

ASSESSING THE DEVELOPMENTS, INNOVATIONS AND DOWNSIDES OF THE NIGERIA'S OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT 2010*

Abstract:

The Oil and Gas Sector, has over the years, accounts for a high percentage of revenue, and economic stimulation in Nigeria, prompting the need for citizen's involvement. The dynamics of economic development of any nation largely depends on the participation of her citizens in economic activities aimed at creating value in the system. This paper adopts the doctrinal approach, in assessing the role of the Nigeria Oil and Gas Industry Content Development Act 2010, in stimulating local participation, technological transfer and ownership in the Oil and gas sector. It assesses the challenges to the actualisation of the Nigeria content, and finds that the regulator, Nigerian Content Development Management Board (NCDMB) is constrained in its achievement due to weak enforcement capacity, confusing measurement standards, and non- regulation of the regulator itself. The paper recommends for stakeholders' participation, periodic amendments to the Act, and proposes key enforcement strategies to aid the achievement of the industry targets and objectives. The paper seeks to educate the government, citizens, and stakeholders of the Oil and Gas sector in Nigeria.

Key Words: Local Content, Development, Participation, Economy, Nigeria, Oil and Gas sector.

1. INTRODUCTION

Nigeria's economy before 1950's was largely based on the exportation of agricultural products.¹ However, the discovery of Oil in Commercial quantity in Oloibiri, present day Bayelsa State, in 1956 brought about the exportation of Oil, veering the economy from purely agrarian economy to predominantly Petroleum Economy.² Exploration Licences leading to the discovery Oil, before Independence were granted by the Colonial Government.³ However, these changed when the United Nations (UN) Resolution 1803 XVII of 1962 declared States' Sovereignty over their Natural Resources, shortly after Nigeria's Independence in 1960.⁴ The Resolution provided the needed impetus for Oil bearing countries to assert their sovereignty, ownership and control over their resources. Flowing from these, the Organization of Petroleum Exporting Countries (OPEC) adopted, the UN Resolution 1803 in 1968.

The Nigeria's Petroleum Decree (now Act) of 1969, was enacted as a measure to enforce the control over Natural Resources within Nigeria's territorial borders. The Petroleum Act wrest control and pricing

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¹Eteng, I. "Minority Rights under Nigeria's Federal Structure". *Constitution and Federalism. Proceedings of the Conference on Constitution and Federalism*. (Fenix Nigeria Ltd Ibadan; 1997).

² F. E. Nlerum, ' *Reflections on Participation Regimes in Nigeria's Oil Sector*', Nigerian Current Law Review 2007-2010; P.147; Available at <<http://www.nials-nigeria.org/journals/NCLR.5.pdf>>; Accessed 1 June, 2020

³ The license for exploration for whole of Nigeria was granted to Shell D'Arcy as a concession for exploration under the oil exploration license of 1938 granted by the British Government.

⁴ The Resolution provided that State and International organization shall and conscientiously respect the sovereignty of people and nations over their natural resources in accordance with the Charter of the United Nations and the principles contained in the Resolution.

mechanism from Multi-National Companies (MNC's) and vested same in the Nigerian government.⁵ At this time emphasis were not strong on participation of Nigerians in the Oil Sector, but focus was beam on earning royalty and taxes from Oil production.⁶

During this era, Dr. Philip Asiodu, (former Minster for Petroleum between 1971-197),⁷ in support for Local participation, and growth of the oil and gas industry in the 1970's, upon assumption of office, laid down visionary projections to serve as a guide to policy construct in the Oil and gas sector, in order to encourage Local content and economic stimulations. These Projections became the foundation for the Nigeria Content Pursuit. The eight-policy foundation burdens on: (1) The enquiry of Government on indigenus participation, and control of the production and marketing of crude oil. (2) the Maximisation of revenues derived from crude oil production and exports. (3) Rationalisation and control of internal marketing of petroleum products (4) The development of indigenus manpower and acquisition of petroleum know-how. (5) A programme of development of refineries for local and export markets. (6) The exploitation of our gas resources for projects including LNG (Liquefied Natural Gas), LPG (Liquefied Petroleum Gas), Petro-chemical, etc. (7) How to increase the impact of oil on the local economy i.e., how to extend its linkage effects to stimulate industrial development locally, and (8) The development of a Nigerian tanker fleet.⁸

With these laudable policy construct, Nigeria's Oil Sector was set for new phase of local engagement and genuine participation. However, not much of local content was achieved after this policy but only the allocation of Marginal Oil Fields to Nigerian companies in the early 90's. No coordinated action was taken to allow the activities in the Oil sector spill over to other sectors. At the renewed drive for Nigerian Content in early 2000's, there was a paltry 5% local participation in the Nigerian Oil and Gas Industry.⁹ The Nigerian Oil and Gas Industry Content Development Act, 2010 was enacted, the primarily focus of the Act was to provide a statutory impetus to the local content drive. As captured in its long title, the Act is to provide for the development of Nigerian content in the Nigerian oil and gas industry; to provide for the Nigerian content plan, supervision, coordination, monitoring and implementation of Nigerian content; and for related matters.¹⁰ This Article is divided into Eight Sections, comprising of the Abstract, Introduction, Conceptual Clarification, Historical Development of Nigerian Content Policy, the economic development task of the NOGICDA, Legal regime and Innovation of the Nigeria Content Act, challenges, Conclusion and Recommendations.

⁵Section 1 of the Petroleum Act vests the entire ownership and control of all Petroleum in Nigeria in the State. The Act also empowers the Minister to grant licenses and leases to operators in the Petroleum industry. The provisions of the First Schedule to the Act, in so far as they are applicable, apply in relation to all such licenses and leases.

⁶ P.C. Asiodu; '*Nigeria and the Oil Question*'; Being a Presidential Address delivered by Mr. P.C. Asiodu in February 1979 at the Annual Conference of the Nigerian Economic Society in Lagos, Nigeria. P.7

The Decree (Act) made soft Local Content demands. The Act re-defined Petroleum to exclude gas, reducing the length of concession period, to twenty years, setting out clearly the period and stages for surrender of acreage granted under concessions. It stipulates that within ten years, producing companies must Nigerianise their most senior positions up to 75 percent, and 100 percent for other cadres; It further required oil producing companies to produce schemes for the exploitation of gas associated with their petroleum production. In addition, other provisions in regulations made under the decree set out procedures for acquisition of land for oil development and transportation purposes, providing also, for payment of compensation to the owners of such lands.

⁷ Ibid, P.C. Asiodu; P.7

⁸ Ibid, 8.

⁹ J. Balouga, "*Nigerian Local Content: Challenges and Prospects*" (2012)3rd Quarter International Association for Energy Economics P.23.

¹⁰ H. O. Onyi-Ogelle, '*National Participation in the Nigeria Oil and Gas Industry: Prospects and Challenges*' (2016) 7(2): 134-144, Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS). 139.

2. CONCEPTUAL CLARIFICATION

There is need to clarify some concepts commonly used in this work. These includes:

2.1 Nigerian Local Content

The term “Local Content” is one that has been variously defined by scholars, policy makers, legislation, and different Study Reports. In essence, Local Content carries the definitional plurality of most legal terminologies which makes it subject to multiplicity of definitions. The Nigerian Extractive Industry Transparency Initiative¹¹ defined Local Content as “...an initiative on the part of the Nigerian government to help develop local capacity building in the Nigerian oil and gas industry and to enable Nigerians participate actively”. While this definition is more descriptive, according to James U. Monday, “It can also be defined as the integrated contributions to myriad of operations or inputs in the crude oil and natural gas extraction process, which are made by Nigerian personnel, local contractors, wholly owned Nigerian companies or by Nigerian registered companies in which Nigerians effectively own a majority of the equity”¹²

Local content can refer to jobs or value-added, that is created anywhere in the domestic economy as a result of the actions of an oil and gas company, or it can more narrowly refer to jobs that are created in the neighbourhood of the oil production plant. Although policies mainly refer to local content without specifying its location within the economy, it is common that the communities closest to—and possibly most affected by—oil or gas installations will also exert the most pressure for jobs.¹³ This definition is a product of a World Bank Study Team; it captures the wider and narrow meanings of Local Content. It defines “Local Content” in the light of ‘Jobs’ and ‘value-added’ to the economy by activities of the Oil and Gas Industry. Interestingly, the definition restricts the concept of “Local Content” to the ‘activities’ in the Oil and Gas Industry. However, the concept of “Local Content” has transcended the borders of Oil and Gas Industry in Nigeria to other sectors of the economy as there is now a deliberate policy to “localize” participation. The Nigerian Oil and Gas Industry Content Development Act, 2010 introduces a fairly new nomenclature for “Local Content”, describing same as “Nigerian Content”. The Act defines ‘Nigerian Content’ to “*the Quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and service in the Nigerian Oil and Gas Industry*”¹⁴. However, in this research, the term “Nigerian Content” and “Local content” will be used interchangeable. Even though an acknowledgement is made that some subtle distinction is capable of being made, but for the purpose of this paper, the terms are used to imply participation of Nigerians in the Oil and gas sector.

¹¹Glossary of Term Used in the Nigerian Extractive Industry; (2010) A publication of the Nigerian Extractive Industry Transparency Initiative and Coalition for Change-Centre for Public Private Partnership (CPPC)Ibadan; ISBN: 978-978-906-654-4 at P. 71

¹² J. U. Monday, ‘Local content policy, human capital development and sustainable business performance in the Nigerian oil and gas industry’(2015) *Journal of Management and Sustainability*, (Online) 5, 75–83, ISSN 1925-4733 < <http://www.ccsenet.org/journal/index.php/jms/article/view/42665/24667> >Accessed 10 June, 2020.

¹³ S. Tordo, et el, (2013) ‘Local content in the oil and gas sector’ A World Bank study. Washington DC; World Bank. <<http://documents.worldbank.org/curated/en/549241468326687019/Local-content-in-the-oil-and-gas-sector>> Accessed 20 December, 2020.

¹⁴ The Nigerian Oil and Gas Industry Content Development Act, (NOGICDA) 2010, Section 106

2.2 Oil & Gas Industry:

The “Oil” within the content of the discussion, mean “A simple or complex liquid mixture of hydrocarbons that can be refined to yield gasoline, kerosene, diesel fuel and various other products”.¹⁵ Gas means “Any fluid, combustible or non-combustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions”¹⁶. In general, the petroleum Industry, also known as the oil industry or the oil patch, includes the global processes of exploration, extraction, refining, transporting (often by oil tankers and pipelines), and marketing of petroleum products. The largest volume products of the industry are fuel oil and gasoline (petrol).¹⁷ Within the contemplation of the Act, Oil and Gas Industry is considered “as activities connected with the exploration, development, exploitation, transportation and sale of Nigerian oil and gas resources including upstream and downstream oil and gas operations”¹⁸.

2.3 Participation

The Word “Participation”, is a vital concept under this Study, therefore it is worthy of clarification in the way it is used in the Study. To ‘Participate’ means to partake of, to take part or have a share in common with others.¹⁹ Within the context of the Research, Local Participation would be the ability of indigenous companies or firms to take part or partake in upstream activities of the Petroleum Industry.

3. HISTORICAL DEVELOPMENT OF THE NIGERIAN CONTENT POLICY:

The development of the Nigerian Content Regime can be discussed under three phases, namely: (1) Post Discovery of Oil or Closed Era, (2) Pre-NOGICDA Era and (3) NOGICDA Era.

3.1 Post Discovery of Oil or Closed Era (1956-1990)

The period was characterized by exclusive control of the nascent Oil and Gas Industry by the Foreign Firms. There was no discernible Local Content Policy or a comprehensive legislation projecting the Nigerian Content. Although, the Nigerian National Oil Corporation (NNOC) was established by Decree No. 18 of 1971, but fourteen (14) years after the discovery of Oil, the Industry was foreign dominated. The promulgation of the Petroleum Decree (Now Act) 1969, and the subsequent re-negotiation of some Oil Exploration License (OEL), and Oil Mining Lease (OML), brought in semblance of Local Content, but its impact was negligible. Similarly, Joint Venture Agreements reached and Partnership with Nigerian Government by Agip and other foreign firms could best be described as Royalties and Rent, having no impact on the general economy of Nigeria. Suffice to say that there was tepid attempt at Nigerian Content under the Petroleum Act.²⁰

¹⁵ Glossary of Term Used in the Nigerian Extractive Industry; (2010) A publication of the Nigerian Extractive Industry Transparency Initiative and Coalition for Change-Centre for Public Private Partnership (CPPC)Ibadan; P. 86 ISBN: 978-978-906-654-4

¹⁶ Ibid, 54.

¹⁷ N. Sonnichsen, ‘Daily Global crude oil demand 2006-2021’ < www.statista.com/statistics/271823/daily-global-crude-oil-demand-since-2006 >Accessed 12 March, 2021

¹⁸ NOGICDA 2010, Section 106

¹⁹ The New International Webster’s Comprehensive Dictionary of English Language; (2004) Encyclopaedic Edition, Published by Typhoon International Corp. P.920 ISBN:1-58279-558-4

²⁰ for instance, in the Petroleum Act; under paragraph 38 (a)(i) of the first schedule to the Act, the grantee of an OML is required to ensure that there is 75 per cent Nigerian content in managerial, professional and supervisory grades in connection with their concessions. Similarly, under paragraph 38(a) ii of the same schedule, Nigerians in any particular job group were not to be less than 60 per cent of the total number of employees, while subparagraph (b) provided that all skilled, semi-skilled, and unskilled workers were to be Nigerians.

In a move to further strengthen the Nigerian Content, Regulation 26 of the Petroleum (Drilling and Production) Regulations 1969 made under the Petroleum Act, further required holders of Oil Prospecting Licences to submit a detailed programme for the recruitment and training of Nigerians for the approval of the Minister, within 12 months of the grant of their concessions. Although, the Petroleum Act set the stage for increased government participation in the Nigerian Petroleum Industry, it did not establish an institutional framework for the implementation of that Right, other than empowering the Minister of Petroleum to make Regulations for the governance of the industry.²¹

After the creation of NNOC, another initiative that suggested a Local Content drive was the establishment of the Petroleum Trust Development Fund (PTDF) by Decree No. 25 of 1973. The objective of the Fund, was the development of adequate man power resources in order to enable Nigerians play dominant roles in the Petroleum industry. This Initiative were laudable as the PTDF trained a lot of Nigerians²² and gave several scholarships but it did not break the monopoly of the IOC's in the Petroleum Sector as there was no cognisable platform to launch the Nigerian Content Initiative. The introduction of the "Indigenization Policy" during the Military Regimes was fiercely resisted by the Seven Sisters²³ who threatened Capital Flight and also influenced the flagrant violation/infracton of the Policy; hence the policy was a disaster and consequently abandoned. This period witness absolute monopoly of the Foreign Oil Firms as they were involved in all Upstream activities with no Local Participation of any form.

3.2 Pre-NOGICDA Era (1991-2010)

Nigeria was approaching three decades of Oil production without genuine economic prosperity, when in the early 1990's the Babangida Regime initiated a Local Content Policy, whereby Nigerian Firms were granted license to drill from Marginal Oil Field. The President in consonance with his powers to farm out any Marginal Oil Field located in an OML or OPL which had been left unattended for a period of not less than ten years from the date of the first discovery in that particular field.²⁴ This initiative served as an impetus and a platform which was responsible for the first crop of Indigenous investors in the Petroleum Sector such as Oando, Conoil, Dubri Oil, and Monipulo, who are now operating OPLs and OMLs and are competing with IOCs, which had hitherto operated without any competition in the Nigerian Petroleum Sector.

It is pertinent to note that the defining period in the local content initiative in Nigeria was the year 2000, when the National Petroleum Investment Management Service (NAPIMS) led an aggressive pursuit for

²¹ P. Subai 'Local Content Law in the Nigerian Petroleum Industry: Comparative and Contemporary Perspectives' (2017) P.31. See also, A. Adefulu; 'Nigerian Local Content Policy' (2011) SCRIBD Publication. <<https://www.scribd.com/doc/21132887/Nigerian-Local-Content-Policy>> accessed 4 January, 2021

²² PTDF, 'History' (2012) <http://www.ptdf.gov.ng/index.php?option=com_content&view=article&id=40&Itemid=54> accessed 2 March, 2021

²³ Sampson Anthony, 'The Seven Sisters: The Great Oil Companies and the World they shaped' (New York: Viking Press: 1975) The "Seven Sisters" is a common term for the seven transnational oil companies of the "consortium for Iran" oligopoly, which had dominance in the petroleum industry from the mid-1940's to the Mid-1970s. These consisted of the Anglo-Iranian Oil Company (now BP), Royal Dutch Shell, Standard Oil Company of California (Chevron), Gulf oil (now merged into chevron), Texaco (now merged in Chevron), Standard Oil Company of New Jersey (now ExxonMobil), Standard Oil Company of New York (Now ExxonMobil).

²⁴ Paragraph 16 A of the First Schedule to the Petroleum Act, (now CAP. P.10) LFN, 2004. O. Oke; 'Marginal Fields in Nigeria: Who Owns the Field' (2017) Publication of Mondaq. <<http://www.mondaq.com/Nigeria/x/591234/Oil+Gas+Electricity/Marginal+Filed+In+Nigeria+Who+Owns+The+Field>> accessed 4 January, 2021

the introduction of a formal framework for Local Content in Nigeria. NAPIMS in collaboration with Intellectuals, Industry Practitioners and Norwegian Experts brainstormed on the way forward for the Petroleum Sector. The Nigerian Government also commissioned a Study comprising a Team of Norwegian and Nigerians Firms to develop a Report on the implementation of the Local Content Policy in Nigeria. The reason for involving Norwegian Firms was apparent in view of the fact that, Norway had made monumental success in the practice of Local Content. Three Reports emerged, to wit, (1) the National Committee Report, (2) the INTSOK Report, and (3) the Synchronised Report. These Reports formed the basis for the Nigerian Content Bill submitted to the National Assembly for passage. Between the year 2000 to 2010 when the Act was passed, the Nigerian Content Division (NCD) was created in the NNPC to act as the Policy enforcer. A target of 70% Nigerian Content by 2010 was set but this was not achieved. In April, 2010, the Nigerian Oil and Gas Industry Content Development Act was signed into Law by President Goodluck Jonathan.

3.3 Nigerian Oil and Gas Industry Content Development Act (NOGICDA) Era:

This era is referred to as the Liberal era. One unique feature of this period is that there is a clear and discernible Nigerian Content Policy backed by one of the most significant legislation in the Petroleum Industry, to wit, The Nigerian Oil and Gas Industry Content Development Act, 2010. The Act was the much-awaited legal framework/regime needed to back up the Policy and establish an Institutional framework for the implementation and effective monitoring of the Nigerian Content Project. The Act is expected to deepen Local Participation in the Industry while also adding value or creating value in the Nigerian Economy and setting the platform for redistribution of wealth created by the Industry which has long been described as an ‘enclave economy’.

4. NOGICDA AND THE TASK OF ECONOMIC DEVELOPMENT IN NIGERA

The enactment of the NOGICDA clearly evinced the government’s thinking towards inducing local participation while also stirring economic growth through activities in the Oil Sector. The Act itself defines Local Content as “the Quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human, material resources and service in the Nigerian Oil and Gas Industry”²⁵. This definition consists of salient issues that stimulates economic growth. They are as follows: -

- a.) Value added or created in the Nigerian Economy
- b.) Systematic Development of capacity and capabilities
- c.) Deliberate utilization of Nigerian human, material resources and service

The question of “*Value added or created in the Nigerian Economy*” connotes the spread of the wealth created in the Oil and Gas Industry to other sectors in the Economy. Part of the ‘evil’ or ‘ills’ the Act was enacted to cure was the inability of the activities in the Oil industry to inspire or have positive effect on other sectors of the Nigerian Economy. The Oil and Gas Industry generates a colossal amount of wealth which hitherto elude the Nigerian economy but the law has come to remedy the anomaly.

The other aspect of the definition of the Act is the ‘*Systematic development of capacity and capability*’. The Act advocates for ‘Systematic’ development of ‘capacity and capability’, which connotes a structured and progressive development of competence in Nigeria and Nigerians. It also envisages the full participation of Nigerians, and transfer of technology from the International Oil Companies to Nigerians for the purposes of achieving tangible participation. Essentially, it is when a producing nation

²⁵ NOGICDA 2010, Section 106

takes charge of its resources by commanding majority of activities in the Industry that the gains of ownership can be realised.

The phrase '*Deliberate utilization of Nigerian human, material resources and service*' is targeted at domiciliation of oil and gas activities in Nigeria by using Nigerians to perform tasks, purchasing machines, and materials from Nigerian manufacturers (where available). This is to boost manufacturing/fabrication industry and also utilise Nigerian Service providers. The Act brought about several innovations aimed at Local participation.

5. LEGAL REGIME AND VITAL INNOVATIONS UNDER THE NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT, 2010.

By virtue of Section 1 of the Act,²⁶ the Act takes precedence over any other Law in Nigeria including the Petroleum Act, on matters burdening on Local Content. The Act introduced a number of innovations, giving impetus to the Nigerian Content Policy, and the establishment of the Nigerian Content Regulator, Nigerian Content Development Management Board (NCDMB). The NOGICDA, 2010 has some key policy thrust, which are fundamental in the realization of the Nigerian Content. These key concepts are discussed as follows: -

5.1 First Consideration for Nigerian Operators

The Concept of "First Consideration" is provided in Section 3(1) of the Nigerian Oil and Gas Industry Content Development Act.²⁷ This provision is one of the cardinal points of the Nigerian Local Content policy. It is designed to stimulate indigenous participation by encouraging the award of Oil Blocks, Oil Field Licences, Oil Lifting Licences and award of contracts to indigenous companies. First Consideration under Section 3(1) of the Act is targeted at Upstream activities of the Oil and Gas Industry.

The NOGICDA, did not define what "first consideration" entails. However, the meaning can be gleaned from other provisions of the Act,²⁸ commanding all operators and project promoters to consider Nigerian content when evaluating any bid. Where the bids are within 1% of each other at commercial stage, the bid containing the highest level of Nigerian Content will be selected provided the selected bid is 5% higher than its closest competitor.²⁹ This provision suggests that the "first consideration" is some form of advantage and/or encouragement given to Nigerian firms to boost Local Participation in the upstream sector which has long been monopolised by foreign firms.

This policy concession given to Nigerian Indigenous Companies is further strengthened by Section 16 of the Act which gives Nigerian indigenous companies (that is, 100 percent Nigerian-owned companies) a 10 percent price advantage over bids of other companies. By implication, the bid of such an indigenous company would not fail or be disqualified solely on the basis that it is not the lowest bidder if the value of its bid does not exceed that of the lowest bidder by more than 10 per cent.³⁰

²⁶ Nigerian Oil and Gas Industry Content Development Act, 2010, Section 1

²⁷ Nigerian Independent operators shall be given first consideration in the award of Oil blocks, oil field licenses, oil lifting licenses and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such condition as may be specified by the Minister.

²⁸ NOGICDA 2010, Section 14

²⁹ Ibid

³⁰ NOGICDA 2010, Section 16

5.2 Exclusive Consideration

The phrase “Exclusive Consideration” is yet another plank on which the Nigerian Content regime is founded. Section 3(2) of the Act provides that exclusive consideration should be given to Nigerian indigenous service companies who demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work, to bid on land and swamp operating areas of the Petroleum industry for contracts and services contained in the schedule to the Act. Clearly, this subsection targets the downstream sector by providing that the various Petroleum Sector services contracts, which had been dominated and performed by Foreign Service Companies, exclusive consideration be given and executed in favour of Nigerian private firms provided they have the apparent capacity to undertake the Projects.

Exclusive Consideration was not defined in the Act; however, having regard to the spirit behind the policy of Nigerian Content, it is safe to describe “Exclusive Consideration” as one of the incentives given to Nigerian Service companies to stimulate Local Participation in the Oil and Gas Industry. This Clause is relevant in view of the dominance of foreign firms in the Petroleum Servicing sector. Given the chasm in capital base, experience and ownership of equipment between the Nigerian Firms and its foreign counterpart, a provision such as this becomes the incentives needed by indigenous companies to have a fair share of contracts in the oil and gas industry.

5.3 Labour Clause

One of the most significant platforms on which the Nigerian Content Act stands is the provision of the “Labour Clause”. The Act stipulates that all Projects or Contracts with an implementation cost of over \$100,000,000 must contain a “Labour Clause” mandating, use of a minimum percentage of Nigerian labour in specific cadres as may be stipulated by the Board.³¹ In the same vein, the Act also provides for expatriate professional employees engaged in engineering or other professional services in the oil industry to be registered with the relevant Nigerian professional bodies. The Act further provides that, all operators and companies operating in the Nigerian oil and gas industry shall employ only Nigerians in their junior and intermediate cadre or any other corresponding grades designated by the operator or company.³² The rationale for the Labour Clause is to ensure that Nigerians involvement at important levels in project execution so as to arm them with the requisite experience for the control of the Oil and Gas Sector. As an additional requirement, it is expected that the Nigerian Content Plan submitted during the bidding process should contain an “Employment and Training Plan” (E&T Plan) which must make provisions for the following:

- i.) An outline of the hiring and training needs of the operator/project promoter and major contractors, with a breakdown of skills required and anticipated shortage in the Nigerian Labour force;
- ii.) A time frame for employment opportunities for each phase of project development and operations to enable members of the Nigerian workforce prepare themselves for such opportunities.³³

For effective supervision and compliance with this provision, Operators/project promoters are expected to report to the Board on their “E&T” activities on a quarterly basis. In addition to the hiring and training

³¹ NOGICDA 2010, Section 34

³² NOGICDA 2010, Section 35

³³ NOGICDA 2010, Section 29 (a)(b)

needs and the time frame for employment opportunities which have to be clearly stated in the E&T Plan, the efforts and procedure for their execution must also be included.³⁴

It is also important to note that the Act also empowers the Board to ‘Nigerianise’ all positions in the industry after four (4) years as contained in the Succession plan to be submitted by the operator.³⁵ This is without prejudice to the grant of expatriate quota to the operator under the Act.

5.4 First Consideration for Nigerian Goods & Services:

From the economic perspective, the benefit derivable from Local Content Policy to any economy is the patronage and consumption of goods and services produced in the Country. This patronage will have a multiplier effect on other sectors of the economy through Resource redistribution.

Within the context of the Nigerian Content Act, the provision of Section 12 of the Act requires Operators in the Oil and Gas Industry to give “first consideration” for Nigerian goods and services. Demonstrating the importance of this requirement, the Act made it obligatory for an Operator to specifically show examples of how first consideration is assessed by the Operator in its evaluation bids for goods and service required for a given project. This policy statement expressed in the Act has been central to the growth of businesses such as Fabrication, Welding and Engineering Drawing, which are essentials components of the Oil and gas Industry in Nigeria. The Act then goes ahead to prohibit all Operators, Project promoters, Contractors from engaging any entity outside the country for any fabrication and welding activities.³⁶ It is on the strength of the “first consideration” platform that the Act makes provision for the utilisation by Operators in the Oil and Gas Industry of Nigerian Legal Service, Insurance Companies and Banks. The Act provides that every multinational oil company operating in Nigeria must domicile a minimum of 10% of its annual profit in Nigerian Banks.³⁷ Similarly, multinational oil companies operating in Nigeria shall contract their legal and insurance services to Nigerian Law firms and Insurance companies. Nigerian insurance companies must be given opportunity to cover all insurable risk in the oil and gas sector except in the opinion of the Nigerian Insurance Commission (NAICOM), the capacity of Nigerian Insurance companies have been exhausted.³⁸ Nigerian companies must also handle all legal services.³⁹ By implication, Operators and contractors in the industry are expected to retain only the services of a Nigerian Legal Practitioner, or a (firm) of Nigerian Legal Practitioners whose office is located in any part of Nigeria.⁴⁰

It is worth noting that the Act also requires that every company carrying out any project in a community, must establish a presence in that community.⁴¹ The idea behind this provision is to recognise Community Content. The patronage and consumption of Nigerian goods and service is strategic to Nigerian Content development as this will enable the country retain a reasonable percentage of the wealth created in the Petroleum Industry.

³⁴ Ibid

³⁵ NOGICDA 2010, Section 31 (1)

³⁶ NOGICDA 2010, Section 53

³⁷ NOGICDA 2010, Section 52(2)(f)

³⁸ NOGICDA 2010, See Section 49 & 50

³⁹ NOGICDA 2010, Section 51(1)

⁴⁰ NOGICDA 2010, Section 51(2)(3)

⁴¹ NOGICDA 2010, Sections 25-27

5.5 Joint Qualification System (JQS):

The Joint Qualification System is created pursuant to the provision of Section 55 of Act. The Section provides that the Board shall establish, maintain and operate a joint qualification system (JQS) in consultation with industry stakeholders which shall be administered in accordance with provisions set out in the Regulations to be made pursuant to Section 56 of the Act. The Joint Qualification System as established is intended to be an industry databank of available Nigerian companies with various competence and capabilities and shall be used as Sole system for Nigerian Content registration and pre-qualification of contractors in the industry. The Joint Qualification System has the following functions:

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- i.) Verification of contractors' capacities and capabilities;
- ii.) Evaluation of application of Nigerian content in the operations of oil companies and contractors;
- iii.) Data base for national skills development pool;
- iv.) Ranking and categorization of oil service companies based on capabilities and Nigerian Content.⁴²

The JQS makes it easy for Operators in the Oil and Gas Industry, their Alliance Partners and Promoters to easily locate Nigerian Companies who are competent and has the capacity to execute the various heads of services mentioned in the Schedule to the Act. It is a platform that projects the image of Nigerian Indigenous Companies with a view to exposing their goods and services to Operators who need them. This innovation has remained a very critical step towards enforcing the provision of Section 12 of the Act dealing with First Consideration for Nigerian goods and services.

5.6 Nigerian Content Development Fund

The Nigerian Content Development Fund is established by virtue of the provision of section 104(1) of the Act. The Fund constitutes the sum of one percent (1%) of every contract awarded to any Operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the Upstream sector of the Nigerian Oil and Gas industry. This Fund shall be deducted at source and paid into designated Account broadly known as the Fund⁴³. The Fund is to be managed by the Nigerian Content Development Management Board (NCDMB).⁴⁴

The National Assembly while considering various Reports of Stakeholders in the Industry noticed a monumental capacity gap within Nigerian indigenous players in the Industry. The Fund was created to boost weak indigenous capacity by employing same to stimulate Nigerian Content through projects, programmes and activities directed at increasing local capacity and competence.⁴⁵

5.7 Minimum Nigerian Content Requirements in the Oil and Gas Industry:

One of the major innovations of the Act, is the creation 280 Oil and Gas activities in the Schedule to the Act. This provision also sets the minimum Nigerian Content level or prescription for each of the Oil and Gas activity. The essence of the Nigerian Content requirement in the Schedule to the Act is to give an immediate indication of the intention of the law makers on national or local participation.

The Schedule, though ambitious but sets the pace for industry takeover and nationalization of the Petroleum Industry. The Act itself gives the Minister of Petroleum Resources the powers to review the

⁴² NOGICDA 2010, Section 56

⁴³ NOGICDA 2010, Section 104(2)

⁴⁴ NOGICDA 2010, Section 104(3)

⁴⁵ NOGICDA 2010, Ibid

list in the Schedule. It is instructive to note that the list has not been revised since the passage of the Act till date.

5.8 New Content Regulator

With the enactment of the Act, the Nigerian Content Department of the NNPC which hitherto managed the Nigerian content was scrapped and, in its place, a new content regulator and manager was created, to wit, the Nigerian Content Development Management Board (NCDMB) to oversee the Nigerian content initiative. This body is the brain-child of the new regime under the Act and primed to have a focused regulation, management and implementation of the Nigerian Content.

6. CHALLENGES AND WEAKNESSES OF THE NIGERIAN LOCAL CONTENT REGULATORY FRAMEWORK:

In spite of the strength of the Legal framework discussed above, there are inherent weaknesses in the Legal/Regulatory framework that has limited the success level of the Nigerian Content. These weaknesses shall be discussed below:

6.1 Lax Accountability Standards

The Act fails to create regulatory accountability of the apex regulator of the Nigeria Content. While the NCDMB coordinates, implement and enforce the Nigerian Content Law in the Oil and gas industry, accountability on these laudable duties is a mirage. The Law must be made, to regulate the regulator for effective implementation.⁴⁶ Regulatory Accountability entails that Regulatory bodies like the NCBMB operates independent of sectoral interest, with well-defined system of public accountability, that allows for judicial review of the policies and decisions of the NCBMB. While it can be successfully argued, that such function of oversight is performed by the Ministry of Petroleum Resources, the National Assembly vide the Senate and House Committees on Local Content,⁴⁷ accountability for effectiveness must transcend this oversight function to compelling the NCBMB, to submitting a periodic Technical Reports of its stewardship to the National Assembly to ensure steady assessment of the Nigerian Content under NCBMB.

6.2 Lack of Discernible Standard of Measurement of Nigerian Content Growth

The NOGICDA, empowers the Board to implement the provisions of the Act, to ensure a measurable and continuous growth of the Nigerian Content in all arrangements, projects, operations, activities or transactions in the Nigerian Oil and Gas industry,⁴⁸ The Act in the Schedules apportions percentages of Nigerian Content to the 280 Oil and Gas activities; however the Act itself fails to propose the indices for ascertaining the percentages. Therefore, calculating the existing level of local content and the parameters for the target of the Act is unascertainable. The NCBMB lacks a discernible measure and method for the measurement of Local content in the Oil and Gas Sector⁴⁹ such absence of a statutory recognised model has open such measures to several changes and adoption of various parameters which

⁴⁶ A. B Ahmed and M. Bello, 'Regulatory Failures and the Collapse of the Capital Market in Nigeria: Aligning Responsibilities with Accountability' (2015) Vol. 40. Journal of Law, Policy and Globalization, ISSN 2224-3240, P. 180

⁴⁷ Constitution Federal Republic of Nigeria 1999, Chapter C-23 Laws of the Federal Republic of Nigeria 2004, Section 88 and 89

⁴⁸ NOGICDA 2010, Section 5

⁴⁹ J. Ovadia, 'Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development' (2013) Faculty For Oil Sector Transparency in Nigeria (FOSTER) <<http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER-Measurement-and-Implementation-of-Local-Content.pdf>> Accessed 11 March, 2021

are detrimental and flood with uncertainties, in measuring the level of growth of Nigeria Content in the Oil and Gas Sector.

6.3 Uncertain Enforcement Capacity and Procedure:

Section 59 of the NOGICDA, mandates the NCDMB to undertake an '*effective monitoring of the implementation*' of Act. In the same vein, Sections 70 (c) and (d) of the Act, empowers the Board to monitor and manage the development of the Nigerian Content, and to supervise, coordinate, administer and monitor the implementation and development of Nigerian Content as provided for in the schedule to the Act. The Act provides that compliance to the provision of the Act shall be a major consideration in the award of Licences, Permits, and any other interest in bidding for oil exploration, production, transportation, development or any operations in the Nigerian Oil and Gas Industry.⁵⁰ It is contended that the NCDMB appears weak and limited with regards to the enforcement of the provisions of the Act. The Board is conferred with considerable monitoring and reviewing powers which it does not have adequate statutory powers of enforcement. The NOGICDA in Section 68 states the offence of violating provisions of the Act when it states thus, "an operator, contractor or sub-contractor who carries out any project contrary to the provisions of this Act, commits an offence, and liable upon conviction to a fine of five per cent of the project sum for each project in which the offence is committed or cancellation of the project". The issue however is that there is no specific provision that states how these provisions are to be enforced. For instance, it is unclear if the NCDMB can cancel a contract granted by Agip to its subcontractor or if it has a right to cancel an OML granted by the Federal Government of Nigeria, to an operator, for contravening the provision of the NOGICDA.⁵¹

Again, it appears that the Act does not confer the NCDMB with any specific powers to prosecute violations of Section 68 which actually constitutes an offence. While such jurisdiction may be deemed to be incidental and inferred from the fact that the Board is mandated to implement the provisions of the Act, there is need for clarification in this regard.

The NOGICDA is silent on which Court that has jurisdiction to handle cases of breach of the provisions of the Act. It therefore becomes open to speculations and assumptions whether the provision of Section 251(1)(a) & (n) of the Constitution⁵² dealing with revenue of Government from mines and minerals (including Oil fields, Oil mining, geological surveys and natural gas) is what confers jurisdiction on the Federal High Court. The Act similarly, failed to provide for the procedure that will be adopted to bring to book any offender, or to redress any breach. The Act therefore has to be explicit on five percent penalty for violation of the Act. This provision is laudable but the lack of details is a major hindrance to the realization of the noble idea and also the bane of enforcement.

It is imperative to note that the provision of the Act which allows the Board to accept gift of money, land or other property on such terms and conditions as may be specified by the person or organization making the gift⁵³ has the potential to cause Regulatory Capture as some gift may be veiled which may hinder the exercise of discretion. The provision of section 92(2) of the Act does not cure the problem already created.

⁵⁰ NOGICDA 2010, Section 3(3)

⁵¹ P. Subai (ed) '*Local Content Law in the Nigerian Petroleum Industry: Comparative and Contemporary Perspective*' (2017) P.70

⁵² Constitution Federal Republic of Nigeria 1999, Section 251(1)(a) & (n)

⁵³ NOGICDA 2010, Section 92(1)

6.4 Weak Technology Transfer Provisions:

The provisions dealing with technology transfer is clearly shown in the provisions of Sections 43-47 of the Act. A clear perusal of the provision of Sections 43-47 shows that they are merely exhortatory on the subject of Research and Development. There is no definite scheme that requires the IOC's to locate Research and Development in designated Centres or Universities in Nigeria, to foster the domiciliation technology. Most of these technology and Intellectual Property (IP) Rights are not registered in Nigeria. The Act only requires the IOC's to show Research and Development Plan when there is "any project" in the bidding process. Research and Development is at the heart of local content in the Petroleum Industry. The issue of Research and Development is a matter of political will and foresight not legislation per se. Engaging in Research and Development is a function of negotiation, honest implementation and incentives and not legislation, therefore the Nigerian Government through the NNPC must collaborate and provide useful incentives to lure the IOC's for profitable technology transfer to Nigerians.

6.5 The Protectionist Approach to Nigerian Content:

From the provisions of Sections 1, 2 and 3 of the Act, it is clear the Nigerian Content Act adopts the Protectionist Approach. The Act is apparently strict on the application of the Nigerian content in the Industry. The essence of Local content development policies is basically to encourage local participation in any industry predominantly run by foreign stakeholders. The petroleum industry in Nigeria is not different as it is dominated by foreign petroleum-producing and services companies. To facilitate indigenous investments and participation in the industry, government takes measures to impose a strict local content development policy. Local content development policies have been implemented in petroleum-producing nations such as Brazil, Ghana, Saudi Arabia, Indonesia, Norway, and Kuwait.⁵⁴ Local Content Approaches are generally Protectionist or Collaborative. It is Collaborative when the policy objective is to synergise effort with the IOC's to grow the local industry and it thrives where they are right ingredients that can spur quick growth.

A Local Content is Protectionist in nature, when it sets out strict and rigid procedures for the IOC's while giving special advantage to indigenous companies in the Petroleum Producing Countries. Norway stands out as a success story in the implementation of Local Content regime in the world and its approach is the Collaborative. This kind of Approach is geared towards protecting the nascent industry from fierce competition from the IOC's and other Oil Service companies.

Nigeria's Content Laws, favours the protectionist approach with stringent conditions and Guidelines on employment, Training and patronizing of goods and services produced in the Country. Several provisions in the Act commands these from the IOC's, and Nigeria is struggling with other aspects of Local Content such as Transfer of Technology and Research and Development of Indigenous Technology because of the Rentier Mentality, where emphasis is more on Ownership of Oil Blocks and Servicing companies. The Nigerian protectionist approach was founded on almost a non-existent Local industry hence the Nigerian content is still hunted by major challenges militating against the success of the Act in achieving the objectives of Content development.

⁵⁴ O. T. Ayoola, 'Nigerian Oil and Gas Industry Content Development Act's Perceived Performance Impact' (2017) being a Doctoral Dissertation submitted to Walden University, Available at <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=4486&context=dissertations> Accessed 16 February, 2021

6.6 Possibility for Corruption:

The Act contains four points of corruption vulnerability relating to the following: conflict of interest, broad discretionary power and the likelihood of political influence as well as influence by oil and gas companies, the murkiness of the oil and gas contract system in Nigeria, and the potential of the Act to serve as an engine of facilitation payments.⁵⁵ Clearly, the provision that allows the Board to accept gift is inimical to regulatory independence and as such has the potential to compromise strict regulation and monitoring. The fact that the Board along with the Council exercise wide unchecked powers makes it open to influence from the Multinationals which is counter-productive to regulatory independence.

7. CONCLUSIONS AND RECOMMENDATION

The enactment of the Nigerian Oil and Gas Industry Content Development Act, 2010 undoubtedly had a positive impact on the Petroleum Industry in Nigeria. After over 40 years of Crude Production, the Nigerian Economy benefited just a little fraction of the wealth created in the Oil and Gas Industry, while a staggering amount eluded the Economy as a result of Capital Repatriation. The NOGICDA is a strategic legislative intervention in the Petroleum industry. Its importance is underscored by the massive Indigenous participation in the Nigerian Oil and Gas Industry. While the innovation introduced by the Act are laudable to encourage indigenous participation, such participation has been hampered by poor implementation occasioned by lack of statutory measurement standards, Corruption, laxity of enforcement, Lack of Regulatory Accountability, Lack of positive will and implementation strategy to aid research and development and also the lack or sloppiness in the transfer of technology. The paper recommends that Rather than the Protectionist approach adopted by the Act, a Collaborative approach, where policy objective is synergised with effort of IOC's in order to ensure a steady growth of the oil and gas sector in Nigeria, should be adopted. The NCDMB should be reformed, increasing its Institutional capacity for a more effective monitoring, implementation and enforcement of the Nigerian Content. A robust Enforcement Unit comprising of critical Stakeholders in the Petroleum Industry such as the Worker Union i.e. Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSON) and Nigerian Union of Petroleum and Natural Gas Workers (NUPENG), to checkmate compliance with employment quotas and other regulatory standards in the industry. The Act should be amended to create regulatory accountability of the regulator of the Nigerian Content. The Minister of Petroleum in line with his powers under Section 36 of NOGICDA should make regulation setting a target for operators in the Oil and Gas Industry to prioritize Research and Development of indigenous Oil production technology in Nigeria. Effective implementations and amendments of the relevant provisions of the Act, will further cement economic stimulation and citizen's participation in the Oil and Gas sector in Nigeria.

⁵⁵ C. Nwapi, 'Corruption vulnerabilities in local content policies in the extractive sector: An examination of the Nigerian Oil and Gas Industry Content Development Act, 2010', (2015) Resources Policy, **46**, (92), <<https://www.sciencedirect.com/science/article/pii/S0301420715000835>> Accessed 6 January, 2020.