

CONTINENTAL FREE TRADE AND SHIPPING IN NIGERIA: OWNERSHIP OR FLAGGING?

In March 2018, 44 African Union member states signed the African Continental Free Trade Agreement (“AFCFTA”). The Agreement established the Continental Free Trade Area which would formally exist once all documents are concluded and ratified by 22 states. The Agreement currently has 49 signatories out of the 55 member states. The Agreement seeks to enhance intra Africa trade and the free movement of goods and services within Africa. The Agreement is projected to increase intra-African trade by 52% (fifty-two percent) by 2022.

Nigeria is yet to sign the Agreement as consultations are still ongoing between the government and stakeholders in this regard. The Agreement contains a Trade Protocol which deals with import and export duties, liberalization of trade and trade remedies.

There are aspects of the Trade Protocol which impact directly on carriage of goods by sea and shipping and by extension the maritime industry in Nigeria. The Trade Protocol streamlines the requirements that qualify vessels to ply African waters which in turn highlights the intersect between indigenous tonnage and the benefits of intra African trade.

VESSEL FLAGGING

Nigeria is heavily reliant on shipping for imports and statistics show that over 90 percent of goods imported into Nigeria are carried by sea. Carriage of goods by sea is indeed the most common route for imports into Nigeria and when regard is had to economies of scale it appears to be the most cost effective mode of transport. Even goods that are not landed directly at the Ports in Nigeria come from neighboring Ports like Cotonou port in Benin Republic. Consequently, legislation and the supply chain in respect of Shipping has a substantial impact on Nigeria’s economy with regard to revenue and the market forces of demand and supply.

Most of the vessels that call at Nigerian Ports are owned by foreign entities. These vessels reflect the composition of the global merchant fleet which are owned by the shipping majors from Europe and Asia. Many of these vessels fly flags of convenience from other registries for commercial reasons and expediency.

Some of these vessels fly Nigerian flags or are bareboat chartered for cabotage operations in Nigeria. Ships registered under flags of convenience tend to tactically reduce operating costs or avoid the regulations obtainable in the owner's country. To do so, a vessel owner will find a nation with an open registry, or a nation that allows registration of vessels owned by foreign entities. A ship operates under the laws of its flag state, so vessel owners often register in other nations to take advantages of reduced regulation, lower administrative fees, and greater numbers of friendly ports.

The Nigerian Maritime Administration and Safety Agency (NIMASA) is the agency in charge of registration and flagging of Nigerian vessels.



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The advantages of flying Nigeria's flag include qualification to participate in supplying services for coastal and inland shipping (ie, cabotage trade) which is reserved for Nigerian-flagged ships which are built and crewed by Nigerians. Where a vessel is not built in Nigeria or crewed or managed by Nigerians, it may still qualify for cabotage ahead of other vessels if flying the Nigerian flag. Secondly, the vessel will acquire a high rating/classification to provide shipping services for specified contracts in the oil and gas industry under the Nigerian local content policy, which interestingly was designed to increase the capacity of Nigerians to participate in the oil and gas industry.

NIGERIA AND TONNAGE

In 2003 Nigeria enacted a Cabotage Act 2003, to restrict the use of Foreign Vessels in Domestic Coastal Trade, promote the development of Indigenous Tonnage and to establish a Cabotage Vessel Financing Fund. This Act was geared at shoring up indigenous tonnage to partake in coastal shipping. Although the Cabotage Act deals more with coastal shipping rather than merchant shipping outside Nigeria's coastline the provisions of the Act included a Cabotage Vessel Financing Fund which was designed to enable Nigeria acquire indigenous tonnage. There is to be paid into the Fund a surcharge of 2 per centum of the contract sum performed by any vessel engaged in coastal trade: This Fund is yet to be allocated to garner vessel financing. The net effect is that most vessels plying Nigerian waters are operating under the cabotage waiver system as bareboat charters involved in cabotage operations. These vessels are equally owned by foreign entities.

Why is the issue of vessel ownership a crucial issue with regards to the AfCFTA? The simple answer would be that there are economic benefits that accrue to ownership and that in itself is one of the key reasons why the AfCFTA was created. More so the benefits are regional and as such ought to be utilized by a specific demographic with a core emphasis on the movement of capital within the region.

It is important at this stage to draw the distinction between flagging and indigenous ownership. Even though a vessel may be Nigerian flagged it may very well not be indigenously owned by a Nigerian or be of African ownership. The Nigerian flag may very well be a flag of convenience.

The issue of ownership in contradistinction to flagging becomes important under the AfCFTA because of the criterion for liberalization and incentives enumerated therein.

ACFTA SHIPPING CRITERION

Article 6 of Section II of the AfCFTA states that :

"The terms "their vessels" and "their factory ships" in paragraph 1(h) and 1(i) shall apply only to vessels, leased vessels, bare boat and factory ships which are registered in a States Party in accordance with the national laws of a States Party and meet one of the following conditions:

- a) the vessel sails under the flag of a State Party; or***
- b) at least, 50 per centum of the officers of the vessel or factory ship are nationals of the States Party or States Parties; or***



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- c) *at least, 50 per centum of the crew of the vessel or factory ship are nationals of the States Party or States Parties; or*
- d) *at least, [50/51] per centum of the equity holding in respect of the vessel or factory ship are held by nationals of the States Party or States Parties or institutions, agency, enterprise or corporation of the government of the States Party or States Parties”.*

Article 2 of the General Provisions state that The State Parties undertake to grant all transit traffic freedom to traverse their respective territories by any means of transport suitable for that purpose

2. State Parties undertake not to levy any import or export duties on the transit traffic referred to in Article 2(1). However, in accordance with Article 8 (1) of this Annex, a State Party may levy administrative or service charges equivalent to services rendered.

Article 5 Licensing of Transitors and Carriers

- 1. Any person intending to be engaged in the operation of transit traffic under the provisions of this Annex shall be licensed for that purpose by the competent authorities of the State Party in whose territory he is normally resident, or established and the competent authority shall inform all the other State Parties of all the persons so licensed.**
- 2. The conditions for the issuance of the licences referred to in Article 5(1) to persons resident, or established in a State Party shall be the following:**

From the AfCFTA it has become clear that any vessel that expects free and unlimited passage to trade in the African Continental Free Trade area needs to be flagged in an African State that is a party to the Agreement and in addition has 50 percent of its crew from a state party or the equity shareholding in respect of the vessel in 50/51% equity holding in nationals of a state party.

It is interesting to observe that the requirements appear quite similar to those of the Cabotage Act in Nigeria which rather than protect coastal shipping for indigenous operators has by way of the waiver system still left Cabotage trade quite porous to foreign participation and as such has been unable to circumvent the pertinent issue of capital flight.

The AfCFTA on the other hand permits flagging and as such, foreign vessels using the mechanism of flags of convenience in State Parties will easily participate in trade and enjoy all the incentives including the unfettered passage afforded therein.

It is common knowledge that Liberia which is also a State party to AfCFTA is one of the biggest Ship Registries and as such foreign Ship owners who have registered their vessels in such registries will partake of unrestricted trade along the African transit corridor.

The AfCFTA in its protocol on trade on goods seeks to bestow certain incentives on vessels plying the African waters to increase intra african trade. It is instructive to reflect on how much of the global fleet is indigenously African. Needless to say there will be an increase in flagging demands in African states which will bring in some measure of revenue but quite clearly the revenue realized from flagging is much lower than the benefits derived from vessel ownership. Voyage charter freight and time charter hires generate a substantial portion of the earnings from international trade and the terms of carriage tend to be determined by the Ship owner or Carrier. Clearly a substantial portion of such earnings will probably be remitted out of the African economy therefore not contributing to the development envisaged by the AfCFTA. From an economic perspective it is debatable whether flagging alone will decisively reduce the cost of regional carriage of goods by sea thereby making intra African trade cheaper in terms of transport costs.

BILLS OF LADING

The ACFTA creates its own transit document **The African Continental Free Area Transit Document** which appears to double as a bill of lading and the provisions are set out below.

The African Continental Free Area Transit Document" means a *Customs Document for transit declaration* approved by the African Union Ministers of Trade and to be utilized within the African Continental Free Trade Area;

Schedule I Notes for the Use of the African Continental Free Trade Area Transit Document

- 1. *The African Continental Free Trade Area Transit Document herein after referred to as “ AfCFTA TD” shall be prepared in the country of commencement where the goods are first declared to be in transit.***
- 2. *The AfCFTA TD shall be printed in the Arabic, English, French and Portuguese languages, but completed in the language of the country of commencement. The Customs Authorities of the other countries traversed reserve the right to require their translation into their own language.***
- 3. *In order to avoid unnecessary delays which might arise from this requirement, carriers are advised to supply the operator of the means of transport with the requisite translations.***
- 4. *The AfCFTA TD remains valid until completion of the transit operation at a customs office of destination, provided that it has been taken under customs control at the customs office of commencement within the time limit given by issuing authorities and meets the following requirements:***
 - (a) *The AfCFTA TD must be typed or multi-graphed or printed legibly; (b) When there is not enough space on the manifest to enter all the goods carried, separate sheets to the same model as the manifest may be attached to the latter but all copies of the manifests must contain the following particulars:***



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- (i) *a reference to the sheets;*
 - (ii) *the number, type of packages and goods in bulk be enumerated on the separate sheets; and*
 - (iii) *the total value and total gross weight of the goods appearing on the said sheets.*
5. *Weights, volume and other measurements shall be expressed in units of the metric system and values in the currency of the country of commencement, or in the currency determined by the African Union Ministers of Trade.*
6. *No erasures or over-writing shall be allowed on the AfCFTA TD. Any correction shall be made by deleting the incorrect particulars and adding, if necessary, the required particulars.*
7. *Any correction, addition or other amendment shall be acknowledged by the person making it and countersigned by the Customs Authorities.*
8. *When the AfCFTA TD covers coupled means of transport, or several containers, the contents of each means of transport shall be indicated separately on the manifest. This information shall be preceded by the registration of identification number of the means of transport or container.*
9. *If there is more than one customs office of destination, the entries concerning the goods taken under customs control at, or intended for, each office shall be clearly separated from each other on the manifest.*

The issue of the AfCFTA Transit Document raises several questions. Is it just a transit document or will any liability accrue based on the fact that it enumerates cargo on the face of the document similar to a bill of lading? In terms of carriage regimes will it be governed by the international carriage conventions or strictly subject to the dispute resolution mechanisms within the AfCFTA? Noteworthy is that no mention is made of limitation of liability within the transit documents. Where do standard forms stand in the face of this new innovation and as between the Parties can vessels that issue standard form bills of lading still ply the African Transit route if a compulsory requirement for carriage is the AfCFTA Transit Document? Will both documents operate simultaneously with one operating as a title document/receipt while the other operates as a mere passage licence? All these are matters that will need to be unraveled and judicially tested upon the coming into existence of the Agreement in our Climes.

CONCLUSION

In looking at the AfCFTA several issues have been brought to the fore. With respect to Shipping it is submitted that a closer look needs to be taken at the essence of the agreement. At the heart of the AfCFTA is gleaned a medium aimed at bolstering economic, industrial and regional value chain development. Are the relevant drivers required to actualize the ethos of the agreement present? In the alternative what can be done to build capacity to achieve the aim? Good legislation is a key part of economic advancement but to have a positive outcome legislation must work hand in hand with other



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indispensable components of the Shipping value chain. If Africa intends to establish a continental market for goods through intra Africa trade it must strategically build capacity in respect of vessel ownership. It must invest in ship building and increase its maritime asset base to enable it have a market share in the global fleet. To emerge as a viable trade hub there must be a decisive shift away from mere flagging of foreign operators to a deliberate investment in vessel ownership by African entities. Only then will African economies be positioned to play a key role in creating, utilizing and investing the revenue that comes from carriage of goods by sea in Intra africa trade.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo

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