

## CABOTAGE REGIMES AND THEIR EFFECTS ON STATES' ECONOMY

### **Abstract**

*Countries around the world especially coastal States establish cabotage laws which apply to merchant ships so as to protect the domestic shipping industry from foreign competition by eliminating or limiting the use of foreign vessels in domestic coastal trade. Coastal States' deep dependence on the seas and its resources remains integral to their economic wellbeing and survival as nations. Due mainly to the importance of maritime trade and the critical role that coastwise and inland waterway transportation play in nations' economy, these States had always created cabotage laws aimed at protecting the integrity of their coastal waters, preserving domestically owned shipping infrastructure for national security purposes, ensuring safety in congested territorial waters and protecting their domestic economy by restricting the rights of foreign vessels within their territorial waters. The concept of cabotage has however been broadened lately to include air, railway and road transportations. In view of the forgone disquisition, this paper discussed inter alia the basis on which nations anchor their decisions in determining which form of cabotage policy to adopt. The work also investigated into the likely implications of each cabotage regime on the economy of the States adopting it. This work found out that liberalized/relaxed maritime cabotage is the best form of cabotage for both advanced and growing economies and recommended that States should consider it. The work employed doctrinal and analytical research approaches.*

**Keywords:** *Cabotage, State Security, State Economy, Foreign Vessels, Cabotage Regimes*

### **1. Introduction**

The term cabotage connotes coastal trading<sup>1</sup>. It is the transport of goods or passengers between two points/ports within a country's waterways<sup>2</sup>. Originally cabotage was concerned with shipping along coastal routes, from one port to another of a country's territorial waters<sup>3</sup>, but now its application has been broadened to include aviation, railways, and road transport as well. In this new sense it refers to the restriction of the operation of sea, air<sup>4</sup>, or other transport services within a particular country to that country's own citizens or transport services. Historically therefore, nations have used the concept of cabotage as a tool for protecting their domestic trade and commerce from undue foreign competition. Cabotage, often referred to as coastal trading, is usually regulated by the national law of the host nation<sup>5</sup>.

Cabotage rights refer to the rights of foreigners and foreign vessels to participate in the transportation of goods and passengers in another country. It refers to the rights granted by a country to foreign vessels to transit along its coast for the purpose of trade from one port to another within the territorial limits of that nation. In aviation, it implies the right to operate within the territorial borders of another country.

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<sup>1</sup>See also B.A Garner (ed.) Black's Law Dictionary 8<sup>th</sup> edn. (St. Paul's Minnesota, West Publishing Co,2004) p.215

<sup>2</sup> See L.Uche, "History of Cabotage Law in Nigeria" in E. Azinge and O.O Eruaga, *Cabotage Law in Nigeria* (Lagos: NIALS,2012) p.4; Section 2 of Coastal and Inland Shipping( Cabotage) Act,Cap.C LFN 2004

<sup>3</sup> This remains the intendment and purport of the Coastal and Inland Shipping( Cabotage) Act,Cap.C LFN 2004

<sup>4</sup> This informed the short disquisition on air cabotage. However the kernel of the discussion in this paper remains its conventional usage as appertaining to maritime transport of goods and services within a state's coastal territory.

<sup>5</sup> In Nigeria, this is exemplified by the Coastal and Inland Shipping (Cabotage) Act,Cap.C LFN 2004 and the Guidelines on Implementation made thereunder.

Most nations however in their national policies prohibit aviation cabotage rights, with strict sanctions against it. This is usually, as stated above, for reasons of economic protectionism, national security and public safety. The European Union, whose Member States all grant cabotage rights to each other however stands as a notable exception to this general principle<sup>6</sup>. Also Chile which has been described as operating the most liberal cabotage rules in the world, enacted in 1979, permits foreign airlines to operate domestic flights in Chile, based on principle of reciprocity for Chilean carriers in the foreign airline's country. This uncommon cabotage regime can be attributed partly to Chile's geographical need for air service, and partly as an incentive to liberalization in other countries amid the international expansion of its flag carrier LAN Airlines, which now has major operations in many other Latin American countries<sup>7</sup>.

Cabotage principles are therefore designed to ensure the participation of citizens of the concerned country in its own domestic trade. These principles foster the development of merchant marines and give preference to local labor and industry<sup>8</sup>. Cabotage laws also guarantee national security and protect a country's domestic economy against any likely threats from foreign competition.

## **2. Historical Origin of Cabotage**

The word "cabotage" has its root from the French word "caboter" which means to sail coastwise or "by the capes"<sup>9</sup>. Cabotage is the carriage of passengers, cargoes and mail by a nation's vessels between two points/ ports within the territory of the same nation for compensation or hire<sup>10</sup>. The origin of cabotage is still in doubt/dispute. There is however this belief that as a legal principle, cabotage was first enunciated in the 16th century by the French. Navigation between ports on French coasts was restricted to French ships. This principle was later extended to apply to navigation between a metropolitan country and its overseas colonies<sup>11</sup>. However, the American Merchant Marine Act of 1920 otherwise known as the Jones Act seems to be the first known formal enactment on cabotage<sup>12</sup>. This is a United States federal statute that provides for the promotion and maintenance of the American merchant marine. The Act has several purposes which include *inter alia*, to regulate maritime commerce in United States waters and between United States ports. Section 27 of the Act deals with cabotage and mandates that all goods transported by water between United States ports be carried on United States-flag ships, constructed in the United States, owned by United States citizens, and crewed by United States citizens and United States permanent residents. The Jones Act has been lauded as being vital to America's national security and playing some crucial role in safeguarding America's borders<sup>13</sup>. Cabotage plays a significant role in strengthening national border security and acts as a tool in checking and preventing international terrorism by preventing the involvement of foreigners in a country's domestic shipping.

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<sup>6</sup>"European Transport Policy for 2010: Time to Decide" EU Commission White paper". Ec.europa.eu. 2005-12-01. <<https://ec.europa.eu> > ... > *Transport > Transport themes > European strategies*> Last accessed on May 26, 2017.

<sup>7</sup>Havel, F. Brian, *The Principles and Practice of International Aviation Law*, (Cambridge: Cambridge University Press 2014) pp. 50–53.

<sup>8</sup>Jones Act - Transportation Institute<<https://transportationinstitute.org/jones-act/>> Last visited on May 19, 2017.

<sup>9</sup>H. I. Santos, 'Cabotage Laws: a Colonial Anachronism', (1997) *Vol. 36 Revista De Derecho Puertorriqueño*, 1.

<sup>10</sup>Sheehan, 'Air Cabotage and the Chicago Convention', (1950) *63 Harv. L. Rev.* 1157.

<sup>11</sup>"History of Ships", <<https://www.britannica.com/topic/cabotage>> Last visited on June 1, 2017.

<sup>12</sup>However, laws similar to the Jones Act date to the early days of America as a nation. *For instance*, in the First Congress, on September 1, 1789, Congress enacted Chapter XI, "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes", which limited domestic trades to American ships meeting certain requirements.

<sup>13</sup>Lexington Institute <[www.lexingtoninstitute.org](http://www.lexingtoninstitute.org)>. Last accessed on June 5, 2017.

Originally, the concept of cabotage under maritime law was limited to coastal trade between ports on the same coast of a particular State. Understandably, a nation's right to reserve coastal trade to its own vessels, crews and citizens, was based on its jurisdiction over territorial waters. In the process of time however, the principle of cabotage was broadened to include trade between ports of the same State but situate on different coasts, "for example, trade between Boston and San Francisco", even though vessels must necessarily traverse the high seas to reach the destination port<sup>14</sup>. Some States especially the United States and Portugal had gone as far as interpreting cabotage to include trade between the home State and its overseas possessions. Such interpretation/expansion has however never been widely accepted among nations, under international maritime law, mainly for fear of economic reprisals<sup>15</sup>.

### 3. Cabotage as a Protectionist Policy

Cabotage laws have been in existence since the early days of nations. For instance, in 1789, the first Congress of the United States restricted registration for coastal trades and fisheries to United States' built and United States' owned vessels and gave these vessels preferential treatment with respect to tonnage taxes and cargo import duties<sup>16</sup>. The right of nations to exclude foreign vessels from their local/domestic maritime trades is widely accepted without qualifications in the international community; and most coastal States have adopted cabotage laws just to enforce that right<sup>17</sup> in order to eliminate unhealthy foreign competitions in their coastal trades<sup>18</sup>. Historically therefore, nations have protected their domestic trade and commerce from foreign competition through the aid of cabotage principles such as the *Jones Act*<sup>19</sup> in the United States and *cabotage laws* in Japan and Australia<sup>20</sup>. The cabotage principle will ensure protection and safeguard to national maritime industries development; guarantee national security, defence, and robust national economy; prevent dependency on foreign vessels and foreign companies; and as well provide working and business opportunities for the country's citizens. Cabotage therefore, is a vital protectionist policy employed by various States in the protection of their domestic fleet in the carriage of cargoes within their coastal waters<sup>21</sup>. The principle of cabotage is discriminatory in nature, by shutting foreign-flagged vessels out of coastal waters in order to avoid foreign competitions. However, it is a practice accepted internationally and is used as a tool "for achieving set economic goals, especially where competition is unfair and dominance is prevalent"<sup>22</sup>. Whether in the maritime or aviation industry, cabotage is often motivated by a number of factors some of which include the reservation of all or part of the country's market opportunity for national flag ships or aircraft, for political, socioeconomic, geo-cultural and security reasons<sup>23</sup>. On the contrary however, experience has shown that where available coastal ships are less than required in the shipping industry,

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<sup>14</sup>History of Ships', < <https://www.britannica.com/topic/cabotage> > Last visited on June 1, 2017.

<sup>15</sup>Thomas & Thomas, 'Theories of Trade in International Law and their Influence on Air Commerce', (1953) 7 *Sw. L.J.* 219, 237.

<sup>16</sup>*Ibid.*

<sup>17</sup>R L Mc George, United States Coastwise Trading Restrictions: A Comparison of Recent Customs Service Rulings with the Legislative Purpose of the Jones Act and the Demands of a Global Economy (1990) Vol. 11, *Northwestern Journal of International Law & Business*. pp. 62-63.

<sup>18</sup> See also Section 3 of the Coastal and Inland Shipping (Cabotage) Act, Cap.C LFN 2004

<sup>19</sup>The Merchant Marine Act of 1920 which requires that all goods transported by water between U.S. ports be carried on U.S.-flag ships, constructed in the United States, owned by U.S. citizens, and crewed by U.S. citizens and U.S. permanent residents

<sup>20</sup>M Asrofi, 'Cabotage Full Implementation vs Cabotage Relaxation' < [www.frost.com/prod/servlet/market-insight-print.pag?docid=236707803](http://www.frost.com/prod/servlet/market-insight-print.pag?docid=236707803) > last accessed on May 22, 2017.

<sup>21</sup>G. Babatunde, 'The effects of cabotage regime on indigenous shipping in Nigeria', (2011) *World Maritime University Dissertations*, 6. See also A. Awah "General Overview of Coastal and Inland Shipping Act" in E. Azinge and O.O Eruaga, *Cabotage Law in Nigeria*, op.cit p.63

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

cabotage restrictions do not do any good for the nation. The implication is that where there are not enough domestic coastal vessels, imposition of cabotage principle would discourage coastal transport due to the procedural lags which in turn affects the economy.

#### **4. Air Cabotage**

The limitation/restriction of the carriage of goods and passengers between two points within a particular country to that country's own transport services was originally a shipping term, but now covers aviation, railways, and road transports. It is trade or navigation in coastal waters, or, the exclusive right of a country to operate the air traffic within its territory. The first legal regime providing specifically for air cabotage with international support<sup>24</sup> is Article 16 of the Convention Relating to the Regulation of Aerial Navigation otherwise called Paris Convention of 1919. The article provides that "Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory". Articles 1 and 40 of the Convention variously explained the term 'territory' of a State to include the home State, colonial territories and adjacent waters. Article 40 however added that protectorates and mandates administered under the League of Nations are well included in the territories of the protecting or mandatory State for purposes of the Convention. Thus 'territory' as recognized and defined by articles 1 and 40 of the Convention to mean land areas and their adjacent waters under the sovereignty, protection or mandate of a State was applied to article 16 of the Convention so that trade between land areas and territorial waters under a country's sovereign jurisdiction was included in the cabotage restriction and reserved to that country's national operators<sup>25</sup>.

The present legal regime on aviation, Convention on International Civil Aviation also called the Chicago Convention of 1944 has however abrogated the Paris Convention of 1919 we discussed above. The Chicago Convention was introduced, in order to establish a workable and efficient international aviation system by means of multilateral agreements for the exchange of commercial air rights. This was primarily, the idea of the United States which convened the conference and invited discussion on several issues including "the application of cabotage to air traffic"<sup>26</sup>. The United States during the discussion tactically avoided the narrower sense/construction of the term 'cabotage' as used under the maritime law that is to say, coastal trade between two points/ports belonging to one and the same country. Instead, the United States observed that cabotage should include traffic between a territory and its colonies and possessions<sup>27</sup>. Such definition offered by the United States despite its apparent broadness received stiff opposition from other States because it excluded commerce with mandated areas or protectorates as cabotage. The final draft of the Chicago Convention eventually incorporated such commerce within its definition. Articles 2 and 7 of the Convention are apposite at this juncture. Article 7 provides as follow on cabotage:

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<sup>24</sup>D. R. Lewis, 'Air Cabotage: Historical and Modern-Day Perspective', (1980) Vol. 45, *Journal of Air Law and Commerce*, 1060.

<sup>25</sup>J. Cooper, *Aviation Cabotage and Territory*, (1952) *U.S. Av. REP.* 256, 257

<sup>26</sup>D. R. Lewis, *op.cit.* p. 1061.

<sup>27</sup>The United States submitted two similar proposals regarding cabotage. Document No. 16 United States 'Proposal of an Agreement Regarding Provisional Arrangements for World Routes and Services' contained the following "cabotage" article: Article 21 Air commerce for hire may be reserved as cabotage exclusively to the aircraft of any Contracting State only if it both originates and terminates within the limits of such Contracting State or is between such Contracting State and its colonies and possessions or among such colonies and possessions. Document No 19 states *inter alia* that each State signatory hereto reserves the right to reserve as cabotage exclusively to aircraft of its own nationality traffic which both originates and terminates within the limits of such signatory State; provided that for the purposes of this agreement the limits of each State shall include its colonies and possessions.

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

Article 2 defines territory and stipulates that:

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Article 7 of the Convention recognizes State's right under the Convention to reserve for their national aircraft all carriage of passengers, mail or cargo transported for compensation between two points within areas under their sovereignty, suzerainty, protection or mandate. Inferring from the above provision, a broad, fundamental principle of sovereignty with specific application to cabotage has thus been established for air transportation<sup>28</sup>.

The broad definition of air cabotage under article 7 of the Convention is partially due to the circumstances surrounding the period of the Convention. The world was just emerging/ struggling to wiggle out of the World War II and its devastating effects when the Convention was established. This no doubt allowed nationalistic concerns to prevail over international interests. As a result of the war, it became the general view that air transportation must remain completely under every State's domestic control to ensure adequate protection of their national interests. It therefore seems that the general view of most States participating in the Convention is as expressed in the United States proposal on cabotage when it stated that:

It is the view of the United States that each country should, as far as possible, come to control and direct its own internal airlines. In the long view, no country will wish to have its essential internal air communications under the domination of any save their own nationals.... This suggests recognition of the principle that the people of each country must have the dominant voice in their own transport systems. If air transport is not to become an instrument of attempted domination, recognition of this principle seems to be essential<sup>29</sup>.

Several factors actually account for the recognition of extensive air cabotage principle. In the first place, undeveloped nature of the commercial aviation necessitates the cabotage principle here to act as a protective device to insulate carriers from undue competition and thereby assure their continuing financial viability. Moreover, unlike maritime transportation, which is usually confined to coastal trade, the very nature of air transportation is that it can penetrate the major internal centers of commerce of the States concerned and increase their vulnerability to international market forces<sup>30</sup>.

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<sup>28</sup>G. S. Robinson, *Changing Concepts of Cabotage: A Challenge to the Status of United States Carriers in International Civil Aviation?*, (1968) 34 *J. AIR L. & COM.* 553, 561.

<sup>29</sup>*Proceedings of the International Civil Aviation Conference*, Chicago, 1944, U.S. DEPT OF STATE, Pub. No. 2820, (1949) 561.

<sup>30</sup>Institut du Transport Aerien, *Cabotage in International Air Transport, Historical and Present Day Aspects*, (1969) 7-E, 7-8. (Cited as ITA Study)

Careful examination of the second half/sentence of article 7 of the Convention reveals that it employs a reciprocity principle to restrict discriminatory grants of cabotage rights to different States. What has generated no small debates among scholars is the exact nature of restriction whether absolute or qualified because of some ambiguity associated with the language and interpretation of the Article in relation to these two words “specifically” and “on an exclusive basis.” Scholars have suggested that the language of this Article is susceptible to dual interpretations. The first referred to as the strict or restrictive interpretation de-emphasizes the “specifically” and gives effect to the phrase, “on an exclusive basis”<sup>31</sup>. This version of interpretation allows cabotage rights to be granted only on a nonexclusive basis, and so prohibits absolutely any forms of discriminatory grants<sup>32</sup>. It follows therefore, based on this interpretation that if one State is granted cabotage rights by another State, any other contracting State would automatically acquire the right to demand corresponding privileges<sup>33</sup>. This strict version not only theoretically bans exclusive award of cabotage rights, but in practice it also discourages nonexclusive grants between two contracting States since any such grant would automatically expose the granting State to an unlimited entry by other States demanding similar rights, a notion which is repugnant to nationalistic doctrines<sup>34</sup>. It seems however in our minds that the bans or restrictions on cabotage agreements place an undue infringement upon States’ free exercise of their national sovereignty.

The second version of interpretation, known as the flexible or liberal version, gives full meaning to the word “specifically” in article 7 of the Convention. This pattern of interpretation allows cabotage rights to be granted on an exclusive basis provided it is not stipulated that they are exclusive, without third States having the right to demand corresponding privileges<sup>35</sup>. Such arrangement must therefore always leave open the possibility of other States receiving similar cabotage rights. The implication then is that, States may conclude agreements awarding cabotage rights to other States so long as the agreements do not specify that these rights are exclusive. Following this line of argument, contracting States are allowed to tacitly conclude agreement to this effect. However, if this school of thought is followed the implication is obvious that cabotage rights can easily be granted on a discriminatory basis<sup>36</sup>. The issue is that, so long as the agreement granting cabotage rights to a particular State does not contain an express provision precluding the grant of such rights to another State, an excluded State will have upheaval task proving that the exclusivity restriction embedded in article 7 of Chicago Convention has been violated. A legal scholar has therefore noted in this respect that “the burden placed upon a complainant State, of proving that certain cabotage rights were given on the basis of 'exclusivity,' would in most, if not all, instances be insuperable.”<sup>37</sup>

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<sup>31</sup>*Ibid.*

<sup>32</sup>This strict interpretation of the wordings of the second sentence seems to agree with the United States stance at the Convention. A United States draft proposal submitted as part of Document 19 postulated: (7) In order to prevent discriminatory practices and to assure equality of treatment, it is provided that: (a) Each State shall refrain from granting exclusive rights of air commerce to any nation or its air transport enterprises, or from making any agreement excluding or discriminating against the air-craft of any signatory State, and will terminate any existing exclusive or discriminatory rights as soon as such action can be taken under presently outstanding agreements. See *Proceedings of the International Civil Aviation Conference, Op Cit.* 1269.

<sup>33</sup>G. S. Robinson, *Op Cit.*

<sup>34</sup>*Ibid.*

<sup>35</sup>W. M. Sheehan, ‘Air Cabotage and the Chicago Convention’, (1950) *63 HARV. L. Rev.* 1157, 1157.

<sup>36</sup>The Scandinavian States prefer and have adopted the flexible interpretation of article 7 of the Convention. In agreements granting cabotage rights on reciprocity basis between them, they employ an additional safeguard by including a safety clause which terminates the agreement in the event third states demand cabotage rights by virtue of article 7. See *ITA Study, Op Cit.* 14.

<sup>37</sup>G. S. Robinson, *Op Cit.* p. 562.

It is arguable from the above analysis that what really matters in this version of the construction of Article 7 is the letters or wordings of the agreement granting cabotage rights as against the eventual attitude of the granting State towards complainant third State. The issue being that once the arrangement has tactically avoided the inclusion of an expression precluding another State from enjoying the same cabotage rights awarded to one State, no contracting State may have any right of actions against the grantor even though in practice it was denied this rights. This indeed is hypocritical though in our minds, it is still improper and contrary to nationalistic doctrines to impose a duty on States to accept and award cabotage rights to every contracting States demanding for such rights simply because it has granted to another State.

### 5. Types of Cabotage Regime

In a broad sense, two types of cabotage law or policy exist. Generally, different States adopt and apply any of these policies depending on “their objectives, national interests, local situations”<sup>38</sup> as well as the perceived security implications of such cabotage regime to the State in question.

#### Strict Cabotage Regime

In a strict maritime Cabotage regime, the presence of foreign vessels and personnel are strictly prohibited by the law. Such regime usually stipulates that domestic coastal trades are restricted to ships built, owned, crewed and operated by citizens of the country adopting the regime. A good example of a regime of strict Cabotage laws is the one found in the United States of America by a combination of some of its shipping laws of which The Merchant Marine Act of 1920 also known as Jones Act stands out<sup>39</sup>. The law under the Act regulates maritime commerce in the United States waters and between United States ports. Section 27 of the Act deals with cabotage and provides to the effect that “all goods transported by water between the United States ports be carried on the United States flag ships, constructed in the United States, owned by the United States citizens, and crewed by the United States citizens and the United States permanent residents”. Also, the American Passenger Vessel Service Act of 1886 was a protectionist principle relating to cabotage. The Act provides that “No foreign vessels shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of \$200 (now \$300) for each passenger so transported and landed”<sup>40</sup>. As a result therefore, no vessels are permitted to engage in the coastal trading in the United States territorial seas except they are qualified under the Act that is to say they are U.S.-built, owned and documented.

Diligent study of these and other cabotage laws of the United States reveals that cabotage rights are exclusively reserved for the US citizens and shipping companies. Research shows however that the United States is not alone in this strict cabotage policy which tends to reserve waterborne commerce only to its nationals and domestic shipping companies. Research reveals that about 54 nations have cabotage laws that, like the Jones Act, are expressly meant to promote a national-flag fleet<sup>41</sup>. These laws as we noted earlier are deliberately designed just to protect the country’s domestic maritime industry from foreign participation, domination or control for the benefit of its nationals and its domestic

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<sup>38</sup> *Ibid.*

<sup>39</sup>This also seem to be the intendment and purport of Sections 3 and 4 of the Coastal and Inland Shipping (Cabotage) Act, Cap. C LFN 2004 notwithstanding the waiver provisions contained in sections 9-11 therein. But for further disquisition on this restrictive policy, See, O. Ohio, “Restrictions of Vessels for Domestic Trade Under The Nigerian Cabotage Act: Extent And Scope” in E. Epiphany and O.O Eruaga, *Cabotage Law in Nigeria, op.cit*, pp. 86-106

<sup>40</sup> <[https://en.wikipedia.org/wiki/Passenger\\_Vessel\\_Services\\_Act\\_of\\_1886](https://en.wikipedia.org/wiki/Passenger_Vessel_Services_Act_of_1886)>, last visited on June 13, 2017.

<sup>41</sup>G. Babatunde, *Op Cit*, p. 9.

shipping industry<sup>42</sup>. Above all, strict cabotage regime is employed by countries for security purposes. Strict cabotage a times operates as a country's defence mechanism against terrorism. A good example is found in the US Merchant Marine Act of 1936 which allows the government to bar foreign vessels from operating in the US waterways. One of the declared purposes of this Act as contained in its preamble is "to aid in the national defense".

### **Relaxed or liberalized cabotage regime**

A country is said to practise relaxed or liberalized cabotage if its cabotage law does not strictly enforce or require strict compliance with those elements of restrictions mentioned in strict cabotage. In a relaxed cabotage regime, foreigners are granted some measure of participation in the ownership or building of vessels and their operations in the State's maritime industry. Such cabotage regime allows to a certain measure, foreign-flagged vessels' participation in a State's coastal trading<sup>43</sup>. This has been the trend for a decade now as several, especially Asian countries,<sup>44</sup> with the objective of making their cabotage laws more relaxed to accommodate foreign involvement in their coastal trade, have carried out certain reforms of their cabotage policies to reflect this objective.

The first instance here is the China's ease of its cabotage regulations in 2003 to allow foreign lines to ship empty containers between ports in its coast. Empty containers were considered as domestic cargoes and therefore subject to cabotage regulations. However, the amendments only applied to shipping companies of countries that have signed relevant bilateral agreements with China<sup>45</sup>. In the same year, the Korean government abolished its trans-shipment fees and relaxed cabotage regulations. The reason behind the relaxation was to make Korean ports more attractive as a northern hub for container traffic in Asia<sup>46</sup>. Research reveals that within a year of the relaxation, six foreign steamship lines had entered the market, providing competition to local feeder-operators and thereby reducing rates for shippers<sup>47</sup>.

For Brazil, in its relaxation policy, foreigners and foreign-flagged vessels can have rights of cabotage in its ports but only port support and maritime support navigation when such foreign-flagged vessels are chartered by a Brazilian shipping company, and provided that there are no Brazilian-flagged vessels available. Foreigners would also enjoy rights of cabotage in Brazilian ports if it is a matter of public interest, or the foreign vessel is being chartered as a substitute for a vessel owned by the Brazilian shipping company under construction at a Brazilian shipyard<sup>48</sup>.

In New Zealand, before 1994, domestic marine movement was restricted to New Zealand flag vessels unless no local vessel was available, in which case a foreign vessel could apply to the Ministry of Transport for a permit to move a specific cargo<sup>49</sup>. A more relaxed rule was introduced by the New Zealand Government in the Maritime Transport Act of 1994. Section 198 of the Act provides *inter alia* that when foreign vessels passing through New Zealand waters while on a continuous journey from a foreign port to another foreign port, and is stopping in New Zealand to load or unload international

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<sup>42</sup>E. O. Omuojine, 'Nigerian Cabotage: Its Policy, Problems and Prospects' <<https://www.scribd.com/doc/.../Nigerian-Cabotage-It-s-Policy-Problems-Prospects>>. Last visited on June 13, 2017.

<sup>43</sup> G. Babatunde, *Op Cit*, p. 9.

<sup>44</sup>Some among the Countries are: China, Korea, India, Brazil, New Zealand, Australia, and Malaysia.

<sup>45</sup>D Anderson and J Monteiro, 'Domestic Water Transportation before and after Deregulation' (2010) p.6 <[Ctrf.Ca/Wp.../07/34andersonmonteirodomesticwatertransportation.Pdf](#)>. Last visited on June 14, 2017.

<sup>46</sup> G. Babatunde, *Op Cit*, p. 10.

<sup>47</sup> D Anderson and J Monteiro, *Op, Cit*.

<sup>48</sup> G. Babatunde, *Op Cit*.

<sup>49</sup> *Ibid*.

cargo, it can engage in carriage of coastal cargo so far this is incidental in relation to the carriage of the international cargo<sup>50</sup>. The implication is that when foreign vessels have arrived in New Zealand to discharge or load international cargo or passengers these vessels may engage in the coastal trading for an indefinite period. The New Zealand government however eventually decided to levy tax on coastal containers moved by foreign-flag vessels as a result of pressure from local ship-owners and labour unions demanding reintroduction of cabotage<sup>51</sup>.

In Australia, all including foreign vessels can engage in cabotage provided they are duly licensed. However, foreign vessels can only qualify for licensing, if they do not receive a subsidy from a foreign government. Additionally, they must meet all requirements of customs and immigration legislation for both the ship and the crew<sup>52</sup>. The same goes for Malaysia where the cabotage laws permit foreign registered vessels to be licensed though temporarily, by the Domestic Shipping Licensing Board (DSLMB) to partake in coastal trading where there are wants of Malaysian vessels<sup>53</sup>. Sequel to complaints by East Malaysian traders about the high rate of container freight from peninsular Malaysia, the government of Malaysia initiated a policy program to overhaul the entire marine transport system. This led to the relaxation of cabotage policy specifically in 2009 wherein foreign vessels are now permitted to carry “containerised trans-shipment” goods between ports in the peninsula and east Malaysia<sup>54</sup>.

For Nigeria, it practices what has been described as a compromise between strict and relaxed cabotage. This belief must have come from the fact that foreigners are allowed certain level of freedom of involvement in Nigerian coastal trade due mainly to non-availability of required sophisticated vessels and skilled manpower in the Nigerian maritime industry. However, from the provisions of sections 3 to 6 of the Nigerian Coastal and Inland Shipping (Cabotage Act) 2003, one can safely argue that the country practices strict cabotage. Section 3 provides as follow:

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.

Section 4 provides that:

- (1) 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.
- (2) Nothing in this Section shall preclude a foreign vessel from rendering assistance to persons, vessels or aircraft in danger or distress in Nigerian waters.

Section 5 goes on to provide that:

A vessel, tug or barge of whatever type other than a vessel, tug and barge whose beneficial ownership resides wholly in a Nigeria 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.

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<sup>50</sup> Maritime Transport Act 1994-New Zealand Legislation. Sec.198 (c) (i) & (ii).

<sup>51</sup> G. Babatunde, *Op Cit*.

<sup>52</sup> *Ibid*.

<sup>53</sup> E. O. Omuojine, *Op, Cit, p. 6*.

<sup>54</sup> G. Babatunde, *Op Cit. p. 11*.

Section 6 mandates that:

A vessel of whatever type or size shall not engage in domestic trading in the inland waters of Nigeria except a vessel that is wholly owned by Nigerian citizens.

A close look at the above provisions shows that in letter, Nigeria practises more of strict cabotage. However, implementation of Nigerian's cabotage law poses a great deal of challenge due to a number of factors<sup>55</sup>. It seems that Nigeria is not technically prepared yet for the implementation of its cabotage law. The country's indigenous shipping industry is as yet unable to lift cabotage cargoes in its coastal waters due to lack or inadequate seaworthy vessels needed for the task and low expertise and proficiency in the industry. This would require that foreigners and foreign vessels are always co-opted in Nigeria's coastal trade.

### **6. Cabotage Rights and its Implications on States' Security.**

Cabotage law generally empowers navigation and trading within a nation's coasts or from port to port within a nation, which are reserved exclusively for and carried on by its national flagships and nationals<sup>56</sup>. Different nations therefore enact cabotage law principally as a protective device to safeguard local shipping interests in the carriage of locally generated cargo. The law restricts or entirely excludes foreign vessels and shipping companies from participating in the carriage of cargo and passengers between two ports belonging to the concerned country. A nation's cabotage law is therefore designed to favour its citizens and domestic shipping companies as against foreigners within the coastal waters of that country. Cabotage principle whether in strict or relaxed form is also designed for the purpose of economic protectionism and national security of the concerned State.

Economically, cabotage principle encourages and ensures the development of domestic shipping through the establishment and development of the national merchant fleet thereby boosting economy of the State. Above economic reasons, States adopt cabotage, especially strict cabotage for national security purposes. This is because involvement of foreign vessels and personnel in the State's coastal trading might not only generate unhealthy competition in the country's coastal trading and economy but can increase cases of terrorism in the State. America for instance, is conscious of this in choosing which form of cabotage regime to operate. This informs the reason why the Merchant Marine Act of 1920 (Jones Act) has been lauded as being vital to America's national security and plays a vital role in safeguarding America's borders<sup>57</sup>. It has been observed that the United States' merchant marine plays an integral national security role both in times of war and peace<sup>58</sup> and is critically important in the protection of the national security. In two recent analyses carried out by respected U. S. homeland security voices, both concluded "that America is safer and more resilient because of a strong domestic maritime industry and the Merchant Marine Act of 1920, Section 27 of which is commonly known as the (Jones Act)"<sup>59</sup>.

Just in line with this reasoning, former U.S. Senator Slade Gorton<sup>60</sup> has argued *inter alia* that:

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<sup>55</sup> *Ibid*, pp. 50-52.

<sup>56</sup> G Babatunde, *Op Cit*, 8.

<sup>57</sup>Lexington Institute, *Op, Cit*. See also J H Weakley, 'The Importance of Jones Act Fleet to U.S. Homeland Security', < [www.maritime-executive.com/.../the-importance-of-the-jones-act-fleet-to-us-homelan...](http://www.maritime-executive.com/.../the-importance-of-the-jones-act-fleet-to-us-homelan...)> last visited on 16 June, 2017.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup>America's former Senator and Attorney General and a member of the National Commission on Terrorist Attacks on the United States, otherwise known as the "9/11 Commission.

Any discussion about border security in the context of the presidential election or otherwise should look no further than the Jones Act and the importance of U.S. maritime to our homeland security.... that too often the role of maritime is ignored as commentators traditionally focus on the economic and national security benefits of a strong American fleet. To me, however, the most vital benefit of the Jones Act is the law's critical role in protecting America's borders and homeland security<sup>61</sup>.

Gorton finds the security profile of the Jones Act fleet "far more reassuring," given that American crews and operators are required to pass serious background checks and carry U.S. Coast Guard-issued licenses and credentials. He went further to call American vessel owners and crews to fully partner with American law enforcement agencies as according to him, domestic fleet helps "plug a porous border". Gorton argued that the benefit of the Jones Act is "too often overlooked and should not be underestimated"<sup>62</sup>.

In the same vein, The Lexington Institute has maintained in its June 2016 study that "the Jones Act plays a significant role in strengthening U.S. border security and helping to prevent international terrorism". Also, a study by the Government Accountability Office (GAO) carried out in 2011 found that approximately 5 million maritime crew influxes the United States each year, and the overwhelming majority of seamen entering U.S. ports are foreigners. Although there is no known exact estimate of foreign seamen involvement in terrorist attacks and no clear evidence of extremists infiltrating the United States on seafarer visas, the possibility of illegal entry of foreigner through a United States seaport by taking advantage of maritime industry practices is considered a key concern.

### **7. Strict Cabotage Regime and its Impacts on States' Economy**

Findings have revealed that strict cabotage regime does no good to the national economy even to those advanced nations such as the United States of America. For instance, the American Merchant Marine Act of 1920 otherwise called Jones Act which reserves domestic shipping for vessels that are built, owned, crewed, and flagged in the United States has been severely criticized by several authors on the account that the Act rather has negative effects on the economy<sup>63</sup>. It has been stated that the American cabotage policy under the Jones Act which requires and emphasises that for ships to engage in cabotage in American coast they must be built, owned, crewed, and registered in the United States bears much less meaning in American economy today in the face of globalization, extensive offshore outsourcing and the steady rise of flags of convenience which implies that the Act 'deprives users of domestic routes from access to the lower-cost foreign-flag vessels that now dominate world shipping industry<sup>64</sup>. This Act by its provision excludes foreign ships from supplying services on domestic routes. With the exclusion of these potential suppliers, the act thereby prevents American shippers from hiring what might be their preferred suppliers. This law has been criticized as violating the principle of comparative advantage by which Americans benefit from importing goods or services if hiring foreigners have relatively lower costs<sup>65</sup>. Reducing the supply of possible shipping services will undoubtedly increase cost of hiring the vessels. The crux of the argument is that if foreigners or foreign-flagged vessels are granted cabotage rights, this would remove the monopolistic power of the American flagged vessels, beat down the price of hiring ships and eventually impact positively on the national economy. Research has revealed however that liberalization is a sensitive issue as protected workers seem always opposed to such clamour. In the discussion of cabotage laws in the recent Comprehensive Economic

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<sup>61</sup> J H Weakley, *Op, Cit.*

<sup>62</sup> *Ibid.*

<sup>63</sup> T Grennes, 'An Economic Analysis of the Jones Act' (2017) *Mercatus Research, Mercatus Center at George Mason University*, 45.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

and Trade Agreement negotiations between Canada and the European Union, it was gathered that the Seafarers' International Union of Canada strongly objected to any weakening of Canada's cabotage laws<sup>66</sup>.

If advanced State like the United States could feel the negative impacts of strict cabotage policy on its economy, then, developing nations like Nigeria should not venture it. From study, we can conclude midway here that the best form of cabotage even for developed entity like the United States is a relaxed/liberalized cabotage regime although the level of such liberalization may vary. Several States actually have restrictions on the involvement of foreigners on the domestic shipping. Both Japan and China are known to have strict cabotage law<sup>67</sup>. However, the United States in particular is regarded as having the most restrictive cabotage policies in the world<sup>68</sup>.

## **8. Conclusion**

Individual nations enact cabotage laws generally as protectionist tool for their economy as such laws are geared toward warding off undue foreign competition in the nation's coastal trading. By so doing, if the country is well equipped in terms of human skill and expertise with adequate sophisticated vessels to carry out their maritime tasks independent of foreign aid, it will help to build a viable maritime industry, create job opportunities for the citizens and will eventually result in a very stable economy. In this work however, we have found out that the form of cabotage policy a country adopts would largely depend on its economic, political and security concern. It means therefore that beyond economic reasons there are other concerns which determine a country's choice of cabotage regime to adopt such as security issue as in the United States of America. The United States claims that their strict cabotage regime, beyond economic purpose, is aimed at averting international terrorism.

It is already trite from our findings in this work that strict cabotage, especially in maritime industry is not favourable even to the viable economy like that of the U.S. Even if vessels built, assembled, owned and operated by Americans as required by the cabotage law, are adequate to cope with the domestic shipping demands, that would not be without some 'side effects' to the American economy. The issue is, with the emergence of 'flags of convenience' in the world shipping industry, foreign flagged ships are hired at cheaper rates compared to American flagged ships, yet users of domestic routes are constrained by the law to hire American flagged ships at exorbitant rates. This will in turn reduce the level of domestic shipping culminating in reduction in the national net income. It has been found more over that, unlike the claims of some authors, strict cabotage is not a panacea to international terrorism. No direct links have been established between liberalized cabotage (where some level of foreign participation in domestic shipping is allowed) with international terrorism. Where a country adopts relaxed cabotage, stiff method of granting foreigners and foreign vessels' involvement in coastal trading can be put in place to prevent any possibility of terrorism resulting from grant of cabotage rights.

We suggest therefore that liberalized/relaxed maritime cabotage is the best cabotage regime and recommend that States to adopt same even though some groups which gain from strict cabotage law may oppose to such policy. The aim would be to produce viable economy through economy-friendly cabotage principle that would better the lots of indigenes and world habitants at large.

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<sup>66</sup>L Ryan, 'CETA and Shortsea Shipping', < [www.canadianshipper.com/features/ceta-shortsea-shipping](http://www.canadianshipper.com/features/ceta-shortsea-shipping) > last visited on June 20, 2017.

<sup>67</sup>K Bryng and M Jonassen, "Maritime Cabotage—New Guidelines from the European Commission," April 22, 2014. < [svw.no/.../maritime-cabotage---new-guidelines-from-the-european-commission.pdf](http://svw.no/.../maritime-cabotage---new-guidelines-from-the-european-commission.pdf) > last visted on June 20, 2017.

<sup>68</sup>F Bertho, 'Maritime Transport in Australia and the United States', <[https://ideas.repec.org/h/wsi/wschap/9789814504690\\_0008.html](https://ideas.repec.org/h/wsi/wschap/9789814504690_0008.html)>last visited on June 20, 2017.