

Analysis of the Nigerian Oil and Gas Industry Content Act 2010

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Objective

The Acting President of the Federal Republic of Nigeria, Dr Goodluck Ebere Jonathan, signed the Nigerian Oil and Gas Industry Content Act 2010 ('the Act') into law on 22 April 2010. With effect from this date, the Act shall be applicable 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.

The Act is designed to give the force of law to the Nigerian Content Policy, the objective of which is to increase the quantum of composite value added to or created in the Nigerian economy, through a systematic development of capacity and capabilities through the deliberate utilisation of Nigerian human and material resources and services in the country's oil and gas industry.

With inception from early 2000, the Nigerian Content Policy envisioned by the Nigerian National Petroleum Corporation served as the basis for measuring and ensuring local participation and job creation for Nigerians in the oil and gas industry.ⁱ

Regulation 26 of the Petroleum (Drilling & Production) Regulations made pursuant to Section 9 of the Petroleum Act Chapter P10 Laws of the Federation of Nigeria 2004, is a precursor to the Nigerian Content Policy, as it prescribes that a licensee of an oil prospecting license and a lessee of an oil mining lease must submit an employment plan for Nigerian employees within 12 months of the grant of a license or the grant of a lease, respectively. Consequently, these objectives have been incorporated into the drafting of oil and gas agreements, such as the joint operating agreements (JOAs), and production sharing contracts (PSCs), and rehashed in the Nigerian Content Directives (NCD), issued by the Nigerian National Petroleum Corporation.

The aim of the Nigerian Content Directives (NCD) issued by the Nigerian National Petroleum Corporation (NNPC) is to oversee the implementation of the Nigerian Content Policy.ⁱⁱ

The NCD sought to transform the oil and gas industry into the economic engine for job creation and national growth by developing in-country capacity and indigenous capabilities. It was designed to ensure that a greater proportion of the work was done in Nigeria, with active participation of all sectors of the economy. In addition, an ultimate aim is that Nigeria is positioned as the hub for service delivery within the West African sub-region and beyond.

Although the NCD did not have the force of law, it had far-reaching effects with NNPC as senior partner in most oil and gas projects, and aimed to increase local content value in the provision of materials, services and equipment to the local oil and gas industry to 70 per cent by 2010. It therefore required compliance by tenderers seeking to execute contracts with NNPC participation.

With the passage of the Act, it is expected that the initial challenges the government experienced in implementing this regulation, coupled with the lack of compliance by holders of oil mining leases, will be a thing of the past.

The objective of the Act as set out in the preamble is:

‘... to provide for the development of Nigeria Content in the Nigerian Oil and Gas industry; for Nigerian Content Plan; for supervision, coordination, monitoring and implementation of Nigerian content and for matters incidental thereto.’

The Act appears to apply to all ‘subsequent’ⁱⁱⁱ oil and gas arrangements, agreements, contracts or memoranda of understanding relating to any operation or transaction in the Nigerian oil and gas industry, without mentioning the implication on pre-existing contracts. This lacunae is expected to be addressed by the Nigerian Content Monitoring Board^{iv} with the mandate to provide guidelines for the implementation of the provisions of this Act.

Highlights of the Act

The Act establishes a legal and regulatory framework for the growth of the indigenous oil and gas companies, by giving priority to Nigerian independent operators in the award of oil blocks, oil field licenses, oil lifting licenses and all projects, subject to the fulfillment of such conditions as may be specified by the Minister.^v

The Act establishes the Nigerian Content Monitoring Board (‘the Board’), and charges it with the responsibility of providing guidelines, monitoring, coordinating and implementing the provisions of the Act.^{vi}

The Act further provides for exclusive consideration to be given to Nigerian companies (defined as companies registered under the Companies and Allied Matters Act (CAMA) and with at least 51 per cent equity holding by Nigerians^{vii}) for all oil and gas projects in inland and swamp water areas, subject to proof of acquisition or lease of the equipment to be utilised during the project, verifiable by satisfactory evidence of such acquisition or lease.^{viii} Compliance with the Act is mandatory for the award of all necessary licenses and permits in the industry.^{ix}

The Act makes it mandatory for operators to submit a Nigerian Content Plan to the Board in the bidding stage and prior to executing any project.^x

The Nigerian Content Plan provides, amongst other things, that:

- a. First consideration shall be given to services provided from within and goods manufactured in Nigeria;
- b. Nigerians shall be considered first for training and employment in the work plan for which the plan was submitted;^{xi}

Section 11(1) of the Act provides for minimum percentage specifications of Nigerian content in any project to be executed in the Nigerian oil and gas industry as listed in Schedule A to the

Act. These range from 45 to 100 per cent for the majority of service categories, with the exception of four marine service categories ranging between 30^{xii} and 40 per cent.^{xiii} The Board is charged with the responsibility of setting minimum content levels for project descriptions not specified in Schedule A.^{xiv}

The Act also provides for domestic provision of insurance, legal and banking services, except where it is impracticable to do so.^{xv} The Act allows companies to explore offshore insurance with the written approval of the National Insurance Commission where there is evidence of exhaustion of local capacity.^{xvi}

It is worthy of note that the Act is not clear as to the procedure for determining the ‘impracticability’ of each situation. This would therefore form part of the remit of the Nigeria Content Development and Monitoring Board (‘the Board’).

The Act further provides for operators to establish their offices within the catchment areas/host communities and to submit an employment and training plan,^{xvii} capacity building and succession plan where there is no immediate local capacity.^{xviii}

The Act also establishes a fund to be known as the Nigerian Content Development Fund (‘the Fund’), for purposes of funding the implementation of Nigerian content development in the Nigerian oil and gas industry. Every operator, contractor, subcontractor, alliance partner or any other entity involved in upstream activity shall contribute one per cent of the contract value to the Fund.^{xix}

The Act extends its sphere of influence to the Coastal and Inland Shipping (Cabotage) Act No 5 of 2003, as the Board is mandated to work with NIMASA^{xx} to ensure the realisation of local content objectives in the maritime sector.^{xxi}

Matters arising under the Act

Until now, the principle of the lowest bidder had been the criteria for award of contracts in the Nigerian oil and gas industry. However, with the passage of the Act, this will no longer be the sole consideration for determining which company will be awarded contracts to execute projects. This is because an indigenous company, which has the capacity to execute a project, would not be disqualified in the bidding process as long as its quoted value is not 10 per cent higher than the lowest bid.^{xxii}

The Act further provides for Operators and Project Promoters to give priority to bids containing the highest level of Nigerian content where the bids are within one per cent of each other at commercial stage, provided the Nigerian content in the selected bid is at least five per cent higher than its closest competitor.^{xxiii}

The operators and alliance partners are also required to maintain a bidding process for acquiring goods and services that shall give full and fair opportunity to Nigerian indigenous contractors and companies.^{xxiv}

The Act further expects that 50 per cent of the equipment deployed for the execution of work will be owned by Nigerian subsidiaries where the international/multinational companies are working through such subsidiaries.^{xxv}

This Act has elicited varied reactions from industry stakeholders, including:

- a) The Federal Government of Nigeria, through its regulatory agencies:
 - i. The Ministry of Petroleum Resources (MPR);
 - ii. Department of Petroleum Resources (DPR);
 - iii. Nigerian National Petroleum Corporation (NNPC);and
 - iv. National Petroleum Investment Management Services (NAPIMS)
- b) Indigenous oil and gas companies
- c) International oil and gas companies (IOCs)
- d) the Nigerian Content Consultative Forum (NCCF) (which comprises of representatives from the oil and gas industry, organised private sector, Manufacturers Association of Nigeria (MAN), and the Bankers Committee and Nigerian Society of Engineers amongst others).

The main thrust of the IOC's concern is the impossible threshold provided for Nigerian Content in Schedule A of the Act,^{xxvi} which indigenous companies may not be able to fill due to lack of capacity. In addition to this, allowing a mere five per cent management positions to expatriates to take care of investor interests portends anti-investment connotations for foreign companies.^{xxvii}

In converse, the indigenous oil and gas service companies through the umbrella group of local companies, PETAN,^{xxviii} argue that the lack of capacity has resulted from underuse of local expertise. PETAN maintains that Nigerian oil and gas service companies have the technical expertise to perform as well as their foreign counterparts. Therefore, where there is in-depth capacity, attracting local or foreign financing may no longer be a challenge given the high rate of return on the oil and gas business.

The mandatory 'Labour Clause' in Section 34 of the Act for contracts exceeding US\$100 million, provides the minimum percentages of Nigerian labour in specific cadres as may be directed by the Board.

It is important to note the provisions of Section 11(1) of the Act, which allow the Minister to authorise the continued importation of relevant items where there is inadequate capacity, provided that such approval does not exceed three years from the commencement of this Act.^{xxix}

Although indigenous companies view the local content regime as their road to El Dorado, they do face the challenge of finding funding for capital-intensive oil and gas industry equipment, the availability of which is a criterion for the award of contracts to indigenous companies.

Local banks appear to have placed an embargo on lending, and this poses a funding challenge for the indigenous companies' ability to meet the relevant criterion for the award of contracts under the local content regime.

In order to address this challenge, indigenous companies may need to explore the following options:

- entering into technical/financial arrangements with foreign companies in a partnership arrangement; or
- setting up a special purpose vehicle (SPV) which will be a Nigerian company, subject to the foreign partner's willingness to relinquish 60 per cent control of the Nigerian company to their local partners in order to partake of contracts in the industry reserved for indigenous companies.

The Minister of Petroleum Resources, Dieziani Alison-Madueke, has assured foreign investors that the Act is not designed to frustrate their investment, but to encourage more indigenous participation in the sector and enhance the Nigerian economy.^{xxx}

Effect on investment

The passage of the Nigerian Content Act has elicited concern from stakeholders, the strongest being the possible effect of the Act on securing both local and foreign investment.

The difficulty in securing local funding has retained the reliance on foreign investment. This therefore poses a challenge on the willingness of international companies to invest in projects where they have minimal control/equity participation.

The Petroleum Industry Bill (PIB) lends its support to the local content policy, by providing for the award of licences or leases to the National Oil Company or any indigenous oil company,^{xxxi} which is defined as one with at least 60 per cent ownership by Nigerians.^{xxxii} It is important to note that the ownership percentage proposed under the PIB differs from the 51 per cent equity shareholding for Nigerians under the Act.^{xxxiii}

The PIB proposes to ensure that a holder of a petroleum mining lease employs a minimum of 95 per cent Nigerians in supervisory/management positions, in addition to Nigerians constituting at least 60 per cent of its Board of Directors.^{xxxiv}

Although the PIB is yet to be passed into law, it is designed to supersede pre-existing oil and gas industry legislations.

Conclusion

Although there appear to be implementation challenges pending the formulation of guidelines by the Nigerian Content Development and Monitoring Board, the Act is expected to address the growing gap between annual expenditure and percentage of local participation, and most importantly address the unemployment crisis by generating at least 300,000 jobs over the next five years.^{xxxv}

It is also important to ensure that the tenets of the Act are realised by local companies participating directly in the oil and gas operations, rather than through farming it out to foreign partners due to lack of financial or technical expertise. Indigenous companies must live up to the expectations of the Act by maximising local capacity.

As laudable as the Act may be, it is also imperative that the interests of the various stakeholders are protected to guarantee the economic drive and growth that will result in local capacity building and high return of investment for both local and foreign stakeholders.

ⁱ www.nigcontent.com/index.php?option=com_content&task=view&id=12&Itemid=50 [accessed June 1, 2010].

ⁱⁱ www.nigcontent.com/index.php?option=com_content&task=view&id=29&Itemid=56 [accessed June 1, 2010].

ⁱⁱⁱ Emphasis added; see also Section 6, Nigerian Oil and Gas Industry Content Act, 2010.

^{iv} Section 4, Nigerian Oil and Gas Industry Content Act, 2010.

^v Section 3(1), Nigerian Oil and Gas Industry Content Development Act 2010.

^{vi} Section 4, *ibid.*

^{vii} Section 109, *ibid.*

^{viii} Section 3(2), *ibid.*

^{ix} Section 3(3), *ibid.*

^x Section 7, *ibid.*

^{xi} Section 10(1), *ibid.*

^{xii} For such services as domestic clearing of cargo and marine logistics.

^{xiii} For such services as marine insurance and marine consulting.

^{xiv} Section 11(2), Nigerian Oil and Gas Industry Content Act, 2010.

^{xv} Sections 50 to 52, *ibid.*

^{xvi} Section 50, *ibid.*

^{xvii} Sections 28 and 29, *ibid.* (this is also provided for in Section 404 of the Petroleum Industry Bill).

^{xviii} Sections 30 and 31, *ibid.*

^{xix} Section 107, *ibid.*

^{xx} Nigerian Maritime Administration and Safety Association.

^{xxi} Section 108, Nigerian Oil and Gas Industry Content Act, 2010.

^{xxii} Section 16, *ibid.*

^{xxiii} Section 14, *ibid.*

^{xxiv} Section 15, *ibid.*

^{xxv} Section 41(2) Nigerian Oil and Gas Industry Content Development Act 2010.

^{xxvi} Section 11 (1) of the Nigerian Oil and Gas Industry Content Development Act 2010.

^{xxvii} Section 32 Nigerian Oil and Gas Industry Content Development Act 2010.

^{xxviii} PETAN is the acronym for Petroleum Technology Association of Nigeria.

^{xxix} Section 11(4) Nigerian Oil and Gas Industry Content Development Act 2010

^{xxx} Kunle Akogun, 'Nigerian Firms Now to Get Priority in Oil Sector', available online at <http://www.thisdayonline.com/nview.php?id=171674> [accessed 27 April 2010].

^{xxxi} Section 257 of the Petroleum Industry Bill 2009 [The National Assembly Version].

^{xxxii} Section 494 of the Petroleum Industry Bill 2009 [The National Assembly Version].

^{xxxiii} Section 109 Nigerian Oil and Gas Industry Content Development Act 2010.

^{xxxiv} Sections 403 of the Petroleum Industry Bill 2009 [The National Assembly Version].

^{xxxv} <http://allafrica.com/stories/printable/201005050479.html> [accessed 8 June 2010].