

under domestic laws like the FCPA, the Bribery Act and the CFPOA. Lastly, NGOs provide valuable assistance in combating public sector corruption.

Notes

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- 9 Martin, *Using Local Consultants in Foreign Lands*, *supra* at 6.
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- 15 Abra E Edwards, Willkie Farr & Gallagher LLP Client Memorandum, *The United Kingdom Passes a Comprehensive New Antibribery Law* (19 April 2010), available at www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3312%5CUnited%20Kingdom%20Enacts%20Bribery%20Act%202010.pdf (accessed 14 July 2010) (the strict liability offence portion of the Bribery Act is not enforceable until the publication of statutory guidance regarding anti-bribery compliance programmes).
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Local content requirements in the oil and gas sector: a way of life or an emerging trend?

Local content requirements are not a new phenomenon for the oil and gas sector, and the history in this sector has been to promote local content in various ways. However, one must ask the question, is the wave of local content requirements on the rise or, at a minimum, changing? What must I do to adapt my

international operations? What is counsel's role or involvement in local content requirements?

What is 'local content'?

The purpose of local content requirements is to promote local industries, to promote



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local products and services, to hire and train local workers and to promote social responsibility. But the objective of local content is to find ways to keep money in the host country, money that might tend to otherwise leave for a foreign company's corporate office.

It's worth noting at this point the difference between a 'foreign' company and a 'local' company as defined for purposes of this article. Countries take different approaches and view 'foreign' companies differently, but for the purposes of this article what is referred to as a foreign company is one that is not founded in and whose principals are not from the local (ie, host) country. Even a company that is legally established to do business in a host country, either through a partnership vehicle with a local entity, or through a branch office, or through a subsidiary, etc, is not a local company since it was not originally founded in the local country and its principal owners are not citizens of the local country.

Local content requirements vary from country to country, but a company is typically faced with one or more of the following scenarios, in no particular order. For example, a foreign company may be required to partner with a local company in order to do business in the local country. Alternatively, a foreign company may be required to have a local agent or local sponsor, who may be a company or an individual, through which the foreign company must run its business and/or commercial activities. The premise behind this is for the foreign company to have local participation and/or local ownership in its local operating entity.

Another example of local content requirements is that a foreign company is required to employ local labour. The intention is to train, develop and educate the local workforce. The requirements may be based on a certain percentage of the overall personnel working for the foreign company in the local country, or based on a specific government-mandated/regulatory number. Visas for foreign workers are sometimes used as a mechanism to restrict hiring or use of non-local personnel.

A third example is when a foreign company is required to procure a certain percentage of equipment, supplies, parts, etc for its operations in the local country. This concept sometimes has the caveat that

it is required as long as sufficient parts are available, of suitable make and quality, and can be procured at competitive prices.

Let us not forget the social responsibility aspect of local content requirements. As a foreign company, one should have an interest in the community where one is working. Complying with local content requirements ultimately helps to enhance the economies, financial and economic infrastructures, physical infrastructures of the community and education and talent of the local workforce, creating better communities for all involved.

It is also worth noting that the local content requirements are likely to be different for international oil companies than they are for international service providers or vendors. An international oil company may be required to partner with a local entity, most often the host government or national oil company. An international service provider is usually not a partner with the local government or national oil company, although they might be a client. An international oil company and international service provider will both be required to procure a certain percentage of local labour, supplies, equipment, etc from local vendors and service providers. However, the application of these requirements will likely differ. The international oil company will often seek to pass its local content requirements down to its service providers and vendors, and the percentage of local content procured by an international service provider will be included in the overall percentage procured by the international oil company. The pass-through effect will continue down the line. Although the application may differ, the intent and effect are the same.

Two notable recent examples of changing and emerging local content requirements are the Nigerian Petroleum Industry Bill (PIB) currently under legislative consideration and the call for tender of 28 deep-water rigs, which is unprecedented in size and scope, published by Petrobras earlier this year. A great deal has already been written on the Nigerian PIB, but less so on the Petrobras 28 rig tender.

Petrobras

This is one of the largest local content initiatives, if not the largest, ever seen in the

oil and gas sector. Early on, Petrobras was criticised by some because it would likely pay more for the rigs and for goods and services, but this did not dissuade Petrobras.

The tender was split into two, seven and 19 rigs. The first two and seven, totalling nine rigs, were intended for Petrobras' direct ownership and exclusive use. Seven rigs were to be built in one shipyard, allowing for economies of scale and funding for the construction and development of the shipyard. The other two were for a separate yard or yards and were meant to incorporate new technology or designs. This was really more of a construction tender than a drilling rig tender because the tender went out directly to Brazilian shipyards and not to drilling contractors (although, some of the Brazilian drilling contractors also hold interests, through affiliate or subsidiary entities, in Brazilian shipyards). The intention is for the shipyards to build the rigs for Petrobras, deliver them directly to Petrobras, and presumably Petrobras will later contract with drilling contractors to operate the rigs.

The tender for the following 19 rigs went out to drilling contractors as a more traditional tender for contract drilling services. However, this tender had one huge contingency – to be awarded a drilling contract, the drilling contractor has to build its new rig(s) in Brazil, by a Brazilian shipyard, and the rig has to be constructed with varying percentages of local content.

This leads to several follow-on questions. What constitutes a Brazilian shipyard? What percentage of equipment and materials needs to come from Brazilian companies, suppliers and vendors? What percentage of personnel employed to build the rigs needs to be Brazilian? These questions were addressed in the call for tender. But, aside from the local content questions, there is also an underlying question of whether or how the Brazilian government will guarantee the risk – default of the shipyard, default of Petrobras, default of the drilling contractors. What about the project management risk? Will those 'virtual' shipyards that have yet to be built be completed in time to subsequently build and deliver the drilling rig(s) per the deadlines in the Petrobras tender? Will the shipyards have the knowledge and expertise to build the rigs? These issues have yet to

play out, but Brazil is optimistic of its ability to deliver.

The deadline for submitting bids in the 19 rig tender was 24 June 2010. Petrobras has received tenders from a number of international and local drilling contractors and is analysing the participating bids.

Was this tender really about drilling rigs, or was it about re-building the shipbuilding industry? Opinions vary on the answer. What is certain, however, is that Brazil will develop its shipbuilding industry, it will develop the associated industries, and it will train its work force, and it will do all of this through the use of increased local content requirements.

Local content requirements are not going away. In order to operate within the legal framework of local content requirements in a host country, foreign companies need to adapt to and adopt these requirements. Whether it is hiring personnel, procuring goods, materials or services, or whether it is partnering with a local entity, local content requirements will impact the way a foreign company does business in a host country.

Unless one is involved in a lobbying effort, one probably cannot change the local content requirements of a host country, but as counsel one is expected to advise his/her client(s) on what to do in the face of these requirements. The role of counsel to an international oil company and/or international service company is to: be familiar with and understand the local content requirements of the host country; and assist one's client(s) in making sure they are complying with local content requirements of the host country by making sure the company's operational structure, and its provision of personnel match the legal requirements/legal framework of the host country.

Counsel to a foreign company should understand the needs of the business or operations group required to perform their work (ie, what level of technical knowledge and/or training is required to perform the job function?). Most companies have a human resources department that helps provide the personnel, both ex-pat and local, for the company. In other cases, this function may be outsourced to either an international or local manning agency. While the provision of personnel may be managed by a company's human resources department, counsel to a foreign company should coordinate with



the company's human resources department and with the company's business or operations group. This may seem like simply coordinating or liaising between groups, but the involvement should go beyond that. As counsel, one should make sure that the link exists between the needs of the business group or operations, the personnel provided by human resources, and the legal requirements of local content laws or regulations. Counsel should monitor a company's personnel structure to ensure compliance with the legal framework of local content requirements.

As counsel, one should not simply reiterate the laws to one's client(s), one must advise

and help guide through the legal framework of local content requirements.

Local content requirements are not always easy to understand. Companies might have a difficult time finding sufficient competent, trained and educated personnel. Companies' costs might increase. Companies might encounter problems with corruption. Nonetheless, international companies need to be prepared for increasing local content requirements around the globe.

From country to country, the means of achieving the goal may differ, but the objective of local content requirements is the same.

The new Mexican upstream legal regime: developing the E&P contracts

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The main features of the 2008 legal reform: the new arrangements in context

28 November 2008 may be considered a date on which a major step for Mexico's upstream industry was accomplished. After more than 60 years of industry history, a set of reforms was enacted by the Federal Congress aiming to provide PEMEX with an exploration and production (E&P) legal regime closer to international best practices.

The package of reforms went beyond E&P, as it involved the suppression, amendment and enactment of numerous statutes in different matters such as: incorporating an upstream regulatory agency; fostering various sources of sustainable energy; developing public policy in terms of energy transition and its financing; and strengthening the role of the PEMEX's Board of Directors.

When originally submitted to Congress, the presidential bill went further beyond, aiming to liberalise the midstream and downstream markets. However, during the negotiations of the package, several politically-oriented tradeoffs took place, including those related to the said mid/down industries.

Although the 2008 energy reform is not as promising as the private sector expected, it should not be underestimated. Strengthening

corporate governance, institutional design and best industry practices are intrinsically positive goals. The real acid test of the reform will be passed once the bid rounds regarding all relevant projects are successful and the performance of all players – including IOCs – results in a substantial increase of the national production.

Understanding a complex NOC: PEMEX as a contractual operator versus a technical operator

When the likelihood of a potential upstream legal reform was originally discussed back in the spring of 2008, there were some constitutional taboos that were simply put aside of the congressional negotiations. Being absolute the state's ownership of hydrocarbons, alternatives that amounted to concessions, joint ventures or production sharing agreements were disregarded altogether.

Despite the restrictions, the team that took the lead on implementing the legal reform reviewed a cluster of jurisdictions (and their respective NOCs) with certain similarities to those of Mexico. Amongst them Iran, Kuwait, Saudi Arabia, Angola and – more recently – Iraq were considered as potential references in the context of an oil-service environment.