

## Energy & Natural Resources - Nigeria

### Local content and cabotage policies raise questions about local protectionism

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### Introduction

In addition to the Electric Power Sector Reform Act 2005 and the Petroleum Industry Bill (which is still being considered by the Nigerian legislature), any shortlist of the most significant Nigerian oil and gas sector legislation in the last decade must include the Nigerian Oil and Gas Industry Content Development Act 2010 (the Local Content Act) and the Coastal and Inland Shipping (Cabotage) Act 2003.

The significance of these two statutes – and the accompanying regulations and guidelines – derives from the following:

- their protectionist approach;
- their shared objectives of increasing Nigerian equity, equipment ownership and participation in the oil and gas sector (the Local Content Act) and in the coastal trade and shipping sector (the Cabotage Act) respectively; and
- their prescription of aggressive blueprints for boosting emerging local technical capacity within ambitious timeframes.

The resulting challenges, while different under both regimes, highlight the pressing need to re-evaluate the current approaches to implementing them. Holistic options that focus realistically on closing the continuing in-country capacity gap and developing structures that will address the immediate funding challenges faced by indigenous participants in both sectors should also be prioritised.

### Current landscape

Cabotage in Nigeria is governed principally by the Cabotage Act and the accompanying guidelines. The act defines 'coastal trade' or 'cabotage' as including the carriage of goods by vessel, or by any other mode of transport (excluding pipelines), from one place in Nigeria or above Nigerian waters to any other place in Nigeria, either directly or via a place outside Nigeria, and includes the carriage of goods in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of Nigeria, whether in or under Nigerian waters. The cabotage regime is overseen and enforced by various government agencies, including the Nigerian Maritime Administration and Safety Agency (NIMASA) and the Nigerian Content Development and Monitoring Board (NCDMB), which was established under the Local Content Act.

### Eligibility to engage in coastal trade

Only vessels that are wholly owned and crewed by Nigerian citizens, built and registered in Nigeria and flying the Nigerian flag may engage in coastal trade in Nigeria. Only vessels, tugs or barges whose beneficial ownership resides wholly with Nigerian citizens may engage in the carriage of materials or supply of services to and from oil rigs, platforms and installations, or the carriage of petroleum products between oil rigs, platforms and installations. The four pillars of the Nigerian cabotage regime are therefore that vessels be:

- wholly owned by Nigerian citizens;
- registered in Nigeria;

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- crewed by Nigerian citizens; and
- built by Nigerian shipyards.

### **Growing calls to review cabotage regime**

Foreign-owned vessels are therefore restricted to the extent that they may engage in coastal trade in Nigeria by the Cabotage Act. However, the act advocates a "liberal" cabotage policy through the use of a ministerial waiver system similar to that prescribed by the Local Content Act, although the latter restricts instances of recourse to and the duration of the waiver. The system appears to be thriving, given the dearth of Nigerian-owned, crewed or built vessels. The nationality requirement may be waived where the non-availability criterion is satisfied, meaning that a foreign-owned vessel may engage in cabotage in Nigeria provided that it procures the necessary licences and waivers from the Nigerian minister of transport.

Given the dearth of local capacity, the waiver regime has, unsurprisingly, been over utilised by foreign vessel owners to such an extent that it has raised important issues about abuse, causing critics and indigenous shipowners to allege that lax implementation is hampering the effectiveness of the regime's protectionist objectives. In particular, they contend that there has been an indiscriminate grant of unconditional waivers in certain instances, leading to a need to review the regime's implementation over the last decade.

Authorities are expressly required to carry out checks to confirm whether there is non-availability or inadequate in-country capacity before granting either a licence or a waiver to any foreign-owned vessel. However, in practice – and notwithstanding that the Cabotage Act and guidelines expressly confer on the minister the power to grant both licences and waivers subject to regulatory checks – it is not unusual for foreign-owned vessels to engage in cabotage merely after applying for a licence or waiver to NIMASA, paying the prescribed fees and ensuring that receipts of such payments are carried onboard the relevant vessels.

However, it is important to examine whether the current challenges to the cabotage regime arise from laxity – which should be easy to rectify – or whether they are more fundamental. In response to allegations of discrimination against indigenous shipowners in the award of contracts, international oil companies (IOCs) operating in Nigeria argue that vessels owned or offered by most indigenous shipowners do not meet the technical and structural specifications required for specific projects, with a number being obsolete in design. Several factors contribute to this. One great challenge is the inadequacy of financing options currently available to local shipowners. Offshore disasters such as the Macondo incident in the Gulf of Mexico in 2010 appear to support operators' preference for newer and more technologically advanced vessels, with a view to reducing accident risks, particularly in deep offshore areas. The directive of the International Maritime Organisation prescribing the use of double-hulled oil tanker vessels, which are less susceptible to rupturing and spilling, may also contribute to heightened safety concerns that are having an impact on IOC contract awards.

The current waiver regime highlights the need for well-articulated and coordinated steps to address the existing financing and capacity deficiencies as the Nigerian cabotage regime enters its second decade.

### **Harmonising cabotage and local content regimes**

Foreign-owned vessels that have been granted waivers by the minister of transport to engage in cabotage must meet the requirements of the Local Content Act as implemented by the NCDMB. There are potential areas of conflict in the provisions of both acts that deal with similar issues.

For instance, the Cabotage Act requires that vessels (not those on bareboat charter to a Nigerian entity or that have been granted a waiver by the Nigerian minister of transport) should be 100% owned by Nigerians, while the Local Content Act requires a demonstration that at least 50% of all equipment – presumably including vessels, tugs and barges that are engaged in coastal trade utilised for Nigerian oil and gas sector operations must either be already owned by the Nigerian subsidiary of the foreign vessel-owning company or be owned by the subsidiary before the expiration of the contract for which the vessel is required. This means that, inconsistent with the 100% Nigerian ownership requirement set out in the Cabotage Act, 50% Nigerian ownership (whether actual or potential) of a vessel, tug or barge is sufficient for the purposes of the Local Content Act.

In addition, all companies (whether Nigerian or foreign) providing shipping services to, or within, the Nigerian oil and gas industry are subject to specific Nigerian content prescriptions – measured in terms of everything from man hours to the percentage spent on the procurement of local goods and services. The minister of petroleum resources has the power to grant waivers under the Local Content Act, but only where there is inadequate indigenous capacity and subject to the demonstration of a

commitment to close out the existing capacity gap in-country. Another notable difference between the Local Content Act and the Cabotage Act is that such waivers may be granted only for up to three years from entry into force of the Local Content Act (April 22 2010). Technically, therefore, local content waivers may not be granted after April 21 2013, unless the Nigerian National Assembly amends the act to extend this period. Pending such an amendment, it will be interesting to see how difficulties arising from this provision will be addressed in relation to services, goods and equipment where local availability and capacity continues to be inadequate.

Vessel-owning companies with less than 51% Nigerian equity ownership will not qualify as Nigerian companies under the Local Content Act, and are therefore not entitled to first or exclusive consideration in bids for contracts in the Nigerian oil and gas industry. While this would make bids from foreign companies less competitive from a local content perspective, the challenge for Nigerian shipowners remains whether they own or can acquire and present vessels, equipment and personnel that will meet the technical criteria and capacity requirements of oil and gas sector operators.

## Conclusion

Foreign and Nigerian vessel owners engaged in the offshore sector of the Nigerian petroleum industry must consider the potential impact of the cabotage and local content regimes in their funding, investment and operational decisions. While both regimes have increased compliance requirements in order to facilitate implementation, there remains an urgent need to harmonise and consider the efficacy of both regimes, and to adopt structures to close out the continuing local capacity gaps.

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