Nigeria’s National Content Bill: The Hype, the Hope and the Reality

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Abstract

Nigeria’s recent efforts to pass local content legislation with stringent targets and stiff penalties have drawn widespread attention, spurred ongoing debate and prompted numerous international workshops and seminars. Lack of local content has been blamed for high unemployment and lack of capacity, and even been linked to militancy in the Niger Delta region. After much debate and delay, the bill has become law. This article reviews the bill’s history and tracks the hype surrounding Nigeria’s moves towards a legislative mandate. It discusses the provisions of the bill, observing that it is poorly drafted, vague and therefore difficult to comply with. The bill could also violate international agreements, such as bilateral investment treaties and GATT, and is unnecessary in the face of contractual alternatives that could be successfully utilized to enhance local content. Contract models contain ample provisions for enabling local content and have been successfully employed by other resource-rich nations.

INTRODUCTION

Oil producing nations adopt local content policies to extend benefits from oil and gas to other sectors of the economy. An observer to the rhetoric surrounding Nigeria’s efforts to pass local content legislation may be forgiven for believing that legislation is the only means of compelling international oil companies (IOCs) to enhance local content.

Ignored in the zeal to enact stringent local content legislation and amidst the finger-pointing at IOCs for social and economic woes, is that a readily available and equally effective option exists: a contractual framework which presents an opportunity for robust collaboration between the national oil company, the Nigerian National Petroleum Corporation (NNPC), and the IOCs to effect meaningful change. The contract model has been effective in other oil producing nations and would require changes within NNPC as well as its active engagement with IOCs. The contractual alternative has not been tried in Nigeria and found wanting; it has not been tried at all.

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BACKGROUND

With 36 billion barrels of proven oil reserves, Nigeria had been Africa’s largest oil producer, until it was recently overtaken by Angola owing to shut-ins caused by militancy in the Niger Delta region.¹ Nigeria ranks as the 11th largest producer in the world.² It is a member of Oil Producing and Exporting Countries (OPEC) and its importance to the West lies not only in the high quality of its crude but also in its accessibility to western markets and exploration potential.

The Nigerian economy is oil dependent, with three primary business models: joint ventures, production sharing contracts (PSCs) and risk service contracts. In joint ventures, the national oil company, NNPC, “partners” with an IOC to exploit oil and gas resources though a joint operating agreement. NNPC owns the asset while the IOC typically operates and provides the funding; both parties share in revenue and costs based on their participation interests. Under PSCs, the NNPC owns the concession and employs IOCs as “contractors” to operate it; IOCs fund operations but revenues are shared between the parties.

In risk service contracts, the oil prospecting licence title is held by NNPC, while the IOC, which operates, is deemed a contractor but funds exploration and production activities.³ Unlike PSCs, the risk service contract covers only one oil prospecting licence, is limited to five years, and terminates if there is no commercial discovery.⁴ Under any of the models above, operations are carried out largely by IOCs. PSCs and risk service contracts share common characteristics, such as: (1) the contractor is not a co-owner with NNPC and has no working interest; (2) as a contractor, the IOC works under NNPC supervision; (3) the IOC finances all stages of the operation, though this applies in a risk service contract only if the contractor is retained in the production stage.⁵ Focus on the contractual regime relating to local content will focus on PSCs, given the government’s stated intent to restrict new contractual agreements to PSCs and the anticipation that the bulk of Nigeria’s future productions will be from deepwater operations, with an expected production of 1.23 million barrels in the next five years.⁶

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⁴ Ibid.
⁵ Ibid.
⁶ Of the 22 blocks offered in 2000, 11 were deep offshore, seven in shallow waters and four onshore. There were no bids for the shallow or onshore concessions. See “The significance of the Bonga offshore oil platform attack” (25 June 2008) The Oil Drum, available at: <http://http://www.theoildrum.com/node/4196> (last accessed 20 September 2009).
POVERTY AMIDST PLENTY AND THE LOCAL CONTENT PARADIGM

Despite earnings of $400 billion in oil revenues since 1970, living standards in Nigeria remain harsh, and the fruits of oil and gas have not filtered into the larger economy, fuelling the perception that oil has been more of a curse than a blessing. Revenues have been squandered, corruption is systemic, infrastructure has decayed, and other sectors of the economy have been neglected.

The World Bank reports that in 2008 oil accounted for 97.5 per cent of export earnings and 81 per cent of government revenues. Notwithstanding the country’s immense oil wealth, Nigerians are mired in poverty, with 54 per cent of the approximately 148 million citizens living on less than $1 per day.

Though political instability, economic mismanagement and theft by Nigeria’s rulers have contributed to this sad turn of events, some blame the nation’s social and economic woes for the drain of capital, as foreign firms provide the bulk of goods and services in the industry, limiting Nigerians to a negligible share of the approximately $10 billion expended annually. NNPC observed “low Nigerian Content in the industry, evident from the over 80 per cent of work value carried out abroad. This has led to a dearth in jobs, skills development, capacity building/utilization and lack of sustained national economic development”. As Nigeria’s former minister of state for petroleum, Odein Ajumogobia, lamented: “In the last 20 years alone, the industry has generated total revenues of some $300bn while industry spend has grown to some $12bn annually in the last five years. Despite this activity level, the country has little to show in terms of local capacity and capability for indigenous participation.”

While a combination of lack of capacity, infrastructure, basic industry and corruption probably contributed to the drain of capital, economic woes (including Nigeria’s endemic unemployment, lack of local capacity, widespread poverty, and also militancy in the Niger Delta) are often blamed on a lack of local content. Local content has metamorphosed into the silver bullet that cures all ills, notwithstanding systemic corruption, political instability, fiscal mismanagement, unemployment and crime; it has become the single engine for job creation, cross-sectoral growth and capacity building.

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7 Revenue Watch Institute, above at note 2.
9 Ibid.
11 HO Ajumogobia, speech at the Nigerian Content Consultative Forum (20–21 October 2008) (copy on file with the author).
12 Ibid.
WHAT IS LOCAL CONTENT?

NNPC defines local content as the “quantum of composite value added or created in the Nigerian economy through the utilization of Nigerian human and material resources for the provision of goods and services to the petroleum industry within acceptable quality, health, safety and environmental standards in order to stimulate the development of indigenous capabilities”.\(^\text{13}\) Local content therefore refers to activities that add value to the Nigerian economy through the employment of Nigerians and utilization of indigenous entities in the procurement of goods and services, with the goal of stimulating local companies and encouraging foreign investment.\(^\text{14}\) It involves promoting local input, increasing local administrative and technical capacity, using local raw materials and increasing cross-sectoral linkages.\(^\text{15}\)

The belief in the potency of local content as a cure for many of the country’s ills apparently underlies recent government efforts, commencing with the transition to civil rule and the election of Olusegun Obasanjo as president in 1999, to place a high premium on local content and to formulate a local content policy. In November 2001, the Obasanjo administration inaugurated a National Committee to review the level of local content in the Nigerian oil and gas industry and issued a directive to IOCs to maintain a mandatory minimum of 30 per cent local content for all goods and services.\(^\text{16}\)

In August 2003, the government set up another committee, headed by INTSOK (Norwegian Oil and Gas Partners) and subject to an existing memorandum of understanding between the governments of Norway and Nigeria. The INTSOK report concluded that “the Nigerian content development initiative requires an exhaustive systematic approach that would assess local content levels, identify constraints, develop clear policies and processes to stimulate local content growth, define clearly the roles and responsibilities

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13 See the definition on NNPC’s website at: <http://www.nigcontent.com/index.php?option=com_content&task=view&id=128&Itemid=50> (last accessed 20 December 2010). This definition was adopted in sec 106 of the Nigerian Content Development Bill 2010.

14 INTSOK (Norwegian Oil and Gas Partners) “Enhancement of local content in the upstream oil and gas industry in Nigeria” (August 2003), available at: <http://bora.nhh.no/bitstream/2330/262/1/R25_03.pdf> (last accessed 20 December 2010). This study was commissioned by the Norwegian Agency for Development Cooperation and the Norwegian Ministry for Petroleum and Energy and executed through INTSOK, within the context of a memorandum of understanding signed between the governments of Norway and Nigeria.


of stakeholders”. These committee reports formed the basis for ensuring legislative initiatives and other governmental efforts, including through NNPC, to promote local content.

As part of the initiative to spur local content, a legislator in Nigeria’s House of Representatives, Chudi Offodile, sponsored the Nigerian Content Development Bill 2003, with the following key provisions:

- Dual stewardship: The Department of Petroleum Resources (DPR) to monitor compliance with the bill, while NNPC to ensure compliance by its joint operations partners, contractors and service providers.
- A Joint Qualification System be established to keep a data bank of qualified domestic firms able to provide services in the industry. The Joint Qualification System shall also set specific local content targets on various goods and services, based on IOC classifications.
- An implementation process be established, requiring NNPC and its joint venture partners to implement a “uniform project implementation procedure” of their joint operating agreement with applicable changes to conform to the act.
- A penalty of N1m for category A companies be provided, with a potential suspension of their licence for three years.
- IOCs and service companies in Nigeria to ensure over ten years that 95 per cent of their managerial, professional and supervisory staff are Nigerian.
- The DPR be required to establish a local content performance monitoring procedure.
- The DPR be required to set local content targets and conditions for IOCs to compel joint ventures or partnerships to be with indigenous companies and to effect technology transfer.
- IOCs be required to invest in local fabrication, infrastructure and other facilities in Nigeria.

17 Ibid.
19 See sec 2 of the Nigerian Content Development Bill, 2003.
20 See id, sec 4.
21 See id, sec 5.
22 See id, sec 6.
23 See id, sec 8.
24 See id, sec 12.
25 See id, sec 13.
26 See id, sec 14.
27 See id, sec 16.
Though the 2003 bill was not passed into law, by the end of the Obasanjo administration NNPC started to implement some of its key provisions. For example, in March 2005 NNPC established the Nigerian Content Division, headed by a group general manager and tasked with working with the IOCs to “develop strategies, drive implementation and ensure compliance with directives by the oil companies”.28 NNPC also introduced the Joint Qualification System to facilitate the contracting process by providing a database of available “goods and services suppliers to the Nigerian petroleum industry and streamline the prequalification process”.29

Among the bill’s weaknesses are that it provided for establishing a Nigeria Content Monitoring Board, but contained no provisions on the procedure for appointment, tenure or reporting lines, nor did it provide a mechanism for appealing an adverse board decision. The draft bill imposed impractical processes and failed to address regulatory oversight and interfaces between NNPC and the DPR. In addition, only the president would grant waivers, an excessive measure when such authority could be delegated to the minister of petroleum resources. The bill also required operators to manufacture items to replace imported products, although operators are clearly not engaged in manufacturing. Requiring board approval of low value contracts would also increase bureaucratic delays and result in cost increases. Furthermore, it provided for harsh penalties, including the possibility of imprisonment for five years.

**NNPC directives**

Even pending review and hearings on the 2005 Nigerian Content Development Bill, the administration of former President Olusegun Obasanjo continued with its aggressive local content initiative and set targets of 45 per cent local content by 2006 and 70 per cent by 2010. To implement this requirement, a local content division was established within NNPC, which issued local content directives to IOCs,30 requiring domestication of engineering design, project management, fabrication and integration of fixed platforms weighing up to 10,000 tons, fabrication of all piles, decks, anchors, buoys, jackets, etc. The ambitious directives had little correlation with Nigeria’s capacity. Even the NNPC has belatedly acknowledged lack of capacity in some of the sectors above, such as insurance. NNPC’s group general manager for insurance, Odunayo Bammeke, recently acknowledged 33 per cent local content in insurance but noted that the Nigerian insurance industry lacked the requisite

29 Ibid.
He asserted that the statistical profile of capacity in the insurance industry ruled domestic insurance companies out of consideration. The lack of financial strength and required technical competence of domestic insurers and re-insurers, however, did not preclude NNPC’s Local Content Division from mandating that IOCs use them.

Notwithstanding capacity limitations, remarkable efforts were undertaken by IOCs to implement the directives, resulting in general compliance with the above requirements but with challenges remaining in the following, limited areas:

- All third party services relating to fabrication and construction including non-destructive testing, mechanical tests, post-weld heat treatment as well as certification of welding procedures and welders must be carried out in Nigeria. The Nigerian Institute of Welding must certify all such tests in collaboration with international accreditation bodies.
- Henceforth, all line-pipes, sacrificial anodes, electrical switchgear paints, ropes, pigs, heat exchangers and any other locally manufactured material and equipment must be sourced from in-country manufacturers.
- All seismic data acquisition projects, all seismic data processing projects, all reservoir management studies and all data management and storage services are to be carried out in Nigeria.
- All concrete barges and concrete floating platforms are to be fabricated in-country.
- Operation and maintenance of offshore production units are to be performed by Nigerian companies.
- All international codes and standards used in the industry are to be harmonized to support utilization of locally manufactured products such as paints, cables, steel pipes, rods, sections and ropes and to improve capacity utilization in local industries. Clauses that create impediments to or exclude participation of local companies should not be included in any invitation to tender.

Lack of capacity remains the primary challenge in attaining these objectives. For example, regarding the first requirement, the availability of satisfactorily trained welders remains an issue, as well as the capacity of the Nigerian


Institute of Welding to provide required certification. Line-pipes, sacrificial anodes, electrical switchgear paints, ropes, pigs and heat exchangers are to be manufactured locally, but there is no domestic manufacturer for code compliant pipes and only one manufacturer for water line-pipes.

The directives were issued with scant regard for the country’s technical manufacturing base and technical competence, availability of required equipment, or the financial capacity of domestic companies to execute any major contracts. Nor does it appear that their capacity to meet requisite health, safety and environmental standards was considered.

Regarding the employment of qualified Nigerians, it is recognized that the country’s universities and institutions of higher learning are in a mess and “it is not uncommon to read and hear that employers of labour in the country are increasingly dissatisfied with the quality of graduates from Nigerian universities”. Notwithstanding its high Nigerianization expectation, NNPC now acknowledges that, “[d]espite the execution of mega projects and development of deepwater blocks, there have been acute local skill shortages and dearth in competent technical manpower to participate in execution of these projects. The industry has therefore over time depended on foreign labour to take up key roles in project execution and operations of the facilities”. The industry, NNPC and the Nigerian government are now collaborating to develop human capacity by providing additional training and enhancing existing training programmes.

2008 National Content Development Bill
The Nigerian Senate passed Senator Maeba’s 2005 Nigerian Content Development Bill in November 2006, but it did not pass the House of Representatives and, consequently, had not been enacted into law by the end of the Obasanjo administration in 2007. With the election of President Umaru Musa Yar’Adua and a new National Assembly, Senator Maeba revived his bill, which was revised and passed by the Senate in 2008 and sent to the House of Representatives for passage and awaited action with the overhaul of the Nigerian petroleum industry through the omnibus Petroleum Industry Bill, discussed further below.

The 2008 version sought to establish general principles to ensure international competitiveness of the materials, equipment and services provided

33 Ibid.
34 Ibid.
by all companies in the industry and maintained the concept of a National Content Monitoring Board to administer local content. Generally, it was an improvement over the earlier version. Other key features of the revised bill include:

- Instead of imprisonment for non-compliance, a fine of 5 per cent of the project cost or cancellation of the project.  
- Minimum of 60 per cent Nigerians on the board of directors.  
- Use of locally manufactured goods must meet industry specifications.  
- Local content will be included in bid evaluations, with the contract being awarded to the company with the highest local content value.  
- Contracts shall not be awarded solely on the basis of cost; a 10 per cent mark-up is allowed for awards to Nigerian companies.  
- Approvals from the National Content Board to be provided within ten working days.  
- Submission of an annual technology transfer plan.

The bill, however, contained stringent requirements for IOCs, such as: 95 per cent Nigerianization for managerial/professional/supervisory positions; maximum of 5 per cent of management positions for expatriates; operator or other companies to submit a project plan to establish a local government area office for the project; the minister to make regulations to require operators to invest in or set up a facility, factory or production units within Nigeria for the purpose of providing any services otherwise being imported into Nigeria.

Like the NNPC directives, the draft National Content Development Bill had a similar disregard for human, technical, financial and manufacturing capacity. It tasked IOCs with furnishing requisite human, manufacturing and materials capacity and sought to penalize them for the country’s technical, financial and educational deficiencies. It also neglected the cost impact of compliance, notwithstanding NNPC’s notoriety for failing to fund its share of joint venture operations.

In addition, the bill presented definitional hurdles regarding exactly what constituted an “indigenous” company. Arguably, a Nigerian affiliate of an international service provider could qualify as a Nigerian company though

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37 See secs 71 and 112 of the draft Nigerian Oil and Gas Industry Content Development Bill.  
38 Id, sec 70.  
39 Id, sec 37.  
40 Id, sec 14.  
41 Id, sec 15.  
42 Id, sec 25.  
43 Id, secs 46 and 47.  
44 Id, sec 37.  
45 Id, sec 34.  
46 Id, sec 27.  
47 Id, sec 49.
manufacturing is outsourced outside the country, as could a shell Nigerian company formed with Nigerian fronts, frustrating the intent of the bill. Finally, no reason was adduced for focusing solely on the upstream petroleum sector, where IOCs dominate, excluding midstream and downstream sectors.

Nonetheless, the bill was passed by the Nigerian Senate on 17 April 2008 and sent to the Nigerian House of Representatives for consideration even as the then minister of petroleum resources, Dr Rilwanu Lukman, spearheaded efforts to pass a comprehensive Petroleum Industry Bill (PIB) to reform the industry, including local content requirements.48

The 2010 National Content Bill
The 2008 version, renamed the Nigerian Oil and Gas Industry Content Development Bill, 2010, was passed by both chambers of the National Assembly and signed into law by President Goodluck Jonathan on 22 April 2010.49 The Nigerian Oil and Gas Industry Content Development Act (the Act) essentially codifies the 2008 bill, with some revisions.

As contemplated in the previous iterations, it establishes a Nigerian Content Development and Monitoring Board (the Board)50 and a Nigerian Content Development Fund to implement local content, the fund to be financed by a mandatory “one per cent of every contract awarded to any operator, contractor, subcontractor or other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry”.51

As in the 2003, 2005 and 2008 drafts, the act requires “all regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry” to incorporate Nigerian content as a key element in project development and management.52 It further requires that “first consideration” be given to Nigerian operators in the award of oil blocks, oil field licences and in projects where contracts are awarded in the Nigerian oil and gas industry; additionally Nigerian indigenous service companies shall be given “exclusive consideration” where they have the requisite capacity.53

50 Id, sec 4.
51 Id, sec 104.
52 Id, sec 2.
53 Id, sec 3.
Other key provisions and problems

The Act defines “operator” to include NNPC, its subsidiaries, joint venture partners and entities operating in the Nigerian oil and gas industry, begging the question as to how the Board will enforce the Act against NNPC in practice, especially when, as discussed further below, NNPC sits on the Board’s Governing Council.

Under the Act, operators must submit a Nigerian content plan as a condition for bidding for any licence, permit or interest or before commencing any oil and gas project. The plan must contain provisions showing that: “first consideration shall be given to services provided from within Nigeria and to goods manufactured in Nigeria”; and “first consideration for training and employment” of Nigerians in the work programme for which the plan was submitted.

While the Act ostensibly applies to virtually anyone engaged in the Nigerian oil section, to operators, “alliance partners and contractors”, it hardly disguises its key target: IOCs. Beyond complying with the provisions of the Act, they are also expected to act as enforcers: “The operator shall ensure that its partners, contractors and subcontractors are contractually bound to report Nigerian content information to the operator … The operator shall effectively communicate its Nigerian content policies and procedures to its contractors and subcontractors and … monitor and enforce their compliance”. Accordingly, operators who are already subject to the Board’s enforcement must also enforce the provisions of the Act vis-à-vis contractors. The Act doesn’t say how or when. Nor is it clear whether an operator’s failure to enforce is actionable.

Nonetheless, the penalty for breaching the Act is a fine of 5 per cent of the project value or cancellation of the project. Thus, while the Board shall “issue directives to operators, contractors and other entities”, it looks to the operator to ensure compliance. Indeed, the Act requires operators to submit an annual “Nigerian Content Performance Report covering all its projects and activities for the year under review” but there is no similar requirement for contractors.

The Act mandates technology transfer, requiring the operator to submit an annual plan, “satisfactory to the Board”, requiring operators to “carry out a programme in accordance with the country’s own plans and priorities, to the satisfaction of the Board, for the promotion of technology transfer to Nigeria in relation to its oil and gas activities”. Operators may rightfully be puzzled by what the “country’s own plans and priorities” may be at any

54 Id, sec 106.
55 Id, sec 7.
56 Id, sec 10.
57 Id, secs 65 and 66 (emphasis added).
58 Id, sec 60.
59 Id, sec 43.
given time. While the Act purports to apply uniformly to all operators, it is hard to imagine this provision applying to “Nigerian companies”.60

The Act further requires that operators set out a program of technology transfers from the operator and alliance partners to Nigerian individuals and companies and for operators to facilitate technology transfer without regard for intellectual property laws: “The operator shall give full and effective support to technology transfer by encouraging and facilitating the formation of joint ventures, partnering and the development of licensing agreements between Nigerian and foreign contractors and service or supplier companies agreements for all such joint ventures or alliances shall meet the requirement of Nigerian content development to the satisfaction of the Board”.61 This requirement is vague and hard to decipher.

The Act further authorizes the minister of petroleum resources to “require any operator to invest in or set up a facility, factory, production units or other operations within Nigeria for the purposes of carrying out any production, manufacturing or for providing a service otherwise imported into Nigeria”.62 The breadth of this authority and absence of nexus to oil and gas operations reasonably raises a question as to the true intent of the Act. A plain language construction of this provision empowers the minister to require an operator to set up a power plant, manufacturing plan or training for services “imported” into Nigeria. Little light is shed on what services or products “otherwise imported into Nigeria” means.

Operators are further required to provide a satisfactory plan to establish a project office where project and procurement decision-making will take place and in the “Catchment Area where the project is to be located” before commencing work63 “Catchment area” and what constitutes a “project office” are undefined. Moreover, the provision is vague: the plan shall be “to the satisfaction of the Board” but submission of the plan is “where applicable”. Significantly, even where the project office is located in a “catchment area”, the Board must approve operators’ “list of personnel” employed there.64 Additionally, the Board can “require any operator to maintain an office in a Community where the operator has significant operations”.65 Like “catchment area”, the “community where the operator has significant operations” is undefined and will presumably be as directed by the Board in its sole discretion. How this provision will apply to Nigeria’s significant operations offshore remains unclear.

60 See id, sec 106, defining a “Nigerian company” as a “company formed and registered in Nigeria … with not less than 51% equity shares [sic] by Nigerians”.
61 Id, sec 45.
62 Id, sec 47 (emphasis added).
63 Id, sec 25.
64 Id, sec 26.
65 Id, sec 27.
The requirements to locate a project office in a “catchment area” and “community”, as well as for the Board’s approval of the list of employees based in project offices, appear insensitive to operators’ legitimate security concerns in light of the militancy in the Niger Delta area and the spate of kidnappings and attacks in other areas.

Another notable weakness is the apparent lack of confidentiality in the Act: the list of operators’ personnel in project offices could fall into wrong hands and those employees be targeted. Lack of confidentiality is acute in yet another area: the Act’s requirement that all operators submit to the Board their “legal services plan” every six months, including a comprehensive report on legal services used in the past six months, a forecast of anticipated legal services in the coming six months, projected expenditure for legal services, a list of attorneys employed for the past six months, the nature of work done, expenditure by the operator and the legal services budget for the past year.66 Potentially sensitive information would be divulged to the Board without any assurance of confidentiality.

As with earlier iterations, the Act mandates operators to comply with minimum specifications for Nigerian content as listed in the schedule to the Act,67 which contains specific requirements for several functions, including front-end engineering and design, detailed engineering and other engineering services, fabrication and construction, materials and procurement, well and drilling services/petroleum technology, and research and development.68

Also codified in the Act is the requirement in previous drafts to prescribe employment and training of Nigerians: Operators are to: give Nigerians “first consideration” for employment and training; submit an employment and training plan; provide a time frame for employment opportunities for each project phase; and provide quarterly reports of their employment and training activities to the Board.69 Operators must also provide training where “Nigerians are not employed because of their lack of training”.70 There is no prescribed matrix for who will determine, when or how, that “Nigerians are not employed because of their lack of training”. As discussed below, “first consideration” is not defined but one may assume that it means first preference.

Ultimately, the Board in its sole discretion assesses an operator’s compliance with the Act. Curiously, the Act does not establish an objective standard, merely requiring that an operator’s Nigerian content plan be to “the satisfaction of the Board”.71 The Board issues a certificate of authorization if it is

66 Id, sec 51.
67 Id, sec 11(1).
68 Ibid. See sched to the Act.
69 Id, sec 28.
70 Id, sec 30.
71 See id, secs 7–9.
satisfied with the plan, but may, as part of its review, conduct a “public review”. In any event, its review of the plan must be concluded within 30 days “from the date of commencement of such review or assessment”. It is not specified when the review of the plan commences, what constitutes “public review” or the purpose thereof. Nor are there any safeguards to avoid it becoming a media spectacle or degenerating into the public humiliation of an operator. Other unanswered questions include whether the “date of commencement of such review” is the same as when the plan was submitted by an operator, where the “public review” will be held and under what standards, whether the plan is deemed approved or denied should the Board fail to act within 30 days, or whether the Board’s denial can be appealed and, if so, when, where and under what standard.

Significant flaws in the Act

The Board’s independence and objectivity

While the Act purports to create an independent legal entity entrusted with its administration and enforcement (the Board), it quickly resolves any misapprehension of actual independence, making clear that the Board is tasked with implementing “the regulations made by the Minister [of petroleum resources] in relation to any aspect of this Act”. It further provides that the minister “may issue to the Board directives in relation to Nigerian content development with respect to the application, administration and implementation of this Act”. Besides exploding the fiction of an independent and objective Board, the Act broadly empowers the minister to implement regulations “in relation to any aspect of this Act” without further legislative or judicial review.

Additionally, the Board’s Governing Council (the Council) includes representatives of NNPC, the Ministry of Petroleum Affairs, and the “agency in charge of technical regulation of the industry”: the Directorate of Petroleum Resources (a division of the Ministry of Petroleum Resources and which is responsible inter alia for regulating oil and gas operations).

72 Id, secs 8 and 9.
73 Id, sec 9.
74 Id, sec 70.
75 Id, sec 100.
76 Id, sec 70(b).
77 Id, sec 72. See the inclusion of a representative of the DPR, Emmanuel Kpenwin Bekee, amongst the representatives on the Board’s Governing Council: <http://www.ncdmb.gov.ng/init.php> (last accessed 12 September 2010). According to NNPC’s website, the NNPC established the Nigerian Content Consultative Forum, which generally comprises representatives from the Nigerian Society of Engineers, oil and gas industry, organized private sector, bankers committee, etc. “Each forum holds monthly working sessions for respective industry sectors to obtain input and feedback for planning and implementing the Nigerian Content agenda”. See: <http://www.nigcontent.com/index.php?option=com_content&task=view&id=49&Itemid=71> (last accessed 12 September 2010). The Petroleum Technology Association of Nigeria is “an association of Nigerian Indigenous Technical Oilfield service companies in the upstream and downstream...
The Act’s definition of “operator” subject to the Board includes NNPC. It appears that NNPC is the only “operator” that sits on the Council of the Board created to regulate it, to the exclusion of any other operators or industry representatives.\(^7^8\) Other members of the Council include the National Insurance Commission, Council of Registered Engineers of Nigeria, Nigerian Content Consultative Forum, Petroleum Technology Association of Nigeria: industry groups which traditionally advocate local content, but not a single representative of IOCs or operators.\(^7^9\)

**Relationship to other laws**

The Act seems to take precedence over existing legal regimes in the oil and gas industry, including the seminal Petroleum Act: “Notwithstanding anything to the contrary contained in the Petroleum Act or in any other enactment or law, the provisions of this Act shall apply to all matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian oil and gas industry”.\(^8^0\)

Because compliance with the Act is a “major criterion for award of licences, permits and any other interest”,\(^8^1\) non-compliance could result in the loss of concessions and the non-renewal of expiring oil mining leases. Overruling the Petroleum Act and the legal regimes that formed the basis of PSCs and production sharing agreements, and imposing additional burdens beyond those contemplated in those agreements could violate the stability of their contractual provisions.

**Vague**

The “definition” section attempts to define a mere 12 terms, leaving many key terms vague. For example, critical to the Act is the concept of “first consideration” to Nigerians but even that term is undefined, as are “alliance partner”, “catchment area”, “major contractor”, and others.

Where the Act attempts a definition, the result is questionable. For example, it defines “partner” to mean “any foreign company working on any project in partnership or as major contractor to an operator”.\(^8^2\) This definition is arguably contrary to established law, disregards express disclaimers of “partnership” in contract arrangements and impermissibly imposes fiduciary duties.

\(^7^8\) Id, sec 72.
\(^7^9\) Ibid.
\(^8^0\) Id, sec 1.
\(^8^1\) Id, sec 3.
\(^8^2\) Id, sec 106.
No standard for review or avenue for redress
There is no mechanism for appeal or redress. In particular, where the Board is granted unfettered discretion, there are no checks on its power, no provision for judicial review, and no standard for Board action to safeguard against abuse or against arbitrary and capricious rulings. The Board will therefore act as the judge, jury and executioner.

Encourages corruption
Nigeria has been synonymous with corruption, ranking 121st out of 180 in Transparency International’s 2008 Corruption Perceptions Index. For a country trying to shed its reputation for corruption, the Act brazenly allows the Board to “accept gifts of money, land or other property on such terms and conditions, if any, as may be specified by the person or organization making the gift”, potentially setting the stage statutorily to entrench corruption further.

Relationship with other agencies/regulators
The Act fails to address the relationship of the Board to NNPC and the Directorate of Petroleum Resources. In addition, NNPC has maintained a Nigerian Content Division. Nothing in the Act precludes additional local content requirements by other agencies, potentially subjecting operators to enforcement by disparate groups.

Finally, the Act repeats the flaws of earlier iterations and manifests a similar disregard for human, technical, financial and manufacturing capacity. It tasks IOCs with furnishing requisite human, manufacturing and materials capacity and penalizes them for the country’s technical, financial and educational deficiencies.

Complying with the vague, stringent provisions of the Act, under the unfettered discretion of the Board, will be daunting for operators and contractors in Nigeria. The many undefined nebulous concepts, poor drafting, apparent failure to harmonize with existing law, and discriminatory intent in focusing inordinately on one class of operators (IOCs) could form a basis for constitutional challenge. Besides legal challenges, the Act could lead IOCs to leave Nigeria and usher in an era of uncertainty and litigation.

The Petroleum Industry Bill
In addition to the recently passed Act, the draft PIB also contains “among the strongest and most far reaching provisions in the world with respect
to the promotion of Nigerian content”,\(^{86}\) such as the following local provisions:

“403. (1) The holder of a petroleum mining lease shall ensure that: (a) the number of Nigerian citizens employed by him in connection with the lease in its managerial, professional and supervisory grades or any other corresponding grades designated by him shall not be less than ninety five per cent of persons employed by him in those grades and further that Nigerians constitute a minimum of sixty per cent of its Board of Directors; and (b) the number of Nigerian citizens in any one such grade shall not be less than 60\% of the total; and (c) all skilled, semi-skilled and unskilled workers, or any other corresponding grades designated by the lessee are citizens of Nigeria.

404. (1) A licensee of a petroleum prospecting licence shall within twelve months of the grant of his licence, and the lessee of a petroleum mining lease shall on the grant of his lease, submit for the Minister’s approval, a detailed programme for the recruitment and training of Nigerians.”

The draft legislation essentially duplicates requirements in the recently passed Act and restates a requirement in the Petroleum Act of 1969, Nigeria’s principal enactment governing oil and gas.\(^{87}\) Specifically, the first schedule to the Petroleum Act contains local content requirements in section 38:

“The holder of an oil mining lease shall ensure that -

(a) within ten years from the grant of his lease -

(i) the number of citizens of Nigeria employed by him in connection with the lease in managerial, professional and supervisory grades (or any corresponding grades designated by him in a manner approved by the Minister) shall reach at least 75\% of the total number of persons employed by him in those grades; and

(ii) the number of citizens of Nigeria in any one such grade shall be not less than 60\% of the total; and

(b) all skilled, semi-skilled and unskilled workers are citizens of Nigeria.”

Thus, the local content requirement in section 403 of the draft PIB increases the managerial, professional and supervisory percentage from 75 in the

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\(^{86}\) Dr Rilwanu Lukman, then minister of petroleum resources (keynote address on the proposed petroleum industry bill, 16 July 2009), available at: <http://www.nnpcgroup.com/petIndsBillDocs/SpeechByHonorableMinisterToIndustry.pdf> (last accessed 27 October 2009).

Petroleum Act within 10 years to 95 immediately.\textsuperscript{88} It restates the Petroleum Act’s requirements noted above that the number of Nigerian citizens in any one such grade be not less than 60 per cent of the total, and that all skilled, semi-skilled and unskilled workers be Nigerian citizens. The only change in this section is the new requirement that Nigerians constitute at least 60 per cent of the board of directors, a requirement which has already been incorporated into the Act.

**BEYOND THE RHETORIC: IS LEGISLATING LOCAL CONTENT NECESSARY?**

Legislating for local content is over-kill. First, the Petroleum Act already contained local content requirements for oil mining lease holders, as shown above. Secondly, it is clearly in the interest of IOCs to maintain their licences by fulfilling local content obligations. It is also cheaper. No IOC needs local content legislation to realize the cost-effectiveness and relationship building impact of hiring qualified Nigerians or acquiring Nigerian goods and services that meet quality, safety, health, timing and pricing requirements, rather than sourcing personnel, goods and services from overseas. Faced with militancy and the kidnapping of expatriates in the Niger Delta, coupled with general insecurity in the country, it is unlikely that IOCs will seek to employ expatriate labour when qualified Nigerians are available.

Thirdly, the draft PIB, which imposes obligations on “the holder of a petroleum mining lease” may miss its intended target, IOCs, because, under the PSC framework, the national oil company, NNPC, is the holder of the licence. Section 44(3) of the Nigerian Constitution vests the Nigerian government with ownership and control of all petroleum in, under or upon any land in Nigeria. Section 1 of the Petroleum Act reaffirms this ownership model, stating that “the entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State”. Additionally, clause 3.1 of the 1993 PSC provides that “[t]he CORPORATION [NNPC], as holder of all rights in and to the Contract Area, hereby appoints and constitutes the CONTRACTOR the exclusive company to conduct Petroleum Operations in the Contract Area”.

Because NNPC has not granted an interest in the concession, the IOC may not be deemed a licensee; indeed, under the PSC framework, NNPC employs the IOC as a contractor to “conduct Petroleum Operations”.\textsuperscript{89} Accordingly, the local content obligations that befall the “holder” arguably apply to NNPC. The legislation raises interesting questions as to how the NNPC will self-regulate and, if regulation is entrusted to another agency, such as the Ministry of Petroleum Resources, how will it penalize another government agency (NNPC) for non-compliance? This potential quagmire is avoidable by a

\textsuperscript{88} See sec 403(a) of the draft PIB, above at note 48.

\textsuperscript{89} Clause 3.1 of the 1993 PSC.
contractual approach where NNPC leverages existing contractual provisions to require IOCs to conform to local content obligations, rather than a mandated legislative route which promises little besides psychological comfort.

Fourthly, to the extent that the local content requirement in the PIB survives notwithstanding passage of the Act, it is uncertain whether it will be harmonized with the Act and subject to the Board’s oversight or whether it will create a parallel supervisory structure, with the potential for added confusion and red-tape.

Finally, no additional legislative or other regulatory anchor was necessary for NNPC’s local content directives and initiatives; otherwise, its directives and demands would be legally tenuous and unsustainable. NNPC did not wait for the passage of a local content bill to establish a joint qualification system to maintain a database of qualified domestic firms, set up a National Content Division, or issue numerous directives to IOCs, and no bill has been necessary for the growth spurts in Nigerian local content because none is necessary.

LOCAL CONTENT LAWS AND INTERNATIONAL TRADE AGREEMENTS

To the extent that the legislative local content mandate befalls IOCs, it arguably violates international agreements such as the General Agreement on Tariffs and Trade (GATT)90 which bound Nigeria when it joined the World Trade Organization on 1 January 1995, as well as bilateral investment treaties (BITs). While the spectre of violating these international agreements may not have arisen in 1969 when the Petroleum Act was enacted (as Nigeria was not a member of the World Trade Organization and had not entered into any BITs), they are clearly applicable today. GATT prohibits national treatment in its article III:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources.”

Accordingly, local content requirements that mandate local sourcing of goods and services are arguably discriminatory and contrary to these provisions of GATT. Further, the Uruguay Round agreement on Trade Related Investment Measures (TRIMs) contains the following restriction in its article 2:

“1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.”

The illustrative list of measures inconsistent with GATT article III(4) includes the “purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production”. Accordingly, local content legislation could be susceptible to challenge under the TRIMs agreement to the extent that it mandates use of domestic products, unlike a contractual agreement where both parties agree to utilize local goods and services.

LEGISLATING LOCAL CONTENT COULD VIOLATE BILATERAL INVESTMENT TREATIES

BITs are agreements between nations in which each nation agrees to promote and protect the investments of the other. Nigeria has entered into BITs with Egypt, Finland, France, Germany, the Republic of Korea, the Netherlands, Serbia, Spain, Switzerland, Turkey and the United Kingdom.92 BITs typically offer the following substantive protection:

- Fair and equitable treatment of investments and an obligation not to impair by “unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal” of investments by protected nationals.
- Full physical security and protection, which shall not be less than that accorded either to investments of a contracting state’s own nationals or to investments of nationals of a third state.

91 Available at: <http://www.wto.org/english/docs_e/legal_e/18-trims_e.htm> (last accessed 10 December 2010).

92 These are the BITs available on the International Centre for Settlement of Investment Disputes website: <http://icsid.worldbank.org> (last accessed 27 October 2009).
• An “umbrella clause” where each contracting state agrees to observe “any obligation it may have entered into with regard to investments of nationals of the other Contracting Party”.

• Free transfer of payments relating to investments.

• A most-favoured nation provision, pursuant to which the host state must not treat one foreigner’s investments less favourably than that of an investor from another foreign country.93

While a contractual arrangement to enhance local content would not infringe BIT arrangements, local content legislation that favours indigenous companies, goods or services arguably infringes treaty agreements. Treaty violations could arise, for example, where the local content legislation targets IOCs without imposing a corresponding burden on indigenous oil and gas companies and on investments of nationals of other states, thereby breaching the fair and equitable treatment and “most favoured nation” requirements.

A CONTRACTUAL ALTERNATIVE EXISTS

The problem with a contractual approach is not that it has been tried and found wanting but that it has not even been tried. For example, Nigeria’s 1993 model PSC remains an excellent vehicle for enhancing local content as shown by a number of provisions. For example:

“5.1. Within two (2) months after the Effective Date and thereafter at least three (3) months prior to the beginning of each Year, the CONTRACTOR [IOC] shall prepare and submit for review and approval by the Management Committee, pursuant to Clause 6, a Work Programme and Budget for the Contract Area setting forth the Petroleum Operations which CONTRACTOR proposes to carry out during the ensuing Year, or in the case of first Work Programme and Budget, during the remainder of the current Year. The Management Committee shall review and approve such Work Programme and budget in accordance with Clause 6.3(e) prior to submission of the Work Programme and Budget to the Ministry.”

This provision clearly gives NNPC, a member of the management committee, veto power over a proposed work programme and budget as unanimity is required in all decisions of the Management Committee.94 Accordingly, NNPC determines contract awards and the extent to which local resources are utilized. It supervises IOCs and can challenge cost recovery when procurement breaches the PSC.


94 See clause 6 of Nigeria’s 1993 model PSC.
“Rights and Obligations of the Parties

(i) Prepare and carry out plans and programmes for industrial training and education of Nigerians for all job classifications with respect to Petroleum Operations in accordance with the Petroleum Act 1969;

(k) Employ only such personnel as are reasonably necessary to conduct the Petroleum Operations and employ qualified Nigerian Nationals to the maximum extent possible and in this respect:

(i) CONTRACTOR shall determine the qualifications and number of positions required to conduct Petroleum Operations in a prudent and cost effective manner.

(ii) Qualified Nigerians shall be employed in all non-specialized positions.

(ii) Qualified Nigerians shall also be employed in specialized positions such as those in exploration, drilling, engineering, production, and finance. CONTRACTOR shall have the right, subject to applicable laws, rules and regulations, to employ non-Nigerians in such specialized positions where qualified Nigerians are not available provided that CONTRACTOR shall recruit and train Nigerians for such specialized positions such that the number of non-Nigerian staff shall be kept to a minimum.

(l) Give preference to such goods which are available in Nigeria or services rendered by Nigerian nationals, provided such goods meet the industry standards and such services are of good quality and are offered at competitive prices and are timely available.”

Article 1.3 of annex E of the PSC provides that:

“The CONTRACTOR shall have the authority, subject to any limitations or restrictions established by the Management Committee, to enter into any contract or place any purchase order in its own name for the performance of services or the procurement of facilities, equipment, materials or supplies, provided that:

(a) Prior approval of the CORPORATION shall be obtained for all foreign contracts and foreign purchase orders awarded to third parties where the cost exceeds US$250,000;

(b) Prior approval of the CORPORATION shall be obtained for all local contracts and purchase orders where the cost exceeds N1m.”

Under these provisions, NNPC has a veto and must approve contracts above $250,000 before they are awarded to foreign companies. Further, articles 3.1 (c) and (d) also establish that NNPC’s approval is required before contracts are put out to tender by third parties:

“(c) When a contract is to be bid, the CONTRACTOR shall present a list of proposed bidders to the CORPORATION for concurrence not less than [sic]

95 Id, clause 8.
fifteen (15) working days before the issuance of invitations to bid to prospective contractors...

(d) If the CORPORATION has not responded within fifteen (15) working days from the date of the official receipt following the presentation of the list of proposed bidders as aforesaid, the list shall be deemed to have been approved."

Read together, these provisions clearly show that the Nigerian government, through NNPC, retains significant control over the procurement of goods and services. Both the Petroleum Act and the PSC show that there is an existing regime for implementing local content. Inquiry therefore should focus on why the government, through NNPC, has not leveraged these existing frameworks, and the reason for optimism that another layer of legislation would make a difference. The key lies with NNPC, which is the holder of the oil mining licence under the concession arrangements with IOCs and is a member of the Management Committee with an equal vote in the PSC.

THE NATIONAL OIL COMPANY IS PIVOTAL TO IMPLEMENTING CONTRACTUAL REQUIREMENTS

The success or failure of local content policy hinges on the role of the national oil company, such as NNPC, which owns the lease/licence and supervises the IOC contractor. As shown above, the Nigerian government, through NNPC, has notice of and approves, expressly or impliedly, the acquisition of goods and services from local or foreign sources. It is unlikely that an IOC would unilaterally acquire goods and services with the risk of NNPC later disallowing cost recovery.96 Accordingly, new laws are hardly necessary to enhance Nigerian local content; a collaborative framework between the IOCs and NNPC to implement existing contractual agreements is what is needed.

Such collaboration requires leadership by the national oil company, NNPC. The criticality of such engagement and NNPC’s role in the success of recent local content initiatives is demonstrated by the results of the 2006 NNPC local content directives which, according to NNPC’s former group managing director, Alhaji Lawal Yar’adua, resulted in “50 per cent of the available 5 million annual engineering man-hours [being] domiciled in the country compared to about 250,000 man-hours in the past. The number and tonnage of fabrication in-country has also increased steadily such that fewer items are destined for foreign yards”.97

If NNPC deserves praise for its success, it also is to be blamed for its failures. It has been reported that implementation of the local content initiative has been

96 Under clause 3.1 of the 1993 PSC, recoverable “operating cost” means “expenditures made and obligations incurred and approved by NNPC in carrying out petroleum operations”.

hindered by NNPC’s institutional deficiencies, including lack of human capacity, resulting in a failure to meet the 45 per cent local content target for 2006. A reputable Nigerian daily newspaper, *The Guardian*, observed that NNPC’s failure to approve contracts submitted by the IOCs resulted in the latter suspending projects given NNPC’s lack of a sense of urgency and related the minister of petroleum’s dismay that it took NNPC 24 months to approve a project.

Indeed, the Nigerian *Vanguard* reported that barely 18 per cent local content had been achieved by the end of 2006, a far cry from the 45 per cent target, and feared that even the approximately 18 per cent local content for 2006 would not be achieved in 2008. Additionally, as noted above, NNPC’s own group general manager of insurance, Odunayo Bammeke, stated that the Nigerian insurance industry lacked requisite underwriting capacity, leading to charges that NNPC is undermining local content efforts.

In an apparent rebuke, the Nigerian minister of state for finance, Reni Babalola, observed that “NNPC should be at the forefront of those supporting and encouraging the attainment of the local content targets for the industry, as it has done for other sectors”. Indeed, three years ago the chairman of the Nigerian Insurers Association, Dolapo Balogun, accused the Nigerian Content Division of NNPC of sabotaging the local content policy it is tasked with stewarding, alleging that “the Nigerian insurance market has not been able to enjoy the full benefits of the federal government’s local content policy … owing to the flagrant abuse of the processes for placing of insurance contracts by multi-national oil companies with the active support and connivance of the NNPC.”

NNPC blames the present administration for the lack of will to implement local content policies, resulting in the outsourcing of projects that could have been handled in-country. *The Guardian* cited an unnamed NNPC

99 Ibid.
senior manager as concluding that the administration’s retirement of two NNPC group general managers in charge of local content indicated the current administration’s lack of interest in implementing local content policies.\textsuperscript{105}

The reality is that the local content provisions in the PSC are for the benefit of the national oil company, NNPC. If a sophisticated entity such as the NNPC fails to enforce a contractual provision, it can hardly be expected that the counterparty, an IOC, will unilaterally implement such a provision on its behalf. The extent of the non-implementation of the local content provision therefore depends on NNPC.

In expensive, multi-billion dollar, deep, offshore projects, IOCs are likely to rely on proven, international service contractors rather than risk substantial amounts of money on untested local companies with questionable capacity, capital, business practices or insurance. The extent to which local firms are employed will probably be influenced by the degree of pressure mounted by the national oil company, such as NNPC.

Experience from other resource-rich nations that have successfully implemented local content policies contractually shows the pivotal role played by national oil companies; it further shows that contracts, such as PSCs, are potent vehicles for enhancing local content:

\textbf{Brazil}

The national oil company, Petrobras, is a world leader in deep-water drilling, with operations in Nigeria, Argentina, Colombia and even the United States. Brazil’s national petroleum agency was established in 1998 to regulate petroleum activity in the country and ensure local benefits from oil projects.

Local content is implemented contractually, with contracts for concession or authorization, rather than legislatively. To participate in the tender rounds, a company must first submit an expression of interest, have a legally accredited representative in Brazil, be accepted as technically, legally and financially qualified, and pay a participation fee. Bid evaluation considers the company’s commitment to acquire local goods and services; the higher the local content the more points given to the company.\textsuperscript{106}

\textsuperscript{105} Ibid.

\textsuperscript{106} HK Nordas, E Vatne and P Heum “The upstream petroleum industry and local industrial development: A comparative study” (report by the Institute for Research in Economics and Business Administration, Bergen: SNF report no 08/03).
Malaysia
The state-owned oil company, Petronas, has been a key vehicle to develop local content, utilizing the PSC to require IOCs to purchase local goods and services. The PSCs require IOCs to purchase goods and services locally to the maximum extent possible; Petronas’s approval is required for procuring goods or services outside the country.

Indonesia
The state-owned oil company, Pertamina, has also been a key vehicle to develop local content, through PSCs, which set a 35 per cent target; however, if local suppliers cannot meet the quality standards in a competitive manner, imports are allowed. Significantly, it has used PSCs as a vehicle for securing national interests.

Mexico
The state-owned oil company, Pemex, has played a key role in enhancing local content. Clause 38.1 of Mexico’s Generic Model Public Works Contract Based on Unit Prices includes the following local content requirement:

“Subject to the Applicable Provisions, including the international treaties ratified by Mexico, in case of subcontracting of the Works in accordance with Clause 16, the Contractor shall give preference to (i) acquiring goods of Mexican origin and (ii) hiring services provided by Mexican companies, whether private or state-owned, provided such goods and services are competitive with regard to price, quality, delivery time and any other condition relevant for subcontracting. ... Without prejudice to that provided in the Applicable Provisions, including articles 7 and 154 of the Federal Labor Law, in the hiring of the Contractor’s Personnel engaged in the execution of the Works, the Contractor shall give preference to professionals, workers and other employees of Mexican nationality when they have the qualifications and experience required for the Works provided in the Contract.”

Equatorial Guinea
Articles of the Equatorial Guinea’s model PSC also contains robust local content provisions:

“23.1: Preference to Equatoguinean Services
The Contractor and its subcontractors undertake to give preference to Equatoguinean services, materials, equipment, consumables and other

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107 Id at 38–39.
108 Ibid.
109 Id at 28.
goods whose quality and time of delivery are comparable to those available internationally, provided that the cost in Equatorial Guinea is no more than ten per cent (10%) above the cost of similar services, materials, equipment, consumables and other goods available internationally.

23.2: Employment and Training of Equatoguineans

23.2.1 From the Effective Date, the Contractor shall ensure priority employment for adequately qualified Equatoguinean personnel in all levels of their organization, as the employee’s skill allows, and as provided for in Article 23.2.2, shall train or contribute in the training of such personnel to enable them to qualify for any position relating to Petroleum Operations. Expatriate personnel may only be employed if the Contractor and its subcontractors have exhausted all possibilities of recruiting adequately qualified Equatoguinean personnel in the required area of specialization.

23.2.2 During the term of this Contract, the Parties comprising the Contractor (other than the National Company) shall spend a minimum of [insert amount] Dollars ($ [insert amount]) per Calendar Year, to provide a mutually agreed number of Ministry and National Company personnel with on-the-job training in the Contractor’s operations in Equatorial Guinea and overseas and/or practical training at institutions abroad, particularly in the areas of natural earth sciences, engineering, technology, accounting, economics and other related fields of oil and gas exploration and exploitation. Additionally, during the term of this Contract, the Parties comprising the Contractor (other than the National Company) shall transfer to the Ministry a minimum of [insert amount] Dollars ($ [insert amount]) per Calendar Year which the Ministry shall use at its sole discretion to educate and train Equatoguinean personnel selected by the Ministry at universities, colleges or other training institutions selected by the Ministry and for other general training and educational purposes. The above costs will be recoverable as a Petroleum Operations Cost in accordance with the provisions of this Contract.”

Summary

The contract models noted above ensure IOC engagement; some, such as the Equatorial Guinean model, allow for deducting associated costs, and the primary thread remains the initiative of the national oil company. A contract model sets up a collaborative framework with IOCs, avoids the kind of arbitrariness seen with Nigeria’s ambitious targets, and avoids potential legal issues associated with the Act. A return to contract provisions would ensure active NNPC engagement, which is critical not only to local content implementation but also to the transfer of skills relating to oil exploration, development and production.

PAST AS PROLOGUE

Time will tell whether the much-heralded Act becomes the single engine for growth it has been hyped to be. Nonetheless, the Nigerian government's
recent appointment of the first executive secretary of the Board raises questions whether, beyond the rhetoric, implementation of the Act will be significantly different from NNPC’s local content policy. That is because, in selecting the secretary, who serves as the Board’s “chief executive and accounting officer”, responsible for “the execution of the policies and administration of the daily affairs of the Board”, President Jonathan picked Ernest Nwapa, NNPC’s former group general manager for the Nigerian Content Division who led NNPC’s design and administration of its local content policy.111

It remains to be seen, therefore, whether and to what extent Mr Nwapa’s implementation of the Act varies from his administration of NNPC’s local content directives. To the extent that any improvement in local content is merely incremental, the Nigerian government would have needlessly deterred investors and undermined confidence in its oil and gas industry for marginal dividend when it could have achieved more through increased collaboration with IOCs and by leveraging existing contracts.

**CONCLUSION**

Contracts remain effective weapons for enhancing local content, provided the national oil company is engaged. Nigeria has by-passed the contract option and rushed into creating a legislative mandate in a continuing pattern of blaming IOCs for high unemployment and deeming local content legislation to be a single engine for cross-sectoral growth. While legislation and blaming IOCs yields short-term political benefits, they scarcely address systemic issues such as the national oil company’s disengagement or legal issues such as breach of GATT and BIT obligations.

Nigeria should therefore leverage the existing agreements with IOCs, such as in the PSCs, promote its national content requirements and, at a minimum, ensure that any legislation passes constitutional muster, meets its GATT and BIT obligations, and preserves the sanctity of contracts.

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111 See sec 81 of the Act. According to the Board’s website, Engr Ernest Chu Nwapa is its executive secretary; see <http://www.ncdmb.gov.ng/govc.php> (last accessed 12 September 2010).

112 See Engr Nwapa’s profile on the Board’s website: <http://www.ncdmb.gov.ng/govc.php> (last accessed 12 September 2010). NNPC drafted the NCD Bill, the earlier version of the Act.