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# Local content implementation strategy for Kenya's oil and gas industry: an evaluation of Sections 50, 51 and 52 of the Petroleum Act 2019

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Local Content Implementation Strategy for Kenya's Oil and Gas Industry:  
An Evaluation of Sections 50, 51 and 52 of the Petroleum Act 2019

Mwangoma Veronica Lilian



2019

Local Content Implementation Strategy for Kenya's Oil and Gas Industry:  
An Evaluation of Sections 50, 51 and 52 of the Petroleum Act 2019

Mwangoma Veronica Lilian

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



JUNE, 2019

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Mwangoma, Veronica Lilian

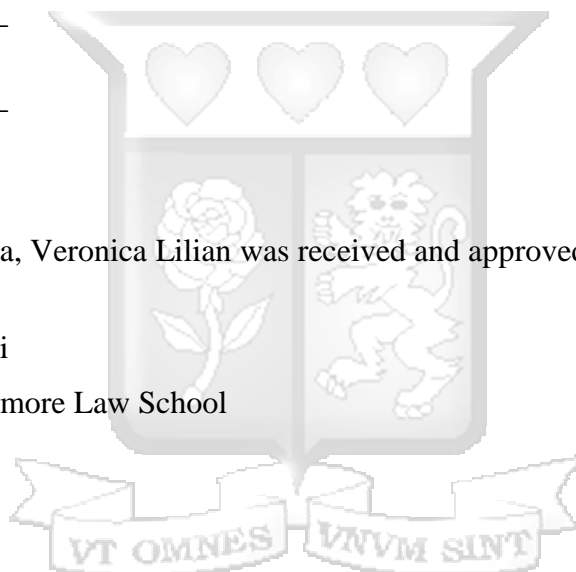
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## Abstract

Kenya has realised the need to promote local content in its oil and gas industry hence the reason why the concept of local content has been legislated through sections 50, 51 and 52 of the recently enacted Petroleum Act 2019. This study explores the legal and institutional framework within which the government of Kenya has introduced local content requirements in the oil and gas industry in order to tackle various aspects of local content.

The study analyses key drivers of local content within Kenya's legislative framework and examines factors that impede successful implementation of local content in Kenya's oil and gas industry. The study evaluates the adequacy of the local content provisions under the Petroleum Act to establish whether the requirements meet international best practices.

As a yardstick, the research underscores the presence of local content within Nigeria's oil and gas framework and examines the mechanisms in place to measure and monitor implementation in order to identify factors that explain the achievement of positive local content outcomes in Africa's best case study on local content in the oil and gas industry. In particular, the study analyses the legal and institutional framework that promotes local content in Nigeria in order to draw lessons for implementation in Kenya. The study finds that Nigeria's local content requirements in law are well structured and very specific on the in-country needs and this has resulted to positive local content outcomes. This specificity in law has positively shaped local content in Nigeria's oil and gas industry and, if Kenya can draw lessons from Nigeria's framework, it will most likely achieve positive local content outcomes in the oil and gas industry.

This study was conducted through analysis of primary and secondary data such as statutes, books, scholarly articles, journals and reports. This study hopes to inform the government of Kenya and policy makers on how best to implement these local content frameworks in order for the country and the citizens of Kenya to maximize on the benefits of the oil and gas sector.

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## List of Abbreviations

|        |  |
|--------|--|
| EPRA   | Energy and Petroleum Regulatory Authority              |
| GOK    | Government of Kenya                                    |
| IKTVA  | In Kingdom Total Value Addition                        |
| IOC    | International Oil Company                              |
| JQS    | Joint Qualification System                             |
| KEBS   | Kenya Bureau of Standards                              |
| LC     | Local Content  |
| LCB    | Local Content Bill                                     |
| LCD    | Local Content Division                                 |
| LCDC   | Local Content Development Committee                    |
| LCPs   | Local Content Policies                                 |
| LCRs   | Local Content Requirements                             |
| NAPIMS | National Petroleum Investment Management System        |
| NCCF   | Nigerian Content Consultative Forum                    |
| NCD    | Nigeria Content Division                               |
| NCDF   | Nigerian Content Development Fund                      |
| NCMB   | Nigerian Content Monitoring Board                      |
| NCEI   | Nigerian Content Employment Initiative                 |
| NOC    | National Oil Company                                   |
| NOCK   | National Oil Corporation of Kenya                      |
| NOGCDA | Nigeria Oil and Gas Content Development Act            |
| NNPC   | Nigerian National Petroleum Corporation                |
| OECD   | Organization for Economic Co-operation and Development |
| PSC    | Production Sharing Contract                            |
| R&D    | Research and Development                               |
| SMEs   | Small and Medium Enterprises                           |
| TRIMS  | Trade Related Investment Measures                      |
| WTO    | World Trade Organization                               |

## List of Cases

Mitchell vs Mosley (1914) 1 Ch 438

Stephen County vs Mid-Kansas Oil & Gas Co. (1923) 113 Tex.

Brown vs. Humble Oil & Refining Co (1935) Tex. S. C.

Holmes vs. United States, 85 F. 3d 956, 959 (2d Cir. 1996)

Rich vs. Donaghey(1918) Okla. S.C.; 3 A.L.R.

Westmoreland and Cambria Natural Gas Co. vs. De Witt et al (Pa 1889).

Ohio Oil Co. vs. Indiana [1900] U.S.S.C. 44L.

Borys vs. CPR and Imperial Oil Limited [1953] 7 W.W.R.



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## Dedication

*To my late father, I wish you could have waited to see me to graduate with an LL.M in Oil and Gas Law, I know it would have made you so proud, but God knows. May you always dance with the angels.*



# CHAPTER ONE

## INTRODUCTION TO THE STUDY

### 1.0. Introduction

Local content is generally defined as the extent to which the output of the extractive industry sector generates further benefits to the domestic economy beyond the direct contribution of its value-added through productive linkages with other sectors.<sup>1</sup> These linkages are created through purchase of locally supplied goods, labour or local skills and knowledge transfer.<sup>2</sup> Local content is adopted by resource rich countries through different strategies. The strategies vary on a case to case basis and may include requirements in law to promote local employment and national industry participation or enhance skills development among local employees.<sup>3</sup> Increasingly many countries are introducing the concept of local content in their legal framework, through legislation, regulations and industry contracts.<sup>4</sup>

For instance, since the late 1970's the upstream oil and gas industry has been the single most important sector in Nigeria's economy yet the industry was dominated by foreign subsidiaries of the worldwide oil majors.<sup>5</sup> This led Nigeria to implement a local content policy to encourage participation of Nigerian owned or controlled companies in the upstream petroleum sector in the early 1990s.<sup>6</sup> However the need for a legislative framework on local content in Nigeria's oil and gas industry was sparked by Shell's decision to award GBP 300 Million contract to a UK based company, for the design and fabrication of a floating production, storage and offloading vessel.<sup>7</sup> The contract was reported to result in the creation of additional 4,000 jobs in the UK.<sup>8</sup>

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<sup>1</sup> Tordo S, Warner M, Manzano O, & Anouti Y, *Local content policies in the oil and gas sector*, World Bank Study. Washington, DC: Bank. doi:10.1596/978-0-8213-9931-6. License: Creative Commons Attribution CC BY 3.0 P.1(2013), 115-117.

<sup>2</sup> Auty R, 'Mining Enclave to Economic Catalyst: Large Mineral Projects in Developing Countries. *Brown Journal of World Affairs*', 135-145(2006).

<sup>3</sup> Tordo, *et al*, *Local content policies in the oil and gas sector*. 115-117.

<sup>4</sup> Olawuyi DS, '*Local content requirements in oil & gas contracts: Regional trends in the Middle East and North Africa.*' *Journal of Energy and Natural Resources Law*, (2018).

<sup>5</sup> Olamola A & Olumide S, '*The quest for local content in the upstream sector of the Nigerian oil and gas industry*', *Oil, Gas & Energy Law Intelligence (OGEL)* Vol. 3 Issue I, March (2005).

<sup>6</sup> Olamola A et al, '*The quest for local content in the upstream sector of the Nigerian oil and gas industry*'.

<sup>7</sup> [http://www.amec.com/news/news\\_2ndlevel.asp?pageid=181](http://www.amec.com/news/news_2ndlevel.asp?pageid=181). Accessed on 21<sup>st</sup> May 2019.

<sup>8</sup> <http://www.nof.co.uk/Nof2/exhibition.nsf/NavigationClusterNews/0DCA4CF6DF7AE44680256B74003BC352?OpenDocument>. Accessed on 21<sup>st</sup> May 2019.

The Nigerian Senate argued that the local economy would have benefited from the performance of the contract in Nigeria and the attendant creation of jobs in the industry. The Senate concluded that the award ‘negates the growth of local capability and development of Nigeria’s infrastructure’ and resolved to deliberate legislative programme to create an enabling environment for increased local content and participation in the oil and gas industry. This resolution resulted to the enactment of the Nigerian Oil and Gas Content Development Act, 2010.

Similarly, there have been on-going discussions on how Kenyans can benefit from their natural resources and maximize on the economic opportunities offered by the emergent upstream petroleum industry.<sup>9</sup> The host community, within which the petroleum operations are being carried out, in Turkana County, has in recent times, called on the government to focus on the enabling legal and socio-economic conditions to create an enabling environment for local content. There will be economic opportunities for the locals in form of employment, supply of goods and services and, training when the construction of oil production facilities and export pipeline begins. Considering the foregoing, local content in the anticipated construction phase, will come in form of sub-contracts issued by engineering procurement construction contractors as well as the need for supply of construction materials which will be required in large quantities. Additionally, there will be need for suitable local skills which will require enhancing through training.<sup>10</sup> Support services<sup>11</sup> in and around Turkana County will make the town busy, thus driving economic prosperity in a region which was previously undeveloped.

The government of Kenya, cognizance of the sovereignty over its natural resources and the need to protect its citizen’s rights over these resources, introduced local content requirements in the oil and gas sector through the recently enacted Petroleum Act 2019. This move implies that the country has realized the need for locals to maximize on the economic opportunities that have emerged as a result of upstream petroleum operations.

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<sup>9</sup>George Wachira, ‘Local content in oil production’ Business daily, 4<sup>th</sup> December 2018  
<https://www.businessdailyafrica.com/analysis/ideas/-Local-content--in-oil-production-crucial/4259414-4881250-ydgvgl/index.html>.

<sup>10</sup> George Wachira, ‘Local content in oil production’ Business daily, 4<sup>th</sup> December 2018.

<sup>11</sup> Services such as catering to feed the large number of workers; local passenger transport; air transport services; provision of petroleum fuels; security; medical support; accommodation and other indirect services.

This study explores the legal and institutional framework within which the government of Kenya has introduced Local Content Requirements (LCRs) in its oil and gas industry in order to generate further benefits to other sectors of the economy. The research analyses key drivers of local content within Kenya's legislative framework and examine factors that impede successful implementation of local content in upstream petroleum operations in Kenya.

The study evaluates the adequacy of the local content provisions under sections 50, 51 and 52 of the Petroleum Act 2019, to establish whether the requirements match international best practice standards. In so doing, the study underscores the existence of local content within Nigeria's legal and institutional framework and examines the mechanisms in place to measure local content and monitor implementation in order to highlight factors that explain the achievement of positive local content outcomes in Nigeria's oil and gas industry. In particular, the research examines the legal and institutional framework that promotes local content in Nigeria in order to draw lessons for implementation of local content in Kenya's oil and gas industry.

Nigeria's legal tradition is similar to Kenya's and both countries face similar political and socio economic challenges. Additionally, both countries are characterized by corruption, poor governance, incapacitated workforce and a weak industrial base to serve the oil and gas industry. Even though there are glaring differences between Kenya and Nigeria, the two countries have striking similarities which justifies the need for Kenya to draw lessons from Nigeria in order to develop a successful local content implementation strategy.

### **1.1 Definition of Key Terms**

**'Economic benefits'** in this research shall mean the steady growth by which the productive capacity of the economy is increased over time to bring about rising levels of national income and improved standard of living for the citizens of that country.

**'Local content requirements'** in this research shall be understood to mean to be the mandatory requirements placed by host countries on investors (whether local or foreign) to obtain a certain threshold of the various goods and services to be used in their production in the host country. These local content requirements could be measured in value, man-hours or quantity as stipulated in the relevant policy or legislation.

**‘Local content outcomes’** in this research, local content outcomes are construed in terms of national industry participation along the petroleum value chain, local employment generation, technology transfer, training and skills development for local employees in the petroleum sector.

**‘Operator’** in this research means the designated entity that is responsible for managing the day to day operation of oil and gas exploration, development and production.

**‘Well structured’** in this research shall mean properly drafted to ease implementation.

**‘Upstream Petroleum Operations’** means exploration, appraisal, development and production stages in oil and gas operations of oil wells that lead to the recovery of oil and bring the crude oil to the delivery point.

## **1.2 Problem Statement**

The Government of Kenya (GOK), cognizance of the need for its citizens to maximize on the opportunities available in upstream petroleum operations, legislated on the concept of local content through sections 50, 51 and 52 of the Petroleum Act 2019<sup>12</sup>. These provisions require operators to give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards (KEBS) or in absence of a Kenyan standard any other internationally acceptable standard that the Energy and Petroleum Regulatory Authority (EPRA) shall approve<sup>13</sup>; and ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain.<sup>14</sup> The Act further requires a contractor to prepare and submit a long term and annual local content plan which corresponds with the work program to EPRA for approval before engaging in petroleum operations.<sup>15</sup> Section 51 of the mandates EPRA to oversee, coordinate and manage the development of local content, set minimum requirements

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<sup>12</sup> An ACT of Parliament to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes

<sup>13</sup> Section 50(b) of the Petroleum Act, 2019.

<sup>14</sup> Section 50( c) of the Petroleum Act 2019.

<sup>15</sup> Section 50 (2), Petroleum Act 2019.

for local content in local content plans and undertake local content monitoring, audit and enforcement.<sup>16</sup> Lastly, section 52 establishes a training fund for the purpose of training Kenyan nationals in upstream petroleum operations.<sup>17</sup>

The move by GOK to introduce local content requirements is a milestone for Kenyans since the repealed Petroleum (Exploration and Production) Act Cap 308, had one insubstantial provision on local content which was to the effect that contractors should give preference to the employment of and training of Kenyan nationals in petroleum operations<sup>18</sup>. The inclusion of LCRs in sections 50, 51 and 52 of the Petroleum Act 2019 is a positive and welcomed move by the government to promote and encourage Kenyans to maximize on the opportunities available in upstream petroleum operations. However, the three sections are not robust enough. The provisions are inadequate because they do not provide a legal basis for the definition of a ‘local person’ and they also do not provide a satisfactory threshold and sufficient methodology for measuring, monitoring and implementation of local content. The inadequacy creates uncertainty in law, and if not remedied, will most likely to create a legal risk in the implementation of local content in upstream petroleum operations.

In 2016, Senator Gideon Moi sponsored the Local Content Bill, 2018<sup>19</sup>, which seeks to ensure that locals benefit from the activities of the extractives industry. The Bill is guided by the principles of governance as set out in Article 10 of the Constitution of Kenya, the principle of ownership of natural resources and the principle of equity in the sharing of benefits accruing from natural resource exploitation as set out in Article 69 of the constitution of Kenya.<sup>20</sup> The objective of the Bill is the maximization of value addition to minerals within Kenya; the creation of employment in the extractives industry value chain by use of local expertise, goods, services, business and financing; and the enhancement of the participation of Kenya’s in the

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<sup>16</sup> Section 51 (2) (a-g) Petroleum Act, 2019.

<sup>17</sup> Section 52 (2), Petroleum Act 2019.

<sup>18</sup> Section 9 (g) of the Petroleum (Exploration and Production) Act Cap 308 (Repealed).

<sup>19</sup> The Bill is based on Article 69(1) of the Constitution, 2010, that imposes obligations on the state to ensure sustainable management of natural resources and the equitable sharing of the benefits accruing. It is further predicated on Article 66 (2) of the Constitution, which requires Parliament to enact legislation ensuring that investments in property benefit local communities and their economies. The objective of the Bill is the maximisation of value addition to minerals within Kenya; the creation of employment in the extractives industry value chain by use of local expertise, goods, services, businesses and financing; and the enhancement of the participation of Kenyans in the extractives industry value chain, among other.

<sup>20</sup> Section 5, *Local Content Bill*, (2018).

extractives industry value chain, among others.<sup>21</sup>The Bill, contains important provisions which support the provisions of the Petroleum Act, 2019 and matches international best practices to a large extent but it is not clear when it will be enacted into law.

### **1.3 Research Objectives**

The overall aim of this research is to show how local content implementation in Kenya can be streamlined and implemented to minimize disputes through specific local content requirements as well as strong legal and institutional frameworks that prioritize development of the country's national industry participation. Particularly, the study aims:

- 1.3.1 To analyse the legal and institutional framework underlying the introduction of local content requirements in Kenya's oil and gas industry.
- 1.3.2 To establish whether the requirements in law match international best practice standards by drawing lessons from Nigeria.
- 1.3.3 To analyse the challenges that are likely to be encountered in implementing the provisions of sections 50, 51 and 52 of the Petroleum Act 2019.

### **1.4 Hypothesis**

- 1 There is a relationship between the sovereignty over natural resources and local content provisions requiring preference of employment, procurement of local goods and services and, transfer of technology and training of locals in upstream petroleum operations.
- 2 By failing to adequately legislate on local content in line with international best practices, the sovereignty of Kenyans over their natural resources is compromised.

### **1.5 Research Questions**

The overarching question that this study answers is:

Do the existing legal provisions under sections 50,51 and 52 of the Petroleum Act adequately legislate on local content in line with international best practices?

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<sup>21</sup> Clause 4, *Local Content Bill* 2018. The Bill aims to facilitate the development of an effective local labour force, enhance local ownership and the procurement for local assets and services as well as the maximization of value addition local content development and local participation in the extractives industry.

In answering this broad question, the study answers the following research sub questions:

1. What are the key features of local content?
2. What lessons can Kenya draw from Nigeria's enforcement of local content legislation?
3. What is the current legal and institutional framework governing local content in Kenya's upstream petroleum operations?
4. What specific monitoring and enforcement mechanisms will Kenya need to enact in order to ensure the effective implementation of local content requirements?

## **1.6 Literature Review**

Various studies on this subject are reviewed herein to provide a broad perspective on different factors that drive and determine successful local content outcomes in frontier oil and gas jurisdictions.

A considerable amount of literature is available on specific cases of LCRs adopted by countries. General lessons from countries that are regarded as 'benchmark cases' exist but may not be relevant to countries with an entirely different background such as Kenya.

### **a) National Industry Participation in Procurement of Goods and Services**

The Local Content Bill, 2018 proposes the involvement of local communities in procurement processes in the petroleum value chain. The Bill places a requirement on operators to maintain a bidding process that accords fair opportunities for locals to supply goods and services in the extractives value chain.<sup>22</sup> The Bill requires the operator to give priority to local goods and service providers even if their bids are higher, provided that price differential does not exceed ten percent (10%) of the price quoted by a foreign bidder.<sup>23</sup> When it becomes law, the Bill will enhance the national industry capacity to participate effectively in the procurement of goods and services in the petroleum value chain.

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<sup>22</sup> Sections 39-42, *Local Content Bill 2018*.

<sup>23</sup> Section 39(3) (C) and Section 39(4) *Local Content Bill 2018*.

In Nigeria the Oil and Gas Industry Content Development Act<sup>24</sup>, presents several opportunities for the promotion of local participation by providing that first consideration be given for Nigerian goods and services so as to develop the supply of local services and products.<sup>25</sup> The Act further provides that the award of contracts shall not be solely based on the principle of the lowest bidder where a Nigerian company has the capacity to execute the job and the company shall not be disqualified exclusively on the basis that it is not the lowest financial bidder, provided the value does not exceed the lowest bid price by 10 percent.<sup>26</sup>

Elimma, Ezeani and Nwuke<sup>27</sup> have argued that this provision of Nigeria's Local Content Act does not guarantee effective competition among bidders because it discourages effective competition in relation to foreign suppliers. Nevertheless, foreign companies may participate in the process by either incorporating a Nigerian subsidiary or enter into a Joint Venture Agreement with one or more indigenous companies.<sup>28</sup>

In the Middle East and North African Countries, an IOC is obligated to give due and proper consideration to preferring locally sourced goods and services when their price, quality, time of delivery and other terms are like internationally available ones.<sup>29</sup>

A study by Olawuyi<sup>30</sup> has shown that Middle East and North Africa (MENA) countries have introduced local content requirements, laws and policies that require foreign companies to give priority to nationals, domestic firms and locally produced material, in the procurement of goods and services used for petroleum operations.

Orango and Musangi<sup>31</sup> argue that operations in the extractives industry require materials that meet high technological standards<sup>32</sup> which has become a challenge to the host community since

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<sup>24</sup>Nigerian Oil & Gas Content Development Act, 2010.

<sup>25</sup> Section 12, *Nigerian Oil & Gas Content Development Act*, 2010 (Nigeria).

<sup>26</sup> Section 16, *Nigeria Oil and Gas Content Development Act* 2010 (Nigeria).

<sup>27</sup>Elimma C. Ezeani and Nwuke C, 'Local content and the marginal fields programme: Challenges for indigenous participation in the Nigeria Oil & Gas' *Oil & Gas Energy Law Intelligence*, Vol 15 Issue 1, (2017), 9.

<sup>28</sup> Nwaozuzu C, 'Marginal fields licensing around 2013: Prospects, delays' *Vanguard*, Lagos, 2014.

<sup>29</sup> Olawuyi DS, 'Local content requirements in oil and gas contracts'.

<sup>30</sup> Olawuyi DS, 'Local content requirements in oil and gas contracts'.

<sup>31</sup> Orago NW and Musani PV, 'Titanium mining benefit-sharing in Kwale County: A comprehensive analysis of the law and practice, in 'Drilling past the resource curse? (ed) Ambani J, *Strathmore University Press*, Nairobi, 2018.

majority do not have the capacity to provide such goods and services. This has resulted to a tender process that is dominated by local elite and political class locking out members of the host community. This has marginalized local communities and created inequalities and conflicts between locals and international oil companies. Orango and Musangi state that there is need to build capacity and financial ability of the national industry in order to be able to compete with foreign bidders for the supply of goods and services in upstream petroleum operations.

Mushemeza, Okiira, Morales and Herrera<sup>33</sup> have stressed the importance of considering industrial capacity when designing local content policies. They argue that the type of local content policy required by a country is shaped by its technological and industrial base. For example, if a country's local content strategy is focused on promotion of local procurement, then its local companies must count with high levels of technology and its national industries must be able to meet international standards required by International Oil Companies (IOCs).<sup>34</sup> If the aim of the local content policy is to develop linkages and spillover effects with the county's broader economy, then the industrial base and technology of the country are essential.<sup>35</sup>

#### **b) Local Employment Generation**

Universally, the extractives industry has continued to be capital intensive and technological advanced, with weak links to the local economy.<sup>36</sup> This has resulted in extractives projects being 'enclave projects' generating minimal opportunities for employment,<sup>37</sup> especially for semiskilled and unskilled labour.<sup>38</sup>

Odon states that employment enhancement initiatives are the simplest local content strategic consideration to achieve and measure. He further states that it must be deployed in strategic

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<sup>32</sup> See International Financial Corporation, 'Sustainable and responsible mining in Africa',14, who affirms that the challenge of mining companies in finding local firms with the capacity to supply the needed mining goods and services.

<sup>33</sup> Mushemeza ED, Okiira J, Morales M & Herrera JJ, 'Local content in Latin American and African oil and gas sector: A comparative analysis of selected countries', *Global journal of human-social science economics*. Vol 17 issue 3 Version 1.0, USA 2017.

<sup>34</sup> Heum P, Kasande R, Ekern O, Nyombi A, 'Policy and regulatory frameworks to enhance local content.' *Institute for Research in Economics and Business Administration*, Bergen. (2011).

<sup>35</sup> Klueh UH, Pastor G, Segura A, and Zarate W, 'InterSectoral linkages and local content in extractive industries and beyond-the case of Sao Tome and Principe.' *International Monetary Fund*, Washington D.C, 2007.

<sup>36</sup> International Financial Corporation, 'The art and science of benefit sharing in the natural resources sector', 43.

<sup>37</sup> See International Financial Corporation, 'Sustainable and responsible mining in Africa',15, which affirms the inability of mining projects to create broad-based employment opportunities, creating only about 1-2% of employment.

<sup>38</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing',79.

working relationship with the human resource function of an extractive company. Initiatives include nationalization of employees, localization of skills, graduate development programs and staff enterprise entrepreneurship programmes etc.<sup>39</sup>

In Nigeria, the Local Content Act requires IOCs to give first consideration for employment and training to Nigerians, in a project executed in the Nigerian oil and gas industry.<sup>40</sup> The intention of the act is to develop local skills. Section 29 of the Nigerian Content Act requires an operator to submit an employment and training plan specifying the procedure for such training. The operator is also required to supply training locally or elsewhere for Nigerians who are not employed for lack of training.<sup>41</sup> Additionally, an IOC can only retain 5 percent allowance for expatriate positions in an indigenous oil firm.<sup>42</sup> However, Ezeani and Nkwue have argued that this provision may deter foreign investors since they may not consider this provision an effective representation of their interests.<sup>43</sup> Secondly, IOCs in Nigeria are required to submit a Nigerian content plan for all projects<sup>44</sup>, which is to ensure that first consideration is given to Nigerians for training and employment.<sup>45</sup> The Act provides that the Nigerian Content Monitoring Board (NMCB) shall ensure that an IOC maintains a reasonable amount of personnel in the areas it has significant operations.<sup>46</sup> Ezeani and Nkwue have argued that there is no indication of what constitutes a reasonable number of personnel-what percentage of the total employees would be reasonable? They suggest that it would have been preferable if these issues were clearly addressed in the Act or through subsidiary legislation.<sup>47</sup>

Olawuyi has written that IOCs are mostly brought on board in many Middle East and North African countries, mainly because local industries do not have the experience, skills and

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<sup>39</sup>Odon A '8 ways to maximize local content in the extractives industry-a snapshot' <http://goxi.org/profiles/blogs/8-ways-to-maximise-local-content-in-the-extractive-industry-a> 26th December 2018.

<sup>40</sup> Section 28(1), *Nigerian Oil and Gas Industry Content Development Act 2010* (Nigeria).

<sup>41</sup> Section 30, *Nigerian Oil and Gas Industry Content Development Act 2010*. (Nigeria).

<sup>42</sup> Section 32, *Nigerian Oil and Gas Industry Content Development Act 2010*. (Nigeria).

<sup>43</sup> Elimma C et al 'Local Content and the marginal fields programme'.

<sup>44</sup> S. 7 of the *Nigerian Oil and Gas Industry Content Development Act 2010*.

<sup>45</sup> S.10(1)(b) *Nigerian Oil and Gas Industry Content Development Act, 2010*.

<sup>46</sup> S. 28(2) *Nigerian Oil and Gas Industry Content Development Act, 2010*.

<sup>47</sup> Elimma C et al 'Local Content and the marginal fields programme'.

capacity to undertake petroleum operations.<sup>48</sup> He states that local content regulations emanate from the basis that domestic work force and industries should over time develop the capacities to supply human resources needed to drive the oil and gas value chain, by substituting and to creating more local employment through substituting domestic labour for imported or foreign based labour.<sup>49</sup>

Additionally, Olawuyi states that one of the many drivers of local content in the Middle East and North African Countries is the desire to maximize economic benefits to citizens through job and employment opportunities. The Middle East and North Africa region is characterized by high unemployment rates and has the highest youth unemployment rates, despite its oil wealth.<sup>50</sup> Furthermore the government is the major employer across the region.<sup>51</sup> Olawuyi states that most of the regimes in the MENA region mandate the IOCs to prioritise employment of suitable qualified nationals. He goes on to say that by mandating the employment of nationals, the aim is to reduce the high levels of unemployment and create opportunities for employment in non-government sectors, thereby contributing to income growth, capacity development of nationals and overall increased economic growth of an oil producing country. Nationals are concerned about local employment and this often results to disputes, grievance and conflict. Handing employment opportunities to community members can help improve company-community relations, enabling IOCs to obtain the social license to operate.<sup>52</sup> Local content can assist in compensating afflicted communities through employment opportunities and value addition given the negative effects of oil and gas activities on surrounding communities.<sup>53</sup>

Tordo, Warner, Manzano and Anounti (2013) have written that since local content policies are part of a broader category of policy interventions aiming to strengthen the productive structure

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<sup>48</sup> Muller T and Schnitzer M 'Technology transfer and spillovers in the international joint ventures' Munich Discussion Paper N. 2003-22 (2003), also Levett M & Ashley E. Chandle, 'Maximizing Development of Local Content across Industry Sectors in Emerging Markets' *Centre for Strategic and International Studies* (2012).

<sup>49</sup> Olawuyi DS, 'Local content requirements in oil and gas contracts', 6.; See also OECD, 8-10.

<sup>50</sup> Overall unemployment rates range from Saudi Arabia (18%), Oman (16%), UAE (9%), Bahrain (4%) and Qatar(3%).

<sup>51</sup> For example, over 61% of UAE nationals are directly employed by the government. see 'Taking a more sophisticated approach to GCC labour market policy', 2013 at 5.

<https://www.worldgovernmentssummit.org/api/publications/document/f69d5ec4-e97c-6578-b2f8-ff0000a7ddb6>

<sup>52</sup> Tordo S, Brandon S. Tracy and Arfaa N, 'National oil companies and value creation', (2011), World bank working paper 218,1-10; World Bank, Human Capital for oil, gas and other minerals industries, Science, Technology and Skills for Africa's Development (2014).

<sup>53</sup> Ado R, 'Local content policy and the WTO Rules on Trade-related Investment Measures:The Pros and con', 2(1) *International Journal of Business and Management Studies*, 137,142. (2013)

of a economy, their success largely depends on their interaction and coherence with broader economic development policies and related implementation tools. It is therefore possible that, for example, the success of regulatory interventions to increase local employment in the oil and gas sector may require an improvement in the quality of education, changes in labour mobility.

### **c) Development of Human Capital in the Oil and Gas Sector**

The term ‘human capital’ has been defined as the stock of accumulated skills and experiences that make workers more productive.<sup>54</sup> Organisation for Economic Co-operation and Development (OECD) in 2001 defined human capital as the knowledge, skills, competencies, and attributes embodied in individuals that facilitate the creation of personal, social and economic well-being. A more comprehensive definition of human capital was given by Marimuthu et al. (2009)<sup>55</sup> as the processes that relate to training, education and other professional initiatives in order to increase the levels of knowledge, skills, abilities, values, and social assets of an employee which will lead to the employee’s satisfaction and performance, and eventually on business performance. Therefore, the significance of developing human capital, to promote local content in the oil and gas industry, cannot be over-emphasized.

Several authors have conducted researches on how local content policies have impacted on human capital development and corporate performance in the Nigerian oil and gas industry.

A study by Ozigbo<sup>56</sup> addressed the impact of local content policy on local capacity building in the Nigerian oil and gas Industry. He found that the local content in the industry was still very low as over 60 percent of the work value in the oil and gas sector was carried out abroad. This, he writes, has led to dearth in skills development, capacity building/utilisation and poor business performance. The study concluded that partnering or alliance formation of various forms (especially with the multi-nationals) is an important tool in the development of the Oil and Gas Industry, especially where the required capital and indigenous technical capacity are relatively in short supply.

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<sup>54</sup> Stiglitz, JE., & Boadway, RW, ‘Economics and the Canadian economy’ New York, (1994).

<sup>55</sup> Marimuthu M, Arokiasamy L, Ismail M , ‘Human capital development and its impact on firm performance: evidence from developmental economics’ *The Journal of International Social Research* Volume 2 / 8 (2009). 1

<sup>56</sup>Ozigbo, NC, ‘Technological capacity building in the Nigeria’s oil and gas industry’ Proceedings of the 19th Annual International Information Management Association, San Diego, CA, 13-15 October, 51-63. (2008).

There is a clear gap in the existing literature. First, is the absence of an analysis of local content outcomes; most of the available literature focuses on the study of policies adopted by countries rather than on the achieved outcomes, hence there is insufficient literature on measurable outcomes. On the other hand, the available literature is focused on specific benchmark countries rather than on crosscutting factors and transferrable lessons that generally account for successful local content outcomes in oil and gas jurisdictions.

### **1.7 Research Design**

This study was mainly undertaken by a qualitative analysis of information supported by quantitative data analysis where available. The main objective of the study was an in-depth analysis of local content in Kenya's upstream petroleum operations.

### **1.8 Approach and Methodology**

The study places Kenya's local content provisions under part five (5) of the Petroleum Act side by side with Nigeria's local content law in order to draw lessons that will lead Kenya to achieve positive local content outcomes in its oil and gas industry. The logic behind the comparison is that, if the research identifies factors that contribute to positive local content outcomes resulting from Nigeria's legislative framework, then the lessons can be implemented in Kenya's budding oil and gas industry, in order to achieve positive local content outcomes.

The research will use data in legislation, contracts and secondary sources such as the scholarly works of those who have researched and written about local content. In the bid to keep up-to-date with current issues surrounding local content, newspaper articles and journals will be used in the study. Contracts will be used on the assumption that, when LCRs are included in agreements, then it can be said that local content policies have been established into binding tools that enforce policy into practice and outcomes.

## **1.9 Chapter Breakdown**

### **Chapter 1 - Introduction to the Study.**

### **Chapter 2: Conceptual Framework Meaning, Nature and Scope of Local Content**

This chapter will provide the conceptual framework underlying local content in the oil and gas industry. Various aspects such as mineral oils as property under the constitution of Kenya, ownership, sovereignty over natural resources and definitions the meaning, nature and scope of local content in the Kenyan context.

### **Chapter 3: Benchmarking With Global Best Practice: A Case Study of Nigeria**

To identify factors that determine successful local content outcomes, this chapter will analyse key elements that promote local content against the achievement of positive local content outcomes in Nigeria's oil and gas industry for a possible transplant to Kenya. The logic is that, if the research identifies key elements present in the promotion of local content in Nigeria then it is possible to identify some of the factors that can explain what leads to the achievement of positive local content outcomes. This will form a basis for recommendations of Kenya's local content implementation strategy.

### **Chapter 4: Local Content: The Kenyan Experience**

This chapter seeks to analyse the legal and institutional framework within which the government seeks to introduce local content regulations in Kenya. The first part will scrutinize Kenya's legislative and institutional frameworks to tackle various aspects of local content. The second part will look at key drivers of local content within the legislative framework, and the last part will examine factors that impede successful implementation of local content in Kenya's oil and gas industry.

### **Chapter 5: Key Findings and Recommendations**

### **Chapter 6: Conclusion**

## CHAPTER TWO

### CONCEPTUAL FRAMEWORK

#### 2.0 Introduction

Chapter 1 provided a general introduction to the research and outlined the statement of the research problem and the research questions that this study aims to answer. This chapter identifies key concepts and theories relating to local content in the oil and gas sector. The first part discusses oil and gas as a natural resource and analyses the principle of sovereignty over national resources and ownership of mineral oils as the guiding principles for promotion of local content in the oil and gas industry. The second part analyses the meaning nature and scope of local content in view of answering the research question ‘what are the key features of local content?’.

#### 2.1 Oil and Gas as Natural Resource

Natural resources are the naturally occurring assets that provide use benefits through the provision of raw materials and energy used in economic activity (or that may provide such benefits one day) and that are subject primarily to quantitative depletion through human use.<sup>57</sup> They are subdivided into mineral and energy resources, soil resources, water resources and biological resources.<sup>58</sup>

The Constitution of Kenya defines natural resources to mean physical factors and components, whether renewable or nonrenewable including sunlight, surface and ground water, forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy.<sup>59</sup> The term fossil fuel is defined as hydrocarbons formed by natural processes from the remains of dead plants and animals and include petroleum, coal and natural gas.<sup>60</sup>

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<sup>57</sup> OECD, <https://stats.oecd.org/glossary/detail.asp?ID=1740>, Accessed on 24<sup>th</sup> May 2019.

<sup>58</sup> <https://stats.oecd.org/glossary/detail.asp?ID=1740>, Accessed on 24<sup>th</sup> May 2019.

<sup>59</sup> Article 260, *Constitution of Kenya*, (2010).

<sup>60</sup> [https://www.sciencedaily.com/articles/f/fossil\\_fuel.htm](https://www.sciencedaily.com/articles/f/fossil_fuel.htm) Accessed on 24th May 2019.

Okonkwo describes natural resources as raw materials that are extracted from the ground or soil, and can only be modified by man for his benefit and use and they include fossil fuels, coal, oil, natural gas, gold, copper, iron, diamonds and minerals.<sup>61</sup>

## 2.2 Principle of Permanent Sovereignty Over Natural Resources

The principle of permanent sovereignty over natural resources owes its existence to the struggles of newly independent and developing states in the post-World War II era.<sup>62</sup> At its core was the plight of those states to end economic dominance by powerful developed state interests. Its genesis was very controversial, touching primarily on issues such as nationalization of foreign property, compensation, and standards of treatment of foreign investments.<sup>63</sup> The concept is gradually expanding to include a states' duties to its own nationals in connection with natural resource ownership and management.

Although initially fuelled by the need to preserve the rights of colonial peoples during decolonization and independence, the focus of sovereignty over natural resources nonetheless soon shifted to the rights of the state especially the right to self-determination, including economic self-determination, and the right to development. These rights provided the basis for recognition of this principle in several United Nations instruments since 1952.<sup>64</sup> In 1962, United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources declared:

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

This principle requires sovereign states to use resources for 'the well-being of their people.' However, Schrijver has written that a state's sovereign right to freely explore, exploit and dispose of its natural resources, and the assertion that 'the extent to which the people in a resource rich

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<sup>61</sup> Okonkwo T, 'Ownership and control of natural resources under Nigerian Constitution 1999 and its implication for environmental law and practice' International Law Research Vol 6, No. 1 Canadian Centre for Science and Education (2017).

<sup>62</sup> Barrera-Hernández L, 'Sovereignty over natural resources under examination: The inter-American system for human rights and natural resource allocation,' Annual Survey of International & Comparative Law: Vol. 12: Iss. 1, Article 4. Available at: <http://digitalcommons.law.ggu.edu/anlsurvey/vol12/iss1/4>

<sup>63</sup> Barrera-Hernández L, 'Sovereignty over natural resources under examination'.

<sup>64</sup> Barrera-Hernández L, 'Sovereignty over natural resources under examination'.

region of a State are entitled to (extra) benefit from resource exploitation in their region is a matter of domestic politics,"<sup>65</sup> It is for this reason that states ownership of natural resources are vested in the state to hold in trust for their people.

### 2.3 The Concept of Ownership of Natural Resources

The question of ownership of natural resources is governed by multiple legal frameworks cutting across international and national laws.<sup>66</sup>The United Nations General Assembly (UNGA) Resolution 1803 of 1962 provides that ‘the right of the peoples and nations to the permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the state concerned.’<sup>67</sup> Likewise, the Rio Declaration on Environment and Development provides under Article 2:

‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’<sup>68</sup>

The above provisions advance the principle of ownership and sovereignty over natural resources. However, there exist multiple international legal theories regarding the ownership of oil and gas.

#### 2.3.1 Theories of Ownership of Natural Resources

There are five theoretical concepts of ownership that govern the legal relationship and entitlements over natural resources.<sup>69</sup> These concepts define the states’ ownership and the individuals’ ownership rights over natural resources. It has been stated that because of the fugacious nature of subsurface oil and gas the courts of the late 1800’s were presented with

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<sup>65</sup> Schrijver N, ‘Sovereignty over natural resources, balancing rights and duties’. Cambridge University Press, P9 (1997).

<sup>66</sup>Omorogbe Y & Oniemola P ‘Property Rights in Oil and Gas under Domanial Regimes’ in McHarg A et al (eds), Property and the Law in Energy and Natural Resources (2010) 115-139.

<sup>67</sup>The United Nations General Assembly (UNGA) Resolution 1803 of 1962.

<sup>68</sup> The Rio Declaration on Environment and Development of 1992.

<sup>69</sup> Okonkwo ‘Ownership and control of natural resources under Nigerian Constitution 1999 and its implication for environmental law and practice’.

challenges.<sup>70</sup> For a considerable length of time, the legal maxim *cujus est solum, ejus est usque ad coelom et ad inferos* (the owner of the surface owns everything from the skies to the center of the earth) has applied to ownership disputes but, because of the fugacious nature of oil and gas, a neighbor could drill a well on his side of the fence and drain away another owner's oil or gas. This issue was particularly acute in the United States in light of the fact that 14th Amendment in the American Constitution specifically protects private property.<sup>71</sup>

This chapter looks at some of these theories.

### ***2.3.1.1 Absolute Ownership Theory***

This theory proclaims that whoever owns a piece of land owns the natural resources lying underneath it. Absolute ownership has been defined as 'the actual right a person has on a property.'<sup>72</sup> The meaning of "absolute ownership" can be expressed in the Latin maxim *quic quid plantatur, solo solo cedit* (whatever is affixed to the soil belongs to the soil). This is just a general articulation of the law. The principle has had long judicial recognition in some countries as well as some states in the US. In the case of *Mitchell v Mosley* (1914) 1 Ch 438 the Court held that

'the grant of the land includes the surface and all that is supra – houses, trees, and the like ...And all that is infra, i.e. mines earth, clay etc...'<sup>73</sup>

Under the private ownership system, the landowner is vested with discretion and powers to decide what to do with the resources, including whether or not to exploit them. It is up to the land owner to decide whether to 'leave resources unexploited, extract them, or grant third party rights through concessions, leases or a sale of a mineral interest.'<sup>74</sup>

This theory was first adopted in the U.S. state of Texas in respect of ownership of oil and gas, 'that a landowner owns a corporeal possessory interest (similar to a fee simple) in the substances beneath his land, but his ownership is a determinable fee subject to the rule of

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<sup>70</sup> Omorogbe Y Et al 'Property Rights in Oil and Gas under Domanial Regimes'.

<sup>71</sup> About 'Owning' Petroleum and Natural Gas' available at <http://www.fhoa.ca/about-freehold-mineral-rights/about-owning-petroleum-a-natural-gass.html> (accessed 28<sup>th</sup> May 2019).

<sup>72</sup> <https://definitions.uslegal.com/a/absolute-ownership/> (accessed on 28<sup>th</sup> May 2019)

<sup>73</sup> Mitchell v Mosley (1914) 1 Ch 438.

<sup>74</sup> Wieland P 'Going beyond panaceas: Escaping mining conflicts in resource -rich countries Through middle -ground policies' (2013) available at <http://www.nyuelj.org/wpcontent/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 28<sup>th</sup> May 2019).

capture'.<sup>75</sup> The theory was given judicial backing in *Stephen County v. Mid-Kansas Oil & Gas Co.* where the court stated that:

Oil and gas in place are minerals and realty subject to ownership, severance, and sale while embedded in the sands and rocks beneath the earth's surface in like manner and to the same extent as is coal or any other solid minerals.<sup>76</sup>

One of the leading cases for this theory, as it is applied in Texas is *Brown v. Humble Oil & Refining Co.*<sup>77</sup> where the Court stated:

Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well of one's land and this is a property right. And it is limited only by the physical possibility of the adjoining landowner's diminishing the oil and gas under one's land by the exercise of the same right of capture.

### ***2.3.1.2 The Qualified Ownership Theory***

This theory states that fossil fuels are incapable of being owned, until they are captured and reduced into possession. This theory implies that non-absolute property inheres in a person. The ownership is limited in time, restricted to one or more uses, or shared.<sup>78</sup> The theory implies that minerals such as oil and gas cannot be owned in place before they are extracted and reduced to possession. Thus, this theory 'does not accept that full ownership can be vested in oil and gas in situ'.<sup>79</sup> Clark has described this theory as 'proprietary right that is analogous with a profit *à prendre* under English common law or a servitude right to minerals under Scots law'.<sup>80</sup>

The qualified theory has also been referred to by some courts and writers as the "law of capture".

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<sup>75</sup> Other states, like Oklahoma, have adopted the 'exclusive-right-to-take' theory that a landowner does not own the substances that underlie his land, but merely retains the exclusive right to capture the substances, a non-corporeal interest'.

<sup>76</sup> *Stephen County v. Mid-Kansas Oil & Gas Co.* (1923) 113 Tex. 160, 167, 254 S. W. 290, 292.

<sup>77</sup> (1935) Tex. S. C. 83 S. W. (2d) 935 at 940.

<sup>78</sup> Okonkwo, 'Ownership and control of natural resources under Nigerian Constitution 1999 and its implication for environmental law and practice'.

<sup>79</sup> Clark B, 'Migratory things on land' Property rights and a law of capture' (2002). Electronic Journal of Comparative Law (ECJL), Vol. 6, Netherlands.

<sup>80</sup> Clark B, 'Migratory things on land'

The leading case for qualified ownership as it is applied in Oklahoma, is *Rich v. Donaghey*<sup>81</sup> where the Court, citing the Supreme Court decision in *Ohio Oil vs Indiana*, stated that fee simple owners of land have:

...no absolute right or title to the oil or gas which might permeate the strata underlying the surface of their land, as in the case of coal or other solid minerals fixed in, and forming part of, the soil itself.

But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as exclusive right, subject to legislative control against waste and the like, to erect structures on the surface of their land, and explore thereof by drilling wells through the underlying strata, and to take therefrom and reduce to possession, and thus acquire absolute title as personal property to such as might be found and obtained thereby. This right is the proper subject of sale and may be granted or reserved. This right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more specifically, as designated in the ancient French, a profit à prendre.

### ***2.3.1.3 The Non-Ownership Theory***

In the context of oil and gas, non-ownership theory has been defined as ‘a characterisation of oil and gas rights used in a minority of jurisdictions. This theory holds that the owner of a severed mineral interest does not have a present right to possess the oil and gas in place, but, has the right only to search for, develop, and produce it’.<sup>82</sup> The Supreme Court of Pennsylvania in the case of *Westmoreland and Cambria Natural Gas Co. v. De Witt et al*<sup>83</sup> declared support for this theory in the following words:

Natural gas belongs to the owner of the land, and is part of it, and, so long as it is on or in it, is subject to his control; but when it escapes, and goes into other land, or comes under another’s control, the title of the former owner is gone. If an

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<sup>81</sup> (1918) Okla. S.C.; 3 A.L.R. 352 at 355.

<sup>82</sup> US Legal, ‘Non-Ownership Theory Law and Legal Definition’ available at <http://www.definitions.uslegal.com> Accessed on 28<sup>th</sup> May 2019.

<sup>83</sup> 18A.724, 725 (Pa 1889).

adjoining or distant owner drills a well on his own land and taps his neighbor's vein of gas, so that it comes into his well and under his control, such gas belongs to the owner of the well. The owner of land, leasing it to another for the purpose of drilling gas wells thereon, and reserving the right to till the soil, after the lessee has drilled a well and has gas ready to flow into pipes by turning a valve, cannot claim that the lessee is not in possession, and that he must resort to a court of law to establish his title before a court of equity will interfere...

The court describes gas as *ferae naturae* 'in common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their fugitive and wandering existence within the limits of a particular tract was uncertain'.<sup>84</sup> The court stated that 'possession of the land, therefore, is not necessarily possession of the gas'.<sup>85</sup>

In 1900, the United States Supreme Court in the case of *Ohio Oil Co. v. Indiana*<sup>86</sup> enunciated what has come to be known as the 'non-ownership' or 'qualified ownership theory of oil and gas law:

Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession.

The principle that oil and gas cannot be owned absolutely until found and reduced to possession is recognized in all of the oil and gas producing jurisdictions of the United States. This principle was incorporated into Canadian oil and gas law by the 1953 decision of the Judicial Committee of the Privy Council in *Borys v. CPR and Imperial Oil Limited*<sup>87</sup> where Lord Porter, for the Privy Council, stated:

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<sup>84</sup> 18A.724, 725 (Pa 1889).

<sup>85</sup> 18A.724, 725 (Pa 1889).

<sup>86</sup> [1900] U.S.S.C. 44L. Ed. 729 at para 64.

<sup>87</sup> [1953] 7 W.W.R. (NS0 550 – 551).

The substances are fugacious and are not stable within the container although they cannot escape from it. If any of the three substances (petroleum, gas or water) is withdrawn from a portion of the property which does not belong to the appellant but lies within the same container and any oil or gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So, also, if any substance is withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners have no remedy against him. The only safeguard is to be the first to get to work, in which case, those who make the recovery become owners of the material which they withdraw for any well which is situated on their property or from which they have authority to draw.

There are many reasons why the non-ownership theory can no longer stand the test of time. First is that modern scientific technology has defeated the theory, though oil and gas move from one place to the other, it is presently capable of ownership by an individual, corporate entities or government. Second, the concept that oil and gas are migratory, though on the face of it is true, but this is limited to the extent that when oil and gas eventually reach “a trap”, they remain “relatively static until the reservoir is tapped”<sup>88</sup> therefore, the “judicial thought” expressed in the cases discussed above, becomes unhelpful in modern century. Hardy had earlier on argued this point when he wrote that “for this reason, the concept of free migration or self-transmission can be considered erroneous in so far as it forms the basic premise for the non-ownership theory and the servitude analogy”.<sup>89</sup>

#### ***2.3.1.4 Ownership of Strata Theory***

This theory states that “the landowner owns the sedimentary layer containing the oil and gas within the limits of the vertical planes representing the boundaries of his tract”. This theory creates limited ownership of oil and gas.

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<sup>88</sup> GW Hardy III, ‘Public Policy and Terminability of Mineral Rights in Louisiana’ (1966). Louisiana Law Review, Volume 26 Number 4, at 734.

<sup>89</sup> Ibid at 734.

### 2.3.1.5 Servitude Theory (*Profit à Prendre*)

This theory declares that the owner has an exclusive right to remove the minerals. This exclusive right is referred to as ‘servitude’. In this case, the minerals are not possessed by the owner prior to removal, thus they are not capable of possession by anyone prior to removal. Generally, this theory ‘applies equally to situations of complete or severed ownership’. However, it must be pointed out that judicial pronouncements that a surface owner who is in actual possession of the surface is in constructive possession of the minerals in place has ‘muddied’ this theory.<sup>90</sup>

According to Smith, ‘when there is a severance, the mineral owner has a *profit à prendre*’, which in the United States Law ‘is treated the same as an easement for most purposes... the profit is in gross, meaning that its ownership is not tied to the ownership of other land in the vicinity (i.e. to a dominant estate)’.

### 2.3.1.6 The National Ownership Theory

The national ownership theory is also known as the ‘domanial system.’ This system is one that assigns rights over natural resources to the State.<sup>91</sup> The theory provides for the vesting of ownership rights in the sovereign. This is the most prevalent system of ownership of minerals. Only a few countries, including the United States (US), are cited as not having adopted this model.<sup>92</sup> Many others retain sovereign rights over all mineral deposits, including oil and gas. In many of these countries this right is enshrined in legislation and the constitution.<sup>93</sup> The theory advocates the vesting of complete and total ownership of natural resources in the State.

The ‘domanial system’, is said to trace its origins from the Roman law. It was first known as the ‘regalian system’ until after the Second Punic War whereby the Roman Empire became the owner of all conquered lands.<sup>94</sup> Mineral resources came under the ownership of the sovereign, represented by the relevant political authority, which granted permits, licences and leases for

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<sup>90</sup> JC Smith, ‘Ownership and Use of Subterranean Space’ available at <https://www.emlf.org> (accessed on May 12, 2017).

<sup>91</sup> Wieland P ‘Going beyond panaceas: Escaping mining conflicts in resource -rich countries through middle -ground policies’ (2013) available at <http://www.nyuelj.org/wpcontent/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 29<sup>th</sup> May 2019).

<sup>92</sup> Wieland P ‘*Going beyond panaceas*’.

<sup>93</sup> See for instance Section 44 (3) of the Constitution of the Federal Republic of Nigeria of 1999 .

<sup>94</sup> Omorogbe Y & Oniemola P ‘*Property Rights in Oil and Gas under Domanial Regimes*’ in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139.

exploration and exploitation of mineral resources. According to this system, the ‘dominium directum’ (the dominion of the soil) was vested immediately either in the crown, or in the feudal landlords and was separated from the dominium utile (the possessory title), the right to use and profit from the soil.<sup>95</sup> Further, according to the domanial law system, the State vests mineral resources in itself while the landowners only have a right of compensation for the loss of surface rights.<sup>96</sup>

The Constitution of Kenya codifies this theory by stating that ‘all minerals and mineral oils shall vest in and be held by the national government in trust for the people of Kenya’.<sup>97</sup> Therefore, entire ownership and control of all petroleum in, under, or upon any lands in Kenya is vested in the state, which grants permits, licences and leases for exploration and exploitation of natural resources.

Finally, it should be noted that the modern concepts of ‘state ownership’ and ‘private ownership’ of natural resources has been greatly influenced by either of the above theories of ownership of natural resources, and these has become ‘the basis of the legal system and concept of property rights adopted by different countries across the world in the regulation, use, management, transfer and alienation of their natural resource endowment’.<sup>98</sup>

#### **2.4 The Public Trust Doctrine**

The public trust doctrine is an ancient doctrine of property law that governs sovereign stewardship of natural resources.<sup>99</sup> It recognizes public rights in private property. The doctrine promotes both public access to trust resources and justifies government protection of them.<sup>100</sup> It also equips the public, being the beneficiaries of the trust, with the right to challenge government on the management of their natural resources.<sup>101</sup>

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<sup>95</sup> Omoroge Y& Oniemola P ‘*Property Rights in Oil and Gas under Domanial Regimes*’.

<sup>96</sup> Omoroge Y& Oniemola P ‘*Property Rights in Oil and Gas under Domanial Regimes*’.

<sup>97</sup> Article 62(3) of the Constitution of Kenya, 2010.

<sup>98</sup> L Aladeitan.

<sup>99</sup> Blum M, Wood M, ‘*The public trust doctrine in environment and natural resources law*’ Carolina Academic Press, Dorham, North Carolina (2013) 1.

<sup>100</sup> Blum M et al ‘*The public trust doctrine in environment and natural resources law*’.

<sup>101</sup> Blum M et al ‘*The public trust doctrine in environment and natural resources law*’.

Since natural resources can be used to create and increase the wealth of a country, its ownership and control has become a subject of legal, political and socio-cultural controversy, for whoever controls them controls the economy. Thus, it is imperative that the wealth which is created through the ownership of natural resources is distributed in such a manner that guarantees a reasonable share for the locality from which the natural resources are produced.<sup>102</sup>

From the above analysis we see that natural resources are sovereign and in most cases, their ownership is vested in the state to hold in trust for its people. It is on this basis that the concept of local content in the oil and gas industry was introduced in order for the people of a country endowed with natural resources, to realize maximum economic benefits from their natural wealth.

## 2.5 Meaning, Nature and Scope of Local Content

Kenya has recently discovered commercially viable oil and the people of Kenya are apprehensive to obtain maximum benefits from the ownership of their natural resources.

Resource rich countries have increasingly introduced the concept of local content in order to maximize the benefits accrued in the petroleum sector.<sup>103</sup> This section will analyse the meaning, nature and scope of local content in order to answer the research question; ‘What is the nature of local content?’

### 2.5.1 Meaning of Local Content

Local content is generally defined as the extent to which the output of the extractive industry sector generates further benefits to the economy beyond the direct contribution of its value-added, through links to other sectors.<sup>104</sup> The *Financial Times* describes local content as ‘the materials, parts etc. that have been made in that country rather than imported. A minimum level of local content is sometimes a requirement under trade laws when giving foreign companies the right to manufacture in a particular place.’<sup>105</sup> While there is no universally-accepted

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<sup>102</sup> Okonkwo ‘Ownership and control of natural resources under Nigerian Constitution 1999 and its implication for environmental law and practice’.

<sup>103</sup> Tordo S et al *Local content policies in the oil and gas sector*, 1.

<sup>104</sup> Tordo S, et al, *Local content policies in the oil and gas sector*, 1.

<sup>105</sup> Financial Times, Lexicon, <http://lexicon.ft.com/Term?term=local-content>.

definition of this term in the petroleum industry, ‘local content’ can be thought of as the added value that petroleum activities bring to a host nation in addition to the direct revenues obtained through sales of hydrocarbons belonging to the government of that nation or from taxes, service fees, state participation, or dues collected from companies carrying out upstream activities in that nation.<sup>106</sup>

Kenya’s Petroleum Act, 2019 and the Energy Act 2019 defines local content as the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available workforce, services and suppliers, for the sharing of accruing benefits.<sup>107</sup>

### 2.5.2 Defining “Local”

There various ways in which people and entities are classified as ‘Local’.<sup>108</sup> In North African countries, ‘Local’ refers to nationality, rather than the locality or county where the oil and gas activities take place, it is generally defined in terms of nationals, and companies owned, or majority controlled by nationals.<sup>109</sup>

Olawuyi states that countries in the Middle East adopt a broad definition of locals that includes services by locally-registered entities and the employment of locals.<sup>110</sup> ‘Local’ in this is equivalent to goods, services or workforce gotten from the area where the oil and gas operations take place, this is in contrast with nationality of the service provider or laborer.<sup>111</sup> This distinction is important and could pose a legal risk if not clarified and handled properly.<sup>112</sup>

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<sup>106</sup> Anyanwu J, ‘*Local Content in the Hydrocarbon Sector: Lessons of Experience*’, Mozambique Coal and Gas Seminar in Maputo, Mozambique, (February 27-28, 2013).

<sup>107</sup> See S.2 of the Petroleum Act, 2019 and S. 2 of the Energy Act 2019.

<sup>108</sup> Olawuyi DS ‘Local content requirements in oil & gas contracts’.

<sup>109</sup> Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

<sup>110</sup> Example section 1-2 Iran’s *Maximum Utilization of Production and Services Potency in Providing Country’s Needs and Promotion of Exports* (2012). Also Article. 23 Model PSA (Jordan) of February (2007); Article 19.1 *Model Exploration and Production Sharing Agreement* (Oman) Dated April 24, (2004).

<sup>111</sup> Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

<sup>112</sup> Olawuyi, ‘*Local content requirements in oil & gas contracts*’.

The need for involvement of locals in upstream petroleum operations can create a delicate relationship between IOCs and the locals.<sup>113</sup> While LCRs designed to recognise and prioritise nationals may provide a mechanism for addressing this fragility, it could be a legal risk point for IOCs in situations where it is hard to find an acceptable standard for the required goods and services from the local workforce.<sup>114</sup> Olawuyi argues that conceptualizing ‘local’ in terms of nationality could result in project delays and cost inflation for the investor where locally-produced goods are not immediately available or only available at much higher costs.<sup>115</sup> However, most investors are keen on maintaining social stability within the host communities and would most likely be motivated to acquire the social license to operate, than dwell on the loss resulting from the aforementioned tradeoffs.<sup>116</sup> Olawuyi states that a more flexible model to managing such tradeoffs is found in the Qatari PSC which provides that Contractor shall, *when possible*, give first consideration or preference to locally manufactured or locally available goods.<sup>117</sup> This allows a contractor to consider other categories of locals for operational reasons, or when qualified locals or service providers are not available.<sup>118</sup>

### **2.5.3 Nature of Local Content**

The definition of local content shows that LCRs must entail contractual provisions, laws and policies that mandate IOCs, to prioritise locally manufactured and or available goods, services and domestic workforce in the procurement of goods and services required in the oil and gas value chain. LCRs are also designed to leverage economic benefits from the extractives industry as a tool for developing other sectors of the economy through the promotion of local skills development, economic diversification, technology transfer and knowledge creation and participation of locals in the oil and gas value chain.<sup>119</sup>

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<sup>113</sup> World Bank, 2014. ‘*Human Capital for the Oil, Gas and Minerals Industries*’ Science, Technology, and Skills for Africa’s Development.

<sup>114</sup> World Bank, 2014. *Human Capital for the Oil, Gas and Minerals Industries*. Science, Technology, and Skills for Africa’s Development.

<sup>115</sup> Olawuyi DS, ‘*Local content requirements in oil & gas contracts*.’

<sup>116</sup> World Bank, 2014. *Human Capital for the Oil, Gas and Minerals Industries*. Science, Technology, and Skills for Africa’s Development.

<sup>117</sup> See Article 23 (2) of the Model Development and Production Sharing Agreement of 2002, State of Qatar.

<sup>118</sup> Olawuyi DS, ‘*Local content requirements in oil & gas contracts*.’

<sup>119</sup> Organization for Economic Co-operation and Development (OECD) (2017) P 6-7.

## 2.5.4 Local Content Policies (LCPs)

LCPs are policies created to promote the use of local content in an industry that might otherwise turn to foreign sources for goods and services. They seek to attract investors into the relevant host nation industry, while, at the same time, putting these potential investors on notice as to the minimum level at which they would be required to source products and services locally and/or work with local companies, if they chose to invest.<sup>120</sup> LCPs also aim to encourage training and employment of host country nationals within the industry, as well as investment in developing and procuring local goods and services, and transfer of technology through assistance, investment, licensing, trade and/or training.<sup>121</sup>

In general, LCPs are perceived to be a way of promoting investment in, and the economic growth of, the host nation. They are meant to create jobs for local nationals in the petroleum activities and to further the development of entire new industries, such as manufacturing as well as to build technological capabilities for the host nation.<sup>122</sup> LCPs seek to ensure the highest possible rate of domestic employment, strengthen the local economy, and help the host country become less reliant on foreign capital and expertise.<sup>123</sup>

LCPs may also be seen as a way to broaden the host nation's economic base: requiring international companies to purchase goods and services from local businesses gives those businesses revenues with which to expand, modernize, and diversify.<sup>124</sup> This, in turn, can enable the host nation to weather the effects of a sudden fall in international commodity prices that might otherwise lead to crippling losses, particularly where export revenues for domestic resources decrease while their cost of production remains the same.<sup>125</sup> By encouraging expansion and diversification, LCPs can hasten the nation's overall economic development,

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<sup>120</sup>Pereira E, Mathews C & Trischmann H, 'Local content policies in the petroleum industry: Lessons learned', 4 Oil & Gas, Natural Resources & Energy Journal. 631 (2019), <https://digitalcommons.law.ou.edu/onej/vol4/iss5/3>

<sup>121</sup>International Petroleum Industry Environmental Conservation Association (IPIECA), 'Local content strategy: A guidance document for the oil and gas industry', available at <http://www.ipieca.org/resources/good-practice/local-contentstrategy-a-guidance-document-for-the-oil-and-gas-industry-1st-edition/> (accessed on 6<sup>th</sup> June 2019).

<sup>122</sup> Pereira E, Et al, 'Local content policies in the petroleum industry: Lessons learned'.

<sup>123</sup> Pereira E, Et al, 'Local content policies in the petroleum industry: Lessons learned'.

<sup>124</sup> Pereira E, Et al, 'Local content policies in the petroleum industry: Lessons learned'.

<sup>125</sup> See for example International Monetary Fund (IMF), Presented at the Annual Meeting of Arab Ministers of Finance in Manama, Bahrain (Apr. 2016), <https://www.imf.org/external/>.

thereby helping to alleviate the effects of the so-called “Dutch disease” in which rapid growth in the natural resource sector overwhelms other sectors of the domestic economy.<sup>126</sup>

### **2.5.5 Measuring Compliance of Local Content**

In several countries, the minimum level of local content to be achieved for each category of goods and services is not expressed as a percentage or with a timeframe, rather, the obligation is simply to prioritise services, materials, equipment, consumables and other goods when their price, quality, time of delivery and other terms are comparable.<sup>127</sup>

Generally, in order to determine whether LCRs and LCPs are being complied with or are meeting their designed goals, it is important to have clear and specific metrics in place. As a general proposition, the clearer the metrics employed, the easier it will be to monitor and enforce most LCRs.<sup>128</sup> Pereira et al, states that ‘metrics used to measure local content might include the number of local employees hired, trained, or promoted; monetary value of goods and services purchased locally by the international company; participation of local companies in the relevant activities; involvement of local institutions in R&D activities; or by other means such as the development and/ enhancement of other sectors e.g. the manufacturing industry’.<sup>129</sup>

### **2.5.7 Monitoring and Enforcement of Local Content**

No matter how well-designed a local content policy is, it is of little value without an effective enforcement mechanism to support it. In most cases, LCP enforcement are enforced by government agencies that have jurisdiction over petroleum resources such as a national energy ministry or by agencies specifically tasked with enforcement of LCRs. Alternatively, contractual provisions embodying LCRs may be subject to enforcement by courts of general jurisdiction, provided those courts have or can obtain the expertise necessary to interpret the relevant provision. One of the reasons for lack of clarity on the scope of local content

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<sup>126</sup>Oputa S, ‘Local content: A vehicle of hope or an El Dorado’ Energy & Corporate Africa Available at <https://www.energycorporateafrica.com/local-content---a-vehcle-of-hope--or->(Accessed on 6th June 2019).

<sup>127</sup>Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

<sup>128</sup>Pereira E, Et al, ‘Local content policies in the petroleum industry: Lessons learned’.

<sup>129</sup>Pereira E, Et al, ‘Local content policies in the petroleum industry: Lessons learned’.

requirements in most countries is that, while many countries stipulate LCRs and LCPs, very few establish strong institutions or mechanisms for monitoring and enforcing such requirements.<sup>130</sup>

Monitoring compliance is just part of the enforcement puzzle. Nations use sanctions and rewards to punish noncompliance and encourage good behavior. In Nigeria, for example, operators, contractors, and subcontractors who fail to comply with the local content requirements may be fined up to 5% of the project sum for each project in which the offence is committed or face cancellation of the project.

In Angola, fines can be imposed on noncompliant firms and companies with unpaid fines are ineligible for new contracts, and contracts that violate the local content rules can be declared null and void.<sup>131</sup> On the other hand, some governments might provide incentives for higher compliance with the country's LCPs.<sup>132</sup> By rewarding compliance rather than simply punishing noncompliance, such a government may be able to create a positive climate of cooperation and in the end reap the benefit of behavior that exceeds expectations.<sup>133</sup>

Whereas rewards and sanctions may seem logical and effective they may pose challenges of their own. For sanctions, for instance, at what level should the fines be set? If the penalty is deemed too low, it risks becoming an accepted 'cost of doing business' rather than effective tools for securing compliance; if the penalty is too high, IOCs may choose to do business elsewhere. Worse, some IOCs may look for alternative methods of avoiding compliance, including attempting to bribe regulatory officials. Rewards for good behavior must be fine-tuned as well to avoid the risk of the host government 'giving away' more than necessary to secure the benefits intended by the policies in question.<sup>134</sup>

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<sup>130</sup>Olawuyi DS, 'Local content requirements in oil & gas contracts'.

<sup>131</sup>Toledano P, Mandelbaum J and Thomashausen S, eds. '*Local content: Angola – petroleum*', Columbia Center on Sustainable Investment, <http://ccsi.columbia.edu/files/2014/03/Local-Content-Angola-petroleum-CCSI-July-2014.pdf> (Accessed on 6th June 2019).

<sup>132</sup>Herbert Smith Freehills, 'The New Iranian Petroleum Contract—Government Approval' (2016) <https://www.herbertsmithfreehills.com/hsfpdf/latest-thinking/thenew-iranian-petroleum-contract---government-approval?pdf=1> (Accessed on 6<sup>th</sup> June 2019)

<sup>133</sup>Pereira E, Et al, '*Local content policies in the petroleum industry: Lessons learned*'.

<sup>134</sup>Pereira E, Et al, '*Local content policies in the petroleum industry: Lessons learned*'.

## 2.5.8 Conclusion

The sustainable management of natural resources especially, oil and gas resources, has the potential to enhance sustainable development and uplift the standards of living of host communities. Some of the major benefits that have been known to flow from properly managed natural resources include; creation of employment and skills acquisition for host communities; local procurement and use of local products in oil and gas operations. However, most petroleum operations occur in jurisdictions with several structural and governance challenges such as weak legal and regulatory framework, weak governmental capacity to deliver public goods as well as heightened expectation of employment and economic development by the host community. These challenges coupled with exacerbation of corruption and other unethical practices by public officers have contributed to the lack of employment opportunities and the failure to share the benefits of the oil and gas industry. This has generated tensions leading to varying degrees of conflicts, from community protests to actual armed struggle for the control of natural resources.<sup>135</sup>

As noted above, revenue from petroleum operations<sup>136</sup> may be quite substantial but this does not automatically lead to the creation of significant local employment or value-added opportunities.<sup>137</sup> Nonetheless, sovereignty over natural resources tends to vest in the nation where those resources are located and governments may well experience pressure from their citizens to translate that sovereignty into tangible benefits for the nation at large. People may reasonably believe they deserve a major share of the economic gain derived from their national resources and expect their government to get it for them. Due to its importance, this sentiment often shapes a host government's approach to oil and gas industry revenue management.

Oil and gas industry revenue management may be essential for the welfare of the state and its citizens hence, LCPs are a frequently-chosen vehicle for achieving an economic benefit goals for the citizens, as well as more traditional capacity building. In an attempt to answer the question; 'what are the key features of local content?' this chapter has demonstrated that the

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<sup>136</sup> For example, including bonuses or fees for rights to explore and develop the resources, direct participation in the petroleum contracts, taxes on the petroleum activities themselves, and profits from sale of the state's share of production, if any.

<sup>137</sup> Tordo Et al, *Local Content Policies in the Oil and Gas Sector*, 23-26.

nature of local content requires LCPs and LCRs to prioritise local employment, skills development, technology transfer, locally manufactured and or available goods, services in the procurement of goods and services required in the oil and gas value chain in order to achieve economic benefits.



## CHAPTER THREE

### BENCHMARKING WITH GLOBAL BEST PRACTICE: A CASE STUDY OF NIGERIA

#### 3.0 Introduction

As seen in chapter 2, the sovereignty over natural resources tends to vest in the nation where those resources are located and governments and the citizens may exert pressure on the government to translate that sovereignty into tangible economic gains for the people. Local content policies are a frequently introduced to assist a resource rich country in achieving economic benefits for its citizens. It is evident from the analysis provided in chapter 1 that the objective of local content is to increase and maximize on the benefits arising from the oil and gas industry and translating those benefits to other sectors of the country's economy. While Local content has been widely adopted in resource rich countries most of these countries exhibit different factors that explain the need for LCRs and LCPs in the oil and gas sector. Based on the foregoing, this chapter will analyse local content in Nigeria's oil and gas industry in order to benchmark and draw lessons for implementation in Kenya. This chapter will identify best practice standards and aim to answer the research question 'what lessons can Kenya learn from Nigeria's enforcement of local content legislation?',

In doing so, the study analyses the presence of local content within Nigeria's oil and gas framework and the mechanisms in place to measure, monitor and enforce LCRs. In particular, the research analyses the legal and institutional framework that promotes enforcement of local content in Nigeria's oil and gas industry and identifies factors that drive and determine local content outcomes in order to draw lessons than can be applied in Kenya.

In this chapter, local content outcomes are construed in terms of national industry participation along the petroleum value chain, local employment generation and skills development for local employees in the petroleum sector.

### 3.1 Background

Nigeria is the first country in Sub-Saharan Africa to export crude oil<sup>138</sup> and possesses approximately 37 billion barrels of proven oil reserves<sup>139</sup> with an approximate oil production of 1733 barrels per day.<sup>140</sup>

The principal legislation for Nigeria's oil and gas industry is the Petroleum Act of 1969 which vests ownership and control of all petroleum in the state.<sup>141</sup> Despite its ownership and control, the government of Nigeria has opened up the Upstream sector to more private-sector participation driven by the desire to maximize oil exploration benefits; provisions of incentives to encourage foreign investments and; promotion of indigenous participation in the upstream sector of the industry.<sup>142</sup>

### 3.2 Review of Legal and Institutional Frameworks in Nigeria:

#### 3.2.1 Nigerian National Petroleum Corporation (NNPC)

The local content policy in Nigeria started in 1971 through the establishment of the National Oil Corporation (NOC), which was established to promote Nigeria's indigenization policy in the petroleum sector.<sup>143</sup> In 1977, NOC was merged with the Ministry of Petroleum to establish the Nigerian National Petroleum Corporation (NNPC). NNPC was established as a mechanism to nationalize assets, regain state control, gain higher rents from foreign companies, generate employment and promote technology transfer.<sup>144</sup> It was tasked with exclusive responsibility of upstream and downstream development as well as to regulate and supervise the oil industry on behalf of the government.<sup>145</sup> NNPC initiated the actual local content initiative through

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<sup>138</sup> CEE Bankwatch, 'The Reality behind EU 'Energy Security': The case of Nigeria (2011) P 14.

<sup>139</sup> <https://www.get-invest.eu/market-information/nigeria/> Accessed on 20<sup>th</sup> April 2019.

<sup>140</sup> <https://www.ceicdata.com/en/indicator/nigeria/crude-oil-production> Accessed on 20<sup>th</sup> April 2019.

<sup>141</sup> Section 1, *Petroleum Act*, (1969) (Nigeria).

<sup>142</sup> Nwokonko CH, 'Enhancing local content in the upstream oil and gas industry in Nigeria: An appraisal of current policy' Vol.2 Issue 1 *Oil, Gas & Energy Law Intelligence* (OGEL) (2004).

<sup>143</sup> Oyewole B 'Best practice for local content development strategy: The Nigerian experience' UNCTAD, (2015). <https://unctad.org/meetings/en/Presentation/Atelier%20Lancement%20Tchad%20-%20Babafemi%20Oyewole%20-%2026%20nov%202015.pdf>. (Accessed on 22<sup>nd</sup> April 2019).

<sup>144</sup> Nwokeji, U. 'The Nigerian national petroleum corporation and the development of the Nigerian oil and gas industry: History, strategies and current directions.' The James Baker III Institute for Public Policy, Rice University, Houston, Texas, (2007).

<sup>145</sup> Ugwushi, B, Ajayi C, and Eloji, K.N, 'Nigerian content policy in the oil and gas industry :Implications for small to medium sized oil service industries.' (2009)

acquisition of interests in the operations of the IOCs and these interests grew to about 70%, with the responsibility of controlling all acreages and other activities.<sup>146</sup>

NNPC implemented its local content strategy through the National Petroleum Investment Management Services (NAPIMS) which was tasked with monitoring the contracting procedures of NNPC to ensure that the local content criteria is present in every contract. NAPIMS also provided an opportunity for capacity building for local suppliers to ensure that they are able to participate in the bidding processes of the petroleum industry.<sup>147</sup>

NNPC created the Nigerian Content Division (NCD) to effectively monitor and enforce local content compliance and was mandated with developing projects to enhance local capacity, as well as certify and train local providers through Public Private Partnerships (PPPs).<sup>148</sup> The spirit of PPPs gave birth to Nigeria's Enterprise Development Centre (NEDC) hosted by the Pan Atlantic University since 1991.

NNPC is credited for spearheading several developments and local content outcomes top of the list being the Nigerian Oil and Gas Content Development Act (NOGCDA) 2010, which established The Nigerian Content Development Monitoring Board (NCDMB) that replaced the NCD.

### **3.2.2 The Nigerian Oil and Gas Content Development Act, 2010**

The Nigerian Content Act prioritizes awards of oil blocks, oil fields, and oil lifting to 'Nigerian independent operators';<sup>149</sup> gives exclusive consideration to Nigerian indigenous service companies that meet certain conditions to bid on land and swamp operating areas.<sup>150</sup> The Act established the Nigerian Content Monitoring and Development Board (NCDMB) whose mandate is to enforce compliance in building the country's national industry capacity to

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<sup>146</sup>Balouga J, 'Nigerian local content: Challenges and prospects' *International Association for Energy Economics*, (2012).

<sup>147</sup> Mushemeza ED, *et al* 'Local content in Latin American and African oil and gas sector'.

<sup>148</sup> Mushemeza ED, Okiira J, 'Local content frameworks in the African oil and gas sector: Lessons from Angola and Chad' Evidence and Lessons from Latin America Programme (ELLA), Kampala, (2015).

<sup>149</sup> Section 3(1), *Nigerian Content Development Act*, (2010) (Nigeria).

<sup>150</sup> Section 3(2) *Nigerian Content Development Act*, (2010) (Nigeria).

participate in the oil and gas sector.<sup>151</sup> The Act requires all exploration and production companies that are desirous of conducting operations in Nigeria, to submit Nigerian content plans for all bidding on tenders in the industry and comply with the regulations designed to promote domestic goods and services.<sup>152</sup> Key provisions of the Act are tabulated in *appendix 1* of this thesis.

### 3.2.3 Nigerian Content Development and Monitoring Board (NCDMB)

One significant achievement of the NCDMB to date has been setting up the Nigerian Oil and Gas Industry Content Joint Qualification System<sup>153</sup> for Nigerian content registration, pre-qualification, and verification of capacities and capabilities as a requirement of the Act. JQS allows for evaluation of application of Nigerian content, provides a database for national skills development; it ranks and categorises oil service companies based on capabilities and Nigerian content as required by the Act.<sup>154</sup>

In terms of monitoring and evaluation, the Board has developed a compliance monitoring & enforcement strategy which calls for third party monitoring of Nigerian content compliance through the creation of a third party inspection task force.<sup>155</sup> The taskforce, known as the Nigerian Content Consultative Forum(NCCF)<sup>156</sup>, comprises of 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.<sup>157</sup>

Another project for the Board is the Nigerian Content Employment Initiative (NCEI) which requires all IOCs to show, in their reports to the NCDMB, that they are identifying new

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<sup>151</sup> Section 4, *Nigerian Content Development Act*, (2010) (Nigeria).

<sup>152</sup> Section 7, *Nigerian Content Development Act*, (2010) (Nigeria).

<sup>153</sup> Visit <https://nogicqs.gov.ng/>

<sup>154</sup> Section 54-56 *Nigerian Content Development Act*, (2010) (Nigeria).

<sup>155</sup> Ovadia J 'Measurement and implementation of local content in Nigeria-a framework for working with stakeholders to increase effectiveness of local content monitoring & development', *Facility for Oil Sector Transparency in Nigeria* (2013).

<sup>156</sup> Established under section 57 of the Nigerian Content Development Act to provide a platform for information sharing and collaboration in the Nigerian oil and gas industry with respect to upcoming projects in the oil and gas industry; information on available local capabilities; and other policy proposals that may be relevant to Nigerian content development.

<sup>157</sup>Section 58 *Nigerian Content Development Act*, (2010)(Nigeria).

employees for training.<sup>158</sup> In each report submitted, the Board expects companies to identify new potential Nigerian employees.<sup>159</sup> The Board will then use capacity building funds from the Nigerian Content Development Fund to train these Nigerians so that they can be hired for future projects and opportunities.<sup>160</sup>

The NCDMB has clear statutory powers to prescribe penalties of at least 5% of the project total on any entity that fails to comply with LCRs.<sup>161</sup> Fines levied by the NCDMB are paid into a Local Content Development Fund dedicated to training and supporting local enterprises. This ensures that LCRs are actually monitored and enforced such that they can result in real and quantifiable benefits.<sup>162</sup> Also, Operators are required to deduct 1% of all contract sums, at source and pay into the Nigerian Content Development Fund (NCDF) to develop Nigerian content. The fund is meant to support capacity building initiatives carried out by the NCDMB.<sup>163</sup>

From analysis of the NCMB mandate and achievements it is pertinent to note that in addition to promoting public awareness and reducing uncertainty on the scope of LCRs, a focal local content department can coordinate and spearhead the development of a standardized approach to local content in alignment with government priorities and domestic laws.<sup>164</sup> It can also guide operators and investors in the formulation and development of petroleum operations or projects that are in line with the country's vision and more specifically can result in real, measurable and long term local benefits.<sup>165</sup>

#### **3.2.4 Nigerian Enterprise Development Centre**

The Government of Nigeria, cognizance of the need for capacity building in order for indigenous SMEs to participate in the oil and gas value chain, spearheaded establishment of the Enterprise Development Centre in 2003 as a PPP initiative with the Pan-Atlantic University.

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<sup>158</sup> Ovadia J 'Measurement and implementation of local content in Nigeria'.

<sup>159</sup> Ovadia J 'Measurement and implementation of local content in Nigeria'.

<sup>160</sup> Ovadia J 'Measurement and implementation of local content in Nigeria'.

<sup>161</sup> Section 4, *Nigerian Content Development Act*, (2010) (Nigeria).

<sup>162</sup> Olawuyi DS, 'Local content requirements in oil & gas contracts'.

<sup>163</sup> Ovadia J 'Measurement and implementation of local content in Nigeria'.

<sup>164</sup> Olawuyi DS 'Local content requirements in oil & gas contracts'.

<sup>165</sup> Valérie Marcel et al, 'A local content decision tree for emerging producers' Chatham House (2016) 24.

The Centre emerged as a direct response to the dearth of available professional business development and support services to small and growing businesses in Nigeria.

### **3.3 Measurement of Local Content in Nigeria**

*“But the Nigerian Content measurement is an issue- when you call an IOC and ask ‘how are you doing with the Nigerian Content’, they will give you numbers like 70-85% and they may be right because what they are measuring is the fact that out of a hundred million dollars that they would have spent on their projects, they’ve given 85 million to Nigerian companies. So considering the fact a few years ago it used to be about 25%- everybody is clapping for themselves- we are all saying we are doing Nigerian content. But if you check, the real Nigerian content they do is not for us. How much of that 85 million that is given to Nigerian companies is spent in Nigeria? Then you will know that we still have a long way to go.” ~Ernest Nwapa, Presentation at ‘Operationalising a Development Agenda for Local Content’<sup>166</sup>*

This statement credited to the former chairman of the NCMB lends credence to the challenges in measurement of local content. One of the most controversial measures of local content in the NOGCD Act is a requirement of a maximum of 5% of management positions for expatriate workers and the minimum levels of Nigerian Content prescribed in the Schedule.<sup>167</sup>

The Schedule to the Act expresses in percentages, specific targets for achievement of local content in 280 separate oil and gas activities. The targets are in terms of overall spend and other defined measures. However, as illustrated in the above quote, that is only the beginning of addressing the critical question of how to measure local content.

### **3.4 Factors that Influence Positive Local Content Outcomes in Nigeria**

Based on the assessment of Nigeria’s legal and institutional framework, this research found that Nigeria has indeed achieved positive local content outcomes aided by its clear legislative and strong institutional framework. The legal and institutional framework has to a large extent, created an enabling environment for Nigerians to participate in the oil and gas operations.

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<sup>166</sup> Eng. Ernest Nwapa –Chairman, Nigeria Content Development and Monitoring Board, Oil and Gas Local Content Convention (2014).

<sup>167</sup> Schedule to the Nigerian Oil and Gas Content Development Act, (2010).

The research findings on factors that influence positive local content outcomes in Nigeria's oil and gas industry are discussed in detail below.

**i. Well Developed and Structured Local Content Frameworks**

Local content frameworks in Nigeria contain a clear definition of local content and lays emphasis on employment and skills development. Nigeria has achieved positive local content outcomes because it has structured its local content frameworks to specifically address key issues on technology, procurement, employment, training and skills development. These provisions are strengthened by the presence of a monitoring and enforcement mechanism, government support for oil and gas programmes and the active involvement of NNPC during local content implementation. The study of Nigeria has shown that high local content specificity results in the achievement of high local content outcomes. Nigeria's local content frameworks contain clear objectives and provide firm enforcement mechanisms which has resulted to positive local content outcomes in its oil and gas industry.

Generally, there are clear local content provisions in legislation, which the research treats as specificity. This finding is consistent with the research hypothesis that the more specific and well-structured local content provisions a country has, the more likely it will achieve positive local content outcomes.

**ii. Active Involvement of the National Oil Company in Advancing Local Content**

The Role of NOCs in supporting the achievement of positive local content outcomes cannot be overlooked. Nigeria's NNPC is actively involved in advancing local content strategies. NNPC was initially fronted as a mechanism to enforce local content provisions contained in the legal framework mainly through its internal policies. It adopted measures to support the involvement of private entities and partners and together with other stakeholders, established an enterprise centre that has been valuable in capacity building. The experience in Nigeria shows that NOCs positively influence the adoption of local content. Nigeria's national local content frameworks clearly positions NNPC as a key player in the implementation process. NNPC did not have an internal local content strategy, but it created, the Nigerian Content Division, which was later

rebranded to the Nigerian Content Monitoring Board in charge of capacity building, planning and monitoring of local content.

Additionally, apart from creation of employment and technology transfer, there are other factors that influence the extent to which NOC can lead to the achievement of high local content outcomes. These include the degree to which the NOC works together with the private sector and IOCs to enhance knowledge and technology transfer.

Despite other structural challenges such as limited independence from the government, generally, NOCs involvement can lead a country to achieve positive local content outcomes in its oil and gas industry,

### **iii. Strong Monitoring and Enforcement Mechanisms**

One of the reasons why Nigeria is often viewed as a local content success story is that its local content requirements are supported by the NCMB, which oversees, monitors and implements the provisions of Nigeria's Oil and Gas Content Development Act. This institutional framework has played a key role in enforcing local content in Nigeria's oil and gas industry.

### **iv. Presence of Local Content Development Mechanisms**

There is need for institutional mechanisms to promote local content development in the oil and gas industry. The establishment of the Enterprise Development Centre in Nigeria is a milestone in local content development. The Centre has contributed to capacity development through training locals to acquire the necessary skills enabling them to participate in the oil and gas value chain.

Secondly, as discussed above, the Nigerian Content Act established a Local Content Development Fund(LCDF) for the purpose of funding the implementation of Nigerian content development in the oil and gas industry. The Act mandates IOCs to contribute 1% of the project total towards the LCDF and the amount is payable at source. The fund is managed by the NCMB and is specifically employed for projects, programmes and activities directed at increasing Nigerian content in the oil and gas industry. This is a legal requirement that is

provided for in law and not in contract, hence making it compulsory and non-negotiable. Having such a provision in the Act as opposed to contract, in my opinion, is better way of ensuring compliance since IOCs are required to comply with the country's laws. If the provision is placed in contract, IOCs get a chance to negotiate their way out of it, or sometimes, negotiate favorable payment terms to their advantage.

### **3.5 Key Lessons from Nigeria**

The key lessons identified from Nigeria's local content experience include:

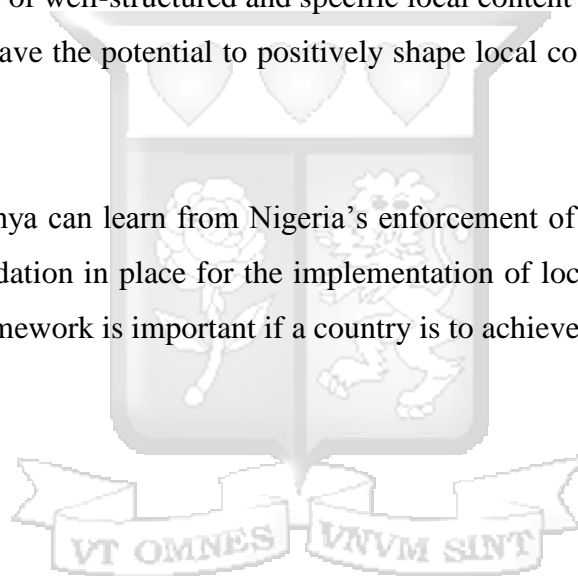
- i. A local content policy that is guided by the national developmental agenda which identifies the sectors of strategic importance to the Government.
- ii. Investment in capacity building that can be used in different sectors. The Government should prioritise the sectors that its skills can be used in other sectors and have huge potential for creating lateral linkages.
- iii. An assessment of the demands of a sector and the local capability to supply goods and services to inform the local content obligations. This includes an evaluation of skills, capital, infrastructure and governance requirements.
- iv. Local content policy requirements should be predictable and reliable for the investors, yet adaptable to accommodate changing circumstances. For instance, new discoveries in the oil and gas cycle might result into a progression from short term exploration to long duration production operations.
- v. Project development, operations/production and maintenance plans should include local content strategies that involve skills and supplier development plans, investment and support of training and research institutions, as well as procurement strategies that facilitate and support local content.

### 3.6 Conclusion

The desire by resource rich countries to use the oil and gas industry to promote other sectors of the economy has been around for a long time.<sup>168</sup> The absence of a well-designed and properly implemented legal and institutional framework to support local content policies, has been the missing link that hinders the expected effect of the measures put in place for the petroleum industry to boost other sectors of the economy.<sup>169</sup>

The information gathered from Nigeria on the existence of local content requirements for employment, national industry participation, training and technology transfer; monitoring and implementation mechanisms and NOCs participation in local content strategies and programmes shows that the existence of well-structured and specific local content frameworks and the role of NOCs are factors that have the potential to positively shape local content outcomes in resource rich countries.

The key lesson that Kenya can learn from Nigeria's enforcement of local content legislation is that having a firm foundation in place for the implementation of local content policies through legal and regulatory framework is important if a country is to achieve the desired outcomes.<sup>170</sup>



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<sup>168</sup>Oyewole B, 'Overview of local content regulatory frameworks in selected ECCAS countries'.

<sup>169</sup>Oyewole B, 'Overview of local content regulatory frameworks in selected ECCAS countries'.

<sup>170</sup>Oyewole B, 'Overview of local content regulatory frameworks in selected ECCAS countries' United Nations Conference on Trade and Development (UNCTAD), Geneva, 2018. [https://unctad.org/en/PublicationsLibrary/ditccominf2018d4\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ditccominf2018d4_en.pdf)

## CHAPTER FOUR

### LOCAL CONTENT: THE KENYAN EXPERIENCE

#### 4.0 Introduction

Historically, Kenya has not been a significant oil producer or exporter.<sup>171</sup> The legal regime governing the oil and gas industry has thus; not been progressive. For a very long time, the oil and gas industry in Kenya was governed by the Petroleum (Exploration and Production Act) which was repealed by the Petroleum Act 2019. It is only recently that concerted efforts have been made to redesign Kenya's legal and institutional framework for the development of local content in the petroleum sector through sections 50, 51 and 52 of the Petroleum Act 2019. Having analysed and drawn lessons from Nigeria in chapter 3, this research has established that having a firm foundation in place for the implementation of local content policies through legal and regulatory framework is important if a country is to achieve the desired outcomes.

This chapter, the core of this research, aims to answer the question 'What is the current legal and institutional framework governing local content in Kenya's upstream petroleum operations?'. In so doing, this chapter aims to undertake an analysis of the new petroleum regime in relation to local content, focusing on upstream petroleum operations. This chapter is divided into four sections. After this introductory section, the chapter details an analysis of the legal and institutional framework in section 4.1. Section 4.2 undertakes an analysis of the key drivers of LCRs in Kenya. It affirms that there are a number of apparent reasons that GOK may wish to increase the local content in the oil and gas industry some of which include the desire to increase domestic valued-added by substituting domestically produced goods for imported goods, and to create more local employment by substituting domestic labor for imported or foreign-based labor. GOK feels that there must be economic benefits to be captured by LCPs that increase the local content with respect to value-added and employment. Lastly, section 4.3 of this chapter analyses and critiques the mechanisms in place to measure and enforce local content in Kenya's oil and gas industry and finds that there are no adequate mechanisms in law to measure and enforce local content in Kenya's upstream petroleum operations.

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<sup>171</sup> Brown M, 'Mining in Kenya, the start of a new era?' (2013).  
[https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining\\_in\\_Kenya2.pdf](https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining_in_Kenya2.pdf). (Accessed on 16<sup>th</sup> June 2019)

## 4.1 Existing Legislative and Institutional Mechanisms for Local Content in Kenya

The growing importance of the petroleum sector has seen the development of a comprehensive and holistic legal and regulatory framework for the oil and gas industry to limit the negative impacts of petroleum operations.<sup>172</sup> This has been achieved, in part, through the promulgation of the Constitution of Kenya in 2010 as well as the subsequent enactment of the Petroleum Act 2019 and the development of the Local Content Bill 2016<sup>173</sup> to create the necessary legal framework for local content.

### 4.1.1 Legal and Policy Framework

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

**The Constitution of the Republic of Kenya, 2010**, the supreme law of the land<sup>174</sup> lays the basis for management of resources in an expansive Bill of Rights, which is the framework for all economic, social and cultural policies.<sup>175</sup> The Constitution has provisions on land<sup>176</sup> which are critical factors in upstream petroleum operations. Despite mineral resources being vested in the National government to be held in trust for all Kenyans,<sup>177</sup> the surface land and the properties appurtenant thereon is the property of the host communities. The Constitution, in Article 62(1) (f) as read with Article 62(3), vests mineral resources in the National Government as trustees for the people of Kenya. This means that the National Government, as trustee, must ensure that

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<sup>172</sup> Orago et al ‘Titanium mining benefit sharing in Kwale County.’

<sup>173</sup> See statement of objects and reasons, Local Content Bill, 2018, Para 3-4, which affirms that discovery of minerals has not led to socio-economic development of local communities and entrenched local content for the following reasons: lack of capacity of local communities to participate in the extractives industry; lack of technology and technical know-how; lack of public participation; and, importantly, lack of legal framework for the exploitation of natural resources in a manner that ensures that accruing benefits are equitably shared with the host communities. The Bill aims to change the narrative and ensure host communities participate effectively in the mining industry and benefit from the profits accruing from the industry.

<sup>174</sup> Article 2, *Constitution of Kenya* (2010).

<sup>175</sup> Article 19(2), *Constitution of Kenya* (2010).

<sup>176</sup> Article 63 and 64, *Constitution of Kenya* (2010), in relation to community land and private land respectively.

<sup>177</sup> Article 62(1)(f) and 62(3), *Constitution of Kenya*, (2010) classifies minerals and mineral oils as being part of public land that vests in, and is to be held by, the National Government in trust for the people of Kenya and be administered by the National Land Commission on behalf of Kenyans.

minerals resources are used strictly for the benefit of the beneficiaries, the primary ones being the host communities.<sup>178</sup> In the exploitation of natural resources, the Constitution requires the National Government to ensure that these resources are exploited, utilised, managed and conserved in a sustainable manner.<sup>179</sup> Additionally, the constitution provides that natural resources be used for the benefit of the people of Kenya.<sup>180</sup> Further, the State shall ensure sustainable exploitation, utilization and management of environmental and natural resources and ensure equitable sharing of accruing benefits.<sup>181</sup> In the context of local content, apart from entrenching the important provisions on sustainable and beneficial exploitation of natural resources as discussed above, the Constitution further requires Parliament to enact legislation to govern the exploitation of these natural resources ensuring that investments in property benefit local communities and their economies.<sup>182</sup> This requirement has led to the enactment of the Mining Act, the Energy Act 2019, the Petroleum Act 2019 as well as the development of the Local Content Bill 2018, which seek to enhance local content in the extractives industry.

**The Petroleum Act 2019**, provides a framework for contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations.<sup>183</sup> The Act 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.<sup>184</sup> The Act further provides for local content requirements and requires operators to comply with the LCRs in all operations.<sup>185</sup>

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<sup>178</sup> See Article 69(1) (h) Constitution of Kenya (2010), which requires natural resources to be used for the benefit of the people of Kenya.

<sup>179</sup> See Article 69(2) Constitution of Kenya (2010), which places a duty on every person, including International Oil Companies, to cooperate with state organs in ensuring ecologically sustainable development and use of natural resources.

<sup>180</sup> Article 69, *Constitution of the Republic of Kenya* (2010).

<sup>181</sup> Article 69(1)(a), *Constitution of the Republic of Kenya* (2010)

<sup>182</sup> Article 66(2) *Constitution of the Republic of Kenya* (2010).

<sup>183</sup> Preamble of the Petroleum Act, 2019.

<sup>184</sup> Section 2 *Petroleum Act* (2019).

<sup>185</sup> Section 50 (1) (a) *Petroleum Act* (2019).

The Act mandates the Energy and Petroleum Regulatory Authority (EPRA) to oversee, coordinate and manage local content<sup>186</sup> and empowers the CS, in consultation with EPRA, to make regulations regarding local content in petroleum operations.<sup>187</sup> Based on this, an operator shall before engaging in petroleum operations prepare and submit a long term and annual local content plan which corresponds with the work program to the Authority for approval before engaging in petroleum operations.<sup>188</sup> The local content plan should address employment and training, research and development, technology transfer, industrial attachment and apprenticeship, legal services, financial services, insurance services, succession plans for positions not held by Kenyans; consultancy services, construction services, hospitality services, transport services, security services, clearing and forwarding services, inspection services and other goods, works and services as maybe prescribed in regulations.<sup>189</sup>

In the context of employment and training, the Act requires IOCs to ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain.<sup>190</sup> On procurement of local products, the Act requires IOCs to prioritise services and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by KEBS or any other internationally accepted standard.<sup>191</sup>

**The Energy Act 2019** is intended to among other functions, regulate midstream and downstream petroleum activities.<sup>192</sup> The Act defines local content<sup>193</sup> and imposes a requirement on contractors to comply with LCRs and to submit to EPRA for approval, an annual local content plan which corresponds with the work program.<sup>194</sup> It is a requirement under the Energy Act that the local content plan should ensure that priority is given to services provided and

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<sup>186</sup> Section 51(1) *Petroleum Act*, (2019).

<sup>187</sup> Sections 50(4) and 51(1)(c), *Petroleum Act*, 2019.

<sup>188</sup> Section 50(2), *Petroleum Act*, (2019).

<sup>189</sup> Section 50 (3), *Petroleum Act* (2019).

<sup>190</sup> Section 50(1)(c) *Petroleum Act*, (2019).

<sup>191</sup> Section 50(1) (b), *Petroleum Act* (2019).

<sup>192</sup> These activities include importing, exporting, transporting, refining, storing and selling petroleum or petroleum products; producing, transporting, distributing and supplying of any other form of energy, and to all works or apparatus for any or all of these purposes.

<sup>193</sup> Section 2, *Energy Act*, (2019).

<sup>194</sup> Section 206, *Energy Act* (2019).

goods manufactured in Kenya.<sup>195</sup> The Act further provides that skilled and qualified Kenyans should be given first priority in respect to employment at all levels of the value chain.<sup>196</sup>

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

**Public Procurement and Asset Disposal Act, 2015** promotes local procurement in public procurement and provides for the support for local industries and contractors through measures that require state bodies to make provisions for giving preference to and exclusively reserving some goods and services for local suppliers. It provides preference/priority for goods that are extracted, manufactured, and grown in Kenya. It establishes a Public Procurement Regulatory Authority, which is required to ensure that state entities and all those involved in spending state money or in the disposal of state assets promote and adhere to local content and participation requirements in their procurement procedure.

**The National Construction Authority Act (National Construction Authority Regulations) 2014** stipulates that registration applications by foreigners shall be accompanied by an undertaking that the contractor shall enter into a joint venture with a local company or person for not less than 30% of the contract value and shall transfer technical skills to a local community or person as the National Construction Authority may from time to time determine.<sup>197</sup>

**The Model PSC** requires IOCs together with their subcontractors to where possible, employ Kenya citizens in upstream petroleum operations and train citizens until the expiry or

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<sup>195</sup> Section 206(3)(a), *Energy Act* (2019).

<sup>196</sup> Section 206(3)(b), *Energy Act* (2019).

<sup>197</sup> Regulation 12(3).

termination or the contract.<sup>198</sup> The Model PSC also requires IOCs to give preference to Kenyan service providers.

**The Local Content Bill 2018** is based on Article 69(1) of the Constitution that imposes obligations on the state to ensure sustainable management of natural resources and the equitable sharing of benefits accruing.<sup>199</sup> It is further predicated on Article 66(2) of the Constitution which requires parliament to enact legislation ensuring that investments in property benefit local communities and their economies.<sup>200</sup> The objective of the Bill is the maximization of value addition to natural resources within Kenya; the creation of employment in the extractives industry value chain by use of local expertise, goods, services, businesses and financing; and the enhancement of the participation of Kenyans in the extractives industry value chain, among others.<sup>201</sup>

The Bill requires the National Government, in collaboration with the county governments, to put in place measures to ensure that IOCs develop and adopt local content in the entire oil and gas value chain.<sup>202</sup> Further, it establishes the Local Content Development Committee(LCDC) mandated with the oversight, coordination and development of local content.<sup>203</sup> The Bill empowers the Cabinet Secretary, in consultation with the LCDC, to set the minimum local content required for each operator, which must be complied within petroleum operations.<sup>204</sup> Based on this minimum local content requirement set by the CS, each IOC must submit a long term local content plan as well as employment and skills development plan when making an application for a license.<sup>205</sup> Subsequent to the issuance of the license, an IOC would further be expected to submit annual local content plans for approval by the LCDC.<sup>206</sup> IOCs will also be required to submit quarterly reports of the employment and training undertaken during the

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<sup>198</sup> Clause 20 of the Model PSC.

<sup>199</sup> Statement of Objects and Reasons, *Local Content Bill*, 2018 para 2.

<sup>200</sup> Statement of Objects and Reasons, *Local Content Bill*, (2018), para 2.

<sup>201</sup> Clause 4, *Local Content Bill*. The Bill aims to facilitate the development of an effective local labour force, enhance local ownership and the procurement of local assets and services as well as the maximization of value addition, local content development and local participation in the extractives industry.

<sup>202</sup> Clause 6, *Local Content Bill* (2018).

<sup>203</sup> Clause 7-18, *Local Content Bill* (2018).

<sup>204</sup> Clause 19, *Local Content Bill* (2018).

<sup>205</sup> Clause 20 and 24 of the *Local Content Bill* (2018). The employment and skills development plan is to ensure the mining operator is developing skills of local populations to enable them take up employment opportunities and responsibilities in the management of extractives processes.

<sup>206</sup> Clause 20 and 21, *Local Content Bill* (2018).

reporting period and specify the number of new local persons employed within the reporting period.<sup>207</sup>

In the context of training and employment, the Bill requires IOCs to build local capacity and expertise through training.<sup>208</sup> The operator is further required to give first consideration to local persons when vacancies occur and only employ foreigners when there is no suitable Kenyan available to take up the employment.<sup>209</sup> Priority in this context should be given to local persons from the host community, who must be reasonably represented in the operator's workforce.<sup>210</sup>

On procurement of local products, the Bill requires the operator to maintain a bidding process that accords fair opportunities for local persons to supply goods and services in the extractives value chain.<sup>211</sup> The operator must give priority to local goods and service providers even if their bids are higher, provided that the price differentials do not exceed 10 percent of the price quoted by a foreign bidder.<sup>212</sup>

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

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

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<sup>207</sup> Clauses 24(3) and (4), Local Content Bill (2018).

<sup>208</sup> Clause 25, Local Content Bill (2018).

<sup>209</sup> Clause 26, *Local Content Bill* (2018).

<sup>210</sup> Clause 26(2)(a), *Local Content Bill* (2018).

<sup>211</sup> Clauses 39(3)(c) and 39(4), *Local Content Bill* (2018).

<sup>212</sup> Clauses 39(3) (c) and 39(4), *Local Content Bill* (2018).

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

#### **4.1.2 Institutional Framework**

There are various institutions that have been established to implement and monitor local content under the various laws discussed above; they include:

##### ***4.1.2.1 The Energy & Petroleum Regulatory Authority (EPRA)***

Section 2 of the Petroleum Act defines the word 'authority' to mean the Energy and Petroleum Regulatory Authority established under section 9 of the Energy Act. EPRA is independent in the performance of its functions, exercise of its powers and is not subject to the direction or control of any person or authority.<sup>213</sup> The functions of the Authority include the enforcement of local content requirements,<sup>214</sup> regulating, monitoring and supervision of upstream petroleum operations in Kenya in accordance with the laws relating to petroleum, the regulations and the relevant petroleum agreement.<sup>215</sup>

Section 51 of The Petroleum Act 2019 mandates EPRA to supervise, co-ordinate, and manage the development of local content and prepare guidelines to include targets and formats for local content plans and reporting; make appropriate recommendations to the Cabinet Secretary for the formulation of local content regulations; set minimum requirements for local content in local

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<sup>213</sup> Section 9(3) *Energy Act* (2019).

<sup>214</sup> Section 10(ee) *Energy Act* (2019).

<sup>215</sup> Section 10(b) *Energy Act* (2019).

content plans; public education and awareness; undertake local content monitoring, audit and enforcement; and perform any other functions as may be prescribed in regulations.<sup>216</sup>

#### ***4.1.2.2 Local Content Development Committee (LCDC)***

The Local Content Bill proposes the establishment of a Local Content Development Committee.<sup>217</sup> The Bill proposes that LCDC should oversee, co-ordinate and manage the development of local content in the country and make policy recommendations to the CS for the development and implementation of local content. It also proposes that LCDC should recommend to the CS, minimum standard requirements for local content and the development of local content plans. LCDC will also be tasked with appraising, evaluating and approving local content plans that shall be submitted by IOCs. Further, the Bill proposes that LCDC should develop strategies for implementation of local content policies in consultation with the county governments, in order to strengthen the capacity of local persons, businesses and the capital market to fully leverage the objectives of local content.<sup>218</sup>

#### ***4.1.2.3 National Oil Corporation of Kenya (NOCK)***

NOCK was incorporated in 1981 with a mandate to participate in all aspects of the petroleum industry.<sup>219</sup> The Corporation is wholly owned by the Government of Kenya through a joint ownership by the Ministry of Petroleum and Mining and the National Treasury.<sup>220</sup> Although the Petroleum Act 2019 is not explicit about the upstream role of NOCK, it is expected that any government participation in upstream oil and gas activities will be through a National Oil Company.<sup>221</sup> The existing NOCK may require to be institutionally reformatted if it has to play this role while still undertaking downstream marketing.<sup>222</sup>

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<sup>216</sup> See section 51(b-g) *Petroleum Act 2019*

<sup>217</sup> Section 9 *Local Content Bill (2018)*.

<sup>218</sup> Section 10 (1) *Local Content Bill (2018)*.

<sup>219</sup> <https://nationaloil.co.ke/about-us/> 13<sup>th</sup> April 2019 11.30 am.

<sup>220</sup> <https://nationaloil.co.ke/about-us/> 13<sup>th</sup> April 2019 11.30 am.

<sup>221</sup> George Wachira, 'Local content in oil production' *Business daily*, 4<sup>th</sup> December 2018.

<sup>222</sup> George Wachira, 'Local content in oil production' *Business daily*, 4<sup>th</sup> December 2018.

## 4.2 Key Drivers of Local Content Policies in Kenya

Research has shown that local content either in form of policies, laws, regulations, contracts clauses and initiatives, remain an investment challenge and a legal test to both governments and business operating in the petroleum sector.<sup>223</sup> Asiago and Wasuna state that introduction of LCRs appears to favor rigid legal and ambiguous institutional frameworks that seem to hinder governments and business practices in the petroleum sector.<sup>224</sup> However, there are various factors that drive oil and gas producing countries to adopt LCRs in their petroleum sector despite the legal test. This section aims to answer the question ‘what drives Kenya to adopt local content requirements in its petroleum sector?’

### i) Desire to Increase the Level of Domestic Capabilities and Competencies

IOCS are often brought in, in many resource rich countries, mainly because local industries do not have the experience and technological capacity to effectively undertake petroleum operations.<sup>225</sup> Olawuyi states that LCRs emanate from the basis that local workforce and industries should over time develop the capacities to supply the goods, services and human resources needed to drive the oil and gas value chain, by substituting locally produced goods for imported goods, and to create more local employment by substituting local labor for imported or foreign-based labor.<sup>226</sup> LCRs in Kenya therefore emphasize the desire and need for IOCs to incorporate practices that encourage the development of a better-trained, qualified local workforce over the period of the petroleum contract.<sup>227</sup> Generally, all local content laws in Kenya’s Petroleum industry mandate IOCs to give preference to local goods, services,

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<sup>223</sup>Asiago BC, Wasuna MK, ‘Are local content requirements in developing petroleum sectors sustainable? Managing expectations while aligning sustainable principles with regulatory policy.’ *Oil, Gas & Energy Law Intelligence(OGEL)*, (2018).

<sup>224</sup>Asiago BC et al, ‘Are local content requirements in developing petroleum sectors sustainable?’.

<sup>225</sup>Muller T, and Schitzer M ‘Technology transfer and spillovers in international joint ventures’ Munich (Discussion Paper No. 2003–22, 2003), also Levett M, and Chandler AE, ‘Maximizing development of local content across industry sectors in emerging markets’ *Center for Strategic and International Studies*, Washington DC (2012).

<sup>226</sup>Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

<sup>227</sup> See for example Section. 50(3) *Petroleum Act* (2019) states that a person carrying out works under the Act shall submit an annual local content plan which shall address industrial attachment and apprenticeship. This is the government’s deliberate move to ensure that locals are trained to acquire and develop the relevant skills needed in the industry. In addition, Section 25(1) of the *Local Content Bill* (2018) is more elaborate on skills development. It states that an operator shall, in order to develop the skills and capacity of local persons and enterprises to participate effectively in its extractive industry operations, prepare and implement strategies and plans for utilization of technical service contracts, joint ventures and strategic alliances to broaden opportunity for local persons and enterprises to build capacity; in addition, contractors are required to submit plans for the utilization of internship to equip locals at all levels of extractives value chain with the view to developing a critical mass knowledge and competent national skill pool.

consumables, works or enterprises.<sup>228</sup> IOCs have a responsibility to give due and proper consideration to preferring locally-sourced services where the goods meet the relevant specifications as prescribed by KEBS or in the absence of a KEBS standards, other internationally accepted standard.<sup>229</sup> LCRs also mandate the IOC to prepare plans and programs for training and educating nationals during the term of the contract.<sup>230</sup> This is meant to enhance the capability of the domestic workforce overtime.<sup>231</sup>

**ii) Desire to Create a Level Playing Field for Locals and Home Based Industries to Participate in Oil and Gas Activities.**

The cycle of being overly dependent on foreign goods and services may never be broken if resource rich countries do not create a level playing field for new or emerging local industries and workforce to participate in upstream petroleum operations, and compete with foreign suppliers.<sup>232</sup> LCRs therefore aim to ensure that domestic industries are given an opportunity to compete with foreign suppliers.<sup>233</sup> For example, the LCB emphasises the need to create a level playing field for domestic participation in procurement of goods and services by requiring an operator to maintain a bidding process which provides a fair opportunity to local persons to participate in the process.<sup>234</sup> 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.<sup>235</sup> The Bill further proposes a requirement on the IOC to give preference to local persons where the price differential does not exceed 10% of the bidding price quoted by a foreign entity.<sup>236</sup> The aim is to provide a level playing field for domestic industries to participate in oil and gas activities.

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<sup>228</sup> See Section 50-51 *Petroleum Act* (2019) and Section 206 *Energy Act* (2019).

<sup>229</sup> See Section 50-51 *Petroleum Act* (2019) and Section 206 *Energy Act* (2019).

<sup>230</sup> Section 50(3) *Petroleum Act* (2019) and Section 206(4) (a) of *Energy Act* (2019).

<sup>231</sup> Olawuyi DS, 'Local content requirements in oil & gas contracts'.

<sup>232</sup> Tordo S *et al*, *Local content policies in the oil and gas sector*, 115-117.

<sup>233</sup> Olawuyi DS, 'Local content requirements in oil & gas contracts'.

<sup>234</sup> Section 41(1), *Local Content Bill* (2018).

<sup>235</sup> Section 41(3), *Local Content Bill* (2018).

<sup>236</sup> Section 41(3) *Local Content Bill* (2018). See also Section 41(4) *Local Content Bill* (2018) which states that The award of a tender shall not be based solely on the principle of the lowest bidder where a local company has the capacity to undertake the project and a local company shall not be disqualified solely on the basis that it is not the lowest financial bidder unless the value exceeds the lowest bid price by ten percent.

### **iii) Desire to Maximize Economic Benefits to Citizens Through Job and Employment Opportunities**

All legislative and contractual provisions on local content in Kenya's oil and gas industry mandate IOCs to prioritise employment of suitably qualified Kenyans.<sup>237</sup> The intention is to create opportunities for local employment and contribute to growth in income, capacity development and the overall increased economic growth.<sup>238</sup> Local employment is among the topmost concerns for citizens, and it is an issue that often drives disputes, grievances and conflicts between locals and IOCs.<sup>239</sup> 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.<sup>240</sup> 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.<sup>241</sup>

### **iv) The Desire to Improve National Technological Capacity**

Section 50(3) (c) of the Petroleum Act, and all other enabling provisions of the law on local content<sup>242</sup> as well as petroleum contracts<sup>243</sup> mandate IOCs to bring some level of technology or perform research and development in the country to enable local companies boost their competitiveness through access to state-of-the-art technology, or benefit from technology transfer.<sup>244</sup> Mandating IOCs to utilise locally made technology in petroleum operations reduces

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<sup>237</sup> See for example 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).

<sup>238</sup> Olawuyi DS, 'Local content requirements in oil & gas contracts'.

<sup>239</sup> Ovadia J, 'The role of local content policies in natural resource-based development' 37-38; also Tordo S, *Local content policies in the oil and gas sector*, 7-15.

<sup>240</sup> Tordo S, Tracy B, and Arfaa N, 'National oil companies and value creation.' World Bank Working Paper 218, Washington DC (2011) 1-10; See also, 'Human capital for the oil, gas and minerals industries' Science, Technology, and Skills for Africa's Development, World Bank (2014) 1-4; also Esteves & Barclay, 'Enhancing the benefits of local content: Integrating social and economic impact assessment into procurement strategies' Impact Assessment and Project Appraisal, (2011) 205.

<sup>241</sup> 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.

<sup>242</sup> Section 206(4)(c) *Energy Act* (2019); See also Section. 22(5), 25(1), Section 32(1-2), 32(2)(a), Section 33(1) of the *Local Content Bill*, (2018); These provisions mandate IOCs to submit local content plans with a technology transfer plan in order to develop skills and capacity of local persons and enterprises to prepare an implement strategies and plans for technology transfer with local enterprises to provide credible measurable plans on increment and transfer of technological know-how to locals.

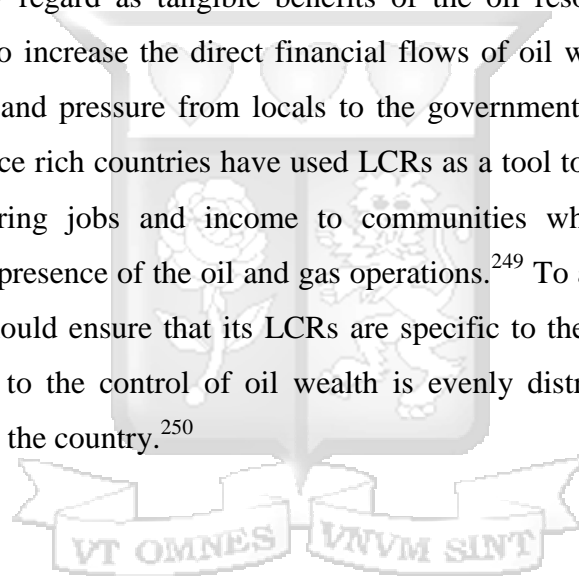
<sup>243</sup> See Clause 23 of *Kenya's Model PSC* which provides that a contractor shall develop a technology transfer program in accordance with the energy and petroleum policy, the Act and regulations to promote transfer of technology and skills on upstream petroleum operations to indigenous Kenyan employees and government officials. The aim of the technology transfer program is to build and develop in Kenya, specialized technical management and professional skills relevant to upstream petroleum operations and any necessary facility requisite for advancement of technical skills in upstream petroleum activities.

<sup>244</sup> 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.

the importation of technology for petroleum operations and this could in turn compel IOCs, as well as service companies, to invest in technologies and facilities for local manufacturing and service provision.<sup>245</sup> Opening up technology ventures, can facilitate domestic production and availabilities of technologies required for oil and gas exploration.<sup>246</sup>

**v) Desire to Mitigate and Manage Social and Political Risks that May Result from Arising Domestic Expectations for Better and More Equitable Distribution of Wealth and Authority.**

LCRs are also used to mitigate and manage social and political risks that may result from rising domestic expectations for better and more equitable distribution the ‘oil wealth’.<sup>247</sup> Locals may not see what they may regard as tangible benefits of the oil resources despite the subsidy programmes designed to increase the direct financial flows of oil wealth to nationals and this may result to conflicts and pressure from locals to the government to increase more tangible benefits.<sup>248</sup> Most resource rich countries have used LCRs as a tool to mitigate such conflicts by requiring that IOCs bring jobs and income to communities where there is considerable dissatisfaction with the presence of the oil and gas operations.<sup>249</sup> To avoid unnecessary pressure and conflicts, Kenya should ensure that its LCRs are specific to the needs of the local person and ensure that access to the control of oil wealth is evenly distributed among the interest groups and tribes across the country.<sup>250</sup>



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<sup>245</sup> 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); also Glass A and Saggi K. ‘The role of foreign direct investment in international technology transfer’. In International Handbook of Development Economics, ed by Dutt A and Ros J. Cheltenham UK, and Northampton, MA:Edward Elgar Publishing.

<sup>246</sup> Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

<sup>247</sup> 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; also Krueger A ‘The political economy of the rent-seeking society’, *American Economic Review* 64(3) (1974): 291–303.

<sup>248</sup> 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); See Ovadia J, ‘The role of local content policies in natural resource-based development’.

<sup>249</sup> Ovadia J, ‘The role of local content policies in natural resource-based development’.

<sup>250</sup> Olawuyi DS, ‘Local content requirements in oil & gas contracts’.

### 4.3 Measurement and enforcement of Local content in Kenya

The Petroleum Act 2019 has established the Energy and Petroleum Regulatory Authority (EPRA) which is mandated to supervise, co-ordinate, and manage the development of local content.<sup>251</sup> Section 51 makes provision for monitoring and enforcement of local content and tasks the authority with overseeing, coordinating and managing the development of local content; as well as preparing guidelines to include targets and formats for local content plans and reporting. The Authority is also tasked with making appropriate recommendations to the Cabinet Secretary for the formulation of local content regulations and set minimum requirements for local content in local content plans. Additionally, the Authority is tasked with the mandate to monitor, audit and enforce local content.<sup>252</sup> However, section 51 of the Petroleum Act does not provide a specific yardstick for measurement and implementation of local content that EPRA should use in monitoring and enforcing LCRs. Whereas the Act requires IOCs to comply with the stipulated local content requirements, it is silent on the minimum levels of local content to be achieved for the purpose of monitoring and implementation. This creates a legal risk in monitoring and enforcement of LCRs.

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

The Petroleum Act does not define the word ‘local’ or ‘local person’. However, it defines ‘local community’ to mean people living in a sub-county within which the petroleum resources are situated and are affected by the exploitation of that petroleum resource.<sup>253</sup> On the other hand, the Local Content Bill defines a ‘local person’, as an entity that is effectively owned and controlled by a ‘Kenyan’ and performs works, services or supplies goods and materials to an operator as a subcontractor or otherwise and whose business enterprise is incorporated under the

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<sup>251</sup> Section 51(1) of the Petroleum Act, 2019.

<sup>252</sup> Section 51 (1) of the Petroleum Act, 2019.

<sup>253</sup> Section 2 *Petroleum Act* (2019).

Laws of Kenya with a ‘principal place of business in Kenya’.<sup>254</sup> The definition in the LCB aims to ensure that qualified Kenyans or Kenyan business enterprises are given first consideration in matters of employment and supply of goods and services.

In Kenya, ‘Local hire’ requirements form part of key LCRs; and in as far as measuring and enforcing LCRs in a nation suffering from widespread unemployment such as Kenya, hiring any citizen may be said to be enough to count towards fulfilling such requirements. However, Pereira et al, has written that if, the State seeks to encourage economic development in a particular area, a more specific and limited definition may be used in which ‘local’ means a resident of the targeted region.<sup>255</sup> He proposes that the term ‘national content’ may be preferable where a reference to the nation as a whole is favored over specific subnational regions.

Similarly, section 50(3) of the Petroleum Act requires an IOC to give a local content plan which addresses *inter alia*, legal services, financial services, insurance services, clearing and forwarding services, consultancy services, security services among others. In practice, the services listed under section 50(3) of the Petroleum Act are ordinarily provided by service providers who are registered entities such as companies and SMEs. This provision of the law raises pertinent concerns on which service providers or companies qualify as ‘local’. When an IOC is required to contract with local companies the host nation government must decide what businesses will qualify as local. The questions that Pereira et al asks is, is mere physical presence of a service provider in the host nation enough to make a business ‘local’? If so, how much ‘presence’ in country is necessary? Legal residence or place of incorporation, for example, are reasonably easy to determine; but would they suffice? Perhaps the situs of the ‘local’ company headquarters or its principal business activities would be a better measure.<sup>256</sup>

In order to effectively measure and audit compliance of local content, it is important for those mandated with the duty to monitor and enforce LCRs to understand, for example, where products are being manufactured, developed and assembled as these steps should lead to a

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<sup>254</sup> Section 2, *Local Content Bill* (2018).

<sup>255</sup> Pereira E, et al, ‘*Local content policies in the petroleum industry: Lessons learned*’.

<sup>256</sup> Pereira E, et al, ‘*Local content policies in the petroleum industry: Lessons learned*’.

higher level of employment in and added value to Kenya. It is also important for enforcement officers, to understand the different stages of an oil and gas business and how it works in a practical manner in order to estimate where the maximum number of opportunities for locals can be found.<sup>257</sup>

As a general proposition in measuring local content, the clearer the metrics employed, the easier it will be to monitor and enforce most policies; but metrics are not always just neutral measures of compliance or success.<sup>258</sup> Pereira et al, has written that metrics<sup>259</sup> used to measure local content might include the number of local employees hired, trained, or promoted; monetary value of goods and services purchased locally by the international company; participation of local companies in the relevant activities; involvement of local institutions in R&D activities; or by other means such as the development and/ enhancement of other sectors e.g. the manufacturing industry.

In any case, LCRs should be targeted at each country's needs and expectations. For instance, Kenya is less likely to be able to rely on her national work force to provide domestic labour to serve in upstream petroleum operations, so it is most likely that the LCRs will add higher emphasis on training and skills development for the local work force in comparison with other developed oil and gas producing countries with qualified personnel.

It is imperative to note that the Local Content Bill establishes a Local Content Development Committee (LCDC) whose mandate shall be to recommend and advise the Cabinet Secretary for Petroleum on the formulation of policies and strategies to develop and implement local content in the extractives industry. One other key functions of the LCDC will be to ensure implementation of local content policies and strategies by IOCs and formulate implementation strategies to improve the capacity of local persons, businesses and the capital market to fully

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<sup>257</sup> For example, IOCs are less likely to undertake the majority of the petroleum operations by themselves but rather outsource such activities to third parties. Therefore, a higher focus on the IOCs instead of services contractors may add less value from an employment perspective.

<sup>258</sup> Pereira E, Et al, '*Local content policies in the petroleum industry: Lessons learned*'.

<sup>259</sup> These metrics may need to be dynamic: in other words, they may need to be adapted as petroleum activities within the host country move from exploration through development to production.

leverage on the objectives of local content.<sup>260</sup> The legal risk that Kenya is most likely to face in monitoring and enforcement of local content is the proposed double regulatory framework as seen above. If the Bill is enacted into law, the LCDC's mandate will overlap with that of the EPRA. Where both regulators have the same mandate, the key question for determination will be, who has the final say?<sup>261</sup> The inconsistency of laws will result into a weak regulatory and institutional foundation for local content implementation in Kenya's upstream petroleum operations.

It is important for the country to have a framework that that provides clarity and certainty for efficient monitoring and enforcement.

## **Conclusion**

The above analysis, indicates that with the growth of the oil and gas industry in Kenya, legal reforms have been undertaken to ensure that natural resources are managed sustainably for the benefit of Kenyans in line with the principle of sovereignty over and ownership of natural resources as discussed in chapter 2 of this research. The Constitution in Articles 10, 40, 44(2), 69 and 72 creates a basic framework for the transformation, leading to the enactment of the Energy Act 2019, the Petroleum Act 2019 and the development of the Local Content Bill, 2018. Generally, the requirements in law and contract have created a framework that is focused on the economic development of the country. The provisions lay emphasis on local content ranging from local employment, training of locals for skills development and procurement of local goods and services.

Evidently, Kenya is making strides in legislating on local content. However, the oil and gas sector, like majority of other oil producing countries, faces challenges that impede the measurement and enforcement of local content. These challenges can partially be avoided through legislation. As demonstrated in this chapter, the local content provisions in the Petroleum Act are inadequate. There is need to have a robust legislation and regulations that provides a meaningful definition of the term 'local' and provides metrics for measurement and

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<sup>260</sup> Section 10, *Local Content Bill*, 2018.

<sup>261</sup> There will be a legal challenge with compliance of laws especially in this case where both laws i.e Petroleum Act and Local Content Bill seek to regulate local content in the petroleum industry.

enforcement of local content. The legislations must meet international best practice standards, as seen in Chapter 3 of this research, in order for the citizens of Kenya to maximize on the benefits available in upstream petroleum operations.

In order to lay down an implementation strategy for local content in Kenya's oil and gas industry, chapter 5 will outline key research findings on the challenges facing implementation of local content in Kenya's oil and gas industry and provide recommendations for implementation.



## CHAPTER FIVE

### KEY FINDINGS & RECOMMENDATIONS

#### 5.0 Introduction

Having studied local content frameworks in both Kenya and Nigeria's oil and gas industries under chapters 3 and 4 of this research, this study has drawn key lessons for implementation in Kenya's oil and gas industry. This chapter provides an analysis of the key research findings and seeks to answer the research question; 'What specific monitoring and enforcement mechanisms will Kenya need to enact in order to ensure the effective implementation of local content requirements?'.

This chapter finds that achieving accruing benefits of the oil and gas industry requires a comprehensive legal framework and efficient institutional enforcement mechanisms that ensure sustainable management of resources. These frameworks must adequately and efficiently provide solutions for challenges such as weak monitoring and enforcement mechanisms, inadequate qualified local personnel, and inadequate skills and capacity to produce local materials required in upstream petroleum operations. If not managed, these challenges will most likely generate the dreaded 'resource curse' exemplified by increased poverty, exacerbation or corruption and other unethical practices by public officers.

In an attempt to recommend specific monitoring and enforcement mechanisms to ensure effective local content requirements, the first part of this chapter will outline key research findings on challenges that impede successful implementation of local content in Kenya's oil and gas industry. The second part will provide recommendations drawn from the case study of Nigeria discussed in chapter 3 of this research.

## **5.1 Key Findings**

### **Factors that Challenge Successful Implementation of Local Content in Kenya's Oil and Gas Industry.**

Despite introducing local content in the oil and gas sector, Kenya has not yet achieved the desired results.<sup>262</sup> This has been attributed to various factors which shall be discussed in detail in this section.

#### **5.1.1 Key Finding 1: Weak Legal and Institutional Framework**

The study of Kenya's local content experience in Chapter 4 has shown that Kenya's legal and institutional framework is not robust and it does not meet international best practice standards laid out in Chapter 3. Currently, one of the greatest impediments to local content in Kenya's petroleum sector as seen in chapter 4 is the weak legal and institutional framework. The absence of a clear legal and institutional framework creates a legal risk especially now that Kenya is preparing to move on to the production phase in the oil and gas value chain. As discussed above, the existing legislative framework leaves unanswered, key questions relating to definition of local persons, measuring, reporting and evaluating compliance of local content.

Additionally, the Petroleum Act is silent on specific sanctions and penalties for non-compliance with LCRs. There is need to impose, through law and regulations, harsh and strict penalties for noncompliance with LCRs if local content implementation is to be taken with the seriousness it deserves.

Needless to say, the legal framework in place is not robust and lacks clarity on pertinent matters such as definition of local person, measurement of local content outcomes as well sanctions for noncompliance.

#### **5.1.2 Key Finding 2: Weak Monitoring and Enforcement Mechanism**

Kenya's oil and gas industry is still in its infant stage and is yet to put in place reliable mechanisms to monitor and enforce LCRs. Section 51 of the Petroleum Act makes provision for monitoring and enforcement of local content but it does not provide a specific yardstick for

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<sup>262</sup>Kakonge JO 'Implementation of a local-content policy in the oil and gas sector: Lessons for the Kenya Turkana oil and gas fields' *Research Journal* (2018).

measurement and implementation that EPRA should use in monitoring and enforcing LCRs. Whereas the Act requires IOCs to comply with the stipulated LCRs, it is silent on the minimum levels of local content to be achieved for the purpose of monitoring and enforcement. This creates a legal risk in monitoring and enforcement of LCRs, as the law does not provide a specific threshold for monitoring and measuring local content. There is need for Kenya to develop a comprehensive legal framework that clarifies the methodology for implementing, measuring and reporting local content outcomes.

In terms of enforcement, the Petroleum Act does not stipulate specific sanctions tailored for local content noncompliance. The law mandates the Authority 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.<sup>263</sup> Needless to say, five million shillings is a general penalty for any contravention under the petroleum act for which no fine or penalty is expressly stated. This amount, in my opinion, is not punitive enough since it is not commensurate to the revenues generated by IOCs. There is need for regulations that impose a specific penalty for local content noncompliance in order to ensure strict implementation of LCRs.

### **5.1.3 Key Finding 3: Inadequate Capacity to Produce and Supply Quality Materials**

The high capital, complex technology, and reliance on global supply chains by multinational investors in the oil and gas industry have traditionally impeded local participation. Oil and gas demands high tech and sophisticated goods and services which are only catered for by very few firms globally.<sup>264</sup> A significant challenge for Kenya's oil and gas industry is that local suppliers do not have the capacity to produce or supply most of the goods<sup>265</sup> that meet the required standards of the oil and gas industry. This challenge has created an easy way out for IOCs to continue involving foreign firms in importing materials required in the oil and gas industry operations which is against the intended purpose of local content.

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<sup>263</sup> Section 124 *Petroleum Act*, (2019).

<sup>264</sup> 'Building business opportunities in Kenya's oil & gas sector', World bank group, 2016.

[http://extractivesbaraza.com/assets/content/PDF/Publications:%20Donor%20Programs/Kickoff\\_consult-wkshp-April-4\\_email-ver.pdf](http://extractivesbaraza.com/assets/content/PDF/Publications:%20Donor%20Programs/Kickoff_consult-wkshp-April-4_email-ver.pdf). Accessed on 25<sup>th</sup> April 2019.

<sup>265</sup> Supply of goods and services in areas such as civil works, supply of bulk construction materials, electrical installations, engineering, construction, operations and maintenance are some of the critical priority needs for upstream petroleum operations.

The biggest opportunity for local suppliers is in the construction phase, since many activities in the other phases are high tech and specialized.<sup>266</sup> Procurement of local goods will peak with the construction of oil production facilities in Turkana and the export pipeline to Lamu. It is anticipated that the construction phase will commence in early in 2020 and finish in 2022 in readiness for first oil export via Lamu.<sup>267</sup> In order to build the local capacity to meet these requirements, there must be a clear and practical plan to develop local content capacity in Kenya.

#### **5.1.4 Key Finding 4: Inadequate Qualified Personnel to Take Part in the Oil and Gas Value Chain**

As discussed in previous chapters, local content is concerned with the utilisation of local labour in the oil and gas industry. One of the key drivers of local content is the desire by the government to create employment opportunities for its citizens. However, the industry requires highly skilled workers like petroleum engineers, geologists, welders, among others skilled personnel. The challenge that Kenya is facing, is that, there is a shortage of professionals to serve in the capacity of highly skilled personnel required in upstream petroleum operations. This inadequacy leads IOCs to bring in expatriate workers to fill in the gap. In order to capitalize on employment opportunities available in upstream petroleum operations, the government needs to put in place mechanisms to train or sponsor local people to train and acquire technical skills in areas such as petroleum engineering, welding, geology among other technical fields required in the oil and gas value industry chain.

#### **5.1.5 Key Finding 5: Corruption**

The oil and gas industry is a very lucrative industry which requires highly qualified and incorruptible personnel to ensure strict compliance of the local content requirements that have been put in place. For example, the greatest impediment to enforcing procurement requirements required by the local content laws and regulations, is corruption. This impediment has killed SMEs that refuse or are unable to pay bribes resulting to their bids being ignored by

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<sup>266</sup> Building business opportunities in Kenya's oil & gas sector', World bank group, 2016.

[http://extractivesbaraza.com/assets/content/PDF/Publications:%20Donor%20Programs/Kickoff\\_consult-wkshp-April-4\\_email-ver.pdf](http://extractivesbaraza.com/assets/content/PDF/Publications:%20Donor%20Programs/Kickoff_consult-wkshp-April-4_email-ver.pdf). Accessed on 25<sup>th</sup> April 2019.

<sup>267</sup> George Wachira, 'Local content in oil production' Business Daily, 4<sup>th</sup> December 2018.

procurement officials despite the fact that they have met all qualifications. Efforts must be made to tackle this challenge, which is widespread in Kenya.

## **5.2 Recommendations**

### **i. Need for Specific Methodology to Measure Local Content in the Oil and Gas Industry**

This study has shown that Kenya's current legal and institutional framework is weak. The local content provisions under sections 50,51 and 52 of in the Petroleum Act 2019, are inadequate. They do not put in place adequate provisions for measuring, monitoring and enforcement of local content as well as sanctions for noncompliance with LCRs. Kenya needs to develop a comprehensive legal framework that clarifies the scope and standard for implementing, measuring and reporting local content outcomes, like is the case in Nigeria. In order to achieve better development outcomes in the oil and gas as sector, Kenya needs a local content policy that is backed by a sector-specific legislative framework that guarantees measurement, implementation and monitoring of local content.

Seeing that the Local Content Bill, 2018 is more comprehensive and specific on local content requirements in the extractives industry as compared to the Petroleum Act, there is need to make the necessary amendments to the Bill and enact this pending legislation, in order for the country to maximize the full benefits of the oil and gas industry in line with local content objectives.

### **ii. Need to Unpack and Contextualize the Definition of the Term 'Local' in Legislation;**

The definition and distinction of people and entities that can be classified as local persons is not provided for in the Petroleum Act. This creates an uncertainty in law and can pose a legal risk if not clarified and handled properly. The term 'local' should be defined in terms of citizenship, in accordance with the Constitution of Kenya, 2010 and national law for natural persons and; in terms of ownership and control by nationals, as per national law for companies or artificial persons. For the purposes of defining and measuring local content, a local company or firm should be a business entity that has been incorporated under the laws of Kenya whose principal

place of business is in Kenya and which is effectively owned and controlled by Kenyan nationals.

For goods, 'local goods' should be defined as materials produced, manufactured, mined or grown in Kenya or supplied by a local. Similarly, 'local services' should be defined as works and services performed or supplied by a local person.

### **iii. Need for an Overarching National Local Content Policy**

The oil and gas sector is very significant to the national economy, therefore any policy particularised for this sector must form part of the overall national agenda. As it is, Kenya does not have a national local content policy. There is need to adopt an overarching National Local Content Policy which will form the basis for regulation of local content across all sectors.

Given the current expected levels of resources and activities required in the oil and gas life cycle, it is imperative to have a National Local Content Policy that focuses on building capacity for activities related to the oil and gas life cycle and especially those activities that can be used beyond just the oil and gas industry. Given the high levels of spend involved in oil and gas exploration and production activities, IOCs are better able to invest in capacity development than other sectors. To get the maximum benefit of that capacity, a strategic approach must be taken to ensure that local content initiatives in the petroleum sector are not solely focused on the oil and gas industry. Kenya therefore needs to use the oil and gas industry as a multiplier for Kenyan economic development. For sector specific skills, Kenya can recover the investment in building capacity by taking advantage of the relatively long life cycle of the upstream industry.

By focusing efforts on capacity to be built to support the oil and gas industry, which can be leveraged to other key priority sectors<sup>268</sup>, as an example, the National Local Content Policy should seek to ensure that there is effective spill over of benefits between economic sectors.

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<sup>268</sup> The key priority sectors for driving GDP growth in Kenya Vision 2030 have been identified as tourism, agriculture, manufacturing, financial services, business process outsourcing, wholesale and retail trade. Beyond these, Kenya has immense value generating potential in extractives (oil, gas and minerals), ITC and other goods and services sectors.

The strategy will require prioritization of skills and services for individual industries, as well as at a national level. Each industry has its own level of demand and local content potential therefore each sector will have its own specific strategy, but it must be aligned with the national local content policy, for maximum impact.

#### **iv. Need to Strengthen Local Content Monitoring and Enforcement Mechanisms**

If the Local Content Bill is enacted in its current state, it will establish the Local Content Development Committee tasked with the mandate to monitor and enforce local content. To avoid the duplicity of bodies that are tasked with local content monitoring, this research recommends that only one institution be put in place to monitor and measure local content. The institution should also be tasked with enforcement of local content development across all levels of the value chain.

There is an urgent need for the Cabinet Secretary for petroleum to draft local content regulations, while building EPRA's capacity to monitor compliance in order to avoid a holdup in local content implementation. In so doing, EPRA should set up a local content department to coordinate and spearhead the development and standardized approach to local content in alignment to government policies and national laws.

In addition, The Cabinet secretary for Petroleum needs to impose a specific penalty for local content noncompliance while drafting local content regulations. In order to ensure compliance, this research proposes that the penalty should be 5% of the project total on any entity that fails to comply with local content requirements and, this penalty should be paid to the local content training fund provided for under section 52 of the Petroleum Act.

#### **v. Training to Build Skills and Capacity Development**

The lessons learned from Nigeria show that, for local-content policies to succeed in Kenya, the country needs to put in place mechanisms for skills and capacity development. The Ministry of Petroleum, Ministry of Trade and Industrialisation and the Ministry of Education need to work together to ensure proactive capacity building through establishment of local content

development centres in order to develop skills and build capacity of local persons to participate in upstream petroleum operations across the oil and gas value chain.

Local content is only possible if local suppliers are able to provide goods and services at a standard acceptable to the oil and gas industry. Achieving and increasing local content in the oil and gas industry, an industry that so new, complex and advanced will require enhancing the capability of local individuals, communities and firms to participate through capacity development and the provision of infrastructure, facilities, utilities and government services at international industry standards. The GOK should therefore identify the need to formulate a local content policy to encourage utilisation of local skills, services and resources, enhance local capacity, promote the transfer of technology from international players to locals in the petroleum sector.

The Ministry of Petroleum should also set up a national database for national skills identification and skills development as well as an oil and gas joint qualification system that provides a platform for registration, prequalification and verification of Kenyan content.

In addition, the Petroleum Act should impose a mandatory requirement for IOCs to show, in their reports to EPRA, that they have identified new potential Kenyan employees for training in order to enhance and promote skills development in the oil and gas industry.

#### **vi. Local Content Training Fund**

The local content training fund established under section 52(6) of the Petroleum Act is a good idea. However, the Act provides that the fund shall be as stipulated in the petroleum contract, which makes it negotiable. This research recommends that section 52(6) be amended to create a mandatory requirement for all contactors and sub-contractors to contribute to the training fund an equivalent of 1% of the contract sum awarded and the amount should be deductible at the commencement of the contract.

In addition, the Petroleum Act should provide that, all penalties paid by IOCs for local content noncompliance should be paid to the local content training fund to be utilized for local content training and development in upstream petroleum operations.

#### **vii. Sanctions for Noncompliance**

To guarantee compliance and enforcement, Section 51 of the Petroleum Act should be amended to include a provision in law granting EPRA clear statutory powers to prescribe penalties of at least 5% of the project total on an entity that fails to comply with the local content requirements.

#### **viii. Participation of the National Oil Corporation of Kenya in Local Content**

The existing structure of NOCK should be reconstituted in order for it to be actively involved and to play a fundamental role in promotion of local content. The case of NNPC shows that NOCs that adopt local content as part of their strategy are more successful at achieving positive local content outcomes. However, there is need to strengthen the capacity of NOCK to enable it adopt an effective and successful local content strategy.

### **5.3 Conclusion**

In conclusion, to answer the question, ‘what specific monitoring and enforcement mechanisms will Kenya need to enact in order to ensure the effective implementation of local content requirements?’ this chapter has shown that in order to give sufficient legal basis for LCRs and ensure effective implementation and enforcement of local content in the oil and gas industry, Kenya needs to ensure that its local content frameworks are well structured and specific to in-country needs in order to achieve positive local content outcomes.

These frameworks should be backed by a robust mechanism to monitor and enforce local content requirements in upstream petroleum operations. Therefore, in order to give sufficient legal basis for LCRs, the local content provisions in the Petroleum Act 2019 should be amended to meet international best practice standards or the Local Content Bill, 2018 should be enacted into law in order to provide robust provisions on local content to ensure that Kenyans enjoy maximum economic benefits of their natural resources.

## **CHAPTER SIX**

### **CONCLUSION**

As seen throughout this research, the benefits of upstream petroleum operations can be shared in many different ways, which include access to employment opportunities in petroleum operations, local procurement of goods and services, training and development as well as technology transfer. This research has also shown that successful realisation of local content in the oil and gas industry requires adequate capacity in skills, competent local industries and advanced technology as established in chapter 2. Kenya can gain this from IOCs by using the unique capabilities that they bring along with their investments in a manner that allows Kenya to advance value addition, develop and enhance standards of local firms and industries, improve the capacity of the local workforce, promote local equity participation and foster the growth of local industries. A robust legislative framework for local content will provide the roadmap towards this goal as seen in the case study of Nigeria.

GOK has realized the need to promote local content in upstream petroleum operations hence the reason why, the concept of local content in upstream petroleum operations has been legislated through sections 50, 51 and 52 of the Petroleum Act, 2019. As seen in Chapter 4 and appendix 2 of this research, the requirements in law are focused on the economic development and lay emphasis on employment and training of locals, procurement of local goods and services as well as technology transfer. Nonetheless, Kenya's oil and gas sector, like majority of other oil producing countries, faces challenges that impede the realization of successful local content outcomes in the oil and gas industry. These challenges can partially be avoided through robust legislation as seen in the case of Nigeria.

As demonstrated in chapter 5, unless specific legal provisions and strong monitoring and enforcement regulations are put in place to enforce local content, the locals may not see the benefits of the newly acquired 'oil wealth' which may lead to conflicts and lack of trust between various stakeholders in the oil and gas industry. To avoid such conflicts, the Local Content Bill 2018 should first be amended to include strict penalties for noncompliance and then enacted to ensure proper and well-structured enforcement in order avoid a hold up in local content

implementation and for the citizens to realize maximum benefits from upstream petroleum operations.

The research findings in chapter 5 have shown that local content is only possible if local suppliers are able to provide goods and services at a standard acceptable to the procuring industries. Achieving and increasing local content in new, complex or advanced industries will require enhancing the capability of local individuals, communities and firms to participate through capacity development and the provision of infrastructure, facilities, utilities and Government services at international industry standards. The Government should therefore formulate LCPs to encourage utilisation of local skills, services and resources, enhance local capacity, promote the transfer of technology from IOCs to locals in the oil and gas sector in order for the country and its citizens to benefit from the sovereignty over their natural resources and overcome the challenges in implementation of local content.

In conclusion, the oil and gas industry has the potential to enhance development and improve the socio economic conditions of host communities if well managed as seen in chapter 2,3 and 4 of this research. The proper management of petroleum operations requires a comprehensive legislative and regulatory framework that ensures that local persons benefit from the activities of upstream petroleum operations. The Constitution of Kenya, 2010, reaffirms that Kenya's resources belong to the people of Kenya and its exploitation should focus on benefiting the Kenyan people. Therefore, Kenya must utilise its resources to create economic opportunities for its citizens. It must add value to and diversify its production across the oil and gas industry to enable the country to ensure economic sustainability. As seen in chapter 2, the only way for Kenya to utilise its resources to create economic benefits for its citizens is through local content requirements and policies. The GOK has made an attempt to introduce LCRs in the oil and gas sector through the Petroleum Act 2019 but, this research has shown that the existing legal framework on local content does not adequately legislate on local content in line with international best practices. In failing to adequately legislate on local content, Kenya's sovereignty over its natural resources is compromised. Therefore, there is need to strengthen the LCRs in the Petroleum Act 2019 to ensure that the legal framework is robust and matches international best practices. Adequate LCRs and a strong monitoring and enforcement mechanism, can lead Kenya to achieve positive local content outcomes.

**Appendix 1: Key Provisions of the Nigerian Content Development Act**

|    |   | Section | Provision   |
|----|---|---------|---|
| 1. | Definition of Nigerian Content                    | 106     | The quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through deliberate utilisation of Nigerian human, material resources and services in the Nigerian oil and gas industry.   |
| 2. | Definition of Nigerian Company                    | 106     | 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”.  |
| 3. | Nigerian Content Development and Monitoring Board | 4 &69   | Established to monitor, coordinate and implement the provisions of the Act; and to constitute the Nigerian Content Consultative Forum to provide the platform for information sharing.  |
| 4. | Submission of Nigerian Content Plan               | 7,12,13 | The Nigerian content plan forms part of the requirements necessary for bidding for any license, permit or interest in the oil and gas industry in Nigeria. It should contain provisions to ensure that first consideration is given to Nigerian independent operators, goods and services as well as ensure that Nigerians are given priority in employment and training.   |
| 5. | Principle of the Lowest Bidder                    | 16      | Contracts shall not be awarded solely on the principle of lowest bidder (provided that the Nigerian company's bid does not exceed the lowest bid price by 10% per cent). However, where bids are within 1 % of each other at the commercial stage, the bid containing the highest level of Nigerian content shall be selected, provided the Nigerian content in the selected bid is at least 5% higher than its closest competitor. |
| 6. | Nigerian Capacity                                 | 11(4)   | Where the domestic capacity is inadequate, the Minister   |

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|     |                                   |       | may authorize the continued importation of the relevant items up to 3 years from the commencement of the Act.  |
| 7.  | Nigerian Content Development Fund | 104   | Contractors should pay 1% of total contract sum awarded in the upstream sector into the Nigerian Content Development Fund (NCDF). The fund is deductible at source and shall be utilized for purpose of funding the local content development in the oil and gas industry.   |
| 8.  | Fabrication and Welding           | 53    | All fabrication and welding activities must be performed in Nigeria.   |
| 9.  | Tax Incentives                    | 47&48 | There shall be tax incentives granted by the minister to companies that establish facilities, factories, production units or other operations within Nigeria for the purpose of manufacturing goods or providing services which were previously imported.  |
| 10. | Employment & Training             | 28-33 | <p>Nigerians should be given first consideration for employment and where Nigerians are not employed because of their lack of training, the operator shall ensure that every reasonable effort is made within a reasonable time to supply such training locally or elsewhere and such effort and the procedure for its execution shall be contained in the operator's employment and training plan.</p> <p>IOCs shall strictly employ Nigerians only in junior and intermediate positions.</p> <p>Only a maximum of 5% of management positions may be retained by IOCs for expatriates subject to the approval of NCMB.</p> <p>IOCs shall submit a succession plan to NCMB for positions</p> |

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|-----|--------------------------|-------|--|
|     |                          |       | not held by Nigerians and shall ensure that Nigerians understudy the expatriates for a maximum of 4 years, after which the position shall become ‘Nigerianised’.   |
| 11. | Technology Transfer      | 43-46 | IOC shall submit a programme of planned initiatives aimed at promoting the effective transfer of technology from the IOC and alliance partners to Nigerian individuals and companies.  |
| 12. | Research and Development | 37-41 | <p>For every project for which a plan is submitted, an IOC shall carry out a programme and make expenditure, for the promotion of education, attachments, training, research and development in Nigeria in relation to its work programme and activities.</p> <p>IOC is required to submit a R&amp;D Plan which outlines a revolving 3 to 5 year plan for oil and gas related R&amp;D initiatives to be undertaken in Nigeria, together with a breakdown of the expected expenditures that will be made in implementing the R&amp;D Plan.</p>  |
| 13. | Financial Services       | 52    | <p>IOCs requiring financial services shall retain the services of only Nigerian financial institutions (where practicable) and; IOCs shall submit a Financial Services Plan (FSP), where financial services are required. The FSP should include among others details of financial services utilized in the past 6 months, a forecast of financial services required during the next 6 months, projected expenditure; and the nature of financial services required.</p> <p>All IOCs shall maintain bank account(s) in Nigeria in which it shall retain a minimum of 10 per cent of its total revenue accruing from its Nigerian operations.</p> |

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| 14. | Legal Services                                | 51        | <p>IOCs requiring legal services shall retain the services of Nigerian legal practitioners whose offices are located in Nigeria.</p> <p>This is implemented through the provision of a Legal Service Plan (LSP) to be submitted to the board every 6 months which shall extensively provide a report on the legal services utilized in the last 6 months by expenditure, a forecast of legal services required during the next 6 months and the projected expenditure for the services.</p> <p>In addition IOCs should provide a list highlighting the external solicitors utilized for legal services in the past 6 months, the nature of work done and the expenditure made by the operator.</p> |
| 15. | Insurance Services                            | 49& 50    | <p>All insurance risks relating to oil and gas business, operations or contracts shall be insured with an insurance company through an insurance broker registered in Nigeria under the provisions of the Act; and no insurance risks can be placed with foreign insurance companies without the written consent of the National Insurance Commission.</p>   |
| 16. | Establishment of a Joint Qualification System | 54,55 &56 | <p>Establishment of a Joint Qualification System (JQS) as an industry databank of available capabilities in the oil and gas industry</p>   |
| 17. | Penalties                                     |           | <p>IOCs that carry out any project contrary to any of the provisions of the Act will be committing an offence and upon conviction shall be liable to a fine equal to 5% of the project sum for each project in which the offence is committed.</p>   |

**Appendix 2: Key Local Content Provisions in the Petroleum Act 2019**

|    |   | Section | Provision   |
|----|---|---------|---|
| 1. | Definition of Local Content                 | 2       | The added value brought to the Kenyan economy from the 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.  |
| 2. | Definition of Local Community               | 2       | People living in a sub-county within which a petroleum resource under is situated and are affected by the exploitation of that petroleum resource.  |
| 3. | Monitoring and Enforcement of Local Content | 51      | The Energy and Regulatory Authority is Established under section 9 of the Energy Act to enforce local content requirements. EPRA is mandated to supervise, co-ordinate, and manage the development of local content.<br><br>Further, EPRA is mandated to—<br>oversee, coordinate and manage the development of local content; prepare guidelines to include targets and formats for local content plans and reporting; make appropriate recommendations to the Cabinet Secretary for the formulation of local content Regulations; set minimum requirements for local content in local content plans; public education and awareness; undertake local content monitoring, audit and enforcement; and perform any other functions as may be prescribed in regulations. |
| 4. | Local Content Requirements                  | 50      | Contractor shall give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or in absence of a Kenyan standard any other internationally acceptable standard   |

|    |                             |    |  |
|----|-----------------------------|----|--|
|    |                             |    | <p>EPRA shall approve; and</p> <p>Contractor shall ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain:</p> <p>Contractors shall before engaging in petroleum operations prepare and submit a long term and annual local content plan which corresponds with the work program to the Authority for approval.</p> <p>Local content plan shall address— employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; succession plans for positions not held by Kenyans; consultancy services; construction services; hospitality services; transport services; security services; clearing and forwarding services; Inspection services; and other goods, works and services as may be prescribed in the regulations.</p> |
| 5. | Local Content Training Fund | 52 | <p>The training fund is established for the purpose of training Kenyan nationals in upstream petroleum operations.</p> <p>All moneys raised by the contractors as training contribution shall be paid into the Training Fund.</p> <p>The training contribution shall be such amount as is specified in the petroleum agreement.</p>  |

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