

LOCAL CONTENT



Nigeria – Petroleum



Columbia Center
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

The project¹ - background



Resource-rich countries are increasingly inserting requirements for local content (“local content provisions”) into their legal framework, through legislation, regulations, contracts, and bidding practices. If successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer and build a competitive local workforce. However, local content goals are often unfulfilled and the opportunities are not captured. For example, local content provisions typically require investors to meet targets measured as a percentage of investment, hours worked, equipment supplied, or jobs created. If targets are too high, they may either scare away investment or remain unmet as investors accept the fines or find loopholes. If they are too low, the country will not maximize potential linkages. This shows the importance of the framing of local content provisions. Targets, and other local content objectives, need to be carefully quantified, adapted to the local context and collaborative. Because local content provisions can be key to translating resource investments into sustainable benefits for the local population, this project examines the detail of the existing legal frameworks for local content in a number of countries.

CCSI has conducted a survey of the local content frameworks of a number of countries – identifying the key legislation, regulations, contracts and non-binding policies and frameworks dealing with local content issues in the mining and petroleum sectors². A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses³ – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country’s local content⁴. The profiles examine provisions dealing with local employment, training, procurement, technology transfer, local content plans as well as local ownership, depending on the country's approach to and definition of local content. In addition, as key to translating provisions into action, the profiles look at implementation, monitoring and enforcement provisions as well as the government’s role in expanding local involvement. Aside from emphasizing the strong clauses, which may be adaptable across countries, the profiles summarize the provisions but do not provide commentary, because local content is so context specific. The profiles are intended as a tool for policy makers, researchers and citizens seeking to understand and compare how local content is dealt with in other countries, and to provide some examples of language that might be adopted in a framework to achieve local content goals. Hyperlinks are provided to the source legislation, regulations, policies and contracts where available.

¹ The project was managed by Perrine Toledano and Jacky Mandelbaum, with assistance from Sophie Thomashausen. Research was conducted by Elsa Savourey, with input from Shazia Ahmad.

² General legislation with provisions that relate to local content (for example, tax laws with incentives for local procurement or employment in any industry), was not included in the review. The review included dedicated mining or petroleum sector or specific local content legislation, regulations, policy and contracts.

³ Those clauses are framed and singled out by a “thumb up”.

⁴ Our criteria for assessment of the quality of the provisions were language that is less likely to present a loophole, i.e. less likely to be subject to interpretation due to vagueness and more likely to lead to enforcement because of its clarity in terms of rights and obligations of both parties (state and investor), and reasonable in its obligations on the company. In addition, as mentioned above, we looked for clauses that encourage collaboration between the company and the government in defining local content targets and goals, and those where the government has a role, as well as clauses enabling implementation and monitoring of the requirements and those giving the government strong remedies to enforce companies’ compliance.



The impact of international law

The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of local content goals by prohibiting some types of local content requirements (a sub-category of “performance requirements”¹). CCSI therefore surveyed the relevant WTO agreements and investment treaties in each country profiled to identify the provisions that may prevent, counsel against and/or shield local content standards. These provisions are quoted in the profile in order to show the potential barriers to implementation of local content so that they can be kept in mind when countries enter into these international investment treaties². Free Trade Agreements other than the WTO agreements, some of which may contain investment chapters, are not included in the scope of the review, but may also be relevant and should be similarly kept in mind.

¹Performance requirements are measures in law, regulation or contract that require investors to meet specified goals when entering, operating or expanding in, or leaving a host country. Some are strictly mandatory; others are imposed as a condition for receiving some sort of added benefit or advantage.

²Countries implementing local content requirements should be aware of the possibility of a challenge to those provisions either through the WTO (state-to-state dispute settlement) or arbitration under the bilateral investment treaties (which is investor-state dispute settlement). While the potential for such actions may be low, they remain a risk depending on the circumstances, and particularly should relations between the state and the investor sour over the course of the investment.



Highlights

- Comprehensive local content framework for the oil and gas sector
- Nigeria is one of the few countries having enacted a piece of legislation dedicated to local content (the “Act”). It came into effect in 2010.
- A key objective is to increase the “Nigerian content” meaning “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 oil and gas industry”.
- A schedule to the Act sets the minimum level of “Nigerian Content” to be achieved for each category of goods and services (with no timeframe)
- A Board is established and its role is to guide, effectively monitor, coordinate and implement the provisions of the Act.

✓	Employment Requirements
✓	Procurement Requirements
✓	Training Requirements
✓	Technology Transfer Requirements
✓	Monitoring and Enforcement Mechanisms
✓	Government Obligations in Support of the Companies' Program



International Law

Legislation

[Nigerian Oil and Gas Industry Content Development Act, 2010](#)
(the “Act”)
Provides a comprehensive legal framework for local content

Regulation

Other regulations deal to varying degrees with local content but the Act is the most significant instrument, and therefore will be the main focus of this summary.

Policy

A local content policy was issued in the early 2000’s and is the basis for the Act.

Contract

The Act provides that all subsequent “arrangements, agreements, contracts or memoranda of understanding” which relate to “any operation or transaction” in the oil and gas industry must conform to its provisions.

Key definitions

- **Nigerian company:** “a company formed and registered in Nigeria in accordance with the provisions of the Companies and Allied Matters Act with not less than 51% equity shares by Nigerians.”
- **Nigerian content:** “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 oil and gas industry”.
- **Nigerian content indicator:** “a percentage rating of a company based on specific criteria defined on the basis of values ascribed to each criterion.”
- A schedule to the Act sets out what is referred to as “Nigerian Content (NC) Level” and is described for each good and service in “%” in terms of man-hours, volume, length, and monetary spend.

Overview



Rights application

- Preference given to Nigerian independent operator (*undefined*)
- All operators required to submit a Nigerian Content Plan at the time of the bid – Promotion of the Nigerian Content is the major criteria for awards of licenses

Plans

- Nigerian content plan required explaining how first consideration will be given to Nigerians and Nigerian goods and services.
- A schedule to the Act specifies the minimum level of “Nigerian Content” for each goods and services
- More specific plans outline succession for all non-Nigerian roles; research and development to be carried out in Nigeria; technology transfer to indigenous Nigerian companies; and financial/legal services to be obtained in Nigeria

Training and Employment

- 5% maximum of management positions may be filled in by expatriates. Nigerians only must be employed in junior level or intermediate cadres positions.
- Company must provide or fund training in order to be in a position to hire Nigerians employees.

Procuring goods and services

- Preference given to a qualified Indigenous Nigerian company, if it does not exceed the lowest bid by more than 10%.
- Company to quarterly notify the Board* of all contracts and purchase orders above US\$1, 000,000. The Board will assess all the documents of the bid before the contract is granted.
- Requirements to set up manufacturing facilities for goods that would be imported otherwise; legal and financial services are also explicitly part of local content

Technology Transfer

- Plans and reporting on technology transfer, research and development are imposed.
- Joint ventures between foreign operators and Nigerian companies need to be encouraged.

Implementation

- The Act establishes the Nigerian Content Monitoring Board (“the Board”). To facilitate the implementation of Nigerian Content, the Board establishes a Nigerian content consultative forum, a joint qualification system, *and* a Nigerian content development fund.

Monitoring and enforcement

- Companies must submit annual local content reports called Nigerian Content Performance Reports.
- The Board may monitor and investigate companies in relation to their compliance with local content requirements.
- Penalties are prescribed – 5% of the “ project sum”.



- The promotion of Nigerian Content is the major criterion for awards of licenses (Art. 3 (3)).
- As a start, Nigerian independent operators (undefined) will be given first consideration in the award of oil projects in the Nigerian oil and gas industry (subject to any conditions to be specified by the Minister) (Art. 3 (1)).
- Then all operators are required to submit a Nigerian Content Plan (undefined) to the Board complying with the Industry Content Development Act, when bidding for any license, permit or interest (Art. 7).
- The *Nigerian Content* Plan must contain provisions ensuring that first consideration is given to services provided and goods manufactured in Nigeria and to Nigerians for training and employment in the work programme. Any agreement signed with any association of employees must contain provisions consistent with the Nigerian Content Plan (Art. 10).
- A schedule to the Act sets the minimum level of Nigerian Content to be achieved in any oil and gas operations. Where this level is not provided by the schedule (or an amendment thereof), the Board will set that level. However when there is inadequate capacity to achieve the target set by the schedule, the Minister can give an approval for importation that is limited to 3 years (Art. 11).
- International or multinational companies working through Nigerian subsidiaries must demonstrate that a minimum of 50% of the equipment used is owned by the Nigerian subsidiaries (Art. 41 (2)).

Training and employment



- Operators need to submit a detailed Employment and Training Plan as part of their Nigerian Content Plan (Art. 29):



“The [Nigerian Content] plan submitted by any operator or project promoter for any project shall contain an Employment and Training Plan (E and T Plan) which shall include

(a) an outline of the:

(i) hiring and training needs of the operator or project promoter and operator's major contractors with a breakdown of the skills needed,

(ii) anticipated skill shortages in the Nigerian labour force,

(iii) project specific training requirements, and

(iv) anticipated expenditures that will be made directly by the operator in implementing the E and T Plan as a forecasted and actual expenditure;

(b) a time frame for employment opportunities for each phase of project development and operations, to enable members of the Nigerian workforce to prepare themselves for such opportunities;

(c) the operator or project promoter shall report to the Board quarterly on employment and training activities for the reporting period and compare this to the E and T Plan (...).”

- Where Nigerians are not employed because of a lack of training, the operator needs to use every reasonable effort to supply such training locally according to the operator’s Employment and Training Plan (Art. 30).
- For each of its operations, the operator must submit to the Board a succession plan for any position not held by Nigerians that provides for Nigerians to understudy each incumbent expatriate for a maximum period of four years; at the end of the four years, the position will become “Nigerianised” (Art. 31).
- A maximum of 5% of management positions may to be filled by expatriates. (Art. 32) The operator must present an application for expatriate quota (assumed to be within 5%) to the Ministry of Internal Affairs, any other agency or Ministry of the Federal Government, only after getting approval for the Board regarding the application (Art. 33).
- All projects or contracts whose total budget exceeds US\$100 million will contain a "Labour Clause" mandating the use of a minimum percentage of Nigerian labour in specific cadres as may be stipulated by the Board (Art. 34).
- All operators will employ only Nigerians in their junior and intermediate cadre (Art. 35).

Procuring goods and services - Bidding



- Operators and alliance partners must maintain a bidding process for acquiring goods and services which gives “full and fair” opportunity to Nigerian indigenous contractors and companies (“indigenous” is undefined) (Art. 15).
- Where bids are within 1% of each other at commercial stage, the bid containing the highest level of Nigerian content shall be selected provided the Nigerian content in the selected bid is at least 5% higher than its closest competitor (Art. 14).
- Where a Nigerian indigenous company has the capacity to execute the bidding job, the company will not be disqualified exclusively on the basis that it is not the lowest financial bidder, to the extent that the value does not exceed the lowest bid price by 10 percent. (Art. 16).
- For all contracts in excess of US\$1,000,000, the operator must provide the advertisements, pre-qualification criteria, technical bid documents, technical evaluation criteria and the proposed bidders lists, to the Board for approval (Art. 17).



- Any operator should invest in or set up a facility, factory, production units or other operations within Nigeria in order to facilitate the production, manufacturing of goods or for providing a service that would otherwise be imported into Nigeria (Art. 47). The Minister will consult with its government regarding an appropriate fiscal framework and tax incentives for foreign and indigenous companies establishing such facilities (Art. 48).
- More particularly: all operators/project promoters/ contractors should only carry out fabrication and welding activities in the country (Art. 53).
- Operators/ contractors must retain *legal services* from a Nigerian legal practitioner or a firm of Nigerian legal practitioners whose office is located in Nigeria. Contractors need to submit to the Board a Legal Service Plan every 6 months describing the past and future use of legal services, the attached expenditure (Art. 51).
- Similarly operators / contractors must retain the services of Nigerian financial institutions except when the Board declares it impracticable. Contractors need to submit to the Board a Financial Service Plan every 6 months describing the past and future use of financial services, and attached expenditure. All contractors must maintain a bank account in Nigeria and retain there a minimum of 10% of their oil and gas revenues (Art. 52).



- Operators need to submit an annual technology transfer plan according Nigeria's own plans and priorities (Arts. 43-46):



“43. Each operator shall carry out a programme in accordance with the country's own plans and priorities, (...), for the promotion of technology transfer to Nigeria in relation to its oil and gas activities.

44. The operator shall submit to the Board annually a plan, (...), setting out a programme of planned initiatives aimed at promoting the effective transfer of technologies from the operator and alliance partners to Nigerian individuals and companies.

45. The operator shall give full and effective support to technology transfer by encouraging and facilitating the formation of joint ventures, partnering and the development of licensing agreements between Nigerian and foreign contractors (...).

46. The operator or project promoter shall submit a report to the Board annually describing its technology transfer initiatives and their results and the Minister shall make regulations setting targets on the number and type of such joint venture or alliances to be achieved for each project”.

- The operator must submit to the Board a Research and Development Plan every 6 months that contains an outline of a revolving three to five year plan for research and development to be conducted in Nigeria, and the expected expenditures incurred in implementing it. In addition, the operator should publicly seek proposals for research and development initiatives related to its activities (Art. 38).



- The Role of the Nigerian Content Development and Monitoring Board ("the "Board") is to develop procedures that will guide, monitor, coordinate and implement the provisions of the Act (Art. 4) and organize various activities to facilitate the implementation (Art.67):



“The Board shall conduct workshops, conferences, seminars, symposia and any other public forum considered as appropriate for the benefit of operators, contractors, the public and other stake holders to enhance the implementation of the provisions of this Act”.

- The Board will establish a joint – Joint Qualification System, a Nigerian Consultative Forum and a Nigerian Content Development Fund (Arts. 55, 56, 57, 58, 104):



“55. 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 by the Minister in accordance with the provisions of this Act.

56. The Joint Qualification System shall constitute an industry databank of available capabilities and shall be used for :

- (a) the sole system for Nigerian content registration and pre-qualification of contractors in the industry;
- (b) verification of contractors' capacities and capabilities;
- (c) evaluation of the application of Nigerian content in the operations of oil companies and contractors;
- (d) database for a national skills development pool; and
- (e) ranking and categorization of old service companies based on capabilities and Nigerian content”.



“57. The Board shall set up a consultative body to be known as the Nigerian Content Consultative Forum (NCCF) which shall provide a platform for information sharing and collaboration in the Nigerian oil and gas industry with respect to:

- (a) upcoming projects in the oil and gas industry;
- (b) information on available local capabilities; and
- (c) other policy proposals that may be relevant to Nigerian content development

58. The Nigerian Content Consultative Forum shall be made up of key industry stakeholders, government and regulatory agencies and representatives from the following sectors-

- (a) fabrication;
- (b) engineering;
- (c) finance services, legal and insurance;
- (d) shipping and logistics;
- (e) materials and manufacturing;
- (f) information and communication technology;
- (g) petroleum technology association of Nigeria;
- (h) education and training; and
- (I) any other professional services nominated by the Board”.



“104. (1) A Fund to be known as the Nigerian Content Development Fund [...] is established for purposes of funding the implementation of Nigerian content development in the Nigeria oil and gas industry.

(2) The sum of one per cent 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 Nigeria oil and gas industry shall be deducted at source and paid into the Fund.

(3) The Fund shall be managed by the Nigerian Content Development Board and employed for projects, programmes and activities directed at increasing Nigerian content in the oil and gas industry”.

Monitoring and enforcement



- Operators are required within 30 days of the end of each quarter, to submit to the Board a quarterly listing of all contracts, subcontracts and purchase orders awarded in the previous report quarter which exceed \$1,000,000 (USD) procurement (or such other limit determined by the Board). The listing must include estimates of Nigerian content (Art. 24).
- Operators *must* report to the Board, on a quarterly basis, with respect to Research and Development activities, so the Board can compare these activities to the operator's Research and Development Plan (Art. 39).
- Operators must submit an annual detailed report measuring their performance in terms of Nigerian Content (Arts.60-63):



“60. Within sixty days of the beginning of each year, each operator shall submit to the Board their annual Nigerian Content Performance Report covering all its projects and activities for the year under review.

61. (...) [T]he report shall specify by category of expenditure the Nigerian content on both a current and cumulative cost basis and shall set out :

(a) employment achievement in terms of hours or days worked by Nigerian and foreign workers and their status; and

(b) procurement achievement in terms of quantity, tonnage of locally manufactured materials and materials of foreign origin.

62. The Board shall undertake regular assessment and verification of the Nigerian Content Performance Report filed by all operators in compliance with the provisions of this Act as may be considered appropriate by the Board.

63. The Board shall issue directives to operators, contractors and other entities or persons in order to develop a process to facilitate reporting of activities relating to any aspect of this Act”.

- Any operator, contractor, or subcontractor carrying out any project contrary to the provisions of this Act is 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 (Art. 68). “Project sum” is undefined.



- Nigeria has been member of the WTO since January 1, 1995.
- All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs. This can impact a country's ability to impose certain local content requirements (referred to as “investment measures”), to the extent they affect trade in *goods*.
- The following types of local content requirements are covered by TRIMS²:
 - requiring a company to purchase or use products of domestic origin – TRIMs prohibits discrimination between goods of domestic and imported origin;
 - limiting the amount of imported products that an enterprise may purchase or use depending on the volume or value of local products that the enterprise exports;
 - restricting foreign exchange necessary to import (e.g., restricting the importation by an enterprise of products used in local production by restricting its access to foreign exchange); and
 - restricting exports.

¹ The TRIMs Agreement clarifies existing rules contained in Articles III (National Treatment Obligation (NTO)) and XI (Prohibition on Quantitative Restrictions) of the General Agreement on Tariffs and Trade (GATT), 1994.

² It is important to be aware of the types of measures prohibited under the TRIMs Agreement, in order to avoid the potential for dispute settlement under the WTO - a state can bring an action against another state for an alleged violation of the TRIMs Agreement (i.e. “state-to-state action”).



General Agreement on Trade in Services (GATS)

- A separate WTO agreement, the General Agreement on Trade in Services (“GATS”), covers investment measures related to services (in Article XVI), including the following which are relevant to local content:
 - Requirements to use domestic service suppliers
 - Limits on the number of service suppliers
 - Limits on the total value of service transactions or assets
 - Limits on the total number of service operations or quantity of service output
 - Limits on the total number of natural persons permitted
 - Restrictions on or requirements for certain types of legal entities (e.g., joint venture requirements)
 - Imposition of domestic equity
- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. Nigeria’s [commitments](#) relating to financial services can affect the implementation of Art. 52 of Nigeria’s local content framework.



- As of 1 June 2013, Nigeria has entered into **22 bilateral investment treaties** (BITs) but only 9 are in force.¹
- Investment treaties are international agreements between two or more countries which establish the terms and conditions of foreign investment within each country and provide rights directly to the investors of each country which is party to the treaty. The treaties can contain restrictions on local content requirements.²
- Investment treaties can contain the following types of provisions, each of which affects a country's ability to impose local content requirements:
 - non-discrimination provisions (“national treatment” and “most-favored nation” obligations), which are relevant in the context of local content when:
 1. host countries require some foreign investors to source from certain goods and service providers but don't impose similar requirements on other investors; and
 2. host countries give an advantage to some domestic or foreign goods and services providers, but not to a foreign provider whose state has a relevant treaty with the host country. (Note that this is relevant only where the foreign provider of goods or services has or, intends to have³, a presence in the host country);
 - restrictions on capital transfers;
 - “pre-establishment” protections, which prevent a state from imposing conditions on foreign investors that are not imposed on domestic investors, such as requirements to transfer technology to local firms, to establish the firm through a joint venture, or to reinvest a certain amount of capital in the host country;
 - incorporation of the TRIMs agreement; and
 - *explicit* prohibition of performance requirements that go beyond what is restricted by the TRIMs Agreement.

¹ According to UNCTAD's [country specific list of bilateral investment treaties](#)

² It is important to be aware of the BITs a country has signed and the types of requirements prohibited under it, in order to avoid the potential for arbitration against the country - the majority of investment treaties allow investors to bring arbitration claims directly against the country in which they have invested (“investor-state arbitration”).

³ I.e., the conditions under which an investor may enter into the territory of a party, not only the conditions once the investment is made.



- Among the 22 BITS signed by Nigeria, 10 BITS were reviewed (and are available on [UNCTAD database](#)).
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITS, no performance requirements are prohibited in the BITS. On the contrary, 4 BITS signed with Germany, Egypt (not in force), Switzerland and the UK specifically authorize special incentives to stimulate the local industry to the extent that the investor's activity is not affected. See below an example from the BIT with UK.

Nigeria – United Kingdom

“Article 3 – National Treatment And Most-favoured-nation Provisions

(1) Parties must treat investments or returns of nationals or companies of the other party no less favorably than investments or returns of its own nationals or companies or those of any third state.

(2) Parties must treat the management, maintenance, use, enjoyment or disposal of investments of nationals or companies of the other party, no less favorably than those of its own nationals or companies or of nationals or companies of any third state.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this Article, either Contracting Party may grant to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party in connection with an investment.”

- A similar clause exists in the BIT with Germany (Article 4), Egypt (Article 2) and Switzerland (Article 3).