

## National Participation in Nigerian Oil and Gas Industry: Prospects and Challenges

By

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### **Abstract**

*This paper considers the concept of national participation and development of Nigerian content in the country's oil and gas industry. It analyzes the state of the oil and gas industry in Nigeria. An attempt is made to succinctly elucidate on the otherwise illusory concept of national participation. The various policy and legal framework for the realization of Nigerian content in the development of the industry is considered as well as the prospects and challenges attendant to such initiatives. While the paper finds that significant progress has been recorded in the development of local content in the industry, it makes adequate recommendations towards addressing some of the key challenges to such development in the industry.*

**Keywords:** *National participation, local content development, oil and gas industry, Nigeria.*

### **Introduction**

Nigeria is the largest oil producer in Africa and ranks among the top ten in the world with oil and natural gas endowments.<sup>1</sup> The country is estimated to have a proven oil reserve of over 37.2 billion barrels and a proven natural gas reserve of over 180 trillion cubic feet (Tcf).<sup>2</sup> Out of the thirty-six constituent states, nine states situated in the Niger Delta region of the Country produces the onshore oil and gas, while the source of the country's offshore production is from wells in the Bight of Bonny, Bight of Benin and the Gulf of Guinea. According to the U.S. Energy Information Administration,<sup>3</sup> Nigeria produces over 2.53 million barrels per day (bbl/d) of crude oil and 1 trillion cubic feet (Tcf) of dry gas, out of which it exports over 2.3 bbl/d of crude oil and 17.97 million metric tons (875 Bcf) of liquefied natural gas (LNG). This makes Nigeria the 5<sup>th</sup> largest exporter of LNG in the world.<sup>4</sup> The Nigerian economy is largely dependent on the oil and gas sector, which accounts for about 95% of its foreign exchange earnings, 40% or more of its GDP and 75% of Federal Government total revenue.<sup>5</sup>

The above facts and figures go to show that the oil and gas industry in Nigeria plays a crucial role to the sustenance of the nation and fuels her economic and development activities. The industry has been widely described as the nation's live wire and literature abounds on its role

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<sup>1</sup> D Otiotio, 'An Overview of the Oil and Gas Industry in Nigeria', <[https://www.academia.edu/2654835/AN\\_OVERVIEW\\_OF\\_THE\\_OIL\\_AND\\_GAS\\_INDUSTRY\\_IN\\_NIGERIA\\_BY\\_DENNIS\\_OTIOTIO](https://www.academia.edu/2654835/AN_OVERVIEW_OF_THE_OIL_AND_GAS_INDUSTRY_IN_NIGERIA_BY_DENNIS_OTIOTIO)> Last accessed on 12<sup>th</sup> December, 2015.

<sup>2</sup> U.S. Energy Information Administration (U.S. EIA), 'Nigeria Country Analysis Brief', October 16, 2012, cited in D Otiotio, *ibid*.

<sup>3</sup> *Ibid*.

<sup>4</sup> D Otiotio, *op. cit*.

<sup>5</sup> IMF Country Report No. 12/194, '2011 Article IV Consultation Report on Nigeria', July 2012, cited in D Otiotio, *ibid*.

and significance in Nigeria.<sup>6</sup> However, despite the robust nature of the Nigerian oil and gas industry and the profits accruing to Nigeria therefrom, the participation of Nigerian indigenous companies (i.e. companies owned by Nigerians) in the oil industry leaves much to be desired and is one of the most complex issues confronting the country.<sup>7</sup> Indeed an estimated \$8 billion is spent annually on servicing the industry in operations such as fabrication, engineering procurement, construction (EPC), Front End Engineering Design (FEED), conceptual designs and seismic studies. This figure is projected to hit \$15 billion within the next few years.<sup>8</sup> Regrettably, of these huge sums of money spent in servicing the industry, only a very little proportion of the accruable profit is spent in Nigeria.<sup>9</sup> This is attributable to the fact that the international oil companies (IOCs) have over time dominated the Nigerian oil industry and repatriate majority of these amounts abroad where most of the equipment are manufactured, thus providing employment opportunities for citizens of other countries.<sup>10</sup> The major reason for this situation has been attributed to low ‘local content’, which is a situation where most of the service contracts are awarded to foreign firms because local indigenous firms lack the requisite skills, technical expertise, manpower and production capacity and capability to compete favourably with their foreign counterparts.<sup>11</sup>

There is no doubt that the ultimate objective of any oil-producing, developing country is to control and operate all phases of its industry. This explains why successive governments since the country’s return to democracy have deemed it an urgent need to positively develop the level of participation of Nigerians in the oil and gas industry. Indeed, the Federal Government of Nigeria have initiated several policies and enacted some legislations towards the statutorization of such golden initiative. This paper critically examines the various issues associated with national participation in the petroleum industry in Nigeria, particularly the key statutory and/or policy framework regulating same.

### **Concepts of Nigerian Content, Local Content and National Participation**

The term, ‘Nigerian content’ has been defined as ‘the quantum composite value added or created in the Nigerian economy through the utilization of Nigerian human and material resources for the provision of goods and services to the petroleum industry.’<sup>12</sup> This view is apposite the definition contained in section 106 of the Nigerian Oil and Gas Industry Content Development Act<sup>13</sup> which defines the term ‘Nigerian content’ to mean ‘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 and material resources and services in the Nigerian oil and gas industry.’

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<sup>6</sup> O Agosto, ‘Industry Report - Oil and Gas (Upstream)’, (2002), cited in UB Ihua, C Ajayi, and KN Eloji, ‘Nigerian Content Policy in the Oil and Gas Industry: Implications for Small to Medium-Sized Oil-Service Companies’, in S Sigué (ed), ‘Repositioning African Business and Development for the 21<sup>st</sup> Century’, <nigerianrc.org/sites/default/files/Local Content in Nigeria.pdf> Last accessed on 21<sup>st</sup> September, 2015.

<sup>7</sup> L Atsegbua, *Oil and Gas Law in Nigeria: Theory and Practice* (3<sup>rd</sup> ed, Benin: Fifers Lane Publishers, 2012), p. 213.

<sup>8</sup> UB Ihua, C Ajayi, and KN Eloji, ‘Nigerian Content Policy in the Oil and Gas Industry: Implications for Small to Medium-Sized Oil-Service Companies’, *ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> UB Ihua, C Ajayi, and KN Eloji, *op. cit.*

<sup>13</sup> Nigerian Oil and Gas Industry Content Development Act No. 2 of 2010.

The term ‘local content’, according to Jubilee Easo and Angela Wallace, carries an expansive meaning, but within the oil and gas industry it is generally recognized as an intervention by a national government aimed at ensuring that the majority of the goods and services required at each stage of the oil and gas value chain are locally supplied.<sup>14</sup> Tam Brisibe, shares a similar view when he opined that ‘local content’ means different things to different people, the common denominator being value addition in the country.<sup>15</sup> Obuaya, a leading voice in the clamour for higher participation of local companies in the industry, provided his definitions in line with this idea of ‘value addition.’<sup>16</sup> He defines ‘local content’ as ‘a set of deliberate orientation and actions to build domestic capacity relevant for service and product delivery comparable within that industry’ and ‘an opportunity to locally build a sustainable culture of service quality and capabilities exceeding customers’ expectations and comparable to international standards through key local personnel and management.’<sup>17</sup> Though simple, Obuaya’s definitions reflect on some important indices to examining the concept of local content such as ‘deliberate orientation’, ‘capacity building’, ‘sustainable capability’, ‘product deliverability systems’ and ‘comparability’.<sup>18</sup>

The term ‘national participation’ is yet to receive precise definition. The Oxford Dictionary of Current English defines the word ‘national’ to mean ‘relating to a nation; owned, controlled and financially supported by the state.’<sup>19</sup> The same dictionary also defines the term ‘participation’ to mean ‘the action of taking part in an activity or event.’<sup>20</sup> Juxtaposing the above definitions, the term ‘national participation’ invariably refers to a situation where the state or its citizens own, control or financially support particular activities. From the perspective of the oil and gas industry in Nigeria, national participation then presupposes a situation where the state and citizenry own, control or financially support activities in the oil and gas industry.

If the various definitions on the concepts of Nigerian content, local content and national participation are considered *vis-à-vis* the oil and gas industry, it may be safely argued that these concepts all relate or refer to one and the same thing, which is ultimately about the encouragement and realization of a competitive advantage for Nigerians in so far as activities in the oil and gas industry is concerned. Thus, these terms may be used interchangeably.

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<sup>14</sup> J Easo and A Wallace, ‘Understanding Local Content Policies in Africa’s Petroleum Sector’, <<https://www.andrewskurth.com/pressroom-publications-1154.html>> Last accessed on 12<sup>th</sup> December, 2015.

<sup>15</sup> J Ogbodo, ‘Government Unfolds New Plans to Boost Local Content’, (2008), <<http://www.guardiannewsngr.com/news>> Last accessed on 26<sup>th</sup> September, 2015.

<sup>16</sup> T Obuaya, ‘Local Content Implementation in Nigeria: A Road Map’, being a paper presented at the Nigerian Oil and Gas Conference, Abuja, Nigeria, 2005, cited in UB Ihua, C Ajayi, and KN Eloji, *op. cit.*

<sup>17</sup> *Ibid.*

<sup>18</sup> UB Ihua, C Ajayi, and KN Eloji, *ibid.*

<sup>19</sup> C Soanes *et al* (eds), *Oxford Dictionary of Current English* (4<sup>th</sup> ed, Oxford: Oxford University Press, 2006) p. 600.

<sup>20</sup> *Ibid.*, p. 654.

## Theoretical Foundations for Local Content Development

Warner argues that there are two distinct strategies for achieving higher local content targets.<sup>21</sup> The first strategy is where the state requires oil companies to give greater preference to those nationals and national suppliers who can compete internationally on cost, quality and timeliness, i.e. what can be termed local content participation. This policy is implemented through negotiated conditions and agreements between host countries and multinationals evidenced by issues such as lower pre-qualification and tender appraisals criteria and lower tariffs on imported machinery and semi-finished materials not available in the country.<sup>22</sup> The second policy strategy is where governments propose a ‘step change’, i.e. gradual change of local content capacity achieved by consciously building the capability of national and local skills to access opportunities, considered as ‘local capability development’.<sup>23</sup> It can also be argued that while the former strategy can be considered more of a ‘push model’, the latter is more of a ‘pull model’.<sup>24</sup>

Warner considers the latter strategy as a more progressive model that would involve considerable undertakings from the IOCs such as providing direct and prolonged assistance to indigenous firms to improve their quality and reliability; payment of premiums or subsidies to overcome some of the higher costs incurred in capacity development; payment of additional insurance premiums to support local suppliers and contractors; investing in physical infrastructure such as buildings and utilities; and providing financial services such as venture capital, credit guarantees and short-term loans to local suppliers and contractors.<sup>25</sup> He stressed that ‘we should not be so naive as to expect changes in local content and community investment practices to occur in the absence of the right incentives.’<sup>26</sup>

However, Ihua *et al* have argued that although the latter model sounds laudable, nevertheless, it is important to consider that multinationals are not charity organizations, but strictly profit-oriented organizations, driven by the goal to maximize shareholders’ funds. As such, the model suggested by Warner may be difficult to apply.<sup>27</sup> They therefore posit that for a country like Nigeria, an effective local content policy would need to be driven by an optimal balance of both incentives on one hand and strict regulations on the other. This is because, in comparison to other countries, Nigeria has very low level of local content in the oil industry operations.<sup>28</sup> According to the Nigerian National Petroleum Corporation (NNPC), only about 14% of the amounts spent servicing the industry is invested in Nigeria, compared to 25% in Indonesia, 50% in Norway and 70% in Brazil and Malaysia.<sup>29</sup>

The essence of the national participation or local content concept *vis-à-vis* the petroleum industry is to develop adequate manpower and technical capacity among the indigenes to

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<sup>21</sup> M Warner, ‘Community Content: The Interface of Community Investment Programmes with Local Content Practices in the Oil and Gas Development Sector’ in *Briefing Note 9* (London: ODI, 2007), <[www.odi.org.uk/business](http://www.odi.org.uk/business)>, cited in UB Ihua, C Ajayi, and KN Eloji, *ibid*.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> UB Ihua, C Ajayi, and KN Eloji, *ibid*.

<sup>25</sup> M Warner, *op. cit*.

<sup>26</sup> *Ibid*.

<sup>27</sup> UB Ihua, C Ajayi, and KN Eloji, *op. cit*.

<sup>28</sup> *Ibid*.

<sup>29</sup> DF Adebola, JO Okoro and OT Nwasike, ‘Building Local Capability: A Case Study of Agbami Project’, being a paper presented at the 30<sup>th</sup> SPE Annual International Conference and Exhibition (NAICE), Abuja, Nigeria, 31<sup>st</sup> July – 2<sup>nd</sup> August, 2006, cited in UB Ihua, C Ajayi, and KN Eloji, *ibid*.

power the industry.<sup>30</sup> The absence of this is to the benefit of the IOCs, since there will be no competition to its status and role in the industry as technical supplier.<sup>31</sup> As aptly captured by Turner, the IOCs resist the transfer of technology for use in the processing of petroleum as part of efforts to avoid displacement.<sup>32</sup> The national oil companies (NOCs) are viewed by the IOCs as potential disrupters of market share and profits in the industry.<sup>33</sup> The IOCs are therefore, naturally reluctant to transfer petroleum technology and managerial skills, and their petroleum development policies are usually aimed at making the host nations technologically dependent.<sup>34</sup> Another reason for this monopoly can be traced to the sophisticated and capital-intensive nature of the petroleum technology, which becomes obsolete so quickly because of the fast-changing nature of the industry and the need to find new ideas to deal with these changes.<sup>35</sup>

The clamour for national participation by developing oil-producing states reflects two significant international developments. These are: (a) the efforts by developing, oil-producing countries to acquire the necessary technical capacity to be able to control their oil industries; and (b) the assertion of the principle of permanent sovereignty over natural resources.<sup>36</sup> These developments have given rise to an adverse relationship between the economic power of the IOCs and the political sovereignty of most developing countries.<sup>37</sup>

### **Policy Framework for Local Content Development**

The local content policy action started in 1971 through the establishment of the Nigerian National Oil Corporation, (NNOC).<sup>38</sup> NNOC was established as a vehicle for the promotion of Nigeria's indigenization policy in the petroleum sector. It later became NNPC in 1977

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<sup>30</sup> Technical capacity here refers to the 'systematic and formulated knowledge about the industrial art in the field of petroleum and capable of changing as a result of researches leading to new discoveries.' See DHN Alleyne, 'The State Petroleum Enterprises and the Transfer of Technology', in United Nations (ed), *State Petroleum Enterprises in Developing Countries* (New York: Pergamon Press, 1980), p. 111. See also K Khan, 'The Transfer of Petroleum Technology and Petroleum Development in Developing Countries: with Special Reference to Trinidad and Tobago', (1986) 4(1) *JENRL*, 11 – 12.

<sup>31</sup> K Khan, *op. cit.*, p. 18.

<sup>32</sup> T Turner, 'Nigeria: Imperialism, Oil Technology and the Comprador State', in P Nore and T Turner (eds), *Oil and Class Struggle* (London: Zed Press, 1980), pp. 199 – 200.

<sup>33</sup> M. Kassim-Momodu, 'Transfer of Technology in the Petroleum Industry: The Nigerian Experience', (1988)22 *JWTL*, 51, at 52.

<sup>34</sup> *Ibid.*

<sup>35</sup> O. A. Alegimenlen, 'Issues in the Acquisition of Petroleum Development Technology for Third World States', Vol. XV No. 2, *OPEC Review*, 1991, 123.

<sup>36</sup> DHN Alleyne, *op. cit.*, p. 109. The principle of permanent sovereignty over natural resources essentially dictates that resource rich nations should have control over their natural resources. However, that control is contingent upon the State utilizing the resources for national development. In addition, in exercising the rights attached to this principle the State must act within the parameters of international law. For a more detailed discussion on the point, see N Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997), pp. 258 – 298. See also *Texaco Overseas Oil Petroleum Co. & Anor v The Government of the Libyan Arab Republic* (1978)17 ILM 1; *East Timor (Portugal v Australia)* (1995) ICJ 90.

<sup>37</sup> R Engler, *The Brotherhood of Oil* (Chicago: University of Chicago Press, 1977), p. 144.

<sup>38</sup> J Balouga, 'Nigerian Local Content: Challenges and Prospects', (2012) *International Association for Energy Economics, Third Quarter*, pp. 23 – 26, cited in C. S. Ayonmike and B. C. Okeke, 'The Nigerian Local Content Act and its Implication on Technical and Vocational Education and Training (TVET) and the Nation's Economy', (2015) 3(1) *IJELD*, 26 – 35, 29.

through NNOC's merger with the petroleum ministry. NNPC flagged off the actual local content initiative through acquisition of interests in the operations of the IOCs. These interests grew to about 70%, with the responsibility of controlling all acreages and other activities.<sup>39</sup> Although conscious efforts were made in the past through the 1969 Petroleum Act<sup>40</sup> and its subsidiary Regulations, enforcement of local content policy, the springboard for sustainable economic transformation of Nigeria, was mere paper work.<sup>41</sup>

However, by 2000, the Nigerian Content Policy was envisioned by the NNPC to serve as the basis for measuring local participation and job creation for Nigerians in the oil and gas industry.<sup>42</sup> The objective of the policy was to increase the quantum of composite value added to, or created in, the Nigerian economy through the systematic development of capacity and capabilities and the deliberate utilization of Nigerian human and material resources and services in the oil and gas industry.<sup>43</sup> In an effort to realize the ideals of the policy, the Nigerian Content Division (NCD) was established within the NNPC.<sup>44</sup>

The NCD was formed as a strategic unit for the purposes of driving and monitoring the implementation of the policy. Its implementation efforts were to be focused on developing initiatives to build capabilities across the industry value chain. The immediate focus was on core industry activities and support services with the greatest impact on Nigerian content. These key support industry areas include; fabrication, engineering, well and drilling services, refining, logistics, shipping, banking and insurance, manufacturing, materials as well as professional services. The NCD was required to produce Monthly and Quarterly Performance Reports, and the Nigerian Content Impact Report.<sup>45</sup>

Pursuant to its mandate, the NCD, on 13<sup>th</sup> of October, 2006, issued the Nigerian Content Development Directives. The directives, *inter alia*, stated as follows: (a) FEED and detailed engineering design of all projects are to be domiciled in Nigeria; (b) project management teams and procurement centres for all projects must be located in Nigeria; (c) operators and project promoters must forecast procurement items required for projects and operational activities and forward the materials list to NCD on or before the 31<sup>st</sup> of January of every year, together with a master procurement plan (MPP) for ongoing and approved projects; (d) fabrication and integration of all fixed (offshore and onshore) platforms weighing up to 10,000 tons are to be carried out in Nigeria; and (e) all waste management, onshore and swamp integrated completions, onshore and swamp well simulations, onshore fluid and mud solids control, onshore measurement while drilling (MWD), logging while drilling (LWD) and directional drilling (DD) activities are to be performed by Nigerians or indigenous companies having genuine alliances with multinational companies.<sup>46</sup>

Essentially, the directives by the NCD were aimed at ensuring that a greater portion of the work in the oil and gas industry was done in Nigeria with active participation of all sectors of the economy. Although the NCD directives did not have the force of law, it had far reaching effects since NNPC was a major partner in most industry projects.<sup>47</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> Cap. P10 *Laws of the Federation of Nigeria* 2004.

<sup>41</sup> CS Ayonmike and BC Okeke, *op. cit.*

<sup>42</sup> L Atsegbua, *op. cit.*, p. 226.

<sup>43</sup> *Ibid.*, p. 227.

<sup>44</sup> *Ibid.*

<sup>45</sup> See the NNPC Coordination Procedure for Nigerian Content Implementation Document No. 1 of 12<sup>th</sup> June, 2006, cited in *ibid.*, p. 228.

<sup>46</sup> A comprehensive listing of the directives can be found in *ibid.*, pp. 228 – 231.

<sup>47</sup> *Ibid.*, p. 232.

## Legal Framework for Nigerian Content Development

### 1. *Nigerian Content and the Immigration Act*

The Immigration Act provides that no person, other than a citizen of Nigeria, shall accept employment (not being employment with the Federal Government or a State Government) without the consent in writing of the Director of Immigration; or on his own account or in partnership with any other person, practice a profession or establish or take over any trade or business whatsoever or register or take over any company for any such purpose, without the consent in writing of the Minister given on such conditions as to the locality of operation and persons to be employed by or on behalf of such person, as the Minister may prescribe.<sup>48</sup> Any person desirous of entering Nigeria for any of the above mentioned purposes must produce the consent to an immigration officer; and the failure to do so shall be an offence under the Act, and any person who commits such an offence shall be liable on conviction to deportation as a prohibited immigrant.<sup>49</sup>

The essence of the above provisions is to prevent the indiscriminate engagement of expatriates in positions where there are suitable Nigerian alternatives and these provisions apply even to activities in the petroleum industry. Thus, the Act imposes the requirement of expatriate quota and other permits before a foreigner can undertake such engagements in Nigeria and where same is to be granted, it may be coupled with such conditions as to the development of local expertise as the Minister may prescribe. Such permits are meant to last for a limited period of time and though may be renewed upon expiration, the application for renewal must show, *inter alia*, a detailed training programme for Nigerians in the field, list of Nigerians understudying the expatriate on a prescribed format showing date of employment, qualifications etc, and a list of Nigerian Senior/Management staff in the applicant's employment showing names, designations, qualifications, salaries per annum, etc.<sup>50</sup>

### 2. *Nigerian Content and the Petroleum Act*

Section 1 of the Petroleum Act vests the entire ownership and control of all petroleum in, under or upon any lands (including land covered by water) which is in Nigeria, or is under the territorial waters of Nigeria, or forms part of Nigeria's continental shelf, or forms part of the Exclusive Economic Zone of Nigeria, in the State.<sup>51</sup> The Act also empowers the Minister to grant licenses and leases<sup>52</sup> to operators in the petroleum industry.<sup>53</sup> The provisions of the First

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<sup>48</sup> Immigration Act, Cap. II *Laws of the Federation of Nigeria* 2004, s. 8(1). See *Awolowo v Minister of Internal Affairs*.

<sup>49</sup> *Ibid*, s. 8(2). See also *Shugaba Damian v Minister of Internal Affairs*.

<sup>50</sup> Wikiprocedure, 'Nigeria - Apply for Expatriate Quota Approval Certificate', <[http://www.wikiprocedure.com/index.php/Nigeria\\_-\\_Apply\\_for\\_Expatriate\\_Quota\\_Approval\\_Certificate](http://www.wikiprocedure.com/index.php/Nigeria_-_Apply_for_Expatriate_Quota_Approval_Certificate)> Last accessed on 27<sup>th</sup> September, 2015. For a detailed outline of the procedure and documents required for the applications, see *ibid*.

<sup>51</sup> The term 'state' here refers to the Federal Government of Nigeria. Indeed, the Constitution also contains similar provisions. See the 1999 Constitution of the Federal Republic of Nigeria (CFRN, as amended 2011), s. 44(3). Also see *AG-Federation v AG-Abia State (No. 2)* (2002)6 NWLR (pt. 764) 542 where the Supreme Court, while confirming the vesting of ownership of petroleum resources in the Federal Government, further held that the Federal Government alone and not the littoral states can lawfully exercise legislative, exclusive and judicial powers over the maritime belt or territorial waters as well as sovereign rights over the exclusive economic zones subject to universally recognized rights. Further see *NNPC v Famfa Oil Ltd* (2012)17 NWLR (pt. 1328) 148 and *South Atlantic Petroleum Company v Minister of Petroleum Resources* (2003) 10 CLRN 122.

<sup>52</sup> That is an oil exploration license (OEL), or an oil prospecting license (OPL) or an oil mining lease (OML).

<sup>53</sup> *Ibid*, s. 2(1).

Schedule to the Act, in so far as they are applicable, apply in relation to all such licences and leases.<sup>54</sup> Now, the First Schedule to the Petroleum Act empowers the Minister, if he considers it to be in the public interest, to impose on any such licence or lease special terms and conditions not inconsistent with the Act, including terms and conditions as to the participation by the Federal Government in the venture to which the licence or lease relates, on terms to be negotiated between the Minister and the applicant for the licence or lease.<sup>55</sup> The cumulative effects of the above statutory provisions is that the Minister, acting on behalf of the Federal Government of Nigeria and in line with the principle of permanent sovereignty over natural resources, may, while granting an OEL, OPL or OML, impose on such a license or lease terms and conditions allowing the Federal Government to participate in the venture to covered by the license or lease, and though such national participation is to be on terms to be negotiated between the Minister and the holder of the license or lease,<sup>56</sup> such terms may extend to the development and/or use of local content for purposes of the venture.

Furthermore, when an OML is granted, the holder thereof is required, within ten years from the grant of his lease, to ensure that the number of citizens of Nigeria employed by him in connection with the lease in managerial, professional and supervisory grades (or any corresponding grades designated by him in a manner approved by the Minister) shall reach at least 75% of the total number of persons employed by him in those grades; and that the number of citizens of Nigeria in any one such grade shall be not less than 60% of the total. He must also ensure, within the said period, that all skilled, semi-skilled and unskilled workers are citizens of Nigeria.<sup>57</sup>

More elaborate provisions for the development of local content in the Nigerian petroleum industry is contained in the Petroleum (Drilling and Production) Regulations,<sup>58</sup> which is a subsidiary legislation under the Petroleum Act. The said Regulations mandate the licensee of an OPL, within twelve (12) months of the grant of his license, and the lessee of an OML, upon the grant of his lease, to submit for the Minister's approval, a detailed programme for the recruitment and training of Nigerians.<sup>59</sup> The programme shall provide for the training of Nigerians in all phases of petroleum operations whether the phases are handled directly by the lessee or through agents and contractors.<sup>60</sup> Any scholarship schemes prepared, and any scholarships proposed to be awarded, by the licensee or lessee (whether or not related to the operations of the licensee or lessee or to the oil industry generally) shall be submitted for the

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<sup>54</sup> *Ibid*, s. 2(3).

<sup>55</sup> *Ibid*, First Schedule, Paragraph 35(a).

<sup>56</sup> *NNPC v Famfa Oil Ltd* (2012)17 NWLR (pt. 1328) 148, the Supreme Court held that provisions of paragraph 2 of Deep Water Block Allocation to Companies (Backing Rights) Regulations 2003 (a subsidiary legislation under the Petroleum Act) which gives the Federal Government the arbitrary right to acquire five-sixth of an OPL or OML interest is invalid to the extent that it is inconsistent with paragraph 35 of First Schedule to the Petroleum Act which stipulates that such participation or acquisition must be made on terms to be negotiated between the Federal Government and the holder of the OPL or OML.

<sup>57</sup> Petroleum Act, First Schedule, Paragraph 38.

<sup>58</sup> Petroleum (Drilling and Production) Regulations, LN 69 of 1969.

<sup>59</sup> *Ibid*, Paragraph 26(1). Note that the whereas the holder of an OPL has a compliance grace period of 12 months commencing from the effective date of the grant, the holder of an OML is obliged to comply immediately he is granted the OML. One begins to wonder the reason for the dichotomy. Surely this cannot be predicated on the statutory dichotomy in the duration of the OPL and OML since the latter generally has a longer lifespan. See the Petroleum Act, First Schedule, Paragraphs 6 & 10. It also appears that there is no such obligation on the holder of an OEL. The cumulative effect of the above is the statutorization of unsatisfactory uncertainties in this piece of legislation.

<sup>60</sup> Petroleum (Drilling and Production) Regulations, Paragraph 26(2).

approval of the Minister.<sup>61</sup> Once any such programme or scholarship scheme has been approved by the Minister, it may not be varied without his permission.<sup>62</sup> A report on the execution of such programme and the progress of Nigerianization shall be submitted by the licensee or lessee at or about the end of June and December in every calendar year.<sup>63</sup> Indeed, the point must be emphasized that failure to comply with any of the above provisions constitutes a valid ground for the revocation of the license or lease.<sup>64</sup>

### 3. *Nigerian Content under Contractual Arrangements*

There are several contractual arrangements between the NNPC and the IOCs which deal with the issues of local content, particularly as regards to training and transfer of petroleum technology.<sup>65</sup> For example, the NNPC's draft service contract obliges the contractor to:

...make the maximum use of available indigenous Nigerian manpower in the conduct of petroleum operations under this contract. The contractor shall within six months after the effective date and after consultation with the NNPC submit for NNPC's approval a detailed recruitment programme, and within 12 months, submit for NNPC's approval, a training programme for all Nigerians employed by the contractor in the conduct of all petroleum operations....<sup>66</sup>

In other service contracts in Nigeria, it is possible to find a schedule for the training of local manpower, to the following effect:<sup>67</sup>

	<b>By third year</b>	<b>By fifth year</b>	<b>By tenth year</b>
Unskilled	100	100	100
Skilled	50	75	100
Clerical and supervisory	50	75	90
Technical	50	75	85
Management	50	75	85

The main objective of these contractual provisions concerning manpower training is to control and operate all phases of the oil industry.

### 4. *Nigerian Content and the Petroleum Technology Development Fund Act*<sup>68</sup>

The Act was enacted for purposes of establishing the Petroleum Technology Development Fund for the purposes of training and education of Nigerians in the petroleum industry.<sup>69</sup>

<sup>61</sup> *Ibid*, Paragraph 27.

<sup>62</sup> *Ibid*, Paragraph 28.

<sup>63</sup> *Ibid*, Paragraph 29.

<sup>64</sup> Petroleum Act, First Schedule, Paragraph 25(1)(b). See the case of *FGN v Zebra Energy* (2002)18 NWLR (pt. 798) 162.

<sup>65</sup> L Atsegbua, *op. cit.*, p. 214.

<sup>66</sup> Article 14, NNPC Proforma/Draft Service Contract in 'Basic Oil Laws and Concession Contracts, South and Central Africa (Original Text)', Supplement Nos. 65 – 60 (1970 – 1980), cited in L Atsegbua, *ibid*.

<sup>67</sup> K Khan, *op. cit.*

<sup>68</sup> Cap. P15 *Laws of the Federation of Nigeria* 2004.

<sup>69</sup> See the long title to the Petroleum Technology Development Fund Act, *ibid*.

Section 1 of the Act established the Petroleum Technology Development Fund and requires that the following monies be paid into the Fund, to wit: (a) the balance of monetary assets outstanding in the accounts of the Gulf Oil Company Training Fund at the commencement of the Act; (b) all further sums payable to or received by the Minister charged with responsibilities for matters relating to petroleum development in terms of any agreement made by the Government and any company in relation to petroleum oil prospecting or mining concessions; and (c) any other sums, from time to time, freely donated or accruing to the Government or the Fund for the training and education of Nigerians in the petroleum industry as the said Minister may direct.

The money in the Fund together with interest (if any) payable in respect thereof shall be applied for the purposes of training Nigerians to qualify as graduates, professionals, technicians and craftsmen, in the fields of engineering, geology, science and management in the petroleum industry in Nigeria or abroad.<sup>70</sup>

#### 5. *The Nigerian Oil and Gas Industry Content Development Act, 2010*

For purposes of giving fresh impetus and vigour to the push for local content development in the petroleum industry, the National Assembly enacted the Nigerian Oil and Gas Industry Content Development Act. The essence of the Act, as stated in its long title, is to provide for the development of Nigerian content in the Nigerian oil and gas industry; to provide for the Nigerian content plan, supervision, coordination, monitoring and implementation of Nigerian content; and for related matters.

The provisions of the Act applies to all matters relating to Nigerian content in respect of all operations in the oil and gas industry notwithstanding anything to the contrary contained in any other statute<sup>71</sup> and all regulatory authorities, operators, contractors, and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry are required to consider Nigerian content as an important element of their overall project development and management philosophy for project execution.<sup>72</sup>

The Act details activities in the industry where Nigerian independent operators are to be given first consideration<sup>73</sup> and also those where exclusive consideration is to be given to

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<sup>70</sup> Without prejudice to the generality of the foregoing, the Act prescribes that the Fund be utilized as follows: (a) to provide scholarships and bursaries, wholly or partially in universities, colleges, institutions and in petroleum undertakings in Nigeria or abroad; (b) to maintain, supplement, or subsidize such training or education specified above; (c) to make suitable endowments to faculties in Nigerian universities, colleges, or institutions approved by the Minister; (d) to make available suitable books and training equipment in the institutions specified above; (e) for sponsoring regular or as necessary visits to oilfields, refineries, petro-chemical plants, and for arranging any necessary attachments of personnel to establishments connected with the development of the petroleum industry; and (f) for financing of and participation in seminars and conferences which are connected with the petroleum industry in Nigeria or abroad. See *ibid*, s. 2.

<sup>71</sup> *Nigerian Oil and Gas Industry Content Development Act*, s. 1.

<sup>72</sup> *Ibid*, ss. 2 and 3(3).

<sup>73</sup> *Ibid*, s. 3(1).

Nigerian indigenous service companies.<sup>74</sup> The Act establishes the Nigerian Content Development and Monitoring Board (NCDMB)<sup>75</sup> and empowers it to monitor, coordinate and implement the provisions of the Act.<sup>76</sup> The Act provides for the submission of a Nigerian Content Plan for any proposed project in the industry,<sup>77</sup> which plan is to be reviewed by the Board and a Certificate of Authorization issued by it if it is satisfied that the plan complies with the Nigerian content requirements of the Act.<sup>78</sup> The Act also provides for the submission of an Employment and Training Plan (E and T Plan),<sup>79</sup> Succession Plan for any position not held by Nigerians,<sup>80</sup> Research and Development Plan (R and D Plan),<sup>81</sup> Technology Transfer Plan,<sup>82</sup> Legal Services Plan (LSP),<sup>83</sup> Financial Services Plan (FSP),<sup>84</sup> and an Annual Nigerian Content Performance Report<sup>85</sup> to the Board. All operators in the industry must comply with the project development and operations, employment and training, succession, research and development, technology transfer, and professional services (including insurance, financial and legal services) requirements of the Act.

The Act establishes the Nigerian Content Development Fund for purposes of funding the implementation of Nigerian content development in the Nigeria oil and gas industry.<sup>86</sup> The Fund shall be managed by the Board and employed for projects, programmes, and activities directed at increasing Nigerian content in the oil and gas industry.<sup>87</sup>

An operator, contractor or sub-contractor who carries out any project contrary to the provisions of the Act, commits an offence and is liable upon conviction to a fine of five percent of the project sum for each project in which the offence is committed or cancellation of the project.<sup>88</sup>

### **Prospects of Local Content Development in the Oil and Gas Industry**

Since the signing into law of the Nigerian Oil and Gas Industry Content Development Act in 2010, and with the NCDMB driving its implementation, there has been a systematic but gradual improvement in local content in the industry.<sup>89</sup> With Nigerians developing competence in jobs that were the exclusive preserve of expatriates, most of the jobs that were executed outside Nigeria are now being performed by Nigerians and in Nigeria. This has led

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<sup>74</sup> *Ibid*, s. 3(2).

<sup>75</sup> *Ibid*, s. 69.

<sup>76</sup> *Ibid*, s. 4. The Act transferred all functions and powers hitherto exercised by any other agency or department of the Federal Government of Nigeria with respect to the implementation of Nigerian content development or policy in the Nigerian oil and gas industry pursuant to any law or enactment to the Nigerian Content Monitoring Board. See *ibid*, s. 103.

<sup>77</sup> *Ibid*, s. 7.

<sup>78</sup> *Ibid*, ss. 8 - 13.

<sup>79</sup> *Ibid*, s. 29.

<sup>80</sup> *Ibid*, s. 31(1).

<sup>81</sup> *Ibid*, s. 38(1).

<sup>82</sup> *Ibid*, s. 44.

<sup>83</sup> *Ibid*, s. 51(2).

<sup>84</sup> *Ibid*, s. 52(2).

<sup>85</sup> *Ibid*, s. 60.

<sup>86</sup> *Ibid*, s. 104(1).

<sup>87</sup> *Ibid*, s. 104(3).

<sup>88</sup> *Ibid*, s. 68.

<sup>89</sup> E Alike, 'Challenges of Enforcing the Nigerian Content Act', <<http://www.thisdaylive.com/articles/challenges-of-enforcing-the-nigerian-content-act/177281/>> Last accessed on 28<sup>th</sup> September, 2015.

to the retention of a large chunk of the industry expenditure in-country, with the attendant positive impact on employment generation and growth of Gross Domestic Product (GDP).<sup>90</sup>

Driven by the NCDMB, the Act recorded its major achievement when Mobil Producing Nigeria Unlimited (MPNU) built three wellhead platforms locally for the development of 20 new oil fields in the country.<sup>91</sup> MPNU, operator of the Joint venture (JV) with the NNPC, used a local company to execute two of these facilities at the Snake Island Integrated Free Zone in Lagos. Mobil's feat was a landmark achievement as the facilities were the largest fabrication contracts carried out in-country by Nigerian companies for the NNPC/MPNU Joint Venture.<sup>92</sup> Before the enactment of the Act, this kind of project was executed in foreign fabrication yards, with its attendant capital flight.

Also for the first time in the history of the industry, ExxonMobil have used locally-made pipes, while other IOCs have also committed to use locally-made pipes for crude oil transportation. With this commitment, many companies have also commenced the setting up of pipe mills in Nigeria. Offshore living quarters have also been fabricated in Nigeria for the first time in the history of the industry, for Ofon Phase II project being developed by French oil giant, Total. The Ofon Phase II Living Quarters platform and topside was built for Total Exploration and Production Nigeria by EIFFEL Construction Metallic of France, with OOP Engineering Limited as local content partner.<sup>93</sup> Popham Walter Odusote (PWO), an engineering and project management firm has also successfully completed the detailed engineering design for the living quarters of the Egina FPSO for Total. The Egina FPSO living quarters will have a total accommodation capacity of 242 persons-on-board.<sup>94</sup>

Though much success has been recorded in the execution of certain categories of projects in the oil and gas industry in Nigeria and by Nigerians, the integration of fabricated steel structures into Floating Production Storage Offloading (FPSO) vessels is yet to be done locally.<sup>95</sup> A typical FPSO for each of the Nigeria's five deepwater oilfields has a length of over 300 metres, weight of more than 110,000 tonnes and 60 metres of width. But of the over 110,000 tonnages, only about 8,000 tonnes are fabricated in Nigeria by indigenous contractors as all the major fabrication works are done in Korean yards by Hyundai Heavy Industries and Samsung Heavy Industries. Though Nigerian indigenous companies fabricate structural steel components of up to 8,000 tonnages, these structures are transported to

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> The project, which was under MPNU's Satellite Fields Development Programme phase 1 (SFDP-1), was intended to develop the resources of over 20 discovered but undeveloped oilfields in the NNPC/MPNU Joint Venture acreage. Phase one of the project (SFDP-1) comprises the Abang, Oyot and Itut (AOI) fields located in Oil Mining Leases (OMLs) 67 and 70, Offshore Nigeria. Nigerdock was contracted to fabricate the Abang and Itut wellhead platforms, piles, coating and corrosion protection; installation of mechanical/electrical equipment skids, testing, sea-fastening and load-out; while Dorman Long Engineering Limited was also contracted to fabricate the Oyot wellhead platform. The completion/load-out of the platform was carried out at the Snake Island Integrated Free Zone Lagos base of Nigerdock by EIFFEL Nigeria Limited, a local subsidiary of EIFFAGE Construction Metallique of France, contractors to the project. See *ibid.*

<sup>93</sup> The platform has 140 personnel on board, with total weight of 6,800metric tonnes, with total floor area of 5,300square metres on seven levels and a helideck being fabricated by Aveon Offshore in Port Harcourt, Rivers State. See *ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> FPSOs are floating vessels that store crude oil produced in both deep and shallow offshore and offload it into export tankers for shipment. With storage tank that can store up to two million barrels of oil, FPSO also has helicopter landing facilities, accommodation facilities for over 180 personnel and source of power supply. See *ibid.*

foreign fabrication yards for integration into the main FPSOs, before the FPSOs sail to Nigeria, on completion.<sup>96</sup>

Currently, provision of subsea systems engineering and project management along with subsea Christmas trees, production and intervention control systems, manifolds, flowline connection systems, installation support and associated spares are done in the United Kingdom and also integrated into the FPSOs in Korean yards. Fabrication, assembly and testing of manifolds and associated structures are done mostly by Norwegian firms while the contract for the umbilical, flowlines, risers and oil loading terminal activities are executed mostly by Italian contractors. The commissioning and start-up of the subsea umbilical, flowlines and risers connecting the subsea wells to the FPSO, along with the oil-loading terminal, consisting of an offloading buoy and offloading lines and part of the FPSO anchoring system are done in Nigeria with the assistance of foreign companies. However, with the signing of the Nigerian Content Act, the NCDMB has unveiled robust plans to ensure that the industry carry out integration of FPSO locally.<sup>97</sup>

### **Challenges to the Development of Local Content in Nigeria**

It has not been an all-success story for local content development in the Nigeria petroleum industry, despite the robust policy and legal frameworks for same. The several challenges faced in this regard, particular emphasis being placed on the regime of the Nigeria Oil and Gas Industry Content Development Act may be summarized thus:

1. *Uncertainties and imprecision of most key provisions of the Act:* A lot of uncertainties trail the meaning and practical application of most key concepts and provisions in the Act. For example, the term ‘first consideration’ was not defined in the Act, nor did the Act spell out the guidelines for the Board to determine the veracity of the criteria employed by the operator in determining first considerations within the provisions of the Act. Also, the Act failed to define the terms ‘management position’ and ‘intermediate cadre’.<sup>98</sup> In the absence of clear statutory guidance on the import of such key terms in the Act, its implementation is being undermined as various companies adopt their own interpretations while the NCDMB remain helpless. Consequently, this has seen the influx of all kinds of expatriates into Nigeria to do jobs that ordinarily should be Nigerianized.
2. *Insufficient sanctions for breach:* The sanctions for non-compliance under the Act are negligible (5% of the project amount) and therefore insufficient to prevent breach. Remember that many countries give tax advantages and incentives to these companies for obeying their home country’s local content policies, laws and directives. Moreover, under the Nigerian JV system, some 60% of this negligible penalty will

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<sup>96</sup> *Ibid.*

<sup>97</sup> Samsung Heavy Industries (SHI) of Korea won the contract for the construction of the FPSO for the Egina Oilfield being developed by French oil giant, Total. But for the current court action over the project, the integration of the FPSO was originally planned to take place at the Lagos Deep Offshore Logistics (LADOL) base in Lagos, with first oil scheduled for 2017. See *ibid.*

<sup>98</sup> Another worrisome example is found in s. 30 of the Act which provides that where Nigerians are not employed because of their lack of training, the operator shall ensure, to the satisfaction of the Board that every reasonable effort is made within a reasonable time to supply such training locally or elsewhere; and such effort and the procedure or its execution shall be contained in the operator’s E & T plan. The Act woefully failed to provide any guidance as to what will amount to ‘a reasonable time’. The result is that the IOCs continue to hide under such provisions to undermine the law, bring in their nationals and deny Nigerians of such opportunities. Even partnership with Nigerian universities which will promote collaboration in research and technology transfer is being relegated to the background, while the IOCs extend financial support and research grant to the universities in their home countries.

- eventually be paid by Nigeria through NNPC. This means that only 2% will be the actual penalty payable by the IOC for breach as against the heavy tax benefits for obeying their home country's local content laws and policies to Nigeria's detriment!
3. *No role for PENGASSAN and NUPENG in the Act:* The implementation of the Act can only be effective to the extent that the NCMB is effective. Thus, any lapse by the Board spells doom as the benefits of the Act will elude Nigerians. It is therefore very pathetic to note that unlike similar laws in the industry, the oil workers' unions (PENGASSAN and NUPENG) and the labour unions, i.e. Trade Union Congress (TUC) and Nigeria Labour Congress (NLC) are not represented on the board of the NCMB. The omissions of unions who are on the field and whose members have been fighting for the greater and effective involvement of Nigeria creates doubt as to whether the government really wants the Act to be effective or whether it was merely passed to stave off domestic pressure.
  4. *Implementation Difficulties:* The implementation of some provisions in the Act portends serious difficulties. For instance, the Board is statutorily required, within a timeframe of 30 days, to issue a Certificate of Authorization for every project. This certificate is to be issued after a review and assessment of the Nigerian content plan for the project. This raises serious issues as to the credibility of the review to be done within 30 days and as to how all unclear issues in the plan can be resolved within this period without undermining the objectives of the Act. Furthermore, the requirement to submit a Nigerian content plan as a pre-condition for the award of any contract in the industry will pose serious administrative bottlenecks to the Board in view of the heavy traffic of contracts executed in the industry.
  5. *Exploitable lacunae in the Act:* Many operators now hide under the provisions of the Act to embark on all manner of contract staffing and casualization, contrary to the intents of the Act and the dictates of the 'Guidelines on Labour Administration issues in Contract Staffing/Outsourcing in the Oil and Gas Sector' as issued by the Federal Ministry of Labour and Productivity in May, 2011 is also clear.
  6. *Ministerial Waivers:* Section 11(4) of the Act gives the Minister of Petroleum the power to grant waivers where there is insufficient capacity to meet the targets set by the Act. This is a huge discretionary power that is susceptible to abuse, especially in view of the fact that the infrastructural base for the development of the required technology are still largely undeveloped. Indeed, our experience has shown that discretionary powers are a major source of corruption and like vices in Nigeria.

It is the fact of the above circumstances and many more that pose serious challenges to the realization of the local content initiative in the Nigerian oil and gas industry.

### **Conclusions and Recommendations**

Although there appears to be implementation challenges bedeviling the various frameworks for the development of Nigerian content in the oil and gas sector, it is expected that the existing regimes will address the otherwise growing gap between annual expenditure and the percentage of national participation in the oil and gas industry. This however, will not be attained unless the various issues arising in this regard are addressed.

It is therefore advisable to have a review of the Nigeria Oil and Gas Industry Content Development Act so as to address some of the challenges already highlighted. Such legislative review should aim at clearing the various ambiguities and uncertainties as well as the administrative bottlenecks inherent in some of the current provisions of the Act. The penalty for breach of the provisions of the Act should be increased so as to deter potential offenders, and it may be necessary to provide that a particular proportion (e.g. 80%) of the penalty is to be paid by the IOC where the entity in default is a joint venture with the NNPC.

It is also advisable to amend the constitution of the NCDMB to include representatives from organized labour unions operating in the oil and gas industry as this will further improve the capacity of the NCDMB to monitor the level of compliance with the provisions of the Act.

Pending a legislative review of the Act, the Ministers of Petroleum, Labour and Interior Affairs should collaborate with the NCDMB and issue such guidelines and directives that will help clear up the uncertainties in the Act, ease the implementation thereof and ensure a robust compliance enforcement strategy. Particularly any application for expatriate quota or renewal thereof should not be granted unless a one-month advert of the position and relevant qualification for same placed in at least two national newspapers and there is no Nigerian with such qualification available to take up the position.

It must be emphasized that the effective implementation of the Nigerian content initiatives is not a task for NCDMB alone. This calls for the active support of all relevant bodies such as the Immigrations, Customs, and Nigerian Police etc. In addition, the National Assembly and indeed all the State Houses of Assembly in Nigeria need to monitor the implementation thereof to deliver greater dividends to their constituents. Host communities and the various community development committees are also enjoined to do the same.

Nigeria should also strive towards the development of indigenous technology and the requisite infrastructure needed to drive the industry and not rely completely on technology transfer from the IOCs. Efforts should be made to locally develop whatever technology that is imported. This will be in line with the United Nations Centre for Trade and Development (UNCTAD) Code of Conduct for the Transfer of Technology.<sup>99</sup> All these, it is believed, will go a long way to reposition the country in for enhanced dominance and control of the industry.

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<sup>99</sup> The Code outlines the following process for technological development in the industry: (a) the identification of the technological needs; (b) the acquisition of information on alternative sources of the technology required, including local sources; (c) the evaluation and selection of the appropriate technology for the assignment; (d) the breakdown of the package of technology supplied into the items to be imported and those to be developed locally; (e) negotiation of the best possible terms and conditions for the technology to be imported; (f) the adaptation and absorption of imported technology and the development of indigenous technology; (g) the dissemination of the newly acquired technology to other users. See AF Ewing, 'UNCTAD and the Transfer of Technology', (1976) 10(3) *Journal of World Trade Law*, 197 – 214, 206.