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DEVELOPMENT OF THE SOUTH AFRICAN COASTAL SHIPPING POLICY: THE PROSPECT OF MARITIME CABOTAGE

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is, unless specifically indicated to the contrary in text, my own original work which has not been submitted before in whole or in part at any other University for a degree.

SIGNED ON 6 NOVEMBER 2020 AT DURBAN, SOUTH AFRICA

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ABSTRACT

The Comprehensive Maritime Transport Policy (CMTP) provides the official policy position on maritime issues in South Africa since 2017. It covers a variety of maritime matters relating to shipping conduct on the coast and offshore and extends to the utilisation of landside resources. However, this work evaluates policy provisions pertaining only to coastal shipping and in particular to cabotage.

Cabotage refers to the rights a coastal state reserves for itself to trade vessels of its choice between ports along its coast. The CMTP states cabotage as the official coastal shipping policy in South Africa for the first time in over a century-and-a-half of coastal shipping. However, the CMTP does not state the manner in which cabotage will apply. In fact, some of its ambitions seem impractical. Through a thorough historical account, the thesis sheds light on why cabotage has never been adopted in South Africa. It also gives the rationale for abandoning in 2017 the *laissez-faire* position that had existed over many decades.

Given that cabotage presents itself in different forms, the thesis provides an overview of the various cabotage forms by reference to a sample of comparable jurisdictions. It then asks the question: what is the prospect of South African cabotage in light of the continental and international cabotage practice scope? The question directs focus to three issues: the meaning of cabotage; the scope of its application; and the comparative measure for its application. The analysis gleans the likely direction for cabotage implementation from the CMTP and other instruments despite anomalies that exist between what the CMTP sets out to achieve and the proposed legal framework for its implementation. The conclusion is that, given the dearth of shipping capacity in South Africa, coastal trade dependence on feeder cargo and imbalanced cargo trades, the country's only proper option, when cabotage is adopted, is liberal cabotage. It should be implemented without comparing South Africa to other jurisdictions but must be founded on its own merits and that such should show a ready source of cargo.

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ABBREVIATIONS AND ACRONYMS

AEC	African Economic Community
AGSR	Australian General Shipping Register
AIMS	Africa’s Integrated Maritime Strategy 2050
AISR	Australian International Ship Register
ASGISA	Accelerated Shared Growth Initiative of South Africa
AU	African Union
AU Charter	(Revised) African Maritime Transport Charter
BBBEE	Broad-based Black Economic Empowerment
bpd	barrels per day
BRICS	Brazil, Russia, India, China and South Africa (a bloc of countries which have formed a group of emerging economies in order to strengthen trade and other economic ties)
CAATA	Comité Andino de Autoridades de Transporte Acuático/Committee of Aquatic Transport Authorities
CAN	Community of Andean Nations
CEMZA	Combined Maritime Zone of Africa
CEN-SAD	Community of Sahel-Saharan States
CMTP	Comprehensive Maritime Transport Policy
COMESA	Common Market for Eastern and Southern Africa
CVFF	Cabotage Vessel Financing Fund
DIS	Denmark International Ship Register
dwt	deadweight tonnage
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEA	European Economic Area

EFTA	European Free Trade Agreements
EU	European Union
FCL	Full Container Load
FOC	flag of convenience
FTA	Free Trade Agreement
GEAR	Growth, Employment and Redistribution (strategy)
IGAD	Intergovernmental Authority on Development
LSBCI	Liner Shipping Bilateral Connectivity Index
MARAD	Maritime Administration (US)
MOT	Ministry of Transport
MSA	Merchant Shipping Act
NASSCO	National Steel and Shipbuilding Company
NEPAD	New Partnership for Africa's Development
NIMASA	Nigerian Maritime Administration and Safety Agency
NIS	Norwegian International Ship Register
NMA	National Maritime Authority
NNSL	Nigerian National Shipping Line
NOR	Norwegian Ordinary Ship Register
OACL	Ocean Africa Container Lines
OECD	Organisation for Economic Co-operation and Development
OFA	Ocean Freight Agreement
PetroSA	Petroleum, Oil and Gas Corporation of South Africa
RDP	Reconstruction and Development Programme
REC	Regional Economic Community
RORO	Roll-on/Roll-off (vessels/containers)
SA	South Africa(n)

SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SAECS	South Africa Europe Container Service
SAMSA	South African Maritime Safety Authority
SAPPI	South African Pulp and Paper Industries
Sapref	South African Petroleum Refineries
SAR	South African Railways
SASBF	Ship Acquisition and Ship Building Fund
SCRR	Sea Competitive Rail Rates
TEU	Twenty-foot Equivalent Unit
TNPA	Transnet National Ports Authority
UK	United Kingdom
UMA	Arab Maghreb Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USC	United States Code
USSC	Union Steam Ship Company of New Zealand
VOC	Vereenigde Oost Indische Compagnie (Dutch East India Company)

CHAPTER 1:
INTRODUCTION

The origin of the term ‘cabotage’ is not certain. It seems to have been derived from either the French ‘caboter’ or the Spanish ‘cabo’, which referred to the sailing of ships from cape to cape without entering the high seas.[1] Whatever its origins, in modern maritime trade, cabotage refers to shipping restrictions along the coast of a state and to trading limits within its ports. An unintended consequence of cabotage is that it is discriminatory; it keeps foreign flags out of the coastal trade.[2]

A jurisdiction that practices cabotage allows vessels registered in other jurisdictions uninhibited transit along the domestic coast. Foreign vessels may transit but not trade between ports along the domestic coast, because intra-coastal trade takes place within internal waters, which are ordinarily the preserve of the national fleet. Transiting foreign vessels would normally require permission to trade between domestic ports (in place of a national carrier). Therefore, use of the term ‘cabotage’ refers to the exclusion of foreign vessels or the imposition of restrictions that a coastal jurisdiction[3] places over the loading and discharge of cargo between its coastal ports.

Cabotage should not be confused with cargo reservations and flag discriminations. These generally refer to restrictions placed on certain cargos or to preferential treatment in respect of use of port facilities and sailing rights. Such restrictions do not routinely exclude foreign flags. Cargo reservations could mean that the loading of a specified category of cargo (for instance, government military cargo or aid cargo designated as such for a particular destination) is reserved, as the name suggests, for national carriers. Under these circumstances, any carrier can carry any other type of cargo to the same destination. Similarly, flag discrimination could be a result of bilateral or multilateral arrangements between countries to load one another’s cargo to the exclusion of others and may include preferential berthing for their vessels.

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[1] https://en.oxforddictionaries.com/definition/cabotage. (Accessed 11 October 2017). See also http://www.businessdictionary.com/definition/cabotage.html. (Accessed 11 October 2017).
[2] A. Odeke, Protectionism and the Future of International Shipping: The Nature Development and Role of Flag Discrimination and Preferences, Cargo Reservations and Cabotage Restrictions, State Interventions and Maritime Subsidies (1984).
[3] It is suggested that the use of the term “jurisdiction” rather than “country” provides a better description of how cabotage functions because cabotage practice sometimes extends beyond borders of a single country and may reflect collaborative restrictions of several sovereignties.

Cabotage, on the other hand, is more restrictive, since it reserves all coastal trade for the exclusive benefit of the national carrier. It excludes all foreign elements from participating freely in the coastal market. Typically, the exclusion of foreign vessels eliminates foreign competition with a view to promoting the establishment of the domestic fleet on the coast through guaranteed supply and demand.[4]

Over the years, the concept of cabotage has evolved to refer simply to any form of restrictive practice which reserves a domestic market share for domestic service providers. Therefore, in modern industrial trade, cabotage is no longer confined to the shipping industry.[5]

In the context of this work it is proposed that, properly defined, cabotage is the reservation of a jurisdiction's right to engage a merchant fleet of choice wholly or partly excluding others from trading between its coastal ports. It occurs when the coastal jurisdiction, through legislative instruments, exercises its prerogative to dictate parameters for the development of its maritime industry in a manner befitting its economic and social imperatives.

Unlike in other jurisdictions such as the United States, in South Africa cabotage refers to movable property (including animals) and not passengers. Consequently, the thesis focuses on cabotage in the context of trade and not on the carriage of passengers. This will become clearer when dealing with the proposed legislative framework for cabotage in Chapter 3 and in Chapter 8.

1.1 THE RATIONALE FOR GOVERNMENT INVOLVEMENT IN COASTAL SHIPPING IN SOUTH AFRICA

South African coastal policy has remained the same from the time of British rule to Nationalist Party days and throughout the South African democratic years. The various administrations adopted a policy of no cabotage over South African coastal waters. If South Africa has never reserved for itself the right to exclusive coastal trade, the question is then: *why is there now a policy shift from having no coastal restriction to cabotage implementation?* The answer to this question provides a proper basis for the

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[4] Odeke op cit note 2 75.

[5] Cabotage and Aviation Rules relating to Cabotage on International Flights (nd), available at https://www.aopa.org/go-fly/destinations/international-travel/cabotage. (Accessed 16 October 2017).

core question that this work focuses on. The following section therefore attempts to address this question by looking at the government's rationale for introducing cabotage as gleaned from various draft instruments[6] over the past two-and-a-half decades.

The reasons put forward by the government for its perceived sudden interest in coastal shipping in general are not new. Cabotage, shipbuilding, shipping skills transfer, attraction of favourable foreign exchange and job creation, for example, are some of the more commonly advanced grounds for state involvement in coastal shipping.[7] Modern proponents of the concept articulate it in a fresh dialect. However, the idea itself is in fact an old idea. The impetus behind the promotion of what in recent years has become known as the "blue economy"[8] seems to be generated by the notion that coastal countries derive significant benefits from state-driven shipping investment,[9] and that the fruit of such investment will place the country on a path to economic programmes that can boost what Jones aptly calls the "political economy".[10] Grounds for state-driven investment have been differently formulated over time.[11] The rationale

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[6] A fuller exposition of the development of the maritime policy will be dealt with in chapter 3.

[7] B.D. Ingpen South African Merchant Ships' (1979) 23 cites A Golden Opportunity: Controlling our Own Exports. A South African Shipping Company (1916), which was a report that raised the same issues in 1916 during the early days of the Union government.

[8] The concept of the Blue Economy was originally formulated by Gunter Pauli and popularised through his book The Blue Economy: 10 Years, 100 Innovations, 100 Million Jobs (2010). Pauli advocates a balance between sustainability of the environment (the sea) with building up social capital while generating income and job creation.

[9] See T. Jones 'Coastal Sea Transport and Intermodal Competition in South Africa' (1985) 233.

[10] Ibid.

[11] The overarching rationale for state involvement in the sphere of maritime trade and transportation worldwide can be summarised as follows:

a. State investment can foster, develop and maintain a merchant marine.
b. A domestic merchant fleet provides services that generate earnings in foreign currency and in the process correct the effects of dependence on foreign transport services that generally harm the country's balance of payments.
c. State capital investment can rejuvenate coastal trade and in turn justify state exploitation of the coast exclusively for the country,
d. The coastal state can harness skills in strategic areas, particularly in seafaring, and other expertise that are exclusively maritime in nature and may extend the benefit further to enhance hinterland projects.
e. In particular, developing countries such as South Africa stand to benefit from state-directed maritime investment as they can stimulate commercialisation of coastal waters and revitalise other natural maritime resources to create employment opportunities.
f. Adopting state-driven maritime investment can position the country to revive its shipbuilding and stimulate related maritime engineering industries.
g. A domestic merchant marine would reduce the country's dependence for trade on foreign bottoms.
h. An efficient domestic merchant marine provides a ready and reliable means of transport that would be indispensable in times of diplomatic isolation, war and during other foreign-instigated insurrections.

The list is not exhaustive.

for state involvement worldwide is generally around the same issues.[12] In particular, the state seeks to implement cabotage as a kind of stimulus which, it is hoped, will possibly regenerate coastal shipping. Cabotage therefore seems to be the basis on which the government of South Africa seeks to re-enter the shipping industry, among other imperatives.

Presented in no particular order, below is a list of reasons for state involvement in coastal shipping in South Africa. The list is derived from various policy documents that government has published over the past 25 years which include the South African Comprehensive Maritime Transport Policy, 2017, hereinafter referred to as the CMTP. These policies will be dealt with in some detail in chapter 3.

1.1.1 Socio-economic contribution

The government proposes to implement a coastal carriage regime, from which it hopes to recoup a sizeable portion of the revenue derived from the country's sea trade and transport. The policy drive indicates, in particular, that the government is keen on the benefits that could be generated from its direct involvement in coastal shipping.

For instance, policy drafters have placed emphasis on the need

> *to facilitate growth and development of South Africa's maritime transport system in support of socio-economic development of the country whilst contributing in international trade.*[13]

The latest policy document defines "Comprehensive Maritime Transport Policy" as

> *that component of national policy relating to all forms of transport by sea … within which all national maritime assets can develop and be utilised for the socio-economic growth and prosperity of the nation whilst being of service to international shipping and trade.*[14]

Therefore, it appears that the government seeks involvement in the maritime industry not merely to stimulate mainstream shipping commerce but to ensure that state

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[12] A. Odeke, Protectionism and the Future of International Shipping: The Nature, Development and Role of Flag Discrimination and Preferences, Cargo Reservations and Cabotage Restrictions, State Interventions and Maritime Subsidies (1984).
[13] CMPT cover page. Underlined for emphasis.
[14] Ibid. 17.

investment in coastal shipping yields economic fruit for social development and the general public good.

1.1.2 Job creation

In a country plagued by chronic joblessness,[15] the state is under tremendous pressure to address unemployment. For this reason, maritime policy focuses on the exploitation of the country's coastal waters for job creation through seafarer employment, shipbuilding opportunities, shore-based activities and in downstream businesses. Furthermore, in the South African historical context, the government seems to be looking to extend the policy to "upliftment" or "empowerment" of formerly socially-repressed and economically – excluded population groups.[16]

1.1.3 Balance of payments

Approximately 95% of South Africa's total trade is carried by sea.[17] Foreign vessels and operators service virtually all of that trade. Government laments the fact that the country pays about R160bn per annum[18] to foreign companies to procure these services.[19] The extent to which South Africa relies on sea trade for its economic well-being therefore cannot be overstated. As matters stand, the bulk of foreign shipping companies carry South African trade because the country desperately lacks domestic capacity to carry its own trade.

Observations from comparable jurisdictions, as will be seen in subsequent chapters, point to the need for South Africa to possess a sizeable fleet on its register, consisting of different kinds of ships suitably equipped for movement of homogeneous cargos up and down the coast and between its ports and those of its trading partners. Therefore, South Africa will meaningfully strive to curtail foreign services and thus improve its

[15] The unemployment rate stood at 27.7% during the second quarter of 2017. See South African Unemployment Rate (2019), available at https://tradingeconomics.com/south-africa/unemployment-rate. (Accessed 8 August 2017).
[16] CMTP 29.
[17] Draft South African Maritime Transport Policy, 2009, Ministerial Foreword.
[18] SA Maritime Safety Authority Applauded for Ship Registry (2015), available at http://www.samsa.org.za/press-room/news/sa-maritime-safety-authority-applauded-historical-ship-registry-2015. (Accessed 8 February 2016). The South African Maritime Safety Authority reports these figures. It states that 80% of imports are also carried on the back of foreign vessels.
[19] Neither the draft instruments nor the CMTP makes the basis for the figure given clear. The assumption is that the R160 billion is calculated based on South African Revenue Services (Customs) figures adjusted for balance-of-payments purposes as published by the South African Reserve Bank. That assumption is not without its own challenges.

balance of payments through seaborne trade only once it has established its own commercial fleet. What, then, is the status of the South African merchant marine?

1.1.4 Stimulation of the South African domestic merchant marine

The South African ship register listed the following commercial vessels during the last quarter of 2015. The vessels were *Cape Orchid*, *Cape Enterprise* and *Oliphant*. The registration of these vessels was hailed as a significant success, given that the South African ship register was shorn of any commercial vessels about 30 years ago. The *Oliphant* has since been withdrawn from the ship register. Reasons for her subsequent withdrawal have not been made public. Her owners remain the only South African-owned enterprise that could possibly add a vessel to the flag in the foreseeable future.

The lack of a cogent approach to building tonnage capacity becomes more pronounced if one observes stark contrasts in shipping capacity between South Africa and her immediate trading partners. BRICS members, Brazil, Russia, India and China boast a commercial fleet of 172, 1 891, 534 and 2 044 vessels, respectively,[20] while South African trails with only two vessels under its flag. Even though it and its economy are far smaller than those of its partners, this is still a dismal picture.

Therefore, the position with regard to South African shipping capacity is simple: the country does not have a commercial fleet. Government bemoans the status quo and seeks policy intervention to avert the perceived corrosive effect that the absence of a merchant marine imposes on the country's economy.

1.1.5 Shipbuilding capacity and maritime skills development

Closely related to owning ships is the potential for capacity the government sees in the building of such ships. During the halcyon days of South African shipping, two Durban-based companies built eleven commercial vessels in less than a decade-and-a-half for the South African trade. The last ship built on South African shores was the Unicorn Lines-operated (Offshore Supply Vessel) *Voortrekker* in 1983.

China, Japan and the Republic of Korea have since made tremendous strides towards strengthening their shipbuilding capacities. These countries now dominate the

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[20] Let's Talk Maritime (19 January 2019), available at http://www.bdlive.co.za/business/trade/2013/03/25/. (Accessed 15 February 2016).

shipbuilding market. During the year 2016, these three countries accounted for a total of 91.8% of world tonnage built. Korea took the lion's share with about 38.1%.[21] If South Africa wants to build the fleet through new orders, its ambition depends on the shipbuilding capacity of these countries when only 35 years ago, South Africa had reasonable capacity for building ships.

1.1.6 Skills transfer

The castration of the strength of the South African shipyards had a negative effect on skills that the industry had developed over time. Skills transfer decline and local shipbuilding following the exodus of vessels from the South African register to registers elsewhere in the late 1900s.[22] A more readily identifiable casualty of shipping decline was in seafaring, where crews that had been trained on decks of South African coasters had to seek employment offshore, thus leaving a gaping hole in skills transfer in this field.

The government seeks to reverse this state of affairs by resuscitating coastal shipping, shipbuilding and complementary services. It also intends to re-establish skills through specialised domestic maritime institutions for seafarer training and education and related industries.[23]

1.1.7 Cabotage

The government's drive to implement cabotage emanates from the notion that South Africa has unexplored potential that government intervention can unlock. This is fuelled by the idea that the exclusive exercise of proprietary rights over the coast will result in significant economic benefits for the country. However, reservation of coastal shipping for the domestic fleet is, by its very nature, solely dependent on the presence of a strong domestic-flagged merchant marine. Therefore, in the absence of a domestic fleet, the government's enthusiasm to implement cabotage is optimistic.

The list of reasons for state involvement discussed above is not meant to be exhaustive. It is given simply introduce the reader to the grounds on which government seeks to

[21] The World Maritime Fleet in 2017 (10 July 2017), available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1516. (Accessed 10 August 2017).
[22] The events leading to the evacuation of the South African register will be dealt with more detail in the following chapter.
[23] South African Comprehensive Maritime Transport Policy, 2017, 100–107.

implement cabotage. Since the substance of the issues forms the bedrock of the government’s rationale for cabotage, the reader is alerted to the unavoidable restatement of some of the issues at a later stage, albeit that those will be focused on the development of the policy governing coastal shipping.

1.2 RESEARCH QUESTION

Ordinarily one would look at policy and by dint of interpretation assess the outcome of a particular proposed directive by government and its execution. In the case of cabotage, the cart seems to have been put before the horse. Cabotage has been stated as the official regime to apply over South Africa coastal waters. However, the policy does not provide a blueprint for its application. The core question that this thesis aims to explore is therefore whether the South African maritime policy provides a meaningful platform for the implementation of cabotage. The thesis examines what the probable course for the South African cabotage regime is in view of the experiences of other jurisdictions. Consequently, the thesis looks into the prospect for cabotage in South Africa in light of the CMTP, bearing in mind the challenges that other jurisdictions have experienced in implementing the regime.

The question traverses two distinct areas of commerce that interplay over coastal shipping. These areas are maritime economics and maritime law. It must be noted that the enquiry involves a practical evaluation of cabotage rather than theoretical debates on either economics or legal precedence. Therefore, ancillary questions that arise with respect to maritime economics require an evaluation of tonnage capacity and coastwise cargo to establish a quantifiable basis on which cabotage could apply. Maritime law, on the other hand, looks at policy influences that impact on the legal framework without any discussion of case law. The maritime law enquiry will identify framework misalignments and will deal with instances of potential conflict between the proposed legal framework and policy pronouncements.

1.3 AIMS AND OBJECTIVES OF THE STUDY

The question posited evaluates the policy with reference to three objectives: the definition and nature cabotage; the scope of its application and the comparative measure for its application. The aims of the study are therefore to define cabotage in the South African context; to evaluate the method of its implementation, particularly in light of regional, continental and international cabotage practices; and to suggest the type of cabotage suitable for South Africa.

The weight of the international character of maritime business, in particular, and its well-established and well-articulated norms, raises questions regarding whether or not the policy aspirations on cabotage are realistic and if in fact they can be achieved. With this in mind, the thesis evaluates the impact of cabotage, taking into consideration the fact that shipping takes place in a highly globalised environment.

1.4 THE SCOPE OF THE STUDY

The impact of cabotage on the South African coast will be evaluated through an analysis of comparable jurisdictions. The approach will glean some context and patterns for cabotage implementation from countries where it is prevalent and from those countries that seek either to revive its application or to abandon it. This will be done through a comparative study of practices of a sample of countries where cabotage has taken centre stage.

The sample countries are Nigeria, the United States of America, New Zealand and Australia. In these exemplars, cabotage presents itself in different forms, from the most rigorous to the most permissive. The choice of these countries bears this consideration in mind. However, no one country or combination of countries is perfectly comparable to South Africa. The sample is therefore meant to cover a broad spectrum of cabotage practices from which South Africa can derive the widest possible range of lessons. The basic reasons for the choice of each of these countries to undergird the discussion advocating cabotage implementation in South Africa are as follows:

- **NIGERIA**: Nigeria is virtually the only African state with a legislated position on cabotage. Furthermore, the size of the Nigerian economy is relatively comparable to that of South Africa. Therefore, the ability to sustain cabotage can be juxtaposed from Nigeria to South Africa. Moreover, Nigeria can provide important lessons for South Africa because both countries are members of the African Union, which has called on its members to implement regional and continental cabotage. In general, Nigeria also serves as a good example of the operation of cabotage in a developing economy.

- **UNITED STATES**: Unlike Nigeria and South Africa, the US has a developed economy. However, a discussion on cabotage inevitably involves the US given its prolonged and consistent cabotage practice. Over the years the US government has defended and continues vigorously to defend cabotage as a fundamental policy for the country despite a barrage of criticism for not changing its stance on the policy.
- **AUSTRALIA**: Material on Australia entails the most recent debate on the retention of cabotage. Australia practises liberal cabotage, which is the opposite of what is seen in both Nigeria and the US. The country began its cabotage journey in 1912 and continued the practice for another 100 years. In 2012 an updated version was introduced. However, in 2015, another amendment was introduced to reverse changes that had been made. The cabotage laws introduced in 2012 thus remain law. Therefore, Australia shows the ebbs and flows of what works from time to time projected over a long period of time.
- **NEW ZEALAND**: The debate in New Zealand started in 1994 when the government repealed cabotage. The country revisited the matter a decade later and conducted a study with a large stakeholder participation. The New Zealand approach to cabotage promotes consensus between the parties that are affected by the repeal or reintroduction of cabotage. However, the method supports a permissive form of cabotage in which room is given to re-evaluation of the effects of cabotage, for instance, on freight rates in particular and on the economy in general. The New Zealand approach provides latitude for variation that stringent forms of cabotage do not permit. The New Zealand policy approach is similar in a sense to South Africa's, because like New Zealand, South Africa drives its policies through stakeholder participation and consensus.

1.5 RESEARCH APPROACH AND HYPOTHESIS

The approach of the dissertation is not necessarily to proselytise for or against cabotage. The study intends to point out the pitfalls of cabotage implementation. Because government has made cabotage a policy, but has not clarified what form cabotage should take, for instance, the study attempts to show which cabotage forms the country is likely to follow and the challenges that are normally associated with such forms.

The scope of this work requires a discussion of some basic maritime economics concepts. Therefore, it is essential to evaluate South African tonnage capacity and cargo movement at the outset. The hypothesis in respect of tonnage capacity is simple. The country does not have a commercial fleet through which to implement cabotage. With respect to cargo, the picture is more complex. Therefore, a fair amount of effort will be dedicated to evaluating data particularly for the coastwise movement of bulk, break bulk and containerised cargo. An analysis will be conducted to establish the types of cargoes and the volumes shipped and landed within South African ports and in ports in the range between Dar Es Salaam and Luanda. With respect to cargo the research ultimately seeks to establish whether or not sufficient cargo exists to justify cabotage implementation along the coast or in the SADC region.

1.6 RESEARCH METHODS

The thesis is based on an empirical study and a desktop review of academic journals, data from coastal shipping companies and other coastal participants. Various pieces of legislation, policies, treaties and other instruments governing the maritime field relevant to SADC or the continent will be analysed and articulated in a coherent, fluid, precise and objectively verifiable manner. The thesis employed quantitative methods of research to establish the maritime economics basis for cabotage particularly with respect to cargo data. In this regard, data was collated from shipping companies that are typical "coasters" and from Transnet (port terminals). Data analysis was directed specifically to determining the actual types and volumes of cargo moving along the coast (as opposed to mere categories).

1.7 CHAPTER OVERVIEW

Chapter 1 introduces the study and gives the rationale for cabotage. It also provides the blueprint for the study. Chapter 2 sets out the history of the development of coastal shipping in some detail to give a clear context of the issues canvassed in the various documents forming the basis for the maritime policy. Chapter 3 deals with domestic, regional and continental policies relating to cabotage. The chapter shows the correlation between AU and SADC instruments and how these affect cabotage implementation in

South Africa. Chapter 4 focuses on cargo and its trades. It emphasises the central role that cargo plays in cabotage. The chapter details cargo volumes and the types of cargo shipped and describes the trade routes on which domestic and regional cargo moves.

Having adequately described the landscape and cargo base in which cabotage is set to apply, focus shifts to the practice of cabotage. Chapter 5 provides a worldwide overview of cabotage practice. Drawing from the sample of the specific countries chosen, chapters 6 and 7, respectively, discuss strict cabotage (Nigeria and the US) and liberal cabotage (Australia and New Zealand). Chapter 8 analyses lessons drawn from the specific instances of cabotage practices, particularly in the preceding two chapters. Chapter 9 provides the conclusion and recommendations.

CHAPTER 2:
DEVELOPMENT OF COASTAL SHIPPING

This chapter provides a two-part historical overview of the South African coastal shipping trade. Section A gives early history, while Section B covers modern coastal shipping. The chapter is intended to serve as a canvas against which a proper discussion of the maritime policy and in particular cabotage implementation can take place. Its objective is therefore to explain how coastal shipping was established, expanded and sustained, and in the process, show the circumstances under which the region and South Africa in particular has over the years conducted coastal trade without cabotage.

As a corollary, the narrative will shed some light on the tension that seems to prevail between industry (ship owners in particular) and the government. Currently the former controls coastal trade and the latter coastal waters over which trade operates. It is important to appreciate that the tone of the relationship between these two parties will inevitably impact on the implementation of cabotage.

SECTION A: EARLY HISTORY

This section consists of four parts that respectively discuss pre-colonial coastal shipping, colonial coastal shipping, development of coastal shipping until the middle of the 20th century and consolidation and rationalisation of the coastal fleet.

2.1 PRE-COLONIAL COASTAL SHIPPING

2.1.1 Trade with the East

It is important to start by giving a regional perspective of the history of shipping because that was the approach to shipping before the region was divided up into colonies and colonial borders were established. Southern Africans traded with each and with other African coastal communities and with the island people of Madagascar.[1] That trade was predominantly between these Southern African people and the Muslim Arabs.[2] The

[1] The Rise of the Zimbabwe Civilizations Encyclopaedia Britannica, available at https://www.britannica.com/place/Mozambique/The-rise-of-the-zimbabwe-civilizations#ref932096. (Accessed 21 November 2017).

[2] O., R. & A. Atmore 'Medieval Africa 1250-1800' (1975) 6. A typical Arabic ocean trade along the African coast between 1250 and 1400 followed a route from Cairo along the coast to Aden. The route extended from there into the continent's interior to Ethiopia.

route between Africa and the Arab world that had its roots in Baghdad[3] generated much shipping activity in Southern Africa. Trading ports were found in Mogadishu, Malindi and Mombasa, Pemba and Zanzibar. The primary ports on the east coast were Mogadishu and later Kilwa in Zanzibar.[4] At Zanzibar, trade branched off to the Island of Madagascar (where foodstuffs and timber were generally traded). An alternative trade route proceeded straight down to Sofala. At Sofala the route turned inwards to Sena.[5] Traders sailed further down the coast towards Mozambique and into the Zambezi and Limpopo Rivers for gold, and ivory, and other minerals.[6]

Figure 2.1: Early Arab trade route to Southern Africa

[3] From there it went to Muscat, where it proceeded all the way along the coast (crossing the route from Eden to Calicut). Ibid.
[4] O. Oyekan Culture and Customs of Zimbabwe (2002).
[5] Ibid.
[6] Atmore et al. (note 2).

The Arabs did not advance into the interior until the 19th century.[7] They focused on the coast, while the locals[8] brought goods from Great Zimbabwe in the interior to the Arabs, who had established harbour towns in Sofala and Sena.[9] The basin for this trade was Great Zimbabwe. Therefore, the trade footprint seems not to have extended to what is today known as South Africa.

Trade with the east shows that there were no coastal restrictions for foreigners trading in regional waters. In fact, it seems foreigners and locals established prolonged harmonious trading patterns that even allowed cultural integration. Cabotage was not a practice.

2.1.2 Trade with the West

Europe's wish to trade with the East was hampered by the need to follow the overland route (the Silk Road) which was under the jurisdiction of various Arab nations. Arab control blocked Western access to India and the Far East. Therefore Europe made efforts to re-establish entry into India. As a result, in 1488, the Portuguese established another route from Europe to India that circumvented Arab overland domination by sailing around the southernmost point of the coast of Africa, the Cape.

During the 17th century, the Dutch also began to sail around the Cape to trade with the East and did so more purposefully. The Vereenigde Oost Indische Compagnie (VOC), commonly known as the Dutch East India Company, sent Jan Van Riebeeck to the Cape, where he and his men arrived on 6 April 1652.[10] The VOC wanted to establish a victualling station for its ships that passed through the Cape twice a year from the west to the Far East and back.[11] Jan Van Riebeeck formed a council and built a fort to

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[7] Ibid.

[8] The interaction between the locals and the Arabs gave birth to KiSwahili, which is a derivative language of Arabic and Bantu dialects. See, The Rise of the Zimbabwe Civilizations (note 1).

[9] The Zimbabwe Kingdom, although inland, had a trade network along the south-eastern African seaboard all the way to India. The route referred to above connects Africa to India through the Arab route at a point between Aden and Muscat. From there it proceeds all the way to the spice lands of Calicut in Kerala province. See T.N. Huffman Mapungubwe and Great Zimbabwe: The Origin and Spread of Social Complexity in Southern Africa 28 (2009) *Journal of Anthropological Archaeology* 37–54 50.

[10] The council had administrative, legislative and judicial powers. It ruled over Dutch Cape between 1652 and 1795.

[11] J. Hunt 'Dutch South Africa Early Settlers at the Cape 1652 to 1708' (2005).

administer and protect the station from the Khoi and the San people and from European competition, in furtherance of his VOC instructions.[12]

Van Riebeeck immediately began operating on the coast, transporting salt, wood and cow manure to the fort. He had vessels built specifically for trading by 1655[13] for seal hunting and for transporting skins from Robben Island. However, Jan van Riebeeck's ambitions lay in slave trading. He intended to supply some slaves to the Netherlands and to retain some for himself and for the "free burghers" who supplied produce to VOC ships.[14] By 1658 Jan Van Riebeeck was utilising bigger vessels received from Amsterdam and had added the west coast slave trade route to his itinerary from the coast of Guinea to the Cape.

There were other types of cargo traded in the Cape. However, slaves remained the primary commodity. High mortality and morbidity rates as well as Batavia's own requirement for slaves spiked the demand for slaves from the Cape, from where they were constantly needed and trans-shipped to Batavia. These were ideal conditions for a vibrant coastal traffic, particularly between the Cape, Angola and Madagascar.[15]

The trade environment ensured that the Cape route flourished beyond the original plan of having it as a refreshment station. By the mid-17th century, and despite Batavia's instructions to make it a mere settlement, the Cape was at this time indisputably a colony. Trade continued at Table Bay under Dutch mastery for the rest of the century, albeit that the Cape remained predominantly a refreshment station for the VOC ships. The Dutch grip on the Cape began to loosen with the VOC bankruptcy in 1789 predicating a new coastal trading pattern.[16]

2.2 COLONIAL COASTAL SHIPPING

2.2.1 Establishment of colonies and subsequent port development

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[12] Ibid.
[13] His first-built vessel was the famous *Robbejacht.* See F. Mason History and Progress of Unicorn Lines (1995) (unpublished work, Seaford Knysna).
[14] Ibid.
[15] History of Slavery and Early Colonisation in South Africa (nd), available at http://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa. (Accessed 18 April 2017).
[16] VOC Bankruptcy and the British Occupation US Library of Congress, available at http://countrystudies.us/indonesia/9.htm. (Accessed 25 April 2017).

The English took over the Cape at the beginning of the 19th century. Soon after that the English built a garrison town in Grahamstown.[17] Consequently, sparsely populated communities started to develop along the east coast, prompting the development of ports to service these communities. The occupation also influenced the resurgence of other small settlements in places such as Mossel Bay[18] and Saldanha Bay.[19] In 1820 the British established a settlement in Algoa Bay,[20] situated along the banks of the Baakens River.[21] As these were times of war, imported cargo (arms, uniforms, garrison stores and other cargo and personnel) from Britain landed in the Cape. It was easier to ship cargo up the coast to Algoa Bay than to utilise overland routes that were not always easily accessible. Therefore the route between Table Bay and Algoa Bay represents the first recognisable modern coastal shipping route in South Africa.

The influx of English dwellers and the consequent establishment of English settlements on the east coast invigorated coastal shipping activity. This led to the establishment of the Kowie River port (later to become Port Alfred) in 1841.[22] Castle Line and Union Line vessels called at the ports.[23] Knysna lagoon developed over the same period. It was used as a timber port. However, very few vessels called at Knysna because entry to the port was difficult.[24] Therefore, Mossel Bay gained prominence as the port from where general cargo was carried to Table Bay.[25].

The arrival at Table Bay on 16 August 1825 of the *Enterprise*, the first steam vessel on the South African coast, brought new ideas to the coast.[26] In 1838 the Cape of Good Hope Steam Navigation Company ordered the *Hope*,[27] the first paddle steamer built

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[17] Built in 1811. See History of Cape Town, available at https://en.wikipedia.org/wiki/History_of_Cape_Town. (Accessed 22 April 2017).
[18] Mossel Bay was once the Portuguese watering post. On 3 February 1488 Bartolomeo Dias landed at Mossel Bay. Here they found a spring from which to replenish their water supplies. See Mossel Bay, available at https://en.wikipedia.org/wiki/Mossel_Bay#History. (Accessed 25 April 2017).
[19] Also named after another Portuguese explorer, Antonio de Saldanha, who visited the country in 1503. See Saldanha Bay Wikipedia, available at https://en.wikipedia.org/wiki/Saldanha_Bay#History. (Accessed 25 April 2017).
[20] Algoa Bay is located in the vicinity of modern-day Port Elizabeth.
[21] A major factor for this establishment was the Kaffir Wars between 1779 and 1878.
[22] E. Turpin 'Basket Work Harbour – The Story of Kowie' (1983).
[23] This occurred before the companies were amalgamated. Amalgamation into Union-Castle Line took place only in March 1900. See Union-Castle Steamship Company (2012) Cayzer Family Online Archive, available at http://www.cayzer.com/Union-castle. (Accessed 24 April 2017).
[24] Ibid.
[25] B. Ingpen South Africa Merchant Ships – An Illustrated Recent History (1979).
[26] The standard types of ships before this time were wind-propelled barques, brigs and schooners.
[27] Ingpen (note 24) 48.

specifically for the coast. The *Hope* plied her trade between Table Bay and Port Elizabeth until she was wrecked in 1840.

An increase in east coast trading (from which came wool, animal hides and dried aloe sap[28]) led to the development of another pair of river ports, namely Beaufort[29] and Malgas[30] ports, by 1845. However, Beaufort and Malgas ports proved cumbersome for vessel operations. Beaufort soon fell into disuse and both ports were eventually closed by 1856. Kowie River port was also difficult to navigate, and as a result, it ceased to trade towards the end of the 19th century.

There were new developments further up the east coast. The Trekboers who had left the Cape for the hinterland had reached Natal and established Natalia Republic in 1839. The British annexed Port Natal in 1844.[31] Annexation meant the British now had three settled colonies, one on the west coast and two on the east coast. All three needed to communicate with each other and each with Britain. Coastwise trade was buoyed up by the mail service between the Cape and Natal.[32] Other than mail, typical cargo for the outward leg to Natal was "building implements such as spades, hoes and also tents, building materials, wagons, liquor, etc.".[33] The cargo types were indicative of the fact that Natal was still being developed. The inward voyage to the more developed Cape was usually more varied and even exotic. Cargo parcels included ornamental products such as elephant tusks, sea-cow teeth, and horns of various types of game, as well as materials required for clothing apparel, such as buffalo and ox hides; and, of course, agricultural products such as Natal wattle and sugarcane.[34] This cargo formed the backbone of the return leg to the Cape for what was a British or Cape-owned and Cape - registered tonnage.[35]

[28] Overberg and Malgas, available at http://www.southafrica-travel.net/westcape/overberg_malgas.htm. (Accessed 25 April 2017).
[29] Beaufort was declared a port in 1841 and abolished as a port in 1864. See South Africa – History and Families of Witsand (White Sands) and Fort Beaufort (nd), available at https://www.geni.com/projects/South-Africa-History-and-Families-of-Witsand-White-Sands-and-Port-Beaufort/12050. (Accessed 24 April 2017).
[30] The development of the railways and roads (in particular the Competitive Sea Transport Rates of 1911) rendered this port completely irrelevant by the early 20th century. However, Malgas port remained navigable until 1930 (see note 29).
[31] Flag of the Natalia Republic (nd) Wikipedia, available at https://en.wikipedia.org/wiki/Flag_of_the_Natalia_Republic.
[32] Ingpen (note 24).
[33] Ibid. 5.
[34] Ibid.
[35] Ibid.

In an attempt to curb "capital flight", Natal operators formed the D'Urban Shipping Company in 1844. That moment marks the beginning of the campaign for "domestic goods on domestic fleet" on the South African shores that has repeatedly reared its head over the intervening years, and is with us as cabotage, as we know it today.

Natal harbour flourished and received the first steamer at Port Natal in 1852.[36] In the same year the General Screw Steam Shipping Company of London commenced a steamer coastal service for the mail service between the Cape and Natal.[37] Three years later the first Harbour Board was established to embark on deepening the port and to perform some form of dredging services.[38] In all, the annexation of Natal had a positive impact on coastwise trade.

The formation of the Natal Sugar Company in 1853 provided the colony with more reliable cargo supplies to other colonies, especially to the Cape. In 1858 exports totalled about 110 tons and had more than doubled by the following year to 290 tons.[39]Likewise, shipping of farming equipment into Natal showed a commensurate increase by 1859.[40] The demand for labour to increase sugar outputs also led to the arrival of indentured labourers from Madras, who were engaged to work the sugarcane fields in 1860.[41]

Natal had a very active community of sugar traders concentrated in the southern part of the colony. C.G. Smith was the driving force with the largest trade in this sector. His focus went beyond dealing in sugar. His interests extended to cattle trading and livestock distribution. He shipped sugar from Umkomaas and Umzimkulu river ports as well as from Port Shepstone to Durban.[42] The return cargo consisted of general commercial goods.[43]

[36] The *Sir Robert Peel* on 16 August 1852, available at http://www.historic-shipping.co.uk/gsssco/Sir%20Robert%20Peel.html. (Accessed 25 April 2017).
[37] P. Dickinson Shipping Interests of C. G. Smith 1886–1966 (March 1988) 3(1) *SAJEH* 20–32.
[38] Ibid.
[39] Ibid.
[40] The value of agricultural equipment was 2.777 pounds in 1856, 1.943 pounds in 1857, 3.975 in 1858 and 7.810 the following year. This represented an increase of about 181% in three years. Figures derived from A. McMartin The Early Days of The Natal Sugar Industry, with Special Reference to the Introduction of Varieties (1948) 85, available at https://pdfs.semanticscholar.org/9dec/d0f3ff6d4ced63d775c28ddb9aedbef268be.pdf (Accessed 10 December 2019).
[41] For a detailed discussion see Ship List of Indian Indentured Labourers (nd), available at http://www.sahistory.org.za/article/ship-list-indian-indentured-labourers. (Accessed 25 April 2017).
[42] This service gave Smith and other traders on this route substantial savings of about £2 10s 0d per ton. Ibid.
[43] Ibid, 68.

An increase in the number of sugarcane planters entering the market prompted the rise in demand for coastal shipping services between the south coast and Durban. Smith's Coasters carried sugarcane to Durban from Port Shepstone[44] and Port St Johns.[45] At some point, Smith's Coasters[46] extended its coastal service from the south coast to Port St Johns, East London (founded at the mouth of the Buffalo River in 1844)[47], and Kynsna.[48] However, the south coast service ran into problems[49] and was eventually closed at the turn of the century.

Coastal shipping on the eastern seaboard grew from strength to strength and received some stimulus from a hive of activities associated with the gold rush from 1878 [50] well into the 20th century. Other events that caused a spike in coastal traffic were an outbreak of cattle plague (*rinderpest*) in the course of 1888-1889 and the Anglo-Boer War during the period 1899 -1902[51] The cattle plague stimulated regional coastal trade with Madagascar and Mauritius. Smith's Coasters carried import cattle to replenish local supplies (for both meat and oxen for sugarcane plantations). The return voyage typically consisted of sugar from Mauritius.[52] During the Anglo Boer War, allied coasters carried war supplies for British soldiers fighting against the Boers.[53] In particular, Smith's Coasters shipped mail from the other colonies to Natal. These events formed the foundations for South African coastal shipping.

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[44] The *Somtseu* and later the *Frontier* ibid.
[45] The *Umzimvubu*.
[46] *Somtseu* and *Umzimvubu*.
[47] The British used this port for landing stores during the Frontier Wars. In 1848 Sir Harry Smith, the then Cape governor, claimed it for the Crown and named it London. When it was linked to the Cape later, it was renamed East London http://showme.co.za/east-london/tourism/a-history-of-east-london/. (Accessed 3 May 2017).
[48] B. Ingpen Unicorn, Navigating New Frontiers (2003).
[49] Challenges seem to have been both physical and economical in nature. Brian Ingpen (note 34) and Paul Dickinson (note 38) 20 detail some groundings in the south coast and problems with insufficient bridge heights that plagued coasters as being some of the challenges. The authors also indicate the introduction of railway lines from the south coast to Durban in 1901 as the proverbial nail in the coasters' coffin. Dickinson states that rail introduced a more economical alternative for the transportation of cargo to Durban, with which ships could not compete.
[50] The first declared gold field in South Africa was in Knysna after a gold nugget was found in the Karatara River near Ruigtevlei in 1878. It attracted a number of fortune seekers which, for coasters, translated into transportation of passengers, equipment and foodstuffs. See Knysna (nd), available at https://en.wikipedia.org/wiki/Knysna. (Accessed 4 May 2017).
[51] Ibid. 22.
[52] Dickinson (note 38) 30 shows figures for oxen at 2 122 head in 1896 and at a peak of 23 059 head by 1902.
[53] V. Solomon South African Shipping Question 1886-1914 (1982).

Cabotage murmurs that saw the formation of D'Urban Shipping Company in 1844 failed to gain momentum. Vessels continued to operate on the South and southern African coast regardless of where they were flagged. The "domestic goods on domestic fleet" campaign came to naught and the antecedent prevention of capital flight followed suit.

Therefore, there was no cabotage on the Southern African coast at the end of the 19th century. Calls to exclude vessels flagged outside a particular coast failed. We turn now to look at the period from the beginning to the middle of the 20th century.

2.3 DEVELOPMENT OF COASTAL SHIPPING (1900 TO THE 1950s)

Three significant events mark this era. The first is concerned with the establishment of the Union Castle Line and subsequent Conference dominance. The submission is that the presence of Union Castle Line had an impact on the coast despite the fact that the company operated a predominantly international trade. The second event was the implementation of Sea Competitive Rail Rates (SCRR), which was aimed at stimulating railway traffic. The third relates to the effect that the Great Depression and the two World Wars had on coastal shipping.

2.3.1 Conference dominance

The service operated by the Union Steam Ship Company constituted the umbilical cord connecting Britain and its South African colony.[54] The company had held rights to the Cape mail contract since 1857 and had two sailings to Europe per month.[55] The mail service formed the basis for an association of the lines steaming between the two countries. These lines later became known as the South African Conference Lines or simply the Conference,[56] led by the influential Donald Currie. This meant that Donald Currie also had exclusive rights in the distribution of mail along the coast to other colonies.[57]

[54] G.R. Berridge The Politics of the South African Run: European Shipping and Pretoria (1987). The author argues, for instance, that South African exports were referred to as "homebound" traffic while imports to South Africa were known as "outbound" traffic. The proper perspective was therefore, at least at the beginning of the trade, to view Britain as "home" and South Africa as an "outpost" with which England was trading.
[55] Solomon (note 54).
[56] Ibid.
[57] Ibid. 7.

Donald Currie's Castle Mail Packets Company Limited amalgamated with the Union Steam Ship Company to form the Union Castle Line in 1900.[58] The merger formed an even greater force to reckon with on the high seas and on the coast alike. It is no exaggeration that the merger made Union Castle a shipping colossus and gave it the right to take the first bite of the South African shipping trade cherry.[59]

The effect that Conference activity had on coastal trade cannot be overstated. First, any genuine efforts for coastal competition were stifled by the presence of the Conference, as it was the Conference's modus operandi to preserve its share to the exclusion of other coastal participants, especially newcomers. Second, a "British shipping services provider" bias was firmly entrenched in South Africa over this period and this would have directly stunted the growth and development of international and coastwise trade in the interest of South Africa.

The environment that the Conference presence created set the scene for the Ocean Freight Agreement (OFA), which followed soon after the formation of the Union of South Africa in 1910. The OFA divided carriage of cargo in and out the country into three categories: Mail Contract, Northbound and Southbound. The government traditionally gave Union Castle, the only negotiator for the Conference, the right to carry mail to and from South Africa. In a manner that suggested an exchange, the Conference agreed to keep freight for export agricultural products down and to recover the shortfall against freight for consumer and capital imports. The OFA also obliged the government to informally discourage potential newcomers from competing with the Conference.[60]

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[58] All Conference chairmen were from Union Castle and the company also housed the Conference Secretariat although Conference members shared the expenses of running the office, for instance. Ibid. 4.

[59] Berridge (note 56) 7 states that Union Castle had an annual subsidy and received priority berthing during times of port congestion.

[60] Berridge (note 56) 5.

Solomon states that strictly speaking, there were three Conferences: The Outward Conference, the Homeward Conference, and the Coastwise Conference.[61] The OFA was never intended to burden the coast or to subject it to Conference control. Therefore, "coastal conference" terms would have been the illegitimate products from the Conference that the Union could never have intended but which clearly had the Union's acquiescence. The argument is therefore that government hands were tied. The arrangement between the Union government and the Conference meant that the government could not promote coastal shipping because of the OFA.

Paul Dickinson states that there were 16 coastal vessels operating along the coast during this time. Thesens, Smith Coasters, African Coasters, Dart & Howes and others owned these vessels.[62] Generally, coasters had staple cargo to sustain their business during this period. However, Thesens, Smith Coasters and African Coasters held a bigger share of the market.[63] Precise cargo and route distribution patterns could not be verified. However, it is clear that the routes were sustained by some means of informal route allocation, which prevented overlaps that could lead to excess tonnage available on any single route. This balance did not depend on any Conference arrangement.

Smith Coasters carried sugar from Durban to the Cape and returned with groceries, building materials, automotive cargo and canned foods. African Coasters traded on the same route transporting general cargo and newspaper print made from Natal wattle to Cape Town.[64] These companies seem to have had settled informal terms not to compete.

Similarly, Thesens and Dart & Howes traded from Table Bay to the West African coast and along the south and eastern Cape. Thesens carried timber, general cargo and passengers. When road access improved between the Cape and Knysna, Thesens shifted its focus to the provision of service to fishing concerns (as well as seal-skin traders) and those in the mining of copper and diamonds, especially after diamond discovery near Port Nolloth. By the late 1930s, Thesens was carrying palm oil, timber and passengers up the west coast to Matadi in the then Belgian Congo.[65]

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[61] Solomon (note 54) 28.
[62] Ibid.
[63] Ibid.
[64] Ingpen (note 49).
[65] Ibid.

Dart and Howes traded in the Beaufort West/Table Bay port range. The outward carriage was made up of petrol drums and general cargo, while the return voyage consisted of bagged wheat, barrelled water, and in some instances, construction materials and fishing equipment.

However, the presence of the Conference had a destabilising effect on the further development of coastal trade. The OFA committed government cargo to the Conference for half a decade in the first period of its operation. The Union government effectively signed away the opportunity for domestic carriers to ship South African tonnage over that period. The position of foreign-owned shipping enterprises was thus enhanced and secured for 78 years.[66] The effect of the OFA was that high-tariff, time-sensitive coastwise cargo was carried by foreign-owned fleets, the greatest objection to this practice being in respect of coastwise cargo from East London and Port Elizabeth.[67]

In the wake of the scuttling of one of its vessels, Captain Tonnesen of Thesens commented:

> *Owing to strong competition from overseas ships in the coastal trade, the South African coasters – excellent and efficient little vessels that they were – found that there was very little trade for them. Here we have the South African government subsidising*[68] *a foreign shipping line while our own merchant fleet – small though it is – is left entirely in the cold. The coasters cannot possibly be expected to compete with the huge vessels sailing along the coast and if something is not done, other vessels will follow this one which would probably not have been sunk had things been better*.[69]

Thesens were basically arguing for cabotage. The idea was then, as it is now, that the exclusion of foreign vessels from participating in coastal trades would stimulate growth of the domestic coastal fleet. The message was directed at government and the request was for government to protect coasters from international competition. The government did not heed the call but continued with the OFA, which entrenched foreign vessel domination.

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[66] The OFA lasted from 1912 well into the 1990s: Berridge (note 56) 4.
[67] Ingpen (note 49) 28.
[68] Berridge (note 56) 14 places such subsidy at £300 000 in 1945, all of which the government committed to British interests without making any provision for South African coasters.
[69] Ingpen (note 49) 28.

Any party that did not have Conference approval found it quite difficult to trade on South African international routes or along the coast. Conference restrictions on international routes were to be expected. However, the Conference pursued control of the coast with just as much vigour. For instance, Thesens and Co was not part of the Conference and therefore had to contend with Conference opposition when the company started sailing[70] between Port Elizabeth and Knysna.[71]

The parameters of the mail contract (to which Union Castle had exclusive rights) did not extend beyond the Cape. Rennie provided the mail service between the Cape and Natal, supplemented by passengers and other cargo.[72] Rennie therefore provided feeder services that linked the two colonies for British ships using the Cape as the point of entry.[73] Naturally the arrangement, particularly relating to the mail service, required confirmation from the Union Castle and the Conference. This becomes more evident when one considers the fact that when Rennie's ships were wrecked (four years after commencing the inter-colony mail service), it was Union Castle who took over the service between the Cape and Natal.[74]

2.3.2 Sea Competitive Railway Rates

Coastal shipping faced an even bigger challenge than the Conference and its OFA during this time. The Union Government enacted the Sea Competitive Railway Rates (SCRR) in 1911. The SCRR was an adaptation of the policy first employed by the old Colonial Cape government through which it favoured transportation of cargo by rail. Through the state-controlled South African Railways Administration, the Union extended this policy to cover a wider range of cargo.[75] The SCRR applied to any freight moved between ports in the Union and the hinterland close to the coast.[76] The policy set a rail charge below the sea freight rate to any competing port in the Union. The type

[70] With the *Clara*.
[71] Ingpen (note 49) 17, where he shows a copy of a letter from the Union Castle's London office in which Union Castle stipulated who could trade on the coast and on what terms. The letter also reveals that an "attack" would ordinarily be launched against a competitor, whether or not such acts would improve efficiencies.
[72] Ibid. 6.
[73] Ibid. 16.
[74] Ibid.
[75] Ingpen (note 49) 27.
[76] Ibid.

of cargo affected would typically be that which coasters would otherwise have carried at profitable rates.

The net effect of the SCRR was that coasters were left to lift low-value cargo such as paper and sugar.[77] The whole object was to make it impossible for coastal vessels to compete with rail. As a state entity, the Railways Administration had no pressure to turn a profit. Therefore, it could afford to sustain the practice of undercutting shipping rates regardless of the fact that it was uneconomical for it to do so.[78] The policy was maintained despite its glaring anomalies.[79] The SCRR led to a significant decline in coastal tonnage.

2.3.3 Effects of the Depression and the World Wars

Coasters suffered a further setback during the First World War (1914 to 1918) and the Great Depression of 1930. Disruptions during the Second World War between 1939 and 1945 saw a significant depletion of the coastal fleet. During this time, ten of the sixteen coastal ships from South African operators were called up for wartime duties.[80] Some of the commissioned tonnage was converted to troop vessels or set apart for the exclusive use as carriers of army stores and war supplies. At one stage of the war, only one vessel[81] from Natal had not been commissioned for war out of the entire coastal fleet.[82]

Sustained market distortions caused by the unpredictability of wartime trade patterns eventually dried up coastal cargo. Shipping operators lost personnel to war call-ups which, as a consequence, stifled coastal operations.[83] Therefore, whatever strides coastal shipping companies had made post the First World War and the Depression were lost during the Second World War.

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[77] Dickinson (note 38) 22.
[78] Ingpen (note 49) 28. A similar policy applied with respect to road transport.
[79] For example, Trevor Jones 'Coastal Sea Transport and Intermodal Competition in South Africa' (1985) cites instances in which railage charge was set higher on short than on long hauls. A typical example of this would be a charge for cargo from Cape to Durban by rail over about 2 106 kilometres set at a lower rate than a Cape to Durban port-to-port rate covering 1 474 kilometres.
[80] Ingpen (note 49).
[81] The *Nahoon* from Smith's Coasters was still under repairs after an accident. She continued to ply her trade between Natal and the Cape but not without fear of being torpedoed.
[82] Ingpen (note 49).
[83] Ibid. (note 49) 33. Ingpen records that Walter Grindrod and Cecil Renaud received the military call-up to North Africa, where they would be stationed, which left the company in limbo during their absence.

2.3.4 Overview of the period

In all, coastal shipping suffered tremendously during this era from Conference interference and the OFA, implementation of the SCRR, and disruptions caused by the economic downturn and the two World Wars.

Natal was home to flourishing sugarcane fields, and the Cape was the hub for the manufacturing of canned foods, vineyard produce and confectionery. Sugar trade volumes recorded over this period were significant, particularly during the period 1916-1917 and 1926-1927, as reflected in Figure 2.2 below. Therefore, it was the sugar industry that kept coastal shipping in business over this period, particularly on the main coastal route between the Cape and Natal.

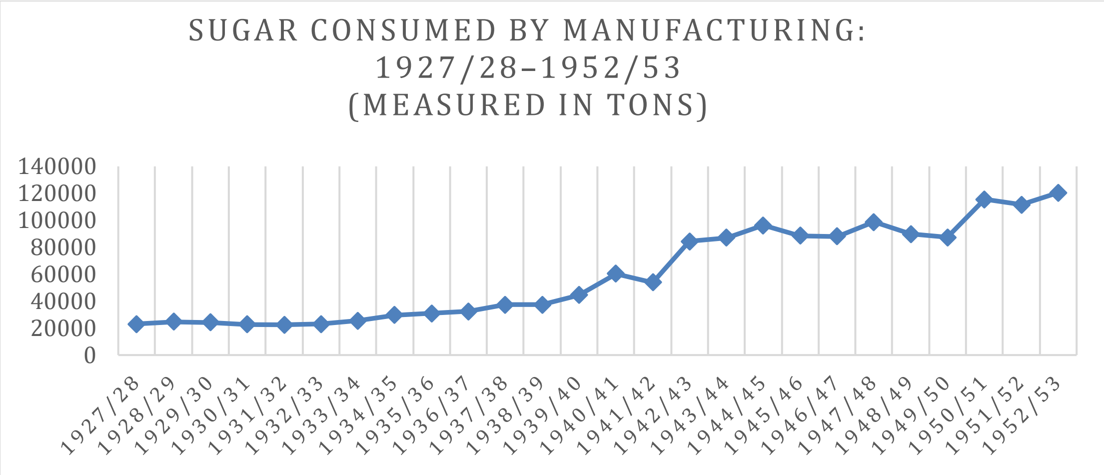

Figure 2.2: Manufacturing industry's sugar demand during the period from 1927 to the mid-1950s

(Source: Dickinson, 1988)

Arguably, the first half of the 20th century was among the most difficult for coastal shipping. However, a constant supply of cargo from the sugar industry propped coastal shipping up for a while until it could reinvent itself. Sugar continued to play an important role in the development of coastal shipping in the following era when the coastal fleet was rationalised.

2.4 CONSOLIDATION AND RATIONALISATION OF THE COASTAL FLEET (1950 TO 1976)

The highlight of this era was the abolishing of the SCRR on 1 September 1954. The news led to a sudden availability of high-freight cargo and a resultant surge in coastal shipping. Coastal cargo rose from 443 000 tons in 1953 to over a million tons by 1955.[84] The surge demonstrated the shortcomings of the SCRR which the government pursued over 50 years.

Foreign vessels began to terminate their southern African services in Durban. These vessels would then rely on coasters to distribute the cargo to Lourenço Marques (Maputo), Nacala, and Beira.[85] The cargo windfall encouraged the formation of Durban Lines (Pty) Ltd,[86] registered in 1955 for the Durban-Mozambique-Ocean Islands route.

Buoyant market conditions continued, with the result that coastal rates increased in 1959. Higher revenues provided coasters an opportunity to supplement their fleets and to adopt modern technologies.[87] This modernisation was first evident in the introduction of diesel-powered engines on the coast and the accompanying profits derived from new diesel efficiencies.[88]

However, in the early 1960s, coasters battled to secure capital to meet further expansion. The result was inefficiencies that inevitably follow dependence on ageing fleets and the associated heavy maintenance costs. The rate of growth had therefore reached its peak. Cargo started to decline as well, which reduced tonnage demand. This eventually led to the reduction of coastal operators from seven to four.[89] The survivors were Smith's Coasters, African Coasters, Durban Lines, and Thesens.[90] With the exception of Thesens, which at the time was owned by Coast Lines of Liverpool, the

[84] B. Ingpen Grindrod – Charting New Horizons (2010) 42.
[85] Ibid.
[86] Formerly Durban Coasters (Pty) Ltd.
[87] The gains were significant. For instance, Smith's Coasters managed ownership of only 13 ships in 71 years from 1889 to 1960. However, the company acquired nine ships in four years between 1960 and the time when it was sold 1966. These figures were derived from Dickinson (note 38) 32.
[88] Ibid. 29. Dickinson points out that in the trade where Smith's Coasters was earning £14 307 with *Nahoon*, they were earning £43 858 with its replacement, diesel-powered *Intaba*.
[89] Ibid. 31.
[90] Houston bought Thesens in 1921 but kept the name and fleet colours. Houston sold Thesens to Mitchell Cotts. In 1936 the latter sold Thesens to Coast Lines, Liverpool.

rest of the coastal operations which survived were South African owned. All vessels operating along the coast were flagged in South Africa.[91]

It was at this point that ownership of coastwise fleets experienced perhaps the most significant shifts. In 1962 African Coasters secured an exclusive deal to carry sugar for Huletts and Umfolozi sugar distributors. The deal was meant to exclude Smith's Coasters from shipping sugar along the coast.[92] However, in a strategic comeback, C.G. Smith and Tongaat acquired control of Huletts in the same year. The two companies formed a subsidiary distribution company, which transferred all carriage rights to Smith's Coasters, leaving African Coasters without any sugar cargo.[93] Smith's profits consequently soared and as a result the company managed to acquire a new fleet of eight vessels.[94]

African Coasters resolved to sell its shares to a mining house, Union Corporation Limited (which later became known as Gencor), which took a controlling stake in the company in 1964. In return, the Corporation committed the carriage of the products of its subsidiary, the South African Pulp and Paper Industries (commonly known as SAPPI) on the fleet of African Coasters. As a direct outcome of this development, African Coasters acquired six modernised vessels, which then set it on the path for further acquisitions of other coasting businesses.

In 1966 a further re-organisation of the coastal fleet took place. Although Smith's Coasters had sufficient sugar as its base cargo and general cargo for its vessels, its parent company, C.G. Smith, was desirous of focusing on its core sugar business. Without the approval of Smith's Coasters, C.G. Smith merged its shipping subsidiary with African Coasters.[95] The merger of the two companies became known as Unicorn Lines.[96] Large volumes of sugar cargo had thus been added to the expanded Unicorn Line fleet that was already enjoying dominance in the carriage of paper and paper-based products.

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[91] Ingpen (note 86).
[92] Ibid. 10.
[93] Ibid. 54.
[94] Ibid.
[95] Ibid.
[96] B. Ingpen Development of Unicorn 1869–2004 (nd) states that the name of the new company reflected the majority shareholder's logo; hence it was called Unicorn Shipping Lines.

In 1965 Safmarine, having been established in 1946 and plying its trade predominantly in international waters, bought a controlling shareholding in Thesens.[97] The move held hopes for the fulfilment of an old ambition of having a domestic carrier which would trade both on the coast and the high seas. However, in 1967, Safmarine sold Thesens to Unicorn Lines in return for a 40% stake in the newly-formed giant.[98]

The amalgamation exercise placed Unicorn Lines in a position to deploy tonnage at will in an environment that was favourable,[99] and at a time when the company had a formidable fleet of 26 ships[100] and not many coastal competitors.

In 1969 the government reduced wharfage charges for coastal vehicle shipment, which Unicorn Lines and Skipkor (Port Elizabeth) sought to take advantage of. However, the duopoly was short lived. Unicorn bought out Skipkor in its first year of operation.[101] Unicorn Lines thereafter enjoyed a monopoly over the trade. The company turned its conquest towards the north to capture the Mozambique route, where Durban Coasters (Pty) Ltd[102] (aka Durban Lines) was the dominant coaster. The two companies initially competed. However, in 1970 Unicorn Lines took up a 32% shareholding in Durban Lines and had bought the entire shareholding by 1974.[103]

The Unicorn Lines coastal fleet continued to expand. However, by 1974 it had been reduced to 23 vessels after new and more purpose-built substitute vessels had been acquired and the old ones had been sold.[104] Unicorn Lines added two petroleum products tankers at this time for the coast.[105]

In the light of such massive acquisitions and fleet modernisation it came as no surprise that Unicorn Lines was the forerunner of cellular cargo delivery and handling on the coast. Unicorn Lines (bare boat) chartered the *Voorloper*, a 1 900-dwt (deadweight

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[97] B. Ingpen Coastwise Shipping in South Africa: A Study in Transportation Geography (1983) (unpublished Master's thesis, University of Port Elizabeth).
[98] Ibid. 69.
[99] Ibid. 68. Ingpen records that coastwise cargo increased 121.5% between 1960 and 1966.
[100] African Coasters contributed 12 vessels to the merger, Smith's 8 and Thesens 6. Ibid. 69.
[101] Ingpen (note 99).
[102] The company was registered under this name in 1951 and changed its name to Durban Lines in 1961 http://www.crwflags.com/fotw/flags/za~hf.html#dl. (Accessed 26 May 2017).
[103] Ingpen (note 86) 76.
[104] At this time the company was gearing to develop trade routes to Sri Lanka, Israel, South America, the Indian Ocean islands and West Africa. Ibid. 69.
[105] Mason (note 13).

tonnage) ro-ro cellular vessel. This marked the beginning of a new era of boxed cargo movement along the coast.

SECTION B: MODERN COASTAL SHIPPING

This section deals with coastal shipping developments over the period between 1977 and 2010. It consists of four segments, namely coastal containerisation, coastal monopoly, shipping in the new millennium and the conclusion.

2.5 MODERN HISTORY OF SOUTH AFRICAN COASTAL SHIPPING

As the heading suggests, this section deals with the history of coastal shipping in the modern era of diesel engines and containerised cargo.

The development of coastal containerisation was an extension of the advances already achieved in deep-sea cargo handling and transportation. Therefore the evolution of coastal cargo movement from purely bulk and breakbulk parcels to boxes does not possess a frame of reference independent of wider international developments that took place at the time. The discussion of the development of coastal containerisation is therefore conducted bearing this context in mind.

2.6 COASTAL CONTAINERISATION (FROM 1977 TO 1985)

Containerisation was set to commence on the South African coast on 1 July 1977.[106] Durban and Port Elizabeth on the east and Cape Town on the west coast met the deadline and were declared ready to transit to the new form of cargo handling.[107]

Richards Bay, having been inaugurated on 1 April 1976,[108] was at the time new and possessed tremendous potential for expansion. However, it was better positioned as a bulk export terminal and coal terminal. Therefore, Richards Bay would receive calls only from dry bulkers and not cellular ships. This port was therefore not designated for participation in the new era of containerisation. Efforts continued to prepare the other ports to handle containers.

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[106] Berridge (note 56) 210.
[107] Ingpen (note 86) 63.
[108] The official opening of the port occurred when Safmarine's *SA Vaal* entered the port with Prime Minister B.J. Vorster on board to attend the occasion. Ibid. 20.

Unicorn Lines had by this time cornered for itself a niche coastal market and had also expanded its operations into developing countries. International southbound cargo was on the rise, and Safmarine held the lion's share of its traffic.[109] For the coast, the significance of trade expansion was that first, most of the large European vessels would not call at smaller Southern African ports such as Walvis Bay and East London. Second, European carriers generally used Durban as the terminal port. This resulted in the availability of large amounts of feeder cargo for the African eastern seaboard.[110]

It was also expected that the coast would benefit further because other groupings such as the South Africa-Far East Conference and later the US Conference had undertaken to adopt containerisation in the early 1980s. These operators would not call at all the ports.[111] The movement of cargo from the excluded ports would therefore cause a surge in coastal activities. The stage seemed set for unprecedented coastal trade prosperity.

The success of the coastal trade was not dependent merely on transshipments. Unicorn Lines enjoyed high-volume trades between Durban and Cape Town and Cape Town to Port Nolloth. The company began to provide a purely containerised service using two vessels.[112] Its service to Port Nolloth was also thriving on the back of the discovery of Africa's largest deposits of zinc, copper, and lead on the west coast. The chief cargo to Port Nolloth was fuel oil supplies for (diamond – mining) dredgers and dry cargo to mining and fishing communities along the west coast.[113]

However, the period was not without its challenges. The expected growth was stunted by political instability caused by Apartheid policies. The Soweto uprising of 16 June 1976 (as well as the Sharpeville insurgence in 1960) were probably foremost in the thoughts of the would-be investor looking to plunge into the prospective containerised South African trade. Inevitably South Africa suffered the backlash of economic sanctions imposed as a result of the unhealthy political environment. In the end, this translated to less coastal cargo for feeder services than predicted.

Even more disturbing was the fact that organised boycotts and sanctions against the Apartheid government affected virtually all the various sectors of business life, and

[109] Ibid. 64.
[110] Ibid.
[111] Ibid.
[112] Ibid. 119.
[113] Ibid.

mining was among the most affected. Consequently, Gencor (formerly Union Corporation Limited) had to streamline its operations by selling its majority share in the parent entity[114] of Unicorn Lines. However, Grindrod managed to buy that controlling stake for itself, thus establishing its name on the coast well into the foreseeable future.

Unicorn Lines was a formidable coastal shipping company by tonnage size and operational expertise. However, the company still had competitors to contend with. There were three other coasters at the time, namely Rennie's Coasters, Green R Line and Zambezi Africa Line. The first two soon disappeared in a consistently depressed market, leaving Unicorn and Zambezi in a duopoly. There were further competitive pressures from rail, albeit relatively small, and road transport, which had found a way of offering rates lower than profitable sea rates.[115] The result was an unimpressive coastal trade trajectory.

In 1979 Zambezi joined hands with Unilever for the transportation of the latter's products between Natal and Cape Town with an intermediary call at Port Elizabeth.[116] The two companies operated a fully containerised service called Cape Natal Lines. The service enjoyed a 15% market share on the coast.[117] However, in the now established tradition of competition elimination, Unicorn Lines eventually took over Cape Natal Lines in 1983. Consequently, the entire coastal share was in the hands of Unicorn Lines.

It will be remembered that the South African Railways (SAR) ships had provided the coastal coal service earlier between Maputo and the Cape and later between Natal and the Cape. The demand for coal, especially in the Cape, arose from supplies for steam locomotives, steam tugboats, coal-powered electricity stations, and also for general industrial and household use. The introduction of the first nuclear-powered turbine station in Koeberg in 1984[118] sounded the death knell for the SAR ships. The station caused a sharp decline in the demand for coal, following less dependency on coal as a source of energy. The installation of the second Koeberg turbine in 1985 was the

[114] African Coasters Holdings.
[115] Ingpen (note 86) 64.
[116] Ingpen (note 99) 232.
[117] Ibid. 72.
[118] Koeberg Nuclear Power Station, available at https://en.wikipedia.org/wiki/Koeberg_Nuclear_Power_Station. (Accessed 26 May 2017).

proverbial nail in the SAR ships' coffin. The SAR dispensed with its coastal coal service and sold all the assets used in this operation.

With the demise of the SAR ship operation, Unicorn Lines was the only coastal operator by the end of the millennium and virtually the most powerful coaster in Southern Africa. Significantly, the company's rise to dominance occurred without direct government involvement and certainly without the protection afforded coasters in the cabotage trade.

2.6.1 Milestones of this period

Containerisation may not have delivered on all its promises by the end of 1985. However, there were a few discernible milestones worthy of note that arguably marked this period as the crest of South African shipping both on the coast and on the high seas.

Cargo volumes on the coast witnessed a tremendous growth from a mere 0.4 million tons in 1953 to 2.1 million tons by 1981,[119] and vessels of about 46 415 tons operated on the coast.[120] The rise of Unicorn Lines to shipping eminence, which the company achieved in the 1980s, eventually served the long-held ambition of the provision of coastal services by a South African-owned coastal operator. Unicorn became the only operational member of the South African Coastal Conference from this era onwards.[121] The company was therefore on a path to take advantage of the earliest upswing in feeder service when it occurred, as was evidenced in the following season of coastal development. Overall, the first decade of coastal containerisation introduced measurable efficiencies that translated to tangible profits for the South African fleet.

Progress over this era extended to other areas of maritime business. For instance, an improved South African shipping outlook predicated port expansion. Typical examples of this were the establishment of the Richards Bay[122] port for coal and the expansion of the Saldanha port for its staple ores. Since the latter's focus was exports, the venture would have served to ameliorate the country's woes associated with balance of payments. Further progress was also achieved in public/private sector relations. The

[119] Ingpen (note 99) 73.
[120] Ibid. 214.
[121] Ibid.
[122] A. de V. Minnaar Richards Bay (1985) 17 Contrée 15–20 20 says the port was on its third phase expansion from 26 million tons capacity per annum to 44 million tons of coal per annum by 1983.

government's collaborative work with both Safmarine[123] and Unicorn Lines[124] revealed a new approach to business conduct, one that prioritised common commercial goals above (sometimes trivial) non-commercial differences. Increased domestic tonnage and the rise in the number of international port calls created a demand for tugboat building.[125] Local ship builders met the demand.[126] These tugs were available for port service and for salvage operations. The country's shipbuilding industry flourished and contributed to locally-produced tonnage of small container ships.[127]

The overall effect of this hive of activity would have been manifest in the corresponding skills development transferred to local crews, engineers, shipbuilders, operators, shore-side services, and all who interacted with and serviced the South African fleet and its related businesses. The country turned around a trade service heavily reliant on overseas players into an independent shipping service and offered services to other jurisdictions. All this was achieved without cabotage. The results were evident in the fleet that the country possessed, as shown in Figure 2.3 below.

[123] The IDC bought tankers and handed them over to Safmarine to operate albeit ironically these never came under the South African flag. Nevertheless, South African crews in attendance undoubtedly gained some valuable skills from working on these tankers.

[124] Ingpen (note 24) 117 says that the Department of Foreign Affairs was the catalyst in making way for Unicorn Lines to enter trade in the Middle East.

[125] The government had already ordered seven tugs to augment its fleet. See Ingpen (note 99) 107 for full details.

[126] Two Durban-based shipbuilders, Barens and Dorbyl, built eleven vessels for Unicorn Lines between 1969 and 1983. Jones (note 81) 241.

[127] Unicorn placed orders in Durban for two 8 000-ton ships and eventually built at least ten ships locally. For further details, see Ingpen (note 24).

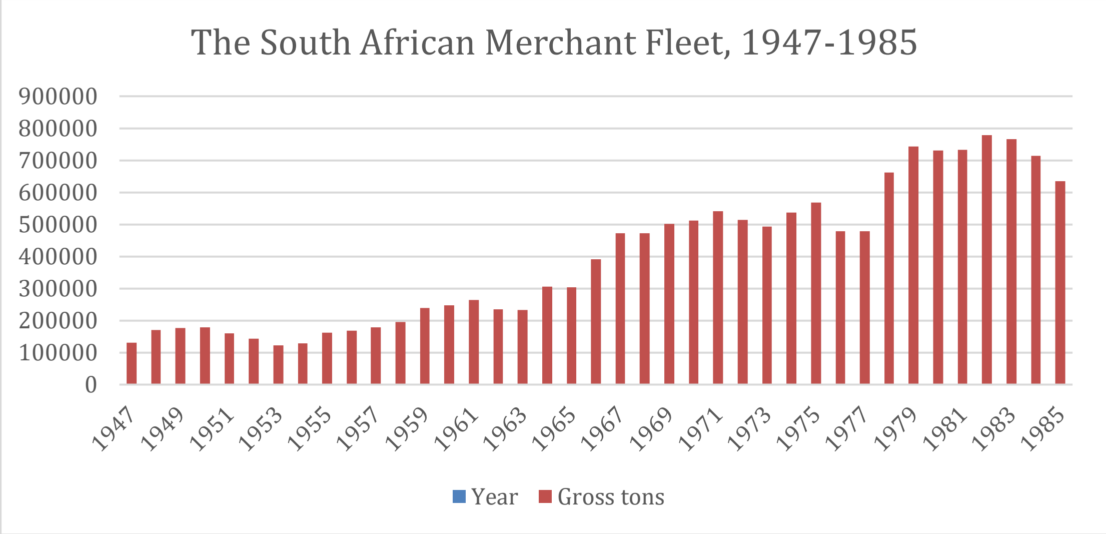

Figure 2.3: South African commercial fleet during the period from 1947 to 1985

(Source: Tonnage figures adapted from Berridge, 1987:229)

These and other achievements established a basis on which South Africa could build further on its coastal trade.

2.7 COASTAL MONOPOLY (FROM 1985 TO 2000)

In the mid 1980's Unicorn Lines were indisputable champions of the coastal trade. At this stage the company boasted a fleet of 19 ships.[128] However, in the course of its expansion, not all of the company's tonnage was registered under the South African register at this time although the company's operations were still largely South African. In 1985 the company contracted to carry 270 000 tons of salt per annum[129] from Walvis Bay to Durban, where it would be used as a base substance in chemical preparations by AECI paints and manufacturers at Embokodweni (formerly Umbogontwini), south of Durban.[130] Unicorn Lines managed to corner this market, with the result that the company carried virtually the entire annual demand two years later.[131]

In July 1986 Unicorn Lines shareholding changed hands, and with that the holding company (to which Unicorn Lines was a subsidiary) became known as Grindrod Unicorn Group, which was shortened to Grincor, later called Grindrod. Grindrod listed

[128] Mason (note 13) 136.
[129] The annual demand for salt was 400 000 tons per annum. Ibid.
[130] Previously salt had been sourced from Australia and Brazil. Ibid. 135.
[131] Ibid.

on the Johannesburg Stock Exchange on 5 November 1986, thus becoming the first listed South African coastal operator.[132]

However, the listing of Grindrod came at a very politically tense time. The government's tyrannical policies and generally messy political handling invited fresh calls for tougher economic sanctions, which reduced the number of South Africa's trading partners even further. This limited cargo to the country, which in turn had a negative effect on feeder volumes on the coast. The 1987 global shipping recession exacerbated commercial frugality. Grindrod was driven to relocate some operations to offshore centres to shield[133] the business from negative perceptions created by adverse political conditions in the country.

Further pressure on coastal shipping came in 1989 with the abolition of the road permit system. The long-awaited overhaul of the road freight system finally arrived. It will be remembered that commercial road freight was heavily regulated until this time. Long distance road haulage had been operated under strict licence conditions for a period of about 60 years since 1930. Some flexibility had been introduced under the Road Transport Act of 1977, which saw a measure of competition between road and rail.[134]

Jones states that this period saw an unprecedented rise in road freight's market share, largely at the expense of rail, and to a lesser extent at the expense of coastal shipping.[135] He shows that road had gained a 55% share of the freight market only ten years after deregulation, while rail, the main casualty, had stagnated at 45%. This, of course, resulted in financial strain for Grindrod, which had to shoulder the burdens occasioned by the shrinking coastal market share.

In the light of new market conditions, Grindrod decided to move its core operations offshore as well, with disastrous consequences for the country's ship registry. This shift was particularly perilous to coastal trade because the company had a virtual monopoly

[132] Safmarine retained its 40% share in Unicorn Lines acquired during the 1967 the merger, while Grincor held the other 60%.

[133] For instance, Grincor formed Griffin Shipping Holdings Limited and moved its vessels into that company to enable the vessels to trade in an identity that had no association with South Africa. The business operated out of Hong Kong. For fuller details see Ingpen (note 86) 88.

[134] Trevor Jones in S. Jones The Decline of the South African Economy (2002) 143.

[135] Ibid. 193.

at this stage. It effectively resulted in the complete "de-flagging" of the South African commercial ship register.

In the absence of cabotage anywhere on the African coast, Unicorn Lines began to operate as a foreign flag further up the coast of Africa, both to the east and to the west, through joint ventures with European entities that were already established on the routes. The company also operated services to the Indian Ocean Islands in a joint venture with Delmas. Furthermore, the company joined Moore-McCormack from the US and together they operated fortnightly calls at all South African ports, and in Mozambique, Tanzania and Kenya. On these trades, Unicorn Lines vessels bore no reference to South Africa. The trade was eventually conducted under the guise of the US counterpart who were free to trade on the coast. The glaring duplicity was, of course, the fact that none of the African countries in which US companies traded enjoyed reciprocal rights on the US coast due to the latter's ardent cabotage policy.[136]

Unicorn Lines increased its capacity on the west coast of Africa routes in 1992 to Angola[137] and to the then Zaire.[138] However, this did little to enhance the company's financial standing. The Indian Ocean Island route was also badly affected by fluctuations in returns and therefore was soon phased out. Trade between Angola and South Africa eventually improved, and this prompted a joint venture between Unicorn Lines and Safmarine to provide coastal services that covered ports from Angola in the east to Kenya in the west. However, service on this route was withdrawn because of over-tonnage.[139]

In 1994 South Africa shed its pariah status and did so convincingly. Despite the new developments, Grindrod retained its tonnage offshore. The company listed the subsidiary, Griffin, on the Johannesburg Securities Exchange, but kept Griffin's core operations in Hong Kong.[140] It seemed that through Griffin, Grincor had been convinced that it was more worthwhile to operate from offshore than from the South

[136] Ingpen (note 86).
[137] Ibid. The conflict in Angola, at its peak in 1995, led to higher insurance premiums. The turnaround came with the assassination of Jonas Savimbi in 2002. The event was followed by peace and fresh investments.
[138] Ibid. Zaire civil war disrupted the services with consequent financial losses.
[139] Grindrod withdrew from this route as soon as it bought the "Safmarine shares" in 1999.
[140] Griffin delisted in 1997 following the Asian market crash that significantly lowered chartering rates. Its fleet was either sold or brought back onshore to Unicorn Lines. Ingpen (note 86) 90.

African coast. Grindrod's [141] approach to coastal services changed from this point onwards. The result was that by the turn of the century, the company had withdrawn whatever was left of its multi-purpose fleet from the South African registry.[142]

With Unicorn Lines operating overseas or trading on the African coastline under pseudonyms or joint ventures, the beginning of the new millennium marked the end of South African-flagged vessels on the coast. The country was confined to trading with foreign-flagged vessels which has, for all intents and purposes, remained the norm to date.[143]

2.8 COASTAL SHIPPING IN THE NEW MILLENNIUM

Currently, Grindrod serves the coast on two fronts: containerised and tanker services. Both services are operated with other companies utilising vessels registered elsewhere. First, the containerised service is undertaken through Ocean Africa Container Lines, a joint venture the company operates with AP Møller. The focus of OACL (as it is commonly known) is the movement of containerised cargo between ports in the country and the handling of feeder cargo to West Africa as far as the port of Luanda in Angola. On the east the service goes as far as Beira, in Mozambique.[144] Grindrod's focus is therefore on the broader African seaboard. The recent picture shows that coastal shipping, particularly container trade, has once again settled into its original Southern African regional base.

The second service was born out of interactions with the oil majors. [145] Previously oil majors moved their own products along the coast and elsewhere in the region themselves. However, in the last two decades, these companies have enlisted Unicorn Lines to ship their oil products along the coast instead. The second service is therefore a joint venture service Unicorn Lines offers, initially through Southern Tankers,[146] and

[141] Ingpen (note 86) 23 says Grincor changed the name to Grindrod after the company acquired majority shares after buying back the Safmarine shares from the Restis Group.
[142] The History of South African Shipping, available at http://webcache.googleusercontent.com/search?q=cache:U11ZGNAYLrYJ:mastermarinersa.co.za/wp-content/uploads/2016/06/HISTORY-OF-SOUTH-AFRICAN-SHIPPING.docx+&cd=1&hl=en&ct=clnk&client=safari. (Accessed 14 June 2017).
[143] Ingpen (note 86) 5.
[144] Before 2004, OACL vessels sailed all the way to Mombasa, Kenya. Because of delays in that port, OACL subsequently ended its service in Beira.
[145] Shell, Caltex, Engen (ex-Mobil) and BP.
[146] With Dudula Shipping Company 2004 to 2007.

subsequently through UniCal.[147] UniCal services the refineries between Durban and Cape Town as well as Mossel Bay. In this way, Unicorn Lines maintains its presence on the coast in the shipment of oil and petroleum products. Initially this service was provided through Unicorn Bunkers under contract with BP and Engen in Durban and with Chevron in Cape Town [148] and lately through Linsen Nambi Bunker Services.[149]

Whether on its own or in a form of a joint venture, Unicorn Lines has no vessels registered in South Africa, although it remains a South African-registered company. Its fleet is registered in Singapore, the UK, and elsewhere. The amalgamation of the entire South African fleet under the same roof therefore placed the country's entire coastal shipping expertise on the table of a single boardroom. For all intents and purposes, it has remained there. No other coastal operator has emerged since; nor is there any realistic prospect that there will be new entrants in the near future.

2.9 CONCLUSION

The chapter began with a discussion of the early history of coastal shipping. The narrative of 11th century Southern African routes shows coastal shipping that was buoyed by the trade of the Arab Muslims with the coastal and river merchants of Great Zimbabwe and the people of the eastern seaboard islands. South Africa and Mozambique did not exist. Borders of these and other countries are postcolonial constructs. Nevertheless, evidence exists to suggest that foreign traders were not only welcomed to areas located in modern Southern Africa but that integration between foreign traders and locals was sufficiently intimate and sustained long enough to produce shared values.[150] Therefore, Southern African precolonial history shows no evidence of coastal discriminatory practices. Similarly, nothing suggests that Arab traders or local traders or both as an amalgamation sought to exclude others from coastal routes. Therefore, cabotage does not appear to have been practised over this period.

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[147] A joint venture that started in 2008 with Calulo Services (Pty) Ltd.

[148] Unicorn Bunkers, available at http://www.grindrod.co.za/Company/28/Unicorn-Bunkers. (Accessed 21 July 2017).

[149] The company operates three South African registered vessels; two service BP/Engen in Durban and the third vessel services Astron Energy in Cape Town. See https:/linsennambi.com/about-bunker-services, accessed 17 February 2020.

[150] Swahili became a coastal trader's language that flourished since then. Today Swahili has its own news channel on BBC NEWS, available at https://www.bbc.com/swahili/dira-tv-48275890. (Accessed 17 May 2019).

The arrival of the Dutch during the 17th century may have expanded trade along the coast, especially the slave trade. However, vessels of various flags plied the Southern African coast equally exposed to capture, cargo theft, piracy and other plundering methods of the time. There were no restrictions with regard to who might trade on the coast apart from European territorial conquests between the Dutch, the English and the Portuguese, which determined who ruled the conquered coast and who was excluded.

British colonisation of the Cape led to the development of predominantly English coastal settlements. British domination spread from the southernmost tip of Africa further into the interior and paved the way for the development of coastal shipping fleets, ports, and other coastal infrastructure. The chapter shows a chronological development of the coast and features the dominant characters. It also highlights events that shaped coastal shipping such as economic downturns, market crashes, World Wars, government-sanctioned anti-coastal shipping policies and a political climate averse to trade and other coastal development. The entire development was almost exclusively driven by British men loyal to England. It was not driven by locals for the development of South Africa.

It is important to note that British policy[151] over this period was that cargo to and from British Colonies had to be carried on British vessels.[152] The effect of this was that all cargo to or from the Cape and Natal was exclusively reserved for carriage by British fleets. Therefore, it was British colonisation of South Africa that introduced cabotage on the coast. However, Natal attempted colonial cabotage towards the middle of the 19th century. The colony wanted to see local cargo carried exclusively by local vessels. The attempt resulted in the formation of D'Urban Shipping Company. However, efforts for this exclusivity amounted to naught. After that, cabotage never really took root in the colonies.

The chapter then tracks coastal shipping at the end of colonial South Africa. It has been pointed out that at the beginning of the 18th century, Britain was one of the sea powers

[151] Navigation Acts applied between 1651 and 1853 and the Merchant Shipping Act of 1869. For a full treatise, see Bruce Farthing International Shipping: An Introduction to the Policies, Politics and Institutions of the Maritime World (1987). See also A. Berriedale Keith 'Merchant Shipping Legislation in the Colonies' *Journal of the Society of Comparative Legislation*
Vol. 9, No. 2 (1908), pp. 202-222 (21 pages).

[152] It is therefore unsurprising that a voyage from the Cape to Britain was known as the "homebound" voyage because a vessel bound for Britain was going home, where it was flagged.

but that at the end of the century, Britain "was *the* sea power".[153] It was from this position of strength that Britain abandoned cabotage and any form of coastal restrictions during the middle of the 19th century. British shipowners wanted freedom to trade with vessels from anywhere.[154]

Expansion of dominance over coastal colonies was thereafter practised without any policy restrictions, through pure market control. This dominance meant that on becoming independent at the beginning of the 20th century, the Union had to rely on a variety of international fleets operating in a market environment controlled by the British. For the coast, British control of international carriage predicated British control of coastal transshipments. The Union's OFA contracts bound it to internationally-flagged fleets that also controlled coastal transshipments, particularly between colonies. In the process the Union acquiesced in the suppression of local coasters.

The Union had no room to suggest policies that would restrict coastal access to international vessels. Therefore, once Britain had abandoned coastal restrictions, its former colony, which did not have shipping capacity, could not advocate cabotage. The Union instead implemented stifling policies and tariff structures that deliberately undermined coastal shipping (such as the SCRR) which were introduced early in the 19th century and subsisted well into the middle of the century. These policies were ruinous to coastal enterprises owned by South Africans.

The new Republic of South Africa was formed in the 1960s. Like the Union before it, the Republic did not promote coastal shipping. Instead it focused its energy on supporting its hinterland developmental policies in favour of rail while actively suppressing coastal shipping and other modes of transport. Hopes of a South African-owned coastal fleet were raised when Safmarine bought Thesens in 1967. However, Safmarine soon after sold Thesens for a share in Unicorn Shipping. South African coastal shipping history leading up the late 1970s shows that the country never had an appetite for cabotage. Cabotage practice introduced by the British at the beginning of the 19th century (as reflected in the Navigation Acts and subsequently in the Merchant Shipping Act of 1869) was abolished and replaced by British market-share control in a new, restriction-free coastal environment.

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153 Farthing (note 152) 10.
154 Ibid.

Section B of the chapter covers coastal shipping history over the modern era at the beginning of a containerised shipping. During this period the presence of international vessels on the South African coast (which were increasingly non-British) was a familiar sight. These vessels utilised Durban as the terminal port, where cargo would then be transshipped to destination ports along the African seaboard. Over the next two decades transshipment services operated through feeder operations saw significant growth in coastal shipping.

Unicorn Lines dominated coastal services and feeder services after its coastal business take-over bid during 1966 to 1983. However, the government exercised cargo reservation over state cargo, particularly coal, which was only carried by SAR ships. Lack of demand for coal led to the demise of SAR ships. Unicorn Lines became the only coastal operator from 1985. From then, South African coastal shipping was characterised by Unicorn Lines' rise to prominence as a single coaster which saw the company with a fleet of 19 ships and listed on the Johannesburg Stock Exchange in 1986 under its new parent company, Grindrod.

In the new millennium Unicorn Lines had to contend with the effects of economic sanctions, global recession and the abolition of the road permit system, which trimmed company revenues. Grindrod moved its core operations offshore, thus removing its vessels from the South African register. However, Grindrod continued to ply its trade on the coast and expanded its operations further up the west coast to Luanda and up the east coast to Kenya.

The positivity that came with a new political dispensation in 1994 generally stimulated trade and coastal cargo. However, the Unicorn Lines coastal fleet did not return to the South African register. No new ship-owning enterprises have emerged either to join or to compete with Grindrod since then. Currently Grindrod maintains its presence on the coast through OACL and Unicorn Shipping. Unicorn Lines flags the fleet of about 42 vessels under its control in jurisdictions where favourable employment and convenient operating conditions exist. Similarly, the OACL fleet is not registered in South Africa.

In the context of this study, it must be borne in mind that Grindrod's continued ability to trade on the coast using a fleet that is not registered in South Africa and the freedom afforded other foreign-flagged vessels to operate on the coast continues by virtue of the fact that there is no cabotage in South Africa. Therefore, the government seeks to reserve coastal trade to South African-registered ships. This premise forms the basis for cabotage, which is central to the South African maritime policy.

The history of coastal shipping provides a canvas against which the development of maritime policy in South Africa ought to be understood. It also shows why South Africa has not adopted cabotage over the years. The effect of the absence of a domestically-registered fleet lies at the core of the reasons for the government's eagerness to change maritime policy. The next chapter discusses the development of the policy itself.

CHAPTER 3:
DOMESTIC AND REGIONAL COASTAL POLICY

This chapter deals with the development of South African maritime policy. It evaluates regional and continental instruments that influence this development. The discussion regarding regional and continental instruments encapsulates the interplay between domestic and regional trade policy, particularly over the SADC region. This interplay becomes more apparent in the next chapter, which covers movement of domestic and regional cargo.

This chapter deals with policy development in two phases. The first phase deals with domestic developments over the period 1996 to 2018. Advances made in developing policy over this period will be traced chronologically through the following documentary instruments:

- National Transport Policy (White Paper) 1996
- Draft Maritime Policy 2009 and 2010
- Review Report on the South African Maritime Transport Policy
- Green Paper 2015
- Draft Comprehensive Maritime Transport Policy
- Comprehensive Maritime Transport Policy, 2017
- Draft Merchant Shipping Act 2018.

The second phase of the chapter deals with regional and continental policies pertinent to domestic cabotage. A discussion of these policies is prompted by the fact that South Africa is a member of SADC and SADC is a polity of the African Union.[1] As such, it is essential to consider South Africa's regional and continental commitments to these structures insofar as they impact on cabotage. Such considerations are important, especially given that the AU aims to implement continental cabotage. Therefore, the state of affairs requires an evaluation of domestic cabotage policy in the context of broader regional and continental endeavours. It must be emphasised that the discussion in the second phase will be confined to the effects of SADC and AU instruments on

[1] Commonly known as the "AU".

cabotage implementation in South Africa as opposed to the effects of South African cabotage implementation on SADC and the continent.

3.1 DEVELOPMENT OF DOMESTIC POLICY (1996 TO 2018)

The period immediately after the first South African democratic elections in 1994 saw significant policy shifts with regard to how maritime transport and coastal shipping in general was perceived. The government consciously moved towards integration of coastal shipping into the broader transport framework to align the maritime industry to government's wider national building objectives.[2]

3.1.1 National Transport Policy White Paper (1996)

The first of the government's efforts to define coastal shipping policy under the new dispensation came with the National Transport Policy White Paper.[3] Perhaps to underscore its importance, the National Transport Policy became official policy within two years of the new government assuming power.

However, the National Transport Policy paved the way for the development of transport strategies for all modes of the country's transportation system and not just for shipping. It dealt with infrastructure, operation and control of land passenger, land freight transport, civil aviation, maritime transport and road traffic and safety.[4] What was significant about this policy was that maritime transport now, unlike before, enjoyed parity with other modes of transport. However, its scope was wide and therefore provided no definitive maritime policy. Nevertheless, the National Transport Policy introduced or at least formalised the idea of freight services as a vehicle for social and economic development.[5]

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[2] Prominent policies and frameworks of the time were the Reconstruction and Development Programme (RDP), the Growth, Employment and Redistribution (GEAR) strategy, the Accelerated Shared Growth Initiative of South Africa (ASGISA) and programmes to aide participation in the economy by historically disadvantaged individuals, were all directed at socio-economic development.
[3] Referred to hereinafter as the National Transport Policy.
[4] See policy statement dealing with "Operation and control", for instance.
[5] The National Transport Policy sought to "Provide safe, reliable, effective, efficient, and fully integrated transport operations and infrastructure which will best meet the needs of freight and passenger customers at improving levels of service and cost in a fashion which supports government strategies for economic and social development whilst being environmentally and economically sustainable". See "Policy vision".

With regard to cabotage, the National Transport Policy stated that:

> *Cabotage options will be monitored in the light of changing international cabotage practices and attitudes. The introduction of cabotage protection legislation on an African continental or Southern African regional basis will be investigated.*[6]

Therefore, the policy does not commit to any specific position with respect to cabotage. However, the policy was unambiguous about the fact that a legislative framework for cabotage was envisaged and that such framework would consider regional and continental developments.

3.1.2 Draft Maritime Policy (2009 and 2010)

It took over a decade for drafters to deliver a policy document specific to the maritime industry.[7] The White Paper on the South African Maritime Policy[8] came in two parts. The first came out in 2009 and was the first draft. It provided impetus for further maritime policy development through stakeholder engagements. The second version, published in 2010, embodied industry comments and amendments to the first draft. However, there were no remarkable differences between the two versions. Therefore, for convenience, both draft versions have been dealt with as a single draft document.

As expected, general ideals of the National Transport Policy set the tone for the Draft Maritime Policy and were indeed used as a platform for subsequent renditions of a more comprehensive maritime policy. Therefore, the first decade of the 21st century saw great strides being made in the development of the first South African policy document intended to deal exclusively with shipping and related matters.

The Draft Maritime Policy also emphasised regional policy developments and integration. It recognised the importance of the SADC Protocol on Transport, Communication and Meteorology,[9] which seeks to harmonise the role of coastal shipping and align regional cabotage practices.[10] It is important to note that the SADC Protocol specifically requires its members to progressively remove restrictions on

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[6] See the section dealing with "The operation of ships".
[7] However, it must be remembered that progress was registered elsewhere. The policy resulted in the promulgation of the South African Maritime Safety Authority Act (SAMSA Act), 5 of 1998 and the revised Ship Registration Act, 58 of 1998, promulgated in the same year.
[8] The Draft Maritime Policy.
[9] Of 2006; referred to hereinafter as the "SADC Protocol".
[10] Ibid. paragraph 3.3.2.5, 23.

cabotage between SADC member states and commit those, like South Africa, who do not prohibit cabotage by vessels registered in SADC countries to ensure the status quo.[11] Therefore, the SADC Protocol unequivocally prohibits cabotage between its members.

The Draft Maritime Policy rightly acknowledged that cabotage developments in South Africa "hold little promise if not sequenced with those of other SADC states or even those that fall under the African Maritime Transport Charter".[12] The Draft Maritime Policy called for cabotage development at sub-regional, regional and continental levels.[13] As pointed out earlier, this statement undergirds the discussion in the second part of this chapter regarding the AU Maritime Charter.[14]

At the heart of the Draft Maritime Policy was the need to re-engineer maritime business by ensuring that the maritime industry, both publicly and privately owned, support the government developmental state approach and its attributes.[15] However, although clear on its intentions, the Draft Maritime Policy was not a comprehensive policy. It recognised the need for the development of other policies to deal particularly with cabotage amongst other issues.[16] Nevertheless, the relevant policy statements left no doubt that cabotage implementation was among the policy's foremost priorities alongside the establishment of a home-grown fleet and the establishment of regional corridors.[17]

3.1.3 Review Report on the South African Maritime Transport Policy (2013)

The Review Report on the South African Maritime Transport Policy[18] was prepared by the National Maritime Policy Transport Technical Policy Committee consisting of various government departments, SAMSA and the Ports Regulator of South Africa, National Treasury and Transnet. The Maritime Report consolidated the position regarding policy development from the National Transport Policy in 1996 and updated

[11] Ibid., read with Article 8.2 of the SADC Protocol, 8/2.
[12] Ibid. paragraph 3.3.4.4.
[13] Ibid. paragraph 3.12.2.1.
[14] The African Maritime Transport Charter is an instrument of AU in which member states resolved to co-operate in all fields of maritime activity and to co-ordinate and harmonise their maritime policies. Ibid. paragraph 3.12.2
[15] Ibid. paragraph 3.17 at 68.
[16] The then National Minister of Transport described it in his foreword as "one instalment in policy formulation around the maritime industry and responsibilities" Ibid.
[17] Draft Maritime Policy (note 8), 5.
[18] Hereinafter referred to as the "Maritime Report".

it to 2013. The Maritime Policy highlighted and emphasised what government considered crucial for incorporation into what would be a comprehensive maritime policy.

It reiterated the government's position as a developmental state which then undergirded the urgency with which the state sought the maritime industry's collaboration to eradicate poverty, inequality and unemployment. Further work on the policy was done on the basis of what it had produced during 2009 and 2010.[19] Notably the Maritime Report adopted the stance that the approach to maritime policy required problem identification through research, analysis, and consultation through quantitative and qualitative methods.[20] The approach meant policy development would be based on scientific evaluations and would be conducted through stakeholder engagements. Cabotage would therefore not be handed down to industry as a directive; consultation would be a key feature in its development.

The remainder of what the Maritime Report covered comprised iterations and useful expansions of the Draft Maritime Policy. However, two notable nuances are worthy of mention. First, the Maritime Report categorised trade into four sectors. Second, even more significant, the Maritime Report clearly demarcated interests which policymakers sought to fall under cabotage.

3.1.3.1 Trade categories

The Maritime Report advocated aggregation of trade into coastal, regional, continental and international systems.[21] These were then described. A brief delineation (excluding International shipping) is given below in turn.

i *Coastal shipping*

The coastal system was described as any marine commercial activity conducted along the South African coast, including the carriage of cargo, passengers and equipment on board a ship from one coastal place to another coastal place in the same country.[22]

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[19] Maritime Report (note 18), 8 paragraph 1.5.1.2.
[20] Ibid. 1.5.3.
[21] Ibid. 25.
[22] Ibid. 3.8.7.

With regard to cargo, South African vessels must be "mandated … for carrying 100% of all cargo movement between ports within South African borders" and alternatively on the basis of reciprocity. Such coastal cargo carriage must also conform to the requirement providing for 25.1% preferential access to BBBEE candidates.[23]

The Maritime Report stated that:

> *The national maritime interests linked to the transformation of the shipping industry, strategic control of the South African coast, broader maritime security, employment creation and the economic development of the region have to be* <u>*the overall guiding principles*</u> *in regard to exercising rights over the country's coastal trade economy by introducing cabotage regime.*[24] *(Underlined for emphasis.)*

The national maritime interest that cabotage should be designed for would protect a wide list of interests that include:

- "Activities of exploration and exploitation or transportation of living and nonliving resources at sea by a South African ship from one port to another one within the Republic
- Carriage of passengers by a South African ship from one port to another within the Republic
- Manning of South African ships, including the training of a sea cadet, in the waters of the Republic".[25]

It is important to bear these coastal interests in mind. The discussion relating to the draft legislation on which to implement cabotage (dealt with later) shows a misalignment of these interests.

ii *Regional trade*

Here, the Maritime Report expands on regional policy development and integration stated in the Draft Maritime Policy. It recognised that South Africa was a member of SADC bound to NEPAD countries and arrangements that requires institutionalised regional development including in relation to coastal shipping. This position in SADC has been formalised by the SADC Protocol, which recognises the strategic importance

[23] Ibid. 3.8.16.28, 33.
[24] Ibid. 3.8.12.
[25] Ibid. 3.8.14.

of the role of coastal shipping. The Maritime Report therefore recommended a SADC Regional Coastal Shipping System that is in line with the AU Maritime Charter and AIMS.[26]

iii *Continental trading*

The Maritime Report highlighted Africa's reliance on "outside" trade and lamented the lack of intra-Africa trade which averages about 10 percent of total trade.[27] It called for a coastal shipping system that recognises a Combined Maritime Zone of Africa (commonly referred to as the CEMZA) in line with the AU Maritime Charter. This implied an intention to implement cabotage, as the name suggests, over the entire African coast.

Having consolidated the position of the Draft Maritime Policy and having been more specific on the basis of the maritime policy, work progressed to produce a comprehensive maritime policy. A comprehensive draft came out only in 2015. In the intervening period, government introduced Operation Phakisa in August 2014, which many confused with a maritime policy. Operation Phakisa was a delivery action plan. It was a strategy intended to fast track implementation of programmes in focus areas.[28] It did not deal with coastal shipping.

3.1.4 Green Paper on the South African Maritime Transport Policy (2015)

The Green Paper South African Maritime Transport Policy, published in 2015,[29] was the first attempt at providing a comprehensive maritime policy. It called for further development of policies including a policy on cabotage[30]in line with domestic, regional and global imperatives, bearing in mind South Africa's commitment to SADC and the AU.[31] In particular, the Green Paper sought to establish a framework through which to

[26] AIMS refers to the Africa's Integrated Maritime Strategy 2050.
[27] Maritime Report (note 18), 32.
[28] The focus areas were: Marine Transport and Manufacturing, Offshore Oil and Gas, Aquaculture and Marine Protection Services and Ocean Governance. Refer to Report on Operation Phakisa Implementation (report by State President to media and stakeholders) (13 August 2015).
[29] Hereinafter referred to as the "Green Paper".
[30] The Green Paper (note 29) incorrectly defined "cabotage" as the "transport of cargo between the ports of a country in a ship registered in another country". See definitions vii.
[31] Green Paper (note 29) Executive Summary x.

investigate how coastal and regional shipping can be used as a vehicle for economic development and trade facilitation to achieve the ideals of the AU Maritime Charter.[32]

The Green Paper stated that the main objective was "to ensure a level playing field for South African shipowners and operators against foreign competition and to attract both domestic and foreign investment in the local maritime industry". Pivotal to this objective was the development of cabotage and related policies. Specific cargo was the target for cabotage, namely sugar, paper and petrochemicals carried by tank containers.[33]

Furthermore, the Green Paper for the first time made a distinction between genuine coastal services and feeder services. It advocated for the promotion of regional and continental coastal shipping services in a similar way to domestic coastal services. The idea was to promote cabotage to control all African shipping services other than feeder services through bilateral or multilateral agreements with African countries that trade with South Africa.[34] These trades would operate on the UNCTAD model of 40:40:20.[35]

Notably, the Green Paper makes four important points:

- Cabotage and other restrictions are proposed whenever measures to promote a shipping industry in South Africa are under discussion. Such proposals tend to undermine practical proposals that could be implemented to benefit the industry.
- There is not much domestic cargo that could move as cabotage.
- The exclusive use of South African-flagged vessels for cabotage is likely to result in a loss of domestic production to foreign imports, as most of it is locally-produced sugar moving from Durban to Cape Town, and cabotage restrictions could raise the shipping costs sufficiently to render imports less expensive.
- There is no South African-flagged fleet to carry cabotage cargo, particularly if cabotage includes feeder cargo.

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[32] Ibid.
[33] Green Paper (note 29) 27.
[34] Ibid. 34.
[35] See Policy statement 115.

Where cabotage includes feeder cargo, the cost of "feedering" imports and exports would surely rise, especially because liner companies would in all likelihood divert feedering to elsewhere outside the South African coast.[36]

Insofar as the objectives of the policy are directed at socio economic upliftment, the above pointed to the counterproductive nature of cabotage implementation. Therefore, government undertook a feasibility study to deal with this and other issues.

3.1.5 Draft Comprehensive Maritime Transport Policy

The proposed Comprehensive Maritime Transport Policy for South Africa, also known as the Maritime Passage of Hope and Development, was published in 2016.[37] Perhaps in an effort to cure the defect of its predecessor, the Draft CMTP defined cabotage as a "trade transit of a foreign vessel along the coast (cabotage trading), from one port to another within the territorial limits of a single nation". However, the inclusion of "transit of a foreign vessel" left the definition wanting.

Cabotage definition was further conflated by the definition of "coastal shipping", which includes "the carriage of cargo by a ship from one place in the Republic … to any other place in the Republic … either directly or through a place outside the Republic … provided that this shall not apply to cargo which is consigned on a through bill of lading to or from a port outside the Republic and is unloaded at a port within the Republic for transshipment purposes only".

The Draft CMTP called for:

- A statutory framework to regulate coastal shipping through cabotage;
- Registration of vessels on a preferential basis for the creation of a South African fleet to be primarily used for cabotage;
- A licensing regime to regulate coastal cargo carriage and coastal services along the coast on an incentivised basis;
- Such framework to be part of a long-term strategy to promote South African ship ownership to serve national and regional economy.[38]

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[36] Green Paper (note 29), 36.
[37] Hereinafter referred to as the "Draft CMTP".
[38] Draft CMTP (note 37), 60.

With regard to regional and continental commitments, the Draft CMTP proposed a collaborative approach between South Africa and other regional structures to establish common standards for the alignment of the SADC Protocol and AU Maritime Charter systems with regards to cabotage.

The Draft CMTP released a plan for the establishment of a legislative review and a cabotage framework for a "phased in cabotage restriction" to commence within five years.[39]

3.1.6 Comprehensive Maritime Transport Policy

The Comprehensive Maritime Transport Policy for South Africa[40] was gazetted in June 2017.[41] The work that commenced with the National Transport Policy in 1996 finally produced the first South African maritime policy. The CMTP defines itself as that "component of national policy relating to all forms of transport by sea … concerned with creating the conditions for a safe, secure and stable environment within which all national maritime assets can develop and be utilised for the socio-economic growth and prosperity of the nation whilst being of service to international shipping and trade".

The CMTP clearly defines cabotage as "trade transit of a vessel along the coast (cabotage trading), from one port to another within the territorial limits of a single nation." However, cabotage does not apply to cargo discharged in a domestic port for transshipment to ports outside of South Africa.[42] Therefore, feeder cargo consigned on a through bill of lading will similarly not form part of cabotage cargo.

Policy statements clearly emphasise the development of a regulatory and legislative framework for cabotage and the introduction of "cabotage restrictions on coastal shipping as part of a long-term strategy to promote South African ship ownership to serve the national and regional economy".[43] It is also envisaged that movement of cargo along the coast will be conducted on the basis of a prescribed licensing regime

[39] Ibid. 121.
[40] The final policy retained the name "Maritime Passage of Hope and Development" introduced at draft stage. It is referred to hereinafter as the "CMTP".
[41] *Government Gazette* 40904.
[42] CMTP (note 40) 4.
[43] Ibid. 48.

which will grant the designated national carrier preferential treatment in the use of port facilities.[44]

With regard to the region and continent, the CMTP commits South Africa to SADC and the AU Maritime Charter through the Association of Maritime Administrations whose aim is to promote and foster collaboration among African Maritime Authorities on a variety of initiatives including implementation and monitoring African cabotage.[45] The schedule to the CMTP shows that the plan is for South Africa to commence phased-in cabotage in 2022.[46]

3.1.7 Draft Merchant Shipping Act 2018

The Draft Merchant Shipping Act 2018 (Draft MSA) is discussed here as a policy offspring of the CMTP. It proposes various amendments to the Merchant Shipping Act 57 of 1951. This section deals only with the main provisions of the Draft MSA pertinent to cabotage.

The Draft MSA makes it abundantly clear that only South African-owned ships can be involved in cabotage trades. Section 62 states: "No ship, other than a South African-owned ship, is permitted to engage in coastwise traffic". The definition of "coasting ship" is a "… ship employed in plying between ports in the same country but does not include any fishing vessel …". In terms of the CMTP such vessel will be engaged in cabotage trade.

Notably, involvement of foreign interests in coastal shipping has not been precluded. The language used suggests foreign participation on the basis of minority shareholding.[47] The trade over which the restriction applies covers all routes and all activities relating to loading and discharge of in the range of ports between Richards Bay and Port Nolloth.

Section 63 proposes licensing of vessels involved in cabotage trade, referred to as "coastwise traffic", a term which has been given a corresponding meaning to "coasting ship". Section 63(1) states:

[44] Ibid.
[45] Ibid. 23.
[46] Ibid. 111.
[47] See section 14 of the Draft MSA.

> *The owner or the master of a South African-owned coasting ship engaged in coastwise traffic or of a prescribed ship, shall be in possession of a licence issued to him or her in terms of this Act by the Authority.*

Therefore, coasting ships can engage in cabotage only under license issued by SAMSA. The licence will be issued only in respect of South African-owned ships. Section 61(2)*(b)* specifically states that a foreign vessel is not a coasting ship:

> *… although bound for one or more intermediate ports in the Republic … nor shall its voyage between ports in the Republic be deemed coastwise traffic.*

To conclude, the development of domestic policy in respect of coastal shipping shows that South Africa is poised to implement cabotage under a comprehensive policy that has been progressively developed over two decades from 1996 to 2018. However, the discussion shows that cabotage implementation as gleaned from the Draft MSA does not necessarily reflect the CMTP's cabotage ambitions. This issue is canvassed further in chapter 8.

3.2 REGIONAL AND CONTINENTAL POLICIES

This section broadly assesses SADC and AU instruments that influence the development of South African coastal shipping policy. To avoid redundancies, this section will deal only with policy-related matters. It does not deal with cargo-related matters, which will be dealt with in the following chapter.

A proper context for SADC cabotage requires a brief overview of the AU maritime policy position and the proposed integration of the continent through Regional Economic Communities (RECs) and the role of the RECs as regional extensions of the AU.

3.2.1 AU maritime instruments

The starting point for any meaningful discussion of cabotage in Africa requires an understanding of the role of the AU as the overarching body driving cabotage in the continent through its regional structures. An overview of how the AU implements its programmes in the regions is therefore important as it provides context for SADC regional cabotage and for domestic policies such as the South African CMTP and any legislation derived from it.

The AU position on maritime transport integration in general and on cabotage in particular is derived from two AU instruments, namely the Revised African Maritime Transport Charter 2010 (AU Maritime Charter) and the Africa Integrated Maritime Strategy 2050 (AIMS 2050).

3.2.2 The AU Maritime Charter

The main objective of the first instrument, the AU Maritime Charter, is to set out a clear path for maritime transport in Africa and the structuring of coherent policies that would ensure sustainable growth and development of African trading vessels.[48] Other objectives[49] seem ancillary to the prioritisation of developing a robust African merchant fleet. A corollary of this objective is the advancement of African coastal trades in which the African merchant fleet will operate.

As part of the implementation process, the AU Maritime Charter emphasises the need to establish regional and sub-regional purpose-driven organisations that will focus on maritime transport, inland waterways and port operations. It places an obligation on member states to form these organisations without delay.[50]

3.2.3 Africa Integrated Maritime Strategy 2050 (AIMS 2050)

The second instrument, the AIMS 2050, "provides a broad framework for the protection and sustainable exploitation of the African Maritime Domain for wealth creation".[51] The framework acts as a tool through which the AU seeks to address Africa's maritime challenges for sustainable development and competitiveness.[52] The idea is to integrate and direct collective resources to foster wealth creation through the exploitation of oceans, seas and inland waterways falling within the African domain.

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[48] Chapter II Article 3 of the AU Maritime Charter.
[49] There are twelve other objectives stipulated in the Charter (note 48).
[50] Chapter III Article 6 of the Charter (note 48). A number of these organisations are not directly affiliated to the AU. However, they operate on the basis of a regional mandate within SADC, for instance, as the Southern REC. A typical example is the Port Management Association of Eastern and Southern African PMAESA chaired by Namibia. The organisation focuses on integrated strategies for greater port productivity within SADC and for integration SADC strategies with those of other RECs. For further details see Namibian Ports Authority Group Annual Report 2016-2017, available at https://www.namport.com.na/files/files/2016_2017%20Namport%20Annual%20Report(1).pdf. (Accessed 16 October 2018).
[51] Africa's Integrated Maritime Strategy (AIMS) 10.
[52] Ibid.

In this context, some of the AU instruments use the term "Trans-African Cabotage" to refer to proposed cabotage between regions. The AU Maritime Charter, for instance, defines Trans-African Cabotage as "the exercise of maritime transport and related activities between Member States [of the African Union]".[53]

3.2.4 AU regional agenda

Regional cabotage by its very nature operates only as a collaborative effort of several autonomous jurisdictions. In Africa, the responsibility of ensuring fruition of these collaborative efforts rests with the AU as the body that is responsible, in particular, for coordinating regional maritime transport. AU statutes delineate five African regions, namely the Northern, Western, Central, Eastern and Southern Regions.[54]

In the aggregate, these five regions are comprised of 55 AU member states. As part of the AU agenda to drive African maritime integration, the AU formed the African Economic Community (AEC) to govern the overall development of the continent. The AEC in turn established RECs as a means of delivering on the AU objectives in each region. With regard to maritime matters, the AU places an obligation on RECs to develop, coordinate and harmonise maritime policies and strategies. RECs work closely with one another and with the AU, which uses them as building blocks for implementation of its programmes regionally with the eventual objective of integrating the economy of the whole continent.[55] The number of RECs is more than the number of African regions because RECs are not confined to the geography of their statutory regions. Room has been left for the development of new RECs and for consolidation of existing ones.

There are currently eight RECs.

- **THE ARAB MAGHREB UNION (UMA)**. Its member states are Algeria, Libya, Mauritania, Morocco and Tunisia.[56] The UMA is not a signatory to

[53] See the Charter (note 48) definitions at 2–4. What is in the square brackets contain own additions.
[54] These were established in terms of the African Union's Resolution CM/Res.464 (XXVI).
[55] See AU 50th Solemn Declaration, for instance, available at https://au.int/sites/default/files/pages/31464-file-50th_anniversary_solemn_declaration_en.pdf. (Accessed 6 October 2018).
[56] AMU – Arab Maghreb Union, available at https://www.uneca.org/oria/pages/amu-arab-maghreb-union. (Accessed 8 October 2018).

AU protocols, but it is a recognised functionary of the AEC in the Northern Africa region.[57]

- **THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)**. COMESA has 21 member states. These are Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Kingdom of Eswatini, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.[58]
- **THE COMMUNITY OF SAHEL-SAHARAN STATES (CEN-SAD)**. The CEN-SAD consists of 24 states; Benin, Burkina Faso, Central African Republic, Chad, the Comoros Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia.[59]
- **THE EAST AFRICAN COMMUNITY (EAC)** is made up of the Republic of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda.[60]
- **THE ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (ECCAS)** members are Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, DRC, Equatorial Guinea, Gabon, Rwanda and Sao Tome and Principe.[61]
- **THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)** consists of Benin, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo, Burkina Faso and Cabo Verde as its member states.[62]

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[57] African Union: Regional Economic Communities (RECs) (nd), available at https://au.int/en/organs/recs. (Accessed 8 October 2018).
[58] COMESA Members States (nd), available at http://www.comesa.int/comesa-members-states/. (Accessed 8 October 2018).
[59] CEN-SAD – The Community of Sahel-Saharan States (nd), available at https://www.uneca.org/oria/pages/cen-sad-community-sahel-saharan-states. (Accessed 8 October 2018).
[60] Overview of EAC: About EAC (nd), available at https://www.eac.int/overview-of-eac. (Accessed 8 October 2018).
[61] ECCAS – Economic Community of Central Africa (nd), available at https://www.uneca.org/oria/pages/eccas-economic-community-central-african-states. (Accessed 8 October 2018).
[62] From an ECOWAS of States to an ECOWAS of Peoples Economic Community of West African States (ECOWAS) (nd), available at http://www.ecowas.int/member-states/. (Accessed 8 October 2018).

- **THE INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT (IGAD)**. IGAD member states are Djibouti, Ethiopia, Eritrea, Kenya, Somalia, the Sudan, South Sudan and Uganda.[63]
- **THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)**. Member states in SADC are Angola, Botswana, Comoros, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, eSwatini, United Republic of Tanzania, Zambia and Zimbabwe.[64]

The Abuja Treaty (1991), the AU Constitutive Act and the AU Protocol on Relations Between the African Economic Community and the Regional Economic Communities, 2008 (AU Protocol), in particular, regulate the relationship between the AU and RECs.[65] The mandate given by these instruments allows the AU to enforce execution of the objectives of the AU Maritime Charter and implementation of the AIMS 2050 in SADC and in other RECs.

3.3 SADC REC STATUS

SADC was originally formed in 1980 in Zambia as the SADCC, an acronym for Southern African Development Coordination Conference.[66] It was reconstituted into its current form in the early 1990s after Namibia and South Africa joined the group in 1992 and 1994, respectively.[67] The Treaty of the Southern African Development Community, 1992[68] is its founding document. The SADC Treaty can be enforced in member states because SADC possesses "legal capacity as is necessary for the proper exercise of its functions"[69] to deal with its members in their territories. Figure 3.1 below shows SADC member countries.

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[63] The IGAD Region: The Geography of the Region (nd), available at https://igad.int/about-us/the-igad-region. (Accessed 8 October 2018).
[64] Member States (2012), available at https://www.sadc.int/member-states/. (Accessed 8 October 2018).
[65] African Union (note 57).
[66] The SADCC's aim was to wean its members off economic dependence on Apartheid South Africa and to enhance regional integration. See Southern African Development Community (2012), available at https://www.sadc.int/themes/economic-development/. (Accessed 19 October 2018).
[67] Members of the SADCC were Angola, Botswana, Lesotho, Malawi, Swaziland, Zimbabwe, Mozambique, Tanzania and Zambia.
[68] Referred to hereinafter as the 'SADC Treaty'.
[69] See Article 3 dealing with the legal status of the SADC Treaty (note 68), in particular, Article 3(2).

Figure 3.1: SADC Member states

(Source: SADC.org)

3.3.1 SADC Protocol

While the SADC Treaty forms the legal basis of all SADC law in general, the Protocol on Transport, Communications and Meteorology in the Southern African community region 1996[70] specifically undergirds SADC cabotage. The SADC Protocol obliges member states to recognise that "they are all members of the African Economic Community bound to implement this Protocol in accordance with its principles".[71] The SADC Protocol serves as a policy and regulatory framework designed to nurture an efficient, reliable, cost-effective, environmentally responsible and economically sustainable integrated transport system.[72] The authority of this instrument points to the fact that the success of domestic maritime policies such as the South African CMTP

[70] The Protocol on Transport, Communications and Meteorology in the Southern African Community Region 1996 (SADC Protocol) was signed 1996 in Lesotho on 24 August 1996.
[71] The preamble requires SADC states to be mindful of the protocols they have concluded and that will in future be signed. For further details see SADC Protocol (note 70) 1.
[72] Article 2.3 of the SADC Protocol (note 70).

will, in the long run, be achieved only if such domestic policies remain compatible with broader policy frameworks of the REC, AEC and ultimately the AU.

The SADC Protocol regulates transport, communications and meteorology. Its text is accordingly presented in three parts.[73] This discussion, however, looks only at the part dealing with maritime transport and inland waterways (chapter 8 of the SADC Protocol) and ignores the other parts.

The SADC Protocol has a wide scope of application that comprises the entirety of the transport sector in each member state.[74] Its main objective is to promote regional economic development.[75] The attainment of this objective requires the development of a harmonised maritime and inland waterways transport policy to achieve a collective approach regarding relevant concepts.

Areas in which member states align policies and develop common understanding relate inter alia to:

- Shipping and port policy;
- Promotion of ship ownership as a base for the establishment of a viable SADC merchant fleet industry;
- Enhanced use of coastal shipping and feeder services for the region;
- Encouragement of joint ventures and alliances between ship owners to improve economies of scale within the region;
- Sale of bulk regional cargo on CIF basis; and
- Promotion of efficiency in maritime transport along individual coasts.[76]

What the SADC Protocol envisages is the establishment of a strong regional shipping industry based on combined tonnages (both public and private) of its members, who will trade freely on each other's coasts. Member states that already have cabotage restrictions have bound themselves to grant access to vessels of other member states.

[73] It consists of twelve chapters. The text of the first two chapters contains definitions and introductory information and sets the tone of the framework. The three regulatory divisions are transport (chapters 3 to 9), communications (chapters 10 to 11) and meteorology (chapter 12). Maritime and Inland Waterways Transport is dealt with in chapter 8 65.
[74] See Article 2.1.
[75] Article 8.1 65.
[76] Article 8.2.

Similarly, members whose cabotage practices do not exclude coastal participation of other member states have bound themselves to maintaining the status quo.[77]

Furthermore, any country or region that refuses SADC vessels access into their trades will also not be allowed to trade in SADC, while a country or region that grants access to SADC vessels will likewise be granted access to SADC coastal trades.[78] The SADC Protocol arrangement suggests regional cabotage will impose no restrictions between its members and that vessels foreign to SADC will be dealt with purely on the basis of reciprocity. In the event that SADC vessels are not permitted cabotage trade, for instance in the EU, EU vessels will be excluded from cabotage trades in SADC. This means EU vessels, in this example, would be allowed to load cargo in SADC only where such cargo is destined for ports outside SADC. Alternatively, such vessels may discharge SADC cargo loaded outside the region.

In conclusion, the tone (if not the letter) of the regional and continental policy environment subjects domestic cabotage policies to SADC and AU cabotage imperatives. The implication is that South African domestic cabotage as expressed in the CMTP and as proposed in the Draft MSA will be exposed to SADC and African cabotage in the event of any misalignment. Cabotage in South Africa cannot exist outside of these instruments. A glaring omission therefore seems to be the fact that, apart from acknowledging these instruments, neither the CMTP nor the proposed implementation framework (presented by the Draft MSA) gives full weight to the binding nature of the AU and SADC instruments. The prime example of this shows in the fact that, in direct conflict with the SADC Protocol, the domestic position is that African-registered vessels will be excluded from participating in South African cabotage trades. The domestic cabotage position offers no reprieve for AU registered vessels and in turn predicates the exclusion of South Africa from the SADC and Trans-African cabotage trades. Domestic cabotage policy adamantly reserves cabotage trades solely for South African-registered fleets on the basis of a licence. However, the Draft MSA suggests that transiting African-flagged vessels, along with other foreign vessels, may have some access to trade on the South African coast. At the heart of the domestic

[77] Article 8.2.2 and 8.2.3

[78] Article 8.2.4 and 8.2.5.

policy conundrum is the fact that AU member vessels will not be treated any differently from other vessels registered outside the African continent.

3.4 CONCLUSION

The chapter dealt with policy development in two phases. First it dealt with domestic instruments that have driven policy development and thereafter considered the influence of AU and SADC instruments on policy development. On the domestic front, the chapter showed development of the South African coastal shipping policy from inception in 1996 to finalisation about two years ago. The development involved a consultative process in which government released to the public a series of draft policies and other documents for comment over a period of about 20 years which eventually culminated in the CMTP in 2018. The CMTP is a document which, for the first time, comprehensively deals exclusively with South African maritime policy. As the first step towards cabotage implementation, the Draft MSA was then published in 2018. The Draft MSA proposes reservation of cabotage trades to South African-registered fleets on the basis of a licence. However, the proposal suggests that transiting foreign vessels will still be allowed to trade along the coast and that foreign-flagged vessels may do so without a licence.

The chapter thereafter evaluated continental and regional instruments. The conclusion derived from these instruments gives context for the South African coastal policy. These instruments are binding on South Africa. Therefore, it was crucial and will remain necessary for South Africa to align its position with its AU commitments (particularly with respect to the AU Maritime Charter and AIMS 2050), SADC Protocol and other regional development initiatives such as the New Partnership for African Development (NEPAD) and protocols binding it to other structures.[79] Further, obligations also arise under the Southern African Customs Union[80] and from bilateral

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Clause 95 in particular states: "As a Regional Economic Community (REC) SADC complements the AU in the Southern region of Africa, driving the regional integration agenda. Accordingly, SADC co-operates on all matters, including maritime, with other RECs in the continent such as the East African Community (EAC) and the Economic Community of West African States (ECOWAS)".

[79] See CMTP (note 40) clauses 90 to 98 20 and 21 for further details.

[80] The Southern African Customs Union (SACU), as the name suggests, is a customs union of five Southern African countries, namely Botswana, Lesotho, Namibia, South Africa and Swaziland. See Free Trade Agreements (EFTA) (1 May 2008), available at http://www.efta.int/free-trade/free-trade-agreements/sacu. (Accessed 19 October 2018).

and multilateral arrangements with the Indian Ocean Rim and the South Atlantic organisations.

Therefore, the CMTP and indeed the legislative framework flowing from it must conform to AU and SADC instruments. The CMTP was developed domestically and largely crafted for domestic usage. However, its objective will be validly implemented only to the extent that it complies with SADC aspirations.

The following chapter deals with domestic and regional cargo movement. SADC trade, in particular, further highlights the importance of integrating regional cabotage trades and the antecedent requirement of aligning regional and continental trade instruments.

CHAPTER 4:
THE ROLE OF CARGO IN COASTAL TRADES

Sustainability of any trade route and, consequently, its success largely depends on the availability of cargo. It follows that any proposal to implement cabotage requires an assessment of cargo availability on the routes in which cabotage will apply. Policy indications are that cabotage will apply either within South Africa in the range between Richards Bay and Saldanha Bay or, if applied regionally, within the range of SADC between Angola in the west and Tanzania to the east.

The policy neither states the routes nor identifies the cargo or cargo sources that will drive cabotage within South Africa or in the region. This chapter therefore seeks to evaluate the current state of the coastal cargo base in South Africa and on a broader SADC port range to determine whether existing coastal cargo patterns point towards any cargo as the potential driver for successful cabotage implementation. It is important to note that in the context of cabotage context "cargo" has been defined to exclude passengers. (See Chapter 3 at 3.1.7).

In the attempt to appraise coastal cargo, the chapter will evaluate the major routes and cargo carried domestically by analysing TNPA port statistics and, on a wider regional base, the chapter will assess statistical data provided by dominant coastal and regional operators. South Africa has no navigable inland waterways. They do not form part of formal trade patterns in SADC. As such they have been excluded. Therefore the discussion on cabotage cargo only relates to seaborne trade.

4.1 COASTAL ROUTES AND COASTAL SERVICES

South Africa does not have islands or navigable inland waters. Therefore the study of cargo routes exclusively focuses on domestic cargo movements along the coast between Richards Bay and Saldanha. Similarly, the assessment of regional cabotage does not include inland waters. It covers the coast in the range of ports between Luanda and Dar es Salaam including the island ports of Reunion, Mauritius and Madagascar. However, services on the southern African coastal region are concentrated principally between Mozambique and Angola. The effective set of ports on which the appraisal anchors therefore lies between Beira and Namibe. Instances of significant coastal activities outside these boundaries exist and will be specified. The main coastal route in the set runs between Durban and Walvis Bay. Grindrod, through its wholly-owned subsidiary,[1] Ocean Africa Container Lines, (OACL), continues to dominate domestic coastal routes, a market Unicorn Lines (as it was then known) had cornered successful. OACL provides a coastal domestic and regional containerised sea freight service as well as a dedicated coastal feeder service for international carriers.[2]

4.1.1 Container and breakbulk services

OACL operates a scheduled containerised service on the Southern African coast using three vessels[3] on a fortnightly basis. These vessels have a capacity to carry about 1 100 TEUs (Twenty-foot Equivalent Units).[4] All three vessels have an additional capacity to carry breakbulk cargo of about 4 500 tons, depending on the type of cargo (weight, dimensions and packaging) and the ship's gear capacity required on board, among other factors.

In 2012 OACL inaugurated a service between Nacala and Luanda.[5] As a result of erratic cargo supplies, operations were subsequently truncated to the port range between Beira[6] and Namibe.[7] In order to improve efficiencies, optimise space utilisation and minimise the effects of trade imbalances, coastal vessels do not call at all consecutive ports in both directions. Actual calls at some ports may be subject to inducement. On a typical voyage from east to west, vessels call at Beira, Durban, Cape Town and Namibe. On the return voyage vessels leave Namibe and call at the two Namibian ports of Walvis Bay and Lüderitz. Thereafter vessels would call at Cape Town, Port Elizabeth, Durban, Maputo and Beira.[8]

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[1] OACL was originally formed in partnership with Safmarine/Maersk. It was formed as a vehicle for feeder services. In 2012 Grindrod bought the 51% share and made OACL a wholly owned Grindrod subsidiary. See Grindrod Acquires the Remaining Shares in Ocean Africa Container Lines (27 August 2012), available at http://www.grindrod.co.za/News/44/Grindrod-acquires-the-remaining-shares-in-Ocean-Africa-Container-Lines-(OACL). (Accessed 13 December 2017).
[2] OACL data.
[3] Currently these are the *Border*, *Barrier* and *Boundary*, with the capacity to carry 1.162, 1.104 and 1.112 TEUs respectively. *Border* and *Boundary* are registered in Antigua and Barbuda, while *Barrier* is registered in Madeira, Portugal.
[4] On average, that translates to about 755 TEUs of full container loads calculated at 14 metric tons (mt) per TEU per vessel. However, the true determinant of the carrying capacity of these vessels is gross tonnage, which on average is about 11000 mt.
[5] OACL data (note 2).
[6] On a straight-line distance calculation Beira lies some 845 km south of Nacala.
[7] Namibe is located some 717 (straight-line) kilometres south of Luanda.
[8] OACL data (note 2).

4.1.2 Feeder services

Coastal traffic consists of domestic, regional and feeder cargo.[9] Feeder cargo constitutes about 80% of total traffic moving along the coast.[10] The South Africa-Europe Container Service (SAECS) is the major distributor of feeder cargo in the region. It distributes coastal feeder cargo on the basis of logistics strategies that, for instance, reduce costs through minimised vessel turn-around times.

Currently OACL remains the primary common feeder operator in Southern Africa. A significant portion of feeder service takes place in the eastern Cape ports of Port Elizabeth, Ngqura and East London. In this regard, OACL provides a weekly scheduled service to Daimler Chrysler on behalf of the SAECS consortium. One vessel[11] with the capacity to carry about 1 150 TEUs[12] services the eastern Cape. On its westbound voyage, it sails directly to Port Elizabeth; while the eastbound voyage starts at Port Elizabeth and sails via Ngqura to arrive back at East London.[13] In a similar way to vessels servicing other coastal routes, the vessel employed in the eastern Cape service has additional capacity to carry breakbulk cargo.

Therefore, OACL leads the coastal feeder market through contractual feeder arrangements that enable it to adjust to the requirements of European lines. Apart from its general coastal domestic and regional feeder service, OACL offers a dedicated service to six international container shipping lines.[14] Therefore, this larger portion of coastal feeder base remains in the exclusive hands of a single operator.

It must be borne in mind that feeder cargo is consolidated on the basis of market conditions that prevail from time to time. Therefore, logistical arrangements for coastal feeder may be varied according to demand, risk and costs. For this reason, it is foreseeable that European lines may vary logistic arrangements at any given time to meet prevailing conditions. For instance, SAECS may relocate a feeder hub from Durban to a jurisdiction outside South Africa, such as, Maputo whenever this may be

[9] South African Maritime Transport Sector Study (2011).
[10] Ibid.
[11] Currently, the *Horizon*.
[12] That is, 909 (full container load) TEUs.
[13] OACL data (note 2).
[14] CMA, CGM, DAL, Safmarine, MOL, Maersk and Ignazio Messina.

deemed necessary in the event that cabotage operations increase costs or become generally inconvenient. Since feeder cargo cannot be entirely locally controlled, it may therefore not strictly speaking be considered a good candidate for South African cabotage. The scenario would be much more complex if regional cabotage applies.

4.1.3 Overview of coastal tonnage

The coast is currently serviced by a fleet of nine vessels comprising four container vessels and five product tankers. The fleet has a combined carrying capacity of about 176 500 deadweight tons which includes a total carrying capacity of about 4 450 TEUs.

An overview of domestic coastal and regional as well as feeder services appears on Table 4.1 below. The service involves certain ports. In the order of their appearance, these are Beria (BEW), Maputo (MAP), Durban (DUR), Port Elizabeth (PLZ), Cape Town (CT), Lüderitz, (LDZ), Walvis Bay (WVB), Namibe (NBE), NCT (Ngqura), East London (EL) and Mossel Bay (MZY).

Table 4:1: Overview of coastal and regional routes and vessel deployment

ROUTE	TYPE OF SERVICE	NO OF VESSELS	CAPACITY (dwt)	SCHEDULE
BEW/MAP/DUR/PLZ/ CT/LDZ/WVB/NBE	General cargo	3	3 x 14 000	Fortnightly
PLZ/NCT/EL	Feeder cargo	1	1 x 17 000	Weekly
BEW/MAP/DUR/EL/PLZ/ MZY/CT/WVB	Tanker services	5	3 x 16 500 + 1 x 29 000 + 1 x 39 000	Monthly (or as per demand)

(Source: Author, from OACL/Unicorn Tankers data)

4.2 COASTAL CARGO MOVEMENT

This section expands on the foregoing, which presented the types of coastal services, the amount of tonnage involved, and route activity on the Southern African coast. Focus will now shift to the types of cargo that move on the different routes described above. Cargo appraisal on these routes will be conducted on the basis of two sources. The first source will be TNPA port cargo statistics, particularly in relation to the status of domestic coastal cargo. The second source will be the collated statistical data and other information obtained from coastal operators, which show regional cargo movement.

It must be stated at the outset that TNPA cargo statistics are not, for the purposes of this study, sufficiently disaggregated. Coastwise cargo is stated in broad categories of bulk, breakbulk and containers. No further delineation has been given, for example, bulk: iron ore and coal, among others. In addition, it is customary for ports not to describe container contents. Ports receive sealed containers and shippers are under no obligation to declare container contents outside recognised norms for carrying dangerous goods. Therefore, the container contents are not known on a commodity-specific basis.

Furthermore, and more detrimental to the proper appraisal of coastal cargo movement, is the fact that TNPA data does not reveal the shipping port for landed cargo. Conversely, the landing port for shipped cargo is not stated. Therefore, there is no indication of the load port for a container discharged in Cape Town. Similarly, no destination port is indicated for a container loaded in Cape Town. Cargo data records volumes per port but only in respect of cargo landed in that particular port without any reference to where that cargo was shipped. Likewise, data in respect of cargo shipped from a particular port has no corresponding entry showing where such cargo will be landed.

4.2.1 Overview of domestic coastal cargo

TNPA statistical data presents coastal cargo in three categories of bulk, breakbulk and containers, as stated. It shows volumes handled in each port without any specificity regarding the actual type of cargo. The analysis below gives some indication of the type of cargo that moves along the coast. The discussion deals first with bulk and breakbulk cargo (primarily bulk cargo) and thereafter proceeds to containerised cargo. The discussion begins by identifying sources of cargo and thereafter relates it to the volumes depicted in the TNPA statistical data.

4.2.1.1 Sources of bulk cargo

There are four crude oil refineries located along the South African coast. They are controlled by a handful of oil majors. These refineries are found in Durban, Mossel Bay and Cape Town. There are two refineries in Durban. Engen Petroleum Limited (Engen) owns one and the other, SapRef, is jointly owned by Shell SA (Pty) Ltd (Shell) and BP Southern Africa (Pty) Ltd (BP). PetroSA Ltd owns the refinery at Mossel Bay. Cape Town also has a refinery and a storage and distribution facility. Chevron South Africa (Pty) Ltd (Chevron) owns the refinery formerly operated by Caltex. The storage and distribution facility is operated by Burgan Cape Terminals (Burgan). There are other refineries located inland, namely Total South Africa (Total) and Sasol. To the extent that the study focuses on coastal cargo, inland refineries are mentioned only for the sake of completeness. Therefore, unless otherwise indicated by the text, inland refineries are irrelevant to the discussion.

Oil majors have varying production capacities. Chevron and PetroSA produce about 110 000 barrels per day (bpd) and 45 000 bpd respectively. PetroSA products such as gasoline, diesel and kerosene are shipped to East London and Port Elizabeth while the rest of its products are exported.[15] The Sapref plant, which is a shared facility between Shell and BP, produces about 180 000 bpd. The bulk of its production is sold in South Africa, Botswana, Swaziland, Zimbabwe and Namibia, while a significant amount is exported to the Southern African region. Over and above that, BP, in particular, also operates on the eastern seaboard. It distributes its products to Mozambique, Malawi and Tanzania.[16] Engen's capacity is in the region of 120 000 bpd.[17] The company operates in about 30 countries, mostly situated in Africa. These include Namibia, Botswana, Lesotho, Swaziland, Kenya, and countries in Central and West Africa as well as in the Indian Ocean rim.[18]

The total South African petrochemical production by oil majors is therefore about half a million barrels per day. However, it must be borne in mind that not all of this

[15] R.M. McLaren Towards a Contract Affreightment Basis Underlying the Maritime Transport of Petrochemicals in the Richards Bay–Walvis Bay Range – A Comparison of Alternative Combinations of Tankers (2001) University of Natal 49.
[16] Ibid. 47.
[17] South African Fuel Industry (nd) South African Petroleum Industry Association, available at http://www.sapia.org.za/Overview/South-African-fuel-industry. (Accessed 11 September 2017).
[18] Ibid. 44.

production moves by sea. Petroleum products are also moved through pipelines, rail and road. Pipeline volumes, however, do not have much effect on the coastal corridor.

4.2.1.1.1 *Carriage of coastal petrochemicals*

Over many years, until 2014, Grindrod provided a significant portion of coastal services to the refined petroleum products industry through Unicorn Tankers. Unicorn Tankers operated an exclusive carriage contract with oil majors Shell, Total, Chevron and Sasol, which equated to about 90% of the total coastal capacity.[19] The service operated on the basis of Unicorn Tankers as carrier or as charterer. Unicorn Tankers tonnage has therefore been at the forefront of the distribution of petrochemicals and refined oil products from sources in Durban, Mossel Bay and Cape Town to sink ports along the east coast such as Port Elizabeth and East London.

However, during 2014, Unicorn Tankers ceased to be the dominant operator in the carriage of refined petroleum products on the coast. Oil majors have since undertaken the carriage of their own products themselves. This turn of events significantly trimmed Unicorn Tankers' involvement in the service. Currently, the company services the coast on two fronts. First, it operates on its own two vessels[20] of about 16 500 deadweight ton capacity. However, the standard space utilisation of these vessels is about 14 000 tons.[21] This tonnage[22] services Sasol, Chevron and Total. The outward leg of the services is Durban/East London/Port Elizabeth/Mossel Bay/Cape Town, and the inward leg is Cape Town/Mossel Bay/Durban or, depending on cargo, Cape Town/Port Elizabeth/East London/Mossel Bay/Cape Town.

Second, Unicorn Tankers jointly owns another vessel[23] with Engen on an equal-share basis. This service has the following locations as sources: Engen refinery in Durban, PetroSA in Mossel Bay, Chevron and Burgan in Cape Town (although cargo is also discharged here) and Puma Energy (Pty) Ltd in Walvis Bay. Sink ports for this cargo are located in East London, Port Elizabeth, Maputo (Bulk Procurement Systems), Beira, Dar es Salaam and Mombasa.[24] The service extends to sinks of lesser demand in the Indian Ocean Islands and Mauritius. The westbound voyage in this route would typically be Durban/East London/Port Elizabeth/ Cape Town and Walvis Bay.

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[19] Unicorn Tankers data.
[20] Currently these are *Kowie* and *Breede*. Both are flagged in Singapore.
[21] Unicorn Tankers data (note 19).
[22] Provided by the capacity of the *Kowie* and *Breede*.
[23] *Berg* is flagged in the United Kingdom and boasts a deadweight ton-capacity of 16 870.
[24] Unicorn Tankers data (note 19).

Engen operates on its own another 40 000 deadweight ton-capacity vessel[25] that appears on the coast from time to time. This vessel connects the services of Reliance Industries, India to the South African east coast and therefore cannot strictly be counted as part of the coastal tonnage. However, its relevance in this study is that Engen utilises its capacity to supplement its own coastal capacity whenever necessary.[26]

Other operators in coastal carriage of refined petroleum products are Shell and BP. Shell currently operates on the coast with a 29 000 deadweight ton-capacity vessel,[27] while BP deploys a 39 000 deadweight ton-capacity vessel.[28]

In appraising coastal tonnage, it must be borne in mind that coastal operators share capacity on occasions. Data from coastal operators suggests that shared capacity is intermittent and that it does not cause significant changes to the distribution flows given above. However, what may distort distribution patterns is that coastal operators also utilise capacity available on import vessels calling on the coast. The method is vaunted as being cost effective and efficient for capacity utilisation purposes.[29]

Records relating to sharing arrangements and the use of import vessels are closely held for marketing reasons. This coastal capacity, although currently not readily quantifiable, possesses a cost-saving aspect that naturally promotes its continued use. It is therefore not unreasonable to assume that freight rates offered by such a service would be more attractive to the shipper than standard coastal freight rates. The proposition is made on the simple basis that the import vessel would already be on course to the shipper's discharge port and therefore would bear only marginal cost for accommodating coastal cargo if the import vessel has available space. On this basis, it is likely that a properly evaluated impact of engaging an import vessel for coastal cargo would not be insignificant. As stated, coastal operators treat this information as confidential, which in turn limits this study.

[25] The UK-registered 40 000 *Lavela i*s fully owned and operated by Engen.
[26] Coastal Carrier data.
[27] Shell currently runs its coastal operations with the Singapore-registered *Maersk Brigit*.
[28] *Eco Revolution* is a newly built tanker (2016) registered in the Marshall Islands.
[29] Unicorn Tankers data (note 19).

4.2.1.2 Overall bulk cargo distribution

TNPA statistics provide a picture of how bulk cargo is distributed along the coast. Statistics before 2014 appear intermittent and fairly inconsistent in many respects. As such, they reveal no discernible trend. For this reason, the study will appraise TNPA statistical data only for the period of four years from 2014 to 2017.

Figure 4.1 below provides an overview of annual coastal bulk and breakbulk (non-containerised cargo) handled in South African ports which predominantly consists of liquid bulk movements of refined petroleum products (as will be more fully explained later). This category shows a steady volume decline over four years. The year 2015 shows 6.8% less cargo volumes than 2014, while regression between 2015 and 2016 was about 1.85%. A further volume decline of about 3.9% was recorded between 2016 and 2017.

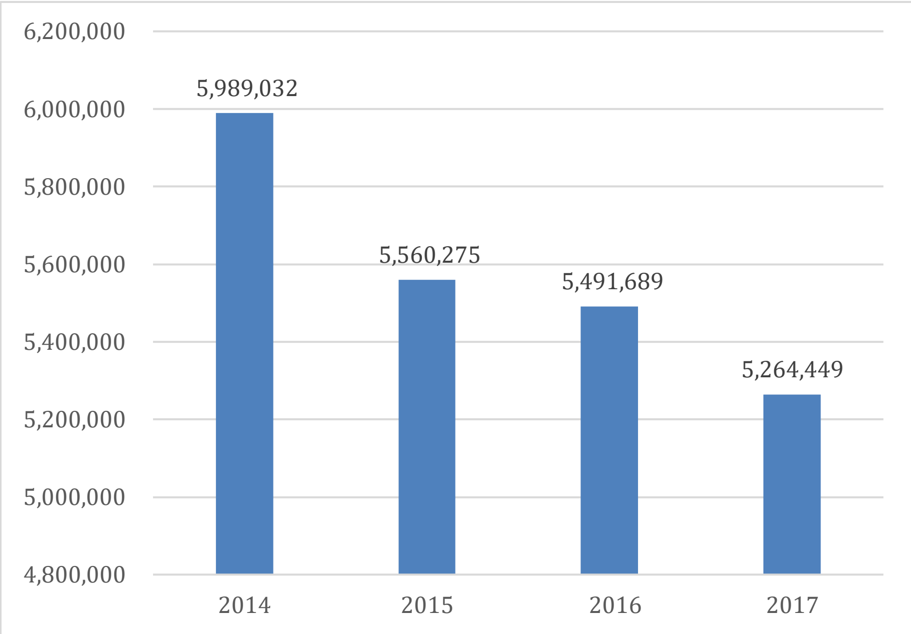
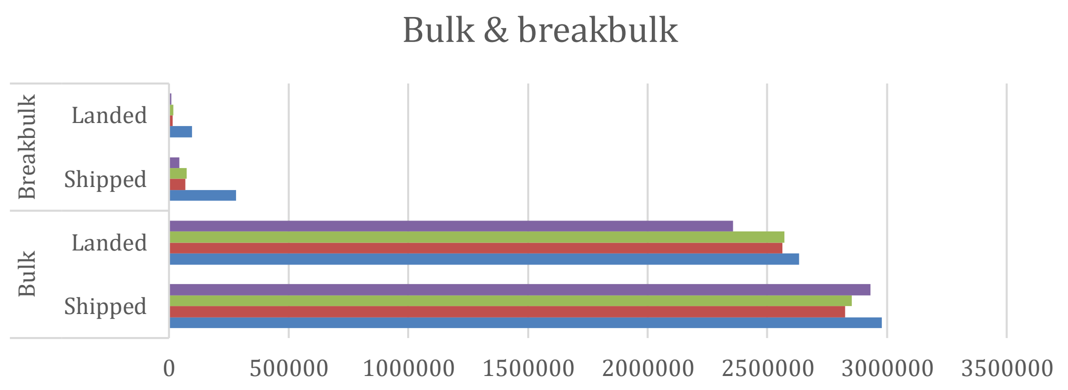


Figure 4.1: Non-containerised coastal cargo volumes in million tons (2014-2017)

(Source: TNPA port statistics)

Figure 4.2 below subdivides non-containerised cargo into bulk and breakbulk, thereby providing some distinction between the two categories. The overall picture that one gains is that coastal bulk cargo volumes are not plentiful and further that bulk cargo volumes have suffered a steady decline in recent years. Another observation is that breakbulk cargo forms a minuscule part of this scarce and declining source of coastal cargo. The sheer paucity of coastal breakbulk cargo instantly renders it a bad candidate for cabotage. Consequently, breakbulk cannot receive too much attention in an enquiry to determine whether the coast has sufficient cargo with which to support cabotage. It will, however, be important to look at the status of coastal breakbulk as potential supplementary cargo. On the above basis, petroleum bulk cargo is presented as a potentially more substantial traffic base for coastal shipping and consequently for cabotage.



	Bulk		Breakbulk	
	Shipped	Landed	Shipped	Landed
2017	2931858	2357925	42732	9907
2016	2853514	2570791	72608	17705
2015	2826116	2562661	67295	15567
2014	2978223	2633039	279927	97374

Figure 4.2: Bulk and breakbulk comparison

(Source: TNPA port statistics)

4.2.1.3 Average bulk cargo monthly distribution

Figures 4.3 and 4.4 below explore typical bulk data using 2015 annual figures (representing monthly average) to show bulk flows at different ports to depict monthly activity.

Durban, Mossel Bay and Cape Town are major sources of refined petroleum products with Sapref (BP/Engen) in Durban, PetroSA in Mossel Bay and Chevron and Burgan in Cape Town.

4.2.1.3.1 Shipped monthly activity

Accordingly, the picture of average volumes for shipped bulk in Figure 4.3 is consistent in that it shows Durban as the port that ships the highest volumes of bulk cargo, followed by Mossel Bay and Cape Town. As would now be expected, other ports show minimum monthly shipped bulk activity, as they are cargo sinks and not cargo sources.

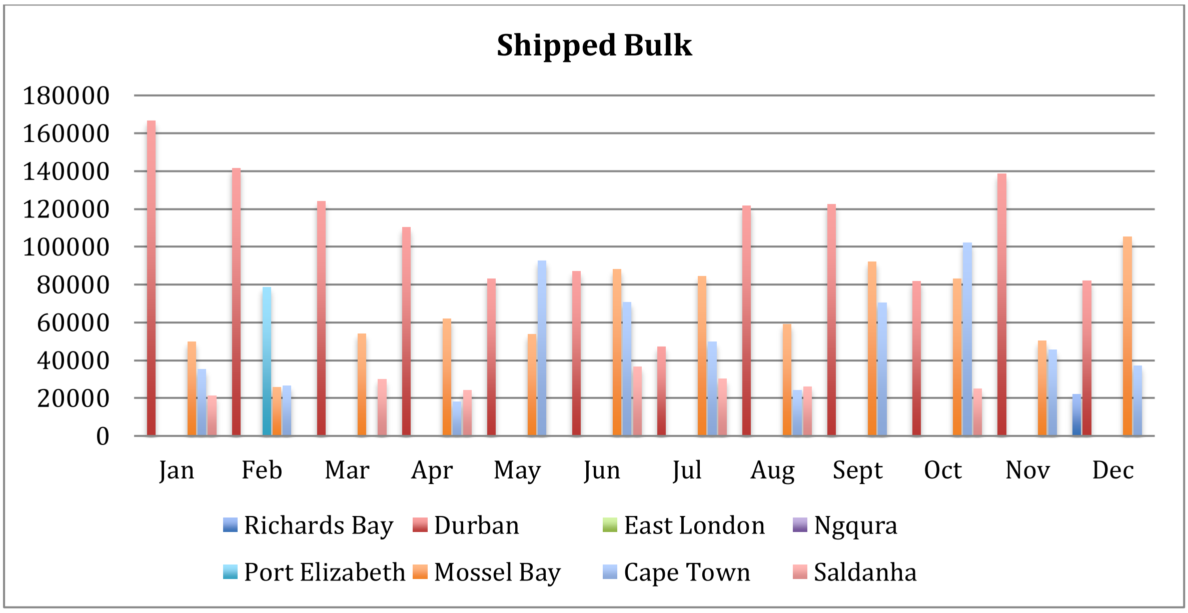


Figure 4.3: Shipped bulk monthly average

(Source: TNPA 2015 port statistics)

4.2.1.3.2 Landed monthly activity

The same trend appears when looking at landed bulk cargo, as shown in Figure 4.4 below. On this chart, East London shows the highest bulk landed volumes, followed by Port Elizabeth, Richards Bay and then Cape Town. Durban shows minimal activity because, unlike Cape Town, which acts as both cargo source and cargo sink, Durban is almost exclusively a cargo source.

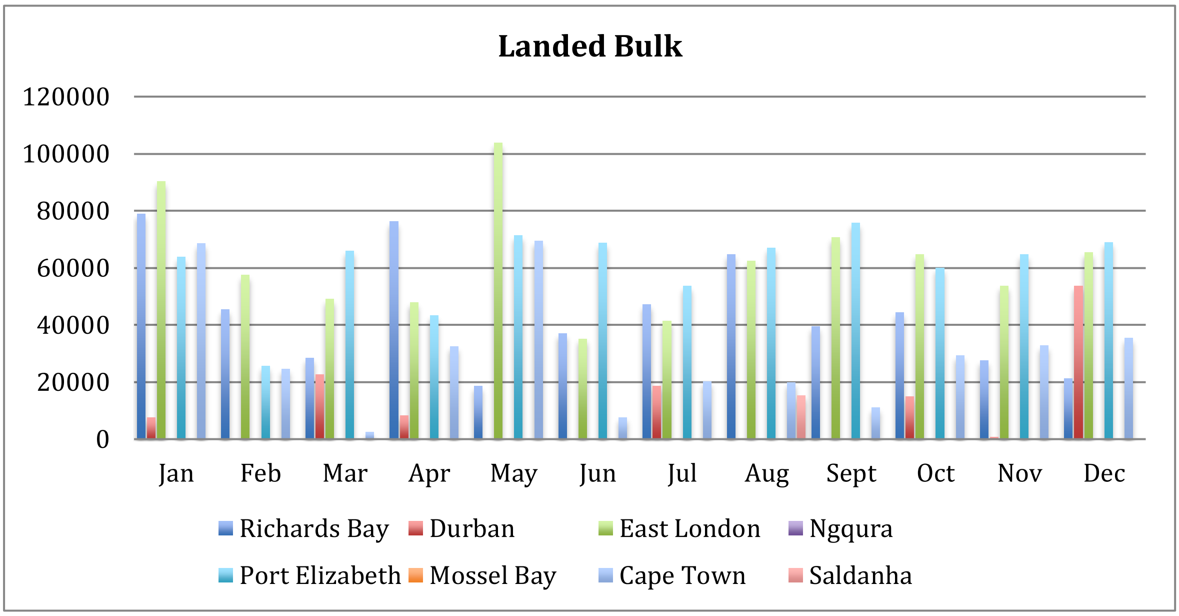


Figure 4.4: Landed bulk monthly average

(Source: TNPA 2015 port statistics)

4.2.1.3.3 Synopsis of bulk cargo figures

What the above exercise illustrates is that Durban handles the highest volumes of coastal bulk shipment in South Africa at an average of about 1.3 million tons per annum, while Cape Town handles the highest volumes of landed bulk cargo and averages about 750 000 tons per annum.

The effect of these statistics, particularly the annual coastal volumes over four years (Figure 4.1 above) is that there could be no suggestion of additional bulk tonnage becoming available in the near future. Adding a single bulk vessel on the coast may result in over-tonnage. In fact, continued volume decline alone points towards reduction of the current coastal bulk fleet. Therefore, cabotage on the South African coast cannot be approached on the basis of an expanded coastal bulk fleet unless a case for increased bulk volumes can be shown.

4.2.1.4 Containerised cargo volumes

The fact that TNPA statistical data does not disclose the port of shipping for a container landed at any port and vice versa potentially means that the handled total volume of coastal containers may include duplicate entries. The same container may be counted twice, initially at port of loading and subsequently at port of discharge. If one relies on a simple calculation that adds up containers handled at each port to determine annual handled volumes, for instance, that may lead to a higher total volume count than the actual unit count of containers in the coastal trade. In an attempt to avoid distortions created by potential duplications, it is therefore important to delineate handled volumes into landed and shipped containers. For this reason, Figure 4.5 below is a better representation of seaborne container volumes on the coast.

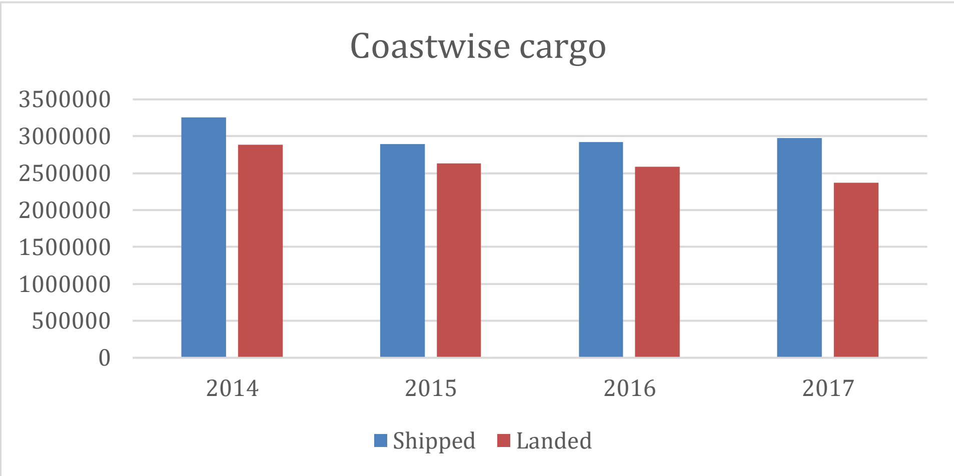
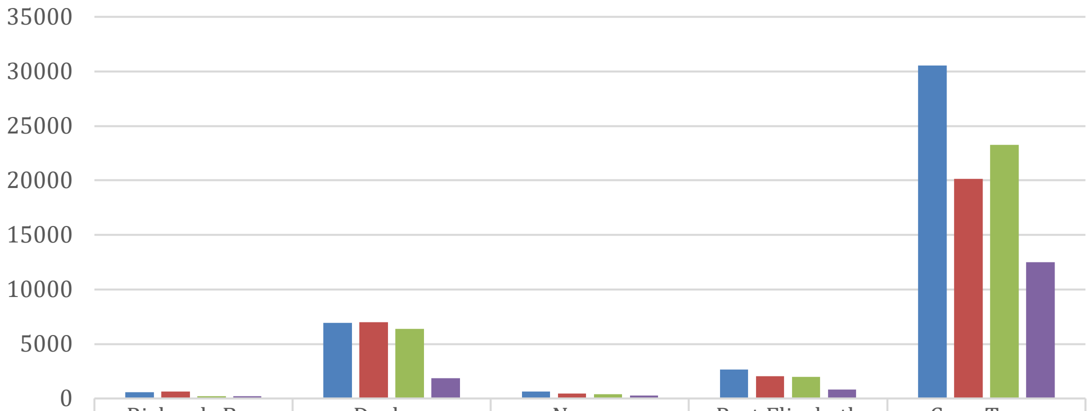


Figure 4.5: Total shipped/landed coastal TEUs (2014-2017)

(Source: TNPA port statistics)

The following two diagrams (Figures 4.6 and 4.7) give an overview of cargo flows between landed and shipped TEUs with particular emphasis on handled cargo volume differences between port located at cargo sources against ports that receive such cargo. The distinction between these two types of ports must be borne in mind when considering sources of South African cargo. Figures 4.6 and 4.7 show landed and shipped activity respectively.



	Richards Bay	Durban	Ngqura	Port Elizabeth	Cape Town
2014	547	6961	624	2625	30527
2015	651	6994	479	2030	20131
2016	202	6356	402	1996	23242
2017	182	1847	285	822	12526

Figure 4.6: Landed annual TEUs

(Source: TNPA port statistics)

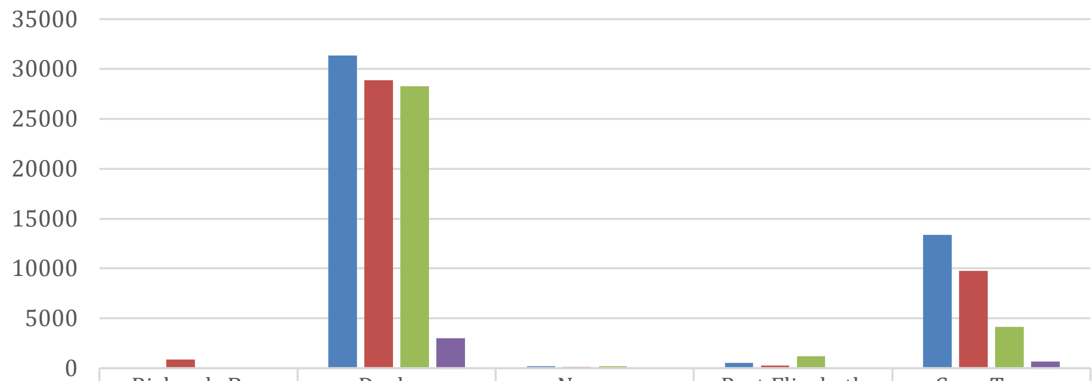
Cape Town handles the highest volumes of landed coastal containerised cargo in South Africa per year. The highest number of TEUs at this port stood at about 31 000 in 2014. Since then the port has experienced a volume decline of about 30%. The reason for the decline remains unclear and requires further research. The estimated total for 2017 is about 20 840.[30] It appears on this basis that Cape Town therefore receives an average of about 23 700 TEUs per annum from the coast.

Richards Bay is not strictly speaking a container port, particularly for coastal shipping. Ngqura is focused more on transshipments and other high seas activity. It receives virtually no coastal trade. Port Elizabeth handles negligible coastal trade. It is geared more towards deep-sea activities. East London is not a deep-sea port of call for container ships. It is not geared for container vessels. The port consequently predominantly serves as a feeder spoke port.

Therefore, only Durban and Cape Town show appreciable activity of shipped containerised coastal cargo. Durban handles the highest volumes of the two source ports, as Figure 4.7 below shows. Its highest volumes in 2014 were a total of about

[30] The graph shows mid-year figures (June 2017). The estimated total of 20 840 TEUs is calculated on the basis of figures up to November. December figures had not been released at the time of finalising the graph. Therefore an average of the previous 11 months has been used for the 12th month.

31 300 TEUs. Durban shipped volumes have been fairly consistent since. In the four years from 2014 to 2017, Durban has shipped an average of about 28 800 TEUs of containerised coastal cargo per year.[31]



	Richards Bay	Durban	Ngqura	Port Elizabeth	Cape Town
2014	0	31363	191	559	13376
2015	868	28867	141	298	9725
2016	0	28302	172	1173	4120
2017	40	2975	54	4	689

Figure 4.7: Shipped annual TEUs

(Source: TNPA port statistics)

Bearing in mind that the enquiry in this section seeks to determine what cargo moves along the coast, it is imperative to further differentiate further between full and empty container volumes in order to determine the loads of the full containers. The exercise is also important since full and empty TEUs attract different freight charges. Figure 4.8 below depicts the respective categories. What becomes immediately clear from this exercise is that coastal sea transport carries comparatively higher volumes of empty than fully-loaded containers.

Movement of large volumes of empty containers arises from container repositioning for feeder activity between cargo sources and cargo sinks. This phenomenon seems to reinforce the idea that feeder activity is the central business for South African coastal shipping and that as such trade between South African ports contributes relatively far less to coastal trade.

[31] The same basis used to calculate landed cargo above was used for shipped cargo in Figure 4.7.

On the basis of the above, coastal cargo consists mainly of feeder cargo from domestic ports to sink ports outside of South Africa. The remaining portion of actual coastal trade equates to about 20% of the volumes shown below.

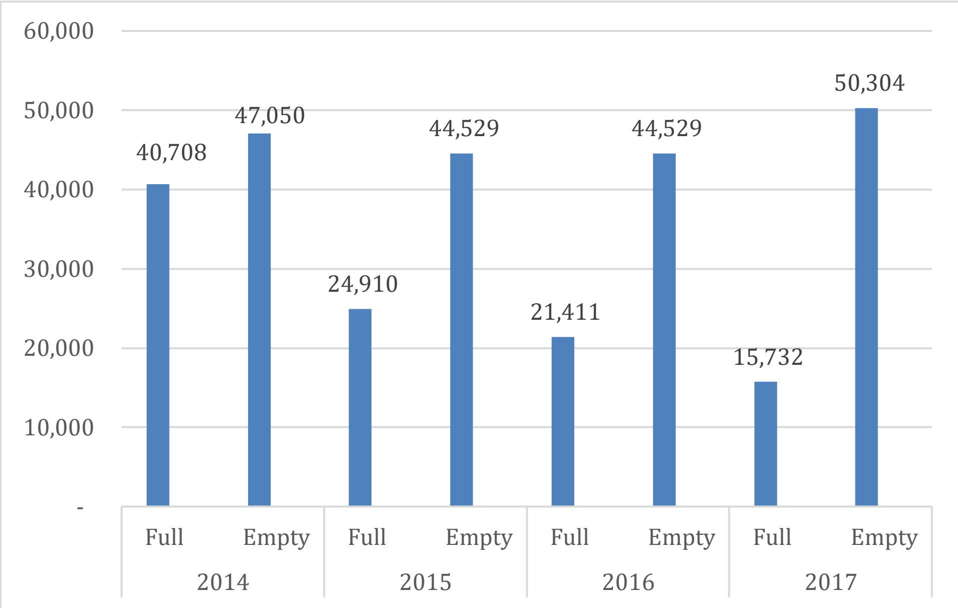


Figure 4.8: Full and empty TEUs (2014-2017)

(Source: TNPA port statistics)

4.2.1.5 Actual cargo moving on the coast

Attempts to disaggregate portions of coastal trade into feeder cargo and genuine coastal cargo were fraught with challenges. The manner in which ports collate data is deficient for this purpose. Transshipment container volumes are given, but not their destinations. Coaster companies were also not forthcoming with statistics that would make the exercise meaningful. The information on feeder cargo movement is generally kept confidential for marketing purposes. However, information regarding major commodities moving along the coast and their tonnages was made available.

Table 4.2 below has been prepared on the basis of tonnage flows supplied by coasters showing average tons for the period 2015/16. As was shown in the previous chapter, the dominant coastal route runs within the Durban/Walvis Bay port range. Therefore, Table 4.2 below includes the port of Walvis Bay in order to provide a composite picture of cargo flows, although Walvis Bay is not a South African port.

Table 4.2: Major coastal commodities

SOURCE	COMMODITY	TONS PER YEAR (EXCLUDING FEEDER)
Durban	Sugar	220 000
	Paper	20 000
Cape Town	Malt Wheat Waste paper	20 000 10 000 15 000
Walvis Bay	Salt	30 000

(Source: OACL)

As seen in the previous chapter, agricultural products, namely sugar and paper, have sustained the route between Durban and Cape Town. Illovo Sugar and Tongaat Huletts in Durban remain the main producers of sugar in the country. SAPPI and Mondi plantations, on the other hand, utilise Durban as their shipment port as well. Demand for sugar supplies still emanates from Western Cape canneries and confectionery industries along the coast. These industries require significant amounts of sugar delivered to them on a regular basis and in amounts that road transport cannot cope with without substantially increased transport costs. The same applies to paper and paper products. Therefore, despite recent efficiencies achieved in the use of the road transport system, sugar and paper remain the staple cargo for coastal shipping.

Malt and wheat are transported from the Western Cape to Durban and further inland to meet the demands of the breweries and related industries. In the 1980s, a large amount of salt from Walvis Bay was destined for the Durban basin. Therefore, it would virtually all be discharged in Durban. However, currently salt is discharged in consignments along the east coast between Port Elizabeth and Durban, largely for inland user destinations.[32]

[32] OACL data (note 2).

Historically, the Durban/Walvis Bay route suffers imbalanced trades. The westbound leg is thick while the eastbound leg is considerably less dense. Vessels from the east coast sail from Durban relatively full only to return almost empty.[33] This is because sources of cargo are not evenly spread. Therefore, transportation of empty containers (repositioning) for feeder services plays a pivotal role as these containers fill up space on vessels returning to sources of production in Durban, for instance.[34]

4.2.1.6 Synopsis of containerised domestic coastal cargo

The above discussion points to five factors regarding containerised coastal cargo and cabotage implementation. First, South African coastal activity almost exclusively depends on feeder volume, which constitutes about 80% of the total coastal seaborne trade. Feeder services utilise ports on a range that is wider than South African borders. As such these services can be relocated to feeding hubs outside South Africa. The remaining 20% portion of containerised activity (which excludes feeder cargo) would be insufficient to support cabotage.

Second, the bulk of coastal cargo volumes move between Durban and Walvis Bay. Walvis Bay is not a South African port, which means it cannot be subject to the cabotage regime of another sovereignty. Walvis Bay volumes would then have to be excluded from the domestic cabotage equation. Doing so would further reduce the non-feeder portion of coastal cargo volumes on the route. As a result, trade on the route would be significantly hampered.

Third, in the event that some arrangement with Namibia could be made for Walvis Bay to become a cabotage port, the Durban/Walvis Bay route is notoriously imbalanced. There is normally sufficient cargo for the westbound leg, while the eastbound leg barely loads any cargo. Therefore, cabotage implementation needs to bear this imbalance in mind. The imbalance in trade means that the correct number of vessels that should be employed on the route cannot be determined by simple reference to average space demand and utilisation in both directions.[35] Another less difficult basis on which to decide tonnage will have to be developed.

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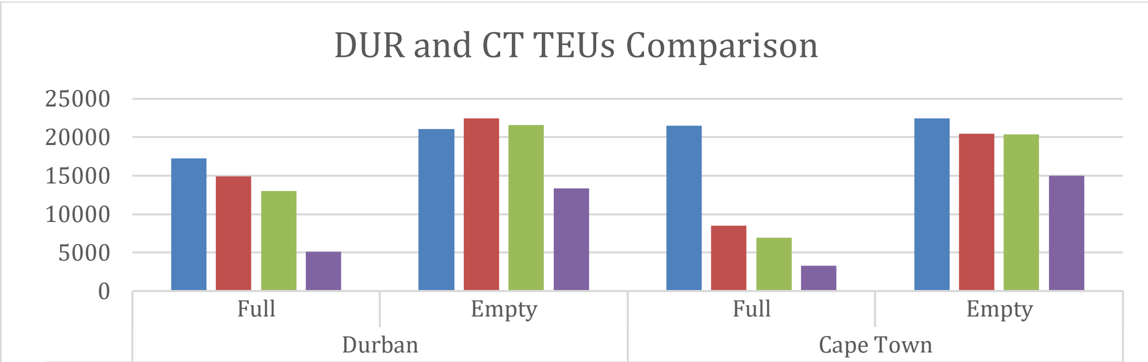
[33] T. Jones, Coastal Sea Transport and Competition in South Africa (1985).
[34] OACL data (note 2).
[35] Jones (note 33) 45.

Fourth, the seemingly high volumes of containerised coastal cargo shipped and landed in Durban and Cape Town respectively are predominantly empty TEUs, as shown in Figure 4.9 below. The effect of this is that the coastal carrier on the dominant South African route would be forced to cater for an "empties trade" which might yield only 50% of the value of standard freight for an FCL (full container load).[36]



	Durban Full	Durban Empty	Cape Town Full	Cape Town Empty
2014	17275	21049	21479	22424
2015	14933	22458	8467	20427
2016	13036	21622	6972	20390
2017	5115	13328	3311	15023

Figure 4.9: Full/Empty TEUs – main route

(Source: TNPA statistics)

Fifth, other South African container ports show very low coastal volumes. For instance, based on volumes handled at that port, Richards Bay should be excluded from a list of potential cabotage ports. Port Elizabeth, Ngqura and East London also show very low and sporadic coastal volumes and can likewise be left out of the cabotage equation. However, if the Durban/Cape Town cabotage route can be sustained (on any other basis that may be found outside of this study), ports in between Durban and Cape Town could be considered as ports of call subject to specified incentives, or alternatively on a marginal costing basis, since coastal vessels sail past these ports in any event.

Therefore, the position in respect of both shipped and landed coastal containerised domestic cargo is that cabotage would have to depend on the volumes generated in

[36] Freight is chargeable when one carrier is carrying empty containers for another carrier. On 2 October 2017 a prominent coastal carrier estimated freight of an FCL between Durban and Cape Town at about US$ 400 while an empty container was estimated at about US$150, depending on volumes quoted for and who the client was. Freight is also chargeable when a route experiences a trade imbalance, which occurs when containers remain at the port of discharge while required at the port of loading. A carrier usually charges freight to have the containers relocated.

Durban and Cape Town. Coastal operators would have to be in a position to ship cargo from Durban and to land cargo in Cape Town. Vessels would then have to load empty containers to ports along the coast or to make a ballast voyage to Durban.

In light of the above, it is therefore abundantly clear that cabotage cannot be sustained on the route between Durban and Cape Town because this route historically experiences imbalanced trades. Since this route is the country's dominant route, it follows that its low volume performance indicates that cabotage implementation on the basis of domestic cargo would have to depend on the current tonnage equivalents. On this basis it would therefore be difficult to implement cabotage, especially where cabotage is seen as a catalyst for an expanded home fleet. From a cargo point of view, the main South African route does not have sufficient cargo to be self-sustaining. It follows that the implementation of cabotage on the basis of the status quo cannot lead to increased tonnage under the South African flag. The incontrovertible conclusion regarding the first part of this chapter must be answered in the negative.

Therefore, the policy seems to have missed two practical considerations. First, the policy does not identify the cargo that will drive cabotage. It has been shown that in South Africa such cargo does not currently exist. Second, the policy does not describe the route envisaged for cabotage, thereby leaving interested parties guessing whether cabotage will be applied domestically or regionally. It has been shown that there is still a considerable amount of work that should first be accomplished to justify SADC cabotage.

Therefore, the policy fails to deal with practical considerations to justify cabotage implementation. In particular, the policymaker seems not to have accorded cargo sufficient weight as the cornerstone for cabotage implementation.

4.3 REGIONAL CABOTAGE

The CMTP suggests a form of regional cabotage serviced by a national coastal carrier. With that in mind, this section is concerned with the assessment of the regional cargo base. It must be emphasised that regional strategic, political, legal and social considerations, although integral and important to SADC cabotage, will not be covered.[37] The enquiry relates only to the status of regional cargo and focuses on the appraisal of trade flows to determine whether or not sufficient cargo exists for regional cabotage purposes.

4.3.1 Limitations of regional cargo data

Bearing in mind the nature of sources of information for regional cargo, there are instances in which it will be cumbersome to provide full details of certain vessels referred in the study. However, details relating to volumes and vessel routes will be disclosed. Broad cargo descriptions and general description of sources of such cargo will be given to avoid divulging precise details that might traverse commercial confidentiality boundaries. On the same basis, coastal carriers that provided cargo information for this section withheld the latest statistics. Therefore, the regional cargo analysis predominantly deals with information in respect of cargo carried over four years during the period 2010 to 2013.

Furthermore, it was not possible to collate statistics from the countries to which South Africa exports. The relevant agencies of the respective countries do not have readily accessible cargo records. With the exception of bulk salt exports from Walvis Bay, no regional data was made available in respect of other bulk and breakbulk cargo. Therefore, the study predominantly covers exports from South Africa to other ports in the SADC region.[38] Nevertheless, the available information provides the study with a clear and sufficient basis on which reasonable inferences can be drawn.

[37] Detailed coverage of regional and continental imperatives for cabotage policy was discussed in chapter 3.

[38] South African agencies have no statistics for cargo moving in the SADC region. Therefore, the information discussed in this regard is derived from records of coastal shipping companies who operate vessels on the African eastern and western seaboards and the Indian Ocean Islands.

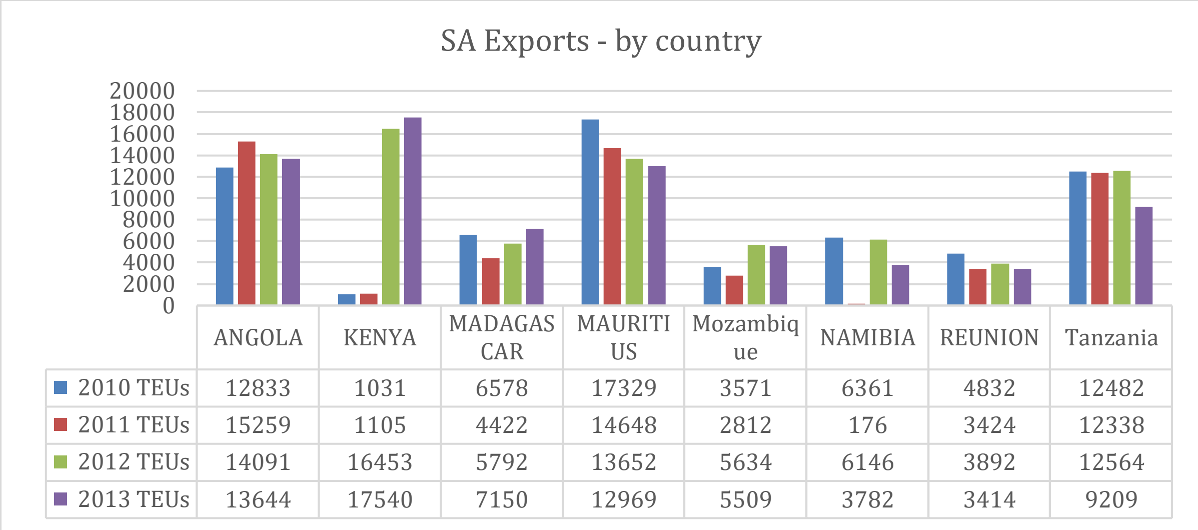
4.3.2 Regional cargo overview

Regional cargo assessment covers the range of ports between Luanda to the west and Mombasa to the east. It also includes ports in Reunion, Mauritius and Madagascar.

It appears from the statistical records of coastal operators that import volumes moving along the Southern African coast into South Africa are very low. The bulk of TEUs imported from the region are landed empty.[39] The dominant ports for the majority of empty containers seem to be Beira and Maputo.[40] Vessels from these ports often return to South Africa with an average of about 700 empty TEUs.[41] Some of these containers come from as far up the coast as Djibouti and Lomu. For example, on 16 June 2017, a vessel from Beira carried 451 TEUs to Durban, 381 of which were empty. The vessel then sailed to Cape Town and discharged only 1 FCL. On 29 May 2017, another vessel from Maputo discharged 842 TEUs in Durban, 805 of which were empty. The same vessel discharged 65 FCL in Cape Town. Information received from two different regional coasters confirm this trend.

The two graphs below, Figure 4.10 and Figure 4.11, show respectively the top eight regional countries to which South Africa exports and the types of cargo exported. The eight countries, in alphabetical order, are: Angola, Kenya, Madagascar, Mauritius, Mozambique, Namibia, Reunion and Tanzania. However, the lion's share of South Africa's coastal cargo is exported mostly to four countries, namely Mauritius, Angola, Tanzania and, more recently, Kenya. Overall, a negligible amount of cargo goes elsewhere. On the information available, South African exports are generally shipped to the region from the port of Durban.

[39] However, these numbers vary and can reach close to a thousand empty TEUs per vessel on occasion. For instance, on 23 June 2017, one vessel landed 928 TEUs in Durban, of which 854 were empty. The same vessel discharged 55 FCL in Cape Town.
[40] This is shown from container statistics of a coaster that operates in the range of ports between Beira and Walvis Bay.
[41] Ibid.



	ANGOLA	KENYA	MADAGASCAR	MAURITIUS	Mozambique	NAMIBIA	REUNION	Tanzania
2010 TEUs	12833	1031	6578	17329	3571	6361	4832	12482
2011 TEUs	15259	1105	4422	14648	2812	176	3424	12338
2012 TEUs	14091	16453	5792	13652	5634	6146	3892	12564
2013 TEUs	13644	17540	7150	12969	5509	3782	3414	9209

Figure 4.10: South African seaborne exports (Luanda to Mombasa)

(Source: South African coastal operators)

On average, Mauritius imports from South Africa about 14 000 TEUs a year. Angola and Tanzania import an average of about 13 000 TEUs and about 11 500 TEUs respectively. Kenya imported an average of about 16 500 TEUs in 2012/3 and about a thousand TEUs a year in each of the preceding two years. Other regional countries on average each import between 3 500 and 6 000 TEUs from South Africa per year.

It appears that between the east and the west, the bulk of coastal containerised exports are concentrated on the south-eastern seaboard (Madagascar, Kenya, Tanzania and Reunion), while the single highest export destination is in Angola, on the south-western seaboard. Interestingly, the remaining countries (Namibia and Mozambique) have relatively lower seaborne export volumes from South Africa.[42] However, because they are contiguous to South Africa, they present an ideal opportunity for regional cabotage, particularly since the coastal route passing along these countries already exists and is well established. Therefore, on the basis of the volumes in Figure 4.10 above, the position of these countries allows for a short sea-pendulum trade from South Africa to the east, perhaps up to Nacala, swinging back to Beira, Maputo, through South African ports to Lüderitz and Walvis Bay to the west and back again.

[42] Probably because seaborne transport in general faces steep competition from road transport that operates between SA and countries such as Mozambique and Namibia.

The longer coastal route (for instance, between Luanda and Mombasa) may require the use of some of the shorter pendulum ports (such as Maputo, Durban or Ngqura) as transshipment ports to improve transit efficiencies and to create shorter sailings. Transshipment on these terms possesses potential to stimulate further coastal activity.

4.3.3 Regional commodities

Figure 4.11 below shows major export cargo shipped to SADC countries. Regional cargo flows effectively consist of four types of commodities. This assemblage may be regarded as typical primary cargo for regional cabotage. These are processed foods, paper (including paper products), chemicals and other goods from manufacturing industries. Chemicals are the most dominant exports across the spectrum of all sampled countries.

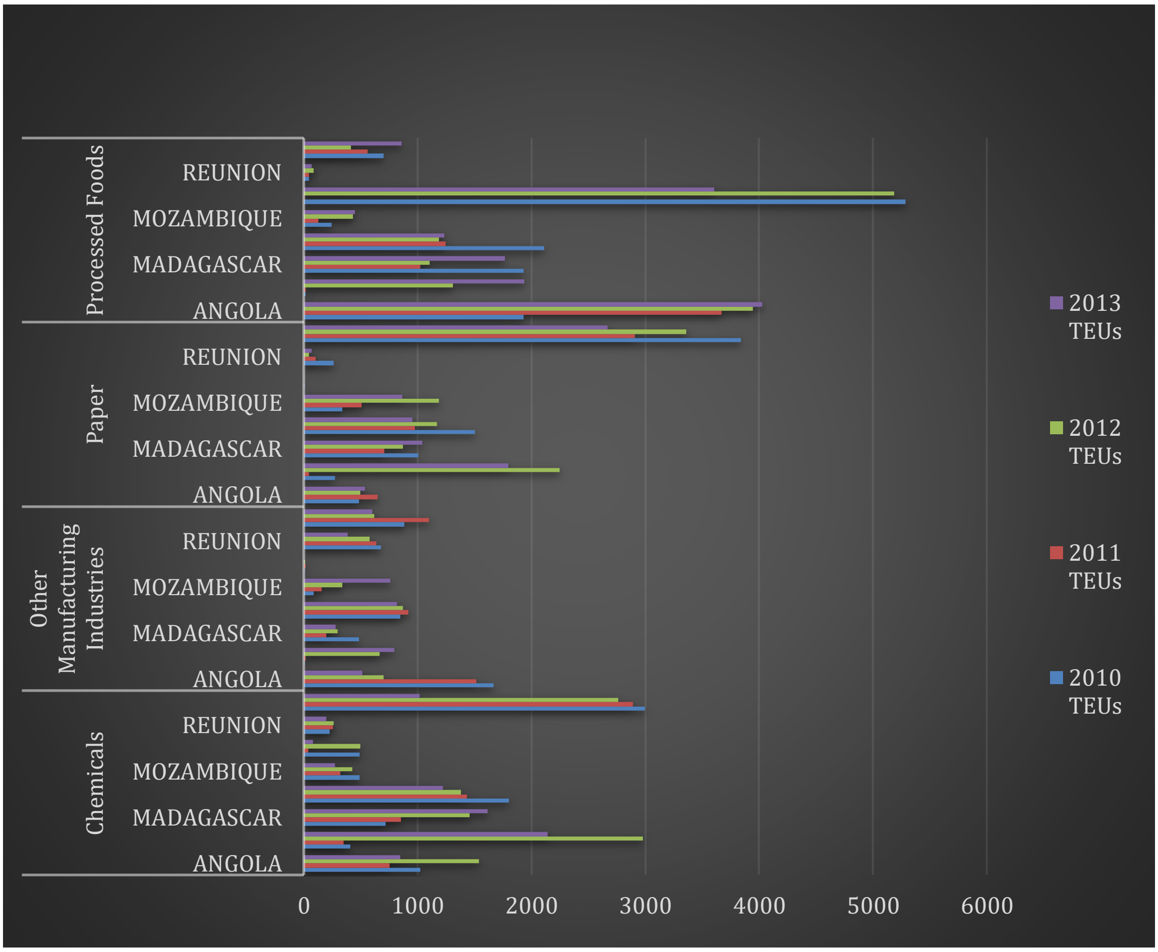


Figure 4.11: Primary regional cargo exports – South Africa to SADC

(Source: Local regional coastal operators' statistics)

Out of the eight regional sinks, Mauritius, Angola, Tanzania and Kenya are the only four that show overall cargo volume consistency. Others depict erratic trends. For instance, Namibia shows highest volumes of processed foods imports while showing negligible volumes in respect of other commodities. Namibia's containerised cargo demand from South Africa is primarily in respect of a single commodity. As such, this is not a diverse coastal trade. Therefore, in the event of a decline in the demand for processed foods from South Africa, for whatever reason, coastal trade between South Africa and Namibia could face a crisis.[43]

Other relevant export volumes of processed foods land in Angola, Mauritius and Madagascar. Chemicals are exported fairly proportionally between Mauritius, Kenya and Angola. However, Tanzania shows the highest volumes of chemical exports. Paper exports to Kenya and Mauritius also make appreciable volumes. The category for 'other manufacturing commodities' is dominated by Angola, while other sampled countries share proportionally in this category.

4.4 CONCLUSION

This chapter examined whether South Africa has sufficient coastal cargo on which to support cabotage. Based on TNPA cargo statistics, South Africa has three main cargo groupings: bulk, breakbulk and containerised cargo. After assessing the status of bulk coastal cargo, indications were that there are consistent supplies of petrochemicals and petroleum products on the coast, given the site of refining sources and the corresponding positioning of sink ports, where petrochemicals are mostly in demand. However, five vessels with a combined deadweight tonnage of about 117 500 adequately cater for the movement of this cargo. No further expansions can realistically be made to the coastal fleet unless bulk cargo volumes increase significantly. Any additions to current tonnages would rapidly lead to over-tonnage.

Since the impetus for cabotage is to expand the domestic fleet, prevailing bulk coastal cargo volumes cannot be the basis on which to achieve the objective, particularly where fleet expansion beyond the existing five vessels would lead to coastal oversupply. It will be difficult to establish good justification for changing the prevailing order to

[43] Namibia's proximity to South Africa means there is potential for the two countries to rely more on land-based transport modes to move their trades. Where costs are comparable, sea transport would most likely be the least preferred mode of transport.

substitute five private vessels flagged elsewhere with five domestically-registered vessels owned by nationals unless it could be shown that other more worthwhile benefits exist. So far, the gains can be seen as too insignificant to warrant full scale and probably costly overhaul of the current coastal carriage arrangement. Other sources of cargo would first have to be found to justify changes in favour of cabotage.

Furthermore, oil majors hold a greater portion of petrochemicals. Therefore, cabotage would ideally have to incorporate strategies to encourage refining industries. Incentive schemes (instead of surreptitious coercion and state pressure) may therefore be useful methods adopted to drive policy changes. The domestically-registered coastal carrier would have to be convinced of the financial benefits of trading on the coast. Similarly, incentives in the form of tax breaks and wharfage waivers, among others, might encourage local registration of appropriate tonnages, which in return would reciprocate by meeting certain imperatives relating to vessel manning, ownership or building of the vessels.

With regard to breakbulk cargo, statistical review shows that South African ports handle relatively small volumes of breakbulk cargo. As a stand-alone cargo class, breakbulk cargo does not have any meaningful role to play in cabotage. It would remain relevant only as supplementary cargo, while a wider breakbulk cargo base is being developed. In any event, the type of vessels that typically ply the coast are suitably designed as multi-purpose carriers, albeit designed primarily for container carriage. They have sufficient capacity to handle current levels of breakbulk cargo volumes. The likely scenario is that the breakbulk cargo base will remain the same and that this class of cargo would not constitute an important cargo component for cabotage. Therefore, as is the case with bulk cargo, current volumes of breakbulk cargo do not justify cabotage implementation, albeit for different reasons: bulk for not possessing the desired effect of stimulating the merchant flag fleet, and breakbulk for having low demand.

The chapter then turned to the discussion of containerised coastal cargo. This category is divided into landed and shipped containerised cargo. The observation was that Cape Town receives most TEUs moving along the coast, while Durban handles the highest volumes of shipped cargo. Volumes in the other South African ports show paltry TEU activity. This means that the bulk of containerised coastal activity takes place in Durban and Cape Town. That being the case, cabotage cannot be sustained on volumes produced solely by two (out of eight) of the country's commercial ports. Furthermore, the relatively high volumes of containerised coastal cargo recorded in both Cape Town and Durban consists of empty TEUs. Empty TEUs generally attract half the amount of the standard freight rate. The assessment indicated that South African coastal trade does not generate sufficient volumes of full containerised cargo required to support cabotage implementation. On this basis, domestic cabotage would therefore not be feasible as a vehicle for an expanded domestically-flagged fleet.

The enquiry then proceeded to whether cargo was available for the implementation of regional cabotage. SADC ports in the range between Mombasa to the east and Luanda to the west were assessed. It was observed that regional routes suffer considerable imbalances. In the case of SADC regional coastal trade, cabotage could be implemented only on the basis of South African exports to regional countries. Strategies would have to be developed to minimise the effects of the ballast return leg. Currently, regional cabotage would typically operate on the basis of a well-freighted South Africa outbound leg, while the inbound leg would be utilised to reposition the vessel (through freight from empty TEUs) for another round of exports.

The chapter further identified four types of commodities exported to regional countries in substantial volumes. These are processed foods, chemicals, paper products and other manufactured goods. The sample used Durban as the South African port of export. These commodities are generally exported to Mauritius, Tanzania, Kenya, Madagascar, Reunion, Mozambique in the east, and Angola and Namibia in the west. There are, of course, other commodities that are exported to these and other regional countries in lesser volumes that could be utilised as supplementary cargo to the mentioned primary cargo.

For a period of four years from 2010 to 2013, about 14 000 to 15 000 TEUs were shipped from South Africa to Mauritius and Angola while about 11 600 TEUs went to Tanzania per year. About 16 500 TEUs were exported to Kenya. These volumes show that a moderate cargo platform exists to operate a coastal vessel to carry about 1 100 to about 1 700 TEUs. Therefore, purely on the basis of cargo availability, it is feasible to implement regional cabotage either on a shorter coastal route between ports in Mozambique, South Africa and Namibia or on a longer coastal route on a range of ports between Mombasa (via Reunion and Mauritius) and Luanda. It was suggested that the creation of a transshipment port, for instance in Durban, may be necessary to improve efficiencies for the longer route between Mombasa and Luanda.

However, regional cabotage necessitates an elaborate plan that would bind other SADC countries to cabotage ideals, as expounded in chapter 3. South Africa would not be in a position to implement regional cabotage by mere promulgation in its own parliament without the active participation of the other affected SADC member states. A system that would bind other sovereignties will have to be developed before regional cabotage can become a reality, even if cargo on which the policy can be implemented existed. Nothing has been done or proposed to coordinate SADC coastal states for cabotage. Challenges regarding potential misalignment of the CMPT with SADC and ultimately AU instruments were discussed in previous chapters. In the circumstances regional cabotage remains a mere idea.

Therefore there is little or no cargo on which to form the basis for the implementation of cabotage, either domestically or regionally. Domestically, the cargo base is too small to justify operational change, particularly as changes will not lead to the growth and expansion of the domestic fleet. On the regional front, some cargo has been identified. However, cabotage implementation would first require regional integration to make the policy binding on all the SADC coastal countries. The CMTP, so far, pays lip service to less regional cabotage and the matter seems not to have been prioritised.

Having looked at the issue of cargo in South Africa and in SADC and assuming cabotage implementation can progress past this issue, the next chapter provides an overview of restrictive coastal policies which different jurisdictions apply. The idea is to glean experience from worldwide cabotage practices on which a strategy for cabotage implementation may be based.

CHAPTER 5:
OVERVIEW OF WORLDWIDE CABOTAGE PRACTICES

5.1 INTRODUCTION

Having looked at cargo, this chapter assesses other factors that generally affect cabotage implementation. First, the chapter conducts an appraisal of the different kinds of cabotage regimes which various jurisdictions apply. In this regard, the discussion covers different cabotage approaches implemented by individual countries and those adopted in various regions. Second, the chapter gives an overview of the different mechanisms that are commonly applied to complement each type of cabotage in the respective jurisdictions and how these affect ship registration patterns in particular. The whole discussion is driven by the need to explore key concepts that South African policymakers must consider in developing strategies for cabotage. The chapter makes an observation that the measure of strictness or liberty which each jurisdiction adopts for its cabotage practice is dictated by specific conditions of the particular country rather than an objectively verifiable criterion applicable in all circumstances.

A variety of factors may be critical for cabotage implementation. However, the chapter limits the discussion to two issues that are closely related, and which may sometimes be discussed interchangeably. The first relates to the type of cabotage, and the second is concerned with the form of ship registration that a jurisdiction adopts. The first issue establishes the approach each jurisdiction adopts based on its particular imperatives and the degree of latitude such imperatives can permit (ranging from the narrowest to the most permissive application). The second issue is founded on the fact that cabotage requires a merchant fleet as a prerequisite for its practice. Countries often use ship registration legislation to attract tonnage and bend its letter to accommodate the particular country's priorities in accordance with its stage of merchant fleet development and service offering.

In light of the above, it is therefore important to appreciate different formulations of cabotage restrictions that various jurisdictions apply. These will be evaluated with a view to gleaning the type that may be regarded as suitable for South Africa given the limited scope for cabotage implementation in the light of existing coastal trade volumes as detailed in the previous chapter. It must be emphasised that the type of cabotage and the form of ship registration are distinct but very interdependent concepts. It is also important to bear in mind that the discussion deals with the probabilities of their application in South Africa since the policy has pronounced no clear direction on the subject.

5.2 DIFFERENT FORMS OF CABOTAGE REGIMES

A number of countries practise cabotage, but each country adapts the tone of cabotage to its own coastal market dynamics. For instance, the form of cabotage that a country chooses may be influenced by the stage of development of its merchant fleet; the type of commodity most prevalent on its coast; sources and ownership of such cargo; proximity and size of its port facilities relative to regional ports (especially if its ports handle significant numbers of transshipments); and its geopolitical positioning (particularly if its policies have regional significance), among other factors. These factors form the basis of the country's cabotage practice, which is normally designed to produce specific outcomes. As a result, cabotage practice can be distinguished from one jurisdiction to another. However, what remains consistent despite different approaches to cabotage is that reservation of coastal trade for the national flagged vessel is commonly intended to stimulate shipping capacity and to expand transport service range; to mitigate the effects of adverse freight expenditures on the country's balance of payments; and to ensure strategic deliveries in areas of maritime expertise and in education.[1]

Apart from open cabotage, which simply means no cabotage restrictions, of which South Africa has been a prime example, this work identifies two forms or styles of cabotage: restrictive and liberal cabotage.

5.2.1 Restrictive cabotage

Usually restrictive cabotage imposes unconditional terms with regard to construction, ownership, crewing and flagging of vessels permitted to participate in the jurisdiction's coastal trade. Therefore, in restrictive cabotage regimes, trading is reserved for nationally-built vessels, exclusively or predominantly owned and controlled by resident nationals and manned exclusively or by a high percentage of national crews. The

[1] Structure, Ownership and Registration of the World Fleet Ch 2 (2017), available at http://unctad.org/en/PublicationChapters/rmt2017ch2_en.pdf. (Accessed 8 February 2018).

requirements of this type of cabotage could mean that a domestically-built vessel, owned by a locally-registered company that is controlled by nationals but is flagged elsewhere, will be excluded from domestic trade regardless of how it is manned. As a result, this excludes from coastal participation even nationals whose vessels may be registered on the so-called national second register (expanded on in the following discussion). Restrictive cabotage is often seen in coastal markets in which there are substantial volumes of government-related cargo and in circumstances where the country already possesses a sizeable merchant fleet. In instances where some form of waiver can be obtained for foreign flags to participate in restrictive cabotage trades, formalities and criteria are onerous and laden with procedures that are usually not transparent. The result is that barriers to entry in these coastal trades remain too high for foreign vessels, effectively making it impossible for them to participate in coastal trades. Typical examples of countries that practise restrictive cabotage are the US, Japan and China (excluding Hong Kong).

5.2.2 Liberal cabotage

This type of cabotage generally excludes or diminishes the application of the requirements of restrictive cabotage or may temporarily suspend most restrictions for a period of time. Liberal cabotage allows foreign participation, often places no restrictions on where cabotage vessels were built, places least emphasis on crewing by nationals; and ordinarily does not select vessels on the basis of flag registration. The liberal approach often places competition above the development of an indigenous fleet. However, with this approach, foreign participation on cabotage trades is often introduced through licencing mechanisms. These mechanisms allow the designated authority, typically the transport ministry, to exercise discretion through waivers and to generally determine circumstances deemed appropriate for foreign participation. The usual prompts for waivers are factors relating to scarcity of resources such as tonnage shortages or lack of competent crews and low levels of capital expenditure for acquisitions, among other factors. In cases where the jurisdiction’s cabotage structure is underdeveloped, waivers become the norm. Waivers inevitably impose liberal cabotage on a jurisdiction that would otherwise practise restrictive cabotage if there was a choice.

However, waivers allow creation of avenues through which a jurisdiction can supplement shortages, provide suitable tonnages, or develop training for its crews, among others. Foreign involvement may be enlisted under strict conditions when and if justified by prevailing circumstances. However, specified conditions may often be attractive to foreign participants, while the jurisdiction itself in turn enjoys a measure of control over the manner in which foreign ships trade along its coast.

Liberal cabotage is often seen in jurisdictions at the early stages of fleet development or where an already established merchant fleet exists but demand imbalances occur, for example, where under-tonnage or lack of suitable capacity for specific trades remains a challenge. In such circumstances, foreign interests may be granted permission to trade on the coast under some form of licence, either on the basis of a single engagement or for a fixed period of time, at the discretion of the designated authority. This practice does not normally require domestic registration of foreign interests under the national flag. India is a classic example of a country where this type of cabotage regime is practised, as will be seen in the discussion below.

Predictably, if the country's strategic thrust involves retention and transfer of maritime skills, the form of cabotage would reflect this in the requirements regarding the engagement of the crew. Crewing requirements normally oblige participation of nationals. However, depending on the degree of availability of suitable crews, it is not unusual for foreign vessels trading on the coast to have a relatively larger contingent of foreign crews. However, pivotal positions such as the master or first officer may continue to be reserved for nationals. Nevertheless, a jurisdiction may still require engagement of a particular minimal percentage of its nationals which, if not met, would mean that the foreign vessel would not be issued with a licence to trade on the coast.

A cavalier application of waivers for manning foreign vessels can potentially divert from the objectives of cabotage where foreigners operate on a waiver license basis. A divergence of interests may arise since the licensed vessel commonly flies a different flag, which would often be a vessel registered under a flag of convenience (FOC). The foreign crew and remuneration arrangements often undercut what the national flag seeks to achieve with regard to working conditions and general wellbeing of its local crews. Therefore, in jurisdictions where protection of the rights of crew may be a sensitive subject, this would generally be reflected as a variable in the licence conditions forming the basis of the waiver. The solution is normally to engage foreign crews on similar employment conditions to those applicable to local crews. This has the effect of discouraging foreign flags from employing non-nationals.

There are instances in which restrictions regarding vessel ownership or shareholding in vessel-owning companies receive attention. Under liberal cabotage, national shares in the vessel (or controlling company) need to be only 51%. Therefore, the remainder of the shareholding represents the degree to which foreigners can then participate in cabotage trade. Ownership by nationals may also be recognised, particularly if one or two general rules have been substantially met. For instance, a vessel owned by a national, but which flies a foreign flag, may be allowed to trade on the coast. This mainly occurs if the foreign flag concerned is on the country's parallel or second ship register. If the vessel has been built locally or is manned by national crews, this would further make it easier for the foreign flag to obtain a licence for coastal operations. However, waivers of this nature tend to be unpredictable; they usually depend on the requirement of the coastal state at the time of the issuing of the licence and may change soon after the particular need for them has been realised. They are therefore difficult to measure properly. Examples of these may be seen below in the discussion involving countries such as Greece, Norway and other European Union (EU) countries.

Countries that have low volumes of coastal cargo often do not to implement cabotage. However, there are instances where high cargo volumes exist but cabotage does not apply. Owing to its flexibility and because liberal cabotage can accommodate moderate expressions of coastal restrictions, it is the regime of choice in a regional cabotage arrangement where a bloc of countries grant access to each other's coastal trades in a mixture of coastal trades where some practice cabotage and others do not.

Under liberal cabotage there is often no requirement that the vessel must be domestically built. It must simply be registered under the domestic flag of the jurisdiction where it is trading or under the domestic flag of the reciprocating country. Crews engaged on these vessels also come from various members of the bloc. However, in most instances, the master is required to be a national of the country where the vessel is trading.

The broadminded approach of liberal cabotage in a regional context may be further seen in the fact that members of the bloc that practise restrictive cabotage in their respective jurisdictions cannot compel those in the bloc who have no cabotage rules to apply restrictions to reserve their coastal trade for the rest of the bloc. Countries are also free to conclude bilateral agreements and to grant access to their coastal trades on a reciprocal basis to countries that are outside the bloc. Therefore, countries in the bloc may still be "vulnerable" to foreign competition away from their coast in circumstances where the country that does not restrict cabotage (but belongs in the bloc) is guaranteed trade within the bloc of countries that have cabotage restrictions. The classic example of this can be seen in the UK coastal trade. The UK has the highest coastal volumes in the EU but does not have cabotage restrictions. Countries in the EU bloc are therefore exposed to foreign competition in the UK in circumstances where UK-registered vessels enjoy cargo reservations, for example, on the Italian coast and elsewhere in Europe.

The following discussion contains examples of jurisdictions of different forms of cabotage practices.

5.3 OVERALL JURISDICTIONAL CABOTAGE PRACTICES

This section evaluates legislative mechanisms for ship registration that different jurisdictions often adopt to implement and drive cabotage. Therefore, the evaluation entails different methods that jurisdictions apply to structure their ship registers. It also shows how such structuring translates into a particular form of cabotage. A broad sample of worldwide cabotage proponents is covered in the assessment to determine where cabotage is predominantly practised, by whom and in what form. The approach is intended to simplify the process of suggesting the type of cabotage and the corresponding form of ship registration that South Africa should adopt in view of the different requirements identified for vessel registration.

A discussion is facilitated by reference to specific countries and a brief exposition of some of the dynamics experienced in each country and the type of cabotage regime that such dynamics produce. The intention is to appraise the various types of cabotage practices with a view to gleaning the type of cabotage suitable for South Africa.

5.3.1 *Ship registration*

The registration of a vessel under a particular flag has the effect of subjecting that particular vessel to the laws of the country where it has been registered. The nationality of a ship is what determines which requirements relating to safety, crewing, working hours, taxation, and social security and pension regulations apply to the ship.[2] Therefore, in the context of cabotage, domestic flag registration equates to a form of legal title a country possesses over the merchant fleet under its register. For this reason, domestic laws that govern ship registration ultimately determine who would be under such authority and for what purpose. Ship registration laws of a particular flag therefore often set the tone of the cabotage policy and become the measure through which the aims of the policy are often delivered.

Bearing in mind the rationale for ship registration, South Africa aspires to become one of the world's 35 maritime nations through aggressively promoting its ship register.[3] The following subsection therefore evaluates the overall commercial standing of each of the top 35 countries on the basis of deadweight tonnage it carries (actual freightable vessel space) and its world share. The idea is to gauge if there is any relationship between the country's world standing on the one hand and its ship registration mechanisms and form of cabotage on the other. However, the discussion goes beyond just world standing, for reasons that will become more apparent below.

5.3.2 *World deadweight tonnage shares*

The leading 35 maritime nations that South Africa desires to be a part of, own about 95% of world's total deadweight tonnage. Only one of these countries is from Latin America and none is from Africa.[4] The remaining share of about 5% is thinly spread among all other ship-owning nations. In the African context Angola, Nigeria and Egypt together hold about 1.23%,[5] while South Africa holds 0.11% of the world's share.[6] The

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[2] N.P. Ready Ship Registration (1998).
[3] See CMTP Policy statement p,51 and Draft Maritime Policy 2009 p,28.
[4] UNCTAD/RMT/2016 United Nations publication Review of Maritime Transport (2016), available at http://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf. (Accessed 25 February 2018). The list includes inland states such as Switzerland.
[5] Ibid.
[6] Maritime Profile: South Africa (nd), available at (http://unctadstat.unctad.org/CountryProfile/MaritimeProfile/en-GB/710/index.html). (Accessed 6 February 2017).

South African percentage share includes two domestically-flagged dry bulk carriers and 42 vessels of various types registered under FOCs.[7]

Table 5.1 below shows the list of the countries (leading countries) that own the lion's share of registered world tonnage. Virtually all of these countries have two sets of fleets: one registered under the domestic flag, and the other registered offshore under FOCs. About 50% of the world's tonnage share is in the hands of only five countries, namely Greece, Japan, China,[8] Germany and Singapore.[9] Ten of the leading countries are members of the EU.[10] Greece controls the highest carrying capacity.[11]

Sixteen of the leading countries have about 50% or more of their vessels registered under domestic flags.[12] Ten[13] of the sixteen are the so-called "developing countries".[14] The other six countries are from the developed world, namely Singapore, Hong Kong (China), Norway, Netherlands, Italy and Canada.

Table 5.1 shows the world ranking position of the 35 leading countries. It provides categorisation of each country with respect to:

- Whether or not each of them practises restrictive cabotage;
- Deadweight tonnage percentage under its domestic flag;
- World share percentage of its total deadweight tonnage (combination of domestic and FOC-flagged tonnage); and
- Each country's developmental status.

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[7] Grindrod Limited is a company registered in South Africa. It owns a fleet of 56 vessels, 14 of which have been chartered in.
[8] China owns the highest fleet number. The smaller vessels (under 1 000 gross tons) that are involved in Chinese cabotage trades boost the number of the Chinese fleet, which currently numbers 5 206. See note 1, under 'Vessels'.
[9] See http://unctad.org/ (note 1).
[10] Belgium, Cyprus, Denmark, France, Germany, Greece, Italy, Netherlands, Norway and UK.
[11] Greece has 308 836 933 deadweight tonnage under its control. See UNCTAD 'World Fleet and Operation' at http://unctad.org/ (note 1).
[12] Except for Monaco, which has no home-registered vessels.
[13] These are China, Thailand, India, Malaysia, Brazil, Vietnam, Indonesia, Russia, Iran and Kuwait.
[14] Singapore has only recently been graduated to 'developed' status. The assumption is therefore that its flagging ratio still reflects on its status as a developing country. Singapore was a developing country until 1997, after which it graduated to the status of a developed country.

Table 5.1: Thirty-five leading maritime nations and South Africa (by dwt)

NO	COUNTRY	Cabotage Restricted Yes/No	Domestic-flagged % of total	% of world share	Developmental Status
1.	Greece	Yes	22	17	DC
2.	Japan	Yes	13	12	DC
3.	China	Yes	47§	8.7	LDC
4.	Germany	Yes	10	6.9	DC
5.	Singapore	No	65§	5.2	DC
6.	Hong Kong	Yes	77§	4.8	DC
7.	South Korea	Yes	20	4.4	DC
8.	US	Yes	15	3.3	DC
9.	UK	No	10	2.8	DC
10.	Bermuda	Yes	2	2.7	DC
11.	Norway	No	36	2.7	DC
12.	Taiwan	Yes	12	2.5	DC
13.	Denmark	No	42§	2.1	DC
14.	Monaco	No	0	1.6	DC
15.	Turkey	Yes	30	1.5	LDC
16	Italy	Yes	68§	1.3	DC
17.	Belgium	No	35	1.2	DC
18.	India	Yes	73§	1.2	LDC
19.	Switzerland	Inland	8	1.1	DC
20.	Russia	Yes	38	1.0	LDC
21.	Iran	Yes	23	1.0	LDC
22.	Netherlands	No	41§	0.97	DC
23.	Indonesia	Yes	88§	0.96	LDC
24.	Malaysia	Yes	51§	0.94	LDC
25.	Brazil	Yes	24	0.88	LDC
26.	UAE	Yes	4	0.86	LDC
27.	Saudi Arabia	Yes	21	0.78	LDC
28.	France	Yes	29	0.68	DC
29.	Canada	Yes	27	0.55	DC
30	Kuwait	Yes	48§	0.16	LDC
31.	Cyprus	Yes	37	0.51	DC
32.	Viet Nam	Yes	82§	0.46	LDC
33.	Oman	Yes	0.8	0.40	LDC
34.	Thailand	Yes	75§	0.38	LDC
35.	Qatar	Yes	12	0.37	LDC
No Rank	South Africa	No	5	0.03	LDC

NOTES: DC = Developed country; LDC = Less-developed country; **§** = % of vessels under domestic flag above 40% of total

(Source: extracted from UNCTAD Publications, 2016)

At a glance, the above table suggests some correlation between the stage of the country's development and the percentage of domestic versus FOC-tonnage registration. Developed countries seem to flag more of their vessels under FOCs, while developing countries flag more at home.[15] The view is further enforced by the widely held opinion that developing countries use cabotage as a means of stimulating domestic shipping and, in particular, as an instrument of increasing domestic flagged tonnages.[16] The domestically-flagged vessels are thereafter used to trade internationally. If that argument can be sustained, the observed trend would be crucial for South Africa, which is a developing country that trades with other developing countries, for instance, in the BRICS bloc.[17]

However, an attempt to relate the size and strength of a country's domestic fleet to its developmental status meets some challenges. A few developed countries show substantial tonnages under the home flag. Singapore, Hong Kong, Denmark, Italy and the Netherlands are typical examples. This suggests the existence of other factors that influence a country's flagging patterns. The following section looks at cabotage restriction in a variety of jurisdiction to see if these affect the development of home flags.

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15 Countries have been described according to International Monetary Fund (IMF) classification. However, the terms 'Less Developed' and 'Developing' countries have been used interchangeably. See Developing Country (nd), available at https://en.wikipedia.org/wiki/Developing_country#List_of_countries_that_are_graduated_developed_economies_according_to_the_IMF. (Accessed 30 January 2018).

16 See, for instance, A. Odeke, Protectionism and the Future of International Shipping (1984); and J.A. Sabatino Pizzolante Cabotage in the Andean Community: The Rebirth of the Merchant Marine? (2002), available at https://www.researchgate.net/publication/237555192_Cabotage_in_the_Andean_Community_The_Rebirth_of_the_Merchant_Marine. (Accessed 24 February 2018). See also T.A. O'Keefe Latin American and Caribbean Trade Agreements – Keys to a Prosperous Community of Americas (2009).

17 South Africa's Liner Shipping Bilateral Connectivity Index (LSBCI) for the year 2016 shows other developing countries such as China and Malaysia as its top trading partners. The LSBCI captures the overall quality of a liner shipping connection between pair of countries. It therefore reflects the respective countries' container trade 'ties' albeit that the emphasis is on the 'effectiveness' of the liner trade as opposed to the 'intensity'. The LSBCI shows the maturing competitiveness of the liner shipping service between South Africa and each of these countries. See UNCTAD: Bilateral Liner Shipping Activity Connectivity since 2006 (2016), available at http://unctad.org/en/PublicationsLibrary/itcdtab74_en.pdf. (Accessed 7 February 2018).

5.4 INFLUENCE OF THE DEGREE OF CABOTAGE RESTRICTIONS

A handful of countries that have appreciable numbers of vessels flagged both at home and elsewhere will be appraised to determine the extent to which cabotage restrictions apply in these jurisdictions and the level of such restrictions. The outcome will inform the overall picture of worldwide cabotage restrictions. It will then be used to gauge whether certain approaches to cabotage restrictions influence the development of home registries, bearing in mind that the realisation of South Africa's cabotage ambitions largely depends on the development of a viable domestic flag. Five categories have been created for this purpose.

Two countries from each of the five categories have been examined to tease out the status of individual coastal practices in an attempt to discern if key features exist to cabotage restrictions that could be related to particular flagging patterns. The basis for grouping countries in this manner is twofold: first, to avoid burdening this work with the assessment of individual countries where consolidation is possible and thus avoid potential duplication; second, grouping countries promotes a wider consideration of factors that may influence coastal policies and consequently ensures a more diverse evaluation of how cabotage restrictions may influence ship registration patterns. As part of this diversity, countries that do not control the majority of world tonnage have also been included in the assessment.

Table 5.2 below presents a list of countries derived from leading maritime nations which have been grouped into five distinctive categories.

Table 5.2: Cabotage manning and ownership restrictions

NO	COUNTRY	FORM OF CABOTAGE RESTRICTIVE / LIBERAL/ OPEN	MANNING RESTRICTIONS	OWNERSHIP RESTRICTIONS	WAIVERS Yes/ No
First category – Top 5 world tonnage leaders					
1.	Greece	Liberal	100% Greek/ EU ownership, Greek captain, Certificate of Greek knowledge if Safety Officer is not Greek	50% shares + Greek or EU nationals, Greek vessel management	Yes
2.	Japan	Restrictive	100% Japanese subject to very strict conditions	100% Japanese	No
3.	China	Restrictive	100% Chinese subject to very strict conditions	100% Chinese	No
4.	Germany	Liberal	German master and 50% + German/EU crew, Foreigners required to have safe manning certification issued in German	50% shares + German or EU Company central office in German	Yes
5.	Singapore	Open	No	Permanent residents and foreign nationals	N/A
Second category – EU countries outside the top 10 list					
6.	Norway	Liberal	Non-EU members require work permits unless employed on EU vessels	Six-tenths share ownership by Norwegian/ EU nationals, owner or vessel proven actual affiliation to Norway equates to ‘deemed nationality’, Company head office and board offices in Norway and chairman resident in Norway for 2 years +, ship’s economic activities and operation must be in Norway.	Yes
7.	Denmark	Open	No	Two-thirds Danish/EU nationality or permanent resident with effective control. Company’s permanent presence in Denmark.	N/A
8.	Belgium	Open	No	50% + Belgian/EU ownership of the vessel. Require certification of technical conformity for vessels over 15 years.	N/A

NO	COUNTRY	Form of cabotage Restrictive / Liberal/ Open	Manning Restrictions	Ownership Restrictions	Waivers Yes/ No
9.	Italy	Liberal	100% Italian/EU nationals, Non-EU crew to board Italian vessels subject to trade union agreements, Safety Officer must have knowledge of Italian	50% + Italian/EU nationals	Yes
10.	Netherlands	Open	No	Any person/ company from EU or Switzerland	N/A
Third category – Developing Countries on the top 35 list					
11.	Brazil	Liberal	Yes		Yes
12.	Russia	Restrictive	Yes		Yes
13	India	Liberal	Yes		Yes
14.	Indonesia	Liberal	100% manned by Indonesian nationals	50% + ownership of vessel/ company owning vessel.	Yes
Fourth category – OECD members outside the top 35 list					
15.	Finland	Yes	Yes	60 + share of Finnish/EU ownership. Foreign flags allowed, cabotage operations subject to Finnish authorities having the full right to specify the conditions as to use of the vessel	Yes
16.	Iceland	Open	No	Icelandic and EU nationals/ residents.	Yes
17.	Ireland	Open	No	EU Member nationals or EU company with principal place of business in EU	N/A
18.	Sweden	Liberal	Swedish captain and 50% + Swedish/EU crew	50% + Swedish/EU nationals, EU company with principal place of business in EU, controlled in Sweden	Yes
19	Spain	Liberal	Spanish Captain and first officer and 50% minimum Spanish/EU crew	Spanish/EU national, company representative appointed in Spain	Yes

NO	COUNTRY	Form of cabotage Restrictive / Liberal/ Open	Manning Restrictions	Ownership Restrictions	Waivers Yes/ No
Fifth category – CAN ≥ 5% ownership of world fleet					
20.	Bolivia	Liberal	Yes		Yes
21.	Colombia	Liberal	Yes		Yes
22.	Ecuador	Liberal	Yes		Yes
23.	Peru	Liberal	Peruvian captain and 80% of the crew, 30% + in respect of fishing vessels	51% + Peruvian nationals domiciled in Peru, company must have principal place of business in Peru, have 'real and effective headquarters' in Peru, Peruvian board chairman, majority directors and general manager resident in Peru	Yes
24.	Venezuela	Open	No	Foreign ownership of a Venezuelan vessel permitted subject only to the registration of the ship-owning company in Venezuela. Foreign vessels may also fly national flag under bareboat charter or lease	N/A

(Source: US MARAD*[18]*)

The First category consists of the top five countries that control close to 50% of the world tonnage. These are Greece, Japan, China, Germany and Singapore. Greece and Singapore will be used as examples of this category. The Second category consists of EU member countries outside the top 10 of the leading countries. These are Norway, Denmark, Italy, Belgium and the Netherlands. These countries may also be categorised as developed countries. The examples in this category will be Denmark and Norway. The Third category is made up of developing countries on the list of 35 leading countries. These are China, India, Russia, Indonesia and Brazil. India and Indonesia will be used as examples. Incidentally, the majority of the countries in this category are South Africa's trading partners in the BRICS bloc of nations. The Fourth and Fifth

[18] US MARAD By the Capes, Around the World – A Summary of World Cabotage Practices (October 2001) in J.R.F. Hodgson & M.R. Brooks Canada's Maritime Cabotage Policy (2001), available at http://maryrbrooks.ca/wp-content/uploads/2012/03/CabotageFinal.pdf. (Accessed 19 February 2018).

categories are comprised of countries that fall outside the top 35 ship leading nations (at the bottom 5% of the world-tonnage ownership). The Fourth category consists of OECD members that are developed countries, namely Finland, Iceland, Ireland, Sweden and Spain. The examples will be Finland and Sweden. The Fifth category consists of developing countries Bolivia, Colombia, Ecuador, Peru and Venezuela. These countries are collectively called the Community of Andean Nations and are commonly known by the acronym CAN. Examples used in this category will be Venezuela and Peru.

5.4.1 First category

With the exception of China, the rest of the countries in this category are developed countries. Singapore graduated into the category in 1997.[19] Three are from Asia and the other two are from Europe. Notably in this category, only China and Singapore possess more tonnages under the home flag than elsewhere. However, all these countries practise cabotage except Singapore. Cabotage restrictions in Japan and China require manning of vessels exclusively by respective nationals. China makes some exception that other nationalities may work on Chinese vessels with the approval of the authorities. In practice, however, Chinese vessels are manned by Chinese nationals exclusively, given the extent of formalities that the incumbent would have to navigate.[20]

5.4.1.1 Greece

Greece practises cabotage, but only in respect of non-EU vessels. Greece was the last member of the EU to liberalise cabotage policies on 1 November 2002.[21] Before that date, Greece strictly protected its coastal trade against all foreign nationals. As a part of the EU, Greece permits only EU members to trade on its coast. Even for EU members, coastal operations are subject to conditions that must be met before Greek authorities can issue a licence permitting them to trade. Conditions include the requirement that the vessel seeking to trade in Greece must be authorised in flagged-state cabotage trades, for instance. However, licence conditions are not set as

[19] Developing Country (note 15).
[20] Comparison Chart of Maritime Policies (20 June 2012), available at http://www.jpmac.or.jp/img/en/outline/Summary%20of%20the%202011%20Study.pdf. (Accessed 21 February 2018).
[21] European Commission's Fifth Report on the Implementation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime cabotage (2001-2010), 22.04.14, 2 (EU Fifth Report).

preconditions to avoid breach of EU free-trade protocols to which restrictive adherence is required. These must be met while engagement regarding actual trade continues. Nevertheless, a vessel owner intending to operate in Greek waters must be issued with a licence by the Greek authority, which may be refused if the owner has not met the licence conditions. In any other case, only vessels under the Greek flag can operate on the coast. There is a requirement for the ship's master to be a Greek national.[22] Greek waivers do not apply except on a reciprocity basis with another flag in the discretion of the Minister of Merchant Marine.[23]

5.4.1.2 Singapore

Perhaps owing to the size of its coast, Singapore does not have restrictions regarding who may trade along its littoral waters. It therefore comes as no surprise that the Singaporean ship-registry laws[24] do not discriminate against registration of foreign-owned and locally-owned vessels. Conditions that are imposed seem to reflect a commercial rationale. For instance, vessels on the register must not be over 17 years old. This country's commerce-orientated policy may partially explain its popularity.[25] Singapore therefore represents the only country in the top five tonnage-controlling nations that imposes no restrictions on its coastal trade.

5.4.2 Second category

This category deals with EU members on the list of top 35 nations (carrying capacity). The UK, Belgium, Denmark, Ireland, Netherlands and Iceland are EU members who do not have cabotage restrictions on their coast.[26] However, of the six mentioned, only the UK has a sizeable coastal trade. [27] The European Commission Fifth Report[28] shows

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[22] J.R.F. Hodgson & M.R. Brooks Canada's Maritime Cabotage Policy (2001), available at http://maryrbrooks.ca/wp-content/uploads/2012/03/CabotageFinal.pdf. (Accessed 20 February 2018).
[23] http://www.maritimeadvocate.com/law_cases/the_evolution_of_greek_maritime_law.htm. (Accessed 13 February 2018).
[24] Merchant Shipping (Registration of Ships) Regulations, made under the Merchant Shipping Act (Chapter 179, sections 8, 44, 45, 216), available at https://www.mpa.gov.sg/web/wcm/connect/www/f81111eb-13af-4885-bb15-11948881f4bf/ms-registration-of-ships-regs.pdf?MOD=AJPERES. (Accessed 13 February 2018).
[25] The Singapore ship registry ranks fifth in the world with over 127 000 dwt registered on it. See UNCTAD Publications for more details.
[26] See UNCTAD Publications 2014 and also EU Fifth Report (note 21), particularly with regard to the fact that Cyprus has Bilateral Agreements restricting cabotage. 13.
[27] Hodgson & Brooks (note 22).
[28] EU Fifth Report (note 21).

that Denmark possesses a comparatively moderate coastal trade,[29] but that the size of its coastal market has been shrinking. Belgium and the Netherlands have low volumes of cargo on their coasts.[30] This scenario seems to offer an explanation for the lack of effort to apply restrictive cabotage in these two jurisdictions. Expanding the EU view to include Italy, which imposes restrictions on coastal trades, also indicates a nexus between high coastal volumes and cabotage restrictions. Further, geography seems to play a pivotal role in this scenario. Italy's restrictive approach probably finds its basis in the fact that Italy has a considerable coastline and a few small and large islands. Belgium's non-restrictive approach, on the other hand, seems consistent with the fact that its coast is short, with excellent landside infrastructure. Italy's annual coastal volumes were about 58.6 million tons in 2010. Coastal trade volumes for both Belgium and the Netherlands over the same period have never reached a million tons.[31] In the circumstances, it is not unreasonable to conclude that substantial coastal volumes are a factor that justifies the existence of cabotage restrictions on the coast.

Attention now turns to the two examples of the category.

5.4.2.1 Norway

Norwegian coastal trade is reserved to Norwegian nationals under Regulation No. 3577/92, made under the Norwegian Act of 4 December 1992 No. 121 on Services in Maritime Transport. EU members trade freely on the Norwegian coast on the strength of Regulation No. 3577/92, issued by the EU Council of the European Economic Area (EEA), which prohibits EU member states from restricting access to each other's trades. Norwegian annual coastal volumes were about 42.5 million tons in 2010. In the context of cabotage as the driver of flag building, only vessels that meet the restrictive criterion of the Norwegian ship register could carry these volumes. However, latest developments have seen a relaxation that permits a dilution of these rules. Norway does not have a single 'home' register for its national merchant fleet. It has the Norwegian Ordinary Ship Register (NOR) and the Norwegian International Ship Register (NIS). Vessels under the NOR must be owned by at least 60% Norwegian nationals or by EU

[29] Table 4.1: Cabotage Transport of Goods shows Denmark's coastal capacity at about 14.1 million tons in 2010. The UK, the leader of the EEA coastal activity in volume terms, had about 71.3 million tons during the same year.
[30] EU Fifth Report (note 21), 22.04.14, 8. (See also ibid. 54.)
[31] Ibid.

members, but the company that owns the vessel does not have to be registered in Norway. Its head office must, however, be located in Norway.[32] The majority of directors and the chairman must be Norwegian and all of them must be resident in the country.[33] On the back of this ship-registration arrangement, only tonnage from the NOR is eligible for Norwegian cabotage trades.

NIS registration extends registration rights to nationals and foreigners alike, hence the exclusion from coastal trades. Therefore, Norwegian ownership in foreign-controlled vessels is not a prerequisite for eligibility for registration by the NIS. The NIS gives vessel owners the benefit of financial savings that would otherwise be available only under FOCs. Both foreign- and Norwegian-owned ships can be included in the NIS. The primary goal for the approach seems to stem from a desire to achieve the goal of maintaining a national fleet. The NIS mimics FOC conditions as close as possible. For instance, tax benefits include exemption from income tax for non-Norwegians operating NIS-registered vessel or where the NIS-registered vessel is owned by both Norwegian and foreign interests. Seafarers resident abroad (residents of Nordic countries excluded) are exempted from taxation. The only requirement is the appointment of Norwegians for vessel management of the foreign-owned fleet.[34] Initially, NIS-registered vessels were excluded from coastal trades in terms of Regulations No. 802 of 1989. However, with effect from 1 January 2016, the rights of NIS-registered vessels were extended in certain circumstances in terms of Regulations of 8 October 2015 No. 1170, for example, if involved in specialised trades. The condition for coastal operations is that the master of the NIS vessel must be a Norwegian national or a national from the EU.[35]

A combination of both these registers makes up the 'national fleet' by virtue of the fact that both the NOR and the NIS are Norwegian registers. The effectiveness of this dual system manifests itself in the fact that in 2016 the Norwegian domestic flag had only 150 fewer vessels compared to Norwegian vessels flagged under various FOC

[32] Trade Areas NIS Ships (2016), available at https://www.sdir.no/en/shipping/registration-of-commercial-vessels-in-nisnor/new-registration-nis/trade-areas-nis-ships/#Section_1_Application. (Accessed 13 February 2018).
[33] EU Fifth Report (note 21), 23.
[34] Trade Areas (note 32).
[35] Ibid.

registers.[36] Norway issues licences to allow NIS tonnage to work on its coast to further national interests. However, Norway's fleet registered outside the NOR and the NIS accounts for a higher number of vessels owned by Norwegians. Nevertheless, its domestic-flagged fleet represents about 46% of its total fleet, which indicates the strength of the attractiveness of its dual system of ship registration.

5.4.2.2 Denmark

The Danish market is generally liberal as a result of its affiliation to the EU and the World Trade Organisation. There are no cabotage restrictions on Denmark's coast, although some restrictions exist with regard to ownership under the flag. Its coastal trade has shown moderate growth. Denmark recorded annual coastal cargo of about 14.8 million tons in 2010.[37] Its coastal trade has been open to any vessel regardless of its flag. The country's domestic trade policy approach seems to be provided largely through a selection of bilateral agreements that give chosen countries a right to access its markets.[38] For example, Denmark concluded a bilateral agreement with China as far back as 1974. The agreement was updated in the year 2000 to bring it in line with modern shipping standards. Denmark was also one of the EU countries that were involved when China entered into an agreement with EU members.[39] Foreign nationals are allowed to register their vessels in the Danish domestic register provided that foreign seafarers receive terms equivalent to their Danish counterparts.[40]

Denmark operates a dual system of ship registration through the Denmark International Ship Register (DIS), which is structurally similar to the NIS.

5.4.3 Third category

Cabotage policies of all the countries in this category do not allow free foreign coastal trading. With the exception of Indonesia, all these countries are South Africa's close trading partners in the BRICS bloc of nations. Brazil, for instance, gives coastal trade preferences to Brazilian nationally-flagged vessels over FOCs by virtue of Law

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[36] UNCTAD: Review 2016 reported numbers of Norwegian beneficially owned vessels to be at 858 and 996 for domestic and FOC registration respectively.
[37] Ibid.
[38] International Relations (2015) European Commission/Danish Maritime Authority, available at http://www.dma.dk/themes/jointheDanishmerchantfleet/Sider/Internationalrelations.aspx. (Accessed 13 February 2018).
[39] Ibid.
[40] Ibid.

9.432/97. Russia places the same restrictions with respect to its coast under Russian Government Resolution No. 404 of 24 May 2001. Foreign vessels may be engaged on the Russian or Brazilian coast only as an exception, to cater for the lack of appropriate tonnage or to provide for emergency towage services in the absence of domestic vessels.

5.4.3.1 India

Sections 406 and 407 of the Merchant Shipping Act, 1958 regulate Indian cabotage. India handled about 117.78 million metric tons of coastal cargo for the 2016 financial year.[41] Only Indian-flagged vessels or vessels chartered by Indian nationals under licence issued by the Director General of Shipping can participate in coastal activities. Standard exceptions apply. Foreign vessels will be permitted to carry cargo between two Indian ports in the absence of suitable Indian tonnage, or under licence. The Director General may grant a general licence, which allows the foreign vessel to trade only in some Indian ports and not in others. Alternatively, the authority may issue a licence that grants permission to trade over a specific period of time or on a voyage basis. The licence may have other applicable conditions. The Director General's powers are such that licensing is flexible enough to allow this office a discretion to engage foreign vessels whenever it is deemed appropriate to do so. The wide powers that the Director General possesses have been applied to relax cabotage restrictions for a variety of reasons. For instance, cabotage has been recently lifted for a period, in one event, in order to attract container transshipment volumes.[42] In another involving vehicle transportation, the motivation was to reduce road and rail congestion through the utilisation of foreign-flagged RORO vessels, which diverted vehicular cargo volumes to coastal shipping.[43]

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[41] Coastal Cargo Handled in India 2018, by Major Port (2018) Statista, available at https://www.statista.com/statistics/693091/coastal-cargo-volume-handled-by-major-port-india/. (Accessed 21 February 2018).

[42] The motivation for uplifting cabotage was to reduce operating times and therefore make it more attractive for mainline foreign vessels used in transshipment of containers destined for or coming from India at neighbouring Sri Lanka, Malaysia and Singapore. See India Relaxes Cabotage Protections for Container Shipping (11 March 2016), available at https://www.joc.com/port-news/asian-ports/india-relaxes-cabotage-protections-container-shipping_20160311.html. (Accessed 13 February 2018).

[43] India Loosens Cabotage Laws (2015), available at https://www.maritime-executive.com/article/india-loosens-cabotage-laws#gs.ss7w=DM. (Accessed 15 February 2018).

5.4.3.2 Indonesia

Cabotage was reintroduced in Indonesia through Maritime Law No. 17 of 2008. Indonesian coastal trade accounts for about 7% of its total national freight and passenger trade.[44] Coastal trade is open only to Indonesian Sea Carriage Companies, which must be established and licensed as such. The vessels of these companies must be owned (majority shareholding of at least 51%) and manned by Indonesian nationals.[45] Indonesia also operates on a licence-based system that is controlled by the Minister of Transport on terms similar to those existing in other jurisdictions. The Minister issues what it calls a Shipping Company Business Licence, which must comply with certain rules.[46] The issuing of licences is an indication that Indonesia does not have a restrictive cabotage policy. Where deemed expedient, the Indonesian Ministry of Transport (MOT) may issue a licence as provided for in the MOT Regulations allowing foreign vessels to participate in coastal trading in respect of a particular sector for a specified period.[47] In the event that such time extension expires before the objective has been achieved for the licence, the MOT can reissue another MOT Regulation to extend the time, or add to or vary the initial regulation.[48] Therefore, in Indonesia, a foreign ship-owning company in which Indonesian nationals have no shares and whose vessels are crewed only by foreign nationals can continue to operate on the Indonesian coast for an indefinite period until domestic capacity has been developed.

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[44] The Report: Indonesia 2014 (nd) Oxford Business Group 273, available at https://oxfordbusinessgroup.com/indonesia-2014. (Accessed 22 November 2019).

[45] Cabotage and its Impact in India (4 March 2015), available at https://www.clydeco.com/insight/article/cabotage-and-its-impact-in-indonesia. (Accessed 15 February 2018).

[46] Ibid.

[47] The Ministry issued Regulation No 48 of 2011 to deal with tonnage shortages in the oil and gas sectors. Gerald Yee of Clyde & Co, Indonesia, argues that this type of licencing strategy allows for relaxation of cabotage conditions in cases of domestic supply shortages and restrictive application once domestic capabilities have recovered. See 'Cabotage and its Impact in Indonesia' available at Clyde & Co.com (note 45).

[48] For instance, MOT Regulation Number PM 100 of Year 2014 has seen several amendments: MOT Regulation Number PM 79 Year 2014; MOT Regulation Number PM 10 Year 2015 and MOT Regulation Number PM 200 Year 2015. Currently MOT Regulation Number PM 100 Year 2016 is in place. See SSEK Legal Consultants Indonesia Extends Cabotage Exemption, available at https://www.lexology.com/library/detail.aspx?g=a8172147-3ccf-4f59-bc16-46df69aa69ec. (Accessed 22 November 2019).

Indonesian and Indian cabotage systems represent a fairly liberal form of cabotage, which appears on the face of it to be quite restrictive, while in practice it is relatively lax.

5.4.4 Fourth category

This category consists of developed countries who are OECD members and who are not on the list of the leading 35 nations. Iceland and Ireland have no restrictions on their coast, whereas Finland, Sweden and Spain prohibit coastal operations by foreign vessels.[49] Iceland and Ireland have very low levels of coastal trade volumes. Irish volumes have reached a million tons only twice in ten years between 2001 and 2010, while Icelandic volumes have never reached a million. Unsurprisingly, Spain's coastal volumes seem comparatively high given the country's coastal topography. Its annual coastal volumes were about 80.7 million tons in 2010.[50] Coastal volumes for Finland and Sweden appear in the discussions below.

5.4.4.1 Finland

As a member state of the EU, Finland is regionally subject to EU Regulation No 3577/92. Domestically, Finnish cabotage is regulated in terms of Law of 15.02.199/342 read with the Law of 19.05.2000/440. The former governs transport operations under licence, while the latter deals with international combined transport. Finland's coastal volume share is at an average of about six million tons per annum.[51] Finnish cabotage restrictions do not apply to EU member states. All other coastal operations are reserved for vessels under the domestic flag or, in certain circumstances, under the Finnish second registry known as the National Flag List of Cargo Vessels in International Trade.[52] Finland's domestic flag requires 60% shareholding of ship ownership to be in Finnish hands.[53] The innovation is that Finnish cabotage imposes no restrictions on a vessel registered outside Finland and outside the EU, provided such vessel was 1) built

[49] Hodgson & Brooks (note 22).
[50] Coastal Shipping Transport Volume in Spain 2006-2015 (2015), available at https://www.statista.com/statistics/436974/coastal-shipping-transport-volume-in-million-tonne-km-in-spain/. (Accessed 25 July 2019).
[51] EU Fifth Report (note 21), 22.04.14, 8.
[52] Hodgson & Brooks (note 22).
[53] Survey on Cabotage and on the Various Elements Needed to Fix Prices and National Terms Governing the Goods Transport Contract (2007), available at https://www.iru.org/sites/default/files/2017-01/cabotage-survey-Finland-en.pdf. (Accessed 22 November 2019).

in Finland and was immediately registered in that register; 2) such second register is not an FOC; and 3) strong reasons can been shown that such registration will promote ship building and job creation in Finland. Permission to register in the second register is limited to the period of the charter, for instance.[54]

5.4.4.2 Sweden

Swedish cabotage is perhaps better explained from the perspective of the rules of the EU. Sweden regulates cabotage under the provisions of Council Regulation No 3118/93 read with Regulation No 3315/94 of the EEA. The country's coastal trade averages about 11 million tonnes per annum.[55] Only Swedish vessels and EU member vessels can load and discharge cargo between Swedish ports. Foreign flags are completely excluded from participation. As a means of ensuring minimum operational disruptions, Swedish authorities reserve themselves the right to waive cabotage restrictions if suitable tonnage is not available domestically and cannot be sourced from other EU members. However, there are Swedish restrictions to which waivers do not apply. Swedish authorities require a Swedish master for every vessel that operates on the coast, and at least 50% of the crew must be Swedish or EU nationals for vessels that are registered on its second register.[56] Therefore, vessels on the Swedish second register are obliged to adhere to these manning requirements as a prerequisite for cabotage participation. This seems to indicate that Swedish crew rights enjoy particular priority in the country's cabotage policy.

5.4.5 Fifth category

This category consists of the Community of Andean Nations (CAN). The CAN countries are Bolivia, Colombia, Ecuador, Peru and Venezuela. Venezuela and Peru will be used as examples of domestic cabotage. CAN countries possess sizeable inter-trade activity. In 2000 CAN was already generating about 7.5 million tons, 55% of which was coastal trade, a tenth of which was carried through inland waters.[57]

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[54] https://www.traficom.fi/en/transport/maritime/ship-registration. (Accessed 16 February 2018).
[55] EU Fifth Report (note 21), 22.04.14.
[56] Hodgson & Brooks (note 22) 55.
[57] Ibid. 6.

Individual Latin American countries, like most developing countries, reserved cargo and restricted foreign flag participation to foster their merchant marines.[58] These mechanisms proved a success, in Chile and Brazil, for instance, where cargo reservations were followed by massive shipbuilding in those countries. The increase in national builds was also buoyed by the UNCTAD Liner Code of Conduct, which advocated the 40:40:20 Rule.[59] However, cargo reservation penalised the consumer, who had to pay higher freights than would have been the case in an open market.[60]

CAN sought to avoid the surge in cost. It therefore established a body through which it would retain a measure of flexibility in applying its exclusionary rules. CAN members bound themselves to the monitoring and compliance body, the CAATA (Comité Andino de Autoridades de Transporte Acuático – also known as the Andean Committee of Aquatic Transport Authorities). CAATA obliges members to liberalise their trades inter se in concert to ensure competition. CAATA Decision 288 prescribes that cargo originating from the sub-region may be carried only by vessels owned, chartered or operated by companies belonging to its member states.[61] It does not prescribe how individual members should conduct cabotage with respect to third party states. However, Decision 314 obliges member states to develop policies to promote sub-regional fleets through practical measures that involve eliminating bureaucracy in ship-registration processes, the provision of long-term financial instruments for the acquisition of suitable vessels, establishing liberal legal frameworks, shipping-friendly labour and tax requirements, and encouragement of foreign investments.[62]

5.4.5.1 Venezuela

In Venezuela foreign vessels not registered under the domestic ship registry are not allowed participation in coastal trade except in transshipments and in the repositioning of their own empty coastal containers. Two pieces of legislation govern coastal shipping in Venezuela: The Law for Reactivation of the National Merchant Marine and the Law for the Protection and Development of the Merchant Marine. These laws allow foreigners 100% ownership of a Venezuelan vessel subject only to the registration of the ship-owning company in Venezuela. These foreign vessels are also allowed to fly

[58] Sabatino Pizzolante (note 16).
[59] O'Keefe (note 16).
[60] Sabatino Pizzolante (note 16).
[61] Ibid. 7.
[62] Ibid.

the national flag with 100% foreign ownership under bareboat charter or lease.[63] Therefore, it seems that Venezuela offers some of the most liberal avenues to foreign interests who want to participate in cabotage trades, which incidentally include coastal cargo otherwise reserved for CAN members. Furthermore, vessels involved in cabotage trades are entitled to a 50% rebate in port dues and are exonerated from VAT and other taxes. However, despite an overtly foreign-friendly cabotage regime, vessel numbers on the Venezuelan national ship register remain low.[64]

Commenting on Venezuela, Pizzolante[65] argues that legislation intended to stimulate the merchant marine requires government to complement it with a set of clear policies; specific objectives; an update of related statutes (particularly employment legislation); the certainty of staple cargo; and, above all, ensuring a stable political environment.[66]

5.4.5.2 Peru

Peruvian cabotage is regulated under the National Merchant Navy Marine Reactivation and Promotion Law No. 28583 of 22 July 2005. In Peru, maritime transport may be conducted only by nationals or by nationally-registered companies. The Peruvian company must have its principal domicile and "real and effective headquarters" in Peru.[67] The chairman of the board, the majority of directors and the general manager must be nationals and must be residents of Peru. The captain and 80% of the crew on board a Peruvian-flagged vessel must be nationals. Nationals may use foreign-flagged vessels for only six months. Manning restrictions extend even to fishing vessels, which must be manned by at least 30% of nationals.[68]

5.5 SUMMARY OBSERVATIONS

The proliferation of second registers has provided many countries with a method of developing their national merchant fleets. The mid-1980s saw the establishment of the Norwegian NIS, German GIS, Denmark DIS and the Italian IIS. France has its second

[63] Ibid. 9.
[64] Ibid. 14.
[65] Sabatino Pizzolante (note 16).
[66] Ibid. 15.
[67] OECD Investment Policy Reviews: Peru (2008), available at https://epdf.pub/oecd-investment-policy-reviews-peru.html. (Accessed 22 November 2019).
[68] Ibid.

register in Kerguelen, Portugal in Madeira, the Netherlands in the Dutch Antilles, and Spain in the Canary Islands. The UK has quite a few locations for its second registries. They are in Bermuda, the Cayman Islands, Gibraltar and the Isle of Man, and in other places.

The relevance of these second registers is that they provide an avenue for national vessels registered outside the national register to participate in cabotage trades of their countries despite the fact that they do not meet national imperatives governing their (first) national register. Typical examples of countries [69] that allow participation of vessels in the second register in coastal trades are Australia, Canada, China, Finland, France, Germany, Greece, Italy, Japan, New Zealand, Norway, Portugal, Spain and Sweden.[70] Notably Greece, China, Japan and Germany lead the top 35 table (see Figure 5.1 above).

On the basis of the above overview it appears that globally, the form of cabotage and the level of its strictness largely depends on each country's capacity (including the country's economic strength) and what each deems beneficial to its citizens relative to its coastal resources. Depending on each country's deemed priorities, its coastal resources are then directed towards shipbuilding, ownership and control, ship management, ship operations, employment, skills development and the retention of such skills. The importance of these factors in each country determines the degree of austerity of its cabotage which in turn influences how that country shapes its domestic register. There seems to be no one-size-fits-all approach.

5.6 CONCLUSION

The chapter set out to identify forms of cabotage practices. Two forms or types of cabotage were identified as the norm worldwide. These are restrictive and liberal cabotage. Open cabotage is not considered a form of cabotage. It is viewed as a fortuitous "form" of cabotage that often arises by virtue of a jurisdiction's acquiescence to foreign coastal trade involvement rather than a deliberate policy position. In this context South Africa is considered to have no cabotage.

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[69] Countries that do not practise cabotage but that allow participation in coastal trades on this basis have not been included.
[70] KX Li & J Wonham 'Registration of Vessels – New Developments in Ship Registration' (1999) 14(1) The International Journal of Marine and Coastal Law 137–154 137.

The chapter described how each form of cabotage operates. In particular, the chapter explained instances of restrictive cabotage practices and their degree of rigidity; and gave examples of countries where they are found. Liberal cabotage practices and mechanisms for their application were also explained. The emphasis was on the fact that liberal cabotage practices depend on waivers implemented under specific conditions usually predicated by tonnage demand and supply cycles of each coastal state. The chapter gave some focus to the EU concept of regional cabotage in light of the fact that the CMTP envisages SADC cabotage.

The chapter then evaluated a broad sample of countries that practise cabotage and assessed the influences of the degree of the strictness of its cabotage principles (or absence thereof). An attempt was then made to relate the result to each jurisdiction's cabotage practice in general and particularly its ship registration arrangements. Countries were presented in five categories. The two categories consist of countries that own the highest volumes of deadweight capacity in the world. These are mostly 'first world' countries. The third category comprises South Africa's chief trading partners in the BRICS bloc and Indonesia. In order to make the sample more representative of the world's total deadweight tonnage, countries that fall outside the list of the leading 35 nations were also discussed. These countries mostly appear in categories Four and Five.

A summary was then made which seems to indicate that the majority of the top 35 coastal jurisdictions largely own tonnage under two forms of fleet registries: under the domestic flag or under the second register. The second register often offers terms which are relatively similar to FOC terms of operation and are better in comparison to those offered under domestic flag registers. Therefore, the degree to which each jurisdiction applies cabotage restrictions seems to determine which of the two forms vessel operators prefer.

Consequently, second registries are often used to lure domestic owners away from traditional FOC registries over which the country has no influence. The second register, which the country controls, is then positioned as a means of retaining the fleet under the country's authority. Once again, depending on the degree of strict cabotage applied, vessels in second registries are eligible to participate in cabotage trades as these are often typically owned by nationals, manned by local crews, often built locally and in general operated in a manner that promotes the same national interests as vessels under the so-called “first register”. However, to distinguish between vessels in the first and second registers, it would appear that the former are generally given preference in cabotage trades, while the latter are usually utilised to supplement tonnage shortages and therefore participate in cabotage trades provided certain conditions have been met.

To conclude, there is no debate that South Africa is short on tonnage and related resources for cabotage implementation. Building the domestic fleet on the basis of a second register is not part of the policy. The country does not seem to have the potential for a second register in any event. The only practical option for South Africa remains in substantial acquisitions of tonnage, failing which the country will continue to depend on the involvement of foreign flags for its coastal operation well into the foreseeable future. Since acquisition of suitable tonnage cannot be achieved overnight, pragmatism calls for the operation of coastal trades using foreign flags while building the nationally-registered merchant fleet. Therefore, the scenario points towards the adoption of liberal cabotage because restrictive cabotage severely limits engagement of foreign-flagged vessels. With regard to regional cabotage, the perspective of the CMTP is that SADC cabotage will be born out of the South African fleet. On that premise, the only conclusion is that SADC cabotage cannot be realistically pursued until a South African domestic fleet has been established. Without a domestic fleet, it may simply be too early to consider regional cabotage.

Chapters 6 and 7 will look respectively at restrictive and liberal cabotage. Each practice has been structured on the basis of the individual country’s specific priorities. The aim of the exercise will be to glean the benefits and challenges experienced in the particular jurisdictions. Nigeria and the United States will serve as examples of restrictive cabotage, while Australia and New Zealand will exemplify liberal cabotage.

CHAPTER 6:
STRICT CABOTAGE PRACTICES:
NIGERIA AND THE UNITED STATES OF AMERICA

The preceding chapter dealt with an overview of global cabotage practices in various jurisdictions. It gave the reader the length and breadth of the elements of cabotage and the diverse approaches to its practice as well as the basis on which various individual jurisdictions or blocs of countries implement it in its strict or liberal form. This chapter provides specific accounts of the application of strict cabotage, which is the less common of the two forms of cabotage. Instances of liberal cabotage will be covered in the next chapter.

CLASSIC FEATURES OF STRICT CABOTAGE

Strict cabotage typically translates to policies that:

1. Ordinarily prohibit foreign participation. Where foreign participation is allowed, foreign shares in vessel-owning companies involved in cabotage are usually limited to the maximum of 25%. Therefore, shares held in respect of each cabotage vessel must show a corresponding proportion of at least 75% in favour of local nationals (as there is sometimes a requirement that controlling shareholders must be resident nationals).
2. Cabotage vessels must fly the domestic flag and must engage a minimum of 75% of national crews on board at any given time.
3. Cabotage vessels must be built and repaired locally with locally-sourced spares. Usually there are no exceptions in this regard. If exceptions were to apply a minimum of 75% of local content would be required.

These features are customary in strict cabotage jurisdictions. They may, however, be applied in varying degrees. It is possible to find a different weighting of each of these characteristics, which makes levels of restriction differ somewhat from one strict cabotage jurisdiction to another. For example, among the well-known protagonists of strict cabotage, which include the United States of America, Japan, Nigeria and Peru, the United States would perhaps reflect a higher degree of rigidity and restrictiveness, followed by Japan and Peru. Nigeria may arguably be as strict as the United States. However, its cabotage laws have yet to reach full application. Therefore, Nigeria may be rated among the most stringent cabotage practitioners based on its policy documents, but the manner in which cabotage is applied in Nigeria renders it comparatively far less strict in practice than the other jurisdictions mentioned, as will be seen later in the discussion below.

The chapter uses Nigeria and the United States as examples for strict cabotage. It also provides a background that deals with the coastal shipping frameworks of these two countries, to provide proper context. The reasons for choosing the United States and Nigeria as examples of strict cabotage were stated in the first chapter. However, it may be worthwhile reiterating those reasons here.

Nigeria has a clearly articulated legislative position on cabotage. The country is probably Africa's strongest cabotage protagonist. Like South Africa, Nigeria has a long history of European shipping involvement and foreign coastal domination. Therefore Nigeria's drive for coastal economic reform, which focuses on increased participation of indigenous people, resonates with the aspirations expressed in the South African maritime policy. Moreover, Nigeria and South Africa are both obliged to implement cabotage nationally, regionally and continentally in terms of Article 15 of the Revised African Union Transport Charter.[1] Nigeria is therefore instructive for South Africa since it reached the first milestone of the Charter in 2003 when it enacted national cabotage legislation, as will be seen below.

Any meaningful and systematic treatment of cabotage inevitably involves a discussion of United States coastal shipping, given that the country is probably the earliest jurisdiction to codify cabotage into law and remains among the strictest exemplars of cabotage in existence.[2] Over the years the United States government has defended and continues to defend cabotage vigorously as a fundamental policy, despite a barrage of criticism levelled against it for not changing its stance.

[1] Article 15(1) of the Revised African Union Transport Charter (Charter) requires African States to promote Trans-African Cabotage at national, regional and continental levels. Article 15(2) encourages the establishment of shipping lines to carry intra-African trade.
[2] T Grennes An Economic Analysis of the Jones Act (2017) Mercatus Research, Mercatus Center Arlington, VA George Mason University 39. Grennes says the United States is regarded as possessing probably the strictest cabotage regime, followed by Japan and China.

6.1 NIGERIA

Nigeria possesses a coastline of about 800 km and about 3 000 km of inland waterways.[3] The major part of Nigerian coastal trade consists of oil and gas activity, which constitutes about 91% of the total coastal trade.[4] The remainder combines passenger and breakbulk cargo movements.

6.1.1 Period from early 1960s to early 1990s

A brief outline of Nigeria's recent shipping history is necessary to understand its current framework. Like other African states, Nigeria's shipping context is embedded in its colonial past. Nigeria became a British protectorate in 1901 at the pinnacle of European expansion into Africa. The country gained independence about half a century later. In 1962 the newly formed legislature of the Federation of Nigeria enacted the Merchant Shipping Act,[5] which consolidated shipping practice in Nigeria in a manner that was not designed to benefit Nigerian indigenous people. The MSA dictated shipping business in Nigeria for over four decades. It covered a variety of Nigerian shipping issues. However, only three are covered in this discussion. These are cabotage, ship ownership and training and crewing.

With regard to the first issue, the MSA introduced codified exclusivity rules for trade within Nigerian waters. Only a Nigerian ship, a Commonwealth ship[6] or a certified ship could trade in or from Nigerian waters.[7] The restriction was not called cabotage. However, the MSA clearly required, as a prerequisite to trading on the coast, that a foreign vessel (other than a Nigerian-registered vessel or a Commonwealth vessel) had to obtain a licence to do so.

The exclusive right to trade in Nigerian waters was closely connected to the ship's national identity and was vigorously protected. Authorities were entitled to call for proof if they had "reason to believe that there [was] some doubt"[8] regarding whether in fact the Nigerian-registered ship validly qualified to be registered in Nigeria. If the

[3] O.A. Savage-Oyekunle 'Effect of the Cabotage Act 2003 on Nigerian Maritime Industry', available at http://www.lasu.edu.ng/publications/law/oluremi_savage-oyekunle_bk_2.pdf. (Accessed 17 May 2018).
[4] Ibid.
[5] Merchant Shipping Act 1962 No. 30 ("MSA").
[6] A ship owned by a Commonwealth citizen or that is registered in a Commonwealth state.
[7] Section 5(1)*(a)* to *(c)* of Chapter 2 of the Act.
[8] Section 306(3).

master of such ship failed to produce proof within 30 days of the demand to do so, the ship was liable to forfeiture.[9] Trade restrictions on the Nigerian coast were therefore classic cabotage practice.

However, there were no requirements for vessels to be built in Nigeria, manned or owned by Nigerian citizens; nor was there any expectation regarding control or ship ownership (through majority board membership of the ship owning company or requiring establishment of company offices in Nigeria). However, contrary to practices observed in traditional cabotage trades, business related to the ship (agency, commercialisation, manning or any other activity ordinarily associated with the ship's flag) was located outside of Nigeria, as will be seen below.

The second issue concerned ownership. A ship could not be registered in Nigeria unless owned wholly by "persons qualified to own registered Nigerian ships",[10] namely Nigerians as Commonwealth citizens and foreign citizens and their corporate entities established outside Nigeria, with headquarters typically in Europe.[11] Owners of these vessels had a choice of registering such vessels either in Nigeria or in a Commonwealth state. The choice the owner made did not affect the rights of the vessel to operate in Nigerian cabotage trades. The ship enjoyed dual registration provided the 'sharing' Commonwealth state recognised dual registration. Otherwise the ship would be only a Nigerian vessel.

Section 307 of the MSA required registration of a vessel "if it is owned by Nigerians as citizens or as body corporates", provided a Nigerian citizen or company already owned such vessel at the time the section came into force.[12] There was minimal indigenous Nigerian shipping participation under this arrangement. The classic examples were the shipping interests of Patrick Osoba (who had shares in the Finnish-controlled and Finnish-registered 'Nigeria Lines' in partnership with Nordstrom and

[9] Section 307(4).
[10] Section 306(1): "… [A] ship shall not be registered in Nigeria under this Act unless she is owned wholly by persons of the following descriptions (in this Act referred to as 'persons qualified to own a registered Nigerian ship')–
- *(a)* Commonwealth citizens
- *(b)* Bodies corporate established under and subject to, the law of a Commonwealth country and having their principal place of business in a Commonwealth country."

[11] Section 306(1)*(a)* and *(b)* (note 10).
[12] Section 307(5).

Co) and the Nigerian government's own line, The Nigerian National Shipping Line Ltd (NNSL).

The company started as a joint venture of three parties. The government, on the one side, held a 51% share, while Elder Dempster and Palm Lines held 33% and 16% of the shares, respectively.[13] The NNSL had offices in Nigeria and Liverpool. It provided cargo services between the UK, Continent, Mediterranean and West Africa.[14] The company's marine superintendent and deputy superintendent and engineer[15] appear to have been the only foreigners. Otherwise, the board of directors, including the chairman,[16] were all Nigerians by virtue of the fact that this was a state-owned entity.

Apart from government officials, indigenous Nigerian citizens traditionally did not enjoy any real or meaningful cabotage participation in cabotage trade or shipping through vessel ownership, trade, ship building or through any activities that the coastal state normally provides. Therefore, with the exception of the NNSL, which became the singular exception, foreign interests dominated Nigerian cabotage trades.

The third issue that the MSA dealt with related to restrictions against Nigerian participation in crewing and ancillary services. A prescribed system existed, governing who might be trained and who might be employed or otherwise engaged as a seaman in Nigerian waters.[17] Nigeria did not have an open employment market where a seafarer's seafaring competence determined the suitability of his employability. All seamen were carefully 'screened' by a statutory office, which placed requirements that met state imperatives.[18] Ironically, under the MSA, Nigerian citizens were not targets for apprenticeship or engagement on Nigerian-registered ships, in much the same way as Nigerian ship ownership was not intended for national owners. The design of the

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[13] G.B. Bello-Olowookere 'The Effects of Cabotage Regime on Indigenous Shipping in Nigeria' 2011. Dissertation, World Maritime University.

[14] International Shipping and Shipbuilding Directory, Benn Brothers (Marine Publications) Limited, London 1969.

[15] Capt. J. Farrell and W.M. Potts, See International Shipping and Shipbuilding Directory (note 14) 230.

[16] Ibid. 230. Directors of the board were N.O. Oyesiku,(General Manager), Lt. Col. V.L. Oduwaiye, G.N.O. Sefia, A.S. Alanamu, J.A. Adeyeye, P.O. Ahimie; and the chairman was Adekunle Ojora, who was at the helm until 1973.

[17] Section 17 made provisions for apprenticeship of boys by implication excluding girls while section 20 established the Mercantile Marine Office (and its tentacles). Subsection (1) made these locations where "all the business within Nigeria connected with the engagement and discharge in Nigeria of seamen" was conducted.

[18] Superintendents were established and operated through the administratively intensive Mercantile Marine Office.

MSA permitted Commonwealth countries control over Nigerian cabotage trades through businesses that were registered outside Nigeria.

In 1978 attempts were made to address some of the issues raised above through the draft amendments to the MSA. However, the proposed amendments never came into force.[19] Four years later another significant amendment was made through the National Shipping Policy, completed in 1982. Its operation relied on the UNCTAD Code of Conduct, which was not ratified at the time. Therefore the statutory regime set by the MSA remained the order of Nigerian shipping business, despite various attempts to change it, until the late-1980s, when the Federal Military Government promulgated the National Shipping Policy Decree 10 in 1987 after ratification of the UNCTAD Code. The policy also established the National Maritime Authority (the NMA), which was the arm for the implementation of the new policy.[20]

The period from the 1960s to the establishment of the NMA influenced the current Nigerian shipping framework, particularly from a political perspective. It meant policy makers would place significant emphasis on indigenous Nigerian participation in the construction of future coastal shipping frameworks. The consequence of this approach was the deliberate ousting of any considerations for foreign participation in coastal and inland water trades. Observations made from the time of preparation of the Nigerian cabotage framework, particularly from the early 1990s to 2003, reflect the attitudes referred to above. They are invaluable to the South African policy maker for reasons that will become more apparent below.

6.1.2 Period from 1993 to 2003

In 1993, recognising the need for a functional fleet for cabotage, the NMA established the Ship Acquisition and Ship Building Fund (SASBF), which was established to assist Nigerian citizens in acquiring ships as a means of expanding the Nigerian fleet.[21] The recipients were nine indigenous private Nigerian shipping firms and two government-owned enterprises. These entities received about US$92 million as loans. However, the SASBF was suspended two years later as a result of mismanagement and inappropriate

[19] L.N. Mbanefo Nigerian Shipping Laws (1993).
[20] Bello-Olowookere (note 13).
[21] Ibid.

spending and because some firms were not able to meet repayment terms.[22] After that, from 1998 onwards, the NMA focused its efforts on the Cargo Sharing Policy. The policy dealt with international trade therefore will not be discussed in any detail here. In any event, it was abandoned in the year 2000 since it did not contribute to more Nigerian-owned tonnage.[23] The collapse of the two mechanisms meant that Nigeria had not been successful in finding a stimulus to revive its coastal fleet. Therefore, the Nigerian government sought to introduce what it perceived as a more robust approach to dealing with foreign domination of its coastal trades. The Coastal and Inland Shipping (Cabotage) Act No. 5 of 2003 is set against this background.

6.1.3 The Coastal and Inland Shipping (Cabotage) Act ("the Cabotage Act")

The Coastal and Inland Shipping (Cabotage) Act No. 5 of 2003, commonly referred to as the Cabotage Act, regulates modern coastal shipping and provides the authoritative shipping framework for Nigeria. It repealed the MSA and its subsequent amendments[24] and subordinated existing laws dealing with shipping to provide certainty in instances of conflict of laws.[25] It is expressed in definitive terms and emphasises the legislature's intention to indigenise shipping economic activities.[26] This will be evident below in the discussion relating to the prerequisite for cabotage entry, application of waivers and funding arrangements.

However, before delving into such discussion, it is important to note that the Cabotage Act prescribes clear lines of enforcement [27] and powers that allow acting on "reasonable suspicion" to prevent statutory breaches. These powers extend to the

[22] Ibid.
[23] Ibid.
[24] Section 53 provides that "[a]ny provisions of any existing laws with respect to the registration of vessels, ownership, size and type of vessel, participation in Nigerian domestic coastal and inland waters trade in whatever forms that is inconsistent with the provisions of this act is repealed in so far as it affects matters under this Act and in particular as set out in the schedule to this Act".
[25] For instance, section 2(1), among other subordinate clauses, recognises the provisions of the MSA (see note 5) "… to the extent that the said Merchant Shipping Act is not inconsistent with the provisions of this Act".
[26] See also O.A. Savage-Oyekunle Rethinking the Administration of Justice (2011), available at http://www.lasu.edu.ng/publications/law/oluremi_savage-oyekunle_bk_2.pdf. (Accessed 17 May 2018).
[27] Officers from the enforcement unit established in terms of section 30(1).

boarding and detention of vessels, confiscation and removal of items and crew without a warrant if it is believed any provision of the Cabotage Act has been contravened.[28]

6.1.3.1 Prerequisites for coastal participation

Section 3 of the Cabotage Act deals specifically with vessel participation in domestic coastal trades.[29] The section allows coastal participation to vessels that meet the four-tier criteria for strict cabotage. These relate to domestic flag registration, total ownership by citizens, locally-built vessels and complete restriction of foreign crews from domestic vessels.

Only locally-built, domestically-registered vessels[30] that are exclusively owned and manned by Nigerian nationals have access to Nigerian coastal trades. Only one exception exists for foreign vessel participation – the unavailability of suitable Nigerian tonnage to provide the required service.

Section 23 imposes a strict requirement of 60% or more unencumbered shares for any vessel flying the Nigerian flag. A stricter requirement exists for coastal participation. It is therefore important to draw a distinction between ownership percentages required for coastal participation (100%) and the domestic registration percentage (60%). The difference in these requirements suggests outcomes that the legislator may not have intended.

In light of the foregoing, the Cabotage Act also seeks to emphasise the importance of the oil and gas and related coastal shipping activities. Section 5, particularly, excludes participation in this trade of any person or entity other than a Nigerian or a company

[28] Section 31 states that "[w]here an enforcement officer believes on reasonable grounds that a vessel has contravened the provisions of this Act, the enforcement officer may stop and board the vessel, detain the vessel or its officers or both and, with a warrant, search the vessel and seize anything found in or on the vessel that the enforcement officer, believes on reasonable grounds shall afford evidence with respect to any contravention of this Act".

[29] Section 3 provides that "[a] vessel other than a vessel wholly owned and manned by a Nigerian citizen, built and registered in Nigeria shall not engage in the domestic coastal carriage of cargo and passengers within the coastal territorial inland waters, or any point within the waters of the exclusive economic zone of Nigeria".

[30] This includes a rebuilt vessel. In other words, a vessel that has to undergo significant refurbishments before trading in Nigeria will have to be refurbished in Nigeria unless the work is negligible. Otherwise it will not qualify for entry as a "vessel engaged in cabotage" in terms of section 22 read with section 29. See also section 7(1) which provides: "In the case of rebuilding a vessel, such vessel, shall be eligible for cabotage services if the entire building including the construction of any major components of the hull or superstructure of the vessel is effected in Nigeria."

fully owned by Nigerian nationals.[31] Related coastal and port shipping services as well as engagement of any vessel regardless of type or size in coastal shipping activities is specifically prohibited unless performed by Nigerian nationals or by a company wholly owned by nationals. Therefore towage, dredging, pilotage and any other similar services are reserved exclusively for Nigerians.[32]

However, the aforementioned requirements mean that a vessel built and registered in Nigeria and fully manned by Nigerians may not participate in the oil and gas trades if 1% of such vessel is owned by a person other than a Nigerian citizen. The only avenue would be for Nigerians holding 99% of the shares to show that they are providing "unavailable tonnage in demand". This approach may raise challenges if vessel finance arrangements require security for payment from Nigerian owners who cannot meet finance conditions without some assistance from outside the country. This and other related commercial issues provide context for the inclusion of trade-sensitive provisions in the form of waivers crafted as part of cabotage legislation, as will be seen in the following discussion.

6.1.3.2 Waivers

The waiver system considers practicalities in the provision of shipping services and accommodates certain business imperatives to ensure the provision of uninterrupted coastal services. Waivers are triggered especially where appropriate tonnage for a particular cargo is scarce or where there is an absence of suitably qualified personnel that meet strict cabotage requirements described above. The blueprint for waivers is set out in Parts III and IV of the Cabotage Act (sections 9 to 21). In this regard legislation provides room for some flexibility in the application of cabotage rules in order to prioritise trade activity without derogating from the provisions of section 3 of the Cabotage Act.

[31] Section 5 provides that "[a] vessel, tug or barge of whatever type other than a vessel, tug and barge whose beneficial ownership resides wholly in a Nigerian citizen, shall not engage in the carriage of materials or supply services to and from oil rig, platforms and installations whether offshore or onshore or within any ports or points in Nigerian waters".

[32] In this regard, see sections 4 and 5 of the Act. In case of any ambiguity, section 6 states, rather superfluously, that "[a] vessel of whatever type or size shall not engage in domestic trading in the inland waters of Nigeria except as a vessel that is wholly owned by Nigerian citizens".

In granting the waiver, the Minister[33] may suspend strict requirements but may do so only in the manner prescribed. Foreign participation may be permitted on a joint venture basis.[34] However, the majority of the shares in the joint venture must be in favour of the Nigerian component share. This is the only instance in which 'dilution' may be allowed. In all other instances, Nigerian nationals must exclusively own Nigerian shares in ship-owning entities.

Section 15 of the Act provides another avenue for foreign participation through the grant of licences. However, the licence application must emanate from a person who is resident in Nigeria and must be made to the Minister on behalf of the would-be foreign participant. There is no direct access for the foreigner to make such application. A licence under this section attracts all waiver conditions under sections 9 to 11 of the Act. Therefore, the application can be granted only if no suitable Nigerian tonnage is available.

Waivers also apply in respect of vessel manning. Nigerian-registered vessels must exclusively employ nationals. However, this requirement may be waived under section 10 if a vessel owner cannot procure suitably qualified crews.[35] A detailed discussion regarding the implementation of waivers is provided below.

6.1.3.3 Cabotage Vessel Financing Fund

The Cabotage Act places considerable importance on Nigerian total share ownership as a prerequisite to trading on the coast. Dilution of shares therefore would amount to instant disqualification unless a waiver applies. However, strict cabotage translates to difficulties in raising capital. In order to deal with this impasse, the Cabotage Vessel Financing Fund (CVFF) [36] was established under section 42 to provide financial assistance to citizens.[37] Without the availability of local finance, Nigeria would not be

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[33] 'Minister' refers to the head of the ministry responsible for shipping at the time.
[34] Savage-Oyekunle (note 3).
[35] Section 10 provides that "[t]he Minister may on receipt of an application grant a waiver to a duly registered vessel on the requirement for a vessel under this Act to be wholly manned by Nigerian citizens where he is satisfied that there is no qualified Nigerian officer or crew for the position specified in the application".
[36] The Fund is reminiscent of the erstwhile SASBF of the early 1990s.
[37] Section 42(2) spells out the Fund objectives: "The purposes 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."

able to insist on strict compliance with the Cabotage Act. Accessibility of domestic vessel finance therefore bolsters the Nigeria's stance on cabotage.

6.1.4 Challenges of Nigerian cabotage

Nigerian cabotage has met with many difficulties and has been criticised.[38] However, the only two challenges discussed here relate to waivers and vessel finance. These are the most relevant issues to South Africa given the stage of its cabotage policy development.

6.1.4.1 Poor application of the waiver system

The main criticism of the Cabotage Act has been the waiver system. Waivers were introduced in the Cabotage Act to deal with shortage of both tonnage and skills.[39] The idea was for the Minister to exercise discretion to refuse waivers to foreigners as soon as Nigerians were in a position to offer the full spectrum of coastal services. In turn, waivers have been condemned on the basis that they defeat the purpose of the statute since the practice legitimises foreign involvement. Furthermore, continued foreign participation on the Nigerian coast is seen as hindering Nigerian participation.[40]

There have been complaints that the Nigerian government has failed to show its commitment to implementing cabotage, especially in supporting NIMASA (Nigerian Maritime Administration and Safety Agency) to deal with truant ship owners.[41] These complaints follow what appears to be flagrant disregard of the regulations relating to crewing. Nigerian vessels have been arrested for engaging non-nationals on their vessels while performing cabotage operations.[42] It has also been reported that cabotage has been hindered because "some powerful individuals in government are trying to frustrate the implementation of the [cabotage] law".[43]

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[38] I.M. Erakhoba Nigerian Cabotage Regime: What Next? (10 October 2012), available at http://documents.jdsupra.com/403026b1-f004-467b-8066-5f53ef2707ac.pdf. (Accessed 23 May 2018).
[39] Ibid
[40] Ibid.
[41] See G. Oritse Nigeria: Cabotage Law - Nimasa Begins Clamp Down on Non-Compliant Vessels (2018), available at https://allafrica.com/stories/201807180610.html. (Accessed 15 September 2018).
[42] Ibid.
[43] See Why Cabotage Act Implementation Failed (23 January 2018), available at http://thenationonlineng.net/cabotage-act-implementation-failed/. (Accessed 15 September 2018).

The problems stated above manifest more readily in offshore vessel operations where there is a prevalence of foreign vessel involvement. Concomitant waivers have been issued to oil companies on the basis that these companies require the right kind of tanker vessels and appropriate skills to meet stringent cargo specifications particular to the industry.[44] Scarcity of suitable Nigerian tonnage has meant foreign companies so far predominantly meet the demand for the provision of specialised vessels. They control the majority of major trades while most of the vessels engaged in the remaining 9% of the trade are smaller locally-built boats with local crews presumably largely owned by nationals.[45] In view of the above, the need for manning waivers will persist for as long as Nigeria continues to lack suitably qualified crews, especially for senior positions. Similarly, problems with cabotage will persist, particularly on offshore routes, until Nigeria can muster adequate and varied tonnage capacity under its flag to cover the full range of its coastal services.

In 2013 about 84 chartered vessels obtained licences under the waiver system. Foreigners owned and operated double the share of vessel trade with 56 vessels, while local participation stagnated with 28.[46] The figures indicate the extent to which Nigeria continues to lack capacity to service its own coast a decade after the Cabotage Act came into force, as well as the extent to which the Nigerian government's lack of commitment to proper cabotage implementation has affected its course.

6.1.4.2 Ineffective vessel finance models

More than a decade and half later Nigeria has yet to see the fruits of its cabotage policy process that started in 2003. Coastal traders unanimously agree that a gross lack of implementation of the statute exists.[47] The Nigerian government has failed to ensure that the oil and gas industries support cabotage by ring fencing this cargo for coastal trades.[48] Therefore, guaranteed funding for capital investment remains elusive and impractical in the absence of guaranteed cargo.[49]

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[44] Ibid.
[45] M. Igbokwe Nigerian Maritime Cabotage Policy & Law: The Case and Advocacy (2006).
[46] Department of Petroleum Resources, 2017.
[47] Savage-Oyekunle (note 3).
[48] Ibid.

The CVFF has not provided the solution to this challenge. First, publication of its guidelines was delayed. Funding has generally not been accessible to shipping operators who are at the mercy of commercial banks, through whom the CVFF is run. Commercial banks allegedly also charge exorbitant interest rates for financing shipping capital assets, which operators find difficult to meet.[50] In short, the Nigerian vessel finance model has been ineffective as an instrument for achieving the ideals of the Cabotage Act.

6.1.5 Observations

The Cabotage Act is couched in language that is undoubtedly meant to make Nigeria one of the strictest cabotage jurisdictions. The intention of the statute was always to catapult Nigeria into an era of total independence from foreign domination. Therefore, at the core of the statute was the idea that Nigeria would build its own ships, owned and operated by its people, manned by its crews and flagged in the country. However, the reality has been that Nigerian cabotage has had to depend on waivers because the country has not been able to produce appropriate tonnage to serve the oil and gas industries which form the core of its coastal shipping.

In the circumstances, the prospect of seeing strict cabotage implementation on the Nigerian coast to date remains a distant reality. Nigeria coastal shipping still largely relies on vessels from elsewhere hence the country's aspirations of restricting foreign domination from its coastal trade or of implementing strict cabotage in its proper form holds little promise.

A fuller exposition of what South Africa needs to bear in mind in the development of its coastal policy with respect to Nigeria is dealt with in chapter 8.

6.2 THE UNITED STATES OF AMERICA

The United States of America possesses possibly the most comprehensive historical codification of cabotage laws. American shipping policy on which cabotage has been

[50] Ibid.

driven and sustained can be best summarised in the statements of the country's first and third presidents.

In his Second Annual Address to Congress in 1790, President George Washington said:

> *I recommend it to your serious reflections how far and in what mode, it may be expedient to guard against embarrassments from these contingencies, by such encouragements to our own Navigation as will render our commerce and agriculture less dependent on foreign bottoms…*[51] *[T]he transportation of our own produce offer[s] us abundant means for guarding ourselves.*[52]

In a similar vein Thomas Jefferson, who was president of the US in the first decade of the 19th century, stated that:

> *For a navigating people to purchase its marine afloat would be a strange speculation, as the marine would always be dependent upon the merchants furnishing them … We must, therefore, build them for ourselves.*[53]

Throughout the years, the US government has heeded these calls despite economic and political changes in and outside its borders, although the motivation and intensity have differed over time. America's commitment to avoiding dependence on foreign vessels for trade at all costs resulted in the formulation of a plethora of statutes[54] to achieve this shipping policy ideal. A substantial number of shipping statutes designed for the exclusion of foreign participation deal with both coastal and international shipping. For obvious reasons, the discussion here has been limited to those that impact on coastal shipping.

6.2.1 Early US coastal restrictions

Coastal trade protection seems always to have received priority in the US. The country's first Congress enacted Chapter XI, the Act for Registering and Clearing Vessels, Regulating the Coastal Trade on 1 September 1789.[55] Chapter XI imposed tax

[51] I. Heine The US Maritime Industry: In the National Interest (1980) Washington DC National Maritime Policy Council.
[52] W. Frankel 'Jonesing for Shipping Reform: The Merchant Marine Act in the 21st Century' (16 April 2018) Claremont Journal of Law and Policy 3.
[53] Ibid.
[54] Heine (note 51) says there were already over 50 statutes aimed at promoting shipping by 1966. Many more were enacted for the same purpose after that.
[55] Maritime Law (nd), available at https://europeancrewcenter.com/maritime-law.html. (Accessed 15 August 2018).

penalties on non-US-built and foreign-owned vessels in order to shelter the US trading industry from British competition in particular.[56] The Cabotage Act of 1817, as its name suggests, prevented foreign flag interests from participating in domestic shipping operations. The Subsidy Act of 1891, although directed at the development of the entire trading fleet, delivered high-speed vessels for the coast on the strength of government subsidies.

Similarly the Shipping Act of 1916 was enacted for international trade. Its relevance to coastal trading was that the predicted 'embarrassment' that Washington cautioned against earlier occurred when the First World War started in 1914. The US did not have sufficient tonnage to transport its own trade both internationally and along the coast. Reliance on Europe, whose ships were called up for war duties, led to freight rate chaos. The US government was thereafter actively involved in shipbuilding of both foreign ocean-going and coastal trades. Over 1 400 vessels had been produced by the time the war ended. Therefore, wartime lessons provided fresh impetus for making the independence of the US merchant marine the lynchpin of the American economy, history, and even national identity.[57] The effect was that, from that time onwards, the coast was reserved exclusively for American citizens operating American-built vessels that were manned by American crews.

6.2.2 The Merchant Marine Act ("the Jones Act")

The Merchant Marine Act 1920, commonly known as the Jones Act,[58] followed shortly after the First World War. One of its primary objectives was to deal with the post-war tonnage surpluses.[59] However, its critical impact was that it formalised cabotage policy in the US. The Jones Act represents a consolidation of various US statutes reflecting American cabotage policy that for all intents and purposes has remained virtually unchanged for nearly 200 years.

The modern version of the Merchant Marine Act 1920 provides under Title 46 of the United States Code (USC) 55102, that a vessel may not in any way participate in the movement of cargo by water or by land and water between points in the United States

[56] Frankel (note 52).
[57] Ibid.
[58] The Merchant Marine Act was named in recognition of its champion, Senator Wesley Livsey Jones.
[59] Heine (note 51) 5.

or between ports in the US via a foreign port.[60] This law provides the basis on which foreign vessels are excluded from US coastal trades. A full rendering on how this legislation functions will be provided later in the discussion. It is appropriate at this stage first to set out the trade in respect of which the legislation applies.

6.2.3 US cabotage trade coverage

American domestic shipping is diversified and complex. It caters to 40% of the US population, particularly those who live in the 48 states (and the Columbia District), connected by marine highways and navigable waterways. Despite the expanse which coastal shipping covers, coastal cargo trade amounts to a meagre 2% of domestic freight transportation.[61]

The US cabotage trade comprises three distinct services. These are Ocean, Great Lakes and inland waterways services. Unique features that each service possesses cannot generally be substituted for each other.[62] Ocean-borne trade can be further divided into coastwise, intercoastal and non-contiguous shipping.[63] Coastwise trade predominantly carries petroleum and dry-bulk products such as ores and coal. Intercoastal service operates between Atlantic and Gulf ports and those on the Pacific coast. Petroleum products form the dominant cargo of this service. Non-contiguous service connects mainland US with Alaska, Puerto Rico, Hawaii and Guam. It predominantly carries fuels, chemicals and general cargo. From the mainland, the trade carries raw materials for processing, particularly in Puerto Rico, and the return leg carries finished products.[64]

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[60] Title 46 USC Code 55102 (b) provides: "Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel–

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
(2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement."

[61] C. Grabow, I. Manak & D. Ikenson The Jones Act: A Burden America Can No Longer Bear (28 June 2018).
[62] Ibid.
[63] Ibid. 102.
[64] Ibid. 106.

The second domestic service operates in the Great Lakes. There are five Great Lakes that connect mid-continental US ports. These inland fresh waters give vessels access to the Atlantic through the St Lawrence Seaway. The Great Lakes trade has been mostly used in the transportation of iron ore, coal, and limestone. It also carries petroleum and other liquid cargo, albeit in comparatively lesser volumes to dry bulk cargo.[65]

The third domestic service runs through the inland waterways system. It operates from North-eastern US to Pacific Northwest and from the Great Lakes to the Gulf inland waterways. This trade carries more cargo than the combined tonnages of both ocean-borne and Great Lakes trades.[66] Cargo on this trade consists predominantly of farm products, marine products, coal, non-metallic minerals and chemical and allied products.[67]

Altogether dominant cargo on the American coast is comprised of mostly bulk products, typically petroleum, iron ore, grain, crushed rock, decorative stone and coal. Containerised movement is mostly dominant in the non-contiguous ocean trades, in particular in the Alaska, Hawaii and Puerto Rico services.[68] The combined total of domestic cargo handled per annum amounts to about one billion tons.[69]The Department of Transport Maritime Administration (MARAD) provides trade volume reports up to 2014. The 2014 report divides the Tank Vessel Trade (liquid bulk) into Crude Carriers, Product Tankers and Tank Barges.[70]

Apart from cargo trades, US domestic transport also has a strong passenger service element. In 2010 this trade was estimated at close to 50 million passengers transported. Such activity translated into domestic business and coastal trade participation of about 223 ferry operators in 39 states.[71]

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[65] Ibid. 109.
[66] Ibid. 111.
[67] Ibid.
[68] Domestic Shipping: US-Flag Waterborne Domestic Trade and Related Programs (nd), available at https://www.marad.dot.gov/ships-and-shipping/domestic-shipping/. (Accessed 9 August 2018).
[69] Ibid.
[70] The Report reveals that for the year 2014 the aggregate domestic market figure for qualifying Jones Act Crude Carriers was 21 million tons, 31 million for Product Tankers and 86 million for Tank Barges while volumes for Product Tankers and Barges for the Inland waterways trade alone was estimated at about 117 million metric tons. See MARAD Trade Statistics (nd), available at https://www.marad.dot.gov/resources/data-statistics/#trade-stats. (Accessed 16 August 2018).
[71] Ibid.

6.2.4 *The US cabotage fleet*

The Jones Act covers a fleet of about 38 000 vessels, a substantial number of which are barges and tugboats. Only about 91 of these vessels are eligible for trade on the coast. The Jones Act typically prescribes four primary requirements that apply to all vessels operating between US ports. In order to participate in American cabotage trades, a vessel must be registered under the US flag, owned by US citizens, manned by US crews and built in the US.[72] These requirements have been strictly applied to practically every ocean-going ship, passenger ship, barge, ferry, tugboat and small service ship.[73] The US fleet carries a large variety of trade cargo, as has been shown. It also has title to virtually any type or form of cargo that originates in or moves along the US coast regardless of its value. The net cast over what constitutes 'coastal cargo' spreads wide enough to cover sewage sludge and materials dredged for landfill use.[74]

6.2.5 *Waivers and exceptions*

On the strength of Title 46 USC 501, the Secretary of Defense may grant waivers. However, waiver determination is, as a general rule, the prerogative of Homeland Security.[75] Therefore, the practice is for the Secretary of Defense to request the Secretary for Homeland Security to issue a waiver. The hierarchy is perhaps a reflection of the notion that the Jones Act apparatus preserves US security as a priority before serving as means of supporting defence efforts.

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[72] Frankel (note 52).

[73] The US Code Title 46 Subtitle V Part D Chapter 551 defines the term "merchandise" to include:

"(1) merchandise owned by the United States Government, a State, or a subdivision of a State; and

(2) valueless material.

"Requirements: Except as otherwise provided (in this Act) a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel–

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

(2) has been issued a certificate of documentation with a coastwise endorsement or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement."

[74] Grennes (note 2).

[75] See, for instance, the waiver issued by Acting Homeland Secretary Elaine C Duke: Waiver of Compliance with Navigation Laws (28 September 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf. (Accessed 21 August 2018).

Waivers are seldom granted and any consideration for a waiver is in fact subject to MARAD, which must be satisfied that no suitable US tonnage is available to perform the task in respect of which the granting of the application for the waiver is sought.[76] In determining whether or not to recommend a waiver, MARAD is also under the obligation in each instance of waiver application to "identify any actions that could be taken to enable qualified United States flag capacity to meet national defense requirements".[77] Waivers can be withdrawn at any time.[78]

Over time, relatively less cumbersome forms of waivers have been designed for specific industries. A recent and fairly popularly used waiver system appears from the 2006 Jones Act amendment. It allows small passenger ship charterers to operate on the coast, provided they carry no more than 12 passengers.[79] Similarly, it must be shown that granting these waivers will not adversely affect US shipyards and operators.[80] The applicant's task is difficult. For example, a charterer would have to prove that the application will not prejudice protected industries in which it is not a participant.

Nevertheless, the bulk of waivers granted over the last two decades related almost exclusively to disaster management cases. For instance, waivers were granted to deal with the aftermath of Hurricanes Katrina and Rita in 2005; cleaning operations during the Gulf of Mexico BP oil spill in 2010; Hurricane Sandy in 2012; and Hurricanes Harvey, Irma and Maria in 2017 (although the Trump administration gave only a ten-day waiver). The only non-weather-related waiver in recent times was granted in 2011, to deal with the oil crisis. The Obama Administration allowed 48 foreign tankers to move oil from Louisiana and Texas to Northeast refineries.[81]

[76] 46 USC 501*(b)* provides: "When the head of an agency responsible for the administration of the navigation or vessel-inspection laws considers it necessary in the interest of national defense, the individual, following a determination by the Maritime Administrator, acting in the Administrator's capacity as Director, National Shipping Authority, of the non-availability of qualified United States flag capacity to meet national defense requirements, may waive compliance with those laws to the extent, in the manner, and on the terms the individual, in consultation with the Administrator, acting in that capacity, prescribes."
[77] Title 46 USC 501(2)(A).
[78] 46 USC 501(3)*(c)* states that "[t]he authority granted by this section shall terminate at such time as the Congress by concurrent resolution or the President may designate".
[79] Grennes (note 2) 8.
[80] Frankel (note 52).
[81] Grennes (note 2) 9.

In any other event, the US policy on cabotage has been strictly applied, without exceptions.

6.2.6 Challenges of American cabotage

6.2.6.1 Decreasing and aging fleet

Viewing the American coastal fleet as a subset of the US flag fleet gives the proportion of the fleet eligible for trading on the American coast its proper context. The US share of the world fleet tonnage has declined sharply over time. In 1960 the US had 2 926 domestically-flagged vessels representing 17% of the world's total share of merchant fleets. However, in 2016, the US only had 789 vessels flying the US flag, representing about 3.47% of world share.[82]

Thomas Grennes argues that only 91 of the above vessels are eligible for coastal trading.[83] About 75% of the container flag fleet is older than 20 years and about 65% of its total is over 30 years old.[84] The overall average age of the US fleet in 2016 was 33 years compared to the world fleet average age of 13 years. Similarly, the age of US tankers does not look good. On average, US tankers are at least five years older than the average world tanker fleet.[85]

The Jones Act was designed to increase the US fleet for trade, to support the US military during times of conflict and, by extension, to stimulate coastal shipping. However, statistics relating to both the age and number of the US fleet do not support the argument that the Jones Act contributes towards fleet expansion, security or coastal shipping. Unsurprisingly, foreign-flagged vessels carried more than a quarter of Desert Shield and Desert Storm supplies to Saudi Arabia, while the US flag fleet carried only 12.7% of equipment and supplies in that war. The difference was carried by the military itself. A similar deployment pattern was again seen during the Gulf War in 2003. The US flag fleet handled 6.3%, while foreign flags handled almost three times that amount of

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[82] See Structure, Ownership and Registration of the World Fleet Ch 2 (2017), available at https://unctad.org/en/PublicationChapters/rmt2015ch2_en.pdf; and also Table 1-24: Number and Size of the U.S. Flag Merchant Fleet and Its Share of the World Fleet (23 May 2017), available at https://www.bts.gov/archive/publications/national_transportation_statistics/table_01_24. Accessed 16 January 2019).
[83] Grennes (note 2) 11.
[84] Grabow et al (note 61).
[85] Ibid.

cargo.[86] Therefore US cabotage has failed to support wartime efforts or to promote US security.

6.2.6.2 US shipbuilding decline

The American shipbuilding industry has also declined. The country has been left with only three shipbuilders of large commercial vessels, namely NASSCO, Philly Shipyard and VT Halter.[87] Of the three domestic shipbuilders, only NASSCO manufactures vessels for both the military and commercial industries. The other two firms focus on commercial vessels only. Thomas Grennes states that the three shipyards cannot be commended for high productivity. He says they have produced only 40 large commercial vessels in a decade-and-a-half between 2000 and 2016.

The disparity in the focus of these shipbuilding firms means that of the little available home-grown shipbuilding capacity, more is available for building commercial vessels than for building ships for military and security purposes. The skill acquired in building commercial vessels may not necessarily be used in building military vessels. As a result, the scenario undermines the argument that the Jones Act contributes to security and increases shipbuilding capacity.[88]

Moreover, US shipbuilders have been accused of being uncompetitive and inefficient. US Shipbuilders charge uncompetitive prices between US$190 million and US$250 million for coastal and feeder vessels that would cost US$30 million in foreign shipyards.[89] The latest military builds also serve as an example of inefficiencies of the US shipbuilding firms. For instance, the *Gerald R Ford* is a nuclear-powered US Navy aircraft carrier that was commissioned in 2017. It cost US$12.9 billion and sets the record as the most expensive vessel ever built. It was delivered late.[90] Similarly the *Zumwalt* was also delayed and was significantly over budget. Its final price of US$4.24

[86] Ibid.
[87] The National Steel and Shipbuilding Company (NASSCO), which is a division of General Dynamics, is the largest. NASSCO has yards in Norfolk, San Diego, and Mayport, Florida. VT Halter is based in Pascagoula, Mississippi and Philly Shipyard in Philadelphia. See Grennes (note 2) for a detailed discussion.
[88] Grennes (note 2).
[89] Grabow et al (note 61).
[90] Ibid.

billion meant its budget (which could build 32 similar vessels outside the US) could build only two vessels in US shipyards.[91]

What causes further criticism is the fact that the shipbuilding industry thrives on the premise of the 'US-built' requirement of the Jones Act under circumstances that barely recognise present-day manufacturing and distribution realities. The Jones Act requires that coastal vessels be substantially built in the US. However, American shipyards outsource components abroad to such an extent that it becomes difficult to describe a vessel as categorically US- or foreign-built. Sometime a vessel's construction can be better reflected as 'US-assembled', particularly because shipyards commonly import ship design, main engine and other parts from other countries.[92] This is reflected, the argument continues, in the fact that a vessel meets the Jones Act requirements if all of its major components[93] and superstructure are made in the US and not the entire vessel.[94] Essentially, the argument is that in light of the dilution of the 'US-built' requirement, it would be more sensible to exempt cabotage operations from the requirement of American-built vessels.

A further anomaly is that NASSCO partners with Daewoo Shipping Engineering of Korea. Philly is a subsidiary of Norwegian Aker ASA, which trades its shares on the Oslo stock exchange. Despite this blatant bastardisation of the US-built requirement, Philly Shipyard publicly advertises that it has supplied more than 50% of the Jones Act vessels.[95]

6.2.6.3 High freight rates

The primary issue with the Jones Act as a whole is that it induces high freight rates which in turn impact negatively on consumer prices. The objectionable effects of the Jones Act may be evident in various market distortions. Colin Grabow highlights the anomalies in coastal transport distribution. He observed:

[91] Ibid. 14.
[92] Ibid.
[93] Any part in excess of 1.5% of the vessels steel weight (or 7.5% in case of rebuilding) is deemed a major component. See C.G. Papavizas Public Company Jones Act Citizenship (2015) 30(2) Tulane Maritime Law Journal 383–437 (Summer).
[94] Grabow et al (note 61).
[95] Grennes (note 2) 17.

Although 38 states and the District of Columbia are connected by navigable waterways and marine highways, and nearly 40 percent of the US population lives in coastal counties, coastal shipping of cargo between US ports in the Lower 48 states comprises a negligible 2 percent of domestic freight.[96]

Largely, the market for coastal shipping often redirects to other modes of transport or to sources of shipping outside the country. Farmers have at times flown livestock to avoid paying high shipping freights.[97] States such as Maryland and Virginia import most of their bulk salt requirements (for road ice treatment) from Chile and Mexico using the Panama Canal as they find it cheaper to do so than to buy salt from Ohio mines using South Louisiana ports, where they would have to pay much higher freight rates.[98] Grain for feeding cattle and crop fertiliser have sometimes been imported from Canada rather than through New Jersey Port because of high freight rates associated with coastal shipping.[99] Similarly, North Carolina farmers import soybean meal from Brazil using foreign vessels, although the US remains the world largest soy producer and second largest soy exporter.[100] These are just some of the market distortions Jones Act freight rates have produced.

Exorbitant freight rates have likewise affected the coastal passenger trades. Cruise ship passengers pay higher rates between Washington and Alaska. As a result, cruise ship voyages originate in Vancouver, Canada. This in turn stifles cruise ship development in Washington.[101]

However, the trade that the Jones Act freight scourge affects the most is the non-contiguous trade. The burden of the Jones Act falls on these trades because of their exclusive reliance on sea transport. There are no pipelines, trucks or trains to provide alternative transportation means.[102] Therefore, the economic benefit of repealing the

[96] Grabow et al (note 61) 19.
[97] Grennes (note 2) 19 recorded that Hawaiian ranchers resorted to chartering a 747 weekly from Keahole Airport to get their cattle to the mainland US more cheaply as it was less expensive to use an airline than to use coastal shipping.
[98] Grennes (note 2).
[99] Ibid. 30.
[100] Ibid. 31.
[101] Frankel (note 52).
[102] Grennes (note 2) 26.

Jones Act to the residents of Hawaii, Puerto Rico, Alaska and Guam has been estimated at about US$ 5 billion to US$ 15 billion.[103]

Vessels employed in the non-contiguous trades are old. The World Economic Forum reported that of the 25 US-flagged coastal containerships 20 were built three decades ago.[104] The oldest of these is a steam-powered vessel[105] that was built in 1968. The US coastal fleet constitutes 10% of the total capacity of container vessels employed on the US coastal trades. The fleet's advanced age translates to massive maintenance costs that are exacerbated by general operational inefficiencies associated with reliance on old technologies. These costs are passed on to shippers most of whom can choose other modes of transportation. However, shippers in non-contiguous territories such as Hawaii have no option but to use shipping.[106]

In Puerto Rico, for instance, the effects of the Jones Act have largely contributed to inflated living costs. Freight for a 20-foot container of household cargo from the East Coast to Puerto Rico costs about US$3063, when the same shipment to Santo Domingo costs US$ 1504 and US$1687 to Kingston.[107] Partly as a result of this, the cost of living in Puerto Rico has been estimated at 13% above the second highest urban area in the sample of 325 US suburban areas. Puerto Rican supermarkets recorded 21% higher costs than supermarkets in mainland US.[108]

Several studies have been conducted on the effects of the Jones Act on the country as a whole. JF Francois and others[109] examined the consequences of US cabotage restrictions on the US economy. Applying general equilibrium models of the US, the authors analysed the impact of the Jones Act on a range of services such as trade,

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[103] Ibid.
[104] See World Economic Forum Reform Jones Act to Grow Economy (nd) Hawaii Free Press, available at http://hawaiifreepress.com/ArticlesMain/tabid/56/ID/8823/World-Economic-Forum-Reform-Jones-Act-to-Grow-Economy.aspx. (Accessed 16 January 2019).
[105] See ship details of the MV *Horizon Challenger* (nd) Marine Traffic.com, available at https://www.marinetraffic.com/en/ais/details/ships/shipid:13276/mmsi:-6812211/imo:6812211/vessel:HORIZON_CHALLENGER. (Accessed 16 January 2019).
[106] Ibid.
[107] M.B. Hill The Sinking Ship of Cabotage: How the Jones Act Let Unions and a Few Companies Hold the Economy Hostage (7 April 2013).
[108] Grennes (note 2).
[109] J.F. Francois, H.M. Arce, K.A. Reinert & J.E. Flynn 'Commercial Policy and Domestic Carrying Trade' (February 1996) 29(1) The Canadian Journal of Economics 181–198.

production, welfare, agriculture, steel, as well as upstream and downstream services of these sectors. The study revealed that

> *the Jones Act effects a transfer from US consumers of [maritime] transportation services to US maritime carriers, allowing domestic shippers to charge rates substantially above comparable world prices. Estimates of the size of this transfer range in the billions of dollars.*[110]

Francois et al concluded that the Jones Act repeal would cause a US industry surge of about US$1.5 billion in the water sector, US$158 million in petroleum, US$103 million in chemicals, US$91 million in air transportation, US$50 million in steel, US$40 million in plastics and US$32 million in lumber.[111]

The authors also highlighted the fact that

> *the Jones Act provides indirect protection to the ship building and maintenance and repair industries. These industries are upstream suppliers to the Jones Act fleet that benefit from the downstream protection. Thus while the basic argument that the Jones Act ensures a merchant marine fleet for defence purposes may lack merit, the secondary argument that it benefits domestic shipyards, also important in time of war, does [have merit].*[112]

The secondary argument deserves merit on the basis that "the Jones Act does protect about 1 800 jobs in shipyards (shipbuilding and repair), while ensuring an additional $160 million of domestic activity in these sectors".[113] However, such job protection costs the economy about US$3 billion.[114]

In light of the above, US cabotage policy through the Jones Act is substantially more expensive than world shipping rates and burdensome to the US economy as a whole. Essentially, the overall costs exceed the overall benefits of continuance with the Jones Act. Simply put, a small group of shipping interests (shipbuilders, seafarers and ship

[110] Ibid. 183.
[111] Ibid. 190.
[112] Ibid. 191.
[113] Ibid.
[114] Ibid.

owners) benefit from the Jones Act, while the general body of American consumers absorbs losses that it causes.[115]

6.4 SUMMARY OF STRICT CABOTAGE

Strict cabotage means that the coastal state reserves itself full rights to engage a fleet of its own choice for all shipping activities taking place along the jurisdiction's coastline. The coast is viewed as an extension of its inland industries that deserve protection from foreign penetration. Therefore, vessels plying trade in domestic waters must be built, repaired and flagged domestically. Most importantly, such vessels must be owned and manned by nationals.

The most common drivers of strict cabotage relate to security; protection of home industries and general domestic market insulation; job creation and skills transfer; flag fleet stimulation; and vessel ownership. In this setting, factors relating to economic efficiencies (including savings and streamlined processes), foreign direct investment, robust competition and other factors play a subservient role. As a result, the main characteristic of strict cabotage is the exclusion of all foreign participation in the economic activities of the coastal state.

It must be remembered that first, commercial realities compel strict cabotage practitioners to rely on waivers. The Nigerian experience is a classic example in this regard. Second, capital shortages and a lack of suitable expertise, particularly in developing economies, dilute the nature of strict cabotage, because countries like Nigeria do not have the capacity to implement cabotage without any foreign involvement. The difficulty with implementation is especially pronounced at the start of cabotage policies.

6.5 CONCLUSION

Continued lack of expertise and capital shortage to supplement tonnage forces compromises manifest in the practical implementation of cabotage. The result, as seen in Nigeria, is that the country struggles to achieve the chief aim for enacting cabotage, which was to promote involvement of nationals in cabotage trades and shipping in general. In Nigeria, foreign participation accounts for more than half of the total of

[115] Grennes (note 2) 31.

participants in cabotage trades. Instead of alleviating the status quo ante Cabotage Act, waiver implementation forced by the lack of capital, shortage of appropriate expertise and poor waiver enforcement legitimises the modern version of foreign domination of the Nigerian coast.

In light of the above, Nigeria serves as a perfect example of a jurisdiction that has written strict cabotage into law, but that essentially practises liberal cabotage. Foreign interests dominate coastal trades in Nigeria and therefore ultimately its coastal policy cannot be correctly described as strict cabotage, despite what the Cabotage Act envisioned.

By contrast, the US has managed to sustain cabotage over a significant period of time. Notably, the US is a developed country with a long history of ship ownership. Its cabotage operates on the back of one of the largest economies in the world. Its cabotage requirements are less strict then those of Nigeria. US cabotage rests on four pillars. Cabotage is reserved strictly for US-flagged vessels that are 75% owned by US citizens, operated by at least 75% US citizens and 100% built in the US. Therefore, the US allows a margin of 25% percent foreign participation, albeit only in respect of its manning and ownership requirements. In order to protect its shipbuilding industry and its repair dockyards, no foreign involvement is permitted. These land-based activities will not be shared with foreigners.

The US has a strict code for the implementation of its cabotage policy. There are very few instances in which the US has invoked waivers or permitted exceptions to its cabotage law to allow foreign vessel participation. Exceptions have seemingly been reluctantly granted exclusively to assist in emergency disaster management, for instance, to facilitate aid relief and to lessen the impact of oil spills on the environment and to alleviate chronic energy shortages. In those cases, foreign participants have been granted waivers, but strict conditions have been attached. In any other case, cabotage implementation remains restricted and is closely monitored by multiple administrative agencies such as the Coast Guard and the Federal Maritime Commission, who ensure adherence to its code to the letter.

The above seems to suggest that strict cabotage functions well primarily in an environment that possesses a suitable skills base and sufficient government capital funding for investment in its coastal fleet; and where there is strong administration process of government policies. Therefore ex facie, strict cabotage seems more suited for developed countries than it is for developing countries like South Africa.

A detailed account of the observations made from the US experiences insofar as they relate to South Africa will be canvassed more fully in chapter 8. The next chapter looks at liberal cabotage in Australia and New Zealand.

CHAPTER 7:
LIBERAL CABOTAGE

This chapter deals with specific instances of liberal cabotage using coastal practices of Australia and New Zealand as examples.

FEATURES OF LIBERAL CABOTAGE

The nature of liberal cabotage makes it relatively more difficult to define than is the case with strict cabotage. However, as a starting point, its chief character is that it is not rigid. Liberal cabotage is variable. Therefore its characteristics may be distinguishable from one jurisdiction to the other. More significantly, within a single jurisdiction its fluidity may cause its features to vary according to what policymakers in that particular jurisdiction deem expedient at the particular time of putting it in place.

Regardless of how it may be defined, in liberal cabotage:

1. Foreign participation is permitted and sometimes encouraged.
2. Foreign shareholding in ship-owning companies involved in cabotage trades may be offered above 25%.
3. Requirements regarding engagement of national crews are not onerous (50% national crew or less) especially if local or negotiated employment rates apply equally to all crew while the vessel operates on the coast.
4. However, senior positions on board coasting vessels e.g. master and chief engineer, are generally reserved for nationals.
5. Ordinarily there is no requirement for cabotage vessels to be built and repaired domestically.
6. Cabotage vessels must fly the domestic flag. However, secondary registries that support the domestic flag are created.
7. Vessels on bareboat charter to nationals are permitted to trade on the coast for the duration of the charter.
8. Foreign-flagged vessels have a right to transport transshipment cargo along the coast.
9. Ordinarily there are no direct government subsidies for the flag fleet, but finance programmes exist to stimulate cabotage in general.
10. Stakeholder views are a major part of its formulation.

The above list is not meant to be exhaustive.

The flexible nature of liberal cabotage presents itself in varying degrees of intensity from one jurisdiction to the next. The position in which a particular jurisdiction eventually settles is often a product of great controversy borne out of divergent views between various stakeholders regarding how it should apply. Issues relating to whether cabotage should be adopted and if so the measure of its applicability are commonly debated between government, shippers, ship owners and labour. Depending on interests that are at stake, the degree of liberality that becomes the eventual choice, be it very liberal (virtually no cabotage) or very controlled (closest to strict cabotage), often reflects a point of settlement reached between stakeholders after considerable debates. Classic portrayals of these debates have been seen in Australia and New Zealand, evident in the liberality variations of their cabotage regimes.

On the one hand, Australian materials comprise the latest debate on cabotage and offer important insights into how a relatively more controlled form of liberal cabotage works. On the other hand, materials on New Zealand present an overview of the most recent debate on cabotage reintroduction that led to a significantly far less controlled form of liberal cabotage. Therefore a discussion that combines Australian and New Zealand literature presents a broad coverage of the issues pertaining to liberal cabotage from one end of the spectrum to the other. This coverage provides a sound basis on which to evaluate variations of cabotage for its development and implementation in South Africa.

7.1 AUSTRALIA

The Commonwealth of Australia, as it is formally known, is an island continent comprising mainland Australia, the island of Tasmania and smaller islands,[116] with a coastline length of about 36 000 km.[117] The country is completely surrounded by water. Trade with its neighbours, near or far, depends solely on seaborne carriage.

The Australian coastal shipping framework, like South Africa, has its foundations in the country's colonial history. During the 19th and the early 20th centuries it was

[116] Australia (nd), available at https://en.wikipedia.org/wiki/Australia. (Accessed 19 July 2018).
[117] Australia's Coastline (nd), available at https://www.australiaforeveryone.com.au/coastline.html. (Accessed 19 July 2018).

expected of colonies such as Australia to emulate the fiscal and constitutional policies of their British masters. As such, Australia, although not legally bound to adopt a similar approach, followed an open coastal policy analogous to that of Britain. All six Australian colonies (as it was then composed) had an open coastal policy as provided for under the Merchant Shipping (Colonial) Act of 1869 (UK).[118]

After the colonies were federated, an urgent need arose to change coastal policy to prioritise trade, defence and labour imperatives.[119] Dominance of foreign shipping interests, reliance on foreign-controlled tonnage and the need to curb "the employment of non-whites crews on ships" operating on Australian routes[120] also heightened the urgency for policy changes.[121]

Interestingly, the principal factors debated at the beginning of the 20th century pertaining to national security, seafarer employment and low freight rates remain the basis for many coastal policy commissions seen in Australia to date. Generally, the perception over the years has been that possession of a sizeable and efficient domestic fleet provides an effective safeguard for national security, industrial and trade prosperity.[122]

7.1.1 The Navigation Act 1912

The Navigation Act 1912 formulated the legislative basis for Australian cabotage. It defined 'coastal trade' as the loading of passengers and cargo at any Australian port for carriage to any port in Australia.[123] It demarcated parameters within which foreign participation was prohibited.[124] The Navigation Act provided exceptions and exemptions under which foreign participation was permissible. Foreign operators could obtain licences to operate on the coast provided they met Australian crew wage

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[118] M.L. McConnell, 'Cabotage and the Colonial Corset: The Great Australian Bind' (1988) 4 ANZ Mar. L.J. 1–16 3.
[119] McConnell (note 3) argued that the newly Federated Australian Commonwealth perceived the Japanese as a security threat.
[120] McConnell (note 3). 6 citing J. Bach A Maritime History of Australia (1976).
[121] Ibid.
[122] Ibid.
[123] The definition applied to discharge operations as well.
[124] For practical reasons, British mail ships were exonerated from the licence provision until the railway system connecting Western and Southern Australia was completed. See McConnell (note 3) 14.

conditions and manning levels and were not receiving financial assistance from their governments or any form of subsidy from elsewhere.[125]

Therefore, the Navigation Act set the Australian coast aside as a local operation for local interests. However, it is important to note that from the very beginning, Australia did not create a barrier against foreign participation or against foreign direct investment. The three basic conditions for licensing were designed to level the playing field between Australian operators and prospective international participants operating on the Australian coast.

The first two requirements, relating to crewing conditions and levels of manning, meant that international operators involved in shipping on the Australian coast adopted Australian labour-related practices that were mandatory for Australian operators. Likewise, the third requirement, which prevented subsidisation of foreign participants, was appropriate in the circumstances. In its absence, foreign operators would otherwise have had a competitive advantage over Australian operators because of financial assistance received to cover capital and/or operational costs. Foreign government subsidies would have led to a pricing differential in favour of the foreign operator, for instance. The importance of placing these conditions in the first place seems to have been lost on Australia over time, as will be seen later in the discussion.

Although security and preservation of local skills were important to the formation of the policy governing the Australian coast, the real basis for the commencement of cabotage was largely economic.[126] Cabotage was founded on the desire to build an Australian merchant fleet and on the protection of Australian seafarers from low-paid crews. The approach, although regarded as dated compared to international shipping norms of the time, was warranted, given the stage of institutional development of the country in the mid-1920s.[127] In particular, Australia could ill afford to exclude international participation on the coast, especially in the early 20th century, because Australia had no merchant fleet. Its merchant marine was essentially British vessels

[125] Ibid. 13.
[126] Ibid. 16, citing the Report of the Royal Commission on the Navigation Act 1923/24 (1924) Parliament of the Commonwealth of Australia in Shipwreck Databases Western Australian Museum Government of Western Australia, available at http://www.museum.wa.gov.au/maritime-archaeology-db/bibliography/report-royal-commission-navigation-act-1923-24-parliament-commonwealth-australia.
[127] Ibid.

registered in Australia.[128] However, dependence on British shipping interests continued to plague Australia even when the country had its own fleet, as will be seen.

7.1.2 Attempts to amend coastal policy

The Navigation Act went through various amendments over time that mostly represented adjustments to meet periodic imperatives either to bring the policy in line with other policies or a changed political climate. However, more significant changes were made to the statute from the 1950s.[129] Unfortunately, those changes did not bring about a significant growth in the coastal fleet despite a noticeable growth in coastal shipping activity.

At its peak during the 1970s, coastal shipping carried 52% of coastal trade but thereafter started to decline.[130] A commission appointed in 1976 produced the Report on Australian Maritime Legislation. The commission's conclusions were that Australia had one of three choices to help stimulate its coastal trade. The first option was to look for the most efficient and most affordable seaborne method of transporting cargo. The second option was to insulate shipping from competition completely, leaving the economy to absorb the impact of doing so. The last option was to combine the first and second options and to come up with a compromise that would avoid protectionism while preventing unfair competition.[131]

The government decided to promote coastal competition and therefore chose the middle path with some variations, purely as a practical step. The decision to do so was forced on Australia by the fact that more than half a century had passed, and the merchant marine and coastal shipping operations remained under British control. The Navigation Act served only to promote that monopoly.[132] The scarcity of indigenous tonnage meant more foreign vessels plied the coast and their continued presence worsened the conditions for the establishment of the Australian fleet. Vessels under licence could operate on the Australian coast whether flagged in Australia or flagged elsewhere.

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[128] Ibid. 17.

[129] D. Kirkby The Sailor is a Human Being: Labour Market Regulation and the Australian Navigation Act (2007), available at http://press-files.anu.edu.au/downloads/press/p200721/pdf/ch10.pdf. (Accessed 26 July 2018).

[130] S. Everett & C. Kittel Sustainability and Australian Coastal Shipping: Some Issues (2010) 2(3) Australian Journal of Maritime and Ocean Affairs 82–89.

[131] Ibid.

[132] Ibid.

These were subject to Australian rates of pay and other cabotage conditions. However, tonnage shortages led to a practice that allowed foreign vessels to trade on the coast under a permit system.[133]

Vessels issued with a permit did not have to comply with Australian labour practices or cabotage restrictions in the same way vessels that operated under licence did. The idea behind the imposition of three conditions (Australian crew wages, manning levels and no foreign subsidies) on which Australian cabotage was based had been forgotten. Differential pricing became inevitable between operators. The effect was that vessels that operated under licence competed poorly against foreign vessels operating under the permit system. In turn, this hampered investment in the Australian licensed coastal fleet.[134]

The Australian government appointed the Crawford Committee in 1982 to evaluate the cause of the flagged fleet stagnation.[135] The Committee made observations relating to the Australian fleet both domestically and internationally. Unsurprisingly, the Committee observed that the Australian coastal fleet was disadvantaged because it was competing with subsidised fleets with low-paid crews while its own environment required Australian fleets to pay higher wages and to grant longer leave days, which sometimes meant that owners had to employ double crews as a result of six months on-six months off leave agreements.[136]

The influence of the findings on domestic shipping led to renewed government involvement. Efficiencies derived from efforts directed at the Australian national fleet benefited the domestic coastal fleet as well. For instance, the Capital Grants Act of 1987 led to new investments in the Australian-flagged fleet making it possible to retire the old fleet.[137] However, notwithstanding financial investment shortly thereafter, the modal share of shipping dropped to 35% of coastal trade and hopes of reviving the home fleet continued to suffer.

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[133] These permits were issued in the form of either a single voyage permit or a continuous voyage permit in terms of the Navigation Act.
[134] Everett & Kittel (note 15).
[135] Ibid.
[136] Ibid.
[137] Ibid.

In 1996 yet another body, the Shipping Reform Group, was formed to investigate options to revive Australian shipping. This body focused on reflagging and the establishment of a second register while retaining cabotage conditions. However, there was no resolution. Prominent coastal cargo interests such as the Sea Freight Council of Western Australia were adamant that cabotage thwarted the development of the petrochemical industry. They argued that cabotage removal would result in a savings of about $22.5 million a year. BHP (formerly BHP Billiton) agreed, adding that (at the time) it had cost 33% more to move iron ore from Port Hedland (Western Australia) to ports in New South Wales (Eastern Australia) on an Australian-flagged bulk carrier than to deliver iron ore to Korea on a similar-sized vessel.[138]

7.1.3 Recent developments

In the last decade, Australia has experienced serious depletion of its fleet, to such an extent that in 2010 there were no container vessels operating under its registered flag. The country's logistical chain totally depended on unlicensed foreign operators trading in foreign-registered vessels to transport containers to land-based modes on the back of the permit system.[139]

The scenario is not entirely unexpected, given that modal patterns over the last 50 years have shifted in favour of road transportation, particularly because of its door-to-door offering.[140] This generally leaves coastal shipping with a modal share consisting predominantly of low-freight bulk cargo that may not be suitable for road haulage.[141]

The continued decline of the coastal fleet has been attributed to exorbitant capital and operating costs of the Australian-flagged vessels. These costs are generally regarded as comparatively higher than those of foreign operators on the permit system and are higher than road haulage costs.[142] Furthermore, costs of operating an Australian-crewed vessel (excluding fuel) constitute an estimated 38% of total operating costs, while costs on foreign-crewed vessels, calculated on the same basis, were about 13%.[143] Under

[138] Ibid. 86.
[139] Ibid.
[140] Ibid. 87.
[141] The trend resembles patterns seen on the Cape/Durban route, where container operators have been left to compete with foreign operators for high-value high freight cargo under conditions where foreign vessels can provide similar services at marginal cost pricing.
[142] Everett & Kittel (note 19).
[143] Ibid.

these conditions, the Australian-flagged vessel is not well placed to compete with a foreign-owned vessel.

7.1.4 Latest cabotage position in Australia

Australia recently introduced a new coastal regime to deal with some of the challenges stated above. The Navigation Act 2012 repealed the Navigation Act 1912. The old statute has been rewritten to reflect contemporary seafaring trends, to modernise measures relating to environmental protection and to deal with conditions of employment of Australian seafarers.[144] Provisions relating to coastal trade[145] have been assigned to another piece of legislation, the Coastal Trading (Revitalising Australian Shipping) Act 2012 (Coastal Trading Act), which has perhaps afforded Australia the opportunity to deal with issues relating to seafarer employment separately from issues connected with fleet revitalisation for the first time in a hundred years.[146]

The Coastal Trading Act provides that 'coastal trade' ordinarily refers only to the transportation of cargo between Australian States[147] and not within States,[148] and excludes transshipment trade cargo.[149] The implication is that cabotage does not apply in respect of cargo movements between two ports located in the same State and that any cargo moved between States for consolidation for shipment elsewhere outside Australia does not form part of coastal trade for cabotage purposes.

Similarly, the Coastal Trading Act focused on tonnage utilised in coastal trade. It does not apply to vessels working offshore or to vessels that provide pilotage, towage and salvage services nor does it apply to vessels involved in recreational activities.[150]

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[144] Australian Legislation, available at http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill_em/nb2012133/memo_0.html. (Accessed 2 August 2018).
[145] In particular, Part IV – Coasting Trade, sections 284 to 293 of the Navigation Act 1912.
[146] However, the usual Australian labour statutes remain applicable to seafarers on the coast. These are for instance, the Fair Work Act 2009 (as amended August 2012), the Occupational Health and Safety (Maritime Industry) Act 1993 and the Seafarers Rehabilitation and Compensation Act 1992. These and other labour laws are ordinarily labour friendly and consequently drive operational costs upwards. It is therefore difficult to conceptualise a meaningful method of dealing with labour and national ship registry issues separately when both are governed by the same legislative framework.
[147] The reference relates to the eight Australian States, namely New South Wales, Queensland, South Australia, Victoria, Northern Territory, Australian Capital Territory, Tasmania and Western Australia.
[148] However, an owner may choose to be bound by the Coastal Trading Act in terms of section 12 although trading within the same State.
[149] Coastal Trading Act 2012 section 7(1)*(a)* to *(c)* and section 2*(b)*(ii).
[150] Ibid. section 10.

However, crucial provisions introduced by the Coastal Trading Act relate to the new system of granting licences. It abolished distinctions between licensed coastal operators and operators under the permit system (previously single voyage or continuous voyage permits). With effect from 1 July 2012, coastal operators could apply for one of three licence options.

The first option is a general licence. It is issued only in respect of the domestic fleet under the Australian General Shipping Register (AGSR). The general licence provides unrestricted access to coastal trade for a period of up to five years, renewable. Operators issued with this licence must show that *each seafarer working on each vessel*[151] while on the coast is an Australian or a permanent resident, or is permitted to work on that vessel through some formal process.[152] Continued validity of the general licence is conditional upon the assurance that each seafarer on the vessel is an Australian citizen. The position highlights unequivocal preference for Australian seafarers to work on board Australian vessels, which has been attached as a condition of licence.

The second option is a temporary licence. A vessel registered under the AGSR cannot be issued with a temporary licence. A temporary licence provides coastal trade access to vessels registered under Australia's second register, the Australian International Ship Register (AISR), and to vessels registered elsewhere.[153] A temporary licence allows coastal trade for one year only. An operator who applies for a temporary licence must state the type of cargo intended for carriage and the port of loading and port of discharge in respect of such cargo, among other conditions.[154]

The third option is the emergency licence. This licence, in a similar way to the other two, grants the operator access to coastal trade for the purposes of carrying cargo and passengers and not merely the provision of services ordinarily connected to emergencies. However, the applicant must specify details of the emergency, cargo to be carried, the number of voyages to be undertaken to complete the task and the loading and discharge ports for the cargo. Perhaps more importantly, the applicant must state where the vessel has been registered. Depending on vessel registration, the applicant

[151] Ibid. section 21*(b)*.
[152] Ibid. section 13.
[153] Ibid. section 40.
[154] Ibid. section 35, read with section 40.

must give reasons why a vessel registered under the AGSR cannot perform the emergency service sought in the application.[155]

The new licensing system seems to have been designed to eliminate the unsatisfactory position which permitted foreign vessels access to coastal trade through single voyage and continuous licences. The reasons for discontent emanated from the fact that, among other things, foreign vessels were not obliged to employ Australian seafarers, were not compelled to comply with Australian tax laws and generally made no contribution towards the advancement of Australian coastal shipping. They were seen as a stumbling block in the development of the Australian merchant fleet in particular.

Therefore the Coastal Trading Act seems to have been directed at re-establishing the notion that Australian coastal trade should be preserved first and foremost for Australian interests, although foreign participation will not be precluded, provided that such participation occurs in a manner that caters to Australian coastal policy priorities.

7.1.5 Potential further amendments to Australian cabotage legislation

However, the debate regarding foreign participation and the adoption of cabotage as a means of developing the Australian merchant fleet seems far from being settled. Two years after the Coastal Trading Act, another proposal in the form of the Shipping Amendment Act, Bill 2015 (the Bill) was presented to parliament to challenge new legislation. In particular, the Bill proposed reintroduction of foreign participation.

Arguments that have been raised in support of the Bill mostly relate to comparatively higher freight costs in cabotage trades than freight available in trades where foreign vessels participate freely. For instance, the thrust of the submissions against cabotage was that it was cheaper to import sugar from Brazil to Melbourne (where most soft drink manufacturers are located) than it was to transport sugar from North Queensland to Melbourne.[156] Cane growing was the sector of agriculture affected the most by higher freight rates that Australian-registered vessels charged for moving sugar along the coast.

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[155] Ibid. section 64(2)*(b)* and *(c)*.

[156] Matthew Canavan – Nationals Party Whip in the Senate, available at https://www.youtube.com/watch?v=xad4q_b3Zec. (Accessed 18 July 2018).

Another argument in favour of passing the Bill was based on the statistical observations of coastal volumes, freight rates and coastal share following a stricter policy against foreign participation. At the end of the financial year 2012/13, Brett Whiteley argued that a decline of about 22% in coastal freight volumes was directly related to the introduction of the Coastal Trading Act in 2012.[157] Further, over the same period, average freight rates increased from about AS$18/ton in 2011 to about AS$29.70/ton in 2012, which translated to an increase of about 63% following the introduction of the Coastal Trading Act.

Against this background, the object of the Bill was to redirect focus from cabotage and consequently away from merchant fleet building to competitive coastal services and the best utilisation of available coastal tonnage regardless of whether it was foreign or not.[158] The Bill proposed the repeal of provisions relating to general, temporary and emergency licences.[159] The suggested alternative is to allow any person who has a legal or beneficial interest (other than banks and capital investors) in a vessel to apply for a coastal shipping permit, irrespective of the flag of the vessel.[160] The permit would be valid for a period of 12 months.[161] It would refer to one vessel,[162] but could be transferred to a third party 'transferee' on application.[163]

Interestingly, the Bill required employment of only two Australian senior crew members[164] on board foreign vessels engaged in coastal trading. Otherwise, the Bill made no provisions for the employment of Australian seafarers. It also made no distinction between vessels registered in the AGSR, the AISR and vessels registered

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[157] Brett Whiteley MP, available at https://www.youtube.com/watch?v=iN87nh3Tjz8. (Accessed 18 July 2018).
[158] Section 3 of the Shipping Amendment Act, Bill 2015 ('the Bill') stated as its object provision of "… a regulatory framework for coastal shipping in Australia that:
- *(a)* fosters a competitive coastal shipping services industry that supports the Australian economy; and
- *(b)* maximises the use of available shipping capacity on the Australian coast".

[159] The Bill section 10 read with section 19.
[160] Ibid. section 13.
[161] Ibid. section 11(6).
[162] Ibid. section 18.
[163] Ibid. section 25.
[164] Ibid. section 38(2) requires employment of at least two Australians "for the whole of the period for which the permit is in force:
- *(a)* either the master or the chief mate; and
- *(b)* either the chief engineer or the first engineer".

elsewhere. A vessel that has been issued a coastal shipping permit would be required to undertake to trade on the coast for a maximum period of 183 days (6 months).

So far, the Bill has not yet been passed into law. In the event that it becomes statute, the proposed coastal shipping permit system would effectively abolish cabotage. Once again, an avenue would be reintroduced through which foreign vessels could ply the Australian coast and typically offer freight rates that vessels registered under the AGSR could hardly compete against. Not only would such a step further the development of the AGSR; it would also create permanent dependence on foreign tonnage, which in turn would reestablish exclusion of Australian participation from coastal shipping, which Australia has struggled with for more than 100 years.

7.2 SUMMARY

The hallmark of Australian coastal policy, for a long time, has been the permit system. Today, foreign participation predominantly occurs through registering vessels under the Australian flag directly or through its second register or, more infrequently, through the granting of emergency licences. By virtue of the fact that Australia seems permanently tied to foreign vessel participation on the coast, the tone of its cabotage policy remains unequivocally liberal.

At the outset of its cabotage practice, Australia adopted liberal cabotage that allowed foreign vessels on the coast provided they were first, not subsidised; secondly, paid Australian prescribed crew wages; and thirdly, observed stipulated manning quotas. However, the approach did not contribute to the development of the Australian coastal fleet. The country continued to depend on British vessels to lift Australian coastal cargo. Whenever Australia imposed stricter policies to reduce foreign participation, it negatively affected coastal freight rates.

Australia has spent the best part of the last 50 years setting up one commission after the other to find a solution that would secure foreign coastal participation and simultaneously rejuvenate the country's struggling fleet. The task has not been easy and not much has been gained from various administrations' repeated attempts.

For instance, in an attempt to deal with the advantage foreign operators usually have over their local counterparts, Australia obliges foreign vessels to pay crew wages that local labour union arrangements recognise. This obligation means foreign owners lose the low operating cost advantage that ordinarily enables them to offer lowered coastal freight rates. However, the consequence is that incentive for foreign investment in Australian coastal shipping is likewise lowered. Again, this undermines further participation of foreign operators.

Nevertheless, the Australian cabotage paradigm presents some measure of levelling the playing field between foreign and local coastal operators. However, Australian shippers' choice of service providers remains somewhat limited compared to what it would be if foreign participation were allowed. Ultimately, the shipper is denied access to cheaper coastal freight rates.

7.3 NEW ZEALAND

New Zealand is an island country with a landmass of about 265 000 square kilometres and a coastline spanning over 15 000 kilometres.[165] It is considerably smaller than Australia, its closest and largest trading partner. New Zealand consists of two main distinct landmasses, namely the North and South Island. It has a population of about 4.7 million people. The North Island, although comparatively smaller, is more densely populated than the larger South Island. The Cook Strait separates the two main islands.[166]

The country has six leading container ports.[167] Four of these are located in the North Island including Tauranga, which is the largest container port in New Zealand. New Zealand's largest bulk coastal cargo consists of petroleum products and cement.[168] Loading of bulk commodities occurs at ports nearest to production centres in much the same way that handling of petrochemicals occurs on the South African coast. The ports of Whangarei and Taranaki in the North Island cater for petroleum products. The

[165] New Zealand, available at http://www.geoatlas.com/en/maps/countries-4/new-zealand-1045 (Accessed 29 June 2018).

[166] About 3 677 200 people live in the North Island of New Zealand while the South Island recorded a population of about 1 115 800 in June 2017. Auckland city alone is home to about a third of the estimated 4 million of the country's population. See Auckland (nd), available at https://en.wikipedia.org/wiki/Auckland (Accessed 29 June 2018).

[167] In the order of the highest containers handled to the least (for the period 2016/7) these are Tauranga, Auckland, Lyttelton (port of Christchurch), Napier, Otago and Wellington. Largest New Zealand Ports, available at https://www.championfreight.co.nz/largest-nz-ports. (Accessed 4 July 2018).

[168] Tauranga, Auckland, Wellington and Napier, while Otago and Lyttelton are located in the South Island.

handling of cement, which is the second largest bulk cargo, is shared between Whangarei and Westport in the South Island.[169]

Furthermore, New Zealand has shown strength and capacity to develop as a major transshipment hub for the South Pacific despite its relatively small size. New Zealand ports handle a significant volume of transshipment cargo, particularly through Taranaki and Port Nelson. In 2014, 90% of cargo handled in Taranaki was transshipment cargo, while Port Nelson handled 40%.[170]

Given New Zealand's physical features, it is not surprising that 99.5% of its overall trade is carried by sea.[171] Its geography and location of its dominant cargo encourages active inter-port trade across the two main islands. Thus the dispersion of cargo sources (centres of production in the South Island) and sinks (especially in Auckland) seems to suggest cabotage as the obvious coastal policy choice for New Zealand. However, the study shows the complexity of making such choice. The discussion below sets out the New Zealand coastal shipping picture through a brief history of early cabotage operated under the New Zealand flag, the changes that took place during the mid-1990s, and the current cabotage position.

7.3.1 Cabotage reservation for flagged vessels (early 1900s to 1980s)

New Zealand early history shows that the coast had a few dominant and predominantly British operators. However, at what may be referred to as the pinnacle of New Zealand coastal trade (by number of ships under the New Zealand flag), the coast had about seven dominant operators, especially during the late 1960s to early 1970s. Among these were Anchor Shipping & Foundry Co. Ltd and Canterbury Steam Shipping Co. Ltd, which operated on the coast with agencies in ports such as Bluff, Lyttelton, Wellington, Auckland and others. Holm and Co. Ltd serviced the New Zealand coast, Rarotonga and Chatham Islands. Northern Steamship Co. Ltd operated on the west coast between Onehunga to Lyttelton, Timaru, Dunedin and Bluff. Parry Brothers Ltd provided coastal bulk services. Union Steam Ship Company of New Zealand Ltd provided

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[169] New Zealand Ports and Freight Yearbook 2016 (2016) Deloitte, available at https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/finance/2016-Ports-and-Freight-Yearbook.pdf. (Accessed 29 June 2018).
[170] M. Thompson & J. Cockerell Cabotage in New Zealand and Australia: A World of Difference between Neighbours? (2015), available at https://www.clydeco.com/insight/article/cabotage-in-new-zealand-and-australia-a-world-of-difference-between-neighbo. (Accessed 7 September 2018).
[171] Ibid.

passenger and cargo coastal services on both the New Zealand and Australian coasts. Pearl Kasper and Shipping Co. Ltd provided inter-island and coastal services. The New Zealand Government Marine Department does not appear to have had any trading vessels in its possession at the time except for the usual fleet for fisheries, rescue and research.[172]

For a period, only domestically-registered vessels could trade on New Zealand's coast.[173] However, New Zealand did not practise strict cabotage. Foreign vessels were allowed coastal participation provided they were registered under the New Zealand flag.[174] Furthermore, in the usual fashion, ministerial waivers were granted to foreign vessels to provide coastal services that domestically-registered operators did not have capacity to perform.

In the late 1960s to early 1970s, New Zealand coastal operators had a combined fleet of about 73 vessels. The Union Steam Shipping Company[175] of New Zealand owned about 45 of these vessels. At one stage, the USSC was the biggest shipping company in the southern hemisphere and New Zealand's largest private sector employer.[176] It had offices in London and a London Board of Directors while having branch offices in New Zealand. USSC operated on the New Zealand coast, New Zealand/Australian coast and in the Pacific Islands. Although vessels trading on the New Zealand coast were required to fly the New Zealand flag, there were no restrictions regarding ownership of vessels or on vessel-owning companies operating on the coast. As a result, British interests owned and controlled the lion's share of the New Zealand-flagged vessels.[177]

With time, however, the fleet decreased. By 1983 New Zealand had a coastal fleet of 19 vessels and 10 operators. Coastal activities involved the carriage of general cargo, passengers, petroleum products, vehicles, cement and other cargo totalling about

[172] International Shipping and Shipbuilding Directory (1969) Benn Brothers (Marine Publications) London, UK Limited.
[173] R.Y. Cavana Coastal Shipping Policy in New Zealand: The Case for an Empirical Cost Benefit Analysis (1994).
[174] M.R. Brooks, Liberalization in Maritime Transport (2009).
[175] The Union Steam Ship Company of New Zealand has been abbreviated as "USSC".
[176] Union Company, available at https://en.wikipedia.org/wiki/Union_Company. (Accessed 7 January 2019).
[177] P&O of Britain owned the Union Steam Ship Company of New Zealand Limited. See Cook-Strait Ferries Changed the Nature of Shipping in New Zealand (13 August 2012), available at http://static.stuff.co.nz/files/FerryTaleCelebration.pdf. (Accessed 20 November 2019).

7 million tons. The economic benefit of these activities was estimated at about 1 000 direct employment opportunities with a related wage bill of about $70 million and a further indirect shore-based employment and support services pool that coastal shipping provides.[178]

As part of major economic reforms in the early-1990s, the New Zealand government introduced the Transport Law Reform Bill. The Bill contained clause 240, which sought to allow foreign vessels free rein on the New Zealand coast. Submissions were made as part of the process regarding whether or not cabotage was to remain policy. Robert Cavana[179] provided a detailed report on these submissions. Various submissions were made, among others, that coastal services were very competitive, reliable, and cost efficient. Cavana attributed such competition and improved coastal services to deregulation of the road transport industry that took place in 1983 which, he stated, prompted efficiency and competitiveness in coastal shipping.[180]

The thrust of the argument for retaining cabotage was that the nature of cabotage required that it be viewed as a domestic transport operation.[181] In other words, the approach to coastal operations must be to look at it as one would a local firm. On this basis, coastal operators wanted the government to give coastal operating firms protection ordinarily expected by and afforded to other transportation modes. They argued, for instance, that foreign airlines had no right to operate on New Zealand domestic routes. Similarly, foreign road hauliers that do not pay tax (especially if subsidised by home countries) and who employ cheap labour would have an unfair competitive advantage over domestic hauliers, which would not be allowed in the country.[182] Therefore emphasis was placed on the fact that any firm operating in New Zealand using its own labour, not obliged to comply with New Zealand legislation and not obliged to follow domestically recognised business practices, would not be permitted to trade in New Zealand. It followed, the argument continued, that foreign vessel owners must similarly not be allowed to operate on the New Zealand coast.[183]

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[178] Ibid.
[179] Cavana 1994 (note 58).
[180] Ibid. 173 reports 27% freight reduction for voyages between North Island Auckland port and South Island Lyttelton over the period from 1988 to 1992 and 47% freight reduction of ferry rates for almost a decade following road transport deregulation.
[181] Cavana 1994 (note 58).
[182] Ibid.
[183] Ibid.

Cabotage protagonists further argued that the suggested approach to coastal operations was in line with that of other maritime nations. Therefore, there were no grounds on which New Zealand coastal operations should be treated differently.[184]

The conclusion that came out of these submissions was that the potential cost to New Zealand of withdrawing cabotage appeared considerably greater than the benefit of keeping the policy.[185] The recommendation was therefore for the government first to conduct an appropriate cost benefit analysis to compare the potential advantage of opening the coast to foreign vessel competition with the benefit of keeping the status quo. The government ignored the recommendation and proceeded to liberalise the New Zealand coast without conducting the cost benefit analysis. The effect of liberalisation appears below under 'New-era cabotage'.

7.3.2 Maritime Transport Act 1994

The New Zealand government enacted the Maritime Transport Act 1994, which abolished cabotage with effect from 1 February 1995. The relevant provisions regulating coastal shipping conduct are found in section 198. The provisions reserve carriage of coastal cargo[186] for three categories of vessels: first, New Zealand-registered ships;[187] second, foreign vessels on demise charter to New Zealand based operators who employ New Zealand crews or other crews, provided the employment contracts fall under New Zealand labour laws;[188] and third, a category which extends coastal participation to foreign-flagged vessels.

However, in order to order to trade on the New Zealand coast, foreign vessels must meet two conditions. First, a vessel calling at a New Zealand port must not have commenced its voyage in New Zealand and its final destination must be outside New Zealand. Second, the vessel may perform coastal services only as an ancillary part of

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[184] Ibid.

[185] Ibid. 171.

[186] Maritime Transport Act 1994 ('MTA') section 198(6) defines coastal cargo as including "passengers who initially board vessel at a New Zealand port for carriage to and final disembarking at another New Zealand port; or goods initially loaded at a New Zealand port for carriage to and final unloading at another New Zealand port…".

[187] In terms of section 8 of the Ship Registration Act 1992, vessels that may be registered are those that are solely owned by nationals or that nationals own in the majority with non-nationals and vessels that are owned by permanent residents.

[188] MTA (note 71) section 198 (1)*(b)* provides as follows: "… a foreign ship on demise charter to a New Zealand-based operator who employs or engages a crew to work on board the ship under an employment agreement or contract for services governed by New Zealand law.".

the operation. The main service must remain the carriage of 'international cargo', the definition of which specifically excludes upliftment and discharge of coastal cargo.[189]

Section 198(1A)*(a)* deals with some elements of foreign vessels' coastal operations. It stipulates that foreign vessels may load or discharge coastal cargo only at a New Zealand port where international cargo would be loaded or discharged in New Zealand. However, any possible limitation to foreign vessel trading in New Zealand is vitiated by the next provision. Subsection (1A)*(b)* allows foreign vessels to load and discharge cargo at a port in New Zealand where the vessel was scheduled to pass by without having to perform international operations.[190]

Therefore, international vessels in transit have permission to load cargo from one New Zealand port for discharge at another New Zealand port virtually without any formalities. With respect to cargo itself, foreign vessels also have permission to load 'international cargo'[191] from one port in New Zealand to another port in New Zealand for consolidation purposes. A foreign vessel in its transit through New Zealand may therefore carry any type of cargo irrespective of its origin or destination. Given that no distinction exists between genuine coastal cargo and transshipment cargo, international cross-carriers have a right to operate on the New Zealand coast.[192]

Furthermore, the Minister has the power in terms of section 198(2) to waive all restrictions relating to coastal trade in the absence of New Zealand vessels, vessels under charter to New Zealand-based operators and vessels en route to elsewhere. Furthermore, the Minister may in any event authorise the carrying of coastal cargo by any vessel regardless of its flag affiliation, manning practices, where it was built, allegiance to New Zealand, or any other reasons. Ministerial waiver also does not require proof that the proposed service would not be available from any of the vessels in the combined pool of the New Zealand fleet including vessels on demise charter to

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[189] MTA (note 71) section 198(1)*(c)*(i) and (ii).

[190] MTA (note 71) section 198(1A)*(a)* and *(b)* provide that a foreign vessel "may only load and unload coastal cargo–

(a) at a New Zealand port at which it loads or unloads international cargo; or

(b) at a New Zealand port that it is scheduled to pass in the course of its continuous journey".

[191] The definition of international cargo in section 198(6)*(b)*((i) and (ii) of the MTA (note 71) includes goods initially loaded at a New Zealand port for carriage to and unloading at a foreign port and vice versa. The same principle applies to carriage of passengers.

[192] R.Y. Cavana A Qualitative Analysis of Reintroducing Cabotage onto New Zealand's Coast (2004) 31(3) *Maritime Policy Management* 31(3) 179 –198.

New Zealanders and foreign vessels transiting New Zealand waters.[193] Section 198(2) provides the minister with blanket discretion to bypass any kind of formality ordinarily associated with cabotage.

As such, virtually any vessel may trade on the New Zealand coast either under putative restrictions in terms of section 198(1) of the Act or under no restrictions at all on the basis of ministerial waivers.

7.3.3 New-era cabotage (period after 1995)

This section highlights the result of abolishing cabotage in New Zealand. The almost instantaneous upside of abolishing cabotage was seen in freight rate reductions. As a result of increased competition and marginal costing, freight rates reduced by up to 50% for transportation of cargo between the North and the South Islands.[194] In particular, freight rates for the Auckland-Lyttelton voyage decreased by about 25%. Freight rates for northbound cargo showed a relatively smaller reduction compared to freight rates for south-bound traffic because international lines normally travel south when leaving New Zealand.[195] Nevertheless, downward freight rate adjustments were substantial even for northbound traffic.

Since deregulation, the coast has also experienced an average container volume increase of about 5% per annum since 1995. One major coastal operator, Pacifica Shipping, reported a 100% general cargo volume increase in 2000.[196] Bulk cargo remained unaffected because the oil industry continued to utilise specialised tankers on the coast and traditionally charters in foreign vessels to supplement their fleets during peak seasons.[197]

Significant freight cost reductions that New Zealand achieved in the aftermath of the scrapping of its older form of cabotage were made possible by the fact that firstly, international carriers charge marginal costs for carrying coastal cargo. Secondly, considerably lower operating costs were passed on to New Zealand shippers and thirdly, some of the foreign operators were operating on the back of government

[193] Vessels falling under section 198(1) of the MTA (note 71).
[194] Cavana (note 77) 186.
[195] Ibid.
[196] Ibid.
[197] Ibid. 187.

subsidies from their home countries.[198] New Zealand coastal operators, on the other hand, had to set their freight rates on the basis of local currency, particularly bearing in mind that bunker costs remain sensitive to US dollar fluctuations. In addition, these operators had to pay local taxes, had an obligation to meet legislated minimum wage requirements and had to ensure general compliance that international carriers did not have to carry as a cost.[199]

Unsurprisingly, the New Zealand shipping industry began to struggle. At the end of the millennium, New Zealand had no domestically-flagged vessels carrying international trade.[200] Local operators were confined to coastal services only. In 2000 the New Zealand government had to revisit its position once again. It commissioned what was termed the Shipping Industry Review team to chart a course to revive New Zealand participation in shipping. However, the government sought a strategy that would preserve coastal infrastructure and permit continued access and competition.[201] Given that at the time New Zealand shipping trade was confined to coastal shipping, the debate inevitably revolved around the reintroduction of cabotage. Robert Cavana provided a paper on the debate. Some of his observations are set out below.

Notably, at the beginning of the new millennium, the position was not remarkably different from what it was in the early 1980s. In 2000, New Zealand had nine coastal operators controlling a total of 21 vessels.[202] Eleven of these were registered under the New Zealand flag, while virtually all the other vessels on the coast were registered under FOCs. Not much had changed in the range of cargo that these vessels carried along the coast prior to cabotage removal except that coastal cargo had increased. Petroleum products formed the highest percentage of coastal cargo volumes loaded in New Zealand at about 3.7 million tons. Cement was about 0.7 million tons.[203] General cargo carried was about 200 000 TEUs per annum, 80% of which formed the genuine

[198] Ibid. 180.
[199] Ibid.
[200] Ibid. 179.
[201] Ibid.
[202] Ibid. 184.
[203] Ibid.

cabotage portion.[204] International operators captured between 7% and 9% of coastal trade.[205]

A noteworthy observation was that international lines used New Zealand more for transshipments than they did for the sole purpose of moving cargo between ports within New Zealand.[206] It was not unusual for different container lines to call at different ports and collect containers for other lines and deliver them at Auckland for transfer to passing vessels destined for overseas terminus. However, transshipment and 'hubbing' activities resulted in coastal volume increases of about 5% per annum from 1995 for the next ten years.[207]

A further observation was that coastal containers accounted for about 2.4 million tons per annum. Similar to the South African case, data given does not disaggregate between genuine coastal container volumes (originating from and destined to New Zealand) and transshipment volumes. Furthermore, the debate around cabotage related almost exclusively to containerised cargo, while bulk commodities remained virtually unaffected. It will be recalled that bulk shippers traditionally engage specific tonnage for their cargo and charter in more vessels in times of tonnage under supply. Therefore bulk cargo traders supported reintroduction of cabotage provided the definition of cabotage cargo was modified to exclude coastal bulk cargo.[208]

Broader conclusions derived from the Shipping Industry Review revealed that typically, two interest groups dominate the cabotage debate. One group would normally promote job preservation, creation and stimulation of 'home industries'. This group normally places less weight on the cost of cabotage. In New Zealand local domestic ship owners and domestic transport operators, maritime worker's unions and other transport sector associations represented these interests. Their support is based, among other things, on the conviction that cabotage would provide employment opportunities for seafarers and related services. However, cabotage was seen only as a short-term

[204] Ibid.
[205] Cavana (2004) (note 77) estimated this figure at up to 7% while other sources estimate it at higher percentages of up to 9%. See Cavana 2004 (note 77) in J. Sankaran Freight Logistics in the New Zealand Context (2000) International Journal of Physical Distribution & Logistics Management 145–164.
[206] Cavana ((2004) (note 77) 185.
[207] Ibid. 186.
[208] Ibid. 192.

solution while searching for a more permanent solution for the future. No suggestions were put on the table regarding what that solution would look like.

The other group normally prioritises lowered costs and service efficiency and seem to be driven less by the need to prioritise development of local maritime industries if the method adopted would not translate to lower average freight rates. The group places significant weight on the potential development of other industries that could benefit from lower transportation costs. In New Zealand, international operators, manufacturers, ports, boards, other primary producers and their associations presented the latter view. This group almost unanimously agreed that reintroducing cabotage would have a serious overall negative impact on the economy. In particular, they argued that cabotage leads to increased freight rates.[209]

7.3.4 Contemporary New Zealand coastal stance

In the meantime, the country's failure to attract new domestic operators and the lack of local interest in coastal trade continue unabated. In 2003, New Zealand's key domestic operator, Pacifica Shipping, removed two of its vessels from service, citing "the impact of tax-free overseas ships" on the New Zealand coast.[210] Pacifica had a fleet of four RO-ROs before cabotage was abolished. Pacifica, which enjoyed a 30% coastal market share, had been reduced to a single ship company by 2015.[211] The company has since been bought by China Navigation Company, the new prospect for success of the New Zealand coastal trade. The coastal fleet continues to decline despite volume increases from 45 000 TEUs per quarter in 2012 to 60 000 TEUs per quarter in 2015.[212]

[209] Ibid. 192.
[210] Ibid. 196.
[211] New Zealand and Ports Year Book 2016, Deloitte (note 54).
[212] Ibid.

7.4 SUMMARY

In the mid-1990s New Zealand abandoned cabotage that was, for all intents and purposes, fairly liberal in nature. What followed was a form of cabotage that could hardly be described as cabotage in the traditional sense. Given its degree of liberality, particularly with respect to the freedom with which foreign vessels were allowed to ply the coast, New Zealand cannot be properly categorised as a cabotage jurisdiction. The manner in which its coastal operations have been conducted since 1995 permits virtually any vessel to trade on its coast.

As is the norm in jurisdictions where foreign vessels are permitted to trade, New Zealand recorded significant decreases in average freight rates and its coastal volumes increased substantially. Existing domestic operators such as Pacifica Shipping thrived as coastal volumes increased.

However, the prosperity period seems to have been short-lived for local operators. Increased competition from international passers-by who could operate on marginal costing began to decrease average coastal freight rates to a point that was below what local operators could sustain. The result was that even leading coastal operators began to decrease the sizes of their fleets. Domestic operators were no longer able to compete with their subsidised foreign counterparts, who also had no obligations to pay prescribed crew wages, for instance. As a result, the New Zealand coastal industry became an unsustainable venture for local operators. One after the other, local operators either reduced their fleets or were forced out of coastal trade.

By virtue of the very liberal cabotage provisions of section 187 of the New Zealand Coastal Shipping Act, trading conditions continue to favour foreign operators. At present, foreign operators such as China Navigation Company have taken full advantage of the trading conditions on the New Zealand coast. Among other things, the absence of a suitable domestic fleet entitles authorities to call for capacity from any available foreign operator. Therefore, the liberality of New Zealand's cabotage as set out in section 187 of the Coastal Shipping Act gives foreign vessels carte blanche access to the coast. However, the consequence of virtually unfettered prevalence of foreign tonnage on the New Zealand coast seems to stunt the development of local coasting firms. The result has been the scarcity of domestic capacity, which in turn fosters engagement of foreign vessels. Regardless of shortage of locally registered tonnage, the degree of liberality of New Zealand cabotage reduces costs and thus stimulates trade.

7.5 CONCLUSION

Similar to the way in which restrictive cabotage practices began, liberal cabotage has in one way or another evolved from early British colonial concepts of coastal shipping governance. Motivated by the desire for independence, each former colony seems to have adapted its coastal policy thereafter in line with its trade, economic interests and social gearing requirements at each stage of coastal policy development.

However, liberal cabotage, as its nomenclature suggests, is flexible in nature and as such, the manner and tone of its implementation allows adaptation that accommodates evolving political, social and economic imperatives. Liberal cabotage also seems to indicate a shift in the landscape of the cabotage debate. The modern trend seems to be covering a much wider array of issues.

In general, observations from both Australia and New Zealand include the following.

- First the size, shape, location and whether the country is an island or not is irrelevant. The geographical positioning, especially of New Zealand, with its north and south configurations, instinctively but deceptively suggests a classic scenario for cabotage. However, it is evident from the above discussion that geography by itself does not equate to a perfect opportunity for cabotage.
- Second, liberal cabotage is usually applied in varying degrees. The degree of liberality of cabotage depends on policy objectives of each government administration. Particularly in Australia, for 100 years, there has not been a single administration that has committed itself to one consistent and sustained form of liberal cabotage. Sometimes, liberal cabotage driven through a reliance on waivers has increased the domestic flag, but at times, a less liberal approach has had to be adopted.
- Third, each jurisdiction has its own boundary prescribing the extent of liberality of each cabotage. For example, in New Zealand, industry-wide consensus seems to be a line not to be crossed. The liberality of New Zealand cabotage seems to have been consistently matched with New Zealand’s policies governing other industries. The degree of cabotage liberality has been

> determined after wider consultation with industry to ensure cabotage is not incongruent with industry requirements. Consequently, the degree of liberality of New Zealand's cabotage has been relatively consistent with developments in other economic industries, particularly those that depend on coastal shipping.

Therefore, consultation and consensus seem to be central to liberal cabotage policy in New Zealand. Having said that, there has been an instance where government has been presented with reports calling for a proper market analysis and it has simply proceeded to remove cabotage without conducting such an analysis. However, it may have been opportune for the government to do so, given that it thereafter adopted a very liberal form of cabotage, perhaps indicative of its sensitivity to industry needs. In any event, it was generally agreed that the policy would be revisited in due course.

The next chapter reflects on both restrictive and liberal cabotage regimes and evaluates lessons considered instructive for South Africa cabotage policy development.

CHAPTER 8:
LESSONS FOR SOUTH AFRICA

This chapter gives context to observations gleaned from the United States, Nigeria, Australia and New Zealand with regard to the development of cabotage in South Africa. Principally, the chapter analyses findings deemed instructive for South Africa from the above countries. Wide-ranging observations can be made from the previous chapters. However, the discussion will be confined to factors that provide direct lessons for formulating the South African cabotage policy.

To provide an overview, the chapter begins with a brief outline of the South African basis for cabotage expressed in the CMTP. It is important to stress from the outset that this section does not deal with the basis for the South African framework for maritime transport development in general. It deals with the specific basis for cabotage within such framework. Although the maritime framework and cabotage are related, they are severable. This chapter therefore seeks to respond to the fundamental question: with the CMTP in place, what is the probable course for cabotage in South Africa, bearing in mind the cabotage experiences of the US, Nigeria Australia and New Zealand?

BASIS FOR CABOTAGE UNDER THE CMTP

The desired outcome of the CMTP is to achieve a transformed and effective coastal shipping and cabotage market.[1] A list of reasons for the need to transform has been given. However, the main reason for introducing cabotage is "to promote South African ship ownership to serve national and regional economy" [*sic*].[2] The CMTP also seeks to ensure a level playing field between local and foreign coastal participants. The prevailing view is that, unlike their South African counterparts, foreign vessels participating in coastal shipping in South Africa are subsidised, do not pay levies (on fuel and spares) and mostly flag their vessels under low or tax-free regimes.[3] These factors are said to weigh potentially heavily against the development of a domestically-owned and controlled coastal shipping industry and to militate against domestic fleet development in general.[4] The advantages of coastal shipping are then stated at clause

[1] CMTP Policy Statement 8 48.
[2] See ibid paragraph *(c)*.
[3] CMTP Policy Statement 8 (note 1) clause 168.
[4] Ibid. clause 169.

171. Notably, the reasons given for transformation do not directly address why there should be cabotage.

Against an unclear basis for cabotage, it may be appropriate to start with how not to approach cabotage. An approach to coastal market control that ‘indigenises’ ship ownership, fleet development and coastal shipping poorly presents what cabotage is about. It presupposes that cabotage depends predominantly on nationally-built vessels, indigenous ownership, employment of indigenous crews and domestic flagging. This basis obscures the reasoning for implementing maritime cabotage. As suggested in the first chapter, properly defined, cabotage refers to the jurisdiction’s prerogative to engage a shipping fleet of choice over its coast in a manner befitting its economic and social imperatives. The reason for implementing cabotage must therefore be based on state sovereignty and economic and social benefit.[5] As such, the exercise of sovereignty must be subject to the economic and social benefit of the state. It is only after determining what factors would stimulate the economy and lead to social upliftment and whether those factors can realistically be achieved that the jurisdiction can implement cabotage.

The approach of the CMTP suggests that domestic ownership and domestic fleet development naturally boost the economy and contribute to social development. The argument advanced here is that if approached in this way, cabotage implementation in South Africa will overlook cabotage variations that do not place emphasis on ship ownership and fleet development and which may, in fact, offer better economic and social development benefits.

Bearing the above in mind, the analysis of the sample of countries studied looks at whether cabotage implementation in those countries points to any potential economic and social benefit in the South Africa context. In other words, regard being had to the lessons from the specific jurisdictions under discussion, would cabotage potentially promote South African ship ownership and serve the national economy?

[5] A. Akpan, Maritime Cabotage Law (2019).

8.1 UNITED STATES OF AMERICA

There are numerous observations that can be made regarding the American coastal policy with respect to South Africa. In the main, lessons from the US point to the fact that cabotage is a policy that is exceedingly difficult to implement successfully. Ordinarily cabotage creates economic inefficiencies and increases freight costs. The gains are relatively small and the cost is too high.

Observations regarding the US relate to three issues. First, the benefit that South Africa seeks in implementing cabotage differs markedly to what underlies the basis for US cabotage. Second, geography of the US coastal trade that sustains cabotage bears no comparison to the South African coastal trade. Third, cabotage appears too expensive for a developing country such as South Africa. Overall, these reasons project the US as a poor comparator for modern South Africa largely because the Jones Act was passed almost 100 years ago in an unequivocally different economic and social climate to today. The reasons are dealt with in turn below.

8.1.1 The basis for US cabotage

The reason for the United States cabotage arose from the need to provide the US defence force with a support fleet in war times. To date, matters relating to cabotage fall within the domain of Homeland Security.[6] Historically, the US sought cabotage to benefit natural security, given the global hostilities that prevailed at the time. The First World War resulted in expedited US-built vessels for use in war to support the US military fleets. There was no real use for this massive tonnage under the US flag after the war. As a result, the US enacted the Jones Act to deal with vessel oversupply.[7] Consequently, tonnage was transferred to domestic ownership and utilised for nationally-flagged vessels on the coast. The size of the US fleet that existed greatly influenced the manner, pace and evolution of US trade along the coast and led eventually to the establishment of the US cabotage policy.

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[6] Cabotage waivers are issued by the Homeland Secretary. See https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf. (Accessed 21 August 2018).

[7] I. Heine The US Maritime Industry: In the National Interest (1980) 5.

The exclusion of foreign merchant vessels was a natural result of this process. Indigenising coastal fleets was not the cornerstone of US cabotage. Cabotage was a response to deal with over-tonnage. The conversion and refurbishing of war time vessels was state sponsored. It was therefore logical that aid from the fiscal purse should benefit US citizens exclusively. Similarly, these vessels were financed in the US and were therefore registered under the US flag and commensurately manned by US crews. Even then, the strategy that informed engagement of US-manned vessels was largely informed by security benefits associated with such practice rather than a sheer desire to exclude foreign crews.[8] A large part of the benefit that the US sought in cabotage was to deal with vessel oversupply that resulted from decommissioned warbuilt tonnage. However, motivation for cabotage on the basis of support for the maritime and shipbuilding industry was only a subsequent phenomenon that serves to shield certain sectors such as US shipbuilders, crews and owners.[9] Unlike in South Africa, US cabotage was established to protect existing industries as opposed to establishing new ones.

It is also noteworthy that US unionists and shipbuilders insist on the argument that foreign-flagged vessels have an unfair advantage because they operate under less stringent laws and regulations, have no obligations to pay minimum wages and receive production subsidies.[10] Therefore, the argument continues, cabotage is necessary to level the playing field. As seen above, this is precisely the argument stipulated in the CMTP to motivate for cabotage.

However, the US and South Africa's original basis for cabotage cannot be equated. They are diametrically opposed to one another. South Africa does not have a fleet under its domestic flag, while the US had over-tonnage at the beginning of its cabotage regime. Based on this factor alone, US cabotage is not a useful reference point for South Africa. The US was a comparatively well-established and relatively old superpower in a post-World War armament race at the commencement of its cabotage. By contrast, South Africa is a young state in the 21st century with no looming external threats or

[8] Ibid.
[9] J. Frittelli Cargo Preferences for U.S.-Flag Shipping: Congressional Research Service Report for Congress (2015), available at https://fas.org/sgp/crs/misc/R44254.pdf.
[10] Ibid.

overarching defence needs that require its urgent commitment to substantial vessel capacity. South Africa's priority is not to eclipse Europe or any country for that matter.

Unlike the US, South Africa cannot build shipping capacity on the grounds of military expansion, support for the military or on mere political motivation. Furthermore, the South African maritime industry exists but is relatively small to command the support that warrants its preservation. Instead, South Africa is making efforts towards the establishment of its maritime industry rather than its preservation. Even then, South Africa's shipbuilding industry does not deal with large vessels (commercial or military) like the US does. South Africa builds tugs and other smaller craft and has a vibrant albeit not colossal crewing and ancillary services sector. South Africa has no domestic ownership status. Therefore, its basis for cabotage must show that implementing the policy will benefit the economy and result in social development. Potential benefit for cabotage must be well established and placed in the context of modern global markets that are remarkably different in shape and in size from what the US experienced at the commencement of its cabotage practice.

8.1.2 Geography of the US domestic coastal trade

The US experience has much to offer South Africa with regard to the 'physical shape' of the country's trade. In the US geography has a tremendous influence on the sustenance of cabotage trades. Coastal shipping holds a 2% modal share of the US coastal freight compared to 71% and 10% that road and rail respectively carry (the remainder is shared among air, pipeline and other modes).[11] The meagre 2% share occurs despite the fact that the US has a sizeable population, an extensive coastline, long waterways and a hive of coastal activity. This points to the fact that the success of coastal shipping does not depend on nor can it be assumed to exist on the basis of population distribution patterns or merely on business activity along the coast alone. Coastal patronage depends on modal efficiencies and competitive pricing. Coastal market shares will mirror the extent to which different modes of transport offer quick and affordable services to the user.

[11] Demand: Freight Transportation Modal Shares: Scenarios for a Low Carbon Future (2013), available at https://www.nrel.gov/docs/fy13osti/55636.pdf. (Accessed 23 September 2019).

If the US did not have cabotage, trade to US territories would be subject to competition with the obvious benefit of lower freight rates. Puerto Rico, in particular, shows the highest freight rates in the trade from which cabotage operators benefit handsomely at the expense of Puerto Ricans.[12] Effectively, competition to the US territories is subjugated by two factors. First, US territories virtually depend on shipping as the only reasonable mode of carriage of cargo. This means, regardless of the coastal policy, intermodal competition does not exist on these trades. Second, trade to US territories enjoys a legislative sheath protecting it from international shipping competition. Without cabotage restrictions, Hawaii, for instance, would have access to the Pacific trade, which is one of the busiest routes in the world.[13]

Therefore, it is clear from the above that non-contiguous cabotage trades play a very important role in supporting US cabotage. Consistent with their relative distance to other US states, Alaska and Hawaii carry the highest coastal share at 67% and 34% respectively.[14] Other US modes of transport (that the Jones Act does not prohibit) cannot compete with shipping in these trades. It has already been shown that the shipping modal share along the coast amounts to a trifling 2% despite the US vast and complex waterway system and large populations strewn along its long coast.[15] Therefore, cabotage in the US is propped up (over and above the prevention of alternative waterborne alternatives) and buoyed by the lack of alternative modal transport to service non-contiguous territories effectively.

South Africa cannot be compared to the US with respect to its geography. South Africa has a relatively small cabotage trade advantage. Details on the available South African markets have been given from which it is clear that South Africa has no meaningful captive market that would solely rely on coastal shipping and has no inland waterways. So far, the best benefit for South African coastal shipping occurs in respect of low-value cargo shipped between Durban and the Cape. On all other routes, coastal shipping

[12] C. Grabow, I. Manak & D. Ikenson The Jones Act: A Burden America Can No Longer Bear (28 June 2018) Policy Analysis No 845 Cato Institute.
[13] T. Grennes An Economic Analysis of the Jones Act (2017).
[14] W.W. Olney Cabotage Sabotage? The Curious Case of the Jones Act (2019).
[15] Grabow et al (note 12) 19.

faces firm modal competition bolstered by market anomalies, especially in road transport.[16]

8.1.3 The high costs of sustaining US cabotage

As seen in chapter 6, the principal objection to US cabotage is that it induces high freight rates which in turn impact negatively on consumer prices. Joseph Francois estimates that the repeal of the Jones Act would boost US industries by about US$1.5 billion in the water sector, US$158 million in petroleum, US$103 million in chemicals, US$91 million in air transportation, US$50 million in steel, US$40 million in plastics and US$32 million in lumber.[17]

The impact of exorbitant coastal carriage costs is felt in both the freight and passenger markets although the effects seem more prevalent in the transportation of cargo. Various domestic industries, particularly input industries, have forcefully argued that without access to cheaper foreign shipping, producers have to pay more to transport cargo domestically. For example, US cabotage makes products such as foodgrains, scrap metal, raw salt, soya, etc., prohibitively expensive, which stifles domestic trade.[18]

The effect of high transportation cost, especially on non-contiguous trades, cannot be overstated. Using Puerto Rico as an example, William Suarez[19] explains that

> *… a 100-pound (45.4 kg) bag of fertilizer in the US is around $3.50, but in Puerto Rico due to the freight cost it is between $0.10 and $0.14 per 50 pounds (22.7 kg) over the original cost. As a result, the importer is paying around $0.22 extra just for bringing the produce from the US. It means that the basic price of 100 pounds (45.4 kg) of this fertilizer will start at $3.72. However, the importer should add its expenses and profit, almost 9% of the cost ($0.37); therefore, the consumer will be paying easily $4.10. Certainly, this is not a big deal for a casual consumer, but the $0.60 means money for a regular farmer.*[20]

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[16] See T. Jones Coastal Sea Transport and Intermodal Competition in South Africa (1985), for a fuller discussion on landside market imperfections in South Africa.
[17] J.F. Francois, H.M. Arce, K.A. Reinert & J.E. Flynn 'Commercial Policy and Domestic Carrying Trade' (February 1996) 29(1) The Canadian Journal of Economics 181–198.
[18] Ibid.
[19] W. Suarez Cabotage as an External Non-tariff Measure on the Competitiveness on SIDS's Agribusinesses: The Case of Puerto Rico (2018) XXX(III) Centro Journal 172–207.
[20] Ibid. 196.

As a result, producers in the farming industries often resort to sourcing input products from outside the US.

The underlying causes of high coastal trade costs are multifold. Their effects on freights are interwoven. However, at the heart of the causes of high costs are cabotage requirements normally associated with strict cabotage. This section discusses two requirements of strict cabotage found particularly in the US which directly contribute to high costs: first, the exclusive coastal utilisation of US-built (and -repaired) vessels; and second, the compulsory engagement of US crews on vessels trading on the coast. Observations in this regard are hereafter extrapolated for South Africa.

8.1.4 Coastal utilisation of US-built vessels

The 'US-built requirement' can sometimes be confusing when discussed in respect of cabotage because, strictly speaking, it forms part of the argument for shipbuilding which does not always necessarily relate to cabotage. However, in the US, where strict cabotage requires US-built vessels, the requirement falls squarely within cabotage because a vessel that is not built in the US cannot participate in US coastal trades. The discussion below has been constructed on that basis.

During the 1940s, in the early cabotage stages, the US had 64 privately operated shipyards and 8 naval shipyards that built large merchant ships.[21] However, from the middle to the end of the 20th century, shipbuilding prowess moved from the West to the East, particularly to China, Japan and Korea. On the one hand, Asia has since the 1950s offered competitive shipbuilding prices. On the other hand, the US has not been able to reduce costs of building vessels. Therefore, insistence on the 'US-built requirement' has over time made building vessels in the US extremely expensive as a consequence of the exogenous rise of Asian shipbuilding industries.[22]

As shown in chapter 5, currently the US has only three shipyards: NASSCO, Philly Shipyards and VT Halter. None of these shipyards is owned and controlled exclusively by US citizens. At the heart of US shipbuilding decline is the fact that it is much cheaper

[21] Olney (note 14).
[22] Meanwhile Asian shipyards have reached new heights of efficiency and production levels. It is unsurprising that the largest container vessel, the MSC*Gülsün*, was built by Samsung Heavy Industries, Geoje Shipyard, South Korea with a record 23 756 TEU capacity. It sailed for the first time on 8 July 2019 .

to build a ship in Asia than it is in the US. A large merchant vessel will cost about US$220 million to build in the US,[23] while the same vessel will cost US$22.7 million in Asia.[24] To trade on the coast, the US coastal operator is obliged to purchase a US-built vessel priced at about eight times more than a similar-sized vessel built in Korea. The unabating competitiveness of the Asian shipbuilding market makes US shipbuilding exceedingly expensive. The price differential is passed on to US coastal shippers in the form of higher freight prices.[25]

Responding to exorbitant shipping costs, US shippers have resorted to other modes of transport. As a result, waterborne movement of cargo along the Atlantic, Pacific coasts and Great Lakes region has declined by 61% between 1960 and 2014.[26] Over the same period, barge usage has increased by about 365% despite the declines in actual coastal cargo volumes. The reason for this is again the cost of building ships. A shipyard in the US can build 15 barges for the cost of a single US-built coastal vessel.[27] Furthermore, barges normally require a crew of 6 to 12, while crews number 21 to 28 on board for a typical coastal tanker.[28]

Predictably, over time, the burden of high shipbuilding prices has contributed to the overall lack of competitiveness of US coastal shipping services. In the process, coastal operators have been forced either to reduce their service offering or to abandon the coastal market altogether. A glaring regression of the development of the US coastal fleet exists. In 2000 the US had 193 cabotage compliant vessels. The number of such vessels had reduced to 92 by 2016, which represents a staggering 52% plummet in just a decade-and-a-half. The average age of the 92 vessels is about 30 years.[29] The decline clearly shows that coastal operators are either moving their vessels out of coastal trade

[23] The largest vessel built in the US is the *Daniel K Inouye,* which was built in 2018 for US$ 210 million. It is the first of four (together US$929 million). It has a TEU capacity of 3 600. It took three years to build. Notably, Daniel Inouye (who died in 2012) was a strong Jones Act supporter. See A. Gomes New Matson Vessel is Largest Containership Ever Built in US (29 November 2018), available at https://www.ttnews.com/articles/new-matson-vessel-largest-containership-ever-built-us. (Accessed 27 September 2019).
[24] Olney (note 14) 9.
[25] Ibid.
[26] Revitalizing Coastal Shipping for Domestic Commerce (2017), available at https://fas.org/sgp/crs/misc/index.html. (Accessed 28 September 2019).
[27] Ibid. 7.
[28] Ibid.
[29] Olney (note 14) 11.

or staying in the trade without ordering new US-built vessels after old vessels have been scrapped.

For instance, Matson Navigation Company Inc (Matson) operated the Hawaii route with a fleet of 10 vessels. In 2018 Matson bought four vessels constructed by Philly Shipyard. The new fleet replaced seven steam-powered vessels built about 40 years ago. The four vessels also meant Matson could put the remaining three diesel engine vessels built in the 1980s on reserve.[30] Effectively, once all the new US-built vessels were launched, Matson's operations to Hawaii reduced to less than half of its previous service capacity. Notably, without the US-built requirement, Matson could have used Korean shipyards to replace its entire fleet of 10 with similar-sized container vessels for US$ 300 million (assuming US$30 million[31] for each 3 600 TEU capacity vessel). Instead, Matson paid US$929 million for only four vessels to preserve its right to trade off the US coast.[32] Inevitably Hawaiian shippers will have to shoulder the high costs that flow from price disparities of Matson new orders.

8.1.5 Engagement of US crews

US operating costs account for 70% of daily operating costs for a US crewed container ship compared to 28% for a foreign-flagged vessel. The single cause of the difference is the employment of US crews.[33] Although the finding relates predominantly to US international vessels, John Frittelli argues that it remains relevant for the coast because coastal operators draw crews from the same pool.[34] Another exercise conducted to compare average daily operating cost of a foreign-flagged vessel and US vessels estimated such costs at about US$6000 and US$22 000 respectively.[35] This cost calculation is over and above the construction cost discussed above.

Labour is therefore the primary cost on US coastal vessels. An additional cost comes from crew sizes, which are regulated by a 1915 statute, when vessels were not automated. These requirements vary depending on the type of the vessels. Generally, they require a higher number of crew members than would ordinarily be the case if

[30] See Gomes (note 24).
[31] Grabow et al (note 12).
[32] Gomes (note 24).
[33] Revitalizing Coastal Shipping (note 26) 13.
[34] J. Frittelli Shipping US Crude Oil by Water: Vessel Flag Requirements and Safety Issues (21 July 2014), available at https://fas.org/sgp/crs/misc/R43653.pdf. (Accessed 22 November 2019).
[35] Ibid.

modern crew numbers were required.[36] Considering that at least 75% of the crew[37] on board a US coastal vessel must be US citizens, substantially higher US coastal operating costs do not come as a surprise.

8.1.6 Extrapolating for South Africa

Despite the non-comparable size and the point of commencement of US cabotage, the US remains instructive to South Africa. Overall the US scenario shows that cabotage presents serious challenges regardless of the country's economic strength. The struggles of one of the biggest economies in the world provide a clear narrative of how cabotage can have an overall effect of reducing domestic shipments, which negatively affects consumer prices.

South African policy makers should note that cabotage founded on the domestic-built requirement prohibit cheaper alternatives (from Asian shipyards), translates to coastal operations that depend on inefficient and ageing vessels and leads to reduced coastal fleet capacity. Furthermore, because the domestic-built requirement also stifles domestic shipments, it increases domestic prices.[38] As a corollary, the scenario explains why it was possible to propagate Asian cabotage, especially in China and Japan, on the basis of exclusive use of domestic-built vessels.

The US analysis provides classic evidence that cabotage premised on domestically-built vessels can be expensive outside Asia. South Africa can therefore ill afford to require cabotage on the basis of South African-built tonnage. Furthermore, bearing in mind the purpose of cabotage expressed in the CMTP, it is unlikely that the exclusion of foreign-built vessels from cabotage trades will result in increased coastal participation, which in turn can be a stepping-stone for economic growth and social development. Instead, building vessels domestically could burden coastal operations and lead to a decline in coastal shipments, which in turn could drive up consumer prices.

In addition, exclusive employment of South African crews could lead to increased operational costs, particularly as a result of a higher wage bill. In South Africa, domestic crews would in all likelihood be part of unionised labour, as they are

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[36] Grennes (note 13).

[37] Report to the Congress: Foreign Direct Investment in the United States (1973) Volume 6 Appendix J – Taxation US Department of Commerce.

[38] Olney (note 14) 29.

worldwide. Potentially, coastal operators could be locked into long-term wage contracts that do not move downwards in times of a negative freight market, with obvious consequences to coastal operations.

In summary, implementation of strict cabotage would mean that vessels would have to be built in South Africa and would have to be manned largely by South Africans. Building vessels in South Africa would likely cost more than ordering vessels from Asia because, among other things, South Africa does not possess the economies of scale on which countries like Korea and China manage to reduce shipbuilding rates. It would therefore be more prudent for South Africa at least to begin its quest of owning vessels with foreign-built vessels while perhaps building capacity to compete with Asian shipbuilders at a later stage.

Engagement of high numbers of national crews on nationally-flagged vessels normally requires government subsidies, which result in inflated crew wages across the board.[39] Coastal operators draw crews from the same pool (coastal and foreign-going crews) and therefore are obliged to pay equal wage rates to coastal and foreign-going crews despite differences between them, such as limited geography of coastal vessels (limiting economies of scale), high operating costs, domestic-built costs and unionised wage scales, among other factors.

The cost of retaining coastal practices of this nature is borne by many consumers and therefore dispersed. Ultimately, strict cabotage has only a few beneficiaries, namely vessel operators, ship builders and seafarer labour unions.

8.2 NIGERIA

This section reviews two observations with respect to Nigeria. The first relates to the principal differences between Nigerian and South African coastal cargo base and their respective operations. The second observation is concerned with how Nigeria applies waivers.

8.2.1 Nigerian coastal trade: distinguishing features

The Nigerian coastal trade is unique in comparison with coasts of the other countries in the sample. In particular, Nigeria possesses two distinguishing features. First, the

[39] Ibid.

Nigerian coast enjoys significant volumes of offshore liquid bulk cargo. Second, shipping controls virtually the entire coastal modal share. These features are explained below in turn.

The first unique feature of the Nigerian coastal traffic base is that it is buoyed by significant volumes of oil, gas and bitumen deposits found off and along the coast of Ondo, Lagos, Ogun and Edo.[40] In 2007, these deposits were estimated at about 22.5 billion cubic metres of crude oil, 3.5 trillion cubic metres of gas and 42.7 billion cubic metres of bitumen.[41] Oil and gas alone constitute about 91% of the volumes that move along the Nigerian coast.[42] The remaining 9% consists of container, passenger and breakbulk activities.[43]

Therefore, unlike in South Africa, the coastal trade route between the shore and production centres is created by the existence of natural commodities within Nigerian territorial waters and will last as long as production continues to exist. Currently, there are no predictions that Nigerian natural resources are approaching imminent depletion; hence the Nigerian coastal base may be expected to continue well into the foreseeable future.

The second distinguishing feature of the Nigerian coastal traffic base is in the geographical location of the country's cargo sources. Access to these locations requires utilisation of supply vessels (anchor-handling tugs, floating production, storage and offloading facilities, crew transportation and accommodation and other methods that service platforms and rigs) between the landside and the offshore location. Supply vessels are the only mode of transport that can operate in this trade. Therefore, the coastal shipping transport servicing offshore centres experiences no intermodal competition. This trade pattern can be seen in the South African ship-to-ship bunker trade that Linsen Nambi, for instance, services utilising locally registered tonnage. Such

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[40] See Bitumen Deposit States in Nigeria, available at https://www.finelib.com/about/nigeria-natural-resources/bitumen-deposit-states-in-nigeria/153. (Accessed 30 September 2019).

[41] I.E. Okon & J.O. Edem The Impact of Cabotage Law Implementation on Nigeria's Indigenous Shipping Industry: A Study of the Onne Sea Port, Rivers State, Nigeria (2019) 8(7) International Journal of Development and Sustainability 388–403.

[42] O.A. Savage-Oyekunle Effect of the Cabotage Act 2003 on Nigerian Maritime Industry (2011), available at http://www.lasu.edu.ng/publications/law/oluremi_savage-oyekunle_bk_2.pdf. (Accessed 17 May 2018).

[43] Ibid.

trade does not impact on transport costs because it is service exclusively by waterborne transport. It therefore does not interfere with the shipper's modal choice.

Apart from offshore to oil rig and ship-to-ship operations, South African coastal traffic depends largely on the transportation of containers. A large portion of this containerised traffic consists predominantly of transshipment cargo. Moreover, 'genuine' coastal container volumes consist of empty TEUs. The South African coastal traffic base is by no means exclusive to coastal shipping. It is exposed to major modal competition from both rail and road transport.[44]

With regard to the transportation of non-containerised cargo, South Africa possesses a relatively consistent traffic base of petroleum products compared to other components of its coastal trade. However, production of petroleum products, to a certain degree, is limited by refinery capacity and demand along the coast. In Nigeria, centres of high demand are located on the coast (Lagos). In South Africa, high-demand centres are located inland (Gauteng), where road, rail and pipelines compete. The size of the South African coastal traffic base is considerably smaller than that of Nigeria. South Africa typically requires five vessels to transport petroleum products at any given time. Such capacity cannot be increased without the risk of over-tonnage.[45]

To summarise, Nigeria possesses a much larger coastal cargo base. Its base is also different save for some similarities in offshore services. Nigerian coastal shipping faces no modal competition and thrives on the back of substantial volumes of natural cargo sources found and largely consumed on the coast. However, the South African coastal traffic base is significantly smaller and is subject to modal competition. Refineries are its major source, from where petroleum products are carried for distribution to a few coastal centres. Transportation of petroleum products is already well catered for by current tonnages. As such, there are no immediate prospects of growing tonnages on the strength of the available cargo. Nevertheless, the Nigerian experience indicates for South Africa significant benefits for the reservation of offshore and ship-to-ship

[44] Refer to chapter 4 for a detailed account of the South African coastal traffic base and its limitations.

[45] However, South Africa is building some offshore capacity for petroleum product in the Mossel Bay vicinity. There is also potential for the servicing of offshore facilities, or ship-to-ship oil transfers could be explored. The scope and extent of these developments is not clear at this point. In any event, there are no indications so far that South Africa intends to make offshore activities part of its cabotage plans.

services for cabotage. The CMTP provides for this position. The rational seems sensible especially because reserving this trade for cabotage poses no threat to transport costs.

However, outside of the offshore ship-to-ship bunker trade services, the Nigerian scenario offers no real basis on which to meaningfully compare or indeed support South African cabotage.

8.2.2 Waivers

As explained in chapter 5, the US and Nigeria practice strict cabotage. In exceptional circumstances, strict cabotage ordinarily reserves the right to the coastal jurisdiction to waive some or all of its sacrosanct requirements relating to flag, ownership, where a ship was built, and manning. The Cabotage Act pronounces strict cabotage in Part II, sections 3 to 8, and provides for waivers in Part III, sections 9 to 14.

Section 3 of the Nigerian Cabotage Act requires vessels trading on the coast to be owned and manned by Nigerians. It also requires such vessels to be built and flagged in Nigeria. However, unlike the US, Nigeria lacks appropriate tonnage to carry its coastal cargo. As a result, Nigeria has been compelled to issue waivers. The practice then allows coastal participation of foreign-built, foreign-flagged and foreign-owned vessels that employ foreign crews.

The record of indigenously-owned vessels on the coast shortly after the Cabotage Act was enacted speaks for itself. Only 11 out of the 245 vessels were owned by Nigerians on the Onne oil and gas trade route, while Apapa port recorded only 44 of 222 tankers in Nigerian hands.[46] The overall percentage of the total carriage of coastal petroleum products provides an even clearer picture of indigenous participation over the same period. Nigerian-owned tankers carried petroleum products of about 97 041 tons, which amounts to 3.4%, while foreign-flagged vessels carried 96.6% through waivers. Further, West Africa Offshore chartered 15 foreign-flagged vessels and only one Nigerian-flagged vessel for coastal operations. Only 45 of the 183 crews employed in those vessels were Nigerians.[47]

[46] Okon & Edem (note 41).
[47] Ibid.

One would be tempted to expect a virtually flawless cabotage regime in Nigeria, given its cargo base, the location of sources and the coastal modal monopoly waterborne transport enjoys over other modes of transport. However, Nigeria has experienced tremendous challenges despite these advantages. Nigerian commentators lament the position. They argue that the Minister responsible set weak conditions for obtaining a waiver licence to admit foreign-flagged vessels to the coast. Furthermore, the manner in which the waiver system has been applied creates a proliferation of foreign firms who dominate the provision of coastal services.

The common position among Nigerian scholars is that waivers are a practical part of any cabotage implementation. Nevertheless, the waiver system has been attacked and generally considered as having failed for various reasons. First, Nigerian stakeholders have been excluded from the process of granting licences. Second, the administration and enforcement of cabotage laws is expensive, especially monitoring services, which require amphibious aircraft and patrol boats. [48] The general thrust of the argument is that the challenge of Nigerian cabotage arises from lack of capital and human resource capacity and management of these responsibilities rather than the inappropriateness of waivers or the general failure of Nigerian cabotage. Contrary to other Nigerian commentators, Kalu argues that the Nigerian cabotage framework as a whole is profoundly flawed because the application of the waiver system fails to safeguard the interests of indigenous ship operators.[49]

Nigeria, with its vast coastal resources and high percentage of shipping modal share and other advantages, has struggled with cabotage. South Africa should therefore approach the matter even more carefully, bearing in mind that it has a comparatively low traffic base, vulnerable modal position, and virtually no vessels under its flag. In particular, South Africa should consider the pitfalls that follow insistence on the exclusive engagement of domestically-built and -flagged vessels. Observations from Nigeria indicate clearly that a country applying strict cabotage at the commencement

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[48] See O. Aggbakoba Guide for the Cabotage Financing for the Financial Sector in Nigeria (2002); U. Nkoro The Nigerian Cabotage Policy: Its Prospects and Opportunities OCI Paper (2012) a paper presented for OCI. Consultants Ltd, Labour House, Central Area, Abuja, Dec. 2012; V.O.S. Okeke & E.T. Aniche ‘An Evaluation of the Effectiveness of the Cabotage Act 2003 on Nigerian Maritime Administration’ (2012) 2(1) Sacha Journal Policy of Strategic Studies 12–28.

[49] K.K. Anele ‘A Study of the Cabotage Policy in Nigeria from the Prisms of Ship Acquisition and Shipbuilding’ (2018) 17(1) WMU Journal of Maritime Affairs 91–17.

of its coastal policy may not realistically be in a position to provide sufficient tonnage required for its full complement of coastal services without foreign participation.

Therefore, it would be advisable for South Africa to consider a policy position that allows measured foreign participation until such time as suitable tonnage has been secured. Currently South Africa has no plausible basis on which to adopt strict cabotage. Strict cabotage entails a ‘domestic-built’ requirement as its fundamental tenet. South Africa does not have domestically-built vessels on which strict cabotage could be implemented. If the country were to insist on strict cabotage, like Nigeria, South Africa would in all likelihood be forced to rely on waivers for the provision of services on the coast. As seen in Nigeria, waivers tend to promote coastal domination by foreign firms because of the lack of suitable domestic tonnage.

It must, however, be borne in mind that, unlike Nigeria, South Africa first, does not require a large fleet for its coastal operations. It would require a coastal fleet commensurate to its traffic base. As a result, South Africa may not necessarily need to invest heavily in increasing coastal tonnage. Second, vessels that currently operate on the coast are already owned by South Africans, albeit that they are flagged elsewhere. Therefore, a simpler approach may be to encourage the inclusion of these vessels under the South African flag and to disregard where such vessels were built. Approaching implementation in this way focuses on the lower-hanging fruits. However, the suggestion may not accord with the aspirations of the CMTP. The approach is therefore suggested as a short-term practical solution while broader issues around implementations are being addressed and long-term solutions are sought. Furthermore, observations from Nigeria suggest that approaching the matter any other way could result in dependence on waivers, which are cumbersome and expensive to administer and maintain.

Nigeria and South Africa have a largely similar colonial past and a long history of deliberate exclusion of indigenous people from economic activities. Therefore, the tendency to want to compare these countries can be understood. However, at the heart of the matter is the fact that South Africa and Nigeria possess non-comparable essential cabotage drivers, specifically with regard to cargo volumes and modal transport competition. South Africa enjoys no natural advantage with respect to both cargo volumes and exclusivity of coastal shipping trade in the manner observed in Nigeria.

In light of these factors, South Africa would be well advised not to emulate Nigerian cabotage and its waiver system too hastily. It seems that the creation of a coastal fleet and a vibrant coastal trade in South Africa will inevitably require involvement of foreign firms, at least in the short-term, until South Africa has built its own capacity.

Overall, observations from both the US and Nigeria indicate that the cost involved in propping up strict cabotage makes it difficult to justify its continued existence where it already exists and its implementation where it is proposed. Therefore, strict cabotage would not be suitable for South Africa. Attention now turns to observations with respect to liberal cabotage in Australia and New Zealand.

8.3 AUSTRALIA

Liberal cabotage by nature is not rigid. Therefore, liberal cabotage principles generally do not function on a finite basis. This means the articulation and form of liberal cabotage may differ from one jurisdiction to another. Therefore, inasmuch as Australian cabotage is liberal, the degree of its liberality depends on features that are unique to Australia. This presents a challenge when comparing Australian and New Zealand cabotage regimes, for instance. Therefore, in approaching liberal cabotage it is necessary to establish the principal determinants that limit a particular liberal stance. It is essential that South African policymakers observe this principle.

At the beginning of its cabotage practice, Australia adopted liberal cabotage, permitting participation of foreign vessels on the Australian coast subject to three requirements. Foreign vessels could not be subsidised, had to comply with Australian prescribed crew wage scales and had to adhere to stipulated manning quotas. These three requirements therefore limited the degree of the Australian liberal coastal regime.

Over time, Australia has measured the degree of the liberality of its cabotage on a balancing scale that has, on the one hand, domestic fleet expansion and on the other hand, competitive freight rates. It seems, as will be seen, priority was given to the protection of domestic operations, but if there was pressure to lower freight rates, the tendency was to introduce a method to encourage foreign participation.

In 1912, when Australia enacted the Navigation Act, its priority was the establishment of its own domestic fleet. By 1950 that had not been achieved. However, freight rates seem not to have been an issue at that stage. In the 1970s coastal shipping peaked at

52% of coastal modal share. However, British vessels controlled virtually all coastal tonnage through single voyage or continuous voyage permits allowed in terms of the Navigation Act.[50] The permit system exempted foreign vessels from the three requirements that originally formed the principal determinants for Australian cabotage. Moreover, British vessels could be registered or flagged outside Australia. Cabotage liberality was therefore further extended. The immediate benefits of not paying prescribed crewing wages, for instance, lowered freight rates. These conditions favoured increased foreign vessel participation, which in turn frustrated efforts of developing the Australian fleet.[51]

Australia continued to struggle to balance fleet development and competitive freight rates. During the 1980s the government established funding to deal with the shortage of domestic tonnage. However, government investment occurred at a time when the coastal modal share for shipping had declined to 35%. The effort lost impetus as coastal trade as a whole was sluggish. A decade later shippers began to clamour more vociferously for the scrapping of cabotage. The primary reason was that cabotage was expensive. In particular, the Sea Freight Council of Western Australia argued that cabotage hampered development of the petrochemical industry. They maintained that cabotage removal would save the industry about $22.5 million a year.[52] However, calls for change were ignored.

The permit system created an environment in which foreign operators trading in foreign-registered vessels dominated the Australian logistical chain.[53] The balance between domestic fleet revitalisation and competitive freights rates has not been established. Notably, Australia reworked its cabotage legislation in 2012 and changed the permit system to level the playing field between foreigners and locals. However, before any discernible results from the new framework could be realised, another amendment was introduced to parliament in 2015. The amendment seeks to reintroduce the main provisions of the Navigation Act that favour foreign operators in order to keep freight rates low. It has not as yet been passed into law.[54]

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[50] S. Everett & C. Kittel Sustainability and Australian Coastal Shipping: Some Issues (2010) 2(3) Australian Journal of Maritime and Ocean Affairs 82–89.
[51] Ibid.
[52] Ibid. 86.
[53] Ibid. 50.
[54] Refer to the Shipping Amendment Act, Bill 2015.

In summary, Australia has not been able to develop a strong domestic fleet despite 100 years of concerted effort. At its height in the early 1970s, Australian coastal shipping enjoyed a little more than half of the modal share. However, the coast operated with foreign-controlled tonnage. At the beginning of the new millennium Australia had 33 registered vessels under its flag. Only five were registered outside Australia. In 2010 the country had no containerised vessels operating under its flag. In 2017 the number of Australian vessels of all types had decreased to 14. Over the period from 2002 to 2017, the coastal shipping modal share also decreased from 27% to 15%. The shrinking coastal modal share reflects the growth of road transport haulage and its door-to-door advantage over other modes of transport.[55]

The continued decline of the coastal fleet has been attributed to exorbitant capital and operating costs of the Australian-flagged vessels. These costs are generally regarded as comparatively higher than those of foreign operators on the permit system and are higher than road haulage costs.[56] Furthermore, Australian-crewed vessel costs (excluding fuel) constitute an estimated 38% of total operating costs, while foreign-crewed vessels calculated on the same basis were about 13%.[57] Under these conditions, the Australian-flagged vessel is not well placed to compete with other modes of transport or with foreign-owned vessels.

Presently, Australian coastal shipping is essentially confined to two services. First, it is primarily engaged in the transportation of bulk cargo such as bauxite, alumina, crude oil, iron ore, petroleum products, steel products and sugar. The bulk of activities in this service involves carriage of iron ore from Port Hedland to Port Kembla, bauxite from Weipa to Gladstone and oil products from refining centres to terminals around the Australian coast. Tonnage used in this trade is typically provided by commodity suppliers owning and operating the service that transports their own product.[58] Second, coastal shipping serves transshipments, daily passenger and RORO service between the Port of Melbourne and Tasmania. Notably, the Melbourne/Tasmania service is subject

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[55] The rising dominance of road haulage cannot be overstated. Even in island trades, where waterborne transport is often the exclusive link to the mainland, shippers place an increasing demand on carriers to provide door-to-door logistics services, especially for time-sensitive cargo. Effectively, in those trades, the carrier will still be chosen predominantly on the basis of its road haulage provision, sometimes even above freight rates. See P.D. Fanam & L. Ackerly 'Evaluating Ocean Carrier Selection Criteria: Perspectives of Tasmanian Shippers' (2019) Journal of Shipping and Trade 5.
[56] Everett & Kittel (note 50).
[57] Ibid.
[58] Australian Sea Freight: 2003-2004 Information Paper 56 (March 2006) .

to cabotage and most significantly, this trade is 99% reliant on waterborne transport given its geographical restrictions and dependence on specialty shipping.[59]

8.3.1 What can South Africa derive from the Australian experience?

First, regardless of its variation and degree of liberality, liberal cabotage is founded on the basis of foreign vessel participation. Foreign participation occurs on the basis of a licensing regime. A licensing regime that does not afford foreign operators liberty to minimise operational costs will result in either increased coastal freight rates or foreign disinvestment. However, a licensing regime that is too permissive will thwart the development of a domestic fleet because it encourages involvement of competitively-priced foreign tonnage. Therefore, if South Africa prioritises flag stimulation and adopts a licensing regime that insulates coastal shipping from competition, it will be leaving the economy to absorb the impact of doing so. However, in the event that the bar for licensing foreign flags is too low, South Africa will be doing so at the expense of developing a strong domestic fleet. Therefore, the potentially mutually exclusive nature of the variables for domestic flag development and low freight rates will require South Africa to perform a complex balancing act.

Second, the Australian experience highlights a very important lesson. It is usually difficult for a country to approach the development of coastal shipping policy in the same way it approaches policy development of other modes of transportation. Unlike policies for air and land-based modes of transport, coastal shipping policy restrictions that confine foreign participation inevitably lead to increased coastal freight rates. Increased freight rates in turn negatively affect local industries that depend on shipping transport. Therefore, overall cabotage effects that raise costs under strict cabotage can also be found in jurisdictions that practise liberal cabotage. However, liberal cabotage allows a greater platform and faster responses to cabotage challenges. A typical response involves a variation of licence conditions that encourage foreign tonnage which in turn reduces freight costs.

[59] Inquiry into National Freight and Supply Chain Priorities (March 2018) Supporting Paper No 2, Maritime Freight, Commonwealth of Australia, available at https://www.infrastructure.gov.au/transport/freight/freight-supply-chain-priorities/supporting-papers/files/Supporting_Paper_No2_Maritime.pdf. (Accessed 11 October 2019).

Third, the balance between flag stimulation and competitive coastal rates is difficult. Modern economies encourage modal competition to keep transport freights low. However, in the last two to three decades, shipping has lost its modal share, particularly because of the advantages associated with road haulage. Door-to-door services complementing road transport induce transport users to divert cargo away from coastal shipping. This generally leaves coastal shipping with a modal share consisting predominantly of low freight bulk cargo (notably liquid-bulk cargo) that may not be suitable for road haulage.[60] A shipper's choice based on the carrier's door-to-door capability is a trend even in water-dependent trades, where the carrier is chosen among other carriers on the basis of its ability to transport cargo to the shipper's premises.[61]

Like Australia, South African coastal shipping particularly with respect to general cargo, suffers from road transport domination. South African coastal shipping predominantly serves dry-bulk and liquid-bulk industries. Furthermore, Australian tonnage supply patterns were also similar to South Africa's until recently. In South Africa, Shell, BP and Engen provided tonnage (sometimes in collaboration with Unicorn Tankers, for instance) to transport their own cargo along the coast. However, lately tonnage has been operated more independently. Nevertheless, product specialisation still means that cargo owners have a significant influence on tonnage distribution. Australia illustrates the point that the modal share for coastal shipping is generally shrinking and is largely propped by shipment of bulk cargo over long distances.

Fourth, bulk cargo movement seems less sensitive to the door-to-door requirements which transportation of general cargo stresses so vehemently. Therefore, bulk and containerised shipping should be seen as distinct trades for cabotage purposes because of the type of cargo that the two forms of service provide. Approaching bulk and containerised cargo simply as similar to or as a "cluster" of coastal cargo subject to cabotage may prove inappropriate.[62]

Notably, the definition of "cargo" in the Draft MSA excludes bulk cargo. It reads: "**'cargo'** means any cargo, except liquids in bulk and gases in bulk, that may require

[60]. Everett & Kittel (note 50).
[61] Ibid.
[62] Ibid.

special precautions owing to its particular hazard to ships or persons on board …". Also "**goods**" definition "includes all animals and movable property" and clearly excludes passengers. It appears therefore that the South African coastal cargo context recognises the special handling requirements that petroleum products demand. The approach seems to readily acknowledge the distinction between bulk liquids in particular and general cargo. As such what seems conclusive is that the proposed way forward excludes petroleum products, LPG and passengers from cabotage. Therefore, if the definition is retained, the cargo of petroleum products which this study argues could form a proper subject of cabotage would have been left out. Thus, the coastal cargo share for cabotage would be containerised cargo most of which constitutes movement of empty containers.

South Africa would need first to conduct a proper analysis of the impact of cabotage on the respective trades before deciding whether in fact both cargo forms could be considered proper subjects of cabotage.

8.4 NEW ZEALAND

Coastal policy shifts in New Zealand started on the back of overall changes in transport policy. Deregulation of road transport in 1983 prompted efficiency and competitiveness in coastal shipping[63] even before cabotage was introduced (which happened only close to a decade-and-a-half later). At the time that proposals to remove cabotage were first aired, coastal shipping was already actively competing with itself and with other modes of transport. It was already providing a wider choice of transport services.[64] Cavana reported freight reductions of about 27% for voyages between Auckland in North Island and Lyttelton in South Island over the period from 1988 to 1992 and 47% freight reduction of ferry rates for almost a decade. It is therefore important to note that when the question initially arose as to whether or not New Zealand should abolish cabotage, coastal freight rates were much lower than they had been in the previous decade. The New Zealand cabotage debate was therefore not directly about flag stimulation or job creation, as this was not really an issue at the time. The coast had ten New Zealand companies operating 19 vessels. Coastal cargo also had a wide base that included

[63] R.Y. Cavana Coastal Shipping Policy in New Zealand: The Case for an Empirical Cost Benefit Analysis (1994).
[64] Ibid.

general cargo, passengers, petroleum products, coal and coke, sand and shingle, motor vehicles and cement. About 1 000 people were employed in coastal operations at a wage bill of about NZ$70 million, excluding shore-based and downstream employment.[65]

New Zealand conducted a cost benefit analysis.[66] As the nomenclature suggests, the exercise was designed to evaluate all the costs and benefits associated with cabotage. Costs of abolishing cabotage were weighed against the benefits of abolishing it.

8.4.1 Costs of abolishing cabotage

These related to job retention, freight pricing, fiscal loss, balance of payments and environmental and strategic concerns.

Employment was chief among factors for consideration for the support of cabotage retention. In particular, the concern related to the potential loss of 1 000 jobs and incidental payments. However, the response of the domestic shippers to this was that foreign labour competition was irrelevant. Associations such as Federated Farmers, Business Roundtable and Employers Federation advocated for cabotage removal. Treasury supported this view on the basis that labour protection is not a sound principle. Instead, the most productive labour force had to be engaged.[67] This approach would, of course, not be appropriate in South Africa, where employment opportunity is intricately linked to segregation. Employment of the most effective labour force is logical only in a society in which individuals were always given equal opportunities. Applying this principle in South Africa would likely perpetuate existing inequalities.

Regarding freight pricing, the concern was that the entrance of foreign operators would lead to anti-competitive behaviour. There was nothing that could prevent foreign vessels from operating at marginal cost pricing to gain market share. The most vulnerable trade route was the Auckland to South Island route, because most imports were unloaded in Auckland and exports loaded in the South Island. The concern was

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[65] Ibid.
[66] The process typically involves specification of objectives, identification and alternatives, collection and interpretation of data, classification of costs and benefits, discounting of these, adjusting to risk and the unknown, criteria determination and recommendations. See Cavana (1994) (note 63) 167 for a full exposition on a cost and benefit exercise.
[67] Cavana (1994) (note 63) 168.

that in the long term foreign operators would later raise their rates once domestic operators had been driven out of the trade.[68]

Regarding the effects on the fiscus, the analysis found that foreign operators were not obliged to pay company tax in New Zealand and natural persons likewise would not be liable to PAYE. The New Zealand government would therefore lose on taxes. Perhaps connected to this was the New Zealand operators' loss of earnings and the subsequent effect that such loss would have on the country's balance of payments. The concern regarding the environment was that the increase of foreign tonnage would increase the risk of pollution on the New Zealand coast, increase greenhouse emissions and increase the risk of disease and unwanted pests entering the country. Strategic concerns involved the usual proposition that domestic crews, in particular, may supplement defence needs in times of conflict. Furthermore, strategically, New Zealand's geography required it to have a reliable domestic coastal fleet to cope with potential national disasters.[69]

The concerns raised with respect to marginal costs pricing operations, non-contribution of foreign operations to the domestic economy, adverse effects on the balance of payments and concerns regarding the environment have all been expressed in South Africa. However, not all of these reasons can properly justify the existence of cabotage. For instance, it seems strange to suggest that an increase in pollution (or introduction of unwanted pests) with foreign vessel participation would conversely be reduced by the exclusive use of domestic fleets. However, concerns regarding marginal cost pricing may be plausible. Nevertheless, the point is that the exercise of evaluating these factors would highlight the need for South Africa to conduct its own study to determine which of these would be important and why.

8.4.2 Benefits of abolishing cabotage

The argument for foreign participation was centred around the fact that cabotage added costs which, if avoided, would allow revenue redirection towards expansion of service choice and increased competition. The overall benefit would be lowered domestic transport costs. However, cognisance was taken of the fact that in the short term, manufacturers who ship their cargo from the North Island to the South Island would

[68] Ibid.
[69] Ibid. 169–170.

benefit until local operators had been put out of business (before foreign operators raised freight cost again).[70]

Treasury found it virtually impossible to determine the impact of greater competition in the absence of data from foreign vessel operators and without having an understanding of the cross-elasticities of demand on the structures of foreign shippers. The conclusion was that abolishing cabotage would have a negative impact on the coastal shipping industry. New Zealand could not place reliance on the empirical cost benefit analysis alone to decide whether to abolish or to retain cabotage.[71]

8.4.3 Observations for South Africa

What South Africa could also learn from the analysis is that the cabotage debate usually arises between two main groups. One group supports job preservation, creation and stimulation of domestic businesses and insulation of coastal shipping on the basis that it is an extension of the domestic industry. This group does not focus on the cost of cabotage but on the benefit of its retention. Typical among its members are domestic ship owners and domestic transport operators, maritime workers' unions and other transport sector associations (excluding shippers). This group argues that cabotage provides employment opportunities for seafarers and related services.[72] The other group prioritises reduction of costs and provision of a wider assortment of coastal services on the strength that the paradigm offers costs that are lower than those other models offer. The emphasis is placed on competition and service efficiency. This group is not motivated by domestic development issues. It usually consists of international operators, manufacturers, ports, boards, other primary producers and transport users.

However, this grouping can be expected to differ in South Africa. Unlike in New Zealand and other jurisdictions, coastal operators in South Africa do not support cabotage mainly because vessels operating on the coast are registered elsewhere. Therefore, South African-owned vessels do not form part of the domestic transport industry in the proper sense. Entities that own coastal vessels are locally registered but provide coastal services on the same terms that are ordinarily associated with services provided by foreign vessels. For the same reason, interests of the coastal bulk industry,

[70] Ibid.
[71] Ibid. 171.
[72] Ibid.

particularly of those carrying petroleum products along the coast, can be expected to be similar to foreign interests. On this basis, it follows that South African companies that operate on the coast would prefer the status quo: no cabotage. Apart from what has been stated, delineation of the various interest groups in South Africa would be expected to run in a similar vein to those of New Zealand.

Furthermore, South Africa should bear in mind that a cost benefit analysis will not be of great assistance in deciding coastal policy without a better understanding of the pricing structure of foreign vessels that operate on the South African coast. The absence of such data would mean there is a weak platform on which to compare pricing of vessels on the coast properly, because only data in respect of domestic vessels would be available. It is not unreasonable to assume that the New Zealand government recognised the difficulty that the absence of such empirical data caused. Nevertheless, the government decided to respond by abolishing cabotage without comparing the total cost of coastal operations. The government's ability to change policy without completing the study should also serve as a reminder that the state retains the prerogative to make decisions on policy. South African coastal stakeholders should therefore note that even where liberal cabotage applies, the government is not beholden to the findings of consultative processes.

Turning to New Zealand again, predictably, abolishing cabotage in 1995 was soon followed by a decrease in freight rates. Freight rates for cargo moving between the North and the South Islands reduced by up to 50% owing to marginal costing and increased competition.[73] Costs on the Auckland-Lyttelton voyage decreased by 25%, while coastal volumes increased by about 5% following a rise in transshipment activity. However, as predicted during the costs analysis debates, gains that followed the new coastal regime were possible because foreign flags charged marginal costs for carrying coastal cargo. Also, most were subsidised and had lower operating costs, and the benefit was passed on to shippers.[74] New Zealand coastal operators, on the other hand, could not minimise costs because they had to pay taxes and prescribed wages for crews, among other expenses.[75] A year after abandoning cabotage, New Zealand was left with

[73] R.Y. Cavana 'A Qualitative Analysis of Reintroducing Cabotage onto New Zealand's Coast' (2004) 31(3) Maritime Policy Management 179–198 186.
[74] Ibid. p. 180.
[75] Ibid.

nine operators[76] controlling a total of 21 vessels operating only on the coast[77] (without any capacity for international trade). Half of the coastal fleet was registered under the New Zealand flag, while the rest were registered under FOCs. The coastal crew complement of 1 000 in 1995 had been reduced to 600 by 2005.[78]

In view of the above, it would be important for South Africa to note that the exclusive engagement of domestic fleet raises costs. South Africa should also bear in mind that coastal shipping functions better where competition exists but that the participation of foreign vessels in the coastal trade makes it extremely difficult to increase domestic fleet capacity. Domestic fleet operation and capacity diminishes if it does not enjoy any form of protection from foreign competition. In the circumstances, it seems almost conclusive that opening trade to foreign-flagged vessels will lower freight costs on the one hand while sounding the death knell for domestic fleet development on the other. If South Africa seeks to achieve both objectives, it would have to prepare itself adequately for the potential conflict of interests that would arise.

As expected, opening the coast to foreign competition was followed by significant shrinkages of the New Zealand coastal ship operations. Disturbed by the decline, in 2004 New Zealand conducted another analysis, this time for the reintroduction of cabotage to mitigate weakened coastal operations. The analysis focused specifically on coastal shipping because New Zealand's high seas tonnage capacity had completely vanished at that stage. The aim of the study was to find a strategy that would encourage local participation in coastal shipping. However, as a prerequisite, the envisaged strategy needed to secure and enhance existing coastal shipping infrastructure and preserve a competitive range of services.[79]

In South Africa, much work has been done to advocate for cabotage. However, it seems minimum effort has gone into defining the parameters for cabotage operation and in assessing the feasibility of a cabotage regime: how it will be implemented, and when and how its success will be measured. Prerequisites that cabotage should meet have not been set. The benefit of conducting a study similar to New Zealand's would afford

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[76] These were Silver Fern Shipping Ltd, Holcim (NZ) Ltd, Golden Bay Cement, Tranz Rail Interisland Line, Pacifica Shipping (1985) Ltd, Strait Shipping, Leslie Shipping, Reef Shipping Ltd and Sea Tow. For full details, see Cavana (2004) (note 73) 185.
[77] Ibid. 184.
[78] Ibid.
[79] Cavana (2004) (note 73).

South Africa the opportunity to decide its own requirements for cabotage which, it is hoped, would disclose the type of cabotage the country will apply. The study should also determine the short-term goals and what in the long run cabotage is intended to achieve and the parameters for such achievement.

In New Zealand the quantitative study conducted in 2004 found that the shippers' transport choice was based on service frequency and quality, transit time, price and value-add services (such as door-to-door services).[80] Furthermore, the study also found that passing international vessels had a considerable amount of underutilised space on their vessels. Manufacturers and producers exploited such overcapacity to their advantages. Similar to the findings of the previous analysis, the effect of under-utilised space was exaggerated by the fact that imports (inbound traffic) were discharged in Auckland while exports (outbound traffic) were loaded from other ports.

The study also revealed that international vessels focused more on transshipments than on genuine coastal trading. The coast was utilised predominantly for container repositioning for overseas trade. For instance, P&O Nedlloyd, Columbus and FESCO structured their coastal services so as not to call simultaneously at the same ports. They then carry each other's "empties" from smaller ports to Auckland for transfer to other passing vessels, presumably for repositioning for exports in other New Zealand ports. The practice reduces aggregation costs, which cannot be achieved if local vessels are utilised.[81] In addition, while international vessels gained a proportion of the coastal market,[82] their existence increased coastal shipping business largely because international vessels discharge in Auckland. Cargo is then distributed along the coast through feeder services. For example, cargo volumes of Pacifica Shipping Ltd increased by 100%.[83]

However, the 2004 study ran into similar challenges to those of its predecessor. There was even less statistical data available on which a rigorous cost benefit analysis could be conducted than was the case in 1995. Therefore, the study relied on stakeholder analysis instead.[84] In summary, the stakeholder views followed the expected trajectory.

[80] Ibid. 183. These services would nowadays include parcel tracking, among others.
[81] Ibid. 185.
[82] Which Cavana (2004) (note 73) placed at 10–15%. Ibid 184.
[83] Ibid. 187.
[84] Ibid. 188.

Workers' associations felt cabotage would have a positive impact on seafarer employment. Manufacturers opposed reintroduction for fear of increased freight rates and limitations of choice of service. Domestic ship owners supported reintroduction for the employment of New Zealand coastal vessels, while international ship operators opposed reintroduction, arguing that it would increase freight rates.[85] Significantly, the government did not comment.

The conclusion was that the reintroducing cabotage would have a net negative effect on the economy. Therefore, the recommendation was not to reintroduce cabotage. This time the government followed the findings of the study.

The above analysis of the New Zealand coastal business once again shows the benefit of conducting a study of this nature. South Africa would find it quite useful to identify and differentiate beforehand (pre-cabotage) its shippers and to categorise their transport preferences in a systematic way to glean the demand (need) for coastal services, including expectations and long-term requirements, among others; and to tailor cabotage in a manner that would correctly respond to the demand patterns the study reveals.

The manner in which bulk and containerised coastal trades respond to the cabotage debate is interesting. In New Zealand, the 2004 study found that marginal costing and increased competition did not affect bulk coastal shipping in the manner in which it affected containerised cargo. Therefore, transportation patterns before and after cabotage were virtually unchanged. Bulk shipping relied on dedicated domestic tonnage and chartered-in tonnage to supplement the fleet during times of higher demand. New Zealand has twice shown the importance for South Africa to conduct a study to determine whether the containerised and bulk coastal trades will be affected in the same way when cabotage becomes the official coastal policy. With regard to containerised cargo, the study should specifically differentiate genuine coastal movements from transshipment cargo volumes. It should also determine the precise inter-port coastal movement. It is hoped that the result would shed light on how containers are distributed from port to port; which of these containers are transported by international lines; and which move by feeder vessels and in what volumes. On the basis of the analysis provided in chapter 4, it would be expected that the suggested

[85] Ibid. 191.

study would show that patterns of container relocation seen in Auckland occur in Durban and to a lesser extent in Cape Town as well. Nevertheless, research specifically dealing with this aspect should be conducted to confirm the position. With regard to coastal bulk shipping, it is suggested that a study specific to the movement of petroleum products would be important. Further, the study will be important bearing in mind the relatively small size of the bulk fleet servicing the South African coast, the specialised nature of tonnage engaged and the relationship that petroleum products owners have with the coastal companies that transport these products. It is assumed, without concluding, that factors that drive bulk industry are likely compare differently to those that drive other South African coastal trades. South Africa would be better served by evaluating the extent of such difference and adjusting the tone of its cabotage accordingly.

8.5 CONCLUSION

Liberal cabotage appears far more practical than strict cabotage. The latter seems to be based more on principle and conviction rather than on practical business considerations. Liberal cabotage leaves room for debate and allows various stakeholders to debate issues and to come up with resolutions that may be more suitable for a particular jurisdiction as opposed to simply following government's stipulation regarding how cabotage must function. Perhaps the chief advantage of liberal cabotage is that it operates on the basis that it can be altered. However, this also becomes its Achilles heel in that it may affect the certainty of the coastal policy.

What is common in both Australia and New Zealand is that despite their expansive experiences in dealing with cabotage, both these countries have had to revise their stand on the policy, moving from almost no restrictions to different variations of liberal cabotage but have not yet been able to settle the matter to general satisfaction. Australia's 2015 Bill and New Zealand's postponed discussions provide evidence of the fragile nature of coastal policies and the need for their constant appraisal, especially if liberal cabotage undergirds such coastal policies. South Africa will have to bear the debates in these countries in mind in the furtherance of its cabotage ideals.

Furthermore, liberal cabotage in Australia and New Zealand serves as a reminder that liberality allows an opportunity for both government and industry to engage more readily on what imperatives need to be accommodated and in what order. Although the ‘elasticity’, detail and extent of liberality may differ between jurisdictions, liberal forms of cabotage facilitate far greater involvement of participants and the appreciation of their views. Therefore, a steady liberal cabotage form seems to be the result of a robust consultative process. Having said that, New Zealand shows that the government retains the prerogative to decide on what policy to apply. It can decide when to and when not to follow recommendations.

Nevertheless, a progressive coastal shipping policy approach seems to require a set of clear goals to dictate the parameters for discussion and guide the degree of cabotage liberality. New Zealand’s paramount consideration was the preservation of coastal infrastructure and continued access and competition in coastal trade. The objective meant that requirements relating to flag stimulation, ownership of shares in coasting vessels and benefaction of national crews played a subsidiary role in determining the policy stance. Subsidiary issues may be eliminated completely if thwarting the primary objectives relating to coastal access, for instance. Therefore, cabotage policy discussions between government and stakeholders in South Africa should be directed at determining the primary objectives. In doing so, parameters for the form of cabotage the country should follow should be clearly set.

The objectives of the South African coastal policy so far reflect a greater interest leaning towards domestic flag stimulation and seafarer employment-related issues rather than coastal access and competition. Such parameters must bear in mind the fact that the degree of cabotage liberality predicates the degree of access to foreign participants. If cabotage is too liberal, it serves little or no purpose in assisting the country in its quest to revitalise the domestic coastal operations. Only about half of the New Zealand coastal fleet is registered under the domestic registry. However, industries that depend on coastal shipping benefit from such liberality. South Africa has no vessels. The country’s reasonable starting point is therefore foreign vessel participation.

Notably the involvement of foreign interests in coastal trade keeps coastal freight rates relatively low yet suppresses development of domestic tonnage. An excessively liberal cabotage tone would encourage foreign vessel involvement with which local operators cannot compete. However, onerous cabotage requirements may induce international operators to relocate hub operations or establish new transshipment centres outside South Africa to circumvent cabotage. This would not be difficult, given long-standing arrangements between international lines and the existing feeder operators. However, the position would be less clear if South African cabotage is the first step to SADC cabotage.[86] This issue among others re-emphasises the need for a study on the potential effects of cabotage as explained above.

In conclusion, the reality is that, regardless of the degree of its liberality, cabotage does not translate to coastal fleet stimulation by itself. However, a liberal cabotage approach considers a wider range of coastal shipping issues that are non-prescriptive. In South Africa it would create an environment for proper dialogue regarding domestic flag stimulation that the CMTP highlights and other cabotage-related benefits for other parts of the country's economy. This means South Africa should avoid a 'one-size-fits-all' approach to cabotage implementation. The country should consider developing cabotage on the assumption that it will evolve until the most workable coastal policy has been established. South Africa should therefore avoid an inflexible basis for cabotage implementation. The course for coastal shipping policy should therefore follow liberal cabotage founded on principles befitting South Africa's economic and social imperatives.

[86] See discussion on the overarching structure of the AU, SADC Protocol and CMTP in respect of regional and continental cabotage provided in chapter 2.

CHAPTER 9:

CONCLUSION

The thesis sought to investigate whether or not the CMTP provides a discernible course for cabotage implementation in South Africa. The enquiry involved a proper consideration of what cabotage is; the measure of its application through a prism of various jurisdictions where cabotage has been applied; and what this could potentially mean in South Africa. The jurisdictions that the study examined in depth were Nigeria, the United States of America, Australia and New Zealand. The thesis stated the legal framework for cabotage in various jurisdictions. It was not necessary to deal with legal precedence to assess the practical application of cabotage. The reason for studying the mentioned countries were set out. The overarching basis for selecting these countries was that they jointly and severally encapsulate the origin, evolution, practice and volatility of cabotage.

The introductory chapter defined cabotage. It distinguished the traditional approach to cabotage from its modern application. The traditional context for cabotage connotes a coastal policy in which the right to trade between ports of the same state is reserved for the fleet registered in that particular coastal state. However, the thesis proposed a wider and purpose-driven cabotage definition that reflects its modern form. Cabotage in its modern context has been utilised as a method of engaging a shipping fleet of choice (not necessarily flagged under the coastal jurisdiction) in a manner that responds to specified economic and social needs of the coastal state.

Therefore, cabotage is defined as the reservation of a jurisdiction's right to engage a shipping fleet of choice over its coastal waters between its ports in a manner befitting its economic and social imperatives. It occurs when the coastal state, through its legislative instruments, exercises its prerogative to dictate parameters for the development of its maritime industry. In this context, cabotage drivers must be determined first before cabotage is applied. The study proposed the tone of cabotage and the measure of its application that serves predetermined economic and social imperatives. On this basis the study suggested that the correct approach to cabotage should not simply pivot on the establishment of a flagged fleet or the exclusion of foreign vessels. Primacy should be given to the articulation of clear imperatives that would benefit the economy and promote social development. Cabotage may be a factor but it cannot be regarded as *a priori* to economic and social development.

In light of the above, the study then explained the rationale for abandoning *laissez-faire*. The conclusion drawn was that South Africa's quest for cabotage was not strange or unique in that other jurisdictions have proffered similar reasons for cabotage. Many countries perceive cabotage as a means of stimulating shipbuilding, shipping skills transfer, attraction of favourable foreign exchange and job creation, among others.

After defining cabotage and providing its rationale in South Africa, chapter 2 gave the historical development of coastal shipping both domestically and regionally. The historical narrative served two main purposes. First, it explained how coastal shipping has been conducted over the years. Second, by providing the proper context for cabotage in Southern Africa, it explained why cabotage was never contemplated as a coastal policy until recently.

The chapter showed that coastal trade was almost always conducted on a regional basis. The strongest South African route was between the Cape and what was then Natal from inception. Further, cargo on this route was driven by commodity trading: sugar and paper products from Natal for the westbound voyage and canned foods and general cargo from the Cape. There were various carriers over time that traded on the various routes. However, early British domination meant vessel operations on the coast thrived when in conformity to the dictates of British-aligned conference arrangements. In later years, when South African coastal shipping was at its peak, Unicorn Shipping dominated the coastal scene. Even then, coastal operations depended largely on feeder cargo. After incorporating and thereby eliminating virtually all of its coastal competitors, Unicorn Shipping, which at that stage had become known as Grindrod, took a decision to flag all of its vessels outside the country. Because there is no cabotage in South Africa, Grindrod currently operates along the coast as the only South African-registered company although its fleet is registered outside the country. Coastal operations remain largely dependent on feeder cargo from the South Africa Europe Container Service (SAECS) and other international formations.

With regard to the absence of cabotage, the chapter showed that the Southern African coast was initially developed under British rule at the time when Britain ruled the seas and lands alike. The result was that South Africa, even after the establishment of the Union of South Africa, conducted itself in a manner that subverted coastal trade independence and which worked against coastal shipping development. South Africa bound itself to the OFA and suppressed the growth of coastal modal share through the SCRR. The deregulation of road transport in the late 1980s substantially undermined coastal shipping development. These policy shifts, among other factors, suppressed any potential for the development of coastal shipping modes on which cabotage could have been kindled.

Having defined cabotage and its rationale and having shown how coastal operations were previously conducted in the absence of cabotage, it was important to provide the policy environment in which cabotage will apply in the future. Chapter 3 presented the national and SADC policy framework in two parts. The first part covered the policy environment for domestic cabotage as proposed under the CMTP. The second part described continental and regional policies that govern the cabotage environment which domestic cabotage must mirror or complement. It was found that there is misalignment between the CMTP's proposed cabotage and cabotage as envisaged by the AU and SADC. Meaningful cabotage implementation will require alignment of the CMTP with AU and SADC imperatives.

Assuming policy hurdles can be resolved either through multilateral agreements or other arrangements, does the coast possess a cargo base on which cabotage can be based? Chapter 4 attempted to respond to this question. The enquiry was conducted into two parts. The chapter highlighted cargo as the pivotal ingredient for a successful trade in any route and that cabotage implementation as suggested would likewise dependent on the availability of coastal cargo.

The discussion was divided into two parts. The first part covered the analysis of cargo and tonnage engaged on the coast. The second part traced regional coastal activity from South Africa to dominant regional trades as inter-regional data particularly for cargo movement from the region to South Africa was not accessible. With regard to domestic routes, the discussion dealt first with bulk and breakbulk cargo (primarily bulk cargo) and thereafter proceeded to containerised cargo. The discussion began by identifying sources of cargo and thereafter volumes.

Four crude oil refineries located along the South African coast were identified as sources of cargo. These sources are controlled by oil majors with centres in Durban, Mossel Bay and Cape Town. The chapter also showed that typically (liquid) bulk service are operated from Durban/East London/Port Elizabeth/Mossel Bay/Cape Town on the outward leg. The inward leg runs from Cape Town/Mossel Bay/Durban or, depending on cargo, Cape Town/Port Elizabeth/East London/Mossel Bay/Cape Town.

The study identified Grindrod, through Unicorn Lines, as virtually the exclusive coastal carrier to the oil majors Shell, Total, Chevron and Sasol. Cargo sourced from centres controlled by these companies constituted about 90% of the total coastal volumes. After 2014, oil majors insourced coastal services, save for Engen, which continued to engage Unicorn Shipping, albeit on a shared basis. However, from time to time Engen supplements capacity with its own tonnage.

The overall assertion that the study made with regards to non- containerised cargo was that the South African coast possessed negligible breakbulk cargo volumes and that breakbulk was, in any event, sufficiently catered for in the tonnage capacity provided by multipurpose vessels that move coastal containerised cargo. The minuscule volumes involved in the breakbulk category did not warrant further study. Breakbulk cargo should be given a supplementary cargo status for cabotage purposes.

With regard to bulk cargo, a significant amount of cargo exists in this category. Durban handled the highest volumes of coastal bulk shipment in South Africa at an average of about 1.3 million tons per annum, while Cape Town handled the highest volumes of landed bulk cargo, which averaged about 750 000 tons per annum. The major coastal commodities are sugar, paper products, wheat and malt. Another dominant cargo on this trade is salt. However, salt has its source in Namibia and its sink in Durban. Therefore it cannot, strictly speaking, be regarded as domestic cargo.

With respect to tonnage, five vessel tonnage capacity (with a combined deadweight tonnage of about 118 000 dwt) sufficiently catered for current coastal cargo volumes. Any additional capacity would almost instantaneously lead to over-tonnage. The reality is that cabotage on the South African coast cannot be seen as a catalyst for an expanded coastal bulk fleet unless a case for increased bulk volumes can be shown. Given the status quo, cabotage would be impractical as a vehicle for traffic expansion.

The study thereafter investigated the position in respect of containerised coastal cargo. Cape Town receives most TEUs, while Durban showed the highest number of shipped TEUs. A significant amount of traffic in the dominant route (between Durban and Cape Town) consisted of empty containers, forming about 80% of TEUs of the total coastal traffic base. Movement of large volumes of empty containers arose from container repositioning for feeder activity between cargo sources and cargo sinks. Such activity reinforces the idea that feeder operations formed the backbone of cargo movement between South African ports and the wider Southern African coastal shipping trade, while domestic trade activity contributed relatively far less to such trades.

Similar to the other trades, it would be difficult to implement cabotage on the basis of containerised domestic cargo volumes, especially where cabotage is intended for the expansion of the home fleet. The incontrovertible conclusion regarding the first part of the chapter was therefore that South African coastal trade as a whole did not have sufficient cargo to be self-sustaining. It follows that cabotage implemented on the basis of existing cargo volumes cannot expand coastal trade.

The second part of the chapter was concerned with whether or not cargo existed for the implementation of cabotage on a regional basis. The study investigated the position in respect of ports in the range between Mombasa and Luanda. The potential for regional cabotage was shown. However, regional coastal trade suffers from serious imbalances. Regional coastal trade depended predominantly on imports from South Africa. The major regional traffic base constituted of significant volumes of processed foods, chemicals, paper products and other manufactured goods. Other cargo types exist but only as supplementary cargo. The major cargo is exported from South Africa, predominantly to Mauritius, Tanzania, Kenya, Madagascar, Reunion, Mozambique on the eastern seaboard and to Angola and Namibia on the west. About 11 000 to 17 000 TEUs per annum move in these trades. Volume distribution showed that a moderate cargo platform existed on which cabotage can operate at current coastal tonnage levels of about 1 100 to about 1 700 TEUs vessel capacity. However, caution was expressed regarding the importance of establishing proper regional integration to bind other SADC countries to cabotage ideals (as explained in the preceding chapter).

Chapter 5 identified forms of cabotage practices. Two forms or types of cabotage were identified as worldwide norms. These were restrictive and liberal cabotage. Open cabotage was not considered a form of cabotage policy because it can arise without legislation or policy, which is the case in South Africa. Therefore the forms considered (and their variations) were those that result from state intervention. Worldwide practices were evaluated using a broad sample of countries that engage in cabotage. These were assessed on the basis of the degree of the strictness of their individual cabotage principles (or absence thereof). An attempt was then made to relate the result to each practice's influence on the respective ship registration pattern.

An overview of cabotage practices of the top 35 maritime nations was given in view of the fact that South Africa aspired to be on the list of these nations. However, in order to make the assessment more robust, the fourth and fifth category consisted of countries that fall outside the list of the leading 35 nations. The first category consisted of five countries that own about 50% of the total deadweight capacity in the world. The second category presented EU members outside the top 10 of the leading countries. The third category comprises South Africa's chief trading partners in the BRICS bloc and Indonesia. The fourth and fifth categories comprised countries that made up the remaining 5% of world total deadweight tonnage.

A table was then created which indicated that the majority of the top 35 maritime nations practised cabotage and that they own tonnage under two forms of fleet registries: domestic flag or second registries. It also appeared that the second register often offered relatively similar terms to FOC terms of operation. Such terms were found to be undoubtedly commercially better in comparison to those offered under domestic flag registers. Therefore, the degree to which each jurisdiction applied cabotage restrictions seems to determine which of the two forms vessel operators preferred.

The overview revealed that globally, the implementation of the form of cabotage the country desired, whether strict or liberal, largely depended on each country's capacity (including the country's economic strength) and what each deemed beneficial for its development bearing in mind its coastal resources. The approach of each state depended on what was considered paramount (for example, if it was vessel ownership, cabotage policy would allow coastal operations regardless of where the vessels were built. However, if priority was given to shipbuilding, such vessels, although they might be registered under the flag, would not be allowed to trade on the coast). Therefore the degree of austerity of each cabotage practice would be reflected in its domestic register. There seems to be no one-size-fits-all approach.

The discussion then proceeded, under Chapter 6, to deal with the practice of strict cabotage using the US and Nigeria as exemplars. Liberal cabotage was dealt with in the following chapter.

Chapter 6 dealt with the trademark of strict cabotage which centres around the promotion of indigenous tonnage ownership and the exclusion of foreign interests from coastal trade participation. Under strict cabotage waivers were used but often with onerous conditions attached to them.

In the case of Nigeria, the legislative intention was to enact strict cabotage with a view to thrusting the country into an era of total coastal independence. At the heart of the Cabotage Act lay the desire for Nigeria to build its own ships, owned and operated by its people, manned by its crews and flagged in the country. However, continued lack of expertise and capital shortages to supplement tonnage forced compromises that were manifest in how cabotage was implemented in Nigeria. Therefore, the reality of Nigerian coastal trade was its dependence on foreign tonnage introduced to the trade through its waiver system. The main reason for reliance on waivers was that the country had not as yet been able to produce appropriate vessel capacity to serve its vast oil and gas industries which form the core of its coastal shipping base. Nigerian cabotage trades had more than 50% foreign participants. The conclusion was that the Nigerian cabotage framework supported strict cabotage while in reality, Nigeria practised liberal cabotage.

By contrast, the US has managed to promote and sustain strict cabotage over a significant period of time. Notably, US cabotage requirements are less strict then those of Nigeria, which requires 100% 'local content'. US cabotage rests on four pillars. Cabotage is reserved strictly for US-flagged vessels that are 75% owned by US citizens, operated by at least 75% US citizens and 100% built in the US. Therefore, the US allows a margin of 25% percent foreign participation, albeit only in respect of its manning and ownership requirements. Further, the US was a developed country with a long history of vessel ownership and is one of the largest economies in the world. Its security needs are more urgent and its resources allow the US to implement cabotage independent of others.

The US has a strict code for its cabotage implementation. It has granted very few waivers to allow foreign vessel participation. These seem to have been limited to emergency and disaster management cases only. In those cases, waivers were granted with strict conditions attached. In any other case, cabotage implementation remained tight and closely monitored by multiple administrative agencies who ensure strict compliance with US cabotage rules.

On the basis of the variances on the stricture of cabotage implementation in Nigeria and the US, the conclusion was that strict cabotage seemed to gain traction only in jurisdictions that possessed a suitable skills base and sufficient government capital funding for investment in coastal fleets; and where there is strong administration process of government policies. Therefore, *ex facie*, strict cabotage seemed primarily more suited for developed countries then for developing countries such as South Africa.

Chapter 7 evaluated liberal cabotage practices. Liberal cabotage is by nature flexible and is often driven through consultation and consensus. Its flexibility also allows adaptable cabotage implementation that accommodates evolving political, social and economic imperatives. However, three central observations were made with regard to Australia and New Zealand. First, the size, shape, location and whether the country is an island or not is irrelevant. Second, liberal cabotage is usually applied in varying degrees. The degree of liberality of cabotage depends on the policy objectives of each state. Lastly, each state has its own boundary prescribing the extent of liberality of each cabotage.

In general, liberal cabotage ameliorated the anomalies created by blanket foreign exclusions observed under strict cabotage. Instead, liberal cabotage provided space for the application of waivers through which foreign flagged vessels may be engaged on the coast at the convenience of the coastal state. Further, subject to certain (often reasonable) conditions, the state usually adapted the degree of (the stricture of its) waiver application in line with its social and economic interests at various stages of coastal policy development to meet its priorities. The conclusion was therefore that liberal cabotage would be more suited for a country like South Africa which is at developmental stages of its coastal policy. Coastal policy liberality will accommodate South Africa’s evolving political, social and economic imperatives which would be determined by consultation and consensus.

The penultimate chapter amalgamated observations gleaned from the primary study sample of the United States, Nigeria, Australia and New Zealand. Essentially chapter 8 focused on the specific findings deemed instructive for South Africa confined to factors that provide direct lessons for formulating the South African cabotage policy. Bearing the rationale for cabotage in South Africa in mind, and having considered the lessons derived from the study of the US, Nigeria Australia and New Zealand, could it be said the CMTP provided a probable course for cabotage in South Africa? The response to this question is negative.

The study revealed that strict cabotage as seen from the US raises costs and definitely diminishes domestic fleet capacity while raising consumer prices. Nigerian practice showed that strict cabotage without a domestic fleet cannot be sustained. Without a domestic fleet, coastal shipping depends on erratic application of the waiver system which works in favour of foreign flags. In general, strict cabotage was not recommended for South Africa.

Liberal cabotage was instead recommended. It was observed that the objectives of the South African coastal policy so far reflected a greater interest leaning towards domestic flag stimulation and seafarer employment-related issues rather than coastal access and competition. However, liberal cabotage, like strict cabotage, served little or no purpose in assisting the country in its quest to revitalise domestic coastal operations. It was observed that the degree of cabotage liberality predicates the degree of foreign participation. As such South Africa should adjust the degree of liberality of its own cabotage to meet its social and economic requirements bearing in mind the need to allow some degree of foreign participation.

9.1 CONCLUSIONS AND RECOMMENDATIONS

The conclusions to be drawn from this study are that the adoption of a policy of cabotage has been conducted on policy assumptions not based on adequate research. I have shown that the only type of cabotage regime that is feasible given South Africa’s circumstances is liberal (flexible) cabotage built on the foundation of the current coastal trade in conjunction with existing tonnage controlled by South African interests, albeit flagged offshore.

In order to determine the precise contours of such a policy, South Africa needs to devote more attention to setting the parameters for cabotage and determine the ‘elasticity’ of its liberal cabotage. In doing so, the key would be the continued discussions between various industry participants and the relevant government departments. The process would require studies to establish the real nature of cargo movements along the coast. The investigation must evaluate, among other things, the following: the volumes of containers shipped from each port and establish precisely where such containers are landed and vice versa, what constitutes proper feeder cargo and volumes involved in such trade, the potential for coastal vehicle transportation, and the extent to which oil and gas could influence the coastal cargo base.

The South African cabotage context presents an opportunity for job creation (the antecedent skills development and retention vehicle), industry expansion and greater trade autonomy. It is therefore a commendable step in the right direction. However, the status quo firmly indicates that South African policy makers need to revisit the method of implementing cabotage. The approach ought to prioritise the old adage “cargo is king”.[1] Cabotage can only be sustained if there is cargo to support it. It therefore raises great concerns that the government forges ahead with cabotage without clear pronouncement regarding the “cabotage route” or the cargo base for cabotage. The draft legislative framework also does not deal with these central issues. Instead the proposed framework excludes the only potential cargo base on which cabotage can be sustained.

My own view is that there is scope for gains in terms of a modest revival in the South African register; the investigation of a special cabotage regime for the off-shore oil industry; improved training and jobs for South African seamen; development of service trades and supporting industries. Without the existence of a clear traffic base for cabotage, an approach focused on increased domestic tonnage is a fallacy. South Africa will be better served by an in-depth and very careful consideration of the appropriate dimensions for its proposed cabotage trades.

[1] See for instance comments of SAL President, Anders Hyrup available ata https://www.joc.com/breakbulk/breakbulk-carriers/sal-heavy-lift/special-report-‘cargo-king’-sal-heavy-lift_20191209.html, and concurrence from Thuso Mhlambi Director of Linsen Nambi available at https://www.bizcommunity.com/Article/196/586/180809.html, accessed 14 February 2019.

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