most countries is that, while many countries stipulate LCRs

¹⁰⁹ Article 62, Constitution of Kenya (2010).

and LCPs, very few establish strong institutions or mechanisms for monitoring and enforcing such requirements.¹¹⁰

Other than overseeing compliance, the application of sanctions and rewards, as the case may be, is another tool for enforcement. Take the case of Angola where contracts that violate the Local Content rules can be declared null and void. In addition, fines may be imposed on non-compliant firms. If a non compliant firm has not paid the fines due, it is ineligible for new contracts.¹¹¹

Another approach is to instead of focusing on punitive measures for noncompliance, offer incentives for higher compliance with a country's LCPs. Where this is done properly, a government creates a cooperative business environment that in turn leads to behaviour that exceeds expectations.¹¹²

Whereas rewards and sanctions may seem logical and effective they may pose challenges of their own. Questions arise as to the level of sanctions to be applied. Should a penalty be deemed too low, it risks becoming an accepted 'cost of doing business' rather than effective tools for securing compliance. Conversely, excessively punitive sanctions may lead to IOCs moving their operations to favourable locations. Worse still, where they chose to remain, IOCs may resort to avoiding compliance through unscrupulous methods such as bribery. Rewards for good behavior must be tailored with an outlook of avoiding the risk of the host government 'giving away' more than necessary to secure the benefits of its policies.¹¹³

3.3 An Evaluation Of Legal And Policy Frameworks On Local Content In Kenya

The legal framework underlying Local Content regulation in Kenya constitutes laws, regulations, contracts and a Bill proposed to manage LCRs. This part analyses Local Content requirements in laws, regulations, contract as well as the proposed Bill in order to develop a clear understanding of the legal and institutional framework within which the government of Kenya seeks to introduce Local Content requirements.

¹¹⁰ Olawuyi DS, 'Local Content requirements in oil & gas contracts'.

¹¹¹ Toledano P, Mandelbaum J and Thomashausen S, eds. 'Local Content: Angola – petroleum' Columbia Center on Sustainable Investment, <http://ccsi.columbia.edu/files/2014/03/Local-Content-Angola-petroleum-CCSI-July-2014.pdf> on 12 January 2020.

¹¹² Pereira E, Et al, 'Local Content policies in the petroleum industry: Lessons learned'.

¹¹³ Pereira E, Et al, 'Local Content policies in the petroleum industry: Lessons learned'.

3.3.1 The Constitution

The Constitution is the foundation for management of resources in an expansive Bill of Rights, which is the framework for all economic, social and cultural policies.¹¹⁴

The Constitution has provisions on land that are crucial in upstream petroleum operations.¹¹⁵ Despite mineral resources being vested in the National government to be held in trust for all Kenyans the surface land and the properties appurtenant thereon is the property of the host communities.¹¹⁶ Minerals resources are used strictly for the benefit of the beneficiaries, the primary ones being the host communities.¹¹⁷

The Constitution enjoins the National Government to ensure the exploitation, utilisation, management and conservation of mineral resources is done in a sustainable manner.¹¹⁸ Further, the State has to ensure equitable sharing of accruing benefits.¹¹⁹ In the context of Local Content, the Constitution requires Parliament to enact legislation to govern the exploitation of natural resources while making sure that investments in property benefit local communities and their economies.¹²⁰ To this end, legislation has been passed by parliament to give effect to the constitutional assurances. Specifically, the enactment of the Mining Act, the Energy Act 2019, the Petroleum Act 2019 as well as the drafting and tabling of the Local Content Bill 2018 seek to enhance Local Content in the extractives industry.

3.3.2 Petroleum Act 2019

The objective of this Act is to lay down a clear framework for contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations as well as the regulation of midstream and downstream petroleum operations.¹²¹ The Act further provides for a definition of Local Content requirements and requires operators to comply with the LCRs in all operations.¹²²

Under this Act, Local Content is defined as:

¹¹⁴ Article 19(2), Constitution of Kenya

¹¹⁵ Article 63 and 64, Constitution of Kenya (2010).

¹¹⁶ Article 62(1)(f) and 62(3), Constitution of Kenya, (2010)

¹¹⁷ Article 69(1) (h) Constitution of Kenya (2010).

¹¹⁸ Article 69(2) Constitution of Kenya (2010).

¹¹⁹ Article 69(1)(a), Constitution of the Republic of Kenya (2010).

¹²⁰ Article 66(2) Constitution of the Republic of Kenya (2010)

¹²¹ Preamble, Petroleum Act, 2019 (Act No. 2 of 2019).

¹²² Section 50 (1) (a) Petroleum Act (Act No. 2 of 2019).

*“the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.”*¹²³

The Act mandates the Energy and Petroleum Regulatory Authority (EPRA) to oversee, coordinate and manage Local Content¹²⁴ and empowers the CS, in consultation with EPRA, to make regulations regarding Local Content in petroleum operations.¹²⁵ Before engaging in petroleum operations an operator is required to seek the approval of the Authority by preparing and submitting a long term and annual Local Content plan that corresponds with the work program.¹²⁶ Ideally, this plan ought to encompass the issues of employment and training, research and development, technology transfer and industrial attachment and apprenticeship. The plan must also make provision for a number of professional services including legal, financial, consultancy, construction, hospitality, transport and insurance. Moreover, it ought to include clear succession plans for positions not held by Kenyans.¹²⁷

In the context of employment and training, IOCs have to prioritise the engagement of qualified Kenyans at all levels of the value chain.¹²⁸ On procurement of local products, the Act requires IOCs to prioritise services and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by KEBS or any other internationally accepted standard.¹²⁹

Gaps in the Law

The Act does not make provision for benefit sharing and royalties to the local community. The Act should give percentages on benefit sharing with the communities. For instance, the Petroleum Act of Norway provides a framework for benefit sharing and royalties.¹³⁰

¹²³ Section 2 Petroleum Act (Act No. 2 of 2019).

¹²⁴ Section 51(1) Petroleum Act, (Act No. 2 of 2019).

¹²⁵ Sections 50(4) and 51(1)(c), Petroleum Act (Act No. 2 of 2019).

¹²⁶ Section 50(2), Petroleum Act, (Act No. 2 of 2019).

¹²⁷ Section 50 (3), Petroleum Act (Act No. 2 of 2019).

¹²⁸ Section 50(1)(c) Petroleum Act, (Act No. 2 of 2019).

¹²⁹ Section 50(1) (b) , Petroleum Act (Act No. 2 of 2019)

¹³⁰ Sections 1-2, Petroleum Act (Act No. 72 of 29 November 1996) Norway.

While the Act provides for employment of Kenyans in general,¹³¹ it lacks a framework for the engagement of the local community, which ideally ought to be paramount due to the issue of social license. As such, IOC's compliance on Local Content standards including the employment of the local community is diminished.

Under the Production Sharing Contract in the Act, Local Content provisions are negotiated between the State and the IOC.¹³² Hence, the result of such negotiation depends on the prowess of each negotiating party and each contract may result in different provisions leading to a lack of uniformity.

Finally, there is no provision for an independent regulator to monitor and enforce the relevant provisions. This has made it difficult to monitor and enforce compliance of the negotiated agreements. Compliance has not been made a license renewal requirement hence the IOCs are not compelled with dire sanctions to make compliance directly attached to the survival of the project.

The lack of a uniform compliance standard makes it uncertain for IOC's hence they can be reluctant to invest in the country, this has largely been left to be driven by the PSC negotiations. However, Local Communities have not been factored in in the negotiations.

3.3.3 Energy Act 2019

The Energy Act 2019 is intended to among other functions, regulate midstream and downstream petroleum activities. Some of the contemplated activities are the importing, exporting, transporting, refining, storing and selling of petroleum or petroleum products. The Act defines Local Content¹³³ and imposes a requirement on contractors to comply with LCRs and to submit to EPRA for approval, an annual Local Content plan which corresponds with the work program. It is a requirement under the Energy Act that the Local Content plan should ensure that priority is given to services provided and goods manufactured in Kenya.¹³⁴ The Act further provides that skilled and qualified Kenyans should be given first priority in respect to employment at all levels of the value chain.¹³⁵

¹³¹ Section 50(1)(c) Petroleum Act (Act No. 2 of 2019).

¹³² Schedule, Petroleum Act, (Act No. 2 2019)

¹³³ Section 2, Section 206, Energy Act, (Act No. 1 of 2019).

¹³⁴ Section 206(3)(a), Energy Act (Act No. 1 of 2019).

¹³⁵ Section 206(3)(b), Energy Act (Act No. 1 of 2019).

Gaps in the Law

The Energy Act while providing for the employment of members of the local community, does not give the specific percentage of locals to be employed. Additionally, the Act lacks proper guidelines as to how the locals to be employed would be subsumed into the value chains. Any number absorbed by the IOC will be taken as sufficient, this makes compliance a nightmare. This is compounded by the fact that it has not provided for an independent body to monitor and audit compliance.

Being the Act that regulates midstream and downstream activities it should provide strategic actions and incentives by the state to ensure that more Local Content qualifies to be employed by the IOCs in their manufacturing processes.

3.3.4 Mining Act

The Mining Act, 2016 provides for preference in local procurement and the employment of Kenyans. It provides Local Content requirements in terms of capacity building, equity participation, research and development. It also recognises the local community in areas where the mining industry is located. The law promotes local participation in the industry through employment, training, skills transfer, use of local goods and services and local equity participation.

Gaps in the Law

The Act does not provide for a monitoring system to ensure compliance. There are no sanctions for non compliance neither are there incentives to ensure compliance.

In this act, when it comes to the incorporation of Local Content is not a prerequisite to issuance of licenses and there is no further requirement for training of the locals.

3.3.5 Public Procurement and Asset Disposal Act, 2015

This Act promotes local procurement in public procurement and provides for the support for local industries and contractors through measures that require state bodies to make provisions for giving preference to and exclusively reserving some goods and services for local suppliers. It provides preference/priority for goods that are extracted, manufactured, and grown in Kenya. It establishes a Public Procurement Regulatory Authority, which is required to ensure that state entities and all those involved in spending state money or in the disposal of state assets promote and adhere to Local Content and participation requirements in their procurement procedure.

Gaps in the Law

The Act governs MDAs and Public Entities only and it is not specific to the Oil and gas Industry thus not binding to private companies, whereas IOCs private companies.

3.3.6 The National Construction Authority Act (National Construction Authority Regulations) 2014

Under this Act and its attendant Regulations, registration applications by foreigners must be coupled with an undertaking that the contractor will enter into a joint venture with a local company or person for not less than 30% of the contract value and transfer technical skills to a local community or person.¹³⁶

The Model PSC requires IOCs together with their subcontractors to where possible, employ Kenya citizens in upstream petroleum operations and train citizens until the expiry or termination of the contract.¹³⁷ The Model PSC also requires IOCs to give preference to Kenyan service providers.

Gaps in the law

The Act is specific to construction hence does not cover all the facets of downstream oil and Gas transactions and therefore does not set a requirement for training and skill development, Further, this act does not set a requirement for consultation of the local communities.

3.3.7 Kenya National Trade Policy, 2017

Kenya National Trade Policy, 2017 promotes in-country value addition to promote an export led globally competitive economy. This is aimed at providing opportunities for expanded markets, increased employment, income generation and distribution and, improved competitiveness. It recognizes that Kenya's trade and investment can only thrive if local industries are globally competitive.

Gaps in the law

It is not specific to the oil and gas industry and it is limited to the trade of oil and gas and its extraction. Therefore, a policy is not legally enforceable when not legislated or put in contract hence need of an extra step for enforceability.

¹³⁶ Regulation 12(3), National Construction Authority Regulations, 2014.

¹³⁷ Clause 20 Model PSC, Schedule, Petroleum Act (Act No. 2 of 2019)

3.3.8 Mining and Minerals Policy Sessional Policy No.7 of 2016

Mining and Minerals Policy Sessional Policy No.7 of 2016 provides for Local Content requirements for goods and services for the mining sector and in supporting industries. The policy's focus includes local equity participation in investment in the mining sector as one of its objectives. It provides for maximisation of mining benefits through use of local goods and services by promoting horizontal/lateral and vertical/backward & forward linkages in the mining industry.

Gaps in the law

When it comes to policy, is not legally enforceable when not legislated or put in contract hence need of an extra step for enforceability

3.3.9 Sessional Paper No 4 on Energy, 2004

Sessional Paper No 4 on Energy, 2004 provides the most current Policy for the promotion of investment in research and human resource development in Kenya's energy sector. The policy requires industries to actively contribute to and participate in the development of human capacity through skills development, so as to enhance the quality, depth and breadth of Kenyan participation in all aspects of the provision of goods and services. This is intended to ensure that the industries will make investments in and provide support for local institutions, such as universities and technical and vocational schools, in enhancing Kenya's indigenous training and research and development capacity and output. It promotes development and implementation of a comprehensive capacity program for the energy sector on a continuous basis.

Gaps in the law

This policy does not set up procedure for collaboration with local institutions. In addition to the fact that a policy is not legally enforceable when not legislated or put in contract hence need of its amendment to ensure the enforceability.

3.4 Enforcement Of Local Content In Kenya

The Petroleum Act establishes the EPRA with a mandate of the supervision, co-ordination, and management of the development of Local Content; as well as preparing guidelines to include targets and formats for Local Content plans and

reporting.¹³⁸ The Authority is also tasked with issuing propositions to the Cabinet Secretary for the formulation of Local Content regulations. However, the Act stops shy of issuing a specific yardstick for measurement and implementation of Local Content that EPRA should use in monitoring and enforcing LCRs. Whereas the Act requires IOC's to comply with the stipulated Local Content requirements, it is silent on the minimum levels of Local Content to be achieved for the purpose of monitoring and implementation. This creates a legal risk in monitoring and enforcement of LCRs.

As seen above, the Local Content provisions under section 50 of the Petroleum Act largely require IOC's to inter alia, give preference to the employment and training of 'locals' as well as preference in procurement of 'local' goods and services. In order to effectively measure and enforce Local Content in Kenya, there is need to analyse what the country means by 'Local Content' and specifically define and contextualize the term 'local'.

The Petroleum Act does not define the word 'local' or 'local person'. However, it defines 'local community' to mean "people living in a sub-county within which the petroleum resources are situated and are affected by the exploitation of that petroleum resource."¹³⁹

On the other hand, the Local Content Bill, 2018 defines a 'local person', as

"an entity that is effectively owned and controlled by a 'Kenyan' and performs works, services or supplies goods and materials to an operator as a subcontractor or otherwise and whose business enterprise is incorporated under the Laws of Kenya with a 'principal place of business in Kenya'."¹⁴⁰

The definition in the LCB aims to ensure that qualified Kenyans or Kenyan business enterprises are given first consideration in matters of employment and supply of goods and services.

In Kenya, 'Local hire' requirements form part of key LCRs. In as far as measuring and enforcing LCRs, hiring any random Kenyan may be said to be enough to count towards fulfilling such requirements. However, as argued by Pereira et al, should a State seek to encourage economic development in a particular area, a more specific

¹³⁸ Section 51(1) of the Petroleum Act, 2019 (Act No. 2 of 2019).

¹³⁹ Section 2 Petroleum Act (Act No.2 of 2019).

¹⁴⁰ Section 2, Local Content Bill (2018).

and limited definition may be used in which ‘local’ means a resident of the targeted region.¹⁴¹ Conversely, the term ‘national content’ may be preferable where a reference to the nation as a whole is favored over specific subnational regions.

As I have already alluded to in the preceding discussion, the Petroleum Act requires an IOC to give a Local Content plan that covers a number of professional services. In practice, the services listed under section 50(3) of the Petroleum Act are ordinarily provided by service providers that are registered entities such as companies and SMEs. This provision of the law raises pertinent concerns on which service providers or companies qualify as ‘local’. When an IOC is required to contract with local companies, the onus is upon the host nation government to elaborate on the qualifications of a local entity. Here again, Pereira et al ask pertinent questions including whether the mere physical presence of a service provider in the host nation qualifies to make it ‘local’. They argue that if this is the case, what determines the level of presence required? They further question whether legal residence or place of incorporation would suffice and suggest that the location of the ‘local’ company headquarters or its principal business activities would be a better measure.¹⁴²

In order to effectively measure and audit compliance of Local Content, it is important for those mandated with the duty to monitor and enforce LCRs to understand the entire business model and value chain of an oil and gas business. This equips them with the tools to gauge where the maximum number of opportunities for locals can be found. Since IOCs often outsource the majority of the petroleum operations to third party services contractors, from an employment perspective therefore, there should be higher scrutiny on the operations of these service contractors as opposed to the IOCs themselves.

As a general proposition in measuring Local Content, where unambiguous metrics are applied, monitoring and enforcement of policies becomes more efficient and productive. Applicable metrics include the number of local employees hired, trained, or promoted; monetary value of goods and services purchased locally or even the level of involvement of local institutions in R&D activities.

¹⁴¹ Pereira E, et al, ‘Local Content policies in the petroleum industry: Lessons learned’.

¹⁴² Pereira E, et al, ‘Local Content policies in the petroleum industry: Lessons learned’.

LCRs should be targeted at each country's needs and expectations. For instance, with Kenya's nascent oil industry, emphasis should be on training and skills development for the local work force. This is in comparison with other developed oil and gas producing countries with qualified personnel.

It is imperative to note that the Local Content Bill establishes a Local Content Development Committee (LCDC) whose mandate shall be to recommend and advise the Cabinet Secretary for Petroleum on the formulation of policies and strategies to develop and implement Local Content in the extractives industry. One other key functions of the LCDC will be to ensure implementation of Local Content policies and strategies by IOCs and formulate implementation strategies to improve the capacity of local persons, businesses and the capital market to full leverage on the objectives of Local Content.¹⁴³ The legal risk that Kenya is most likely to face in monitoring and enforcement of Local Content is the proposed double regulatory framework as seen above. If the Bill is enacted into law, the LCDC's mandate will overlap with that of the EPRA. The inconsistency of laws will result into a weak regulatory and institutional foundation for Local Content implementation in Kenya's upstream petroleum operations.

The above analysis, indicates that with the growth of the oil and gas industry in Kenya, legal reforms have been undertaken to ensure that natural resources are managed sustainably for the benefit of Kenyans. Generally, the requirements in law and contract have created a framework that is focused on the economic development of the country. The provisions lay emphasis on Local Content ranging from local employment, training of locals for skills development and procurement of local goods and services.

Evidently, Kenya is making strides in legislating on Local Content. However, the oil and gas sector, like majority of other oil producing countries, faces challenges that impede the measurement and enforcement of Local Content. These challenges can partially be avoided through a hybrid approach legislation. As demonstrated in this chapter, the Local Content provisions in the Petroleum Act are inadequate. There is need to transplant the hybrid legal system as implemented by Norway into Kenya to cover the oil and gas legal, institutional and regulatory framework.

¹⁴³ Section 10, Local Content Bill, 2018

3.6 Conclusion

This chapter confirms the availability of various legal interventions that have been taken to achieve the Local Content. However there exist various gaps within the law which make it hard for Kenyans to fully benefit from the proceeds of oil explorations. To cure these legal weakness there might be need to harmonize our laws and to further anchor our Local Content on the principles of public participation as espoused in our constitution. The institutional framework also exposes weaknesses that can be cured through sectoral horizontal realignment in order to maximize the benefits Kenyans can accrue from their natural resources.



Chapter 4: Benchmarking: Why Norway?

4.1 Introduction

The aim of this chapter is to examine how the hybrid approach has been implemented in Norway, with focus on the key strengths and lessons that can be drawn to improve Kenya's Local Content policies. It will identify positive Local Content milestones that can be adopted in Kenya to ensure successful Local Content outcomes. To achieve this, it will consider the overall LCRs and LCPs framework in the Norwegian petroleum sector. It will breakdown the existing regulatory and institutional framework and discuss the reasoning behind the various policy interventions that are the hallmark of the hybrid approach to Local Content discussed in Chapter 2. Finally, it will form the basis for recommendations that ought to be adopted into Kenya's Local Content strategy.

As discussed under the theoretical framework, the approach applied is the legal transplant method. For a legal transplant to be successful, the law should be transplanted from a matured legal system to a less advanced legal system. Norway has a highly advanced and working legal system in matters oil and gas and this informs the basis upon which I chose it as a comparator to Kenya.

4.2. A Strong Foundation

Oil exploration in Norway commenced in the mid 1960's driven by the principle that oil exploration is the idea of collective ownership of petroleum resources within Norway by the state.¹⁴⁴ From the outset there were a number of favourable factors that influenced the success story of its LCPs. A stable political system coupled with functional and dependable institutions and high literacy levels ensure the Country had high levels of accountability, and conversely minimised corruption.¹⁴⁵ Yet another key factor was the well-developed industrial base that featuring a solid manufacturing industry¹⁴⁶; meaning that local factors of production and talent were not only available but also well equipped to pivot to the emergent petroleum industry.

¹⁴⁴ Obiri KA and Bjeirmi B, 'A Comparative Analysis of Local Content Policies in the North Sea and the Gulf of Guinea Regions' *Journal of Scientific Research & Reports*, 25(5): 1-13, 2019 p 3

¹⁴⁵ Havro GB & Santiso J, To benefit from plenty: Lessons from Chile and Norway, OECD Policy Brief No 37, Paris, (2008).

¹⁴⁶ Asiago BC, 'Norwegian Local Content Model A Viable Solution?' *US-China Law Review* 14 (471) 2017 p 477

The manner in which Norway developed its LCRs has become so sought after and is credited with being the yardstick of a good bureaucratic design in the oil and gas sector.¹⁴⁷ While the country did not have specific requirements as to the share of Local Content, when Norway formulated its LCRs in the early 1970s, it was manifest that they were tailored towards specific targets revolving around the protection of the interests of the local economy and communities and avoiding the resource curse.¹⁴⁸

In order for an entity to be licensed for petroleum activities, it had to commit to the use of onshore Norwegian bases. Furthermore, the employment of Norwegian labour was prioritised. There was a preference of Norwegian oil companies including the National Oil Company, Statoil. The rationale behind awarding contracts to Norwegians was to promote the establishment and growth of local industries. These local companies not only accelerated the development technological know-how but also raised revenues from petroleum. Moreover, the government was keen to partner with foreign petroleum companies. It did this through technology transfer agreements that had a heavy leaning towards Research and Development and joint development programmes with Norwegian companies and institutions.

However, when Norway joined the European Economic Area in 1994, it had to bring its LCPs into conformity with European laws. For instance, its LCPs could no longer give precedence to Norwegian companies as this would be tantamount to discrimination on the basis of nationality. Be that as it may, the Local Content policies had long since taken root and to a good extent had not only achieved their purpose but remain pertinent until today. This is evinced by the fact the Norwegian oil services industry has become a major contributor towards the economy employing nearly 122,000 people across 1,100 companies.¹⁴⁹

The following discussion analyses particular Local Content policy interventions that Norway prioritized and engaged in from the time it was a nascent oil economy through its development into a powerhouse in the industry. The discussion will revolve around the legal, licensing, institutional and regulatory framework for Local Content

¹⁴⁷ Thurber MC et al, , Exporting the “Norwegian Model”: The Effect of Administrative Design on Oil Sector Performance, 39 ENERGY POLICY 5366 (2011)

¹⁴⁸ Hunter T, Legal Regulatory Framework For The Sustainable Extraction Of Australian Offshore Petroleum Resources. A Critical Functional Analysis, The University of Bergen, 2010.

¹⁴⁹ Deutsche Gesellschaft für Internationale Zusammenarbeit, Space for Local Content policies and strategies: A crucial time to revisit an old debate (2017)

highlighting themes such as how the participation of domestic industries happened; technology transfer with the aid of foreign companies; the training and employment of a local workforce; and research and development. In tandem with these themes the discussion will also contend with the monitoring and enforcement framework that ensured compliance with LCRs.

4.3 Overview of the LCPs and LCRs in the Norwegian Petroleum Industry

In Chapter 2, we saw that Norway took a hybrid approach to its LCRs. This entailed coming up with legislation to govern the hydrocarbons sector while also getting into contractual agreements with relevant partners. This section elaborates the key laws that informed the Local Content policy. Special attention will be given to the clauses that bring out the themes alluded to in the previous section. It will also highlight the institutional structure that Norway put in place with the goal of furthering its Local Content objectives. Going further, it will highlight some of the contractual agreements including the Joint Venture agreements, the Frame and Training agreements as well as the Model Training Agreements that were the hallmark of the application of the contract approach.

4.3.1 Highlights of the Legal Framework

On the legislative end, the initial attempt at legislation was the Royal Decree 9 April 1965. It governed the exploration for and exploitation of petroleum deposits in the seabed and its subsoil on the Norwegian continental shelf. This Decree was subsequently repealed by the Royal Decree 8 December 1972. This Decree was an embodiment of what had become colloquially known as the “ten oil commandments”. These were contained in a White Paper dated 14 June 1971 that was endorsed by Parliament after being submitted by the then Standing Committee on industry.¹⁵⁰

One of the commandments was that the exploitation of the vast oil wealth present in the Norwegian Continental Shelf ought to ensure energy security for the country. It was recognized that a new industry based on petroleum would be developed. Another tenet was to have the growing oil industry give cognizance to the already existing industrial activities. The sector was from the outset mandated to take into account policies that would enable the protection of the environment. The commandments as

¹⁵⁰ Hunter T, Law and Policy Frameworks for Local Content in the Development of Petroleum Resources: Norwegian and Australian Perspectives on Cross-Sectoral Linkages and Economic Diversification, 27 Mineral Economics 115 (2014)

embodied in the 1972 Decree further recognized the participation of the Norwegian state at all appropriate levels of the oil industry. They envisioned the creation of an integrated oil community, that was focused not only on the participation of local oil and oil services firms but also that of IOCs. Finally, it was recognized from early on that future large-scale discovery presented new tasks for Norway's foreign policy.¹⁵¹

The 1972 Decree provided that for as long Norwegian suppliers offered competitive prices, quality and delivery reliability, they would be given priority over foreign suppliers during tendering processes.¹⁵²

Following the 1972 Decree, the next major piece of legislation pertaining to petroleum activities to come in force, was the 1985 Petroleum Act.¹⁵³ After reforms in the LCRs occasioned by Norway joining the European Economic Area, a new Act pertaining to petroleum activities was passed in 1996.¹⁵⁴ In 1997, new Regulations also came into force.¹⁵⁵

4.3.2 Highlights of the Institutional Framework

Regarding the institutional framework, the 1972 Decree established a policy making arm through a Ministry of Petroleum and Energy. The Norwegian Petroleum Directorate became the technical control and resource management arm while the country's national oil company, Statoil, became the face of its commercial participation arm.

The Ministry of Petroleum and Energy, had the mandate of decision making and issuing of licenses. It required that all entities desirous of operating in the oil and gas scene in Norway submit Local Content Plans that provided an account of the intended partnerships between IOCs and the Norwegian supply industry that would lead to opportunities of the Norwegian industry to supply goods and services to the development, operation and maintenance of the project in question, and information on the plans for further cooperation.¹⁵⁶

¹⁵¹ Norwegian Petroleum Directorate, 10 Commanding Achievements, 2010 <http://www.npd.no/en/Publications/Norwegian-ContinentalShelf/No22010/10commanding-achievements/>

¹⁵² Section 54, Royal Decree 1972

¹⁵³ Petroleum Act of 22 March 1985

¹⁵⁴ Petroleum Act of 29 November 1996 No.72

¹⁵⁵ Petroleum Regulations of 1997

¹⁵⁶ Section 23, Petroleum Act 1985

During the tendering process for the selection of oil companies to exploit the Norwegian resources, the Ministry could request to include Norwegian firms and had the final authority to change the company selected for the supplier contract.

In the issuing of licensing, the Ministry of Petroleum and Energy required a commitment to carry out a technological transfer into the country as a precondition to obtaining a license. This has led to the companies developing highly advanced technologies making Norway highly competitive by the international standards.

Not only must licensees pursue local training but also bring on board a number of Norwegian personnel. Additionally, upon being granted a license, they were required to undertake a training agreement to train both the locals and their employees. Further, it was required of Licensees that they use Norwegian suppliers to procure goods and services for their petroleum activities.¹⁵⁷

When Statoil was established in 1972, it was granted 50% shareholding in the IOCs operating in Norway through modifications of the existing agreements between the Norwegian State and the IOCs.

4.3.3 Highlights of Select Licensing and Contractual Agreements

Further evincing Norway's hybrid approach was the use of licensing agreements to determine the partnerships between IOCs and the Norwegian State. Worth a mention are the representative historical licenses such as the Model Petroleum Production Licenses of 1974, 1979, 1981, 1988, and 1991.

The requirement that IOCs submit a Local Content plan was a feature of the 1979 License. This plan was required to elaborate how activities onshore would be organized in the exploration phase. It was also necessary to give the location of the onshore activities as well as how these IOCs would engage a domestic labour force with specifics as to the particular occupations that would be engaged.¹⁵⁸

Norway also entered into a number of contractual agreements that each had unique Local Content interventions. For instance there was the Standard Petroleum Exploration & Production Agreement; the 1981 Frame Agreement for Offshore

¹⁵⁷ Section 11 Model Petroleum Production License 1974

¹⁵⁸ Section 15 Model Petroleum Production License 1979

Petroleum Technology Research & Development Activities; and Model Training Agreement Concerning Petroleum Activities.

The 1981 Frame Agreement For Offshore Petroleum Technology Research & Development Activities for instance made it a requirement that research and development (R&D) activities be carried out in partnership with local Norwegian institutions and industry.¹⁵⁹ The 1988 and 1991 Frame Agreements established partnerships between IOCs Research and Development headquarters and Norwegian industry and/or research institutions. Another element prevalent in these Agreements was the fact that IOCs were to offer Norwegian industry and research institutions possibilities to perform tests of concepts, equipment and process within their precincts, including their laboratories. The Agreements emphasized professional and financial participation in Research and Development projects in Norway.¹⁶⁰

The Norwegian State also pushed for Joint ventures through contracts referred to as Joint Participation Agreements. A good example is the development approval for the Statfjord field was granted by the Norwegian Parliament in June in 1976. These led to incorporation of JV agreements among the companies both local and foreign to promote research and development cooperation through Norwegian institutions of higher learning.¹⁶¹

Complementary to the foregoing, IOCs committed to “goodwill agreements” where they declared their intention to conduct as much research in the field of energy as possible in Norway without being submitted to strict legal obligations. These agreements mandated IOCs to submit annual reports to the Research Council of Norway. Projects implemented under the goodwill agreements mostly related to the preparation of applications for licenses and future field development in the framework of concession rounds.¹⁶²

¹⁵⁹ Art.4 Frame Agreement on Technological Research & Development of March 1991

¹⁶⁰ Art.4 Frame Agreement on Technological Research & Development of March 1991

¹⁶¹ http://www.npd.no/Global/Engelsk/3-Publications/Facts/Facts2013/FACTS_2013.pdf. On 7 April 2020

¹⁶² Vorobyov, A, ‘Research and technology agreements in the Norwegian concession system of the 1970s - 1990s’ *Baltic Region* (2012), 4, pp. 43-51

4.4 Conclusion

The success of Norway's LCRs and LCPs was occasioned by the convergence of a multiple factors, key among these being political will, democratic regulatory institutions keen on identifying the best approach that would work for Norway and an already existing and well developed maritime and manufacturing industry that became crucial in the exploitation of Norway's offshore oil fields, which form the bulk of the country's oil wealth.

The focus of the Norwegian Local Content incentive was on the production chain. We see that the aim from the beginning was to have a favourable environment for the participation of local firms in the hydrocarbons sector. This is seen no clearer than by the regulation that firms conduct at least 50% of the research for the technology needed to develop assets at local Norwegian institutions. Foreign firms were required to transfer technology to their Norwegian counterparts, as enshrined in the licenses.

IOCs served to provide technical assistance to Statoil and smaller Norwegian firms that were legally the operators of the oil and gas assets. This resulted in the growth and development of Norwegian companies into competent operators. The preferences for local firms, when competitive regarding price and quality, continued until 1996, when EU legislation required the Government to give equal access to all operators regardless of origin.

Kenya will need to adopt the provisions of Norway through a legal in order to ensure that local content in Kenya is comprehensively captured and prioritised in the oil and gas industry. This will ensure that the locals benefit from the natural resources in their habitats and the country earns a better revenue from the oil and gas sector.

A legal transplant from Norway will ensure that locals are educated and absorbed into the Oil and gas sector through trainings and employment as well as employment in the production of associated goods and services, It will also grant the state a better negotiating platform in the negotiation of local investment.

Chapter 5 : Key Findings, Recommendations And Conclusions

5.1. Introduction

Having analyzed Local Content legal and institutional frameworks in both Kenya and Norway's oil and gas industries under chapters 3 and 4 of this research, this study has drawn key lessons for implementation in Kenya's oil and gas industry. This chapter will seek to answer the research questions as enumerated in Chapter 1.

The achievement and realization of maximum accruing benefits is dependent on a proper legal and institutional framework as well as effective enforcement mechanisms geared at ensuring sustainable use of resources. To avert degeneration into poverty, corruption and other immoral practices, solutions to the challenges identified by this study will play a key role.

Therefore this study seeks to recommend specific interventions which if implemented will allow Kenyans to fully harness the benefits that accrue from their mineral resources as stated in the Constitution of Kenya¹⁶³ and their accompanying obligation for public participation. The recommendations will draw from the case study in Chapter Four of Norway.

5.2 Key Findings

The nascent Local Content sector in Kenya has not been able to achieve its desired results because of various factors some of which are considered in the following discussion.

5.2.1 Training and Absorption

As discussed in Chapter Two and Three, Local Content is geared at the maximum utility of local labour in the oil and gas sector. Key among the drivers of this is the government's need to create job opportunities for its population. However, where highly skilled labour is required, Kenya currently faces a dearth of professionals to take up those highly specialized roles.

To utilize on available opportunities, there is need for the government to put in place incentives and offer scholarships and trainings to its population so that IOCs do not have to rely on expatriates for the provision of highly specialized services when there is a large population of potentially capable youth in the country.

¹⁶³ Article 69(1)(a), Constitution of the Republic of Kenya (2010).

5.2.2 Monitoring and Compliance

Key to the success of implementation of any programme is the enforcement and compliance mechanisms. In order to address the challenges associated with monitoring and compliance highlighted in Chapter Two of the study, it is important that proper mechanisms be put in place to ensure compliance and fully operationalize the existing law.

As for mechanism provided for under Section 51 of the Petroleum Act, it is about that a yardstick to be applied by EPRA in monitoring compliance is provided for in our legal framework. Currently, our legal framework does not set out the threshold requirements for monitoring compliance. There is an urgent need for clarification of the methodology to be used in measuring the implementation of Local Content. In regard to the sanctions for non compliance, the Petroleum Act is marred with generalities. The Act only provides for a general penalty of not less than Ksh. 5,000,000/= for a contractor or subcontractor who fails to comply with the provisions of the Act.¹⁶⁴

Critical priority needs for the upstream petroleum sector pose a challenge to the country's oil and gas industry because most of the local suppliers lack the capacity to supply most of the materials. This has necessitated the involvement of foreign firms, which in the long run militates against the objective of Local Content. Beyond the construction phase, most of the subsequent activities are highly specialized and high tech and involves skills which most locals lack. Clearly, practical plans and measures to develop Local Content and enhance it need to be put in place.

5.2.3 Legal and Institutional Framework

A cursory glance at Kenya's legal and institutional framework that falls short of international best practice standards and can barely be described as being robust. The absence of a clear legal and institutional framework has been a great impediment to Local Content in Kenya, and has arguably posed a legal risk in light of Kenya's to production of oil and gas. Key among its shortcomings are; its failure to provide a conclusive definition of local person, measuring amongst other aspects of evaluation of compliance with Local Content.

¹⁶⁴ Section 124, Petroleum Act, 2019.

The principal statute relating to Local Content is the Petroleum Act.¹⁶⁵ While it defines Local Content as outlined in Chapter Two of this research, it fails to provide sanctions in cases of non-compliance with Local Content. For effective implementation of the Local Content, it is important that stiff penalties be provided for in law to curb non-compliance with LCRs.

5.2.4 Capacity

That the upstream petroleum sector is demanding in terms of capital requirements, complexity of technology among other factors has served to effectively hinder the participation of the local population. Globally, very few firms can, on their own cater for high tech and sophisticated demands of the upstream petroleum sector.¹⁶⁶ Owing to the inability of the local suppliers to produce goods that meet the oil and gas sector specific standards, the sector has been forced to rely on foreign companies for supply of most of the equipment and tools they need. This, again, defeats the object of Local Content.

As noted in Chapter One of this study, there is need for continuous systemic development of our capacity as a nation to effectively manage and run our oil and gas industry without reliance on expatriates and foreign aid.

5.2.5 Licensing

It being a lucrative field, the process of obtaining licences in the oil and gas sector faces corruption related challenges. Many people set out to bribe officials so as to obtain licences and circumvent the law. Many a times, procurement laws are flouted with contempt leading to the supply of goods that fall below the required standards or the licencing of unqualified personnel. Otherwise competent individuals and firms who are unable or unwilling to part with bribes are locked out of the process unfairly. A lot needs to be done to arrest this vice in the country and entrench a culture of integrity in the various sectors of our economy, key among them the oil and gas sector. All awards and licences should be merit based.

¹⁶⁵ Act no. 2 of 2019.

¹⁶⁶ Building business opportunities in Kenya's oil & gas sector', World bank group, 2016.
http://extractivesbaraza.com/assets/content/PDF/Publications:%20Donor%20Programs/Kickoff_consult-wkshp-April-4_email-ver.pdf.

5.3 Recommendations

5.3.1 Need for a substantive training and absorption infrastructure

Training of locals should be done in local public universities and tertiary institutions through sponsorship by the oil and gas companies and the syllabus to be approved by The Kenya National Qualifications Authority (KNQA) and the Technical and Vocational Education Training (TVET) respectively.

The law must make a provision that all the people trained by the oil and gas industries as is done in Norway. In doing this, the law should create timelines for the absorption of the trained personnel to ensure that at the end of a certain period, eg 10 years, the trained personnel are absorbed.

5.3.2 Need for accountable monitoring and enforcement mechanism

As is currently done in Norway and as evaluated in Chapter of this study, there is need to appoint supervisors and inspectors to monitor compliance with the laws and regulations currently in place. The establishment by way of a statutory interdict of a Local Content development committee to monitor enforcement and compliance will come in handy.

The role of supervision of Local Content needs to be streamlined so as to avoid the multiplicity and overlap of roles between different bodies. This research strongly recommends the creation of one supervisory body to monitor and ensure compliance from the bottom to the top of the value chain.

There is need for the strengthening of the capacity of EPRA to monitor Local Content and implementation of Local Content regulations. Stiffer penalties should be imposed for entities that fail to comply with Local Content requirements in a bid to force them to comply and punish for non- compliance.

5.3.3 Need for a Legal and Institutional Framework that is people driven

There should be a single definition of Local Content and what amounts to “local” across the board to ensure compliance by avoiding loopholes in the definition.

A legislation should be enacted establish a unitary compliance system that is available in all counties. This would ensure a standard compliance system across the board in all the oil and gas ventures across the country.

Kenya should set standards of consultation to ensure actual consultation with the communities happen.

The government should draft a law guiding the entering into Public Private Partnerships with oil and gas in order to ensure that Local Content has a stake and bargaining power in such agreements.

There should be a set minimum ownership of shares in the oil and gas industry to be owned by local person/industries this should be done gradually with an aim of making sure that local fully control certain value chains after a set duration.

The computation of compensation of land owners and local communities should be stipulated comprehensively under the law

The definition of Local Content should be unified and one comprehensive definition adopted across the board.

The Kenyan Law on local transplant is not comprehensive and therefore a legal transplant from Norway which has been the best internationally on the jurisprudence on oil and gas.

5.3.4 Need for a national Local Content policy

The oil and gas sector play an important role in the economy. Its significant role can be appreciated better by having the sector form part of the national agenda.

This can only be done through the adoption of the national Local Content policy which will then form the basis and set the framework for regulation of Local Content. Key areas that the National Policy should focus on are capacity development, and having developed such capacity, focus on maximizing on the benefit of such capacity. Diversification of Local Content initiatives is also important so that the scope of Local Content is not limited to only oil and gas.

It is instructive to note that the upstream petroleum industry has a long life cycle. Properly tapped into, in terms of sector specific skills, Kenya can strategically take advantage of this and use it to recover the investment in capacity building. Kenya has immense potential to generate value from extractives, specifically oil and gas. Concerted efforts should be geared at supporting the oil and gas industry with a focus of leveraging it to other key priority sectors.

The National Local Content Policy should be geared at sharing out the benefits accruing from oil and gas sector to other sectors of the economy especially the key priority sectors for the realization of Vision 2030. For maximum impact of the National Local Content Policy, the sector specific strategies will need to be aligned with national Local Content policy.

5.3.5 Aligning our institutional framework to answer to the needs of the stakeholders in the industry

The Government should offer incentives and infrastructure to local producers such as capital, electricity and capital as well as tax incentives to ensure that they have the capacity to produce goods of international standards.

The impact of international law The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of Local Content goals by prohibiting some types of Local Content requirements.¹⁶⁷ Hence because Kenya is a unitary law system it should legislate in compliance with the WTO provisions.

When seeking investment partners, the government should give due consideration to the provisions in the pertinent WTO agreements and investment treaties that may hamper Local Content standards.

5.3.6 Participation of the National Oil Corporation of Kenya in Local Content

NOCK plays a critical role in promotion of Local Content. The existing structure of NOCK should be altered so as enhance its role in the promotion of Local Content. Positive Local Content outcomes can only be achieved if the capacity of NOCK is enhanced to enable it adopt an effective and successful Local Content strategy.

5.3.7 Operationalization of the Local Content Training Fund

The Local Content training fund is established under section 52(6) of the Petroleum Act. However, the Act provides that the fund shall be as stipulated in the petroleum contract. The petroleum contract is negotiable. It therefore goes that this fund will also be negotiable.

¹⁶⁷ A Sub-Category Of “Performance Requirements”1).

This study recommends the amendment of section 52(6) to create a mandatory requirement for all contactors and sub-contractors to contribute to the training fund an equivalent of 1% of the contract sum awarded and the amount should be deductible at the commencement of the contract. This will better operationalize the statutory provision and make it easy to realize its intended purpose.

5.4 Conclusions

As seen in this paper Local Content can be applied through; Employment of locals, technology transfer, use of local goods and services and training and development of locals.

This research has also shown that for the effective realisation of Local Content, the laws on Local Content has to be in place to ensure the technological and technical knowhow in the oil and gas industry. Kenya also has to develop its capacity in the oil and gas industry and the goods and services provision to ensure that it needs the standards in the tendering process. It should also improve the capacity of the local workforce through trainings, promote local equity participation and foster the growth of local industries. This is best done through policies and legislation.

In an attempt to ensure that Local Content is ensured, the government has legislated on Local Content in the sections 50 through to 52 of the Petroleum Act, 2019.

As indicated in this research paper, unless there are in force strict legal provisions and a strong monitoring and enforcement regulations locals may never realize the benefits of the newly acquired ‘oil wealth’ and this may lead to conflicts arising from a lack of trust between the various stakeholders in the oil and gas industry and the locals. In order to avoid this, the Local Content Bill 2018 should be amended in line with the highlighted provisions in the Norway legislation and to include strict penalties for non-compliance

Local Content is only possible if local suppliers are able to provide goods and services at a standard acceptable to the procuring industries, this will require that the local industries have the capacity to produce such goods. The Government should therefore formulate LCPs to encourage utilisation of local skills, services and resources, enhance local capacity, promote the transfer of technology from IOCs to locals in the oil and gas sector in order for the country and its citizens to benefit from the

sovereignty over their natural resources and overcome the challenges in implementation of Local Content.

Judging by the aforementioned, the oil and gas industry has the potential to enhance development and improve the socio economic conditions of host communities if well managed as seen in Norway. The Constitution of Kenya, 2010, reaffirms that Kenya's resources belong to the people of Kenya and its exploitation should focus on benefiting the Kenyan people. Therefore, Kenya must utilise its resources to create economic opportunities for its citizens. It must add value to and diversify its production across the oil and gas industry to enable the country to ensure economic sustainability. The GOK has made an attempt to introduce LCRs in the oil and gas sector through the Petroleum Act 2019 but, this research has shown that the existing legal framework on Local Content does not adequately legislate on Local Content in line with international best practices. In failing to adequately legislate on Local Content, Kenya's sovereignty over its natural resources is compromised. Therefore, there is need to strengthen the LCRs in the Petroleum Act 2019 to ensure that the legal framework is robust and matches international best practices. Adequate LCRs and a strong monitoring and enforcement mechanism, can lead Kenya to achieve positive Local Content outcomes.

Even though the country has adopted comprehensive laws on oil and gas, there has been no law to comprehensively cater for Local Content. The law on Local Content has not been passed hence Local Content is not covered under the law. There is need to amend the law to provide for Local Content regulations so as to maximize the economic benefits that Kenyans derive from Local Content.

There is no comprehensive law on the procedure of consultation of local communities in Kenya, something which the law should look at considering the fact that most oil and gas activities are conducted by foreign nationals.

A robust framework is equally important in the monitoring and enforcement of Local Content requirements in upstream petroleum operations. One way of putting in place a robust legal framework is by amending the provisions of the Petroleum Act so as to have them meet the standards of international best practices. There and then, maximum benefit from Local Content will be realized.

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Appendix A

Ethics Certificate

RHInnO Ethics - - 1 of 1

Completion of Online Research Ethics Review Submission

You have successfully submitted your application for ethics review "Legal and Institutional Framework for Implementing a Hybrid Approach to Local Content in Kenya's Petroleum Sector: Lessons from Norway"

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Appendix B

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