De-Regulation or More Regulation: The Intellectual Predicament of the Law of Maritime Cabotage

1.0 Abstract:

In the various jurisdictions of the world, different maritime approaches are applied. Many maritime countries pursue either a deregulated or protectionist maritime cabotage framework. The justification for the choice of maritime cabotage approach in each country varies from issues of national security to the desire to promote national economic development. It is these varied rationales which divides opinions and creates the intellectual predicament among scholars as they seek to validate theoretical arguments on the best approach of maritime cabotage law and policy.

2.0 Introduction:

The law of maritime cabotage is a legal instrument employed by many maritime countries to reserve all maritime trade and services between any two points of its maritime territory to her national instrumentalities of commerce through the framework of national regulations.

This law was intrinsically premised on a domestic national sovereignty framework domain but presently now embraces stronger, the international trade, economic, competition, and developmental aspects of a maritime cabotage regulatory mechanism.

However, the national regulatory approach is being challenged by a re-conceptualisation of the phenomenon of the law of maritime cabotage, which now covers a wider field of maritime activities, straddling the: national, regional, supranational, and international spheres.

Further, the law of maritime cabotage has expanded so unwieldy that as a legal concept, there is no longer any consistency, neither is there any legal certainty. This is as a result of the general over-use, abuse, and misuse of the concept of maritime cabotage law in the national, supranational, regional and international jurisdictions. This in turn has led to the concept of the law of maritime cabotage being occasionally, but systematically and strategically used as a ‘special purpose vehicle’ to advance political motives.

Generally there is no disputing the fact that the law of maritime cabotage exist to facilitate the economic growth and national development of a country. What is disputed has usually been what maritime cabotage approach is the most appropriate to achieve these desired objectives for a sovereign country.
Thus, on the one hand it is argued that a 'de-regulated maritime cabotage policy' is the most appropriate approach as it encourages competition and the free market to drive economic development. However, on the other hand, it is very persuasively argued that a stringently protectionist maritime cabotage approach is the better approach as it protects the development of the domestic maritime sector and is vital to the protection of a country's national security.

For the specific purpose of this treatise, there are two intellectual predicaments that arise with regards to the most appropriate approach for the law of maritime cabotage.

The first predicament is the intellectual debate on 'open or closed seas'. This is a protracted debate dating back to the 17th century, in what was famously tagged the 'Battle of the Books'. It was led on the one hand by Hugo Grotius who argued that the seas should be open and free for all. And on the other hand, by John Selden who argued that the sea was capable of being owned and hence should not be free for all to use as they wished [(1)].

The second intellectual predicament is related to the first and on its own is a congested minefield of arguments and counter arguments, which on the balance of probability is likely to always remain debatable with no clear cut solutions. When the second intellectual predicament is combined with the first, the consequence is that the vexed subject matter of the law of maritime cabotage becomes an even more 'poisoned chalice'.

The second predicament is concerned with the particular set of rationales used to support the argument as to whether the seas should be open or closed. These rationales include: Sovereignty argument, national security argument, economic argument, and national development argument.

3.0 First Intellectual Predicament: The Debate on Open or Closed Sea

The concepts of *mare liberum* (free open seas to all nations), *mare clausum* (closed seas under the sovereign right of a nation), and *de dominio maris* (on the dominion of the seas) were embodied under the Roman legal philosophy [(2)].

This tripod stand argument of whether: the seas should be free from all control; or a sovereign nation should exercise control over its seas; or how far out such control should be permitted demonstrates the difficulty encountered in striking a satisfactory

[(1)] For a broader read, see: E. GOLD, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, Toronto, 1981.
[(2)] A. DEWAR, *The freedom of the seas*, in *Journal of the Royal Institute of International Affairs*, 1930, **9**(1), pp. 63 – 67.

balance between a de-regulated or more regulated maritime cabotage policy [3]. The current regulatory approaches (protectionist, liberal and flexible) for the law of maritime cabotage, to a large extent mirrors the conceptual arguments put forward by Grotius, Selden and Van Bynkershoek on the status of the territorial seas [4].

In 1609, the Dutch jurist Hugo Grotius published the *mare liberum* (freedom of the seas), asserting that the seas were incapable of being dominated and thus, it was available for the free use by all interested maritime interests [5]. Grotius argued that it was irresponsible for a maritime nation to claim sovereignty over a large part of the sea which such nation was incapable of policing [6]. Therefore, where a nation is incapable of claiming possession of the sea, the absence of such effective possession means the sea could not be subjected under the sovereignty of that nation [7]. In essence, the *mare liberum* doctrine sought to postulate that no nation ought to have proprietary rights such as title or possession over the seas by virtue of the fact that the sea is common to all [8].

As the doctrine of *mare liberum* gathered support, there was growing resentment among scholars who held a different view to Grotius postulation. Hence, in 1635, the book *mare clausum* (closed sea) was published by the English jurist John Selden [9]. Contrary to the principles of *mare liberum*, Selden's work advanced the legal principle that certain bodies of water could be claimed under the exclusive jurisdiction of a particular nation. Selden argued that the sea was virtually as capable of appropriation as the land [10].

The *mare clausum* principle argued that in accordance with natural law and the law of nations, just like land, the sea could be subjected to national possession. Further, Selden reasoned that the right of foreign vessels engaging in maritime activities in waters under the sovereign rights of other nations should be viewed as a privilege similar to those imposed on landed proprietors [11].

The concept of the territorial sea as it is known today may in all fairness be attributed to *Pontanus*, a Dutch jurist who abandoned the distinction between sovereignty and ownership of the high sea as put forward by *Grotius* [12]. *Pontanus* argued that sovereignty accorded a nation the power of excluding external entities from its sovereign activities. *Pontanus* took a more practical approach by seeking to distinguish between the high seas and the territorial seas. He argued that whilst the

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[3] E. PAPASTAVRIDIS, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Oxford, 2013.
[4] For a detailed study of these three concepts, see the principles on the: *mare liberum*, *mare clausum* and *De Dominio Maris*
[5] H. GROTIUS, *The Freedom of the Seas*, New York, 1916.
[6] H. GROTIUS, *Mare Liberum: The Freedom of the Seas OR The Right Which Belongs To The Dutch To Take Part in the East Indian Trade*, in J. Scott, (edited by) *Classics of International Law*, New York, 1916.
[7] J. O'BRIEN, *International Law*, London, 2001.
[8] L. OPPENHEIM, *International Law: A Treatise*,1, New York, 1905.
[9] R. RAYFUSE, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden, 2004.
[10] D. ARMITAGE, *The Ideological Origins of the British Empire*, Cambridge, 2000.
[11] T. FULTON, *The Sovereignty of the Sea: An Historical Account of the Claims to England to the Dominion of the British Seas, And of the Evolution of the Territorial Waters: With Special Reference to the Right of Fishing And The Naval Salute*. Edinburgh, 1911.
[12] R. CHURCHIL, A. LOWE, *The Law of the Sea*, Manchester, 1988.

high sea should be free for all, the territorial sea was capable of being subjected to State ownership and exclusive jurisdiction [13]. Thus, *Pontanus'* theory was a compromise of the theories of *mare liberum* and *mare clausum.*

Another Dutch jurist, *Cornelius Bynkershoek,* compromised the disparate views in his essay *De Dominio Maris* in 1702. *Bynkershoek* argued that a coastal nation should be entitled to claim dominion over so much of the sea as it could effectively control and protect [14]. His views rapidly coalesced into the cannon-shot or three mile rule, which prevailed for the most part until the *1982 United Nations Convention on the Law of the Sea*.

The *UNCLOS Convention* expanded the principle of dominion of the territorial sea to a distance of twelve nautical miles [15]. The *UNCLOS 1982* provides that a Coastal State is eligible to claim a territorial sea of 12 nautical miles, a contiguous zone of 24nm, an Exclusive Economic Zone (EEZ) and continental shelf zone of 200nm [16]. In some cases a further continental shelf zone could be claimed if the natural prolongation of that shelf extends further [17].

Thus, coastal States are considered to have exclusive sovereignty in the first two maritime zones (territorial sea and contiguous zone), subject only to any applicable international law. The coastal States have rights to enjoy and explore the resources of the latter two maritime zones (EEZ and continental shelf). However, these rights are not exclusive as other neighbouring coastal States have the same rights to access these zones [18].

Bynkershoek then set out the doctrine of the freedom of the high seas and sovereignty over territorial waters to coastal nations. He opposed the *mare clausum* doctrine by suggesting that sovereignty could only be extended outward from the coastline up to the limit of the power of arms (*terrae potestas finitur ubi finitur armorum vis*) which became the famous cannon-shot rule [19].

The arguments surrounding the different maritime cabotage approaches presently is not very different from the arguments that surrounded the free or closed seas around the 17th century. If anything it is even more rooted in the national, commercial and political benefits that will accrue to the sovereign nation [20]. The respective argument over the freedom of the seas was not because any of the parties had the interest of the international community as its priority [21]. Rather, these arguments were born out of

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[13] J. PONTANUS, *Discussiones Historicae de Mari Libero: Adversus Johannem Seldenum*, Frankfurt, 1637.
[14] P. POTTER, *The Freedom of the Seas in History, Law and Politics*. New York, 1924.
[15] ARTICLE 2 of the *United Nations Convention on the Law of the Sea,* 1982.
[16] See respectively, ARTICLES 3, 33, 57 of The *United Nations Convention on the Law of the Sea,* 1982.
[17] See; PART VI of *The United Nations Convention on the Law of the Sea*, 1982.
[18] D. ROTHWELL, T. STEPHENS, *The International Law of the Sea*, Oxford, 2010.
[19] J. REDDIE, *Researches, Historical and Critical, in Maritime International Law*, Edinburgh, 1844.
[20] For a supportive discussion on the issue although from a slightly different perspective, see: J. MOORE, *UNCLOS Key to Increasing Navigational Freedom*, in *Texas Review of Law & Politics*, 2008, **12**(2), pp. 459 – 467.
[21] See: H. HANNUM, *Autonomy, Sovereignty and Self – Determination: The accommodation of conflicting Rights*, Pennsylvania, 1996.

the biased desire to develop and protect the source of wealth of the respective countries [22].

For instance, the closed sea policy was beneficial for England because she had a head start in colonising many countries [23]. Hence, England sought to restrict trade in and from those colonised nations to itself and to any other country to which she gave permission to trade [24]. The Netherlands on the other hand had developed an efficient maritime transport service and was eager to generate revenue by engaging in sea trade outside their jurisdiction and therefore an open policy suited them better [25].

The *mare liberum* and *mare clausum* arguments were historically centred on sovereignty and sea trade supremacy [26]. Presently, the arguments on the choice of maritime cabotage approach is centred on; sovereignty, national development, economic, and national security rationales [27]. However, what has not changed very much is the fact that the choice of most maritime cabotage approaches are deeply intertwined with the politics of the sovereign nation in particular, and that of the region in general [28].

4.0 The Protectionist Maritime Cabotage Approach:

A protectionist maritime cabotage approach often departs radically from the basic principles of reserving coastal trade for indigenous registered vessels and extends to cover a wide scope of requirements and activities. In some jurisdictions, the protectionist maritime cabotage approach requires that:

a) The vessel should be documented, registered with, and fly the flag of the host nation. Also, the principal place of business should be situated in the host nation.
b) The vessel should be owned by a person(s) that satisfy the nationality requirements (indigenous persons) of the host country.
c) The vessel should be crewed by persons that satisfy the nationality requirements (indigenous persons) of that host nation.
d) The vessel should be built, re-built, and repaired in the host nation.

In some countries, their protective maritime cabotage approach extends to cover maritime activities up to 200 miles from the coast which includes the Exclusive

[22] For a general discussion on the issue, see: J. KRASKA, *Grasping The Influence Of Law On Sea Power. Naval War College Review*, 2009, **62**(3), pp. 113 - 135
[23] D. ARMITAGE, *op cit.* p. 1 ff.
[24] H. THORNTON, *John Selden's Response to Hugo Grotius: The Argument for Closed Seas*, in *International Journal of Maritime History*, 2006, **18**(2), pp. 105 - 128
[25] H. GROTIUS, *op cit.* p. 14. ff.
[26] V. GREY, *Freedom of the Seas. Foreign Affairs*, 1930, **8**(3), pp. 325 - 335
[27] See: M. IGBOKWE, *Advocacy Paper for the promulgation of a Nigerian Maritime Cabotage Law: Draft Modalities for Implementation of Coastal and Inland Shipping (cabotage) Act*, Lagos, 2001, pp. 1. ff.
[28] For an in depth examination on the issue, see: B. SLATTERY, B. RILEY, N. LORIS, *Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*, in *The Heritage Foundation*, 2014, *NO. 2886*, pp. 1 - 9; D. JOHNSTON, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries*, Connecticut, 1987; M. BROOKS, *Liberalisation in Maritime Transport*, Paris, 2009; D. HACKSTON, G. ENGLISH, R. TAYLOR, J. MACDONALD, *Research Study on the Coasting Trade Act*, Ottawa, 2005.

Economic Zone (EEZ) and the Continental Shelf [29]. Such protectionist approach does not only cover carriage of goods and passengers within the reserved area but includes maritime services such as seismic activities, towage, hydrographic surveys, oil spills and sometimes salvage services [30].

5.0 The Liberal Maritime Cabotage Approach:

A liberal maritime cabotage approach places few or no reservation with regards to who conducts maritime cabotage activities in the coastal waters of a particular maritime nation. Traditionally, vessels, irrespective of flag; ownership; place of build or composition of crew nationality are free to engage in the coastal trade and services of a liberal maritime cabotage nation.

Different theories and approaches have been entertained with regards to the appropriate policy of maritime cabotage law. In a world that is increasingly embracing liberalisation, the arguments supporting a protectionist maritime cabotage law is becoming more difficult to satisfactorily vindicate.

In examining this complex issue, it is important not to focus on countries without a national shipping fleet because there would be no maritime cabotage trade in the absence of competition from foreign vessels. Instead, the focus ought to be on countries that possess a dedicated national shipping fleet and who also have the necessary institutional and infrastructural facilities to engage in both domestic and international maritime activities. For such countries, it is difficult to imagine how they could be threatened to any considerable degree by foreign vessels trading in their territorial waters. Rather, those foreign vessels should be considered as a huge advantage to the domestic maritime sector. This is because firstly, allowing foreign vessels the privilege to engage in coastal trade deprives indigenous ship owners the opportunity of availing themselves of the opportunity to charge oppressive freight rates. Secondly, as a result of the liberal system, indigenous ship owners are subjected to that wholesome competition by which alone their inventive energies can be fully developed [31].

Thus, it is argued that when the pre-requisite institutional and infrastructural structures are in place, it is logical to argue that the liberalisation of maritime cabotage law is as advantageous in the maritime sector as it is in most other sectors.

The analysis of the different maritime cabotage approaches demonstrates with utmost clarity, the legal, economics and political ambiance with which maritime cabotage law is surrounded by. It is evident that each of the three different maritime cabotage approaches (Strict, Liberal and Flexible maritime cabotage policies) does not provide

[29] See for instance, the provisions of the maritime cabotage law in Canada.

[30] W. OYEDEMI, *Cabotage Regulations and the Challenges of Outer Continental Shelf Development in the United States*, in *Houston Journal of International Law*, 2012, **34**(3), pp. 607 – 651.

[31] J. LALOR, *COASTING TRADE. Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States*, 1 (Abdication-Duty), New York, 1881. This very succinct commentary of John Joseph Lalor which although written in 1881, is still so timelessly true even now beckons on all countries to be careful in their choice of maritime cabotage approach.

the same kind of implications or solutions to the maritime nations respectively nor are they adopted on the same premise by the various maritime nations. Hence, an industrialised maritime nation like the United States of America champions a strict maritime cabotage policy primarily on the basis of national security and indigenous employment of both sea-going and shore personnel. On the other hand, a developing maritime nation like Nigeria adopts a similarly strict maritime cabotage policy. However, unlike the United States; Nigeria's premise for implementing a protectionist maritime cabotage policy is to facilitate national development through the stimulation of growth in the country's maritime sector.

Overall, the strict maritime cabotage laws such as those applied in; USA, Japan, China and Nigeria, which typically mandates for a one port stop policy for foreign vessels, impinge negatively on the cost and the efficiency that is necessary to facilitate international trade. Further, it is suggested that such protectionist policies do not contribute enough to justify particularly the national security argument. On the other hand, it is also suggested that the liberal maritime cabotage laws as adopted in countries like; New Zealand and South Africa are likely to curtail the participation of indigenous maritime interests in the maritime cabotage activities of their country as a result of superior competition presented by foreign shipping interests.

6.0 Second Intellectual Predicament: The Rationales for the Different Approaches of the Law of Maritime Cabotage.

The law of maritime cabotage has survived many centuries and has been continuously practiced in many jurisdictions under a variety of approaches. Nonetheless, many countries that implement a maritime cabotage policy appear to often vary the rationale behind their choice of approach.

The arguments and counterarguments from both liberal and protectionist maritime cabotage advocates may summarily but somewhat unjustifiably be articulated as; that there are no middle grounds between the two theories [(32)]. Thus, based on these theories, it would seem that the growth of the maritime sector and by extension the economic development of a country may only be guaranteed by adopting either a liberal or protectionist maritime cabotage approach [(33)].

The conundrum facing both sides of the arguments is that their respective theories when tested in reality raise very significant issues. For instance, advocates of a liberal maritime cabotage policy believe that a liberal policy framework designed for industrialised nations would automatically suit a developing country [(34)]. This is despite the fact that there is ample evidence indicating that developing economies

[(32)] W. KERR, N. PERDIKIS, *A Guide to the Global Business Environment: The Economics of International Commerce*, Massachusetts, 2014.
[(33)] B. MARTIN, *In the Public Interest?: Privatization and Public Sector Reform*, London, 1993.
[(34)] L. TAYLOR, *The Revival of the Liberal creed: The IMF and the World Bank in a Globalized Economy,* in *World Development*, 1997, **25**(2), pp. 145–152.

often lack the pre-requisite infrastructural and institutional structures to pursue such liberal policies [35].

As a consequence, in many of these countries, the reality is that a liberal policy allowing for free trade and services is the exception rather than the rule [36]. Even in some sectors of a country's economy where there are minimal or no domestic market failures, evidence suggests that a liberal policy towards free trade and services is not beneficial to everyone [37]. However persuasive the theory of liberalisation may seem, it should be noted that no country could in all honesty be said to practice a total liberal system [38]. A quick example lies in the fact that all countries to some degree place restrictions on the movement of goods and SERVICES in and out of their border [39].

The other side of the argument which is the protectionist view suggests that not only could a country have a comparative advantage but in fact a country could have the absolute advantage in everything [40]. However, the starting point of this argument raises the question which is: if this argument is valid, then there should be no fear for competition [41]. Thus, it is suggested that protectionist maritime cabotage policies towards maritime trade and services in a country are often deployed as the preference to protect domestic industries from being pushed out of business by foreign competitors [42].

It is these rationales or lack of them, which form the foundation for the development and sustainability of the concept of the law of maritime cabotage in any country.

7.0 The Sovereignty Argument

The sovereignty argument is probably the oldest and arguably the most legally valid rationale used by sovereign maritime countries to justify the implementation of a protectionist law of maritime cabotage [43]. Nonetheless, the concept of sovereignty is

[35] D. RODRIK, *King Kong Meets Godzilla: The World Bank and the East Asian Miracle*, in A. Fishlow, et al, (edited by), *Miracle or Design? Lessons from the East Experience*. Washington, 1994, Pp. 13 -38.
[36] A. SHAH, *Deregulation or Protectionism?* in, *Global Issues*, 17th January, 2010
[37] D. RODRIK, *The Developing Countries' Hazardous Obsession with Global Integration*, Massachusetts, 2001.
[38] O. HATHAWAY, *Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection. International Organization*, 1998, **52**(3), pp. 575 - 612.
[39] For a general discussion on the issue, see: L. LOW, *Evaluation on Obama's Fuel Efficiency*, in *Econsguide*, May 2009.
[40] For a general discussion on the issue, see: U. DADUSH, et al, *Is Protectionism Dying?* Washington, 2011.
[41] G. PRIEST, *Competition Law in Developing Nations: The Absolutist View*, in D. Sokol, T. Cheng, L. Ioannis (edited by), *Competition Law and Development*, California, 2013, PP. 79 – 89
[42] M. MELITZ, *When and How Should Infant Industries Be Protected?* in *Journal of International Economics*, 2005, **66**(1), pp. 177-196
[43] This work has no intention of dwelling on the detailed historical analysis on the subject matter of sovereignty. The idea is to examine the use of sovereignty as a rationale for implementing the law of maritime cabotage. However, for a reflective study and in depth intellectual analysis, see: N. WALKER, *Sovereignty in Transition*, Oxford, 2003.

prima facie incoherent because it references both the governing power constituting the law and the law restraining that very power [44].

The Spanish origin of *'Cabotaje'* defined it as sailing along the coast without going out to the open sea [45]. Thus, it can be argued that maritime cabotage may have started out with explorers cautiously navigating within the boundaries of the sovereign country in order to avoid the dangers of the open sea [46]. Those early explorers used a variety of techniques to navigate the seas including hugging the coast and navigating by sight of geographic landmarks, using visible land characteristics as guide to arrive the next port safely [47]. This precautionary method of sailing along the coast for navigational and trading purposes has today become the very controversial piece of maritime law known as cabotage [48].

As the nations of the world became richer with bigger volumes of multinational trade leading to an increase in international commerce, the need arose for countries to define their boundaries both on land and at sea [49]. Thus, each littoral country established sovereignty over its territorial waters and hence, protectionist maritime cabotage law was justified on the basis of national sovereignty [50].

It has been said that there exists perhaps no conception of a meaning which is more controversial than that of sovereignty (except perhaps, the meaning of cabotage). This is because the concept of sovereignty has never had a meaning which was universally agreed upon either from the declaratory or constitutive perspective [51]. Hence, the different conceptual dimension of sovereignty has created an intellectual predicament in which the concept of sovereignty is both indispensable and problematic.

Maritime cabotage is intimately and intrinsically linked with sovereignty, and as such, its implementation is generally recognised as a manifestation of a nation's desire to preserve its territorial sovereignty [52]. Proponents of the Jones Act claim that a

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[44] B. ROERMUND, *Sovereignty: Unpopular and Popular*, in N. Walker (edited by), *Sovereignty in Transition*, Oxford, 2003. Pp. 33 - 54

[45] See: N. HESSE, *International Air Law: Some Questions on Aviation Cabotage*, in *McGill Law Journal*, 1953, **1**(1), pp. 129 - 140

[46] ABC, *The Art of Navigation*, 2011.

[47] G. SPERA, S.STROM, *A Brief History of Human Navigation*, in *Crosslink*, 2002, **3**(2), pp. 52 -54.

[48] What could be an interesting side question to research is whether those early navigators could ever have envisaged that what started out as a safety mechanism would many centuries later turn out to be a controversial piece of maritime law argued aggressively for and against.

[49] See *Tratado de Límites de 1881* (Article 3 of Boundary Treaty of 1881 between Argentina and Chile).

[50] Art. 1 of the Geneva Convention on the Territorial sea and the Contiguous Zone 1958. See also; Art. 1 of the Convention on the Law of the Sea 1982. The customary practice by States regarding the breadth of the territorial sea is 12- mile maximum. For a practical example: see the Guinea/Guinea-Bisau Maritime Delimitation case. [1988] 77 *I.L.R.* p. 636

[51] L. OPPENHEIM, *The Subjects of the Law of Nations*, in: R. Roxburgh (edited by), *International Law: A Treatise*, 1, New Jersey, 2005, Pp. 125 - 300

[52] F. BLISS, *Rethinking Restrictions on Cabotage: Moving to Free Trade on Air Cabotage,* in *Suffolk Transnational Law Review*, 1994, **17**(2), pp. 382 – 407.

protectionist maritime cabotage policy is as much an issue of sovereignty as it is a shipping issue [53].

8.0 The National Development Argument

The law of maritime cabotage is gradually gathering global momentum with many maritime nations either seeking to implement maritime cabotage law for the first time or seeking to restore or amend their maritime cabotage law [54]. The reason for the current surge in interest in cabotage law may be attributed to the need for national development [55].

There have been strong arguments that the law of maritime cabotage is instrumental in preserving, maintaining and developing local content and indigenous maritime infrastructures which in turn generates revenue for the host nation [56]. National development involves building capacity with regards to maritime personnel, indigenous maritime tonnage, maritime infrastructure and revenue generation [57]. The proponents of a protectionist maritime cabotage law claim that it creates and sustains jobs, hence abolishing it would result in job losses particularly amongst indigenous labour force. Furthermore, they assert that, there is no justification for singling out coastal shipping to face foreign competition when other domestic service industries are protected from exposure to the very same competition [58].

The protectionist maritime cabotage regime in the United States sustains over 500,000 good-paying jobs and generates $100 billion in total annual economic output [59]. In china, over 6000 small to medium size shipping companies are dependent and sustained by the protectionist Chinese maritime cabotage policy [60]. This is because the building, repair, and maintenance of vessels locally stimulates the employment of more indigenous persons in the maritime industry; on board ships as seafarers, offshore in oil rigs and onshore in shipbuilding and repair technology [61].

The International Transport Workers Federation (ITF) is a strong proponent of national maritime cabotage law, where its implementation creates employment opportunities for indigenous people and eliminates unfair competition in a domestic industry. The ITF argue that maritime cabotage law represents the main and sometimes the only serious opportunity to secure employment for local seafarers,

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[53] See the comments of Michael McKay, National President of American Maritime Officers to European Union Dredging Agency (EUDA) in 2002

[54] See developments in this area of law in South Africa, Indonesia and Australia.

[55] C. BERG, A, LANE, *Coastal Shipping Reform: Industry Reform or Regulatory Nightmare*, Melbourne, 2013.

[56] See: M. IGBOKWE, *op cit.* p. 1. ff. See also: TRANSPORTATION TRADES DEPARTMENT, *A Strong Maritime Industry Creates Americans Jobs and Protects American Security.* Washington, D.C, 2011.

[57] S. SANYAL, *Cabotage Relaxation Should Not Hurt National Interest*, in *The Business Line*, November, 2011.

[58] O. OYELERU, *Cabotage Regulations and the Challenges of Outer Continental Shelf Development in the United States*, in *Houston Journal of International Law*, 2012, **34**(3), 608 - 649

[59] TRANSPORTATION TRADES DEPARTMENT, *A Strong Maritime Industry Creates Americans Jobs and Protects American Security*, Washington, 2011.

[60] WTO, *Trade Policy Review: China*, Geneva, 2006.

[61] AMERICAN MARITIME PARTNERSHIP, *Why We Need the Jones Act*, Washington, D.C. 2011

particularly in countries with no national fleet [62]. Even for countries that supply a high number of seafarers to work on foreign ships, maritime cabotage law can provide national training opportunities which minimises the reliance on foreign training policies. The national training scheme, whilst of international standard can be tailored to meet local maritime needs such as engaging seafarers who need to work closer to home [63].

What is important is to have a holistic analysis of the impact that the adoption of a liberal or protectionist maritime cabotage law would have on the whole national economy as opposed to limiting such analysis only to the maritime sector. It is sufficiently argued that a protectionist maritime cabotage policy protects jobs for the indigenous maritime labour market. However, what is also true is that a liberal maritime cabotage policy could also create employment opportunities well beyond the maritime sector to cover other important sectors of the national economy [64].

Also, the introduction of competition into the domestic shipping market usually results in lower freight rates and a more efficient service, although it opens the door to foreign investors who may bring with them cheap foreign labour [65]. However, foreign labour is not always cheap, particularly when foreign labour is imported from an industrialised country to a developing country [66].

It is thus suggested that competition should be encouraged where it can be the motivator for the indigenous labour force to raise their skills and standards to an internationally recognisable level capable of being exported to other countries [67]. However, care must be taken to ensure that such foreign competition does not become a hindrance to other domestic transport services such as road and rail [68].

An argument commonly raised is that the abolishment or relaxation of maritime cabotage law will permit sub-standard foreign ships, which in turn will increase the risk of maritime accidents such as pollution in the coastal waters and of the marine environment [69]. The difficulty with this argument is that the same ships prohibited from engaging in coastal trade are free to transit the same coastal waters with the same attendant risk in the course of their international voyages [70]. In any event, it is argued that it would be more appropriate for such 'sub-standard vessels and their

[62] ITF, *ITF Backs Union Action to Defend Chilean Shipping Industry*, in, *Lloyd's List*, October, 2012.
[63] ITF, *Inside The Issues: Ferries*, in *Lloyd's List*, April, 2011.
[64] K. SHADLEN, *Exchanging Development for Market Access? Review of International Political Economy*, 2005, **12**(2), pp. 750 - 775
[65] Lower freight rates as a result of competition follows the theory of supply and demand. One of the key points for those advocating for the abolition of the Jones Act in the United States of America is that the cost of labour in America is too expensive and hence it is not attractive to employ American crew or build ships in America.
[66] A Filipino crew working on board an American vessel will be cheap labour but an American crew working on a Filipino vessel or any other vessel is expensive labour.
[67] THE AFRICAN CENTER FOR ECONOMIC TRANSFORMATION, *African Transformation Report: Growth with Dept,*. Accra, 2014.
[68] L. BUTCHER, *Shipping: EU Policy. House of Common Library Report (SN/BT/55)*, 2010. See for instance, how domestic air transport is fairly regulated and protected by air cabotage laws.
[69] This is the argument that is repeatedly made by advocates of the Jones Act in the United States who are against relaxing or liberalising the Jones Act in any form.
[70] Except that these sub-standard vessels do run the risk of being arrested in port by the Port State Control (PSC). For an in depth read on Port State Control, see the Paris MOU and other MOU's.

potential risks to be left to the scrutiny of the more suited Port State Control (PSC) and other relevant agencies [71].

9.0 The Economic Argument

The basis of this argument is that whether a country adopts a protectionist, liberal, or flexible maritime cabotage approach, the economic benefits expected to accrue to the country forms a major consideration point. From a very basic perspective, whether as an intermediate cost of production where products are transported to manufacturing centres or as an element of the final pricing of goods through the transportation of finished goods, coastal shipping within the scope of maritime cabotage generates economic benefits to the national economy. The domestic shipping industry in the United States generates over $100 billion in annual economic output by virtue of the Jones Act [72]. This appears to be the rationale why many developing maritime nations now opt for a protective maritime cabotage policy, although in reality they often do not get the policy to function efficiently [73]. Thus, the economic arguments made by countries that adopt a particular maritime cabotage approach include:

9.1 Protecting the Infant Industry

The infant industry argument was first codified in 1791 by *Alexander Hamilton* when he argued that the protection of the independence of the United States depended on encouraging manufacturing growth through; trade regulation, tariffs and industry subsidy [74]. This argument has since been systematically developed by prominent economists to withstand critical and intellectual examination over the years [75].

The protection of infant industry is one of the oldest and most effective economic arguments often adopted by countries that are developing a new sector in their economy[76]. The *Mill–Bastable test* lays down two conditions that should justify the protection of infant industry [77]. First, the test requires that; protection should be temporary as long as the infant industry matures and becomes viable without continuous and long term protection. Secondly, it argues that the cumulative net benefits accruing from the protected industry should exceed the cumulative costs of protection within a reasonable period of time [78]. The argument follows that a new

[71] UNESCAP, *ANNUXERE I: The Cabotage Debate*, Bangkok, 1988.
[72] AMP, *Why we Need The Jones Act*, Washington, 2012.
[73] See: N. OKONJO-IWEALA, *Presidential Retreat on Maritime Safety: Harnessing the Potential of Nigeria's Maritime Sector for Sustainable Economic Development*, Abuja, June, 2012. Also, See: the section on Nigerian maritime cabotage law and policy later on in this chapter.
[74] A. HAMILTON, *The Report on the Subject of Manufactures*, Washington, 1791.
[75] Daniel Raymond and Friedrich List (The National System of Political Economy -1841) have both lent their support to this argument.
[76] See: P. DICKEN, *Global Shift: Mapping the Changing Contours of the World Economy*, London, 2011.
[77] M. KEMP, The Mill-Bastable Infant-Industry Dogma, in *Journal of Political Economy*, 1960, **68**(1), pp. 65-67.
[78] For a more detailed discourse on the two conditions to protect infant industry, see: J. STUART-MILL, *Principles of Political Economy with some of their Applications to Social Philosophy*, New York, 1848, pp. 918–919; and C. FRANCIS BASTABLE, *The Commerce of Nations*, New York, 1921, pp.140–143.

domestic industry will struggle to fulfil its potential of becoming an international competitor if such industry is not offered protection from bigger and other international competitors who have become experts at mastering the dynamics of low cost of production [(79)]. The infant industry needs to be accorded time to reach a level where economies of scale, industrial infrastructure, and production capacity have progressed sufficiently to allow the protected industry to compete internationally with little or no disadvantage [(80)].

Contrary to general perception were developing countries are usually fingered as the culprit of seeking protectionist policies, history shows that many industrialized nations only managed to reach the summit of the world economy through the consistent and aggressive application of protectionist policies [(81)]. It was on this account that the German economist, *Friedrich List* derided Britain as hypocrites for only finding it convenient to advocate for free trade and liberal (maritime cabotage) policies after becoming an industrial leader on the back of protectionist policies [(82)].

In what can be seen as a rare exception, whilst other arguments in support of protectionism may be viewed as reacting to the problems in the international economy, the infant industry argument has a positive impact appreciated by free trade exponents [(83)]. This is borne out of the fact that there have been recommendations to legitimize limited, time bound protectionist policies for infant industries in developing countries [(84)].

However satisfying the protection of the infant industry argument seems, it is not without its own problems. Firstly, there needs to be a careful critical analysis to determine whether in fact the protected infant industry would be viable and how long it would take to achieve that [(85)]. Secondly, at some point, a decision needs to be made on whether to remove the protectionist policy gradually or abruptly.

This is because it can become a tricky political decision with serious economic consequences to replace a protectionist policy with a liberal one for special interest purposes [(86)]. There is always a danger with government intervention that if left in place for too long, inefficiencies will become entrenched because the domestic industry will have no need to become globally competitive [(87)].

[(79)] A. YOUNG, *Lessons from the East Asian NICs: A Contrarian View*, in *European Economic Review*, 1994, **38**(3-4), pp. 964-973.
[(80)] M. SAREL, *Growth in East Asia: What We Can and What We Cannot Infer*, in *Economic Issues*, 1997 **1**(1), pp. 1 - 22.
[(81)] H. CHANG, *Kicking Away the Ladder: How the Economic and Intellectual Histories of Capitalism Have Been Re-written to Justify Neo-Liberal Capitalism*, London, 2002.
[(82)] F. LIST, *The National System of Political Economy*, London, 1841.
[(83)] D. YOFFIE, B. GOMES-CASSERES, *International Trade and Competition: Cases and Notes in Strategy and Management*, Singapore, 1994.
[(84)] E. ZEDILLO, *Report on Financing for Development to the United Nations*, New York, 2000.
[(85)] K. JONG-IL, L. LAU, *The Sources of Economic Growth of the East Asian Newly Industrialized Countries*, in *Journal of the Japanese and International Economies*,1994, **8**(1), pp. 235-271.
[(86)] WORLD BANK, *The East Asian Miracle: Economic Growth and Public Policy, Summary*, New York, 1993.
[(87)] R. PASTOR, *The Great Powers in an Age of Global Governance: Are They Still Great*? in J. Clarke, G. Edwards, (edited by), *Global Governance in the Twenty-first Century*, Basingstoke, 2004, pp. 139 – 176.

Finally, advocating for the protection of infant industries is at best a judgment call; albeit that it can be guided by the experiences of other nations who have adopted similar policies [(88)]. Assuming that judgment call is wrong, not only would resources have been wasted, but the country in question may have to face the wrath of retaliatory countries, particularly from industrialized nations which could inflict serious damage to the very economy that was in need of help [(89)].

9.2 Domestic Freight Rates

The antagonists of protectionist maritime cabotage policies generally cite the high domestic freight rates borne by domestic shippers as a reference point. This high cost of freight often eventually reflects on the high cost of consumer goods [(90)]. Domestic shipowners usually struggle to offer competitive shipment cost compared to the costs of international shipment. This explains the challenge that domestic products face in competing with imported products on pricing [(91)].

In contrast, proponents of a liberal maritime cabotage policy point to lower cost of consumer goods brought about by allowing foreign vessels who can offer marginal cost freight rates to compete in maritime cabotage trade and services, as an important economic benefit [(92)]. The issue of high domestic freight rates leading to high prices of consumer goods particularly resonates in Malaysia and the United States of America. In the case of Malaysia, complaints by shippers in East Malaysia have led to the switching from a protectionist to a flexible maritime cabotage policy where foreign vessels now visit East Malaysian ports. In the United States of America, the Jones Act has been repeatedly identified as the reason for high domestic shipping cost [(93)]. This is because the ships are more expensive to build in American shipyards, American crew are paid higher wages compared to wages paid to crew from many other maritime nations, there is a lack of foreign competition, and the coastwise vessels are olde,r which all adds up to higher operating costs and leads to higher freight rates which results in high prices of consumer goods [(94)].

[(88)] M. MELITZ, *When and How Should Infant Industries Be Protected*? in *Journal of International Economics*, 2005, **66**(2), pp. 177-196

[(89)] J. SMITH, *The world's Wasted Wealth 2: Save Our Wealth, Save Our Environment*, California, 1994.

[(90)] For deeper discussion on the impact of protectionist maritime cabotage laws on domestic freight rates and consumer prices in Malaysia and in the United States, see respectively: P. BARNSBERG, *Malaysia Eases Cabotage Law, Adds Incentive*, in *Journal of Commerce Online*, 2001; and B. SLATTERY, B. RILEY, N. LORIS, *op cit*. pp. 1 – 9. In Malaysia, the high domestic freight was the reason behind higher prices of consumer goods particularly in Sabah and Sarawak States. This led to calls for maritime cabotage policy to be abolished. However, the Malaysian government moved to relax the maritime cabotage laws in an attempt to attract foreign carriers to Malaysian ports and trigger development of hubs and cargo trans-shipment centres. Further, In the United States, a report from the Federal Reserve Bank of New York concluded that: as a result of the applying the Jones Act, it costs an estimated $3,063 to ship a twenty-foot container from the East Coast of the United States to the Island of Puerto Rico. The same shipment costs $1,504 to nearby Santo Domingo (Dominican Republic) and $1,687 to Kingston (Jamaica). Similarly, it cost $8,700 to ship a 40-foot container from Los Angeles to Honolulu, whilst the same shipment from Los Angeles to Shanghai costs only $790.

[(91)] UNESCAP. *Op cit*. p. 3. ff

[(92)] V. WEE, *China Cabotage Rules benefit Hong Kong: HIT*, in *Seatrade Global (Asia, Port and Logistics*), 10th October 2013.

[(93)] J. FRITTELLI, *Federal Freight Policy: An Overview. Congressional Research Service Report for Congress*, 2nd October 2012.

[(94)] B. SLATTERY, B. RILEY, N. LORIS, *op cit.* pp. 1-9

However, advocates of protectionist maritime cabotage policies contend that although freight rates may be higher, those freights are paid to indigenous ship-owners which mean the revenue remains in the national economy. The protectionists further argue that it is important that:

a) The seeming advantage of lower freight rates provided from foreign competition should be measured in the long term with regards to the effect that foreign competition may have on other domestic transport system.
b) The continuous reliability of the foreign provider and the consistency with maintaining the low freight rate offer by the foreign provider must be monitored and guaranteed [(95)].

10. National Security Argument

National security is presently a primary reason that many countries reference for implementing a protectionist law of maritime cabotage. The argument for this is that, a country cannot claim to have a robust national security if her territorial and coastal waters are traversed freely by foreigners without restrictions [(96)]. It may be argued that relying on foreign vessels could jeopardise the security of a country, particularly in times of emergency. As a result, every coastal nation should endeavour to secure her maritime borders by ensuring these water passages are efficiently monitored and relevant authorities are aware of activities in this region [(97)].

Thus, national security is one of the strongest arguments repeatedly put forward by countries like Japan, China, and the United States of America who adopt a protectionist maritime cabotage approach [(98)]. As part of a wide range of sanctions, the United States imposes substantive controls against certain countries on commercial shipping for reasons of national security. Some of the enacted legislations in the United States prohibit vessels that fly the flag of various countries from visiting its ports and territorial sea [(99)]. It is however, not clear whether the vessels flying the flag of these countries are also prohibited from the so called 'innocent passage', which would imply that the United States is in breach of international law[(100)].

The necessity of protecting a sovereign State dictates that terrestrial and maritime borders must be monitored for foreign security threats. The general concession is that when national security is mentioned in the context of maritime cabotage, it is to contend with foreign threats [(101)]. However, there have been instances where

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[(95)] See: D. GOURE, *The Contribution of the Jones Act to U.S. Security*, Virginia, 2011.
[(96)] V. BELLAMY, *The Implementation of Cabotage Principle in Indonesia*, in *HG.Org Legal Resources*, August, 22nd 2010.
[(97)] M. HILL, The *Sinking Ship of Cabotage: How the Jones Act Lets Unions and a Few Companies Hold The Economy Hostage*, in *The Labor Watch*, April, 2013. Pp. 1 – 8.
[(98)] For a detailed analysis on this issue, see the section in this chapter where the maritime cabotage legislations of these countries has been given sufficient attention.
[(99)] OECD, *Regulatory Issues in International Maritime Transport*. Paris, 2001.
[(100)] See The United Nations Convention on the Law of the Sea, 1982.
[(101)] M. VENUNATH, *India Prepares To Ease Cabotage Rules*, in *IHS Maritime 360*, 7th December, 2014.

dangerous national security threats have originated internally [102]. Thus, the argument that a protectionist maritime cabotage approach enhances the national security of a country by preventing acts of espionage from occurring from within the coasts of the country is highly debatable [103].

The United States Navy claims that the Jones Act is critical to the national security of the United States. Thus, the slightest liberal modification would make the United States more vulnerable and less secure whilst hampering its ability to meet strategic sealift requirements[104].

In considering the position taken by advocates of a protectionist maritime cabotage approach on national security, one must stop to ponder the validity of such argument in these present times of fewer wars [105]. The fact that the countries that have adopted a liberal maritime cabotage approach have not experienced any kind of national security threat from opening up their maritime cabotage trade and services to non-nationals is a compelling testament to the weakness of using national security as an excuse for adopting a strict maritime cabotage approach [106]. Additionally, the responsibility for monitoring and securing the maritime borders of coastal nations would arguably be better left to the expertise of the; Navy, Custom, Marine Police, and Coastguard agencies [107].

An argument could be made that there is the possibility that foreign vessels could engage in espionage, thereby posing national security threats where a foreign vessel is allowed unrestricted movement through the navigational 'bloodstream' of a sovereign nation [108].

Nevertheless, it is contended that the probability of such occurrence is so remote that, it in effect invalidates the argument [109]. Furthermore, the argument that national security is sufficient excuse for implementing maritime cabotage law is flawed for two principal reasons. Firstly, littoral States which have either liberalised or have no

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[102] The Niger- Delta crisis in Nigeria was an internally originated security threat and most of the incidences that occurred in the coastal waters which threatened national security were perpetrated by indigenous persons.

[103] A. GRIBBIN, *Seaports Seen as Terrorist Target*, in *Washington Times*, 22nd January 2002.

[104] The American merchant marine vessels have a history of providing vital assistance to the military in times of war. During the Korean War in 1950, the 24th Infantry Division and its equipment was transported on merchant marine vessels from Japan to Pusan (in South Korea) for duty. The Military Sealift Command transported nearly 54 million tons of combat equipment and supplies, in addition to nearly 8 million tons of fuel and troops to Vietnam between 1965 and 1969 during the Vietnam War. The Department of Defence was provided with ocean transportation in support of the United States deterrent efforts during the Cold War years in the 1970's and 1980's by the Military Sealift Command. In the Persian Gulf War, the Military Sealift Command ships delivered more than 12 million tons of military cargo and other equipment during the war. Further, during Operations Enduring Freedom and Iraqi Freedom (2002 - 2010), the Jones Act vessels transported 57% of all military cargoes moved to Afghanistan and Iraq under the Military Sealift Command. See: American Maritime Partnership, 2011. Why We Need the Jones Act. Washington: AMP

[105] W. OYEDEMI, *op cit.* pp. 607 – 651.

[106] The European Union, South Africa, New Zealand all have open coast policies with no reported threats to their national security.

[107] A. BAKER, J. SULLIVAN, *Port of Entry Now Means Point of Anxiety*, in *New York Times*, 23rd December, 2001.

[108] AMERICAN MARITIME PARTNERSHIP, *America's Domestic Maritime Industry Makes Our Homeland More Secure*, Washington, D.C., 2011.

[109] For a different take on the argument, see: M. IGBOKWE, *op cit.* p. 1. ff

maritime cabotage laws at all have not had their national security threatened by foreigners who engage in their cabotage trade. Secondly, if national security is an important (and it is) aspect of a sovereign nation, then there are surely more efficient ways of monitoring and policing the coastal waters of the State (Marine customs, marine police) than employing the merchant marine, whose expertise lie in transporting cargo between ports in a country or groups of countries. Lastly, it comes across as presumptuous to assume that acts of espionage against the national security of a country need only be carried out by foreigners [(110)].

Whilst the national security argument has often been used to justify implementing protectionist maritime cabotage laws, it can however be logically argued that the real impact has been its use in protecting the inefficient national maritime sector and labour interests. The advent of technology, combined with the sophistication of modern security threats, suggest that national security concerns can be addressed without continuing with some of the more protectionist maritime cabotage practices that are currently adopted [(111)].

11. Conclusion:

So therefore, what is the most appropriate option with regards to the implementation of the law of maritime cabotage? Is a de-regulated or more regulated maritime cabotage policy framework? Furthermore, what rationale most complements the chosen maritime cabotage approach?
Although, there are no safe answers for these questions, it would appear that; firstly, there is no one size fits all solutions to these challenges. Secondly, following on from the first suggestion, it seems most appropriate that every maritime country should choose a maritime cabotage approach that best fits its maritime capacity.

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[(110)] For instance, the Niger Delta Crisis is a clear indicator that acts similar to espionage can be carried out by indigenous persons who feel ignored and abandoned by the government of a country.
[(111)] B. SLATTERY, B. RILEY, N. LORIS, *op cit.* pp. 1 – 9.

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