

Highlights of Nigerian Local Content Legislation in the Marine Transport Industry by

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Local Content and Marine Transport

The topic which the organizers of this conference have assigned to me is Highlights of Nigerian Local Content Legislation in the Marine Transport Industry. Having regard to the distinguished participants here I will endeavour as much as possible to try and keep my discussion practical since you are all familiar with the laws I am called upon to speak on.

By definition marine transport is the means of carrying of goods and persons by water, whether in inland waterways including rivers and oceans. It can be domestic (inland and coastal) supported with boats, ferries, coastal vessels of less than 500 gross tonnage or ocean transport with big vessels of over 500 gross tonnage in size and types which support international trade.

There are a number of laws which seek to improve local participation in the Nigerian Marine Industry. My task today is to draw your attention to those Nigerian laws regulating the development of local capacity in the carriage of goods and persons by water in both domestic and international trade.

Background

The need to enhance local capacity in the Maritime sector has been an issue of grave concern to all stakeholders in the Nigerian Marine Transport industry. For years the industry has been under the control of foreigners. This realization of the importance of marine transport especially in the oil and gas sectors of the economy gave rise to agitation by local operators for a need to be protected against their expatriate competitors who were often better funded and equipped and sometimes even more diligent in the discharge of their obligations than the local actors.

This agitation soon caught the Federal Government's attention resulting in earlier legislative attempts to protect the indigenous players in the industry. In 1987 the Federal Government enacted the National Shipping Policy Act.

The Act established a National Maritime Authority to co-ordinate and implement Nigeria's national shipping policy. The essence of establishment of the NMA was inter alia to correct imbalances in the Nigerian shipping trade; ensuring the greater participation of indigenous shipping lines in liner conferences, thereby influencing the decision making processes of such liner conferences serving Nigerian international seaborne trade; promote the acquisition of shipping technology by creating and

diversifying employment opportunities in the shipping industry through stimulation and protection of indigenous shipping companies; increase the participation by indigenous Nigerian shipping lines in ocean shipping through the application of the provisions of the UNCTAD Code on general cargo by entering into bilateral agreements or other suitable arrangements; encourage the increase of ownership of ships and the achievement of indigenous skills in maritime transport technology; achieve a systematic control of the mechanics of sea transportation; and promote the training of Nigerians in maritime transport technology and as seafarers.

In furtherance of these objectives section 14 of the Act **reserved exclusively for national carriers the right to the freight belonging to the Federal, State and Local Governments, including Federal and state owned companies and parastatals. To qualify for grant of national carrier status, the shipping company must be fully owned by Nigerian individuals or enterprises fully owned by Nigerian individuals, have at least 60% of its equity shares and the company is registered in Nigeria and that 100% of the crew of at least 75% of the shipboard officers, including the captain and the chief officer are Nigerians.**

Section 14(3) of the Act provided that all public sector contracts for importation and exportation of goods on FOB and C and F basis.

Section 18 conferred a duty on the NMA to ensure that Nigerian vessels carry Nigeria's share of cargo in volume and earnings in accordance with provision any cargo sharing arrangement entered or agreed to by the authority or by the Federal Government.

The National Shipping Policy Act 1987 was subsequently repealed and replaced by the Nigerian Maritime Administration and Safety Agency Act, 2007. It is to consider the key provisions of this important legislation that we shall now turn.

NIGERIAN MARITIME ADMINISTRATION AND SAFETY AGENCY ACT, 2007

The Nigerian Maritime Administration and Safety Agency is the agency charged with the enforcement of the provisions of the cabotage law in Nigeria.

The Act provides for the promotion of maritime safety and security, protection of the maritime environment, shipping registration and commercial shipping and the establishment of the Nigerian Maritime Administration and Safety Agency.

Some of the relevant key functions of the Agency are set in section 22 (1) (k) and 22(1) (j). **One of which is to develop and implement policies and programmes which will facilitate the growth of local capacity in ownership manning certification, employment and construction of ships and other maritime infrastructure and to enforce and administer the provisions of the cabotage Act 2003.**

Section 35 of the Act restates the provisions of Section 18 of the repealed National Shipping Policy Act, 1987 relating to qualification for grant of National Carrier Status. The section provides as follows:

“35. The Minister, on the recommendation of the Agency, may grant national carrier status to a shipping company if

(a) the Nigerian individuals or enterprises fully owned by Nigerian individual own at least sixty per cent of its equity shares, sixty percent in the shares of any vessel owned by the company and the shipping company is registered in Nigeria;

(b) the vessel owned by the company operates on international route, the deep sea and not in Nigerian coastal or inland waterways;

(c) the head office of the company is located in Nigeria and its management and control is directed from its Nigerian head office;

(d) the company owns at least one ocean going vessel of not less than 5,000 net registered tonnage;

(e) the terms and conditions of the employment of seafarers engaged by the company are in conformity with Nigerian laws and accepted by international rules and standards;

(f) the company's vessels are registered in the Nigerian Ship Registration Office and the vessels satisfy all conditions stipulated in the Merchant Shipping Act; and

(g) one hundred percent of the crew and at least seventy-five per cent of the shipboard officers, including the captain and the chief officer and wherever possible chief engineers, are Nigerians.”

Section 36 of the Act preserves the exclusive right of National carriers to carriage of export and import cargo belonging to Federal, state and local Governments, including Federal and state owned companies and agencies.

The Section provides as follows:

“36(1) National carrier shall have exclusive right to carriage of export and import cargo belonging to the Federal, State and local Governments, including Federal and State owned companies and agencies.

(2) The Agency and the Federal Government shall, from time to time, issue guidelines on incentives to be granted to Nigerian shippers other than the parties under subsection (1) of this section who employ national carriers for the carriage of cargo.

(3) The Agency may, from time to time, develop and attach additional eligibility criteria for granting the status of national carrier to a shipping company."

Another important provision of the NIMASA Act is Section 37. This section preserves at least 50% of carriage rights in respect to liquid or bulk cargo to national carriers.

37.-(1) Subject to subsection (2) of this section, national carriers shall have the right to participate in the carriage of bulk dry or liquid cargo.

(2) The participation of national carriers in the carriage of bulk cargo to and from Nigeria shall be subject to a carriage right of not less than fifty per cent of such cargo.

(3) All other cargo to and from Nigeria outside the jurisdiction of liner conferences shall be subject to the same principles of cargo sharing as specified in subsection (2) of this section and subject to such exceptions as the Federal Government may, from time to time, determine.

(4) A cargo support shall cover the totality of available trade, including bulk dry and liquid cargo.

(5) The Nigerian flagged vessels shall carry at least fifty percent of the cargo generated through technical assistance or international aid.

(6) The Agency shall determine an efficient strategy for the participation of national carriers in the carriage of crude and petroleum product to and from Nigeria.

By far the most important legislation aimed at achieving local capacity development in the Marine Transport industry has been the Cabotage Act.

COASTAL AND INLAND SHIPPING (CABOTAGE) ACT 2003 AND ITS IMPLEMENTATION GUIDELINES AS AMENDED IN 2007

This is an Act to restrict the use of foreign vessels in domestic coastal trade in Nigeria, to promote the development of indigenous tonnage and to establish a cabotage vessel financing fund. The objective of the Cabotage Act is primarily to reserve the commercial transportation of goods and services within Nigerian coastal and inland waters to vessels flying the Nigerian flag, owned and crewed by Nigerian citizens and built in Nigeria.

Under this Act, "Coastal Trade" or "Cabotage" means

- (a) the carriage of goods by vessel or any other mode of transport, from one place in Nigeria or above Nigeria waters to any other place in Nigeria or above Nigeria waters, 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;

- (b) the carriage of passengers by vessel from any place in Nigeria situated on a lake or river to the same place, or to any other place in Nigeria, either directly or via a place outside Nigeria to the same place without any call at any port outside Nigeria or to any other place in Nigeria, other than as an in-transit or emergency call, either directly or via a place outside Nigeria;
- (c) the carriage of passengers by vessel from any place in Nigeria to any place above or under Nigerian waters to any place in Nigeria or from any place above Nigerian waters to the same place or any other place above or under Nigerian waters where the carriage of the passengers is in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources in or under Nigerian waters; and
- (d) the engaging by any vessel, in any other marine transportation activity of a commercial nature in Nigerian waters and the carriage of any goods or substances whether or not of commercial value within the waters of Nigeria.

“Place above Nigerian waters” in the context of the coastal trade includes any vessel, offshore drilling unit, production platform, artificial island, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, dredge, floating crane, pipe laying or other barge or pipeline and any anchor cable or rig pad used in connection therewith.

Cabotage is limited in scope to activities falling within the definition of Cabotage or Coastal Trade; Cabotage activities carried out within Nigerian waters and inland waters and vessels as defined in the Cabotage Act. It applies to the following areas:

1. Nigerian inland waters and lakes
2. Nigerian coastal waters
3. Nigerian territorial waters
4. Nigeria's Exclusive Economic Zone
5. Islands (Natural or artificial) within Nigerian waters, platforms, rigs, floating workshops and other such structures and
6. Any carriage in, under or on Nigerian waters.

The following vessels are subject to Cabotage –

1. Passenger vessels
2. Crew boats
3. Bunkering vessels
4. Fishing Trawlers
5. Barges
6. Off – shore service vessels
7. Tugs
8. Anchor handling tugs and supply vessels

9. Floating petroleum storage
10. Dredgers
11. Tankers
12. Carriers
13. Any other craft or vessel used for carriage on, through or under water of persons, property or any substance what so ever

Under the Cabotage Act, there is a strict restriction of non- Nigerian vessels in domestic coastal trade. Section 3 prohibits engagement in domestic coastal carriage of cargo and passengers within the coastal territorial, inland waters or within the EEZ of Nigeria by vessels other than results wholly owned and manned by Nigerian Citizens, and built and registered in Nigeria.

Section 3 of the Act provides thus:

*"A vessel other than a vessel **wholly owned and manned by a Nigerian citizen, built and registered in Nigeria** shall not engage in the domestic coastal carriage of cargo and passengers within the coastal, territorial, inland waters, island or any point within the waters of the Exclusive Economic Zone of Nigeria."*

This is the punch section which implements the Cabotage regime in respect of domestic carriage of cargo or passengers on the principal of non availability. Cabotage is a way of encouraging participation of Nigerian indigenous ship-owner in our shipping industry by restricting the use of foreign vessel in our domestic coastal and inland waters. **It seeks to restrict shipment of goods within Nigeria's costal and territorial inland waters solely to vessels that are:**

- (1) Owned by Nigerians**
- (2) Manned by Nigerians and**
- (3) Built in Nigeria**
- (4) Registered in Nigeria**

The Act goes further to state in Section 4(1) that *"a tug or vessel not wholly owned by a person who is a Nigerian citizen shall not tow any vessel from or to any port or point in Nigerian waters, or tow any vessel carrying any substance whatsoever whether of value or not or any dredge material whether or not it has commercial value from a port or point within Nigerian waters."*

Under Section 5, a vessel, tug or barge of whatever type other than a vessel, tug or barge whose beneficial ownership resides wholly in a Nigerian citizen shall not engage in the carriage of materials or supply services to and from oil rigs, platforms and installations or the carriage of petroleum products between oil rigs, platforms and installations whether offshore or onshore or within any ports or points in Nigerian waters.

This Section limits the rendering of towage services from or to any port in Nigeria to tugs or vessels wholly owned by a Nigerian citizen. Subsection 2 preserves the International maritime duty to render assistance to vessels in distress under **Article 10 1989 salvage convention and section 390 of the MSA 2007**. This need to protect life and maritime property at sea is of paramount importance. To this end the exception granted to foreign vessels to render assistance to vessels in distress is to be encouraged.

However when read together with clause 8(1) (a) which seeks to limit the engagement of salvage operations by foreign vessels in Nigeria waters unless the minister has determined that the particular salvage operation is beyond the capacity of Nigerians owned or operated salvage vessels, one will find that there is a troubling issue which is not resolved by the subsection 2. The practical implication of sections 8 (1) (a) and Section 8(2) is that a non Nigerian vessel may not carry out a salvage operation in Nigerian waters without the Minister determining that the operation is beyond the capacity of Nigerian owned and operated salvage vessel and companies unless the salvage operation is strictly for the purpose of rendering assistance to a person, vessel or aircraft in distress.

Other than salvage of wrecks, there is usually sometimes the need to conduct a salvage operation to prevent severe harm to the environment. This may not necessarily involve rendering of assistance to vessels or persons in distress.

Dangers of accidental pollution from oil tankers have become more apparent in recent years due to the increasing number of high profile tanker casualties; spilling hundreds of thousands of tons of crude oil into the seas these include the **Torry Canyon, The Amoco Cadiz, the Eleni V.** and the **Exxon Valdez** to mention a few. Clean up costs are usually very high. Accidental pollution may also result from well blow outs, from collision between ship and installations or from breaking of pipeline either through natural wear and tear or through sabotage.

By the very fact that pollution spreads up very fast and can have severe impact on coastal life and the ecosystem, is it therefore wise to wait for ministers approval before a foreign vessel which chances on a serious cause of marine pollution can attempt to prevent or minimize damage to the marine environment since the exemption in Section (8) (2) does not cover environmental salvage.

Any foreign vessel which renders assistance to a vessel in distress under clause 5(2) is automatically a salvor under general maritime law, once maritime property has been saved.

The right to salvage may, but does not necessarily arise out of an actual contract. It is a legal liability arising out of the fact that property has been saved, that, the owner of the property who has had the benefit of it should make remuneration to those who

have conferred the benefit upon him notwithstanding that he had not entered into any contract on the subject (per Sir. J. Hannen in ***the Five Steel Barges*** [1890] 15 PD 142). This right to reward for rescue of maritime property has been recognized for centuries, it is based on the equity that a person who has encountered a danger and has expended work and labour on another ship or cargo which has benefited by his exertion should receive same reward.

To now seek to regulate the rendering of salvage services in Nigeria at the Minister's discretion is likely to discourage the rendering of assistance in the protection of lives at sea and of maritime property despite introduction of Section (8), (2). Without such encouragement the maritime industry could be so fraught with dangers and risks that few if any would reasonably engage in it in spite of its importance to Nigerian Commerce. It is hoped that this section will be revisited and any restriction to the right to carry out a salvage operation will be removed.

From the foregoing provisions, it can be seen that only vessels, barges, tugs that are wholly owned, manned, built and registered in Nigerian can operate within our costal, territorial, inland waters and Exclusive Economic Zone of Nigeria. Foreign vessel would be prohibited from operating within such areas unless they are granted a waiver or a restricted license under the law.

Ministerial Waivers

Sections 9-12 of the Act make provisions for the Minister of Transport to grant waivers on the ownership, manning and building of vessels by Nigerian citizens.

- Section 9 permits the Minister to grant a waiver on the requirement for a vessel to be wholly owned by Nigerian citizens where he is satisfied that there is no wholly Nigerian owned vessel that is suitable and available to provide the services or perform the activity described in the application.
- Section 10 permits the Minister to grant a waiver on the requirement for the vessel to be wholly manned by Nigerian citizens where he is satisfied that there is no qualified Nigerian officer or crew for the position specified in the waiver application.
- Section 11 also permits the Minister to grant a waiver on the requirement for a vessel to be built in Nigeria where he is satisfied that no Nigerian ship building company has the capacity to construct the particular type and size of vessel specified in the application.

It is important to note that even though waivers may be granted to foreign vessels to operate under the cabotage regime in Nigeria, priority is still given to the companies with local content according to the quantum of the local participation. For instance,

where applications are made to the Minister for waivers on the requirements above, and the Minister has determined that a waiver be granted, the waivers are granted in the following order

- (a) in the first instance, to a shipping company and vessels owned by a joint venture arrangement between Nigerian citizens and non-Nigerians (Under this, the equity shareholding of the Nigerian(s) joint venture partner in the vessel and the shipping company shall not be less than 60% and is held free from any trust or obligation in favour of non- Nigerians)
- (b) in the second instance, to any vessel registered in Nigeria and owned by a shipping company registered in Nigeria provided that the applicant shall comply with all the relevant provisions of the Act.

It should be noted also that for a foreign vessel to be licenced and registered in Nigeria, all applications for the relevant permits and procedures must be carried out by a person resident in Nigeria and acting on behalf of the foreign owned vessels.

Ownership under the Act

The concept of the ownership of a vessel under the Cabotage regime in Nigeria is explained under Section 23 of the Act thus:

- (1) *Subject to sections 9-12 a vessel shall not be registered for use in the domestic trade unless the Minister is satisfied that-*
 - (a) *the vessel is wholly and beneficially owned by Nigerian citizens or by a company wholly and beneficially owned by Nigerian citizens **and a vessel or company is 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 not a citizen of Nigeria***
 - (b) *the vessel is on bareboat charter to Nigerian citizens and is under the full control and management of Nigerian citizens or a company wholly and beneficially owned by Nigerians in terms of subsection (1)(a)*
 - (c) *the vessel is owned by a company registered in Nigeria and the percentage of shares in the company owned by Nigerian citizens is not less than 60 per cent*
 - (d) *any foreign vessel is licenced in compliance with Part II of this Act*
 - (e) *the vessel is exclusively manned by officers and crew of Nigerian citizenship except where Section 10 applies, and*

- (f) *the vessel possesses all certificates and documents in compliance with international and regional maritime conventions to which Nigeria is a party including all safety and pollution requirements imposed by Nigerian law and any international convention in force.*
- (2) *A vessel shall not be registered for use in the domestic trade unless the controlling interest in the company is owned by Nigerian Citizens.*
- (3) *The controlling interest shall not be deemed to be vested in Nigerian Citizens-*
- (i) *if the title to a majority of the shares thereof or 60 percent are not held by such citizens free from any trust or fiduciary obligation in favour of any person not a citizen of Nigeria; or*
- (ii) *if the majority of the voting power in such company is not held by citizens of Nigeria; or*
- (iii) *if through any contract or understanding it is so arranged that more than 40 percent of the voting power may be exercised, directly or indirectly on behalf of any person who is not a citizen of Nigeria; or*
- (iv) *if by any other means whatsoever control of any interest in the company in excess of 40 percent is conferred upon or permitted to be exercised by any person who is not a citizen of Nigeria.*

The citizenship requirement under the Act with respect to the ownership of cabotage companies and vessels are as defined by the Nigerian Constitution 1999 (amended in 2010) and excludes corporate citizenship. Ownership is determined by the identity of the individual owners who truly own and control the interests in the vessel and the ship owning company.

In the enforcement of the local content mandates, the Minister in the performance of his duties under the Act is mandated to take due care and carry out adequate investigations to ascertain the true ownership of vessels and ship owning companies and issue guidelines which would aid in the determination of these issues.

Mandatory training of Nigerians

A waiver is not granted to foreign companies until they have signed an undertaking to train Nigerian cadets.

Enforcement of the Act

NIMASA is the enforcement agency for cabotage in Nigeria. Section 22 and 29 of the Act require cabotage vessels to be registered in the Special Cabotage Register domiciled in NIMASA. However, due to the multi-sectoral nature of the coastal trade, the enforcement of the Act requires the active participation of all government agencies who are directly or otherwise involved in the various aspects of coastal trade.

NIMASA works in close collaboration with the oil and gas sector in the implementation of the Act specifically NNPC, DPR, NAPIMS, LNG, PPMC and other agencies such as the NIPC, NIS, NCS, NPA and the Nigerian navy to ensure harmonized regulatory and operational practices.

Cabotage Vessel Financing Fund

Having identified lack of financing as one of the challenges of the indigenous players in the industry, the Act established the capital vessel financing fund for the benefit of Nigerian citizens and shipping companies wholly owned by Nigerians. The funding is to be derived from a surcharge of 2 percent of the contract sum performed by any vessel engaged in the coastal trade, a sum from time to time to be determined and approved by the national assembly, monies generated under the cabotage act including tariffs, fines, and fees for licenses and waivers etc. NIMASA is charged with the responsibility for collecting and administration of these fund. Despite these loudable efforts, operators in the shipping sector are yet to access the 3-billion naira cabotage funds which the federal Government ear marked for disbursement through the NIMASA for those intending to expand their fleet or start new business in the shipping sector.

NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT ACT 2010

The passage into law of the Nigerian Local Content Bill is one of the significant developments for domesticating the oil industry through local value additions. The bill received presidential assent on 22nd April 2010 and created a Law to provide for the development of indigenous content in the Nigerian Oil and Gas Industry and for a Nigerian Content Plan to manage the coordination, monitoring and implementation of the local content. Previous acts of governments had made feeble policy attempts at developing a local content framework for the industry and the fanfare associated with the recent enactment into law of the Nigerian Local Content Bill is very understandable.

The Act which takes precedence over all other existing enactments and laws pertaining to Nigerian content in the petroleum industry defines Nigerian Content as *'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, material resources and services in the Nigerian oil and gas industry'*.

Section 1 of the Act provides that:

*“Notwithstanding anything to the contrary contained in the Petroleum Act or in any other enactment or law, the provisions of this Act shall apply to **all** matters pertaining to Nigerian content in respect of all operations or transactions carried out in or connected with the Nigerian Oil and Gas Industry (**emphasis mine**).”*

Furthermore, the interpretation section of the Act provides that Nigerian oil and gas industry means:

*“**All** activities connected with the exploration, development, exploitation, **transportation** and sale of Nigeria oil and gas resources including upstream and downstream oil and gas operations (**emphasis mine**).”*

Based on the above, the Act applies to *all* operations in the Nigerian oil and gas Industry including marine transport which inextricably tied to off shore oil and gas operation.

Nigerian Content of materials and equipment

Section 11 requires that the minimum Nigerian content in any project to be executed in Nigerian oil and gas industry shall be consistent with the level set in Schedule “A” to the Act. The Section also states that all operators, alliance partners and contractors shall comply with the minimum Nigerian content for a particular project item, service or project specification set out in Schedule A.

Where there is inadequate capacity to attain any of the targets in Schedule “A” the Minister may authorize the **continued importation** of the relevant items. However, **such approval by the Minister shall not exceed 3 years from the commencement of the Act.**

The Act does not make provision for an instance where after 3 years from commencement of the Act there is still inadequate capacity; such a situation would require an amendment of statute.

Labour and Employment

The Act requires that Nigerians are given first consideration for employment and training in any project executed by any operator or project promoter in the industry

Section 35 of the Act also requires all operators and companies operating in the Nigeria oil and gas industry to employ only Nigerians in their junior and intermediate cadre or any other corresponding grades designated by the operator or company.

Employment of expatriate

Each Operator or project promoter *may retain a maximum of 5% of management positions as may be approved by the Board as expatriate positions to take care of the interests of investors.* The law also requires that operators obtain the approval of the Board prior to applying to the Ministry of Interior for expatriate positions.

Labour Clause

All projects and contracts whose total budget exceeds US\$100 million are required to include a "Labour Clause" mandating the use of minimum percentage of Nigerian Labour in specific cadres as may be stipulated by the Board.

Succession Plan

Each Operator is required to submit a succession plan covering any position not held by Nigerians. The succession plan is to provide for Nigerians to understudy each incumbent expatriate for a **maximum period of 4 years** after which the position shall become nigerianised.

The effect of this is that subject to the 5% ceiling for expatriate employment in managerial positions, all positions must be held by Nigerians after 4 years from the commencement of the Act.

The relevant provisions in this regard are as follows:

- Section 28

"Subject to Section 10, subsection (b) of this Act, Nigerians shall be given the first consideration for employment and training in any project executed by any operator, project promoter in the Nigerian oil and gas industry".

- Section 33

"Upon the Commencement of the Act, operators shall **make application to and receive the approval of the Nigeria Content Development and Monitoring Board before making any application for expatriate quota** to the Ministry of Internal Affairs or any other agency or ministry of the Federal Government. The application shall be detailed and shall include job titles, description of responsibilities, the duration of the proposed employment in Nigeria and any other information required by the Board for the purposes of implementing the provisions of this Act".

- Section 35

"All operators and companies operating in the Nigeria oil and gas industry **shall employ only Nigerians in their junior and intermediate cadre** or any other corresponding grades designated by the operator or company".

- Section 41 (2)

“International/multinational companies working through their Nigerian subsidiaries must **demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by the Nigerian subsidiaries.**”

- Section 49 (1)

“All operators, project promoters, alliance partners and Nigerian indigenous companies engaged in any form of business, operations and contracts in the Nigerian oil and gas industry, **shall insure all insurable risks related to its oil and gas business, operations or contracts with an insurance company through an insurance broker registered in Nigeria** under the provisions of the Insurance Act 2003, as amended.”

- Section 51

“All operators, contractors and other entities engaged in the operation, business or transaction in the **Nigerian oil and gas industry requiring legal services shall retain only the services of a Nigerian legal practitioner or a firm(s) of Nigerian legal practitioners whose office is located in any part of Nigeria.**”

The Nigeria Oil and Gas Industry Content Development Act is certainly an ambitious plan by the government to achieve considerable results in local content in the Oil and Gas industry. An instructive element of the Act is the government's will to ensure compliance of companies operating in Nigeria by retaining a significant percentage of industry spends locally and improving local capacity and expertise. A stimulus for this growth of the Nigerian companies, defined as having at least 51% Nigerian equity shareholding, is the special considerations granted them for every project, bid and other sundry contracts in the Industry.

A pertinent question that challenges the Act is determining whether the actual take-off point of the law is in tandem with the spirit of the local content policy. The Act requires that all subsequent arrangements in the petroleum industry must comply with the provisions of the Law. In effect, all prior existing contracts and arrangements before the enactment of the Law remain unaffected. This position offends the local content policy and leaves a loophole for circumventing of the policy.

Nigerian Local Content Act and Bilateral Investment Treaties

Nigeria has bilateral investment treaties as at 1st June 2009 with the following countries, Bulgaria, China, Egypt, Ethiopia, Finland, France, Germany, Italy, Jamaica, Korea Republic, Netherlands, Romania, Serbia, Spain, Sweden, Switzerland, Taiwan, Turkey, Uganda and the United Kingdom.

The applicability of treaties in Nigeria is subject to the ratification /enactment of the treaty into law by the Nigerian National Assembly. This is premised on the provisions of Section 12(1) of the Nigerian Constitution which is to the effect that no treaty between the Federation and any other country shall have the force of law except to the extent

to which any such treaty has been enacted into law by the National Assembly. In the event that such treaty is not ratified, it may not be applicable locally in Nigeria. We note that parties are bound by their agreement based on the principle of international law of contract (*pacta sunct servanda irrespective of such domestication*).

This position is buttressed by the provision of the Vienna Convention to which Nigeria is a signatory. Article 27 of the Convention provides that a party to a treaty (in this case, the BIT) may not invoke the provisions of its internal laws as justification for its failure to perform a treaty obligation.

Typically Bilateral Investment Treaties contain common substantive protection provisions, taking for example the Nigeria-Netherlands BIT the protection provisions include:

a. Fair and equitable treatment of the investments and an obligation not to impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal” of investments by protected nationals

b. Full physical security and protection, which in any case shall not be less than that accorded either to investments of a Contracting State;

c. A so-called “umbrella clause”, pursuant to which each Contracting State agrees to observe “any obligation it may have entered into with regard to investments of nationals of the other Contracting Party”. Although there is conflicting case law regarding the scope of such clauses, there is some authority to suggest that such clauses elevate breaches of contract by government entities to the level of a breach of an international treaty;

d. A prohibition of expropriation, save where:

- (i) The measures are taken in the public interest and under due process of law;
- (ii) The measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given; and
- (iii) The measures are accompanied by “just compensation” representing the genuine value of the investments affected; and

e. Free transfer of payments relating to investments.

Based on (b) above, **it is arguable that the Nigerian Oil and Gas Industry Content Development Act does not give full and physical protection to the investment of non – Nigerian Nationals in Nigeria as it does to Nigerian Nationals and as such may be challenged by an investor of a country that has a BIT agreement with Nigeria.** Furthermore, under the “fair and equitable treatment” most of the investment treaties require host States to accord ‘fair and equitable treatment’ to investors of the other contracting state. It is difficult to reduce the word ‘fair and equitable treatment’ to a

precise legal meaning and as a result, it is determined by International Arbitral Tribunals on a case by case basis. However, arbitral tribunals have identified the protection of investors' legitimate expectations as the "dominant element" of the fair and equitable treatment standard.

The burden of proving that an investment has fallen short of this standard is on the party claiming that there has been no fair or equitable treatment. Having stated that the Nigerian Oil and Gas Industry Act could give rise to a treaty claim where the fundamentals for such a claim exist, it is doubtful whether an investor can invoke a treaty claim against the Nigerian government as a result of the impact which the NCDCA has on its investment in the absence of a BIT between Nigeria and the investor's country. For instance, the United States has no BIT with Nigeria, the option open to the investor in such circumstance is to migrate its Nigerian interests to a country that has a BIT with Nigeria. Even at this, the difficulty in bringing a BIT claim against the Nigerian government still exists. As such a migration would not necessarily afford the investor in question with a right of recourse where the basis for its cause of action rests on events that have occurred prior to the migration. However, it may provide the investor with treaty protection and a right of recourse with respect to future government actions.

CONCLUSION

As it can be seen in the laws highlighted above, the problem with lack of indigenous participation in the maritime sector has not been because of lack of legislation but of the implementation of these legislations as with every other aspect of the Nigerian society. There is no doubt that the NIMASA Act, the Cabotage Act, and now the Nigerian Oil and Gas Industry Content Act, will aid capacity development if strictly implemented. It is already apparent, until guidelines are formulated by the Nigerian Content Development and Monitoring Board that there will be implementation challenges in respect of the Oil and Gas Industry Content Act 2010. We anxiously wait to see how far the proposed guidelines will address some of the challenges that appear to be facing the implementation of the act.