AN APPRAISAL OF LEGAL AND INSTITUTIONAL FRAMEWORK ON MARITIME LAW IN NIGERIA

BY

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LL.M/LAW/71806/2013-2014

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

MAY, 2016

DECLARATION

I declare that this dissertation entitled: "An Appraisal of the Legal and Institutional Framework of Maritime Law in Nigeria" has been carried out by me in the Department of Public Law, Faculty of Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma in this or any other university.

_____ **_____**

ABDULAZIZ ,Hafsat Avosuahi **Date**
LL.M/LAW/71806/2013-2014

CERTIFICATION

This Dissertation entitled: "An Appraisal of the Legal and Institutional Framework of Maritime Law in Nigeria" by ABDULAZIZ, Hafsat Avosuahi meets the regulations governing the award of the degree of Master of Laws - LL.M of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This research work is dedicated to Almighty Allah and also to the loving memory of my beloved parents late, Alhaji Abdulwahab Obini Abdulaziz and Late Hajiya Halima Suleiman Abdulaziz. They were my strength and support all through the period of this programme. They are appreciated for their encouragement and prayers; may Aljannah Firdaus be their final abode, Insha Allah, Ameen.

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ABBREVIATIONS

AJA	-	Admiralty Jurisdiction Act
CS	-	Continental Shelf
C-Z	-	Contiguous Zone
EEZ	-	Exclusive Economic Zone
EU	-	European Union
ECOWAS	-	Economic Community of West African States
FD&D	-	Freight Demurrage and Defence
FOC	-	Flag of Convenience
GATS	-	General Agreement on Trade In Services
ICJ	-	International Court of Justice
IMF	-	International Monetary Fund
ILO	-	International Labour Organization
IMCO	-	Intergovernmental Maritime Consultative Organization
IMO	-	International Maritime Organization
ISA	-	International Seabed Authority
ISO	-	International Standard Organization
ISPS	-	International Ship and Port Facility Security
ISSC	-	International Ship Security Certificate
ITLOS	-	International Tribunal for the Law of the Sea
LOS	-	Law of the Sea
MAN	-	Maritime Academy of Nigeria
MOWCA	-	Maritime Organization for West and Central Africa

MASECA	-	Maritime Security Agency
MSA	-	Merchant Shipping Act
MSY	-	Maximum Sustainable Yield
MSC	-	Merchant Ship Council
NIEO	-	New International Economic Order
NIMASA	-	Nigerian Maritime and Administration and Security Agency
NIOMR	-	Nigeria Institute for Oceanography and Marine Research
NGMTS	-	Negotiating Group on Maritime Transport Services
NMA	-	National Maritime Authority
PCIJ	-	Permanent Court of International Justice
PICMSS	-	Presidential Implementation Committee on Maritime Safety and Security
P&I	-	Protection and Indemnity
SOLAS	-	Safety of Life At Sea
STCW	-	Standard Training, Certification and Watch keeping for Seafarers
TS	-	Terrestrial Sea
UK	-	United Kingdom
UNCLOS	-	United Nations Convention on the Law of the Sea
UN	-	United Nations
UNCITRAL	-	United Nations Commission on International Trade Law
UNCTAD	-	United Nations Conference on Trade and Development
US	-	United States
USA	-	United State of America
WTO	-	World Trade Organisation -

ABSTRACT

Nigeria has a land area of 923,768.64 square kilometers, with a coastline of over 823 kilometres and navigable inland waterways of about 4,000 kilometres. These confer on Nigeria great potentials. To what extent these potentials have been tapped for productivity and nation building would be appraised considering the attendant issues and challenges faced by the co-ordinating and regulating bodies. The research discusses the development of maritime industry in Nigeria with focus towards development, structural formation, legal and institutional framework, capacity building and cabotage and the role of the Nigerian Maritime and Administration and Security Agency (NIMASA). It also examines some challenges faced by cor-ordinating and regulating bodies such as enforcement policies as well as issues attendant in the industry are discussed briefly. Again, it takes a look at the United Nations Convention on the Law of the Sea (UNCLOS), which provides the foundation for an effective regional maritime regime. However, this large and complex convention is not without its limitations. There are many examples of apparent non-compliance with its norms and principles. The root causes of these problems as discussed by this research lies in basic conflicts of interest between countries on the law of the sea issues, the built-in ambiguity of UNCLOS in several regimes, and the geographical complexity of the coastal and landlocked regions in particular. The research posits that the law of the seas, maritime, etc. between countries should be harmonized to avoid conflicts of laws that often affect the maritime industries generally.

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CHAPTER ONE

General Introduction

1.1 Background to the Study

The United Nations Convention on the Law of the Sea (UNCLOS), also called the Law of the Sea Convention or the Law of the Sea treaty, is the international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. The Law of the Sea Convention defines the rights and responsibilities of nations with respect to their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. The Convention, concluded in 1982, replaced four 1958 treaties. UNCLOS came into force in 1994, a year after Guyana became the 60th nation to sign the treaty.[1] As of January 2015, 166 countries and the European Union have joined in the Convention. However, it is uncertain as to what extent the Convention codifies customary international law.

While the Secretary General of the United Nations receives instruments of ratification and accession and the UN provides support for meetings of states party to the Convention, the UN has no direct operational role in the implementation of the Convention. There is, however, a role played by organizations such as the International Maritime Organization, the International Whaling Commission, and the International Seabed Authority (ISA). (The ISA was established by the UN Convention.)

The UNCLOS replaces the older and weaker 'freedom of the seas' concept, dating from the 17th century: national rights were limited to a specified belt of water extending from a nation's coastlines, usually three nautical miles, according to the 'cannon shot' rule developed by

[1] "The United Nations Convention on the Law of the Sea (A historical perspective)". United Nations Division for Ocean Affairs and the Law of the Sea. Retrieved 30 April 2009.

the Dutch jurist Cornelius van Bynkershoek.[2] All waters beyond national boundaries were considered international waters: free to all nations, but belonging to none of them (the mare liberum principle promulgated by Grotius).

In the early 20th century, some nations expressed their desire to extend national claims: to include mineral resources, to protect fish stocks, and to provide the means to enforce pollution controls. (The League of Nations called a 1930 conference at The Hague, but no agreements resulted.) Using the customary international law principle of a nation's right to protect its natural resources, President Trumanin 1945 extended United States control to all the natural resources of its continental shelf. Other nations were quick to follow suit. Between 1946 and 1950, Chile, Peru, and Ecuador extended their rights to a distance of 200 nautical miles (370 km) to cover their Humboldt Current fishing grounds. Other nations extended their territorial seas to 12 nautical miles (22 km).

By 1967, only 25 nations still used the old 3-mile (4.8 km) limit,[3] while 66 nations had set a 12-nautical-mile (22 km) territorial limit and eight had set a 200-nautical-mile (370 km) limit. As of 28 May 2008, only two countries still use the 3-mile (4.8 km) limit: Jordan and Palau.[4] That limit is also used in certain Australian islands, an area of Belize, some Japanese straits, certain areas of Papua New Guinea, and a few British Overseas Territories, such as Anguilla.

[2] "United Nations Convention on the Law of the Sea". United Nations Treaty Series. Retrieved 2013-12-01.
[3] "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements". United Nations Division for Ocean Affairs and the Law of the Sea. 8 January 2010. Retrieved 2010-02-24.
[4] "Table of claims to maritime jurisdiction"(PDF). United Nations Division for Ocean Affairs and the Law of the Sea. Retrieved 1 April, 2016.

UNCLOS I

In 1956, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) at Geneva, Switzerland. UNCLOS I resulted in four treaties concluded in 1958:

a. Convention on the Territorial Sea and Contiguous Zone, entry into force: 10 September 1964
b. Convention on the Continental Shelf, entry into force: 10 June 1964
c. Convention on the High Seas, entry into force: 30 September 1962
d. Convention on Fishing and Conservation of Living Resources of the High Seas, entry into force: 20 March 1966

Although UNCLOS I was considered a success, it left open the important issue of breadth of territorial waters.[5]

UNCLOS II

In 1960, the United Nations held the second Conference on the Law of the Sea ("UNCLOS II"); however, the six-week Geneva conference did not result in any new agreements. Generally speaking, developing nations and third world countries participated only as clients, allies, or dependents of the United States or the Soviet Union, with no significant voice of their own.

UNCLOS III

The issue of varying claims of territorial waters was raised in the UN in 1967 by Arvid Pardo, of Malta, and in 1973 the Third United Nations Conference on the Law of the Sea was convened in New York. In an attempt to reduce the possibility of groups of nation-states dominating the negotiations, the conference used a consensus process rather than majority vote.

[5] Thomas E.B. (1978). "*The Seizure and Recovery of the S.S. Mayaguez: Legal Analysis of United States Claims*", Part 1 (PDF).Military Law Review(Department of the Army)82: 114–121. ISSN 0026-4040. Retrieved 21 April, 2016.

With more than 160 nations participating, the conference lasted until 1982. The resulting convention came into force on 16 November 1994, one year after the sixtieth state, Guyana, ratified the treaty.

The convention introduced a number of provisions. The most significant issues covered were setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones(EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes.

The convention set the limit of various areas, measured from a carefully defined baseline. (Normally, a sea baseline follows the low-water line, but when the coastline is deeply indented, has fringing islands or is highly unstable, straight baselines may be used.) The areas are as follows:

Internal Waters: Covers all water and waterways on the landward side of the baseline. The coastal state is free to set laws, regulate use, and use any resource. Foreign vessels have no right of passage within internal waters.

Territorial Waters: Out to 12 nautical miles (22 kilometres; 14 miles) from the baseline, the coastal state is free to set laws, regulate use, and use any resource. Vessels were given the right of innocent passage through any territorial waters, with strategic straits allowing the passage of military craft as transit passage, in that naval vessels are allowed to maintain postures that would be illegal in territorial waters. "Innocent passage" is defined by the convention as passing through waters in an expeditious and continuous manner, which is not "prejudicial to the peace, good order or the security" of the coastal state. Fishing, polluting, weapons practice, and spying are not "innocent", and submarines and other underwater vehicles are required to navigate on the

surface and to show their flag. Nations can also temporarily suspend innocent passage in specific areas of their territorial seas, if doing so is essential for the protection of its security.

Archipelagic Waters: The convention set the definition of Archipelagic States in Part IV, which also defines how the state can draw its territorial borders. A baseline is drawn between the outermost points of the outermost islands, subject to these points being sufficiently close to one another. All waters inside this baseline are designated Archipelagic Waters. The state has sovereignty over these waters (like internal waters), but subject to existing rights including traditional fishing rights of immediately adjacent states.[6] Foreign vessels have right of innocent passage through archipelagic waters (like territorial waters).

Contiguous Zone: Beyond the 12-nautical-mile (22 km) limit, there is a further 12 nautical miles (22 km) from the territorial sea baseline limit, the contiguous zone, in which a state can continue to enforce laws in four specific areas: customs, taxation, immigration and pollution, if the infringement started within the state's territory or territorial waters, or if this infringement is about to occur within the state's territory or territorial waters.[7] This makes the contiguous zone a hot pursuit area.

Exclusive Economic Zones (EEZs): These extend from the edge of the territorial sea out to 200 nautical miles (370 kilometres; 230 miles) from the baseline. Within this area, the coastal nation has sole exploitation rights over all natural resources. In casual use, the term may include the territorial sea and even the continental shelf. The EEZs were introduced to halt the increasingly heated clashes over fishing rights, although oil was also becoming important. The success of an offshore oil platform in the Gulf of Mexico in 1947 was soon repeated elsewhere in the world,

[6] "UNCLOS 3 Article 51". United Nations Division for Ocean Affairs and Law of the Sea. Retrieved 29 March 2016.

[7] "Section 4. Contiguous Zone, Article 33". UNCLOS Part II – Territorial Sea And Contiguous Zone. United Nations. Retrieved 2012-01-19.

and by 1970 it was technically feasible to operate in waters 4000 metres deep. Foreign nations have the freedom of navigation and over flight, subject to the regulation of the coastal states. Foreign states may also lay submarine pipes and cables.

Continental Shelf: The continental shelf is defined as the natural prolongation of the land territory to the continental margin's outer edge, or 200 nautical miles (370 km) from the coastal state's baseline, whichever is greater. A state's continental shelf may exceed 200 nautical miles (370 km) until the natural prolongation ends. However, it may never exceed 350 nautical miles (650 kilometres; 400 miles) from the baseline; or it may never exceed 100 nautical miles (190 kilometres; 120 miles) beyond the 2,500 meter isobaths (the line connecting the depth of 2,500 meters). Coastal states have the right to harvest mineral and non-living material in the subsoil of its continental shelf, to the exclusion of others. Coastal states also have exclusive control over living resources "attached" to the continental shelf, but not to creatures living in the water column beyond the exclusive economic zone.

Aside from its provisions defining ocean boundaries, the convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas, and also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority and the Common heritage of mankind principle.[8] Land locked states are given a right of access to and from the sea, without taxation of traffic through transit states.[9]

[8] Jennifer F. (2003), *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise*? Wisconsin International Law Journal. 21:409

[9] This is a principle that was first developed in the Convention on Transit Trade of Land-locked States.

Part XI and the 1994 Agreement

Part XI of the Convention provides for a regime relating to minerals on the seabed outside any state's territorial waters or EEZ (Exclusive Economic Zones). It establishes an International Seabed Authority (ISA) to authorize seabed exploration and mining and collect and distribute the seabed mining royalty. The United States objected to the provisions of Part XI of the Convention on several grounds, arguing that the treaty was unfavorable to American economic and security interests. Due to Part XI, the United States refused to ratify the UNCLOS, although it expressed agreement with the remaining provisions of the Convention.

From 1983 to 1990, the United States accepted all but Part XI as customary international law, while attempting to establish an alternative regime for exploitation of the minerals of the deep seabed. An agreement was made with other seabed mining nations and licenses were granted to four international consortia. Concurrently, the Preparatory Commission was established to prepare for the eventual coming into force of the Convention-recognized claims by applicants, sponsored by signatories of the Convention. Overlaps between the two groups were resolved, but a decline in the demand for minerals from the seabed made the seabed regime significantly less relevant. In addition, the decline of Socialism and the fall of Communism in the late 1980s had removed much of the support for some of the more contentious Part XI provisions.

In 1990, consultations were begun between signatories and non-signatories (including the United States) over the possibility of modifying the Convention to allow the industrialized countries to join the Convention. The resulting 1994 Agreement on Implementation was adopted as a binding international Convention. It mandated that key articles, including those on limitation of seabed production and mandatory technology transfer, would not be applied, that the United

States, if it became a member, would be guaranteed a seat on the Council of the International Seabed Authority, and finally, that voting would be done in groups, with each group able to block decisions on substantive matters. The 1994 Agreement also established a Finance Committee that would originate the financial decisions of the Authority, to which the largest donors would automatically be members and in which decisions would be made by consensus.

On 1 February 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) issued an advisory opinion concerning the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with Part XI of the Convention and the 1994 Agreement. The advisory opinion was issued in response to a formal request made by the International Seabed Authority following two prior applications the Authority's Legal and Technical Commission had received from the Republics of Nauru and Tonga regarding proposed activities (a plan of work to explore for polymetallic nodules) to be undertaken in the Area by two State-sponsored contractors - Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga). The advisory opinion set forth the international legal responsibilities and obligations of Sponsoring States AND the Authority to ensure that sponsored activities do not harm the marine environment, consistent with the applicable provisions of UNCLOS Part XI, Authority regulations, ITLOS case law, other international environmental treaties, and Principle 15 of the UN Rio Declaration.[10]

[10] Case No. 17 – Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area – Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (1 February 2011).

1.2 Statement of the Problem

This research envisaged the following problems:

For disputes with regards to the exercise of jurisdiction by coastal states in their EEZ, concerning fisheries, marine scientific research and pollution, the convention seems to prescribe recourse to settlement by special arbitration. Disputes arising out of the administration of sea-bed exploitation are to be referred to ITLOS Sea-Bed Dispute Chamber, while disputes on marine boundaries are to be settled by arbitration.

However, most of the existing local legislation regarding the maritime zones have not been amended to reflect the acceptance of the new regime of the law of the sea. For example, Decree No. 38 of 1971, extended Nigerians territorial waters thirty nautical miles of the coast of Nigeria, thereby altering the 12 miles limit set in the Interpretation Act 1964.[11]

Despite the unanimity at UNCLOS III as to mile limit, the position has remained in conflict with the new regime. The same is true of the definition of the continental shelf.[12]

The first problem this presents is that of the interests of states which are adjacent or opposite states in the Gulf of Guinea which seem difficult to reconcile in terms of delimiting the marine boundaries.

The second problem is that with the coming into force of the LOS provisions like the Territorial Waters Act[13] regarding jurisdiction over offences committed in territorial waters seems inconsistent with the convention. Jurisdiction beyond the 12 mile limit will be extra-territorial and a violation of the rights of other states, it may interfere with rights of innocent passage or navigation. Indeed, the 30 mile limit is well outside the contiguous zone created to

[11] Now Cap. 179, LFN, 1990
[12] Sections 1(2) and 15 of the Petroleum Act Cap. 350, LFN, 1990
[13] Section 2(2) Territorial Waters Act Capo. T5 Vol. 14 LFN, 2004

permit a coastal state to enforce its criminal, immigration or sanitary laws outside the territorial sea. It may therefore raise problems, for instance, with the exercise of the right of hot pursuit.

1.3 Aim and Objectives of the Research

The aim of this research work is to appraise the legal and institutional framework on maritime law in Nigeria through the following objectives:

i) To determine the rights and interests of states which are adjacent or opposite to the Gulf of Guinea that have been difficult to reconcile in terms of maritime boundaries.

ii) To examine the issues of jurisdiction of states over offences committed in their territorial waters.

iii) To address the problems of nautical miles in respect to coastal states.

iv) To identify the problems of conflicts and dispute regarding Maritimes zones and proffer practical solutions to them.

1.4 Justification of the Research

The importance of this work lies in the fact that it will provoke renewed interest in the development of Nigerian maritime law by the Federal Government and relevant agencies. It will hopefully entitle the stakeholders of the maritime sector by creating awareness of the immense benefits that would accrue to Nigerians and the National Economy if the law is properly enforced to harness our maritime sector with participants of Nigerian operators.

1.5 Scope of the Research

The study focuses mainly on the legal and institutional framework of Maritime law in Nigeria. It exposes the possible challenges of the laws, examines the opportunities that will accrue to the indigenous shipping agencies. The study is limited to the role and function of

NIMASA, as the Federal Government regulatory agency aimed at seeing the nation competing favourably with its counterparts.

It also takes a look at cabotage law and the Nigeria institute for oceanography and marine research.

1.6 Methodology

The methodology adopted by the researcher is the doctrinal method that is, library oriented. It was carried out in the National Library Abuja and Law Library Ahmadu Bello University, Zaria. The internet was also consulted. Materials consulted are statute books, international treaties, textbooks, journals and articles on the subject matter under consideration. The sources of materials consulted are primary and secondary sources. The primary sources are local and international statutes, textbooks whereas the secondary sources are articles in journals and paper presentations at the international law.

This research work wholly depends on textbooks, statutes, articles, journals and the internet.

1.7 Literature Review

Mohammed Tawfiq Ladan in his book, Materials and Cases on Public International Law[14] extensively highlighted on the international law of the sea, and Nigeria's maritime law. He raised fundamental issues and clearly enunciates the seminaries and dissimilarities of the two laws.

Another author in the Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea analyzed on the law of the sea, procedures of agreement implementation, and on the New Legal regimes of 1982 UNCLOS. His contribution on the territorial sea, Continental Zone, exclusive economic Zone, continental shelf were

[14] (2007) Ahmadu Bello University Press, Zaria

relevant to this study. He succeeded in making a distinction between the zones and proffered useful legal definitions of the zones.

Osita, C.E., in Transfer of technology to developing Countries,[15] elaborated on the prevention and control of marine pollution from all sources. His contribution on the promotion of the development and transfer of marine technology on fair and reasonable terms and conditions with proper regards for all legitimate interests including the rights and duties of holders, suppliers and recipients of technology are invaluable to this research. They have been analysed in the light of this research.

Ilogu, L.C.[16] made needful contributions on the maritime sector, especially in the area of ship, ship mortgage, but failed to succinctly address the issue of new emerging trends in the maritime sector which this research aims at addressing.

Akinsanya, A. in his work on maritime pollution in environmental law and policy,[17] made useful observation on marine pollution and its adverse effect on marine life. His work is relevant to this research but did not touch on issues of Nigeria's maritime interest.

Brownlie, I., in Principles of Public International law,[18] gave an apt examination of the convention on the law of the Sea, bringing grey areas to light and making useful recommendations. However, he failed to examine the issues of Nigerian maritime interest within the African context.

Green, L.C., in his work, International Law through the cases,[19] highlighted the issue of innocent passage and observed the challenges militating the exploitation and exploration of

[15] (1986) Transfer of Technology to developing Countries, Amazon Books Store.
[16] (2006) Essays on Maritime law and Practice ELCSAM Integrated Services Ltd Lagos Nigeria
[17] (1973) Maritime Pollution in Environmental Law and Policy, Lagos State University.
[18] (1973) Principles of Public International Law, Oxford, Clarendon Press.
[19] (1970) International Law through the Cases, London Stevens.

marine resources. The work failed however, to look at the African context, especially Nigeria; and her maritime sector, which this research aims to augment.

Walker, W.L., in Territorial Waters,[20] discussed the parameters of boundary disputes and adjudication and made useful recommendation on the issues raised in the work. The work on the other hand did not address the challenges of vessels, especially on Nigerian waters which this research aims to address.

Ayua A.I. Yagba T.A.T., Osiase O.A. "in the New Law of the Sea and Nigerian Maritime Sector: Issues and Prospects for the Next Millennium,"[21] highlighted issues on the exploration and exploitation of the marine environment; and discussed to some extent the challenges faced by coastal states, but failed to proffer solutions that would curb the problems faced by the coastal states which are peculiar to each situation. This research therefore aims at analyzing these grey areas and recommending practical way out if the issues raised.

Patel, B.N. and Thakkar H., in "Marine Security and Piracy: Global Issues, Challenges and Solutions"[22] analysed the menace of piracy and made valuable comparative analysis of different legal regimes and suggested ways of combating maritime piracy as a subject of universal jurisdiction and the dimension of global maritime piracy. Though invaluable their contribution, they however failed to identify those problems that are peccary to Africa coastal states.

[20] (1945) Territorial Waters, The Canon Shot Rule, British Year Book of International Law.
[21] (2001) The New law of the Sea and Nigerian Maritime Sector: Issues and Prospects for the Next Millennium
[22] (2007) Maritime Secuity and Piracy: Global Issues, Challenges and Solutions, Easter Book Company (EBC) Publishing Ltd 34-A Lalbagh, Lucknow-226001.

1.8 Organizational Layout

The research is divided into five chapters.

Chapter one consist of the general introduction and preliminary issue like statement of the problem, justification of the research, objectives, scope of the research, methodology, literature review and organizational layout of the study.

Chapter two discusses development of the law of the sea, origin, nature and development of international maritime law and the subject of maritime law.

Chapter three examines an overview of Nigerian maritime law and its institution like Nigeria maritime administration and safety (NIMASA), Nigeria Institute of Oceanography and maritime research (NIOMR), meaning of cabotage, Nigeria coastal trade and potentials of cabotage, international maritime related conventions and agreement, cabotage issues with international implication.

Chapter four focuses on maritime zone conservation and management within the limits of jurisdiction, the internal waters, the contiguous zone, regime of the high seas and international seabed, nationality of ship, piracy, consent of jurisdiction on the basis of treaty and conservation of marine environment.

Chapter five summarizes the research by way of conclusion, findings and recommendations.

CHAPTER TWO

DEVELOPMENT OF THE LAW OF THE SEA

2.1 Introduction

One cannot gainsay the fact that law is one of the disciplines that is very pivotal to the very nature of man. Without the discipline of law, our present society would certainly not have been what it is today, law has played and continue to play a primordial role in governing and regulating human affairs. The concept of law is very wide, cutting across various schools of thought Without going into that, law has been graphically defined in the Black's Law Dictionary[1] as the regime that orders human activities and relations through systemic application of the force of politically organized society, or through social pressure, backed by force, in such a society. Suffice for our purpose to say that it is that discipline which is concerned with the elaboration of rules and regulations to guide human affairs in the society. It is worth noting that the growth of human civilization has generally been linked with the gradual development of a system of legal rules together with the machinery for their regulation and effective enforcement.

It is common knowledge that about 2/3 of this planet is covered by water and that to go from one part to another, it has since time immemorial been necessary to traverse large bodies of water. Man has been compelled to traverse the seas and oceans with the aid of vessels of increasing sophistication in pursuit of trade and commerce, acquisition of new territories, exchange of ideas, diplomatic missions, cultural and sporting activities, exploration and exploitation of minerals and you name them. These numerous activities of man in relation to the ocean invariably necessitated some sort of regulations to guide the conduct of ocean usage. Maritime law is a direct response to these exigencies.

[1]Black's law Dictionary- seventh edition, West Crmip, Si. Paul Minn. 1'999. p 83.

Maritime law which is also referred to as Admiralty law or Law of the Sea deals with marine matters. It is that body of law governing marine commerce and navigation, the transportation at sea of persons and properties and marine affairs generally such as rules governing workers' compensation claims, actions in contract and tort arising out of commerce on or over water.[2]

It is of interest to note that although marine transactions may involve people of many nations and goods of diverse origins and transactions involving many countries, yet the law applicable to it is not international law per se.[3] Maritime law is a municipal law, but because of the identity of the subject matter, their international connections and their historical derivation from a common source of maritime usages, the municipal maritime laws of different countries tend to be identical, becoming a kind of universal common law and taking the shape and form of international law.[4]

With this brief introduction, the paper will now focus on the origin of international maritime law.

2.2 The Origin of International Maritime Law

By origin it is intended first- to discuss what actually necessitated the coming to being of international maritime law and secondly to discuss the sources from where it emanated from or from where it derived its legitimacy.

- **Necessitating Factors**

Before the 15th century, there was freedom for even- state to navigate and fish on the oceans and high seas without any restriction- The only qualification then seem to be the ability of a state to carry on navigation and fishing exercise. Thus because of their mastery in the art of

[2] Ibid. p. 9S2
[3] Belgore M.B., (1991), *Jurisdiction with reference to forum convenient and concept of seaworthiness. Judicial Lecture: continuing Education for the Judiciary*, Ml) Publisher Ltd, p. 2-6. 4. Id.
[4] Ibid

navigation, the Vikings of Scandinavia explored much of the North Atlantic, Venice explored the Adriatic, England explored the North Sea, and large parts of the Atlantic, while Sweden explored the Baltic, Norway and Denmark were on the Northern Sea.[5] This hitherto freedom to navigate and fish on the high seas began to face serious challenges from the 15th centuries onwards with Spain. Portugal and Britain laying claims of sovereignty on certain areas of the open seas which could hardly be distinguished from claims of ownership. Portugal claimed the whole of the Indian Ocean and very large portions of the Atlantic, Spain claimed the Pacific and the Gulf of Mexico, while Britain arrogated to herself the Narrow Sea and the North Sea.[6]

Tunkin,[7] however, traced the history of international maritime law to the age of slave society under which feudal systems of government made attempts to extend their monarchical authority to the high seas.

- **Sources**

With the scramble and appropriation of the high *seas*, there was bound to be conflict of interest thus the need for regulations to guide and regulate their conducts. Most of the legislation on shipping promulgated by states are derived from isles of international application. A newly independent nation for example inherit a large portion of such laws from its colonial master. These acquired rules were developed over centuries from customary rules and conventions and resolution of actual problems. These customary rules and conventions are themselves sources of much of the international laws on shipping. Originally, these rules were confined to customary practices, but in recent times, they have

[5] Ajomo M.A. (1998), *The Regime of the High Seas and International Sea Red Area*. The New law of the Sea and the Nigerian Maritime Sector: Issues and Prospects for the next Millenium. Nigerian Institute of Advanced legal Studies, p. 40.
[6] Starke, J.G. (1984), *Introduction to International law*, 9th ed. Butterworths, p. 234.
[7] Tunkin G.I. (1956), *International Law*, London, p. 415.

been put into written codes or conventions. Amongst the oldest of these codes are the "*Lex Rhodia de jeclu "* and the *"codes of Oleron and Wiseby".*

As maritime traffic increased, conferences under the auspices of the United Nations and the International Maritime Organization (IMO) were organized by major shipping nations which usually ended up with the adoption of conventions. These contentions which are the international approximation of Acts of parliament were, however, to a large extent influenced by a combination of factors, such as economic, political, military and ideological considerations.

Prior to the United Nations Conferences on the Law of the Sea (UNCLOS I-III) and The Hague Codification Conference of 1930, more than 60 international conferences on various uses of the sea-were held. These conferences produced 64 multilateral conventions dealing with specific and technical aspects of marine affairs ranging from the protection of submarine cables to salvage at sea.[8]

Having said this, it will be germane at this juncture to discuss some of the sources of international maritime law. But before we go into that, let us look at the enabling statute of these sources.

Article 38(1) of the statute of the International Court of Justice is widely recognized as the most authoritative pronouncement of the sources of international law. It provides as follows:

> *"The court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply;*
> *a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

[8] Multilateral Treaties Relevant to the United Nations Convention on the laws of the Sea. United Nations New York, 1985.

b. International custom as evidence of a general practice accepted as law;
c. The general principles of law recognized by civilized nations;
d. *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law."*

From the foregoing, it is apparent that international conventions, customs, general principles of law, judicial decisions and academic writings have been identified as good sources of international law. This categorization is not watertight as some of them do overlap. For example, treaties and conventions to a large extent merely reechoed accepted rules of customary law. The sources of international law therefore are:

Custom

In international law, custom is a dynamic source of law in the light of the nature of international system and the lack of centralized governmental organs. Customary rules are deducible from the practice and behaviour of states. The essence of custom according to Article 38 is that it should constitute "evidence of a general practice accepted as law." What is needed therefore is a general recognition among states of a certain practice as obligatory. It must be pointed out that the term custom is not the same with usage. A usage is a general practice which does not reflect any legal obligation e.g. ceremonial salutes at sea, and the practice of exempting diplomatic vehicles from parking prohibitions.[9]

[9] Parking Privileges for Diplomats Case U.R. 701 396 (Fed. Amin Ct… FRG).

Some elements of custom are:

i) **Duration**: In international law, there is no prescribed time limit for a custom to crystallize. The passage of time will of course be part of the evidence of generality and consistency of the practice.

ii) **Uniformity**: This is the consistency or repetitiveness of a particular practice. A one hundred percent uniformity is not what is required but a substantial uniformity. Thus some substantial degree of uniformity among state practices is essential before a custom could come into existence A case in point here is *The Anglo - Norwegian Fisheries*[10] case in which the court refused to accept the existence of a ten-mile rule for bays as a baseline in measuring territorial sea on the ground that there had been insufficient uniformity of behaviour. Also the International Court of Justice (ICJ) stated in *The North Sea Continental Shelf case*[11] that state practice had to be "both extensive and virtually uniform in the sense of the provision involved. This criterion was held to be indispensable in the formation of a new customary international law.

iii) **The Opinio Juris, et necesftatis**: This is the recognition by states of certain practice as legally obligatory, it is a factor, which turns a usage into a custom and renders it part of the rules of international Law. In many cases, the courts are willing to assume the existence of an opinion juris on the basis of evidence of a general practice, or a consensus in literature or tie previous determination of the court or other international tribunals.

[10] CJ Report, 1951,116,131 and 138.
[11] ICJ Report, 1969, p. 3.

Conventions

Article 38 make reference to International conventions, whether general or particular, establishing rules expressly recognized by the contracting states"[12]. Conventions generally create norms for future conduct of the parties in terms of legal prepositions. Such conventions or treaties are in principle binding only on the parties thereto although in some cases the declaratory nature of the provisions may produce a strong law-creating effect on other parties. Non-parties may accept the provisions of a multilateral, convention as binding on them by ratifying and domesticating it.

Because of rapid technological development and problems not highlighted when a convention is made, conventions soon become obsolete. In a bid to update, give effect and take care of recently cropped up issues, there are now dozens of conventions, amended conventions, protocols, regulations and recommendations that cover practically every area of international maritime law. For example the convention dealing with maritime safer i.e., The Safety of life at Sea convention has since 1948 been constantly amended.[13]

General Principles of Law

Article 38(1)(c) of the statute of the International Court of Justice refers to "the general principles of law recognized by civilized nations" as yet another source of international law. The intention is to authorize the courts to apply the general principles of municipal jurisprudence in so far as they are applicable to states.

The most fertile grounds for the implementation of municipal law analogies have been those of procedure, evidence and the machinery of the judicial process. The ICJ in the

[12] PC1J, Series A. So. 101927, p. 18.
[13] An overview of Maritime Law in Nigeria, Essays in Honour of Chief (DR.) Christopher Oladipo, p. 329

Corfa Channel Case,[14] while referring to circumstantial evidence, pointed out that "this indirect evidence is admitted in all systems of law and its use is recognized by international decisions". Thus, it follows that it is the courts that have the discretion as to which principle of law to apply in the circumstance of a particular case.

Judicial Decisions

The court over time, notwithstanding Article 59 of the PICJ which limit the scope of application of its decisions, has been able to follow its previous judgments and inserts a certain measure or certainty within the process so that one finds that disputing states and textbook writers often quote judgments of the court as authoritative decisions. Just like English judges are said to create laws in the process of interpreting the law, so also the judges of the ICJ do create laws. The case of Anglo-Norwegian Fisheries cited above established the criteria for the recognition of baselines from which to measure the territorial sea. This criteria was later enshrined in the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958.

The phrase "judicial decisions" is also taken to encompass international arbitral awards and the decisions of the National Court and the Permanent Court of Arbitration created by the Hague Conference of 1899 and 1907.

Writers

The fact that some writers have had a formative influence on the development of the law of the sea cannot be overemphasized. For example, Gidel[15] has had some influence on the development of the law of the sea. Academic writers have also been useful in stimulating

[14] Report 1954, p. 53
[15] His work are associated with the concept of contiguous zone.

thought about the values and aims of international maritime law as well as pointing out some defects that exists within the regime thus making valuable suggestions for its improvement.

2.3 Nature of International Maritime Law

By nature it is intended to look at some of the typical qualities and characteristics of international maritime law as distinct from other branches of law. Suffice it to say that international maritime law is not much different from other branches of international law.

As an international law therefore, maritime law contains both private and public attributes. In its private perspective, international maritime law deals with those cases and matters within a particular legal system in which foreign elements are involved thus raising the question as to the applicability of law or the involvement of foreign courts. By contrast, public international maritime law will cover relations between states in all their diverse dealing with regard to maritime issues.

Like international law, international maritime law is devoid of legal organs to create and enforce it. Thus organs identifiable with domestic laws such as the legislature, hierarchy of courts and acceptable system of enforcement of laws are absent in international maritime law. one may be tempted to argue that the General Assembly of the United Nations is to international what legislature is to domestic law and the ICJ to international law what the courts are to domestic law. as sound as this argument is, it must be realized that conventions and resolutions are mere guides and not binding on any state as such[16] and for the ICJ to have jurisdiction, both parties must agree to submit to its jurisdiction,[17] an aspect which reduces the potency of the ICJ.

[16] Article 17(1) U.N. Charter
[17] Articles 36 SICJ

Also where a conference is convened and a convention made, that convention does no immediately become binding on the international community. Most countries who sent delegates to the conference will become signatories to the convention. Others may sign the convention but may refused to be bound by some of its clauses.[18] Those countries, which did not send delegates to the conference or took part in the preparation of the convection, are also entitled to become parties to it by acceding to it or ratifying same.

The most fundamental aspect of conventions however, is that even if a country has signed it, ratified or acceded to it, it still does not in many countries, including Nigeria, become law until the provisions of the constitution are fully complied with by way of enacting it into law. In Nigeria, it is by the National Assembly or any other body having powers to make laws for the country specifically incorporating that convention into the laws of Nigeria. This is called the domestication of the convention. For example on the 7th of November 1988, the Nigerian government ratified the Hamburg Convention, but it did not become law. For it to become law, it must have to be domesticated.[19]

The most distinguishing feature of international maritime hw is not carriers and shippers have to contend with two distinct sets of laws. First is the domestic or internal regulations of each state and secondly regulations governing the relationships with the authorities of other states. For example the internal regulations to protect Nigeria's interest in shipping include:

1. *Ownership of vessels by its nationals*
2. *Proper registration of ships*
3. *Use of nationals of ships of other nations.*

[18] This is known as making reservations
[19] Section 12, 1999 CFRN.

4. *The safety of ships, safety of construction, equipment, navigation, loading and management, survey and certification of ships.*
5. The welfare of seafarers and passengers as well as dockworkers.
6. Contractual aspects of carriage of goods by sea.
7. Safety and adequacy of port facilities.
8. Training and qualifications of seafaring personnel.
9. Pollution of waters by oil and dangerous goods,
10. The jurisdiction of courts over disputes and offences within national waters and on the high-seas.
11. Regulations of the use of ports.
12. Sea fishing and the exploitation of off-shore resources.

A foreign ship entering the territorial waters of Nigeria for example, must take cognizance of its domestic laws regulating maritime activities. It should be borne in mind that since a majority of these domestic regulations stem from common customary practices which have been reechoed in international treaties and conventions, they are very identical with that of other states.

Another distinguishing factor between the common law action and admiralty action is that admiralty actions had been and often are actions in *rent* as against actions *in personam* of common law actions. An action is *rem* is an action commenced by the arrest of a defendant or his goods not minding whether the goods in question is the subject of the wrong being complained of or not. The rationale of the procedure was to make the defendant put up a bail or security for securing compliance with judgment if any were to

be awarded against him. Lord Denning MR explained the position in the case of *The Banco*[20] as follows;

> *This case requires its to enquire into the jurisdiction of the court of Admiralty. Long years ago, in the seventeenth and eighteenth centuries, the ordinary mode of commencing a suit in Admiralty was by arrest either of the person of the defendant or his goods. Not only could the offending ship be arrested, but the other ships of the defendant could be arrested also, and any other goods that belong to him, so long as they were within the jurisdiction. The object was to make the defendant put up bail or provide a fund for security in compliance with the judgment, if and when it was obtained against him.*

At this juncture, it is pertinent to ask which one of the various municipal laws would apply in a maritime dispute involving for example, people of many nations and goods of diverse origin. The answer here could be found in the well-accepted principle of private international law that parties to a contract can expressly or by implication confer jurisdiction on the court of any particular forum. This is called the principle *of Forum Convenient* and the jurisdiction so chosen by the parties may have no connection whatsoever with the *lex fori* (law of the forum) of the contract or the physical presence of the parties thereto. The courts must as a matter *of fact* feel reluctant to insist on trying *a case* where the panics have voluntarily stated in their agreement that jurisdiction is in a foreign court.[21] Some of the reasons for choosing a particular jurisdiction are neutrality of the forum, convenience for the trial action, low cost implication and the need to avoid proof of a foreign law in the course of proceedings.

[20] (1971)1 ALL ER 525 at 531.
[21] The chaparral (1968) 2 Lloyds Rep. 158 a! 162.

The principle *of forum conveniens* was the subject of the 1964 Hague Convention on the Choice of Court. Article 22 of that convention provides that once a choice of forum agreement has been concluded, other court should decline jurisdiction except

1. Where the choice is not exclusive.
2. Where under the *lexfori* of the excluded court, the parties were unable because of the subject - matter to exclude its jurisdiction.
3. Where the forum agreement is void or voidable by being obtained by an abuse of economic power or other unfair means.
4. For the purpose of provisional or protective measures.

This convention has, however, not been ratified by- most countries and in contrast some countries have made exclusion clauses in contract affecting their country unenforceable. The Carriage of Goods by Sea Act 1970 of the United States of America makes inclusion of jurisdiction clause in bills of lading invalid while the Australian Sea Carriage of Goods Act 1924 makes it illegal to make an agreement to oust their jurisdiction in a bill of lading relating to the carriage of goods to Australia from abroad. Attention will now be focused on the development of international maritime law.

2.4 Development of International Maritime Law

It will be prudent to start by defining what development means although the concept seems to be very familiar to Africans since they are constantly being reminded of being underdeveloped the other side of the coin.

To a physical scientist, development is seen as the carrying out of building, engineering, mining or other operations, in, on, over or under land or the making of any material change in the use of any building or other land. Thus to this group of persons, the erection of

buildings, making of new roads, laying of new sewages, erecting bridges, opening up quarries and sinking bore holes are all development.[22] To an economist, development is seen as a vision of a better life, life that is materially richer, institutionally more modern, and technologically more efficient and access to an array of means to achieving the vision. There is no doubt that economic growth *is* a necessary condition of development. In this regard, the society develops economically as its members jointly increase their capacity for dealing with the environment.[23]

The above two perspectives of development is very useful to our discourse on the development of international maritime law because with the passage of time, the regime of international maritime law has become richer and more encompassing. Some few examples would, I believe, shed some light on this area.

Prior to the end of the second world war, multilateral conferences on the sea addressed common problems that dealt with certain aspects of seamen's welfare, free navigation in the Suez canal and other navigable water ways, and international shipping (bills of lading, collision at sea, salvage, immunity, tonnage etc). However, a major development in the law of the sea was the 1939 Hague Codification Conference of International Law which was the Ten- first most organised multilateral conference to address the question of the age-long territorial sea, nationality and state responsibility. According to Wang J.C. the conference was particularly necessary because of the tension that has built up between nations that adhered to the concept of free use of the sea and those that wanted to expand their appropriation of the *ocean.*[24]

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[22] English Dictionary ofLaw, Oxford L'niversity Press, Ixiiidon, 1992, p. 23.
[23] Nsonguruaj. U. (2003), *The Third World and the Kight lo Development Agenda for the N'exi Millennium, Human Right and Contemporary Issues in Africa*, Mzlihouse Press Ltd, Lagos, p. 23.
[24] Wang J.C. (1992), Handbook of Ocean Politics, Creeimxxi Press, London. p.23.

The discussions in this conference, which were predicated solely on the territorial sea and the contiguous zone, failed to unify the divergent views on the width of the territorial sea and the purpose of the contiguous zone. Despite this, the conference succeeded in producing a-ticles on the legal status of the territorial sea as a belt of sea which forms part of the coastal states' territory including its airspace above the seabed and the subsoil without defining its seaward extent.

After the Hague Conference, more multilateral agreements were made such that by the end of the second world war to the eve of 1958, a total of *28* multilateral negotiations on fisheries, conservation and management, seamen's welfare, sanitary- regulation, oil pollution were successfully concluded.

Despite these multilateral agreements, the Truman proclamation of 1945 on the United State continental shelf triggered a chain of claims by coastal states for a new ocean enclosure to the extent that it necessitated a call for another international conference to address the controversies as to the meaning, limits and legal status of the doctrine of continental shelf contained in the Truman declaration. The necessity for another conference was further enhanced when in 1952 some Latin American states (Chile, Ecuador and Peru) signed and made a declaration in Santiago claiming what was termed a 200 nautical miles territorial seas for fisheries and other resources.

Against this background therefore, the United Nations convened the first ever Law of the Sea Conference (UNCLOS I) between February 24 to April 28 1958. The conference produced four separate conventions; the Convention on the Territorial Sea and Contiguous Zone; the Convention in the High Seas; the Convention on Fishing and Conservation of Living Resources of the High Seas and the Convention on the Continental Shelf.

Still this conference was unable to reach an agreement on the specific breadth of the territorial sea and contiguous zone. This development further necessitated the second conference (UNCLOS II) convened between March 17 to April 26, I960. And for another time the nations of the world failed to agree on the breadth of the territorial sea and the extent of the contiguous zone. It was therefore not uncommon for coastal states to lay claims over territorial seas expanding from 3 to 6 to 12 and then to 200 nautical miles.

When Ambassador Arvid Pardo, Malta's representative to tin.-United Nations made his famous speech at the General Assembly calling for a declaration and treaty for the peaceful use, in the interest of mankind of the seabed resources beyond national jurisdiction, it was clear that attention was now being focused at global interest, though the problem of ocean pollution from land and vessels and other problems still had to be tackled.

In 1982 the UNCLOS III was convened to address these burning issues and on 10th of December it was opened for signature in Montego Bay, Jamaica. This development marked the culmination for over 14 years of work involving the participation of more than 150 countries representing all regions of the world. This convention was signed by 199 countries on the very first day in which it was opened for signatures - an unprecedented happening in the annals of international law. it was unprecedented because not only were the number of signatories remarkable but it was signed by states of every region of the world, from North to South, East to West, by coastal state sad well as land locked and geographically disadvantaged states. The convention itself was unique in nature, covering 25 subjects and

issues. It comprises 320 articles and 9 annexes governing all aspects from delimitation of territorial waters to environmental control, scientific research, economic and commercial activities, technology and the settlement of disputes relating to ocean matters. This convention represents not only the codification of customary norms by also and more importantly, the progressive development of international maritime law e.g. setting out principles and regulation governing the seabed and ocean floor as the common heritage of mankind.

UNCLOS III has been considered as a major element in continuing the debate on the New International Economic Order (NIEO) envisioned by some underdeveloped nations, which challenges the old economic order and advocates for a redistribution of resources at a global level.

We have so far traced the origin and discussed the nature and development of international marine law, which has as its climax the UNCLOS III. This convention has been aptly describe as the constitution of the oceans and a ground breaking document in many respects.[25]

The UNCLOS III tried to resolve some of the controversial matters for example, it solved the question of the breadth of the territorial sea which has been lingering on for a very long time. The convention now sets the breadth of the territorial seat at 12 nautical miles and established a new Zone called the Exclusive Economic Zone (EEZ) at 200 nautical miles. The convention also made a fundamental change in the continental shelf concept and makes equity and international cooperation the basis for determining marine boundaries.

[25] Ayua A.I. (2002), *Delimitation of Maritime Boundaries in the Light of the New Law of the Sea, and the Nigerian Maritime Sector: Issues and Prospects for the Next Millennium* op. cit. p. 64

2.5 The Subject of Maritime Law

It is a fact that in all fields of endeavour - whenever human beings interact - laws are necessary to provide them with sanctions, with guidance and with a framework for the resolution of disputes. It is also a fact that the majority of this planet is covered with seas and oceans and that to get from one part of it to another, it has since time immemorial been necessary to traverse large bodies of water. Over the ages, men have been compelled to traverse the oceans in vessels of increasing sophistication in pursuit of trade and commerce, acquisition of new territories, exchange of ideas, diplomatic relations, sporting relations and so on. The list is endless. As we shall see, a myriad of problems requiring detailed regulation will inevitably arise from the seemingly simple interaction of man with the waters that cover the earth.

As ships traverse from one country to another, they have to ensure that they comply with two sets of law - those applicable in their states of origin and those applicable in their states of destination. They have to be identified as belonging to a particular country - This requires that they are registered in that country. To be safe at sea they need to comply with regulations governing boat construction, equipment, communications etc. They require a competent crew, and this makes it necessary to comply with regulations on the training and certification of seafarers, their conditions of service and welfare. Since all ships must carry goods and or passengers, there must also be rules on the safety and welfare of passengers and on the storage and safe carriage of goods. The owners of the ships have to be readily ascertainable and their right to lease or chatter their ships to other parties protected by law. Where inevitably disputes arise between persons claiming title to or the right to use a shipor expenses relating to the use of a ship, a machinery must exist for the resolution of such disputes.

Similarly a machinery must exist to facilitate the resolution of problems arising between the owners of ships and owners of cargo, or between the owners of two vessels which collide, or indeed between ship owners and those who render assistance to them in times of trouble or difficulty. Maritime life as well as the environment has to be protected from pollution from hazardous or unnatural substances carried in ships and likely to be discharged into the seas in times of emergency - or indeed deliberately.

We can now understand why this seemingly simple process of ships traversing the oceans from one country to another or more often to a succession of countries is fraught with potential conflicts and problems -especially legal problems. This is what maritime law is all about.

2.5.1 Two Aspects of Maritime Law

As earlier noted, there are two different aspects of maritime law - the internal regulations of each particular state, and regulations governing the relationships with the authorities of other states or the ships of other states. Let us look briefly at each of these two aspects.

The domestic regulations of a state protect its interests in shipping. These interests cover the following:

1. Ownership of vessels by its nationals;
2. Proper registration of ships;
3. Use by nationals of ships of other nations either on charter or as general or common carriers;
4. The safety of ships - safety of construction, equipment, navigation, loading and management, survey and certification of ships;
5. The welfare of seafarers and passengers as well as dock workers;
6. Contractual aspects of carriage of goods by sea;

7. Safety and adequacy of port facilities;
8. Training and qualifications of seafaring personnel;
9. Pollution of waters by oil .and dangerous goods;
10. The jurisdiction of courts over disputes and offences within national waters and on the High sea;
11. Regulation of the use of piers and ports;
12. Sea fisheries and the exploitation of off-shore resources.

2.5.2 The International Aspect

Much of the national legislation on shipping promulgated by a state is derived from rules of international application. Newly independent nations inherit a large body of such laws from its erstwhile colonial masters. These rules have been developed over centuries from customary rules and conventions and resolution of actual problems. These customary rules and conventions are also the source of much of the international laws on shipping. Originally these rules were confined to customary practice, but in recent times, they have been put into written codes or conventions. Amongst the oldest are the "Lex Rhodia de jectu" and the "Codes of Oleron and Wiseby."

As maritime traffic increased and ships became sturdier and faster, greater international regulation of maritime traffic and affairs became necessary. Conferences were held by the major shipping nations, these usually ended in the adoption of a "Convention" which was the international approximation to an act of parliament-. An example of such a convention was the 1924 convention on Bills of Lading (known as the Hague Convention, which starts as follows:

> *"The President of the German Republic, the President of the Argentine Republic, His Majesty the King of the Belgians, the President of the Republic of Chile..."*

> *"Having recognised the utility of fixing by agreement certain uniform a convention with this object and have appointed Plenipotentiaries who, duly authorised thereto, have agreed as follows..."*

From a small "Club" of maritime nations getting together to agree on rules and regulations for their mutual convenience the trend is now a recognised phenomenon. The number of such conventions has increased especially in recent times. Attendance is no longer limited to a small group of nations, but extends to the whole world. When a subject is of sufficient importance, regional groupings of countries ensure that clauses in a particular proposed convention protecting their interests are adopted.

Furthermore, it is no longer left exclusively to the initiative of governments to start the ball rolling. Since the era of the League of Nations and United Nations, various international agencies have come into being which convene regular conferences for the purpose of making conventions. Amongst such agencies are the International Maritime Organisation (I.M.O.), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL) - not to mention the United Nations itself.

Apart from those Conventions which come into existence immediately, there exist a number of amending conventions, protocols, regulations, recommendations e.t.c. which cover practically every area of International maritime law. It is inevitable that such Conferences will continue to be held regularly as existing conventions become obsolete in part requiring updating to effect developments in technology or new safety standards. For example, the most important convention dealing with maritime safety is the Safety of Life at Sea Convention of 1974 - (SOLAS). This Convention has been substantially amended several times since 1948 - at roughly twelve yearly intervals.

2.5.3 Applicability of International Law

One of the greatest problems in "legislating" for different countries is that the consent of every country is require, in order to make any particular legislation applicable to it. Thus conventions do not immediately become legally binding on members of the International community. Some countries become signatories immediately, others sign but refuse to be bound by some of its clauses (this is known as "making reservations"). Those countries who did not attend the conference or take any part in the preparation of the convention are also entitled to become parties to that convention by acceding to or ratifying it. Thus it can be seen that whilst some conventions are accepted by a large number of states (for example, the Hague Convention has been accepted by over 80 countries) other are acceptable to only a handful of nations.

Sometimes, there may be two or more conventions on the same subject which are accepted by different countries (for example, the Hague Convention on Carriage of Goods by Sea (which, as has been said, has been ratified by over 80 countries) was followed in 1978 by the Hamburg Convention on the same subject, incidentally, 20 countries have now ratified the Hamburg Convention.

But the strange thing is that even if a country has signed, ratified or acceded to a Convention, that Convention still does not, in many countries, become law until an enabling Act has been passed by the legislature of that country specifically incorporating that convention into the laws of that country. Such is the case in Nigeria. For example, on the 7th of November, 1988, the Nigerian Government ratified the Hamburg convention of 1978. But up till today, the Hamburg Rules have not been incorporated into the laws of Nigeria and are therefore not yet applicable in this country.

One may be pardoned for thinking that the whole scene is somewhat chaotic - rather like having laws in a country which apply only to those who find them acceptable. But one has to understand that the object of international maritime legislation is to provide guidance. Thus, if a ship owner is proposing to send his ships to Nigeria, he would be prudent to ascertain which international maritime laws are applicable in Nigeria. For example, if the safety of Life at Sea Convention is applicable in Nigeria, any ship coming to Nigeria must ensure that her safety standards accord with Nigerian legislation on the subject. Again, if we know that the country to which our vessels ply operates the Hamburg Rules, we know what to expect in the event of disputes occurring in that country,

2.5.4 Existing Nigerian Laws

Nigeria possesses a detailed set of shipping laws. The main legislation is the Merchant Shipping Act of 1962 which comprises 100 chapters and 433 sections, together with 48 subsidiary laws made pursuant to it. Another important legislation is the Ports Act as well as the Port Regulations and approximately 16 other subsidiary laws made pursuant to it. Other main Acts are the Merchant Shipping Loadlines Act 1969; the Piers Act, the Sea Fisheries Act 1971 (with its Regulations); the Territorial Waters Act 1967 (Amended in 1979); the Exclusive Economic Zones Act 1978; the Pre-Carriage of Goods by Sea Act; the Nigerian Shippers Council Act 1978; the Pre-shipment Inspection of Imports Act 1976 (Amended in 1984) and the National Shipping Policy Act of 1987 setting up the National Maritime Authority.

These and other laws have provided a framework for the conduct of our shipping affairs. A typical maritime case is the cargo claim; for example, a Nigerian trader orders a thousand bags of cement from Spain and they are brought to Nigeria on a German ship. When the cement is discharged, it is discovered that two hundred bags are either missing or damaged. In such a situation,

a claim against the owners of the vessel is filed against the agents of the shipowners in Nigeria by the lawyers acting for the trader. A peculiarity of maritime law is that an "action in rem" can be brought against the ship whilst she is in Nigeria. This action enables the lawyer representing the trader to apply to the Federal High Court for an order for the "arrest" of the carrying vessel. After the international maritime legislation is to provide guidance. Thus, if a shipowner is proposing to send his ships to Nigeria, he would be prudent to ascertain which international maritime laws are applicable in Nigeria. For example, if the safety of Life at Sea Convention is applicable in Nigeria, any ship coming to Nigeria must ensure that her safety standards accord with Nigerian legislation on the subject. Again, if we know that the country to which our vessels ply operates the Hamburg Rules, we know what to expect in the event of disputes occurring in that country

2.5.5 Jurisdiction in Admiralty Matters

Until very recently there was no comprehensive law setting out the jurisdiction of our courts in admiralty matters. Borrowed English laws of procedure, our own procedural rules and what lawyers call "the inherent jurisdiction of the court" (an expression which covers a multitude of sins) were used. This situation can be explained by resorting to history.

2.5.6 Origins of Admiralty Jurisdiction

The admiralty jurisdiction of the High courts in Nigeria traced to the colonial Courts of Admiralty Act of 1890. That Act empowered the courts to exercise the full extent of the admiralty jurisdiction of the High court in England. English law both substantive and procedural was to be applied in the adjudication of admiralty cases. Additionally most contracts relating to carriage by sea to and from Nigeria contained jurisdiction clauses granting jurisdiction to the courts of England. The combined effect of the two developments was that very few admiralty cases are reported to have been decided by Nigerian Courts during the years preceding

independence from Britain in 1960. (See The Tolten (1946) p. 135 where the English court of appeal held that a claim arising out of damage to a wharf in Lagos could properly be litigated in London). We can trace the rapid development of the admiralty jurisdiction in Nigeria to the early 1970s. The notorious "Cement crisis" of that era which was precipitated by the uncontrolled granting of licences to import cement by the government was largely instrumental in drawing awareness to the need. During that era, it appeared that every available vessel in the world whether seaworthy or not was headed for Lagos with a cargo of cement. Some unscrupulous captains registered their arrival and then proceeded to South Africa before returning some weeks later to take their place in the queue and claim demurrage. The ensuing congestion at Lagos Port and the enormous claims for demurrage filed against the Nigerian government drew attention to the importance of the admiralty jurisdiction.

2.6 The Pre-existing Practice of Arrest of Ships

The 1952 Brussels convention on the Arrest of ships was never ratified by Nigeria because it was made at a time when Nigeria was a British colony. As earlier pointed out, there was at that time no Nigerian legislation governing Admiralty practice and procedure. However, the provisions of the Brussels Convention were incorporated into the British Administration of Justice Act 1956 and that Act was applied by Nigerian courts in the exercise of their in rem jurisdiction. Though the 1956 Act was superseded by the Supreme Court Act 1981 in England, the 1956 Act continued to be applied in Nigeria due to legislation made at the time of Independence authorizing our High courts to apply the then existing English rules of practice and procedure.

In 1991 the government finally promulgated a new Admiralty Jurisdiction Decree This Decree sets out in detail the circumstances in which the "action in rem" (that is an action in

which the plaintiff is entitled to an arrest of a ship or cargo) can be validly maintained. The Decree also defines the circumstances where any Admiralty Action (whether "in rem" or" in personam" can be validly brought in this country). The Decree expressly overrides the provisions of jurisdiction clauses contained in contracts of carriage which provide that the courts of specified foreign country should have jurisdiction in the event of a dispute. It defines the circumstances where a party who wrongfully arrests a ship should be liable to the shipowner in damages. It contains the novel proposition that the agent in Nigeria of a foreign ship owner may be' personally liable for any wrongful act or omission of the vessel whilst in Nigeria. This in effect means that the agent will have to ensure that he has a suitable indemnity from his principal the ship owner. If the latter disappears or goes into liquidation, the agent may be saddled with a heavy responsibility.

Another important provision in the Decree gives the court power to give judgement in a foreign currency. Previously when all claims had to be converted into naira so that the courts could award judgment in naira. This was justifiable in the days of strict currency regulation, but the current thinking is that the court should award damages in the currency in which the loss was incurred.

2.6.1 Limitation of Liability

Another important provision of the Admiralty is the provision relating to the right of a shipowner to limit his liability to pay for damage to goods caused by his ship. The Merchant Shipping Act provides that where a ship causes damage, the liability of her owners may (where the damage is caused "without their actual fault of privity") be limited to a sum equal to approximately N47 per ton, the limit of liability would be N47,000 -even though the damage caused by her in a particular incident may amount to millions of naira. The new Decree provides that where a claim is

filed against a ship for damages in circumstances where limitation may be applicable, the shipowner may file a "limitation action". This enables the shipowner to ask the court to declare that he is entitled to limit liability to the figure calculated above with reference to her tonnage. The limitation figure (limitation fund) can be paid into court and the court may distribute it amongst those entitled to claim against him. The advantages of this procedure are obvious. Firstly, it enables the parties to short-circuit the process of a lengthy trial on the issue of the damages payable to the injured party. Secondly, it enables the shipowner to avoid protracted and costly trial on the issue of liability. Once the court accepts that the shipowner can limit his liability and fixes the limitation sum, he can pay this sum into court and thereafter wash his hands of the case, however many claimants against him there might be.

The limitation figure of N47 per ton of the ship's registered weight for damage caused by a ship was fixed by an Order made by the Minister of Transport in 1964. Despite considerable inflationary trends over the past 30 years, the figure has remained the same. But international law on the subject was amended by a 1976 Convention on the Limitation of Liability which would have the effect of increasing the above figure of N47 a hundred-fold. It has been recommended that Nigeria accedes to the 1976 convention, however no action has yet been taken. This means that a ship which has caused damage can get away with a limited liability of N47.000 instead of several million Naira under the 1976 convention.

2.6.2 Cases adjudicated upon by our Courts

A study of the Nigerian Shipping Cases - Volume 1 (covering the years 1907 to 1979), Volume 2 (covering the years 1980 to 1986} and Volume 3 (covering the years 1987 to 1990) and Volume 4 (covering the years 1990 to 1993) give an idea of the varied nature of maritime cases coming before our courts. The cases embrace such varied subjects as arrest of ships,

agency, arbitration, bailment, bills of lading, contractual aspects of carriage of goods by sea, charter-parties, collisions, conflict of laws, container contracts, conversion of goods, damages, demurrage, detinue, documentary credit, foreign currency, injunctions, liability for payment of interest, jurisdiction, liens, lighterage, limitation of actions, limitation of liability, marine insurance, mortgage of ships, negligence, powers of the Nigerian Ports authority, personal injuries, sales of vessels, salvage of vessels, seaworthiness, security for release of arrested vessels, time-limitation, transhipment and a host of other subjects. Whilst the cases are concerned with disputes between two or more parties, there are other maritime issues subject to control by the authorities vested with control of this area. These will be examined next.

2.6.3 Departments Vested with Control

The government department vested with ultimate control of shipping in all its ramifications is the Federal Ministry of Transport. As earlier observed, the Merchant Shipping Act of 1962 forms the mainstay of our shipping activities. The Act gives powers to the Minister of Transport to make regulations on all aspects of shipping (except the contractual aspects 'of carriage by ships). He also has the power to set the standards to be maintained by all vessels within Nigerian Waters - their construction, safety standards, equipment, crew certification etc. He can also detain vessels which are not seaworthy and can set up Marine Boards of Inquiry into any casualty involving Nigerian ships or foreign ships within Nigerian waters. Acting in cooperation with the Attorney General and Minister of Justice, he is empowered to prosecute, with a view to punish those who infringe any of the regulations and standards contained in the Merchant Shipping Legislation.

Over the years, successive Ministers have made Regulations pursuant to the above powers. Most of the powers of the Minister are delegated to the Government Inspector of

Shipping who is a master mariner of great experience. He is responsible for the maritime safety administration as well as issuance of various certificates to vessels and or the granting of appropriate certificates to all categories of seafaring personnel. The Government Inspector of Shipping (G.I.S. for short) and his staff of highly competent engineers play a key role in the country's shipping activities. In most countries, he is a key government official with wide powers and a well-equipped department. But unfortunately this highly important official has been marginalised by bureaucratic controls in Nigeria and left to function with inadequate facilities.

2.6.4 The National Maritime Authority (NMA)

This is a body set by the National Shipping Policy Decree of 1987 (now Cap. 279 of the 1990 Laws of the Federation). The Act, in addition to making provisions for the constitution of the Authority, specifies the aims and objects as well as the functions of the Authority. It is submitted here that these definitions are somewhat misleading. The aims and objectives are descriptive (i.e a mere statement of intent) whilst the functions are substantive powers. The aims and objects clauses do not, in this writers mind, confer powers on the Authority to carry out the aspirations therein stated.

For example, section 3(j) of the Decree states that it shall be the objective of the authority "to achieve a systematic control of the mechanics of sea transportation." What does this mean? Does it remove the comprehensive powers granted to the Minister of Transport by the Merchant Shipping Act and confer them on the Maritime Authority? The answer is definitely NO. In order to achieve that effect, it would have been necessary for the Decree to contain a provision amending the Merchant Shipping Act such as to give effect to that intention. It seems clear that the sole object of section 3 of the Decree is to give an indication of the powers that the government intended to confer on the Authority. Whether the government will enact

legislation giving the Authority substantive powers remains to be seen. It is however clear that the Authority has been systematically exercising those powers. Whether the all important powers of the Minister with regard to maritime safety ought to be removed from the Minister raises a host of questions which should not be glossed over.

The actual powers of the N.M.A. are those formulated in section 4 of the Decree, namely:

(a) to co-ordinate the implementation of the national policy on shipping as may be formulated from time to time by the Federal Government;

(b) to ensure that Nigerian national carriers exercise fully, Nigeria's carrying rights of at least forty per cent of the freight in revenue and volume of the total trade to and from Nigeria;

(c) to grant national carrier status to indigenous shipping lines;

(d) to monitor the activities of vessels of the companies granted national carrier status;

(e) to grant assistance to indigenous companies for fleet expansion and ship ownership.

(f) to regulate liner conferences and national carriers; and to perform such other functions as may be required to achieve the aims and objects of the Act or any national shipping policy as may be formulated by the Federal Government pursuant to this Act.

2.6.5 The Nigerian Shipper's Council

The Council was set up by the Nigerian Shippers Council Decree 1978 (now Cap. 327 of the 1990 Laws of the Federation). The object of the establishment of the council was stated in the preamble to the Decree as being to provide a forum for the protection of the interests of shippers in matters affecting the shipment of imports and exports to and from Nigeria and to advise the federal government on sundry matters related thereto. The functions of the Council

are extremely important for a "cargo owning nation" like Nigeria which places great store by its import and export activities.

2.6.6 The Pre-shipment Inspection of Imports

The Pre-shipment inspection of imports scheme was introduced by the Pre-shipment Inspection of Imports Act 1978 (now Cap. 363 of the 1990 Laws of the Federation). The preamble to the Decree states that its object is to introduce a scheme subjecting goods to be imported into Nigeria to pre-shipment inspection relative to the quantity, quality and comparative pricing of the goods and other related matters.

Section 1 of the Decree provides that as from the commencement thereof, no goods to which the Decree applies shall be imported into Nigeria unless a Clean Report of Finding has been issued in respect of such goods to the overseas sellers of goods by the inspecting authority.

The government has appointed inspectors to carry out such inspections worldwide and despite certain criticisms of the implementation of the scheme, there can be no doubt that it has enabled the country to minimize frauds on imports.

In this chapter we have taken a look at the nature of International maritime law and its relationship to our domestic law. We have had a glance at the major shipping legislation in force in Nigeria. We have looked at the machinery set up by our government to exercise control over the different aspects of the shipping activities of this country. On a final note, it is somewhat perplexing to note the policy of relocating all the above-mentioned departments concerned with shipping administration to Abuja. The resultant Joss of valuable time, as well as remoteness from the main scene of action call for a re-think.

CHAPTER THREE

AN OVERVIEW OF NIGERIA'S MARITIME LAW AND ITS INSTITUTIONS

3.1 Introduction

The term "maritime," can be described as the all-embracing term, which covers matters relating to navigable waters such as the sea, ocean, great lakes, navigable rivers, or the navigation or commerce connected therewith[1].

The Maritime Law or Admiralty is that body of legal principles which govern in particular, marine, commerce and navigation, business transacted at sea or relating to navigation, ships and shipping, seamen, transportation of person and property at sea and to marine affairs generally[2].

The principles of maritime law which governs ship and the operation of ships are often closely related and interwoven. Principles dealing with maritime liens and ship mortgages are two of Such Principles which remain central to the operation of ships and security documentation relating to ships.

In Nigeria today, maritime law is governed essentially by both the provisions of the Merchant Shipping Act (MSA) 1990 and the Admiralty Jurisdiction Act (AJA) 1991[3].

The process of navigating or engaging in commerce through various types of navigable waters introduces the related concept of shipping. Black's Law Dictionary defines "Shipping" as "relating to ships; as shipping interests, shipping affairs, shipping business, shipping concerns. Putting on board a ship or vessel, or receiving on board a ship or vessel."

[1]Ilogu, L.C. (2006) Essays on Maritime Law and Practice, ELCSAM Integrated Services Ltd. Lagos, Nigeria, P. 125.
[2] Black's Law Dictionary (6th edition) p. 969
[3] Ilogu, L.C. op cit. at p. 25.

Shipping involves the art of transporting goods often termed "cargo" from one point to another on any stretch of water. Shipping could therefore be on inland, coastal or international waters and is at all times central to the activities in the maritime industry.

The maritime business can be said to be one of the oldest businesses and profession in the world. It also constitutes a major source of political power and territorial influence for "he who rules the seas rules the world," a fact underscored by the various conquests of the Egyptian, Turkish, Roman, Spanish, Greek and British Empires over the centuries.

3.1 Nigeria Maritime Regulatory Institutions

3.1.1 Nigerian Maritime Administration and Safety Agency (NIMASA)

The Nigerian Maritime Administration and Safety Agency (NIMASA) was established to regulate the maritime industry of Nigeria.[4] It was formerly the National Maritime Authority (NMA) which is responsible for regulations related to Nigerian shipping, maritime labour and coastal waters. The agency also undertakes inspection and provides search and rescue services.[5]

NIMASA was created on 1 August, 2006 when the National Maritime Authority was merged with the Joint Maritime Labour Industrial Council. Both were formerly parastatals of the Federal Ministry of Transport. Under the Act establishing NIMASA, 5% of annual income would support the Maritime Academy of Nigeria (MAN) and 35% of income would be used to develop maritime infrastructure.[6] In December 2009, the agency said it is setting up a fund which would cover 40% of the cost of a nautical education with the student being responsible for the remainder.[7] In June 2010, it was confirmed that NIMASA was encouraging Nigerians to enter the maritime industry. The agency was enforcing the directive that all ship operators engaged in

[4] Section 3(1) of NIMASA Act, 2007
[5] www.nigerianmaritimelaw.com 28/03/2016, 3:12pm
[6] www.nimasa.gov.ng/aboutphp 28/03/2016, 3:17pm
[7] www.nimasa.gov.ng/servicephp 28/03/2016, 3:21pm

the Cabotage trade whether Nigerian or foreign owned, must have Nigerian cadets on board so they could gain sea time experience.[8]

In May 2011, NIMASA was mediating between the Seaport Terminal Operators Association of Nigeria and the Maritime Workers Union of Nigeria, who were seeking improved wages and terms of services.[9] NIMASA was involved in the debate over a proposal to create Maritime Security Agency (MASECA) as a successor to the Presidential Implementation Committee on Maritime Safety and Security (PICMSS). The objective was to provide greater protection for merchant vessels against rising levels of piracy. However, NIMASA and the United Nations were concerned that MASECA could be in conflict with the International Convention for the Safety of life at sea, which does not allow merchant ships to be armed. The MASECA act also seemed to be in conflict with the act establishing NIMASA.[10]

The NIMASA Act established the agency[11], and provides for its functions and powers under the act.

3.1.2 Functions and Powers of NIMASA[12]

The act empowers the agency to:

a. Pursue the development of shipping and regulate matters relating to merchant shipping and seafarers.
b. Administer the registration and licensing of ships.
c. Regulate and administer the certification of seafarers.
d. Establish maritime training and safety standards.
e. Regulate the safety of shipping as regards the construction of ships and navigation.

[8] www.vertic.gov/.media/national 28/03/2016, 3:56pm
[9] www.shipsandports.com.ng/detail 29/03/2016, 10:12pm
[10] Ibid
[11] Section 3(1) of NIMASA Act, 2007.
[12] Section 22(1) of NIMASA Act, 2007

f. Provide search and rescue service.

g. Provide direction and ensure compliance with vessel security measures.

h. Carry out air and coastal surveillance.

i. Control and prevent maritime pollution.

In addition, the act also conferred on the agency powers to do all things necessary for or incidental to or in connection with the performance of its functions to[13]:

a. Enter contracts

b. Acquire, hold and dispose of real and personal property.

c. Join in the formation of companies.

d. Enter partnership; and

e. Let or hire plant machinery, crafts or equipment

3.1.3 Nigeria Institute for Oceanography and Marine Research (NIOMR)

The Nigerian Institute for Oceanography and Marine Research (NIOMR) was established in November 1975 by the research institute establishment order of 1975. The institute is charged with the responsibilities to conduct research into the resources and physical characteristic of the Nigerian territorial Waters and the High Seas beyond.

The institute is mandated to undertake the following[14]:

1. Management measures for the rational exploitation and conservation of abundance, distribution, biological and other characteristics of species of fish and other marine forms of life.
2. Improvement of brackish/marine waters aquaculture

[13] Section 23(1) Ibid
[14] www.arcnigeria.org/index.php 29/03/2016, 2:00pm

3. Genetic characterization of marine and brackish water cultural fish species including the development of improved strains if fish species culture.
4. Effective and sustainable management of fisheries resources through improved post-harvest preservation, utilization and storage using profitable technological processes.
5. Physical characteristics of the Nigerian territorial waters, the high seas beyond topography of the sea beds and deposit on or under the sea beds.
6. Effect of pollution on the health of Nigerian coastal waters and its prevention.
7. The socio-economic challenges of exploitation of the resources of the sea and brackish water.
8. Global climate change and sea level rise.
9. Improvement of coastal and brackish water fishing and fish culture through the design and fabrication of ecosystem friendly fishing gear types and fisheries implements.
10. The nature of coastal and marine environment including coastal erosion, monitoring marine hazards, forecasting/prediction and the topography of the sea beds and deposits on or under it.
11. Extension research and liaison services.
12. Provision of technical training in areas of mandate.

In the light of the above, it is appropriate here to briefly address the issue of how the practice in international law relating to the exploitation of the natural resources beneath the high seas has come to have a bearing or influence on Nigerian municipal law. It will be recalled that two important amendments were introduced to the scope of the Mineral Oils Act 1914, in 1950[15] and 1959 respectively. By the 1950 amendment, the submarine areas of whatever constituted

[15] For a legislation of an earlier date in which reference to territorial waters was made the Territorial Waters Jurisdiction Act 1878, repealed by section 4 of the Territorial Waters Act 1967 (now contained in Cap. 428 Laws of the Federation of Nigeria (LFN) 1990 as amended by 1998 No. 1).

Nigeria's territorial waters at that time were to be regarded as "land" within its usage in the 1914 Act. As for the 1959 legislation, it empowered the Nigerian Federal legislature to extend its future legislative competence on mines and minerals, to cover the areas beneath other waters. The 1959 amendment had the effect of extending the geographical areas of the waters in respect of which Nigerian laws on mining and minerals would apply, which naturally brought into the purview of Nigerian law on this subject, the Nigeria's continental shelf areas. It is significant to observe that shortly before the 1959 zone the continental shelf had just been concluded in the spring of 1958, under Article 2 of the Geneva Convention on the Continental Shelf 1958, the right of a sovereign state to exercise control over the exploration and exploitation of the natural resources of its continental shelf was recognised.

It is clear therefore, that the provisions of the Minerals Oils Act had properly prepared the stage for the reception of this aspect of international law into the Nigerian corpus juris. This was before any specific references and pronouncements on the subject were made in later laws like:

i) Territorial Waters Act 1967 now known as Territorial Waters Act (Cap. 428) as amended by the Territorial Waters (Amendment) Act 1998 No. 1.

ii) Oil in Navigable Waters Act 1968 now known as Oil in Navigable Waters Act (Cap 337) (see Section 17 thereof).

iii) Oil Terminals Dues Act 1969 now known as Oil Terminal Dues Act (Cap. 339) (see Section 7 thereof).

iv) Petroleum Act 1969 now known as Petroleum Act (Cap. 350) (see section 1(1) thereof).

v) Exclusive Economic Zone Act now known as Exclusive Economic Zone Act (Cap. 116) (see section 2 thereof as well as section 1 of the Petroleum (Amendment) Act, 1998 No. 22.).

vi) Offshore Oil Revenues (Registration of Grants) Act (Cap. 336) (see section 1(3) thereof).

In fact, quite a few pre-1969 oil exploration and prospecting licenses and leases granted by the Nigerian government, were made in respect of the submarine zones of the territorial waters and continental shelf areas. The influence of international law on the source and development of Nigerian petroleum legislation may therefore be gauged by the aspects of the foregoing listed laws which have international connections.

3.2 Meaning of Cabotage

The word cabotage take from the Spanish root "cabo" "cab" simply means maritime circulation at short coastal distances. The Cpastal and Inland Shipping (Cabotage) Act[16] signed into law by the President in April this year has a very wide definition of the word cabotage which is used interchangeable with coastal trade. For the purposes of this research, cabotage under the Act covers:

1. Carriage by sea of goods and passengers from one coastal or inland point which could be ports, jetties, piers etc, to another point located within Nigeria;
2. Carriage of goods and passengers by sea in relation to the exploration, exploitation or transportation of natural resources whether offshore or within the inland and coastal waters;
3. Carriage of goods and passengers on water or underwater (sub-sea) installations;

[16] 2003

4. Carriage of goods and passengers originating from a point in Nigeria intended for Nigeria but transiting through another country then back to Nigeria for discharge;
5. Operation by vessel of any other marine transportation activity of a commercial nature in Nigerian waters includes, towage, pilotage, dredging, salvage, bunkering etc.

The Act seeks to reserve the bulk of the coastal trade i.e. the carriage of goods and passengers where possible on vessels built, owned, registered in Nigeria and manned by qualified Nigerian seafarers. The 4 pillars of cabotage from the foregoing are that country.[17] cabotage vessels must built, owned, registered and manned by the nationals of that country.

Types of Cabotage

In the preceding section, we presented data on the level of indigenous participation in the marine transport sector of the' Nigerian economy which indicated gross inadequate indigenous capacity. There is a general consensus that Nigeria does not have sufficient domestic capacity in both the ownership and infrastructural aspects of cabotage covered in the Act. Taking due account of the inadequate indigenous capacity, the Act advocates a liberal cabotage policy through the use of the internationally recognized waiver system. The waiver principle is generally based on any or all of the following;

a. Non-availability
b. Reciprocity or
c. Bilateral agreement

In Germany for instance, waivers are only granted to non-EU vessels on the basis of non-avail ability or, if they are available at very unfavourable conditions. Portugal, Spain, and Sweden also grant waivers if no E.U. vessels are available for the particular service. Greece and Canada grant waivers based on reciprocity to vessels from countries that allow GreeK or Canadian flags to participate in

[17] Section 3 to 6 of Cabotage Act, 2003

their cabotage trade. Germany, Finland and Sweden grant access to non- ED vessels if they have been granted access on the basis of bilateral agreements. Records show that waivers are generally granted very sparingly. In Finland, only 4 waivers were granted in 1997 and in Greece only 18 waivers between 1997/98. Most cabotage countries did not record any waiver in the period under review.

The Nigerian Cabotage law operates its waiver system only on grounds of non availability. This means that waivers may be granted on all the 4 pillars of cabotage where the non-availability criteria is satisfied. The conditions for granting waivers are expressly spelt out to prevent the use of waivers to subvert the noble objectives of the Act. For waivers to be granted and depending on the application, the Minister must be satisfied that requirement requested to be waived is/are not locally available. The Act also makes it mandatory that where the conditions suitable for the grant of a waiver is established, the Minister must follow the prescribed order i.e. priority to a Joint venture company between Nigerians and non- Nigerians. Where this is not available then 100% foreign owned vessel shall be licenced to supply the service.

Foreign flagged vessels which are on long term charter to Nigerians are eligible to engage in cabotage trade. For these to be possible within our jurisdiction and to cater for the peculiarity and constant mobility of the vessels involved in the oil sector, the Act allows for dual registration by permitting temporary registration for such vessels under Section 28. The practical implications of these provisions are that foreign shipping companies are guaranteed at least in the medium term continued participation in cabotage upon the satisfaction of prescribed conditions.

Extensive and practical enforcement provisions are provided in order for the Cabotage Act to achieve its laudable objectives. It has provisions to curb if not completely eliminate subversive practices by stakeholders. The ownership criteria are indeed very rigorous and any

contravention of those provisions is criminalized in the Act. It would therefore be quite difficult to have respectable citizen lend their names as fronts to foreign shipowners.

Another interesting aspect is that the operation of cabotage will be at little or no cost t o the public funds as the Act contains provisions for the beneficiaries to contribute to the successful operation of the cabotage regime.

3.3 Nigerian Coastal Trade and Potentials of Cabotage

Coastal trade offers great opportunities for investment and growth of the domestic maritime industry. Coastal trade covers the entire gamut of marine transport activities carried on within Nigerian exclusive economic zone and inland waters except those activities which are exempted in the Act, The aspect that is commonly spoken of understandably is the offshore industry. Data from the MCTF presented earlier indicated that the estimated budget of the maritime (shipping) component of the offshore industry is USD2 billion a year. Nigerians would certainly wish to invest and take some share of this revenue.

Other equally profitable aspect of cabotage trade which so far has received little attention are:

a) Fishing industry;
b) Passenger ferry services;
c) Towage;
d) Salvage;
e) Dredging (coastal and inland waterways);
f) Liquid bulk e.g chemicals, oil and its derivatives;
g) Dry bulk e.g iron ore, coal, grains;
h) General cargo (feeder and inland transport);

i) Container cabotage trade;

j) Shipbuilding and repair (ship yards, repair yards, emergency repair facilities anchorage);

k) Maritime auxiliary services (freight forwarding services, storage and warehousing, maritime agency services, container/depot services);

l) Port services (pilotage, bunkering, garbage and ballast waste disposal, victualling, communications and electrical supplies);

m) Maritime insurance and finance sector (credit facilities for fleet and business expansion);

n) Training schools for the respective skills required in manning and operation of vessels which will compliment Maritime Academy, Oron;

In general, the cabotage regime will effectively remove the blockade mounted by foreign operators against entry of new indigenous operators. Well implemented, it will promote the development and maintenance of an adequate and competent indigenous merchant marine tonnage and competition among stakeholders operating under a level-playing field. Apart from the obvious ones listed above, it is hoped that cabotage law will stimulate private/public sector investment in the development of maritime infrastructure such as ports, waterways and inter-modal connections, vital links to multi-modal transportation network, reliable and cost effective coastal feeder services. The enormous potential for job creation and the availability of a pool of trained and efficient indigenous seafarers cannot be over looked. Furthermore, the availability of indigenous fleet and seamen in times of conflict and effective policing of the waterways would contribute greatly to national security. Revenue generation for government by way of fees for registration, approvals and licences and fines is another anticipated benefit of cabotage. Also

important is that the cabotage vessels would boost Nigerian tonnage and Nigeria desperately needs that to have some leverage in international maritime negotiations.

Several countries have openly attested to the benefits of cabotage to their national economy and security. We are familiar with the statistics from the United States on the benefits of cabotage commonly produced in the media by advocates of cabotage. President Bush in his 2002 National Maritime Day speech noted that America's waterborne domestic trade totals one billion tons a year and emphasized the importance of cabotage to the nation's economic well being and national defence capabilities. Cabotage regime in Brazil saw the evolution of Brazilian cabotage merchant fleet from 500,OOO grt in 1970 to 3, 500, OOOgrt in 2000. The volume of cargo in their cabotage trade leaped from over 31m tons in 1994 to nearly 67m tons in 2000. Every country which operates cabotage regimes has similar experiences with regard to the positive effects of cabotage in their maritime industry.

3.4.1 International Maritime Related Conventions and Agreements

The sea as we will all agree does not recognize national boundaries. It takes its course as directed by nature. Some counties are bordered by the se and some are completely landlocked. The sea provides the cheapest and most efficient means for bulk transpiration of goods and services needed by every country. It is for these reasons that international customary law throughout the ages recognizes the principle of common usage with respect to the use of the sea, rivers and waterways. The acceptability of this principle of international customary law is of such significance that it has been codified and forms part of the provisions of UNCLOS[18] on pollution of the sea and SOLAS from the safety and health angles. Maritime issues are therefore generally governed by international Conventions and Agreements. Note the operative word is "generally." We shall see from this paper that the legislators were not unmindful of existing international maritime

[18] Article 194(1)and (2)

obligations or of the propensity of established maritime nations to protect their domestic maritime industry while at the same time trying to stifle the growth of maritime industry in developing countries using subtle and sometimes not so subtle mechanisms.

The relevant conventions with respect to matters of exercise of jurisdiction, right of passage, safety, pollution, and certification are governed by UNCLOS, SOLAS, MARPOL 73/78, Salvage and Collision Conventions, ISM Code, ISPC, STCW etc. The relevant ones on international commerce are multilateral agreements such as the WTO Agreement, Bilateral agreements and Regional Agreements like ECOWAS.

3.4.2 Cabotage Issues with International Implications

We shall commence by identifying cabotage issues that have implications on Nigeria's obligations under the intern ational/regional conventions and agreements for which it is a party. The issues that readily come to mind are:

a. Protectionism

b. Safety

c. Salvage

3.4.3 Salvage

To be sure, a captain of a vessel is under a strict duty in international law to assist a vessel under distress or any type of marine peril - see Art 98 of UNCLOS and the Salvage Convention 1989. Any law therefore which will prevent a captain from discharging that duty will be in breach of that international duty. In recognition of this duty on seamen, the Nigerian cabotage law while reserving salvage for Nigerians states that:[19]

> *"Nothing ... shall preclude* a *foreign vessel from rendering assistance to persons, vessels or aircraft in danger or distress in Nigerian waters"*

[19] Section 4(2) Cabotage Act

The Act exempts foreign vessels engaged in salvage operations from the total prohibition of vessels not owned by Nigerians to engage in any marine transport activities.[20] If or good measure and avoidance of doubts, the Act provides that:[21]

> "*... the requirement for Ministerial determination shall not apply to any vessel engaged in salvage operations for the purpose of rendering assistance to persons, vessels or aircraft in danger or distress in Nigerian waters"*

With these exemptions one may wonder why salvage was even included in the services reserved for Nigerian operators. Maritime operators understand the reason and also appreciate the exemptions. The truth is that not all salvage operations are carried out for the purpose of saving life or rescuing a vessel in distress. Most are purely commercial activities with no emergency considerations. The Act therefore reserves such jobs for Nigerian owned and manned tug boats.

3.4.4 Safety

The Cabotage Act is indeed quite proactive in the aspect of safety requirements. Eligibility requirements for participation in cabotage trade require that both foreign and indigenous vessels meet international safety requirements. It is common knowledge that some of the vessels currently trading in Nigeria would not be allowed to trade in their flag states. Whereas the foreign ship owners are at liberty to employ substandard vessels in Nigerian waters because Nigeria has not domesticated some key international conventions, Sections 15 (1) (e) and (f) provides that eligible foreign vessels must

> *"... possess all certificates and documents in compliance with international and regional maritime conventions whether or whether or not Nigeria is a party to the conventions".*

[20] Section 8(1)(a) Ibid
[21] Section 8(2) Ibid

> *"... meet all safety and pollution requirements imposed by Nigerian law and any international law in force".*

Under this umbrella, the Authorities can lawfully enforce MARPOL regulations, ISM Code, Port/Flag State Control Regulations etc which are all enactments pursuant to International Conventions not yet incorporated into our laws. Nigerian owned vessels are required under Section 23(1) (f) to:

> *"possess all certificates and documents in compliance with international and regional maritime conventions to which Nigeria is a party including all safety and pollution requirements imposed by Nigerian law and any international convention in force".*

To further ensure that only vessels considered safe are registered for cabotage, the Act places the maximum age for vessel eligibility at 20. It further reiterates that any vessel over 15 years must possess a valid *"certificate of registry and a certificate of seaworthiness from a recognized classification authority"* see Section 28.

Compliance of the Act to international maritime obligations in terms of manning is further demonstrated in its emphasis on *"qualified Nigerian officer or crew"*. It is a ground for grant of waivers if the Minister is satisfied that no "qualified Nigerian officer or crew" are available for the positions applied for. The certification under STCW comes into play here.

3.5 Protectionism

Cabotage law in whatever form, whether liberal or strict is essentially protectionist. Some people therefore find it difficult to reconcile cabotage policy with the current worldwide trend of liberalization and opening up markets to foreign investors. A proper understanding of the Agreements which govern international trade and commerce and the practices obtainable in

other countries who are also parties to those international trade agreement will be of great assistance in resolving the confusion.

It is important to note that there are two categories of shipping - Coastal and International shipping. Cabotage by its definition is coastal shipping and NOT international shipping. Cabotage regimes are therefore regulated by national laws albeit within the general powers preserved by international conventions and agreements.

3.6 Cabotage and UNCLOS

UNCLOS, generally regarded as the groundnorm on laws of the sea in Arts 56 and 60, recognizes and preserves the right of member states to make laws regulating activities within their territorial and exclusive economic zone, and specifically mentions artificial installations. This is of particular interest to those who argue that cabotage law should not extend to offshore oil installations. In addition, other countries such Canada define their coastal trade to include "exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf. Spain specifically mentions carriage of petroleum products in its cabotage laws. Nigerian Cabotage law is no different in this regard.

3.7 Cabotage and WTO

The principal international agreement of concern to most people is the World Trade Organization (WTO) Agreements. Trade in maritime transport services is one of the negotiation topics under the General Agreement on Trade in Services (GATS) in the W TO. The negotiations are done by the Negotiating Group on Maritime Transport Services (NGMTS). WTO Agreements and its negotiations thereof are restricted to international shipping, auxiliary services, access to and use of port facilities. Cabotage or coastal trade is not a negotiating topic and this means that countries are absolutely free to enact national laws on coastal trade and are under no

obligations to member countries in that regard. Due to the strategic importance of cabotage in national economies the bastions of free trade in the WTO do not wish to liberalize that sector and have not included it under WTO negotiations,

Currently about forty-seven countries have some form of cabotage laws in their legislation. Among them are major industrialized countries including:

a. United States (Merchant Marine Act of 1920 popularly known as "the Jones Act"; reaffirmed earlier cabotage laws dating back to 1789.
b. Canada (the Coasting Trade Act of Canada)
c. Germany (the Coastal Navigation Legislation);
d. Spain (Law 27/1992 of 24th November on State Ports and the Merchant Marine)
e. France, Italy; Norway, Finland.

Developing countries with cabotage regimes include Brazil, Mexico, Malaysia and Nigeria amongst others. Nigeria therefore does not act in isolation but is merely joining other countries in protecting its indigenous shipping industry by legislative intervention. You may have heard talk that the EU has liberalized cabotage. Yes, to the extent that EU Council Regulation (EEC) No 3577/92 of December 1992 opened the provision of cabotage services within the Union to other member states. It should be noted though that *"the beneficiaries of this freedom should be community shipowners operating vessels registered in and flying the flag of a member State"* In essence, coastal trade in EU countries is restricted to EU citizens. We should mention at this point that the United Kingdom does not have a national cabotage law but the stringent domestic regulations and requirements effectively bars participation from non-EU member States owned vessels.

Act IV (increasing Participation Developing Countries) of the WTO advocates "progressive liberalization" that allows:

a) "due respect for national policy objectives and the level of development of individual Members, both overall and individual sectors;
b) appropriate flexibility for individual Members for opening fewer sectors, liberalizing fewer types of transactions".
c) LDCs "only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities" ART X1 Marrakesh Agreements 1994.

Decision of 28 November 1979 by Contracting Parties which continues to apply as part of GATT 1994 states that

> *"contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties"*

Even if cabotage was under negotiations in the WTO which it is not, Nigeria could very well be covered by these provisions in the WTO. The point here, is that Nigerian Cabotage law does not in any wise contradict its obligations under WTO. In point of fact, Nigeria specifically, excluded cabotage in its Schedule of Specific Commitments for Trade in Services deposited with the WTO on April 1994. Under the WTO Agreement, where there are no obligations and commitments, the issue of retaliatory measures and compensation to member States does not arise. It might also be of comfort to note that major WTO membersand major stakeholders of the Breton Woods institutions (World Bank, IMF) operate cabotage regimes.

3.8 Regional Agreements

The major regional agreement which Nigeria is a party is the ECOWAS Treaty and its various Decisions of Heads of States. Nigeria is also a member of the Maritime Organization for West and Central Africa (MOWCA) which includes ail ECOWAS States and some Centra! African States. Maritime issues of ECOWAS countries are negotiated under the auspices of MOWCA.

Demand for shipping services in the West and Central African region generates an estimated USD36.2b annually. Participation of MOWCA member countries in the enormous sub-regional maritime trade is very low or virtually non-existent. In 1999, the total tonnage owned by countries of West/Central Africa stood at 0.9 million dwt. Total tonnage of sub-Saharan African countries was 0.15% of the world total. No container ship was registered under this period. The entire region has no shipyard, only a couple of operational ship repair yards. The blockade by foreign operators against entry by indigenous operators is a common experience by all member countries. Recall the uproar and the anti-corn petition arguments about liner conferences, ostensibly employed by foreign operators against the implementation of the UNCTAD 40-40-20 cargo sharing formular which eventually contributed to the demise of that system. Now, the same foreign operators have emerged under the name of EWATA (Europe West Africa Trade Agreement) and the exclusionary, anti-competitive practices of liner conferences e.g. freight fixing are being practiced. Perhaps it is these aspects that the organizers of this seminar aptly describe as international maritime politics. No sooner had Satomar and Ecomarine, two private sector regional shipping company engaged in feeder services emerge, did the foreign operatorswho hitherto held the opinion that regional shipping service was unprofitable, establish a competing regional feeder service called Clipper CEC.

In recognition of these difficulties faced by indigenous operators in the sub region, MOWCA at the Preparatory Meeting of Experts for sub-regional projects in Abidjan 17-18 April 2002 took steps to implement Res No.168/10/98 adopted at the 10th Ordinary session of the General Assembly of Ministers held in the Republic of Congo Oct 30, 1998 which mandated the formulation of a sub regional Cabotage Policy. A Draft Policy on Sub-regional Cabotage Policy was submitted and adopted in May 2002 by the Meeting of Experts on sub-regional projects and 2nd session of Bureau of Ministers from the Sub-region. The project on sub-regional cabotage policy is on-going and member countries are encouraged by bold step taken by Nigeria in enacting its Cabotage Legislation.

Regional cabotage is not new in Africa as CEMAC (i.e the regional body of Francophone speaking West and Central African countries) already has some cabotage content in its trade laws. The Association of African Shipping Lines in 2001 fully endorsed the development of sub-regional cabotage policy. The thinking in regional level is to encourage individual country cabotage laws and to allow citizens of member countries to participate in each other's domestic trade on the basis of reciprocity. Nigerian Cabotage Act is therefore in line with regional aspirations.

CHAPTER FOUR:

MARITIME ZONE CONSERVATION AND MANAGEMENT WITHIN THE LIMITS OF JURISDICTION

4.1 Introduction

The United Nations Convention on the law of the Sea, 1982 established with due regard to the sovereignty of all states, a legal order for the sea and oceans which will facilitate international communication and promote the peaceful uses of the sea and oceans. This legal order will effect an equitable and efficient utilization of and conservation of the ocean's resources, and also promote the study, protection and preservation of the marine environment.[1] Nigeria is one of the world 120 coastal states as such, the convention is of great significance ion the ascertainment of her rights and obligation in maritime zones that fall within the limits of her jurisdiction.

The convention establishes a zonal system which stipulates the scope and limits of the rights and obligations of coastal states. It makes provisions in respect of nine zones two of which, the exclusive economic zone and the Area (deep sea-bed), are entirely new legal regimes. Others are zones which have acquired cognition in international law; some zones are within the limits of national jurisdiction of coastal states while others are designated as the common heritage of mankind.

The maritime zones which fall within the limits of the national jurisdiction of Nigeria are: the Internal Waters,[2] the Territorial Sea,[3] the Archipelagic Waters, the Contiguous zone,[4] the

[1] See preamble LOS
[2] Article 8
[3] Article 3
[4] Article 33

Exclusive Economic Zone,[5] and the Continental Shelf.[6] The High Sea which comprises of the water column and airspace above the oceans[7] and the area which consists of the sea bed and subsoil which lie beyond the limits of national jurisdiction are zones over which no state can exercise or claim sovereignty.[8]

The maritime zones are an important delimitation of the jurisdiction of the coastal state to exploit, or explore for mineral, energy, or living resources. The degree of jurisdiction that can be claimed by the state will depend on the particular regime of each zone. As we shall see, this varies from full sovereignty in the case of internal waters to restricted sobering rights in the continental shelf.

4.2.1 The Internal Waters

Waters on the landward side of the baseline of the territorial sea form part of the internal waters of these states.[9] This includes all rivers, lakes, canals and ports. A historic bay which is so designated by reason of historic title is part of the internal waters even if it is not on the landward side of the baseline.[10]

The different maritime zones are measured by reference to a baseline which is an artificial line which is determined by the coastal state in accordance with provisions in the convention. Certain rules are to be applies to highly indented coasts, as for example, river mouths, bays, ports and roadsteads. There are also special rules for the determination of the baseline of islands and low tide elevations. Baselines once determined by the State[11] are to be shown on charts or defined by geographical coordinates which must be give due publicity; a

[5] Article 57
[6] Article 57
[7] Article 86
[8] Articles 89, 136 and 137
[9] Article 8
[10] Articles 10 para. 6 Article 15
[11] By applying technical provisions in the convention. Articles 5-15.

copy of each such chart of list of geographical coordinates shall be deposited with the Secretary General of the United Nations.[12] The baseline gives judicial definition to the coast of a coastal state from which the states maritime zones are measured.[13]

The baseline essentially demarcates the area of territorial sovereignty of the State from the area which is subject to the provisions of the convention. However, the convention still has some application to the internal waters in its provisions relating to the right of transit of landlocked states,[14] in pollution matters[15] and in access to ports and assistance for vessels involved in marine scientific research.[16] The Convention otherwise does not apply to activities that occur within the internal waters of a state such as fishing, scientific research, mining, laying of submarine cables, overflight, imposition of environmental legislation and navigation.

Thus, the State can exercise its full sovereignty as provided in its laws and as provided by international law in its internal waters. A foreign vessel in such waters is subject to the civil and criminal jurisdiction of the state.[17]

The key distinction between the internal waters and the adjacent territorial sea is that there is no right of innocent passage and through internal waters. Only where the establishment of a baseline has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of incant passage as provided in the convention shall exist in such waters.

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[12] Article 16
[13] Ahnish F., The International law of Maritime Boundaries and the Practice of States in the Mediterranean Sea p. 10
[14] Part X gives rights to landlocked states to transit passage through other states.
[15] Article 218, Article 220. This gives the right to coastal states to investigate ad take action against vessels in pollution matters. See also Boyle "Marine Pollution under the Law of the Sea Carriage" 79 Am J. Int. Law 347 (1985).
[16] Article 255. Coastal States are required to adopt legislation that will give such vessels right of access to their ports.
[17] Openheim-Lauterpach 460-61 Int. Law 8th ed.; Jessup. The law of Territorial Waters and Marine I Jurisdiction (1927) 194-208

4.2.2 The Territorial Sea (TS)

The body of waters to the sea-ward side of the baseline is known as the territorial sea. Every state has the right to establish a territorial sea not exceeding a width 12 nautical miles from the baseline.[18] Bynkershoek's "canon rule"[19] gradually gave way to differing claims by coastal states of a territorial sea limit that ranged from 3 to 200 nautical miles. With the coming into force of the convention these divergent claims will be standardized and the freedom of coastal states to fix the breadth of their territorial sea has ended.

The delimitation of the territorial sea between opposite areas of adjacent states is determine either by (a) agreement, or by (b) a median or equidistant lie or by (c) any line as may be indicated by historic title.[20]

Under the Nigerian Territorial Waters Act of 1972, the territorial waters of Nigeria include every part of the open sea within 30 nautical miles of the coast of Nigeria measured from the low water mark or of the seaward limits of inland waters.[21] This provisions replaced the 12 nautical mile limit which has hitherto been in place.[22] With the coming into effect of the convention, the 12 limit is once again reestablished.

Nigeria's sovereignty as a coastal State extends beyond its land territory and internal waters to the territorial sea and this includes the air space over and the sea bed and sub soil of the territorial sea. Its sovereignty over this zone is coterminous with its territorial

[18] Article 3
[19] Cornelius Va Bynkershoek the Dutch Juris in the 18th century stated "potestatem terrae finir, ubi finitur armoru vls" wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as canon will carry; for that is as far as we seem to have the command and possession. Bynkershoeks De Domino Maris Dissetatia James Brown Scott (ed.) p. 44
[20] Article 15
[21] Section 1
[22] Under the common law Nigeria claimed 3 miles. The Territorial Waters Act of 1967 extended the claim to 12 miles.

sovereignty. However, this jurisdiction is exercised subject to the Convention and to other rules of international law.[23]

As far as overflight, fishing, laying of submarine cables and mining m the territorial sea are concerned, the jurisdiction of the coastal states is unhindered as the convention has no application over these areas. However in areas such as navigation, scientific research, and environmental regulations, the Convention makes express provisions which will impact on national legislation.

With regard to navigation, ships of all States, whether coastal or land-locked enjoy the right of innocent passage through the territorial sea.[24]To enjoy the privilege of innocent passage, the vessel must be having a continuous and expeditious passage.[25]

Innocent passage is described as passage which is not prejudicial to the peace, good order or security of the coastal State. Passage of a foreign ship will be regarded as prejudicial to the interests of the State if it engages in any of the following:[26]

a. any exercise or practice with weapons of any kind,
b. any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State,
c. any act aimed at collecting information to the prejudice of the defence or security of the coastal State,
d. any act of propaganda aimed at affecting the defence or security of the coastal State,
e. the launching, landing or taking on board of any aircraft,
f. the launching, landing or taking on board of any military device,

[23] Article 2
[24] Article 17
[25] Article 18 para 2
[26] Article 19

g. the loading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State,

h. any act of willful and serious pollution contrary to the Convention,

i. any fishing activities,

j. the carrying out of research or survey activities,

k. any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State,

l. any other activity not having a direct bearing on passage.

To take action under any of these provisions, the State must show that a breach has occurred. For example what is "serious" pollution? What standard of measurement will determine pollution that is "serious" enough to contravene the provisions of the Convention? It would seem that the omnibus provision in Art 19 (2)(m) will provide a wide scope for activities which are borderline[27] and provide some leeway for States which may be wary of acting under the rather restrictive provisions of Art. 19 for fear of being in breach of Art 24 which imposes a duty on the coastal State not to hamper the innocent passage of ships.

The coastal State may pass laws and regulations relating to innocent passage in all or any of the following: in relation to the safety of | navigation and the regulation of maritime traffic; the protection of a navigational aids and facilities and other facilities or installations; the j protection of cables and pipelines; the conservation of the living resources of the sea; the prevention of infringement of the fisheries laws and regulations of the coastal State; the preservation of the environment I of the coastal State and the prevention, reduction and control of pollution j thereof; marine scientific research and hydrographic

[27] However, it has also been argued that the omnibus clause will only apply to activities which have not been expressly mentioned in the Article.

surveys; the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.[28] However, the Coastal State may not pass legislation relating to the design, construction manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards[29] and must in general not adopt any legislation that will have the effect of hindering the innocent passage of foreign ships and shall in particular not pass any laws or regulations which impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent! passage or which discriminates in any way against the ships of any State.[30]

Furthermore, the coastal State must make public all applicable laws,[31] as well as all dangers of navigation.[32] It must not levy foreign ships for reason only of their passage through the territorial sea. However, charges may be levied upon a foreign ship passing through territorial waters if specific services have been rendered to the vessel.[33]

In territorial sea, to use such sea lanes and traffic separation schemes as it may designate. However, such schemes and sea lanes must be clearly marked on charts to which adequate publicity is given.[34] The coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent.[35] This includes the reasonable use of force.[36]

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[28]Article 21.
[29]Article 21 para 2 The US Oil Pollution Act 1990 with its double hull and manning requirements that the standards of foreign ships should be equivalent to US law or j to international law "acceptable to the US" would be in breach of this provision if I it is sought to apply it to ships exercising their right of innocent passage.
[30]Article 24 para 1.
[31]Article 21 para 3.
[32]Art. 24 para 2.
[33]Article 26.
[34]Article 22.
[35]Article 25.
[36]The coastal state may "... use reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless"

4.2.3 The Archipelagic Waters

Archipelagic States like Indonesia have long pressed for the right to adopt a baseline that encloses the archipelago. An archipelagic State is one that is constituted wholly by one or more archipegalos and may include other Islands.[37] This definition will not include a metropolitan State which seeks to adopt the provisions on archipelagic States to groups of island that are its dependencies.

Archipelagic States are given the right to measure the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf from the archipelagic baseline.[38]

The sovereignty of the archipelagic State extends to the waters enclosed by the archipelagic baseline and to the air space above and subsoil below such waters.[39]

However in contrast to internal waters, foreign ships have a right of innocent passage through archipelagic waters.[40]

The archipelagic State may within the archipelagic waters draw closing lines for the delimitation of internal waters.[41] It shall however respect existing agreements with other States and recognise traditional fishing rights and other areas of legitimate activity of adjacent States. It shall also respect existing submarine cables laid by other States.[42]

The Archipelagic State may establish sea lanes through the archipelagic waters and adjacent territorial sea.[43]

The I'm Alone (Canada and the United States) Interim and Final Reports of a Joint Commission. 1933 and 1935. 3 R.I.A.A. 1609; 29 A.J.I.L. 326 (1935)
[37]Article 46 para (a).
[38]Article 48
[39] Article 49
[40]Article 52
[41]Article 50
[42]Article 51
[43]Article 53

4.3.1 The Contiguous Zone (CZ)

For reasons of security and the enforcement of customs, fiscal, immigration laws, coastal States have traditionally sought to exercise control over the waters adjacent to its territorial waters.[44] A coastal State may establish a zone contiguous to the territorial sea but not beyond a width of 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. This is known as the contiguous zone.[45]In this zone, the State may exercise the control necessary to:

a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea and

b) punish any infringement of these regulations where such infringement is committed within its territory or within its territorial sea. In such case, the State will also be able to exercise its right of "hot pursuit" through the territorial waters and contiguous zone.

Where there is no infringement, the coastal State has no further rights in the contiguous zone. The Convention also gives coastal states the right to prevent and punish the removal of historical and archaeological objects without its approval from the contiguous zone.[46]

The coastal state has full sovereignty over the energy and mineral resources of the sea-bed and subsoil of the internal waters, the territorial sea, archipelagic waters. Such rights do not extend to the contiguous zone unless an exclusive economic zone has been proclaimed, in which case the 24 nautical mile limit of the contiguous Zone, will fall within the EEZ which gives

[44]Extravoir remarks that the notion of a contiguous zone "…emerged from the need to temper what would otherwise have been a rigid dichotomy between the freedom of the high seas and sovereignty over the territorial sea. It was also prompted by the need to accommodate the interests of coastal state in securing maximum protection against infringements of their domestic laws and regulations as to maintain on the other hand, the freedom of the high sea, particularly with regard to navigation over as wide maritime area as possible". W.C: Extravoir: The EEZ, 1981 Institute Universitaire de hautes etudes internationale Geneve p. 30.

[45]Article 33

[46]Article 303 para 2. This will however not affect existing laws relating wrecks and salvage.

rights of exploitation to such resources. Indeed the continued relevance of this zone was questioned at the UNCLOS III.[47]

It is arguably still relevant to the extent that it demarcates the portion of ^ o_{Ve}rUt>pmg. EEZ wherein the state can exercise powers of prevention punishment as enunciated above.

4.3.2 Exclusive Economic Zone

The concept of the Exclusive Economic Zone (EEZ) evolved out of the tensions that arose from fishing disputes particularly in the 1960's. In the 1982 Tunisia/Libya case, the EEZ was referred to by the 1CJ as a " concept and which may be regarded as part of the modern International law.[48]The EEZ is an area beyond and adjacent to the territorial sea which does not extend beyond 200 nautical miles from the baseline.[49]The Nigerian Exclusive Economic Zone Decree of 1978 establishes a 200 jnile EEZ. The EEZ has been comprehensively defined as:

> *"an area beyond and adjacent to the territorial sea that extends up to 200 miles from the baseline , in which the coastal state has sovereign rights with respect to all natural resources and other activities for economic exploitation and exploration, as well as jurisdiction with regard to artificial islands, scientific research and the marine environment protection and other rights and duties provided for in the United Nations Law of The Sea Convention. All States enjoy in the EEZ navigation and other communications freedoms and the landlocked and other geographical states specific rights of participation in fisheries and marine scientific research."*[50]

The delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law.[51]The coastal state must deposit with the

[47] Third United Nations Conference on the Law of the Sea Official Records Vol III
[48]ICJ Rep. 1982 para 100 at 74; See also the 1985 Libya/Malta Judgment 1CJ Rep. 1985 para 34 at 33.
[49]Article 57
[50]B. Kwiatkowska: The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989) p. 4.
[51]Article 74. 52, Articles 75 -55, Article 56 para 1 cf see S. 2(1) Exclusive Economic Zone Act 1978.

Secretary General of the United Nations charts or list of geographical co-ordinates showing the delimitation of its EEZ.[52]

In the EEZ, the coastal state has specified sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources, whether living or non-living of the water super adjacent to the sea-bed and of the sea-bed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of the energy from water, currents and winds.[53] Such specified sovereign rights are limited to the resources of the zone and not in any way a sovereign right over the zone itself.[54]

With regard to living resources, the coastal state shall determine the allowable catch of the living resources in its EEZ. The coastal State has a duty to ensure that the living resources in the EEZ is not endangered by over exploitation and shall cooperate with international organisations to achieve this end.[55] Coastal States must contribute and exchange scientific information with a view to conservation of living resources within the EEZ.[56]

The coastal state shall also seek to utilize the living resources in its EEZ. Where it is unable to harvest the entire allowable catch, it shall enter into agreements to give other states access to the surplus subject to the right of landlocked and geographically disadvantaged states to participate in the exploitation of such surplus.[57] However, where the economy of coastal state is overwhelmingly dependent of the exploitation of the living resources of its EEZ such right of participation will not apply.[58]

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[52] Article 74

[53] Article 56 para 1 cf see S. 2(1) Exclusive Economic Zone Act 1978.

[54]See generally Report of the Committee on the Peaceful Uses of the Sea-bed and Ocean Floor Vol II Sup. No. 21 (A/9021). Obinna Okere remarks that the rationale for this limitation is that an acknowledgment of rights over the sea-bed and super adjacent waters themselves might serve as a basis for subsequent extensions of the powers of a coastal state which might jeopardise the freedom of communication and navigation. Obinna Okere, Nigeria's Exclusive Economic Zone (1993) LMCLQ p.124 at 128.

[55]Article 61 para 1-4

[56]Article 61 para 5;

[57]Articles 62, 69 and 70. See also The Landlocked States and Geographically Disadvantaged states where it is argued that the principles of equity and of international co-operation demanded that "the establishment of an economic

The coastal state also has sovereign rights with respect to the establishments and use of.(i) artificial islands;[59] Such artificial islands and safety zones established around them must not interfere with international navigation;[60] (ii) marine scientific research[61] which must be for peaceful purposes only [62] and (iii) is responsible and liable[62] for the protection of the marine environment.[63]

The coastal state in exercising its rights and performing its duties shall have due regard to the rights and duties of other states.[64]

As regards law enforcement in the EEZ, the coastal state may take such measures including boarding, arrest and judicial proceeding as may be necessary to ensure compliance with the laws and regulations adopted by it in the exercise of its sovereign right to explore, exploit, conserve and manage the living resources in the exclusive economic zone. Provided that arrested vessels shall be promptly released upon the posting of reasonable bond or security.[65]

The coastal state is responsible for controlling the dumping of waste into the EEZ.[66] Waste may be dumped in the EEZ only with the prior express permission of the coastal state which in turn must give effect to anti-dumping regulations which it is enjoined to adopt under the Convention.[67]

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zone benefiting a limited number of coastal states would lead to inequality dejure and defacto... The institution of a regime of nequality would require compensation, which should be in the form of a right to participate directly or indirectly in the exploration and exploitation of the resources of the proposed economic zone. This right should benefit the landlocked or geographically disadvantaged states. Statement of Switzerland Ttiird UNCLOS Vol D pp. 180, 181.

[58] Article 71.
[59] Article 60.
[60] Article 60 para 3 - 5 Article 260 262.
[61] Article 56; see also Articles 246 -262.
[62] Articles 192-237.
[63] Article 56; see also Articles 192 - 237.
[64] Article 56 para 2.
[65] Article 73.
[66] Article 210 para 5.
[67] Article 216(l)(a).

4.3.3 The Continental Shelf

The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline where the outer edge of the continental margin does not extend up to that distance.[68]

The Nigerian Petroleum Decree No. 51 of 1969 defines the continental shelf as extending to a water depth of 200 metres or beyond to where the water depth allows the exploitation of the natural resources of the submarine area. This open ended definition of the coastal state is closed by the provisions of the Convention.[69]

The continental margin itself consists of the submerged prolongation of the land mass of the coastal state and consists of the sea-bed and subsoil of the shelf , the slope and the rise. It does not include the deep ocean floor with its oceans ridges or its subsoil.[70] The seabed and subsoil of the EEZ coincide with those of the continental shelf up to the 200 mile limit. Where an EEZ has been proclaimed, this area of coincidence is referred to as the "primary seabed" or the sea-bed of the EEZ. The primary sea-bed is governed generally by EEZ regime but with reference to continental shelf provisions.[71] Only where the continental shelf extends beyond the 200 mile limit does an independent continental shelf regime exist.[72] This area is also referred to as the "outer shelf."

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[68] Article 76 para 1. It may extend up to 350 miles or even beyond in specified circumstances. Art 76 para 5, The ICJ in the 1969 North Sea Continental Shelf judgment stated that "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its territory into and under the sea exist ipso facto and ab initio by virtue of its sovereignty over the land, and as extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploring its natural resources. ICJ Re. 1969 para 19 at 22.
[69] Articles 62, 69 and 70
[70] Article 76 para 3.
[71] Article 56 para 3.
[72] Part VI.

The state is empowered to establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles by methods provided in the Convention.[73] Coastal states seeking a wider margin must submit to the Commission on the Limits of the Continental Shelf, information on the basis of which they justify their extended claim.[74] Charts describing the continental shelf of a coastal State are to be submitted to the Secretary General of the United Nations who shall give due publicity to same.[75] The coastal state exercises over the continental shelf, sovereign exclusive rights for the purpose of exploring and exploiting its resources.[76] These rights include the exploitation of the living organisms belonging to sedentary species,[77] drilling,[78] tunneling,[79] and the use of artificial islands, installations and structures.[80] These rights of the coastal state do not depend on occupation, or on any express proclamation.[81]

The coastal State in the exercise of its rights must not infringe or constitute any unjustifiable interference with navigation and other rights and freedoms of states.[82] No one may exploit the continental shelf except with the express consent of the coastal state.[83] The rights of the coastal state do not affect the legal status of the superadjacent waters or of the air space above those waters.[84]

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[73] Article 76 para 4, See Mcdougal and Burke's remarks that because the formula for identifying the ultimate limit calls for procedures that are highly technical and utilize instruments and equipment that are neither foolproof nor chear, Coastal nations seeking to delimit their coastal state beyond the automatic minimum 200 mile limit may find the requirement daunting. The Public Order of the Oceans, New Haven Press (1985) KXK.
[74] Annex II Art 4.
[75] Article 76 para 9 and 10
[76] Article 77 para 1
[77] Article 77 para 4 Article 68
[78] Article 81
[79] Article 81
[80] Article 60, 280
[81] Article 77 para 3
[82] Article 78 para 2
[83] Ibid
[84] Article 78 para 1

Furthermore, coastal states are expected to share with the international community, a part of the revenue they derive from •exploiting oil and other resources from any part of their continental shelf beyond 200 miles from their shores.[85] The coastal state shall make payments annually with respect of all production at that site. These payments are made through the Seabed Authority which is to distribute the funds to states which are parties to the convention on the basis of an equitable sharing formula that takes into account the interests and needs of developing states, particularly the least developed and landlocked among them.[86]

4.4 Regime of the High Seas and International Seabed

The vast water areas of the world, known as the high seas, constituted until recently the major highway of communication across the world, linking nations for good and for bad, for commerce and culture as well as for hostilies and exploitation. The seas have dominated much of man's endeavours and have influenced civilisations across diverse societies. At the beginning, claims to the open seas were as varied as they were extravagant. The Vikings of Scandinavia explored much of the North Atlantic as a result of their mastery of navigation. Venice claimed the Adriatic, England the North Sea, the Channel and large parts of the Atlantic. Sweden the Baltic, .Denmark and Norway, all the Northern seas. Indeed, under the Bulls of Pope Alexander VI of 1493 and 1506 the new World and the Seas embracing them were divided between the Iberian powers of Spain and Portugal. No sooner after this division than the movement towards 'closed seas' involving extensive appropriations of the oceans began to peter out as a result of challenges, particularly by Britain through attacks carried out by seadogs, like Francis Drake and John Hawkins, who were British heroes but who would today be regarded as pirates.

[85] Article 82. see generally Kodwo Bentil: "The Foreshadowed Global Legal Regime of Deep Sea-bed Exploration and Mining and some Pre-emptive National Legislative Enactments" (1983) LMCLQ p. 260 at 163.
[86] Article 82.

It is remarkable to note that this challenge was during the reign of Elizabeth I which period saw England develop into a major European power with a great navy. It is also worthy to note that even though Elizabeth was declared an illegitimate child, she did not only become the most renowned Princess after time, her reign also witnessed one of the greatest periods of advancement and prosperity in English history.

Part Passu with these developments were the contributions from great authors like the Dutch Hugo Grotius who, in his great work, Mare Libemm, published in 1609, upheld the doctrine of the freedom of the seas. Although Scot Weldwood (Abridgement of the Sea Laws 16! 3) and the Englishman Selden (Mare Clausum 1635) took opposing views to Grotius, such literary exchanges did much to clarify understanding of the issues involved in the law of the sea, and to refine the concepts upon which the law was based. It is pertinent to say that by the beginning of the 19th century, the notion of the open seas and the concomitant principle of freedom of the high seas had become established and international rules applicable to the use of the ocean space have continued to be based primarily on this concept.

The essence of the freedom of the high seas is that no state may acquire sovereignty over any part of it, rather every state was recognised in law to have equal right to navigatfrAipon it and to exploit the high seas right up to the edge of territorial sea.[87] This meant that no preference or priority was recognised in favour of the nearest coastal state or the states of a particular region. Thus while adjacent states to the seas tended to play the major part in the exploitation of fisheries, yet in several areas, especially coasts of developing nations, high seas fisheries were exploited by more distant developed states and important multinational fisheries establishments as has been the case of Iceland and Newfoundland, in the North Sea and North West Coast of Africa.

[87] See Article 2 of the 1958 High Seas Convention and Article 87 of the 1982 Convention.

With regard to jurisdiction, each state had and still has jurisdiction, on the high seas, over its ownships and nationals. This principle was established in Re Louis[88] where a French vessel alleged to be indulging in slave trade and which was on her way from Martinique to the coast of Africa, was captured by an English cutter. It was held that, since the French ship was not a pirate ship, the mere engagement in slave trade did not subject her to interference by a third state, except a treaty which specifically conferred such right could be proved.[89]

Thus, under customary international law, the freedom of the seas, exercised by both coastal and non-coastal states comprised the following:

1) Freedom of navigation;
2) Freedom of fishing;
3) Freedom of laying submarine cables and pipelines;
4) Freedom of overflight.

These four freedoms were codified in the Geneva Convention on the Law of the Sea, 1958. Article 87 of the 1982 Montego Bay Convention* has now added two other freedoms, namely: 5) Freedom of scientific research and; 6) Freedom to construct artificial islands and other installations.[90]

The Geneva Convention on the High Seas of 1958, regarded as "generally declaratory of established principles of international law," was the first successful attempt to translate customary law of the high seas into a codified form, as the earlier attempt to embody the principles of the law of the sea in an international Convention failed at the Hague Codification Conference in

[88] (I897) 2 Podds, 210.
[89] This was at a time when slave trade was still legitimate. The International slaves Convention of 1926 and its supplement fully put paid to slave trade.
[90] 21 ILM 1261 (1982) All reference in this paper to 'Convention' means the Montego Bay Convention on the Law of the Sea, 1982 except otherwise specified.

1930. The high seas were defined in Article 1 of the 1958 High Seas Convention as "all parts of the sea that are not included in the territorial sea or in the international waters of a state."

In the period between 1958 and the adoption of the new Convention of 1982, a number of changes have occurred necessitating a re-definition of the high seas. Some of the developments were the emergence of the Exclusive Economic Zone (EEZ) and the concept of archipelagic waters. A modified definition of the high seas can now be found in Article 86 of the 1982 Montego Bay Convention on the Law of the seas, and it reads as follows: "all parts of the sea that are not included in the Exclusive Economic Zone, in the territorial sea or in the international waters of a state, or in the archipelagic State.[91]

In order to know where the high seas begin, it is necessary to know where the territorial sea ends. Unfortunately, the 1958 Convention was unable to resolve the issue. It was only in the 1982 Convention that the matter was finally put to rest. Article 3 of the 1982 Convention provides that all states have the right to establish the breadth of their territorial sea up to a limit not exceeding twelve nautical miles from the baseline.

Article 2 of the 1958 Convention, reaffirmed four (now 6) freedoms of the sea earlier listed above and which states enjoyed under customary international law. The articles then went on to emphasis that the freedoms should be enjoyed with selfish disregard to the interests of other states. This is more or less emphasizing a principle which states have come to accept.

The recent Nuclear Test case between Australia and New Zealand,[92] on the one hand and France, on the other, in which the complainants alleged that French nuclear testing in the Pacific infringed the principle of the freedom of the sea, provided the ICJ with ample

[91] Article 86 of the Convention. 1 (ICJ Reports, 1976, p. 253.
[92] Fdber's Case (1903) Rl AA 441.

opportunity to make an authoritative pronouncement but the issue was not decided by the Court as France discontinued the tests.

In Articles 2 and 3 of the 1958 Convention and Part X of the 1982 convention, a special regime is provided for landlocked states which number 31 in the world with 14 of them in Africa alone. Under international customary law, there is no general recognition of any servitude in a state to cross the territory of another state to reach the sea. This is so, even where a river flows from one state across the territory of another before reaching the sea.[93] The same is true of the route if egress is a railway and only a special treaty would guarantee freedom of transit.[94]

Under both the 1958 and 1982 conventions, states having no coasts now have free access to the sea on the basis of reciprocity and upon agreement between them and states of transit.

4.5.1 Nationality of Ships

As Shaw rightly observes, the foundation of the maintenance of order on the high seas has rested upon the concept of the nationality of the ship, and the consequent jurisdiction of the flag state over the ship.[95]

Articles 90 and 91 of the 1982 Convention provide for the right to fix the conditions for the grant of its own nationality to ships. Further, that ships have the nationality of the state whose flag they fly but with the proviso that there must be a "genuine link" between the ship and the state. This proviso was inserted in both the 1958 and 1982 Conventions to check the placing of ships under flags of convenience i.e under the flags of countries like Liberia, Panama,

[93] Article 110
[94] Railway Traffic between Lithunia and Poland, PCU, Ser. A/B No, 42 (1931).
[95] Malcolm Shaw: International Law, 2nd ed., p. 317. lp. ICJ reports, 1960, p. 150.

Honduras, Cyprus, Singapore and Somalia. The question of genuine link was the subject of controversy in the J Inter-governmental Maritime Consultative Organisation (IMCO) Case.[96]

There, some members of IMCO objected to the election of Liberia into the 14-member Maritime Safety Committee of IMCO. The ground of objection was that the tonnage which placed Liberia among the 8 largest ship-owing nations in the world and purported to give Liberia automatic admission to the Committee, was fictitious. The ICJ, using the Lloyds Register as the basis for ascertainment of tonnage, ruled that "largest ship-owing nations" in the IMCO constitution referred to registered tonnage and not beneficially owned tonnage. The Court did not pronounce on the meaning of "genuine link."

Article 92 of the Convention re-states the fundamental rule that, apart from treaty and exceptional cases recognised under the Convention, ships on the high seas are subject to the exclusive jurisdiction of the flag state only. Both the 1958 and 1982 Conventions have overruled the decision of the World Court (PCIJ)[97] tendered in the Lotus Case between Turkey and France. Following from this, in the event of collision or any other accident of navigation, no penal or disciplinary proceedings may be instituted against such persons on board the ship except before the judicial or administrative authorities either of the flag state or of the state of which such a person is a national.[98]

4.5.2 Exception to the Exclusive Jurisdiction of the Flag State

There are some exceptions to the exclusive jurisdiction of the flag state, all but one recognised by the. Convention. These are piracy; the right of self-defence; the right of hot pursuit; consent to jurisdiction on the basis of treaty; the right of approach by man-of-war.

[96] ICJ Reports, 1960, p. 150
[97] PCIJ Ser. A. No. 10 (1927) Convention, Article 97.
[98] Convention, Article 97.

Provisions concerning these subject-matters constituted in 1958 and now in 1982, the first attempts to formulate authoritative pronouncements on them. We do not intend to go into lengthy discussion of these exceptions, nonetheless, a brief description of them will not be out of place.

4.5.3 Piracy

Pirates under an ancient rule of maritime law, are offenders against the law of nations, hostes hurnani generis and so may be arrested on the high seas by the warships of any state and brought into port for trial together with their ship. The right to arrest foreign ships on the high seas on allegations of piracy is limited to acts which are piracy jure gentium. And piracy jure gentium has been defined in article 101 of the 1982 Convention as:

a. Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

   (i) on the high seas, against another ship or aircraft, ui against persons or property on board such ship or aircraft;

   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; or

b. Any act of voluntary participation in the operation of a ship of an aircraft with knowledge of facts making it a pirate ship aircraft;

c. Any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

The essence of piracy under international law is that it must be committed for private ends. The requirement that two vessels, pirate and victim, must be involved, distinguishes piracy from hijacking which is the takeover of a ship or aircraft for political reasons.

Similarly, any acts committed on the ship by the crew and aimed at the ship itself or property or persons on board do not fall within the category. So, also perhaps is an attack by one ship on another, except with intent to plunder (animus furandi) that is why the Santa Maria Incident of 1961[99] and that of Achill Law in 1985 did not fall within the category of piracy. The main point here is that every state has the right to seize a pirate ship or aircraft and arrest the persons involved in the act and impose penalties according to its municipal laws. This makes the crime of piracy exceptional in international law, for, in the case of other offences e.g. slave trading, offenders apprehended, by say a warship, must be handed over to the flag state for trial and punishment.

It needs be emphasized that only warships or other ships or aircraft in the service of government and clearly marked or identifiable for the purpose are authorised to seize pirate ships on the high seas. Where a ship is accosted and seized on the high seas on suspicion that it is a pirate ship and it turns out that the suspicion is groundless, the state of the warship shall pay compensation for any loss or damage caused the ship seized.

During wartime, enemy merchant ships may be arrested on the high seas, and blockades of the coast of the enemy quite often occur. In such cases, foreign merchant ships may be confiscated if they try to elude the blockade. A good example of this was the arrest and confiscation of The M.V. Jozina, in 1967 during the civil war between Nigeria and 'Biafra.' The M.V. Jozina, a Dutch vessel, had tried to do gun running in order to elude the blockade of Biafra which was

[99] www.shipsandports.com.ng/detail, 29/03/2016, 10:12pm

instituted by the Nigerian Navy. It was seized by the NNS Nigeria in (he process and the ship and her cargo condemned as good and lawful prize.[100]

4.5.4 The Right of Self-defence

The rule, as an exception to the high seas, was founded on customary international law. The rule of self-defence generally is now codified in article 51 of the United Nations Charter. Although the 1982 Convention[101] makes no mention of jurisdiction over vessels on the high seas on the basis of self-defence, I am of the view that if the right is available on land, it follows logically that it should be available on the seas. Indeed self defence ought to be accommodated under other freedoms recognised by the "general principles of international law" in Article 87 of the 1982 Convention.

Under customary international law, it was thought that a warship is entitled to stop or even attack a foreign vessels on the high seas which is heading for the cpa^t with the purpose of helping an armed rebellion. In the Virginius,[102] an American vessel was arrested on the high seas, by a Spanish cruiser when carrying men and arms to insurgents in Cuba. Most of the crew who were British and Americans were summarily shot. Right of action was conceded to Spain and British protest was limited to the summary execution which they thought was barbaric. The scope of self-defence seems now to lean in favour of those who declare- that Article 51 in conjunction with Article 2(4) of the United Nations Charter now specifies the scope and limitations of the doctrine. In other words, self-defence can only resort to 'if an armed attack occurs', and in no other circumstances, and so those, like Bowett who believe that the right of self-defence is inherent and exists in customary international law over and above the specific

[100] Inspector-General of Police' v, M.V. Jozina (1967), charge No. A/1462/67 (Vol. A/67/2/2). The Inspector General of Police filed the action on November 11, 1967 against The M.V. Jozina and her master, Williams Platinga.
[101] Article 110
[102](1873) Moore Digest 11, p. 895.

provision of Article 51 of the United Nations Charter can be held to be mistaken. The latter group's argument is that based on the realities of the present state of sophisticated armaments, to await an initial attack before defending may well destroy the state's capacity for further resistance and so jeopardise its very existence.

The Cuban quarantine of October 1962, by the United States, posed serious problems of interpretation. The United States did not observe the requirement of obtaining the Security Council's consent before mounting the quarantine to prevent the importation of Russian missiles into the island. The Falklands War of 1982 was a different kettle of fish; Argentina had invaded the Falklands by force of arms and the U.K responded in self defence and, in the process, sank The General Belgrance, the Argentine Cruiser, with much loss of life. Since self defence is premised on the use of proportionate force, the question then is whether the launching of a full scale war by Britain on Argentina was proportionate.

The issue of self defence continues to be controversial and the divergence will remain as long as United Nations practice seems to afford no sufficient guidance.

4.5.5 The Right of Hot Pursuit

This is a principle designed to ensure that a vessel which has infringed the rules of a coastal state cannot escape punishment by fleeing to the high seas. It means that, in such circumstances, the law permits the coastal state to pursue and capture the offending ship on the high seas and bring it to port. This is known as the right of "hot pursuit". The right, which has been developed since the 19th century, was recognised under customary law and was comprehensively elaborated in article 23 of the High Seas Convention 1958 and Article 111 of the 1982 Convention. There is no right of hot pursuit on land. South Africa's claim to this right during the era of apartheid when its forces pursued freedom fighters into neighbouring

territories has no justification in law. Article 111 of the Convention lays down five conditions for hot pursuit. These are:

a. The pursuit must commence when the foreign ship or one of its boats is within the internal waters, the territorial sea or the contiguous zone of the pursuing state.
b. The pursuit may only commence after visual or auditory signal to stop has been given to the offending ship.
c. The pursuit must be continuous and uninterrupted.[103]
d. The right of hot pursuit ceases as soon as the ship pursued enters its territorial waters or that of another country.[104]
e. The pursuit can only be carried out by a warship or military aircraft or by specially authorized government ship or plane.

It must be noted that it is not necessary that at the time when the ship in violation receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. The Convention extends the right to include pursuit from archipelagic waters, the EEZ or the waters above the continental shelf in cases where a violation of the laws which the coastal State is entitled to make in respect of the zone or shelf has occurred. The case of I'm Alone (Canada v USA)[105] remains the locus dassicus on the proportionality of force to be used in arresting an offending foreign ship when exercising the right of hot pursuit.

However, neither the 1958 High Seas convention nor the 1982 Law of the Sea Convention provides any guide as to what to do to effect the arrest of a ship which fails to stop.

[103] James Hamilton Lewis and C. H. White (USA v Russia}, Moore Arb. ⁝. 929.
[104] The Itata, Moore Arb., I1l, 3067. 2 UNRIAA 1609.
[105] 2 UN RIAA 1609

4.6 Consent to Jurisdiction on the Basis of Treaty

The high seas, it is generally true, are covered by a close network of treaties with ramifications extending to almost every matter which calls for international action. Some of the matters covered are:

(1) Slave trade;

(2) Fishery control;

(3) Salvage;

(4) Safety of life at sea;

(5) Cables and wireless;

(6) Commercial agreements etc.

Where a state has consented to interference on the high seas with its merchant ships, in respect of the matters listed above or other, then its ships freedom to sail on the high seas will be limited to the extent of its consent in the agreement.

The Right of Approach (i.e the right of a man-of-war to verify the flag of a suspect merchant ship). The basic principle is that "vessels on the high seas are subject to no authority except that of the State whose flag they fly.[106] One exception to the exclusive administrative jurisdiction of the flag state on the high seas is the general right of a warship or military "aircraft" to approach a merchant ship to verify the ship's right to fly its flag (verification du pavilion or reconnaissance). This the warship could do if it reasonably suspects that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorised broadcasting;

[106] Article 92 of the Convention.

(d) the ship is without nationality; or

(e) the ship, though flying a foreign flag or refusing to show its flag, is, in reality, of the same nationality as the warship.

If the suspicion proves unfounded, and provided the ship boarded has not committed any act justifying the boarding, it shall be compensated for any loss or damage that may have been sustained.

4.7 Conservation and Management of the Living Resource of the High Seas

Until the advent of advanced technology, no attempt was made to control the use of the high sea with regard to fish and other living resources of the high seas. With particular regard to fish the 1958 Convention created a special regime which has been replicated somewhat in Articles 116 to 120 of the Montego Bay Convention of 1982. The essence of both is to introduce some system of catch-limitation (i.e. prevention of over fishing and sharing in the exploitation of fishery resources to preserve the fish stocks of the Sea in the interests of their national and economic exploitation.

In the conservation and management of fishing resources, the role of coastal States has become crucial. This is so because of the creation of the new regime of a 200 mile EEZ in the 1982 Convention which harbours an overwhelming majority of the world's stocks. In the EEZ, which is technically part of the high seas, the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the fish stocks of the zone, as well as duties formulated, though in very general terms, in the interests of the international community.

4.8 The International Sea Bed Area

The United Nations General Assembly Declaration of Principles governing the Sea-bed and the Ocean floor, and the subsoil thereof, beyond the limits of National jurisdiction,[107] was the genesis of the Third United Nations Conference on the Law of the Sea (UNCLOS III) which gave birth to the International Seabed Area.

The economic importance of the sea had long been realised; the ocean reserves of minerals have been estimated to run into millions of tons for ore and billions of barrels for oil and natural gas. At the conclusion of the 1958 Conventions on the Law of the Sea, technology for deep sea exploitation had not yet advanced. However, by the late 60s and early 70s, it had come to be realised that sea-bed mining was a commercial possibility and as international law then stood, the main benefit of mining would only accruing to a handful of developed States best placed to muster the necessary investment and technology. By this time, states, both developed and developing were itching for an international regime that will create order in the seas especially in the area beyond national jurisdiction, in preference to the hazards of a "free for all."[108] The initiative to create a semblance of order and prevent technologically advanced states from carving out the ocean floor into spheres of influence was taken by the Third World through Ambassador Avid Pardo, the Permanent Representative of Malta to the United Nations, who brought the issue before the UN General Assembly in 1967 in a Note Verbale. He proposed that there should be drawn up a Declaration and Treaty concerning the reservation exclusively for peaceful purposes the sea-bed and ocean floor underlying the seas beyond the then limits of national jurisdiction, and the use of their resources in the interests of mankind[109] -

[107] G.A. Res. 2749, 25 GAOR, 1933rd Plenary Meeting at 19.
[108] See Harris, Cases and Materials on International Law, 3rd ed., 1983, p.365.
[109] See Churchill and Lowe, The Law of the Sea, p. 179,

"common heritage of mankind.[110] He then suggested the adoption of an international agency to assume jurisdiction over this 'area' "as a trustee for all countries". The proposal was motivated by the desire to secure both the delimitation of the sea-bed and prevention of a 'land grab' for sea-bed minerals.

The proposal was referred to the First (Political) Committee of the General Assembly, then to a 35-member ad hoc Committee, and then, in 1968, a permanent Committee on the Peaceful Uses of the Sea-bed and Ocean floor beyond the Limits of National Jurisdiction was set up. The Committee's Report led to the adoption in 1969, of the so-called Moratorium Resolution which declared that; Pending the establishment of an international regime including appropriate machinery -

(a) State and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.[111]

(b) No claim to any part of that area or its resources shall be recognised.

Not surprisingly, Western States voted en masse against the resolution. However, as a result of continued diplomatic moves, it was possible in 1970 to produce a Declaration of Principles Governing the Sea Bed and Ocean Floor, and the subsoil thereof, beyond the limits of National Jurisdiction, by 108 votes to.pjJ, with only 14 abstentions, as General Assembly, Resolution 2749[112] It solemnly declared, inter alia, that:

(1) The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of National Jurisdiction (hereinafter referred to as the ('Area'), as well as the resources of the

[110] Note that the Lann American Jurist, Amiies Hello had as early as 1832, in like manner, classified the sea as individual: pauiniony

[111] G.A. Res. 2574 U ^xn), GAOK, 24th Sess. Suppl. 30. The Resolution was adopted by 62 voles to 28, with 28 abstentions.

[112] Resolution 2749 (XXV), Brownlie, Basic Documents in International Law, pp.122-126.

Area, are the common heritage of mankind.

(2) The Area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

(3) No State or person, natural or juridical, shall claim exercise or acquiring rights with respect to the Area or its resources incompatible with the international regime to be established and the principles of this Declaration.

(4) All activities regarding the exploration and exploitation of the resources of the Area and other related activities shall be governed by the international regime to be established.

Through arduous negotiations which lasted from 1974 to 1982, we see in the 1982 Montego Bay Convention on the Law of the Sea, arising from UNCLOS III, the dream of Arvid Pardo come true. We now have a constitution or a charter on the sea which deals with the ocean space as an organic and ecological whole. It has been referred to as, "a j-monument to international cooperation in the treaty making process.[113] The 1982 Convention has introduced new concepts of international law of the sea, which are much far reaching than those of the 1958 Conventions. These concepts were created in response to the advance in technology, to the demand especially by developing countries, for greater international equity, in the uses of the sea and its resources. One of these new concepts is reflected in Part XI of the Law of the Sea Convention and the associated annexes, namely, the International Sea Bed Authority, an extra-ordinarily complicated legal regime which we can now discuss only in outline.

[113] See Bernado Zuleta, former Under-Secretary-General for the Law of the Sea, in The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and index, at xix, UN Sales No. E.83 v, 5 (1983).

The "Area" is the Sea Bed lying beyond national jurisdiction. Some of the resources in it are necessary for the continued industrial existence of the developed nations, particularly those of the West. The nodules in the seabed contain fine, grained oxides of copper, nickel, cobalt, manganese, etc. Apart from these, thirty percent of the world's oil and gas production can be recovered from future offshore drilling. Research has also shown that the world's need of electricity energy could be satisfied by the thermal energy which is in vast supply in the oceans.

In the light of this, one can only imagine what it would have been like for the world economy were the seabed and subsoil, with its abundant reserves of mineral and hydrocarbon deposits, to be left as a free area. Definitely the poor states would have been at a disadvantage.

The concept of "common heritage of mankind" has become the most interesting development in the law of the sea since 1960. The idea of the open sea being a "free for all" is no longer tenable. The 1982 *Convention* on the Law of the Sea has opened a new regime of the seas *for the "Area"* and its resources viz, the International Seabed Authority *(ISA)*[114] *to* administer the "Area." Nigeria ratified the Convention on *July 11,* 1986. The Convention itself came into force on November 16, *1994,* 12 months after the deposit of the 60th instrument of ratification *in* conformity with Article 308 of the Convention.

When fully operative, the ISA will have the responsibility for the management and control of all activities and exploitation of the resources of the sea-bed and subsoil of the sea beyond the limits of national jurisdiction. Under this arrangement, the emphasis would be on the benefits that would accrue to developing countries taking into account their interests and needs. An International Seabed Authority would therefore be fully responsible for the registration and licensing of companies or state entities that would want to obtain exploitation rights on any part of the high seas outside national jurisdiction. The seat of the Authority is in Jamaica.

[114] Convention, Part XI.

The details worked out in the Convention have all the attributes of concession contracts under municipal Law. There is provision for 'reserved sites' to be exploited by the Authority independently through its own or*gan known as the "Enterprise'*.[115] There are also elaborate provisions in the contracts with licenses for the acceptance of obligations for technology transfer to developing countries.[116] Proceeds resulting from licenses issued and other payments accruing to the authority are to be equitably shared, taking into particular consideration the interests and needs of developing states and people who have not attained full independence.[117]

A special provision[118] has been inserted for the protection of land based metal producers and this too has been with the interest of the developing countries at heart. One interesting development to which reference must be made is Resolution II, which was adopted by the Conference and which became an integral part of the Convention, i.e. it became incorporated in the constitution just as the National Youth Service Corps Decree 1973, the Public Complaints Decree 1975, the Nigerian Security Organization Decree 1976 and the Land Use Decree 1978. Though not debated by the Constitution Drafting Committee, it nevertheless became incorporated into the Nigerian Constitution of 1979 by reference.

Under Resolution II, international consortia, made up of companies from developed states (USA, Canada, France, FRG, Italy, Japan, Netherlands and the UK) and states which have already invested research and development funds in the exploration of specific mine sites on the high seas, are recognised as "pioneer investors" with attendant exclusive rights over the chosen mine sites in the deep seabed and ocean floor. Yet, it is the regime of the International Seabed Authority (Part xi of the Convention) that the United States, under

[115] Article 8 of annex III.
[116] Article 44.
[117] Article 160 of the Convention.
[118] Article 151.

President Reagan, was dissatisfied with and therefore made the US vote against the adoption of the Convention. Most other industrialised countries signed but withheld ratification for the same reason.

The US took the view that nations that have expended colossal sums of money and human energy in conducting scientific research and have acquired the technological knowhow to exploit the resources of the area should be allowed to reap the benefit of their labours.

In July 1990, UN Secretary-General, Javier Perez de Cuellar initiated informal consultations in an attempt to meet the objectives of the US and other industrialised states. The end result is the "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10th December, 1982."[119]

By resolution, the general Assembly .urged states to adhere to the Agreement and to the Convention[120] and for purposes of implementations, the Agreement is to be interpreted and applied together with Part XI of the Convention as a single instrument; and in the event of inconsistency between them, the agreement will prevail.

The Agreement has modified Part XI of the Convention in no small measure and many of the advantages which could have accrued to developing countries have been whittled down for example, apart from the supremacy of the agreement over Part XI of the Convention, the provision for mandatory transfer of technology under the Convention shall now no longer apply, instead, there will exist only a mere duty of cooperation.[121] Not only that, the Council of the ISA is given greater role in the agreement while the powers of the Assembly vis-a-vis the Council are considerably reduced.

[119] UN Doc. A/48/950 (1994).
[120] G.A. Resolution 48/263 (July 28, 1994). The Resolution was adopted by a vote of 121 for, none against, and 7 abstentions.
[121] Agreement, annex sec. 5, para, 2

The 'Enterprise', the mining arm of the ISA, will no longer, under the Agreement enjoy any privileged or monopoly status; it will be treated as any other private investor. The power of the ISA to grant production limitations, production authorisations have been removed so also is the equitable sharing of surplus revenues from mining which the Convention stipulates, was to take into particular consideration, the 'interests and needs of the developing States and peoples who have not attained full independence or other self-governing status.[122]

The 1994 Agreement substantially accommodates US objections, and those of other industrialised states, to the deep sea bed mining provisions of the Law of the Sea Convention. The Sea-Bed Authority is streamlined and its regulating discretion curtailed. There is then the fundamental question whether the Convention regime could succeed without US participation in view of that country's influence and economic power? Whether the US eventually accedes to the Convention or not, one thing is clear, there can be no reversal of the regime, jurisdiction and limits created by the Convention. The provisions of the Convention will now come to be applied as binding rules of customary international law especially where these have become entrenched in the municipal laws of states, parties to the Convention, possessing the opinion juris necessary for the creation of rules of customary international law.

4.9 Conservation of Marine Environment

Marine resources may be renewable or non-renewable. Nevertheless in the context of the new paradigm of sustainable development they need to be exploited and managed in a sustainable manner. The oceans themselves being a major component of the bio-sphere need to be treated with great care. A plethora of conventions apply to the oceans. This includes the fairly recent Convention on the Conservation of Biological Diversity. The Law of the Sea Convention is the centerpiece of the legal framework for the management of the seas and oceans.

[122] Convention, Article 160, para. 2 (0 (1); article 172, para 2 (0) (i).

This chapter will however focus on the conceptual and practical aspects of the issue. It will highlight the guiding principles, instrumental regulations for implementing those principles as well as examine some of the practical problems of implementation and regulation of the conservation and management of marine resources, in Nigeria.

4.9.1 The Ecosystem Approach

The pattern of the growth of national and international law in the area of marine resources has largely been from a sectoral, issue by issue basis to an ecosystem and integrated approach. For example, the initial issues were that of freedom of navigation and fishing. Later other issues arose with the development of technology; pollution, for example, then fisheries conservation, which was a direct result of over exploitation of fishes and pollution of the seas. A systemic approach to the conservation of marine biological diversity was then needed to regulate the marine sector. Conservation actions and legislation developed from a phase of unilateral actions to regional and global co-operation. The direct incidence of cooperation were covenants and standards which are translated into national legislation and executive action in the signatory states.

The national jurisdiction over the ocean space has gradually increased to a 200 miles EEZ. This has brought about 38% of the oceans, and 90% of potentially commercially exploitable fish stocks, as well as 87% of offshore hydrocarbons within national jurisdiction.[123] However, it has also brought entire ecosystems or at least large parts of ecosystems within such zones. It has therefore been easy to recognize the impact that exploitation of one resource has on the others and even what that means to the coastal environment and national economy

[123] Belsky, "Inter-relationships of Law in the Management of Large Marine Ecosystems" in Sherrman, Alexander and Gold (ed) Large Marine Ecosystems: Patterns, Processes, and Yields, 1992, at p. 225.

of the coastal state. Even where the EEZ and marine resources overlap between two or more states the need for co-operation and collaboration becomes only more poignantly underscored.

International developments have also mirrored this shift in paradigms. For example, the 1975 United Nations Charter on Economic Rights and Duties of States espoused the need for inter state co-operation in the use of resources to avoid harm to such resources. In 1972 the United Nations Conference on the Environment stressed the fact that environment and development are two sides of the same coin, viz; the inter-connectedness of the ecosystem and the inter play between pollution and resource management. The October 30th, 1980, resolution of the General Assembly called for a Draft World Charter for Nature which required actions by states and their citizens to be conducted in such a way as not to threaten the "integrity of the ecosystems and organisms with which they co-exist".

The Law of the Sea Convention is itself undergirded, suffused and inspired by this environment sensitive ecosystem approach. For example, it is the obligation of nation states to control their ocean space, activities in their ports, coastal areas and EEZ as well as the activities of their nationals and vessels in all ocean areas (Articles. 94, 211, 217, 117-118). The Convention also requires the State to minimize and control pollution and to manage fisheries on an ecosystem model (Article 61, 63,117-20, 65, 64, 66, 67). The management principle required is that of "maximum sustainable yield" (MSY) which must be applied subject to "relevant environmental and economic factors." Article 194(5) requires nation-states to include in pollution regimes measures necessary to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life." This necessarily requires an ab initio ecosystems approach to all issues relating to the marine environment. Furthermore, these obligations are to be implemented in domestic

laws, treaties and other co-operative arrangements (Arts. 117-18, 194, 197, 207, 213, 210, 216, 211, 217-20).

4.10 Principle of Conservation of Biological Diversity

The 1992 Convention on Biological Diversity requires each state to apply its provisions to components of biological diversity within the limits of national jurisdiction as well as to processes and activities under its jurisdiction or control, whether on land or otherwise, .(hat-may have a significant adverse impact on biological diversity.[124] It emphasizes a comprehensive approach to species and ecosystems and their diversity and promotes an integrated approach at the national level to conservation and sustainable use. The convention also accepts the sovereign rights of coastal states over genetic resources within their national jurisdiction, this includes the EEZ and Continental shelf. This is however on mutually agreed terms, including participation in research by the state of origin, and equitable sharing with the state of origin and her peoples "without detriment to the need to allow others to have access to those genetic resources on the results of research and the benefits of commercial or other utilization, including technologies derived from genetic resources.[125]

4.10.1 The Principle of Regional Co-operation

The Regional Seas Convention aims to foster a regional and integrated approach to the conservation of the regional marine environment. Nigeria is a party to the West and Central African Agreement of 1981.[126] The Convention requires the parties to prevent, reduce, combat and control pollution of the marine area and to ensure sound environmental management of natural resources "using the best practicable means at their disposal, and in accordance with

[124] Article 4.
[125] Articles 14 and 15.
[126] Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region.

their capabilities.[127] They shall establish national laws and regulations for the effective discharge of their treaty obligations[128] and act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.[129] The parties shall take all appropriate measures against pollution from ships, aircraft, land based sources, sea based exploration and exploitation activities, atmospheric pollution etc.[130] They shall take measures against coastal erosion, protect rare and fragile ecosystems, utilise environmental impact assessment etc.[131]

4.10.2 Principle of Science Based Regulation

The various international instruments referred to earlier have given a prominent place to the role of science in conserving and managing marine resources and protecting the marine environment. Assessment of activities, policies on the environment, measurement of marine stocks, pollution control, application of management measures for renewable marine resources, monitoring of environmental quality and so on, must necessarily be based on basic and applied research which yield adequate information upon which informed theories may be made. Adequate resources, both human and material should therefore be made available for this purpose.

4.10.3 The Principle of Pro-active National Implementation: Nigeria's Response

From the foregoing discussion, we have come across treaty provisions in all cases requiring pro-active and diligent national implementation of environmental rules, principles and other requirements of marine agreements, albeit with some recognition and concession to the differentiated abilities of states to comply with these requirements to do so. In terms of enacting

[127] Article 4 (1).
[128] Article 4(3)
[129] Article 4(5).
[130] Articles 5-9.
[131] Articles 10,11,& 13.

requisite legislation, Nigeria has not fared too badly. The Territorial Waters Act,[132] The Petroleum Act,[133] The Oil in Navigable Waters Act,[134] the Sea Fisheries Decree,[135] the Exclusive Economic Zone Act,[136] the Environmental Impact Assessment Act,[137] the Harmful Waste (Special Criminal Provisions, etc.) Act[138] and the Associated Gas Re-injection Act[139] are some of the pertinent legislation. For example, Regulation 25 of the Petroleum (Drilling and Production) Regulations enjoins a license or lessee to adopt all practicable precautions to prevent the pollution of inland waters, rivers, territorial waters or the high seas by oil, mud or other fluids or substances which might contaminate the water or cause harm or destruction to fresh water or marine life and where any such pollution occurs to take prompt remedial action. It is an offence under the Oil in Navigable Waters Decree to discharge oil into prohibited sea areas or into the whole of the sea within the seaward limits of Nigeria's territorial waters.[140] sovereign and exclusive rights with respect to the exploration and exploitation of the natural resources of the sea bed, subsoil and superjacent waters of the Exclusive Zone shall be exercised in conformity to the provisions of applicable treaties (including of course the Law of the Sea Convention).[141] The Harmful Waste Act also prohibits the transporting nr dumping of any harmful waste into the sea including the EEZ as well as on land or internal waters without authority.[142]

[132] Cap. 428, L.F.N. 1990.
[133] Cap. 350, L.F.N.1990.
[134] Cap. 337.L.F.N. 1990.
[135] No. 71 of 1992
[136] Cap. 116, L.F.N. 1990.
[137] No. 86 of 1992.
[138] Cap. 165, L.F.N. 1990.
[139] Cap. 26, L.F.N., 1990
[140] Sections 1 and 3
[141] Section 2(2) Cap. 116, L.F.N., 1990
[142] Section 1

4.11 Environmental Quality and Management Profile

A cursory look at the country's profile in the area of environmental quality and management indicates that national compliance with the environmental principles of the Law of the Sea and Marine Agreements - in need of drastic improvement.

4.11.1 Oil Pollution

According to official estimates of the Nigerian National Petroleum Corporation,, about 2300b of oil is spilt in 300 separate incidents annually.[143] It is commonly believed however, that oil companies tend to underestimate the quantity of oil spilt. There also appears to be poor waste management and laxity in a number of oil installations and platforms. For example between 1976 and 1986 there were 2005 oil spill incidents with a total spill of 2,03.8, 711 barrels with only 524,445 barrels or 25.8% recovered.[144]

4.11.2 Gas Flaring

About 88% of associated gas is flared in Nigeria. In 1994, the total emission carbon dioxide from gas flaring in the Niger Delta was estimated at 35 million tons.[145] A large portion of the gas is methane. Nigeria's contribution to global warming, sea level rise etc. is therefore quite considerable.

4.11.3 Fisheries Depletion

It is common knowledge that the Fisheries Department lacks adequate equipment and resources to enforce the legislation.[146] It is not likely therefore that any science based assessment or management can be carried out given that scenario. It is therefore difficult to estimate the

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[143] Moffat and Linden, "Perception, and Reality, Assessing Priorities for Sustainable Development in the Niger River Delta." Ambio, Vol. 7-8, December 1995, 527 at p. 532.
[144] Chokor, "Government Policy and Environmental Protection in the Developing World: The Example of Nigeria" vol. 17, Environmental Management, (No.l) 15 at p.18.
[145] See n. 21 above at p.533.
[146] Ajai: The Management of Nigerian Bio-Diversity: The Legal perspective" in A\ua & Ajai (ed.) Implementing the Bio-diversity Convention: Nigerian and African Perspectives, NIALS, 1996, at pp. 132-133.

Maximum Sustainable Yield (MSY) for these fisheries. Although a non trawling zone extends to 5 nautical miles from the shore, yet trawlers frequently fish in this zone.[147] Fishing with destructive methods and illegal nets is also pervasive. According to UNEP, dams along the Niger River have reduced the fish stocks of the coastal areas.[148] Destruction of coastal wetlands and fish spawning grounds through housing, construction etc. is also a major concern.

4.11.4 Bio-Diversity Loss

Habitat destruction, oil pollution, overfishing etc. are the most significant threats to biodiversity. Pertinent statistics are however, currently unavailable.

[147] See No. 21 at p. 530

[148] Portmann, B.C. & Zabi, (1987), *State of the Marine Environment: West and Central African Region*, UNEP Regional Seas Reports ND Studies No. 108.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

This research has tried to highlight the important of ocean law in the development of and evolution of marine policy. Generally, the politics and global legislation on the sea much depends on the struggle for share of the mass of resources endowed on man by the opportunities and challenges provided in the oceans. Nations simply acknowledge this and their commitment to it at the multilateral level is total. Having reviewed the historical evolution of the law of the sea and the salient features of the new ocean regime of the LOS, the opportunities and challenges provided by this legal regime of the sea suggest that national efforts at evolving strategies in order to enhance optimum utilization of ocean space and its resources must be a necessary part of national planning. The review of Nigeria's marine sector which we have treated here indicate a high degree of political consciousness as regards the multifaceted uses of the sea. Nigeria, like most developing states, is constrained not only by lack of marine technology but also inadequate funding of the marine sector. Indeed, the problems, experiences and challenges confronting nations in developing policy mechanisms and institutions for ocean management illustrate the complexity of the ocean itself. Marine policy therefore requires integrative structures of various dimensions. Its local rooting starts first from its integration in national development planning to harness and maximize participation of all levels of government. There is also the integrative aspect of policy at the regional, and global levels. The necessary links provided by ocean law should form a basic part of ocean policy at the national level. However the challenge of ocean development involves not only national efforts, but more significantly, it involves conscientious efforts at indepth research in ocean governance, marine science and technology.

While commending the very modest achievement of the NMA in promoting Nigeria's ocean interest in the shipping industry in particular, it is expected that the constitutional functions of this authority as a central co-ordinating body of marine affairs should be expanded. Nigeria does not only need a central co-ordinating agency for all ocean affairs but also a national ocean ministry. The dispersal of marine affairs into various ministries and agencies does not augur well for the development of an integrated ocean policy. As a final note, it must be emphasized that marine policy cannot be effective without a fundamental change of attitude towards science and technology in developing countries. Science and technology have hither to been perceived luxuries which can only be addressed when the basic problems of food, shelter, health and education have been resolved. However in todays world, science and technology are prerequisites for the solution of basic problems as about 85% of economic growth today does not depend on material inputs but on technological innovation based on research and development and science research.

5.2 Findings

This research found that:

1. By virtue of the Convention, Nigeria along with other coastal states has become the owner of a great proportion of the living and non-living resources of the oceans of the maritime zones within the limits of her national jurisdiction. She is also the administrator of these areas and is to prevent and control pollution as well as to encourage marine scientific research. In her use and administration of maritime zones within her national jurisdiction, Nigeria must take into consideration the rights of other states, particularly states which are landlocked or geographically disadvantaged. To this end she must also

maximally optimize the use of the oceans resources in a manner that will also not endanger its resources particularly with respect to living resources.

2. The Convention has brought significant and equitable resolution to the regime of the oceans in the acceptance of a 12 mile territorial sea; increased rights for landlocked and archipelagic states; a greater protection and control of the marine environment especially with regards to marine pollution; the establishment of a 200 nautical mile EEZ for coastal states and a reformulation of the continental shelf regime.
3. The coming into force of the UNCLOS III Convention on November 16, 1994 marks a new era in the Law of the Seas that should usher in its wake, a greater spirit of co-operation and understanding among all states. The convention provides a framework around which further agreements on the utilisation of the oceans resources may be formulated. With the provision for compulsory judicial settlement or arbitration of most disputes that may arise under the convention, and the zonal system which was arrived at by consensus, the era of unilateral acts by coastal states should hopefully come to an end.

   Issues relating to trans-boundary maritime resources arise mainly with respect to:

i. Adjacent boundaries of states extending up to 200 nautical miles offshore.
ii. Opposite boundaries where the 200 nautical miles claims overlap especially in enclosed and semi-enclosed seas;
iii. Boundaries between oceanic archipelagic states; and
iv. Boundaries between coastal states permitted to exploit the resources of the continental shelf up to 350 nautical miles and the International Seabed Authority.

4. The management of such trans-boundary maritime resources, especially hydrocarbons, within the 200 nautical miles limit is still in a developmental stage in which state practice has formulated four known models all of which are grounded upon joint development arrangements. When the exploration and exploitation of maritime resources expands beyond the 200 nautical miles limit into the Area, the principles governing the Area will definitely dictate the fate of national rights in such zones that are outside the limits of national jurisdiction.
5. There is a pressing need to effect necessary changes in the existing rules of international law to reflect the emerging developments under the new law of the sea. Meanwhile, the practice of states have shown that under an appropriate joint development arrangement, coastal states with disputed maritime boundaries can have the best of both worlds by securing the benefits of hydrocarbon exploitation while searching for an acceptable solution to the lingering dispute. Unfortunately, developing coastal states are not scientifically and technologically in a position to reap maximum harvest from the wealth of the sea around them.

5.3 Recommendations

In view of the above findings, the following recommendations are made:

1. There should be an enactment of national legislation to give direct effect to the Hamburg Rules of 1978.
2. There should be Policy reform to make our ports operational and competitive and a regime that will permanently put to rest the issue of nautical mile.
3. Tackle the multiplicity of conflicts of boundary delimitation and demarcate clearly, spheres of each zone and make avenue for claims of jurisdiction on the high seas.

4. Indiscriminate arrests of vessels should be stopped. There are alternatives to arrest and these must be looked into; also the government should put in place viable policies to govern the exploration and exploitation of marine resources.
5. The maritime industries should effect changes in the existing rules to reflect the emerging developments and trends.

The recent announcement that neither Nigeria nor Cote de I'voire would be selected as the hub of vessel transportation in the Central and West Central region of Africa is a major loss for Nigeria and should motivate us to set out marine policy aright. The time is right for stock taking we must look to our past errors, take note of what the more advanced nation and our competitors are doing and chart a new course for our maritime industry.

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