Content Bill: What it Portends for Kenya's Economy

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PARLIAMENT OF KENYA

Policy Brief

Introduction

Many resource-rich countries are increasingly introducing requirements for local content policy through legislation, regulations, contracts and bidding practices. If these policies are well implemented they will increase local content and 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 due to inadequate local content enforcement[1] .

There exists inadequate local content enforcement[2] not only in Kenya but also in several countries spread across the world. The participation of domestic manufacturers and service providers in the specific industries which are deemed to be of critical importance to the economic sustainability and industrial development of Kenya still remain low.

Currently, there is no definition of the phrase 'local content' under Kenyan law. However, there is an overarching constitutional requirement for Parliament to enact legislation that ensures investments in property benefit local communities and their economies (Article 66(2)).

The situation in Kenya

Section 9(1)(g) of the Petroleum Act provides that one of the implied terms of a petroleum agreement (Production Sharing Contract or PSC) is an obligation on the contractor to give preference to the employment and training of Kenyan nationals in petroleum operations. This implies companies in the oil and gas industry should voluntarily achieve local content requirements within their corporate social responsibility structures and internal policy statements. Being voluntary and often non-committal, industry initiatives by the companies cannot wholly be relied upon to provide certain and enforceable rights and obligations to promote local content.

There is a working draft known as the Energy Bill 2015 in Kenya that aims to consolidate different sectors such as electricity, petroleum, exploration and geothermal resources. The 2015 Bill provides that any person carrying out any undertaking or works under it shall comply with local content provisions. The release of the 2015 Bill was coupled with the release of the draft "Energy (Local Content) Regulations, 2014".

Key Messages

- There is inadequate local content enforcement in industries/sectors which are critical to the economic sustainability and industrial development of Kenya
- Several countries across the world have implemented successful packages of Local Content Requirements (LCRs) characterised by various laws and regulation
- It is recommended that Kenya implements a comprehensive package of LCRs by creating a Kenyan Content Development and Monitoring Board (KCDMB), which would ensure Local content policy, is open, transparent and is backed by strong and accountable institutions

Challenges

The Energy Regulatory Authority (ERA) requires that any foreign project sponsor shall have a local office where procurement, project management and implementation decision making are to take place to the satisfaction of the ERA. However, ERA does not mention by whom such decisions are to be made and therefore defeats the mischief it is trying to cure. In addition, any potential license applicant must also file a "Local Content Plan" which should generally contain plans for the following: employment, training and succession, research and development, technology transfer, legal services and financial and insurance services. However, the Draft Energy Bill does not currently provide an administrative and institutional framework to support implementation of local content.

Notwithstanding the good intentions of the Kenyan Government, the legal and regulatory framework on local content in Kenya is still weak because:

- Neither the current nor the proposed regulatory framework on local content in energy sector provides for clear roles of the various stakeholders in the industry;
- Timelines for the implementation of local content legislation or policy statements have not been provided;
- Monitoring and evaluation mechanisms to ensure compliance have not been factored in; and
- No definite goals have been set for the achievement of the identified local content objectives.

Although, some countries have set legislations on LCRs, the full potential has not been met (Jojarth 2015). Most of these countries face significant challenges with local content implementation ranging from, lack of local content laws, inadequate local content enforcement, lack of local capacity and infrastructure, legal challenges faced by various international bodies like World Trade Organization (WTO)[3], and lack of a precise definition of the localisation requirements (Jojarth, 2015). The absence of an independent regulator to monitor and enforce the relevant provisions has meant that it has been difficult to keep track of the extent to which contractors are complying with the requirements (Kulasingam, Oraro, HHM Oraro 2015).

Methodology

The development of this policy brief was based on a review of secondary sources of information and research evidence. These included Internet searches of evidence through such engines such as Google, Google Scholar and Pubmed as well as Kenya government policy documents

Discussion of Policy Options

Local content if well comprehended is a win-win situation that will promote partnership among national companies, local companies and international organisations. And it will create a good business environment, through corporate social responsibility and harmony, and insure maximum profit for all.

Governments should put in place laws and policies to regulate local content commitments to compel operators to source a defined quantum of their services and capital goods from within the host country. The laws should compel the state to ensure that in contracting and licensing operators and contractors, preference is given to local providers over foreign ones. In addition, a duty should be placed on the operators to help build local capacities to provide services and capital goods needed in the industry. However, having a Local Content Policy (LCP) in place is all well and good, but its true benefit will be impossible to realise without establishing mechanisms for effective monitoring and enforcement.

Global lessons from Brazil, Nigeria, Malaysia and Norway illustrate how LCRs can be effectively implemented. Nigeria's LCP has been successful because it is backed by the Nigerian Content Development and Monitoring Board (NCDMB) which is mandated to oversee, monitor and implement the provisions of the Nigerian Oil and Gas Industry Content Development Act (NCDA).

The Norwegian government fostered an enabling environment for local content laws and played an active role in facilitating the success of local content objectives. Statoil and associated Ministry of Petroleum played a key role in the development of local technologies. Private companies developed the products whereas Statoil defined product requirements, ensured overall project control, and provided technical skills and advice on the newly developed products.

The Norwegian government invested significantly in research and development, as well as strengthened linkages between private firms and local academic centres to create industry "clusters", which in turn have grown into service suppliers for overseas petroleum markets.

Brazil's National Petroleum Agency (ANP) implemented a Local Content program in 2008. Due to supportive measures by the government to drive the development of local capacity and the key role of the national champion, Petrobras[5], commitments to local content increased from 25 percent to 80 percent over a decade (Sigam and Garcia 2012).

The Malaysia government established strong partnerships with foreign firms, while at the same time supporting local suppliers by identifying gaps and facilitating their interaction with foreign firms. Malaysia's state oil company, Petronas, has historically focused on an international expansion strategy to compensate for the relatively small domestic petroleum market. The company has been able to successfully pursue joint ventures with large petroleum multinationals and has pursued an aggressive human resources strategy, including offering numerous training programmes and establishing its own university to train management and technical staff.

Ghana, the government set a 90 percent local content target and has mandated operators to create an Annual Local Content Plan and Annual Recruitment and Training Programme, and shall "as far as practicable" prefer local inputs to imported goods. The Ghanaian government instituted a 10 percent preference threshold regime, and mandates a local content target of 10 percent in the first year, increasing by 10% each following year. Ghana's local content law likewise gives local companies first preference in bidding rounds for oil blocks and requires a minimum 5 percent equity stake for Ghanaian firms – not including the government-owned Ghana National Petroleum Corporation (GNPC) – in every oil license. Furthermore, the regulations require each licensee, contractor or subcontractor to submit a local content plan to the Petroleum Commission or GNPC for approval prior to the start of their activities. The government is seeking to rely on the regulation to achieve at least 90 per cent of full local participation in all aspects of the petroleum value chain by 2020.

In 2012, the Government of India circulated a series of draft Notifications through the official Gazette of India to establish the Preferential Market Access (PMA) policy that would mandate preferential market access for locally manufactured electronic products with minimum requirements of 30 percent that increases to a minimum of 45 percent over a period of 5 years.

Finally, Indonesia has a mandatory local content rules in the telecommunication sector. The government proposed to have at least 30 percent local components required in the manufacturing of 4G smartphones that are sold domestically. However, wireless modems using 4G LTE networks, such as Bolt, are required to have minimum local content of 40 percent. Failure to meet the new minimum local content requirement by January 2017 can result in the suspension of licenses and a ban on sales and distribution activities in Indonesia.

Recommendations

Drawing from global lessons on successful use of LCRs, we recommend that:

i. Kenya implements a comprehensive package of LCRs through creating a Kenyan Content Development and Monitoring Board (KCDMB), which would ensure this initiative, is open, transparent and is backed by strong and accountable institutions.

ii. The Kenya government fosters an enabling environment to attract foreign investors and establishes a strong partnership with foreign firms while at the same time facilitate linkages between local suppliers and the foreign firms.

iii. The Kenya government invests significantly more in research and development, as well as strengthening linkages between foreign firms and local firms to create industry clusters.

Notes

[1] *Columbia Center on Sustainable Investment; Local Content Laws and Provisions South Africa – mining and petroleum, n.d.*

[2] *Lack of proper enforcement of the local content clauses under the specific law, creating loopholes that favour foreign firms, a situation which is unsustainable for the promotion of local industries.*

[3] *The WTO Agreement on Trade-Related Investment Measures (TRIMs) prohibits the use of measures related to local content, trade balancing, export controls and certain foreign-exchange restrictions, and certain bilateral treaties limit the use of other performance requirements.*

[4] *A Norwegian multinational oil and gas company headquartered in Stavanger, Norway.*

[5] *A semi-public Brazilian multinational corporation in the petroleum industry headquartered in Rio de Janeiro, Brazil.*

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