



**INDIGENOUS PARTICIPATION IN THE NIGERIAN
OIL & GAS INDUSTRY IN LIGHT OF
LOCAL CONTENT LEGISLATION**

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Generally, the legal and regulatory framework for conducting business in Nigeria is governed by the Companies and Allied Matters Act, CAP. C20 Laws of the Federation of Nigeria 2004 (“**CAMA**”) and the Nigerian Investment Promotion Commission Act CAP. N117 Laws of the Federation of Nigeria 2004 (“**NIPC Act**”). CAMA states that any person who intends to carry on business in Nigeria must incorporate a company in Nigeria, while the NIPC Act allows a foreign investor to invest in and participate in the operations of any enterprise in Nigeria except in the sectors outlined under the *Negative list* contained in the NIPC Act.

The prohibition under the *Negative list* specifically relate to the business of production of arms, ammunition, dealing in narcotics and psychotropic substances and dealing in military and paramilitary wears, hardware and accoutrement. However, apart from the restrictions set out in the NIPC Act, mention must also be made of some other statutes in Nigeria which tend to restrict participation in business contrary to the guarantee and protection offered by CAMA and the NIPC Act; of importance in this regard are the Nigerian Oil and Gas Industry Content Development Act (‘Local Content Act’) and the Coastal and Inland Shipping (Cabotage) Act (‘Cabotage Act’).

The Local Content Act and the Cabotage Act have a direct impact on the organizational structure of stakeholders in the Nigerian oil and gas industry. These statutes specifically de-emphasise, restrict and seek to regulate foreign participation/operation in the oil and gas and the inland maritime sectors of the Nigerian economy. The statutes encourage the inclusion of Nigerian indigenous participation in varying degrees, by prescribing thresholds for use of local services and materials with the ultimate aim of promoting the acquisition and transfer of skills and technology to Nigerians.

An overview of the Local Content Act

The scope of the Local Content Act is of general application to all operators in the Nigerian oil and gas sector, which expression includes international oil companies (IOCs), contractors and other entities involved in projects in the oil and gas industry. This statute takes precedence over all other laws, enactments and directives in the oil and gas industry pertaining to Nigerian content.

The major highlight of this piece of legislation is its requirement that all players in the industry (IOC’s, national oil companies, their subsidiaries, joint venture partners operating under any petroleum arrangement in Nigeria) are to give **first consideration** to “*Nigerian Independent Operators*” i.e. operators in the oil and gas industry with 51% equity shares held by Nigerians, in the award of any project in the oil and gas industry.

The statute also provides that **exclusive consideration** should be afforded to Nigerian indigenous service companies in the award of contracts, where such Nigerian indigenous companies demonstrate capacity, competence and ownership of equipment for execution of projects in the land and swamp operating area of the industry. The effect of these provisions is that Nigerian independent operators would be entitled to **first consideration** in the award of contracts in the oil and gas industry, although foreign-owned operators may be eligible for participation in the industry where they are able to demonstrate superior capacity over the Nigerian operators. It is important to note that **exclusive consideration** is given to Nigerian operators in respect of projects in the land and swamp operating areas of the industry.

An overview of the Cabotage Act

As already stated above, the Cabotage Act is one of the laws that touch on the business operations of the operators in the oil and gas industry. This statute restricts the use of foreign vessels in domestic coastal trade and promotes the development of indigenous tonnage and related matters. The Cabotage Act prohibits a vessel other than that wholly owned and manned by Nigerian citizens, built and registered in Nigeria from engaging in the domestic coastal carriage of cargo and passengers within the coastal, territorial, inland waters, or any point within the waters of the Exclusive Economic Zone of Nigeria.

Under the Cabotage Act, a vessel, tug or barge of whatever type other than that whose beneficial ownership resides wholly in a Nigerian citizen cannot (amongst others) engage in the carriage of materials or supply services to and from oil rigs, platforms and installations or carriage of petroleum products between oil rigs, platforms and installations whether offshore or within any ports or points in Nigerian waters.

Unlike the Local Content Act which considers a company with 51% equity shares held by Nigerians to be “a Nigerian company”, the Cabotage Act provides that to be able to own and operate a vessel within the purview of matters that fall within the Cabotage Act, such owning entities must be wholly Nigerian.

A vessel will qualify as a “Nigerian vessel” under the Cabotage Act where the vessel is registered in Nigeria and is wholly and beneficially owned by Nigerian citizens or by a company wholly and beneficially owned by

Nigerian citizens. For this purpose, a vessel or company will be deemed to be wholly and beneficially owned by Nigerian citizens where all the shares in the vessel and the company are held by Nigerian citizens free from any trust or obligation in favour of any person who is not a citizen of Nigeria. The Cabotage Act further stipulates that a vessel will not be registered for use in domestic coastal trade unless Nigerian citizens own the controlling interest in the company that owns the vessel.

Under the Cabotage Act, a vessel will be deemed to be a “wholly owned Nigerian vessel” where it is owned and registered in Nigeria and whose sixty-four shares are beneficially owned by Nigerian citizens or a company registered in Nigeria with 100% of its share capital beneficially owned by Nigerian citizens. Notwithstanding the above, the Cabotage Act further sets out ownership requirements for vessels for the purpose of registration and for use in domestic trade. It is only where any of these ownership requirements is met that the Minister¹ would register the vessel for use in domestic trade under the Cabotage Act.

Ordinarily and by the provisions of the Cabotage Act, foreign owned company would not be entitled to participate in coastal trade activities and ownership of vessels. This would necessitate recourse to apply for a waiver as provided in the Cabotage Act. The Cabotage Act allows the Minister, upon receipt of an application, to grant a waiver to a duly registered vessel, not being a wholly owned Nigerian vessel, where he is satisfied that there is no Nigerian vessel that is suitable and available to provide the services or perform the required activity.

¹ “Minister” under the Cabotage Act means the head of the ministry for the time being responsible for matters relating to shipping.

Furthermore, where the Minister is satisfied that there are no qualified Nigerian officers or crew to man a duly registered vessel, the Minister may grant a waiver on the requirement to have the vessel manned by Nigerian citizens. Similarly, the Minister is at liberty, to grant a waiver in respect of the requirement which requires that a vessel under the Cabotage Act be built in Nigeria; the Minister would grant the waiver that no Nigerian ship building company has the capacity to construct the particular size and type of vessel specified in the application for waiver.

Do the local content laws achieve their objectives to stimulate growth in the Nigerian oil and gas sector?

This question appears to have been answered in the course of an empirical study conducted by economists studying the subject. These commentators observed a “**positive significant indirect effect on job creation through indigenous participation and backward linkages**”².

The economists also found that whilst there was improved participation by local operators, the value generated as a result of the local content laws is not widespread, suggestive of the argument that the objectives of the local content statutes have not been fully attained. They however argue favourably for increased participation of the indigenous operators, which they posit could result in exponential growth of the Nigerian oil and gas industry with its consequential positive impact on the Nigerian economy through the creation of direct and indirect job opportunities.

² *The role of local content policy in local value creation in Nigeria's oil industry: A structural equation modelling (SEM) approach by Adedeji, Sidique & Law*

There is a dearth of information with which to assess whether the Local Content Act has achieved some of its other objectives including technology transfer from foreign to indigenous operators in the oil and gas industry. It does however appear that the Nigerian Content Development and Monitoring Board, which is empowered to ensure the promotion of local content, has approached the task with a sense of urgency; which stakeholders appear to agree is in the best interest of the growth of indigenous capacity in the industry.

For its part, it appears the Cabotage Act has yet to attain its principal objective which is to deepen the participation of Nigerian maritime practitioners in the international maritime business. One leading stakeholder who spoke on the vessel financing fund stated that: “**The fund came into being with the promulgation of the Coastal and Inland Shipping (Cabotage) Act in 2003. It was included in the law that the fund would be derived from two percent deductions of every contract awarded and the funds would be used to help grow the capacity of the indigenous ship owners and also provide financial assistance to Nigerian operators in the domestic coastal shipping in order to acquire vessels. However, in reality, a lot of problems have bedevilled the implementation of the law**”³.

From a legal perspective, the Local Content Act may be inherently self-defeating given its lack of clear definitions particularly with regard to the ownership structures of operators in the industry. As stated above, the statute defines a Nigerian operator as a company in which *51% equity shares [are] held by Nigerians*. This appears to leave it open to interpretation,

³ Dr Taiwo Afolabi, Group Executive Chairman - Sifax Group <http://sifaxgroup.com/ceo-media/sifax-boss-canvasses-implementation-of-cabotage-law/>

what sort of shareholding arrangements are permissible – and therefore allowing for creative legal thinking to circumvent the provisions of the law without contravening its express provisions.

One of the arrangements which could potentially be used to circumvent the provisions of the Local Content Act is the use of nominee schemes. A nominee scheme is a trust arrangement where an operator enters into a nominee agreement with a Nigerian individual(s) who can hold shares on its behalf for the purposes of complying with the stipulations in the Local Content Act. Such operator may thereafter protect its agreement with its Nigerian partners via a series of agreements (loan agreements, shareholders agreements etc) to ensure that its interests are continuously protected in the event of a breakdown in its relationship.

Should this issue become subject of litigation, an interpretation of the Local Content Act would be sought. The argument would be that the wording of the Local Content Act is clear as to the requirement to qualify as a Nigerian company. The position under Nigerian law is that where the language and words used in a statute are simple and unambiguous, the statute should be given its ordinary meaning. The courts would not be allowed to introduce extraneous matters that may lead to circumventing or giving the provision of the statute a meaning different from what the legislature intended. To that extent, a foreign operator who operates such a scheme as that described above would be entitled to argue that the literal rule of interpretation should be applied in interpreting the statute.

It would therefore be in the interest of indigenous operators to lobby for the enactment of subsidiary legislation or issuance of guidelines clarifying some of these points for the development of indigenous participation. Such clarifying document should clarify the acceptability

of nominee/beneficiary arrangements to the regime espoused by the Local Content Act, as is evidenced in the clear and unambiguous manner of the Cabotage Act.

Ultimately, there appears to be some evidence of positive impact of the local content laws on indigenous participation in the oil and gas industry. However, while the laws have an evident impact on indigenous participation of personnel, no significant impact has been noted in terms of infrastructure or technology acquisition. It is submitted that a review and/or amendment to existing legislation and the creation of an enabling environment for local participation would further advance the objectives of the statutes.



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