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## Oil, Gas & Energy Law Intelligence

### Local Content and the Marginal Fields Programme: Challenges for Indigenous Participation in the Nigerian Oil Industry by E.C. Ezeani and C. Nwuke

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# Local Content and the Marginal Fields Programme: Challenges for Indigenous Participation in the Nigerian Oil Industry

Elimma C. Ezeani\* and Chinwe Nwuke\*

## Abstract

*The upstream oil sector in Nigeria since the discovery of oil in the 1950s has been dominated by international oil companies. To revise this situation and learning from the experience of countries with strong representation for indigenous local participation such as Norway and Brazil, Nigeria adopted the Marginal Fields Programme (MFP) allocating marginal oil and gas fields to Nigerian enterprises. This agenda was further boosted by local content provisions in a Nigerian Oil and Gas Industry Content Development Act 2010 (the Local Content Act). The main aim of this joint action is to advance local participation in the oil industry, further liberalise the oil sector and create greater opportunities for jobs and entrepreneurship by Nigerians. This paper considers the potential of the MFP and the 2010 Act on achieving these objectives.*

## 1. Introduction

Nigeria, the first country in Sub-Saharan Africa to export crude oil<sup>1</sup>, still possesses huge resources of oil and gas with an approximate oil production of 2 million barrels per day (Bpd).<sup>2</sup> Oil is the country's main source of revenue and it can be argued that the country's budgets, policies and development plans over the years since the first discovery of crude in Oloibiri have hinged on the profits from the oil sector.

The principal legislation for the Nigerian oil and gas industry is the Petroleum Act of 1969. This Act vests the ownership and control of all petroleum in the State.<sup>3</sup> Three main objectives drive the present initiative to open up the Nigerian upstream oil sector to more private-sector participation. According to Hilary Nwokonko these are: Maximisation of oil exploration benefits; Provision of incentives to encourage foreign investment and; Promotion of indigenous participation in the upstream sector of the industry.<sup>4</sup> This paper is primarily concerned with the first and third of these objectives i.e. the maximisation of oil exploration benefits and promotion of indigenous participation.

Two policies adopted towards these ends are the (i) Marginal Fields Programme; and (ii) the local content legal framework. The grant of marginal fields' licenses and allocation of

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<sup>1</sup> CEE Bankwatch et al, "The Reality behind EU "Energy Security": the case of Nigeria" September 2011, page 14.

<sup>2</sup> Per Heum and others, 'Enhancement of Local Content in the Upstream Oil and Gas Industry in Nigeria – A Comprehensive and Viable Policy Approach' SNF Report No. 25/03 (2003) 1; 9. Also referred to in this paper as "the INTSOK Report".

<sup>3</sup> The Petroleum Act 1969, s 1.

<sup>4</sup> See Chiagozie Hilary-Nwokonko, 'Enhancing Local Content in the Upstream Oil and Gas Industry in Nigeria: An Appraisal of Current Policy' (2004) Vol. 2 Issue 1 Oil, Gas & Energy Law Intelligence

marginal oil fields through farm-out agreements is an essential mechanism by which interests are assigned to marginal field operators, and incentivising local participation by private indigenous companies. In a broad sense, Marginal oil fields, are those oil fields that had been abandoned or left undeveloped for a long period due to their non-commercial volume of oil production.<sup>5</sup> These fields are reclaimed by the Federal Government with the aim of reallocating these fields to indigenous companies willing and able (technically and financially) to develop them.<sup>6</sup> However, the Petroleum Act defines such fields as being such field as the President may, from time to time, identify as a marginal field.<sup>7</sup> The reallocation is undertaken through a platform known as the ‘Marginal Fields Program’ (MFP). A further legislation supplementing this move towards greater indigenous participation has also been enacted - the Nigerian Oil and Gas Industry Content Development Act of 2010 (hereinafter referred to as the ‘Local Content Act’).<sup>8</sup>

Prior to the Local Content Act, actual operations and technical activities in the upstream oil and gas sector in Nigeria have mostly been carried out by foreign firms and contractors with limited participation from Nigerian firms (apart from NNPC which holds majority participating interests in JV/JOAs) which is as a result of a perceived lack of technical and expert labour and financial resources.<sup>9</sup> The impact has been negligible employment figures by the sector of Nigerians and a commensurate lack in the capacity of local entrepreneurs to contribute to the wider financial and social benefits from an oil dependent economy.<sup>10</sup> Efforts specifically targeted towards enhancing local content in the oil and gas sector began in the late 1990s, with the setting of a local content achievement target of 30 per cent to be attained by 2005 and 60 per cent by 2010.<sup>11</sup> These targets were considered ambitious because as at the time they were set, the realized local content level was estimated at 5%. However, by 2008 the Nigerian National Petroleum Corporation (NNPC), working with major oil companies and other local stakeholders successfully raised local content in Nigeria from single-digit levels to about 30 per cent. Regrettably, the country was unable to meet the targets set for 2005 and 2010 respectively.

Government directives asking companies to conduct all design and front-end engineering work for upstream projects in the country as well as the sourcing for seismic data processing projects<sup>12</sup> also meant that local content input had to be actualised. To this end, Chevron Nigeria Limited and the NNPC established a Local Business Development Unit, which was responsible for activities relating to the award of contracts to local oil firms, and facilitation

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<sup>5</sup> Lawrence Atsegbua, ‘Issues in the Development of Marginal Oilfields in Nigeria’ (2005) Vol. 23 Issue 3 Journal of Energy and Natural Resources Law p 323.

<sup>6</sup> Ibid.

<sup>7</sup> Paragraph 17, First Schedule Petroleum Act 2004. The schedule together with the Nigerian Oil and Gas Industry Content Development Act sets out the legal framework for the allocation of marginal oil fields.

<sup>8</sup> Likewise, the Petroleum Industry Bill (PIB), which is awaiting passage into law, proposes more changes regarding indigenous participation in the oil and gas industry. Some benefits to the country include: Opportunities for more indigenous participation; Prospects for local employment; Acquisition of technical experience by operators located in Nigeria; Increase in the involvement of local banks with regards to funding.

<sup>9</sup> Oruwari Humphrey Otombosoba and Adewale Dosunmu, ‘Local Content Policy and Its Implications on Marginal Oil Fields Operations and the Nigerian Economy’ (2016) 5(6) International Journal of Research and Development 354: 357.

<sup>10</sup> H U Nwosu and others, ‘Local Involvement in Harnessing Crude Oil and Natural Gas in Nigeria’ (2006) Vol. 83 Issue 11 Applied Energy p. 1278.

<sup>11</sup> Per Heum (n 2), 25.

<sup>12</sup> Ulrich Klueh and others, ‘Policies to Improve the Local Impact from Hydrocarbon Extraction: Observations on West Africa and Possible Lessons Learnt for Central Asia’ (2009) Vol. 37 Issue 3 Energy Policy pp 1128-1144.

of technology transfer.<sup>13</sup> Another initiative was the establishment of the Onne Oil and Gas Free Zone in 1997, which provided employment opportunities for the local residents.<sup>14</sup> The creation of the free zone was to help strengthen Nigeria's position as Sub-Saharan Africa's leading oil producer and more than thirty national and international companies are currently registered as free zone users<sup>15</sup>

In this paper we examine the interaction between the efforts to optimise production by the reallocation of marginal fields, the parallel attempt to boost indigenous participation by the enactment of the Local Content Act, and the extent to which regulatory activities establish a dependable framework for the future of resource optimisation Nigeria. Section 2 is an overview of the local content framework in Nigeria's oil and gas industry and the relevant regulations in the oil sector. Section 3 reviews the efforts towards enhancing indigenous participation under the Local Content Act. In Section 4, the Marginal Oil Fields Programme is examined while in section 5 the paper considers the challenges to the objectives of enhancing local participation in the oil industry and ensuring resource optimisation. The paper makes its conclusion in section 6.

## 2. Local Content and Oil Sector Regulations

Local Content has been referred to as a set of policies that increase the utilisation of national human and material resources and domiciles economic activity, previously located abroad, in the country.<sup>16</sup> A report from the United Nations describes local content as the purchase or use by an enterprise of products of domestic origin or from any domestic source.<sup>17</sup> Other views hold that 'Local content' is a means of enhancing national wealth through economic development and additional employment of locals;<sup>18</sup> in the oil and gas industry, it includes 'developing local economies, stimulating industrial development, increasing local capability, building a skilled workforce and creating a competitive supplier base'.<sup>19</sup>

In the INTSOK Report, a study on the enhancement of local content in the Nigerian oil and gas industry produced by the combined effort of the Norwegian and Nigerian government agencies, local content is defined in relation to jobs or value added or created anywhere in the domestic economy, as a result of the actions of an oil and gas company.<sup>20</sup> Local content could also refer to the provision of infrastructure for the benefit of the local population. In this sense, it is essentially the development of local skills, technology transfer and use of local

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid. See further Oil and Gas Free Zone Onne, [www.onnefreezone.com/](http://www.onnefreezone.com/) accessed 19 May 2016.

<sup>15</sup> Ibid.

<sup>16</sup> Jesse 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' (*Facility for Oil Sector Transparency in Nigeria*, January 2013) <http://cpparesearch.org/wp-content/uploads/2014/12/FOSTER-Measurement-and-Implementation-of-Local-Content.pdf> accessed 19 May 2016.

<sup>17</sup> United Nations Conference on Trade and Development, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (United Nations Publication 2007) ch 5, 129.

<sup>18</sup> Willy Olsen, 'Local Content Development: What Will It Take?' (United Nations Development Program Conference, Cambodia, March 2008) 11 [www.un.org/kh/undp/media/files/undpconf\\_present080327\\_olsen1.pdf](http://www.un.org/kh/undp/media/files/undpconf_present080327_olsen1.pdf) accessed 8 July 2014

<sup>19</sup> Accenture: 'Developing Local Content Programs: Insights from Accenture for global players to achieve high performance in today's competitive energy landscape: (page 2) at: <http://www.criticaleye.com/insights-servfile.cfm?id=833> accessed 19 May 2016.

<sup>20</sup> The INTSOK Report (n 2); see also Hilary-Nwokonko (n 4).

manpower and local manufacturing, thereby creating skilled workforce and competitive supplier base.<sup>21</sup>

Petroleum operations in Nigeria were previously regulated by the Mineral Oils Act of 1958. The Mineral Oils Act was repealed and replaced by Decree No. 51 of 1969, which is now known as the Petroleum Act of 1969. Other relevant regulation includes the Petroleum (Drilling and Production) Regulations 1969, and the proposed Petroleum Industry Bill. A brief examination of these regulations and the departments that oversee their operations is undertaken below:

### *2.1 Petroleum Act of 1969*

At present, this is the overriding legislation for activities and operations in the Nigerian oil and gas industry. It contains four schedules, which seek to modernise the previous licensing regime without affecting its perception and ideologies. Section 1 of the Act vests entire ownership and control of petroleum in the State. By virtue of sections 2 and 8(a) respectively, the Minister may grant licenses or leases, and supervise all operations carried out under these. The Act further provides that half of the awarded area shall be relinquished ten years after the grant of an oil mining lease (OML).<sup>22</sup> It also prohibits the importation, storage, sale or distribution of any petroleum products in Nigeria without a license granted by the Minister.<sup>23</sup> The Minister may also make regulations providing generally for matters relating to licenses and leases granted under this Act and operations thereunder.<sup>24</sup>

The Act places restrictions on assignments of leases or licenses.<sup>25</sup> The Minister shall consent to an assignment if, among others, he is satisfied that the proposed assignee has sufficient technical knowledge, experience and financial resources to effectively carry out the required petroleum activities.<sup>26</sup> In accordance with the local content policy, the Act provides for state participation<sup>27</sup> and the employment of national personnel.<sup>28</sup> The Act also contains specific local content provisions. It provides that within 10 years of grant of OML, 75 per cent total of Nigerian citizens should be in managerial, professional and supervisory ranks.<sup>29</sup> The OML holder must also ensure that all skilled, semi-skilled and unskilled workers are citizens of Nigeria. A detailed program for the recruitment and training of Nigerian must also be submitted by the holder of an oil prospecting license (OPL) or OML for the approval of the Minister.<sup>30</sup>

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<sup>21</sup> Joe Asamoah, 'Local Content in the Oil and Gas Industry' (Oil and Gas IQ, 2014)

<http://www.oilandgasiq.com/strategy-management-and-information/articles/local-content-in-the-oil-and-gas-industry> accessed 19 May 2016.

<sup>22</sup> The Petroleum Act 1969, s 13. The OML is an exclusive right to search for, win, work, carry away and dispose of petroleum.

<sup>23</sup> Ibid, s 4

<sup>24</sup> Ibid, s 9(b)

<sup>25</sup> Ibid, first schedule, para 14. The Act states that the holder of an OPL or OML shall not assign his lease, license or interest without prior consent of the Minister.

<sup>26</sup> Ibid, para 16(ii). Some indigenous E & P companies have acquired majority participating interests previously held by IOCs. See generally Tade Oyewunmi; "Natural Gas Exploration and Production in Nigeria and Mozambique: Legal and Contractual Issues" [part of OGEL Special on "*Natural Gas Developments: An International and Challenging Legal Framework*"] OGEL 1 (2015), particularly at pp 5 – 9.

<sup>27</sup> Ibid, para 34.

<sup>28</sup> Ibid, para 37.

<sup>29</sup> The Petroleum Act 1969, First Schedule, para 38.

<sup>30</sup> The Petroleum (Drilling and Production) Regulations, Reg 26.

## 2.2 Petroleum (Drilling and Production) Regulations of 1969

The Petroleum (Drilling and Production) Regulations (the “D&P Regulations”) is made pursuant to the Petroleum Act of 1969. The Regulations oblige lessees and licensees to recruit and train Nigerians.<sup>31</sup> Similar to the Nigeria Oil and Gas Industry Content Development Act of 2010, Regulation 26 of the D&P Regulations mandates licensees and lessees to submit a detailed program for the recruitment and training of Nigerians within twelve months of the grant of the license, for the Minister’s approval. The Petroleum Act of 1969 empowers the Minister to make and issue new regulations or amend existing ones in respect of petroleum operations carried out under leases or license granted under the Act. Accordingly, these regulations are amended from time to time to introduce or change significant issues such as royalty rates or utilisation of associated gas.<sup>32</sup>

## 2.3 Petroleum Industry Bill (PIB)

The Petroleum Industry Bill (PIB) is a product of the recommendations of a Presidential Committee set up to undertake reforms in the Nigerian oil and gas industry in 2007.<sup>33</sup> It was initially introduced in December 2008 but has undergone numerous revisions. A new version was presented to the National Assembly on 18 July 2012 by the immediate past federal government administration (PIB 2012) following the recommendations of its PIB Task Force.<sup>34</sup>

By and large, the PIB encourages the development of Nigerian content in the petroleum industry by providing for the award of licenses or leases to any indigenous oil company.<sup>35</sup> The PIB provides a definition of an indigenous oil company that is synonymous with that given by the Local Content Act.<sup>36</sup> The PIB is intended to repeal previous oil and gas legislations upon commencement.

## 2.4 Ministry of Petroleum Resources (MPR)

The Ministry of Petroleum Resources has the main supervisory responsibility over Nigeria’s oil resources. It formulates policies for the oil and gas industry and coordinates the implementation of approved policies. Its main objective is to create an internationally

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<sup>31</sup> The Petroleum (Drilling and Production) Regulations 1969, reg 26(1).

<sup>32</sup> Bernard Taverne, *Petroleum, Industry and Governments: An Introduction to Petroleum Regulation, Economics and Government Policies* (Kluwer Law International Ltd, 1999) 198.

The Regulations were amended in 1988, 2001 and 2006. See further DPR - Acts and Regulations available at <https://dpr.gov.ng/index/acts-and-regulations/> accessed 19 May 2016. See < [www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](http://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf) >

<sup>33</sup> The quest towards having a PIB began as far back as 2000 with the inauguration of the Oil and Gas Sector Reform Implementation Committee (“OGIC”) by the Nigerian Presidency to carry out a comprehensive reform of the Nigerian Oil and Gas Industry. As a result of the OGIC’s recommendations the National Oil and Gas Policy 2004 was approved and the OGIC was re-commissioned in 2007 by the Presidency to draft a Bill based on the National Oil and Gas Policy 2004. The PIB was thereafter submitted to the National Assembly in 2008.

<sup>34</sup> Presently, the PIB has been segmented into three bills (possibly governance, taxation and business items) based on feedback from stakeholders and it is expected that the Nigerian Senate will begin the hearing of the bill shortly.

<sup>35</sup> See Nigeria National Petroleum Corporation (NNPC) ‘An Overview of the Petroleum Industry Bill’ available at [www.nnpcgroup.com/portals/0/pdf/pibconsultativeforum.pdf](http://www.nnpcgroup.com/portals/0/pdf/pibconsultativeforum.pdf) accessed 19 May 2016.

<sup>36</sup> Section 106 of the 2010 Act provides for at least 51 per cent ownership by Nigerians. Additionally, the PIB would ensure that the holder of an OML employs a minimum of 95 per cent Nigerians in management and supervisory roles.

competitive oil and gas sector, which contributes excellently to the development of the Nigerian economy. The Ministry exercises its regulatory function through the Department of Petroleum Resources (DPR).

## *2.5 Department of Petroleum Resources (DPR)*

The Department regulates and monitors all activities of the oil and gas industry.<sup>37</sup> It is responsible for the daily monitoring of the petroleum industry and for overseeing all petroleum industry operations carried out under licences and leases in accordance with industry practices.<sup>38</sup> The tasks set out for the DPR include to: Regulate oil and gas operations; Administer oil and gas acreages and concessions and; Implement government policies on upstream oil and gas issues.<sup>39</sup> In addition, the Department ensures compliance with applicable laws and regulations in line with good practice. The DPR is also authorised to monitor the Nigerian government's indigenisation policy to ensure that the local content ideology is attainable. In furtherance of this, the Guidelines for Farm-out and Operations of Marginal Fields were issued by the DPR so as to ease the procedure for farmout and operation of marginal fields. A map of the available marginal fields is published on the DPR web pages.<sup>40</sup>

The Guidelines for Farm-out and Operation of Marginal Fields ( "Guidelines") were initially issued in July 2001 for the first bid round and replaced in November 2013 by new guidelines for the proposed (didn't hold) second bid round. Under the Guidelines, eligibility to bid for a marginal field notes that "[T]he indigenous company shall be substantially Nigerian and shall be registered solely for exploration and production business."<sup>41</sup> Presumably a company with 51% Nigerian shareholding will qualify as 'substantially Nigerian;' in fact, the Nigerian Local Content Act in its Section 105 expressly refers to this 51% local requirement. The company should also reflect the following attributes: 'background and experience with exploration and production at sufficiently high level'; 'Niger Delta representation'; and the ubiquitous, 'Federal Character representativeness'.<sup>42</sup>

The process for the acquisition of marginal fields as outlined in the Guidelines is as follows:

1. The marginal fields are publicly announced and eligible companies are invited to submit proposals to the DPR, in accordance with the requirements of the guidelines.
2. The DPR selects up to five companies per marginal field.
3. Pre-qualified companies are invited to submit field-specific technical and commercial bid.
4. Successful bidders enter negotiations on a farm-out agreement with the OML holder(s).<sup>43</sup>

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<sup>37</sup> See the Department's web pages at: <https://dpr.gov.ng/index/> accessed 19 May 2016.

<sup>38</sup> Tominiyi Owolabi, Wolemi Esan and Damilola Salawu, 'Oil and gas regulation in Nigeria: Overview' (*Reuters*, 1 May 2014) <[http://uk.practicallaw.com/5-523-4794?q=\\*%&qp=%&qo=%&qe=>](http://uk.practicallaw.com/5-523-4794?q=*%&qp=%&qo=%&qe=>) accessed 8 September 2014.

<sup>39</sup> See 'Roles of DPR – Upstream' (Department of Petroleum Resources) available at <<http://dpr.gov.ng/index/dpr-operations/upstream-regulation/roles-of-dpr-upstream/>> accessed 5 September 2014

<sup>40</sup> Available at: <https://dpr.gov.ng/index/marginal-field-map/> accessed 19 May 2016.

<sup>41</sup> See the GFOMF, Section 6.5 on 'Criteria for Evaluation' at para vii.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*



The key features of a farm-out agreement are also specified in the guidelines. They include provision on the following:

- i. Straddled Fields and Reservoirs – a unitisation agreement should be signed for any straddled field as it is a condition precedent for approval of a farm-out.<sup>44</sup>
- ii. Abandonment – costs for decommissioning shall be shared equitably. An agreed percentage shall be set aside by the farmee in its budget.<sup>45</sup>
- iii. Community Development/Relationship – the farmee is responsible for community development activities.<sup>46</sup>
- iv. Non-performance – in the event of the farmee’s insolvency, the field shall revert back to the farmor less any liabilities of the farmee.<sup>47</sup>
- v. Encumbrance – the farmee may secure any required assistance but shall not reach an agreement with parties that encumber the lease or farm-out area.<sup>48</sup>
- vi. Assignment and Termination - prior consent of the Minister shall be obtained before any assignment or termination by the farmee.<sup>49</sup>

### **3. Enhancing Indigenous Participation Under the Local Content Act**

A focused approach to enhancing indigenous participation in the Nigerian oil industry began with a workshop organised by the National Petroleum Investment Management (NAPIMS) in 2001.<sup>50</sup> The workshop produced a communique which recommended the creation of the National Committee on Local Content Development (NCLCD).<sup>51</sup> In 2002 the Committee produced a report of their findings on Nigerian content in the oil and gas sector, the NCLCD Report. The NCLCD Report proposed targets for aggregate local content value in the oil and gas industry - 40 per cent in 2005 and 60 per cent in 2010 - and recommended the drafting of a Nigerian Content Development Bill.<sup>52</sup> In the same year, a Nigerian content study was undertaken by the Nigerian Content Unit, a section of the Department of Petroleum Resources (DPR). The study was commissioned by the Norwegian Agency for Development Cooperation (NORAD) and the Norwegian Ministry for Petroleum and Energy (NPE) under the custody of the NNPC, DPR, NAPIMS and the Office of the Advisor to the President on Petroleum and Energy. This resulted in the afore-mentioned, “INTSOK Report.” The INTSOK Report stressed that the ultimate goal of a viable local content policy should be the creation of jobs as well as the enhancement of sustainable growth in industrial and national wealth.<sup>53</sup> The Report also recommended that “oil companies should be asked to take – and accept – a major responsibility to achieve the objectives that are set”.<sup>54</sup> A significant finding of the Report is that:

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<sup>44</sup> See Section 13.0 ‘Elements of Farm-out agreements’ at para v.

<sup>45</sup> Ibid para iv.

<sup>46</sup> Ibid para ix.

<sup>47</sup> Ibid section 15.0.

<sup>48</sup> Ibid section 16.0.

<sup>49</sup> Ibid section 17.0.

<sup>50</sup> Toyin Falola and Jessica Achberger (eds), *The Political Economy of Development and Underdevelopment in Africa* (Taylor and Francis 2013) 57.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> See the INTSOK Report (n 2), 63.

<sup>54</sup> Ibid, 64.

As for the **local content policy** regarding upstream oil and gas, **two pillars** have to be constructed. One is the **responsibility of the oil companies**; the other is the **policy of the government**. Government policy will have great bearing as to the commitments that the oil companies are willing to make. Government policy, and in particular policies influencing the framework conditions for investments and business development, also have great bearing on a third group of players that is required for industrial capacity expansion, namely the entrepreneurs who are willing to invest to provide the needed goods and services.<sup>55</sup>

A further report was instrumental to the development of the Nigerian Content Policy - the 'Synchronised Report on Enhancement of Local Content in the Upstream Sector of the Oil and Gas Industry in Nigeria' ("Synchronised Report"). The Synchronised Report recognised the need to balance encouragement of foreign investment with participation and development of indigenous capabilities, and recommended preferential treatment for indigenous companies and the categorisation of companies.<sup>56</sup>

It is worth mentioning that in 2004, a Nigerian Content Division (NCD) was created within the NNPC to actively manage indigenous skills, develop capacities, and monitor compliance and growth in local content implementation. However, it can be argued that it was the three reports – the NCLCD Report, the INTSOK Report and the Synchronised Report which effectively provided the foundation for the Local Content Act 2010.

The Local Content Act is divided into three parts. Part One deals mostly with developing Nigerian content in the oil and gas industry. Part Two provides for the establishment of the Nigerian Content Development and Monitoring Board (NCDMB) while Part Three deals with financial and legal matters.<sup>57</sup> The act aims to facilitate indigenous participation and to promote local content development in the Nigerian oil and gas industry. It applies to all Nigerian operators and operations carried out within the Nigerian oil and gas industry.<sup>58</sup> It also administers local content requirements, which apply to all contracts entered into after its enactment.<sup>59</sup> The objective of these provisions can be said to be to domicile relevant economic activities in the Nigerian oil and gas industry in Nigeria.<sup>60</sup>

The Act defines 'Nigerian 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 services in the Nigerian Petroleum Industry.<sup>61</sup>

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<sup>55</sup> Ibid, 64. Emphasis in original.

<sup>56</sup> Hilary-Nwokonko (n 4), 4.

<sup>57</sup> The Act is divided into three parts. Part one deals mostly with developing Nigerian content in the oil and gas industry. Part two dwells on the establishment of the Nigerian Content Development and Monitoring Board (NCDMB) while part three provides for financial and legal matters.

<sup>58</sup> The Nigerian Oil and Gas Industry Content Development Act 2010, s 1.

<sup>59</sup> The Nigerian Oil and Gas Industry Content Development Act 2010, s 6.

<sup>60</sup> Olaniwun Ajayi, 'Nigeria Oil and Gas' (*Freshfields Bruckhaus Deringer*, March 2013)

<[www.freshfields.com/uploadedFiles/SiteWide/News\\_Room/Insight/Africa\\_ENR/Nigeria/Nigeria%20oil%20and%20gas.pdf](http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insight/Africa_ENR/Nigeria/Nigeria%20oil%20and%20gas.pdf)> accessed 3 July 2014.

<sup>61</sup> This definition emphasises value addition to the Nigerian economy.

It presents several opportunities for the promotion of indigenous participation by prescribing as follows:

1. First consideration to be given to Nigerian operators in the award of licenses or oil blocks and in all projects for contracts awarded in the Nigerian oil and gas industry.<sup>62</sup>
2. Exclusive consideration to be given to Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute the work.<sup>63</sup> Although this section of the Act encourages indigenous participation, the use of the word “exclusive” implies the exclusion of all non-Nigerian service companies. In our opinion, this provision goes against the FG’s objective of attracting foreign investment.
3. Promotion of Nigerian content development shall be a major criterion for the award of licenses, permits and any other bid interests.<sup>64</sup> Likewise, it provides that the NCDMB or “the Board”, established under the Local Content Act, shall ensure a measurable and continuous growth of Nigerian content in all transactions in the Nigerian oil and gas industry.<sup>65</sup>
4. First consideration to be given for Nigerian goods and services so as to develop the supply of local services and products.<sup>66</sup> This must be specified by an operator in a Nigerian Content Plan submitted to the Board for approval.<sup>67</sup>
5. First consideration to be given to Nigerians for employment and training in any project executed in the Nigerian oil and gas industry.<sup>68</sup> The Act is intent on the development of indigenous skills. Section 29 provides for the submission of an Employment and Training (E and T) Plan by operators. The procedure for such training must be specified in the Plan. Furthermore, where Nigerians are not employed for lack of training, the operator must supply such training locally or elsewhere.<sup>69</sup>
6. Use of indigenous assets in oil and gas operations by prohibiting the importation of welded products and requires that all fabrication and welding activities be carried out in Nigeria.<sup>70</sup> This also encourages the ownership of indigenous assets by the local service contractors.
7. Technology transfer in accordance with the country’s plans and priorities.<sup>71</sup>

We identify certain limitations implicit in the above provisions below:

First, the principle of the lowest bidder is not the definitive yardstick for award of contracts. Contracts can be awarded to an indigenous company that is not the lowest bidder but has the capacity to execute a project.<sup>72</sup> However, the value of the contract must not be more than 10 per cent of the lowest bid price. In our opinion, this provision does not guarantee effective competition among bidders. Although, the Act aims to provide full and fair opportunity for

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<sup>62</sup> The Nigerian Oil and Gas Industry Content Development Act 2010, s 3(1).

<sup>63</sup> Ibid, s 3(2).

<sup>64</sup> Ibid, s.3(3).

<sup>65</sup> Ibid, s 5.

<sup>66</sup> Ibid, s 12.

<sup>67</sup> Ibid, s 7.

<sup>68</sup> Ibid, s 28(1).

<sup>69</sup> Ibid, s 30.

<sup>70</sup> Ibid, s 53.

<sup>71</sup> Ibid, s 43. This program must be to the satisfaction of the Board.

<sup>72</sup> Ibid, s 16.

Nigerian contractors,<sup>73</sup> it ought not to discourage effective competition in relation to foreign suppliers. Nevertheless, foreign companies may participate in the process by either incorporating a Nigerian subsidiary or enter into JVA with one or more indigenous company.<sup>74</sup> With respect to expatriate positions in an indigenous oil firm, an operator may retain a maximum of 5 per cent allowance for management positions for expatriates.<sup>75</sup> This section is intended for the protection of the interest of investors. However, it may deter foreign investments as international stakeholders may not consider this an effective representation of their interests.

Second, an operator is mandated to submit a Nigerian content plan for all projects,<sup>76</sup> which is to ensure that first consideration is given to Nigerians for training and employment.<sup>77</sup> The Act further states that the Board shall ensure that the operator maintains a reasonable amount of personnel in the areas it has significant operations.<sup>78</sup> There is no indication of what constitutes a reasonable amount of personnel - what percentage of the total employees would be reasonable? Would this refer to the general employment or would exceptions be made where the operator claims a knowledge or skills shortage? It would have been preferable if these issues were clearly addressed in the Act's interpretation section or subsequent guidelines and/or regulations. Additionally, the penalty for non-compliance with the provisions of the Act is a fine of 5 per cent of the project sum or a cancellation of the project.<sup>79</sup> Even if the fine is adequate a point on which we have reservations, the procedure for enforcement of penalties is not clear.

Third, the brief definition of a Nigerian company under the Act can also be a limitation since it does not absolutely preclude the formation or control of an indigenous company by rich foreign investors. The Act defined a Nigerian company to mean "a company formed and registered in Nigeria in accordance with the provision of Companies and Allied Matters Act with not less than 51 % equity shares by Nigerians."<sup>80</sup> In practice, it is possible that "indigenous" oil companies can be fronts for IOCs or other private foreign owners. The provisions of the Local Content Act ought to have been more detailed and exact in limiting the use of Nigerian registered companies as fronts for foreign ownership. A decisive example can be found in the laws of the UAE, another oil producing country. Article 22 of UAE Federal Law No 8 1984, which law makes provisions for commercial companies, states as follows:

Without prejudice to commercial activities reserved only to nationals, as may be prescribed herein or in any other law, it is a requirement for the establishment of a company to have one or more national partner(s) whose share in the company's capital is not less than 51%.

The above provision is reinforced by Article 2 of the UAE Federal Law No 17 2004 which makes it illegal to conceal foreign involvement in any commercial enterprise. This provision clearly states:

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<sup>73</sup> Ibid, s 15.

<sup>74</sup> Chijioke Nwaozuzu, 'Marginal fields licensing round 2013: Prospects, delays (1)' Vanguard (Lagos, June 10 2014).

<sup>75</sup> Ibid, s 32.

<sup>76</sup> Ibid, s 7.

<sup>77</sup> Ibid, s 10(1)(b).

<sup>78</sup> Ibid, s 28(2).

<sup>79</sup> Ibid, s 68.

<sup>80</sup> Ibid, s 109.

Concealment of any foreigner is prohibited— whether physical or juristic person – and whether it is carried out by using the name, the license, the commercial register of the concealer or by any other means in the light of the definition of concealment mentioned in Article 1 of the present Law.

The above provision has further been interpreted as extending the anti-concealment provisions to ‘side agreements’ in joint venture contracts, that is, agreements where a national purports to hold a percentage of the indigenous company *in trust* for foreign-owners. Such side agreements have hitherto been reached in an attempt to circumvent the provisions of UAE Federal Law No 8 of 1984 which bars foreigners outside established UAE Free Zones, from owning more than forty-nine percent of a Joint Venture.<sup>81</sup> If the intent of the Nigerian Local Content Act is to prohibit and forestall the use of local companies as fronts for foreign commercial companies, provisions such as these referred from the UAE above, are more likely to achieve the objective of preserving local content than what the Local Content Act currently provides.

A fourth limitation is found in sections 43-47 of the Local Content Act on technology transfer. These are general exhortatory provisions requiring operators to show plans on how they proceed with respect to technology transfer to Nigeria. There are no definite schemes or obligations such as a requirement that a percentage of the R&D work undertaken must be carried out in Nigerian centres or universities or that patents and other IP developed in the course of projects in Nigeria should be first registered in the country.

Fifth, the Act does not in its provisions or by reference to secondary provisions address the often cited shortage of skills and experience in the Nigerian labour market which has always been the reason for the minimal employment of Nigerians in the oil and gas industry. The sixth limitation is that there is no provision relating to funding the development of fields subsequent to the awards. While the scope of the Local Content Act is more broadly to address Nigeria’s content policy and not specifically for the marginal fields programme, in our view, field development involves huge investments and risks which cannot be borne solely by the indigenous companies. Most of the indigenous companies are only able to raise money to acquire the fields and require further funding for operations from local banks.<sup>82</sup> Without collateral by way of security, opportunities for funding from banks in Nigeria may not be readily available. Hence, the need to invite foreign partners becomes inevitable<sup>83</sup> Provisions that acknowledge or at least advise on the government’s intent to support the funding initiatives under the aforementioned DPR Guidelines for Farm-out and Operations of Marginal Fields would in our view lend more credibility to the government’s efforts to support local participation.

Notwithstanding the above limitations, the 2010 Act established the NCDMB,<sup>84</sup> tasked with monitoring, coordinating and implementing the provisions of the Act;<sup>85</sup> and a Nigerian Content Development Fund (NCDF) where one per cent of the total contract sum awarded in

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<sup>81</sup> See Nabil A Issa, “United Arab Emirates: Of Side Agreements and JVs’ *The Oath*, online at: <http://www.theoath-me.com/s/united-arab-emirates-of-side-agreements-and-jvs> accessed 19 May 2016.

<sup>82</sup> S 52(1) Local Content Act allows for only the services of indigenous or local banks to be retained.

<sup>83</sup> *Ibid* n 76.

<sup>84</sup> *Ibid*, s 69

<sup>85</sup> *Ibid*, s 4. It also established the Nigerian Content Consultative Forum to provide a platform for information sharing (see s 57)

the upstream sector is to be paid. Local participation in the petroleum sector is currently accelerating however most indigenous players encounter the same obstacles, namely – deficient infrastructural facilities, corruption and mismanagement, unsuitable materials, inadequate financing and volatile locations.<sup>86</sup> These same problems have hindered the development of some previously awarded marginal fields. To a large extent, indigenous participation is still driven by foreign expertise, a situation which has been effectively addressed in countries such as Norway which can be a useful comparator for Nigeria’s local content objectives.

Norway has successfully managed its oil industry adopting local content policy and initiatives since its first production exercise in 1971.<sup>87</sup> According to a commentator,

Norway’s successful management of its oil industry is largely due to the determination of the leaders who ensured that they utilized the existing competence in the country at the time, and to the private companies which were ready to develop expertise and become competitive in this new market both in Norway and abroad. And finally quite a bit of luck goes into the equation.<sup>88</sup>

Lady Luck may have shone on Norway as the last sentence above suggests. However, a more tangible explanation is that the Norwegian government early on, supplemented its Act of 29 November 1996 No. 72 relating to petroleum activities with local content policies. Government equity participation began in 1967 and in 1972 when the Goods and Services Office was created with the aim of monitoring indigenous companies awarded contracts.<sup>89</sup> Norway’s local content policy began in the same year with the creation of the national oil company Statoil, setting in motion a series of policies which mandated oil companies to use Norwegian goods and services.<sup>90</sup> This led to the expansion of Norwegian operators and suppliers. Licenses are awarded through mixed rounds with the mix of partners decide by the Ministry of Oil and Energy.<sup>91</sup> The IOCs trained Norwegian personnel in other parts of the world then brought them back home to indigenise the industry.<sup>92</sup>

At first glance, the policy measures adopted by Norway are similar to those of Nigeria. Both countries established a National Oil Company (NOC) and introduced local content requirement, training of local staff and transfer of technology. However as pointed out earlier, there are marked differences with respect to policy design, transparency and enforcement of regulations,<sup>93</sup> the sharing or transfer of technology and expertise to local companies, and the

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<sup>86</sup> See Nwosu and ors (n10).

<sup>87</sup> See Thomas K Svenson and ors, ‘Oil and Gas Regulation in Norway: Overview’ (Practical law, 2014) <http://uk.practicallaw.com/6-529-5206> accessed 19 May 2016; the INTSOK Report (n 2), 46.

<sup>88</sup> Hege Hertsberg, ‘Making Local Content Work – The Norwegian Experience’ (Local Content Exhibition and Conference, Ghana, October 2013) at: [http://www.ghana.norway.info/News\\_and\\_events/News-and-Events/Ghana/Making-local-content-work---the-Norwegian-experience/#.Vz218U32YdU](http://www.ghana.norway.info/News_and_events/News-and-Events/Ghana/Making-local-content-work---the-Norwegian-experience/#.Vz218U32YdU) accessed 19 May 2016.

<sup>89</sup> Shirley Neff, ‘Memorandum on international Best Practice in Development of Local Content in the Energy Sector’ (Nigeria Extractive Industries Transparency Initiative, 4 May 2005) <[www.neiti.org.ng/sites/default/files/page/uploads/local-content-5-9-051.pdf](http://www.neiti.org.ng/sites/default/files/page/uploads/local-content-5-9-051.pdf)> accessed 19 May 2016

<sup>90</sup> Oystein Noreng, ‘The Norwegian Experience of Economic Diversification in Relation to Petroleum Industry’ (2004) Vol. 2 Issue 4 Oil, Gas & Energy Law Intelligence (OGEL).

<sup>91</sup> See INTSOK Report (n 2).

<sup>92</sup> Ibid. An example is Saga Petroleum, which is an independent private company established in 1971. The company began its operations abroad before establishing in Norway.

<sup>93</sup> Ibid.

promotion and support for research and development activity in the sector.<sup>94</sup>

#### 4. The Marginal Oil Fields Programme (MFP)

In Nigeria, marginal fields are fields initially allocated to IOCs, which have remained undeveloped because they are considered uneconomic in terms of their production and revenue potentials when compared to others.<sup>95</sup> There are about 183 oil fields under concessions in Nigeria that have remained underdeveloped and abandoned. The fields are estimated to contain about 2.3 billion barrels of stock tank oil initially in place (STOIP) valued at USD 50.6 billion.<sup>96</sup> These fields have undergone little or no appraisal activities although exploration discoveries have been made.<sup>97</sup>

The IOCs left some oil and gas resources unproduced many years after discovery for reasons including the OPEC production quota. These fields contain reserves, which when produced by the IOCs are uneconomic but could be profitable for local operators as a result of their low operating costs.<sup>98</sup> In December 1999, about 116 of such fields were identified in Nigeria and they collectively contained presumed reserves of about 1.3 billion barrels.<sup>99</sup>

The Petroleum (Amendment) Decree No.23 of 1996 provided the legal framework for the farmout and award of marginal fields<sup>100</sup> and led to the Marginal Fields Policy (MFP) the objectives of which include: Promotion of indigenous participation; Generation of employment for Nigerian people; Increase of production capacity; Enhancement of oil and gas reserves and; Ensure a favourable return on investments.<sup>101</sup>

In 2003, a total of 24 marginal oil fields were awarded to 31 indigenous oil companies; 17 fields were awarded to sole operators while the remaining 7 were awarded jointly to 14 operators (See Appendix I). About 37 fields were on offer in the 2014 round of bids. (See Appendix II). Out of about 30 marginal fields awarded as at May 2016, only nine<sup>102</sup> had

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<sup>94</sup> See Noreng (n 90).

<sup>95</sup> Deloitte: 'Marginal Fields: Roadmap to Growing the Nation's Reserves' *Inside Tax*, Iss 46 (2014) [www.deloitte.com/view/en\\_NG/ng/insights/publications/inside-tax/7f5a5d0dc7725410VgnVCM3000003456f70aRCRD.htm](http://www.deloitte.com/view/en_NG/ng/insights/publications/inside-tax/7f5a5d0dc7725410VgnVCM3000003456f70aRCRD.htm) accessed 30 August 2014. See also Martin Olisa, *Nigerian Petroleum Law and Practice* (2<sup>nd</sup> edn, Jonia Ventures Limited 1997) 153

<sup>96</sup> Chijioke Emole, 'The Petroleum (Amendment) Decree, 1996, of Nigeria' (1997) Vol. 41 Issue 2 *Journal of African Law*, pp 239-245.

<sup>97</sup> Ownership of the fields were as follows: Shell – 115, Agip – 23, Chevron – 19, Mobil – 10, Elf – 8, Texaco – 3, Ashland – 1 and Nigerian Petroleum Development Company (NPDC) – 4.

<sup>98</sup> See further, Atsegbua (n 5); Olisa (n 95).

<sup>99</sup> Oluropo Rufus Ayodele and Samuel Frimpong, 'Economics of Nigerian Marginal Fields' (SPE Hydrocarbon and Economics Evaluation Symposium, Dallas, April 2003) <[www.onepetro.org/download/conference-paper/SPE-81998-MS?id=conference-paper%2FSPE-81998-MS](http://www.onepetro.org/download/conference-paper/SPE-81998-MS?id=conference-paper%2FSPE-81998-MS)> accessed 19 May 2016.

<sup>100</sup> Petroleum (Amendment) Decree No.23 of 1996, paragraph 16A. This Act came after much controversy between IOCs and local firms to whom marginal fields had been re-allocated by government fiat. See Ayodele and Frimpong (n 99).

<sup>101</sup> See Atsegbua (n 5); Koso I Idigbe and Kelani O Bello, 'Sustainable Operation of Marginal Fields in Nigeria: Opportunities, Challenges and Best Practices' (2013) Vol. 4 Issue 4 *Journal of Emerging Trends in Engineering and Applied Sciences* pp 686-691. The decision of IOCs to concentrate on their deep-water operations and consequently divest their onshore assets has also facilitated the programme with 13 onshore assets put up for sale since 2010 – see Owolabi and ors (n 38).

<sup>102</sup> These and their operators are: Umusadege (Midwestern Oil and Gas/Mart Resources/Suntrust Oil), Umusati (Pillar Oil), Ibigwe (Waltersmith/Morris Petroleum), Egboma (Asuokpu/Umutu (Platform Petroleum), Obodugwa/Obodeti (Energia Petroleum/Oando), Ajapa (Britania-U), Ogbelle (Niger Delta Petroleum Corporation), Ebole (Oriental Energy) and Uquo (Frontier Oil).

commenced production.<sup>103</sup> The Marginal Field Operators (MFO's) current combined volume of 60,000bpd, is however still minimal- about 2 per cent of Nigeria's daily production.<sup>104</sup>

## 5. Marginal Fields, Local Content, and an Effective Regulatory Approach

Voluntary divestments by IOCs will no doubt assist the object of encouraging more local participants into Nigeria's oil and gas industry. The success of the regulatory approach under the MFP and the local content policy objectives to address the peculiar concerns for enhanced indigenous participation depend on a range of factors. These challenges include funding concerns, limited technical competence and legal and policy effectiveness issues affecting the actual realisation of the objectives under both the MFP and the Local Content Policy.

### 5.1 Funding Concerns and Limited Financial (Lending) Assistance

In our view, the fundamental test of the success of the MFP is whether the policy achieves the optimization of oil production and of oil reserves. The DPR has commendably mandated all MFOs with non-producing marginal fields to develop them or risk losing their operating licenses.<sup>105</sup> However given the huge capital requirement for oil exploration and production, there has been comparatively minimal success for the indigenous players in the upstream sector as not many have made progress with their farmed-out leases.<sup>106</sup> This is where the banks play a significant role.<sup>107</sup>

Banks are basically risk averse and lend at a fixed margin. However, before lending, they contemplate several risks such as:

- The oil will not be found in commercial quantities.<sup>108</sup>
- Expropriation, nationalisation of assets or change in legislation will bring the company's operations to an end.<sup>109</sup>

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<sup>103</sup> See Department of Petroleum Resources Nigeria at <https://dpr.gov.ng/index/list-of-marginal-fields/>. See also George Osahon, "Marginal Field Development: Best Practices & Lessons Learned" (Society of Petroleum Engineers' 37<sup>th</sup> Nigerian Annual International Conference & Exhibition, Lagos, July 2013) <[www.spenigeriaouncil.org/images/13NAICE\\_PRESENTATIONS/MFW/DPRMARGINAL%20FIELD%20DEVELOPMENT\\_MFW.pdf](http://www.spenigeriaouncil.org/images/13NAICE_PRESENTATIONS/MFW/DPRMARGINAL%20FIELD%20DEVELOPMENT_MFW.pdf)> accessed 27 August 2014

The Directorate of Petroleum Resources (DPR) instructed all holders of marginal field, both foreign and local, to develop the fields or risk the loss of their operating licenses. See also, Raj Kulasingam and ors, 'Nigeria's Marginal Fields Process, Opportunities, Challenges and Stetson Hats!' (*Nigeria Development and Finance Forum*, 18 April 2014)

[www.nigeriadevelopmentandfinanceforum.org/PolicyDialogue/Dialogue.aspx?Edition=219#](http://www.nigeriadevelopmentandfinanceforum.org/PolicyDialogue/Dialogue.aspx?Edition=219#) accessed 19 May 2016.

<sup>104</sup> See George Osahon, (n 103). The FG announced the Second Marginal Field Bid Round in November 2013. There are 31 fields on offer with 16 located onshore and 15 on the continental shelf, see See DPR Guidelines. See further NNPC: 'FG Kicks off Second Marginal Fields Bid Round - Assures of Transparency and Accountability in Bid Process' (Nigerian National Petroleum Corporation) [www.nnpcgroup.com/PublicRelations/NNPCinthenews/tabid/92/articleType/ArticleView/articleId/479/FG-Kicks-off-Second-Marginal-Fields-Bid-Round-Assures-of-Transparency-and-Accountability-in-Bid-Process.aspx](http://www.nnpcgroup.com/PublicRelations/NNPCinthenews/tabid/92/articleType/ArticleView/articleId/479/FG-Kicks-off-Second-Marginal-Fields-Bid-Round-Assures-of-Transparency-and-Accountability-in-Bid-Process.aspx) accessed 19 May 2016.

<sup>105</sup> See Kulasingam and ors, (n 103).

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> See Taverne, (n 32) 80

<sup>109</sup> In the Nigerian context, this is not an issue as s.44 of the 1999 Constitution, s.25 (1) Nigerian Investment Promotion Commission Act (NIPC) and some of the bilateral investment treaties entered into by Nigeria also provide similar guarantees against expropriation of assets.



- Project is beyond budget or ill-timed and may not perform as expected.<sup>110</sup>
- Company activities may present environment risks leading to its liquidation.<sup>111</sup>

Notably, out of six producing marginal fields, operated by indigenous oil companies, only Britannia-U was originally funded by a bank.<sup>112</sup> Other players had to adopt varied means of obtaining funding: Platform Petroleum's funds were provided by its partners (New Cross); Pillar Oil through shareholder's contributions; WalterSmith Oil Ltd could not raise funds from a bank until it had established production while Energia Oil Ltd relied on cash flow from its shareholders.<sup>113</sup> The traditional banking model in Nigeria prefers lending against collaterals and securities. Most banks maintain that the main problem with funding marginal field development is that the collateral is the marginal field itself.<sup>114</sup> The banks are also more disposed to provide loans where a MFO has a substantial deposit with the bank, cash flow from other oilfield operations or businesses; then the bank can leverage on these to approve loan facilities.<sup>115</sup> There is also a question on the risk-bearing ability of the local banks whose individual capital base (without forming consortia) may not be sufficient to offer financial assistance under the MFP and still continue the day to day retail and other investment banking activities.

A pertinent issue arises with regards to offering the marginal field as collateral. A marginal field is a potential income earner and ought to be, at least presumably, a favourable collateral. Although the Guidelines provide that an awardee may enter into any arrangements necessary to enable it perform its obligations, awardees are however as mentioned earlier, prohibited from encumbering the field in any way. This implies that an awardee may enter into pertinent technical and financial service agreements with regard to the financing and operation of the marginal field, but may not use the marginal field as security in a financial arrangement i.e. the marginal field cannot be used as collateral for a loan. Also important, is the fact that the guidelines further provide that any assignment of interest in a marginal field shall require the prior consent of the Minister. This is in accordance with Para. 14 – 16 of the First Schedule to the Petroleum Act. It essentially requires the Minister's prior consent to the assignment of any right, power or interest in a licence or lease. Creating such a collateral or lien over and in the Marginal Field (a farmed-out portion of an OML) could therefore require such a prior consent of the Minister as provided in the Guidelines.

Local banks therefore have to adopt a 'reserves-based lending' approach, accepting the 'oil in the ground' as collateral for lending, for the development of a marginal field.<sup>116</sup> This is of course a risk for the bank particularly if one considers not only the technical know-how required for indigenous producers which may not be immediately for quick profit yielding exploration and production activities but also that some the marginal fields may well be unprofitable.<sup>117</sup> For the latter sub-economic fields, it could be that there is more work for the Nigerian government to do in terms of for instance, either ensuring the viability of Marginal fields offered in bid rounds, or guaranteeing the loan request by providing another two or

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> See Chijioke Nwaozuzu, 'Marginal Fields Licensing Round 2013: Prospects, Delays(1)' Vanguard Newspapers Nigeria, 10 June 2014 <[www.vanguardngr.com/2014/06/marginal-fields-licensing-round-2013-prospects-delays-1/](http://www.vanguardngr.com/2014/06/marginal-fields-licensing-round-2013-prospects-delays-1/)> accessed 02 Nov 2016.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

more fields with very low reserves, as further security. This would ensure that the fields put together may therefore produce enough oil to service the loans in due course. Alternatively, the FG could provide a direct guarantee to local banks thereby encouraging the latter to provide finances under the MFP, and also monitor the activities by the indigenous players to ensure the field is actually being optimised, or the licence is revoked.

Given the challenges of obtaining assistance from local banks, indigenous companies have mainly opted for financing marginal fields through foreign investments.<sup>118</sup> This portends a situation where indigenous companies act as proxy or fronts for foreign companies who do not have the 51% requirement under the CAMA, thereby defeating the local content objective.

## *5.2 Technical competence, R&D*

The United Nations General Assembly Resolution 1803 (XVII) of 14th December 1962 guarantees a State permanent sovereignty over its natural resources. However, without local technical competence and intellectual property rights over technical processes in oil exploration and production, it could be a challenge for both the State and for indigenous oil producers to have effective control and ownership of petroleum resources. In most circumstances, projects that create opportunities for local participation are driven by foreign technical capabilities.<sup>119</sup> It has been argued by some industry stakeholders that over 70 per cent of contracts awarded to indigenous contractors are executed overseas.<sup>120</sup> Apart from establishing the continued dependence on foreign companies for extracting and processing the oil resources, this defeats the principal objective of local content which is for local participation by citizens in the economic activity and profits of oil exploration. It also demands huge foreign expenditure, results in capital flight out of the country, with significant loss of revenue accruing from oil exploration.<sup>121</sup> The State, in this instance, Nigeria does not therefore benefit from capital re-investment in the economy.

In order to ensure sustainability and adequate reward for investors there is need for operators to develop the technical and managerial know-how for enhancing and sustaining the industry.<sup>122</sup> In the absence of local abilities and suppliers, foreign equipment and skills are brought in. The result is huge operational costs and unprofitable projects. Some marginal field owners have found it difficult to engage competent personnel or to manage the start-up risks in the business.<sup>123</sup> It is essential that indigenous operators have to work with IOC's for an effective transfer of skills; this could indeed form part of the contractual agreement under a marginal field divestment process and there is a proven benefit when organisations work together.<sup>124</sup> For instance, in the Norwegian model, IOC's were in joint teams with the local companies which made it easier for the local companies to learn the business and adapt to the

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<sup>118</sup> Ibid

<sup>119</sup> Bede Nwete, 'Legal and Policy Framework for Promoting Petroleum Expertise in Africa' (2006) Vol. 4 Issue 3 Oil, Gas & Energy Law Intelligence (OGEL)

<sup>120</sup> Jean Balouga, 'Nigerian Local Content: Challenges and Prospects' (2012) International Association for Energy Economics p24 <[www.iaee.org/en/publications/newsletterdl.aspx?id=176](http://www.iaee.org/en/publications/newsletterdl.aspx?id=176)> accessed 02 November 2016.

<sup>121</sup> For instance in 2006, it was estimated that Nigeria experiences capital loss of about \$4.5 billion annually.

<sup>122</sup> Ibid.

<sup>123</sup> See generally, Nwete (n 119).

<sup>124</sup> See further, O O Jegede, and ors, 'Knowledge Sharing and Innovation as it Affects the Local Content in the Oil and Gas Industry in Nigeria' (2013) Vol. 5 Issue 1 African Journal of Science, Technology, Innovation and Development pp 31-38.

challenges.<sup>125</sup> This could form part of the MFP programme as an agenda driven by the government agency to facilitate effective transfer of business and technical know-how.

### *5.3 Legal and Policy Limitations*

The technological edge required in the industry is driven by well-articulated policies, legal and fiscal frameworks.<sup>126</sup> The regulatory requirements for the assignment of a licence or lease, or any right or interest in such licence or lease, have been a recurring issue in the acquisition of upstream petroleum assets in Nigeria. There are certain shortcomings of the overall Nigerian Content Policy framework which may also limit the desired impact of the MFP and the local content policy. For instance, a reporting procedure and format to demonstrate compliance with the local content requirement under the MFP is not provided under the framework. A provision similar to the ANP Regulation No. 9/2007 and Resolution No. 39/2007 under the Brazilian local content policy of Brazil would add credibility and support the objective of increasing local participation<sup>127</sup>

There are other practical methods for improving local participation which can be emphasised in the supply and production chain in a manner similar to the Norwegian local content model.<sup>128</sup> Encouraging present operators and the new players under the MFP to use the services of Nigerian suppliers, researchers, developers, can also address the skills shortage currently in the sector. As it is, the present policy concentrates on the ownership of assets by Nigerians and retaining oil and gas activities in the country.<sup>129</sup> While this may mean wealth distribution for those few able to be part of the high capital investment oil business, it does not guarantee wealth redistribution in terms of income and engagement of services and talents of the wider society. In addition, the provisions of Decree No.23<sup>130</sup> have almost draconian features with the government able to as it appears, forcibly acquire assets of IOCs without offering compensation unlike the more flexible policies found in Norway.<sup>131</sup> If the IOCs are to be persuaded to share their business and technical knowledge with indigenous entrants into the sector under the MFP programme, some flexibility including compensation where relevant, would facilitate their willingness to share such knowledge.

Under the Guidelines, the exact nature of rights granted to a farmee is ambiguous. Under section 12.0(i), it is stated that “the farmor will earn an Over-riding Royalty interest.”

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<sup>125</sup> Odd Instefjord, ‘Reflection on the Norwegian Experience Within the Oil and Gas Sector’ (Grata Law Firm Seminar, Almaty, 23 April 2010) 9  
<[www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDYQFjAD&url=http%3A%2F%2Fwww.gratanet.com%2Fup\\_files%2Fthe\\_development\\_of\\_the\\_local\\_content\\_norwegian\\_experience.ppt&ei=fTEYVPyANtGI7AbGk4CoBw&usg=AFQjCNHZpcXQCnfr4So\\_ukkCr5Nuvlf\\_6Q&bvm=bv.75097201,d.ZWU](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDYQFjAD&url=http%3A%2F%2Fwww.gratanet.com%2Fup_files%2Fthe_development_of_the_local_content_norwegian_experience.ppt&ei=fTEYVPyANtGI7AbGk4CoBw&usg=AFQjCNHZpcXQCnfr4So_ukkCr5Nuvlf_6Q&bvm=bv.75097201,d.ZWU)> accessed 20 May 2016.

<sup>126</sup> See Nwete (n 119).

<sup>127</sup> Aluisio de Lima-Campos, ‘Local Content Requirements in the Oil and Gas Sector’ (World Bank Conference on Local Content Policies in the Oil, Gas and Mining sector, Vienna, September 2013) 8  
<[www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-mining-sector#4](http://www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-mining-sector#4)> accessed 20 May 2016.

<sup>128</sup> Ibid 6.

<sup>129</sup> Ibid 3

<sup>130</sup> In 2004, the Petroleum Act and was amended and Decree No 23 is now entrenched in the first schedule of the Petroleum Act 2004.

<sup>131</sup> Farouk Al-Kasim, ‘The Relevance of the Norwegian Model to Developing Countries’ (Norad Seminar, Norway, 26 January 2006) 17  
<<http://siteresources.worldbank.org/EXTNTFPSI/Resources/606764-1150299531473/FaroukAl-Kasim.pdf>> accessed 2 November 2016.

Without further explanation on what this implies, it could be read to mean that the farmor retains ownership in the field. However, under section 19.0, the same guidelines also state that once the farm-out agreement is entered into, the farmee “shall have all the rights of an OML holder” and that “all the rights and duties of the previous leaseholder shall be transferred to the leaseholder”.<sup>132</sup> There is need for clarity on the legal status of the respective parties in a farm out and to define exactly what is meant by the ‘royalty interest’ retained by the farmor.

We have earlier examined the limitations of the nature of the indigenous company under the Guidelines. Although the Guidelines’ provisions are supposed to be an incentive to develop local content participation, if the financial, technical and management challenges to the indigenous players are not met, the indigenous player will still be unable to effectively develop the marginal field. In light of these, it is therefore incumbent on the government to ensure that there are incentivising and support mechanisms for indigenous players to enable them maximise their entry into exploration activities.

Finally, there is still need for clear incentives on research and development (R&D) and a strategy to guarantee that there are R&D provisions under the MFP programme which incorporate talent from local research institutes and universities. There is also no provision for the new players (and their partners) to engage in ancillary research activities to boost this sector in the country, develop future talent, and establish a skills-base in the industry in further development of the potential under the MFP. The Brazilian model provides for compulsory investment in R&D and provides incentives to promote R&D and innovation.<sup>133</sup> A similar model would be of further advantage to the enhancement of local content participation in Nigeria.

## 6. Conclusion

It has to be admitted that domestic regulations addressing obvious issues of low local content participation in the energy sector are better late than never. To satisfy the broader challenging context of indigenous participation in the oil and gas industry, infrastructure that addresses specific domestic challenges and broader concerns, rather than create generic provisions, are even better. The development of marginal fields is neither risk-free, nor is its success, guaranteed.<sup>134</sup> Therefore, in the specific context of maximising the capacity for marginal field production, developing local content, and creating jobs and opportunities, availability of financial support, a focused approach to regulating minimum local content requirements by the responsible government agencies, and support for business and technical skills development for indigenous operators are also critical considerations for the Nigerian government in its advances towards achieving upstream oil sector liberalisation.

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<sup>132</sup> Section 19.0 (i).

<sup>133</sup> Marcelo Mafra Borges de Macedo, ‘Brazilian Local Content Regulation Framework in the Oil & Gas Activities’ (World Bank Conference on Local Content Policies in the Oil, Gas and Mining sector, Vienna, September 2013) 3-4 <[www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-mining-sector#4](http://www.worldbank.org/en/events/2013/10/01/local-content-policies-in-oil-gas-mining-sector#4)> accessed 8 September 2014

<sup>134</sup> See Kareem Mamdoh, “Marginal Oil Fields: Profitable Oil at Low Reserves: How?” <http://www.slideshare.net/karim3691/marginal-oil-fields-final> accessed 19 May 2016.

## APPENDIX I

### Previously Awarded Marginal Fields and Operators 2003

S/N	FIELD	FARMOR	OML	FARMEE	TERRAIN
1	Asuokpu/Umutu	Shell	38	Platform	Land
2	Asaramatoru	Shell	11	Prime Energy (51%) / Sufolk Petroleum (49%)	Swamp
3	Atala	Shell	46	Bayelsa Oil (100%)	Swamp
4	Eremor	Shell	46	Excel E&P (100%)	Swamp
5	Ibigwe	Shell	16	Walter Smith (70%) / Morris Petroleum (30%)	Land
6	Ofa	Shell	30	Independent (100%)	Land
7	Oza	Shell	11	Millenium Oil (100%)	Land
8	Qua Ibo	Shell	13	Network Oil & Gas (100%)	Land
9	Stubb Creek	Shell	14	Universal Energy (100%)	Swamp
10	Tom Shot Bank	Shell	14	Associated (51%)/ Dansaki Pet (49%)	Offshore
11	Tsekelewu	Shell	40	Sahara (51%) & AOG (49%)	Swamp
12	Uquo	Shell	13	Frontier Oil (100%)	Swamp
13	Ororo	Chevron	95	Guarantee Oil / Owena Oil	Offshore
14	Akepo	Chevron	90	Sogenal (100%)	Offshore
15	Ogedeh	Chevron	90	Bicta (100%)	Offshore
16	Ajapa	Chevron	90	Britania –U (100%)	Offshore
17	Dawes Island	Chevron	54	Eurafic (100%)	Swamp
18	KE	Chevron	54	Del-Sigma (100%)	Swamp
19	Oriri	Chevron	88	Goland (100%)	Offshore
20	Ekeh	Chevron	88	Movido	Offshore
21	Umusadege	Elf	56	Midwestern Oil & Gas (70%) / Suntrust (30%)	Land
22	Obodugwa / Obodeti	Elf	56	Pillar Oil (100%)	Land
23	Umusati/Igbuku	Elf	56	Energia (55%) / Oando (45%)	Land
24	Amoji/Matsogo/Igbolo	Elf	56	Chorus (100%)	Land

Source: Department of Petroleum Resources, Concessions and Leases

## APPENDIX II

### List of Ranked Marginal Fields for 2014 Bid Round

MARGINAL FIELDS	TERRAIN	FARMOR	OML	STATE	DISCOVERY	OIL RECVRY	GAS RECVRY	DRILLED	RANKING	API
EGBOLOM	S	Shell	23	Rivers	1982	84.7	2	2	1	28.6/36.6
NKUKU	O	Exxon	70	Akwa Ibom	1978	60.6	3	2	2	29-30
AKAMBA MOPNISO	O	Total	102	Rivers	1989	50	10	1	3	23.5-38
IBOM	O	Exxon	70	Akwa Ibom	1979	42.8	1	3	4	35
OBUZO	L	Shell	11	Rivers	1971	42	0	1	5	45.4
ASSA WEST	O	Total	102	Rivers	1982	39	1	1	6	
USORO	O	Total	100	Rivers	1989	30	2	2	7	40.4
UDIBE	O	Exxon	70	Akwa Ibom	1995	24.7	10	1	8	27-32
OLOYE	O	Chevron	95	Ondo	NA	21	0	1	9	31.9
EKPAT	O	Exxon	67	Akwa Ibom	1996	20.1	30	1	10	32-34
UDARA	O	Exxon	70	Akwa Ibom	1995	16.8	10	1	11	27-30
RUTA	O	Chevron	95	Ondo	1970	16.8	6	4	12	33.3
AJAKETON	S	Agip	63	Bayelsa	1992	16	2000	1	13	42.7
ODIMODI	S	Agip	62	Bayelsa	1992	16	500	1	14	
KUDO	O	Chevron	89	Delta	1967	15	0	2	15	
AMANIBA	O	Exxon	67	Akwa Ibom	1996	13.3	50	1	16	32-34
IBIOM	O	Total	100	Rivers	1977	11	10	2	17	
BENIN ESTUARY	S	Shell	43	Delta	1988	8.9	30	1	18	18.1/37.8
KOROLEI	S	Shell	46	Bayelsa	1985	8	3	2	19	20.7/21.8
UZUAKU	L	Shell	28	Delta	1998	7.9	0	1	20	44.9
EMOHUA	L	Shell	22	Delta	1979	7.3	1	1	21	31.1/35.4
BANIELE	S	Shell	11	Rivers	1988	7.2	58	1	22	44.9
IKONG	O	Total	100	Rivers	1994	7	200	2	23	
IGBOMOTORU N	S	Shell	33	Bayelsa	1978	6.7	0	1	24	35
IGBOMOTORU	S	Shell	33	Bayelsa	1972	6.6	0	3	25	35
META	O	Chevron	95	Ondo	1965	6.29	20	2	26	
OKIORI	S	Shell	29	Bayelsa	1975	5	0	2	27	22.3
OMOFEJO	S	Chevron	49	Delta	1999	4.09	0	1	28	36.8
OFEMINI	L	Shell	11	Rivers	1966	4	40	2	29	43.2
OLURE	S	Chevron	49	Delta	1966	3.26	0	3	30	43.9
IHEOMA	L	Chevron	53	Imo	1995	3	10	2	31	
SHANGO	O	Chevron	95	Ondo	1991	2.67	0	1	32	30.7
BIME	S	Chevron	49	Delta	1989	2.63	0	3	33	43
OSUOPELE SW	S	Shell	46	Bayelsa	1977	2.2	3	2	34	31.1
AZAMA	O	Chevron	95	Ondo	1996	2.1	0	2	35	46.5
ALAOMA	L	Chevron	53	Imo	1996	2	0	2	36	
OBIRA	O	Chevron	89	Delta	1988	1.28	0	1	37	32.3

Source: Marginal Fields Bid Round Summary (Veren Energy)