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**Kenya's Oil and Gas Industry Local Content Framework: An Analysis of
Sections 50, 51 And 52 of the Petroleum Act 2019**

Mildredtinnah Adongo Odhiambo

120016

**A research proposal submitted in partial fulfillment
of the requirements of the Master of Laws Degree at
Strathmore University Law School.**



**Strathmore Law School
Strathmore University
Nairobi, Kenya**

December 2021

DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Name of Candidate -----

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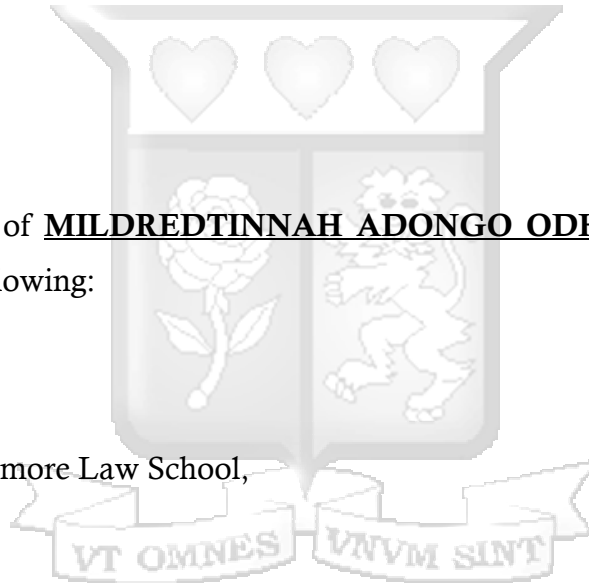
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ABSTRACT

Following the discovery of commercially viable oil in the North Western region of Turkana by Tullow oil, Kenya realized that need to promote local content in its petroleum industry and as a result, the Petroleum Act 2019 was enacted into law. This study analyzes the local content framework under sections 50, 51 and 52 of the Petroleum Act 2019 to establish their efficiency and adequacy for the country's petroleum industry.

This study analyzes the various factors that challenge the successful implementation of local content within Kenya's petroleum industry in comparison to the local content framework of both Nigeria and Brazil. The research evaluates the efficiency and adequacy of the local content provisions under the Petroleum Act with the aim of establishing whether the requirements meet international best practice legislative standards.

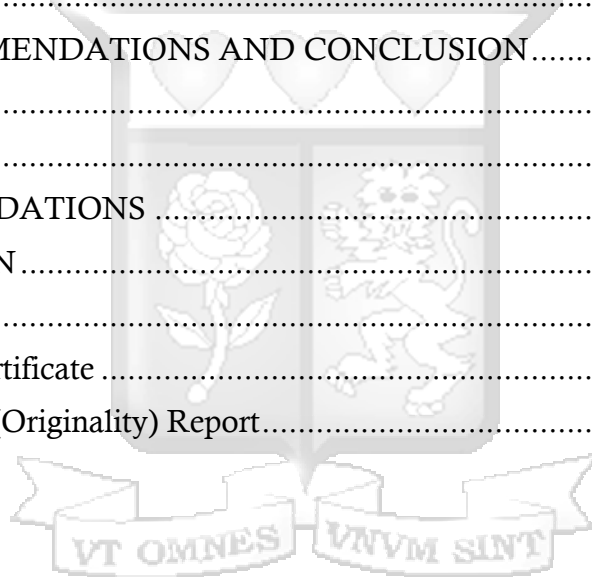
This study compares Kenya's local content framework to that of Nigeria and Brazil and examines that mechanism that have been put in place that to measure and monitor local content to draw lessons from which Kenya can learn and adopt within her petroleum industry in order to achieve success and positive local content outcomes within the petroleum industry. This study particularly analyses the legal and institutional local content frameworks that have promoted local content in both Brazil and Nigeria and compares them to that of Kenya to gauge the Petroleum Act 2019's efficiency and adequacy for the country's petroleum industry.

This study finds that both Nigeria and Brazil's local content frameworks are well structured and are specific to the needs of each of the countries and the result of this is that both countries have been able to achieve positive local content outcomes within their petroleum industries. The specificity in the local content policies and requirements has boosted local content within the petroleum industry and this study recommends that Kenya should draw lessons from the two countries in order to achieve positive local content outcomes.

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LIST OF ABBREVIATIONS

EPRA	Energy and Petroleum Regulatory Authority
IOC	International Oil Company
JQS	Joint Qualification System
LC	Local Content
LCB	Local Content Bill
LCDC	Local Content Development Committee
LCPs	Local Content Policies
LCRs	Local Content Requirements
NCCF	Nigerian Content Consultative Forum
NCDMB	Nigerian Content Development and Monitoring Board
NCEI	Nigerian Content Employment Initiative
NOC	National Oil Company
NOGCDA	Nigeria Oil and Gas Content Development Act
NNPC	Nigerian National Petroleum Corporation
PSC	Production Sharing Contract
R&D	Research and Development
SMEs	Small and Medium Enterprises

LIST OF STATUTES

Constitution of Kenya (2010)

Community Land Act 2016

Intergovernmental Relations Act 2012

Energy Act 2019

Land Act 2012.

Petroleum Act 2019.

Mining Act 2016

Mediation Bill 2020

National Land Commission Act 2012

Natural resources (Classes of Transactions subject to Ratification) Act 2016

Environmental Management & Co-ordination Act 2012

The Mining (Community Development Agreement) Regulations 2016



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I would like to appreciate my family especially my parents for the understanding, patience, moral and financial support that they have given gave me throughout the study period, my supervisor Dr. Eduardo G. Pereira for the able guidance and to the many other persons who assisted me in one way or the other, and whom I may not mention I convey my gratitude and may the Lord bless you all.



DEDICATION

To my father, you have constantly encouraged me to go further and pursue my dreams. You've always believed in me and you never hesitated to provide for me whatever I needed just to see me through this degree and succeed. You are the force behind all my successes and to you I dedicate this LLM in Oil and Gas Law. I hope this makes you proud of me daddy.



CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

Kenya has four (4) petroleum exploration basin namely Lamu Basin, Anza Basin, Mandera Basin and Tertiary Rift Basin. The exploration of the country's oil and gas began in 1956 but commercially viable oil was discovered in March 2012 in Ngamia 1 well in Lokichar Basin in Turkana County by Tullow Oil.¹ The then president, Mwai Kibaki, termed this discovery as a “major breakthrough” for the country's economy.² The state saw a possibility of economic growth in terms of national wealth development that would be achieved through the upstream petroleum operations. Through the discovery of oil, the scramble for Turkana has been evident and as a result tensions have arisen both within the political sphere and among clans with diverse groups claiming that the resources belong solely to the Turkana community.³ This propelled legislators to create a legal framework for the petroleum industry and more specifically, a local content framework that would allow the country and the affected communities to obtain maximum benefit from the upstream oil and gas operations happening in the country.⁴ Over the past years oil and gas discoveries have been made in African countries including Mozambique, Madagascar, and Ghana among many others.⁵ The dilemma surrounding these discoveries is the general effect that the discoveries eventually have on the host countries, given the path of some African countries, particularly Angola, Nigeria and Sudan that have produced oil for decades.⁶ The task for the oil and gas producing countries, Kenya included, is therefore to change the narrative and put in place effective legal

¹<https://www.kpc.co.ke/petroleumsector/#:~:text=Kenya%20has%20four%20%284%29%20petroleum%20exploration%20basin%20and,1%20Well%2C%20in%20Lokichar%20Basin%20in%20Turkana%20County>.

² BBC 'Kenya oil discovery after Tullow Oil drilling' 26th March 2012-<https://www.bbc.com/news/world-africa-17513488>- on 8th May 2019

³ Wasunna M, Okanga J & Kerecha G, 'Advancing Capacity and Access to Justice in Kenya's Extractives Sector', 2018 14

⁴ *The Petroleum Act*, (Act No. 2 of 2019)

⁵ Nwapi C, 'A survey of the literature on local content policies in the oil and gas industry in East Africa' 9(16) *School of Public Policy Technical Paper*, 2016,1

⁶ Nwapi C, 'A survey of the literature on local content policies in the oil and gas industry in East Africa' 9(16) *School of Public Policy Technical Paper*, 2016,1

and institutional local content frameworks that will enable the country to obtain maximum benefit from its upstream petroleum operations.

As valuable as it is to a country's economy and wellbeing, petroleum exploration in its very nature is capital intensive, requires high level of expertise and complex technology; and this is normally beyond reach for developing countries and therefore the need to involve foreign companies such as the International Oil Companies (IOCs).⁷ However, the involvement of the equipment, expertise and financial resources owned by the IOCs often diminishes the net value that the host country would have in other respects realized from the underlying assets and the host country may respond by seeking to adopt "local content policies".⁸ Governments are therefore designing requirements in the form of local content policies (LCPs) to see to it that the petroleum sector is not entirely foreign owned and the petroleum operations do actually contribute to the development of the local workforce and building of the capacity of the local firms to supply goods and services.

Local Content is generally described as the additional value that the host country obtains when goods and services are locally procured and the local workforce is developed.⁹ It is the added value brought to a country's economy from petroleum related activities through the growth of the capacity of the nation and funding the development and procurement of indigenous labor and goods, for the sharing of the profits.¹⁰ What local content policies seek to promote is the increased involvement of locals in foreign investment by dictating the involvement of local firms in the procurement of goods and services, employment of nationals and the utilization of indigenous raw materials.¹¹ In 2019, Kenya passed into law the Petroleum Act that established a legal and institutional framework on local content for the upstream petroleum industry.¹² This study critically analyses the local content provisions within the

⁷ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 633

⁸ Ibid.

⁹ Hackenbruch M, Pluess J, 'Commercial Value From Sustainable Local Benefits in the Extractive Industries: Local Content', March 2011 - https://www.bsr.org/reports/BSR_LocalContent_March2011.pdf on 27th February 27, 2020

¹⁰ Section 2, *The Petroleum Act*, (Act No. 2 of 2019)

¹¹ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,187-188

¹² Sections 50,51 and 52, *The Petroleum Act*, (Act No. 2 of 2019)

Petroleum Act 2019 and seeks to evaluate their adequacy for the oil and gas industry in Kenya.

1.2 Statement of the Problem

The overall research problem addressed in this study is the inadequacy and lack of specificity of the local content framework within the Petroleum Act 2019¹³. The Kenyan government did a commendable job by developing a legal framework for the employment of Kenyans, local procurement of goods and services, monitoring and enforcement and training of Kenyans within the petroleum industry.¹⁴ However, these provisions are inadequate and lack clarity on major aspects, posing foreseeable future legal risks for the industry. For instance, the Act is silent on key local content terms, among them the term '*local*', neither does it state who a '*local person*' or what '*local goods*' are.¹⁵ Secondly, the Act is silent on local content amongst the local community and the only legislated manner in which the local community benefits from upstream petroleum operations is being given five percent of the national government's share derived from the upstream petroleum operations.¹⁶ The local content framework has no provision for the local community. Thirdly, the Act fails to provide a metrics that the Energy and Petroleum Regulatory Authority (EPRA) should use in measuring and monitoring local content in order to effectively the local content requirements within the petroleum industry.¹⁷ Fourth, the proposed Local Content Development Committee (LCDC)¹⁸ is established under the proposed Local Content Bill 2018¹⁹ with its role and mandate mirroring that of the already

¹³ *The Petroleum Act*, (Act No. 2 of 2019).

¹⁴ Sections 50, 51 and 52, *the Petroleum Act*, (Act No. 2 of 2019).

¹⁵ Section 2, *The Petroleum Act*, (Act No. 2 of 2019).

¹⁶ Section 58(3), *The Petroleum Act*, (Act No. 2 of 2019).

¹⁷ Section 51, *The Petroleum Act*, (Act No. 2 of 2019).

¹⁸ Section 9, *Local Content Bill*, (2018).

¹⁹ Section 10(1) (a), *Local Content Bill*, (2018). The Committee has various functions that include overseeing, coordinating and managing the growth and development of local content within the country; making recommendations and advising the Cabinet Secretary on policies and strategies geared towards the development and implementation of local content. The Committee also advises the Cabinet Secretary on the lowest standard requirements for indigenous content and the growth of local content plans under the Petroleum Act 2019; appraise, evaluate and approve local content plans and reports that have been submitted to the Committee. In consultation with the county governments, the committee oversees the implementation of LCPs and strategies by operators to fully leverage the aims of the Petroleum Act 2019.

Finally, the Committee has a duty to consult and collaborate with the county governments to ensure a measurable and uninterrupted growth in the development and adoption of local content with respect to all activities in the extractive sector.

existing Energy and Petroleum Regulatory Authority (EPRA) established under the Petroleum Act.²⁰ If the Bill is passed into law, there will be an overlap in the mandates of both authorities. This study therefore seeks to establish the limitations of the local content framework within Kenya's petroleum industry, conducting a comparative analysis with Nigeria and Brazil and drawing lessons that Kenya can learn and adopt for its own petroleum industry.

1.3 Objectives of the Study

1. To determine the adequacy of Kenya's local content legislative framework for the Kenya's petroleum industry.
2. To establish whether local content framework under the Petroleum Act 2019 matches international best practice standards by drawing lessons from Nigeria and Brazil.
3. To recommend implementation strategies for positive local content outcomes for Kenya's petroleum industry.

1.4 Research Hypothesis

There is a significant correlation between well-structured and adequately legislated local content policies; and positive local content outcomes within the oil and gas industry.

1.5 Research Questions

1. Is Kenya's local content legislative framework adequate to enable the petroleum industry achieve positive local content outcomes?
2. Does the local content framework under the Petroleum Act 2019 match international best practice standards of Nigeria and Brazil?

²⁰ Section 51, *The Petroleum Act*, (Act No.2 of 2019).

These mandates include overseeing, coordinating and managing growth of local content; putting in place measures to include targets and layouts for local content plans and reports; making relevant recommendations for the formation of LCRs to the Cabinet secretary; and setting the lowest requirements standards for local content and local content plans. Further, the Committee has a duty to educate the public on indigenous content; monitor, audit and enforce local content within the petroleum sector.

3. What implementation strategies will propel Kenya's petroleum industry to achieve positive local content outcomes?

1.6 Literature Review

I. Ownership: the place of local goods and services

Okpe observes that with respect to the petroleum industry, local content policies (LCPs) are mostly utilized to increase ownership and control of oil and gas resources through mechanisms that are aimed towards encouraging direct and active participation in the upstream sector measured by the proportion of inputs from the domestic economy.²¹ They are enforced by governments to ensure companies use locally manufactured goods and local workforce in their operations. The intention in developing economies is to stimulate job markets, develop the workforce and enable competitiveness among local suppliers.²²

Under ownership, local content policies require the contractor to engage indigenous firms in joint ventures or make equity available to indigenous partners as a way of fulfilling their local content requirements and obtain licence for petroleum operations.²³ This protects the industry from entirely being owned by foreigners. However, ownership of a company in some countries such as Norway is not a factor that is put into consideration for issuance of a license. Brazil is open for foreign and/or private investment and does not take into consideration the ownership of a company by locals as a determining factor, but is flexible on matters partnerships. That having been said, in Nigeria, Angola, Ghana, and Uganda, local ownership is a determinant.²⁴ Ownership may therefore be a criteria for selection for some countries.²⁵

²¹ Okpe F, 'Economic Development and the Utility of Local Content Legislation in the Oil and Gas Industry: Conflicts and Effects of Nigeria's Local Content Act in the Context of International Investment Law' 28(2) *Global Business & Development Law Journal*, 2015, 261

²² Kakonge J, 'Kenya's Turkana oil and gas field shows the challenges of implementing local content policies' Africa at LSE, 2020, 1.

²³ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?' , September 2015, - <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf> on 2nd March 2020

²⁴ Ibid at 2.

²⁵ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 643 for example in the Philippines, the

The Petroleum Act 2019 directs that where goods and services meet the specifications of the petroleum industry, priority ought to be given to services and goods manufactured in Kenya.²⁶ Further, priority is to be given to the involvement of qualified and skilled nationals at all levels of the value chain.²⁷ These provisions show the government's objective of limiting foreign involvement and ownership in the oil and gas sector. However, these provisions are not stringent enough as the Act as it is, is silent on key terms that aid the effective monitoring and enforcement of local content requirements. The terms 'local', 'local person' and 'local goods' are not defined in the Act, giving room for various interpretations as to what these terms could mean in the context of oil and gas industry. Nwapi notes that while many oil producing countries are adopting local content requirements in their legislations and contracts, there is little critical analysis of the meaning of 'local' in local content. She observes that most countries have adopted a centralist approach which interprets local content in the context of priority being given to their citizens.²⁸ The dangers of this are local agitations that have attended oil and gas and mining development in developing countries, which have often resulted in internecine conflicts.²⁹ This approach therefore impedes the potential of local content policies to give rise to real economic development.

The Act requires the contractor to submit a local content plan that addresses various issues, among them; financial, insurance, legal, construction, hospitality, consultancy, security and transportation services.³⁰ In Kenya, these services are instituted as companies, formed under the *Companies Act 2015*.³¹ The term 'company' in Kenya means a company formed and registered under the Companies Act 2015 or an existing company.³² Unlike the *Nigerian Oil and Gas Industry Content Development Act 2010*,³³ the Petroleum Act 2019 is silent on what a

governments are permitted to enter into contracts for development of natural resources only with host country citizens, or companies whose capital is controlled by such citizens.

²⁶ Section 50(1), *The Petroleum Act*, (Act No.2 of 2019)

²⁷ Section 50(1)(c), *The Petroleum Act*, (Act No.2 of 2019)

²⁸ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,188

²⁹ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,188

³⁰ Section 50 (3), *The Petroleum Act*, (Act No.2 of 2019)

³¹ *The Companies Act*, (Act No. 17 of 2015)

³² Section 3, *The Companies Act*, (Act No. 17 of 2015)

³³ Section 106, *Nigerian Oil and Gas Industry Content Development Act*, (Act No. 2 of 2010) which defines a Nigerian Company as one that is formed and registered within Nigeria in line with the requirements under the Companies and Allied Matters Act and with a minimum of 51 % of its equity shares belonging to Nigerians.

'local company' means, raising concerns as to which service providers or companies qualify as 'local'. Pereira et al argue that it is necessary for a national government to decide what business qualifies as "local". They question whether just by being physically present in a host country is enough for a business to be considered "local" and if so, how much "presence" within the country is required? They suggest that maybe the location of the indigenous firm's headquarters or its principal place of business would serve as a better measure. Another key criterion may be ownership in the aspect that some nations, like the Philippines, the governments are permitted to enter into contracts for development of natural resources only with host country citizens, or companies whose capital is controlled by such citizens.³⁴

Nwapi refers the findings by Esteves, Coyne and Moreno's that identified the characteristics of a local company to include (1) local registration (company is registered under local law); (2) local ownership (a certain percentage of the shares of the company is owned by citizens (include corporate citizens) of the country); (3) local labor force (majority of the company's labor force, both regular and contract, are citizens of the country); and (4) local value added (a certain percentage of the goods and services of the company is produced within the country).³⁵ Tanzania³⁶, Ghana³⁷ and Nigeria³⁸ have adopted this in their local content policies where they have all set a minimum requirement of 51% of company shares to be owned by nationals. According to Nwapi, it is important for host governments to draw clear paths towards taking ownership of their natural resources.³⁹ Locally owned and registered

³⁴ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,643

³⁵ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,201

³⁶ In Tanzania, 'local business' is defined as a business incorporated under Tanzanian laws and entirely owned by the nationals or with a minimum of 51% of its shares owned by Tanzanians. It should further be registered to offer goods or services in the petroleum industry. United Republic of Tanzania, Local Content Policy of Tanzania for the Oil and Gas Industry, Draft One, Dar es Salaam April 2014, p. iii, - https://www.agcc.co.uk/uploaded_files/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf on 25th February 2020

³⁷ In Ghana, an 'indigenous Ghanaian company' a company incorporated under the Companies Act, 1963 (Act 179) with a minimum of least 51% of its equity owned by a Ghanaian national; and with a minimum of 80% of executive and senior management positions and 100% of non- managerial being held by Ghanaian nationals. Petroleum (Local Content and Local Participation) Regulations, 2013, LI2204, Reg 49, <<http://www.reportingoilandgas.org/wp-content/uploads/PETROLEUMLOCAL-CONTENT-AND-LOCAL-PARTICIPATION-REGULATIONS2013.pdf>> on 25th February 2020

³⁸ *Supra note 19*

³⁹ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,202

companies are more likely to hire local people than foreign owned companies and with this, the host state will gradually tackle the recurrent unemployment problem in Kenya and eventually, achieve positive local content outcome for the petroleum sector.

The Act is however not clear on whether it matters who owns the company or whether the location of manufacturing and building products does matter at all when drawing the line as to what ought to be considered as “local”. If being "local" is simply determined by location, the issue will be that the supposedly local firm may happen to be no more than a representative office of a foreign business that outsources all its activities to affiliates or other companies abroad.⁴⁰ This will in turn hinder transparent involvement and will impede fair local competition. Transparency, accountability and the sharing of relevant information should therefore be given more consideration, failure to which, little or no value shall have been added to the host government’s economy. They further observe the importance of understanding the place of manufacture, development and assembling of products as this increases employment for the members of the host nation.⁴¹

The silence of the Act as to what and/or who should be considered as ‘local’ hinders the effective implementation, monitoring and enforcement of local content policies within the oil and gas sector in Kenya.⁴² For instance, the ambiguity as to what is local gives rise to the absence of open transparent talks and indigenous participation in the petroleum industry and as a result, tension arises between the international oil company and the local community who feel like they are not benefiting from the petroleum operation.⁴³ With the above issues put into consideration, developing countries mentioned herein have achieved a certain level of success in the petroleum sector where ownership by the locals has been emphasized and it is therefore prudent that Kenyan legislators define these key terms to draw the line as to what

⁴⁰ Pereira E; Mathews C; Trischmann H, ‘Local Content Policies in the Petroleum Industry: Lessons Learned’ 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 643-644

⁴¹ Ibid at 644.

⁴² Kakonge J, ‘Kenya’s Turkana oil and gas field shows the challenges of implementing local content policies’ Africa at LSE, 2020, 2. -< <https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>>- on 14th June 2020.

⁴³ Ibid at 2. The Ongoing misunderstandings between the government and local communities in Turkana area are as a result of lack of transparency and openness and this has caused conflicts and material damage, resulting in loss of productivity.

ought to be considered as local and what ought to be considered foreign within the petroleum industry's local content.

II. Monitoring and Enforcement of Local Content Development

Local content policies, like any other policies, often face challenges of implementation, monitoring and enforcement. The nature of the petroleum industry needs highly skilled personnel to ensure strict compliance with regulations.⁴⁴ However, corruption across the oil and gas supply chain in most African countries has hindered positive local content outcomes. The sector is largely accessible to the privileged few who are closely linked to those in the government. This has been documented to be the case in Ghana.⁴⁵ Generally, the management of local content is a highly resource-intensive task and the relevant institutions should be granted enough manpower and be equipped with the necessary technical and industry expertise to be in a position to successfully carry out their mandate in this respect.⁴⁶ The Brazilian content has a local content certification system⁴⁷ for the issuance of a local content certificate which indicates the percentage of local content, the goods and services used.⁴⁸ Through the Certification System, the ANP is able to effectively monitor and enforce local content within the petroleum sector. The auditing requirements imposed on the concessionaire boosts the level of transparency and accountability and enables effective monitoring and enforcement of indigenous content within the petroleum operations.

In Kenya, the Petroleum Act 2019 authorizes the Energy and Petroleum Regulatory Authority (EPRA) to play the role of supervising, coordinating and managing the growth of

⁴⁴ Kakonge J, 'Kenya's Turkana oil and gas field shows the challenges of implementing local content policies' Africa at LSE, 2020. -< <https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>>- on 15th June 2020.

⁴⁵ Ayanoore I, 'The politics of local content legislation in Ghana' the University of Manchester, ESID Working Paper No. 104, 2018, - https://www.researchgate.net/publication/328482345_The_Politics_of_Local_Content_Legislation_in_Ghana- on 15th June 2020.

⁴⁶ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) *Oil and Gas, Natural Resources, and Energy Journal*, 2019, 669

⁴⁷ Local Content Certification is "the set of activities carried out by an entity duly accredited by the ANP, with the objective to attest publicly, by means of the issuance of a local content certificate to determine, among others, the goods and services meeting the local content requirements as set out in the ANP-issued Local Content Booklet contained in Annex II of ANP Resolution 19/2013."

⁴⁸ This was established by ANP under Resolution 19/2013

indigenous content within the petroleum sector.⁴⁹ The Authority⁵⁰ also oversees, coordinates, manages, audits, sets minimum requirements and ensures the enforcement and development of local content within the petroleum sector.⁵¹ In order to effectively audit and enforce local content requirements, there is need for clarity as to what is meant by the term ‘local’ as this will enable the EPRA clearly determine the scope and nature of local content within the petroleum industry. Pereira et al suggest that monitoring and enforcement of local content policies will only be easier when the metrics applied are clear and precise to the subject matter at hand.⁵²

The Petroleum Act is silent on the particular measuring method that the *EPRA* should use in monitoring and enforcement of local content requirements within the petroleum industry. The Act does not give a threshold for the investor in terms of the minimum local content requirements which the Authority should use in preparing guidelines as to petroleum operations.⁵³ Pereira et al propose a metrics to be applied to measure local content to contain the number of indigenous employees that have been hired, trained, or promoted; the value in cash of the goods and services locally acquired by the contracted firm; engagement of local companies in the petroleum activities; engagement of indigenous institutions in R&D activities; or by other means such as the development and/ enhancement of other sectors (e.g. the shipping industry).⁵⁴ There is therefore the need for the EPRA to obtain data and understand Kenya’s capacity to take on the petroleum industry. What is the skill available, which goods and services are locally available? In Nigeria, the monitoring body⁵⁵ powered the Nigerian Content Consultative Forum (NCCF), a platform for information sharing and collaboration in Nigeria’s petroleum industry with respect to upcoming projects, available local capabilities and policy proposal that may be relevant for the local content development.

⁴⁹ Section 51, *The Petroleum Act*, (Act No.2 of 2019)

⁵⁰ Established under Section 9 of *The Energy Act, 2019*. ‘There is established the Energy and Petroleum Regulatory Authority hereinafter referred to as the Authority.’

⁵¹ Section 51(2), *The Petroleum Act*, (Act No.2 of 2019)

⁵² Pereira E; Mathews C; Trischmann H, ‘Local Content Policies in the Petroleum Industry: Lessons Learned’ 4(5) *Oil and Gas, Natural Resources, and Energy Journal*, 2019, 644

⁵³ Section 51(2)(b), *The Petroleum Act*, (Act No. 2 of 2019)

⁵⁴ Pereira E; Mathews C; Trischmann H, ‘Local Content Policies in the Petroleum Industry: Lessons Learned’ 4(5) *Oil and Gas, Natural Resources, and Energy Journal*, 2019, 644

⁵⁵ Section 69 (1), ‘*Nigerian Oil and Gas Industry Content Development Act*’(Act No. 2 of 2010) establishes the Nigerian Content Development and Monitoring Board (NCDMB)

Further, the Board established the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund. These institutions allow for easier implementation, monitoring and enforcement of local content requirements within Nigeria's petroleum industry.

Nwaokoro argues that imposing quantitative conditions on companies regarding the hiring of locals when the existing local labour lacks the skills to carry out the task desired discourages investment.⁵⁶ Local content policies ought to be flexible and realistic enough to allow for continuous implementation and to achieve effective and realistic targets and domestic linkages.⁵⁷ Nwapi supports this argument, adding that it is important for a country to recognize and acknowledge its skills level and give a better approach to setting local content requirements rather than stipulating stringent targets that are more likely to create corruption instead of helping to grow the economy.⁵⁸ Brazil has shown flexibility in its local content requirements in 2017 when the Ministry announced a reduction in fines from a minimum of sixty percent (60%) of what was not achieved by the oil companies to forty percent (40%), and from a ceiling of one hundred percent (100%) to seventy five percent (75%) in case of non-compliance with local content obligations.⁵⁹ Further, Brazil established a rewarding system where certain activities in specific areas obtain a higher percentage/ a bonus to wards local content commitments. The flexibility in the enforcement of local content encourages IOCs to take part in the operations and not shy away because of stringent non-flexible local content requirements.

It is important to note that under the Local Content Bill 2018, a Local Content Development Committee⁶⁰ (LCDC) is instituted with the role of overseeing, coordinating and managing the growth of indigenous content within the country, oversee the implementation of local content

⁵⁶ Nwaokoro J, '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, 56

⁵⁷ Hayani Y, 'Local Content in the Extractives Sector: Exploring Policy Issues in New Producing Countries' Policy Center for the New South, 2016. -<<https://www.policycenter.ma/blog/local-content-extractives-sector-exploring-policy-issues-new-producing-countries#.XudEe7zivIU>>- on 15th June 2020.

⁵⁸ Nwapi C, 'A survey of the literature on local content policies in the oil and gas industry in East Africa', 9(16) *School of Public Policy Technical Paper*, 2016, 8

⁵⁹ Bausch K, Miotto T, 'Local Content - Brazil Petroleum', *Columbia Center on Sustainable Investment*, 2017,19 - <<http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf>>- on 18th August 2020

⁶⁰ Section 9, *The Local Content Bill*, 2018

policies and strategies by operators among many others.⁶¹ This is the similar mandate bestowed upon the EPRA under the Petroleum Act 2019.⁶² If this Bill is passed into law, the mandate bestowed upon the LCDC will overlap that of the EPRA. The dilemma would therefore be, of the two authorities, which one has the final say on matters local content development within the petroleum industry. In order to achieve maximum benefit from local content, the procedure for designing and administering local content policies should be supervised by public institution(s) with a clear, limited mandate.⁶³ According to a report by World Bank, when local content policies are sufficiently defined and monitored they are likely to be more successful.⁶⁴

III. Development of Human Capital, Knowledge and Technical Capacity

Anis et al perceive sustainability as “conserving the natural environment for resources that directly or indirectly impact our survival and the environmental, economic and social well-being of a community.”⁶⁵ Sustainable development explores relationship among economic development, environmental quality and social equity. They define the economic dimension of sustainable development as profit and expound further to say that when the companies involved create an economic value to their working environment which is termed as sustainable growth.⁶⁶ They further argue that “the real purpose of sustainable growth in the industrial context is when the 'Real Output', measured by GDP-Gross Domestic Product, increases over time at constant prices.”⁶⁷ According to a World Bank report, focusing strongly on skills enhancement will give African countries a clear window of opportunity to convert

⁶¹ Section 10(1)(a), 10(1)(b), 10(1)(e), *The Local Content Bill* (2018)

⁶² Section 51, *The Petroleum Act*, (Act No. 2 Of 2019)

⁶³ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) *Oil and Gas, Natural Resources, and Energy Journal*, 2019, 668

⁶⁴ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?' , September 2015, - <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf> on 2nd March 2020

⁶⁵ Anis M; Siddiqui T, 'Issues Impacting Sustainability in the Oil and Gas Industry ' ,*Journal of Management and Sustainability*, 5(4) 2015, 116

⁶⁶ Ibid at 116.

⁶⁷ Ibid.

their natural capital into sustainable economic activities that can generate longer-term social and economic benefits.⁶⁸

To enhance technology and skills transfer, the Petroleum Act 2019 provides for training and the Training Fund, giving directions as to the establishment, contribution and management of the Training Fund.⁶⁹ The purpose of the Training Fund is to train Kenyan nationals in upstream petroleum activities.⁷⁰ Similarly, the sample Production Sharing Contract under the Petroleum Act 2019 provides for technology transfer to indigenous Kenyan employees and government officials.⁷¹ However, the industry demands for high level of technology and expertise and in the upstream sector and the presence of the skills gap in Kenya impedes the successful implementation of this requirement.⁷² This results into altercations between the indigenous community and the contractors. For example, in 2013, the elders of the community prevented oil exploration at the Twiga 2 site in Lokichar basin demanding jobs. Complaints were raised on the idea that office jobs were being given to women and men were given hard jobs out in the sun.⁷³ To effectively implement technology transfer, capacities should be divided into basic, middle and advanced. Basic capabilities being simple activities and from experience; middle capabilities being those derived from intentional copy and adaption and advanced planning and advanced capabilities being those developed by R & D activities.⁷⁴ Once this is addressed, it will be easy to categories the locals and engage them at their levels of expertise.

⁶⁸ World Bank, 'Human Capital for the Oil, Gas and Minerals Industries' , March 2014 - < <http://documents.worldbank.org/curated/en/406101468202451878/pdf/857140BR10WB0H00Box382147B00PUBLIC0.pdf>> on 2nd March 2020

⁶⁹ Section 52, *The Petroleum Act*, (Act No.2 of 2019)

⁷⁰ Section 52(2), *The Petroleum Act*, (Act No. 2 of 2019)

⁷¹ Clause 24, *Model Production Sharing Contract*.

⁷² Wasunna M, Kirwa J, 'Kenya Has a Massive Skills Gap: How it Can Fix the Problem', 27th February, 2018 - < <http://extractives-baraza.com/media-center/news/2018/02/27/kenya-has-a-massive-skills-gap-how-it-can-fix-the-problem/>> on 26th February 2019

⁷³ Khamadi S, 'TheTurkana oil Protests' -<http://www.shitemi.com/extractive-industry/the-turkana-oil-protests/>- on 15th October 2021.

⁷⁴ Asghari M, Rakhshanikia M, 'Technology transfer in oil industry, significance and challenges,' 2nd International Conference on Leadership, Technology and Innovation Management.

In most upcoming oil producing countries, the locals lack the competencies for the industry. If available, it's only but a few and the few may not be skilled enough for the industry.⁷⁵ Wasuna et al reiterate that in order for Kenya to realize the full potential of its natural resources, the extractives industry needs more people with the right skills.⁷⁶ According to their observation, “the number of skilled workers in Kenya’s labour market does not match the extractives sector’s current needs. Although the size of the skills gap in Kenya is unknown because detailed research hasn’t been done, industry sources have made it clear that they are struggling to fill posts. According to a report on the petroleum industry in Kenya, the industry is still widely controlled by foreign expertise with technical skills, exploration skills and production skills.

The Act requires institutions wishing to provide human capital development, build knowledge and technical capacity in upstream petroleum operations to be accredited to provide such services. However, as Wasunna et al do observe, despite the fact that Kenya has more than 845 accredited technical and vocational education and training institutions, the courses offered in these institutions are not aligned with global standards hence limiting Kenya’s capacity to compete effectively in the global market.⁷⁷ Sen R. observes that the prosperity of LCPs depends on the domestic suppliers’ capabilities to meet the demand for goods and services within the petroleum sector. This is sadly mirrored in many African countries where local suppliers have no capacity to produce or supply high quality materials that the petroleum industry needs.⁷⁸

⁷⁵ Kakonge J, ‘Kenya’s Turkana oil and gas field shows the challenges of implementing local content policies’ Africa at LSE, 2020. -< <https://blogs.lse.ac.uk/africaatlse/2020/05/25/kenya-turkana-oil-and-gas-field-supply-chain-challenges-local-content-policies/>>- on 14th June 2020.

⁷⁶ Wasunna M, Kirwa J, ‘Kenya Has a Massive Skills Gap: How it Can Fix the Problem’, 27th February, 2018 - < <http://extractives-baraza.com/media-center/news/2018/02/27/kenya-has-a-massive-skills-gap-how-it-can-fix-the-problem/>> on 26th February 2019

⁷⁷ As a result, even where skilled labour is available, the said skills aren’t the right ones and where they are, they are quite inadequate. “Employers can’t rely on certificates from formal technical and vocational institutions as a guide to an individual’s actual competencies. Instead they have to verify new recruits’ competencies to determine how much additional on-the-job training is required.”

Wasunna M, Kirwa J, ‘Kenya Has a Massive Skills Gap: How it Can Fix the Problem’, 27th February, 2018 - < <http://extractives-baraza.com/media-center/news/2018/02/27/kenya-has-a-massive-skills-gap-how-it-can-fix-the-problem/>> on 26th February 2019

⁷⁸ Sen R, ‘Enhancing local content in Uganda’s oil and gas industry’ United Nations University, WIDER Working Paper 2018/110, 2018. -< <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2018-110.pdf>>- on 15th June 2020.

Tubei refers to an audit by the Auditor-General, Edward Ouko, of the extractives industry that indicates that Sh943.9 million (\$9.439 million) set aside as Training Levy Fund is remaining untouched in local banks. In his audit, Mr. Ouko says the State Department of Petroleum had accumulated Sh943, 906,947 for training in a local bank account as of June 30, 2018.⁷⁹ If not well managed, the set Training Fund will merely be a storage for funds and with time, encourage corruption and misuse of the said funds set for development.

Skills development is clearly linked to gender and more long-running gains from the extractive industries. This has proved successful in several African countries, amongst them are Angola, Botswana, Gabon, Ghana and Nigeria.⁸⁰ The report concludes that building specialized human capital does indeed add value for local suppliers, creates a large number of direct and indirect jobs, and in the long run builds governance capacity.⁸¹ Reference is further given to the *Anglo American 2012 Sustainable Development Report* which indicates that “economic value retained through employment and local supplier’s accounts for 66 percent of the total value created through minerals extraction.”

1.7 Research Methodology

The research will involve an analysis of the local content framework under Sections 50, 51 and 52 of the Petroleum Act 2019 and determine its adequacy for Kenya’s petroleum industry. The study will draw from existing legislations and scholarly works on local content in the petroleum industry. The research will also incorporate articles and journals on local content within the oil and gas industry. Further, the study will incorporate a benchmark with global best practice, conducting a case study on Nigeria and Brazil’s local content framework and drawing lessons that Kenya can learn from the two countries’ local content frameworks.

Apart from both being African countries, Nigeria and Kenya experience similar challenges from political to social economic challenges. Both countries are characterized by corruption, poor governance, lack of transparency, inadequate skilled workforce and inadequate capacity to serve the petroleum industry. Brazil and Nigeria have had to deal with similar local content

⁷⁹ Tubei G, ‘Kenya’s Petroleum Ministry on the spot’, 17th July, 2019 - > <http://extractives-baraza.com/media-center/news/2019/07/17/kenyas-petroleum-ministry-on-the-spot/>> on 27th February, 2019

⁸⁰ World Bank, ‘Human Capital for the Oil, Gas and Minerals Industries’, March 2014 - < <http://documents.worldbank.org/curated/en/406101468202451878/pdf/857140BRI0WB0H00Box382147B00PUBLIC0.pdf>> on 2nd March 2020.

⁸¹ *ibid*

challenges in the past before getting to their current stage with regards to local content legislations. Both countries have also achieved a certain degree of positive local content outcomes following a series of amendments to their legislative local content frameworks these improvements justify the need for Kenya to draw lessons from their experiences. With references to local content frameworks in other jurisdictions, this study will propose changes to the Petroleum Act 2019 to enable the industry to achieve positive local content outcomes and for the country to propel the country towards achieving maximum benefits from its oil and gas minerals.

1.8 Significance of the Study

The introduction of the Petroleum Act 2019 shows the country's commitment towards promoting local content and obtaining uttermost benefits from its petroleum. This research seeks to analyze the adequacy of the LCRs under the Petroleum Act 2019, outlining the factors that hinder the successful implementation of local content within Kenya's petroleum sector. Further, this study will recommend amendments and implementation strategies to propel the country towards achieving economic development. This study will demonstrate how implementation of local content in the country can be simplified and implemented in a manner that it reduces disputes through specific LCRs and strong legal and institutional frameworks that give priority to growth of Kenya's national industry involvement.

1.9 Limitations of the Study

The Petroleum Act 2019 is fairly a new legislation and therefore the outcomes of its implementation may not be experienced immediately to enable this research to give practical examples as references. Secondly, the Local Content Bill 2018 may be passed into law during the period of this research, affecting some part of this study. Thirdly, oil and gas is a fairly new concept in Kenya as compared to other jurisdictions and therefore, the literature by Kenyans on this concept may be limited. Finally, this study entails an analysis of Kenya's legislative framework on local content for the petroleum industry and will compare case studies from other jurisdictions on the same. However, due to the limited time for this research, the study will only critically study at Brazil and Nigeria for comparison purposes but will give a few references to other jurisdictions' experiences.

1.10 Chapter Breakdown

Chapter one - Introduction to the study: This chapter is an introduction to the study, briefly discussing the oil and gas industry and the key players in any given oil and gas operation. The chapter introduces local content within the oil and gas industry as well as local content policies, giving a brief of what these terms mean. This chapter also discusses the statement of the problem that this research is seeking to address, highlighting the literature that has been written on the same and the views of different authors on the problems identified.

Chapter two- Conceptual Framework Meaning, nature and scope of local content: This chapter delves deeper into the meaning, nature and scope of local content within the petroleum industry. In this chapter, the meaning of local content is broken down in various aspects, with reference to definitions by other oil producing countries that adopted local content policies. The study also elaborates the relevance of local content policies, highlighting literature that is for and against local content policies. It finally discusses the different ways that local content policies are monitored and enforced.

Chapter three- Legal and institutional framework governing local content in Kenya : This chapter narrows down to local content in Kenya's petroleum industry. It gives a brief history of the petroleum industry in Kenya, focusing on local content frameworks over the years. It introduces the Petroleum Act 2019, discussing the local content provisions and identifying the loopholes within the act as it is. This chapter also discusses the various local content institutions and the roles they play within the industry

Chapter four- Comparative Analysis: The Experiences of Nigeria and Brazil

This chapter studies local content in both Brazil and Nigeria, outlining the factors that influence positive local content outcomes in both countries. The chapter keenly analyses the local content policies in both countries and with the results, conclude as to whether Kenya's local content policies are adequate and whether they meet international best practice standards.

Chapter five: This chapter concludes the study, outlining the findings of the research. With the findings, the chapter proposes implementation strategies, giving recommendations with regards to local content provisions under the Petroleum Act 2019.

CHAPTER TWO

CONCEPTUAL FRAMEWORK MEANING, NATURE AND SCOPE OF LOCAL CONTENT

2.1 Introduction

Oil and gas are valuable commodities that can directly contribute to a country's economic development and well-being. However, the capital, the level of expertise and technology required to explore this resource are normally beyond reach for developing resource rich countries and therefore the need to bring on board external entities such as the International Oil Companies (IOCs).⁸² However, the involvement of the equipment, expertise and financial resources owned by the IOCs often diminishes the net value that the host country would have in other respects realized from the underlying assets and the host country may respond by seeking to adopt "local content policies".⁸³ Determined to maximize the potential of foreign direct investment (FDI) and realize real economic development in their countries, governments are designing policies in the form of local content requirements (LRCs).⁸⁴ To understand local content, this chapter delves into the meaning, the nature and the scope of local content within the oil and gas industry.

2.2 Meaning and Nature of Local Content

"Local content" is not universally defined.⁸⁵ It is a multi-dimensional concept whose scope and depth vary significantly. However, it is generally understood to be concerned with policies instituted by host nations to guarantee that a specified proportion of factors of production required at various stages of the mineral value chain is locally procured.⁸⁶ The

⁸² Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 633

⁸³ Ibid

⁸⁴ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' Law and Development Review, 8(1) 2015,187

⁸⁵ The World Bank (2012) based its definition for "domestic preference qualification" on the percentage of indigenous ownership of the firm whereas the African Development Bank (AfDB) has based its definition for "local firms" on the place of registration, nationals being the majority of board members, and the amount of shares held by the citizens.

⁸⁶ Ramdoo I, 'Local content: Key characteristics', International Institute for Sustainable Development (IISD) (2018),2, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

Financial Times has described local content as the materials, parts etc. manufactured within that nation instead of being imported into the country. Under trade laws, the minimum level of local content is at times a necessity when issuing licenses to foreign firms to manufacture in a particular region.⁸⁷ World Bank Report (2013) has defined local content as the level to which the output of the extractive industry generates additional benefits to a country's economy above the direct contribution of its value added, as through links to other sectors.⁸⁸

Pereira et al refer to Anyanwu's definition that views "local content" as the added benefit that petroleum activities bring to a country separate from the direct revenues obtained via the sale of hydrocarbons that belong to the country's government or from taxes, service fees, state participation, or dues accrued from firms that are carrying out upstream operations in that country.⁸⁹ Nigeria defines local content as the portion of the total value that is added to or generated in the Nigerian economy by a structured development of skills and capacity through the intentional use of Nigerian nationals, material and services in the petroleum sector.⁹⁰ Kenya's Petroleum 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 procuring locally available work force, services and supplies, for the sharing of accruing benefits."⁹¹ The working definition throughout this paper is the Kenyan definition.

2.3 The "Local" In Local Content

What constitutes 'local' content is subject to different interpretations. There is no given universal definition for the term and even different firms have interpreted it in their own way.⁹² Most local content laws do not explicitly define the term "local" in local content. Ramdoo

⁸⁷ Financial Times, Lexicon, <http://lexicon.ft.com/Term?term=local-content>.

⁸⁸ Tordo S, Warner M, Manzano E, Anouti Y, 'Local Content Policies in the Oil and Gas sector', World Bank, Washington, D.C. (2013)

⁸⁹ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 635

⁹⁰ Section 106, *Nigerian Oil and Gas Industry Content Development Act*, (Act No.2 of 2010)

⁹¹ Section 2, *The Petroleum Act*, (Act No.2 of 2019)

⁹² For example, Newmont gives priority to "local local" firms, located around its mining operations whereas AngloGold Ashanti understands "local" to be nationally sourced, and does not distinguish between local importers and locally produced goods.

argues that “local” can narrowly be interpreted⁹³ in a manner that it only focuses on the geographic region and the people living around a specific exploration site.⁹⁴ This school of thought pays a tangible attention to what Warner has termed as “community content,” meaning, “the strategic deployment of local participation and local capability development opportunities arising from an oil or gas project, specifically directed to strengthen the sustainability, relevance and political visibility of community.”⁹⁵ The disadvantage of this approach is that from an administrative point of view, it is quite difficult to effectively monitor.⁹⁶

Secondly, it can be defined broadly where the term “local” is defined in the context of nationality or citizenship on matters employment and in terms of company or a firm, it be interpreted in the context of business registration and/or headquarters as well as ownership and/or control of capital. Companies may also be deemed “local” if they are locally based but foreign owned, locally based and locally owned or locally owned but foreign-based. The term local can further be defined in terms of value addition in the sense that a percentage of locally acquired inputs are used in the manufacturing process or the raw material is used as an input for further transformation by the indigenous industries.⁹⁷

However, what local means can only be deciphered in a country’s definition of local content. For instance, Nigeria defines local content as the portion of the total value that is added to or generated in the Nigerian economy by a structured development of skills and capacity through the intentional use of Nigerian nationals, material and services in the petroleum sector.⁹⁸ In Ghana, local content is the measure of indigenously acquired materials, personnel, financing,

⁹³ Ramdoo I, ‘Local content: Key characteristics’, International Institute for Sustainable Development (IISD) (2018),2, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

⁹⁴ In this context, “local employment” strictly refers to the jobs that are available to persons who come from that particular area and “local suppliers” refers to suppliers originating from the impacted community.

⁹⁵ Warner M, ‘Community Content: The Interface of Community Investment Programmes with Local Content Practices in the Oil and Gas Development Sector’, Policy Brief Note 9, 2007, 5, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2087.pdf> on 10th April 2020

⁹⁶ For example, those migrating from other regions are usually recognized as locals if they are registered at the local municipalities and therefore challenging the purpose of targets set regarding local employment or procurement. Similarly, firms registered in a particular location for tax purposes may qualify as local, even if the firm is foreign-owned and does not undertake substantial economic activity with local or regional stakeholders.

⁹⁷ Warner M, ‘Community Content: The Interface of Community Investment Programmes with Local Content Practices in the Oil and Gas Development Sector’, Policy Brief Note 9, 2007, 5, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2087.pdf> on 10th April 2020

⁹⁸ Section 106, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No.2 of 2010)

goods and services for the petroleum sector and can be quantified in monetary terms.⁹⁹ Nigeria explicitly refers to “Nigerian economy” and Nigerian human and material resources and services, whereas the Ghanaian Regulation refers to “locally produced materials ...” Therefore, while it can be assumed that “local” in the Nigerian case is the same as “national”, the Ghanaian model is ambiguous as to whether local refers to “national” or to the region or locality within Ghana where the goods and services are produced.¹⁰⁰ Tanzania’s draft LCP adopts a national approach to an understanding of “local”, defining it as “the Tanzania Mainland and its people.”¹⁰¹ It defines local content as the additional benefit the country acquired from Tanzania’s petroleum industry through the involvement and development of Tanzanian nationals and local companies through national labour, goods and services, capital, technology and research capability.¹⁰² It further defines local content as the additional benefit brought to a country (and regional and local areas in that country) through the petroleum operations.¹⁰³ The reference to “regional and local areas” departs from the position in other countries, recognizing that the localities or regions where oil and gas resources are extracted deserve special recognition in the implementation of LCPs.¹⁰⁴

2.4 The “Content” In Local Content

The term “content” is meant to respond to different policy objectives that vary with different governments and Ramdoo outlines the policy objectives that play a role in defining “content” to include;¹⁰⁵ (a) an objective to increase the participation of local industries by enabling access

⁹⁹ Regulation 49, ‘*Petroleum (Local Content and Local Participation) Regulations*’, (2013).

¹⁰⁰ Nwapi C, ‘A survey of the literature on local content policies in the oil and gas industry in East Africa’ 9(16) School of Public Policy Technical Paper, 2016, 8. For example, Regulation 9 directs that a company’s local content plan ought to contain provisions that guarantee first consideration being given to Ghanaians in matters of employment and that “adequate provision is made for the training of Ghanaians on the job”. This insinuates that “local” is equivalent to national rather than the subnational locality or region where the oil and gas activities occur. This is the position in most other countries, including Angola, Equatorial Guinea, and Indonesia.

¹⁰¹ See ‘Draft Local Content Policy of Tanzania for Oil and Gas Industry’ (2014), iii -<
https://www.agcc.co.uk/uploaded_files/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf>-
on 4th May 2020.

¹⁰² Ibid.

¹⁰³ Ibid at 7, indicating that “this policy defines the Local Content as the added value brought to a host nation (and regional and local areas in that country) through the activities of the oil and gas industry.”

¹⁰⁴ Nwapi C, ‘A survey of the literature on local content policies in the oil and gas industry in East Africa’ 9(16) School of Public Policy Technical Paper, 2016,9

¹⁰⁵ Ramdoo I, ‘Local content: Key characteristics’, International Institute for Sustainable Development (IISD) (2018),2, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

to oil and gas mining procurement markets and encouraging local sourcing of goods and services; (b) advance the indigenous workforce at different levels of competencies and stages of the value chain. This entails employment, training, skills development and knowledge transfer. (c) Technology transfer to indigenous companies. (d) Locally carry out research and development and innovation activities, or in the alternative, fund indigenous institutions for a similar purpose. This maintains the competitiveness of the indigenous firms and encourages technology absorption; and (e) promote downstream value addition and beneficiation of raw materials that are locally produced.¹⁰⁶

2.5 Local Content Policies (LCPs)

LCPs are policy tools that countries use to bring about economic benefits for their local economy in addition to the fiscal benefits.¹⁰⁷ LCPs not only focus on achieving an increase in local content but also on actions that will lead to its longer-term increase (for example training in applicable skills to the indigenous workforce). Such policies do not guarantee automatic growth in local content but, if implemented appropriately, they can create and enhance local capabilities transferable to other sectors.¹⁰⁸

Pereira et al describe LCPs as policies that are formulated to further the use of local content in an industry that might otherwise turn to foreign sources for goods and services.¹⁰⁹ These policies seek to attract investors to resource rich countries but at the same time notify them the minimal level of local content if they chose to invest.¹¹⁰ Governments believe that maximum economic benefits from their natural resources can best be realized through policies that enhance local participation in the industry and in the long run, increase growth and better the competitiveness of the economy as a whole while keeping up a positive trend in living

¹⁰⁶ Ramdoo I, 'Local content: Key characteristics', International Institute for Sustainable Development (IISD) (2018),2, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

¹⁰⁷ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?', International Institute for Sustainable Development (IISD) (2018),1, <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf>>- , on 4th May 2019

¹⁰⁸ Tordo S, Warner M, Manzano E, Anouti Y, 'Local Content Policies in the Oil and Gas sector', World Bank, Washington, D.C. (2013) 2

¹⁰⁹ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 635

¹¹⁰ Ibid

standards.¹¹¹ According to Nwapi, LCPs may take two forms, first, they may requirements mandating foreign companies to give preferences to local suppliers in the procurement of goods and services, preferences to local labor in matters of employment and preferences to (or mandatory minimum percentages in) the use of local raw materials in production. Secondly, they may take the form of “price preferences” to domestic companies that participate in government procurement bids, “import licensing procedures designed to discourage foreign suppliers, and discretionary guidelines that both encourage domestic firms and discourage external companies.”¹¹²

The general method mostly applied in the various LCP definitions include¹¹³ ownership, which obligate foreign companies to engage local firms in joint ventures or to open equity to indigenous partners to get licences to operate. This ensures that the oil and gas sector is not entirely foreign owned.¹¹⁴ Secondly, increase in local procurement and preferential sourcing from indigenous firms as a chance to localize supply chains where different technologies and inputs are required and employed.¹¹⁵ Thirdly, a measure of raw materials to be further transformed or beneficiated locally through forward linkages.¹¹⁶ Fourth, indigenous participation at various stages of the value chain and of various levels of competencies. This often goes together with the demands to increase indigenous capabilities through training, skills and growth of expertise, and transfer of technology. Lastly, the demand to introduce greater technology or conduct research and development in the country to allow firms

¹¹¹ Nwapi C, ‘Defining the “Local” in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries’ *Law and Development Review*, 8(1) 2015,190-191

¹¹² Cimino C, Hufbauer G, Schott J, ‘A Proposed Code to Discipline Local Content Requirements’, Peterson Institute for International Economics Policy Brief No PB14-6, February 2014,1, <https://www.piie.com/publications/pb/pb14-6.pdf> on 15th April 2020

¹¹³ Ramdoo I, ‘Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?’, *International Institute for Sustainable Development (IISD)* (2018),2, <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDDPM.pdf> , on 4th May 2019

¹¹⁴ In Brazil, ownership requirement wasn't part of their LCP experience except for registration of a legal entity in Brazil. Nigeria, Angola, Ghana, and Uganda consider local ownership as determinant.

¹¹⁵ International Finance Corporation, ‘A Guide to Getting Started in Local Procurement For Companies Seeking the Benefits of Linkages with Local SMEs’ (2011), stipulates the various formulas for defining “local” to include the size of local firms that are involved in the supply chain.

¹¹⁶ Countries with strong policies with this regard include Brazil, Zambia, Nigeria, Australia, South Africa and Mongolia.

perform competitively by employing latest state-of-the-art technology, or for indigenous firms to profit from technology transfer.¹¹⁷

To bring them to life, these policies are either set in contracts between governments and companies or they are legislatively enacted or established in requirements that are bidding as part of the criteria for winning contracts or more indirectly in regulation and tax regimes that discriminate in favor of local industries.¹¹⁸

2.6 Relevance of LCPs

The reasoning behind the use of LCPs is compelled by the need to address common challenges including; (a) the overly dependence on natural resources' contributions to national income (b) the paradox of plenty, also known as the resource curse; (c) to reduce social and political risks arising due to the growing expectations by locals for a better and equitable wealth distribution; and (d) the need to increase job opportunities, due to the capital-intensiveness of the extractive sector.¹¹⁹ Governments in resource rich countries design LCPs for political purposes, strategic purposes, economic and social motivations. LCPs strongly appeal politically because they give solutions to the pressures by the locals for the government to deliver on wealth creating and job availability promises that were made during political campaigns. Because of a nation's sovereignty over natural resources, nations may be forced by their nationals to turn that sovereignty into real and physical benefits for the nation.¹²⁰ They are also considered to be fiscally neutral and have no financial implications for the state

¹¹⁷ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?', International Institute for Sustainable Development (IISD) (2018),2, <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf> , on 4th May 2019

¹¹⁸ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' Law and Development Review, 8(1) 2015,191-192

¹¹⁹ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?', International Institute for Sustainable Development (IISD) (2018),1, -<https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf> , on 4th May 2019

¹²⁰ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 638

In simple terms, locals may believe that they are entitled to a big portion of the economic profit the government gets from the country's resources and expect the state to get it for them.

and hence seen as as a “quick win” by states that are firmly established in the logic of a short-term political cycle.¹²¹

Economically, whenever the local industry is competitive, LCPs are likely to create jobs and expand the growth of indigenous suppliers of services and goods to the industry. Research has estimated that oil and gas companies spend between forty (40) and eighty (80) per cent of their revenues on acquiring goods and services and this exceeds their contribution to state’s revenues by far.¹²² The expenditure from procurement within the petroleum sector represents a profit making market into which the skilled and capable indigenous private sector should exploit.¹²³ Nwapi concurs with Palpacuer and Parisotto’s argument that "the challenge for a local firm... is not so much to enter global networks, which might be done relatively easily on the basis of low costs, but to reach more profitable positions within these networks."¹²⁴ This can be achieved through LCPs, given that LCPs can be used to strengthen the productive capacity of local firms, the end result of which would be enhanced competitiveness of those firms.¹²⁵

On the social aspect, societies are complaining and questioning the continuous failures in policies as well as the incompetence of succeeding governments to deliver on all-round and sustainable development objectives and welfare creation. According to Ramdoo, LCPs are seen as tools for governments to manoeuvre through the interests to acquire deals to maintain social peace and coexistence; and to increase profits at the national level. For petroleum companies, LCPs are viewed as a means to obtain the social licence to operate and transfer some profits to the locals.¹²⁶ Pereira et al take the same stand, noting that in a broader sense, an effective local content program is in a position to better the relationship with local governments, generating preferential access to additional licenses and projects, and a

¹²¹ Ramdoo I, ‘Local content: Key characteristics’, International Institute for Sustainable Development (IISD) (2018),4, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

¹²² Ramdoo I, ‘Local content: Key characteristics’, International Institute for Sustainable Development (IISD) (2018),4, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

¹²³ Ibid.

¹²⁴ Nwapi C, ‘Defining the “Local” in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries’ *Law and Development Review*, 8(1) 2015,192

¹²⁵ Ibid.

¹²⁶ Ramdoo I, ‘Local content: Key characteristics’, International Institute for Sustainable Development (IISD) (2018),4, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020

reduction of industrial or social unrest risks. It also enhances the growth of sustainable relations with the nation, thereby allowing the company to formulate a long term plan.¹²⁷

Finally, more advanced economies have a deliberate interest to increase expertise in emerging high-technology activities. Nations impose LCRs with regards to research and development, innovation and technological transfer to ensure that indigenous companies build their competencies to stay ahead of the innovation curve.¹²⁸ In this context, LCPs help to correct market failure that occurs as a result of lack of specialized skills in developing countries required by the extractive sector, which compels the IOCs to bring in foreign labor with the required skills in order to keep the project up and running.¹²⁹ This can be corrected by mandating firms to contribute to the development of particular local skills and capacities to meet market requirements.¹³⁰ Prior to moving on due to international/regional treaties, Norway required petroleum agreements and other essential documents to be written in Norwegian and fluency in Norwegian was mandatory for employment on offshore drilling platforms. This requirement inspired foreign firms to set up operational entities within Norway where Norwegians took part in key roles, hence encouraging transfer of capital investment, knowledge, skills and expertise.¹³¹

2.7 Arguments Against LCPs

Over the years, LCPs have been criticized and discussions have been made as to the drawbacks of having LCPs in place. The main concerns being be costs, delays, deter investments and corruption. Nwapi notes that LCPs may possibly not be the best policy

¹²⁷ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 648

¹²⁸ Ramdoo I, 'Local content: Key characteristics', International Institute for Sustainable Development (IISD) (2018),4, <https://www.jstor.org/stable/resrep21957.4> , on 9th April 2020.

¹²⁹ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' Law and Development Review, 8(1) 2015,193 "A market failure occurs when there is a distortion that keeps the market from allocating resources efficiently and adjusting to a steady state... The existence of market failures means that domestic industries cannot gain the necessary technology and capacity to compete on the open market without outside intervention and protection."

¹³⁰ Ibid.

¹³¹ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 658. Norway does not have local content regulations for over 20 years. This is due to the fact they had to move on due to international/regional agreements. A similar situation happened to Kazakhstan.

instrument for responding to the inadequate contribution of the extractive sector to the development of local economies in developing resource rich countries.¹³² Nwapi further gives reference to Lec's argument that "LCPs create distortions, inefficiency and corruption." The distortions may come as a result of the industry or sector-selective manner in which most governments apply LCPs. In addition, the major corruption risks in LCPs within the petroleum industry include¹³³ political interference by the officials in charge of enforcing LCRs, favouritism within the industry, undue influence by IOCs, Corruption during public procurement and joint ventures, nepotism¹³⁴ and fronting and use of shell companies.¹³⁵

It has also been argued that requiring companies to use local workforce when the existing workforce lacks the capacity to perform the required task is anti-investment. Instead of investing forward, the companies will be working backwards.¹³⁶ Policy makers do however recognize this criticism and have drafted LCPs that require companies to invest in the development of local skills and capacities to bring local people to the standard that they can perform the tasks for which expatriates are hired.¹³⁷ For instance, Tanzania's 2014 Draft Local Content Policy is perhaps the most explicit and stringent on this issue. The draft policy requires operators to, on matters employment, give preference to Tanzanians who have the requisite qualifications and experience to perform the desired task. In a situation where no such Tanzanian is available, the operator is required to prepare and submit a succession plan that would enable a Tanzanian national to acquire the skills to perform the same task that the foreign national was brought on board to perform. The implementation of this plan will in

¹³² Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,197. For example, it is argued that if lack of skilled workforce is the problem, and training is the solution, imposing minimum levels of employment of local workforce on the IOC may not provide the best outcome.

¹³³ Martini M, 'Local content policies and corruption in the oil and gas industry', U4 Anti-Corruption Resource Centre, September 2014, 3-6 -< <https://www.u4.no/publications/local-content-policies-and-corruption-in-the-oil-and-gas-industry.pdf>>- on 5th May 2020

¹³⁴ Research has indicated reports on misuse and abuse of LCPs and employment based on family ties, affiliation to a certain political party or ethnicity rather than qualifications.

¹³⁵ Angola has evidence of IOCs paying illegal fees to contract with front firms to comply with the LCPs. These firms have unclear ownership and shareholding structures and are usually incapable to deliver on the awarded contract, with the work usually being done by the IOC itself.

¹³⁶ Nwaokoro J, '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, 56

¹³⁷ *Ibid.*

turn influence the government's decision whether to extend the foreign national's work permit.¹³⁸

Nwapi notes that from an industry perspective, it has been argued that LCPs put undue pressure on IOCs to engage the local workforce, for as more locals are hired, the more they seek new and more opportunities to advance in the company. The quest for more opportunities to be provided continues perpetually. To address this, policymakers ought to clearly define what constitutes local content and set realistic and measurable targets for companies to achieve.¹³⁹ Unrealistic targets may more often than not breed corruption as such targets may be an inducement for companies to cut corners in order to fulfill LCPs to remain in business in their host country.¹⁴⁰

2.8 Monitoring and Enforcement of Local Content

Pereira et al note that without an effective enforcement mechanism to support local content policies, even the finest designed LCPs are of minimal value to the host country. They may be viewed as of long term value to a host nation but instead, from an IOC's perspective and its immediate financial interests, they may turn out to be economically efficient. Incentives to evade the system abound¹⁴¹ and for this reason, effective monitoring and enforcement of petroleum industry's operations to ensure compliance is key for the effectiveness of any LCP. Smith and Rosenblum argue that the Natural Resource Governance Institute offers key pointers for successful monitoring of the oil and gas firms' local content performance. They argue that monitoring involves four activities jointly carried out jointly by stakeholders and they include reviewing laws and agreements to understand the obligations of a company, monitoring the activities of a company to determine their compliance with the obligations,

¹³⁸ United Republic of Tanzania, Local Content Policy of Tanzania for the Oil and Gas Industry, Draft One, Dar es Salaam April 2014, p. 19 https://www.agcc.co.uk/uploaded_files/07.05.2014local-content-policy-of-tanzania-for-oil-gas-industry.pdf on 11th April 2020

¹³⁹ Nwapi C, 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' *Law and Development Review*, 8(1) 2015,197

¹⁴⁰ Martini M, 'Local content policies and corruption in the oil and gas industry', U4 Anti-Corruption Resource Centre, September 2014, 3-6 -< <https://www.u4.no/publications/local-content-policies-and-corruption-in-the-oil-and-gas-industry.pdf>>- on 5th May 2020

¹⁴¹ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) *Oil and Gas, Natural Resources, and Energy Journal*, 2019, 658-659

communicating information to tackle areas of non-compliance and enforcing the laws and agreements in case of non-compliance by companies.¹⁴²

Enforcement of LCPs vary for many governments. It may be done by governmental agencies with jurisdiction over petroleum resources (the relevant ministry) or by agencies that are particularly mandated to enforce local content rules. In Nigeria, the Nigeria Content Development and Monitoring Board is established under the Nigerian Oil and Gas Industry Content Development Act to create procedures for monitoring, coordinating and implementing the provisions of the *Nigerian Oil and Gas Industry Content Development Act*.¹⁴³ This guarantees a measurable and continuous development of Nigerian content within the petroleum industry.¹⁴⁴ Ghana has a 'Local Content Committee' that monitors and coordinates the implementation of Ghana's 2013 Regulation.¹⁴⁵ For Brazil, LCP monitoring is subcontracted to third parties that are licensed to carry out that role by Brazil's national petroleum agency under particular rules and guidance.¹⁴⁶ Alternatively, contractual provisions embodying local content rules can be to enforcement by courts of general jurisdiction with the expertise to interpret the relevant provisions.¹⁴⁷

Most stakeholders agree that monitoring and enforcement are essential in ensuring that oil and gas projects proceed as per the legal framework and as such, the risks and opportunities of oil and gas projects are distributed accordingly. However, scarcity in capacity and transparency contribute to inadequate monitoring and enforcement activities. Therefore, governments, civil society, and businesses must partner to intensify their efforts to monitor local content and mitigate the challenges.¹⁴⁸ The most obvious challenge to monitoring and

¹⁴² Smith E, Rosenblum P, 'Government and Citizen Oversight of Mining: Enforcing the Rules' Revenue Watch Institute, (2011) -<
https://resourcegovernance.org/sites/default/files/documents/rwi_enforcing_rules_full1.pdf>- 5th May 2020

¹⁴³ Section 4 , '*Nigerian Oil and Gas Industry Content Development Act*',(Act No.2 of 2010)

¹⁴⁴ Section 5 , '*Nigerian Oil and Gas Industry Content Development Act*',(Act No.2 of 2010)

¹⁴⁵ Regulation no. 72, '*Ghana's Petroleum (Local Content and Local Participation in Petroleum Activities)*', (Regulations 2013).

¹⁴⁶ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,659

¹⁴⁷ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,659

¹⁴⁸ Smith E,Rosenblum P, 'Government and Citizen Oversight of Mining: Enforcing the Rules' Revenue Watch Institute, (2011) -<
https://resourcegovernance.org/sites/default/files/documents/rwi_enforcing_rules_full1.pdf>- 5th May 2020

enforcement of local content is lack of capacity.¹⁴⁹ Capacity reflects politics and priorities and other factors that contribute to effective governance and nations usually have no capacity to inspect, audit and review company's operations over the long life of projects.¹⁵⁰ Access to information is key for effective monitoring and the lack of transparency can be a challenge for both the government and civil society's monitoring efforts. For legislators, the lack of access to critical information hinders credible monitoring and enforcement. For civil societies to successfully monitor local content, they should be in a position to freely access petroleum agreements, work plans, revenue collection figures and other key information on ongoing projects. Therefore, governments and companies should make available all key information for effective monitoring of oil and gas projects.¹⁵¹

In order to secure compliance among industry players, governments have in the past used sanctions to punish noncompliance. For example, in Indonesia, firms taking part in petroleum operations that do not meet the minimum requirements as set out in their agreements are subject to sanctions and fines or have their permit to engage in any further activities revoked.¹⁵² Operating companies in Angola have fines imposed on them in cases of non-compliance and illegibility for new agreements for those with unpaid fines. Further, agreements that contravene the local content rules are voidable.¹⁵³ This system seems logical and maybe effective, however, the question that begs to be answered is the degree at which the fines should be set because if they are set too low, there is the risk of the penalties becoming an accepted "cost of doing business" instead of being adequate tools to secure compliance among the industry players. On the other hand, if set too high, foreign firms may opt to conduct their business in some other countries. Worst case scenario is that some firms may

¹⁴⁹Baluch N, Rambarran R, 'Understanding Local Content Policy in Guyana's Oil & Gas Sector: A critical Overview', University of Guyana: School of Entrepreneurship and Business Innovation Guyana Diaspora and Entrepreneurship Conference July 2019,14 -< <http://repo.uum.edu.my/26210/>>- 5th May 2020

¹⁵⁰ First, they often lack sufficient staff to successfully monitor local content. Secondly, they may not have the skills, technology and financial resources to effectively monitor local content and even where skills and technology are available, weak policies or poor governance can make it impossible to plan and budget for appropriate monitoring and enforcement.

¹⁵¹ Baluch N, Rambarran R, 'Understanding Local Content Policy in Guyana's Oil & Gas Sector: A critical Overview', University of Guyana: School of Entrepreneurship and Business Innovation Guyana Diaspora and Entrepreneurship Conference July 2019,14 -< <http://repo.uum.edu.my/26210/>>- 5th May 2020

¹⁵² Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,659

¹⁵³ Ibid.

seek different techniques of circumventing compliance, including attempting to bribe regulatory officials.¹⁵⁴

However, jurisdictions are urged to not only focus on the use of sanctions to punish noncompliance, but also to consider the use of rewards to encourage good behavior.¹⁵⁵ Some countries make available incentives for greater compliance with the LCPs.¹⁵⁶ This aspect of rewarding compliance rather than just focusing on punishing firms for noncompliance allows such governments to create a positive and welcoming environment for cooperation among stake holders.¹⁵⁷

2.9 Conclusion

In conclusion, it is not easy to make an overall assessment of the performance and impact of LCPs in countries rich in natural resources. This is because there is no actual evidence and experiences in LCPs significantly vary from one country to another. Despite the fact that a number of resource rich countries have attracted notable levels of foreign direct investment,¹⁵⁸ there are also numerous instances where the local content measures have not achieved their stated objectives because of the lacking capacity to implement, manage, and monitor the LCPs.¹⁵⁹

Countries with success stories in using LCPs have employed a mix of quantitative and qualitative measures, based on their capacity to deliver on local content, while ensuring a clear and fair balance between their economic objectives and the viability of their investments.¹⁶⁰

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ For instance, the Brazilian local content has a rewarding system where certain activities in specific areas obtain a higher percentage/ a bonus towards local content commitments. In Iran, incentives are offered for high risk fields, specific projects and technology transfer. Mid 2019, the Indonesian government issued tax incentives for businesses that invest in labor intensive industries, training programs, as well as research and development.

¹⁵⁷ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,659

¹⁵⁸ Nikièma S, 'Performance Requirements in Investment Treaties: Best Practice Series', *International Institute for Sustainable Development*, December 2014

¹⁵⁹ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?', *International Institute for Sustainable Development (IISD)* (2018),2, <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf>, on 4th May 2019

¹⁶⁰ Ibid.

Foreign companies were initially required to give preferences to local firms, provided the latter were competitive on the basis of price, quality, and delivery.¹⁶¹ This measure was temporary, based on performance and was later relaxed. The domestic supply chain now allows for between 50% to 60% of capital inputs, 80% of operational and maintenance inputs, and exports 46 percent of its sales.¹⁶² Quantitative LCRs have majorly been used to encourage indigenous acquisition, placement of locals, technology transfer, or setting up joint ventures. The use of local content was an important criteria in the awarding of petroleum rights.¹⁶³

One of the lessons learnt from the experiences of countries with LCPs is that policymakers should draft clear objectives of LCPs and the monitoring and implementation of these policies should promote capable and competitive indigenous suppliers and not become hindrances to the growth and competitiveness of the oil and gas industry.¹⁶⁴ Secondly, they ought to be temporary, performance-based, and should be done away with as sectors become competitive.¹⁶⁵ Thirdly, the government's ambitions need to be realistic and implementable within the oil and gas sector. They ought to be flexible enough to easily adjust to changing situations.¹⁶⁶ Finally, it is important to ensure a balance between quantitative and qualitative measures based on how far the set policies can be monitored or implemented.¹⁶⁷ For example,

¹⁶¹ In Nigeria, preference for indigenous suppliers with capacity in tendering process and if the provided value of bids less than 10% of lowest bidder. Some specific manufacturing processes such as welding and fabrication should take place in Nigeria (equivalent to prohibiting imports of fabricated products). For Mozambique (petroleum), Brazil, the operator is required to give preference to local suppliers only if competitive on the basis of quality, price, and availability.

¹⁶² World Bank, 'Increasing Local Procurement by the Mining Industry in West Africa', Road Test Version, January 2012

¹⁶³ Cosbey A, 'Everyone's Doing It: The Acceptance, Effectiveness and Legality of Performance Requirements', International Institute for Sustainable Development, February 2015, -<
<https://www.iisd.org/itn/2015/02/19/everyones-doing-it-the-acceptance-effectiveness-and-legality-of-performance-requirements/>>- on 4th May 2020.

¹⁶⁴ Well defined and monitored LCPs, as was the case in, Chile or Brazil were found to be more successful.

¹⁶⁵ Ramdoo I, 'Unpacking Local Content Requirements in the Extractive Sector: What Implications for the Global Trade and Investment Frameworks?', International Institute for Sustainable Development (IISD) (2018),2, <https://ecdpm.org/wp-content/uploads/Unpacking-Local-Content-Requirements-Isabelle-Ramdoo-September-2015-ECDPM.pdf>, on 4th May 2019

¹⁶⁶ They should be able to assume some potentially politically difficult trade-offs. For example, Petrobras in Brazil skimmed 20,000 jobs (one-third of its headcount) during the restructuring process in 1997 but gained in efficiency and sophistication.

¹⁶⁷ Cosbey A, 'Everyone's Doing It: The Acceptance, Effectiveness and Legality of Performance Requirements', International Institute for Sustainable Development, February 2015, -
<https://www.iisd.org/itn/2015/02/19/everyones-doing-it-the-acceptance-effectiveness-and-legality-of-performance-requirements/>- on 4th May 2020

it may be impossible for a government to identify the technology that a firm should use, making it extremely difficult to monitor a legally binding quota for technology transfer.¹⁶⁸

Pereira et al give reference to the result to an analysis by World Bank (2013) of LCPs in oil and gas industries across 48 nations world-wide, indicating that substandard performance of such policies may be as a result of political imperatives being their key drivers rather than considerations of economic efficiency.¹⁶⁹ In addition, the authors of this study have found no evidence showing that the countries that adopted LCPs conducted prior assessment and comparison of the costs and potential benefits of local content with those of alternative policy options. The less developed the economy of a host country, the more assertive the LCPs tend to be.¹⁷⁰ As is, this may be formulated in a manner that foreign investors are obligated to help grow the country's economy rather than encourage them to do so by creating win-win situations for the parties involved.

However, there is hope for the future of LCPs. Governments are better placed if focus is put on improving basic infrastructure and industry policy deficiencies to create an environment where companies can thrive. Foreign investors will be keen to invest in such nations. Excessively aggressive and unrealistic local content requirements will only burden foreign investors, causing them to either reduce their exposure to that host country or experience a reduction in the profits they can realize within that country; and this ultimately would lead to pressure from shareholders or lenders in their countries to reduce investment in the relevant host country even more.¹⁷¹

¹⁶⁸ Unless there is a business case in joint venture, the risk of creating a coerced union that is bound to collapse is imminent if the parties do not trust each other, if they don't share objective, and fail to complement each other. Research indicates likelihood of LCPs success in situations where development of local content was carried out through strategic collaborative partnerships with companies.

¹⁶⁹Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019,659

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING LOCAL CONTENT IN KENYA

3.1 Introduction

Following the discovery of commercially viable oil in the Turkana region in early 2012, Kenya has experienced a renewed interest in the petroleum sector. The government has strategically placed the extractive sector, especially oil and gas, as the driving force of socio-economic growth towards the achievement of its development programme captured in Vision 2030.¹⁷² This chapter delves into the legal and regulatory framework that govern local content in within the petroleum sector in Kenya. By doing so, it analyses the new Petroleum Act's provisions on local content¹⁷³ with a focus on upstream petroleum operations.

3.2 The History of Petroleum Industry in Kenya

Exploration of petroleum in Kenya started in the 1950s within the Lamu Basin. However, commercially viable oil was not discovered until later on within the tertiary rift in 2012, in the tertiary rift. A notable gas discovery followed in offshore Lamu basin.¹⁷⁴ The petroleum works were undertaken under a royalty based licensing system in accordance with the *Mining Act*¹⁷⁵ of 1940 and it went on until the *Petroleum Exploration and Production Act*¹⁷⁶ was enacted in 1984. This Act sort to govern petroleum exploration and improve incentives to companies involved in exploration in Kenya. A revision of the the *Petroleum Exploration and Production Act* was occurred in 1986 and royalties were replaced by Production Sharing Contracts (PSCs).¹⁷⁷ However, with the modern realities, this Act failed to address major issues within the

¹⁷² Odote C, Otieno S, 'Getting it right: Towards socially sustainable exploitation of the extractive industry in Kenya' *East African Law Journal*, 2015, 216.

¹⁷³ Sections 50, 51 and 52, 'the Petroleum Act' (Act No. 2 of 2019)

¹⁷⁴ In 1960 to 1971, ten wells were drilled in the Lamu Bay as a result of British Petroleum (BP) and Shell's exploration of hydrocarbons in 1954. Despite of a number indications of oil staining and untested zones with gas shows in some wells, none of the drilled wells were fully completed for production. <https://nationaloil.co.ke/upstream/> on 18th April 2020

¹⁷⁵ *Mining Act*, (Act No. 29 of 1940).

¹⁷⁶ *Petroleum Exploration and Production Act*, (Act N0. 19 Of 1984).

¹⁷⁷ Hassan S, 'Overview of the oil and gas sector in Kenya', 2015 presentation at the mind speak forum <<https://rich.co.ke/rcfrbs/docs/Sumayya%20Presentation%20on%20the%20Petroleum%20Sector%20and%200Opportunities.pdf>> on 18th April 2020.

petroleum sector such as revenue sharing, environmental standards, and local content, among others.¹⁷⁸ This caused the need for review and in 2019, the *Petroleum Act*¹⁷⁹ was enacted into law, addressing issues that were not tackled under the previous Act.

3.3 Legal and Policy Framework Governing Local Content

The legal framework for local content in Kenya is set out in laws, regulations and agreements. There are general and sector-specific provisions in different laws that do apply to local content within the petroleum industry.

3.3.1 Constitution of Kenya, 2010

As the supreme law of the land¹⁸⁰, the Constitution seeks to promote social justice and foster the realization of the potential of all its citizens.¹⁸¹ The Constitution vests the country's minerals and mineral oils in the national government that holds them in trust for the people of Kenya.¹⁸² This imposes a duty on the government to strictly utilize the country's natural resources to benefit Kenyans.¹⁸³ To encourage local content, the Constitution requires legislators to enact laws that will ensure the state's investments in property benefits the local communities and their economies within the areas of the investment.¹⁸⁴ This requirement promotes alignment between the government and investors since the Constitution informs the establishment of LCPs and LCRs within the sector.¹⁸⁵ The Constitution further imposes a duty on the government to sustainably exploit, use and manage the country's natural resources; and ensure that the accruing benefits from the natural resources are equitably shared.¹⁸⁶ These requirements guided the enactment of the Petroleum Act that has provisions on local content

¹⁷⁸ Odote C, Otieno S, 'Getting it right: Towards socially sustainable exploitation of the extractive industry in Kenya', *East African Law Journal*, 2015, 217

¹⁷⁹ *The Petroleum Act*, (Act No.2 Of 2019).

¹⁸⁰ Article 2(1), *Constitution of Kenya* (2010).

¹⁸¹ Article 19(2), *Constitution of Kenya* (2010).

¹⁸² Articles 62(1)(f), 62(3), '*Constitution of Kenya*' (2010).

¹⁸³ Article 69 (h), '*Constitution of Kenya*' (2010).

¹⁸⁴ Article 66(2), '*Constitution of Kenya*' (2010), which mandates Parliament to enact legislations which guarantee that local communities will benefit from investments made in property within the country.

¹⁸⁵ Olawuyi S, 'Local Content Requirements in Oil and Gas Contracts: Regional trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law*, (2018).

¹⁸⁶ Article 69(1)(a), '*Constitution of Kenya*' (2010).

and seeks to achieve positive local content outcomes. It also informed the proposal of the Local Content Bill of 2018 that stipulates a framework to grow local value capture along the petroleum value chain.¹⁸⁷

3.3.2 Petroleum Act, 2019

This Act is currently the backbone of local content within the petroleum industry in Kenya. It gives a structure for petroleum contracts, exploration, development and production and gives life to the articles of the Constitution operative as long as they apply to all stages of petroleum operations.¹⁸⁸ The Act defines local content as additional value that Kenya gains from petroleum operations through strategic and planned development of the nation's capacity and capabilities; and the investment in expanding and acquiring work force, services and supplies that are locally available, for the sharing of accruing profits.¹⁸⁹

Within the Act are provisions on local content for the petroleum industry, compelling all persons carrying out petroleum operations in Kenya to adhere to.¹⁹⁰ This Act requires that on employment, preference be given to skilled and qualified Kenyans at all levels of the value chain¹⁹¹ and on goods and services; preference be given to local goods and services that meet the set specifications and standards of the petroleum sector.¹⁹² This is an indication of the Kenya's desire to increase the level of domestic capabilities and competencies within the sector.

However, there is an ambiguity to these requirements as the Petroleum Act does not clarify who and/or what should be considered as local. This lack of clarity may lead to undeserving firms and personnel being prioritize, defeating the purpose of LCRs within the petroleum industry.

¹⁸⁷ This is a Bill that was sponsored by Baringo Senator, Gideon Moi with the aim of providing a structure that will facilitate indigenous ownership, control and funding of petroleum operations and; to provide a framework that will expand the local value capture along the value chain during petroleum exploration.

¹⁸⁸ Preamble of *The Petroleum Act* (2019)

¹⁸⁹ Section 2, *'The Petroleum Act'* (Act No. 2 of 2019).

¹⁹⁰ Section 50(1)(a), *'The Petroleum Act'* (Act No.2 of 2019).

¹⁹¹ Section 50(1)(b), *'The Petroleum Act'* (Act No.2 of 2019).

¹⁹² Section 50(1)(c), *'The Petroleum Act'* (Act No.2 of 2019).

The Act further gives a scope of what a local content plan should entail, outlining the areas that the contractor's local content plan should cover. These areas include legal services, employment and training, research and development, technology transfer, insurance services, security services among many others.¹⁹³ The term '*company*' in Kenya means a company instituted and registered under the Companies Act 2015 or an existing company.¹⁹⁴ Unlike the Nigerian Oil and Gas Industry Content Development Act 2010,¹⁹⁵ the Petroleum Act 2019 is silent on what a '*local company*' means and therefore, this provision of the Act raises concerns as to which service providers or companies qualify as 'local'. It is key for a national government to decide what business qualifies as "local". The question to be answered is whether just by being physically present in a host country is enough for a business to be considered "local" and if so, how much "presence" within the country is required? Pereira et al suggest that maybe the place of the "local" company's headquarters or its principal business activities serve as a better measure. Another key criterion may be ownership in the aspect that some nations, like the Philippines, the governments are permitted to enter into contracts for development of natural resources only with host country citizens, or companies whose capital is controlled by such citizens.¹⁹⁶

On monitoring and enforcement of local content, the Energy and Petroleum Regulatory Authority (EPRA)¹⁹⁷ is mandated the role of supervising, coordinating, and managing the growth of local content within the petroleum sector.¹⁹⁸ Part of the Authority's role is to set minimum requirements for local content in local content plans, prepare guidelines to include targets and methods for local content plans and reporting; and to undertake local content monitoring, audit and enforcement.¹⁹⁹ This mandate is similarly bestowed upon the Local

¹⁹³ Section 50(3), '*The Petroleum Act*' (Act No.2 of 2019)

¹⁹⁴ Section 3, '*The Companies Act*', (Act No. 17 of 2015)

¹⁹⁵ Section 106, '*Nigerian Oil and Gas Industry Content Development Act*', (Act No. 2 of 2010) which defines a Nigerian Company as one that is instituted and registered within Nigeria as per the provision of the Companies and Allied Matters Act and with a minimum of 51 % equity shares being held by Nigerians.

¹⁹⁶ Ibid.

¹⁹⁷ Section 2, '*The Petroleum Act*' (Act No.2 of 2019) defines "Authority" as used within the Act to mean the Energy Regulatory Commission, established under section 4 of the Energy Act, 2006. However, this Act was consolidated into the new Act which is '*The Energy Act 2019*' and within this new Act, the "Authority" is established under Section 9 as the Energy and Petroleum Regulatory Authority.

¹⁹⁸ Section 51(1), '*The Petroleum Act*' (Act No. 2 of 2019).

¹⁹⁹ Section 51(2), '*The Petroleum Act*' (Act No. 2 of 2019).

Content Development Committee²⁰⁰ which ensures the development of local content in Kenya. The LCDC oversees, co-ordinates and manages the growth of local content in the nation. It also oversees the implementation of LCPs and plans by operators among many others.²⁰¹ If this Bill is passed into law, there will be an overlap between the mandates of the EPRA and the LCDC, posing future legal risk for the oil and gas industry in Kenya. The Act further establishes the *Training Fund* for the purpose of training Kenyan nationals in upstream petroleum operations; giving guidelines as to its financing and management.²⁰²

3.3.3 Mining Act, 2016

This Act seeks to give effect to the Constitutional requirements on minerals and natural resources; and to provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals.²⁰³ Save for the extent provided within the Act, the caveat in its application is that it does not apply to matters relating to petroleum and hydrocarbon gases.²⁰⁴ On local content development, this Act requires the IOC to give preference in employment to the locals.²⁰⁵ In case of large scale operations, the Act requires the IOC to conduct training programmes for the benefit of employees, undertake capacity building for the employees, to only engage non-citizen technical experts in accordance with such local standard and work towards replacing technical non-citizen employees with Kenyans, within a reasonable period.²⁰⁶ This Act further requires the IOC to give preference, to the maximum extent possible, to locally made material and products, local services and companies or business owned by Kenyan Citizens.²⁰⁷

²⁰⁰ Established under Section 9 of the proposed Local Content Bill of 2018.

²⁰¹ Section 10(1)(a),10(1)(b),10(1)(e), *The Local Content Bill* (2018).

²⁰² Section 52, *The Petroleum Act* (Act No. 2 of 2019).

²⁰³ Preamble of the *Mining Act* (Act No. 12 of 2016).

²⁰⁴ Section 3, *Mining Act* (Act No. 12 of 2016).

²⁰⁵ Section 47(1), *Mining Act* (Act No.12 of 2016).

²⁰⁶ Section 47 (2)(a)-(d), *Mining Act* (Act No. 12 of 2016).

²⁰⁷ Section 50, *Mining Act* (Act No. 12 of 2016).

3.3.4 The Mining (Community Development Agreement) Regulations, 2017.

The CDA Regulations mandates licensees to sign CDAs with the communities located around their areas of exploration. These agreements secured their contribution to the economic, social and cultural well-being of the affected local communities and ensured that the local communities also benefited from the petroleum operations in their areas.²⁰⁸ This Regulation also ensures that benefits were equally shared between the community and license holders; there is significant growth and contribution in the welfare of the community and transparency and accountability pertaining the exploration and mining activities.²⁰⁹

As way of encouraging the growth and development of local content, the CDA 2017 regulations provide for employment of community members, funding, development and maintenance of infrastructure.²¹⁰ These requirements promote the growth and development of local content within the petroleum industry and encourages indigenous participation within the industry. The regulation further provides for the formation of a Community Development Agreement Committee (CDAC) with the head of county government, county commissioners and a member of the county assembly as part of its members.²¹¹ This involvement of the county government in promoting local content encourages the formation of sector and community specific regulations that will not only benefit the national government, but the local communities in the affected areas.

3.3.5 Model Petroleum Agreement (PSC)

In Kenya, a model petroleum Agreement is attached as a schedule within the Petroleum Act, 2019 as a *Production Sharing Contract (PSC)*. The PSC is a model contract between the Kenyan government and an IOC as the contractor for the purpose of sharing production in a petroleum operation within Kenya's territory.²¹² The PSC borrows the definition of local

²⁰⁸ [Legal Alert | Mining Act Series | Mining Community Development Agreements Regulations - ALN Kenya \(africalegalnetwork.com\)](#)

²⁰⁹ Regulation 3, Community Development Agreement Regulations (2016)

²¹⁰ Regulation 3(2), *Community Development Agreement Regulations*, (2016).

²¹¹ *Ibid.*

²¹² Schedule on Model Petroleum Agreement within *the Petroleum Act* (2019).

content from the Petroleum Act²¹³ and further gives specific provisions²¹⁴ as to adherence to laws and regulations on local content.²¹⁵ The PSC gives life to the local content requirements under the Petroleum Act in form of an agreement between the government and a contractor.

3.3.6 The Energy Act, 2019

This Act provides for national and county government functions with regards to energy. It provides for the establishment, powers and functions of the energy sector entities; regulation of midstream and downstream petroleum; regulation, production, supply and use of electricity and other energy forms.²¹⁶ This Act interprets the term local content to mean the additional benefit that Kenya gains from energy related activities by systematically developing national capacity and capabilities and investing in the growth and procurement of local work force, services and supplies, for the sharing of accruing profits.²¹⁷ To enhance local content development, the Act establishes the Energy and Petroleum Regulatory Authority²¹⁸ with the mandate to enforce local content requirements in Kenya.²¹⁹ It further bestows upon the EPRA the role of monitoring and enforcement of local content in all energy undertakings and works on the Authority.²²⁰ The Petroleum Act 2019 bestows upon the EPRA the role of Monitoring and enforcement of local content within the oil and gas sector, as the Authority established under the Energy Act 2019.²²¹

Just as the Petroleum Act, the Energy Act requires all person undertaking energy works to adhere to local content requirements in all their operations.²²² The Act further requires that on employment, goods and services, preference be given to Kenyans and Kenyan goods respectively.²²³ The drafters of the Act saw the need to include a provision to cater for

²¹³ Section 2, 'The Petroleum Act' (Act No. 2 of 2019).

²¹⁴ Part iv, Local content, Model Production Sharing Contract

²¹⁵ Clause 19, Model Production Sharing Contract

²¹⁶ Preamble of *The Energy Act*, 2019.

²¹⁷ Section 2, 'The Energy Act' (Act No. 1 of 2019).

²¹⁸ Section 9(1), 'The Energy Act' (Act No.1 of 2019).

²¹⁹ Section 10(ee), 'The Energy Act' (Act No.1 of 2019).

²²⁰ Section 2017(1), 'The Energy Act' (Act No. 1 of 2019).

²²¹ Section 207 (2), 'The Energy Act' (Act No. 1 of 2019).

²²² Section 206(1), 'The Energy Act' (Act No. 1 of 2019).

²²³ Section 206(3), 'The Energy Act' (Act No. 1 of 2019).

technology and skills transfer by requiring that adequate provision be made for the training of Kenyans on the job.²²⁴

3.3.7 Local Content Bill, 2018

This is a Bill that if passed into law, will be an Act with the aim to provide a framework to facilitate the local ownership, control and financing of operations related to the exploitation petroleum resources. It also seeks to provide a structure that will grow the indigenous value capture along the value chain in the exploration petroleum resources.²²⁵ It defines local content from a broader perspective as compared to both the Petroleum Act and the Energy Act in the sense that it covers the extractive industry as a whole.²²⁶ This Bill seeks to encourage the increase of value-addition and the creation of employment opportunities within the extractive sector value chain by locally procuring expertise, goods, services, businesses and retaining them in the country.²²⁷ The Bill also seeks to maximize value addition through local content development and local participation in extractive industry operations.²²⁸

The Bill imposes a duty upon both the national and county government form measures that will ensure the maximum growth and adoption of local content by operators the oil and gas operations²²⁹, a requirement embedded in the Constitution of Kenya, 2010.²³⁰ On monitoring and enforcement of local content in the extractives industry, the Bill establishes the Local Content Development Committee (LCDC) with the role of overseeing, coordinating and managing the development of local content in the country.²³¹ The Committee also has a duty to collaborate with the county governments to ensure measurable and continuous growth in the development and adoption of local content on all activities in the extractive sector.²³²

²²⁴ Section 2016(3)(c), 'The Energy Act' (Act No. 1 of 2019).

²²⁵ Preamble of Local Content Bill, 2018

²²⁶ Clause 2, '*Local Content Bill*' (2018) defines local content as "the added value brought to the Kenyan economy from extractive industry 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." This section also defines the "extractive industry" to mean the oil, gas and mining sectors in Kenya.

²²⁷ Clause 4 (a), '*Local Content Bill*' (2018).

²²⁸ Clause 4 (f), '*Local Content Bill*' (2018).

²²⁹ Clause 6(1), '*Local Content Bill*' (2018).

²³⁰ Article 69(h), '*Constitution of Kenya*' (2010).

²³¹ Clause 10(1), '*Local Content Bill*' (2018).

²³² Clause 10(2) (a), '*Local Content Bill*' (2018).

However, the role bestowed upon the LCDC mirrors that of the EPRA under the Petroleum Act 2019 and therefore if this Bill is passed into law as it is, there will be an overlap on the roles of both institutions. Therefore, this research suggests that prior to passing the Bill into law, the mandates of the EPRA and those of the LCDC be merged together and a single body be instituted to monitor and enforce local content within the petroleum sector.

The Bill gives the Cabinet Secretary the authority to set the least local content that an operator must apply while engaging in any extractive operation. However, this power is limited to consultation with the committee²³³ and issuance of notice of the same in the Gazette.²³⁴ To effectively monitor local content, the Bill provides for local content certification that the LCDC uses to audit an operator's obligations to the growth of local content under the Bill.²³⁵ On employment and skills development, the Bill has outlined the requirements as to capacity building,²³⁶ education and training of locals,²³⁷ consideration of employment of indigenous persons,²³⁸ succession plan and technology transfer strategies.²³⁹ The Bill requires an operator to submit to an annual local content performance report to the Committee that covers all aspects of its projects and operations for the year that is being reviewed.²⁴⁰ The report shall contain information on expenditure and the employment achievement by the operator within the year, towards local content development. The Bill provides for various strategies for local content development including preference of indigenous firms, goods and services, preference to indigenous labour on matters employment, financial incentives for different areas and the establishment of the Local Content Training and Development Fund.²⁴¹

This Bill is more comprehensive and sector specific as compared to the current Petroleum Act and if amended accordingly and passed into law, it will serve the petroleum industry better

²³³ Local Content Development Committee.

²³⁴ Clause 21, *Local Content Bill* (2018).

²³⁵ Clause 24 (1) to (4), *Local Content Bill* (2018). The Bill mandates the Cabinet Secretary with the role of prescribing a methodology for determining the percentage of local content in goods and services acquired or delivered in Kenya, issuing a metrics method for local content within the oil and gas sector.

²³⁶ Clause 25, *Local Content Bill* (2018).

²³⁷ Clause 27, *Local Content Bill* (2018).

²³⁸ Clause 28, *Local Content Bill* (2018).

²³⁹ Clause 30, *Local Content Bill* (2018).

²⁴⁰ Clause 39, *Local Content Bill* (2018).

²⁴¹ Clauses 41-47, *Local Content Bill* (2018).

than the current Petroleum Act and will allow the petroleum sector achieve a higher percentage of growth in local content.

3.3.8 Public Procurement and Asset Disposal Act, 2015

This Act gives effect to Article 227 of the Constitution on procurement of public goods and services²⁴²; to avail measures for successful public procurement and assets disposal by public entities.²⁴³ With an objective to promote local content development in Kenya, this Act defines "locally produced product or service" as goods and services manufactured in Kenya by companies that are registered and are undertaking their business in Kenya.²⁴⁴ This is a definition that the Petroleum Act can adopt, with an addition indicating the minimum percentage of indigenous ownership as is the case in Nigeria's content. The Act lists the promotion of local industry, sustainable development and promotion of citizen contractors²⁴⁵ as cardinal values and principles to guide State organs and public entities in the procurement of goods and services as is the case with the Petroleum Act 2019. This principle is also reflected under Section 89 (f) that advocates for preference to be given to local contractors during procurement.²⁴⁶ It is further expounded on under Section 155 that requires that preference be given to manufactured articles, partially mined materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or firms where Kenyans are shareholders."²⁴⁷

Where procurement is done through or is as a result of a treaty, agreement or other convention ratified by Kenya and it favours an external beneficiary (in this case the IOC), the procurement is done in Kenya through registered Kenyan contractors and all applicable insurances are issued by registered Kenyan companies.²⁴⁸ The Act further directs that where

²⁴² The Constitution of Kenya, 2010 provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

²⁴³ Preamble of the 'Public Procurement and Asset Disposal Act' (Act No. 33 of 2015).

²⁴⁴ Section 2, 'Public Procurement and Asset Disposal Act' (Act No. 33 of 2015).

²⁴⁵ Section 3(i), (j), 'Public Procurement Asset Disposal Act' (Act No. 33 of 2015).

²⁴⁶ It provides that local contractors are entitled to preferences and reservations in instances where they participate as per section 155.

²⁴⁷ Section 155(2), (3)(a), (b), 'Public Procurement and Asset Disposal Act' (Act No. 33 of 2015).

²⁴⁸ Sections 6(1),(4), 'Public Procurement and Asset Disposal Act' (Act No. 33 of 2015).

effective competition for procurement is lacking without the involvement of foreign tenderers, local contractors are entitled to preference and reservations if they participate.²⁴⁹ Finally, the Act gives a directive on the application of preferences and reservation to Kenyans. It goes further to provide that “for the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents, a mandatory requirement as preliminary evaluation criteria for all external tenderers taking part in international tenders to obtain a minimum of forty(40) percent of their supplies from Kenyan contractors prior to submitting a tender.”²⁵⁰ This minimum requirement allows for the effective monitoring and enforcement of local content in Kenya.

3.3.9 National Construction Authority Regulations, 2014 and National Construction Authority Act, 2011

This Act establishes the National Construction Authority.²⁵¹ The regulations are made pursuant to Section 42 of the National Construction Authority Act, 2011.²⁵² On local content development, the Regulations give restrictions on registration of contractors, stating that the registration under NCA-1 category is open to both local and foreign contractors.²⁵³ Where a foreign contractor applies to undertake construction works or project under category NCA 1, they must demonstrate their capacity for such works.²⁵⁴ It further requires registrations that fall between NCA -2 to NCA -8 as set out in the Third Schedule of the Regulations to strictly be for local contractors.²⁵⁵ These two regulations are anchored on the provision of the National Construction Authority Act that require the Cabinet Secretary to make Regulations stipulating ownership structures of foreign companies that are seeking registration, stating the

²⁴⁹ Section 89(f), ‘Public Procurement and Asset Disposal Act’ (Act No. 33 of 2015).

²⁵⁰ Section 157(8), (9), ‘Public Procurement and Asset Disposal Act’ (Act No. 33 of 2015).

²⁵¹ Preamble of the ‘National Construction Authority Act’ (Act No.41 of 2011).

²⁵² This Section empowers the Cabinet Secretary for land, Housing and Urban Development, in consultation with the Board under the National Construction Authority Act; to make regulations generally for the better carrying out of the purposes of the Act.

²⁵³ Regulation 9(1) of ‘The National Construction Authority Regulations’, 2014

²⁵⁴ Regulation 12(2) of the ‘The National Construction Authority Regulations’, 2014.

²⁵⁵ Regulation 9(2) of ‘The National Construction Authority Regulations’, 2014

categories of contracts for which the foreign companies may apply and those strictly reserved for local contractors.²⁵⁶

The Regulations further prescribe that on application for registration, the foreign company must submit an undertaking in writing that “it shall subcontract or enter into a joint venture with a local person or local firm for not less than thirty percent of the value of the contract work for which temporary registration is sought”,²⁵⁷ and that it shall transfer technical skills not available locally to a local person or firm.²⁵⁸ It further directs that the employees of the joint venture be competitively recruited from the local labour market, and the recruitment or employment of foreign technical or skilled workers on such be done only with the approval of the Authority where such skills are not available locally.²⁵⁹

3.3.10 Technical and Vocational Education and Training Act, 2013

This Act provides for the establishment of a technical and vocational education and training system; and to provide for the governance and management of institutions offering technical and vocational education and training. It also seeks to provide for coordinated assessment, examination and certification to institute a mechanism for promoting access and equity in training; and to assure standards, quality and relevance.²⁶⁰ The guiding principles for this Act include instituting appropriate mechanisms to ensure adequate human capital for economic, social and political development.²⁶¹ It also ensures that the training programs take into account the technical and professional skills, knowledge and levels of qualification needed in the various sectors of the economy and the technological and structural changes to be expected.²⁶²

A key aspect of this Act is that it requires every training institution to (a) adopt appropriate national and international standards in training; (b) establish, implement and manage credible

²⁵⁶ Section 18(5), *National Construction Authority Act* (Act No.41 of 2011).

²⁵⁷ Regulation 12(3)(d)(i) of *The National Construction Authority Regulations*, 2014; as is also indicated under Regulation 16(1) which provides that “the ratio of ownership of a joint venture for construction works between a local firm and a foreign firm shall be at least thirty percent for the local firm.”

²⁵⁸ Regulation 12(3)(d)(ii) of *The National Construction Authority Regulations*, 2014.

²⁵⁹ Regulation 16(3) of *The National Construction Authority Regulations*, 2014.

²⁶⁰ Preamble of the *Technical and Vocational Education and Training Act* (Act No. 29 of 2013).

²⁶¹ Section 3(1)(b), *Technical and Vocational Education and Training Act* (Act No. 29 of 2013).

²⁶² Section 3(1)(c)(ii), *Technical and Vocational Education and Training Act* (Act No. 29 of 2013).

quality assurance systems; (c) create and encourage the necessary collaborations with the national and international agencies on standards and quality assurance; and (d) establish systems and processes for the continuous review and improvement of standards and quality assurance.²⁶³ The training systems are required to combine on-the-job attachment and internships at all levels so as to make available key training for the development of the necessary practical and innovative skills, for the relevant sectors.²⁶⁴

As shown above, these laws aim to promote the growth of local content in Kenya. They all promote the spirit of the Constitution that encourages the use of Kenya's land resources to benefit its people and bring to life the requirement imposed on legislators to promote local content by enacting laws that will ensure the state's investments in property benefits the indigenous communities and their economies within the areas of the investment.

3.4 Institutional Framework

The petroleum industry has established a number of institutional frameworks to implement, monitor and enforce local content policies in Kenya. They include the following;

3.4.1 Energy and Petroleum Regulatory Authority (EPRA)

This Authority is established under Section 9 of the Energy Act, 2019 with the role of regulating, monitoring and supervising upstream petroleum activities within the country. It also coordinates the growth of upstream petroleum infrastructure and promotes capacity building in upstream petroleum operations. Further, the Authority has the mandate to enforce local content requirements.²⁶⁵ The Authority also issues, renews, modifies, suspends or revokes licences and permits for all undertakings and activities within the energy sector.²⁶⁶ On local content development, the Petroleum Act imposes upon the Authority the role of monitoring and enforcement of local content.²⁶⁷ It is mandated to be the overseer, coordinator

²⁶³ Section 38, 'Technical and Vocational Education and Training Act' (Act No. 29 of 2013).

²⁶⁴ Section 39, 'Technical and Vocational Education and Training Act' (Act No. 29 of 2013).

²⁶⁵ Section 10, 'Energy Act' (Act No.1 of 2019).

²⁶⁶ Section 11, 'Energy Act' (Act No.1 of 2019). Also Sections 22,23 and 24 of the Petroleum Act 201

²⁶⁷ Section 51, 'The Petroleum Act' (Act No.2 of 2019).

and manager of the development of local content within the petroleum industry, preparing recommendations to include targets and layouts for local content plans and reporting. The Authority is also tasked with making recommending to the Cabinet Secretary the formulation of regulations on local content and setting the lowest requirements for local content in local content plans. Further, it is the role of the Authority to issue public education and awareness to the locals, monitor, audit and enforce local content requirements.

The inclusion of a monitoring body by the Petroleum Act is indeed a great way to ensure compliance with local content requirements. However, the Petroleum Act fails to provide a metrics that the EPRA should use in measuring and monitoring local content to effectively the local content requirements within the petroleum sector. The lack of clarity on this aspect limits the EPRA as the monitoring authority as it will not be in a position to effectively determine whether the set local content requirements are being complied with. The clearer the method or formula applied, the easier it is to monitor and enforce most LCRs.

On enforcement, the Petroleum Act 2019 does not stipulate specific sanctions for noncompliance with LCRs. What the Act gives is a mandate upon the EPRA to impose a penalty of not less than five million Kenyan shillings (Ksh 5,000,000) to a contractor or subcontractor who defaults on any provision of the Act.²⁶⁸ This is a general penalty for any form of noncompliance under the Act where neither a fine nor a penalty is expressly stated. Given the high amounts of revenues generated by the IOCs in these petroleum operations, this amount is not punitive enough. Therefore there is the need for the Petroleum Act 2019 to be amended to include a specific penalty for noncompliance with LCRs to ensure strict implementation and effective enforcement by the EPRA.

3.4.2 Local Content Development Committee (LCDC)

The Local Content Bill recommends the establishment of a Local Content Development Committee,²⁶⁹ with the role to oversee, coordinate and manage local content development in Kenya and make policy recommendations to the Cabinet Secretary for the growth and

²⁶⁸ Section 124, *The Petroleum Act* (Act No. 2 of 2019)

²⁶⁹ Clause 9, *'The Local Content Bill'*, 2018

implementation of LCRs.²⁷⁰ It also proposes that the Committee recommends to the Cabinet Secretary the lowest LCRs, appraise, evaluate and approve local content plans that IOCs submit.²⁷¹ The Committee shall further ensure a measurable and continuous growth in the development and adoption of local content with respect to all activities in the extractive industry.²⁷²

If this Bill is passed into law, the roles bestowed upon the LCDC will overlap those of the EPRA under the Petroleum Act 2019. Prior to enacting it into law, the Kenyan legislators should amend the laws accordingly so that the petroleum sector only has one monitoring body and not two with overlapping roles.

3.5 Analysis of the Kenya's local content framework for the petroleum industry.

The local content framework discussed above indicates Kenya's desire to obtain maximum benefit from its petroleum resources. The framework in place indicates the key factors that encourage local content within the petroleum industry to include the desire to increase the level of domestic capabilities and competencies. The main reason as to why IOCs are brought in board in petroleum operations is because the indigenous companies lack the experience and technological capacity carry out oil and gas activities.²⁷³ According to Olawuyi, LCRs proceed from the idea that indigenous workforce and companies should develop the capacity to supply goods and services required by the industry, substituting the goods produced locally for those that are imported.²⁷⁴ Kenya's local content framework mandates the IOC to conduct their activities in a manner that encourages the development of skilled and qualified Kenyans over the period of the oil and gas contract.²⁷⁵ The law mandates the IOC to give preference to local goods and services,²⁷⁶ train and educate the Kenyan nationals during the term of the

²⁷⁰ Clause 10, 'The Local Content Bill', 2018

²⁷¹ Clause 10(1)(c), (d), 'The Local Content Bill', 2018

²⁷² Clause 10(2)(a), 'The Local Content Bill', 2018

²⁷³ Muller T, and Schitzer M 'Technology transfer and spillovers in international joint ventures' Munich (Discussion Paper No. 2003-22, 2003).

²⁷⁴ Olawuyi D, 'Local Content Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

²⁷⁵ 50(3) Petroleum Act (2019) and Section 25(1) of the Local Content Bill (2018).

²⁷⁶ Section 50-51, Petroleum Act (2019) and Section 206 Energy Act (2019).

petroleum contract.²⁷⁷ In the long run this will strengthen the capabilities of the locals as well as the local industries to effectively participate in oil and gas operations.²⁷⁸

Secondly, the desire to create a level playing field for locals and indigenous companies to take part in petroleum operations. Over dependence on foreign goods and services occurs as a result of the failure by resource rich countries to create a level playing field for the local workforce and companies to take part in upstream oil and gas activities and compete with foreign suppliers.²⁷⁹ Kenya's local content framework therefore ensures that the indigenous persons and companies are able to compete with the foreign suppliers by emphasizing on the need to create a level playing field for domestic involvement 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.²⁸⁰ 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.²⁸¹ The emphasis in training and technology transfer to the locals also depicts the industry's desire to equip the locals and the local industries with skills that enable that compete at the same level as the foreign companies.²⁸²

Thirdly, the desire to maximize economic benefits to citizens through employment opportunities. The local content framework in Kenya obligates the IOC to give priority to trained and skilled locals and qualified local companies.²⁸³ This requirement aims at creating job opportunities for the locals and increasing the skills and capacity of the local workforce.²⁸⁴ Local employment is one of the major concerns of the indigenous communities and it has over the years resulted into disputes and conflicts between the IOC and the host

²⁷⁷ Section 50(3) Petroleum Act (2019) and Section 206(4) (a) of Energy Act (2019).

²⁷⁸ Olawuyi D, 'Local Content Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

²⁷⁹ Tordo S et al, Local content policies in the oil and gas sector, 115-117.

²⁸⁰ Section 41, *Local Content Bill*, (2018).

²⁸¹ *Ibid*.

²⁸² Olawuyi D, 'Local Content Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

²⁸³ Section 50(1) Petroleum Act (2019); Section 206 (3) (b) Energy Act (2019); Section 26(1) Local content Bill (2018); Clause 20 of Kenya's Model Production Sharing Agreement (2019).

²⁸⁴ Olawuyi D, 'Local content requirements in oil and gas contracts: regional trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

communities.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷

The fourth driver of local content in Kenya is the desire to improve national technological capacity. The local content framework in Kenya mandate the IOC to transfer technology to the locals.²⁸⁸ These provisions make it mandatory for the IOC to engage high levels of technology or conduct research and development within the host nation, allowing the indigenous companies boost their competitiveness through access to the latest technology, or benefit from technology transfer.²⁸⁹ Making it mandatory for IOCs to utilize technology that is locally available minimizes importation of technology for petroleum operations and this in turn compels the IOCs to invest in technologies and facilities for local manufacturing and provision of services.²⁹⁰ Opening up technology ventures, can facilitate domestic production and availabilities of technologies required for oil and gas exploration.²⁹¹

Finally, the desire to manage social and political risks that result from rising local expectations for better and more equitable distribution of wealth and authority. Cook et al argue that countries use LCPs to mitigate and manage rising social and political risks caused by local expectations for equal distribution of 'oil wealth'.²⁹² The indigenous communities often don't

²⁸⁵ Mutuku K, Wandera G, 'Conflict, Security and the Extractive Industries in Turkana,' (2016).

²⁸⁶ Tordo S, Tracy B, and Arfaa N, 'National oil companies and value creation.' World Bank Working Paper 218, Washington DC (2011) 1-10.

²⁸⁷ Ado R, Local Content Policy and the WTO Rules on Trade-Related Investment Measures (TRIMS): The Pros and Cons', International Journal of Business and Management Studies (2013), 142.

²⁸⁸ Section 50(3)(c), Petroleum Act, (2019), Section 206(4)(c) Energy Act (2019); Section. 22(5), 25(1), Section 32(1-2), 32(2)(a), Section 33(1) of the Local Content Bill, (2018); and Clause 23 of Kenya's Model PSC.

²⁸⁹ Tordo S, et al, 'Local content policies in the oil and gas sector'; see also Darling R, 'Beyond taxation: How countries can benefit from the extractive industries through local content' Revenue Watch Institute, New York (2011) 1-10.

²⁹⁰ Muller T et al, 'Technology transfer and spillovers in international joint ventures'. also Coe D, Helpman E, Hoffmaister AW 'International R&D spillovers and institutions' Working Paper No. WP/08/104, International Monetary Fund, Washington, DC, (2008).

²⁹¹ Olawuyi D, 'Local Content Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

²⁹² 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.

see tangible benefits of the petroleum resources and this has in many cases resulted into conflicts and pressure to the government to produce tangible results with regards to the petroleum operations.²⁹³ This has caused most resource rich countries to use LCRs to manage the rising conflicts by requiring IOCs to operate in a manner that their activities bring tangible benefits to the locals and the indigenous communities.²⁹⁴ Kenya's local content framework should therefore be clear, elaborate and specific to the needs of the locals and work towards ensuring that the oil and gas industry is not foreign owned.²⁹⁵ The oil and gas industry should borrow a leaf from Base Titanium that has made great progress with the local communities by entering into Community Development Agreements (CDAs) that ensure that the local communities obtain maximum benefits from the natural resources and at the same time, solve their conflicts amicably without any interferences with the operations of the mining company.²⁹⁶

3.6 Conclusion

The growth of the Kenyan petroleum industry has caused numerous of legal reforms within the industry, to foster maximum gain from the country's petroleum as evidenced above. This legal and policy framework is focused on sustainable development for the country. However, the current local content legal framework is inadequate and poses foreseeable future legal risks for Kenya's petroleum industry. The Petroleum Act 2019 is inadequate and lacks clarity on major aspects of the petroleum industry as discussed above. Secondly, the Act does not provide a measuring and monitoring guideline that the Energy and Petroleum Regulatory Authority should use in ensuring effective implementation, enforcement and monitoring of local content within the oil and gas industry.²⁹⁷ Thirdly, the Act does not give specific sanctions for breach or noncompliance with local content requirements. What the Act gives is a general for any contravention by a contractor or a sub-contractor under the Petroleum

²⁹³ 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).

²⁹⁴ Ovadia J, 'The role of local content policies in natural resource-based development'

²⁹⁵ Olawuyi D, 'Local Content Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa', *Journal of Energy and Natural Resources Law* (2018).

²⁹⁶ Refer to the Msambweni, Lunga Lunga and Likoni CDAs with Base Titanium in Kwale County <https://www.petroleumandmining.go.ke/downloads/>

²⁹⁷ Section 51, *The Petroleum Act*, (Act No. 2 of 2019).

Act.²⁹⁸ This measure is not stringent enough considering the revenues the IOC generates from the petroleum operations. The Local Content Bill similarly suffers from this issue as it only stipulates a fine not exceeding two million Kenya Shillings (Ksh. 2,000,000) for none compliance by an operator and therefore, if passed into law, it still will not solve this issue.²⁹⁹ Prior to its enactment into law, this study suggests that the Bill be amended to provide specific and stringent sanctions for noncompliance so as to enable successful implementation of local content requirements.

Finally, if the lack of clarity and specificity as to the mandates of EPRA and the LCDC is not mitigated prior to the Bill being passed into law, there will be a legal crisis to that extent. Therefore, to meet international best practice legislative standards, there is a need for Kenyan legislators to draft and develop strong legal and institutional framework on local content development; moving the country towards achieving maximum benefit from its petroleum operations and obtaining a sustainable local content development.



²⁹⁸ Section 124, *The Petroleum Act*, (2019).

²⁹⁹ Clause 54 (4), *Local Content Bill*, (2018) which provides that an operator convicted of an offense is liable to a fine of 5% of the value of the proceeds acquired from the extractive operation in respect of which the breach is committed. This value shall however not two million shillings exceed. If not, as an alternative punishment, the operator shall be have their contract with respect to the extractive activity cancelled.

CHAPTER FOUR

COMPARATIVE ANALYSIS: THE EXPERIENCES OF NIGERIA AND BRAZIL

4.1. Introduction

Research has linked natural resource wealth and economic growth, associating natural resource abundance with substantially lower long-run growth rates.³⁰⁰ This has best been referred to as the “Dutch disease” or as others may call it, “resource curse”.³⁰¹ This occurrence shows a negative relation between a nation's natural resource abundance and the growth of its economy, hence the effort by petroleum producing nations to actively encourage and implement LCPs to leverage the resource so as to stimulate and sustain economic growth.³⁰² Countries have implemented legislations and policies in local content to grow their portion of local involvement within the oil and gas sector at every stage of the petroleum operations.³⁰³ This chapter seeks to provide an assessment of local content legal systems in various oil and gas producing countries, focusing on Nigeria and Brazil. It delves into providing a realistic framework to understanding how indigenous content framework has scored in the specified case studies.

4.2. Background

Governments in resource rich countries have in the recent years sought to increase local participation of equipment and services within the petroleum sector.³⁰⁴ However, they have experienced challenges of capital intensity, technological complexity and high levels of skills requirement as this is the nature of the petroleum industry.³⁰⁵ This has driven them to adopt local content policies (LCPs) with the aim of obtaining maximum benefit from their natural

³⁰⁰ Kurtz M, Brooks S, ‘Conditioning the “Resource Curse” Globalization, Human Capital and Growth in Oil Rich Countries’, *Comparative Political Studies*, 44 (6), 2011, 751

³⁰¹ Reference is given to a series of articles by Jeffery D. Sachs and Andrew M. Warner written in 1995 on Natural resource abundance and economic growth, 1997 on Sources of slow growth in African economies, and 2001 on The curse of natural resources

³⁰² Acheampong T, Ashong M, Svanikier V, ‘An assessment of local-content policies in oil and gas producing Countries’ *Journal of World Energy Law and Business*, 9(4), 2016, 2-3

³⁰³ Tordo S, Warner M, Manzano E, Anouti Y, ‘Local Content Policies in the Oil and Gas sector’, World Bank, Washington, D.C. (2013)

³⁰⁴ Acheampong T, Ashong M, Svanikier V, ‘An assessment of local-content policies in oil and gas producing Countries’ *Journal of World Energy Law and Business*, 9(4), 2016, 3-4

³⁰⁵ Ibid.

resource, in this case petroleum. LCPs have gained significance in petroleum producing countries. The establishment of a local content framework in Norway in early 1970s³⁰⁶ resulted into a significant paradigm shift in the petroleum industry, from corporate social responsibility (CSR) model to a value based economic model. Nations are now seeking greater involvement in the petroleum activities through obligations being imposed on IOCs under LCPs.³⁰⁷ Most oil producing nations are now defining or have already defined goals for indigenous involvement, penalties for non-compliance and technology transfer within the petroleum industry.³⁰⁸ This shift in trends is as a result of the progressing petroleum resource scarcity and increasing costs of project and on the other hand, the unfolding significance of the national oil company (NOC). This has created a system of dependence between host governments and the IOCs.³⁰⁹ The higher the percentage of involvement of the host government in the petroleum operations, the more successful the LCPs are perceived to be.

However, it is important to note that the institution and implementation of LCPs alone is not a guarantee for positive local content results. In some instances, excessively relying on LCPs has resulted into an increase in project costs due to disruptions to delivery of goods.³¹⁰ Targets can be set yes but questions may arise whether the capability of local suppliers meets international standards. Secondly, on involvement of indigenous skills and services, do the skills that are locally available meet the needs of the petroleum sector? Setting stringent goals for local content may result into skills shortage and an increase in costs on the indigenous supply chain.³¹¹

This chapter discusses the local content legal systems in Brazil and Nigeria, identifying what the two jurisdictions are doing differently that Kenya's petroleum industry can learn from and

³⁰⁶ Nordas H, Vatne E, Heum P, 'The Upstream Petroleum Industry and Local Industrial Development; A Comparative Study', *Institute for Research in Economics and Business Administration* (SNF), Report No.08/03,2003.

³⁰⁷ Acheampong T, Ashong M, Svanikier V, 'An assessment of local-content policies in oil and gas producing Countries' *Journal of World Energy Law and Business*, 9(4), 2016,5-6

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Brazil has been a victim of this in the past where its local content rules were criticized for increasing costs, adding to manpower shortage and playing a part in cost inflation.

³¹¹ Acheampong T, Ashong M, Svanikier V, 'An assessment of local-content policies in oil and gas producing Countries' *Journal of World Energy Law and Business*, 9(4), 2016, 6

incorporate in its petroleum sector as it strives to achieve positive local content outcomes within the industry.

4.3. COUNTRY CASE STUDIES

Apart from both being African countries, Nigeria and Kenya experience similar challenges from political to social economic challenges. Both countries are characterized by corruption, poor governance, lack of transparency, inadequate skilled workforce and inadequate capability to serve the petroleum sector. Brazil and Nigeria have had to deal with similar local content challenges in the past before getting to their current stage with regards to local content legislations. Both countries have also achieved a certain degree of positive local content outcomes following a series of amendments and implementation strategies in their local content frameworks and these improvements justify the reason for Kenya to draw lessons from their experiences.

4.4. NIGERIA

Besides being Africa's largest petroleum producer, Nigeria is also one of the biggest petroleum exporters globally with crude oil production of averagely two million barrels per day (mbpd) ranking 13th in the world.³¹² The country has served as an alternative to Middle East oil in times of crisis. With reserves estimated at 37.2 billion barrels and production at 2.28 million barrels per day, Nigeria remains to be Africa's largest petroleum producer, closely followed by Angola with 9.5 billion barrels in reserve.³¹³ The Nigerian petroleum sector has developed through the years by focusing on increasing local content and ensuring that local suppliers and workforce occupy a larger portion in developing petroleum assets.³¹⁴ The state of the petroleum sector as at now has majorly been shaped by the institution of laws implemented by the government in the interest of the locals. On behalf of Nigerians, the Nigerian

³¹² International Monetary Fund, IMF Country Report: Nigeria, Report No. 19/92, 2019, 9

³¹³ Ogun D, 'Nigeria Oil and Gas: An Introduction and Outlook' , *Global Oil and Gas Intelligence*, 2018 - <<https://www.oilandgasiq.com/market-outlook/news/nigeria-oil-and-gas-an-introduction-and-outlook>> - on 6th August 2020

³¹⁴ Energy Mix Report, 'An Overview of the Nigerian Oil and Gas Industry Local Content Initiative'-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

Constitution vests ownership and control of oil and gas in the government, enabling the country to regulate exploration and production of its petroleum.³¹⁵

4.4.1. Legal Framework, Institutional Arrangements And Policies

Institutions include the Ministry of Petroleum Resources (MPR), the Nigerian National Petroleum Corporation (NNPC) and the Department of Petroleum Resources (DPR) tasked with the role of ensuring operations in the petroleum sector are regulated to a particular level.³¹⁶ These allow for the implementation and monitoring of laws, policies and regulations affecting the Nigerian petroleum industry.

In order to increase indigenous participation, the Nigerian Oil and Gas Industry Content Development Act (the “Content Development Act”) was passed into law in 2010 to give priority to Nigerians during the awarding of oil blocks, oil fields, and oil lifting.³¹⁷ Further, it grants exclusive consideration to Nigerian local service firms that meet the set conditions to bid on land and swamp operating areas.³¹⁸ The enactment of the Content Development Act resulted into a shift in guaranteeing growth in local involvement in the sector and therefore making efforts towards achieving the country’s target of 70% use of indigenous workforce, materials and resources in the petroleum operations within the country.³¹⁹

Nigeria had initiatives to increase indigenous participation in the petroleum sector prior to the enactment of the Content Development Act. The Nigerian National Petroleum Corporation (NNPC) issued directives with regards to pre-qualification criterion for any

³¹⁵ Section 44(3), *Constitution of the Federal Republic of Nigeria* (1999) which states that, “Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly”

³¹⁶ Energy Mix Report, ‘An Overview of the Nigerian Oil and Gas Industry Local Content Initiative’-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

³¹⁷ Section 3(1), Nigerian Content Development Act, (2010)

³¹⁸ Section 3(2) Nigerian Content Development Act, (2010)

³¹⁹ Energy Mix Report, ‘An Overview of the Nigerian Oil and Gas Industry Local Content Initiative’-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

contracts executed in favor of indigenous labour, goods and services.³²⁰ Local content requirements are incorporated in agreements between the state and the IOCs, requiring priority to be given to Nigerians in employment and provision of services in all petroleum operations in the country.³²¹

To guarantee compliance, the Content Development Act establishes the Nigerian Content Monitoring and Development Board (“the Board”) whose mandate is to enforce compliance in building Nigeria’s national industry capacity to participate in the petroleum industry.³²² The Board ensures compliance in the award or execution of petroleum projects or contracts and in addition to that, it monitors, issues directives and reviews all petroleum projects and activities.³²³

4.4.2. Key Provisions On Nigeria’s Petroleum Local Content

i. Local Content in the Petroleum Industry

The Content Development Act gives a framework aimed at increasing Nigerian involvement in the petroleum Industry. It contains the lowest thresholds for indigenous involvement in petroleum operations through the inclusion of indigenous workforce and services in the petroleum sector.³²⁴ The Act is specific as to the definition of key terms for the petroleum industry such as the term Nigerian content and what ought to be considered to be a Nigerian Company.³²⁵ The Content Development Act had an immediate impact on Nigeria’s

³²⁰ The directives specifically required the holder of an Oil Mining Lease (OML) to ensure that within a ten (10) year period from the grant of the OML, Seventy Five Percent (75%) of managerial professions and supervisory staff are Nigerian.

³²¹ A typical provision in a PSC giving effect to increased Nigerian participation would read as follows: “ten (10) years from the effective date of this contract the number of citizens of Nigeria employed by the CONTRACTOR in connection with the Petroleum Operations in managerial, professional and supervisory positions, shall reach at least seventy five (75%) percent of the total number of persons employed by CONTRACTOR in those positions. The CONTRACTOR shall further ensure that at the fifteenth (15th) and twentieth (20th) year after the effective date of this contract, the minimum level of the total number of Nigerian citizens engaged in Petroleum Operations in managerial, supervisory and other professional positions shall reach eighty (80%) percent and eighty five (85%) percent respectively;”

³²² Section 4, Nigerian Content Development Act, (2010)

³²³ Energy Mix Report, ‘An Overview of the Nigerian Oil and Gas Industry Local Content Initiative’-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

³²⁴ ‘Nigerian Oil AND GAS and Gas Industry Content Development Act’, (Act No. 2 of 2010)

³²⁵ Section 106, ‘Nigerian Oil and Gas Industry Content Development Act’, (Act No. 2 of 2010) defines Nigerian Content as “The quantum of composite value added to or created in the Nigerian economy by a systematic

petroleum sector as soon as it was enacted into law.³²⁶ Changes were made with most of the IOCs that begun to work towards to complying with LCRs in the Act.³²⁷ Another requirement under the Content Development Act is that exclusive consideration be given to indigenous service firms that own equipment and locals with capacity to carry out such work to take part in the contract bidding process.³²⁸ To ensure greater stability and growth in Nigeria's petroleum industry, the Act obligate a retention of a minimum of ten percent (10%) of total revenue accruing from operations within Nigeria.³²⁹

ii. Contracts Bidding Process

The Act requires project promoters and operators to consider Nigerian content when evaluating bids. The award of contracts under the Act is not based solely on the principle of lowest bidder, but exempts indigenous firm with the required capacity to execute a job from disqualification solely on the basis that it is not the lowest financial bidder, provided the value does not go above the lowest bid price by ten percent (10%).³³⁰ Where bids are within one percent (1%) of each other at commercial stage, the bid containing the highest level of Nigerian content shall be selected provided the Nigerian content is at least five percent (5%) higher than its closest competitors.³³¹

iii. Employment and Training

The Content Development Act requires Nigerian locals to be included in petroleum operations and this in turn avails a path for acquiring skills to grow the sector and the economy as a whole.³³² The requirement is imposed on operators and project promoters for the retention of a maximum of 5% of management positions to cater for the investors'

development of capacity and capabilities through deliberate utilization of Nigerian human, material resources and services in the Nigerian oil and gas industry” and Nigerian Company as “A company formed and registered in Nigeria in accordance with the provisions of Companies and Allied Matters Act with not less than 51% equity shares by Nigerians”

³²⁶ Energy Mix Report, ‘An Overview of the Nigerian Oil and Gas Industry Local Content Initiative’-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

³²⁷ Section 3(1), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³²⁸ Section 3(2), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³²⁹ Section 52(2)(f), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁰ Section 16, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³¹ Ibid

³³² Energy Mix Report, ‘An Overview of the Nigerian Oil and Gas Industry Local Content Initiative’-<<https://www.energymixreport.com/an-overview-of-the-nigerian-oil-and-gas-industry-local-content-initiative/>> on 6th August 2020

interests.³³³ The operators must also in the industry to submit a succession plan that entails Nigerian locals understudying each incumbent expatriate position for a maximum period of four (4) years and at the end, the said positions are Nigerianised.³³⁴ IOCs are obligated to strictly employ locals in their junior and intermediate teams or any other corresponding grades designated by the contractor or firm.³³⁵ The Act has a unique requirement that all petroleum agreements with a budget above \$100 million must contain a ‘Labour Clause’ indicating a minimum percentage of Nigerian labour in specific teams³³⁶

iv. Prohibition Of Importation Of Welded Products

Nigeria’s petroleum industry has made it compulsory for all parties and entities engaged in petroleum activities in Nigeria to carry out all fabrication and welding activities in Nigeria, banning any form of importation of welded products into Nigeria.³³⁷

v. Legal Services

Nigeria strictly limits IOCs to retaining local legal practitioner or a company of Nigerian legal practitioners whose office is located within Nigeria.³³⁸

vi. Insurance

IOCs operating in Nigeria are obligated to insure all petroleum business related risks with an insurance firm through a Nigerian insurance broker registered under the provisions of the insurance Act as amended.³³⁹

vii. Financial Services

Where financial services are required, operators must present a Financial Services Plan (FSP) containing information of financial services used in the past six (6) months, a forecast of financial services required during the next six (6) months, projected expenditure; and the nature of financial services required.³⁴⁰ Further, all operators and contractors are obligated to

³³³ Section 32, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁴ Ibid.

³³⁵ Section 35, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁶ Section 34, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁷ Section 53, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁸ Section 51(1), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³³⁹ Section 49(1), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

³⁴⁰ Section 52(3), ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No. 2 of 2010)

keep and maintain bank accounts within Nigeria where they should keep a minimum of 10% of their total revenue accruing from their operations within Nigeria.³⁴¹

viii. Penalties

Parties that do not comply with the requirements under the Content Development Act are considered to be committing an offence and if convicted of the crime, they are held liable to a fine of five percent (5%) of the sum of the project for each project in which the offence is committed or face a cancellation of entire project.³⁴²

ix. Fiscal Incentives

The Minister is obligated to seek consult from the relevant arms of government on the best fiscal framework and tax incentives for foreign and local firms that have set up facilities in Nigeria to engage in production, manufacturing or for providing goods and services that are otherwise imported into Nigeria.³⁴³

4.4.3. Implementation, Monitoring and Enforcement of Local Content in Nigeria's Petroleum Industry

A strong implementation, monitoring and enforcement mechanism is key to establishing the prosperity or failure of LCPs in a country. In Nigeria, the Content Development Act establishes the Nigerian Content Development and Monitoring Board (NCDMB)³⁴⁴ to enforce the provisions of the Act to guarantee a measurable and uninterrupted development of Nigerian content in all petroleum agreements, projects, operations or transactions within the petroleum industry.³⁴⁵ As a means to guarantee compliance, before engaging in any petroleum activity in Nigeria, operators bidding for any licence, permit or interest are required to present a Nigeria Content Plan to the NCDMB showing their compliance with the LCRs. The NCDMB then reviews and assess the plan and if convinced by the operator's compliance, it will issue a Certificate of Authorization to the operator of the project.³⁴⁶

³⁴¹ Ibid.

³⁴² Section 68, 'Nigerian Oil and Gas Industry Content Development Act' (Act No. 2 of 2010)

³⁴³ Section 48, 'Nigerian Oil and Gas Industry Content Development Act' (Act No. 2 of 2010)

³⁴⁴ Section 69 (1), 'Nigerian Oil and Gas Industry Content Development Act' (Act No. 2 of 2010)

³⁴⁵ Section 5, 'Nigerian Oil and Gas Industry Content Development Act' (Act No. 2 of 2010)

³⁴⁶ Sections 7 and 8, 'Nigerian Oil and Gas Industry Content Development Act' (Act No. 2 of 2010)

The NCDMB powered the Nigerian Oil and Gas Industry Content Joint Qualification System (NOGIC JQS), a platform that allows for the registration of Nigerian content and prequalification of contractors within the petroleum sector. This platform combines data on all major operation within Nigeria’s petroleum sector. In its very nature, it accommodates all industry players including operators, regulators, service firms as well as skilled, trained and certified individuals in the industry.³⁴⁷ This has turned out to be one of the major successes of the NCDMB as it works towards developing and increasing Nigerian content within the petroleum industry. To widen its scope in monitoring and evaluation of local content, the NCDMB created the Nigerian Content Consultative Forum (NCCF), a forum for information sharing and collaboration within Nigeria’s petroleum sector with regards to upcoming projects, available local capabilities and policy proposal relevant for the growth of local content.³⁴⁸ The NCCF should incorporate key industry stakeholders, government and regulatory agencies, and representatives from fabrication, engineering, finance services, legal and insurance; petroleum technology association of Nigeria; education and training among others.³⁴⁹ The Board also established the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund.³⁵⁰ This increases the local capacity hence more Nigerians are included in petroleum operations within industry. The NCDMB has continually enforced the Act and the IOCs are voluntarily complying with the provisions of the Content Development Act.

4.4.4. Factors Influencing Positive Local Content Outcome In Nigeria

An analysis of Nigeria’s local content legal and institutional framework has established that Nigeria has over the years achieved a degree of positive local content outcome within its

³⁴⁷ <https://www.nairaland.com/3576204/nigerian-oil-gas-industry-content> this institution is in accordance with section 55 of the Nigerian Oil and Gas Industry Content Development Act that states that “the NCDMB shall establish, maintain and operate a Joint Qualification System (JQS) in consultation with industry stakeholders which shall be administered in accordance with provisions set out in the Regulations to be made by the Minister in accordance with the provisions of this Act.”

³⁴⁸ <https://ncdmb.gov.ng/nccf/>. Established under Section 55 of the Nigerian Oil and Gas Industry Content Development Act 2010.

³⁴⁹ Section 57, ‘Nigerian Oil and Gas Industry Content Development Act’ (Act No.2 of 2010)

³⁵⁰ ‘Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development’ , *Facility for Oil Sector Transparency in Nigeria*, 2013

petroleum industry. This has been achieved as a result of Nigeria's clear legislative and strong institutional framework on local content; that has created an enabling environment for Nigerians to participate in petroleum operations. Factors that have influenced the positive outcomes within the petroleum sector include the following;

i. Presence Of A Clear And Strong Local Content Framework

Nigeria's local content framework is clear as to the definition and scope of local content within the petroleum industry, specifying the meaning of local content, local goods, local company and local person. Its local content framework is structured in a manner that it specifically address key issues on technology, procurement, employment, training and skills development. The specificity and clarity on local content has been key towards the achievement of positive indigenous content outcomes for the industry as it enables effective monitoring and enforcement of local content. This has eased monitoring and enforcement of local content in Nigeria.

ii. Presence of a Strong Monitoring And Enforcement Mechanism

The NCDMB as the monitoring and enforcement body has majorly contributed to the success of local content in the petroleum sector. The NCDMB is actively involved in the growth of local content, right from the review of local content plans, issuance of certificate of operation to overseeing and monitoring local content. The active involvement of the NCDMB has strengthened the provisions of the Content Development Act and majorly played a part in the successful local content outcomes in Nigeria's petroleum industry.

iii. The Presence of other Local Content Development Mechanisms

As discussed in this chapter, these mechanisms include the NOGIC JSQ, a system for Nigeria content registration and prequalification of contractors in the petroleum industry; the NCCF, a platform for information sharing and collaboration in Nigeria's petroleum sector on upcoming projects, available local capabilities and policy proposal relevant for the growth of local content; and the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund. These mechanisms offer greater and wider opportunities for Nigerian nationals to be trained and involved in petroleum operations. Besides making it easier to monitor and enforce local content, these mechanisms promote transparency and minimize corruption and favoritism

that arise within the industry, giving the locals equal access and opportunity to participate in the industry.

4.4.5. What Did Not Work For Nigeria's Local Content

Research has shown that Nigeria's application of LCPs in the petroleum sector has increased indigenous participation in petroleum operations in a way that would have been impossible if the policies were not put in place.³⁵¹ However, Nigeria has been criticized for being heavy-handed in the application of her LCPs. The substantial petroleum revenues flowing into Nigeria over the past decades have not been converted into sufficient infrastructure, sufficient social services or a conducive environment for industrial growth.³⁵² Nigeria has been unable to meet the minimum local content targets as the Nigerian companies are unable to supply goods and services. Nwapa argues this point stating that the local companies have not been able to fully (100%) comply with the requirements provided for under the schedule of the Act.³⁵³ Secondly, reports have shown that the operating firms prefer to engage only one firm to provide a particular service for a specific agreement within the industry. In such a situation, capacity may exist but it may not all be in one company. The available capacity is usually spread across in other companies and only few indigenous firms are able to fully meet the demands of an agreement.³⁵⁴

Finally, Balouga records that there is a disconnect between policy formulation and policy implementation in Nigeria which he refers to as the "knowing-doing gap".³⁵⁵ This gap has persistently incapacitated public policy initiatives and actions in Nigeria, resulting into the

³⁵¹ McCulloch N, Balchin N, Mendez-Parra M, Onyeka k, 'Local Content Policies And Backward Integration In Nigeria', Nigerian Economic Summit Group, October 2017,36 -< https://set.odi.org/wp-content/uploads/2017/10/SET-Nigeria_Backward-Integration_Final-report.pdf> on 2nd November 2020

³⁵² Mushemeza E, Okiira J, Morales M, Herrera J, 'What Matters When it Comes to Adopting Local Content? A Comparative Analysis of Success Factors in Africa and Latin America', ACODE Policy Research Series (79) (2017), 32.

³⁵³ Ovidia J, 'Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development', Facility for Oil Sector Transparency in Nigeria (2013), 24.

³⁵⁴ Ibid. There however is little or no collaboration amongst the local companies that provide the same services and little or in some cases, absolutely no desire amongst operators to split responsibility for a project between different companies.

³⁵⁵ Balouga J, 'Nigerian Local Content: Challenges and Prospects', International Association for Energy Economics, 24, -< <https://www.iaee.org/en/publications/newsletterdl.aspx?id=176>>- on 3rd November 2020.

failure of numerous government projects and programs. Some of the causes of this gap include the absence of political will to carry through change, unpredictability in government policies, unavailability of support from relevant stakeholders and corruption.³⁵⁶ These factors have evidently been a great impediment to achieving greater levels of local participation and indigenous content development in Nigeria's petroleum industry.

Kenya as a nation therefore has the task of ensuring that it does not fall where Nigeria fell. This will be achieved through engagement with the local communities affected by the petroleum exploration to establish their needs and the skills gap in order to formulate regulations from an informed perspective. For instance, the discovery of oil in Turkana came with many challenges among them being that the Turkana community are pastoralist lavishing in poverty.³⁵⁷ For local content policies to work the community needs to be included in the drafting of regulations that will address their needs and allow them to engage in the upstream petroleum operations that match their literacy levels.³⁵⁸ This will solve problem of disconnect between policy formulation and policy implementation that is threatening the success of local content in Nigeria's petroleum industry.³⁵⁹

4.4.6. Lessons From Nigeria's Local Content Framework

A local content policy should be guided by the government's development agenda to increase local participation within the petroleum sector. This has been demonstrated through the establishment of the NOGIC JQS, a system for Nigeria content registration and prequalification of contractors in the petroleum industry; the NCCF, a platform for information sharing and collaboration in Nigeria's petroleum sector on upcoming projects, available local capabilities and policy proposal relevant for the growth of local content; and the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund. These mechanisms offer greater and wider opportunities for Nigerian nationals to be trained and

³⁵⁶ Ibid.

³⁵⁷ Johannes E, Zulu L & Kalipen E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 2015,6.

³⁵⁸ Ibid.

³⁵⁹ Balouga J, 'Nigerian Local Content: Challenges and Prospects', International Association for Energy Economics, 24, -< <https://www.iaee.org/en/publications/newsletterdl.aspx?id=176>>- on 12th October 2021.

involved in petroleum operations.³⁶⁰ Secondly, LCP ought to be established to specifically and comprehensively provide a framework for the petroleum industry and tackle industry related issues that are specific to that particular jurisdiction. This has enabled Nigeria to easily monitor and implement local content requirements within the industry.³⁶¹ Thirdly, local content monitoring and enforcement body should be strengthened to establish sub groups that widen the scope for effective implementation of local content policies. Nigeria has achieved success in local content within the petroleum industry through the institution of the NOGIC JQS, NCCF and NCEI which have driven Nigeria towards positive local content outcomes within its petroleum industry.³⁶²

LCPs should be specific with regards to the minimum local content threshold for the industry to enable easy monitoring and enforcement. This has enhanced the success of local content in Nigeria in the sense that the minimum requirements are not left to be negotiated by the government and the IOCs and this clarity has encouraged positive outcomes in Nigeria's petroleum industry. The Government ought to focus investment on skills training and capacity building to increase local capacity to participate at international standards. The Nigerian government has instituted the Nigerian Content Employment Initiative (NCEI) which promotes skills training and capacity building by identifying new employees to who are in turn trained using the Nigerian Content Development Fund. These mechanisms offer greater and wider opportunities for Nigerian nationals to be trained and involved in petroleum operations.³⁶³

³⁶⁰ <https://www.nairaland.com/3576204/nigerian-oil-gas-industry-content>

³⁶¹ Ovadia J, 'Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development', *Facility for Oil Sector Transparency in Nigeria* (2013), 24.

³⁶² <https://www.nairaland.com/3576204/nigerian-oil-gas-industry-content> this institution is in accordance with section 55 of the Nigerian Oil and Gas Industry Content Development Act that states that “the NCDMB shall establish, maintain and operate a Joint Qualification System (JQS) in consultation with industry stakeholders which shall be administered in accordance with provisions set out in the Regulations to be made by the Minister in accordance with the provisions of this Act.”

³⁶³ 'Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development', *Facility for Oil Sector Transparency in Nigeria*, 2013.

4.5. BRAZIL

Oil in Brazil was discovered in 1864 but it was not until 1939 that oil was discovered in commercial quantities and since then, the petroleum industry in Brazil has gone through a numerous significant transformations.³⁶⁴ Earlier on in the industry, decrees 336 of 1937 and 395 of 1938 nationalized the petroleum industry and obtained exclusive rights to explore, transport, distribute and trade petroleum and its related products.³⁶⁵ In 1945 Brazil declared a new constitution which provided local and foreign petroleum firms that are instituted in Brazil, the rights to acquire petroleum concessions.³⁶⁶ Implementation of several sector reforms begun in the 1990s to further open the oil industry and in 1997, the Oil Bill was passed into law. This law fully liberalized the petroleum industry and placed the regulation of the oil industry in the National Agency of Petroleum, Natural Gas and Biofuels (ANP), an independent institution linked to Brazil's Ministry of Mines and Energy.³⁶⁷

Brazil addresses local content in the context of bidding rounds for Concession and production-sharing agreements. Companies seeking to be part of the bidding process must satisfy the minimum threshold of LCRs so as to win a bid.³⁶⁸ The LCRs within the petroleum industry are defined in percentages and the Concessionaires therefore must guarantee that the specified percentage of goods and services are sourced locally in the performance of their concession and production sharing agreements. Concessionaires must obtain a local content certificate from an independent certifier to prove their compliance.³⁶⁹

³⁶⁴ Anouti Y, Tordo S, 'Local Content in the Oil and Gas Sector: Case Studies', *World Bank Publication*, 2013, 40

³⁶⁵ Acheampong T, Ashong M, Svanikier V, 'An assessment of local-content policies in oil and gas producing Countries' *Journal of World Energy Law and Business*, 9(4), 2016, 296

³⁶⁶ The new constitution was promulgated by General Dutra who become president after the overthrowing of Dictator Vargas in 1945.

³⁶⁷ Acheampong T, Ashong M, Svanikier V, 'An assessment of local-content policies in oil and gas producing Countries' *Journal of World Energy Law and Business*, 9(4), 2016, 296

³⁶⁸ Bausch K, Miotto T, 'Local Content - Brazil Petroleum', *Columbia Center on Sustainable Investment*, 2017, 4 -<
<http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf>>- on 18th
August 2020

³⁶⁹ Ibid. However, it is important to note that Brazil no longer considers local content as a bid parameter for the award of an oil and gas contract.

4.5.1. Legal Framework, Institutional Arrangements And Policies

The Brazilian petroleum industry has two agents that stand out: the National Agency for Petroleum, Natural Gas and Biofuels (ANP) and Petrobras. ANP is the regulatory agency of petroleum sector³⁷⁰ whereas Petrobras is the State Oil Corporation.³⁷¹ These two agents are mandated with the role of implementing and carrying out Brazil's industrial policy; which is to increase the local content in the sales of suppliers for petroleum firms and to encourage the competitiveness of the supply chain.³⁷² The foundation for the first institutional framework in Brazil's petroleum industry was introduced by the National Petroleum Law of 1997 which stipulated that competitive bidding for Concession agreements should include minimum thresholds for local content.³⁷³ 'This law created the ANP which is the regulatory body for the activities that integrate the oil and natural gas and biofuel industries in Brazil'.³⁷⁴ The Petroleum Law also created the National Energy Policy Council with the mandate to advise the state on local content development.³⁷⁵

In 2013, the ANP under Resolution 19/2013 established the local content certification system³⁷⁶ for the issuance of a local content certificate stating the percentage of local content, goods and services that have been used among other things. Then came the Model Concession Contract for Exploration and Production of Oil and Gas in 2015³⁷⁷ that set out the benchmarking of LCRs and the exemptions and adjustments to them, as well as the penalties for non-compliance by the contractors. This Model Contract defines the term local content as

³⁷⁰ Visit www.anp.gov.br/?dw=2447

³⁷¹ <https://www.britannica.com/topic/Petrobras>

³⁷² Prochnik V, 'Brazil's Local Content Industrial Policy For The Oil And Gas Supply Chain: The Case Of Equipment Purchase For Process Control', 1 -<
[https://www.academia.edu/3137171/BRAZIL_S_LOCAL_CONTENT_INDUSTRIAL_POLICY_FOR_T
HE_OIL_AND_GAS_SUPPLY_CHAIN_THE_CASE_OF_EQUIPMENT_PURCHASE_FOR_PROCESS
CONTROL](https://www.academia.edu/3137171/BRAZIL_S_LOCAL_CONTENT_INDUSTRIAL_POLICY_FOR_THE_OIL_AND_GAS_SUPPLY_CHAIN_THE_CASE_OF_EQUIPMENT_PURCHASE_FOR_PROCESS_CONTROL)>- on 18th August 2020

³⁷³ Petroleum Law (Law No. 9478 of 1997)

³⁷⁴ Technology & Business Petroleum, 2017- [https://www.tbpetroleum.com.br/news/law-no-9478-1997-
known-as-the-petroleum-law-completed-20-years-ago-yesterday/](https://www.tbpetroleum.com.br/news/law-no-9478-1997-known-as-the-petroleum-law-completed-20-years-ago-yesterday/)

³⁷⁵ <https://enacademic.com/dic.nsf/enwiki/11798005>

³⁷⁶ Local Content Certification is "the set of activities carried out by an entity duly accredited by the ANP, with the objective to attest publicly, by means of the issuance of a local content certificate to determine, among others, the goods and services meeting the local content requirements as set out in the ANP-issued Local Content Booklet contained in Annex II of ANP Resolution 19/2013."

³⁷⁷ It is also known as the Model Contract 2015

the portion between the value of the goods produced and services rendered within Brazil in line with the terms of the Model Contract 2015, and the total value of the goods used and services provided for this purpose.³⁷⁸ With regards to who ought to be considered a Brazilian supplier, the Model Contract defines a supplier as any manufacturer or supplier of goods or services offered in Brazil through a firm that is incorporated in Brazil, or an entity that uses manufactured goods in Brazil under a special customs regime and tax incentive applicable to the petroleum industry.³⁷⁹ For clarity as to the meaning of a Brazilian Company, the Model Contract references the Brazilian Constitution that defines a Brazilian Company as any company that is instituted in Brazil irrespective of the origin of the capital or the nationality of the shareholders, with a few exceptions.³⁸⁰

4.5.2. Key Provisions in Brazilian Local Content

i. Application For Rights

Brazil's Tender Protocol 2015 (Bid Round No. 13) made it compulsory for bid offers to include local content commitments. The commitment percentages should be in accordance with the stipulated minimum threshold for local content in the industry.³⁸¹ Bids are independently evaluated for every block and calculated as follows, "local content shall have 20% in the calculation of the final grade of the bidder or bidder consortium, as detailed in section 6.3.3. Of this, 5% it shall be allocated to local content offered for the exploration phase and 15% it shall be allocated to local content offered for production development stage."³⁸² Decree N0. 8637 of 2016 lessened some of the LCRs, expanding the list of activities that qualified as local content for the purposes of the local content commitments.³⁸³ Previously,

³⁷⁸ Article 1.3.15, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁷⁹ Article 1.3.25, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁸⁰ Constitutional Amendment No. 6 of 1995, revocation of article 171

³⁸¹ Article 6.3.3, '*Tender Protocol*' (2015) "stipulates that It shall be considered for scoring purposes, only the percentage of local content that are included between the minimum and maximum values defined in Table 7. (...)The overall percentage of local content in the exploration phase and in the production stage of development, calculation object on offer, it shall be automatically generated by the computer program supplied by ANP, as provided in section 6.4, and it shall be calculated from the content percentage place offered for each of the items and sub-items listed in the tables of Annex XIV, weighted by the weight of said item and sub-item in planned investment for its activity (exploration or development of production). The weight of each item should be proposed based on the total cost of the project."

³⁸² Article 6.5 (c), '*Tender Protocol*' (2015)

³⁸³ Article 2, '*Decree N0. 8637 of January 15*' (2016)

tender documents required at least 51% of its capital be owned by citizens of Brazil,³⁸⁴ however, this was reduced to a minimum local content threshold to 50% for bidding rounds starting in 2017.

ii. Employment and Training

The petroleum local content structure in Brazil has no requirements on employment or training, contrary to that of Kenya and Nigeria.³⁸⁵ There were however a number of employment requirements in previous bid rounds for blocks in the Border Strip area that demanded at least two thirds (2/3) of employees to be Brazilian national; and the majority of the administrators and managers of the concession had to be Brazilian nationals.³⁸⁶

iii. Procuring Goods and Services

The Model Contract requires priority to be given to Brazilian suppliers where their goods meet the required standards by the petroleum industry.³⁸⁷ In cases where Concessionaires have affiliates, they are equally subject to similar LCRs with the exception of some services.³⁸⁸ The concessionaire must further commit to locally acquire property and contract services made in the winning bid of the relevant block.³⁸⁹ The Decree provides a list of activities that qualifying for the calculation of local content percentages to include “The signing of purchase contracts for goods, services and systems that enable the installation of new suppliers in the country; direct investment in the expansion of production capacity of suppliers; direct investment in technological innovation process from suppliers; the purchase of goods and systems in Brazil, with local content to service the foreign operations; and the acquisition of explorative lots of goods and systems developed in Brazil”³⁹⁰ The Model Contract 2015 gives the method of measuring the success of the commitments,³⁹¹ further specifying exceptions to set targets.³⁹² The Model Contract further gives room for the adjustment of local content

³⁸⁴ Article 6.3, ‘Tender Protocol’ (2015)

³⁸⁵ Bausch K, Miotto T, Local Content - Brazil Petroleum’, *Columbia Center on Sustainable Investment*, 8 (2017) - <http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf> on 18th August 2020

³⁸⁶ Article 6.3, ‘Tender Protocol’ (2014)

³⁸⁷ Article 20.1.2, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁸⁸ Article 20.2, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁸⁹ Article 20.1.1, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁹⁰ Article 2.II, ‘Decree NO. 8637 of January 15’ (2016)

³⁹¹ Articles 20.4- 20.6, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁹² Articles 20.8-20.10, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

targets, or transfer of surplus over and above a local content obligation to another good or service or to be carried forward.³⁹³ However, the 2017 announcement by the ministry revokes the possibility of exemption granting on the ground that the targets are now more realistic.³⁹⁴

A unique aspect of the Brazilian local content is that it has a rewarding system where some operations in specified areas attract a higher percentage/ a bonus towards local content obligations. This is one of Brazil's strategies to increase local content within the petroleum sector.³⁹⁵ This system of incentives and credits constitutes the conversion of investments into local content units ('UCL') which can then be credited towards concessionaires' local content commitments for ongoing concessions.³⁹⁶

iv. Technology Transfer

Concessionaires in Brazil are obligated to contribute 1% of gross revenue towards financing research, development and innovation.³⁹⁷ The industry has further instituted a Technical-Scientific Committee that prepares and publishes an annual list of areas of priority, operations and projects of interest and topics in research, development and innovation for the petroleum sector.³⁹⁸ Development of technological innovation is one of the activities that earns a concessionaire higher local content percentages. However, the Decree specifies that credit obtained from such investment cannot be used to satisfy the local content requirements on technology transfer.³⁹⁹

³⁹³ Articles 20.11-20.15, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁹⁴ Bausch K, Miotto T, 'Local Content - Brazil Petroleum', *Columbia Center on Sustainable Investment*, 2017, 12

³⁹⁵ Article 2.I, 'Decree NO. 8637 of January 15' (2016). These activities include "Engineering developed locally; any development and technological innovation carried out in Brazil; Activities with a high potential to generate quality jobs; and Activities which promote exports."

³⁹⁶ Bausch K, Miotto T, 'Local Content - Brazil Petroleum' *Columbia Center on Sustainable Investment*, 13 (2017) - <http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf> on 18th August 2020

³⁹⁷ Articles 24, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

³⁹⁸ *Ibid.*

³⁹⁹ Article 2.2, *Decree NO. 8637 of January 15* (2016).

4.5.3. Implementation, Monitoring and Enforcement of Local Content in Brazil's Petroleum Industry

On application of local content within the petroleum sector, Brazil has established a Steering Committee to adopt regulations governing the credit system and to put together recommendations for the ANP to better the existing LCRs.⁴⁰⁰ The Committee's roles include setting limits on the extent to which companies can use subsidies to offset their contractual obligations, examining projects submitted by the Technical Operating Committee and submitting its conclusions on the eligibility of the projects to the ANP. It is also at liberty to request for an impact analysis of the measures adopted and propose guidelines and improvements to the rules for application by the IOCs in the concession contracts and sharing of production.⁴⁰¹ This implementation strategy encourages local content growth within the petroleum industry. The Steering Committee is not only composed of members from the oil and gas sector but also representatives from other ministries.⁴⁰² The multi-ministerial nature of this Committee enables the country to develop and grow its local content in all sectors and not just the petroleum industry hence the general growth of the economy. Transparency is a key aspect in local content development and the Committee is obligated to issue their decision publicly through resolutions.⁴⁰³ This enables all parties involved to easily obtain information concerning their projects.

On monitoring and enforcement, the ANP regulated the requirements on reporting and certification of local content in the 2007 ANP Resolutions.⁴⁰⁴ However, Resolution 36 of 2007 was replaced by Resolution 19 of 2013, which created a provision for monitoring indigenous content commitments by concessionaires. It redefined ANC's guidelines and methods for certifying local content.⁴⁰⁵ For registration and accreditation of certifiers, Resolution 37 of

⁴⁰⁰ Article 3, *Decree NO. 8637 of January 15'* (2016).

⁴⁰¹ Ibid.

⁴⁰² Article 4, '*Decree NO. 8637 of January 15'* (2016). These representatives are from the "Civil House of the Presidency; Ministry of Finance; Ministry of Development, Industry and Foreign Trade; Ministry of Mines and Energy; Ministry of Science, Technology and Innovation; National Agency of Petroleum, Natural Gas and Biofuels - ANP; National Bank for Economic and Social Development - BNDES; and Financier of Studies and Projects - FINEP."

⁴⁰³ Article 5, '*Decree NO. 8637 of January 15'* (2016).

⁴⁰⁴ Resolutions 36, 37, 38 and 39.

⁴⁰⁵ Article 24 and Article 43, ANP Resolution 19 (2013). The certifier must be privy to all information that is relevant for a successful certification process for the work that has been contracted. After completion of calculations, Article 43 mandates the certifying agency to issue local content certificates in line with the model

2007 establishes the criteria and procedures whereas, ⁴⁰⁶ Resolution 38 created the criterion and methods for auditing Certifiers.⁴⁰⁷ The Model Contract 2015 obligates the Concessionaire to keep all documents, books, papers, records, and other parts, and to quarterly avail to ANP the exploration expenses, expenses on development and production and the local investments report in exploration and development.⁴⁰⁸ The Concessionaire is further obligated to make available to ANP local content certificates, agreements, tax records and other records for goods purchased and services rendered within a period of 10 (ten) calendar years.⁴⁰⁹ This auditing requirements boost the level of transparency and accountability in petroleum operations. In instances of noncompliance, fines are issued and the fine is tallied with a formula based on the monetary value of the local content commitment.⁴¹⁰ The announcement by the Ministry in 2017 records that the fines have been reduced from a minimum of sixty percent (60%) of what was not achieved by the petroleum firms to forty percent (40%), and from a ceiling of one hundred percent (100%) to seventy five percent (75%) in case of non-compliance with indigenous content commitments.⁴¹¹ The flexibility in the enforcement of local content encourages IOCs to take part in the operations and not shy away because of stringent non-flexible local content requirements.

4.5.4. Factors Influencing Positive Local Content Outcome In Brazil

The assessment of Brazil's local content indicates an achievement of positive local content outcomes over the years. This has been achieved as a result of the country's strong and clear institutional framework on local content; that has formed a conducive environment for

given under Annex I of the ANP Resolution 19 of 2013, stating the percentage of local content of the goods or services.

⁴⁰⁶ The documentation that is part of this Resolution include the following; Annex I – Application for Accreditation for Local Content Certification, Annex II – Confidentiality Agreement, Annex III – Documentation Required for Technical Qualification, Annex IV – Documentation Required for Legal Qualification, Annex V – Documentation Required for Financial Qualification.

⁴⁰⁷ The documents that are part of this Resolution include Annex I – Notification of Beginning of Audit, Annex II – Auditor's Opinion and Annex III – Warning Notice

⁴⁰⁸ Article 27.1, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

⁴⁰⁹ Article 22.2.5, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

⁴¹⁰ Articles 20.11 – 20.14, *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

⁴¹¹ Bausch K, Miotto T, 'Local Content - Brazil Petroleum', *Columbia Center on Sustainable Investment*, 2017,19 - <http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf> on 18th August 2020.

Brazilians to take part in petroleum operations. Factors that have influenced the positive indigenous content outcome within the petroleum industry include the following;

i. Well-Structured Local Content Framework

From the above assessment, this study has established that the local content structure in Brazil is well structured and as a result, its petroleum industry has achieved positive local content outcomes. The Model Contract 2015 gives clarity as to the meaning, the nature and scope of local content within the petroleum industry. This clarity minimizes any forms of ambiguity or a variety of interpretations as to the meaning of a Brazilian local content, local supplier and local company. Secondly, the Brazilian local content framework is specific as to the minimum levels and percentages of local content that IOCs are expected to achieve towards local content development. This clarity as to the minimum threshold on local content requirements enables effective implementation, monitoring and enforcement of local content within the petroleum sector.

ii. Strong Monitoring And Enforcement Mechanism

The Brazilian content has created a strong, monitoring and enforcement mechanism. The ANP as the regulatory body ensures implementation of local content requirements through a steering committee that is established to adopt regulations governing the credit system. Through the Certification System, the ANP is able to effectively monitor and enforce local content within the petroleum industry. The auditing requirements imposed on the concessionaire boosts the level of transparency and accountability and enables effective monitoring and enforcement of local content in the petroleum operations.

iii. Flexibility On Penalties For Non-Compliance

The flexibility on penalties for noncompliance with local content requirements encourages IOCs to take up petroleum operations in Brazil. The reduction on fines payable to the government from minimum of sixty percent (60%) of what was not achieved by the oil firms to forty percent (40%), and from a ceiling of one hundred percent (100%) to seventy five

percent (75%) in case of non-compliance with LCRs shows Brazil's commitment not to use local content policies as punitive measures against IOCs but rather as a way of encouraging the growth of local content local content and economic growth of the oil and gas industry.

iv. Presence of a Reward System

A unique aspect of the Brazilian local content is that it has a rewarding system where some operations in specific areas attract a higher percentage/ a bonus towards local content commitments. This is one of Brazil's strategies to increase local content within the petroleum sector. This system of incentives and credits constitutes the conversion of investments into local content units ("UCL") which can then be credited towards concessionaires' local content obligations for ongoing concessions. This in its very nature has influenced the positive local content outcome in the Brazilian petroleum industry.

4.5.5. What Did Not Work For Brazil's Local Content

The Brazilian LCP seeks to broaden the engagement of indigenous firms in the procurement of indigenous goods and services, training and development of technological as well as enhancing competitiveness amongst local firms and increase income and job generation.⁴¹² However, despite the increase in participation of the local companies in all areas of the supply chain, the process has not been without its challenges and several decisions were resisted by the industry.⁴¹³

In the execution of the local content policy, there was no central strategic plan to gradually implement the policies in accordance with the country's supply chain reality. The general objectives of the local content policy lacked metrics that could accurately measure its results

⁴¹² Filho N, 'Brazil's Oil & Gas Local Content Policy: Lessons Learned', Institute Of The Americas, September 2017,1 https://www.iamericas.org/documents/energy/reports/Brazil_Oil_Gas_Local_Policy.pdf- on 2nd November 2020

⁴¹³ In the long run, some of the decisions made served to undermine the original principle of the Local Content policy, which resulted into fierce criticism of the policy itself and the strong revisions the industry has overseen over the years.

and were rapidly imposed without focused targets.⁴¹⁴ Secondly, throughout the bidding rounds, the ANP has varied the procedures, requirements and monitoring of local content. Research has shown that the adoption of the long and detailed local content table and the new methodology from the 7th to the 13th Round was bureaucratic, complex and too demanding for the industry to cope with.⁴¹⁵ Thirdly, the set local content percentages did not take into account the actual available capacity in Brazil when they were being established. In most cases, the set targets were impossible to achieve and did not reflect market reality at the time and as a result, the industry experienced project delays and heavy fines imposed on both the operators and suppliers.⁴¹⁶ Fourthly, the need to determine local content requirements for activities occurring ten years in the future proved to be impossible and questions arose as to the effectiveness of the local content model.⁴¹⁷ Finally, the continued struggle to comply with the local content requirements resulted into excessive penalties being imposed on the operators who failed to meet the set local content requirements which in turn partially transferred to the supply chain.⁴¹⁸ The local content policy soon became a punitive measure contrary to the intended purpose of the policy.

4.5.6. Lessons From Brazil's Local Content Framework

LCRs should be instituted in such a manner that they are specific to the needs of a particular jurisdiction and address the issues that affect the petroleum industry in that particular jurisdiction. Positive local content outcomes are likely to be achieved with a strong implementation, monitoring and enforcement mechanism in place. The ANP has implemented auditing requirements imposed on the concessionaire and as a result, boost the level of transparency and accountability and this has enabled successful monitoring and

⁴¹⁴ Filho N, 'Brazil's Oil & Gas Local Content Policy: Lessons Learned', Institute Of The Americas, September 2017,3-4 -https://www.iamericas.org/documents/energy/reports/Brazil_Oil_Gas_Local_Policy.pdf on 2nd November 2020.

⁴¹⁵ https://www.iamericas.org/documents/energy/reports/Brazil_Oil_Gas_Local_Policy.pdf on 2nd November 2020

⁴¹⁶ Further, some requirements provided, to some degree, protection to some goods and services and this resulted into escalated prices and longer delivery time, higher than those in the international market.

⁴¹⁷ To this extent, relevant market variants such as change oil prices and the emergence of new and improved technology for the industry.

⁴¹⁸ Filho N, 'Brazil's Oil & Gas Local Content Policy: Lessons Learned' Institute Of The Americas, September 2017, -https://www.iamericas.org/documents/energy/reports/Brazil_Oil_Gas_Local_Policy.pdf on 2nd November 2020.

enforcement of local content in Brazil.⁴¹⁹ LCPs ought not to only be about punishing noncompliance but also rewarding higher achievements and compliance with the set local content requirements. Brazil has achieved success in local content within its petroleum industry by rewarding compliance with the LCPs. Some operations in specific areas attract a higher percentage/ a bonus towards local content commitments.⁴²⁰ Further, LCPs should also contain a measuring formulas to give room for successful monitoring and enforcement of local content within the industry. Through the Certification System, the ANP has been able to effectively monitor and enforce local content within the petroleum industry. The auditing requirements imposed on the concessionaire has boost the level of transparency and accountability and enabled effective monitoring and enforcement of local content in the petroleum operations. LCPs should be realistic and flexible to encourage investment and create a friendly environment for the IOCs. Brazil has demonstrated flexibility on penalties for noncompliance and as a result, achieved success in local content within the oil and gas industry.⁴²¹

4.6. Conclusion

An assessment of the Nigerian and Brazilian local content structures has established that local content frameworks ought to be specific, comprehensive, strong and well-structured in order for the industry to achieve positive local content frameworks. In both jurisdiction, the objective of the national Government to increase local participation within the industry guides the formulation of both frameworks.⁴²² Both jurisdictions offer platforms for competitive bidding by investors and have instituted compliance with local content requirements as a key requirement for a successful bid. They both require investors to issue a detailed and

⁴¹⁹ *Model Concession Contract for Exploration and Production of Oil and Gas* (2015).

⁴²⁰ Bausch K, Miotto T, 'Local Content - Brazil Petroleum' *Columbia Center on Sustainable Investment*, 13 (2017) - <http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf> on 18th August 2020

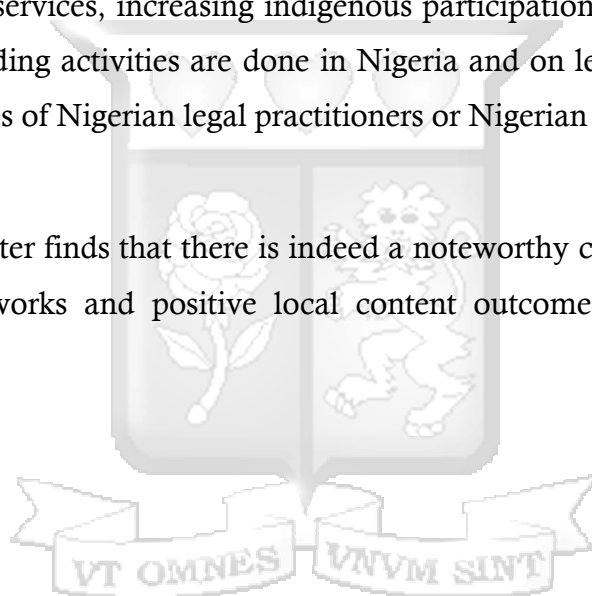
⁴²¹ Bausch K, Miotto T, 'Local Content - Brazil Petroleum', *Columbia Center on Sustainable Investment*, 2017,19 - <http://ccsi.columbia.edu/files/2014/03/Local-Content-Brazil-Petroleum-CCSI-May-2017.pdf> on 18th August 2020.

⁴²² The Nigerian Government has a target of seventy percent (70%) use of local workforce, material and resources in petroleum operations whereas Brazil's national industrial policy is to increase local content in the sales of suppliers for oil and gas companies and to stimulate the competitiveness of the supply chain.

comprehensive local content plan for approval before being given the green light to proceed with the petroleum operations. This chapter has also established that both countries have strong regulatory bodies that give life to the set LCRs and ensure the successful monitoring and enforcement of local content within the petroleum industry in both jurisdictions.

Unlike Nigeria, the Brazilian content has a rewards system that rewards higher achievements and compliance with local content requirements. The Brazilian framework is also more flexible and realistic as compared to that of Nigeria and with this, Brazil has managed to create a friendlier environment for investors in the petroleum sector. Unlike Brazil, Nigeria has a stronger succession structure for the petroleum sector.⁴²³ Further, Nigeria prohibits importation of specific services, increasing indigenous participation within the value chain. All fabrication and welding activities are done in Nigeria and on legal services, IOCs must strictly retain the services of Nigerian legal practitioners or Nigerian legal practitioners' firms located in Nigeria.

In conclusion, this chapter finds that there is indeed a noteworthy correlation between well-structured LCP frameworks and positive local content outcomes within the petroleum industry.



⁴²³ The Content Development Act mandates contractors and sub-contractors to submit a succession plan that allows Nigerians to understudy each current non-native position up to four (4) years and eventually the positions become Nigerianized.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This study has delved into the meaning, nature and the scope of local content, legal and institutional local content framework in Kenya; and analyzed local content frameworks in both Nigeria and Brazil's petroleum industries. Following this assessment, the study has identified implementation strategies that Kenya's petroleum industry can adopt in order to achieve positive local content outcomes within the industry. This chapter draws lessons from both Nigeria and Brazil that Kenya can learn from and adopt in order to effectively monitor and enforce local content and in the long run achieve positive local content outcomes within the petroleum industry.

This chapter finds that an adequate, comprehensive and well-structured local content framework is key for the petroleum industry to achieve positive local content outcomes. For Kenya to obtain greatest profit from its oil and gas resources, the institutional frameworks need to be efficient to enable effective monitoring and enforcement of local content frameworks. The framework should provide remedies to challenges affecting the industry such as inadequate qualified personnel, inadequate skills and capacity to produce material for the industry and weak monitoring and enforcement mechanisms. If these challenges are not remedied, Kenya will not obtain maximum benefit from its oil and gas resource and instead, will continue to suffer from under development, corruption, increased poverty and increased unemployment among the locals despite the country producing oil and gas that ought to turn around its economy.

This chapter attempts to recommend mechanisms for monitoring and enforcing local content under the Petroleum Act 2019, outlining the key findings of the research challenges that hinder successful implementation of local content within the petroleum industry in Kenya. This chapter further provides recommendations drawn from the case study of Brazil and Nigeria's local content frameworks that Kenya can learn from.

5.2 FINDINGS

5.2.1 Weak legal and institutional local content structure

Chapter 3 has demonstrated that legal and institutional framework on local content in Kenya is not robust enough and for this reason, fails to meet international best practice standards demonstrated by both Brazil and Nigeria and this is Kenya's greatest challenge to achieving positive local content outcomes within the petroleum sector. The existing legal framework lacks clarity on major aspects, creating a possible future legal risk for the industry if not addressed appropriately. The current legislative framework leaves unanswered, key questions on the meaning of a local persons, metric for measuring and evaluating compliance with LRCs under the Petroleum Act. The Act is further not specific on sanctions and penalties for non-compliance by contractors and sub-contractors and the general provision on penalties is not punitive enough for the industry. Chapter 3 has shown that Kenya's legal framework is not stringent enough and lacks clarity on major aspects on local content for the industry to meet international best practice standards and impedes the achievement of positive local content outcomes.

5.2.2 Weak Monitoring and Enforcement Mechanism

The Petroleum Act 2019 provides for monitoring and enforcement of local content in the petroleum sector. However, it does not give a criterion or a gauge for the measurement and enforcement that the EPRA ought to use in carrying out its mandate of monitoring and enforcing LCPs. The Act compels IOCs to comply with local content requirements, yet it is silent on the minimum levels of LCRs to be attained for the purpose of monitoring and enforcement. This ambiguity creates a future legal risk for the petroleum industry and there is therefore the need for Kenya to develop a comprehensive and specific legal structure on the methodology for implementing, measuring and reporting local content outcomes.

On enforcement, the Petroleum Act 2019 lacks specific sanctions for noncompliance with LCRs. What the Act gives is a mandate upon the EPRA to impose a minimum penalty of five million Kenyan shillings (Ksh 5,000,000) to a contractor or subcontractor who acts contrary

to the provisions of the Act.⁴²⁴ This is a general penalty for any form of noncompliance under the Act where neither a fine nor a penalty is expressly stated. Given the high amounts of revenues generated by the IOCs in these petroleum operations, this amount is not punitive enough. Therefore there is the need for the Petroleum Act 2019 to be amended to include a specific penalty for noncompliance with LCRs to enable strict implementation and effective enforcement by the EPRA.

5.2.3 Inadequate skilled and qualified personnel

Chapters 1 and 2 have shown that local content largely involves the use of indigenous personnel and the desire by governments to create employment opportunities for its locals is among the key drivers of local content in Kenya. As discussed in this research, the nature of the petroleum industry requires highly skilled and qualified personnel to take up jobs within the industry. However, Kenya has a skills gap as it suffers a shortage of professionals to serve in the capacity of skilled personnel required in petroleum operations. This inadequacy makes it difficult to monitor and implement LCRs as the IOCs are forced to engage non-native workers to fill the gap contrary to the requirements under the Petroleum Act. This in the long run impedes positive local content outcomes within the petroleum industry.

5.2.4 Inadequate capacity relevant for the petroleum industry

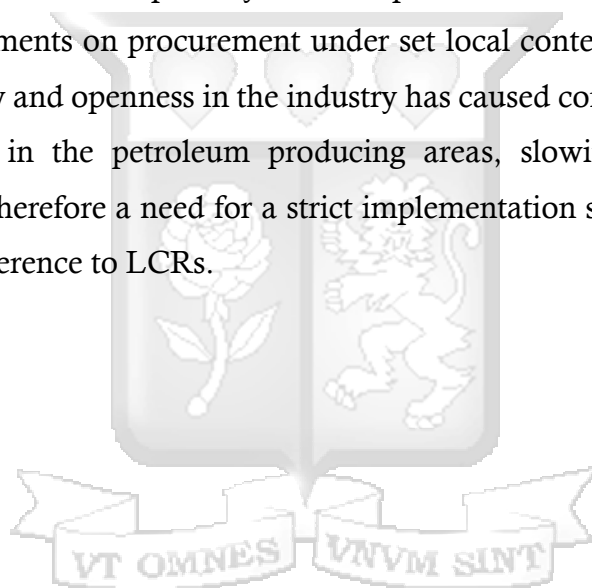
Naturally, the petroleum industry demands complex technology and sophisticated goods and services that are financially intensive. This has over the years been an impediment to local participation the indigenous skills and capacity is limited. For Kenya, the local suppliers lack the capacity to supply goods that meet the set standards for the petroleum industry and where capacity is available, it is insufficient hence hindering local participation within the industry. This inadequacy creates room for IOCs to involve foreign firms to provide goods and services, contrary to the intended purpose of local content and therefore, there is the need to develop

⁴²⁴ Section 124, *The Petroleum Act* (Act No. 2 of 2019)

capacity in Kenya that can be employed within Kenya's petroleum industry to increase local participation and achieve maximum benefit from petroleum operations.

5.2.5 Corruption and lack of transparency

These practices have generally been distinguished as one of the greatest threats to the economic growth of a country.⁴²⁵ The lucrative nature of the petroleum industry makes it susceptible to corruption at all stages of petroleum operation. In upstream sector, corruption vulnerabilities are the exploration stage⁴²⁶, the development stage and production stage.⁴²⁷ In Kenya, corruption and lack of transparency are an impediment to the successful enforcement of local content requirements on procurement under set local content laws and regulations. The lack of transparency and openness in the industry has caused conflicts and unrest among the indigenous people in the petroleum producing areas, slowing down local content development. There is therefore a need for a strict implementation system and incorruptible personnel to ensure adherence to LCRs.



⁴²⁵ Donwa P, Mgbame C, Julius O, "Corruption in the Oil and Gas Industry," *European Scientific Journal*, 11 (22), 2015 -< <http://eujournal.org/index.php/esj/article/download/6055/5832/0>>- on 12th October 2020

⁴²⁶ Corruption vulnerabilities at the exploration stage include Policy formulation; Laws, contracts, fiscal terms; licensing; contract awards; permits and approvals. The challenges include lack of policy clarity, Opaque and incomplete fiscal framework, direct and nontransparent negotiation of licenses, "odd" awards and the delays on permits and approvals.

⁴²⁷ At the development and production stage, corruption vulnerabilities are at permits, approvals; procurement and theft of production or revenues. The challenges include delays in issuance of permits, limited international competitive bidding, nontransparent bids, "Odd" or repeat procurement awards, aggressive local content rhetoric, volume discrepancies and the absence of metering.

5.3 RECOMMENDATIONS

Following the research in the previous chapters, this study has come up with the following recommendations.

5.3.1 Develop and contextualize legislation to define key local content terms within the petroleum industry

As shown in the previous chapters, the Petroleum Act 2019 is silent on key local content terms such as local person, local company and local goods. This creates ambiguity as to the meaning and the extent to which these terms apply, impeding the effective implementation, monitoring and enforcement of LCRs. The term ‘local’ should be construed in the context of citizenship as per Kenya’s Constitution and national law for natural persons. It should also be construed in the context of ownership and control by nationals, as per national law for companies or artificial persons. For a local company or firm, Kenya should emulate the route taken by Nigeria, defining a local company or firm to entail a business entity that is created under the laws of Kenya⁴²⁸ whose principal place of business is in Kenya and is effectively owned and controlled by a certain percentage of Kenyan nationals.⁴²⁹ For goods and services, ‘local goods’ should be defined to entail materials produced, manufactured, mined or grown in Kenya or supplied by a local whereas ‘local services’ should be defined to entail local works and services performed or supplied by a local person as is the case in Brazil.⁴³⁰

5.3.2 Develop an explicit measuring, monitoring and enforcement methodology

This study has shown that the provisions under the Petroleum Act 2019 on measuring, monitoring and enforcement of local content are inadequate. These provisions fail to provide a comprehensive framework to measure local content within the oil and gas sector. As is the case in Nigeria’s content, Kenya needs to establish an exhaustive legal framework that gives

⁴²⁸ Under the Companies Act 2015

⁴²⁹ Nigerian content defines a Nigerian Company as one that is created and registered in Nigeria as required under the Companies and Allied Matters Act, with Nigerians owning a minimum of 51% equity shares.

⁴³⁰ The Brazilian Model Contract defines a supplier as any manufacturer or supplier of goods produced or services offered in Brazil via a firm created in Brazil, or an entity that utilizes manufactured goods in Brazil under a special customs regime and tax incentive relevant to the petroleum sector.

clarity as to the scope and mechanism for implementing, measuring and reporting outcomes of local content. Further, Kenya should also emulate the Brazilian content that is largely measured on the basis of percentages, offering a gauge for effective implementation and monitoring of LCRs. To achieve better local content outcomes, the petroleum industry should develop a sector specific legal framework that guarantees clarity as to the threshold for measurement, implementation and monitoring of local content. Chapter 3 has shown that the Local Content Bill, 2018 is more detailed and particular on LCRs for the petroleum industry compared to the existing Petroleum Act 2019 and should therefore be amended accordingly and passed into law to allow Kenya to gain maximum profits from its petroleum resources.

5.3.3 Strengthen the existing local content monitoring and enforcement mechanisms

As shown in Chapter 3 of this study, the existing local content framework has a weak monitoring and enforcement mechanism for the petroleum industry. There is need for a comprehensive local content legislation to allow the EPRA to effectively monitor and enforce local content regulations. There is also the need to build EPRA's capacity to monitor compliance, set up a department for local content that will coordinate and lead the growth and standardized viewpoint to local content in line with the laws of the country and policies of the government.

This research proposes that Kenya emulates the Nigerian content where the NCDMB has powered sub-groups to enable effective implementation and monitoring of local content in the petroleum industry.⁴³¹ Creating sub-groups will enable the EPRA to widen its scope in

⁴³¹ They include the NOGIC JSQ, a system where contractors in Nigeria register for prequalification in the petroleum sector. It is an electronic platform that consolidates data on all vital activities within the Nigerian petroleum sector. It accommodates all stakeholders in the industry such as the Operators, Regulators, Service Companies and Institutions, as well as individuals with skills, trainings, certifications and relevant qualifications required in the industry. There is also the Nigerian Content Consultative Forum (NCCF), a platform where information and collaborations with respect to upcoming projects, local capabilities and relevant policy proposals promoting the growth of local content in Nigeria is shared. The Board also established the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund

implementing, monitoring and enforcing LCRs within the sector and as a result, positive local content outcomes for Kenya. If the Local Content Bill 2018 is passed into law, the mandates of the LCDC will overlap those of the EPRA under the Petroleum Act 2019 and it is therefore this study's recommendation that only one institution be established to monitor local content in the petroleum industry.

On enforcement, there is the need to impose a specific penalties for noncompliance with local content regulations. A good example is Nigeria where failure by operators, contractors, and subcontractors to comply with the LCRs attracts a fine of up to 5% of the sum of the project for every project where the offence is committed or the cancellation of the entire project.⁴³² This is a mechanism that Kenya should adopt and include in its local content legal framework.

5.3.4 Training to increase skills and capacity for the petroleum industry

This study has established that there is a skills gap in Kenya's petroleum industry. Similarly, the country's capacity to manufacture and supply goods and services for the petroleum sector is also inadequate. Kenya should therefore increase training and build capacity to increase local participation in the sector. As is the case in Nigeria, the Petroleum Act 2019 should be amended to constitute a minimum percentage for professional positions to be taken up by Kenyans right from management to the least position.⁴³³ This research also recommends that the Petroleum Act 2019 should be amended to obligate an operator to issue a succession plan for positions that are held by foreigners.⁴³⁴ This will encourage compulsory and timely training

⁴³² Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019. Similarly, in Indonesia, companies that fail to meet the TKDN levels that are specified in their petroleum contracts are fined and if not, they have their permits revoked. Angola has set up its laws in a manner that noncompliant companies have fines imposed on them and firms that fail to pay their fines are ineligible for new petroleum contracts. Further, petroleum contracts that violate LCRs can be declared null and void.

⁴³³ There is a condition upon operators or project promoters to keep a maximum of five percent (5%) of management positions for the investors.

⁴³⁴ Nigeria has made it mandatory for operators within the petroleum sector to submit a succession plan that will enable the Nigerians to fill-in each incumbent expatriate position for a period of up to four (4) years and at the end, the positions becomes Nigerianized.

of locals and building capacity of suppliers so that they can be take up these positions. The Petroleum Ministry out to further create a national database for national skills identification and skills development as is the case in Nigeria.⁴³⁵ The Ministries of Petroleum, Trade and industrialization and Education should therefore work together to build capacity through the establishment of local content development centers so as to increase local participation in upstream petroleum activities across the petroleum value chain.

5.3.5 Mandatory contribution to the Training Fund

Kenya's position on training fund under the Petroleum Act 2019 is that contribution to the training fund is negotiable in the sense that the funds are provided for in the petroleum contract.⁴³⁶ This study recommends that to this regard, the Petroleum Act 2019 should be amended to make it mandatory for all contractors and sub-contractors to fund trainings, capacity building, research, growth and innovation at the level of 1% of production revenues as is the case with the Brazilian content.

5.3.6 Develop stringent sanctions for noncompliance

Chapter 3 of this research has shown that Kenya's local content legal framework is not stringent enough on punishing noncompliance. To guarantee compliance and enable effective enforcement of the LCRs by the EPRA, this study recommends that the Petroleum Act 2019⁴³⁷ should be amended to grant the EPRA statutory powers to impose a penalty of up to five percent (5%) of the sum of project for particular project where the offence is committed or have the entire project cancelled; as is the case in Nigeria. This will encourage compliance by contractors and sub-contractors to local content development.

⁴³⁵ Nigeria has the Nigerian Content Employment Initiative (NCEI) which mandates the IOC to identify new employees to be trained using the Nigerian Content Development Fund.

⁴³⁶ Section 52(6), *The Petroleum Act 2019* (Act No. 2 of 2019)

⁴³⁷ Section 51, *The Petroleum Act* (Act No.2 of 2019)

5.3.7 Provide incentives for higher compliance

Stringent sanctions for non-compliance with LCRs is key for positive local content outcomes. However, rewarding compliance rather than punishing noncompliance encourages good behavior and creates a favorable environment of cooperation and in the long run acquire the benefit of behavior that goes beyond expectations.⁴³⁸ It is this research's recommendation that Kenya should develop a rewards system where some activities in specific areas attract a greater percentages/a bonuses towards a contractor's commitments in local content, as is the case in Brazil. The Local Content Bill 2018 gives provisions for financial incentives⁴³⁹ and incentives that promote the importation of components and discourage the importation of fully assembled industrial equipment.⁴⁴⁰ From this perspective, the passing of the Local Content Bill into law will therefore serve the petroleum industry better as it will create a favorable environment for investors within Kenya's oil and gas industry.

5.3.8 Develop an industry-based local content legislation

The Petroleum Act covers a broad spectrum for the petroleum sector being the only legislation for petroleum activities in Kenya. The Act gives provisions for numerous aspects of the petroleum sector such as national petroleum policy and plan, petroleum institutions, upstream petroleum rights and management of petroleum resources, information and reporting on petroleum activities, payments and revenues within the industry, environment, health and safety, midstream and downstream petroleum and the use of land for petroleum operations.⁴⁴¹ With all these aspects being stipulated for under the Petroleum Act, there is the possibility of the Petroleum Act being unable to effectively and comprehensively give guidelines for local content within the industry. As is the case in several oil producing countries, this research recommends that Kenya establishes a separate local content

⁴³⁸ Pereira E; Mathews C; Trischmann H, 'Local Content Policies in the Petroleum Industry: Lessons Learned' 4(5) Oil and Gas, Natural Resources, and Energy Journal, 2019, 660.

⁴³⁹ Clause 46, 'Local Content Bill' (2018).

⁴⁴⁰ Clause 52(2) (c), 'Local Content Bill' (2018).

⁴⁴¹ *Petroleum Act* (Act No.2 of 2019)

legislation to effectively and comprehensively provide for local content within the petroleum industry.⁴⁴²

Currently, the Petroleum industry has the Local Content Bill, 2018 that is yet to be passed into law. This research has shown that the Local content Bill is more comprehensive as compared to the Petroleum Act 2019 and will be at a better place to serve the petroleum sector. Chapter 4 has addressed the aspects of the local content bill, giving recommendations on the amendments that should be made on the Bill prior to passing it into law. Therefore, it is this research's recommendation that the Local Content Bill be amended accordingly to address the concerns raised in this paper and after that, be passed into law to give the industry a local content legislation, separate from the Petroleum Act 2019 that allows for easy and effective implementation, monitoring and enforcement of local content within the industry.

5.4 CONCLUSION

As indicated in the previous chapters of this research, indigenous participation within the petroleum sector is in various ways, including local labour and workforce, local manufacture and procurement of goods and local supply of services. The Act encourages local participation and local content development by providing a framework for employment of locals, procurement of local goods and services, training and capacity building and also technology transfer. Chapter 2 has shown that the petroleum industry in its very nature involves advanced technology and requires trained, competent and qualified personnel to carry out the petroleum operations within the petroleum value chain. Kenya in its capacity is has to bring in the IOCs to carry out the petroleum explorations but at the same time, being careful not to let the industry be foreign owned. Chapter 2 has shown that Kenya can gain from the IOCs by using their financial and technological capabilities to train and equip Kenyans through employment of locals, increase the capacity of local firms and train the indigenous workforce to take up positions within the petroleum industry.

⁴⁴² Different countries, such as Nigeria, have established their own specific regulations about local content either as an act or as delegated regulations.

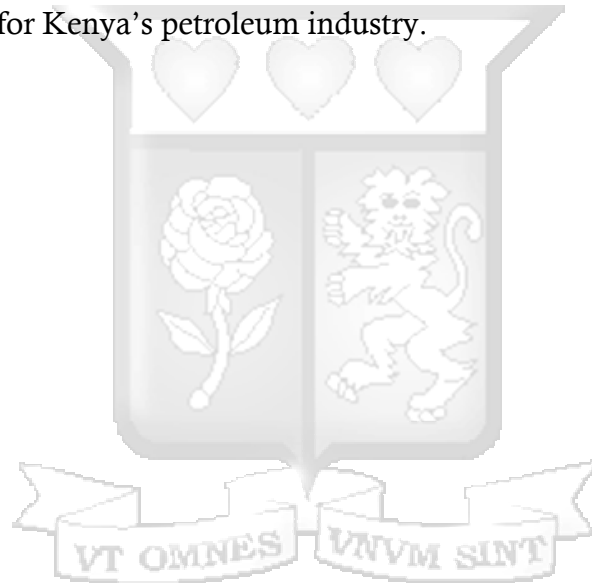
Kenya's desire to obtain maximum benefits from its petroleum and increase indigenous participation is evidenced by the enactment of the Petroleum Act 2019 that stipulates LCRs for the petroleum industry. The requirements in law as shown in Chapter 3 of this study show Kenya's focus on economic development and increase in local participation. The LCRs lay emphasis on employment of locals, education and training of locals, procurement of local goods and services and technology transfer. The Act also covers the aspect of implementation, monitoring and enforcement of LCRs with the EPRA being the statutory authority with the mandate to carry out these tasks. Chapter 4 has brought out what is in both the Nigerian and Brazilian content that Kenya can draw lessons from and emulate in order to achieve positive local content outcomes for the industry.

Despite the existence of a legal and institutional local content framework, Kenya, like any other oil and gas producing country, has experienced challenges with the implementation of these requirements. Chapter 4 of this research has demonstrated the need to enact stronger and comprehensive legal and institutional frameworks on local content, for Kenya's petroleum industry and has further raised the legal concerns with the current local content framework that if not amended, pose future legal risks for Kenya's petroleum sector. The other aspect raised in Chapters 4 is the need to accordingly amend and pass into law the Local Content Bill 2018 since it provides a more comprehensive legislative framework for the petroleum industry as compared to the current Petroleum Act 2019.


It goes without saying that the research findings in Chapter 5 depict the importance of training locals and building the capacity of local suppliers in order for local content to be possible. If the skills and capacity of local laborers and firms are not up to the standard acceptable for the petroleum industry, the IOCs will be forced to engage foreigners, defeating the whole purpose of local content. It is therefore important that the government focuses on enhancing the capacity of local Kenyans and local firms to increase indigenous involvement in the upstream oil and gas operations at international standards.

In conclusion, this study has shown that an adequate and comprehensive legal and institutional local content framework is key for a host country to achieve positive local content outcomes and experience economic growth and development. As demonstrated in chapters 2 and 3, properly instituted local content framework will ensure that indigenous persons obtain

maximum benefits from petroleum operations within their jurisdiction. It is therefore important that a local content framework is clear with regards to who is a local person so that the right persons benefit from the operations. As shown in Chapter 3 and 4, the local content framework ought to provide a strong monitoring and enforcement mechanism for LCRs to allow the EPRA to effectively carry out its mandates in promoting local content development and drive the country towards achieving success in local content. The local content regulations should also be stringent enough to enable successful enforcement of LCRs. Therefore, there is the need to strengthen the local content requirements within the Petroleum Act 2019 to ensure a robust legal framework that matches international best practice standards. A well-structured and adequately legislated local content policies will yield positive local content outcomes for Kenya's petroleum industry.



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Appendix 1: Ethical Certificate



20thSeptember 2021

Mrs Adongo Mildredtinnah,
mildredtinnah.odhiambo@strathmore.edu

Dear Mrs Adongo,

RE: Kenya's Oil and Gas Industry Local Content Framework: An Analysis of Sections 50,51 And 52 of The Petroleum Act 2019

This is to inform you that SU-IERC has reviewed and **approved** your above **SU- master's** research proposal. Your application reference number is **SU-IERC1148/21**. The approval period is **20th September 2021 to 19th September 2022**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and also obtain other clearances needed

Yours sincerely,

for: Dr Virginia Gichuru,
Secretary; SU-IERC



Cc: Prof Fred Were, Chairperson; SU-IERC

Appendix 2: Similarity (Originality) Report

Document Information

Analyzed document	Mildredtinnah Adongo.pdf (D118019317)
Submitted	2021-11-09 20:10:00
Submitted by	
Submitter email	mildredtinnah.odhiambo@strathmore.edu
Similarity	19%
Analysis address	library.strath@analysis.orkund.com

Sources included in the report

W	URL: https://su-plus.strathmore.edu/handle/11071/8309 Fetched: 2021 11-09 20:12:00	1
W	URL: https://su-plus.strathmore.edu/bitstream/handle/11071/10212/Legal%20and%20institutional%20framework%20for%20implementing%20a%20hybrid%20approach%20to%20local%20content%20in%20Kenya%E2%80%99s%20petroleum%20sector%20-%20lessons%20from%20Norway.pdf?sequence=3&isAllowed=y Fetched: 2021 06-08 18:09:43	52
W	URL: https://su-plus.strathmore.edu/bitstream/handle/11071/8309/Local%20content%20implementation%20strategy%20for%20Kenya%E2%80%99s%20oil%20and%20gas%20industry%20-%20an%20evaluation%20of%20Sections%2050%252C%2051%20and%2052%20of%20the%20Petroleum%20Act%202019.pdf?sequence=3&isAllowed=y Fetched: 2021 11-09 20:12:00	83
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W	URL: http://erepository.uonbi.ac.ke/bitstream/handle/11295/93039/Murungi_Introducing%20Local%20Content%20Regulation%20In%20Kenya%20S%20Economy%20A%20Case%20Study%20Of%20Kenya%20S%20Energy,%20Oil%20And%20Gas%20Sector.pdf?sequence=4 Fetched: 2021 11-09 20:12:00	3
W	URL: https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/11/Local-content-and-procurement-requirements-in-oil-and-gas-contracts-regional-trends-in-the-Middle-East-and-North-Africa-MEP-18.pdf Fetched: 2021 11-09 20:12:00	35
W	URL: https://www.bsr.org/reports/BSR_LocalContent_March2011.pdf Fetched: 2021 11-09 20:12:00	2

