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**MERCHANT SHIPPING (INTERVENTION POWERS ON
THE HIGH SEAS IN CASES OF POLLUTION)
REGULATIONS 2015**

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EXPLANATORY NOTE

CHAPTER 1: INTRODUCTION

The law of the sea rests on two traditional principles namely; the freedom of the high seas and territorial sovereignty of a coastal State.¹ The balance of interest had previously weighed in favour of freedom of the high seas.² Hugo Grotius writing in favour of this principle in the 17th century stated that the waters and the seas are necessarily free; as the sea cannot be exhausted neither by navigation nor fishing.³ Although Grotius' view was accurate in the 17th century, it soon became clear with technological developments that this idea is highly unsustainable. Technological developments of the 19th and 20th centuries led to construction of super tankers and nuclear ships which became a huge source of pollution. Also they increasingly transported dangerous and hazardous cargo across the seas and often were involved in accidents which led to catastrophic damage to the marine environment. Hence there was a need to re-evaluate Grotius' view.

The 1958 Geneva Convention on the High Seas was convened to address the state of the legal regime or lack of it in the oceans. The objective of the conference, amongst others, was to 'provide for progressive development of entirely new law in areas such as the protection of the environment.' However, the conference was only concerned with laying down general principles and basic jurisdictional questions concerning legislating and enforcement on marine pollution were resolved. It firmly reiterated the principle of the freedom of the high seas. Corollary to this freedom of the high seas is the principle of exclusive jurisdiction of the flag State which means that the nationality of the flag which a ship flies has sole jurisdiction over it on the high seas.

This balance in the favor of freedom was soon to change after the *Torrey Canyon* incident. The international community realized that there was a need to take a firm stance and lay down definitive rules concerning marine pollution. This was the avenue through which the 1969 International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties (hereinafter 'the Intervention Convention') and its protocol; the 1973 International Convention Relating to Intervention on the High Seas in

¹ Legault, L.H.J; 'The Freedom of the Seas: A Licence to Pollute?' (1971) *University of Toronto Law Journal* 211.

² Stephenson, M.A; 'Vessel –Source Pollution under the Law of the Sea Convention – An Analysis of the Prescriptive Standards 17 U. Queensland L.J. (1992-1993) p. 117, p.117.

³ Ibid.

Cases of Marine Pollution by Substances other than Oil (hereinafter ‘the 1973 Protocol’, were birthed.

CHAPTER 2: PRELUDE TO THE 1969

INTERVENTION CONVENTION

2.1 Torrey Canyon Incident

The Torrey Canyon was a Liberian registered, BP chartered tanker which was carrying 119, 000 tons of crude oil from Kuwait on 19th February 1967 with full cargo of crude oil, reaching the Canary Islands by 14th March. From there the planned route was to Milford Haven in Wales; however the shipmaster in an attempt to save time, took a shortcut to Milford Haven. Unfortunately, on the morning of 18th March 1967, the ship ran aground on the Seven Stones Reef, between Land's End and the Isles of Scilly,⁴ 12 miles off the British coast, that is, on the high seas.⁵ At this point the United Kingdom had made no claim in relation to the establishment of a contiguous zone and therefore could not rely on the provisions of Article 24 (1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone under which a coastal State is given 'the control necessary to prevent infringement of its sanitary regulations within its territory or territorial sea'.⁶

30, 000 tons of oil were released on the sea at the time of the wreck, and a further 20, 000 tons were lost during the next seven days until 26th March when the vessel broke her back and released a further 50 000 tons.⁷ This oil was carried across in the sea in the form of black sticky ooze.⁸ The magnitude of this oil spill meant that there was great fear that the coastline of Britain and France would be badly damaged by the slick. Particularly in Britain, there was fear of the damage such a large oil spillage would do to the tourist rich beaches of Cornwall, Devon and Dorset. At first, the British government attempted to salvage the vessel in an attempt to minimize further pollution. Attempts were also made to control the spread of the spillage to the UK's coastline by the release of about 10 000

⁴ Griggs, C.B.E. Patricks; 'Torrey Canyon', 45 Years On: Have we solved all the problems?' In Soyer, Baris and Tettenborn, Andrew; (eds) *Pollution at Sea: Law and Liability* (informa) 2012, p.3.

⁵ Emmanuelli, Claude C; 'The Right of Intervention of Coastal States on the High Seas in Cases of Pollution Casualties' 25 U.N.B.L.J 79 1976.

⁶ Ibid at p.79.

⁷ Utton, E. Albert; 'Protective Measures and the Torrey Canyon' 9 B.C.L. Rev. 613 (1968).

⁸ Ibid.

gallons of oil detergent.⁹ From the 19th March to 4th April, about 50 000 gallons of oil detergent had been released around the site of the wreck.

However, these operations were of no great effect except to further damage the environment.¹⁰ Desperate for action, the British government made a unilateral decision to bomb the wreck of the *Canyon* in order to sink it. This was done by a bombing action commenced by the Fleet Air Arm on the 28th of March, followed by the Royal Air Force (RAF) dropping aviation fuel to encourage the blaze and burn the slick. This was not as effective as anticipated as a change in tide put out the flames. The bombing was recommenced the day after, on 30th March with the RAF returning this time with napalm; an incendiary agent made of naphthenic and palmitic acids with a burn temperature capacity of about 900° - 3000° Celsius.¹¹ Despite these efforts, the pollution caused by the oil created a 270 square mile slick which contaminated 50 miles off the coast of Normandy and 120 miles off the Cornish coast.¹²

The adoption of the measure to intervene on the high seas was strongly criticized. Not only did it seem like an affront to the freedom of the high seas but it also violated the principle of flag State jurisdiction. Even more controversial was the basis on which this intervention was undertaken in international law.

Following the *Torrey Canyon*, on May 4th 1967, Britain submitted to the Council of Intergovernmental Maritime Consultative Organisation (IMCO), presently the International Maritime Organization (IMO), questions regarding three categories of problems, namely preventive measures against oil pollution; measures to limit the extent of damage; and necessary changes in international law.¹³

In order to effectively deal with the legal implications of these questions, the Council proposed the creation of an *ad-hoc* Legal Committee within the IMO.¹⁴ In relation to the questions presented by the British government to IMO, the Legal Committee was instructed by the Council to consider:

⁹ Griggs, Patricks; p.4.

¹⁰ Ibid.

¹¹ Patnaik, Pradyot; *A Comprehensive Guide to the Hazardous Properties of Chemical Substances*, 3rd edn Wiley Publishers, (2007), p.893.

¹² Ibid at p.3.

¹³ IMCO Doc. C/ES. 111/3 April 18, 1967.

¹⁴ Emmanuelli, Claude; this *ad-hoc* committee has since become a permanent organ of IMCO p.120.

‘The extent to which a State directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be enabled to, take measures to protect its coastline, harbours, territorial sea or amenities, even when such measures may affect the interest of ship-owners, salvage companies and insurers and even of a flag government’¹⁵

The Legal Committee in dealing with this question recommended for the convening of an international conference intended to define the rights of coastal States in relation to pollution casualties off their shores.¹⁶ The Legal Committee drafted the provisions of a proposed treaty. The proposed conference was convened in Brussels in November 1967. The conference resulted in the adoption of the Intervention Convention.

In view of the increasing quantity of other substances, mainly chemical, carried by ships, some of which, if released, would cause serious hazard to the marine environment, the 1969 Brussels Conference recognized the need to extend the Convention to cover substances other than oil. The 1973 Protocol entered into force in 1983 and was amended in 1996 and 2002 to update the list of the substances attached to it.¹⁷

2.2 Legal Regime Regulating Pollution prior to Torrey Canyon

International concern for oil pollution seems to have ‘originated in the decade after the First World War when first the United States and then League of Nations undertook to foster agreement upon measures to combat pollution.’¹⁸ However, there was no political will to tackle this effectively; an international conference dealing with ‘oil discharge’ (the old term for vessel source pollution) which produced a draft agreement was never ratified and interest waned until after the Second World War.¹⁹

¹⁵ IMCO Doc. C/ES. 111/5 1967 para. 15.

¹⁶ IMCO Doc. LEG. 11/4, Dec. 11, 1967.

¹⁷ <<http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx>> Accessed 4 March 2015

¹⁸ McDougal M; & Burke W; The Public Order of The Oceans 28-34 (1962) in Kindt, John Warren; *Marine Pollution and The Law Of The Sea* Volume 1 (William S. Hein & Co., Inc), p.256.

¹⁹ Gold, *Pollution of the Sea by Oil: A Canadian Perspective*, 3 J. MAR. L & COM. 13, 18 (1971) in Kindt, John Warren; p.257.

The first concrete achievement was the 1954 Convention on the Prevention of Pollution of the Sea by Oil (the OILPOL), initiated by the UK in a London Conference. Although this is commended as being the first effort of the international community at dealing with oil pollution problem, it was limited due to the fact that it left implementation and enforcement of laws to the flag States and not to the jurisdiction of coastal States. Therefore this encouraged vessels to register under States with less stringent regulatory regimes; these States have been termed as ‘flags of convenience’ by the international community for the ineffectiveness of their flag State control regimes.²⁰

The four Geneva Conventions were the next attempt at dealing with the problem presented by oil pollution, although it has been argued that these were merely statements of policy rather than definitive law. They were deemed as showing much unwillingness by the international community to deal with the problems posed by pollution effectively.²¹ Article 24 (1) of the Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention) provided for the coastal States to exercise control necessary to prevent infringement of its sanitary regulations. These sanitary regulations were noted to include marine pollution.

Article 24 of the Geneva Convention on the High Seas states that ‘every State shall draw up regulations to prevent pollution of seas by the exploitation and exploration of the sea bed and its subsoil’. This approach is to be contrasted with Article 25 of the High Seas Convention which called for all States to cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or airspace above, resulting from activities with radioactive materials or other harmful agents.’ It is interesting to note that this language of co-operation is lacking in provisions relating to oil spill.

Regardless of the minimal provisions on marine pollution, enthusiasm was still low in signing the Conventions. More than 25 years after opening for signature, these Conventions have been accepted by a mere quarter of the world’s community, almost half

²⁰ Coles, Richard; and Watt, Edward; *Ship Registration and Practice* (Lloyd’s Shipping Law Library).

²¹ International Law and Canadian Article Pollution Control, 38 ALB. L. REV. 921, 924 in Kindt (n 18) (p.257).

of which are Land Locked States.²² Therefore upon the incident of *Torrey Canyon*, the international community was unprepared to deal with the legal issues which it raised and only after that was the lethargy surrounding regulation of high sea usage raised²³ and only then did the international community seek to deal definitively with cases of oil spillage, leading to a litany of Conventions regarding control of Oil Pollution drafted after *Torrey Canyon*.

Hence having established that there was no basis for the UK's action under treaty law, the question remains as to whether there was a basis under customary international law. The International Law Commission (ILC) later justified the action taken by the UK as one based on necessity; a general principle of international law.²⁴ This principle is difficult to define with precision under international law because some writers only acknowledge it as ancillary to the doctrine of self-defence while others note that it is distinct and unique from self-defence.²⁵

What is usually agreed is that it is a form of defense under international law; not a right. It only excuses what would otherwise be considered as an unlawful act.²⁶ Hence although there was no international law allowing intervention, and the law of freedom of high seas was still firmly entrenched in customary international law as well as the 1958 High Seas Convention, the UK was excused of its unlawful actions because it was necessary to prevent severe environmental damage to its coastline.

R.W Abercassis and R.L. Jarashow, analyzing, under customary international law, the requirements of the doctrine of necessity in relation to intervention, noted that danger must be imminent, the rights threatened substantial and the sole remedy the act sought to be justified.²⁷ The danger was clearly imminent as the ship had split its back and as noted above was releasing tons of oil into the UK coastline. Also the rights of the United

²² Kindt, J. Warren; p.269.

²³ Ibid at p.260.

²⁴ Emmanuelli, Claude; p.89.

²⁵ Ibid at p.90.

²⁶ Ibid.

²⁷ Abercassis, W. David and Jarashow L. Richard; *Oil Pollution from Ships*, Stevens & Sons Ltd., (1985), p. 119.

Kingdom were gravely threatened in light of the enormity of the oil spilt. During investigations carried out by the UK Ministry of Agriculture, Fisheries and Food after *Torrey Canyon*, experiments were done to test the effect of the chemical emulsifiers used to dissipate the oil on the marine life around the UK coast.²⁸

It was shown in this experiment that there were high mortalities amongst the marine life, especially the oysters, mussels and cockles.²⁹ Some of them remained comatose for days before they recovered, while there was marked reduction in reproduction amongst some species.³⁰ For some species, the effect of oil over the surface of water in which they were living was to stimulate a certain type of bacteria which became so numerous that it killed such species.³¹ The experiments also note the import of these deaths on the marine food chain and ecosystem.³²

In response to the *Torrey Canyon*, about 2 million gallons of this detergent were sprayed³³ and although the spraying was done in such a way as to achieve minimal damage to marine life and the environment, there were still avoidable damage caused by wrong application of the chemicals.³⁴ There was also a large degree of unavoidable damage to the environment caused by use of these chemicals. An estimated 15, 000 birds were killed, as well as seals and other marine life.³⁵ Efforts were made to save as many birds as possible and out of one reported group's 6000 birds brought to shore, less than 500 were saved.³⁶ Once a bird came into contact with the oil by landing in it, swimming into it from the surface or by coming up underneath it, it became almost invariably

²⁸ Simpson, A.C; Ministry of Agriculture, Fisheries and Food *The Torrey Canyon Disaster and Fisheries*, Fisheries Laboratory Burnham on Crouch Essex, 1968, p. 7-9.

²⁹ Ibid.

³⁰ Ibid.

³¹ Utton, E. Albert; p.616.

³² Ibid.

³³ Simpson, A.C; p.13.

³⁴ Ibid .

³⁵ Barkham, Patrick; *Oil Spills: The Legacy of Torrey Canyon* The Guardian <www.theguardian.com/environment/2010/jun/24> 17th January 2015.

³⁶ Utton E.Albert; p.615.

doomed.³⁷ The oil also interfered with the bird's ability to find food and when food was found and consumed with the oil, it got trapped in their alimentary canal leading to death.³⁸

Although the impact of the *Torrey Canyon* disaster on sea life has been declared inconclusive, completed studies clearly demonstrate the destructive effect on the ecology of the sea citing a complete absence of living things from the bottoms of bays and harbours where oil spills occur regularly as the best evidence.³⁹ Indeed as at 2010, over 4 decades after the *Torrey Canyon*, although the beaches have returned to their pre-1967 state, there are still reports of incidences of birds 'flip flopping' for their lives on landing in oil trapped in the quarries.⁴⁰ The monumental cost in cleaning up the spill was not the only expense to UK's economy. The damage to the 'resort-beach economy'⁴¹ of the coastal area was also deeply affected. The cost of tourism to the UK economy ran into tens of millions of pounds.⁴² Hence the UK's argument for necessity was quite clear and overwhelming.

Abercassis and Jarashow noted that an important corollary of the concept of necessity is proportionality of measures undertaken to the threatened rights.⁴³ The UK's unilateral action was greatly criticized on this limb. The Marine Biological Association of the UK, a year after *Torrey Canyon* published its conclusions on reports undertaken after the incident, which contained remarks about the chemicals used to disperse the oil. The chemicals made the oil more soluble, which meant that it could be absorbed by more organisms; therefore proving more disastrous to the environment.⁴⁴ Hence the use of the chemicals was described as largely ineffective, uneconomical and wasteful of effort.⁴⁵

³⁷ Ibid; Hearing on International Convention for the Prevention of the Seas by Oil before the Senate Comm. on Foreign Relations 87th Cong., 1st Sess. 25 1961 (hereinafter cited as 1961 Hearing).

³⁸ Ibid.

³⁹ Utton E. Albert; p. 616.

⁴⁰ Barkham, Patrick; note 27.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Abercassis W. David and Jarashow L. Richard; p. 118.

⁴⁴ Utton E. Albert; p.616.

⁴⁵ Barkham, Patrick; note 27.

Besides the birds killed due to direct contact with the oil, a majority of them were killed by skin burns and ingestion of the highly concentrated detergents that were used to dissolve the oil and clean the beaches.⁴⁶

The necessity and practicality of using napalm to get rid of the oil slick must also be questioned; especially since 25% of the bombs missed their target.⁴⁷ Indeed the effect of such a substance burning at 800° - 3000° Celsius must pose as much or even more of a threat to the environment as the oil. The UK's actions set a precedent for what not to do when there is an oil spill. In the subsequent *Amoco Cadiz* disaster occurring in 1978 in which the French government relied on *powdered craie de Champagne*- humble chalk was used to sink the oil more effectively than the expensive British chemicals.⁴⁸ It is also said that the French coast recovered quicker than the British coast as a result.⁴⁹

⁴⁶ Utton E. Albert; p.615.

⁴⁷ Barkham, Patrick; note 27.

⁴⁸ Ibid.

⁴⁹ Ibid.

CHAPTER 3: ANALYSIS OF RELEVANT

ARTICLES OF THE 1969 CONVENTION AND

THE 1973 PROTOCOL

The 1969 Intervention Convention drafted by the IMO and signed by Member States in its Preamble indicates that the basis of the Convention is none other than necessity;⁵⁰

‘Convinced that under these circumstances measures of an exceptional character to protect such interests might be *necessary* on the high seas and that these measures do not affect the principle of freedom of the high seas.’

The Intervention Convention is concerned with ensuring that the interests of coastal States are protected in such situations of extraordinary character, such as an oil spill threatening the coastline of the coastal State. The 1973 Protocol, adopting completely the regime of the 1969 Convention extends these substances to those other than oil which still have the capacity to endanger the coastline and interests of coastal States.⁵¹ Article II of the Protocol states that these substances will be decided by the Marine Environmental Protection Committee (MEPC); a body created by the IMO. This body in 1974 released an Annex to the Protocol giving a comprehensive list of the substances considered. This list has been updated in 1991, 1996, 2002 and most recently in 2007. These other substances are split into 5 categories; oils, noxious liquid substances, harmful substances, radioactive material and liquefied gases.

The more recent Annexes (2002 and 2007) have attempted to harmonize the Convention with other regimes of oil pollution in international law. For example, the list of oils was updated to take into account oils listed by MARPOL 73/78 Annex I. Noxious substances in 2002 and 2007 have been harmonized with other pollution regimes including that listed in MARPOL Annex II, International Bulk Chemical Code (IBC), allowing for substances which are periodically updated in the regular circulars of substances issued by the MEPC and BLG circulars. Harmful substances and radioactive materials are extended to include those listed as serious pollutants in the International Maritime Dangerous

⁵⁰ Abercassis W. David and Jarashow L. Richard; p.120.

⁵¹ 1973 Protocol, Article II.

Goods Code (IMDG Code). Finally liquefied gases are extended to include International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1984 (IGC Code.) Therefore, the articles explained below would apply in relation to oils listed in the Convention as well as the extensive and comprehensive list of substances of pollutants identified by MEPC through the Annexes. The extensive powers which it in effect grants to a State over the high seas as the 1969 Convention is dealt with below.

The primary provision of this Convention is found in Article 1(1):

Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil; following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

This Article contains the primary right of intervention by a coastal State. It is a broad right of a coastal State to take measures to intervene in a case of pollution as well as a threat thereof. The coastal State is also entitled to act not only in respect of pollution which poses danger to its coastlines alone but also to ‘related interests’. Related interests are defined broadly in Article II (4) as ‘the interests of a coastal State directly affected or threatened by the maritime casualty’; including tourism, economic factors, and damages to marine life amongst others (Article II (4) (a-d)).

This seems to leave a broad spectrum of situations in which States can intervene on the high seas; although it is hard to envisage a situation where a danger which threatens the coastline of a State does not also affect these related interests and vice versa. The Convention also gives a broad right in the sense that it gives the coastal States the right to intervene not only to mitigate or eliminate a maritime casualty, but also to prevent it, giving a State an element of prescriptive jurisdiction over the high seas.

This is important, because as noted above, it is established customary international law that the high seas is an area of the seas which is open to all States and no State can validly purport to subject any part of the high seas to its sovereignty.⁵² However, it cannot be

⁵² UNCLOS, Article 89.

assumed that such power of a State to make laws on the high seas effectively purports that area of the high seas to its sovereignty. The Convention states that these measures in the Convention do not affect the principle of freedom of the high seas.

Furthermore, this right can be exercised against any sea-going vessel of any type whatsoever or floating craft,⁵³ except warships, ships owned by States and engaged in non commercial ventures and oil installations. 'Oil' in this Convention is also not restricted to persistent or non-persistent oils: crude oil, fuel oil, diesel oil and lubricating oil are included in the definition of oil as well. The 1973 Protocol as explained above has extensively broadened the range of substances which will all be under this right of intervention.⁵⁴ The effect of these above listed provisions is to give a wide basis of intervention to a coastal State.⁵⁵

The impetus of this right is evident when it is noted that such a broad right of intervention is to be exercised over the high seas. As explained above, the freedom of the high seas doctrine holds a hallowed status in international maritime law; dating back to the origins of the law of the sea.⁵⁶ The high seas, although now greatly more circumscribed by the recognition of several maritime zones over which a State has degrees of sovereignty or sovereign control, remains subject to the freedom of the high seas.

Articles 88 and 89 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982⁵⁷ reiterate this when stating that the high seas are open to all States, whether coastal or land-locked⁵⁸ and no State may validly purport to subject any part of it to its sovereignty.⁵⁹ As explained above, the principle of exclusive flag State jurisdiction recognized is also a corollary of this freedom of the high seas. Therefore it is indeed a

⁵³ Article II (2).

⁵⁴ Article II Protocol.

⁵⁵ Emmanuelli, Claude; p.83.

⁵⁶ Attard, D. Joseph; Fitzmaurice, Malgosia; Martinez A. Norman; The International Manual of International Maritime Law, Oxford University Publishers, 2014, p. 239.

⁵⁷ United Nations Convention on the Law of the Sea 1833 UNTS 3, 21 ILM 1261 (1982), Adopted 10 December 1982, Montego Bay, Jamaica, Entered into force 16 November 1994.

⁵⁸ Ibid, Article 87.

⁵⁹ Ibid, Article 89.

very wide and potent power given to a State, as an exception to such long established freedoms.

In light of the very broad right which the Convention seems to afford coastal States, the Convention and its Protocol sets extensive limitations to these broad rights. Article V imposes the first limb of limitation on the coastal State. Article V (1) requires measures taken by the coastal State to 'be proportionate to the damage actual or threatened.' Proportionality will be assessed in light of the provisions in Article V (3):

- (a) the extent and probability of imminent damage if those measures are not taken; and
- (b) the likelihood of those measures being effective; and
- (c) the extent of the damage which may be caused by such measures.

Article V (2) requires that such measures do not 'go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved'. A coastal State should also not 'unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.'

This is an important limitation of this very broad right in Article I above. Its importance is made more evident on consideration on the events of the *Torrey Canyon*. Although there was sympathy by the international community for the plight of the UK, there was consensus that it had gone beyond what was necessary to guarantee and protect its rights and interests, in the use of chemical detergents and extensive bombing of the ship with napalm bombs. This article obliges the State not to go beyond what is necessary to secure its rights and interests.

As noted by Emmanuelli, the difficulty for the claiming State and the benefit for the coastal State will lie in the fact that necessity and reasonability are to be assessed 'following upon the maritime casualty'. Therefore, it involves assessment of the reasonability of the action at the time of the casualty, not in hindsight; therefore what

might seem necessary and reasonable at the time of the casualty might in hindsight after the casualty not necessarily be so.⁶⁰

Nevertheless, this presents a very viable limitation especially noting that a State which acts disproportionately will be subject to an obligation to pay compensation for acts which go beyond what is necessary (Article VI). Article VIII(2) imposes a limitation on the right of the coastal State by subjecting them to a compulsory two step dispute resolution process to settle controversy as to whether measures undertaken in contravention of the Convention or controversy as to the measure of compensation to be paid. In relation to compensation, it is important to note that Article VI only aims to sanction a coastal State for an act which goes beyond what is reasonable and not to compensate the coastal State for its general losses. Therefore, the burden of proof lies on the coastal State to prove the ‘reasonableness’ of the action.

The detailed procedure for dispute resolution is set out in the Annex to the 1969 Intervention Convention. It consists of, firstly, a conciliation process; with a Conciliation Committee; one appointed by each of the parties and the third presiding conciliator selected by the parties on agreement,⁶¹ whose recommendations are not binding on parties.⁶² Failure to reach a decision or rejection of a decision made at conciliation by either party triggers the Arbitration procedure.⁶³ The Arbitration Tribunal is set up similarly to the Conciliation Committee,⁶⁴ and its decision is final and without appeal.⁶⁵ This process is an important safe guard for a claiming State as it is protected by the fact that this resolution process is compulsory and can be initiated by any party concerned, and there is no need for the exhaustion of domestic remedies before commencing such compulsory dispute settlement. (Article VIII (2) Intervention Convention).

Article III of the Convention introduces another limit to the broad right of intervention in Article I above. It could be generally called the ‘Article of Consultation.’ This Article is

⁶⁰Emmauelli, Claude; p. 86.

⁶¹ Annex Article 3.

⁶² Annex Article 9.

⁶³ Annex Article 13.

⁶⁴ Annex Article 14.

⁶⁵ Annex Article 19.

drafted to ensure that although a State takes unilateral actions intervening on the high seas, it does so after notification of the parties who might in any way be affected. In Article III (b), before intervention, the coastal State has a duty to *notify* physical or corporate bodies whose interests are affected in such a maritime casualty and *to take into account* their views.⁶⁶

In Article III (a), a coastal State ‘shall proceed to consultations with other States’ affected by the maritime casualty. These as noted by the Convention will include the flag States; although it could also include neighboring States who are also likely to be affected. Like in the case of the *Torrey Canyon*, it was both France and the UK who were affected and as such consultation is required before actions are taken. Article III(c) extends this duty of consultation to the ‘independent experts of the IMO’, as nominated by the IMO in Article IV. In light of the fact that the 1973 Protocol deals with substances other than oil, Article II (2) of the 1973 Protocol extends this requirement to include experts qualified to give advice in relation to substances other than oil.

It is arguable that this duty of consultation does not produce a stringent limitation on a coastal State as it is merely a duty to ‘consult’ and not to agree. The coastal State is obliged to consult with these parties but not to reach an agreement on such consultations. It would seem according to the textual interpretation of this consultation that they do not bar undertaking such unilateral action following a failure to reach an agreement. In relation to the duty of notification to physical or corporate entities, there is simply a duty to ‘take into account their views’; the weight to be given to these views is left at the discretion of the coastal State.

Furthermore, the exact role of these ‘independent experts’ is not stipulated; therefore their roles and the degree of value to be associated with these are again at the discretion of the coastal State. The duty is simply one of consultation and as such a State which proceeds with consultation and goes ahead to take actions contrary to agreements or reports by such experts is not in violation of this treaty.

⁶⁶ Emphasis mine.

However, this article must be read with the background of the Convention in mind. The Convention was made not only to protect the rights of States but also to discourage disproportionate unilateral action. Also, in light of the fact that this Convention gives a coastal State the right to intervene on the high seas, a zone traditionally outside of its jurisdiction, it is important that a duty to cooperate is to be read strictly to mean 'cooperation in good faith'.

Furthermore, the existence of Article III (d) also puts the nominal duty to cooperate in doubt. Article III (d) allows the coastal State to completely disregard these duties above in cases where urgency is required. All that is required in such situations is the general duty in Article III (e) for the coastal State to 'use its best endeavors to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ships' crews'. Indeed this Article attests to the fact that in all other cases, that is in a case where the urgency is overwhelming, a State is to follow the procedures set out by the Convention which include the duty to consult the IMO experts, flag States, other coastal States, and other related interests. Therefore, although this Convention grants a very broad right to the coastal State in light of its rights to protect its coast and related interests, it also ensures that the exercise of these rights is effectively circumscribed.

CHAPTER 4: NIGERIA'S MARITIME

POLLUTION REGIME

Nigeria is a party to several IMO Conventions. She acceded to the 1969 Intervention Convention in May 2004 but has not yet acceded to the 1973 Protocol and as such only has rights and obligations arising out of the 1969 Intervention Convention. The Nigerian Merchant Shipping Act (MSA) 2007 Section 336 (1) (b) states that from the date of its commencement, a list of IMO Conventions of which the 1969 Convention is included, will come into force in Nigeria. Although this can be considered an incorporation of the international law into the domestic law, it is certain that this incorporation is incomplete. The broadly drafted manner of the 1969 Convention suggests that there is a need to make further regulations to fully set out the procedure for intervention. Section 336 (4) MSA leaves the power to make such regulations to the Minister. There have been no such regulations made to this effect and the following section explores why it is important that Nigeria fully domesticates the 1969 Convention and becomes a party to the 1973 Protocol as well.

Firstly, the risk of pollution through maritime casualty is a real one. The International Tanker Owners Pollution Federation (ITOPF) maintains a database of oil spills from tankers, combined carriers and barges on accidental spillages since 1970.⁶⁷ Their annual tanker spills analysis released in February 2011 shows that the trend towards fewer spills from tankers and less oil spilt is being maintained; only one large spill from a tanker occurred in 2011; the same as for 2008 and 2009, with only four medium sized spills recorded for the second year in a row. However, it notes that 50% of large spills occurred while the vessel was underway in open water with allisions, collisions and groundings maritime casualties accounting for just over half of these.

⁶⁷ 'International Shipping Facts and Figures- Information Resources on Trade, Safety, Security, Environment' IMO International Knowledge Centre 6 March 2012 <<http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>> p. 28.

Furthermore, it notes that when looking at the frequency and quantities of oil spilt, it is the few very large spills that are responsible for a high percentage of oil spilt.⁶⁸ For example, in the 1990s there were 361 spills over 7 tonnes, resulting in 1,137,000 tonnes of oil lost; 73% of this amount was spilt in just 10 incidents, and in the 2000s there were 181 spills over 7 tonnes, resulting in 210,000 tonnes of oil lost; 44% of this amount was spilt in just 2 incidents. Also, *The Atlantic Empress* in one incident 1979 spilt 287,000 tonnes of oil, *The Castillo de Bellver* (1983); 252,000 tonnes spilt and *The Abt Summer* (1991); 260,000 tonnes spilt. In effect, the figures for a particular year may therefore be severely distorted by a single large incident.

This poses an even greater risk for Nigeria as an oil producing, exporting and importing nation. Nigeria is the largest oil producer in Africa, holds the largest natural gas reserves on the African continent, and is one of the world's leading exporters of liquefied natural gas (LNG). OPEC⁶⁹ estimates Nigeria's dealing with oil as in the table below:

Crude Oil production (1,000 b/d)	1, 754
Marketed production of natural gas (million cu.m.)	38, 411
Refinery Capacity (1, 000 b/cd)	445
Output of refined petroleum products (1, 000 b/d)	88.5
Crude oil exports (1, 000 b/d)	2, 193
Exports of petroleum products (1, 000 b/d)	23.0
Natural gas exports (million cu.m)	24, 543 ⁷⁰

Therefore Nigeria is at a real risk of such one-off large oil spill caused by a maritime casualty off its coast. The impetus to proactively set out regulations lies on this as well as the monumental costs of cleaning up such oil spillages if there isn't effective action taken in the event of such a casualty or threat of it. In the *Torrey Canyon*, although the UK took proactive measures as shown above, it is estimated that cost of cleaning up its coasts was about \$18million.

⁶⁸ Ibid at p.30.

⁶⁹ http://www.opec.org/opec_web/en/about_us/167.htm Accessed 7th December 2014.

⁷⁰ b/d (barrels per day);cu. m. (cubic metres);b/cd (barrels per calendar day).

Indeed Nigeria is not ignorant of the challenges of pollution by oil spills. Oil spill incidents in Nigeria have occurred in various parts along its coast. Some major spills in the coastal zone are the GOCON's Escravos spill in 1978 of about 300,000 barrels, SPDC's Forcados Terminal tank failure in 1978 of about 580,000 barrels and Texaco Funiwa-5 blowout in 1980 of about 400,000 barrels.⁷¹ Between 1997 and 2001, Nigeria recorded a total number of 2,097 oil spill incidents.⁷² The environmental impact of such spills on Nigeria is monumental; destruction of biodiversity, marine life as well as human life has been noted by various organisations including the WHO, United Nations and national studies in the country.⁷³

Although these represent oil spills mainly in the internal waters and off shore plants of Nigeria, it is noted that an oil spill the magnitude of *Torrey Canyon* on the high seas, spreading to the coastline of Nigeria would have a similar effect. Also noting the increased size of tankers since *Torrey Canyon*, with its failure to legislate effectively, Nigeria runs a monumental risk to its coast and coasts of its neighbours. There is an obligation on all States, binding on Nigeria, to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.⁷⁴

All of Nigeria's coastal neighbors; to the West, Benin, Ghana, Cote d'Ivoire, Liberia and Sierra Leone and to the east; Cameroon, Equatorial Guinea and Congo have all either ratified or acceded to this treaty. This is important for a few reasons. It could support an integrated approach to such a problem when it arises as the laws of these countries would be uniform. It could help to make the consultation process with 'affected interests' as noted above more productive. When such an integrated approach is taken, Nigeria is sure that its rights will be respected when such a situation arises in its neighboring countries.

⁷¹ Peter, C. Nwilo; and Olusegun, T. Badejpo; Impacts and Management of Oil Spill Pollution along Nigerian Coastal Areas < https://www.fig.net/pub/figpub/pub36/chapters/chapter_8.pdf.> 28 March 2014 p. 5

⁷² Ibid

⁷³ Pyagbara, Saro Legborsi; 'The Adverse Impacts of Oil Pollution on the Environment and Wellbeing of a Local Indigenous Community: The Experience of the Ogoni People of Nigeria' 2007 <http://www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_pyagbara.doc.> 28 March 2015

⁷⁴ *Trail Smelter Arbitration (United States v Canada)* Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

The 1973 Protocol also extends the types of substances for which intervention is permitted, many of which are transported in and out of Nigeria. Therefore it is fair to say that in acceding to the 1969 Convention alone, Nigeria remains limited in its commitment and ability to protect its maritime coasts. There is a need to accede to the 1973 Protocol to ensure this fuller protection, especially as Nigeria is a major importer of many of these oils which are listed therein. It has been noted that the effect of some of these substances in the marine environment are of far more disastrous effect than even oil.⁷⁵

It is important for Nigeria to accede and implement the 1979 to ensure a full measure of protection available under international law. Nigeria in ratifying the 1973 Protocol and effectively implementing the 1969 Convention will be able to rely on technical support and assistance, technological know-how and also financial support of the IMO and its regional neighbours when its coasts and interests are threatened by oil or chemical pollution.

⁷⁵ 'Are HNS Spills More Dangerous than Oil Spills?' A White Paper for the Interspill Conference & 4th IMO R& D Forum Maraseille, May 2009 prepared by Dr.Karen Purnell, Managing Director, ITOPF Ltd, UK<hnsconvention.org/Documents/whitepaper.pdf> 5th January 2015.

CHAPTER 5: DOMESTICATION OF THE

INTERVENTION CONVENTION AND ITS

PROTOCOL

As earlier mentioned, Nigeria has signed and acceded to the 1969 Intervention Convention. It has however, not acceded to the 1973 Protocol. This will be the first step in domesticating these Conventions. To achieve this, an instrument of accession is prepared which will be submitted to the concerned government ministry; the Ministry of Transport. This will be passed on to the present President of the Federal Republic of Nigeria for his authentication and signature. It will then be in his power to submit such a document to the IMO Secretary General after which Nigeria will become a party to the 1973 Protocol. This will signify Nigeria's willingness to be bound by the duties and obligations under the Protocol and also enjoy the rights which it provides.

Nigeria is a dualist State and this means that signing of the Convention alone does not automatically translate into rights and obligations until they are domesticated (passed into law in Nigeria) and published in the Official Gazette. Article 336 of the MSA already incorporates the Intervention Convention of 1969. Therefore, similar incorporation of the Protocol must be effected. Article 336 (1) (b) will thus be amended to include the Protocol. Therefore Article 336 (1) (b) will read the 'Convention relating to Intervention on the High Seas in cases of Threatened Oil Pollution Casualties, 1969 and its Protocol'. Article 336 (3) of the MSA leaves further powers to the Minister to make regulations giving effect to the provisions of the International Conventions and Agreements mentioned therein. 'Minister' in the Act is defined as the Minister charged with responsibility for matters relating to Merchant Shipping.

The Ministry charged with the responsibility of the Nigerian MSA is the Ministry of Transport, therefore the Minister referred to will be whoever heads that Ministry at that pertinent point. There is a need for the Minister to exercise this power as noted above, especially as the Convention is drafted very broadly, there is a need to set out the relevant government parastatals which would be involved in taking action, or be involved in consultations at the threat or incidence of a marine casualty. So the regulations below are made under this power granted by the Parliament to the Minister to make regulations to fully implement this Convention. According to practice, these Regulations will become

attached to the Merchant Shipping Act as its subsidiary legislation, and will be called the Merchant Shipping (Powers of Intervention on the High Seas) Regulations. These Regulations will therefore present a complete implementation of the 1969 Convention as well as the 1973 Protocol. However, as the Annexes to the 1973 Protocol simply list the substances other than oil for which Nigeria can exercise its right of intervention, they will simply be swallowed into the regulations and attached as Annexes thereto.

These Regulations will be closely modeled after the Pollution Casualties on the High Seas- United States Intervention 2004; although it also draws some inspiration from the Australian Protection of the Sea (Powers of Intervention) Act 1981. An improvement on these models is a documentation of the relevant codes and conventions to be referred to when exploring which substances are covered by the 1973 Protocol.

As noted earlier, the MEPC was charged with collating other substances other than oil to which the right to intervention would also apply under the 1973 Protocol. The first 2 amendments, the 1978 and 1996 amendments collate these substances by listing them after the other such substances to which the Convention applies. However, the 2002 and 2007 amendments take a more precise route, referring instead to other Convention or codes in which these lists can instead be found.

Therefore, Schedule I presents the most recent substances to which the Protocol applies, following MEPC's recent practice of referring to the codes or Conventions to which these can be found. This makes the Regulations more accessible and more comprehensible, as opposed to the method of attaching each of the annexes in the model legislations used. Schedule II of the Regulations adopts unchanged the Annex to the 1969 Convention which sets out the process which a country must follow in relation to the compulsory dispute settlement process. This Annex is completely self-explanatory and needs no re-drafting.

DRAFT LAW



INSTRUMENT OF ACCESSION

BY THE FEDERAL REPUBLIC OF NIGERIA

**TO THE PROTOCOL RELATING TO INTERVENTION ON THE HIGH SEAS IN
CASES OF POLLUTION BY SUBSTANCES OTHER THAN OIL, 1973**

NOTING that, on the 24 February 2004, the Federal Republic of Nigeria acceded to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution, 1969

WHEREAS the IMO Protocol Relating To Intervention on the High Seas in Cases of Pollution By Substances Other Than Oil, 1973, As Amended was adopted and open for signature on 2nd November 1973

NOW THEREFORE I, Head of State of the Federal Republic of Nigeria declare that the Government of Nigeria having adopted and ratified the said Convention undertake to faithfully perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I signed this instrument of accession and have here affixed the seal of the Federal Republic of Nigeria.

DONE AT ABUJA, NIGERIA, THIS DAY of Two Thousand and Fifteen

.....
Dr. Goodluck Ebele Jonathan
President of the Federal Republic of Nigeria

A Merchant Shipping (Amendment Act) 2015

An Act to amend the Merchant Shipping Act, Laws of the Federation of Nigeria 2004

Commencement	This Act shall come into operation on a date fixed by the President in the Gazette
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ENACTED by the National Assembly of the Federal Republic of Nigeria	
Amendment of the MSA	The Merchant Shipping Act, Laws of the Federation of Nigeria 2004 (In this Act referred to as the Principal Act) is amended as set out in this act.

Amendment of Section 336(1)(b)	‘Section 336(1)(b)’ of the Principal Act is hereby substituted for a new ‘section 336(1)(b)’
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Principal Act	Convention relating to Intervention on the High Seas in cases of Threatened Oil Pollution Casualties, 1969;
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Amendment of Section 336(1)(b)	International Convention Relating to Intervention on the High Seas in Cases of Threatened Oil Pollution Casualties, 1969 and its 1973 Protocol;
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Explanatory Note: This bill seeks to amend the Merchant Shipping Act 2007 to incorporate the 1973 Protocol Relating to Intervention on the High Seas in Cases of Threatened Oil Pollution Casualties and any subsequent amendment into the Merchant Shipping Act, 2007.

**Federal Republic of Nigeria
Official Gazette**

**MERCHANT SHIPPING (INTERVENTION POWERS ON THE HIGH SEAS IN
CASES OF POLLUTION) REGULATIONS 2015**



ARRANGEMENT OF REGULATIONS

REGULATION

1. Measures to prevent, mitigate or eliminate pollution of the Nigerian coastline by a maritime casualty on the high seas
2. Directions
3. Consultations and Notifications
4. Emergencies
5. Reasonable Measures: Considerations
6. Flag State and Foreign State Considerations
7. Liability for Acts and Omissions
8. Federal Liability for Unreasonable Damages during Intervention
9. Recovery of Expenses incurred in Compliance with Direction(s)
10. Nomination of Experts and Proposal of Amendments to List of Substances
11. Nomination of Negotiators/ Conciliators/Arbitrators
12. Interpretation
13. Citation

SCHEDULES

FIRST SCHEDULE

Substances other than Oil

SECOND SCHEDULE

*Annex to the 1969 International Convention Relating to Intervention on the High Seas in
Cases of Oil Pollution*

MERCHANT SHIPPING (INTERVENTION POWERS
ON THE HIGH SEAS IN CASES OF POLLUTION)

REGULATIONS 2015

S.I. No. ... of 2015

[DATE]

[Commencement]

In exercise of the powers conferred on me by section 336 (3) Nigerian Merchant Shipping Act, 2007 and all other powers enabling me in that behalf, I, Alhaji Idris Umar, Honourable Minister of Transport hereby make the following Regulations:

1. Measures to prevent, mitigate or eliminate pollution of the Nigerian coastline by a maritime casualty on the high seas

- (1) Where the Authority is satisfied that, following upon a maritime casualty on the high seas or acts related to such a casualty, there is grave and imminent danger to the Nigerian coastline, or to the related interests of Nigeria, from pollution or threat of pollution of the sea by oil or substances other than oil which may reasonably be expected to result in major harmful consequences, the Authority may take such measures, whether on the high seas or elsewhere, as it considers necessary to prevent, mitigate or eliminate the danger.
- (2) The Authority, after consultation with Ministry for the Environment, shall determine when a substance other than those enumerated in Schedule I is liable to create a hazard to human health, to harm living resources, to damage amenities, or to interfere with other legitimate uses of the sea.
- (3) In determining whether there is grave and imminent danger of major harmful consequences to the coastline or related interests of Nigeria, the Authority shall consider the interests of Nigeria directly threatened or affected including

but not limited to, human health, fish, and other living marine resources, wildlife, coastal zone and estuarine activities, public and private shorelines and beaches and tourism.

- (4) Upon a determination under paragraph (1) of a grave and imminent danger to the coastline or related interests of Nigeria, the Authority may;
- a. coordinate and direct all public and private efforts directed at the removal or the elimination of the threatened pollution damage;
 - b. directly or indirectly undertake the whole or any part of any salvage or other action he may require or direct under paragraph 1; and
 - c. remove, and if necessary, destroy the ship and/or its cargo which is the source of the danger;
 - d. take control of the ship or part of the ship;
 - e. give directions to
 - i. the owner of the ship
 - ii. to the master of the ship;
 - iii. to any salvor in possession of the ship; or
 - iv. any other person acting in connection with the ship at the time of the casualty.
- (5) The Authority may not undertake any measures listed above without the express approval of the Minister.
- (6) These Regulations do not authorize the taking of measures against a warship or other ship owned or operated by a foreign State and used, for the time being, only on government non-commercial service.

2. Directions

- (1) A direction under these Regulations, issued in relation to a ship involved in a maritime casualty (first ship) referred to in regulation 1, may require the doing of any act or thing with respect to the ship or ship's cargo or prohibit the doing of any such act or thing, and without limiting the generality of the foregoing, may:
- a. require the movement or the first ship or part of the first ship, its movement to a place or area or its removal from a place or area; or

- b. require or prohibit the removal of cargo from the first ship; or
- c. require or prohibit the taking of salvage measures in relation to the first ship, part of the first ship or any part of its cargo; or
- d. require or prohibit the sinking or destruction of the first ship or part of the first ship; or
- e. require or prohibit destruction or discharging into the sea of any of the first ship's cargo; or
- f. require or prohibit the handing over of control of the first ship or part of the first ship
- g. require another ship to be made available for the purposes in connection with unloading, receiving, treating, storing or disposing of any of the first ship's cargo; or
- h. require another ship to be made available for the purposes in connection with repairing, piloting, towing, berthing or securing the first ship;
- i. require
 - i. the movement of another ship; or
 - ii. the removal of another ship from a place or area; where the movement or removal facilitates unloading, receiving, treating, storing or disposing of any of the first ship's cargo; or
- j. require:
 - i. the movement of another ship; or
 - ii. the removal of another ship from a place or area; where the movement or removal facilitates repairing, piloting, towing, berthing or securing of the first ship; or
- k. prohibit:
 - i. the movement of another ship; or
 - ii. the removal of another ship from a place or area; where the movement or removal is likely to impede or interfere with unloading, receiving, treating, storing or disposing of any of the first ship's cargo; or
- l. prohibit:
 - i. the movement of another ship; or

ii. the removal of another ship from a place or area;
where the movement or removal is likely to impede or interfere
with repairing, piloting, towing, berthing or securing the first ship;
or

m. require the temporary release of contractual obligations, where the
fulfillment of those obligations is likely to impede or interfere with the
carrying out of any other direction under this Act relates to the first
ship.

(2) Without limiting the generality of paragraph (1) above, a direction under these
Regulations may:

- a. require that an act or thing be done in accordance with the direction, or
with the approval, or in accordance with the instructions, of a specified
person; or
- b. prohibit the doing of an act or thing except in accordance with the
direction, or with the approval, or in accordance with the instructions,
of a specified person.

(3) A direction under these Regulations may be issued to an owner of a ship, a
master of a ship, or a salvor acting in connection of the ship without
specifying his or her by name.

(4) Nothing in these Regulations shall be taken to prevent the issuing (whether to
the same person or to different persons) of more than one direction, under a
provision of these Regulations, in relation to a ship.

(5) Where there is more than one owner of a ship or more than one salvor in
possession of a ship, a direction under these Regulations issued to the owner
of the ship or the salvor in possession of the ship has effect, for the purpose of
these Regulations, as a direction issued to each of the owners of the ship or
each salvor in possession of the ship, as the case requires.

(6) Where the Authority has issued a direction under these Regulations to a
person or to two or more persons, the Authority may, by further direction
issued to that person or those persons, revoke or vary the earlier direction.

(7) All directions under these Regulations must be made in writing.

(8) The serving of any direction under these Regulations must be done in
accordance with the Admiralty Jurisdiction Procedural Rules 1993.

3. Consultations and Notifications

- (1) Before taking any measure under these Regulations, the Authority;
 - a. after consultation with the Minister and the Ministry of Environment shall determine when a substance other than those enumerated in Schedule I is liable to create a hazard to human health, to harm living resources, to damage amenities, or to interfere with other legitimate uses of the sea.
 - b. shall notify without delay any proposed measures to any persons physical or corporate known to have interests which can reasonably be expected to be affected by those measures.
- (2) The Authority shall consider any such views submitted in response to the consultation or notification.
- (3) In taking consideration of such views, the interests of Nigeria as mentioned in regulation 1(2) are to be given priority.
- (4) The Authority shall, through the Minister, notify without delay the foreign states, International Maritime Organisation and other interests affected by any measures taken under these Regulations.

4. Emergencies

In situations of extreme urgency requiring measures to be taken immediately, the Authority may take those measures rendered necessary by the urgency of the situation without prior consultation or notification as required in regulation 2(1) of these Regulations or without the continuation of consultations already commenced.

5. Reasonable Measures: Considerations

- (1) All measures directed or conducted under these Regulations;
 - a. shall be proportionate to the damage, actual or threatened, to the coastline or related interests of Nigeria;

- b. shall not go beyond what is reasonably necessary to achieve the end mentioned in regulation 1 and shall cease as soon as that end has been achieved; and
 - c. shall not unnecessarily interfere with rights and interests of others, including the flag state of any ship involved, other foreign states threatened by the damage, and persons otherwise concerned.
- (2) In considering whether measures are proportionate to the damage the Authority shall, among other things, consider;
 - a. the extent and probability of imminent damage if those measures are not taken;
 - b. the likelihood of effectiveness of those measures; and
 - c. the extent of the damage which may be caused by those measures.

6. Flag State and Foreign State Considerations

In the direction and conduct of measures under these Regulations, the Authority shall use his best endeavours to assure the avoidance of risk to human life and render all possible aid to distressed persons, including facilitating repatriation of ships' crews.

7. Liability for Acts and Omissions

- (1) Criminal or civil proceedings do not lie against the Minister or a delegate of the Minister, because of any act done or omitted to be done in the exercise of any power conferred on the Minister under these Regulations.
- (2) Criminal or civil proceedings shall lie against the Authority; or a member of the Authority; or a member of staff of the Authority or a delegate of the Authority, because of an act done or omitted to be done in their exercise of any power conferred on the Authority under this Act.
- (3) Criminal or civil proceedings may lie against a person as specified in a direction as mentioned in regulation 1(4) because of an act done or omitted to be done in the exercise of any power conferred on the person by or under the direction.

- (4) Criminal or civil liability does not lie against a person to whom a direction was issued under these Regulations because of an act done or omitted to be done in compliance with the direction.

8. Federal Liability for Unreasonable Damages during Intervention

- (1) Nigeria shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in regulation 1(1).
- (2) Attempts shall be made to settle any disputes arising from the exercise of these measures between Nigeria and a foreign State firstly by negotiation.
- (3) Nigeria shall submit to conciliation and arbitration for settlement of disputes, in failure of negotiations, as set out in Schedule II below.

9. Nomination of Negotiators/Conciliators/Arbitrators

- (1) In accordance with the provisions of regulation 8 (3), the Authority, in consultation with the Nigerian Maritime Association (NMA) shall make designation or nomination of negotiators, conciliators and arbitrators provided for by the Convention and Protocol.
- (2) Such nominations shall be subject to approval of the Minister and President.

10. Recovery of Expenses Incurred in Compliance with Direction(s)

- (1) Expenses incurred from compliance with directions under these Regulations may be recovered from the owner of the ship if:
- i. a person was subject to a direction under these Regulations; and
 - ii. the direction relates to a ship involved in a maritime casualty; and
 - iii. the person is not the owner, or one of the owners, of the ship; and
 - iv. the direction requires the supply of goods or a service to the owner of the ship; and
 - v. the owner of the ship is not otherwise liable to pay the amount of the expenses to the person.
- (2) The amount of the expense is a debt due to the person by the owner of the ship. If there are two or more owners of the ship, debt will be due to the person jointly and severally by the owners of the ship.

- (3) A debt due under this regulation may be recovered in any of the Federal High Courts of the Nigeria, or any other court of competent jurisdiction.
- (4) These Regulations do not apply to the extent that they are inconsistent with an international agreement to which Nigeria is a party.
- (5) A reference in these Regulations to a direction must, in the case of a direction that has been varied by a further direction issued under regulation 2 (6), be construed as a reference to the direction as so varied by that further direction.

11. Nomination of Experts and Proposal of Amendments to List of Substances

- (1) The Authority, in consultation with the Minister, may nominate individuals to the list of experts provided for in Article III of the Convention and Article II of the Protocol who may propose amendments to the list of substances other than those listed in the Convention and its Protocol.
- (2) Such amendments will be subject to approval of the President.

12. Interpretation

- (1) These Regulations shall be interpreted and administered in a manner consistent with the Convention, the Protocol, and other international law. Except as specifically provided, nothing in this regulation may be interpreted to prejudice any otherwise applicable right, duty, privilege, or immunity or deprive any country or person of any remedy otherwise applicable.
- (2) In these Regulations, unless the contrary intention appears:
 - a. **‘authority’** means the Nigerian Maritime Safety Authority established by the Nigerian Maritime Safety Authority Act 2007
 - b. **‘a substance other than convention oil’** means those oils, noxious substances, liquefied gases, and radioactive substances which:
 - i. are enumerated in Schedule1 below;
 - ii. have otherwise been determined to be hazardous under regulation 1 (2);

- iii. shall be further determined by the Maritime Environmental Protection Committee (MEPC) as an annex to the 1973 Protocol
- c. **'cargo'** includes ballast and ship's stores and fuel
- d. **'Convention'** means the International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties 1969;
- e. **'convention oil'** means crude oil, fuel oil, diesel oil and lubricating oil
- f. **'maritime casualty'** means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo;
- g. **'master'** in relation to a ship means the person having command or charge of the ship
- h. **'owner'** in relation to the ship means the person who has possession and control of the ship or the operator of the ship
- i. **'ship'** means:
 - i. any sea-going vessel of any type whatsoever, and
 - ii. any floating craft, with the exception of an installation or device engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof,
- j. **'supply'** means
 - i. in relation to goods- supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and
 - ii. in relation to services- provide, grant or confer;
- k. **'Protocol'** means The Protocol relating to the Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil and the annexes thereto 1973;
- l. **'related interests'** means the interests of a Nigeria which would be directly affected or threatened by the maritime casualty, such as:

- i. maritime coastal, port or estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;
- ii. tourist attractions of the area concerned;
- iii. the health of the Nigerian population and the well-being of the area concerned, including conservation of living marine resources and of wildlife.

13. Citation

These Regulations may be cited as Merchant Shipping (Intervention Powers on the High Seas in Cases of Pollution) Regulations 2015.

Made at Abuja this 1st day of May, 2015.

IDRIS ABDULLA UMAR

Honourable Minister of Transportation

SCHEDULE I

Substances other than Oil

[Regulation 1(2), 3(1)]

1. **Oils** carried in bulk as listed in Appendix I to Annex I of MARPOL 73/78 other than those covered by the 1969 Intervention Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating to MARPOL 73/78, as amended, when carried in bulk, including those listed in Appendix I with the exception of crude oil, fuel oil, diesel oil and lubricating oil which are covered by the 1969 Intervention Convention.
2. **Noxious substances** as defined in Annex II to MARPOL 73/78, as amended, when carried in bulk, and identified:
 - .1 As Pollution Category A or B, in
 - .1 Chapter 17 of the International Bulk Chemical Code (IBC Code); or
 - .2 Lists 1 to 4 of MEPC.2/Circulars, issued annually in December; or
 - .2 In the composite list of GESAMP Hazard Profiles, issued periodically as BLG Circulars, with either
 - .1 a '2' in column B1 and '2' in column E3; or
 - .2 '3' in column E3.
3. **Harmful Substances**, in packaged form, as defined in Annex III to MARPOL 73/78, as amended, and which have been identified as Severe Marine Pollutants (PP) in the International Maritime Dangerous Goods Code (IMDG Code) or which meet the criteria for such as defined in the IMDG Code.
4. **Radioactive materials** transported in type B or C packages or fissile material or under certain arrangements, as covered by the provisions of class 7 of the International Maritime Dangerous Goods (IMDG) Code. Radioactive materials

transported in type B or C packages or fissile material, under special arrangements, as covered by the provisions of class 7 of the International Maritime Dangerous Goods (IMDG) Code.

5. **Liquefied gases carried in bulk:** Chemicals as listed in Chapter 19 of the International Code for the Construction and Equipment of Ships in carrying Liquefied Gases in Bulk, 1983 (IGC Code), as amended, when carried in bulk, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved.

SCHEDULE II

*Annex to the 1969 International Convention Relating to Intervention on
the High Seas in Cases of Oil Pollution*
[Regulation 8(3)]

CHAPTER I. CONCILIATION

Article 1

Provided the Parties concerned do not decide otherwise, the procedure for conciliation shall be in accordance with the rules set out in this Chapter.

Article 2

1. A Conciliation Commission shall be established upon the request of one Party addressed to another in application of Article VIII of the Convention.
2. The request for conciliation submitted by a Party shall consist of a statement of the case together with any supporting documents.
3. If a procedure has been initiated between two Parties, any other Party the nationals or property of which have been affected by the same measures, or which is a coastal State having taken similar measures, may join in the conciliation procedure by giving written notice to the Parties which have originally initiated the procedure unless either of the latter Parties object to such joinder.

Article 3

1. The Conciliation Commission shall be composed of three members: one nominated by the coastal State which took the measures, one nominated by the State the nationals or property of which have been affected by those measures and a third, who shall preside over the Commission and shall be nominated by agreement between the two original members.
2. The Conciliators shall be selected from a list previously drawn up in accordance with the procedure set out in Article 4 below.
3. If within a period of 60 days from the date of receipt of the request for conciliation, the Party to which such request is made has not given notice to the other Party to the controversy of the nomination of the Conciliator for whose selection it is responsible, or if, within a period of 30 days from the date of nomination of the second of the members of the Commission to be designated by the Parties, the first two Conciliators have not been able to designate by common agreement the Chairmen of the Commission, the Secretary-General of the Organization shall upon request of either

Party and within a period of 30 days, proceed to the required nomination. The members of the Commission thus nominated shall be selected from the list prescribed in the preceding paragraph.

4. In no case shall the Chairman of the Commission be or have been a national of one of the original Parties to the procedure, whatever the method of his nomination.

Article 4

1. The list prescribed in Article 3 above shall consist of qualified persons designated by the Parties and shall be kept up to date by the Organization. Each Party may designate for inclusion on the list four persons, who shall not necessarily be its nationals. The nominations shall be for periods of six years each and shall be renewable.

2. In the case of the decease or resignation of a person whose name appears on the list, the Party which nominated such person shall be permitted to nominate a replacement for the remainder of the term of office.

Article 5

1. Provided the Parties do not agree otherwise, the Conciliation Commission shall establish its own procedures, which shall in all cases permit a fair hearing. As regards examination, the Commission, unless it unanimously decides otherwise, shall conform with the provisions of Chapter III of The Hague Convention for the Peaceful Settlement of International Disputes of 18 October 1907.

2. The Parties shall be represented before the Conciliation Commission by agents whose duty shall be to act as intermediaries between the Parties and the Commission. Each of the Parties may seek also the assistance of advisers and experts nominated by it for this purpose and may request the hearing of all persons whose evidence the Party considers useful.

3. The Commission shall have the right to request explanations from agents, advisers and experts of the Parties as well as from any persons whom, with the consent of their Governments, it may deem useful to call.

Article 6

Provided the Parties do not agree otherwise, decisions of the Conciliation Commission shall be taken by a majority vote and the Commission shall not pronounce on the substance of the controversy unless all its members are present.

Article 7

The Parties shall facilitate the work of the Conciliation Commission and in particular, in accordance with their legislation, and using all means at their disposal:

- (a) provide the Commission with the necessary documents and information;
- (b) enable the Commission to enter their territory, to hear witnesses or experts, and to visit the scene.

Article 8

The task of the Conciliation Commission will be to clarify the matters under dispute, to assemble for this purpose all relevant information by means of examination or other means, and to endeavour to reconcile the Parties. After examining the case, the Commission shall communicate to the Parties a recommendation which appears to the Commission to be appropriate to the matter and shall fix a period of not more than 90 days within which the Parties are called upon to state whether or not they accept the recommendation.

Article 9

The recommendation shall be accompanied by a statement of reasons. If the recommendation does not represent in whole or in part the unanimous opinion of the Commission, any Conciliator shall be entitled to deliver a separate opinion.

Article 10

A conciliation shall be deemed unsuccessful if, 90 days after the Parties have been notified of the recommendation, either Party shall not have notified the other Party of its acceptance of the recommendation. Conciliation shall likewise be deemed unsuccessful if the Commission shall not have been established within the period prescribed in the third paragraph of Article 3 above, or provided the Parties have not agreed otherwise, if the Commission shall not have issued its recommendation within one year from the date on which the Chairman of the Commission was nominated.

Article 11

1. Each member of the Commission shall receive remuneration for his work, such remuneration to be fixed by agreement between the Parties which shall each contribute an equal proportion.
2. Contributions for miscellaneous expenditure incurred by the work of the Commission shall be apportioned in the same manner.

Article 12

The parties to the controversy may at any time during the conciliation procedure decide in agreement to have recourse to a different procedure for settlement of disputes.

CHAPTER II. ARBITRATION

Article 13

1. Arbitration procedure, unless the Parties decide otherwise, shall be in accordance with the rules set out in this Chapter.
2. Where conciliation is unsuccessful, a request for arbitration may only be made within a period of 180 days following the failure of conciliation.

Article 14

The Arbitration Tribunal shall consist of three members: one Arbitrator nominated by the coastal State which took the measures, one Arbitrator nominated by the State the nationals or property of which have been affected by those measures, and another Arbitrator who shall be nominated by agreement between the two first-named, and shall act as its Chairman.

Article 15

1. If, at the end of a period of 60 days from the nomination of the second Arbitrator, the Chairman of the Tribunal shall not have been nominated, the Secretary-General of the Organization upon request of either Party shall within a further period of 60 days proceed to such nomination, selecting from a list of qualified persons previously drawn up in accordance with the provisions of Article 4 above. This list shall be separate from the list of experts prescribed in Article IV of the Convention and from the list of Conciliators prescribed in Article 4 of the present Annex; the name of the same person may, however, appear both on the list of Conciliators and on the list of Arbitrators. A person who has acted as Conciliator in a dispute may not, however, be chosen to act as Arbitrator in the same matter.
2. If, within a period of 60 days from the date of the receipt of the request, one of the Parties shall not have nominated the member of the Tribunal for whose designation it is responsible, the other Party may directly inform the Secretary-General of the Organization who shall nominate the Chairman of the Tribunal within a period of 60 days, selecting him from the list prescribed in paragraph 1 of the present Article.
3. The Chairman of the Tribunal shall, upon nomination, request the Party which has not provided an Arbitrator, to do so in the same manner and under the same

conditions. If the Party does not make the required nomination, the Chairman of the Tribunal shall request the Secretary-General of the Organization to make the nomination in the form and conditions prescribed in the preceding paragraph.

4. The Chairman of the Tribunal, if nominated under the provisions of the present Article, shall not be or have been a national of one of the parties concerned, except with the consent of the other Party or Parties.

5. In the case of the decease or default of an Arbitrator for whose nomination one of the Parties is responsible, the said Party shall nominate a replacement within a period of 60 days from the date of decease or default. Should the said Party not make the nomination, the arbitration shall proceed under the remaining Arbitrators. In the case of decease or default of the Chairman of the Tribunal, a replacement shall be nominated in accordance with the provisions of Article 14 above, or in the absence of agreement between the members of the Tribunal within a period of 60 days of the decease or default, according to the provisions of the present Article.

Article 16

If a procedure has been initiated between two Parties, any other Party, the nationals or property of which have been affected by the same measures or which is a coastal State having taken similar measures, may join in the arbitration procedure by giving written notice to the Parties which have originally initiated the procedure unless either of the latter Parties object to such joinder.

Article 17

Any arbitration Tribunal established under the provisions of the present Annex shall decide its own rules of procedure.

Article 18

1. Decisions of the Tribunal both as to its procedure and its place of meeting and as to any controversy laid before it, shall be taken by majority vote of its members; the absence or abstention of one of the members of the Tribunal for whose nomination the Parties were responsible shall not constitute an impediment to the Tribunal reaching a decision. In cases of equal voting, the Chairman shall cast the deciding vote.

2. The Parties shall facilitate the work of the Tribunal and in particular, in accordance with their legislation, and using all means at their disposal:

(a) provide the Tribunal with the necessary documents and information

(b) enable the Tribunal to enter their territory, to hear witnesses or experts, and to visit the scene.

3. Absence or default of one Party shall not constitute an impediment to the procedure.

Article 19

1. The award of the Tribunal shall be accompanied by a statement of reasons. It shall be final and without appeal. The Parties shall immediately comply with the award.

2. Any controversy which may arise between the Parties as regards interpretation and execution of the award may be submitted by either Party for judgment to the Tribunal which made the award, or, if it is not available, to mother Tribunal constituted for this purpose in the same manner as the original Tribunal.