AN ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE REGULATION OF TRANSPORTATION OF PERSONS AND MERCHANDISE UNDER NIGERIAN MARITIME LAW

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OCTOBER 2017

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P14LACL8002

A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A MASTER IN LAWS DEGREE- LL.M

DEPARTMENT OF PUBLIC LAW,
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ZARIA, NIGERIA

OCTOBER 2017

DECLARATION

I declare that this Dissertationtitled: "*AN ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE REGULATION OF TRANSPORTATION OF PERSONS AND MERCHANDISE UNDER NIGERIAN MARITIME LAW*" has been carried out by me in the Department of Public Law. The information derived from primary and secondary literature sources have been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other Institution.

Shekwonya GALADIMA _____ _____

Signature **Date**

CERTIFICATION

This Dissertationtitled "*AN ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE REGULATION OF TRANSPORTATION OF PERSONS AND MERCHANDISE UNDER NIGERIAN MARITIME LAW*" by Shekwonya GALADIMA meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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ACKNOWLEDGMENTS

I thank the Almighty God for His infinite grace and enablement to start and complete this research. I sincerely appreciate my amiable and erudite supervisors: Dr. S.A. Apinega and Dr. S.B Magashi for guiding me and painstakingly going through this work despite their busy schedules, to ensure that it conforms to the guidelines of the School of Postgraduate Studies and enhance the research in terms of analysis and quality.

I also appreciate Prof. M.T Ladan and Prof. D.C John for taking time off their busy schedules to chair my seminar papers and make invaluable contributions that were necessary for this research. Special thanks goes to my parents: Dr. James I. Galadima, Mrs. Joy O. Galadima and siblings for their prayers and support throughout the duration of this research.

I also appreciateIfeanyichukwu E. IgweEsq for his invaluable contribution to this research.

I also appreciate Mummy Sheriff who patiently made corrections as many times as necessary at reduced cost and wonderfully restructured the work on computer when corrections were made.

It is my earnest prayer that God bless and reward you all and others I have not mentioned.

DEDICATION

This Dissertation is dedicated to Almighty God, my parents and siblings.

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LIST OF ABBREVIATIONS

ABS	-	American Bureau of Shipping
AFS	-	Anti- fouling System
AIS	-	Automatic Ship Identification System
ARPA	-	Automatic Radar Plotting Aids
BV	-	Bureau Veritas
BWM	-	Ballast Water Management
CIF	-Cost Insurance and Freight	
COLREG	-	Convention on the International Regulation for Preventing Collisions at Sea
COW	-	Crude Oil Washing
CVFF	-	Cabotage Vessel Financing Fund
DNV	-	Det Norske Veritas
DWT	-	Dead weight Tonnage
EEZ	-	Exclusive Economic Zone
EEDI	-	Energy Efficiency Design Index
EU	-	European Union
FOB	-	Free on Board
FOC	-	Flag of Convenience
FPSO	-	Floating Production Storage and Offloading
FSO	-	Floating Storage and Offloading
GAT	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariffs and Trade

GMDSS - Global Maritime Distress and Safety System

IACS - International Association of Classification Societies

IAPP - International Air Pollution Prevention

IBC - International Bulk Chemical

IGC - International Gas Carrier

ILO - International Labour Organization

IMO - International Maritime Organization

INF - Irradiated Nuclear Fuel

INSB - International Naval Survey Bureau

IOPP - International Oil Pollution Prevention

ISMC - International Safety Management Code

ISM - International Safety Management

ISPS - International Ship and Port Facility Security Code

IRS - International Register of Shipping

IT - Information Technology

LLDCs - Land Locked Developing Countries

LR - Lloyds Register

LSA - Life Saving Appliances

MEPC - Marina Environment Protection Committee

MET - Maritime Education and Training

MLC - Maritime Labour Convention

MOU - Memorandum of Understanding

MSA - Merchant Shipping Act

MTC- Maritime Transport Committee

NGMTS - Negotiating Group on Maritime Transport Services

NIWA- National Inland Waterways Authority

NLS- Noxious Liquid Substance

NMA- National Maritime Authority

NIMASA - Nigeria Maritime Administration and Safety Agency

NPA - Nigeria Ports Authority

NSC - Nigeria Shippers' Council

OECD - Organization for Economic Co-operation and Development

ODMACS - Oil Discharge Monitoring and Control System

OPA - Oil Pollution Act

PPM - Parts Per Million

PPP - Public Private Partnership

RFF - Registered Freight Forwarder

SEEMP- Ship Energy Efficiency Management Plan

SIDs - Small Island Developing States

TEU - Twenty foot Equivalent Unit

UN - United Nations

UNCLOS - United Nations Convention on the Law of the Sea

UNCTAD - United Nations Conference on Trade and Development

VDR - Voyage Data Recorders

WTO - World Trade Organization

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ABSTRACT

Maritime transportation operations and services consist of three types of activities: (a) international maritime transport (b) maritime auxiliary services (c) port services. These services and operations require one form of regulation or the other. Overall, these regulations and practices can be classified under two broad headings: (i) regulations related to commercial maritime operations and practices (ii) regulations related to safety and the environment. The regulation of maritime transportation in Nigeria is carried out by certain institutions and agencies acting under and with a large spectrum of laws, rules and regulations most of which are in furtherance of their obligations under international regulatory legal regime. The legal regime (rules or regulations) provide the basis and tools with which the institutions perform their regulatory functions. The incidence, activities and functions of these institutions and the legal rules and regulations with which they perform their mandate constitute the legal and institutional framework for the regulation of maritime transportation under Nigerian maritime law. The objective of the research is to analyze the regulatory maritime law regime in Nigeria and the institutional framework under which the regulatory regime operates to evaluate the adequacy of Nigerian maritime regulatory law regime with regardto: regulations related to commercial operations, regulations related to safety and the maritime environment. The research methodology adopted is the doctrinal method of research, which relied principally on international conventions, statutes, subsidiary legislation, articles and journals. The research found that for commercial maritime operations and services, the rules and regulations in Nigeria are not competitive and are unsustainable in modern global shipping environment. With regard to safety and the environment, the research found that maritime casualties are caused primarily by human error as a result of relaxed enforcement of rules and monitoring and in some cases, non- compliance with the rules and regulations. With respect to the institutional framework, the research found that the size and service delivery capacity of the Nigeria flag and port state is not sustainable.Based on these findings, the research recommended that for the regulation of commercial maritime operations and services to be more effective, section 18 of the Merchant Shipping Act, 2007 should be amended to introduce a hybrid shipping registry and an international register for the purpose of increasing the revenue base of Nigeria and saving the ship registry from further dwindling. For safety and the environment regulation, the human error problem can be addressed by implementing a globally standardized maritime education and training programme, coupled with an up-to-date ratification, compliance and strict enforcement of international safety regulation in Nigeria. Furthermore, the size of the administration of the Nigeria flag state can be enlarged to effectively cater for ship registration (to significantly increase the nation's merchant fleet), properly administer maritime education and training and ensure the welfare of seafarers, while servicing the interests of international clientele.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The Nigerian Maritime Administration and Safety Agency (NIMASA) and National Inland Waterways Authority (NIWA) are regulatory authorities that have a duty to ensure that maritime transport activities are conducted in an economically safe manner, without placing life and health at risk and without compromising the economic impact of the maritime sector to the Nigerian economy and its people. In addition, public regulation of maritime transport has gradually taken on a new dimension. While it is important to avoid accidents on board vessels, as well as groundings and collisions, importance is also attached to ensuring that damage is not caused to the environment, through ship – source pollution, dumping of waste, discharge of oil from cargo or bunker tanks. Although, ships still enjoy freedom of navigation in waters where the regime applies, they do not have any license for instance to pollute[1].

The functions of the public institutions mentioned above should be the protection of the public interest, while that of the private entities as against public entities involved in some form of regulation such as classification societies should primarily be the protection of the physical values associated with shipping.[2] In practice, however, these two functions tend to overlap.[3] It is advantageous for both the crew and the hull insurer if, for example, fire hazards on board a ship are reduced or eliminated. The dividing line between the public and private functions is also blurred by the classification societies' undertaking or performance of activities which really fall within the public institutions' responsibility.

[1] Edgar G. (1981) *Maritime Transport: The Evolution of International Maritime Policy and Shipping Law*, Lexington Books, p. 288.
[2]Falkanger T, Hans J.B and Brautaset L(2008) *Scandinavian Maritime Law*, 2nd edition Universities Digest, p80
[3]FalkangerT, Hans J.B andBrautaset, L (2008) *Scandinavian Maritime Law*, 2nd edition Universities Digest, pp 79-81

First, it must be stated that "Maritime Transport, and the law and policy within which it operates, must be seen as very similar to other international undertakings operating on a transnational scale".[4]Hence, the shipping industry is controlled by a web of national and international regulations and practices. Overall, these regulations and practices can be classified under two broad headings[5] : (i) regulations related to commercial operations and practices and (ii) regulations related to safety and the environment.

With regard to regulations related to commercial operations and practices, the analysis of the legal framework, which is the subject matter of this research is centered on the provisions of the following legal instruments: The Merchant Shipping Act[6], The National Shipping Policy Act[7], Coastal and Inland Shipping (Cabotage) Act[8], the Nigeria Maritime Administration and Safety Agency Act[9], Nigeria Shippers Council Act[10] , Nigeria Ports Authority Act,[11] and the Council for the Regulation of Freight Forwarders Act[12]. These legislations tend to regulate maritime commercial services and operations within the maritime transport sector of the Nigerian economy. The institutions created by these legislations are the primary enforcers of the regulatory provisions of the Acts. The provisions of these legal instruments take into consideration the commitment of Nigeria to conventions which Nigeria is a party such as those of United Nations Conference on Trade and Development (UNCTAD) and World Trade Organization (WTO). With regard to regulations related to safety and environment, the legal framework considered in this research includes: Merchant Shipping (Safe Manning, Hours of

[4] ibid
[5]Organization for Economic Co-operation and Development (2001): *Regulatory Issues in International Maritime Transport.* Paris : OECD
[6] No 27 of 2007
[7] Cap N75 LFN, 2004 now repealed by NIMASA Act No 17 of 2007
[8] No 5 of 2003
[9]No 17 of 2007
[10] Cap N133 LFN 2004
[11] Cap N126 LFN 2004
[12]No 59 of 2007

work and Watch keeping) Regulations S I, 11 of 2011 and (Training and Certification of Seafarers) Regulations SI, 12 of 2001 which domesticated the STCW Convention in Nigeria under the powers encapsulated in section 408 of the Merchant International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act, 2004[13]. By virtue of the International Convention for the Prevention of Pollution from Ships 1973 and 1978 Protocols (Ratification and Enforcement) Act, 2007[14], the International Convention for the Prevention of Pollution from Ships 1973 and 1978 - MARPOL 73/78 became domesticated and applicable to Nigeria. The analysis of the legal framework for regulating maritime transportation in Nigeria with respect to regulations related to safety and environment will, therefore, be centered on the following Conventions: International Convention for Safety of Life at Sea (SOLAS)[15], Standards of Training, Certification and Watch keeping (STCW)[16], Convention for the International Regulation of Collisions at Sea (COLREG)[17] and International Convention for the Prevention of Pollution from Ships73/78 (MARPOL)[18].

Maritime Transport law has always been categorized into two areas: Private and public or regulatory. The private aspect of maritime law deals mainly with rights, liability and compensation, which is the liability or private law regime of maritime transport law. The regulatory regime tries to control or regulate how maritime transport is conducted to ensure safety of lives and property and to ensure that maritime transport is done in a safest and clean marine environment. If maritime transportation is not regulated, there will be pollution of the marine environment which in itself will pose a threat to the safety of persons and merchandise.

[13] Cap M7 LFN, 2004
[14] No.54 of the International Convention for the Prevention of Pollution from Ships 73/78 (Ratification and Enforcement) Act 2007
[15] No. 5 of the International Convention on the Safety of Life at Sea Act 2007
[16] No.7 of the International Convention on Standards of Training, Certification and Watch keeping Act 2007
[17] No.9 of the International Regulation for the Prevention of Collisions of Ships Act 2007
[18] Op.cit fn 14

Regulatory maritime law deals mainly with regulation regarding the training and competence of seafarers and control of ship source pollution to ensure safety of life at sea. SOLAS, STCW, and MARPOL Conventions are, therefore, interconnected and they are three amongst the main IMO conventions. It should be noted that the branch of Maritime Law known as regulatory maritime law which is the subject of this research is a convention based subject and the task of seeing to the formulation, adoption and enforcement of these standards setting conventions and regulations falls on the shoulders of International Maritime Organization (IMO). NIMASA as an institution or agency of the Federal Republic of Nigeria acts or functions as IMO designated Authority in Nigeria for the regulation and enforcement of IMO domesticated Conventions and Regulations. IMO audit delegation audits the affairs of the Nigeria Maritime Administration and Safety Agency (NIMASA). One of the mandates of NIMASA under section 22, Part VI of NIMASA Act , 2007[19] is to " establish the procedure for the implementation of conventions of International Maritime Organization and International Labour Organization and other international conventions to which the Federal Republic of Nigeria is a party on maritime safety and security, maritime labour, commercial shipping and for the implementation of codes, resolutions and circulars arising therefrom" and to " establish maritime training and safety standards and to control and prevent marine pollution". The national framework for the regulation of maritime transport depends largely on the international framework. Therefore, knowledge of the international element in maritime transportation of persons and merchandise is, therefore, indispensable.

Maritime transport is inherently international in character and vessels on most voyages must operate under the regulatory requirements of many states. The rules and regulations are therefore made by the States, with the International Maritime Organization(IMO) providing the

[19] No. 17 of 2007

platform and the machinery. Without this platform, the international adoption of these regulations would be extremely difficult and perhaps even impossible. IMO is, therefore, a specialized agency of the United Nations. It has a 'regulatory function' in a well-defined area of activity but its work has significant implications in many areas of interest to the United Nations as a whole. The Organization provides a mechanism through which Governments are enabled to co-ordinate their procedures for the regulation of shipping and related maritime activities.

IMO is essentially a standard-setting Organization. The Convention establishing the Organization (the IMO Convention) states that its principal objective is 'the promotion of co-operation among Governments in the field of governmental regulation and practices relating to technical (and related administrative and legal) matters of all kinds affecting shipping engaged in International trade'.[20]

The establishment of IMO resulted from the acceptance by Governments and the international maritime community of general acceptance of two basic facts. The first of these is that shipping is of major importance to the trade of individual nations and of the world in general and, accordingly, that the regulation of maritime transport must necessarily proceed from an international level and perspective[21].

The second of the basic facts accepted by Governments in establishing IMO is that shipping is essentially international in character and it can, therefore, be effectively regulated only through co-operation at the international level between all the Governments which are

[20] Article 1 (a) of the Convention on Inter – governmental Maritime Consultative Organization, adopted on 6 March 1948, entered into force on 17th March 1958. The name of the organization was changed to International Maritime Organization in accordance with an amendment to the Convention which entered into force on 22nd May 1982

[21] Mukherjee P.K and Mark B. (2013) *Farthing on International Shipping* 4th edition, Springer, London pp.29, 175-176

concerned with shipping operations or services, or which are affected by such operations, i.e. between those which provide shipping services as well as those which use these services[22].

The major purpose of IMO is to provide a suitable machinery through which these Governments may discuss and agree on the necessary rules to promote safe and efficient shipping in order to safeguard the ship, its crew, passengers and cargoes and to prevent pollution of the seas from accidents or negligent handling which may result in the discharge of harmful substances into the sea. Members of IMO agree among themselves to take the necessary appropriate measures to ensure that ships flying their flags, or persons operating within their jurisdiction, will follow the rules and regulations developed in IMO. For this purpose, the States utilize the legal and institutional frameworks and powers available to them, either under the respective constitutional systems or under international treaties and agreements between them and other States.

The major basis of IMO's work is that shipping and the activities related to it, should be effectively regulated by the States under whose authority or within whose jurisdiction such activities are undertaken. A ship operates under the authority of the States in which it is registered. A ship registered in a State is entitled to fly the flag of that State, which is referred to as the "flag State"[23]. The flag State has the primary responsibility for regulating the operations of the ship, regardless of where the ship happens to be at any particular time[24].

A ship must of necessity, move from port to port and, therefore, from State to State. Thus, it will on many occasions be in the ports or within the areas of jurisdiction of States other than the flag State. At those times, the ship also becomes subject to regulation by the States in whose ports or jurisdiction it may be on each occasion. The right of such a State over the ship is,

[22]ibid
[23]Articles 91-94 of the United Nations Convention on the Law of the Sea, 1982
[24]ibid

however, subject to certain conditions provided for in international treaties or in general international law. The State in whose port or jurisdiction a foreign ship happens to be is referred to as the "port State" or the "coastal State".

It is now generally agreed that effective regulation of shipping operations involves a combination of measures taken by both the flag State and the port or coastal State. It is also agreed that this regulation can be effective and fair only if it is undertaken by reference to well-considered and generally agreed international standards and regulations applicable uniformly to all ships and to all shipping operations, regardless of where they may take place[25].

International standards are needed first, because safety standards should be applied globally. In shipping, safety is not divisible. A ship which does not follow the prescribed rules of navigation can cause a collision which may damage the innocent ship or cause serious harm or danger to persons and cargoes on board both ships: a ship which is badly constructed, poorly equipped or insufficiently manned could run into difficulties at sea and require assistance from other ships. This could put those other ships in danger or, at least, cause them unnecessary delay or inconvenience. A sub-standard or carelessly managed or operated tanker could cause pollution damage far from the shores of a State of registry or the State from which the oil it is carrying originated or in which it is to be off-loaded. It is, therefore, essential that the standards and regulations which are considered to be necessary for safety and pollution prevention should be applicable and applied to all ships for which such standards are deemed necessary.

The second reason for international regulations and standards is that they help to avoid unfair advantage to ships of different States. If some States were to apply more stringent standards while others were allowed to apply lower standards or no standards at all, the ships of

[25]Op.cit

the former would be at a commercial disadvantage since they would have to incur greater expense in meeting the higher standards.

For these reasons, the international community has agreed that international co-operation for the regulation of shipping should be pursued through the establishment of uniform international regulations and standards[26]. Once these are adopted, States will thereafter implement them by regulating the shipping and related activities which are undertaken under their authority or within their respective jurisdictions.

The major institutional framework under which the regulations related to Maritime commercial operations and practices (including Cabotage operations)and safety and environment are enforced in Nigeria is the Nigerian Maritime Administration and Safety Agency (NIMASA)[27]. NIMASA is constitutionally a member of the IMO. Other institutions that are involved in the regulation of maritime transport in Nigeria includes the National Inland Waterways Authority (NIWA)[28], Nigeria Ports Authority (NPA)[29], Classification Societies, Nigeria Shippers Council[30] and the Federal Ministry of Transport[31].

As stated in the preceding paragraphs, the shipping industry is controlled by a web of national and international regulations and practices; these regulations and practices can be classified, following the approach of Organization for Economic Corporation and Development,[32] under two broad headings:

(i) Regulation related to commercial operations and practices

[26]Article 1 (a) of the Convention on Inter-governmental Maritime Consultative Organization, adopted on 6th March 1948, which entered into force on 17th March, 1958.
[27]Established by NIMASA Act No17 of 2007
[28]Established by NIWA Act Cap N47 LFN 2004
[29]Established by NPA Act Cap N126 LFN 2004
[30]Established by NSC Act Cap N133 LFN 2004
[31] Established by Federal Ministry of Transportation Act, Cap T34 LFN, 2004
[32] Organization for Economic Co-operation and Development (2001): *Regulatory Issues in International Maritime Transport.* Paris : OECD

(ii) Regulations related to the rights and obligations of states and to safety and environmental regulations.

Affected persons and entities who are subject to these regulatory regimes in Nigeria are mostly International Oil Companies and ship owners that own, hire out their vessels. Since regulation in shipping inherently proceeds from the international realm, some of the affected entities may at some point desire a higher/global standard based on certain interest they may possess. Almost all the International Oil Companies operating in Nigeria are Ship-owners that operate globally and are involved in the transportation of oil and oily products and can wield tremendous influence over regulatory regime and institutional framework that govern their maritime transport operations. The same applies to Concessionaires of Port who wield considerable amount of influence over their operations. These accentuate the need for adequate regulatory regime and institutional framework in Nigeria for the regulation of maritime transportation of persons and merchandise.

For instance at about 1:00am on 19th October, 2015, two oil vessels MT Tank and MT Elixir collided along the Bonga Oil Field FPSO, offshore Warri, Delta State, Nigeria where nine Nigeria crew members sank and their bodies have not been found till date. In the accident, one dead body was recovered while the hull of the Small Vessel, MT Tank sank with nine crew members.[33] Through the detailed report of the investigation into the accident has not been made public, marine Accident Investigations have all pointed out to one likely cause which was fatigue.[34] . Fatigue is an issue dealt with under the International Convention on Standard of

[33]Usim, U *Dealing with Fatique, Seafarers Greatest Nightmare*, Nigeria Daily Sun newspaper of 6th June, 2016 at p.27
[34] ibid

Training, Certification and Watching-Keeping (STCW) 1978[35] and also under the International Maritime Labour Convention of 2006. The above underscores the need for better regulation through sustainable legal and institutional framework.

1.2 Statement of the Research Problem

(a) With regard to regulations related to commercial maritime operations and services, the laws appear not to be well streamlined, while some laws conflict with each other. Some of the provisions are not up to date, in terms of keeping up with the trends of modern global shipping and maritime transport and are therefore unsustainable especially in terms of protecting Nigeria's economic and shipping interest. The laws include: The Merchant Shipping Act[36], The National Shipping Policy Act[37] , Coastal and Inland Shipping (Cabotage) Act [38] Nigeria Shippers Council Act[39] , Nigeria Ports Authority Act.[40] The principal legislation governing regulation of maritime commercial operations and services in Nigeria is the Merchant Shipping Act, 2007. The provisions of the Act are based on the English Merchant Shipping Act of 1855 which has been reviewed in England severally giving rise to English Merchant Shipping Act of 1995. The provision of the Nigeria Merchant Shipping Act 2007 requires review especially in the area of Ship Registry, Ship Registration, ownership of Nigeria Flag Vessel, Security Interest in Vessels registered in Nigeria amongst other critical provisions. The Merchant Shipping Act of Nigeria can no longer meet the demands of contemporary and sustainable shipping and it cannot satisfy the need for a viable Nigeria Flag state registry.

[35] Amended in 2005
[36] No 27 of 2007
[37] Cap N75 LFN 2004
[38] No 5 of 2003
[39] Cap N 133 LFN 2004
[40] Cap N 126 LFN 2004

In addition, after the concession of ports in Nigeria in 2006, there is not yet a clear maritime regulatory authority for Nigerian ports not to talk about regulation in this regard. There is no enabling Act for the concession of Nigeria ports.

The Nigeria Cabotage Act created difficulties in its implementation by the inclusion of certain provisions which undermine regulation in this area of the maritime transport sector.

(b) With respect to regulations related to safety and the marine environment, the institutional framework is weak in terms of capacity and competence. The relaxed and discriminate application or enforcement of the laws related to safety and the marine environment has hampered proper regulation in this regard. Also, some institutions regulating maritime transport in Nigeria have overlapping regulatory functions and responsibilities arising from the enabling legislations.

1.3 Aim and Objectives

The aim of this study is to analyze the regulatory maritime law regime in Nigeria and the institutional framework under which the regulatory regime operates for the purpose of addressing the following objectives:

(i) To evaluate the adequacy of Nigerian maritime regulatory law regime with regard to commercial maritime operations.

(ii) To evaluate the adequacy of Nigerian maritime regulatory law regime related to safety and the maritime environment.

(iii) To determine the extent to which the institutional framework or regulatory bodies function with or under Nigerian regulatory law regime.

1.4 Scope and Limitation of the Research

There are two main aspects of maritime law in relation to maritime transportation of merchants and persons in Nigeria – regulatory and private maritime law. This research is basically about the maritime regulatory regime and its institutional framework relating to maritime transportation operation in Nigeria with a background on the international regulatory regime of maritime transport. The legal and institutional analysis made in this research relates only to the following two issues:

(i) Regulations related to commercial operations and practices.

(ii) Regulations related to safety and the environmental.

Although the liability, compensation and remedial regime resulting from maritime transport operations as well as protection of the marine environment generally may have been alluded to, but have not been considered and analyzed in this research.

1.5 Research Methodology

The main research methodology adopted in this research is the doctrinal research methodology. The sources of materials for this research are primary and secondary sources. Primary source provides direct firsthand evidence about an event, object, or works. Primary sources provide the original materials on which other research is based.

In the context of this research, primary sources include official and unofficial records of organizations and of government agencies such as Maritime Conventions, reports, Bills, Maritime statutes and decided cases. Reliance was placed on documents from the IMO, World Bank, UNCTAD, NIMASA, OECD and similar documents in making the analysis. Further reliance was also placed on the provisions of Nigeria Merchant Shipping Act 2007, Nigeria

Maritime Administration and Safety Agency Act 2007, Nigeria Port authority Act 2004, Nigeria Cabotage Act 2003 and other related legislations.

Secondary sources on the other hand describe, discuss, interpret, comment on, analyzes, evaluate and summarize primary sources. Secondary sources include books, articles from Journals and Newspapers, Treatise and Textbooks.

1.6 Literature Review

Generally, there are few literatures related to the subject matter of this research both in case law and scholarly writings relating directly to Nigerian maritime regulatory law. There are also literatures related to the general field of study and these references or literatures can give a good background as to what is considered in this research.

The goals of regulatory law are different from those of private law. Regulatory Conventions such as Safety of Life at Sea (SOLAS), International Convention on the Prevention of Pollution from Ships 1973/1978 (MARPOL), Standards of Training, Certification and Watch-Keeping (STCW) and International Regulation for Preventing Collisions at Sea (COLREG) and their related instruments regulate maritime activities for the protection of wider public interest. For this reason, they are relatively more universal in scope and acceptance, which is evident from the number of state parties. When it comes to private law conventions, national and private interests with economic and other implications are more at stake; with the result that international rulemaking is fragmented.

Existing literature on maritime transportation in Nigeria focuses on other matters such as cabotage (which is narrower in scope), other than regulatory maritime law, (which is broader) and is the subject matter of this research, which has few research materials. This research is broader in scope in the sense that it focuses on international conventions and

national laws from which regulatory agencies derive their powers to function in Nigeria. Furthermore, the research focuses on laws that are meant to facilitate effective and efficient commercial maritime operations as well as ensure the safety of the marine environment, since they greatly impact on each other.

Maritime law has vigorously been described and defined in ways that reflect subjective perspectives as well as semantics[41]. One of such perspectives is that "maritime law provides the legal framework for maritime transport"[42]. Another is that maritime law comprises a "body of legal rules and concepts concerning the business of carrying goods and passengers by water"[43]. Both are contracted in scope but the first is more broad-spectrum and could be construed as embracing maritime matters which extend beyond the purely private sphere of maritime business and commerce into areas of regulatory regime.

Professor P.K. Murkherjee[44] has observed that the expression "admiralty law", used in many countries with Anglo - Saxon legal traditions adds to the terminology debate. Admiralty law refers to the body of law including procedural rules developed by the English Courts of Admiralty in their exercise of jurisdiction over matters pertaining to the sea. This jurisdiction was distinctively different from that of the common law courts. Admiralty law thus originally encompassed those subject matters over which the admiralty courts possessed inherent jurisdiction imbued through a process of evolution. Subsequently, these subject matters, which bore a maritime character, were codified by statutes. Nigeria Admiralty and Civil Jurisdiction Act is a ready example.

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[41]Mukherjee,P.K,(2008)*An Introduction to Maritime Law and Admiralty Jurisdiction*, World Maritime University Publication, Malmo.p1

[42] Guidelines for Maritime Legislation, Third Edition, (Guidelines Vol.1) United Nations Publication, Economic and Social Commission for Asia and Pacific (ESCAP), Bangkok, Thailand.

[43]Schoenbaun T.J and Yiannopoulos,A.N,(1984) *Admiralty and Maritime Law, Cases and Materials*, Charlottesville, st. Paul Minn west publishing company. p.1

[44]Mukherjee,P.K,(2008)*An Introduction to Maritime Law and Admiralty Jurisdiction*, World Maritime University Publication, Malmo.p1

The term shipping law according Professor P.K. Murkherjee is used to describe "the law relating to ships and shipping"[45]. In his view, it is mostly used interchangeably with the term maritime law and encompasses all aspects of regulation of ships, shipping and maritime transportation. It is "both private and regulatory in scope and includes commercial maritime law, Maritime safety, pollution prevention and labour law as well as admiralty law in common law jurisdictions"[46].

From the above, it is pertinent to state that professor Mukherjee's view relates absolutely to regulatory or public maritime law, while the private aspect of maritime law has to do with claims in court for damages arising from shipping operations or activities. It may also bother on regulatory aspect, depending on the facts.

Admiralty law frequently signifies maritime law relating to "wet" matters, that is, those involving ships when they are at sea, as distinguished from "dry" matters, that is, those matters involving ships but pertaining only to commercial aspects that are essentially land-based. In general terms "dry" shipping means cargo claims against sea carriers and disputes under charter parties. The law involved is primarily contractual. "Wet" shipping refers to the types of claims that are usually pertaining to maritime disasters, such as collisions and statutory liability of ship-owners for pollution. The law involved is far less geared towards contract law. There are three matters that underpin both "dry" and "wet" shipping. These are jurisdiction, security and global limitation of claims on tonnage basis[47]. Jurisdiction and security, in particular, have impact on every

[45]ibid
[46]Ibid
[47] ibid

"dry" and "wet" dispute in practice. There is always an interaction between "dry' and "wet" matters in practice[48].

While maritime law consists of two broad elements, dividing it into two neat compartments and labeling them "regulatory" and "private", is rather an oversimplification since "all classification of law into subject or topic areas is somewhat arbitrary, as it can be accomplished in different ways. Nonetheless tradition plays an important part. This is certainly the case with the field of maritime law, which has become established"[49].

The term maritime law normally "refers to the legal rules applicable to shipping, including the rules relating to admiralty and marine insurance (although the latter is often considered to be a separate subject area)"[50]. These are wide ranging, however, that they could also include the ordinary rules of contract and its interpretation. To avoid this, it is preferable to define maritime law as "the set of legal rules that are unique to shipping". However, the actual resolution of maritime disputes often requires considerable knowledge of disciplines such as contract law and the law of torts.

Accordingly, the shipping industry is involved in many matters of general law and non- maritime legal transactions which are not part of the *lex maritime*.[51]It is well acknowledged that many aspects of commercial maritime law are in fact -derived from the *lex mercatoria*[52]. The division may be traceable to perspectives that are politically anchored.

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[48] ibid
[49]Falkanger, T, Hans J .B and Brautaset, L. (2008)*Scandinavian Maritime Law,* 2nd edition, Universities Digest, p. 23
[50] ibid
[51]Op.cit
[52] Tetley, W. (1985)*Maritime Liens and Claims,*Ist edition, London Business Law Communications Ltd, p1

Accordingly, Professor Gold writes:

> ... the new law of the sea has in the past decade addressed itself to almost all areas of ocean use except the one that since before the dawn of history, has been preeminent - the use of the ocean as a means to transport people and their goods from place to place on this planet, so much more of which is water than land. Marine transport has been discussed in an almost abstract manner, as if it did not really fit or belong within the public domain but needed to be confined to the more "private" region of international commerce, which was considered to be outside the scope of the law of the sea.[53]

However, Professor Sanbom in his writing had this to say in 1930 -

> The words "maritime law," as commonly used today, denotes that part of the whole law which deals chiefly with the legal relations arising from the use of ships. But in the earlier period, of which this work treats, the law maritime had a considerably wider scope. It dealt not merely with Admiralty law, but also with the primitive ancestors of some branches of our modern commercial law, dealt, too, with the germs of that public law which we today style international law.

Professor Tetley aptly noted that "Maritime law is not a branch of law, like Company law or Matrimonial law or Tax law, but a slice of all branches of law. Maritime law in other words, cuts through the whole sphere of law"[54]. Certainly, there are numerous subject matters which fall within the scope of maritime law not all of which are compatible with categorization in terms of "regulatory" or "private".

[53] ibid
[54] Tetley, W. (2003)*International Maritime and Admiralty Law*, Blais, Montreal, p. 1

Thus, the learned authors of Scandinavian Maritime Law wrote in 2008:

> Maritime law encompasses private law rules (typically rules governing charter parties and bill of lading), as well as public law rules (for example, ship nationality requirements and control of seaworthiness). Even the rules of international law are to some extent relevant (for example, rules regarding the right of innocent passage through territorial waters and the immunity of state-owned ships from arrest in foreign ports) [55].

Maritime law consists of numerous facets. It is a body of law that is at once international in scope, is perpetually in motion and has a component corresponding to virtually every branch of law have conceivable on land simply because a shipboard community is a microcosm of society ashore [56]. The antiquity of maritime law and its doctrines and principles that have persistently withstood the test of time characterize its resilience. Professor Tetley[57] authoritatively maintained that maritime law is a complete system of law, both public and private, substantive and procedural, natural and international, with its own courts and jurisdiction, which goes back to Rhodian law of 800 B. C. and predates both the civil and common laws. Its more modern origins were civilian in nature, as first seen in the Roles of Oleron of circa 1190 A.D. Maritime law was subsequently greatly influenced and formed by the English Admiralty court and then later by the Common law itself. He contends that the fact that maritime is a complete legal system can be seen from its components parts. For centuries maritime law has had its own law of contract – of sale (of ship), of service (towage), of lease (chartering), of carriage (of goods by sea), of insurance (marine insurance being the precursor of insurance ashore) of agency (ship

[55]Falkanger T, Hans J.B and Brautaset L (2008) *Scandinavian Maritime Law*, 2nd Edition Universities Digest, p.23
[56]Op.cit
[57] Tetley, W (2003)*International Maritime and Admiralty Law*, Blais, Montreal p.1 ;Tetley W, (1999)*Maritime Law as a Mixed Legal System*, Tulane Maritime Law Journal, Vol. 23, p. 331 - 336

chandler), pledge (bottomry and respondentia), of hire (of master and seamen), of compensation for sickness and personal injury (maintenance and cure) and risk distribution (general average). It is and has been a national and international law (probably the first private international law). It also has had its own public and public international law. Maritime law is composed of two main parts – national maritime statutes and international maritime conventions, on the one hand, and the general maritime law (*lex maritime*), on the other. [58] The general maritime law has evolved from various maritime codes, including Rhodian Law (circa 800 B.C), Roman Law, the Roles of oleron (circa 1190), the ordinance de la marine (1681), all of which were relied on in Doctors' Commons, the English Admiralty court, and the maritime courts of Europe. This *lex maritime*, part of *lex mercatoria* or "law merchant" as it was usually called in England, was the general law applicable in all communities of western Europe until the fifteenth century , when the gradual emergence of nation states caused national differences to begin creeping into what had been a virtually pan- European maritime law system. [59]

Today's general maritime law consists of the common forms, terms, rules, standards and practices of shipping industry – standard form bill of lading, charter parties, marine insurance policies and sales contracts are good examples of common forms and accepted meanings of the terms, as well as the York Antwerp Rules on general average, and uniform Customs and practice for Documentary credits. Much of this contemporary *lex maritime* is to be found in the maritime arbitral awards rendered by arbitral tribunals around the world by a host of institutional and ad hoc arbitral bodies[60].

[58] Tetley, W (1999) *Maritime Law as a Mixed Legal System*. Tulane Maritime Law Journal, Vol. 23, November 2, pp. 331 - 336
[59] ibid
[60] Tetley, W (2003)*International Maritime and Admiralty* Law, Blais , Montreal p 1-30

Professor P.K. Murkherjee has identified maritime subjects generally to include – Acquisition and Registration of Ships, Proprietary Interests in Ships, Safe Manning of Ships, Seafarers Qualifications and Maritime Labour, Maritime Safety, Wreck and Salvage, Towage, Pilotage, Carriage of Passengers, Maritime Claims and Arrest of Ships, Limitation and Division of Liability, Carriage of Goods by Sea, Marine Insurance, Marine Pollution and Maritime Security. According to the Professor:

> these subject matters encompass regulatory and private law aspects as well as hybrid areas of maritime law. It will be observed that the non-private law subject matters inevitably flow from corresponding framework provisions in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), which is considered to be largely a codification of the customary international law of the sea and as such, is often referred to as the constitution of the oceans[61]

It can therefore be concluded that shipping is, by its nature, international and its vehicle remains the sea. National or regional approaches, therefore, will not provide adequate solutions. By its nature, maritime law is international and for this reason international law is of great importance. The law of the sea for instance is a multifaceted discipline involving not only narrow shipping interests, but also fisheries, petroleum and natural resource issues.

Maritime Law may therefore essentially be described as having two principal compartments – Private Shipping Law and Maritime Regulatory Regime.

The statutory provisions related to private shipping law in Nigeria as against regulatory law of shipping is essentially of an English heritage and can be found in the Nigeria Merchant Shipping Act, 2007. The Provisions of this Act is not materially different from the English

[61]Op.cit

Merchant Shipping Act, 1995. However, the procedural mechanism for reaching the substantive private maritime law and in some instances the substantive law itself has enjoyed less uniformity globally. The maritime jurisdictions of the world can generally be categorised into three namely: common law maritime tradition, the mixed jurisdictions and civil law maritime jurisdictions. In this connection, Igwe, wrote in 2009:

> There is a great divide in International Maritime Law. This dichotomy has a further spiral effect on the various maritime jurisdictions in terms of procedure, substantive law and practical considerations with respect to enforcement of ship mortgage. Whereas efforts have been made on an international basis with evidence of three international conventions on Maritime Liens and Mortgages in 1926, 1967, and 1993 respectively, no serious consensus has resulted there from. Rather, in reality, many of the world's leading maritime nations, including the United States and United Kingdom, have refused to ratify any of these conventions.[62]

This research is basically about maritime regulatory regime in Nigeria which has attracted fewer and less sufficient rigorous analysis and literatures. In this context, Igbokwe[63] has observed that "UNCLOS and other treaties impose some duties on Nigeria (as a Coastal State and Flag State) and on its ports (as a port State) in respect of the pollution of the marine environment from…vessels activities and the disposition of shipboard waste, oil and garbage through reception facilities and under Article 192 of UNCLOS." The learned author went on to state that in any assessment of the existing national legislations and regulations relating to

[62]Igwe, I. E (2009)*Enforcement of Ship Mortgage in International Maritime Law : Jurisdictional issues and Practical Considerations*, LL.M Dissertation, Faculty of Law , Lund University,p.1
[63]Igbokwe, M *Assessment of Existing National Legislations and Regulations Relating to Pollution Prevention,* National Workshop for the Ratification, Implementation and Enforcement of MARPOL 73/78 organized by IMO in conjunction with Federal Ministry of Transport between 27th to 29th August 2001.p.1

pollution prevention in Nigeria will show that Nigeria is still lagging behind in the adoption of adequate laws and regulations to prevent, reduce and control the pollution of the marine environment.

Igbokwe's paper is very restricted in view of the subject matter of this research. The paper dwelt only on the analysis of regulatory regime of ship source pollution in Nigeria. It did not include an analysis of the regulatory regime related to maritime commercial operations and services. On the contrary, Igwe[64]has described somewhat briefly the public law regulation of ship- source marine pollution in Nigeria:

> There are now rules and regulations in Nigeria designed to protect the marine environment from ship - source pollution. Firstly, there are rules aimed at avoiding incidents which may cause pollution. Secondly, there are rules on dealing with such incidents, so that pollution is avoided, or at least minimized. Finally, there are rules which ensure that liability can be ascertained and compensation paid for damage, loss and expenses incurred as a result of pollution or threatened pollution.

He further contended that because stability and expertise are important for ship finance, ship owners take into consideration the experience, capacity and the service representation of a flag maritime administration and that "it was in contemplation of this fact that the Nigerian Maritime Administration and Safety Agency Act of 2007 provides for appointment of persons with relevant experience and capacity applicable to maritime administration and affairs into the board of the Agency"[65]. His analysis is not vigorous and intense and it centered only on an aspect of

[64]Igwe, I.E. (2012) *Responding to the Challenges of a Viable Flag State: Emergent Nigerian Paradigm and Prospects*. Consultative Paper , Nigerian Maritime Administration and Safety Agency, p. 7
[65] ibid

the institutional framework for regulation of maritime transport and marine pollution which is also only an aspect of the issues regulated in maritime transportation in Nigeria.

Iroegbu[66] has stated that in Nigeria, the maritime industry is dominated and occupied by foreigners; Nigerians own less than 20% of the market share in the industry and that even most of the shipping services which constitute about 30% of the crude oil transaction are performed by foreigners and huge amount of profits are being repatriated to their home countries. This makes the Nigerian economy dependent on the foreign economy and jobs that would have been created for Nigerians are performed by foreigners. He further argues that the regulatory agencies that formulate laws and policies in the maritime industry do not understand the operations in the industry, and thus tend to disregard the necessary conditions needed to ensure these policies attain their set out aims and objectives. As a result, most of the huge contracts in the maritime sector are being awarded to foreign firms due to "incompetency" of indigenous firms leading to huge capital outflow. Furthermore, Iroegbu points out the pitfalls, defects and weaknesses of the cabotage regime in Nigeria. For instance, the conditions prescribed for obtaining waiver by the foreign firms are so simplistic that it is likely that more foreign ships will be granted license and waivers to engage in cabotage in Nigeria. This is because there is presently insufficient Nigerian fleet to cater for the Nigeria cabotage shipping. Thus, with the inclusion of waiver, the bulk of the responsibilities of the indigenous vessels holders have been shifted to foreigners making the Cabotage Act to be ineffective and at the same time defeats the objective or the purpose the Act. Nigerian vessels that would have been employed in carrying these cargoes have to suffer at the expense of these foreign vessels resulting in foreign domination of the maritime industry.

[66]Iroegbu, C.A. (2010) *Weaknesses of the Ongoing Reforms in the Maritime Industry*. The Frontier Post, May 27, 2010.

Airahuobhor[67] has stated that for a vibrant and truly indigenous Cabotage industry, government must aggressively move towards a strict cabotage policy, like the Jones Act of 1949, where the waiver clause will no longer be relevant; the Cabotage Vessel Financing Fund (CVFF) should be enriched through direct budgetary allocation and from excess crude account; Government should drive the wheel to revitalize and make the indigenous ship yard technically and financially virile as well as ensure local patronage; and finally, government should provide an enabling environment for citizens to ensure orderly development of national fleet without necessarily adopting a rigid policy that limits international trade potentials .

Ndikom[68]expressed the view that the waiver aspect of the Act is purely technical and if its management did not involve industry professionals/operators representatives there was obvious tendency that the purpose of the law could be entirely defeated. The power needed for such a waiver operations should not be vested only on the Minister of Transport going by the convention of making use of non-professionals as Ministers of Transport whose oversight functions include maritime administration in the country. There is need, in this regard for a technical committee to be set up, whose members must be tested hands and who should also have proven track records as professionals to work with the Honourable Minister from time to time for purposes of granting waivers.

According to Ihenacho,[69] the age limit of 15 years placed on operational vessels under the cabotage is not in any way good for cabotage operations as efficiency and performance of vessels are not determined by age but on continued maintenance. Age limitation of vessels is very foreign to

[67]Airahuobhor, A, (2014) *Cabotage Act, Vessel Fund and Many Unanswered Questio*ns, Daily Independent, Maritime.
[68]Ndikom, B.C. (2008) *Maritime Transport Administration in Nigeria*, Bumico Publishers,Lagos.
[69]Iheanocho, E. (2004) *Cabotage and Nigeria Prospects, Constraints and Challenges.* Paper presented at a seminar on Cabotage and the Oil and Gas Industry, Organized by NIMASA at Lagoon Restaurant, Lagos

shipping operations world over; as proper maintenance of vessels is a very potent factor and key to vessel performance on any voyage or contract.

Airahuobhor[70] holds the view, which this research agrees with, that the domination of the maritime business environment by foreign operators with cheap access to funding and collaboration with their international masters crippled the indigenous operators. Financial institutions that funded these vessels lacked the technical savvy to ensure that the vessels will remain fit for purpose. Whilst sound technical management practices remain a mirage, the return on the investments became negative. It is estimated that in excess of $2 billion tied up in un-performing local maritime assets". New entrants into the industry are equally following the path of quick gain devoid of sound technical management, noting that there is evidence of sharp practices aided and abetted by foreign unscrupulous partners.

This is a major issue which the Federal Government needs to tackle for improved and sustainable growth of the Nigeria flag state ship registry.

Iroegbu, Ndikom, Iheanacho and Airahuobhor in their somewhat respective brief analysis concentrated only about the institutional framework for the regulation of Cabotage services in Nigeria. Public institutions like NIMASA and NIWA are today considered to have a duty to ensure that maritime transport activities are conducted in a safe manner, without placing life and health at risk; they also have a responsibility not to compromise the benefits or contribution of the maritime sector to the Nigeria economy and protect national shipping interest such as Cabotage. However, in addition, public regulation of maritime transport has gradually taken on a new dimension. While it is important to avoid accidents on board vessels, as well as groundings and collisions, importance is also attached to ensuring that damage is not caused to the

[70]Airahuobhor, A (2014) *Cabotage Act, Vessel Fund and Many Unanswered Questions.* Daily Independent Maritime.

environment, through ship – source pollution, dumping of waste, discharging of oil from cargo or bunker tanks, etc. It is pertinent to state that the regulation of cabotage services is just part of the overall regulation related to commercial maritime operations and services in Nigeria, all of which analysis has been integrated this research.

The IMO adopted a comprehensive framework of detailed technical regulations in the form of international conventions, which govern the safety of ships and the protection of the marine environment in maritime transportation of merchants and persons. National governments, which form the membership of IMO, are required to implement and enforce these international rules and to ensure that the ships registered under their national flags comply.

1.7 Justification

The research recommends solutions to the legal and institutional problems that exist in the regulation of maritime transportation in Nigeria. It also recommends changes to regulations found to be inadequate or obsolete. Furthermore, if the recommendations proffered in this research are implemented, it will guarantee a more economically viable ship registry for Nigeria and engender sustainable shipping in Nigeria.

1.8 Organizational Layout

This research is structured into five chapters. chapter one deals with general introduction, chapter two deals with regulatory framework for maritime transportation, chapter three deals with the regulation of maritime transportation in Nigeria, chapter four deals with the institutional framework of maritime regulation in Nigeria while chapter five covers summary, findings and recommendations.

CHAPTER TWO

THE REGULATORY FRAMEWORK IN MARITIME TRANSPORTATION

2.1 Introduction

Maritime transportation of merchants and persons, of all industries is mostly international.[71] It has to be considered or viewed, therefore, not from the national viewpoint only, but against the broad spectrum of world developments, particularly in the trade sector. Essentially, therefore, shipping is extremely international in character and vessels on most voyages must operate under the regulatory requirements of many maritime nations.

Regulation conceptually covers commercial maritime operations as well as safety and marine environment rules, bearing in mind that both impact each other greatly.

2.2 The Nature and Character of Regulatory Framework in Maritime Transportation

The primary legal authority governing the activities of merchant ships is the state in which the ship is registered, the flag state.[72] It is responsible for regulating all aspects of the commercial and operational performance of the ship. By registering in a particular country, the ship and its owner become subject to the laws of the flag state. That is, registration makes the ship an extension of national territory while it is at sea.[73]. In the celebrated Lotus case (*France v. Turkey*)[74] the Permanent Court of International Justice held that a ship on the high seas is assimilated to the territory of the state the flag of which it flies, for just as in its own territory, that state, exercises its authority upon it, and no other state may do so. Similarly, in *R v.*

[71] Mukherjee P.K and Mark B (2013), *Farthing on International Shipping*, 4th edition , Springer, London, p 1
[72] Articles 91 and 94 of UNCLOS
[73] The "extension of territory " otherwise known as the " floating island doctrine" theory has been confirmed in the celebrated LOTUS case, (1927) P.C.I J Series A No 10 at 25. In *People v Tyler*, (1859) 7 Mich 160 , an American Case, Christancy J. referred to vessels on the high sea as " elongations of the territory of the nation under whose flag they sail"
[74](1927) PCIJ (Ser. A) No.10 (Sept 7)

Anderson[75] , Byles J. referred to a ship being "like a floating island" and Blackburn J. said that a ship on the high sea, carrying a national flag, is part of the territory of that nation whose flag she carries and "all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much as if they had been on land within that territory". Therefore, for ship owners, the choice of registration is a major issue that may have important consequences in terms of (a) tax, applicable company law and financial law; (b) compliance with maritime safety conventions; (c) crewing and terms of employment; and (d) naval protection.[76] Besides national registers, however, there are also open or international registers. International registers aim to offer terms that are favourable to an international ship owner.[77] Furthermore, in some cases it is also possible for a ship owner to register a ship under two different flags. All of these alternatives – to register a ship in one or two national registers or simply in an open register – force ship owners to carefully weigh the relative advantages and disadvantages of each possibility. In general, the restrictions that apply to ship registration set maximum allowable stakes in a ship permitted for foreign national/corporate bodies or minimum levels that must be owned by domestic interest. Many also require that the person or organization owning that ship should have its principal place of business located within their own country or that certain senior management posts within the owning company be filled by nationals[78].

Almost all matters to be regulated by one jurisdiction have one thing or the other to do with another jurisdiction whether it has to do with commercial maritime operations or safety and environment. Ship source pollution for instance is largely international in scope and the interests

[75] (1968) II Cox Crim. Case. 198.
[76]Michalek, J and Subidey, *Facilitation of Transportation in Turkey and Poland: a Comparative Study.*Final Research Programme 2012 – 2013. Poland, p.121.; Murherjee, *P.K (1993) Flagging Options & other* Consideration in Mariner, Journal of the master Mariners Society of Pakistan , Vol. 4, No 1, Jan/March, p.35
[77] ibid
[78] For instance Section 18 of the Merchant Shipping Act of Nigeria, 2007.

involved in pollution incidents are usually transnational. Although other transport modes, such as road transportation, may also have a cross border character, their impact is unlikely to go beyond a regional perimeter. The transnational character of ship – source pollution incidents, by contrast, is much more pronounced and significant. A singular incident is far more likely to involve international interests. Thus, a marine pollution incident will almost invariably have an international element.

The *prestige* incident is a case in point. The 26 year old single hull tanker loaded with 77,000 tonnes of heavy fuel oil was en route from Ventspills, Latvia to Singapore via Gibraltar when it broke into two near Galicia in Spain on 13th November, 2002. A substantial quantity of its cargo escaped into the sea, which did not only affect the coastline of Spain but also of France and Portugal, and even caused intermittent light contamination of British beaches. A major offshore clean-up operation was carried out after the incident using vessels from Spain and nine other European countries. The ship, flying the Bahamas flag, was believed to be beneficially owned by Greek interests. Its registered owner was a Liberian company and it had been chartered by a company in Switzerland on behalf of a Russian oil trader. The classification society of the ship was American Bureau of Shipping and it was insured by the London Steamship Owner's Mutual Insurance Association.[79] In the light of the above, the solution to for instance, the problem of ship source marine pollution considered from both the legal as well the economic perspectives; the international dimension is obviously a crucial factor and would be sought at the international level.

[79] IOPC Fund "Prestige" available online at http://www.iopcfund.org/prestige.htm, accessed on May 13th 2016; Gaia Vince , " Prestige oil spill far worse than thought" 27 August 2003, New Scientist.com news service, available online at http://www.newscientist.com/article.ns?id=dn4100 accessed on 14th May 2016.

2.2.1 Maritime Freight Transportation Services

Maritime transport services consist of three types of activities: (a) international maritime transport, that is, the actual transportation service performed from the time the commodity is on board a ship in a port of loading in a country until the moment when the vessel reaches the destination port of a different state; (b) maritime auxiliary services, that is, any activities related to cargo handling and operations in ports and on ships; and (c) port services, that is, activities related solely to ship management in ports.[80]

2.2.2 Maritime Transport

Maritime transport constitutes over 80% of total world trade expressed in units of tons.[81] According to United Nations Conference on Trade and Development (UNCTAD) world seaborne trade measured in tons has amounted to 8,408.3 million tons.[82] While during 2010 crude oil and oil products referring to commodities such as crude oil, kerosene, diesel and liquefied gas formed 21.2% of total seaborne trade, dry cargo referring to grains formed 67.3% of total seaborne trade.[83] On the other hand, other cargoes referring to all the other types of cargo are often classified by their packing, appearance or loading unloading method such as pallets and containers.[84] While pallets refer to cargo assembled on a wooden or plastic pallet that allows the

[80] Fink C, Mattoo, A and Neagu H.C (2002) *Trade in International Maritime Services: How Much Does PolicyMatter?* The World Bank Economic Review, 16 (1): 81 – 108.
[81] UNCTAD (2006) , Review of Maritime Transport, 2006, Geneva: UNCTAD
[82] ibid
[83] World Trade Organization (2012) Trade Policy Review – Report by the Secretariat – Turkey (WTO document WT/TPR/259, January 2012)
[84] The development of Container system is universally credited to Malcolm Mclean, an American Trucker who recognized in the late 1930s that the then system of moving goods from their point of origin to their destination involved several different transport movements and that the interface between each of these entailed the risk of damage, pilferage and loss of time.

simultaneous handling of more units per period of time, containers refer to packaging of cargo in huge metal boxes that could be loaded and unloaded by cranes.[85]

While in the past all merchant vessels belonged to the general cargo type, today there is a diversity of vessels such as crude oil carriers, liquefied gas carriers, dry bulk carriers, container ships, reefers (refrigerated vessels), roll-on/roll-off or ro-ro vessels (vessels equipped with a ramp that allows cargo to be driven on and off the vessel), and multipurpose vessels. Of these vessels, the container ships are of dominant significance as their importance in world seaborne trade has been increasing speedily over the last fifty years when containers fifty years ago were first introduced.[86] In fact, containers led to a revolution in cargo handling in terms of vessel capacity and dimensions, new types of terminals and changes in hinterland connection modalities. Today, more than 80% of world general cargo trade moved by sea is carried in containers, and on trade between industrialized countries the percentage approaches over 80%.[87]

Containers are usually expressed in twenty foot equivalent unit (TEU), meaning a container with the basic dimensions of 20ft length, 8ft wide and 8ft 6inches in height. The maximum cargo load for a 1 TEU container was in the range of 22 tons and that of a 2 TEU container about 28 tons.[88] With the increase in container dimensions the ratio of 20ft / 40ft containers has decreased from 2.16 in 1986 to 0.94 in 2007.[89] Currently, containers are carried mostly by container vessels. In the past the capacity of container vessels ranged from 800 to approximately 1700 TEU. The design of these vessels was limited in the width dimension. Since Panama Canal could accommodate maximum beam dimension of 32.2m vessels were built

[85] op.cit
[86] Mukherjee P.K and Mark B (2013). *Farthing on International Shipping*, 4th edition , Springer, London, pp120-121
[87] ibid
[88] ibid
[89] Krug, C. B. and Donner M. (2009) *Freight Transport for Development Toolkit : Ports & Waterborne Freight* , The World Bank and Department for International Development, Washington D.C.

accordingly, and they were called Panamax container vessels.[90] But over time the companies opted for flexibility. Vessels were built with capacities of more than 3,000 TEU, and soon they reached capacities of 8,000 TEU. Currently, the largest container vessel has a capacity of 14,000 TEU.[91]

International maritime freight transport has developed specialized branches mainly due to differences in commodity types and to technological improvements in the shipping and bulk shipping. Liner shipping is regular with set schedules in different harbours published in advance. The capital-intensive character of liner shipping, particularly container shipping, has led to a substantial degree of concentration.[92] As emphasized by UNCTAD, the top 20 liner operators, 11 of which are based in Asia, accounted for 67% of the capacity in 2004.[93] On the other hand, non-liner shipping is performed irregularly and is provided on a demand basis, predominantly by specialized bulk carriers.[94] Vessels carry unpacked dry carriages or liquid cargoes, and bulk shipping operations are carried out for individual shippers. Compared to liner shipping, there is less concentration in bulk shipping, and there are many small owners with fleets of one or two vessels. While non-liner tankers and bulk carriers dominate in terms of trade volume, liner vessels are far more significant in value terms, since they tend to carry relatively high-value and low-volume cargoes.

A principal organizational feature of the liner sector is the ability of operators to enter into co-operative agreements and agreements through "conferences".[95] Accordingly, there are over 300 liner conferences worldwide.[96] As one of the oldest in the world, shipping cartels commonly

[90] Op.cit
[91] ibid
[92] Op.cit
[93] UNCTAD (2006), Review of Maritime Transport, Geneva: UNCTAD.
[94] Op.cit
[95] ibid
[96] Organization for Economic Co –operation and Development (2000) Recommendations of the Council

involve collusion to set prices and limit competition among members. Closed conferences not only set freight rates, which apply to all members, but also allocate cargo quotas and restrict membership, while open conferences merely set the freight rates on a specific route. A recent development in the sector has been the supplementation of conferences with verbal agreements and similar arrangements.[97] Compared to independent shipping operations, conferences are expected to determine the fleet capacity, create scale economies, prevent unexpected fluctuation in freight rates, limit competition between members and generate higher profits. However, it is usually argued that even if conferences create costs savings, the savings are not always passed on to shippers, consumers or producers of shipped commodities.[98] Conferences usually cause increased shipping rates and establish market power for their members, thereby restricting the entry of newcomers and delaying improvement in the quality of shipping services.

The prevalence of conferences flows directly from the exemption they enjoy under the antitrust laws of the United States, the European Union (EU) and many countries.[99] Under these systems, shipping conferences are considered necessary to ensure stability and certainty in the movement of freight. However, in recent years, the power of conferences has eroded. Containerization has made it possible for outsiders to supply the same services as conferences at a lower cost to consumers. Non-conference lines offering independent, semi- or full container services at a frequency varying between weekly and fortnightly have emerged and are based

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Concerning Common Principles of Shipping Policy for Member Countries , OECD document number C (2000) 124 /Final , Paris: OECD.

[97]Mukherjee P.K and Mark Brownrig (2013) *Farthing on International Shipping*, 4th edition , Springer, London, pp.117

[98]Michalek, J and Subidey, Facilitation *of Transportation in Turkey and Poland: a Comparative Study*. Final Research Programme 2012 – 2013.p.123

[99] Mukherjee P.K and Mark B (2013) *Farthing on International Shipping*, 4th edition , Springer, London pp. 92 -95

mainly in the newly industrializing economies of East Asia. The share of non-conference lines in the world liner shipping market is about 50%.[100]

Nevertheless, the bulk traffic is organized as a spot market, and contracts are allocated on an extremely competitive basis. As pointed out business is won in the basis of freight rates a few cents per ton lower than the competitor.[101] Hence, bulk shipping services and related freight rates respond to market developments and to supply and demand pressures. Bulk shipping pools are occasionally created, but they fail to survive for long periods. In addition, these pools are not generally exempted from competition policy laws and, therefore, are dealt with by competition agencies in the same way as other commercial activities.

Another distinguishing feature of maritime transport is the phenomenon of open registry regime otherwise known as "flag of convenience". The open registry system refers to the regime where states permit foreign ship-owners to register vessels under their respective flags. Bahamas, Panama, Liberia, Cyprus and Malta are the major open registries. In the last few decades , while there has been a tremendous growth in the number of vessels in the world, the distribution of flag state ownership has changed largely from OECD states to open registries in non – OECD states.[102]

Another organizational feature of the maritime transport sector is the existence of classification societies. These societies make rules for ship construction and maintenance and issue a "class certificate" to reflect compliance. They arose from the efforts of insurers to establish that the vessels for which they were writing insurance were sound. Classification

[100] World Trade Organization Secretariat (2001) " Maritime Transport Services" in WTO Secretariat (ed) Guide to the GATTS : An Overview of Issues for Further Liberalization of Trade in Services, The Hague : Kluwer Law International.

[101] World Trade Organization Secretariat (2001) ' Maritime Transport Services" in WTO Secretariat (ed) Guide to the GATTS : An Overview of Issues for Further Liberalization of Trade in Services, The Hague : Kluwer Law International

[102]Murherjee, P.K (1993) *Flagging Options & other Consideration in Mariner*, Journal of the master Mariners Society of Pakistan , Vol. 4, No 1, Jan/March, p.35

societies have no legal authority. Today, they mainly aim to enhance the safety of life and property at sea by securing high technical standards of design, manufacture, construction and maintenance of mercantile and non-mercantile ships. More than 50 organizations worldwide define their activities as providing marine classification. Ten of those organizations form the International Association of Classification Societies (IACS).[103]It is estimated that these ten societies, together worth the additional society that was accorded associate status by IACS, collectively class the ships dealing with more than 90% of all commercial tonnage involved in international trade worldwide.[104] The voluntary nature of classification implies that classification societies compete with each other to offer attractive classification services to ship owners. In general, the services offered fall into two major categories, namely developing rules and implementing them. The societies continuously update the rules to reflect changes in maritime technology, and they are responsible for the application of the rules, including a technical inspection of the plans of the ship, surveys during construction and periodic surveys for the maintenance of class.

2.2.3 Maritime Auxiliary and Access to and use of Port Services

With respect to the consideration of maritime auxiliary and port services, it should be stated that seaports offer many different services. Activities within the seaports can be classified into (i) infrastructure; (ii) services provided by ports, which require the use of infrastructure and (iii) coordination between different activities performed at ports.[105] Infrastructure consists of the

[103] The ten member societies that form the IACS are American Bureau of Shipping (USA), Bureau Veritas (France), China Classification Society (China), Det Norske Veritas (Norway), Germanischer Lloyd (Germany), Korean Register of Shipping (South Korea), Lloyd's Register (UK), Nippon KaijiKyokai (Japan), RegistroItalianoNavale (Italy) and Russian Maritime Register of Shipping (Russian Federation)

[104] www.iacs.org.uk accessed on 13th may, 2016

[105] Trujillo, L, and Nombela, G (1999) *Privatization and Regulation of the Seaport Industry* , Policy Research Working No 2181 , World Bank , Washington, D.C.

infrastructure within ports such as berths, quays, docks and storage yards and the superstructure such as sheds, fuel tanks, office buildings, cranes and van carriers. Besides the provision of basic infrastructure for the transfer of goods between sea and land, ports provide numerous services to ships, such as pilotage, towing, cargo handling, freezing, administrative paperwork, permits, cleaning, refuse collection and repair facilities. Since many different activities are performed simultaneously within the limited space of port areas, there is need for an agent to act as coordinator to ensure the proper use of common facilities and to oversee the safety of port facilities. In most seaports, these responsibilities are carried out by the port authority, which are generally public institutions.

A remarkable feature of ports today, is the fact that most ports are competing with one another on a global scale.[106] The tremendous gains in the productivity in ocean transport achieved over the past several decades has forced countries to improve port efficiency, lower cargo handling costs, and integrate port services with other components of the global distribution network. Because of the capital intensity of such efficiency improvements, these has encouraged private sector operation of a wide range of port-related operations.

There are three main organizational modes for seaports. Under the "landlord ports" systems, the port authority owns and manages port infrastructure, and private firms provide the rest of the port and maritime auxiliary services. Private firms are able to own superstructures and operate assets pertaining to infrastructure by concessions or licenses. Under the "tool ports" system, the port authority owns both the infrastructure and superstructure, but private firms provide services by renting ports assets through concessions or licenses. Finally, under the

[106] World Bank (2007) *Port Reform Toolkit : Effective decision Support for Policy Makers*, Washington D.C : The World Bank

"service ports" regime, the port authority owns assets and supplies services by directly hiring employees.[107]

Port reform processes referring to the movement from public service ports management model towards the landlord port management model have accelerated during the 1980s. While the tool port management model is not applied in many countries, the landlord port model is considered to be the optimum public-private-partnership (PPP). Ports in many countries have been moving into the landlord port direction. But, when the public port sector in a particular country decides to enter into a PPP with a private operator, it is essential that regulation is introduced.[108]The public sector through regulation has to ensure that the ports operate efficiently and safely, and on the premise that fair and competitive services are provided. Efficiency is usually measured by dwell time defined as the period of time that a container stays within a container terminal before it is moved to a hinterland destination or loaded on vessel.[109]In addition, ports are expected to expand the use of information technology (IT) to support port user requirements. IT systems link electronically port administration with terminal operators, truckers, customs, freight forwarders, and ship agents, and thus reduce time for delivering of cargo and reduce manpower to prepare paperwork involving port use and operation. Finally, ports are expected to have good connections to the inland and market places. In this case, rail and road infrastructures at the ports should be efficient and sufficient.

The number of sizable ports in the world presently has been estimated to be around 3,000 where sizable means that these ports handle a number of types of cargoes in considerable

[107] Krug, C. B. and Donner, M (2009) *Freight Transport for Development Toolkit: Ports* & *Waterborne Freight*, the World Bank and Department for International Development, Washington D.C.
[108] ibid
[109]With the operation of a typical container terminal, today average container dwell time amounts to five to six days-Michalek, J and Subidey , *Facilitation of Transportation in Turkey and Poland : a Comparative Study*. Final Research Programme 2012 – 2013.p.125

quantities.[110] Of the top ten container ports in the world seven are located in Asia while Rotterdam and Hamburg are the main competitors and in the case of dry bulk ports the majority is located in Australia, while the largest one is in China.[111] Of the top ten of all cargo ports, seven are located in China, one in Korea and one in Singapore.[112] As containerization has spread in freight shipping, distribution patterns have evolved into hub and spoke networks, which are intended to maximize utilization of large containerships while providing market coverage to a maximum number of ports. While container ships with 4,000 + TEU capacity provide service between regional hubs, smaller ships are used to pick up and distribute containers within the region.

Freight forwarding forms part of the auxiliary services within ports and in maritime transportation of merchants and persons. Although, in a broad sense, if the activity of freight forwarders would fall under the classical Roman contract type, a distinction would in particular have to be made between his function to act as:

i. a mere agent on behalf of the customer or the performing carrier,
ii. the contracting carrier assuming carrier liability without performing the carriage himself and
iii. the performing carrier.

In the traditional law of freight forwarding, the service has been regarded as agency,

[110] Trujillo, L and Nombela, G (1999) *Privatization and Regulation of the Seaport Industry* , Policy Research Working No 2181 , World Bank , Washington, D.C.; Krug , C. B. and Donner, M (2009) *Freight Transport for Development Toolkit : Ports&Waterborne Freight* , The World Bank and Department for International Development, Washington D.C.
[111]Michalek, J and Subidey, *Facilitation of Transportation in Turkey and Poland: a Comparative Study*. Final Research Programme 2012 – 2013.p.125 Krug C. B. and Donner, M (2009) *Freight Transport for Development Toolkit: Ports&Waterborne Freight*, the World Bank and Department for International Development, Washington D.C.
[112]Krug C. B. and Donner M (2009) *Freight Transport for Development Toolkit: Ports&Waterborne Freight*, the World Bank and Department for International Development, Washington D.C.

which is reflected in the fact that originally reference was made to "freight forwarding agent" rather than "freight forwarder." Thus, in the English case of *Jones V. European General Express*[113], Rowlatt J. described the freight forwarders as persons:

> Willing to forward goods for you ... to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.[114]

The multimodal or combined transport operator must be clearly distinguished from the freight forwarder, and this may give rise to considerable difficulties in practice. A freight forwarder is not a carrier, but an auxiliary person, a professional intermediary between the cargo interests and the carrier, who arranges or organizes the carriage of goods from departure to destination, but who does not undertake to carry himself and who does not accept liability as a carrier. Traditionally, therefore, the freight forwarder acts as an agent and contracts only to arrange carriage, acting on behalf of the cargo interests.[115] In the common law systems, he is under a duty to exercise reasonable skill and care.

In Dutch law, the freight forwarder may represent the cargo interests directly or indirectly.[116] Direct representation means that the forwarder acts in the cargo interests' name and for their account. Indirect representation means that he acts in his own name, but for the cargo interests' account; the principal remains undisclosed. In Belgian and French contracts, the freight forwarder is generally a commissionaire, meaning someone who contracts in his own name but

[113](1920) 4 L I. L Rep. 127
[114] ibid
[115]Dohkubo , O (2008)*The legal Liability of a Freight Forwarder in Multimodal Transport,* LL.M Thesis, Lund University. p.12
[116] Tetley, W *Marine Cargo Claims* (1998), 3rd edition. International Shipping Publication p.936

for the account of his client; again the principal remains principal, but this would appear to be fairly rare. In German law, the freight forwarder is under a legal obligation to contract in his name but for the cargo interests' account; in other words, he is not allowed to disclose his principal.[117]

A carrier undertakes to carry goods. A freight forwarder undertakes to arrange for the carriage of goods. However, uncertainty arises because of two major reasons. First, the changing nature of carriage of goods, and more precisely the advent of intricately organized door-to-door transport networks and multimodal transport in general, have induced many freight forwarders to take on greater responsibilities. Secondly, some freight forwarders tend to create the impression that they are acting as carriers, while they are actually only acting in their traditional role of agents.

Furthermore, the activities that freight forwarding encompasses are not really clear. Taken in its narrow sense, freight forwarding simply means the arranging of transport and nothing more. Taken in its broad sense, a host of other auxiliary and port activities may be included, such as tallying, weighing, warehousing, pick-up and delivery, physical distribution, performing customs formalities, and so on.

The distinction as between carrier and forwarder, so straightforward in theory, is immensely important in practice. A carrier is mostly subject to mandatory rules imposing a minimum standard of liability in relation to the goods that he carries. Usually, he cannot contract out of this regime.

As the status of a freight forwarder is not regulated by any international convention and only in a few domestic laws, he retains a considerable amount of contractual freedom, which

[117] Tetley, W. (1998) *Marine Cargo Claims*, 3rd edition. International Shipping Publication p.936 ;Dohkubo , O (2008) *The legal Liability of a Freight Forwarder in Multimodal Transport,* LL.M Thesis, Lund University. P12

allows him to use exemption clauses to a much larger extent that of any carrier. Consequently, the basic practical issue will almost invariably be whether exemption clauses, which are contained in the contract passed between the cargo interests and the person purporting to be a freight forwarder, will become void or voidable because of this person's subsequent qualification as a carrier.

A freight forwarder's obligations end when it selects a company to perform transportation services, unless the selection itself was negligent. However, if an agency relationship exists between a forwarder and a shipper, the forwarder may be liable for breach of fiduciary duty.[118]

The legal responsibility of freight forwarders often cannot be clearly identified since they can act in two different legal roles-agents and principal contractors. The activities of freight forwarders are not directly regulated by any international convention. It is obvious that an international convention is necessary and that leads us to the issue of International Rules and Regulations.

2.3 International Rules and Regulations

International maritime regulatory laws are developed by the involvement of flag and port states in treaties or conventions. International conventions stipulate agreed objectives for legislation on particular issues, such as maritime safety, pollution control and conditions of seafarers' engagement. They provide internationally established templates from which individual flag states can develop their own national maritime legislation.[119] By so doing, it is hoped that most countries will have that same law on key maritime transport issues, so that major inconsistencies between national maritime legislations are avoided. Consultation, drafting, the adoption of drafts, the opening for signature by the governments and ratification by countries

[118] Chapman, J. L, (2002) *Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments*. Voyles U.S.F. Maritime Law Journal [Vol. l6 No. 1].
[119]Murkherjee, P.K (2000)*Maritime Legislation*, WMU Publication, p10

were the major steps in creating a maritime convention in which several United Nations (UN) agencies and the OECD are involved. At the global level, the maritime industry is principally regulated by the International Maritime Organization (IMO), International Labour Organization (ILO) is responsible for the development of labour standards applicable to seafarers worldwide.[120] The third UN agency that deals with international shipping conventions is the Shipping Committee of UNCTAD.

Finally, the WTO's General Agreement on Tariffs and Trade (GATT) commitments, the ongoing services negotiations at the World Trade Organization (WTO) and the Maritime Transport Committee (MTC) of the OECD provide important forums for the liberalization of maritime services.[121]

As noted earlier in this work, maritime transportation is controlled by a web of national and international regulations and practices. Overall, these regulations and practices can be classified, under two broad headings: (i) regulations related to commercial operations and practices and (ii) regulations related on the rights and obligations of states and to safety and environmental regulations.[122]

[120]Regarding maritime transport, ILO's major interest is in working conditions on ships, such as provisions for manning, hours of work, pensions, vacation, sick pay and minimum wages. Between 1923 and 2005 a total of 41 maritime labour conventions concerning seafarers and dockworkers were adopted, in addition to 33 maritime labour recommendations. Michalek, J and Subidey, *Facilitation of Transportation in Turkey and Poland: a Comparative Study*. Femise Research Programme 2012 – 2013.p125

[121] The Maritime Transport Committee of the OECD is the only international forum that looks at this sector from both the policy and economic perspectives. Key activities of the Committee include the development of common shipping policies and the exchange of information on shipping policy developments both within and outside the OECD, combating substandard shipping to achieve better ship safety and protection the environment through the involvement of the entire maritime industry.

[122] Organization for Economic Co- operation and Development (2001): Regulatory Issues in International Maritime Transport. Paris: OECD.

2.3.1 Regulations Related to Commercial Operations and Practices

Regulations related to commercial operations and practices include maritime transport-specific economic policy regulations, ship registration conditions and requirements, denial of access to national shipping markets, restriction on the freedom and operation of non- nationals, cargo reservation/cargo sharing provisions, extra territorial application of laws, cabotage laws and other forms of subsidies and assistance, cargo liability regimes, national security measures, competition legislation and seaport industry. These regulations reflect a more pragmatic perspective, aimed at giving effect to government policies, achieving national economic objectives and ensuring the participation of nationals or simply regulating commercial activities. While some regulations such as competition or anti-trust laws are intended to free up the market, the bulk of the regulations probably alter or interfere with the market to some degree. [123]

In the context of liner shipping, the fundamental framework among OECD member states consists of the "The Code of Liberation of Current Invisible Operations" (the Code) and "The "Common Shipping Principles".[124] The Code was formally adopted by the Council of the OECD in 1961. Under the Code, members are obliged to eliminate restrictions on current invisible transactions and transfers relating to maritime transport operations, such as harbour services, repair and chartering. According to Note 1 to Annex A of the Code, the provisions of maritime freights are intended to give residents of a member state the unrestricted opportunity to avail themselves of and pay for all services in connection with international maritime transport that are offered by residents of any other member state. These provisions include chartering, harbour expenses, disbursements for fishing vessels, all means of maritime transport including harbour

[123] Mukherjee P.K and Mark B (2013)*Farthing on International Shipping (2013)*, 4th edition , Springer, London , pp 79 - 82
[124] ibid

services such as bunkering and provisioning, maintenance, repairs, expenses for crews and other items that have a direct or indirect bearing on international maritime transport operations.

Because of the fact that the shipping policy of the governments of the members is based on the principle of free circulation of shipping in international trade in free and fair competition, it follows that the freedom of transactions and transfers in connection with maritime transport should not be hampered by measures in exchange control, by legislative provisions in favour of the national flag, by arrangements made by governmental or semi-governmental organizations giving preferential treatment to national flag ships, by preferential shipping clauses in trade agreements, by the operation of import and export licensing systems so as to influence the flag of the carrying ship, or by discriminatory port regulations or taxation measures. The aim is to ensure that liberal and competitive commercial and shipping practices and procedures are followed in international trade and that normal commercial considerations alone determine the method and flag of shipment. Thus, the Code generally obliges OECD members to refrain from introducing and maintaining legislation or other measures in favour of national flag vessels within the OECD; the OECD member States, by having subscribed to the Code, are generally obliged to eliminate barriers to free trade in maritime transport services.

"The Common Shipping Principles" adopted by the Council of OECD in 1987 lays down a common approach to international shipping policy and practices among OECD members based on the following principles: (i) the maintenance of open trades and free competitive access to international shipping operations, (ii) coordinated response to external pressure based on full consultations among member countries, (iii) the role and recognition of government involvement by member countries to preserve free competitive access and the provision of choice to the shippers and (iv) a common approach to the application competition policy to the liner shipping

sector.[125] These principles were reviewed in the late 1990s, and a modified version extending and adding to the 13 principles was formally adopted by the OECD Council in September 2000.[126]Principle 14 deals with maritime auxiliary services and provides that access to and use of these services shall be non-discriminatory. Principle 15 acknowledges the importance of international multimodal transport services involving a sea leg and stipulates non-discriminatory treatment in access to and use of those services as well as a free and fair competitive environment with regard to their provision. Finally, Principle 16 deals with measures related to safety, the environment and the prevention of substandard shipping.

The OECD is also involved in the liberalization of maritime services on a regional basis. OECD members signed an "understanding on common shipping policy principles"[127] in 1993 with the republics of the Former Soviet Union and Central and Eastern Europe, largely modelled on the "common shipping policy principles". OECD members have begun a dialogue aimed at the promotion of free access to international maritime trade, respectful of the principle of free and fair competition on a commercial basis, the promotion of maritime safety, the protection of the marine environment, the need to prevent the operation of substandard vessels and to improve the training of sea-going personnel and the promotion of modern business technologies such as electronic data interchange.

A central group of barriers that have been applied to international maritime transport is the various cargo reservation arrangements. These schemes require that part of the cargo carried in trade with other states must be transported only by ships carrying the national-flag or deemed

[125] Mukherjee P.K and Mark B (2013) *Farthing on International Shipping*, 4th edition , Springer, London, PP 101 – 102; Jan Michalek and Subidey , *Facilitation of Transportation in Turkey and Poland : a Comparative Study*. Femise Research Programme 2012 – 2013.p.126

[126] Organization for Economic Co-operation and Development (2000) "Recommendations of the Council Concerning Common Principles of Shipping Policy for Member Countries" OECD document number C (2000) 124/Final, Paris: OECD.

[127] Mukherjee, P.K and Mark B (2013) *Farthing on International Shipping*, 4th edition , Springer, London, pp 101 – 102

a national by other criteria. These policies have typically been justified by either security or economic concerns. Cargo reservation can be imposed either unilaterally, if ships flying national flags are given the exclusive right to transport a specified share of the cargo passing through the country's ports, through cargo sharing with trade partner countries on the basis of bilateral or multilateral agreements or through a specific form of cargo reservation arrangement.[128] In the latter case, the governments of two or more countries may decide to distribute cargo arising from their common trade, so that each national-flag fleet is granted a considerable share. Ships flying the flag of other states are allowed access to a small share or, in some case no share at all.

A principal feature of the liner sector is the ability of operators to enter into co-operative arrangements and agreements. To counteract the anti-competitive actions of liner conferences at the multilateral level, the United Nations Convention on a Code of Conduct for Liner Conferences was adopted in 1974. The UN Liner Code, which entered into force in 1983 by its ratification by more than 70 countries, applies only to liner conferences in trades between contracting states and embraces a self-regulatory philosophy for "closed"[129] conference shipping operations. The Code establishes a framework within which conferences should operate in trades between contracting states and grants certain rights to those conferences, but at the same time it imposes certain obligations upon them, thereby protecting shipper interests. The Liner Code is best known for its cargo-sharing formula of 40:40:20, which suggests that cargo between member countries be divided, with 40% by vessels of the country of destination and 20% by cross-trading vessels. It should be noted that the 20% figure, and therefore the "40:40" is

[128] ibid

[129] Traditionally, there are two types of conferences, "closed" and "open". Most were "closed". Their member lines were like a club. They did not necessarily wish to let in others in a way that upset the carefully balanced coverage achieved by existing member, nor do they particularly wish to see their share of the market reduced to accommodate others.

recommended only.[130] However, two important qualifications need to be made about this provision. First, the provisions concern conference trades only, not the totality of the liner trade. Second, it is for conferences themselves, not governments, to determine the allocation of the cargo shares between conference members. Governments have no part to play in that allocation. Countries opposing the Convention do so for a variety of reasons. Some reasons are that cargo sharing leads to inefficiencies, reduced competition, reduction in shipper choice, and ultimately, higher freight rates. It is contended that shipper protection could be provided more effectively through national legislation and that ratification of this Convention would be inconsistent with OECD obligations and would run counter to existing competition legislation. Despite having been in force for more than 17 years, the Convention is of limited economic relevance, as numerous countries have not complied with it.

In an effort to reserve the largest possible share of the seaborne trade, in a country, foreign firms are sometimes restricted from entering or opening in the inland or domestic transport market. Ships engaged in Cabotage, that is, to the transportation of commodities between ports of the same country, have been required to be manned by the country's own citizens, either wholly or majority owned by domestic nationals, built at domestic shipyards or registered under the national flag. As a consequence, ship owners operating ships on Cabotage routes have not had to contend with foreign flag vessels.

It is imperative to state at this point that relevant negotiations at the WTO in Geneva with respect to the opening of maritime transport service markets are of significant relevance to the fortunes of shipping.[131] These negotiations proved difficult because of the complex and diverse

[130] Mukherjee, P.K and Mark B (2013) *Farthing on International Shipping*, 4th edition, Springer, London. pp 91 -92
[131] World Trade Organization Secretariat (2001) *Maritime Transport Services in WTO Secretariat (ed) Guide to the GATTS : An Overview of Issues for Further Liberalization of Trade in Services,* The Hague : Kluwer Law International.

nature of the sector. The first issue negotiators had to deal with during the Uruguay Round was to decide which sub-sectors and activities could be covered in the schedule for maritime transport services. It was decided that negotiations should cover the three pillars: (i) international maritime transport, (ii) maritime auxiliary services and (iii) access to and use of port services.[132] The first pillar, international maritime transport, was recognized as being comparatively liberal, although important aspects still needed to be addressed, such as national cargo reservation and unilateral reprisal measures. During the Uruguay Round, considerable attention was given to the second pillar, maritime auxiliary services, including cargo handling and storage services and providing services to ships while in their berths. It was recognized that this was a sector with significant range for liberalization. The third pillar, access to and use of port services covered all other services such as pilotage, towage etc provided to ships while approaching and berthing in ports.

Throughout the Uruguay Round of multilateral trade negotiations, there was considerable discussion as to whether multimodal transport should be added to the negotiations as a "fourth pillar". During negotiations in the specialized Negotiations Group on Maritime Transport Services, it was stressed that door-to-door services would play an increasing role in international shipping. The aim was to ensure that a multimodal transport operator should be able to rent or lease lorries, railway trucks, barges and related equipment for inland cargo transport, and operators should have access to, and use of, these facilities on reasonable and non-discriminatory requirements. Hence, it was contended that multimodal transport should be considered a fourth pillar to the schedule. Other countries have pointed out, however, that multimodal transport such as road and rail transport involves regulatory regimes that go beyond the maritime transport sector and that, as such, and it should not be incorporated into the schedules.

[132] ibid

Debate and talks on maritime transport services at the WTO was aimed to improve commitments in international shipping, auxiliary services and access to and use of port facilities through eliminating restrictions within a fixed time scale. Although negotiations were scheduled to end in 1996, little progress has been achieved until now. Participants failed to agree on a package of commitments. [133] Some commitments exist in certain countries' schedules covering the three main areas of maritime services even as at 2008.[134]

With respect to seaports, public revenue has been used until recently to finance the building of most large maritime infrastructures through national budgeting system. In general, public port authorities have completed the expenditure of maintenance and repairs for infrastructure, and the port authority itself has been financed with a permutation of public funds and tariffs and fees exacted from private firms operating within the port. With the increase in private participation in the operation of seaports, the landlord port became the most desirable category for the operation of seaports from an efficiency perspective, since it permits private enterprises and market forces to play a role in the supply of services while averting the monopolization of critical assets by private firms. The type of economic regulation changes with the size of seaports.[135] For small and large local ports that do not require more than a general cargo terminal, it is possible to consider the introduction of some form of competition among those firms that are willing to operate in the port.[136] Once the single operator is chosen, it is necessary to have some regulation over the charges that this firm imposes on port users; since, otherwise, it would enjoy a monopoly position. The regulatory authority could mainly use price-

[133]Parameswaran, B. (2004), *The Liberalization of Maritime Transport Services* , Springer, Berlin.p10
[134] ibid
[135] Trujillo, L. and Nombela, G (1999*) Privatization and Regulation of seaport Industry, P*olicy Research Working Paper No 2181, World Bank , Washington , D.C.
[136] Clark K., .Dollar, D and Micco, A (2001) *Maritime Transport Costs and Port Efficiency*. Washington, DC: World Bank, working paper series, No 2781.

cap systems or a rate-of-return type of regulation. But in cases of larger seaports, one could introduce competition within the port. If a large port is divided into several independent terminals, it is possible to induce competition between operators for the traffic that calls at the port. In such a case, regulation of prices is less of an issue. Nonetheless, some form of supervision would be needed, since the parties could collude due to their small numbers. [137]

2.3.2 Regulations Related to Safety and the Marine Environment

The problem created by marine pollution and safety is many sided and its solution involves interdisciplinary collaboration, the accommodation of many apparently conflicting interests, and, consequently, the application of many and varied approaches. The problem of control and regulation is complicated by the fact that, to be meaningful and effective, any regime must, of necessity, consist of legal norms and legal arrangements which are compatible with scientific knowledge and technical machinery, with the requirements of economic and commercial practice, and with the political and psychological facts of national and international life.[138]

The regulations on safety and environmental protection are generally based on IMO conventions such as the UN Convention of the Law of the Sea of 1982. By provisions of the convention, the flag state has primary legal jurisdiction for the ship in terms of regulating safety and environment matters, while the coastal state has restricted jurisdiction over vessels sailing in their waters. The extent of powers of coastal states to enforce their own laws are stipulated in

[137]Estache, A. Carbajo J.C and De Rus, G (1999). *Argentina's Transport Privatization and Re-Regulation: Ups and Downs of a Daring Decade-Long Experience*, Policy Research Working Paper 2249, and Washington D.C: The World Bank.

[138] Mensah, T.A (1971) *Legal Problems Relating to Maritime Pollution by Oil* in Peter Hepple (ed) Water Pollution by Oil, Proceedings of Seminar Sponsored by the Institute of Water Pollution Control and the Institute of Petroleum, Published by the Institute of Petroleum, London, p.294

definite terms by dividing the sea into four "zones", each of which is treated differently from a legal point of view: (a) the territorial sea, which is the strip of water close to the shore; (b) the contiguous zone, which is a strip of water to the seaward of the territorial sea; (c) the exclusive economic zone, which is a belt of sea extending up to 200 miles from the legally defined shoreline; and (d) the high sea, which nobody owns. On the high seas, all vessels enjoy, in principle, freedom of navigation under the exclusive jurisdiction of their flag state.[139] While the high seas are free from sovereignty claims by any individual nations[140] the intensity of state control over the waters increases landwards. In the exclusive economic zone, the costal state enjoys considerable sovereign exploration, exploitation, conservation and management rights[141]. Despite the existence of sovereign exploitation and related jurisdictional rights of the coastal state in the exclusive economic zone, the freedom of navigation under Article 58 applies in this zone, although with a number of precise and inherent restrictions. Article 3 stipulates that costal states have the right to enforce international laws and their own laws on safe navigation and pollution in territorial area with a maximum width of 12 nautical miles. The coastal states have limited powers to enforce customs, fiscal and immigration laws in the contiguous zone, and in the exclusive economic zone, that they have the power to enforce only oil pollution regulations.

Given that an international maritime transport service involves the movement of goods by vessel from the port of one country to the port of another country, access to ports is an indispensable element of an international shipping service. Access includes the loading and unloading of cargo, the embarking and disembarking of passengers, the taking on board of fuel and supplies and even the possibility of conducting trade. It is a basic condition for the smooth operation of the international maritime transport industry that merchant vessels from all nations are permitted

133. Articles 87, 89 and 92 of United Nations Convention on the Law of the Sea
[140]*R v Anderson*(1968) II Cox Crim. Cas. 198.
[141] Articles 56 and 60 of United Nations Convention on the Law of the Sea

unhampered access to and the efficient use of ports.[142] The 1923 Geneva Ports Convention and the Statutes annexed thereto, secures freedom of communication by guaranteeing in the maritime ports, under the sovereignty and authority of the parties and for purposes of international trade, equality of treatment among the ships of all contracting states, their cargos and their passengers.

The 1982 "Paris Memorandum of Understanding (MOU) on Port State Control" acts as a benchmark for other MOU's and it aims at eliminating the operation of substandard ships through a harmonized system of port state control. Ships are selected for inspection according to the Paris MOU targeting system. It should be noted that only internationally accepted conventions are enforced during port state control inspections. When serious deficiencies are found, the ship is detained. The captain is instructed to rectify the deficiencies before departure. But flag states that are not a party to conventions receive no more favourable treatment. The results of each inspection are recorded in the central database, located in Saint-Malo, France. Their periodically updated black-grey-white lists, which show the degree of riskiness of individual ships from different flag states, became one of the major indicators of the safety compliance level and environmental responsiveness of national shipping fleets within the last decade.

The IMO adopted a comprehensive framework of detailed technical regulations in the form of international conventions, which govern the safety of ships and the protection of the marine environment in maritime transportation of merchants and persons. National governments, which form the membership of IMO, are required to implement and enforce these international rules and to ensure that the ships registered under their national flags comply.

The majority of IMO conventions fall into three main categories. The first group is concerned with maritime safety, the second with the prevention of marine pollution and the third with

[142]Parameswaran, B. (2004), *The Liberalization of Maritime Transport Services* , Springer, Berlin.p10

liability and compensation, especially in relation to damage caused by pollution. Outside these major groupings are a number of other conventions dealing with facilitation, tonnage measurement, unlawful acts against shipping and salvage.

The extent of ratification and enforcement of IMO conventions is generally high, in comparison with international rules adopted for shore-based industries. The principal responsibility for enforcing IMO regulations concerning ship safety and environmental protection rests with the flag states. Flag states enforce IMO requirements through inspections of ships conducted by a network of international surveyors. Much of this work is delegated to classification societies. However, flag state enforcement is supplemented by what is known as Port State Control discussed above, whereby officials in any country that a ship may visit can inspect foreign flag ships to ensure that they comply with international requirements.

Prominent among more than fifty IMO conventions[143], is the International Convention for the Safety of Life at Sea (SOLAS), which entered into force in 1980, which covers a wide range of measures to improve the safety of shipping. The provisions of the convention cover the design and stability of passenger and cargo ships, machinery and electrical installations, life protection, life-saving appliances, navigational safety and the carriage of dangerous goods. In 1990, the "International Safety Management Code" was incorporated into SOLAS regulations. The Code requires shipping companies to develop, implement, and maintain a Safety Management System, which includes company safety, environmental policy, and written procedures to ensure the safe operation of ships and the protection of the environment. The Code has been effectively enforced, as its violation could result in detention of the vessel by port authorities and denial of permission for the ship to enter its intended port of call, as well as fines.

[143] www.imo.org

The IMO adopted a comprehensive maritime security measures at the "Conference of Contracting Governments to the International Convention for the Safety of Life at Sea" being one of the most prominent of IMO Conventions. The Conference, held at the end of 2002, adopted a number of amendments to the 1947 SOLAS, the most far-reaching of which enshrines the new "International Ship and Port Facility Security Code" (ISPS Code). The Code contains detailed security-related requirements for governments, ports authorities, and shipping companies in a mandatory section, together with a series of guidelines about how to meet these requirements in a second, non-mandatory section. The Conference also adopted a series of resolutions designed to add weight to the amendments, encourage the application of the measures to ships and port facilities not covered by the Code and to pave the way for future work on the subject matter.

The "International Convention for the Prevention of Pollution from Ships" (MARPOL), adopted in 1973 is one of the easily mentioned IMO conventions. It deals with all forms of marine pollution except the disposal of land-generated waste. It covers such matters as the definition of violations, special rules on the inspection of ships, enforcement and reports on incidents involving harmful substances. It should be noted that most oil tankers are currently of "single hull" design. In such vessels, oil in the cargo tanks is separated from the seawater only by a bottom and side plate. If this plate is damaged as a result of collision or stranding, the contents of the cargo tanks risk spilling into the sea and causing serious pollution. An effective way to avoid this risk is to surround the cargo tanks with a second internal plate at a sufficient distance from the external plate. This design, known as a "double hull", protects cargo tanks against damage and thus reduces the risk of pollution. Following the *Exxon Valdez* [144]accident in 1989,

[144] On March 24, 1989, a tragic accident involving Exxon Valdez supertanker ran aground in Alaska's Prince William sound, resulting in the loss of more than 245,000 barrels of oil.

the United States unilaterally imposed double hull requirements on both new and existing oil tankers according to vessel age limits and deadlines for the phasing out of single hull oil tankers. Faced with unilateral action on the part of the Americans to impose double hull requirements on both new and existing oil tankers during 1990s, the IMO established double hull standards in 1992 through the International Convention for the Prevention of Pollution from Ships (MARPOL). This Convention requires all oil tankers with a deadweight tonnage (DWT) of 600 tons or more, as delivered from July 1996, to be constructed with a double hull or an equivalent design. Therefore, no single hull tankers of this size have been constructed since this date. The International Convention requires that single hull tankers with a deadweight of 20,000 tons or more, and delivered before 6th July, 1996, comply with the double hull standards at the latest by the time they are 25 or 30 years old, depending on whether or not they have segregated ballast tanks. The new measures, introducing the Energy Efficiency Design Index (EEDI) for new ships and the Ship Energy Efficiency Management Plan (SEEMP) for all ships were adopted by way of amendments to MARPOL Annex VI, through introduction of a new Chapter 4, and entered into force on January 2013.

The "International Convention on Standards of Training, Certification and Watch-keeping for Seafarers" 1978 was the first to establish basic requirements on an international level on its subject matter. The Convention prescribes minimum standards relating to training, certification, and watch-keeping for seafarers that countries are obliged to meet or exceed.

In view of the distinctive nature of seafaring, most maritime countries have special laws and regulations for seafarers. However, the ILO has adopted over 60 maritime labour standards during the past 75 years. The standards adopted specifically for seafarers covers a multitude of matters including minimum age of entry of employment, recruitment and replacement, medical

examination, articles of agreement, repatriation, and holidays with pay, social security, and hours of work and rest periods, fatigue, crew accommodation, identity documents, vocational training and certificates of competency. Among the ILO conventions, one of the most important international labour agreements is ILO convention No.147. According to this Convention, ships must be similar to those required by ILO standards regarding safety and health, social security and the living and working conditions of seafarers. Furthermore, ILO convention 180, adopted in 1996, aims to promote the health and safety of workers, to improve maritime safety and protect the maritime environment. The convention establishes limits on seafarers' hours of work or rest on board ship, requiring a maximum of 14 hours work per day and 72 hours per week for seafarers on board ship, with minimum rest periods of 10 hours daily and 77 hours weekly. These instruments taken together constitute a comprehensive set of standards and concern all aspects of living conditions of seafarers and in relation to safety and environmental protection in maritime transportation of merchants and persons. The existing Conventions and Recommendations were updated and consolidated in a single coherent document christened the Maritime Labour Convention (MLC) 2006.

The MLC 2006 has two principal purposes: to bring the system of protection contained in existing labour standards closer to the worker; and to improve the applicability of the system by providing a level –playing field for ship-owners and governments interested in decent work condition for seafarers. For this reason, the "MLS 2006 is called the "fourth Pillar" of international maritime regulatory regime, after SOLAS, MARPOL and STCW"[145]

[145]Preghafi, A.P (2015) *An Overview of the Seafarers Rights,* The Voyage, Vol.3, No. 2 Oct – Dec. p.29

CHAPTER THREE

THE REGULATION OF MARITIME TRANSPORTATION IN NIGERIA

3.1 Introduction

In Nigeria, all maritime related decision and policymaking activities, including signing and domestication of maritime conventions are contained in the exclusive list of the Constitution of the Federal Republic of Nigeria, 1999. The Ministry of Transportation and its agencies see to the implementation of the laws, regulations and domesticated conventions. With respect to regulations on commercial operations and practices, it is stated that Nigeria does not associate itself with Organization for Economic Corporation and Development(OECD) Common Shipping Principles and is not a member of OECD. Nigeria has signed and ratified the UN Liner Code. Nigeria has no laws or regulations governing liner conferences. Nigeria regulates the practice of freight forwarding and operates a relaxed cabotage regime. Nigeria also operates concessional ports under a landlord port system.

The main international rules that regulate maritime safety at sea and environment have been transposed into the Nigeria maritime regulatory regime, which ensures that they have full force of the law in the Nigerian territorial waters, Exclusive Economic Zone (EZZ) and on the ships flying Nigeria flag not minding where such ships may be found at any particular point around the world since the ships flying Nigeria flag are extension of the Nigerian territory.

3.2 Regulatory Regime Related to Commercial Maritime Operations and Practices in Nigeria

The regulation of commercial maritime operations and services involves regulating how a ship can become a Nigerian ship or a ship flying the Nigeria flag. After a ship is acquired whether by new or second - purchase or through construction contract, it needs to be registered

if it is a registrable vessel since national regime may prescribe that certain type or size of vessel may not registrable. Registration serves a three-fold purpose.[146] First, there is the public law function. Registration is the procedural device through which the flag state confers nationality on a ship. The granting of nationality makes a ship subject to the national legal regime without which, the ship including people on board would, metaphorically, float in a legal vacuum.

Nationality is thus a substantive matter whereas registration is the procedural mechanism through which, it is effectuated. The flag in physical terms is the symbol of the ship's nationality although in maritime jargon the word is used interchangeably with ship nationality, and flag state refers to the state in which the ship is registered. By virtue of the ship's nationality the flag state exercises jurisdiction and regulation over the ship and meets its obligations under international maritime law. Secondly, there is a private law implication, registration serves as *prima facie* evidence of ownership of the ship and protects other proprietary interests such as mortgages and registrable charge. Thirdly, registration serves as a public record of proprietary interests. This is somewhat of a hybridization of functions. Also, details by which a ship can be identified such as its dimensions, tonnages and classification are recorded in the register. In summary, the following are the functions of registration with respect to ships:

a. Allocation of a vessel to particular state and its subjection to a single jurisdiction,
b. Conferment of nationality or the right to fly the national flags.
c. The right to diplomatic protection and consular assistance by the flag state.
d. The right to naval protection by the flag state.

[146] Mukherjee P.K,(2000) *The Changing Face of the Flag State : Experience with Alternative Registries,* World Maritime University, Sweden.p.5

e. The right to engage in certain activities within the territorial waters of the flag state-for example, cabotage.

f. In case of war, for determining the application of the rules of war and nationality to a vessel.[147]

g. The protection of the title of the registered owner.

h. The protection of the title and the preservation of priorities between persons holding security interests over the vessel, such as mortgages.

The nature of the ship registry whether it is open, closed, or partially open/closed or hybrid is a matter of national maritime policy. Both the public and private law functions of ship registration have public policy implications. The national interest is clearly a question of public policy. But there is also an element of public policy involved in the private law function. The mechanism of registration affords to the public, knowledge and notice of who owns, or has a proprietary interest in a ship which is entitled to the privileges of national flag.[148] Under United Nations Convention on the Law of the Sea (UNCLOS), there must be a genuine link between the ship and its flag state. The absence of any definitive judicial pronouncement on what exactly is meant by genuine link has left flag states free to interpret the term according to their individual national interests and aspirations.

Articles2 and 4 of the United Nations Convention on Registration of Ships 1986 provides that every ship must be registered under one national legislation or the other. In implementing this provisions of the convention relating to the compulsory registration of ships, section 19 of

[147] Mukherjee P.K, (2000)*The Changing Face of the Flag State : Experience with Alternative Registries,* World Maritime University, Sweden, p.5

[148] These two facets of public policy were adequately articulated by Wood V.C in the case of Liverpool Borough Bank v Turner (1860) ,29 L.J.Ch. 827 at 830. Mukherjee P.K, (2000)*The Changing Face of the Flag State: Experience with Alternative Registries,* World Maritime University, Sweden. p.5

the Merchant Shipping Act, 2007 (MSA) provides that whenever a ship is owned wholly by persons qualified to own a registered Nigerian ship, the ship shall be registered in Nigeria in the manner provided in the Act or in any other country in accordance with the laws of that country, unless the ship is exempted from registration under the Act.

The procedure for registration of ships in Nigeria is set out in sections 20-41 of the MSA 2007. An application for registration of a ship in Nigeria is to be made formally in writing to the Registrar at a port of registry in Nigeria. In the case of an individual it can be made by the person requiring to be registered as owner or by one or more of the persons so requiring, if more than one, or by his or their agent; and in the case of a corporation, by its agent. The authority of an agent shall be testified by writing, if appointed by an individual, under the hands of the appointers, and if appointed by a corporation, under the common seal of the corporation.

Before proceeding with the registration of a ship, the Registrar shall be furnished with the following information and documentation such as:

i. the full names, addresses and occupations of the purchaser or purchasers of the ship;

ii. evidence of ability or experience of the purchasers to operate and maintain the vessel; the ownership of shares in the company applying to register the ship;

iii. in the case of a ship with a previous registration, a bill of sale with warranty against liens and encumbrances from the sellers;

iv. the log-book of the ship for inspection by the Registrar; evidence of financial resources sufficient for the operation and maintenance of the ship; and

v. the certificate of incorporation and Articles of Association of the company.

The owner of a ship or an applicant who is applying for the registration of a ship shall on or before making the application, cause the ship to be surveyed by a surveyor of ships and the tonnage of the ship to be ascertained in accordance with the Tonnage Regulations made. Every ship in respect of which an application for registration is made shall, before it is registered, be marked permanently and conspicuously to the satisfaction of the Minister as follows: the name of the ship shall be marked on each of its bows, and the name of the ship and the name of the ship's port of registry shall be marked on the stern of the ship, on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be of a length not less than four inches and of a proportionate breadth.

A declaration may be made by a person or on behalf of a corporation as owner and certificate of registration to be issued by the Registrar upon the completion of registration. Also, pursuant to section 22 of the Cabotage Act 2003, vessels intended for use in cabotage trade are required to be registered in the Special Register for Cabotage Vessels and Ship Owning Companies engaged in cabotage. The Minister of Transport is expected to establish the Special Register for Cabotage Vessels in the Office of the Registrar of Ships.

The Cabotage Act recognizes five types of registration namely:

(a) Registration of Wholly Nigerian owned vessels

(b) Registration of Joint Venture Owned vessels

(c) Registration of Bareboat Chartered vessels

(d) Registration of Foreign owned vessels

(e) Temporary Registration of Cabotage vessel

However, section 8 of the Cabotage Act exempts the following vessels from cabotage regime:

(a) Vessels engaged in salvage operations for the purpose of rendering assistance to persons or aircraft in danger or distress

(b) Vessels engaged in commercial salvage operations

(c) Vessels owned and operated by Nigerian Armed Forces and Government Paramilitary Agencies

(d) Vessels owned and operated by Nigerian Customs Service

(e) Vessels owned and operated by Nigerian Police Force

(f) Vessels owned and operated by the Federal and State Ministries and or their agencies provided the vessels do not engage in commercial activities

(g) Vessels engaged with the approval of the Minister of Transport or any other Government agencies in marine pollution emergency

(h) Vessels engaged in oceanographic research with the approval of the department of fisheries or the Minister of Foreign Affairs

The Nigerian Ship Registry operates as a Unit under the Office of the Director General of Nigeria Maritime Administration and Safety (NIMASA). It is physically sited on the 2nd floor of NIMASA Headquarters Building in Apapa, Lagos. It was re-christened the Nigerian Ship Registration Office by the NIMASA Act 2007, and remains the sole repository of information on ships flying the Nigerian flag.

The primary function of the Ship Registry according to section 16 (1) of the Merchant Shipping Act 2007 is the registration and licensing of ships. To this end, section 17 (1) required the Registrar of Ships to maintain six register books: register for merchant ships; register for

fishing vessels; register for ships under construction; register for ships on bareboat charters and other charters exceeding 12 months duration; register for licensed ships below 15 gross tons; and register for Floating Production Storage and Offloading (FPSO) and Floating Storage and Offloading (FSO).

Deriving from this primary responsibility, the ancillary functions of the Registry include, cabotage registration, provisional registration, consent to transfer or mortgage, change of ownership, registration of mortgages, legal search of vessel files, issuing extracts of Ship Register when required, replacement of lost documents/issuance of Certified True Copies, revalidation of Certificate Registration and closure of registry where vessel is sold, lost or otherwise ceases to be a Nigerian ships.

The Ship Registration Office is not only the repository of flag State resource in Nigeria but also a key component of the Cabotage regime, being the custodian of the Special Register for Vessels and Ship Owning Companies engaged in Cabotage under section 22 (1) Coastal and Inland Shipping (Cabotage) Act 2003. It is also required to advise the Cabotage Services Department on the availability or otherwise of Nigerian flagged vessels with the capacity to perform a carriage contract about to be undertaken by a foreign vessel in cases of application for Ministerial waiver.

The Nigerian ship registry relies on the Maritime Safety Department of NIMASA on whom the Registry relies for expert opinion on the seaworthiness of prospective Nigerian flagged ship.Nigeria Merchant shipping Act 2007 in section 18 states that subject to the provisions of subsection (2) of the section and of any rules made or deemed to have been made hereunder, a ship shall not be registered in Nigeria under this Act unless the ship is owned wholly by persons of the following description:

(a) Nigerian citizens;

(b) Bodies corporate and partnership established under And subject to Nigerian laws, having their principal place of business in Nigeria;

(c) Such other persons as the Minister may, by regulations prescribed.

In addition to the encapsulation above which clearly introduces a national element into Nigerian ship ownership and nationality, it is also important to note that accessing the Nigerian flag has not been deliberately made easy by the grant of right to register ships from Agents or offices located abroad. Furthermore, incomes generated by ships flying the Nigerian flag in Nigeria are taxed and the Coastal and Inland Shipping (Cabotage) Law 2003 limits foreign manning of ships trading in Nigerian waters. It therefore follows that Nigeria runs the Closed or Traditional Registry type. The Closed Registry type by its nature does not encourage substantial revenue growth. The simple fact is that Nigeria, like some other traditional maritime nations, has never considered its Ship Registry as an instrument for revenue generation.

In the late 90s to early 2000s, the Registry seamlessly transited into the computer age as desk officers received computers to reduce the hitherto complete reliance on paper for record keeping and processing. The Registry introduced various administrative initiatives such as the use of checklists to eliminate arbitrariness in the appraisal of applications, introduction of vessel insurance as a requirement and increase of minimum share capital of ship owning companies to ₦25m which assisted in the elimination of substandard ships flying the flag.[149]

Another notable development occurred in the mid- 2000s when the Registry introduced regular sensitization exercises and stakeholder consultation to facilitate widespread buy-in of flag promotion initiatives. This was particularly useful when the Registry confronted its greatest

[149] Anonymous article titled" The Nigeria Ship Registry; Yesterday, Today and The Future "The Voyage, Vol. 3 , No . 2 Oct.- Dec. , 2015

ever challenge with the implementation of the phase-out of single hull tankers which threatened to reduced registered Nigerian tanker tonnage by almost 90%. With total emphasis on consultation, the Registry has been able to steer the Nigerian flag through this minefield and the threat of tonnage annihilation has been averted.

It is suggested that given the economic realities of the Nigerian state it is the right time for the Nigerian flag registry to aspire to build and sustain a record of safety and tonnage growth at the same time. Key to this, is the introduction of fiscal and policy initiatives to encourage registering under the Nigerian flag. The possibilities in this regard are endless; the Agency may consider for example, introducing a fee discounting scheme that allows ship-owners with multiple vessels under the flag to pay less in tonnage fees as the fleet grows. There is also no logical justification for requiring a ship-owner with several vessels under the flag to continually submit the same corporate documents for successive registrations as this not only wastes precious time but also amounts to unnecessary appropriation of rare storage space in the registry. Another possibility is to introduce an accelerated/flexible registration system to cater to Nigerian ship-owners who require urgent flagging in order to capitalize on rare vessel hire opportunities. This can be a win-win for the Agency and the ship-owners who get the opportunity to meet their tender deadlines while the Agency can charge a premium for the service. Of course, this seriously increases the risk of unsafe vessels sneaking under the flag but with a little creativity and thinking outside the box, the necessary safeguards can be built in just like with provisional registration applications. It may also be worthwhile to review the automation of the registration process to allow online submission of documents while originals are presented at a more convenient time. In fulfilment of the provision of the Merchant Shipping Act 2007, it may be necessary to establish other Ship Registry Offices in port cities in Nigeria to ease the burden on

prospective ship-owners and enhance efficiency. There is urgent need to explore on the possibilities of establishing a secondary registry. The potential advantage of this is the generation of badly needed government revenue. The short steps to achieving this are; amending Section 18 of the Merchant Shipping Act, 2007 hiring one of the maritime institutes in Nigeria or an internationally reputed Agency to establish and run the secondary registry on behalf of NIMASA, establishing offices in commercial nerve centers of the world and putting in place the necessary checks and balances to ensure compliance with safety and marine environmental protection regulations.

With respect to UN Liner Code, although Nigeria was among the first group of countries to ratify the United Nations Conference on Trade and Development (UNCTAD) code, the code itself remained dormant because it could only come into force six months after the date on which not less than 24 states with a combined tonnage of at least 25 % of the world general cargo fleet had become contracting parties. The code came into force on the 6th day of October 1983. Three and half years later, the Nigerian Shipping Policy Decree now National Shipping Policy Act[150] based on the code, came into being on the 30th of April 1987.

The National Shipping policy was the result of Nigeria effort to grapple and contain the problems or leakages identified in Nigerian international trade regime even before 1960. Common among these problems are those connected to the following:

i. Terms of trade and shipping practice – where Nigeria and other developing countries are made to accept F.O. B. Terms for their exports and C.I.F. terms for the imports with the result that all trades were constantly shipped in foreign vessels. The practices, apart from discouraging the developing countries from owning their ships, also completely shut

[150] Cap N75 LFN 2004 but now repealed by the NIMASA Act No 17 of 2007

them out from engaging in any downstream export activities and thereby reduce reliance on the production of primary raw materials only.

ii. Inadequacy of services – since the item of freight was usually dictated by the overseas buyer of raw materials and supplier of finished goods, the conferences lines, which by their monopolistic posture were already too powerful for the poor shipper in the developing countries, did not often pay much attention to the quality of services rendered to Nigeria shippers.

iii. Structure of freight rates – similar to aspects of inadequacy of services, was the issue of unilateral determination by the conferences of structure and increases in freight rates. Transport cost in international trade tends to have the same effect as customs tariff and could be as decisive factor in determining a country's export potential.

iv. Depletion of foreign exchange – the result of the above was the heavy drain of foreign exchange from Nigeria and other developing countries to the countries of the first world.

These and other factors formed the basis why Nigeria sought to adopt a shipping policy. The most important aspects of the shipping policy Decree No 10 of 1987, as it relates to ensuring greater participation of indigenous shipping lines in international sea – borne trade, protection and promotion of the local shipping lines, include, among other matters, the following:

i. Carriage of cargo – Section 9 (2) of the shipping policy stipulates that the national carriers shall have the right to participate in the carriage of bulk cargos to and from Nigeria to the tune of not less than 50 percent of such cargos. This section also provides that the cargos shall be shared in conformity with the UNCTAD 40: 40: 20 formula.

ii. Use of chartered Vessels- Section 8 of the policy provides for the national carriers to use chartered vessels when vessels belonging to the national carriers are insufficient for the cargo available.

iii. Ship Acquisition and Ship Building – Section 13 of the policy provided for the establishment of a fund to be applied to assist Nigerians in the development and expansion of a national fleet.

iv. Exports and Imports – Section 14 provides that the national carriers shall have exclusive right to the freight belonging to the federal , state and local Governments, including federal and state owned companies and agencies, except where such freight is exempted by the minister. The section also provides that all public sector contracts for the importation and exportation of goods shall respectively be on F.O.B and C.I.F terms.

v. Cargo Control and Sharing – Section 18 provides that the National Maritime Authority shall ensure that Nigerian vessels carry Nigeria's share of cargo in volume and earnings in accordance with the provisions of the Decree or any other form of cargo sharing arrangements entered into or agreed to by the Authority or by the Federal Military Government.

The most popular and by the most known aspect of the Nigeria Shipping Policy is the 40:40:20 formula of UNCTAD Code of conduct for Liner Conferences. Apart from the UNCTAD formula, the 50-50 ratio for other cargos mentioned in section 9 of the Policy and the exclusive carrying right given to Nigeria National Shipping Carriers in section 14 form part of the regulatory approach of the policy.

Preparatory to cargo control and sharing in 1988, the following prior steps were taken:

i. Appointment and sponsoring of indigenous carriers into various routes and conferences serving the Nigerian trade;
ii. Affixing sharing ratios to the appointed indigenous lines based on their fleet strength;
iii. Setting up of a freight sharing committee to carry out the weekly sharing exercise

The National Maritime Authority (NMA) commenced its cargo sharing operation on the 5th of May 1988 using the NMA cargo notification through the Central Bank of Nigeria and other dealers. In the early part of year 2000 the then Minister of Transport announced the scrapping of the cargo allocation and sharing functions of the Authority stating that the cargo sharing formula has outlived its usefulness in the present scheme of things. He further stated that officials of the Maritime Authority abused it by allocating cargos to shipping lines that could not lift the cargos to the detriment of those who possess the capability to lift the cargos.

The abolition of these two important instruments of promoting and protecting the domestic operators can be seen as a setback in the development of a vibrant shipping industry in Nigeria which necessitated the call by stakeholders for government to enact a cabotage law for Nigeria.

Nigeria embarked on a reform of ports in 2006.[151] Before the commencement of the ports reform, Nigerian Ports Authority (NPA) was operating 8 major ports excluding oil terminals with a cargo handling capacity of 35 million tonnes per annum through Apapa, Tin can Island, RoRo, Container Terminal, Port Harcourt, Warri, Calabar and Federal Lighter Terminal at Onne. [152]

The port reforms process changed everything and led to the adoption of a landlord model of port ownership, incorporating private – public sector partnership (PPP), infusion of private

[151]Usim U, *Port Concession: Has Nigeria fared well in 10 years*? Sun Newspaper of 6thJune, 2016 p.22
[152] ibid

capital and separation of the regulatory from operational role. Hence, the reforms ensured that NPA only played the role of a nautical authority, land manager, property developer and technical regulator while private sector would be involved in cargo operation, port labour, investment in equipment, investment in terminal maintenance and insurance of concession assets.

Although, the reform sought to separate regulation from the operation, it ended up not creating a regulator for the arrangement. The reform was not backed up by law and therefore there was no regulator. It looked more like a lease agreement for landlord and operators.

3.2.1 The Regulation of Freight forwarding in Nigeria

The business of freight forwarding as maritime transport auxiliary activity in Nigeria is regulated by Council for the Regulation of Freight Forwarding in Nigeria established by the Council for the Regulation of Freight Forwarding in Nigeria Act.[153] The Council is charged with the responsibility amongst others, of determining the standards of knowledge and skill to be attained by persons seeking to be registered members of freight forwarders of Nigeria. A registered freight forwarder shall use the abbreviation "RFF" after his name. A person shall not practice or carry on business under any name, style or title containing the words "freight forwarder" unless he is registered under the Act.

Section of 1 of the Act is to the effect that subject to section 22 of the Act, and to rules made under section 11 (4) of the same Act, a person shall be entitled to be registered if:

(a) he has attended a course of training approved by the Council under section 15 of the Act;

(b) the course was conducted at an institution approved by the Council, or partly at one such institution and partly at another or others;

[153] No 59 of 2007 which commenced on 30th of April 2007.

(c) he holds a qualification approved by the Council;

(d) he holds a certificate of experience issued pursuant to section 20 (1);

(e) he has completed a minimum of five years practical working experience in an approved freight forwarding establishment and submits an acceptable certificate of experience;[154]

Subject as aforesaid, a person shall also be entitled to be registered under the Act if -

(a) he passes the qualifying examination conducted by an institution approved by the Council and completes the practical training prescribed; or

(b) holds a qualification granted outside Nigeria and for the time being accepted by the Council and is by law entitled to practice for all purposes as a freight forwarder in the country in which the qualification was granted and, if the Council so requires, he satisfies the Council that he has had sufficient experience as a freight forwarder;

(c) he holds an approved degree in transport or maritime studies from a recognized higher institution and has passed the professional examinations approved by the Council.[155]

An applicant for registration shall in addition to evidence of qualification, satisfy the Council that:

(a) he is of good character;

(b) he has attained the age of twenty-one years; and

(c) he has not been convicted in Nigeria or elsewhere of an offence involving fraud or dishonesty.

[154] Section 13 (1) of the Council for the Regulation of Freight Forwarding in Nigeria Act No 59 of 2007.
[155] Section 13 (2) of the Council for the Regulation of Freight Forwarding in Nigeria Act No 59 of 2007

The Council may, in its sole discretion, provisionally, accept a qualification produced in respect of an application for registration under this section or direct that the application be renewed within such period as may be specified in the direction.

The Council shall, from time to time, publish in the Gazette particulars of qualifications for the time being accepted for registration under the Act.

Subject to subsection 2 of the section, the Council may approve any institution for the purposes of the Act and may for those purposes approve:

(d) any course of training at any approved institution which is intended for persons seeking to become or are already freight forwarders and which the Council considers is designed to confer on persons completing it sufficient knowledge and skill for practice of that profession;

(e) any qualification which, as a result of an examination taken in conjunction with a course of training approved by the Council under this section is granted to candidates reaching a standard at the examination indicating in the opinion of the Council that the candidates have sufficient knowledge and skill to practice as freight forwarders;

(f) any institution either in Nigeria or elsewhere, which the Council considers is properly organized and equipped for conducting the whole or any part of a course of training approved by the Council under this section.[156]

The Council shall from time to time publish in the Federal Gazette a list of qualifications in the profession of freight forwarding approved by it, and subject thereto the Council shall not approve for the purposes of subsection (1) of the section, a qualification granted by an institution in Nigeria unless the qualification has been so published by the Council.

[156] Section 15 of the Council for the Regulation of Freight Forwarding in Nigeria Act No 59 of 2007

The Council may, if it thinks fit, withdraw any approval given under this section in respect or any course, qualification or institution; but before withdrawing such an approval the Council shall:

(a) give notice that it proposes to do so to each person in Nigeria appearing to the Council to be a person by whom the course is conducted or the qualification is granted or the institution is controlled, as the case may be;

(b) afford each such person an opportunity of making to the Council representations with regard to the proposal; and

take into consideration any representation made in respect of the proposal in pursuance of paragraph (b) of the subsection.

Notwithstanding the provisions of any other laws, any government agency responsible for granting of permits, approvals and licenses to freight forwarders shall in addition to any other requirement, require the applicant to submit a certificate of registration as a registered freight forwarder issued by the Council. Every freight forwarder licensed under the Customs and Excise Management Act prior to the coming into force of this Act, shall immediately after the commencement of this Act, submit to the Nigerian Customs Service and any relevant authority, a certificate of registration issued by the Council.

It can be seen that there is no restriction in terms of nationality as to who can practice as a freight forwarder in Nigeria and there may be need to introduce a national element in the practice of freight forwarding in Nigeria.

3.2.1.2 The Nigeria Cabotage Regime

The Nigerian cabotage Act is basically based and modelled after the United States Merchant Marine Act of1920. Section 2 of the Act specifically mentions the requirement which a vessel must fulfil before it can be permitted to trade on the inland waterways of Nigeria thus: " subject to the further provisions of this Act, no vessel other than vessel wholly owned and manned by Nigerian citizens, built and registered in Nigeria shall engage in the domestic coastal carriage of cargos and passengers within the coastal, territorial inland waterways, island or any point within the waters of the exclusive economic zone"

Section 6 provides that before a vessel can be deemed to be wholly owned by Nigerians, the shares in the ship must be beneficially owned by a Nigerian citizens or a corporation registered in Nigeria, 100% share of the capital which is beneficially owned by Nigerian citizens.

Section 7 further clarifies the requirement that the ship be wholly manned by Nigerian citizens. It provides that a vessel is wholly manned by Nigerian citizens where all the officers and crew employed on board the ship are exclusively of Nigerian nationality

Section 8 provides that a vessel will be deemed to be built in Nigeria if all the major components of its hull and superstructure are fabricated or assembled in Nigeria.

Despite the above restrictions on foreign vessels from trading in Nigerian waters, the Act empowers the Minister of Transportation to waive the requirements that a ship be wholly owned, manned and built in Nigeria.[157] It further provides that upon the receipt of an application for a waiver by a duly registered vessel, the Minister may grant a waiver if it is proven that there is no Nigerian owned vessel which can render the services described or contemplated by the foreign vessel in its application. The Minister can also grant a waiver upon the receipt of an application to permit a registered vessel which is not wholly manned by Nigerians to trade in Nigerian

[157] Section 11 of Cabotage Act, 2003

waters if it is shown that there is no qualified officer or crew for the position specified in the application. Further, the Minister can grant a waiver to the requirement for a ship to be built in Nigeria if it is shown that there are no facilities for the building of such ships in Nigeria. This waiver system is made subject to fulfilment of certain further conditions stated in section 13 of the Act. In the exercise of his Ministerial powers under this section , the Minister must follow the prescribed order in case he must give priority to a joint venture company between Nigerian and non – Nigerians. Where this is not the case, then, 100% foreign owned vessels shall be licenced to render the service. The Nigerian Immigration Service and the Nigeria Investment Promotion Commission shall not issue or grant a work permits or expatriate quota to companies engaged in cabotage trade without sighting the waiver certificate (FMOT Cabotage Trade Form) issued by the Federal Ministry of Transport.[158]

Therefore, it can be asserted that Nigerian cabotage operate a waiver system only on ground of non –availability. This implies that waiver can only be granted on the four pillars of cabotage where non availability criteria are satisfied and the conditions for such grant are spelt out to prevent abuse of discretion[159]

In order to address the inadequacy of the indigenous capacity and to ensure uninterrupted operations of critical services while allowing government a period of time, to effect the seamless transition from low indigenous capacity to optimal Nigerian participation, the waiver clause in the Cabotage Acts was provided. Section 51 of the Cabotage Act 2003 provides for a transition of technical and human capacity development. The Cabotage Act has a major and very important provision relating to independent fund for maritime development in the form of the Cabotage Vessel Finance Fund (CVFF).

[158]Guidelines for the Implementation of Nigerian Cabotage Act,2006, p 3
[159]Usoro,M (2005*). Nigeria Cabotage Law and International Politics,* Maritime Cabotage Advocacy paper pp.12 - 167

Section 8, paragraph 42 of the Coastal and Inland Shipping (Cabotage) Act of 2003 established the Cabotage Vessel Financing Fund (CVFF). The purpose of the fund shall be to promote the development of indigenous ship acquisition capacity by providing financial assistance to Nigerian operators in the domestic coastal shipping. The beneficiaries of the fund shall be Nigerian citizens and shipping companies wholly owned by Nigerians.

The CVFF is presently funded through:

a. Two per cent surcharge of the contract sum performed by any vessel engaged in coastal trading;
b. Monies generated under the act including tariff, fines, and fees for licenses and waivers
c. A sum which shall from time to time be determined and approved by the National Assembly;
d. Such further sums accruable to the fund by way of interests paid on and repayments of the principal sums of any loan granted from the fund.[160]

The international legal basis for the promulgation of the cabotage law is derived from the combined effect of Articles 56 and 60 of the United Nations Convention on the Law of the Sea, **(**UNCLOS1982), much credence and preservation is given to the right of member states to promulgate laws regulating activities within their territorial and exclusive economic zones **(**EEZ).This sections of UNCLOS 1982 also grant member states jurisdiction to legislate upon artificial installations within territorial jurisdictions. Canada, no doubt, has defined its coastal trade to incorporate "exploration, exploitation or transportation of mineral or non –living natural resources of the continental shelf"[161]

[160] Guidelines on the Implementation of the Cabotage Act , 2003
[161] Section 3 of Coasting Trade Act of Canada S.C 1992 C31.

Significantly also, is the connection between cabotage trade and WTO**.** To this end, it should be noted that trade in maritime transport form integral part of the topics under the General Agreements on Trade in Services (GATS) in the WTO. The negotiation are carried out by the negotiating group on Maritime Transport Services (NGMTS) but it is also instructive that WTO and its negotiations are limited to international shipping, auxiliary services, access to and use of port facilities. Thus, Cabotage trade does not form part of the negotiating issues and consequently states are at liberty to evolve regimes to deal with coastal trade without incurring responsibility or contradicting their obligation under the WTO.

3.3 Regulation Related to the Safety of Maritime Transportation

The main international rules that regulate maritime safety at sea and environment have been transposed into the Nigeria Maritime Regulatory regime, which ensures that they have full force of the law in the Nigerian territory waters, Exclusive Economic Zone (EZZ) and on the ships flying Nigeria flag not minding where such ships may be found at any particular point in where in the world since the ships flying Nigeria flag are extension of the Nigerian territory.

The International Maritime Organization (IMO) has developed more forty five conventions under its auspices but has identified three amongst the several conventions as its key conventions.[162] The three International conventions are Convention for the Safety of life at sea, 1974 and its protocol of 1988, International Convention on the Standards of Training , Certification and Watch Keeping for Seafarers, 1978 including its 1995 and 2010 Manila amendments and International Convention for the Prevention of Pollution from Ships, 1973 with its 1978 and 1997 protocols. However, the keystone of the International Maritime Organization's efforts to enhance maritime safety is generally agreed to be formed by three conventions: The International Convention for the Safety of Life at Sea (SOLAS); the International Convention on

[162] www.imo.org accessed on 4/7/2016

Standards of Training, Certification and Watch-keeping for Seafarers (STCW); and the International Regulations for Preventing Collisions at Sea (COLREG). Nigeria has ratified the UN Convention on the Law of the Sea 1982 normally referred as the constitution of the sea, MARPOL 73/78, SOLAS, STCW and also the International Labour Organization ILO's Maritime Labour Convention , 2006.

By virtue of Section 215 of the Merchant Shipping Act of 2007 the following amongst other conventions and protocols mentioned there under and their amendments relating to Maritime safety shall apply in Nigeria that is-

(a) International Convention for the safety of Life at Sea, 1974 (SOLAS) was adopted by the International Conference on Safety of Life at Sea;

(b) Protocol Relating to the International Convention for the Safety of Life at Sea, 1988 and Annexes I to V thereto;

(c) International Convention on Standards of Training Certification and Watch Keeping of Seafarers, 1978 (STCW) as amended;

Also by virtue of International Convention for the prevention of Pollution from Ships 1973 and 1978 protocols (Ratification and Enforcement) Act, 2007, the International Convention for the Prevention of Pollution from Ships 1973 and 1978 - MARPOL 73/78 became domesticated and applicable to Nigeria.

It has become the practice yet very critical in Nigeria to domesticate maritime convention verbatim as has been observed by Constance Igburude - Omagbemi in her article: *A review of the Merchant Shipping Regulations 2012*: "In Nigeria, it is trite that IMO conventions, when domesticated are often done verbatim in their original texts, without detailed amplification as

regards implementation, penalty for breaches and other matters requiring a domestic pronouncement."

An illustration of the above assertion can be found in commencement section of the Act domesticating the MARPOL 73/78 in Nigeria. It stated as follows:

> (1) Enforcement of the Treaty on International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol.
>
> As from the commencement of this Act, the provisions of International Convention for the prevention of pollution from ships 173 and the 1978 protocols set out in the first schedules to this Act, shall-
>
> (a) Have the force of law in Nigeria;
> (b) Be given full recognition and effect
> (c) Be applied by all authorities and persons exercising legislative, executive and judicial powers.

The analysis of the legal framework for regulating maritime transportation in Nigeria with respect to regulations related to safety and environment will therefore be centered on SOLAS, STCW, COLREG and MARPOL Conventions. The United Nations Convention on the Law of the Sea (UNCLOS) regarded as the Constitution of the Sea is analyzed in the light of the topic of this research .The Nigerian Merchant Shipping Act, 2007 is also analyzed.

3.3.1 The International Convention on Safety of Life at Sea (SOLAS) and International Convention on Standard of Training, Certification and Watch keeping (STCW)

3.3.1.1 SOLAS Convention

SOLAS 1974 contains 13 articles as well as a comprehensive annex of standard technical requirements. Additional IMO recommendations and protocols bring the document to well over

300 pages. Ship inspections are carried out to ensure that the requirements are satisfied before a vessel commences trading, in connection with periodical surveys, etc. If a ship is in good order, then one or more certificates will be issued. An important feature of the convention is that a certificate issued pursuant to SOLAS will be accepted by all states that have ratified the Convention. International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act, 2004 of Nigeria domesticated the SOLAS Convention in Nigeria without reservation and without amendment to its original form.

The SOLAS Convention specifies minimum standards for the construction, equipment and operation of ships. Generally, the requirements apply to certain classes of ships engaged in international voyages, but some provisions on safety of navigation apply to all ships on all voyages. The following is a brief indication of the subject matter for each chapter of SOLAS:

i. Chapter I of SOLAS sets up the basic system of surveys and certificates.
ii. Chapter II-I focuses on construction standards, particularly as they address subdivision, stability and machinery and electrical installations. In 1996, this chapter was amended to address stability of passenger ships and cargo ships in a damaged condition, and to require corrosion-prevention systems on bulk carriers
iii. Chapter II-2 concerns construction standards pertaining fire protection, fire detection and fire extinction: In 1992, this chapter was amended to require automatic sprinkler systems, public address systems, and luminous markings for escape routes on passenger ships
iv. Chapter III covers life-saving appliances arrangements. (This chapter was significantly revised by the 1996 amendments which came into force on July 1, 1998.) The International Life-saving Appliances (LSA) Code is mandatory under the

1996 amendments. A 1995 amendment introduced a requirement for helicopter landing areas on certain passenger ships, as well as requirements for fast rescue boats, and for a "decision support system" for emergency management on the bridge.

v. Chapter IV addresses radio-communications. (This chapter was significantly revised by the 1988 amendments which came into force on February 1, 1992, and introduced requirements for the Global Maritime Distress and Safety System (GMDSS).) As of February 1, 1999, all merchant ships covered by SOLAS must be converted to the GMDSS, and Contracting Governments are required to provide shore-based radio facilities.

vi. Chapter V covers of subjects under the broad title of Safety of Navigation. In addition to provisions on the ice patrol, there are regulations on danger massages, ships routing and reporting, carriage requirements for navigational equipment such as Gyrocompasses and Automatic Radar Plotting Aids (ARPA), steering gear, bridge visibility, pilot boarding arrangements, manning, emergency towing arrangements, and other subjects. This chapter is currently under review at IMO, with the objective of modernizing its provisions and organizing its structure. Proposals now on the table at IMO include requirements for automatic ship identification systems (AIS), voyage data recorders (VDR), and the option for using electronic chart information systems as an alternative to paper charts.

vii. Chapter VI is generally on carriage of cargoes with special provisions on carriage of grain. In 1996, this chapter was amended to address loading, unloading and stowage of bulk cargoes to prevent excessive stress on the ship's structure.

viii. Chapter VII imposes requirements for the carriage of dangerous goods in packaged form, in solid form in bulk, and for construction and equipment of ships carrying dangerous liquid chemicals in bulk, and for ships carrying liquefied gases in bulk. Under this chapter, the International Bulk Chemical (IBC) Code, and the International Gas Carrier (IGC) Code are mandatory. The Maritime Safety Committee has approved an amendment to revise this chapter to make the Irradiated Nuclear Fuel (INF) Code mandatory for ships carrying INK material as cargo. The Committee adopted the amendment at its 71st session in May 1999.

ix. Chapter VIII has special provisions for nuclear ships (i.e. ships provided with a nuclear power plant).

x. Chapter IX, which entered into force on July 1, 1998, set in place the requirements for Management for the safe operation of ships and made the International Safety Management (ISM) Code mandatory. The ISM Code became mandatory for passenger ships including passenger high speed craft, and oil and chemical tankers, bulk carriers, and cargo high speed craft of 500 gross tonnages and upwards on July 1, 1998. The code became mandatory for dry cargo ships of 500 gross tonnages and upwards on July 1, 2002.

xi. Chapter X concerns safety measures for high-speed craft and makes reference to the High Speed Craft Code.

xii. Chapter XI covers a variety of subjects including the authorization of recognized organizations, enhanced surveys, ship identification numbers, and port state control on operational requirements. In order to fight international terrorism (cf. September 11 2001) an International Ship and Port Facility Security Code (the ISPS Code) was

adopted in December 2002. It consists of two parts: Part A with obligatory rules and part B with guidelines. As a consequence hereof SOLAS Chapter XI was split into two: XI-1 on safety and XI-2 on security. These rules entered into force on July 1 2004

xiii. Chapter XII is a new chapter on bulk carrier safety. It was adopted at a conference in November 1997, and it came into force on July 1, 1999. The regulations pertain to survivability and structural requirements for dry bulk carriers of 150 meters or more in length carrying cargoes such as coal or iron ore.

3.3.1.2 STCW Convention

The STCW convention was adopted originally in 1978 and came into force in 1984. The STCW Convention, as its name indicates, establishes basic requirements on training, certification and watch-keeping for seafarers. Generally, the requirements apply to all seagoing ships, that is., not limited to those engaged in international voyages. The following is a brief indication of the subject matter for each chapter of STCW:

a. Chapter I contains general provisions on such matters as issuance, recognition and revalidation of certificates and endorsements, port state control, communication of information to IMO, quality standards for training, assessment and certification activities, medical fitness standards, use of simulators, responsibilities of companies, and principles governing near-coastal voyages.
b. Chapter II sets out the minimum requirements for certification of the master and personnel in the deck department.

c. Chapter III sets out the minimum requirements for certification of the chief engineer and personnel in the engine department.

d. Chapter IV pertains to requirements for personnel performing radio communication functions, including GMDSS radio personnel.

e. Chapter V has special training requirements for personnel on tankers, on ro-ro passenger ships, and on passenger ships other than ro-ro passenger ships.

f. Chapter VI covers such matters as basic safety training for all seafarers with safety or pollution prevention duties; proficiency in survival craft and rescue boats, and fast rescue boats; advanced firefighting; and provision of medical care on board ship.

g. Chapter VII allows some degree of flexibility to parties to mix and match functions and levels of responsibility when issuing certificates of competence.

h. Chapter VIII covers watch-keeping arrangements, and includes a provision on requiring that watch-keeping personnel must be provided a minimum period of rest each day.

Almost all of the technical details in the STCW Convention are contained in the Seafarers' Training, Certification and Watch-keeping (STCW) Code. This code is made mandatory by reference in the STCW regulations and includes four-column tables with 'standards of competence' based on specific areas of knowledge, understanding and proficiency to be assessed using prescribed methods and criteria. One of the most dramatic changes introduced by the 1995 STCW amendments concerns the role of the IMO in overseeing implementation of the new requirements by all parties.

3.4 Nigerian Merchant Shipping Act, 2007

By virtue of Section 215 of the Merchant Shipping Act of 2007, the following amongst other conventions and protocols mentioned there under and their amendments relating to Maritime safety shall apply in Nigeria, that is-

a. International Convention for the safety of Life at Sea, 1974 (SOLAS) was adopted by the International Conference on Safety of Life at Sea;
b. Protocol Relating to the International Convention for the Safety of Life at Sea, 1988 and Annexes I to V thereto;
c. International Convention on Standards of Training Certification and Watch Keeping of Seafarers, 1978 (STCW) as amended;

Under Section 216 (1) of the Act, the Minister is empowered to "make such regulations he deems necessary or expedient for the purpose of carrying out the provisions of this part of the Act" Section 216 (2) provides that the Minister may by regulation provide for among other things :

a. Survey of ships and issuance of certificates
b. Safety of navigation
c. The management and safe operation of ships

The regulations made under this section shall, in the case of ships to which the Safety Convention applies, include such requirements as appear to the Minister necessary for implementation of the provisions of the safety convention "or any international convention on safety." [163]

It is the pertinent to state that making of regulations under this the above provision or the enforcement of the provisions of safety treaties (whether signed or not signed by Nigeria) but which are not yet enacted or domesticated into law by the Nigeria Federal legislature, raises

[163] Section 216(3) MSA

serious constitutional and legal issues since only ratified conventions that are domesticated by the national assembly can be enforced or implemented. It is the constitutional law of a state that dictates the applicable implementation methodology of a maritime convention [164]and not a statute or regulation made by a Minister or any other person.

The Minister is empowered to appoint qualified persons as Surveyors of ships whether generally or for any specific purpose, or occasion. The Minister may as well make rules as to powers, functions and duties of Surveyors. [165]

Every Surveyor of ships and every Radio Surveyor shall perform the powers, functions and duties conferred on him under the Merchant Shipping Act 2007 and such other powers, functions and duties as may be necessary to carry into effect the provisions of the part xii of the Act.[166]

Specifically, a Surveyor of ships may go on board any Nigerian ship while the ship is still in Nigeria to survey of inspect the ship or any part of the ship, or any of the machinery, boats and equipments, cargo and other property or articles on board the ship, and any certificate or other documents which relate to the ship, or to any officer of the ship.

In the event of any accident involving a ship, or for any other reason he may consider necessary, a Surveyor of a ship may require the ship to be taken into the dock for the purpose of surveying or inspecting the hull of the ship. [167]

The owner of a Nigerian ship or coastal trade and inland water ship is under a statutory obligation to cause the ship to be surveyed in the manner provided in this part of this Act, at least

[164] Mukherjee P.K, (2002) *Maritime Legislation* (WMU Publication, Malmo) pp26-29; P.K Mukherjee (2003)*Transformation of Conventions into National Legislation: Piracy and Suppression of Unlawful Acts.* Journal of International Commercial Law 245, pp246 -250
[165] Section 218 (5) MSA
[166] Section 218 (1) – (3)
[167] Section 218 (4) , MSA

once every year. But If the ship is, during the whole of the last month of any annual period prescribed, absent from Nigeria, the owner shall cause the ship to be surveyed within one month from the date on which the ship next returns to a Nigerian port[168].

A Surveyor shall keep a record of the inspections he makes and certificates he issues in such form and with such particulars respecting the inspection and certificates as the Minister may direct.[169] .

No ship to which the section 221 of the Act applies shall, except where this Act otherwise provides, ply or proceed to sea or on any voyage or excursion unless there is a valid certificate of survey in force in respect of that ship under this part, which certificate is applicable to the voyage or excursion on which the ship is about to proceed. The classes of ships affected are listed in section 221(2) of the Act.

3.4.1 Recognition of Certificates of Survey Granted in Other Countries

Where a foreign ship, which is not a Safety Convention passenger ship, has a foreign certificate of survey attested by an appropriate Officer at a port in a foreign country, and the Minister is, by the production of that certificate, satisfied that:

(a) the ship has been officially surveyed at the port;

(b) the certificate remains in force; and

(c) as to the matters covered by the survey made for the purposes of the certificate, it appears to meet substantially the requirements of this Act, the Minister may; subject to compliance by the owner with any condition which the Minister may specify, direct that,

[168] Section 219, MSA
[169] Section 220, MSA

the certificate shall be deemed to be a certificate of survey issued under the Merchant Shipping Act, and the certificate shall have effect accordingly.[170]

The Minister may, by order declare that the provisions of section 225(1) of the Act shall not apply in the case of a foreign ship whose certificate of survey complies with the requirements of this section, if it appears to the Minister that corresponding advantages are not extended to Nigerian ships at the port at which the foreign ship was surveyed.

3.4.2 Issuance of Certificates of Survey

The Minister is under sections 226 – 230 empowered to issue the following certificates:

(a) Certificate of Survey.

(b) Safety certificates to passenger ships.

(c) Certificates for cargo ships of safety equipments, and exemption certificate.

(d) Certificates for cargo ships of cargo certificates and exemption certificate.

(e) General safety certificates, short voyage safety certificate, a safety equipment certificate, or a radio certificate.

It is prohibited for a Nigerian ship to proceed to sea on an international voyage from a port in Nigeria unless there is in force in respect of the ship:

(a) if the ship is a passenger ship, a safety certificate relating to short voyage safety certificates, is applicable to the voyage on which the ship is about to proceed and to the trade in which it is for the time being engaged; or

(b) if the ship is a cargo ship, both a safety equipment certificate or a qualified safety equipment certificate, and a radio certificate, a qualified radio certificate or a radio exemption certificate.[171] Section 235(1) of the Act

[170] Section 225 (5) MSA

A cargo ship shall not be prohibited from proceeding to sea if there is in force in respect of the ship such certificate or certificates as would be required if the ship were a passenger ship.[172]The master and owner of a ship which proceeds to sea without a certificate shall be deemed to have committed an offence and on conviction shall be liable to a fine less than Five Hundred Thousand Naira or to imprisonment for three years or to both.[173]

3.4.3 Safety Convention Ships of Other Countries

The Minister may by Order provide that certificates issued in accordance with the Safety Convention by the Government of a country other than Nigeria in respect of Safety Convention ships, not being Nigerian ships be accepted as having the same force as corresponding certificates issued by the Minister under the Act, and the certificate shall be referred to as Accepted Safety Convention Certificate.[174]

Where an Accepted Safety Convention Certificate is produced in respect of a Safety Convention passenger ship, not being a Nigerian ship:

(a) the ship shall not be required to be surveyed under this Act by a surveyor except for the purpose of determining the number of passengers, if any, that the ship is fit to carry; and

(b) on receipt of any declaration of survey for the purpose of determining the number of passengers, the Minister shall issue a certificate under section 227 of the Act containing only a statement of the particulars set out in paragraph (c) of subsection (1) of section 227 of the Act and a certificate so issued shall have effect as a certificate of survey [175].

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[171] Section 235 (1) , MSA
[172] Section 235(2), MSA
[173] Section 235 (3) ,MSA
[174] Section 243(1) , MSA
[175] Section 244(1), MSA

Where there is produced in respect of any ship mentioned in section 244(1) of the Act an Accepted Safety Convention Certificate, and a certificate issued by or under the authority of the Government of the country in which the ship is registered or to which it belongs showing the number of passengers the ship is fit to carry, and the Minister is satisfied that the number has been determined substantially in the same manner as in the case of a Nigerian ship, the Minister may, if he thinks fit, dispense with any survey of the ship for the purpose of determining the number of passengers that the ship is fit to carry, and direct that the last mentioned certificate has effect as a certificate of survey[176].

Where a Safety Convention cargo ship, which is not a Nigerian ship, is surveyed in Nigeria in the manner prescribed under the Act, and there is produced in respect of the ship an Accepted Safety Convention Certificate by virtue of the production of which that ship is, under section 247 of this Act, exempted from the rules for lifesaving appliances, or, as the case may be, from the radio rules, the surveyor shall state in his declaration of survey that if the Minister upon receipt of a declaration of survey, issues a certificate of survey in respect of any such ship, the Minister shall state in the certificate the rules from which that ship is exempted and the reasons for the exemption. [177]

Where an Accepted Safety Convention Certificate is produced in respect of a Safety Convention ship which is not a Nigerian ship and the certificate shows that the ship:

(a) is properly with the lights, shapes and means of making signals required by the collision rules; or

[176] Section 244 (2), MSA
[177] Section 246, MSA

(b) complies with the requirements of the Safety Convention as to lifesaving and fire extinguishing appliances or if exempted from some of those requirements the ship complies with the rest; or

(c) that the ship complies with or is exempted from the requirements of the Safety Convention relating to radio communications, or if exempted from some of those requirements, the ship complies with the rest, the ship shall, to the extent to which the certificate is applicable, be exempted from inspection for the purposes of enforcing the collision rules or from the provisions of the rules for lifesaving appliances or of the radio as the case may be.

The master of a Safety Convention ship, which is not a Nigerian ship, shall produce to the collector of customs from whom a clearance for the ship is demanded in respect of an international voyage from a port in Nigeria, an Accepted Safety Convention Certificate that is the equivalent of the Safety Convention Certificate issued by the Minister under the Act, required to be in force in respect of the ship if the ship were a Nigerian ship; and a clearance shall not be granted, and the ship may be detained until the certificate is so produced.[178]

3.5 Convention on the International Regulation for Preventing Collisions at Sea, 1972 (COLREG)

The COLREG Convention codifies the nautical rules of the road, some of which were originally developed to keep steam vessels from colliding in the 1800's. The current version of the collision regulations (COLREGs 1972) was adopted by an international conference in 1972 and entered into force on July 15, 1977.

[178] Section 247, MSA

The COLREGs Convention applies to all vessels on the high seas and in all waters connected to the high seas, which are navigable by seagoing vessels. However, parties are permitted to have special rules for inland waterways and for vessels of special construction, so long as those rules conform as closely as possible to the COLREGs rules. The following is a brief indication of the subject matter for each part of the international regulations for preventing collisions at sea, 1972, as amended:

i. Part A (rules 1 to 3) contains important definitions and general provisions on the applicability of the rules.
ii. Part B (rules 4 to 19) contains the steering and sailing rules, with rules for the conduct of vessels in any condition of visibility, including use of IMO-adopted traffic separation schemes; rules for the conduct of vessels in sight of one another; and rules for the conduct of vessels in restricted visibility.
iii. Part C (rules 20 to 31) contains provisions on lights and shapes.
iv. Part D (rules 32 to 37) contains provisions on sound and light signals.
v. Part E (rule 38) permits exemptions from certain requirements under certain conditions.

In addition to these parts, there are four special annexes with technical provisions on (1) positioning and technical details of lights and shapes; (2) additional signals for fishing vessels fishing in close proximity; (3) technical details of sound signal appliances; and (4) distress signals.

As a legal instrument, COLREGs is unique in the sense that it is intended to impose order over the movement of vessels by prescribing rules of the road. To a great extent, it is self-implementing once a country has become a party and taken any necessary legislative action to give its provisions legal effect to its ships and to waters subject to its jurisdiction.

In Nigeria, the Minister is empowered under the Merchant Shipping Act, 2007 to make collision rules with respect to ships and to aircraft on the surface of the water, for the prevention of collision. The rule shall contain such requirement necessary to implement the provisions of the international treaties, agreements and regulations for the prevention of collisions at sea that are for the time being in force. The collision rules, together with the provisions of this part of this Act relating to those rules or otherwise relating to collisions, shall apply to all ships and aircraft which are locally within the jurisdiction of Nigeria.[179] .

Every owner, master of ship and owner and person in command of an aircraft has obligation to obey the collision rules, and shall not carry or exhibit any light of shapes, carry or use any means of making signals, other than those which are required or permitted by the collision rules to be carried, exhibited or used.

Where an infringement of the collision is caused by the willful default of the owner or master of a ship, as the case may be, of the owner of any aircraft or of the pilot or other person on duty in charge of any aircraft, that person commits an offence and on conviction is liable to a fine not less than five hundred thousand Naira or to imprisonment for a term not less than two years or to both.[180]

Where any damage to person or property arises from the non-compliance by any ship or aircraft with any of the collision rules, the damage shall be deemed to have been occasioned by the willful default of the officer in charge of the deck of the ship at the time or as the case may be, of the pilot or any other person on duty in charge of the aircraft at the time, unless it is shown

[179] Section 265, MSA
[180] Section 266 (1) and (2) MSA

to the satisfaction of the court that the circumstances of the case made a departure from the rules necessary[181].

A surveyor of ships may carry out inspection of a ship in order to ensure that the ship is properly provided with lights, shapes and the means of making sound signals in conformity with the collision rules, and if he finds that the ship is not so provided, the surveyor of ships shall give to the master, owner or his agent notice in writing pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same.

In every case of collision between two ships, the master or person in charge of each ship shall, if he can do so any of the following without danger to his own ship, crew and passengers:

(a) render to the other ship, its master, crew and passengers, if any, such assistance as may be practicable and necessary to save them from any danger caused by the collision, and shall stay by the other ship until he has ascertained that there is no need of further assistance; and

(b) give to the master or person in charge of the other ship the name of his own ship and of the port at which the ship is registered or to which it belongs and also the names of the ports from which it comes and to which it is bound.

If the master or person in charge of a ship fails, without reasonable cause, to comply with this section, he commits an offence and on conviction is liable to a fine not less than Five Hundred Thousand Naira or to imprisonment for a term not less than two years or to both. However, the failure of the master or person in charge of a ship to comply with the provisions of this section shall not raise any presumption of law that the collision was caused by his wrongful act, neglect or default.[182]

[181] Section 266(3)MSA
[182] Section 268 (2) and (3)MSA

In every case of collision in which it is practicable so to do, the master of every ship shall, immediately after the occurrence, cause a Statement of the collision and of the circumstances under which it occurred, to be entered in the official log book; and the entry shall be signed by the master and also by the mate or one of the crew. Every master who fails to comply with this section commits an offence and on conviction shall be liable to a fine not less than One Hundred Thousand Naira.[183]

The Minister may, by Order, direct that the provisions of the rules shall, subject to any limitation of time and to any conditions and qualifications contained in the Order, apply to the ships and aircraft of foreign country, whether or not they are locally within the jurisdiction of Nigeria, and that those ships and aircraft shall, for the purpose of those rules and provisions, be treated as if they were Nigerian ships or aircraft registered in or belonging to Nigeria.[184]

The master or person in charge of a ship shall, in so far as he can do so without serious danger to his own ship, its crew and passengers, if any, render every assistance to any person, even if that person is a subject of a State at war with Nigeria, who is found at sea in danger of being lost.

A master or person in charge of a ship who fails to discharge this obligation commits an offence and will be liable on conviction to a fine not less than two hundred thousand Naira or imprisonment for a term not exceeding two years or to both. However, the compliance by the master or person in charge of a ship shall not affect his right or the right of any other person to salvage. [185]

3.6 Regulation Related to Safety of the Marine Environment

A breach of safety regulation results in pollution to the environment which in itself will pose a safety concern to the ships, crew, persons and cargo. Ship source pollution is therefore

[183] Section 269 , MSA
[184] Section 270,MSA
[185] Section 271, MSA

one of the regulatory concerns of maritime transport law. This is because in the course of the transportation of persons and merchandise, pollution of the marine environment may occur which can make the transportation of persons and merchandise impossible or at least poses danger to safe navigation. There is therefore the need to protect the marine environment from the pollution tendencies of ships and vessels in the course of their commercial maritime operations and services. This is the relevance of ship source pollution in the discourse of regulation of maritime transportation. It is for this reason that the motto of International Maritime Organization (IMO) which encapsulates its overall essence and responsibility is "Safe navigation and Cleaner Ocean". The regulations discussed in this respect are the United Nations Convention on the Law of The Sea 1982 (UNCLOS) and the International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL 73/78).

3.6.1 United Nations Convention on the Law of the Sea 1982, (UNCLOS)

Ship – source marine pollution is perhaps of three kinds namely, operational, deliberate and accidental.[186] Nigeria ratified the UNCLOS on the 14th day of August, 1986.

The regime of marine pollution in public international law is aptly described in the title of Part XII of UNCLOS as 'Protection and Preservation of the Marine Environment' and prior to which there was no systematic body of customary law dealing with marine pollution. Part XII consists of Articles 192-237, contained within 11 sections.

In section 1, Articles 192 and 193 set out the fundamental principles whereby states are obliged to protect and preserve the marine environment. Under Article 194, states must take

[186]Murkherjee P.K , (2007) *The Penal Law of Ship Source Pollution* in TafsirMalickNdiaye and Rudiger Wolfrum (Eds) Law of the Sea , Environmental Law and Settlement of Disputes: Liber Americorum Judge Thomas A. Mensah , Leiden/Boston : Martinus Nijholf Publishers , Max Plank Institute for Comparative Public Law and International law, at pp 465 – 468.

measures to prevent, reduce and control marine pollution from any source, and ensure that pollution does not spread beyond the areas of national jurisdiction. These measures must be designed to minimize inter alia ship-source pollution and extend to preventing accidents, dealing with emergencies, ensuring maritime safety and regulating intentional and unintentional discharges. Article 195 prohibits the transfer of pollution from one sea area to another or the transformation of pollution from one form to another. Article 196 requires states to take preventive and remedial action against the transportation of harmful alien species.

The articles in section 2 require states to cooperate globally and regionally for the development of international rules and standards. There are requirements for promptly notifying other states of imminent danger of pollution. Article 199 requires states to develop contingency plans or responding to pollution incidents.

Section 5 is important because it contains prescriptions for the establishment of international rules and national legislation to prevent, reduce and control marine pollution Articles 210, 211 and 212 address ship-generated pollution matters that are germane to any analysis of the regulatory law. Article 210 has the caption 'pollution by dumping' and serves as a blueprint for the more detailed convention on dumping.[187] It provides that states must make laws and take other measures to curb dumping and that permission from the competent authorities of a state is required before any dumping activities can be carried out.

Article 211, which consists of seven paragraphs, is perhaps the most important provision for the purposes of this research as it is quite detailed and pertains exclusively to ship-generated pollution. The first paragraph requires states to establish international rules and standards for the prevention, reduction and control of vessel-source pollution and to that end, where appropriate, design routing systems to prevent accidents. These must all be carried out through the competent

[187]Xu J, (2007) *The public Law Framework of Ship Source – oil Pollution*, 13 JIML p 417

international organization - in this case; the International Maritime Organization (IMO) - or through diplomatic conference. The measures adopted are intended to prevent pollution damage to a coastal state and its related interests. Under para 2, flag states are required to promulgate laws reflecting these rules and standards in respect of their ships. It is apparent that these provisions are the precursors of the MARPOL Convention.[188]

Paragraph 3 recognizes a coastal state's right to impose regulatory requirements regarding vessel-source pollution on foreign ships navigating in its waters. The requirements must be given due publicity and communicated to IMO, the competent international organization. It is anticipated that states will harmonize their policies and enter into cooperative arrangements. Without prejudice to the right of innocent passage provided under UNCLOS, ships navigating in the territorial seas of states participating in such cooperative arrangements must furnish such information as is demanded of them. The sovereignty of the coastal state in its territorial seas and its enforcement rights in the Exclusive Economic Zone (EEZ) regarding marine pollution are expressly recognized in paragraphs 4 and 5.

Paragraph 6 deals entirely with the notion of the 'special area' and provides the blueprint for that regime elaborated in the MARPOL Convention. Sub-paragraph (a) of paragraph 6 provides that if special mandatory measures are necessary to prevent vessel-source pollution within the EEZ of a coastal state, following a determination by IMO, special laws and regulations may be adopted for these clearly defined areas. These preclude any requirement for foreign vessels to comply with design, construction, manning or equipment standards other than those set internationally. Article 212 deals with pollution from and through the atmosphere and

[188] ibid

provides the blueprint for what is now the Annex VI regime of MARPOL covering vessel-source air pollution.

Section 6 addresses enforcement with respect to pollution emanating from various sources. It deals with the flag state, port state and coastal state aspects of enforcement. Article 216 covers pollution by dumping and requires laws and regulations on the subject to be enforced by coastal and flag states. Article 217 contains detailed provisions relating to flag state enforcement of pollution laws. Under paragraph 2, flag states must prevent such vessels from sailing until they comply with the relevant rules and standards including those concerning design, construction, manning and equipment. Paragraph 3 requires states to ensure that a proper and effective certification regime is put into place pursuant to the relevant international rules and standards and that vessel are periodically inspected to verify that their actual physical condition conforms to what is stated on at particular certificate. Flag states have the prerogative and the obligation under paragraph 4 to investigate violations of rules and standards by their ships and to commence proceedings against them where appropriate, regardless of where the violation has occurred or the pollution been observed. Paragraphs 5, 6 and 7 address investigations and the institution of proceedings. Once satisfactory and sufficient evidence has been collected, flag states are required to commence proceedings expeditiously. Paragraph 8 is aimed at discouraging flag states from setting nominal penalties and stipulates that penalties must be severe enough to discourage violations no matter where they occur.

Article 218 deals with enforcement by port states. It is unique in UNCLOS for several reasons, not least of which is that it establishes the contemporary idea of what has come to be known as port state control. [189] Remarkably, port state control within UNCLOS is addressed

[189]Kasoulides G.C (1993) Port State Control and Jurisdiction: Evolution of Port State Regime MartinusNijhoff Publishers Doordrech/ Boston/London. pp 115 – 117. Xu J (2007)The public Law Framework of Ship Source –

only in respect of maritime pollution, whereas in regulatory maritime law it is an integral part of maritime safety and maritime labour regimes. This article, at least in respect of marine pollution, codifies the legal concept of port state jurisdiction in international maritime law. The cornerstone of this jurisdiction is that it can only be exercised when a ship is voluntarily in a port or offshore terminal of a state. Under port state jurisdiction, international law can also be enforced against a ship voluntarily visiting a port or offshore terminal of that state regardless of where the violation may have occurred. However where a discharge violation occurs in waters under the jurisdiction of another state, the port state is precluded from bringing proceedings against the offending ship unless the other state or the ship's flag state so requests, or the violation causes pollution in the waters of the state instituting the proceedings.

Article 219 concerns detention of a vessel that is by reason of a violation, rendered unseaworthy and as a result, is a threat to the marine environment. The Article contemplates relevant administrative measures which may be taken; release from detention is only permissible if the vessel proceeds to the nearest repair yard. Article 220 deals with' enforcement by coastal states; although enforcement by flag and port states is covered in more detail by other treaty instruments, such as MARPOL, enforcement by coastal states is only addressed in UNCLOS.The substance of this article is, in many respects, similar to the regime in the previous article. First, the coastal state can institute proceedings for any violation committed in waters under its jurisdiction if the offending vessel is voluntarily within its port or offshore terminal. Secondly, where there are clear grounds for believing that a vessel has committed a violation during its passage through a coastal state's territorial seas, the state can carry out a physical inspection of the vessel.[190]

Oil Pollution, 13 JIML p. 418

[190]Xu J, (2007) The Public Law Framework of Ship Source – oil Pollution, 13 JIML p419

In contrast, if there are similar clear grounds in respect of a violation of a coastal state's exclusive economic zone by a vessel navigating in that zone or in the territorial seas, the coastal state can require the vessel to provide information about its identity and port of registry, its last and next port of call and anything else of relevance. If, in such a case, a substantial discharge has resulted, causing or threatening a significant amount of pollution, the coastal state may undertake physical inspection of the vessel if the vessel refuses to give the requested information or if the information is not consistent with the evidence. In a similar navigational situation, where there is clear, objective evidence of a violation resulting in a discharge causing major environmental damage or the threat of such damage to the coastline or related interests of the coastal state, or to 'its resources in the territorial sea or exclusive economic zone, the coastal state can institute proceedings and detain the ship.

Under Article 221, coastal states are entitled to take measures including enforcement measures to protect their coastline and related interests such as fisheries from pollution threats resulting from a maritime casualty. These measures can be taken under convention as well as customary law; here there is a tacit assumption of the existence of the intervention convention. A state can take these measures beyond her territorial seas which would include the high seas in appropriate circumstances. The term 'maritime casualty' is defined to include collisions and stranding. Article 222 provides for enforcement relating to air pollution. This is characterized as 'pollution from and through the atmosphere' generated by ships and aircraft. The article is directed at coastal and flag states and provides the launching pad for Annex VI of MARPOL.[191] Section 7 is mainly directed towards coastal and port states and is important as it provides safeguards against excessive use of enforcement powers or abusive actions. Article 226 is an

[191] ibid

elaboration of the procedures to be followed in the course of investigation of foreign vessels by port and coastal states. Such states must not delay a vessel any longer than is necessary and the physical inspection must, in the first instance, be restricted to an examination of the documentation which the ship is required to carry under relevant international law. Only if there are clear grounds for belief that the physical condition of the vessel is not consistent with what the documentation purports to state or there is inadequate information, can further physical inspection be carried out. Article 228 confirms the prerogative of a flag state to take any measures under its laws, including institution of proceedings and imposition of penalties against its ships, in the event of a pollution violation. A coastal or port state that has commenced proceedings in respect of a violation committed beyond its territorial seas by a foreign vessel must suspend such action if within six months the flag state of the vessel also institutes proceedings.

With respect to violations committed beyond the territorial seas by foreign vessels only monetary penalties are permitted under Article 230. The same rule applies within territorial seas except in cases of willful and serious acts of pollution.[192] In any event, the recognized rights of the accused must be respected. Under Article 231, the flag state and any other affected state(s) must be notified promptly whenever any enforcement measures are taken by a coastal state against foreign vessels. Under Article 232, a state that takes unlawful or unreasonably excessive measures is liable for resulting loss or damage, and legal recourse must be provided in its courts for actions pertaining to such loss or damage.

Section 9 reiterates each state's responsibility to fulfill its international obligations to protect and preserve the marine environment and requires states to ensure that their legal systems provide for an adequate compensation regime. States are required to cooperate in the

[192] Mukherjee P.K (2006) *Criminalization and Unfair Treatment: The Seafarers Perspective* 12 JIML pp.327 – 328.

implementation and further development of international law in the field of liability and compensation for pollution damage and consider such mechanisms as compulsory insurance and compensation funds. Through the vehicle of a public international law convention, this article provides the framework and principle for the institution and enhancement of an appropriate private law regime to address pollution damage.

3.6.2. International Convention for the Prevention of Pollution from Ships 1973/ 78 (MARPOL 73/78)

Several international conventions that are regulatory in scope deal with ship generated pollution but MARPOL 73/78 was analyzed because it dealt with the issue of ship source pollution, that is, pollution resulting in the activities and operation of ships and vessels rather than the pollution of the marine environment generally. The MARPOL 73/78 Convention is by far the most important marine pollution convention and is entirely regulatory or preventive in scope. It regulates six different types of pollution.

In commencement section of the Act[193] domesticating the MARPOL 73/78 in Nigeria it stated as follows:

> i. Enforcement of the Treaty on International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol.
>
> As from the commencement of this Act, the provisions of International Convention for the prevention of pollution from Ships 173 and the 1978 protocols set out in the First Schedules to this Act, shall:
>
> a. Have the force of law in Nigeria;
>
> b. Be given full recognition and effect,

[193] International Convention for the Prevention of Pollution from Ships 1973 and 1978 Protocol (Ratification and Enforcement) Act, No 54 of 2007.

c. Be applied by all authorities and persons exercising legislative, executive and judicial powers.

The MARPOL Convention was adopted in 1973 to replace the earlier regime under the OILPOL Convention of 1954 which dealt only with oil as a pollutant .The majority of the substantive rules in MARPOL can be found in six annexes, some with very detailed rules, supplemented with appendices. When it was first created, MARPOL addressed five types of pollutants through its original annexes. Another annex was added in 1996.[194] At present the six annexes cover:

I. Regulations for the Prevention of Pollution by Oil

II. Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk

III. Regulations for the Prevention of Pollution, by Harmful Substances Carried by Sea in Packaged Form, or in Freight Containers, Portable Tanks or Road and Rail Tank Wagons

IV. Regulations for the Prevention of Pollution by Sewage from Ships

V. Regulations for the Prevention of Pollution by Garbage from Ships

VI. Regulation for the Control of Air Pollution from Ships.

MARPOL is concerned mainly with the regulation of ship-source pollution from operational discharges. As its title indicates, it deals exclusively with preventive measures. Although MARPOL is directed primarily towards regulating operational discharges, several of its provisions deal with the design and construction of oil tankers and address such matters as damage control and subdivision and stability pertaining to accidental spills. These also fall within the scope of the object and purpose of MARPOL; that is, to prevent pollution from ships.

[194] www.imo.org/conventions/contents.asp?doc_id=678&topic_id=258 for all amendments to the convention.

The substantive regulatory law of the convention is contained in the annexes which consist of regulations. Annexes I and II are compulsory: a state can only become a party to MARPOL if it ratifies or accedes to both. The remaining annexes are optional, but states are well advised to subscribe to them for the sake of comprehensiveness and completeness. The following is a summary of the salient features of the MARPOL annexes.

The 'Unified Interpretations' following each of the texts of Annexes I, Ill and VI in the Consolidated Edition of 2006 are a significant feature. Although, strictly speaking, these are not part of the convention as such, they contain useful detailed elaborations and explanations of the highly technical 'provisions of the regulations. These supplementary or subsidiary texts can be selectively included in national legislation developed purporting to implement the convention. They are not only useful for practical application of the convention but can also assist tribunals tasked with interpreting its various provisions in the event of casualties or disputes.

3.6.2.1 Analysis of Relevant Provisions of MARPOL 73/78

Certain kinds of discharges or discharges in certain waters are prohibited, therefore, all vessels are required to contain the respective wastes on board and discharge them to shore-based reception facilities. Consequently, state parties are required to provide adequate reception facilities at designated locations ashore. This is an important preventive prescription in the convention that has serious financial implications. Compliance with the discharge standards under all annexes may be excepted if non-compliance is necessary for saving life at sea or for securing the safety of the ship.

Another preventive feature applicable to Annexes I, II and IV and VI is the provisions relating to surveys and certification of vessels which have now been harmonized with corresponding requirements under the SOLAS and loadline Conventions. The relevant certificates are the International Oil Pollution Prevention (IOPP) Certificate under Annex 1, the International Pollution Certificate for the Carriage of Noxious Liquid Substances in Bulk, otherwise referred to as the NLS Certificate under Annex II, the international Sewage Pollution Certificate under Annex IV and the International Air Pollution Prevention (IAPP) Certificate under Annex VI. Record books must be maintained under Annexes I, II and V; these are known as the oil record book, the cargo record book and the garbage record book. Under Annex V there is also a requirement for each vessel to have a garbage management plan. The convention requires member states to treat violations as offences and provide for appropriate sanctions.

A significant feature of MARPOL is the tacit acceptance' methodology provided in Article 16 by which Protocol I to the convention, an annex to the convention or an appendix -to an annex may be amended. Under this procedure, an amendment, once adopted by IMO, is deemed to have been accepted if a specified number of member states do not object to it within a specified period. Once so accepted, the amendment enters into force on a date fixed by the relevant body within IMO, unless it is rejected by one-third of the state parties whose combined merchant fleets represent at least 50% of the world gross tonnage.[195]

The Convention provides for port state control of foreign ships by each state party when such a ship is in one of its ports or offshore terminals. The general requirements are provided for in Articles 5(2), 6(2) and (5) of the convention and the detailed control procedures, including those in relation to operational requirements, are set out in the respective annexes.[196]

[195]Mukherjee P.K,(2002) Maritime Legislation (WMU Publication Malmo)p.2
[196] Regulation 11 of Annex 1, regulation 16 of Annex II, Regulation 8 of Annex V and Regulation 10 of Annex VI

Annex l has 39 regulations - it originally had 26 - grouped under seven chapters, the first of which contains general provisions. Chapter 2 deals with procedures pertaining to surveys and certification. Chapter 3 prescribes the requirements for control of pollution from the machinery spaces of all ships. Requirements for control of pollution from the cargo areas of oil tankers are contained in Chapter 4. Chapter 5 has only one regulation; it prescribes requirements for carrying a shipboard oil pollution emergency plan. Chapter 6 covers requirements for reception facilities and special requirements for fixed or floating platforms are prescribed in Chapter 7 through a single regulation.

Regulations 15 setting out the standards for operational discharges from the machinery spaces of all ships and 34 regulating the-standards for operational discharges from the cargo areas of oil tankers are perhaps the most important of these Annex 1 regulations. Regulation 15 contains three discharge regimes; one for ships of 400 gross tonnage and above outside V special areas, one for ships of 400 gross tonnage and above in special areas, and one for ships of less than 400 gross tonnage anywhere except the Antarctic area. With regard to operational discharges from the cargo areas of oil tankers, Regulation 34 covers two regimes, one relating to discharges outside special areas and one to discharges in special areas.

For ships of 400 gross tonnages and above, a number of observations are relevant with respect to the standards for discharges from machinery spaces. First, whether the discharges are made outside or in special areas, the standards are virtually identical except with regard to the requirement for oil filtering equipment where in the latter situation an alarm arrangement is an additional requirement. Second, subject to the above, there are in all five conditions which need to be satisfied for ships to discharge oil or oily mixtures from machinery. The first is that the ship must be proceeding en route. Second, oil filtering equipment must be installed, with or without

an alarm system as indicated above, and the oily mixture must be processed through filter before being discharged. Third, the oil content of the effluent without dilution must not exceed 15 parts per million (ppm). Fourth, the oily mixture must not originate from the cargo pump-room bilges of oil tankers. Finally, for oil tankers, the oily mixture must not be mixed with oil cargo residues. With regard to discharges in special areas, it is important to note that, pursuant to paragraph 4 of Regulation 15, all discharges in the Antarctic area are prohibited.

With regard to discharges from machinery spaces of ships of less than 400 gross tonnage, the standards and requirements are in essence the same as those described above, except that in lieu of oil filtering equipment as prescribed for ships of 400 gross tonnage and above, ships must have in operation equipment of a design approved by the Administration to ensure that the oil content of any effluent without dilution does not exceed 15 ppm. If these conditions are fulfilled, according to Regulation 15(6), ships may discharge effluent into the sea or retain it on board to be transferred to reception facilities ashore.[197]

It is worth noting that, although the sub-heading of paragraph 6 of Regulation 1 is captioned 'Requirements for ships of less than 400 gross tonnage in all areas except the Antarctic there is no mention of the Antarctic area in the substantive provision. By contrast, as pointed out above, in respect of ships of 400 gross tonnage and above there is a provision in paragraph 4 of Regulation 15 expressly prohibiting any discharge in that special area. It is also worth noting that in paragraph 9 there is a 'catchall' provision requiring all oil residues that cannot be discharged into the sea under this regulation to be retained on board for transfer to a shore reception facility. Regulation 34 prescribes the standards for operational discharges from the cargo areas of oil tankers. No discharges of oil or oily mixture are allowed in special areas. However, under Regulation 34(2) it is permissible to discharge clean or segregated ballast even in zero discharge

[197] Regulation 15 (6) of Annex I

zones. Clean ballast is defined as ballast water that does not produce a visible sheen on clean, calm water on a clear day, or - where the ballast is discharged through ODMACS equipment - the oil content is not in excess of 15 ppm even if there is a visible 1trace. Segregated ballast is defined as ballast water introduced in a tank permanently assigned \for carriage of ballast and completely separated from cargo and fuel oil.[198]

As far as discharges outside special areas are concerned, a number of conditions need to be met if oil or oily mixtures are discharged into the sea. First, controlled discharges from oil tankers are permitted only when the vessel is more than 50 nautical miles from the nearest land. Except for the coast of Australia, 'nearest land' corresponds to the relevant territorial sea baselines. With respect to the Australian coast, 'nearest land' is defined in MARPOL by reference to specified geographical coordinates. Secondly, controlled discharge is only permitted if the vessel is proceeding en route, and is fitted with and has in operation an oil discharge monitoring and control system (ODMACS) and a slop tank arrangement as prescribed by Regulations 29 and 31, of Annex I. Two parameters are used to prescribe the standards; one specifying the instantaneous rate of discharge of oil content expressed in litres per nautical mile, and the other specifying the total quantity of oil permitted to be discharged expressed as a proportion of the total quantity of the particular cargo of which the residue formed a part. More specifically, the instantaneous rate of discharge of oil content must not exceed 30 litres per nautical mile. The total quantity of oil discharged into the sea must be no more than 1/15,000 of the total quantity of the cargo for tankers delivered on or before 31 December 1979 and 1/30,000 for tankers delivered after 31st December1979.

A zero discharge regime prevails in special areas. Regulation 38 facilitates this by requiring state parties to provide adequate shore-based reception facilities in ports and terminals.

[198] Regulation 1.17 and 1.18 of Annex I

The requirement for total containment of effluents on board in special areas is thus rationalized by the corresponding requirement for reception facilities in those areas. The requirements are prescribed in detail in paragraphs (4), (5), (6) and (7) of Regulation 34. Paragraphs (1), (2) and (3) deal with reception facilities in general, including those required outside special areas, and prescribe locations and capacities.

Regulation 18 essentially deals with segregated ballast tanks required by crude oil tankers and product carriers, and oil tankers of different sizes. The rule for oil tankers delivered after 1 June 1982 is more stringent than for those delivered on or before that date. For example, under paragraphs 7 of this regulation, crude oil tankers of 40,000 tonnes deadweight and above delivered on or before that date may in lieu of segregated ballast tanks, operate with a cargo tank cleaning procedure using crude oil washing (COW) as prescribed in Regulations 33 and 35, so long as the cargo intended to be carried s compatible with COW. Under paragraphs 8, product carriers of 40,000 tonnes deadweight and above delivered on or before 1 June 1982 may as an alternative to being fitted with segregated ballast tanks, operate with dedicated clean ballast tanks provided certain conditions set out in that paragraph are fulfilled. Regulation 18 also addresses the issue of special ballast arrangements for oil tankers delivered prior to that date and provides for protective location of segregated ballast spaces. The objective of these provisions to prevent cargo oil getting into ballast tanks, accidentally or otherwise.

Following the *Erika* incident, and the subsequent deliberations of the Marina Environment Protection Committee (MEPC) of IMO at its 45th and 46th sessions, the original Regulation 13G was amended to accelerate the phasing-out of single hull tankers and bring the double hull requirements into effect sooner than originally planned. Considerable pressure was exerted on IMO by the EU Member States. That regulation was subsequently revised again by

the 2003 amendments, under which the final phasing-out date for Category 1 tankers was brought forward from 2007 to 2005 and for Category 2 and 3 tankers from 20O5 to 2010. Incorporation of the double hull requirement into the MARPOL Convention was hotly debated within IMO. Proponents of the double hull cited the Oil Pollution Act, 1990 (OPA) of the United States in support of their position, although other available technologies are equally if not more effective.

The culmination of these developments in terms of statutory requirements is reflected in Regulations 19 and 20 which are designed to afford preventive measures in the event of oil spills resulting from, inter alia, collisions and stranding. As is apparent from their headings, the two regulations largely pertain to double hull and double bottom prescriptions for oil tankers. Regulation 19 applies to oil tankers delivered on or after 6th July 1996 and Regulation 20 to those delivered before that date. The specific provisions contained in these two regulations mainly concern design and structural parameters, although in paragraphs (7) of Regulation 19, cross-referenced in paragraph 4 of Regulation 20, there is an operational provision - a prohibition against the carriage of oil in any space forward of the collision bulkhead. The categorization of oil tankers delivered before 6th July 1996 is set out in Regulation 20(3).

Regulations 24 to 28 contain provisions aimed at minimizing oil pollution arising out of side and bottom damage to tankers. The provisions in Regulations 27 and 28 deal respectively with intact stability and sub-division and damage stability and are particularly important in terms of preventive measures that are operational as well as in relation to design and construction parameters. Regulations 29 and 30, which provide prescriptions for slop tanks, and pumping, piping and discharge arrangements, are also of prime importance.

Annex I has three appendices; each contains a list of oils and the others standard forms for the IOPP certificate and the oil' record book. The text on Unified Interpretations to Annex I contains five appendices. It should be stated at this point that by virtue of Federal Government Official gazette No 158 of June 2012 containing the Merchant Shipping Regulations, Annexes I to V of MARPOL 73/78 have been codified in Nigeria in the form of Regulations on the Prevention of Pollution by Oil, Noxious Liquids, Packaged Harmful Substances, Rubbish and Sewage. Although these Regulations reflect International Standards as set out by the IMO, their codification implies that NIMASA can now be more effective under its flag and port state control mandates. Where there was previously no penalty for breach of relevant IMO Conventions like MARPOL, the regulations have introduced punishments in the form of fines and detentions, to which the offending ship will now be subject.

It is also important to note that an omnibus provision in Sections 335 (1) (i) of the Merchant Shipping Act is to the effect that international agreements or conventions not specifically mentioned in the section which relates to prevention, reduction or control of pollution of the sea or other waters by matters from ships, and civil liability and compensation for pollution damage from ships to which Nigeria is a party shall also apply to Nigeria. Notwithstanding the provisions of Sections 335 (1) (i) of the MSA, the MARPOL 73/78 has already been enacted into law as International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act No 54 of 2007. An important question is therefore the purpose of the Regulation, in view of the finding that the MARPOL 73/78 which the above mentioned Regulation gives effect to had already been given effect by the Ratification and Enforcement Acts mentioned above.

Sections 335 (3) of the MSA gives the Minister powers to make regulations to give effect to the provisions of International Conventions such as MARPOL 73/78. The preceding section of the MSA therefore serves as sufficient justification for making of the Regulations. The advantage of the powers vested on the Minister in the forgoing section is that regulations giving effect to a convention can further specify detailed procedures and requirements with respect to implementation of the convention in Nigeria. This is because, as has been said previously in this chapter, that IMO Conventions, when domesticated in Nigeria are often done verbatim in their original text, without detailed amplification as regards implementation, penalty for breaches and other matters requiring domestic pronouncement.

CHAPTER FOUR
INSTITUTIONAL FRAMEWORK FOR THE REGULATION OF MARITIME TRANSPORTATION IN NIGERIA

4.1 Introduction

The regulatory institutions responsible for maritime transportation in Nigeria discussed below are: Nigerian Maritime Administration and Safety Agency (NIMASA), Nigerian Ports Authority (NPA), National Inland Waterways Authority (NIWA), Nigerian Shippers' Council (NSC) and Classification Societies. The functions and responsibilities of each agency and institution is also highlighted.

In the preceding chapters, it has been established that shipping is inherently international in nature and therefore its regulation proceeds from the international realm with the International Maritime Organization (IMO) as the international body through which conventions regulating same are negotiated and adopted by member countries. Thus, in national settings, member countries domesticate and ratify the conventions in furtherance of their international obligations so that such conventions will have the force of law in their territories. IMO collaborates with other international bodies such as the International Labour Organization (ILO), United Nations Conference on Trade and Development (UNCTAD), International Association of Classification Societies (IACS)etc to effectively regulate maritime operations.

4.2 International Maritime Organization (IMO)

The International Maritime Organization (IMO) was adopted formally by the Geneva Conference in 1948, but the convention establishing it entered into force in 1958. The purpose of the Organization is to provide machinery for co-operation among governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.[199] The Organization is also empowered to deal with administrative and legal matters related to these purposes.

IMO as a specialized agency of the United Nations is the global standard setting authority for the safety, security and environmental performance of international shipping. IMO as a regulator, provides and maintains a framework for safe, secure and efficient international shipping industry. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented. In other words, it creates

[199] Article 1 (a) of the IMO Convention

a level playing field so that ship operators do not cut corners and compromise on safety, security and environmental performance. This helps to encourage innovation and efficiency.[200]

IMO is the forum at which shipping regulations and standards through conventions are agreed, adopted and implemented; since shipping is essentially an international industry. IMO's measures covers aspects of international shipping such as ship design, construction, equipment, manning, operation and disposal. This ensures that the maritime environment is safe, energy efficient and secure.

IMO's commitment to provide the institutional framework necessary for a green and sustainable global maritime transportation system is centred on energy efficiency, new technology and innovation, maritime education and training, maritime security, maritime traffic management and the development of maritime infrastructure. Its commitment is further underpinned by the development and implementation of global standards covering these issues.[201]

Safety remains IMO's most important responsibility and the most important measure it has taken in this regard is the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto MARPOL 73/78. It covers accidental, operational oil pollution as well as pollution by chemical, goods in packaged form, sewage, garbage and air pollution. Furthermore, in 1998, the International Safety Management Code (ISMC) entered into force and became applicable to passenger ships, oil and chemical tankers, bulk carriers, gas carriers and cargo high speed craft of 500 gross tonnage and above. From 2002, it became applicable to other cargo ships and mobile offshore drilling units of 500

[200] www.imo.org. Accessed on 5/10/2016 at 12:05pm
[201] ibid

gross tonnage and above.[202] Also, a comprehensive security regime for international shipping, including the International Ship and Port Facility Security (ISPS) Code entered into force in July 2004.

With regard to the marine environment, in 2001, the Anti-fouling Systems (AFS) was adopted, the Ballast Water Management (BWM) was adopted in 2004 to prevent the invasion of alien species, while in 2009, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was adopted by IMO. For the human element in shipping, the 1995 amendments to the International Convention on Standards of Training, Certification and Watch keeping for Sea farers, 1978 (STCW) entered into force. Apart from greatly improving seafarer standards, the Convention gave IMO powers to check government actions with parties required to submit information to IMO regarding their compliance with the Convention. In 2010, the STCW Convention and ISMC Code was completed with the adoption of the Manila amendments to the STCW Convention and Code.[203]

Therefore, the main IMO Conventions in fulfilment of its purposes are[204]:

1. International Convention for the Safety of Life at Sea (SOLAS) – which covers the sea.
2. Standards of Training, Certification and Watch keeping Convention (STCW) – covering training and professional standards for sea farers.
3. International Convention for the Prevention of Pollution from Ships (MARPOL) - which addresses environmental concerns.

As IMO instruments have entered into force and are been implemented, development in technology and/or lessons learned from accidents have led to changes and amends being adopted.

[202] www.imo.org. accessed on 5/10/2016 at 1:21pm
[203] ibid
[204] www.itfseafarers,org/ITI-IMO-ILO.cfm accessed on 5/10/2016at 2:17pm

4.3 International Labour Organization (ILO)

International Labour Organization (ILO) as a specialized agency of the United Nations, brings together government, employers and workers representatives of 187 member states, to set labour standards, develop policies and devise programmes promoting decent work for all women and men.[205]

ILO has adopted many international labour standards for seafarers, among which is the Maritime Labour Convention 2006 (MLC). This Convention consolidated over 65 ILO standards for seafarers into a single convention. The MLC 2006 entered into force on 20th August, 2013, establishing minimum working and living standards for all seafarers.

The MLC 2006 covers the following[206]:

a. An employment agreement, guaranteeing decent on-board working and living conditions to be signed by both the seafarer and the ship owner or a representative of the ship owner.
b. Full monthly pay in accordance with the employment agreement and any applicable collective agreement.
c. 14- hour work limit in any 24-hour period, 72 hours in any seven-day period.
d. In the case of illness, injury, ship wreck, insolvency, sale of ship etc the ship owner must pay to repatriate a seafarer.
e. Specific requirements for living accommodation and recreational facilities including minimum room sizes and satisfactory heating, ventilation, sanitary facilities, lighting and hospital accommodation.
f. Access to prompt medical care when on board and in port.

[205] www.ilo.org.accessed on 5/10/2016 at 1:54pm
[206] www.itseafarers.org/ITI-IMO-ILO.cfm. Accessed on 5/10/2016 at 2:32pm

Ships are required to comply with the Convention by holding a Maritime Labour Certificate and Declaration of Maritime Labour compliance issued by the flag state, which must be available on board for any port state inspection.

MLC 2006 has been amended to ensure better protection for seafarers and their families in case of abandonment, death and long term disability. The 2014 amendment became effective on 18th January, 2017 and ILO affirms that the 2014 amendments, require that a financial security system be in place to ensure that ship owners compensate seafarers and their families in the event of abandonment, death or long term disability due to an occupational injury, illness or hazard. With effect from 18th January, 2017, mandatory certificates and other evidentiary documents is required to be carried on board to establish that the financial security system is in place to protect the seafarers working on board.[207]

Another key ILO standard for seafarers is the Seafarers' Identity Documents Convention (Revised), 2003 No.185 which provides a new seafarers' identity document that enhances maritime security, while facilitating shore leave and professional movement of seafarers.[208]

The main focus of ILO's maritime programme, is the promotion of these standards using all of ILO's means of action and through publication of codes of practice, guidelines and reports addressing seafarers' labour issues. In addition, the Sub-committee on Wages of Seafarers of the Joint Maritime Commission periodically meets to update the recommended minimum monthly basic pay or wage figure for able seafarers as provided for in the MLC 2006, while the Special Tripartite Committee of the MLC 2006, among other things, considers amendments to the Convention and keeps it under continuous review.[209]

4.4 United Nations Conference on Trade and Development (UNCTAD)

[207] shipsandports.com.ng. Accessed on 19/3/2017 at 8:51pm
[208] www.ilo.org. Accessed on 5/10/2016 at 1:54pm
[209] ibid

The United Nations Conference on Trade and Development (UNCTAD) is a permanent inter-governmental body established by the United Nations Assembly in 1964.

In accordance with its mandate, UNCTAD carries out work to help developing countries improve their transport systems and ensure better access to worldwide markets. The key issues addressed and areas of intervention include[210]:

a. Freight transport economics with particular coverage of maritime transport, including trends and developments in inter alia, world merchandise trade, shipping, sea borne, port-related issues, transport costs, freight rates, as well as maritime transport connectivity and access.
b. Promoting efficient transport networks and transport corridor development.
c. Transport and logistics of the land locked developing countries (LLDCs) and the small island developing states (SIDS), multimodal and transit transport.
d. Enabling sustainable freight transport systems, including through carbon emission reduction in freight transport, improved transport connectivity and transition towards energy efficient, clean and environmentally friendly freight transport system.
e. Financing sustainable freight transport system, freight markets and transport related regulatory and legal frameworks.

4.5 Flag State Administration and Control

Every merchant ship needs to be registered to a State of its choice, then it is bound to fly the flag of that State and also follow the rules and regulations enforced by same. However, not all vessels are registered to their ship owners' country of origin. The country under whose registration such vessels operate is referred to as a flag state whereas the practice of registering

[210] Unctad.org. Accessed on 5/10/2016 at 3:46pm

the ship to a State different than that of the ship's owner is known as Flag of Convenience (FOC). The vessel in consideration has to comply with all the maritime rules and stipulations laid out by the flag state in accordance with the international maritime rules and stipulations.[211]

A country listed as a flag state must have the necessary maritime infrastructure- both financial and technical and most importantly, must adhere to all regulations established by IMO. Furthermore, by registering a ship in a country, that country becomes the flag state and therefore has what it takes to exercise control over the ship wherever the ship is found in the world, since it is flying its flag. Therefore, if a ship is not complying with the required norms imposed by authority, the country registered as a flag state needs to be adequately equipped to impose strict penalties on the offending party and vessel.

Administration and control means that a flag state for ships is entitled and required to carry out regular monitoring and inspections to ensure that the vessel is following its maritime guidelines appropriately.[212]The flag state administrator determines the legislation and the certificates which should be on board a vessel, namely certificates of IMO and ILO Conventions which are ratified by the flag state. The ship which is registered at a flag state, which has ratified all conventions will have the following certificates in place:[213]

a. Safety equipment
b. Safety construction
c. Class society (not from flag, but mandatory by SOLAS)
d. Safety radio
e. MARPOL annex I (oil)

[211]What are Flag States in the Shipping Industry? Available online atwww.marineinsight.com Accessed on 6/10/2016 at 11:22am
[212] ibid
[213] The Role of the Flag State at a Seagoing Ship. Available online atwww.maritime-mea.com Accessed on 6/10/2016 at 11:43am

f. MARPOL annex II (chemical)

g. MARPOL annex IV (sewage)

h. MARPOL annex V (garbage, not mandatory)

i. MARPOL annex VI (emissions)

j. Load line

k. ISM (for auditors)

l. ISPS (for auditors)

m. MLC (labour inspectors)

4.5.1 Nigerian Maritime Administration and Safety Agency (NIMASA)

The Nigerian Maritime Administration and Safety Agency (NIMASA) was created from the merger of National Maritime Authority (NMA) and Joint Maritime Labour Industrial Council (JOMALIC) (former parastatals of the Federal Ministry of Transport) on 1st August, 2006. The Agency was established primarily for the administration of maritime safety, seafarers' standards and security, maritime labour, shipping regulation, promotion of commercial shipping and cabotage activities, pollution prevention and control in the marine environment. The Agency also implements domesticated IMO and ILO Conventions.[214]

Furthermore, as a flag state administrator and the apex regulatory maritime agency in Nigeria, it regulates the maritime industry through the following instruments:

a. Nigerian Maritime Administration and Safety Agency Act[215]

b. Merchant Shipping Act[216]

c. Coastal and Inland Shipping (Cabotage) Act 2003[217]

[214] www.nimasa.gov.ng
[215] No.17 of 2007
[216] No.27 of 2007

The Agency's core functions are:[218]

1. Administration, regulation and certification of seafarers.
2. Administration and regulation of shipping licenses.
3. Control and prevention of marine pollution.
4. Developing and implementing policies and programs, which will facilitate the growth of local capacity in ownership, manning and construction of ships and other maritime infrastructure.
5. Provide maritime security
6. Perform port and flag state duties.
7. Establish the procedure for implementation of conventions of IMO, ILO and other international Conventions to which Nigeria is a party on maritime safety and security, maritime labour, commercial shipping and for the implementation of Codes, Resolutions and Circulars arising therefrom.
8. Pursue the development of shipping and regulatory matters relating to merchant shipping and seafarers.
9. Establishment of maritime training and safety standards.
10. Regulation of safety of shipping as regards the construction of ships and navigation.
11. Provision of maritime search and rescue services.
12. Provide direction and ensure compliance with vessels security measures.
13. Carry out air and coastal surveillance
14. Enhance and administer the provisions of Cabotage Act.

4.5.2 Nigerian Ports Authority (NPA)

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[217]No.5 of 2003
[218] www.nimasa.gov.ng

Port operations development in Nigeria began in the middle of the 19th Century with the construction of the Lagos break water (east and west moles) and capital dredging activities. This was long after the onset of sea-borne trade which followed the early explorations on the African coasts.[219]

The Nigerian Ports Authority (NPA) was established by the Ports Act of 1954, now CAP 126 LFN 2004 to address the institutional weakness that bordered on lack of coherent policy framework as port development was done on ad-hoc basis, driven by changes on the level and demand of sea borne trade. NPA's statutory duties and functions are:[220]

1. Develop, own and operate ports and harbours.
2. Provide safe and navigable channel.
3. Offer cargo handling and storage services.
4. Maintain port facilities and equipments.
5. Ensure safety and security.
6. Develop and own property.

In 2003, the Federal Government of Nigeria, initiated the drive towards improving efficiency at ports and the landlord model was adopted for all Nigerian ports. This gave rise to the concession of 25 terminals to private terminal operators with lease agreement ranging from 10-25 years. In addition to this move, the Federal Government embarked on ports reform programme, which yielded an agreement in which some of the Authority's functions were ceded to the private sector. The functions ceded were:[221]

a. Cargo handling, stevedoving, warehousing and delivery.

[219] www.nigerianports.org. Accessed on 6/10/2016 at 1:44pm
[220] ibid
[221] ibid

b. Acquisition of cargo handling and operations related equipment.

c. Development and maintenance of ports' superstructure.

d. Maintenance of safety and security within the terminal.

e. Towage, mooring, bunkering, ship chandelling and ship repairs.

4.5.3 National Inland Waterways Authority (NIWA)

National Inland Waterways Authority (NIWA) is established by the National Inland Waterways Authority Act[222] with the primary responsibility to improve and develop Nigeria's inland waterways for navigation. Its statutory roles include the following:[223]

1. Provision of regulation for inland water navigation
2. Ensure development of infrastructural facilities for a national inland waterways connectivity with economic centres using the river ports and nodal points for inter-nodal exchanges;
3. Ensure the development of indigenous technical and managerial skills to meet the challenges of modern inland waterways transportation.
4. Operate ferry services within the inland waterways system.
5. Issue and control licenses for inland navigation, piers, jetties, dockyards.
6. Examine and survey inland watercrafts and shipyard operators
7. Grant licenses to private inland waterways operators.
8. As a regulator, NIWA grants permit and licenses for sand dredging, pipeline construction, dredging of slot and approve designs and construction of inland river crafts.

In transport services, NIWA is equipped with a number of vessels for the operation of ferry services for economic goods and passengers and runs cruise boats for tourism and leisure.

[222] CAP N 47 LFN, 2004
[223] niwa.gov.ng. Accessed on 6/10/2016 at 2:52pm

The Authority's marine servicesentails removal and receipts of derelicts wrecks and other obstructions from inland waterways. It is also engaged in boat construction/repair and dockyard services.[224]

4.5.4 Nigerian Shippers Council (NSC)

Prior to the creation of Nigerian Shippers Council (NSC) in 1978, the quality of shipping services had reduced drastically with increases in freight rates by foreign ship owners who operated scheduled liner services to Nigerian ports. This huge foreign exchange outflows arising from the carriage of our sea borne trade by foreign shipping lines, improvished Nigeria and other developing countries' economies with adverse consequences on balance of payment in favour of developed countries who were major maritime nations. This adverse situation led to UNCTAD's intervention known as the UN Code for Liner Conferences. This code strongly recommended the formation of National Shippers' Council in developing countries to act as a countervailing force against the excesses of foreign ship owners and other shipping services providers.[225]

NSC is established by its enabling Act[226] as an implementation of UNCTAD's recommendation. Section 3 of the NSC Act, 2004 provides the statutory functions of the Council as:[227]

1. Advising the Government of Federation, through the Minister on matters relating to the structure of freight rate, availability and adequacy of shipping, space, frequency of sailing, terms of shipment, class and quality of vessels, port charges and facilities and other related matters

[224] ibid
[225] Shipperscouncil.gov.ng. Accessed on 6/10/2016 at 3:55pm
[226]Nigerian Shippers' Council Act CAP N133 LFN 2004
[227] Shipperscouncil.gov.ng. Accessed on 6/10/2016 at 3:55pm

2. To access the stability and adequacy of existing services and make appropriate recommendations in that behalf
3. To negotiate and enter into agreements with Conference Lines and non- Conference Lines, ship owners, the NPA and other bodies on matters affecting the interest of shippers
4. To consider the problems faced by shippers with regards to coastal transport and matters relating generally to the transportation of goods and advise Government on possible solutions thereto;
5. To encourage the formation of Shippers' Association all over the country
6. To promote and encourage the study and research into problems affecting shippers in Nigeria
7. To provide a forum for the protection of the interest of shippers on matters affecting the shipment of imports and exports to and from Nigeria
8. To provide a forum for consultation between the conference and non-conference lines, tramp owners, NPA and Government of the Federation on matters of common interest;
9. To arrange from time to time seminars and conferences on any matter relating to its functions in Nigeria
10. To carry out such other activities as are conducive to the discharge of its functions under the Act.

In 2015, two additional legal instruments were enacted to enable the Council carry out its new port economic regulation mandate. They are:[228]

1. Nigerian Shippers Council (Port Economic Regulator) Order, 2015
2. Nigerian Shippers Council (Port Economic) Regulations, 2015

[228] ibid

In fulfillment of its port economic regulation function, NSC has commenced work on modalities to among others;[229]

1. Enhance revenue accruable to the Federal Government
2. Determine, provide and cause to be published guidelines for the registration of regulated service providers, specifying among other things, the terms and conditions for registration
3. Provide guidelines on tariffs and charges (setting minimum and maximum levels) in order to guard against abuse of monopoly or dominant market position.
4. Co-ordinate inter-modal transport
5. Perform mediatory role among stakeholders
6. Regulate market entry and exit.
7. Promote efficiency in the provision of port services
8. Minimize cost of doing business and its inflationary effect on Nigerian economy.

4.5.5 Classification Societies

The International Association of Classification Societies (IACS) is a technically based organization consisting of 12 marine classification societies headquartered in London. IACS is a non-governmental organization, which provides technical support and guidance and develops unified interpretations of the international statutory regulations developed by the member states of IMO. These interpretations once adopted, are applied by each IACS member society when certifying compliance with the statutory regulations on behalf of authorizing flag state. IACS

[229] ibid

provides the forum within which the member societies can discuss, research and adopt technical criteria that enhance maritime safety.[230]

Marine classification is a system for promoting the safety of life, property and the environment primarily through the establishment and verification of compliance with technical and engineering standards for the design, construction and life cycle maintenance of ships, off shore units and other marine related facilities. These standards are contained in rules established by each society. Classification societies exist to ensure the continued safety and security of the marine domain with respect to vessels and the various marine aiding constructions. Their absence means that there will be no bench mark or guideline/ standards for vessels and other constructions to adhere to. They are important because they notate grades or classes for vessels, vessel structuring and maintenance along with the structuring aspect of various construction located on the high seas.[231]

It is important to note that while classification societies for ships annotates the necessary classification, they are not official bodies per se and therefore do not take any responsibility in case of vessels not meeting the prescribed standards and been involved in an accident.

Summarily, the role of classification societies are[232]:

1. Promotion of safety of life, property and the environment
2. Develop technical standards (rules) for design and construction of ships
3. Approve designs against their standards
4. Conduct surveys during construction to safety that the ship is built in accordance with the approved design and to the requirements of the Rules.

[230] ibid
[231] The Importance of Classification Societies in the Maritime Industry. Available online at www.marine insight.com. Accessed on 10/10/2016 at 2:27pm
[232] The Role of Classification Societies. Available online at www.wd.gc.ca. Accessed on 10/10/2016 at 2:39pm

5. Make regulations for in-service inspection and periodic survey during operation
6. Carries out statutory surveys and certification as delegated by maritime administration
7. Research and development programmes
8. Support international organizations- IMO, IACS etc

In Nigeria, NIMASA as the flag state administrator recognizes 6 classification societies which are American Bureau of Shipping (ABS), Bureau Veritas (BV), Det Norske Veritas (DNV), Lloyds Register (LR), International Naval Survey Bureau (INSB) and International Register of Shipping (IRS).[233]

Flag State Administrators take advantage of classification societies' global coverage and experienced surveyor network and that is why the responsibility of inspection is delegated to them. Usually, the scope of delegated work is outlined in a delegation agreement between the Flag State and the Classification Society.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

[233] ibid

In this research, an attempt has been made to address two components of regulatory maritime law in Nigeria- regulations governing commercial maritime operations and services and regulations governing maritime safety and the environment within the context of maritime transportation of merchandise and persons and also the institutional framework for implementing the legal framework. The public and regulatory law aspects of maritime law have been alluded to within the context of its international character as it relates to Nigeria.

Since maritime transportation is inherently international in character and vessels including Nigeria owned or registered vessels must operate under the regulatory legal regime of many countries, there is an inherent need for Nigeria to harmonize its own rules and regulations to align fully with international rules and regulations, which are classified in this research as regulations related to commercial operations and practices and regulations related to safety and the environment.

The legal regime governing commercial maritime operations and services and regulations related to safety and the environment impact on each other. The legal regime relating to safety and the environment is so essential for a sustainable regulation of commercial operations and services to be carried out. Also, the regulations related to maritime labour and qualifications of seafarers cuts across both regulations related to maritime commercial services and operations and regulations related to safety. The cabotage regime which is a form of regulation under commercial activities and services restrict seafarers under the law to Nigerian citizens. This can impact on the regulations related to safety. For instance, human element is a complex, multi-dimensional issue that affects maritime safety, security and marine environment protection involving the entire spectrum of human activities performed by ship crew, shore based management, regulatory bodies etc. Furthermore, the rights of seafarers, protection of

which is an inherent part of seafarer welfare, includes the entitlement to enjoy life on board ship, as close as circumstances allow, to that enjoyed by their counterparts ashore. Apart from these ordinary rights, there are rights peculiar to seafaring vocation by reason of such things as isolation, exposure to the elements, mobility of their place of work and shipboard living conditions.

The make-up of a state's maritime administration is largely dictated by the area or areas of focus of its maritime interests and its geographical configuration. Coastal state interest predominates in countries with long coastlines, offshore resources and fragile marine environments while port state interest is paramount in countries with large, busy ports and terminals catering for multiplicity of numbers, types of ship and consequently, safety and security concerns are high. The maritime interests of some states are primarily in the area of crew supply where maritime education and training (MET) and welfare of seafarers are the main preoccupations of the maritime administration. However, in major maritime countries, all of the above interests prevail and the maritime administration therefore is structured accordingly; and this is the case or expectation in Nigeria.

5.2 Findings

1. With respect to the legal regime governing commercial maritime operations and services, it is the finding of this research that the regime (rules and regulations in Nigeria) has not been competitive and sustainable in modern global shipping environment. In other words, it is presently too restrictive. Competitiveness in this context means that Nigeria can increase its tonnage (ships and ship-owners within the supervision and authority of Nigeria) and still maintain safety standards amongst the ships flying its flag.

2. With respect to the legal regime governing safety and the environment, it is the finding of this research that maritime casualties are caused primarily by human error starting from the failure of persons who work in the regulatory institutions with regard to strict enforcement and monitoring, extending to the failure of industry men to comply with the rules and regulations.
3. With respect to the institutional framework for the regulation of maritime transportation in Nigeria, it is the finding of this research that the size and service delivery capacity of the Nigeria flag and port State is not sustainable. It was in contemplation of this fact that section 6 of the Nigerian Maritime Administration and Safety Agency Act of 2007, provides for appointment of only persons with relevant experience, capacity, expert knowledge and qualification applicable to maritime administration and affairs into the board of the Agency, though this section of the Act has been observed more in a breach.

5.3 Recommendations

1. The legal regime governing commercial maritime operations and services such as the Nigeria Merchant Shipping Act 2007 should be made to align with global competitiveness in shipping. For instance, section 18 of the Nigeria Merchant Shipping Act can be amended to introduce a hybrid shipping registry and an international register in order to increase the revenue base of the Nigeria flag state and put a stop to the dwindling state of Nigeria ship registry while at the same time, maintaining safety and environmental standards.
2. The sure way to address shipboard and marine environment human error problem is through the implementation of a globally sound and standardized maritime education and training programme with corresponding appropriate certification regime, uniform in

scope and application; coupled with an up to date ratification, compliance and strict enforcement of international safety regulation in Nigeria maritime transportation industry.

3. The size of the maritime administration of Nigeria flag state should be enlarged and its service delivery capacity improved. It should also have suitable locations in major maritime ports in order to adequately service international clientele. The Nigerian flag state should be competent to register and record mortgages in each of its representative offices. Thus, the maritime administration of Nigeria flag state will have one major component that will deal with ship registration including registration of mortgages, and another that will administer Maritime Education and Training (MET) and the supply of crew - as well as ensure the welfare of seafarers in compliance to international maritime conventions. Furthermore, there must be technical components consisting of the requisite survey, as well as certification and inspection experts to carry out various flag state responsibilities required under the relevant international maritime conventions to which Nigeria is a signatory.

Nigeria is predominantly a port or coastal state without any significant merchant fleet; therefore, its maritime administration should be structured to cater for the relevant needs of the State. The predominant interest should also include maritime education and training (MET) since Nigeria has the potential of becoming a major crew supplying nation given its population**.**

These recommendations have the tendency to revive Nigeria's ship registry because they will aid the increase of the nation's tonnage capacity and improve the reputation of the Nigerian ship registry among shipping counterparts, resulting in significant positive effect on the economy of Nigeria.

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BIBLIOGRAPHY

PUBLISHED BOOKS

Baughen, S. (2004) Shipping Law. Preface to 3rd Edition. Cavendish Publishing Co.

Edgar, G. (1981) Maritime Transport: The Evolution of International Policy and Shipping Law. Lexington Books.

Falkanger T, Hans J.B and Brautaset L. (2008) Scandinavian Maritime Law. 2nd Edition, Universities Digest

Kasoulides, G.C (1993) Port State Control and Jurisdiction: Evolution of Port State Regime. MartinusNijholf Publishers Doordrech/Boston/ London.

Mensah T.A (1971) Legal Problems Relating to Maritime Pollution by Oil in Peter Hepple (ed) Water Pollution by Oil. Proceedings of Seminar sponsored by the Institute of Water Pollution Control and the Institute of Petroleum. Published by the Institute of Petroleum, London.

Mensah, T.A (2007) Environmental Law and Settlement of Disputes: Liber Americorum Judge Leiden/Boston.MartinusNijholf Publishers; Max Plank Institute for Comparative Public Law and International Law.

Mukherjee, P.K (2002) Maritime Legislation. World Maritime University Publication, Malmo.

Mukherjee, P.K (2008) An Introduction to Maritime Law and Admiralty Jurisdiction. World Maritime University Publication, Malmo.

Mukherjee, P.K (2012) The Penal Law of Ship Source Pollution in TafsirMalickNdiaye and RudigerWolfrum (eds) Law of the Sea.

Mukherjee, P.K and Mark B. (2013) Farthing on International Shipping. 4th Edition, Springer, London

Ndikom, B.C (2008) Maritime Transport Administration in Nigeria. Bumico Publishers, Lagos.

Schoenbaun, T.J and Yiannopoulos A.N (1984) Admiralty and Maritime Law, Cases and Materials, Charlottesville.

Schoenhaun, T.J (1994) Admiralty and Maritime Law, 2ndEdition vol. 1, St. Paul Minn West Publishing Co.

Tetley, W (1985) Maritime Liens and Claims. 1st Edition, London Business Law Communication Ltd.

Tetley, W. (1998) Marine Cargo Claims. 3rd Edition, International Shipping Publication.

Tetley, W. (2003) International Maritime and Admiralty Law. Blais, Montreal.

ARTICLES IN JOURNALS

Anonymous. The Nigeria Ship Registry: Yesterday, Today and the Future. The Voyage. Vol 3 No. 2, Oct- Dec 2015

Clark K, Dollar D and Micco A (2001) Maritime Transport Costs and Port Efficiency. Washington, D.C: World Bank Working Paper Series, No. 2781.

Chapman, J. L (2002) Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments. Voyles U.S.F Maritime Law Journal (vol 16, no.1)

Estache A, Carbajo J.C and De Rus G. (1999) Argentina's Transport Privatization and Re-regulation: Ups and Downs of a Daring Decade long Experience. Policy Research Working Paper 2249 and Washington D.C: The World Bank

Fink C, Mattoo, A and Neagu H.C (2002) Trade in International Maritime Services: How Much Does Policy Matter? The World Bank Economic Review, 16(1): 81 -108

Krug C.B and Donner M, (2009) Freight Transport for Development Toolkit: Ports and Waterborne Freight. The World Bank and Department for International Development, Washington D.C

Michalek J and Subidey. Facilitation of Transportation in Turkey and Poland: A Comparative Study. Final Research Programme 2012 -2013. Poland

Mukherjee, P.K (1993) Flagging Options and Other Considerations in Mariner. Journal of the Master Mariners Society of Pakistan, vol 4, No. 1 Jan/ March.

Mukherjee, P.K (2000) The Changing Face of the Flag State: Experience with Alternative Registries. World Maritime University, Sweden.

Mukherjee, P.K (2003) Transformation of Conventions into National Legislations: Piracy and Suppression of Unlawful Acts. Journal of International Commercial Law.

Mukherjee, P.K (2006) Criminalization and Unfair Treatment: The Seafarers' Perspective. 12 JIML

Parameswaran, B (2004) The Liberalization of Maritime Transport Services. Springer, Berlin.

Preghafi, A.P (2015) An Overview of the Seafarers' Rights. The Voyage vol. 3 No. 2 Oct-Dec 2015

Tetley, W. (1999) Maritime Law as a Mixed Legal System. vol 23, Tulane Maritime Law Journal.

Trujillo, L and Nombela, G. (1999) Privatization and Regulation of the Seaport Industry. Policy Research Working Paper No. 2181, World Bank, Washington D.C

Xu, J. (2007) The Public Law Framework of ShipSource Pollution. 13 JIML

OFFICIAL PUBLICATIONS

Guidelines for Maritime Legislation. 3rd Edition (Guidelines vol.10) United Nations Publication, Economic and Social Commission for Asia and Pacific (ESCAP) Bangkok, Thailand

Organization for Economic Co- operation and Development (2000) Recommendations of the Council Concerning Common Principles of Shipping Policy for Member Countries, OECD-Document number C (2000) 124/ Final, Paris: OECD

Organization for Economic Co-operation and Development (2001): Regulatory Issues in International Maritime Transport. Paris: OECD

UNCTAD (2006) Review of Maritime Transport, Geneva: UNCTAD

World Trade Organization Secretariat (2001) Maritime Transport Services in WTO Secretariat (ed). Guide to the GATTS: An Overview of Issues for further Liberalization of Trade in Services. The Hague: Kluwer Law International.

World Bank (2007) Port Reform Toolkit: Effective Decision Support for Policymakers, Washington D.C: The World Bank

World Trade Organization (2012) Trade Policy Review- Report by the Secretariat – Turkey (WTO document WT/TPR/259, January 2012)

UNOFFICIAL PUBLICATIONS

Dohkubo O (2008) The Legal Liability of a Freight Forwarder in Multimodal Transport. Dissertation, Lund University.

Igwe, I.E (2009) Enforcement of Ship Mortgage in International Maritime Law: Jurisdictional Issues and Practical Considerations. Dissertation, Faculty of Law, Lund University.

Igwe, I.E (2012) Responding to the Challenges of a Viable Flag State: Emergent Nigerian Paradigm and Prospects. Consultative Paper to Nigerian Maritime Administration and Safety Agency.

SEMINARS/ WORKSHOP PAPER PRESENTATIONS

Igbokwe M. Assessment of Existing National Legislations and Regulations Relating to Pollution Prevention. A Paper Presented at the National Workshop for the Ratification, Implementation and Enforcement of MARPOL73/78, organized by IMO in conjunction with Federal Ministry of Transport between 27th – 29th August, 2001.

Ihenacho, E (2004) Cabotage and Nigeria Prospects, Constraints and Challenges. A Paper Presented at a seminar on Cabotage and Oil and Gas Industry, organized by NIMASA at Lagoon Restaurant.

NEWSPAPER

Airahuobhor, A. Cabotage Act, Vessel Fund and many Unanswered Questions. Daily Independent Maritime, Wednesday, March 12, 2014.

Iroegbu, C.A. (2010) Weaknesses of the Ongoing Reforms in the Maritime Industry. The Frontier Post, Tuesday, 27th May, 2010

Usim, U. Dealing with Fatigue; Seafarers' Greatest Nightmare. Daily Sun Newspaper of Thursday, 6th June, 2010.

Usim U. Port Concession: Has Nigeria fared well in 10 years? The Sun Newspaper of Wednesday, 6th June, 2016

INTERNET SOURCES

International Association of Classification Societies website. Available online at www.iacs.org.uk. Accessed on 13/5/2016

International Labour Organization website. Available online at www.ilo.org. Accessed on 5/10/2016

International Maritime Organization website. Available online at www.imo.org. Accessed on 5/10/2016

IOPC Fund "prestige incident". Available online at http://www.iopcfund.org/prestige.htm or "prestige oil spill far worse than thought". Available online at http://www.newscientist.com/article.ns?id= dn4100 accessed on 14/5/2016

National Inland Waterways Authority website. Available online atniwa.gov.ng. accessed on 18/8/2016

Nigerian Maritime Administration and Safety Agency website. Available online at www.nimasa.gov.ng. Accessed on 18/8/2016

Nigerian Ports Authority website. Available online at www.nigerianports.org. Accessed on 6/10/2016

Nigeria Shippers' Council website. Available online atshipperscouncil.gov.ng. Accessed on 6/10/2016

shipsandports.com,ng. Accessed on 5/10/2016

The Importance of Classification Societies in the Maritime Industry. Available online at www.marineinsight.com. Accessed on 10/10/2016

The Main IMO Conventions in Fulfillment of its Purposes. Available online at www.itfseafarers.org/ITI-IMO-ILO.cfm. Accessed on 5/10/2016

The Role of Classification Societies. Available online at www.wd.gc.ca. Accessed on 10/10/2016

The Role of the Flag State at a Seagoing Ship. Available online at www.maritime-mea.com on 6/10/2016

UNCTAD website -unctad.org. Accessed on 5/10/2016

What are Flag states in the Shipping Industry? Available online at www.marineinsight.com. Accessed on 6/10/2016