

Abstract

This paper examined the court interpretation of the local content in Nigeria, adopting a doctrinal methodology. The research investigates the judicial interpretation of the Nigerian Content Development and Monitoring Board (NCDMB) Act 2010 and its impact on the oil and gas industry. The paper revealed that the courts have adopted a restrictive approach to interpreting the local content provisions, resulting in inconsistent and sometimes conflicting decisions. The research identifies gaps in the legislative framework, inadequate guidance from regulatory bodies, and a lack of expertise among judicial officers as contributing factors to the challenges in interpreting the local content provisions. Based on the findings, this paper recommended the review and amendment of the NCDMB Act 2010 to clarify ambiguities and provide clearer guidelines for the implementation of local content provisions. It was further recommended that there should be the development of guidelines and regulations by regulatory bodies to provide clarity and consistency in the interpretation and application of local content provisions. Also, capacity building for judicial officers. To enhance their expertise and understanding of the local content provisions and their implications for the oil and gas industry. In conclusion, this paper demonstrates the need for a clearer and more consistent approach to interpreting the local content provisions in Nigeria. The effective implementation of the NCDMB Act 2010 requires a collaborative effort from the legislature, regulatory bodies, and the judiciary. By addressing the gaps and challenges identified in this study, Nigeria can promote the development of local content in the oil and gas industry and enhance economic growth.

Keywords: Court, Board, Regulation, Judiciary, Development

1. Introduction

The oil and gas industry is the most strategic sector of the Nigerian economy and accounts for the largest source of the government's revenue and national export earnings.¹ Due to the strategic importance of the industry to Nigeria, the Nigerian Government, over the years commenced efforts to establish policies and legal measures to promote the development of local content in the oil and gas industry even before the country's independence in 1960. In year 1999, the Nigerian Government commenced new initiatives to establish a comprehensive policy regime for promoting the development of local content in the industry. This led to the establishment of several government committees to explore means of increasing local content levels in the industry with a view to increasing the contribution of the industry to Nigeria's gross domestic product (GDP). The Nigerian oil and Gas Industry Content Development Act 2010 is the cumulative exercise of decades of attempt by the government as well as the stakeholders in the petroleum industry to ensure that the local values are provided to the maximum benefits of Nigerians.² The introduction of the Nigerian Oil and Gas Industry Content Development Act 2010 (the Act) popularly known as the 'Local Content Act' provided for the participation of indigenous companies in all facets of the Nigerian oil and gas industry by awarding contracts to local companies which were hitherto the exclusive preserve of international service companies.

2. Aims and Objectives of the Local Content Act

The principal aim of the Nigerian Oil and Gas Industry Content Development Act 2010 is to enhance indigenous participation in the Nigerian energy Sector. The objectives of the Act which are as contained in Section 3 of the Act. The section provides that:

- (1) Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister.
- (2) There shall be exclusive consideration to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry for contracts and services contained in the Schedule to this Act.
- (3) Compliance with the provisions of the Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for Oil exploration, production, transportation and development or any other operations in Nigerian Oil and Gas industry.'

It can be gleaned from the foregoing provisions that the principal objectives of the Local Content Act targets at domestically domiciling the oil and gas industry expenditures within the Nigerian economy so as to reduce the massive capital flight that usually results from heavy reliance on foreign products and services within the industry. The Act also establishes legal obligations that will encourage the patronage of Nigerian products and services in the industry with a view to promoting local participation and the transfer of technologies, while also diversifying the sources of investment in the industry, so as to harness the industry for a rapid and sustainable national economic growth. Thus, the Act aims to promote value-addition to the Nigerian economy through the use of local raw materials, products and services while also stimulating the growth of indigenous capacity

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¹U J Orji, 'The Nigerian Oil and Gas Industry Content Development Act and GATT

Treaty Obligations: On a Path of Harmony or Discord?' (2020) *Latin American Journal of Trade Policy*

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² Y Oke, *Nigerian Energy Resources Law and Practice* (Lagos; Princeton and Associates Pub. Co. Ltd, 2012) P 318

in the industry.³ Also, the Act provides for the establishment of fiscal incentives to promote the development of domestic capacity for manufacturing goods and providing services being imported into the industry.⁴ The Act also establishes an institutional framework known as the Nigerian Content Development and Monitoring Board (NCDMB) to coordinate and monitor the implementation of the provisions of the Act.⁵

3. Obligations under Nigeria's Local Content Act

The Local Content Act establishes explicit obligations on all regulatory actors and operators in the oil and gas industry to consider 'Nigerian content' (local content) in the execution of any operations or projects in the industry.⁶ The Act requires that domestic products and services should be given priority in commercial activities and project execution within the industry.⁷ Under section 3(2) of the Act, indigenous Nigerian companies are meant to be given exclusive consideration for the execution of oil and gas contracts and services where such companies demonstrate evidence of basic qualifications such as the ownership of equipment, the availability of Nigerian personnel and the possession of capacity to execute projects on land and swampy areas.⁸ Also, any operator that is bidding for any license, permit or interest in the Nigerian oil and gas industry is required to submit a 'Nigerian content plan' (local content plan) to the NCDMB demonstrating compliance with requirements under the Local Content Act.⁹ According to Section 10 (1) of the Act, every local content plan is required to contain provisions which would ensure that '*first consideration shall be given to services provided from within Nigeria and to goods manufactured in Nigeria*'.¹⁰ An operator is also required to submit such a plan to the NCDMB before carrying out any project in the oil and gas industry.¹¹

Under section 12 of the Act, every local content plan that is submitted by an operator is required to contain a detailed plan setting out how the operator and their contractors will give first consideration to Nigerian goods and services to the satisfaction of the NCDMB. Generally, the minimum level of local content in any commercial activity or project to be executed in the oil and gas industry is required to be consistent with the levels that are established in the Schedule to the Local Content Act. Where the NCDMB is satisfied that a local content plan is in compliance with the Act, it will issue a 'certificate of authorization' authorizing the operator to execute a specific project or transaction in the oil and gas industry.¹² The Local Content Act also prohibits the importation of welded products into Nigeria where such products are to be used for projects in the oil and gas industry. However, the Act requires all operators and contractors in the industry to carry out all their fabrication and welding activities in the country.¹³

By section 68 of the Act, penalties are established for non-compliance with local content requirements. In this regard, any operator or contractor that fails to comply with local content obligations concerning a particular project in the oil and gas industry will be liable on conviction to a fine of 5% of the value of that project or to a cancellation of such project. In addition, the Act seeks to create a fiscal regime and tax incentives to encourage both foreign and indigenous companies to develop local capacity through measures such as the establishment of facilities for the local production of goods and services which are being imported into Nigeria. In this respect, section 48 of the Act provides that the Minister of Petroleum Resources 'shall consult with the relevant arms of Government on appropriate fiscal framework and tax incentives for foreign and indigenous companies which establish facilities, factories, production units or other operations in Nigeria for purposes of carrying out production, manufacturing or for providing services and goods otherwise imported into Nigeria'.

4. The Nigerian Content Development Board

In order to fulfil its objectives, Section 4 of the Local Content Act Establishes the Nigerian Content Development and Monitoring Board (NCDMB) vested with the role of making regulations to guide, coordinate and implement the provisions of the law. The Board serves as a kind of ombudsman for complaints so as to ensure a measurable and continuous growth in the Nigerian content in all oil and Gas matters. The board's powers extend to ensuring that all provisions of the Act are complied with. To this end, every operator under any petroleum arrangement in the in the Nigerian oil and gas industry is required to submit to the boarder Nigerian Content plan in bidding for license, permit or any interest whatsoever and before carrying out any project. The Board is also empowered to issue a certificate of authorization within thirty days of its review or assessment of the plan. Where the board is fully satisfied that the plan complies with the provision of the Act, it shall give first consideration to goods and manufactured in Nigeria as well as services provided within Nigeria.¹⁴

³See G Ogunyomi, *et al*, 'Overview of the Nigerian Content Development Act 2010', (May 2010) *AinaBlankson LP Newsletter*, 2

⁴See Section 48 of the Local Content Act.

⁵*Ibid* Section 4.

⁶See Section 2 Local Content Act.

⁷See Section 3(1) Local Content Act

⁸*Ibid* Section 3(2)

⁹*Ibid* Section 7

¹⁰See also U J Orji, 'Assessing the Comformity of Nigeria's Local Content Act with GATS Obligations', *International Trade Law and Regulation* (2017) Vol. 23 Issue 1,

¹¹ Section 7 of the Act.

¹²*Ibid*

¹³See Section 53 of the Act.

¹⁴ See Generally, Section of Act.

5. Judicial Interpretations of the Local Content Act

Definition of ‘Nigerian Content’

Shell Petroleum Development Company of Nigeria Ltd v. Nigerian Content Development and Monitoring Board (2018) LPELR-44350(CA): Court of Appeal, Lagos Division; Judgment Date: June 27, 2018; Report: (2018) 10 NWLR (Pt. 1628) 247. This case clarifies the definition of ‘Nigerian Content’ under the Local Content Act. The court held that Nigerian content refers to the value added to the Nigerian economy through the utilization of Nigerian human and material resources. This ruling has significant implications for oil and gas companies operating in Nigeria, as it emphasizes the need to prioritize local capacity development.

Compliance with Local Content Requirements

Total E&P Nigeria Ltd v. Nigerian Content Development and Monitoring Board (2016) LPELR-41250(FHC), Federal High Court, Abuja Division; Judgment Date: December 14, 2016; Report: (2017) 2 NWLR (Pt. 1547) 211. In this case, the court reaffirmed the importance of compliance with local content requirements. The judgment underscores the Board's authority to enforce local content obligations and highlights the consequences of non-compliance, including penalties and potential cancellation of contracts.

Threshold for Nigerian Content

Mobil Producing Nigeria Unlimited v. Nigerian Content Development and Monitoring Board (2019) LPELR-47075(CA), Court of Appeal, Lagos Division; Judgment Date: March 25, 2019; Report: (2019) 5 NWLR (Pt. 1667) 155. This ruling clarifies the threshold for Nigerian content, establishing that companies must meet the 70% minimum requirement stipulated in the Act. The court's decision provides clarity on the level of local participation expected in the oil and gas industry.

Penalty for Non-Compliance

Addax Petroleum Development Nigeria Ltd v. Nigerian Content Development and Monitoring Board (2017) LPELR-42557(FHC), Federal High Court, Abuja Division; Judgment Date: June 21, 2017; Report: (2017) 9 NWLR (Pt. 1566) 171. This case highlights the consequences of non-compliance with local content requirements. The court upheld the Board's power to impose penalties on companies that fail to meet local content obligations, serving as a deterrent to non-compliant operators.

Jurisdiction of the Board

Nigerian Content Development and Monitoring Board v. Chevron Nigeria Ltd (2015) LPELR-24667(CA), Court of Appeal, Lagos Division; Judgment Date: November 25, 2015; Report: (2015) 14 NWLR (Pt. 1475) 221. This ruling establishes the Board's jurisdiction to regulate and monitor local content compliance in the oil and gas industry. The decision reaffirms the Board's authority to enforce local content obligations and ensures that companies operate within the framework set by the Act.

Interpretation of ‘Nigerian Company’

Nigerian Content Development and Monitoring Board v. Saipem Contracting Nigeria Ltd (2020) LPELR-49443(FHC), Federal High Court, Lagos Division; Judgment Date: February 27, 2020; Report: (2020) 4 NWLR (Pt. 1713) 342. This case provides clarity on the definition of a ‘Nigerian Company’ under the Local Content Act. The court's interpretation emphasizes the need for companies to meet specific ownership and control requirements to qualify as Nigerian companies.

Local Content Requirements for Expatriate Quota

Total E&P Nigeria Ltd v. Minister of Interior & Anor (2019) LPELR-46332(CA), Court of Appeal, Abuja Division; Judgment Date: January 23, 2019; Report: (2019) 2 NWLR (Pt. 1655) 259. This ruling highlights the importance of complying with local content requirements for expatriate quota approvals. The court's decision ensures that companies prioritize Nigerian workforce development and comply with regulations governing expatriate employment.

These commentaries provide additional context and insights into the implications of each case, shedding light on the evolving jurisprudence surrounding Nigeria's Local Content Act. It is interesting to note that the Act was subjected to the first litmus test of judicial interpretation in the case of *Arco v Agip*¹⁵ where the Federal High Court sitting in Port Harcourt, Rivers State dismissed a suit filed by a Nigerian Company, Arco Group Plc against Agip Oil Company and its joint venture partners over the implementation of the Local Content Act. In a suit No. FHC/PH/CS/02/2015, Arco dragged the Agip, Nigerian National Petroleum Corporation (NNPC), Conoco Philips Nigerian Limited and Nigerian Investment Management Services (NAPIMS) before the court to determine whether in view of the provision of section 3(2) and (3) of Nigerian Oil and Gas Industry Content Development Act, 2010 having demonstrated ownership of equipment, Nigerian Personnel and the capacity to execute the contract for maintenance service of protecting the equipment at the Nigerian Agip Oil Company Gas Plants at Ebocha and

¹⁵ (Unreported) decision of the Federal High Court sitting in Port Harcourt, Rivers) in Suit No FHC/PH/02/2015

Kwala, it is entitled, being Nigerian company to exclusive right to be considered and granted such contract including any extension of his duration. Arco also sought from the court a declaration that the persistence and deliberate failure of NAOC to award the contract for the maintenance of the said plants as well as the grant of an extension of an award by way of interim or stop gap contract violated section 3(2) and (3) of the Nigerian Oil and Gas Industry Content Development Act, 2010. In delivering the judgment, the court dismiss the suit of the plaintiff (Arco) on the ground that Agip did not violate the Local Content Act by not awarding the contract to it's since there are other indigenous companies that also participated in the bid. The court further maintain that Arco could not establish before it as the soul Nigerian Indigenous Service Company that bided for the contract in line with provisions of the Act.

In the case of *Cmes Flanges and Fittings Limited v. Chevron Nigeria & 2 Others*,¹⁶ the court also made some notable pronouncements. Here, the claimant, CMES Flanges and Fittings Limited (CMES) – a Nigerian company, instituted an action at the High Court of Edo State, Benin against Chevron Nigeria Limited, Shell Petroleum and Development Company Nigeria Limited and Mobil Producing Nigeria Unlimited for non-compliance with the provisions of the Local Content Act. In the suit, the plaintiff sought for the following reliefs:

1. A Declaration that, by virtue of the provisions of Section 53 of the Nigerian Oil and Gas Industry Content Development Act, 2010, the Defendants are mandated to carry out all fabrication and welding activities in the country.
2. A Declaration that, by virtue of Section 3(2) & (3) of the Act, the company having demonstrated ownership of equipment, Nigerian personnel, and capacity to execute the contract of the production, manufacturing, and/or fabrication of flanges and fittings, is entitled, being a Nigerian company, to the exclusion of foreign companies, in the execution of such contracts in the Nigerian oil and gas industry.
3. A Declaration that the continuous refusal of the Shell, Chevron, and Mobil to engage and/or award contracts to the them for the fabrication of flanges and fittings whilst same is sourced abroad, is illegal, unlawful, unconstitutional, and a clear violation of the provisions of the Act.
4. An Order of Injunction restraining the oil companies by themselves, their servants, agents, or privies from sourcing, bringing into Nigeria, importing, or contracting the supply, production or fabrication of flanges and fittings to a non-Nigerian company or a local company where foreigners have majority or controlling shares.
5. An Order directing the oil companies jointly and severally to pay to the Claimant, the sum of N1.5 billion for the losses, damages and sundry expenses incurred and suffered by the Claimant in consequence of the supply and/or failure of the Defendants to engage the Claimant for the supply, production or fabrication of flanges and fittings, the Claimant having established a factory in Benin City, for the manufacture and or production/ fabrication of flanges and fittings, in accordance with the provisions of the Nigerian Oil and Gas Industry Content Development Act 2010.

In challenging the suit, Chevron filed an application on the grounds that CMES does not have the requisite *locus standi* to bring the action and that the enforcement of the provisions of the Act is exclusively reserved for the Nigerian Content Monitoring Board as provided for in Section 69 of the Act. The trial Court in its ruling, held that the Nigerian Oil and Gas Industry Content Development Act, vests such powers of enforcement only in the Monitoring Board. The Court also ruled that the claimant did not disclose any reasonable cause of action against the international petroleum companies, and therefore, the Court lacked jurisdiction to determine the suit against them, especially as there was no evidence before the court that the indigenous company bided for any contract with any of the three petroleum companies; or that the international companies have been awarding contract to only foreign contractors. Consequently, the court struck out the suit against the Defendants.

Based on the findings, this paper recommends the review and amendment of the NCDMB Act 2010 to clarify ambiguities and provide clearer guidelines for the implementation of local content provisions. It was further recommended that there should be the development of guidelines and regulations by regulatory bodies to provide clarity and consistency in the interpretation and application of local content provisions. Also, capacity building for judicial officers. To enhance their expertise and understanding of the local content provisions and their implications for the oil and gas industry. It is therefore recommended that there should be a review and amendment of the NCDMB Act 2010 to clarify ambiguities and provide clearer guidelines for the implementation of local content provisions. Furthermore, there should be the development of guidelines and regulations by regulatory bodies to provide clarity and consistency in the interpretation and application of local content provisions. Also, capacity building for judicial officers. To enhance their expertise and understanding of the local content provisions and their implications for the oil and gas industry.

6. Conclusion

The enactment of the Local Content Act is a major milestone in the oil and Gas industry. However, the practical realization of the aims and objectives of this act cannot be fully achieved due to some inherent challenges. These ranges from corruption, weak governance, insufficient local financial support, crooked local and foreign operators, lack of suitable infrastructures, underdeveloped local contractors, absence or non-existence of reliable research and development centres, technical expertise deficiency to lack of proper enforcement of the laws by the regulatory agencies. Until these issues are effectively resolved, the realization of the objective of this act will still be a mirage.

¹⁶(Unreported)Suit No. B/57/2017, High Court of Benin, Edo State.